

TROY SMITH

APPELLANT

versus

No. 2010-CA-00701

DIMA HOMES, INC.

APPELLEE

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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Troy Smith, appellant, whose mailing address is Post Office Box 704, Poplarville, Mississippi 39470.
2. DiMa Homes, Inc, a Mississippi corporation, appellee, whose mailing address is 117 N. Main Street, Petal, Mississippi 39465.
3. James W. Gladden, Jr., registered agent and attorney for DiMa Homes, Inc., whose mailing address is Post Office Box 1854, Hattiesburg, Mississippi 39403-1854.
4. Jack Parsons, attorney for Troy Smith, whose mailing address is Post Office Box 6, Wiggins, Mississippi 39577.
5. Jerry A. Evans, attorney for DiMa Homes, Inc., whose mailing address is Post Office Box 1230, Hattiesburg, Mississippi 39403-1230.

by

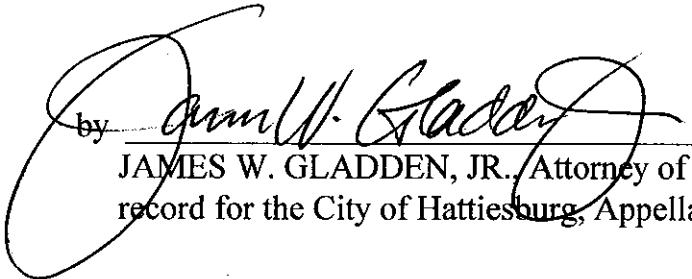

JAMES W. GLADDEN, JR., Attorney of
record for the City of Hattiesburg, Appellant

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TABLE OF CASES, STATUTES AND OTHER CITED AUTHORITIES

Cases Cited:

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<i>Palmer v. Anderson Infirmary Benevolent Ass'n.</i> , 656 So.2d 790, 794 (Miss. 1995)	12
<i>Simpson v. Boyd</i> , 880 So.2d 1047, 1150 (Miss. 2004)	12
<i>Smith v. Sanders</i> , 485 So.2d 1051, 1052 (Miss. 1986)	13

Other Authorities Cited:

§15-1-49 of the Mississippi Code of 1972, as amended	7, 12, 14
"New Home Warranty Act"--§§83-58-3(e)(I)-(viii), 83-58-3(g), 83-58-5(1)(b), 83-58-7 MCA (1972)	6, 10, 15, 16, 17

STATEMENT OF ISSUES

- I.** Whether the trial court erred in dismissing Troy Smith's claim for negligence against the homebuilder as barred by the statute of limitations?
- II** Whether the statute of limitations ever began to run since owner did not receive notice as required by §83-58-7 of the Mississippi Code of 1972 Annotated as amended?
- III.** Whether Troy Smith had six years to file his claim rather than three years?

STATEMENT OF THE CASE

Troy Smith ("Smith") signed a contract on June 27, 2005 with DiMa Homes, Inc. ("Dima") to construct a house on land he owned in Pearl River County, Mississippi. (R. 212-223) As part of that contract, a New Home Warranty Act notice was given to Smith and he signed it on June 27, 2005. (R. 219-222) The construction of Smith's house was completed prior to November 14, 2005 because on November 14, 2005 Smith completed a "walk through" of his house. (R. 225) Then, on November 21, 2005, Smith answered a "Customer Survey" for Dima in which he answered questions regarding the personnel of Dima with whom he dealt and the construction of his house. (R. 226-229)

Smith closed the loan on his house on December 12, 2005 and took possession of the house on that day. (Applt's Brf., pg 4) On December 12, 2008, Smith filed his complaint against Dima in the Pearl River County Circuit Court for damages based solely upon negligence. At no time, from the filing of his complaint to the filing of his Answer to Motion to Dismiss Civil Action with Prejudice, or, Alternatively, Motion for Summary Judgment, did Smith ever assert a claim against Dima under the New Home Warranty Act. The issues were raised for the first time by Smith on appeal to this Court.

Had the warranties or provisions of the New Home Warranty Act been alleged in Smith's complaint in the lower court, Dima would have asserted that Smith did not give Dima written notice by certified or registered mail within ninety days after knowledge of the defect(s). Instead, Smith alleged that he gave Dima such notice on "Dec. 8, 2006," a few

days less than one year after taking possession of the subject property. (Applt's Brf., pg 2; R. 004)

On February 18, 2010, Dima raised, in a motion to the lower court, the issue of an expiration of the 3-year general statute of limitations under §15-1-49 of the Mississippi Code of 1972 , as amended. (R. 095-144) Smith filed his answer to said motion on March 02, 2010. (R 150-179) The lower court considered this issue in the motion and answer based upon briefs submitted by counsel for Smith and Dima. It rendered its Order of Summary Judgment (R. 183-186) and Final Judgment of Dismissal (R. 187) on April 23, 2010. The lower court rendered its Order and Final Judgment on the basis that Smith had sought relief based solely upon negligence and that his complaint filed on December 12, 2008 was barred by one day under §15-1-49 of the Mississippi Code of 1972, as amended.

STATEMENT OF FACTS

The following facts are relevant to issues presented for review of this court:

1. Smith signed a contract on June 27, 2005 with Dima to have a house constructed on land which he owned in Pearl River County, Mississippi. (R. 212-223)
2. As part of this contract, Smith signed a New Home Warranty Act notice on the same date. (R. 219-222)
3. After Smith's house was constructed, he participated in a "walk through" of his house with Dima representatives on November 14, 2005, where he identified defects in the construction of the house. (R. 225)
4. On November 21, 2005, Smith participated in a "Customer Survey" for Dima where he answered questions regarding customer satisfaction with Dima personnel who worked on his house, the construction of his house and other issues. (R. 226-229)
5. On December 12, 2005, Smith closed the loan on his new house and took possession of it. (R. 004, 154)
6. Smith states that immediately upon occupying his house he found deficiencies with it. (R. 004, 154)
7. Smith states that he gave Dima written notice of the deficiencies with the house on December 08, 2006, "within one year" of its occupancy. (R. 004, 154)

8. Smith filed his complaint against Dima in the Pearl River County Circuit Court on December 12, 2008, seeking damages from Dima solely on the basis of negligence. (R. 003-008)
9. Dima filed its Answer on April 17, 2009. (R. 011-019)
10. Dima filed a “Motion to Dismiss Civil Action with Prejudice, or, Alternatively, Motion for Summary Judgment” on February 18, 2010, seeking, in part, to have this civil action dismissed because it was barred by 3-year general statute of limitations. (R. 95-144)
11. Smith filed his “Answer to Motion to Dismiss Civil Action with Prejudice or Alternatively Motion for Summary Judgment” on March 02, 2010. (R. 150-179)
12. The parties to this civil action agreed to have trial court decide the above motion on the filing of briefs by both parties without the necessity of a hearing. (R. 183)
13. The trial court entered its “Order for Summary Judgment” (R183–186) and its “Final Judgment of Dismissal” (R. 187) dismissing this civil action because the Smith complaint had been filed one day beyond the 3-year general statute of limitations contained in §15-1-49 of the Mississippi Code of 1972, as amended.
14. Smith filed a “Notice of Appeal” from the decision of the trial court on April 29, 2010. (R. 188-189)

SUMMARY OF THE ARGUMENT

The lower court rendered its judgment to dismiss this civil action based on an analysis of using a 365-day year and “Leap Year” consideration as a basis for deciding that the 3-year general statute of limitations had run by one day. Equally, and maybe more, important should have been the consideration of when Smith’s action actually accrued and when he had actual knowledge of facts that would have allowed him to bring this action prior to three years. Smith conducted a “walk through” of his house on November 14, 2005 because, according to his contract, the loan on the house was to close within five days of the “walk through.” (R. 213-214) Due to loan underwriting considerations brought on by Smith, it was nearly a month later when the closing on the house was done.

Considering that the house was unoccupied and locked up from after the date of the “walk through” until closing, it is exceedingly difficult to understand how Smith on December 12, 2005 “immediately upon occupying the house . . . found deficiencies with the house. . . ,” unless those deficiencies were apparent to him during his “walk through.” Therefore, serious consideration must be given to the fact that Smith’s time for the filing of his complaint began to run on November 14, 2005 or five days thereafter, and not on December 12, 2005.

Smith has raised for the first time in this appeal the issue of the time limitations of the New Home Warranty Act. These issues were not asserted in his complaint. He raises the issue of the Act’s notice provision and its limitation of six years for filing a civil action involving structural defects in his house. Had these issues been raised at the lower court

level, then Dima would have asserted Smith's failure to comply with Act's notice requirement from the owner to the homebuilder and the homebuilder's right to inspect the house at that time and effect the proper repairs. These rights were denied Dima because Smith did not comply with the provisions of the Act with respect to notice and giving a reasonable opportunity of inspection and right to repair.

ARGUMENTS

I. Whether the trial court erred in dismissing Troy Smith's claim for negligence against the homebuilder as barred by the statute of limitations?

The lower court rendered its judgment to dismiss this civil action as being time-barred by §15-1-49 of the Mississippi Code of 1972, as amended. It concluded that the filing of Smith's complaint against Dima was one day too late.

Standard of Review

The standard of review regarding a trial court's decision to grant summary judgment is that "evidence must be viewed in the light most favorable to the non-moving party and if, in this view, the moving party is entitled to a judgment as a matter of law, the summary judgment should be granted in his favor. Otherwise, the motion should be denied." *Holland v. Peoples Bank & Trust Co.*, 3 So.3d 94, ¶ 9 (Miss. 2008) (citing, *Franklin County Mem'l. Hosp. v. Miss. Farm Bureau Mut. Ins. Co.*, 975 So.2d 872,874 (Miss. 2008)). The moving party is entitled to the grant of a summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue at to any material fact and that the moving party is entitled to judgment as a matter of law." *Callicott v. Prof'l. Servs. Of Potts Camp, Inc.*, 974 So.2d 216, 219 (Miss. 2007) *See also*, Miss.R.Civ.P. 56(c). A fact is material if it "tends to resolve any of the issues properly raised by the parties." *Simpson v. Boyd*, 880 So.2d 1047, 1150 (Miss. 2004) (quoting *Palmer v. Anderson Infirmary Benevolent Ass'n.*, 656 So.2d 790, 794 (Miss. 1995).

Argument

The lower court discussed when the action accrued for Smith, namely December 12, 2005. However, the documents show that Smith participated in a “walk through” of his house on November 14, 2005, at which time he identified a number of defects in his new house. (R. 225)

“[A] cause of action accrues when the plaintiff become aware that he has suffered an injury or has sufficient information to know that he has been injured.” *A-1 By D-2 v. Molpus*, 906 F.Supp. 375, 379 (S.D.Miss. 1995) See also, *Helton v. Clements*, 832 F.2d 332, 334-335 (5th Cir. (Miss.) 1987) “[T]he focus is on the time that [one] discovers, or should have discovered by the exercise of reasonable diligence, that he or she probably has an actionable claim.” *Doe v. Roman Catholic Diocese of Jackson*, 947 So.2d 983, 986 (Miss. 2006) Our Supreme Court has also noted that “[t]he cause of action accrues and the limitations period begins to run when the plaintiff can reasonably be held to have knowledge of the injury. . . .” *Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704, 709 (Miss. 1990)

A plaintiff does not need to have absolute certainty that he has a cause of action, but, rather that “he need merely be on notice—or should be—that he should carefully investigate the materials that suggest a cause probably or potentially exists.” *First Trust Nat. Ass’n. v. First Nat. Bank of Commerce*, 220 F.3d 331, 336-337 (5th Cir. (Miss.) 2000) See also, *Smith v. Sanders*, 485 So.2d 1051, 1052 (Miss. 1986) “[T]he plaintiff need not have actual knowledge of the facts before the duty of due diligence arises; rather, knowledge of certain facts which are ‘calculated to excite inquiry’ give rise to the duty to inquire.” *In re Catfish*

Antitrust Litig., 826 F.Supp. 1019, 1031 (N.D.Miss. 1993) “The statute begins to run once plaintiffs are on inquiry that a potential claim exists. *Id.*”

The facts are indisputable that Smith participated in a “walk through” (R. 225) of his new house on November 14, 2005 in anticipation of closing his loan on this house within five days of the “walk through.” (R. 213-214) At this “walk through” by Smith, he identified defects with new house. Given that Smith, immediately upon occupying his new house, “found deficiencies with the house. . .” and given that the house was unoccupied and locked up from November 14, 2005 until December 12, 2005, it is more than plausible and reasonable that Smith was fully aware on November 14, 2005 or within five days thereafter that he had knowledge of defects in the house which should have given rise to inquiry and due diligence on his part. Furthermore, it is virtually nil that Smith, on December 12, 2005, discovered he had a claim against Dima for the first time when, on November 14, 2005, he had inspected the new house and had found and identified defects with it.

The lower court was correct in its decision that Smith’s complaint was time-barred by §15-1-49 of the Mississippi Code of 1972, as amended. The lower court’s analysis focused on the issues of 365-day year and Leap Year. The more direct rationale for the lower court’s decision is based upon the contract and the “walk through” document that Smith signed. It Order and Final Judgment should be affirmed.

**II. Whether the statute of limitations ever
began to run since owner did not receive notice as required by
§83-58-7 of the Mississippi Code of 1972 Annotated as amended?**

III. Whether Troy Smith had six years to file his claim rather than three years?

Smith also raises issues involving the New Home Warranty Act (§83-58-7 of the Mississippi Code of 1972, as amended) relating to the notion that Smith was not given notice of the New Home Warranty Act and that Smith should have up to six years to file his claims against Dima for structural defects. These issues were raised by Smith for the first time on appeal of the lower court's decision to dismiss the civil action with prejudice.

With reference to whether Smith received notice of the New Home Warranty Act, one need only look to the contract Smith signed with Dima on June 27, 2005. (R. 212-223) As part of that contract, Smith signed a notice of the New Home Warranty Act. (R. 219-222) The difficulty of asserting this claim at this time is that had Smith complied with the provisions of §83-58-7 of the Mississippi Code of 1972, as amended, by sending Dima "written notice within ninety (90) days after knowledge of the defect by registered or certified mail, advising [the builder] of the defects and giving the builder reasonable opportunity to repair defect," the repairs would have been effected to Smith's house within four to six months of his occupancy of his house. Smith has repeatedly stated in the record that he gave Dima notice on December 08, 2006, nearly a full year after he occupied his house. (R. 004, 154) Further, he has never submitted any proof that the notice was actually given on that date, that the notice was in writing and that it was sent by registered or certified

mail. Smith had notice of the New Home Warranty Act, and he was the one who did not comply with its notice provisions.

Smith claims that he should be able to rely on the provisions of the New Home Warranty Act relating to the definition of “[m]ajor structural defect” (§83-58-3(e)(i)-(viii) MCA (1972)), the definition of “[w]arranty commencement date” (§83-58-3(g) MCA (1972), and the warranty commencement date for major structural defects (§83-58-5(1)(b) MCA (1972)). However, Smith fails to recognize that he has not complied with the notice provisions required by the same act under which he is claiming protection. Had he done as the New Home Warranty Act notice provisions required, there is very great likelihood that any problems with the house would have been corrected by early-2006, thereby obviating the need for this civil action. By virtue of Smith’s failure to comply with the notice provisions of the New Home Warranty Act and allowing Dima to have reasonable opportunity to repair any defects, it is not unreasonable to speculate whether Smith wanted his house repaired or wanted a lawsuit.

CONCLUSION

Smith failed to file his complaint against Dima within three years of him having actual knowledge of defects to his house and a reasonable understanding that a cause of action against Dima probably or potentially existed when he participated in a “walk through” of his house on November 14, 2005. This is clearly evident from the “walk through” document he signed on that date.

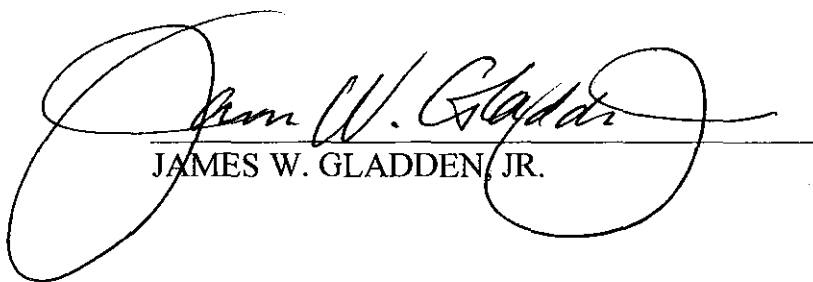
Smith filed his claim against Dima based upon negligence which is governed by the 3-year general statute of limitations. Now, on appeal, he is asserting he has a right to make the six-year warranty commencement date of the New Home Warranty Act his new statute of limitations. Yet, while wanting to take selective advantage of provisions of said Act, he does not want to be held accountable for his knowledge and notice of it on June 27, 2005 nor his obligation to comply with its notice provisions relative to the builder.

Dima asserts the circuit court of Pearl River County, Mississippi was correct in its decision that the 3-year general statute of limitations had run against Smith’s right to file a civil action against Dima. Further, Dima asserts that Smith should not be able, on appeal, to raise for the first time claims and protections afforded by the New Home Warranty Act when denying he had actual notice of the Act provided by Dima to him on June 27, 2005 and failing to comply with notice provisions of the same Act from which he now wants additional protection . Dima requests that the decision of the Pearl River County Circuit Court be affirmed.

CERTIFICATE OF SERVICE

I, **JAMES W. GLADDEN, JR.**, attorney for appellee in this action, hereby certify that a true and correct copy of the foregoing Brief for Appellee has been mailed, postage prepaid, to the Honorable R. I. Prichard, III, Circuit Court Judge, at the usual post office address of said judge at Post Office Box 1075, Picayune, Mississippi 39466-1075; to Mr. Jack Parsons, of the law firm of Parsons Law Office, the attorneys of record for the appellant in this action, at the usual post office address of said attorney at Post Office Box 6, Wiggins, Mississippi 39577-0006; and to Jerry Evans, attorney for Dima, at the usual post office address of said attorney at Post Office Box 1230, Hattiesburg, Mississippi 39403-1230.

GIVEN on this 12th day of November 2010.


JAMES W. GLADDEN, JR.

Westlaw

Miss. Code Ann. § 83-58-5

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West's Annotated Mississippi Code Currentness

Title 83. Insurance

Chapter 58. New Home Warranty Act

→ § 83-58-5. Warranty of builder to owner

(1) Subject to the exclusions provided in this section, every builder warrants the following to the owner:

(a) One (1) year following the warranty commencement date, the home will be free from any defect due to noncompliance with the building standards.

(b) Six (6) years following the warranty commencement date, the home will be free from major structural defects due to noncompliance with the building standards.

(2) Unless the parties otherwise agree in writing, the builder's warranty shall exclude the following items:

(a) Defects in outbuildings including detached garages and detached carports, except outbuildings which contain the plumbing, electrical, heating, cooling or ventilation systems serving the home; swimming pools and other recreational facilities; driveways; walkways; patios; boundary walls; retaining walls; bulkheads; fences; landscaping, including sodding, seeding, shrubs, trees, and planting; off-site improvements including streets, roads, drainage and utilities or any other improvements not a part of the home itself.

(b) Damage to real property which is not part of the home covered by the warranty and which is not included in the purchase price of the home.

(c) Any damage to the extent it is caused or made worse by any of the following:

(i) Negligence, improper maintenance or improper operation by anyone other than the builder or any employee, agent or subcontractor of the builder.

(ii) Failure by anyone other than the builder or any employee, agent or subcontractor of the builder to comply with the warranty requirements of manufacturers of appliances, equipment or fixtures.

(iii) Any change, alteration or addition made to the home by anyone after the initial occupancy by the owner, except any change, alteration or addition performed by the builder, or any employee, agent, or subcontractor of the builder.

Westlaw

Miss. Code Ann. § 83-58-7

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West's Annotated Mississippi Code Currentness

Title 83. Insurance

Chapter 58. New Home Warranty Act

→ § 83-58-7. Notice of owner to builder of defect

Before undertaking any repair himself, except repair to minimize loss or damage as provided in Section 83-58-5 (2)(d), or instituting any action under Section 83-58-17, the owner shall give the builder written notice within ninety (90) days after knowledge of the defect by registered or certified mail, advising him of the defects and giving the builder a reasonable opportunity to repair the defect. The builder shall give the owner written notice of the requirements of this chapter at the time of closing. If the builder does not provide such notice, the warranties provided in this chapter shall be extended for a period of time equal to the time between the warranty commencement date and date notice was given.

CREDIT(S)

Laws 1997, Ch. 465, § 4, eff. July 1, 1997. Amended by Laws 2004, Ch. 567, § 2, eff. July 1, 2004.

HISTORICAL AND STATUTORY NOTES

For provision in Laws 1997, Ch. 465, § 10 concerning the application of that act to new home warranties, see Historical and Statutory Notes under Section 83-58-1.

RESEARCH REFERENCES

Encyclopedias

Encyclopedia of Mississippi Law § 25:24, Compensatory Damages in Breach of Contract Actions.

JUDICIAL DECISIONS

In general 1

1. In general

Homeowners were entitled to damages for construction defects in their home; building contract provided one-year warranty against structural defects, homeowners pointed out cosmetic defects during walkthrough, and they made proper demand for damages under New Home Warranty Act. *DiMa Homes, Inc. v. Stuart*, 2004, 873 So.2d 140. Antitrust And Trade Regulation ⚡ 389(2); Damages ⚡ 45