IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2009-CA-00351

R. W. WHITAKER AND
MONTY FLETCHER — APPELLANTS

VS.

LIMECO CORPORATION
AND WILLIAM KIDD — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT 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 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. R.W. Whitaker, Appellant
2. Monty Fletcher, Appellant
3. William Kidd, Appellee
4. Limeco Corporation, Appellee
5. Michael N. Watts, Attorney for Appellant
6. R. Bradley Best, Attorney for Appellant
7. Margaret Sams Gratz, Attorney for Appellee
8. L. F. (Sandy) Sams, Attorney for Appellee
9. Honorable James L. Roberts, Jr.,Circuit Court Judge

I hereby certify that to the best of my knowledge and belief, these are the only persons having an interest in the outcome of this appeal.

THIS the 29 day of July, 2009.

Michael N. Watts

MICHAEL N. WATTS (MSB #[redacted])
R. BRADLEY BEST (MSB #[redacted])
Attorneys for Appellants

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STATEMENT OF THE ISSUES

1. Whether the trial court erred in dismissing Appellants' claims for breach of promissory notes based on its finding that the promissory notes were not negotiable instruments as defined by Miss. Code Ann. § 75-3-104, and therefore not entitled to the six-year statute of limitations provided by Miss. Code Ann. § 75-3-118.

2. Whether the trial court erred in dismissing Appellants' fraud claims and breach of continuing guaranty claim based on its finding that they did not allege any set of facts that would toll the three-year statute of limitations.

3. Whether the trial court erred by ruling that Limeco Corporation had no corporate liability, and as a result, ruling that Appellants could not pierce Limeco Corporation's corporate veil.

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VS.

LIMECO CORPORATION AND WILLIAM KIDD — **APPELLEES**

STATEMENT OF THE CASE

This case was originally filed by Appellants, R.W. Whitaker and Monty Fletcher, against Limeco Corporation and William Kidd on December 11, 2003. [R. 60-79; R.E. 60-79, Tab 3]. Whitaker and Fletcher loaned Kidd over $850,000. [R. 6, R.E. 6, Tab 4]. Kidd never repaid the loans. [R. 6-9; R.E. 6-9, Tab 4]. Accordingly, on December 11, 2003, Appellants brought suit asserting claims of breach of promissory notes and breach of continuing guaranty. [R. 60-79; R.E. 60-79, Tab 3]. However, due to a defect in service, these claims were dismissed without prejudice by the Lee County Circuit Court on May 8, 2007. [R. 80-83]. On September 18, 2007, Appellants filed their second complaint alleging breach of promissory notes, breach of continuing guaranty, fraud, fraudulent transfer of assets, and piercing the corporate veil. [R.5-26; R.E. 5-26, Tab 4].

COURSE OF PROCEEDINGS BELOW

On December 11, 2003, Appellants Whitaker and Fletcher filed separate complaints in the Lee County Circuit Court against the Appellee's, Limeco and Kidd. [R. 60-79; R.E. 60-79, Tab 3]. Whitaker's complaint sought relief from the defendants for breach of promissory notes and breach of continuing guaranty [R. 60-74; R.E. 60-74, Tab 3], while Fletcher's complaint

alleged breach of a promissory note. [R. 75-79; R.E. 75-79, Tab 3]. At the time, no evidence of fraud was known by Appellants nor was there evidence suggesting the necessity of piercing of the corporate veil. On May 8, 2007, both complaints were dismissed without prejudice for insufficient service of process pursuant to Rule 4(h) of the Mississippi Rules of Civil Procedure. [R. 80-83.]. See, T-Rex 2000, Inc. v. Brett Kidd and Jamie Kidd, 996 So.2d 773 (Miss. 2008) (Whitaker I).

On September 18, 2007, Whitaker and Fletcher re-filed suit against Limeco and Kidd in Lee County Chancery Court, alleging the same causes of action for breach of promissory notes, and breach of continuing guaranty. [R.11-13; R.E. 11-13, Tab 4]. In addition, due to facts learned in Kidd's deposition, Appellants asserted new causes of action for fraud, fraudulent transfer of assets, and piercing the corporate veil. [R.14-18; R.E. 14-18, Tab 4]. Limeco and Kidd filed their separate answers and defenses to the complaint on December 21, 2007. [R. 31-54]. On January 22, 2008, Limeco and Kidd filed their motion to dismiss and motion to stay discovery. [R. 56-59]. Afterwards, by mutual agreement, the case was transferred to the Lee County Circuit Court by Order dated February 4, 2008. [R. 143].

On August 12, 2008, a hearing on the Appellees' motion to dismiss was held. [Tr. 3-26]. The Court took the matter under advisement [Tr. 26] and on January 30, 2009, dismissed Appellants complaint on the grounds that the statute of limitations had expired on Appellants' breach of promissory notes, breach of continuing guaranty, and fraud claims, which in turn precluded a viable cause of action for piercing the corporate veil. [R. 175-179; R.E. 175-179, Tab 2]. Appellant's timely filed their Notice of Appeal on February 26, 2009. [R. 180].

STATEMENT OF FACTS

In early 2002, William Kidd solicited Whitaker and Fletcher to loan him a total of

$850,000, with Whitaker and Fletcher each loaning Kidd $375,000. [R. 6; R.E. 6, Tab 4]. To induce Whitaker and Fletcher to loan him this large sum, Kidd represented that either he or Limeco would repay the loan amount. [R. 6; R.E. 6, Tab 4]. Specifically, Kidd represented that he personally had the assets to repay the loan amount and, while acting as managing director of Limeco, represented that Limeco had sufficient assets to repay the full loan amount. [R. 6; R.E. 6, Tab 4].

As evidence of Limeco's ability to repay the loan amount, Kidd presented Whitaker and Fletcher with Limeco's financial records and books, which reflected Limeco as a solvent company with significant assets. [R. 9-10; R.E. 9-10, Tab 4]. Based on these representations, and the financial books and records presented to them, Appellants loaned Kidd the full amount of $850,000. Kidd entered into a Continuing Guaranty with Whitaker and Fletcher and Kidd executed two promissory notes: the Whitaker Promissory Note and the Fletcher Promissory Note. [R. 9-10; R.E. 9-10, Tab 4]. It was later discovered that Kidd's representations of the financial well-being of Limeco were false.

On or about February 19, 2002, Kidd induced Whitaker to borrow $100,000 from the Peoples Bank & Trust Company in Tupelo, Mississippi, again representing that both Kidd and Limeco had sufficient assets to satisfy the loan. [R. 10; R.E. 10, Tab 4]. After receiving the loan, Whitaker loaned the entire amount to Kidd. [R. 9; R.E. 9, Tab 4]. The loan came due on April 19, 2002, at which time it was extended on the condition that Kidd execute a continuing guaranty, wherein Kidd guaranteed any and all indebtedness of Whitaker to the Bank for an amount up to $100,000. [R. 9; R.E. 9, Tab 4]. When the loan extension came due, Whitaker demanded that Kidd satisfy the bank loan. However, both Kidd and Limeco refused to honor the obligation. [R. 9; R.E. 9, Tab 4]. As a result, Whitaker was forced to repay the entire loan

amount to the bank. [R. 9; R.E. 9, Tab 4].

Around July, 1, 2002, both Fletcher and Whitaker entered into a promissory note with Limeco to memorialize the agreement based on Kidd's representations. [R. 6-8, 21-26; R.E. 6-8, 21-26 Tab 4]. Pursuant to these notes, Limeco promised to pay both Fletcher and Whitaker $375,000 each, satisfying Kidd's debts. [R. 6-8, 21-26; R.E. 6-8, 21-26, Tab 4]. Specifically, the notes state, respectively:

> On demand, for value received, I promise to pay Monty Fletcher. . . the sum of Three Hundred, Seventy-Five Thousand Dollars ($375,000.00) with interest at the rate of Seven Percent (7%) per year.
>
> The purpose of this note is to secure the borrowing and advancing of funds by Fletcher for the benefit of William Kidd, which occurred at an earlier date; the undersigned has not repaid said funds and this instrument is executed by the parties with the express intent of memorializing, in writing, said transaction.
>
> * * *
>
> On demand, for value received, I promise to pay R.W. Whitaker. . . the sum of Three Hundred, Seventy-Five Thousand Dollars ($375,000.00) with interest at the rate of Seven Percent (7%) per year.
>
> The purpose of this note is to secure the borrowing and advancing of funds by Whitaker for the benefit of William Kidd, which occurred at an earlier date; the undersigned has not repaid said funds and this instrument is executed by the parties with the express intent of memorializing, in writing, said transaction.

[R. 21-26; R.E. 21-26, Tab 4]. Both Limeco and Kidd failed to pay any of the outstanding balance of $850,000 loaned to them pursuant to the two notes and continuing guaranty. [R. 6-8; R.E. 6-8, Tab 4]. Limeco and Kidd also defaulted on the additional $100,000 loan from The Peoples Bank and Trust Company, Tupelo. [R. 8-9; R.E. 8-9, Tab 4]

In December of 2003, Whitaker and Fletcher filed suit seeking to enforce both promissory notes and the continuing guaranty in an effort to obtain their money back. [R.60-79; R.E. 60-79,

Tab 3]. Kidd and Limeco subsequently filed a motion to dismiss for defective process and defective service of process. Prior to the action's dismissal, Whitaker and Fletcher deposed Kidd, on March 22, 2007. [R. 171]. It was at this deposition that Kidd revealed for the first time his false representations of Limeco's assets. Specifically, Kidd revealed that Limeco did not have any assets to repay the loan *at the time the notes were entered.* [R. 172-173]. In other words, Kidd revealed for the first time that Limeco's financial records presented to Appellants were false. Importantly, this is the first time Appellants became aware of Limeco and Kidd's false and fraudulent representations that induced them to enter into the notes and continuing guaranty. [R. 159-160]. This revelation became the basis of the fraud and similar claims in the instant action.

Nevertheless, the first suit was dismissed without prejudice for insufficiency of process and insufficient service of process. [R. 80-83]. This order was affirmed on appeal by this Court in T-Rex 2000, Inc. v. Brett Kidd and Jamie Kidd, 996 So.2d 773 (Miss. 2008) (Whitaker I). The Appellants, after learning of the falsity of Kidd's representations and of his fraud that induced them to loan him and Limeco eight hundred fifty thousand dollars ($850,000), re-filed suit, which was ultimately dismissed by the lower court. [R. 5-26; R.E.5-26, Tab 4; R. 175-179; R.E.175-179, Tab 2].

Kidd and Limeco filed a motion to dismiss on the grounds that Appellants' claims were barred by the statute of limitations. The trial court ruled that the Whitaker and Fletcher Promissory Notes were not negotiable instruments pursuant to Miss. Code Ann. § 75-3-104 because they did not contain words of negotiability. [R. 177; R.E.177, Tab 2]. Therefore, the court ruled, Appellants' claims were not entitled to the six-year statute of limitations provided by Miss. Code Ann. § 75-3-118 and as a result, ruled that those claims were barred by the three-year

statute of limitations. [R. 177; R.E.177, Tab 2]. Further, the trial court dismissed Appellants' continuing guaranty claim, as also being barred by the three-year statute of limitations, stating this claim would have accrued no later than the date the loan extension came due. [R. 177-178; R.E.177-178, Tab 2].

The trial court dismissed Whitaker and Fletcher's fraud claim for failure "to allege any set of facts that would toll the three-year statute of limitations. . ." and because "[c]onsequently, the applicable statute of limitations would have begun running on the date on which the Plaintiffs initially became aware of the Defendants' allegedly fraudulent acts. . . . [I]t is certain that the Plaintiffs had knowledge of their claim for fraud at the latest on December 11, 2003, when they filed their original complaint." [R. 178; R.E. 178, Tab 2].

Last, as a result of dismissing Appellants' claims on these grounds, the trial court also dismissed Appellant's claim for piercing the corporate veil, finding that Limeco had no corporate liability when Appellants could not prevail on their previous claims. [R. 178-79; R.E. 178-179, Tab 2]. It is from this Order that Appellants Whitaker and Fletcher appeal.

SUMMARY OF THE ARGUMENT

The trial court erred in dismissing the Appellant's causes of action for four reasons.

First, the trial court erred by finding that the promissory notes in question were not negotiable instruments as defined by Miss. Code Ann. § 75-3-104. [R. 177; R.E. 177, Tab 2]. As a result of this ruling, the trial court denied Appellants the benefit of the six-year statute of limitations provided by Miss. Code Ann. § 75-3-118, and dismissed this claim under the three-year statute of limitations set forth by Miss. Code Ann. § 15-1-49. [R. 177; R.E. 177, Tab 2].

Second, the trial court erred by ruling that the statute of limitations expired on Whitaker's breach of continuing guaranty claim. [R. 177; R.E. 177, Tab 2]. Finding that the claim accrued when the loan extension came due and Limeco and Kidd failed to honor their obligations, this claim was also dismissed under the three-year statute of limitations set forth by Miss. Code Ann. § 15-1-49. [R. 177-178; R.E. 177-178, Tab 2].

Third, the trial court erred in dismissing Appellants' fraud claims. It held that Whitaker and Fletcher failed to present any set of facts that would successfully toll the three-year statute of limitations. The court, in its ruling, reasoned that any claims of fraud would have been known by Appellants by December 11, 2003. [R. 178; R.E. 178, Tab 2].

Fourth, the trial court erred by finding a lack of corporate liability on part of Limeco Corporation, [R. 178-79; R.E. 178-179, Tab 2], even though Limeco's managing director fraudulently mislead the Appellants through his representations and concealment, while acting on behalf of the corporation. Based on its finding, the trial court denied Appellants the right to pierce Limeco's corporate veil for the acts of its director. [R. 179; R.E. 179, Tab 2]. It is from these errors that the Appellants respectfully appeal.

ARGUMENT

As the lower court dismissed this case based on its determination that the statute of limitations had expired on all of Appellants' claims, this Court's *de novo* review can be narrowly focused on determining the appropriate statute of limitations and whether there is a question of fact raised as to the tolling of the statute.

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CLAIMS BY RULING THAT THE PROMISSORY NOTES AT ISSUE WERE NOT NEGOTIABLE INSTRUMENTS.

In dismissing Whitaker and Fletcher's complaint, the trial court ruled that neither the Whitaker nor Fletcher promissory notes were negotiable instruments under Mississippi law. [R.177; R.E. 177, Tab 2]. As a result, the trial court determined that Appellant's claims were barred by the three-year statute of limitations. [R.177; R.E. 177, Tab 2]. However, both the Whitaker and Fletcher promissory notes meet the definition of a negotiable instrument as defined by Miss. Code Ann. § 75-3-104.

Before examining the statutory structure and requirements of a "negotiable instrument," Appellants note that it appears that all conditions creating a negotiable instrument are met, save one. Thus, the Court can focus its analysis on a discrete part of the statutory language cited below. There appears to be no dispute that the promissory notes in question would be negotiable instruments *if* they meet the definition of "payable to order," which is defined as being payable "to an identified person or order."

Miss. Code Ann. § 75-3-104 defines a negotiable instrument as follows:

> (a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a 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;

(2) Is payable on demand or at a definite time; and

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

Miss. Code Ann. § 75-3-104(a)(1)-(3). The Code also defines the terms "payable to bearer" or "to order." It states:

(a) A promise or order is payable to bearer if it:

(1) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;

(2) Does not state a payee; or

(3) States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

(b) 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 Ann. § 75-3-109(a)-(b) (emphasis added). This Court has held that the rules of statutory construction require a statute to be interpreted according to its plain language. Gannett River States Pub. Co. v. Entergy Mississippi, Inc., 940 So.2d 221, 224 (Miss. 2006). The language of Miss. Code Ann. § 75-3-109 unambiguously states that a "promise or order that is not payable to bearer is payable to order if it is payable . . . to an identified person or order." Miss. Code Ann. § 75-3-109(b)(ii). Therefore, the plain reading of this statute is that a promise is payable to order if it is payable to an identified person. When both notes are read in light of the plain language of the statute, it is clear that both notes are negotiable instruments. The notes satisfy each of the four criteria.

First, both notes are unconditional promises to pay a fixed amount of money. See, Whitaker Promissory Note and Fletcher Promissory Note, [R. 21-26; R.E. 21-26, Tab 4]. Second, both Notes fall within the statutory definition of "payable to order," as the statute expressly states that a promise is payable to order if it is payable to an identified person **or** order. See, Miss. Code Ann. § 75-3-109(b)(ii). Here, the notes are payable to R.H. Whitaker and to Monty Fletcher. [R. 21-26; R.E. 21-26, Tab 4]. Since the statute uses the disjunctive "or," on its face, the note can be payable to either of the choices (i.e. to a person or to order). It is a cannon of statutory construction that statutes written in the disjunctive set forth separate and distinct alternatives. In re Branan, 419 So.2d 145, 146 (Miss. 1982) ("use of the disjunctive 'or' denotes a choice between alternatives."). See also, Stegall v. State, 765 So.2d 606, 608-09 (Miss.App. 2000); See also, Hall v. Miss. Dept. Of Public Safety, 96-CA-00832-SCT, slip at 8, 708 So.2d

564 (Miss. 1998)(Table); See also, Quindlen v. Prudential Ins. Co., 482 F.2d 876, 878 (5th Cir.)("as a general rule, the use of a disjunctive in a statute indicates alternatives and requires that the alternatives be treated separately.").

If one puts themselves in the position of the drafter of a promissory note who desired to use the correct language to make it negotiable, he would be perfectly justified to draft the note payable to an identified person. Using firmly established rules of construction for statutes, requiring that terms and conditions divided by the disjunctive be treated separately, drafting it payable to an identifiable person should result in the note being negotiable.

To the extent that the Court finds the statute subject to two reasonable interpretations (i.e. ambiguous), the Court should permit the broader interpretation, if only based on detrimental reliance principles. Just as with any check, if one endorses the back, one can negotiate it. Similarly, either Whitaker or Fletcher should have been able to endorse the note and negotiate the instrument to other persons.

Third, the notes are payable on demand. [R. 21-26; R.E. 21-26, Tab 4]. Fourth, there are no conditions precedent which must be satisfied before demand may be made on the Notes. [R. 21-26; R.E. 21-26, Tab 4]. Accordingly, both notes are negotiable instruments and the six-year statue of limitations provided by Miss. Code Ann. § 75-3-118 applies. This section states:

> (b) Except as provided in subsection (d) or (e), if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six (6) years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of ten (10) years.

Miss. Code Ann. § 75-3-118(b). This section applies to "a note payable on demand." Id. Both

notes clearly state they are payable on demand[1]. [R. 21-26; R.E. 21-26, Tab 4]. For this reason, the six-year statute of limitations provided by § 75-3-118(b) applies to Whitaker and Fletcher's claims against Limeco and Kidd for failure to make payment. Such an action must be brought within 6 years of the demand for payment, which it clearly was.

The notes were executed on July 1, 2002, the earliest date that demand could have been made. Therefore, the applicable statute of limitations would not have expired, at the earliest, until July 1, 2008. Whitaker and Fletcher filed their complaints on September 19, 2007, well within the statute of limitations. As such, the trial court erred by dismissing Whitaker and Fletcher's claims for breach of promissory notes.

II. THE TRIAL COURT ERRED BY DISMISSING APPELLANTS' FRAUD AND BREACH OF CONTINUING GUARANTY CLAIMS BY RULING THAT WHITAKER AND FLETCHER DID NOT ALLEGE ANY SET OF FACTS TO TOLL THE THREE-YEAR STATUTE OF LIMITATIONS.

Independent of the determination by the Court in Issue I, the Appellants' fraud claims are not time barred because their fraud claims did not accrue until March 22, 2007, the date of William Kidd's deposition.

When a party fraudulently conceals a cause of action, such action shall not be deemed to have accrued until such fraud is, or with reasonable diligence, might have been first known or discovered. Miss. Code Ann. § 15-1-67; See also, Channel v. Loyacono, 954 So.2d 415, 423 (Miss. 2007), citing Stephens v. Equitable Life Assurance Society of U.S., 850 So.2d 78, 83 (Miss. 2003). "The test on whether to toll the statue of limitations is whether a reasonable person similarly situated would have discovered potential claims." Pope v. Sorrentino, 992 So.2d 1194, 1199 (Miss.App. 2008), citing Andrus v. Ellis, 887 So.2d 175, 180 (Miss. 2004).

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[1] The Code defines a "note" as a promise. Miss. Code Ann. § 75-3-104(e).

To successfully toll the statute of limitations due to fraudulent concealment, a plaintiff must show "(1) some affirmative act or conduct was done and prevented discovery of a claim, and (2) due diligence was performed on their part to discover it." Channel at 423, citing Stephens at 83. The affirmative act must be designed to prevent the discovery of the claim. Id., citing Robinson v. Cobb, 763 So.2d 883, 887 (Miss. 2000). However, both inquiries are a question of fact that should be left to a jury for determination. Robinson at 888-89. See also, Weathers v. Metropolitan Life Ins. Co., 2009 WL 1886867, ¶14 (Miss. 2009) and Schiro v. American Tobacco Co., 611 So.2d 962 (Miss. 1992) (when genuinely disputed, time of discovery is an issue of fact that is to be decided by a jury.).

As this Court stated in Cobb, "[w]hether [defendant] concealed his participation . . . is a fact question that should have been left for the jury." Id. at 888. Further, the court commented that "[w]hether [plaintiffs] were diligent in their efforts to discover [defendant's] participation . . . is a question of fact, not one of law." Id. at 889. However, in the present case, the trial court erred by removing these questions from the jury. There 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. Also, 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.

First, Kidd and Limeco induced Whitaker and Fletcher to loan Kidd $850,000 and to enter into the promissory notes and the continuing guaranty. [R.6; R.E. 6, Tab 4]. This inducement was performed by fraudulent misrepresentations and concealment. Specifically, Kidd represented that he personally had sufficient assets to repay the entire loaned amount. [R.6-9, 14; R.E. 6-9, 14, Tab 4]. Additionally, Kidd, as managing director of Limeco, represented that

Limeco had sufficient assets to repay the loaned amount. 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. [R.6-10; R.E. 6-10, Tab 4]. Additionally, Kidd brought in his accountant to verify Limeco's assets. [T. 16]. The Fifth Circuit has noted that a defendant is guilty of affirmative acts of concealment when he is "guilty of some trick or contrivance tending to exclude suspicion and prevent inquiry." State of Tex. v. Allen Const. Co., Inc., 851 F.2d 1526, 1529 (5th Cir. 1988). There is no doubt that Kidd's actions were done to exclude suspicion and to prevent inquiry by the Appellants.

Both Whitaker and Fletcher reviewed these documents and based upon the false books and records, loaned Kidd the $850,000. Only later did they learn Kidd presented them with false documentation. It is important to note that Appellants are not asserting that Kidd and Limeco's financial condition deteriorated over time, but in fact, allege that at the time of the inducement to enter the promissory notes, Kidd's statements were false and that Limeco and Kidd presented a false set of books to Appellants. This concealment also continued over time, evidenced by the execution of the Continuing Guaranty and its later extension.

To support Appellants' claims, they provided the lower court with key deposition testimony wherein Kidd contradicted his earlier statements of Limeco's solvency in his deposition taken March 22, 2007. In his deposition, Kidd testified that at the time the notes were entered into, *Limeco had no assets.* [R. 172-173]. Therefore, Kidd presented Whitaker and Fletcher with false documentation, for the sole purpose of inducing them to loan him the money. [R. 15]. Whitaker and Fletcher had no reason to know of Kidd's false misrepresentations until his deposition and accordingly, had no idea they had been fraudulently induced to enter into the notes or the Continuing Guaranty. See, Continental Assurance Co. v. Cedar Rapids Pediatric

Clinic, 957 F.2d 588, 593 (8th Cir. 1992) (false financial statements on company's letterhead were sufficient for the jury to find active concealment and toll federal statute of limitations.).

Further, it is clear that Whitaker and Fletcher performed due diligence in requesting and reviewing Limeco's financial books and records before entering into the notes. The Appellants did not simply rely on the representations of Kidd, but took the reasonable and diligent extra precaution of examining the company's financial records. Many jurisdictions hold that a party may rely on the truthfulness of business records unless their falsity is obvious. See, Spiess v. Brandt, 41 N.W.2d 561, 566 (Minn. 1950). This rule should similarly apply in Mississippi.

These falsified records demonstrate a concealment by Kidd and Limeco as to the true facts of their financial condition. At the very least, they create a question of fact as to the tolling of the statute. See Robinson, supra; See Weathers, supra; See also, Comi v. Breslin & Breslin, 683 N.Y.S.2d 345, 349 (N.Y. 1999) (allegations that defendant falsified financial records created a question of fact precluding summary judgment as to whether, through reasonable inquiry, plaintiff could have determined the truth of the concealment.). Therefore, the statute of limitations did not start accruing until Whitaker and Fletcher learned of this concealment, which was March 22, 2007.

In their re-filing of their complaint, Appellants added additional claims of fraud based on these recent findings which were not pled or known at the time of the original complaint. [R. 5-18; R.E. 5-18, Tab 4]. Whitaker and Fletcher timely filed their complaint on September 19, 2007. [R. 18; R.E. 18, Tab 4]. Accordingly, the trial court erred in ruling that Whitaker and Fletcher failed to allege any facts that would toll the statute of limitations, and by ruling that "it is certain that the Plaintiffs had knowledge of their claim for fraud at the latest of December 11, 2003. . . .". [R. 178; R.E. 178, Tab 2]. This reasoning is obviously flawed since Whitaker and

Fletcher had no idea of Kidd's fraudulent conduct until March of 2007.

Another concerning aspect of this case is that the trial court dismissed this matter on a motion to dismiss. No discovery was ever commenced. The Appellants are fortunate enough that a deposition was taken in the previous case that demonstrates how Appellants were able to start uncovering the deceptions. Appellants expect they will be able to establish other means and instances of the continuing nature of the fraudulent concealment, such as Kidd's transaction involving soliciting the additional $100,00 from Monty Fletcher. A motion to dismiss tests the legal sufficiency of the pleadings. See, Prewitt v. Phillips, 2009 WL 1857296, ¶ 5 (Miss.App.2009); Wilborn v. Equitable Life Assur. Soc. of the U.S., 998 So.2d 430, 434-35 (Miss. 2008). The allegations of fraudulent concealment should have been accepted as true. Clearly, the pleadings state a cause of action. It remains to be seen if Appellants can prove their claim of fraudulent concealment. That can be tested on a subsequent motion for summary judgment. It should not have been dismissed without the opportunity to further develop and demonstrate those facts.

III. THE TRIAL COURT ERRED BY RULING LIMECO CORPORATION HAD NO CORPORATE LIABILITY, AND THEREFORE, THAT APPELLANTS COULD NOT PIERCE THE CORPORATE VEIL.

The trial court erred by ruling that Whitaker and Fletcher could not pierce Limeco's corporate veil based on its findings that plaintiffs claims were time barred. [R. 178-179]. Under Mississippi law, "[w]hen a corporate officer directly participates in or authorizes the commission of a tort, even on behalf of the corporation, he may be held personally liable." Turner v. Wilson, 620 So.2d 545, 548 (Miss. 1993). Such liability cannot be predicated merely on the officers connection to the corporation but must have as its foundation individual wrongdoing. Id. In the present case, there is individual wrongdoing by Kidd-his fraudulent misrepresentations-while he

was acting as managing director of Limeco. Therefore, it is completely appropriate for the Appellants to pierce the corporate veil and the trial court erred by ruling otherwise.

CONCLUSION

The record evidence in this matter shows the trial court erred by dismissing the Appellants case for four reasons. First, the trial court erred in finding that the Whitaker and Fletcher Promissory Notes were not negotiable instruments as defined by Miss. Code Ann. § 75-3-104 and therefore, not entitled to the six-year statute of limitations provided by Miss. Code Ann. § 75-3-118. Second, the trial court erred by ruling that the three-year statue of limitations barred Whitaker's breach of continuing guaranty claim.

Third, the trial court erred by dismissing Appellants fraud claims on the basis that they failed to present any facts that would successfully toll the three-year statute of limitations. Fourth, the trial court erred by disallowing the Appellants to pierce Limeco's corporate veil even though its managing director made fraudulent misrepresentations on behalf of the company. For these reasons, the Appellants respectfully request that this Court reverse the trial court's decision and remand this matter for further proceedings.

CERTIFICATE OF SERVICE

I, MICHAEL N. WATTS, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing document to the following:

Honorable James L. Roberts, Jr.
Circuit Court Judge
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I have also forwarded the original and three copies of the brief to:

Ms. Betty Sephton, Clerk
Mississippi Supreme Court
P. O. Box 249
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THIS, the 29th day of July, 2009.

Michael Watts

MICHAEL N. WATTS