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REPLY ARGUMENT

I. WHETHER THE TRIAL COURT ERRED IN DISMISSING TROY SMITH'S CLAIM FOR NEGLIGENCE AGAINST THE HOMEBUILDER AS BARRED BY THE STATUTE OF LIMITATIONS

A. Date Statute of Limitations Began to Run:

Appellee, DiMa Homes, Inc. (DiMa), brings the argument that the statute of limitations time period should have begun on November 14, 2005, the day he completed a “walk through” of his house for the first time in its Brief to the Court of Appeals. This issue was not raised or argued before the lower court, and should not be entertained by this Honorable Court either.

Out of an abundance of caution, Appellant, Troy Smith, responds to the argument as follows: Appellee asserts in its brief to this Honorable Court that Troy Smith's action accrued when he participated in a “walk through” of his new home, or within five days thereafter.

Appellee is absolutely incorrect in its assertion, as will be shown. Appellant's cause of action accrued on the day of closing on his home, December 12, 2005, and he should have had three years, or until December 12, 2008, to file his claim against DiMa Homes, Inc. (DiMa) for the major structural defects found there.

In order to maintain a claim for negligence, one must show a duty, a breach of that duty, causation and damages. In the instant case, Troy Smith could not have maintained his action for negligence until he had all four of these elements, including damages, which he did not have until he took ownership of his new home.

The case on point for this argument is *Fletcher v. Lyles*, 999 So.2d 1271 (Miss. 2009). In *Fletcher*, the Mississippi Supreme Court reiterated it applies a de novo standard of review to both the statute of limitations and grants of summary judgment. *Id.*, at 1276. It then went on to decide when a purchaser's cause of action accrued.

The Court found that the claims asserted by the Fletchers all arose out of negotiations for the purchase of a home, including the contract and seller's disclosure, which all culminated in the purchase of the home on October 30, 2000. *Id.*, at 1276. The *Fletcher* court quoted the 2006 case of *Bullard v. Guardian Life ins. Co. of Am.*, 941 So.2d 812, 815 (Miss. 2006), which held "...for purposes of a statute of limitations, a cause of action *accrues* 'when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested.'" *Fletcher*, at 1277. The right to sue became vested in Troy Smith upon the closing (purchase) of his home. Before he actually purchased his home, he had no damages, and according to the Supreme Court, "would not have had a viable cause of action against either [defendant] if suit had been filed ... prior to closing." *Fletcher*, at 1277. The Court went on to state, "... [A] statute of limitations 'begins to run when all the elements of a tort, or cause of action, are present.'" *Fletcher*, at 1277, quoting *Caves v. Yarbrough*, 991 So.2d 142, 147 (Miss. 2008). The Fletchers did not have a cause of action until they suffered actual damages. *Fletcher*, at 1277. In other words, no cognizable tort occurred until its damages arose. *Baptist Health v. BancorpSouth Ins. Services, Inc.*, 2010 WL1461598 N.D. Miss., 2010. Finally, this Honorable Court held in *Jackson v. State Farm Mutual Auto Ins. Co.*, 852 So.2d 641 (Miss. App. 2003), that "for statute of limitation purposes, a cause of action 'accrues' once it exists as a legally enforceable claim, that is, when the right to sue has become vested in the plaintiff." *Id.* at 646, quoting *Burgess v. Lucky*, 674 So.2d 506, 509 (Miss. 1996).

For these reasons, Appellant, Troy Smith asserts his statute of limitations period began on the date he actually purchased his home from DiMa on December 12, 2005, and not on the date of the "walk through" or five days thereafter, as Appellee argues.

B. Last Date Troy Smith could have Filed His Action Against Appellee:

Appellant would urge this Honorable Court to consider its original argument that Troy Smith filed his claim against DiMa within the three year applicable statute of limitations time period. As argued before, if extra days are counted for leap years, confusion will reign in our court system. If one is given three years to file his claim, those three years should begin on the day after the occurrence giving rise to the right arises, and end on that date three years later, without thought to whether a leap year falls within those three years, or not.

In Troy Smith's case, he closed on his home on December 12, 2005, and then filed suit against DiMa on December 12, 2008. The lower court counted days, rather than years, included an extra day for the leap year in 2008, and found that he was one day outside his statute of limitations, and gave a summary judgment to DiMa. If, instead, Mr. Smith had closed on his home one year earlier, on December 12, 2004, and filed his action against DiMa on December 12, 2007, he would have been within the time period set forth in the statute of limitations, because there was no leap year during that time period, and he would have been given his day in court. One more example to show the confusion caused by counting an extra day for leap years would be if Mr. Smith closed on January 12, 2004, and filed suit on January 12, 2007, if the extra day for leap year was counted, he would again be denied his day in court, because February 29, 2004 falls within that specific 2004 – 2007 date range.

Mississippi's statutes should be construed toward giving its citizens their day in court rather than being interpreted so narrowly as to deny those, like Appellant, Troy Smith, their chance to present their case to a judge and jury.

- 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 1972 ANNOTATED, AS AMENDED
- III. WHETHER TROY SMITH HAD SIX YEARS TO FILE HIS CLAIM RATHER THAN THREE YEARS

These arguments are made in the alternative, and in the event this Honorable Court finds that Troy Smith filed his action against DiMa after the statute of limitations had expired. As stated in the original brief, Mr. Smith alleged structural damages to his home in the lower court, and therefore, asserts he should be able to raise this issue on appeal, and should have had six years within which to file his claim against DiMa in accordance with §§83-58-7(e),(g) and 83-58-5(1)(b) of the Mississippi Code of 1972 Annotated, as Amended.

CONCLUSION

For the reasons set forth above, Appellant, Troy Smith, urges this Honorable Court to find that his action against DiMa Homes, Inc., was filed within the three year time period allowed. In the alternative, Appellant respectfully requests that the Court hold he had six years within which to file his action against DiMa Homes, Inc., under §§83-58-7(e),(g) and 83-58-5(1)(b) of the Mississippi Code of 1972 Annotated, as Amended.

Respectfully submitted,

TROY SMITH

BY:


JACK PARSONS, His Attorney

CERTIFICATE OF SERVICE

I, JACK PARSONS, of counsel for Appellant, do hereby certify that I have this date mailed a true and correct copy of the above and foregoing APPELLANT'S REPLY BRIEF to the following at their respective addresses listed below:

James W. Gladden, Jr.
P.O. Box 1854
Hattiesburg, MS 39403-1854

Jerry A. Evans
P.O. Box 1230
Hattiesburg, MS 39403

Honorable R.I. Prichard, III
Judge, District 15
P.O. Box 1075
Picayune, MS 39466

THIS, the 10 day of February, 2011.



JACK PARSONS

PARSONS LAW OFFICE

Jack Parsons, MSB [REDACTED]
Tadd Parsons, MSB # [REDACTED]
Dawn Smith, MSB # [REDACTED]
324 E. Cavers Avenue
P. O. Box 6
Wiggins, Mississippi 39577
Telephone: (601) 928-2838
Facsimile: (601) 928-9650