

NO. 33520
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA
CHARLESTON

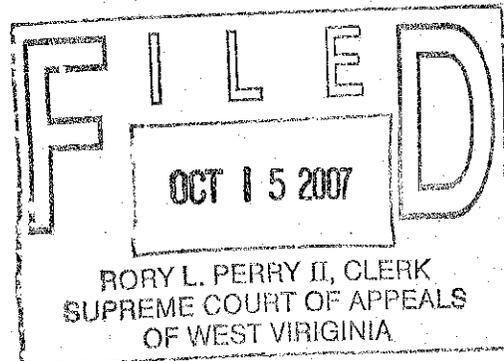
**JERRY NEAL and
KAREN NEAL,**

Petitioners,

v.

J. D. MARION,

Respondent.



BRIEF OF APPELLANTS

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I. PRELIMINARY STATEMENT

Petitioners Jerry and Karen Neal appeal from an Order entered by the Circuit Court of Kanawha County ("circuit court") dismissing all of their claims against Respondent J.D. Marion ("Marion") based upon the "builders and contractors statute," a ten-year statute of repose found at *W. Va. Code* §55-2-6a. The circuit court's order contains just two findings of fact: (1) Marion built the subject home and sold it to David and Beverly Jordan ("the Jordans") on February 23, 1994; and (2) the Neals' complaint was filed on October 1, 2004. In an abjuration of the summary judgment process, the circuit court completely ignored the case put forth by the Neals – which is far more compelling and interesting than the circuit court's abrupt findings – concerning Marion's actions when the Neals purchased the subject home in 1996.

Marion directly participated in the second sale of the home to the Neals by the Jordans prior to the August 8, 1996, closing. At the time when the Neals were considering purchase of the subject home, Marion injected himself into the sale process when he: (1) expressly warranted the quality, safety, and workmanship of the home's construction; (2) promised to make repairs for the Neals if they decided to purchase the home (and actually made repairs shortly after the Neals' purchase); and (3) along with the Jordans, explicitly denied any prior repairs and defective foundation conditions.

The Neals sued Marion and the Jordans for fraud (and civil conspiracy) based upon facts discovered when the Neals set out to remodel their basement more than six years later. Professional engineers performed inspections at the subject home on or about October 4, 2002, April 11, 2003, and May 11, 2003, which revealed prior repairs, major foundation defects, and construction code violations. More importantly, based upon the experts' findings and opinions, Petitioners also allege that Marion deliberately concealed defective foundation conditions and

prior repairs to the foundation by walling in and covering up large portions of the foundation so that the conditions would not be discovered during the course of a normal home inspection.

The Neals do not seek to tear down the builders and contractors statute in this case. Petitioners instead assert that *W. Va. Code* §55-2-6a is entirely inapplicable to legal claims arising from fraudulent words and actions by a builder. In addition, Petitioners assert that in as much as *W. Va. Code* §55-2-6a applies to their breach-of-warranty claims, Marion's fraudulent concealment of the defects deprives him of the right to benefit from any statute of limitations pursuant to the doctrine of equitable estoppel.

II. STATEMENT OF FACTS

In their response to Respondent's motion for summary judgment, Petitioners presented a more complete statement of the facts that give rise to the allegations in their Complaint, including the following:

- Petitioners purchased the subject home (constructed by Marion) from David and Beverly Jordan on or about August 8, 1996 (Complaint at ¶ 10);
- At the time when Petitioners were considering and negotiating the purchase of the home, Respondent Marion expressly warranted the quality, safety, and workmanship of the home's construction to Petitioners (*Id.* at ¶ 18);
- Furthermore, Respondent Marion promised to make repairs for Petitioners if they decided to purchase the home (*Id.* at ¶19);
- At times after Petitioners purchased the home on August 8, 1996, Respondent Marion actually performed or caused his agents to perform repairs to the home;

- More than six years after they purchased the home, Petitioners discovered, through an engineer's inspection, that the home's foundation was severely flawed, unsafe, and inadequate for the home's design and location (*Id.* at ¶ 20);
 - Furthermore, Petitioners discovered through a series of inspections that the builder of the home (Marion) and/or a prior occupant of the home (the Jordans) went to great lengths to conceal the foundation's inadequate construction and prior repairs to the foundation by walling in and covering up large portions of the foundation (*Id.* at ¶ 21 and 38);
 - The prior repairs and substandard conditions were concealed so as not to be discovered by a "normal" home inspection (*Id.* at ¶ 22 and 38);
 - The above-described foundation repairs and conditions were known to Respondent and some or all of his co-Defendants at the time of the sale to Petitioners (*Id.* at ¶ 23 and 39);
 - No substandard conditions or prior repairs to the foundation were disclosed to Petitioners at the time of the sale (*Id.* at ¶ 24);
 - Respondent Marion and the Jordans concealed or failed to disclose the above-described conditions to Petitioners at the time of the sale or at any time thereafter (*Id.* at ¶ 40);
 - Petitioners relied upon the foregoing representations (and/or lack thereof) in making their decision to purchase the home (*Id.* at ¶ 41);
 - Petitioners were justified in relying upon the foregoing representations (*Id.* at ¶ 42);
- and

- Petitioners did not discover and could not discover the above-described conditions until professional engineers performed inspections on or about October 4, 2002, April 11, 2003, and May 11, 2003 (*Id.* at ¶ 43).

Petitioners also produced a report by a professional engineer who opined that Respondent Marion and/or the Jordans *deliberately concealed* defective foundation conditions and prior repairs to the foundation by walling in and covering up large portions of the foundation so that the conditions would not be discovered by a normal home inspection.¹ Petitioners intended to present their testimony and the expert's testimony at the hearing on Respondent Marion's motion for summary judgment, which was scheduled for May 31, 2006.

However, on May 30, 2006, the Court cancelled the hearing and simply announced via telephone call to counsel of record that it granted Marion's motion for summary judgment. The Order entered on October 6, 2006, by the Court to memorialize its ruling did not address any of the above-outlined facts or legal arguments made by Petitioners. The Court's findings of fact and conclusions of law, in their entirety, are as follows:

- (1) There is no genuine issue of fact that the Defendant, J.D. Marion, constructed the [subject home] prior to February 23, 1994.
- (2) The Complaint herein was filed on October 1, 2004.
- (3) The Plaintiffs' claims against Defendant Marion are time barred pursuant to *West Virginia Code* §55-2-6a.²

¹ Petitioners produced relevant portions of the final inspection report of Samuel A. Wood, P.E. as an exhibit to their Response to J.D. Marion's Motion for Summary Judgment, but to ensure that the expert's conclusions are readily available for this Court's consideration, Petitioners have attached a complete copy of that expert report as an addendum to this brief.

² Except for the date of the first sale of the home by Respondent (February 23, 1994), which is undisputed, the facts that form the basis of the Court's order were established by the Complaint and Answers. As such, even though the motion was presented as a motion for summary judgment, the disposition of the claims against Respondent is more akin to a dismissal pursuant to Rule 12 of the Rules of Civil Procedure.

(Order, dated October 6, 2006.)

Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, Petitioners filed a motion to alter or amend within ten days after the Court's entry of the order granting summary judgment. In that motion, Petitioners again requested an evidentiary hearing to present expert testimony in support of their position. Instead of conducting a hearing, the circuit court entered a one-page order denying Petitioners' motion to alter or amend on October 27, 2006.

III. ASSIGNMENTS OF ERROR

The circuit court erred in granting Respondent's motion for summary judgment based upon *W. Va. Code* §55-2-6a where at least part of Petitioners' claims are not affected by the statute. Specifically, the builders and contractors statute governs claims against builders arising from *construction*, but Petitioners' fraud and civil conspiracy claims arise from the builders' *representations* to Petitioners that there had been no prior problems or repairs. The circuit court also erred by applying *W. Va. Code* §55-2-6a where Petitioners and their expert witnesses allege that Respondent engaged in fraudulent concealment, thus precluding Respondent from taking advantage of such statutory limitations pursuant to the doctrine of equitable estoppel. Further, the circuit court erred in refusing to even consider Petitioners' evidence of fraudulent concealment by the Respondent, including Petitioners' expert testimony, and instead viewed the facts in the light most favorable to the Respondent. Lastly, the circuit court erred in granting Respondent's motion for summary judgment without making any findings of fact and conclusions of law that addressed Petitioners' factual allegations and legal arguments.

IV. STANDARD OF REVIEW

A circuit court's entry of summary judgment is reviewed *de novo*. *Wilson v. Daily Gazette Co.*, 588 S.E.2d 197, 214 W. Va. 208 (2003). The Supreme Court of Appeals, like the

circuit court, must view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor. *Id.* When summary judgment has been granted as a result of the exclusion of expert testimony, the Supreme Court of Appeals exercises a heightened degree of review. *Dolen v. St. Mary's Hosp. of Huntington, Inc.*, 506 S.E.2d 624, 203 W. Va. 181 (1998).

V. LEGAL ARGUMENT

A. The Circuit Court Erred in its Application of *W. Va. Code §55-2-6a* to Petitioners' Fraud and Civil Conspiracy Claims.

The statute upon which the Court granted summary judgment to Respondent on *all* of Petitioners' claims, *W. Va. Code §55-2-6a*, limits certain kinds of actions against those involved in construction. Specifically, the statute imposes a ten-year period of limitation on contract or tort actions: (1) to recover for any deficiency in the construction (or supervision of construction); and (2) to recover damages for injury to person or property arising from defective construction. *See Gibson v. W.Va. Dept. of Highways*, 185 W.Va. 214, 220, 406 S.E.2d 440, 446 (*W. Va. Code §55-2-6a* is not unconstitutional, in part, because its application is limited to defined circumstances). In his motion for summary judgment, Marion relied heavily upon this Court's prior ruling in *Shirkey v. Mackey*, which held:

West Virginia Code §55-2-6a (1983) sets an arbitrary time period after which no action, whether contract or tort, may be initiated against architects and builders. Pre-existing statutes of limitation for both contract and tort actions continue to operate within this outside limit.

Syl. pt. 1, 399 S.E.2d 868, 184 W. Va. 157 (1990).

W. Va. Code §55-2-6a does not, however, preclude every kind of action arising from any and all conduct. Because the claims for fraud and civil conspiracy are not actions to recover for

the kinds of damages contemplated by *W. Va. Code* §55-2-6a, the statute is irrelevant to those claims. Petitioners' allegations of fraud and civil conspiracy seek to recover damages for ***Respondent's statements and omissions*** made in 1996 during the sale of the home to Petitioners. As such, Petitioners respectfully request clarification of the holding in *Shirkey* to recognize that there are circumstances where a builder can be held liable for torts that fall outside the scope of *W. Va. Code* §55-2-6a.

While *W. Va. Code* §55-2-6a is intended to provide important protections to architects and builders, it does not insulate a perpetrator of fraud from liability simply because the perpetrator is a builder. Consider, for instance, a hypothetical case where a home builder commits assault and battery upon the owner of a home he built. If the builder attacks his victim more than ten years after he sold a home to the victim, should the victim's tort claims be barred by *W. Va. Code* §55-2-6a simply because the tortfeasor is a builder? Of course not. However, the circuit court's application of *W. Va. Code* §55-2-6a to the Neals' fraud and civil conspiracy claims follows the same disjointed logic.

The statute of limitations applicable to Petitioners' fraud and civil conspiracy claims is generally two years. *W. Va. Code* §55-2-12. However, the application of the appropriate statute of limitations is affected by the discovery rule. Pursuant to the discovery rule, which applies to all actions sounding in tort, a cause of action does not actually accrue until the plaintiff knows, or by "reasonable diligence" should know: (1) that he or she has been injured; (2) the identity of the entity who caused the injury; and (3) that the conduct of that entity has a causal relation to the injury. *McCoy v. Miller*, 213 W. Va. 161, 578 S.E.2d 355 (2003), quoting *Gaither v. City Hospital, Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997). Moreover, in this context, the West Virginia Supreme Court of Appeals has stated that the determination of "when" a Petitioner

discovered a wrong is quintessentially a question of fact for the jury. See *Wooten v. Roberts and Legacy One, Inc.*, 205 W. Va. 404, 518 S.E.2d 645 (1999) citing Syl. pt. 3, *Stemple v. Dobson*, 184 W. Va. 317, 400 S.E.2d (1990); *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988).

Therefore, the Petitioners' allegation that they did not discover and could not discover the defective conditions – and thus the Respondent's fraud – until professional engineers performed inspections on or about October 4, 2002, April 11, 2003, and May 11, 2003, must be decided by a jury in the context of Petitioners' fraud and civil conspiracy claims.

B. The Circuit Court Erred by Refusing to Acknowledge Application of the Doctrine of Equitable Estoppel.

In regard to Petitioners' breach of warranty claims, which would normally be governed by *W. Va. Code §55-2-6a*, Petitioners alleged facts sufficient to invoke the doctrine of equitable estoppel to preclude Marion from hiding behind the statute. Petitioners' allegations of *fraudulent concealment* and *misrepresentation* concerning known defects are what distinguish this case from the case addressed in the *Shirkey* opinion.

Established equitable doctrines apply to prevent perpetrators of fraudulent concealment from taking advantage of any statute of limitation or repose. The doctrine of equitable estoppel applies when a party is induced to act or to refrain from acting to his or her detriment because of reasonable reliance on another party's misrepresentation or concealment of a material fact. *Bradley v. Williams*, 195 W. Va. 180, 465 S.E.2d 180 (1995), citing Syl. pt. 2, in part, *Ara v. Erie Insurance Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989). Further,

[i]n order to create to create an estoppel to plead the statute of limitations the party seeking to maintain the action must show that he was induced to refrain from bringing his action within the statutory period by some affirmative act or conduct of the Respondent or his agent and that he relied upon such act or conduct to his detriment.

Syl. Pt. 1, *Humble Oil & Ref. Co. v. Lane*, 152 W.Va. 578, 165 S.E.2d 379 (1969); see *Estate of Dearing ex rel. Dearing v. Dearing*, 646 F.Supp. 903, 907 (S.D.W.V.1986) (stating that “[i]n the absence of an affirmative act by the Respondents which induces the Petitioners to refrain from timely bringing suit, the Petitioners cannot successfully make out a case for estoppel”).

While the particular statute of limitations at issue can be categorized as a “statute of repose” because it operates from a set date, the doctrine of equitable estoppel is equally applicable to such limitations. See, e.g., *Jones v. Transohio Sav. Ass’n.*, 747 F.2d 1037, 1042 (6th Cir. 1984)(holding one-year statute of repose in federal Truth in Lending Act is subject to equitable tolling where Petitioner alleged fraudulent concealment of violation); *Ellis v. Genral Motors Acceptance Corp.*, 160 F.3d 703 (11th Cir. 1998)(same, to strictly apply statute despite fraudulent concealment would wrongfully “reward those perpetrators who concealed their fraud long enough to time-bar their victims’ remedy”).

The doctrine of equitable estoppel is explicitly applicable to claims under *W. Va. Code* §55-2-6a by virtue of *W. Va. Code* §55-2-17, which partially codifies the doctrine as an exception to all periods of limitation contained in Article 2, Chapter 55 of the Code. Specifically, *W. Va. Code* §55-2-17 provides, in pertinent part: “Where any such right as is mentioned *in this article* shall accrue against a person, if such person shall ... by any other indirect ways or means, obstruct the prosecution of such right ... the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted.” (Emphasis added.) See also *Duttine v. Savas*, 455 F.Supp. 153, 161 (D.C.W.V. 1978)(in suit filed in 1975 concerning notes executed in 1963, subtracting three-year period during which defendants obstructed prosecution from a ten-year

limitation period, pursuant to *W. Va. Code* §55-2-17 and general equitable authority of the court, is an equitable solution to what would otherwise be an unjust and harsh result).

The circuit court also completely ignored Petitioners' argument that Marion "restarted" the running of the ten-year period when he performed repairs to the home at times subsequent to February, 1994. Not only did Plaintiffs discover that Marion performed extensive repairs while the Jordans owned and occupied the home, Petitioners also pointed-out that Marion performed repairs to the home after they purchased it in 1996, pursuant to the express warranties extended by Marion to the Neals. Thus, Petitioners argue that the "performance or furnishing of such services or construction" contemplated by *W. Va. Code* §55-2-6a was not *completed* until 1996, only eight years prior to the filing of Petitioners' Complaint in 2004. See *Gateway Communications, Inc. v. John R. Hess, Inc.*, 208 W.Va. 505, 507, 541 S.E.2d 595, 597 (2000)(when a construction contract is involved, the statute of limitations generally begins to run when the work is completed).

The law does not intend to reward those perpetrators who actively conceal their wrongdoing long enough to time-bar their victims' remedy. "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong." *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232, 79 S.Ct. 760, 762 (1959)(applying doctrine of equitable estoppel, which the Court noted is "frequently employed to bar inequitable reliance on statutes of limitations," to reverse dismissal upon statute of limitations of workplace injury claim). If Petitioners' evidence of an extensive effort by the Respondent to conceal defects is taken as true (as is required for purposes of this summary judgment analysis), then the Respondent cannot take advantage of statutes of limitations pursuant to the doctrine of equitable estoppel.

As such, Petitioners respectfully request that this Honorable Court clarify the holding in *Shirkey* and acknowledge that when a Plaintiff is obstructed from timely prosecution of his action by a builder's fraudulent concealment of known defects and repairs, the builder is not entitled to the benefit of *W. Va. Code* §55-2-6a pursuant to the doctrine of equitable estoppel.

C. The Circuit Court Erred In Viewing The Facts In The Light Most Favorable To The Respondent.

As noted previously, in reviewing a summary judgment motion the circuit court is required to review all facts, and resolve all reasonable inferences, in the light most favorable to Petitioners. Here, the Court simply viewed the facts in the light most favorable to the Respondent. It is important to note that Petitioners relied upon the notice of hearing on Respondents' motion for summary judgment and intended to present their own testimony and the testimony of their primary expert witness. Petitioners submit that their expert could best explain why, in his vast experience, he believes that there was a deliberate effort to conceal the subject construction defects. Even without the hearing, however, the circuit court nevertheless had an obligation to address the Petitioners' factual allegations of fraudulent concealment and to indulge all reasonable inferences in favor of the Petitioners. *Wilson v. Daily Gazette Co.*, 588 S.E.2d 197, 214 W. Va. 208 (2003). The circuit court also had an obligation to give appropriate deference to the expert opinions supporting Petitioners' positions. *Dolen v. St. Mary's Hosp. of Huntington, Inc.*, 506 S.E.2d 624, 203 W. Va. 181 (1998). As a cursory review of the order granting summary judgment reveals, the circuit court failed to meet either of the above obligations.

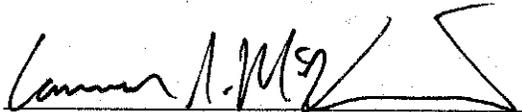
D. The Circuit Court Erred In Not Setting Forth Sufficient Findings Of Fact And Conclusions Of Law.

It is black letter law in West Virginia that a trial court's failure to make findings of fact and conclusions of law in support of an order granting a motion for summary judgment is reversible error. *Hively v. Merrifield*, 212 W. Va. 804, 575 S.E.2d 414 (2002). Here, the circuit court made no findings of fact and conclusions of law sufficient to permit meaningful appellate review. Specifically, the circuit court made absolutely no findings related to Petitioners' arguments regarding: (1) their legal claims unaffected by *W. Va. Code §55-2-6a*; and (2) the doctrine of equitable estoppel. See *Blais v. Allied Exterminating Co.*, 198 W.Va. 674, 678, 482 S.E.2d 659, 663 (1996)(because the trial court did not consider any aspect of the equitable estoppel argument, remand was required so that a full and correct legal determination can be made based upon a full and adequate record), citing Syllabus Pt. 2, *South Side Lumber Co. v. Stone Construction Co.*, 151 W.Va. 439, 152 S.E.2d 721 (1967).

VI. CONCLUSION

Based upon the record and in accordance with persuasive authority, Petitioners respectfully request that the Court reverse the ruling of the circuit court, and remand the claims against Respondent for further proceedings.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Cameron S. McKinney, counsel for the Petitioners, do hereby certify that I have this 15th day of October, 2007, served the foregoing *Brief of Appellants* upon counsel for all parties, via United States Mail, to the following addresses:

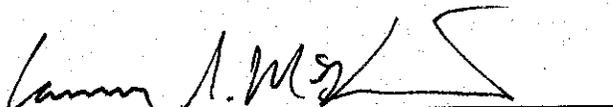
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