

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

2010-CA-00701

TROY SMITH

APPELLANT

versus

DIMA HOMES, INC.

APPELLEE

APPEAL FROM

PEARL RIVER COUNTY CIRCUIT COURT

BRIEF FOR APPELLANT

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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.


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APPELLANT'S BRIEF

STATEMENT OF ISSUES TO BE CONSIDERED BY THE COURT

1. WHETHER THE TRIAL COURT ERRED IN DISMISSING TROY SMITH'S CLAIM FOR NEGLIGENCE AGAINST THE HOMEBUILDER AS BARRED BY THE STATUTE OF LIMITATIONS.
2. 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.
3. WHETHER TROY SMITH HAD SIX YEARS TO FILE HIS CLAIM RATHER THAN THREE YEARS.

STATEMENT OF THE CASE

Troy Smith filed suit against DiMa Homes, Inc., on December 12, 2008, for problems, including structural problems, he discovered after purchasing the home from DiMa Homes, Inc., on December 12, 2005. DiMa Homes, Inc., alleged the claim was barred by the statute of limitations in its answer, and filed a motion to dismiss, or in the alternative, for summary judgment. Briefs were submitted to the court below, and Mr. Smith's action was dismissed on April 23, 2010, on the grounds that the statute of limitations time period had expired.

On December 12, 2008, Troy Smith filed his Complaint against DiMa Homes, Inc., and John Does 105, alleging negligence against the Defendants in building his home. (Record (R.) 0003-0009) Mr. Smith had contracted with DiMa Homes, Inc. (hereinafter DiMa) to build a home for him, which he finally purchased from DiMa on December 12, 2005. After moving into the residence, he discovered a multitude of problems with the home, including major structural problems. A list of the problems was attached to his complaint as Exhibit "A." (R. 0007-0008) Mr. Smith notified DiMa of the deficiencies in the home, in writing, on December 8, 2006, less than one year after taking possession of the property. DiMa represented to Mr. Smith it would resolve the problems, but did not do so. Mr. Smith asked for monetary damages to reimburse him for the repairs made by him to the home, for diminution in value of his home, mental anguish and emotional distress, punitive damages, pre- and post-judgment interest and attorney's fees. (R. 0005) DiMa answered, and among the defenses it raised, was that the action was barred due to the statute of limitations. (R. 0012) Discovery was had, and experts were designated. (R. 0038 and R. 0065) Mr. Smith's expert determined it could take \$55,000.00, or more, to repair the defects in the home. (R. 0043-0044 and also R. 0045-0064). Trial was scheduled to begin on April 13, 2010. (R. 0079) On February 18, 2010, DiMa filed a Motion to Dismiss Civil Action with Prejudice, or, Alternatively, Motion for Summary Judgment. (R.

0095-0144). DiMa asserted Mr. Smith filed his complaint three years and one day after taking possession of him home. (R. 0096) DiMa's motion was set for hearing on March 8, 2010, but on that date, counsel for both parties agreed to submit briefs to the Court arguing their position. The Circuit Court Judge agreed he would then rule on the motion to dismiss and/or for summary judgment. (R. 0180-0181) It was agreed by all parties the trial would be continued until July 8, 2010. (R. 0182) On April 23, 2010, Judge Prichard entered an Order of Summary Judgment, (R. 0183-0186) and a Final Judgment of Dismissal. (R. 0187) Troy Smith's Notice of Appeal was filed on April 29, 2010. (R. 0188)

SUMMARY OF THE ARGUMENT

Three year statute of limitation period:

Troy Smith's action was filed within the three (3) year statute of limitation time period allowed to him, and the trial court erred when it counted specific days rather than years in determining when the three (3) year time period ended. Case law is well settled that a cause of action begins to run on the day after the occurrence of an event, and ends of the last day, however many years later, the law allows for such action. There is no case law stating the extra day in a leap year should be counted when determining time limits for statutes of limitations. Rather, the matter has been indirectly addressed by this Honorable Court and our Supreme Court on many occasions in a different context. Before Rule 6(a) was added to the Rules of Civil Procedure, our state courts had to determine exactly when a time period began running and subsequently, when it ended. It also had to decide what would happen if the time period ended at a time when the courthouse was closed. Those cases determined the day of the occurrence or act is not counted, but rather, the time begins to run on the next day. It was also decided that if a time period ended when the courthouse was closed, the time period would be extended to the next day the courthouse was open. It is important to note that when making these determinations of whether a cause of action was barred because it had been filed on the Monday, after its time period ran out over the weekend, the courts always determined the action was not barred, and did not count leap year days to shorten the time frame. Extra days contained in leap years were simply never considered. If the statute of limitations read six (6) years, the court looked from the day after the date of the occurrence to the date of the occurrence six (6) years away to determine if the statute of limitations had expired. Likewise, Troy Smith took possession of his home on December 12, 2005, and filed his claim for damages on December 12, 2008, the last day of the three (3) year time period he was given within which to file his claim.

There is also a discussion of the notion known as “Leap Year” in the argument, showing that if this Court affirms the trial court’s decision, there would be confusion within the law, and much uncertainty by litigants, due to the fact that some would have a full time period within which to file their action, while others would have to file their action one or two days before the end of the time period in order to have their day in court.

Mississippi Code of 1972 Annotated, as Amended, §83-58-7:

Troy Smith’s statute of limitations time period has not begun to run. According to Miss. Code Ann. §83-58-7, written notice of the requirements of the chapter must be given to the purchaser at the time of closing. If the notice is not provided, the warranties provided by the chapter are extended. Miss Code Ann. §83-58-7. Troy Smith has not yet received this notice.

Mississippi Code of 1972 Annotated, as Amended, §83-58-3 and §83-58-5:

Under these statutes, Troy Smith had six (6) years within which to file his claim for major structural defects.

ARGUMENT

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

When searching for case law for my argument, I, like every other attorney doing research, began my search on Westlaw, and entered the search terms “statute of limitations” and “leap year.” Two cases contain these two phrases – Arceo v. Tolliver, 19 So.3d 67 (Miss. 2009), and Page v. University of Southern Mississippi, 878 So.2d 1003 (Miss. 2004). Neither case is actually on point with the issue raised by this appeal, although both deal with statutes of limitations. In Arceo, there are two footnotes stating that “such-and-such” year was a leap year. See Arceo, 19 So.3d 67, 73 (fn 6) and 75 (fn 8). In Page, the same idea is parenthetically stated. Page, 878 So.2d 1003, 1007 and 1008. There is no discussion by the Court of whether a day should be taken away for a leap year, although it was taken, in the counting of the time for filing a claim. It was simply stated in the footnotes, and/or in parenthesis in the body of the cases. Further, there were no cases cited to show that the higher courts in Mississippi had ever considered the idea that a statute of limitations period is shortened by one day if a leap year occurs during the time the claimant could file his claim.

However, there are several cases found wherein the issue was whether or not a statute of limitations had expired because the courthouse had been closed on the last day of the time period, and the claim was filed on the next day the courthouse was open for business. None of these cases addressed the question of whether a leap year had occurred within the time, nor was a day taken from any of the litigants. For example, in Nelson v. James, 435 So.2d 1189 (Miss. 1983), the United States Court of Appeals for the Fifth Circuit asked the Mississippi Supreme Court to clarify whether an action filed on Monday, after the statute of limitations had expired on Sunday, was timely. The Mississippi Supreme Court held that the action was filed timely. The

statute of limitations time period at issue in Nelson, was six (6) years. The Court thoroughly examined and discussed the issue, and held, “‘Yes,’ it was timely filed.” Id., at 1191. It should be noted that both 1976 and 1980, years within the time period, were leap years. If a day were taken from the litigant for each leap year, his cause of action would have expired on Friday, not Sunday, and his claim would have been time barred. See also Lawler v. Government Employees Insurance Co., 569 So.2d 1151 (Miss. 1990), where the Court held a 17 year old person’s statute of limitations did not begin to run until her 21st birthday on November 6, 1982, and therefore she had until November 6, 1888 to file her claim. Again, 1984 and 1988 were leap years, and if those two days were to be taken away from the minor, her time to file suit was have ended on November 4, 1988, rather than November 6. See also Parkman v. Mississippi State Highway Commission, 250 So.2d 637 (Miss. 1971) (appeal bond) and Gentry v. Wallace, 606 So.2d 1117 (Miss. 1992) (wrongful death). All of these cases dealt with the running of the statute of limitations, and none of them discussed taking days away from a litigant for leap years, nor did they do so.

If this Court affirms the Circuit Court Judge’s ruling, the result will simply create chaos and confusion. Regardless of the amount of time a litigant has to file his claim, whether it be one (1) year, three (3) years, seven (7) years or ten (10) years, there is always a possibility he will be beyond his statute of limitations if he decides to file it on the last day, and it happens to be a leap year, or a leap year, or even two, have fallen within his prescription period. A person with a ten (10) year prescription period would have to know he had to file his claim at least two (2) days before his ten 10 year period was up, or he would be barred from bringing his action, a penalty those with shorter prescription periods time would not have to pay. This creates uncertainty in the law, and is unfair to litigants. For example, if a person who was injured on April 1, 1992, had three years to file his claim and filed it on April 1, 1995, he would have filed within his time

period. However, if this same claimant's cause of action accrued one year later, on April 1, 1993, and he filed his action on April 1, 1996, his claim would be barred by the statute of limitations, because 1996 is a leap year, and he would have filed one day too late.

To make matters more complicated, there is an exception to the leap year rule - "Century leap years are NOT leap years UNLESS they can be evenly divided by 400. (For example, 1700, 1800 and 1900 were not leap years, but 1600 and 2000, which are divisible by 400 are.)" Borgna Brunner, *"Leap Year 101."* Infoplease. © 2000–2007 Pearson Education, publishing as Infoplease. 03 Aug. 2010 <<http://www.infoplease.com/spot/leapyear2.html>>. This means, that although we, or anyone we know, will not be practicing or judging anymore, those who are practicing in 2100, 2200 and 2300, will not have to worry about an extra day in those years, but those practicing in 2400 will. Maybe a little far fetched, but if this court holds that the extra day added in a leap year is not counted for purposes of statutes of limitations, all the uncertainty is eliminated.

It has always been assumed that litigants who are given a specific time within which to file their claims, have until the end of that time to file it. The case law cited shows this may be an area of first impression for this court, but litigants should not be denied their day in court because once every four (4) years an extra day is added to the calendar to keep the solar year and the calendar year in sync.

Leap year is a man-created addition to our calendar, due to the fact that it really takes 365 $\frac{1}{4}$ days for the earth to make a complete orbit around the sun. We don't actually have an extra day every 4 years, we simply created one to help synchronize the calendar year with the solar year. Borgna Brunner, *"Leap Year 101."* Infoplease. © 2000–2007 Pearson Education, publishing as Infoplease. 03 Aug. 2010 <<http://www.infoplease.com/spot/leapyear2.html>>.

2. 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.

The next error made at the trial court level, was that the builder did not comply with §83-58-7 of the Miss. Code of 1972 Annotated, as Amended which states:

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. (Emphasis supplied)

Miss. Code Ann. §83-58-7. The owner has not received a notice as required by this section as of the date of the writing of this brief.

3. WHETHER TROY SMITH HAD SIX YEARS TO FILE HIS CLAIM RATHER THAN THREE YEARS.

§83-58-3, Mississippi Code of 1972 Annotated, as Amended, reads as follows "... (e) 'Major structural defect' means any actual physical damage to the following designated load-bearing portions of a home caused by failure of the load-bearing portions which affects their load-bearing functions, as follows, to wit:

- (i) Foundation systems and footings;
- (ii) Beams;
- (iii) Girders;
- (iv) Lintels;
- (v) Columns;
- (vi) Walls and partitions;
- (vii) Floor systems;

(viii) Roof framing systems....

(g) ‘Warranty commencement date’ means the date that legal title to a home is conveyed to its initial purchaser or the date the home is first occupied, whichever occurs first.” Miss. Code Ann. §83-58-3.

And the following statute, §83-58-5, Mississippi Code of 1972 Annotated, as Amended, declares that “(1) Subject to the exclusions provided in this section, every builder warrants the following to the owner:

(a) ...

(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.” Miss. Code Ann. §83-58-5.

Troy Smith would specifically call the Court’s attention to §83-58-5, 1(b) above, which states the warranty is for six (6) years following the warranty commencement date and that the home will be free from major structural defects due to noncompliance with building standards.

This was the basis of the Appellant’s / Plaintiff’s lawsuit below since there were allegations of structural damages. The expiration of the statute of limitations would therefore, be six years from the date of closing on the house by the Plaintiff / Appellant.

CONCLUSION

In conclusion, Troy Smith asks this Honorable Court to hold the statute of limitations runs from the day after the occurrence of the event, until that date, however many years later, the law allows; which is how the case law reads now, as set out above. Mr. Smith asserts that too much uncertainty and unfairness would occur to litigants if leap year days were included in the time allowance given, thus, shortening the time for some to file their claims, but not all. Some litigants' time would be less than others.

Troy Smith's second assertion of error is that no statutory notice was given him, as required by the laws of the State of Mississippi, therefore, he asks this Honorable Court to hold the statute of limitation cannot begin to run until that statutory notice is given to him.

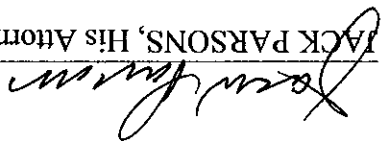
Finally, Troy Smith takes the position that his action was filed within the prescribed statute of limitations of three years, but in the event this Honorable Court finds it was filed outside of the statute of limitations, then, he argues he had six years within which to file his action under the statutes set out above. There was structural damage to the home, as alleged by Troy Smith in his Complaint to the court below. Therefore, the statute of limitations is six (6) years as set out in §83-58-5, 1(b) of the Mississippi Code of 1972 Annotated, as Amended. Troy Smith was entitled to prove this at the trial of this matter. The lower Court erred in this respect, as it did in computing the time on the three (3) year statute of limitations.

Troy Smith, Appellant herein, respectfully requests and urges this Honorable Court to reverse the Circuit Court Judge's dismissal of his cause of action, and hold that the extra day added to our calendar in the year known as leap year will not be counted when determining when a statute of limitations time period expires, or, in the alternative, that the statute of limitations has not yet begun to run because he was not given statutory notice as required, or, in the alternative, that he has six (6) years to file his claim, and remand for trial on the merits of the case.

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 BRIEF to the following at their respective addresses listed below:

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THIS, the 9th day of August, 2010.



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