2009-CA-00351E

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

R. W. WHITAKER AND MONTY FLETCHER — APPELLANTS

V. — Case No.: 2009-CA-00351

LIMECO CORPORATION AND WILLIAM KIDD — 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 disqualification or recusal.

1. Monty Fletcher, Appellant.
2. R. W. Whitaker, Appellant.
3. T-Rex 2000, Inc., Plaintiff in related case.
4. Danny Cash, Plaintiff in related case.
5. Michael N. Watts, Attorney for Appellants.
6. R. Bradley Best, Attorney for Appellants.
7. Julie Murphy Burnstein, Former Attorney for Appellants.
8. Peter C. Sales, Former Attorney for Appellants.
9. David Sparks, Former Attorney for Appellants.
10. Limeco Corporation, Appellee.
11. William Kidd, Appellee.
12. Brett Kidd, Defendant in related case.

13. Jamie Kidd, Defendant in related case.

14. L. F. Sams, Jr., Attorney for Appellees.

15. Margaret Sams Gratz, Attorney for Appellees.

16. Honorable James Lamar Roberts, Jr., Circuit Judge.

L. F. Sams, Jr.

Margaret Sams Gratz

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a)(3) of the Mississippi Rules of Appellate Procedure, Appellees request no oral argument. The facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. Nevertheless, if the Court desires to hear oral argument, Appellees have no objection.

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STATEMENT OF THE ISSUES

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II. Whether the trial court was correct in holding that Appellants failed to allege any set of facts to support a claim of fraudulent concealment and therefore the three-year statute of limitations for the claim of fraud was not tolled.

III. Whether the trial court was correct in holding that because there was no corporate liability on behalf of Limeco Corporation, the Court would not pierce the corporate veil to find William Kidd personally liable for the claims against Limeco.

STATEMENT OF THE CASE

I. Procedural Background

This Court previously affirmed the dismissal of two separate cases filed by Monty Fletcher and R.W. Whitaker against William Kidd and Limeco Corporation due to insufficient process and insufficient service of process. See Monty Fletcher v. Limeco Corporation, No. 2007-CA-01247-SCT, consolidated with R. W. Whitaker v. Limeco Corporation and William Kidd, 2007-CA-01249-SCT (Dec. 11, 2008). These original separate lawsuits were filed in December of 2003, however the case presently before the Court was not filed until September 19, 2007. R. 60-83; R. 5-26.

On September 19, 2007, Appellants filed their Complaint in the Chancery Court of Lee County, Mississippi, alleging breach of contract and fraud claims, however they did not assert fraudulent concealment. R. 5-26. Appellees filed separate answers and defenses to the Complaint and therein asserted a statute of limitations defense. Thereafter, Appellees filed a Motion to Dismiss and Motion to Stay Discovery. The Motion to Dismiss sought to dismiss for lack of subject matter jurisdiction or transfer the case from Chancery Court to Circuit Court and also to dismiss the case as it was barred by the statute of limitations. R. 56-129. The parties agreed to transfer the case from Chancery Court to Circuit Court, and an

Order Transferring Case was so entered. R. 143. Thereafter, the parties completed the briefing on the issue of whether this case was barred by the statute of limitations.

In response to the statute of limitations defense, Appellees asserted that the six-year statute of limitations applied to the breach of promissory notes claims and that the statute of limitations for the fraud claim was tolled because it was fraudulently concealed. R. 153-159. A hearing was held before the Honorable James L. Roberts, Jr. on August 12, 2008. Thereafter, the trial court entered an order dismissing this case with prejudice, specifically finding (1) that the claims for breach of promissory notes were barred by the three-year statute of limitations as they are not negotiable instruments, (2) that the claim for breach of continuing guaranty was barred by the three-year statute of limitations, (3) that the claim of fraud was barred by the three-year statute of limitations, (4) that the statute of limitations for the fraud claim was not tolled because Appellants failed to allege any set of facts to support a claim of fraudulent concealment, and (5) that because there was no corporate liability on behalf of Limeco Corporation, the corporate veil could not be pierced to find William Kidd personally liable for the claims against Limeco. R. 175-179.

II. Factual Background

This case centers around negotiations that began in 2001 for the purchase of the T-Rex 2000 hockey team in Tupelo. For numerous reasons, this deal was never consummated. However, Appellants claim that sometime in early 2002, in an effort to induce them to loan money, William Kidd presented Limeco's financial books and records to them; that Kidd represented that both he and Limeco had sufficient assets to repay the loans; that a total of eight hundred fifty thousand dollars ($850,000.00) was loaned by Appellees to Kidd; and that neither Kidd nor Limeco ever repaid the monies loaned. R. 6-9. Although the Appellees dispute these facts for all other purposes, because the Court considers the facts in the light most favorable to the non-movant on a motion to dismiss, the facts as alleged by Appellants are the only relevant facts to be considered on this appeal.

SUMMARY OF THE ARGUMENT

This is a breach of contract case in which Appellants base their claims on three documents: (1) a Promissory Note between R. W. Whitaker and Limeco Corporation signed July 1, 2002; (2) a Promissory Note between Monty Fletcher and Limeco Corporation signed July 1, 2002; and (3) a Continuing Guaranty between William Kidd and The Peoples Bank & Trust Company signed April 19, 2002. Appellants have also alleged a claim of fraud, asserting that William Kidd made certain misrepresentations that induced Appellants allegedly to lend money to Kidd --- said loans being the subject of the promissory notes.

This lawsuit was properly dismissed with prejudice because Appellants' claims are barred by the statute of limitations. Both the breach of contract claims and the fraud claim are governed by section 15-1-49 of the Mississippi Code which provides for a three-year statute of limitations. Appellants clearly had knowledge of their claims in December, 2003, when they retained counsel and filed their first set of lawsuits which were later dismissed without prejudice. Accordingly, at the very latest, their claims were barred in December, 2006.

Appellants mistakenly argue that the promissory notes are negotiable instruments and thus are subject to the UCC Article 3 six-year statute of limitations. See Miss. Code § 75-3-118. Appellants also argue that their fraud claim was fraudulently

concealed, thereby tolling the applicable three-year statute of limitations. However, these arguments are based upon a misapplication of the law.

First, Article 3 of the UCC, including section 75-3-118, only applies to negotiable instruments. Miss. Code § 75-3-102 (as amended, 1972). The promissory notes at issue in this case are not negotiable instruments because they do not contain the requisite words of negotiability -- "payable to bearer or to order" - specifically required by Article 3 (Miss. Code § 75-3-104). Accordingly, the three-year statute of limitations of section 15-1-49 applies to the breach of contract claims on the promissory notes, and, as previously stated, that time ran in December, 2006, at the very latest.

Second, Appellants assert that their claim of fraud is not barred by the three-year statute of limitations because the alleged fraud was fraudulently concealed thereby tolling the statute of limitations. However, Appellants' argument seems to confuse and mistakenly interchange the underlying facts of the alleged fraud and the facts (or absence of facts) of the alleged fraudulent concealment. In order to establish fraudulent concealment of any claim, there must be shown

> (1) some subsequent act or conduct of an affirmative nature designed to prevent or which does prevent discovery of the claim; and

(2) that even though Appellants acted with due diligence in attempting to discover Appellees' role in the underlying claim, they were unable to do so.

Stephens v. Equitable Life Assurance Society of the United States, 850 So. 2d 78, 83-84 (Miss. 2003); Andrus v. Ellis, 887 So. 2d 175, 181 (Miss. 2004). In this case, the alleged fraud is that Kidd lied to Whitaker and Fletcher and represented to them that he and/or Limeco had sufficient assets to repay the loan on the promissory notes, when in fact neither had sufficient assets (Kidd and Limeco adamantly deny these allegations). Appellants' Brief, pp. 14-16. Beyond this alleged misrepresentation which is the basis of the fraud claim, Appellants assert no other facts --- much less any "subsequent act or conduct of an affirmative nature designed to prevent or which [did] prevent discovery of the [fraud] claim." Appellants also fail to assert any facts to show their "due diligence in attempting to discover" the claim. Accordingly, fraudulent concealment is nonexistent in this case; the statute of limitations was not tolled; and the fraud claim is also barred by the three-year statute of limitations.

ARGUMENT

I. STANDARD OF REVIEW

"This Court employs a *de novo* standard of review of a trial court's grant or denial of a motion to dismiss." Spencer v. State, 880 So. 2d 1044, 1045 (Miss. 2004)

II. BREACH OF CONTRACT CLAIMS

A. The Promissory Notes Are Not Negotiable Instruments

Mississippi Code § 75-3-104 states that a "negotiable instrument" is:

> an unconditional promise or order to pay fixed amount of money, with or without interest or other charges described in the promise or order, if it:
> **(1) *Is payable to bearer or to order at the time it is issued or first comes into possession of a holder...***

Miss. Code § 75-3-104 (as amended, 1972)(emphasis added). Appellants argue that the promissory notes in this case are negotiable instruments because they meet all requirements under Mississippi Code § 75-3-104, specifically that they meet the definition of being payable "to order." However, this argument ignores the clear reading of the statute.

Section 75-3-109(b) states:

> A promise or order that is not payable to bearer is payable to order if it is payable
>
> (i) to the order of an identified person or
>
> (ii) to an identified person or order.
>
> A promise or order that is payable to order is payable to the identified person.

Miss. Code § 75-3-109(b) (as amended, 1972). Appellants argue that under Mississippi Code § 75-3-109(b)(ii), these notes are payable "to order" because they are payable "to an identified person." On the contrary, section 75-3-109(b)(ii) states that a promise is payable to order if it is payable "to an identified person or order."

1. The Disjunctive "Or"

Appellants argue that the disjunctive "or" denotes a choice between alternatives and, as applied to Section 75-3-109(b), should define "payable to order" as payable "to the order of an identified person," "to an identified person," or "[to] order." Appellants' Brief, p. 11-12 (citing In Re Branan, 419 So. 2d 145, 146 (Miss. 1982); Stegall v. State, 765 So. 2d 606, 608 (Miss. 2000); Hall v. Miss. Dept. of Public Safety, No. 96-CA-00832-SCT, 1998 Miss. LEXIS 149, *20-21 (Miss. 1998); and Quindlen v. Prudential Ins. Co. of America, 482 F.2d 876, 878 (5th Cir. 1973)). This simply is not what the statute states. Section 75-3-109(b)(ii) states that a promise or order is payable to order if it is payable "(ii) to an identified person or order." (emphasis added). Subsection (b)(ii) contains the single preposition "to" which is given two objects - "identified person" and "order." Thus, for determination of whether a promise or order is payable to order, there are not two separate terms or conditions under subsection (b)(ii) as Appellant

argues, and the language of the subsection is clear in that regard.

2. Statutory Construction

It is a well recognized principle of law in this State that ambiguity must exist in the language used by the Legislature in a statute before resort will be had to any rules of statutory construction or interpretation. "Without ambiguity, the controlling law of this State requires that the Court look no further than the clear language of the statute and apply it." Forman v. Carter, 269 So. 2d 865, 868 (Miss. 1972). There is no ambiguity in this statute, thus the Court need look no further than a clear reading of the statute.

Nevertheless, if the rules of statutory construction should be employed, one of the Court's maxims of statutory construction is that the legislative intent must be determined from the total language of the act and not from one section considered apart from the remainder. L. W. v. McComb Separate Municipal School Dist., 754 So. 2d 1136, 1140 (Miss. 1999)(citations omitted). Therefore, in this analysis, it is necessary to determine the applications of sections 75-3-104 and 75-3-109 in their relation to Article 3.

Appellants would ask this Court to simply consider subsection (b)(ii) standing alone. However, subsections (b)(i) and (b)(ii) clearly delineate that a negotiable instrument is

payable to order either (i) if it is, for example, "payable to the order of Jane Doe," or (ii) if it is, for example, "payable to Jane Doe or order." If an instrument is simply "payable to Jane Doe" it is not a negotiable instrument. The writing cannot simply be payable to an identified person. Without the term of negotiability -- "to order" -- the writing is not negotiable. Additionally, Article 3 addresses notes that are simply payable to an identified person without the terms of negotiability and limits such instruments to checks only. See Miss. Code § 75-3-104-(c). An analysis of the legislative history of Article 3 clarifies the importance of these terms of negotiability.

As part of the passage of Revised Article 3, section 75-3-805 was repealed, effective January 1, 1993. It had previously stated,

> This chapter applies to any instrument whose terms do not preclude transfer and which is otherwise negotiable within this chapter but which is not payable to order or to bearer, except that there can be no holder in due course of such an instrument.

See Bank of Crystal Springs v. First National Bank of Jackson, 427 So. 2d 968, 970 (Miss. 1983) (quoting Miss. Code § 75-3-805)). Comment 2 to section 75-3-104 discusses the effect of the repeal of Section 75-3-805:

> Unless subsection (c) [relating to checks] applies, the effect of subsection (a)(1) and Section 3-102(a) is to ***exclude from Article 3 any promise or order that is not payable to bearer or to order.*** There is no provision in revised Article 3 that is comparable to former Section 3-805. The comment to former Section 3-

> 805 states that the typical example of a writing covered by that section is a check reading "Pay John Doe." Such a check was governed by former Article 3 but there could not be a holder in due course of the check. Under Section 3-104(c) such a check is governed by revised Article 3 and there can be a holder in due course of the check. But subsection (c) applies only to checks. The comment to former Section 3-805 does not state any example other than the check to illustrate that section.
>
> ...
>
> Total exclusion from Article 3 of other promises or orders that are not payable to bearer or to order serves a useful purpose. It provides a simple device to clearly exclude a writing that does not fit the pattern of typical negotiable instruments and which it is not intended to be a negotiable instrument. **If a writing could be an instrument despite the absence of "to order" or "to bearer" language and a dispute arises with respect to the writing, it might be argued that the writing is a negotiable instrument because the other requirements of Subsection (a) are somehow met. Even if the argument is eventually found to be without merit it can be used as a litigation ploy. Words making a promise or order payable to bearer or to order are the most distinguishing feature of a negotiable instrument and such words are frequently referred to as "words of negotiability. . . . *Absence of the words precludes any argument that such contracts might be negotiable instruments.***

Miss. Code § 75-3-104, cmt. 2 (as amended, 1972)(emphasis added). Clearly the words of negotiability are absent from the subject promissory notes. Consequently, Appellants are precluded from arguing that the notes are negotiable instruments, and the trial court correctly held that the promissory notes at issue are not negotiable instruments because they do not contain words of negotiability as required by Mississippi Code § 75-3-104. R. 177.

B. Section 75-3-118 Only Applies to Negotiable Instruments

Appellants argue that the six-year statute of limitations of section 75-3-118 should apply simply because the promissory notes are "note[s] payable on demand." However, section 75-3-102 expressly states that "this chapter applies to negotiable instruments." Thus, if the promissory notes are not negotiable instruments --- which clearly they are not because they do not contain the language of negotiability --- then, section 75-3-118 does not apply. Thus, the three-year statute of limitations of section 15-1-49, not the six-year statute of limitations of Article 3, applies. The three-year statute of limitations expired in December, 2006, at the latest. Accordingly, the trial court properly held that Appellants' breach of contract claims are time barred. R. 177.

III. FRAUD AND FRAUDULENT CONCEALMENT

Appellants asserted a fraud claim in the Complaint but did not assert a separate claim for fraudulent concealment. It was only after Appellees moved to dismiss the Complaint as time barred did Appellants raise fraudulent concealment. However, in their response to the motion to dismiss, and now in Appellants' Brief (hereinafter "Brief"), Appellants are unable to allege a separate set of facts to support a claim of fraudulent concealment.

A. Facts to Support Fraud Claim Are the Same Facts Alleged to Support Fraudulent Concealment

In support of the fraud claim, the Complaint asserts that in early 2002, Kidd presented the financial books and records of Limeco to induce Appellants to loan Kidd money (R. 6); that Kidd guaranteed that Limeco would repay the debts (R. 6-9; 14-15); that Kidd represented that both he and Limeco had sufficient assets to repay the loan (R. 6, 14-15); that, in fact, Limeco did not have sufficient assets to repay the loan (R. 15); that Kidd entered into the promissory notes on July 1, 2002 (R. 6-7); and that Kidd entered into the continuing guaranty April 19, 2002 (R. 13).

To establish fraudulent concealment of any claim, there must be shown

(1) some subsequent act or conduct of an affirmative nature designed to prevent or which does prevent discovery of the claim; and

(2) that even though Appellants acted with due diligence in attempting to discover Appellees' role in the underlying claim, they were unable to do so.

Stephens v. Equitable Life Assurance Society of the United States, 850 So. 2d 78, 83-84 (Miss. 2003); Andrus v. Ellis, 887 So. 2d 175, 181 (Miss. 2004).

1. Subsequent Act/Conduct to Prevent Discovery of Claim

Appellants' assert that "[t]here was continuing, active concealment of fraud by Kidd, as evidenced by the fact that false documents were presented to Appellants showing Limeco as a

sound company with assets." Brief, p. 14. However, as alleged in the Complaint, the presentation of the financial records or alleged "false documents" occurred in early 2002 in order to induce Appellants to loan the money to Kidd --- a fact that supports the fraud claim.

Appellants also argue in their brief that Appellees' inducement of Appellants to loan the money and enter into the promissory notes and guaranty was "performed by fraudulent misrepresentation and concealment... [s]pecifically, Kidd represented that he personally had sufficient assets to repay the entire loaned amount...;" that he "represented that Limeco had sufficient assets to repay the loaned amount...;" and that to "further induce Whitaker and Fletcher, Kidd presented them with financial books and records reflecting Limeco as a solvent company with significant assets, which Kidd represented to be accurate and true." Brief, pp. 14-15. Again, as alleged in the Complaint, the alleged false representations that induced Appellants to loan Kidd the money is part of the fraud claim. Additionally, per the Complaint, the presentation of the financial records or alleged "false documents" occurred in early 2002 in order to induce Appellants to loan the money to Kidd --- another fact that supports the fraud claim.

Appellants likewise argued to the trial court that their reliance upon the early 2002 presentation of financial records

supports their claim of fraudulent concealment --- "Pursuant to the facts as alleged in the Complaint and pursuant to the history between the parties, it is evident that the Defendants through their conduct (**specifically the presentation of the supposed books and financial records of Limeco**) concealed their fraudulent misrepresentations." R. 159 (emphasis added).

Appellants argue that "a defendant is guilty of acts of concealment when he is 'guilty of some trick or contrivance tending to exclude suspicion and prevent inquiry,'" citing State of Texas v. Allen Const. Co., 851 F.2d 1526, 1529 (5th Cir. 1988). Appellants apparently attempt to link the presentation of the financial records[1] with both their fraud claim and their claim of fraudulent concealment. Brief, p. 15. However, Appellants' reliance on State of Texas v. Allen Const. Co. is misplaced. In State of Texas, the court applied Texas law in resolving an issue of fraudulent concealment of a fraud claim

[1] Appellants cite two cases involving financial records and questions of fact for a jury, but both are distinguishable from this case. In Continental Assurance Co. v. Cedar Rapids Pediatric Clinic, 957 F.2d 588, 593 (8th Cir. 1992), *after* stealing money out of plaintiffs' financial accounts, the defendant fraudulently concealed his theft by sending plaintiffs statements on business letterhead indicating that the accounts were intact, thus the court held there was sufficient evidence for the jury to conclude that the claims were brought within the limitation period. Clearly, the information on the accounts was presented to plaintiffs after the theft in order to fraudulently conceal the theft and is thereby distinguishable from this case. In Comi v. Breslin & Breslin, 683 N.Y.S.2d 345, 349 (N.Y. 1999), the court held that there was a question of fact as to whether plaintiff could ascertain the truth of a corporation's financial condition when the financial records contained false entries. However, Comi did not address fraudulent concealment which is the issue that is presently before this Court.

which, unlike Mississippi law, allows a plaintiff to assert fraudulent concealment on the same set of facts as the underlying claim if the underlying claim is "self concealing" thereby relieving the plaintiff of the burden of demonstrating "affirmative acts." State of Texas, 851 F.2d at 1530-31 & n. 20.

This Court has held that Mississippi law requires that a plaintiff not only show affirmative acts, but must show *subsequent* affirmative acts designed to prevent or which does prevent discovery of the claim. Andrus v. Ellis, 887 So. 2d 175, 181 (Miss. 2004). In Andrus v. Ellis, this Court clarified that, under Mississippi Code § 15-1-67,[2] fraudulent concealment "requires proof of two elements: subsequent affirmative acts of concealment and due diligence. That is, there must be some subsequent affirmative act by the defendant which was designed to prevent and which did prevent discovery of the claim." Andrus, 887 So. 2d at 181 (citing Stephens, 850 So. 2d at 83-84). See also Pope v. Sorrentino, 992 So. 2d 1194, 1198 (Miss. Ct. App. 2008); Ross v. Citifinancial, Inc., 344 F.3d 458, 463-64 (5th Cir. 2003)(stating "Mississippi law is unambiguous: Plaintiffs must prove a subsequent affirmative act of fraudulent

[2] Mississippi Code § 15-1-67 states "[i]f a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered."

concealment to toll the limitations."). Accordingly, Appellants' argument that Kidd's presentation of Limeco's financial records to Whitaker and Fletcher both induced them to loan the money (a fact on the fraud claim) and also operated to conceal the alleged fraud (a fact on the fraudulent concealment) fails under Mississippi law.

2. Due Diligence to Discover Appellee's Role in Claim

The second part of the test to establish fraudulent concealment requires a showing that Appellants acted with due diligence in attempting to discover Kidd's role in the underlying fraud but were unable to do so. In their brief, Appellants assert that "both Whitaker and Fletcher performed the due diligence of a reasonable person by requesting Limeco financial books and records, rather than relying on the statements of Kidd." Brief, P. 14. Again, the Complaint alleges that Kidd presented the financial books and records in early 2002 to induce Appellants to loan him money --- again, a fact that supports the original fraud claim. Appellants assert that "only later [after presentation of the financial records] did they learn Kidd presented them with false documentation." Brief 15. However, Appellants fail to allege facts separate from the original fraud claim to show how they acted with due diligence to discover the claim.

In Channel v. Loyacono, 954 So. 2d 415 (Miss. 2007), the plaintiffs asserted claims of legal malpractice and fraud. In its determination that no fraudulent concealment had occurred, the Court stated,

> [T]he plaintiffs merely state that [defendants] fraudulently concealed their alleged negligence. The plaintiffs offer no evidence to back up their bare assertion. While they do make allegations of fraudulent and negligent acts committed by [defendants], the plaintiffs make no offering of any affirmative act designed to conceal a cause of action.

Channel, 954 So. 2d at 423-24 (Miss. 2007). The Court went on to explain that even if there had been an allegation of an affirmative act designed to conceal the cause of action, it would make no difference because the question would still be whether the claim was "discovered" for the purposes of the discovery rule, and the Court had already concluded that any alleged wrongdoing by the defendants was "discovered" for the purposes of the discovery rule when the plaintiffs contacted their attorneys regarding their lawsuit. Id. at 422 & 424.

If in the present case, Appellants believed that they were owed money, they obviously were aware that a misrepresentation had occurred whenever they demanded payment and such payment was refused --- they were certainly aware of it in December, 2003, when they filed their first set of lawsuits. Thus, under this Court's holding in Channel, even if there had been acts of fraudulent concealment (which Appellees deny there were), any

alleged wrongdoing of Kidd in this case was "discovered" by Appellants for purposes of the "discovery rule" when they contacted their lawyers about these claims --- and were certainly "discovered" when they filed their first set of lawsuits in December, 2003. Accordingly, contrary to Appellants' argument, there was no fraudulent concealment that can be utilized by Appellants to save their fraud claim, and their fraud claim is barred by the statute of limitations. See also Spann v. Diaz, 987 So. 2d 443, 450 (Miss. 2008)(stating "The would-be plaintiff need not have become absolutely certain that he had a cause of action; he need merely be on notice - or *should* be - that he should carefully investigate the materials that suggest that a cause of action probably or potentially exists.")(quoting First Trust Nat'l Ass'n v. First Nat'l Bank of Commerce, 220 F.3d 331, 336-37 (5th Cir. 2000)).

B. No Question of Fact Exists Because Appellants Have Failed to Even Allege a Set of Facts to Support a Claim of Fraudulent Concealment

Appellants cite Robinson v. Cobb, 763 So. 2d 883 (Miss. 2000) arguing that each part of the two-part inquiry is a question of fact, and thus whether there was fraudulent concealment in this case should be determined by a jury or at least *not* be determined on a motion to dismiss. Brief, p. 14 &

17.[3] However, the case at bar is clearly distinguishable from Robinson.

Robinson was a fatality car wreck case. The plaintiffs filed the lawsuit almost five years after the accident and defendant asserted it was barred by the statute of limitations. Plaintiffs claimed that defendant fraudulently concealed the claim against him because after the wreck occurred, defendant attempted to hide his involvement in the car wreck, refused to be interviewed by the accident investigator, and denied knowledge of or involvement in the accident. Robinson, 763 So. 2d at 887-88. The Court held that question of facts existed as to whether defendant attempted to hide his involvement in the car wreck, refused to be interviewed by the accident investigator, and denied knowledge of or involvement in the accident. Robinson, 763 So. 2d at 888. In contrast, in the case *sub judice*, Appellants have not even *alleged* any facts to show how Kidd may have subsequently and fraudulently concealed

[3] Appellants also cite Weathers v. Metro. Life Ins. Co., 2009 WL 1886867, ¶14 (Miss. 2009) and Schiro v. American Tobacco Company, 611 So. 2d 962, 965 (Miss. 1992) arguing that the two part inquiry of fraudulent concealment is a question of fact. However, these cases do not discuss fraudulent concealment, but rather they discuss the discovery rule. Weathers held that a genuine issue of material fact may exist as to when fraud is "consummated." Weathers, 2009 WL 1886867 at ¶16. Weathers involved misrepresentations related to the sale of an insurance policy, and the Court held that the plain language of the policy did not necessarily put the insured on notice of the agent's alleged verbal misrepresentation. Id. at ¶ 19. Schiro involved a latent injury, and the Court held that the cause of action accrued when the plaintiff's doctor diagnosed that a mass on his lung was cancerous. Schiro, 611 So. 2d at 965.

the alleged fraud. The only facts that have been alleged are those related to the original fraud claim.

The trial court appropriately considered the facts as alleged by Appellants (R. 175-176) and correctly held that the Appellants failed to *allege* any set of facts separate from the underlying claim of fraud that would support a claim of fraudulent concealment to toll the three-year statute of limitations. R. 178. The trial court ruled that Appellants "failed to allege any affirmative acts" on the part of the Appellees designed to conceal the Appellants' causes of action and that the "facts alleged only relate[d] to the original act of fraud." R. 178.

IV. PIERCING THE CORPORATE VEIL OR ALTER EGO THEORY

Appellants argue that the corporate veil of Limeco should be pierced to hold Kidd personally liable for the claims against Limeco due to his alleged fraudulent misrepresentations as managing director of Limeco. Brief, pp. 17-18 (citing Turner v. Wilson, 620 So. 2d 545, 548 (Miss. 1993)). However, whether Appellants can prove that Kidd should be held personally liable for the claims against Limeco is irrelevant because the claims against Limeco are all barred by their respective statutes of limitations.

The alter ego theory is applicable when an individual inappropriately attempts to hide behind the corporation to avoid

liability. In that situation, courts may pierce the corporate veil (or shield) and impose personal liability for a corporate obligation. Thus, "in accordance with the corporate shield and alter ego liability, in order for there to be alter ego liability placed on a shareholder of the corporation, there must be a claim in existence against the corporation." Hardy v. Brock, 826 So. 2d 71, 75 (Miss. 2002) (citing 1 William Meade Fletcher, Fletchers Cylopedia of the Law of Private Corporations § 41.28 at 608 (1999)).

Because Appellants' claims against Limeco Corporation are barred by the statute of limitations, there is no corporate liability. Thus, even if Appellants could prove that Kidd should be personally liable for the claims against the corporation, if there is no corporate liability, there can be no alter ego liability. Accordingly, the trial court correctly held that because "dismissal is appropriate for the aforementioned claims, Limeco Corporation cannot be held liable to the [Appellants] for their claims," and that furthermore, "when the Court has found no corporate liability on behalf of Limeco Corporation . . . Kidd cannot be held liable for the [Appellants'] claims against Limeco Corporation." R. 178.

CONCLUSION

Appellants claims are time barred. Their asserted theories are a last ditch effort to resurrect claims which were previously dismissed without prejudice (said dismissals being affirmed by this Court), but which cannot now be pursued because the statutes of limitations have run. Article 3 of the UCC expressly requires words of negotiability that are nonexistent in the subject promissory notes --- these words are a key part of the litmus test to determine whether a writing is a negotiable instrument. The promissory notes in this case fail the test. Accordingly, these notes are subject to a three-year statute of limitations and are thus time barred.

Appellants' attempt to boot strap a claim of fraudulent concealment on to their fraud claim is obvious. They have failed to assert any separate facts that Appellees attempted to conceal Appellants' claims and have further failed to show any due diligence on their part to discover these claims.

Based on the contract in this case, the promissory notes, Appellants' fraud claim accrued on July 1, 2002, when the parties entered into the agreement. Nevertheless, the Appellants should have discovered the fraud claim when they allegedly demanded payment, and Appellees did not pay on the on demand promissory notes. The Complaint does not state when Appellants demanded payment on these notes, however it was

certainly prior to December 11, 2003, when Appellants filed their separate lawsuits. See R. 60-74; 75-79. Thus, pursuant to the holding in Channel, any alleged wrongdoing by the Appellees was "discovered" for the purposes of the discovery rule when the Appellants contacted their attorneys regarding their lawsuit and filed their Complaint in December 2003. Thus, at the very latest, the statute of limitations on the fraud claim expired December 12, 2006.

For the reasons set forth above and in the record, the trial court's decision granting the motion to dismiss with prejudice should be affirmed.

CERTIFICATE OF SERVICE

I, Margaret Sams Gratz, one of the attorneys for the Appellees, Limeco Corporation and William Kidd do hereby certify that I have this day served a true and correct copy of the above and foregoing APPELLEES' BRIEF by placing said copy in the United States Mail, postage prepaid, addressed to the following:

Honorable James L. Roberts, Jr.
Circuit Court Judge
P. O. Drawer 1100
Tupelo, MS 38802

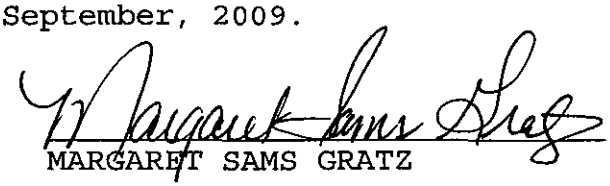
Mr. Michael N. Watts
Holcomb Dunbar, P.A.
P.O. Drawer 707
Oxford, MS 38655

R. Bradley Best
Holcomb Dunbar, P.A.
P.O. Drawer 707
Oxford, MS 38655

I have also forwarded the original and three copies of the brief to:

Ms. Betty Sephton, Clerk
Mississippi Supreme Court
P. O. Box 249
Jackson, MS 39205-0249

DATED, this the 18th day of September, 2009.



MARGARET SAMS GRATZ

CERTIFICATE OF FILING

I, Margaret Sams Gratz, do hereby certify that I have served via first-class, United States mail, postage prepaid, the original and three copies of the Brief of Appellee and an electronic diskette containing same on September 18, 2009, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, Post Office Box 249, Jackson, Mississippi 39201.

MARGARET SAMS GRATZ