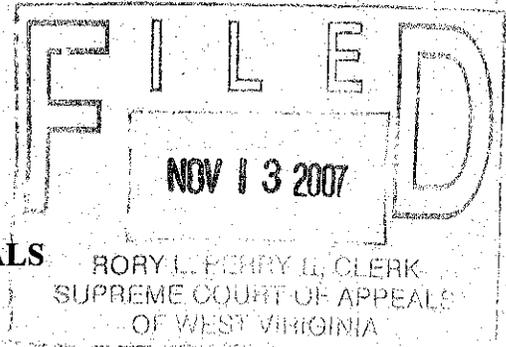


No. 33520

**IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA
CHARLESTON**



**JERRY NEAL and
KAREN NEAL,**

Appellee,

v.

CIVIL ACTION NO. 04-C-2670

J.D. MARION,

Appellant.

BRIEF OF THE APPELLEE, J.D. MARION

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WEST VIRGINIA RULES OF CIVIL PROCEDURE

Rule 56 of the *West Virginia Rules of Civil Procedure*

Rule 59(e) of the *West Virginia Rules of Civil Procedure*

I. STATEMENT OF THE CASE

This is an appeal from an Order entered by Judge Irene C. Berger of the Kanawha County Circuit Court denying the Appellants' motion to alter or amend the court's earlier Order granting Appellee's motion for summary judgment. The motion for summary judgment was based upon the architect and builder' statute of repose, as set out in *West Virginia Code* § 55-2-6a.

The question before the Court is whether the Circuit Court of Kanawha County erred in granting the Appellee's Motion for Summary Judgment.

II. STATEMENT OF THE FACTS

The Appellee, J.D. Marion (hereinafter referred to as "Appellee"), constructed a house located at 522 Woodbridge Drive, Charleston, West Virginia, which the Appellee subsequently sold to David Jordan and Beverly Jordan (hereinafter referred to as "the Jordans") on February 23rd, 1994.

The Appellants, Jerry Neal and Karen Neal (hereinafter referred to as "Appellants"), purchased the aforementioned house from the Jordans on or about August 8, 1996. *See* Complaint at ¶ 10 and 11.

On October 1st, 2004, the Appellants' filed suit against the Appellee, among others, in the Circuit Court of Kanawha County, West Virginia, for alleged damages stemming from their purchase of real property located at 522 Woodbridge Drive in Charleston, West Virginia.

In their Complaint the Appellants alleged that, "More than six years after they purchased the home, Plaintiffs discovered, through an engineer's inspection, that the home's foundation was severely flawed, unsafe, and inadequate for the home's design and location." *See* Complaint

at page 4, ¶ 20.

On January 26, 2006, the Appellee filed a Motion for Summary Judgment, arguing that the ten year statute of repose set out in *West Virginia Code* § 55-2-6a prevented the Appellants from bringing suit for damages related to deficiencies in the construction of the aforementioned residential structure.

Kanawha County Circuit Judge Irene C. Berger entered an Order granting the Appellee's Motion on October 6, 2006.

The Appellants filed a "Motion to Alter or Amend the Court's Order Granting Defendant J.D. Marion's Motion for Summary Judgment," pursuant to Rule 59(e) of the *West Virginia Rules of Civil Procedure*, on October 18, 2006, which was denied by the Circuit Court on October 27, 2006.

The current appeal is from the Order denying the Appellants' Motion to Alter or Amend the grant of summary judgment to the Appellees.

II. ARGUMENT

At issue is the proper interpretation and application of what is commonly referred to as the West Virginia Architect and Builder's Statute of Repose, which is found in *West Virginia Code* § 55-2-6a. The statute provides that:

No action, whether in contract or in tort, for indemnity or otherwise, nor any action for contribution or indemnity to recover damages for any deficiency in the planning, design, surveying, observation or supervision of any construction or the actual construction of any improvement to real property, or, to recover damages for any injury to real or personal property, or, for an injury to a person or for bodily injury or wrongful death arising out of the defective or unsafe condition of any improvement to real property, may be brought more than ten years after the

performance or furnishing of such services or construction: Provided, That the above period shall be tolled according to the provisions of section twenty-one of this article. The period of limitation provided in this section shall not commence until the improvement to the real property in question has been occupied or accepted by the owner of the real property, whichever occurs first.

Id. It is the position of the Appellees that the Kanawha County Circuit Court properly applied the statute to the Appellants' claims and granted the Appellees' motion for summary judgment.

A. Statute of Repose Applies to Fraud and Civil Conspiracy

The leading case interpreting the West Virginia Architect and Builder's Statute of Repose is *Shirkey v. Mackey*, 184 W.Va. 157 at 159, 399 S.E.2d 868 at 870 (1990). In *Shirkey* this Court considered an appeal from a case where the Raleigh County Circuit Court had granted summary judgment to the defendant contractor there, Harold Mackey (hereinafter referred to as "Mackey"). The facts there were that Mackey had purchased a lot in Raleigh County on March 10, 1976. He subsequently built a home on the property and then sold it to Clyde and Delores Ingram (hereinafter referred to as "the Ingrams") on September 16, 1976. The real property exchanged hands several times before being coming into the possession of the Appellants there, Emogene and David Shirkey (hereinafter referred to as "the Shirkeys"). On August 8, 1988, the Shirkeys filed suit against Mackey "... seeking damages for negligence and "breach of [an] implied warranty of habitability and fitness for the use of said premises as a family home.'" *Id.* at 869, 158.

Mackey filed a motion for summary judgment, arguing that more than ten years had passed between his initial sale of the real property in 1976 and the Shirkeys filing suit in 1988. Given this fact, Mackey argued that *West Virginia Code* § 55-2-6a barred the Shirkeys from

bringing suit against him. The Circuit Court of Raleigh County "... granted the appellee's motion for summary judgment, finding that the appellants filed suit outside of the time period provided by W.Va. Code 55-2-6a and that the "discovery rule" had no application to the facts of this case or to W.Va. Code 55-2-6a." Interpreting West Virginia's Architect and Builders' Statute of Repose, this Court reaffirmed the Raleigh County Circuit Court's Order. *Id* at 870, 159.

In *Shirkey v. Mackey*, 184 W.Va. 157, 399 S.E.2d 868 (1990), this Court recognized that the statute of repose established in *West Virginia Code* § 55-2-6a applies equally to all causes of action whether they sound in contract or tort. *Id* at Syl. Pt. 1 and at 871, 160. Indeed, the language of *West Virginia Code* § 55-2-6a says that it applies to any cause of action "... whether in contract or in tort ..."

However, the Appellant argues that the damages they suffered flowing from their claims of fraud and civil conspiracy are different than those sought in connection with a cause of action sounding in tort or contract, implying that fraud and civil conspiracy do not fall within the legal definition of the term "tort."

Both fraud and civil conspiracy are torts, and this Court has commonly referred to them as such. See respectively *Herrod v. First Republic Mortgage Corp., Inc.*, 218 W.Va. 611 at 626, 625 S.E.2d 373 at 388 (2005); *Stern v. Chemtall Inc.*, 217 W.Va. 329 at 339, 617 S.E.2d 876 at 886 (2005); *Legg v. Johnson, Simmerman & Broughton, L.C.*, 213 W.Va. 53 at 56, 576 S.E.2d 532 at 535 (2002); *State ex rel. Dunlap v. Berger*, 211 W.Va. 549 at 568, 567 S.E.2d 265 at 284 (2002); *West Virginia Fire & Casualty Company v. Stanley*, 216 W.Va. 40 at 49, 602 S.E.2d 483 at 492(2004); *Kessel v. Leavitt*, 204 W.Va. 95 at 129, 511 S.E.2d 720 at 754 (1998); *Bruceton*

Bank v. U.S. Fidelity and Guaranty Insurance Company, 199 W.Va. 548 at 554, 486 S.E.2d 19 at 25 (1997); *State Bancorp, Inc. v. U.S. Fidelity and Guarantee Insurance Company*, 199 W.Va. 99 at 102, 483 S.E.2d 228 at 231 (1997); and *City of Fairmont v. Retail, Wholesale, and Dept. Store Union, AFL-CIO*, 166 W.Va. 1 at 9 to 10, 283 S.E.2d 589 at 594 (1980). Therefore, despite the Appellants arguments, the statute of repose codified in *West Virginia Code* § 55-2-6a applies to all causes of action set out in their complaint, including their claims of fraud and civil conspiracy. *Shirkey* clearly stands for this principal.

B. Statute of Repose Applies to All Appellants' Claims for Damages

The West Virginia Legislature enacted what is commonly referred to as the Architects' and Builders' Statute of Repose with the purpose of protecting "... architects and builders from the increased exposure to liability as a result of the demise of the privity of contract defense." *Gibson v. West Virginia Department of Highways*, 185 W.Va. 214 at 220, 406 S.E.2d 440 at 446 (1991). This Court has recognized that "[w]ithout a statute of repose, a party injured because of a latent design or defect could sue an architect or builder many years after a construction project was completed. This could result in stale claims with a distinct possibility of loss of relevant evidence and witnesses." *Id.*

As this Court is well aware, the Architects' and Builders' Statute of Repose, as set forth in *West Virginia Code* § 55-2-6a, "... operates independently of when the injury actually occurs." *Gibson v. West Virginia Department of Highways*, 185 W.Va. 214 at 217, 406 S.E.2d 440 at 443 (1991). See also *Stone v. United Engineering*, 197 W.Va. 347 at 353, 475 S.E.2d 439 at 445 (1996). This Court has explained that a statute of repose differs from a statute of

limitations in that “[a] statute of limitations ordinarily begins to run on the date of the injury; whereas, under a statute of repose, a cause of action is foreclosed after a stated time period . . .”

Id.

This Court has also determined that exceptions to the Architects’ and Builders’ Statute of Repose, such as the discovery rule, are inapplicable given that such exceptions are not contemplated within the language of the statute itself. *See generally Shirkey v. Mackey*, 184 W.Va. 157, 399 S.E.2d 868 (1990). Indeed “. . . it is only through the *straightforward application* of a given limitation period, regardless of the date of injury, that the statutes acquire a “substantive quality.”” (Emphasis supplied.) *Id.* at 870, 159.

The damages Appellants’ claim are all related to and flow from their alleged discovery “. . . that the home’s foundation was severely flawed, unsafe, and inadequate for the home’s design and location.” *See* Complaint at page 4, ¶ 20. Without these alleged deficiencies, the Appellants would be without any cause of action. The statute of repose at issue here, *West Virginia Code* § 55-2-6a, provides in pertinent part that “[n]o action, whether in contract or in tort . . . to recover damages for any deficiency in the planning, design, surveying, observation or supervision of any construction or the actual construction of any improvement to real property, *or, to recover damages for any injury to real or personal property . . .* may be brought more than ten years after the performance or furnishing of such services or construction . . .” (Emphasis supplied.)

Therefore, given that the Appellee completed construction and placed the house at issue in the possession of the Jordans on February 23, 1994, *West Virginia Code* § 55-2-6a acts as a bar to the Appellants’ claims for any and all damages stemming from the alleged deficiencies in

the design of the subject home's foundation. This is true regardless of any other alleged facts.

Thus, the Circuit Court's order was appropriate.

C. Discovery Rule is Inapplicable to a Statute of Repose

As the statute of repose is applicable to the Appellants' underlying Complaint, then the discovery rule, which might otherwise work to allow the Appellants additional time to file their suit, is inapplicable. This Court has defined the discovery rule as "... an exception to a *statute of limitations* which delays the running of the statute until such time as the plaintiff knew, or reasonably should have known, of the injury and its cause." (Emphasis supplied.) *Basham v. General Shale*, 180 W.Va. 526 at 531, 377 S.E.2d 830 at 835 (1988). However, in the application of a statute of repose it does not matter when the injury occurred, but only when the arbitrary time period established by the statute has run. Following this line of reasoning, this Court has held that the application of the discovery rule to the statute of repose "... would negate the entire purpose of ..." *West Virginia Code* § 55-2-6a and has refused to apply the discovery rule to the statute of repose. *Shirkey v. Mackey*, 184 W.Va. 157 at 159, 399 S.E.2d 868 at 870 (1990).

D. Equitable Estoppel is Inapplicable to West Virginia's Statute of Repose

Despite the Appellee's arguments, there is no West Virginia case law supporting the application of the principals of equitable estoppel to bar a party's reliance upon the Architects' and Builders Statute of Repose as a defense. Both cases cited by the Appellants to support their proposition that equitable estoppel is applicable to cases involving statutes of repose are from

United States Courts of Appeal and neither deals with statutes of repose, but with statutes of limitation.

In *Jones v. TransOhio Sav. Ass'n.*, 747 F.2d 1037 (6th Cir.1984), the Sixth Circuit United States Court of Appeals was considering whether the remedy of equitable estoppel was applicable to the one year *statute of limitations* in the Federal Truth in Lending Act. In their brief, the Appellants mistakenly refer to the statute of limitations in the *TransOhio* case as a statute of repose. (Brief of Appellants at pg. 10.) Furthermore, the Sixth Circuit held that in determining whether to toll the statute of limitations in the Federal Truth in Lending Act they were required to look to the congressional purpose and intent in codifying the Act. *Id* at 1040 to 1041. The Sixth Circuit ultimately held that the Act did not manifest an intent to limit the authority of the Courts and that "...the *statute of limitations* for actions brought under 15 U.S.C. § 1640(e) is subject to equitable tolling in appropriate circumstances . . ." (Emphasis supplied.) *Id* at 1041 to 1042.

As was the case in the matter of *Jones v. TransOhio Sav. Ass'n.*, 747 F.2d 1037 (6th Cir.1984), the issue before the Eleventh Circuit Court of Appeals in the matter of *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703 (11th Cir. 1998), was whether or not the principal of equitable estoppel is applicable to the one year *statute of limitations* in the Federal Truth in Lending Act. Therefore, the Appellees respectfully aver that neither *TransOhio* nor *Ellis* support the Appellants position.

Finally, the Architects' and Builders' Statute of Repose itself is explicit in how it should be applied and how it may be tolled. It provides no exceptions for the principal of equitable estoppel. *West Virginia Code* § 55-2-6a states in pertinent part that the statute of repose "...

shall be tolled according to the provisions of section twenty-one of this article.” When looking to *West Virginia Code* § 55-2-21 we find that it provides for a tolling of the statute of repose for “. . . the pendency of that civil action as to any claim which has been or may be asserted therein by counterclaim, whether compulsory or permissive, cross-claim or third-party complaint . . .”

Therefore, it is evident that *West Virginia Code* § 55-2-21 is inapplicable to the matter at hand and cannot act to toll the ten year time period.

This Court has repeatedly applied the maxim “*expressio unius est exclusio alterius*” when interpreting statutory provisions. See generally *Phillips v. Larry’s Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 647 S.E.2d 920 (2007); *Kessel v. Monongalia County General Hospital Co.*, 648 S.E.2d 366, 2007-1 Trade Cases P 75, 755 (2007); *Savilla v. Speedway Superamerica, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006); *T. Weston, Inc. v. Mineral County*, 219 W.Va. 564, 638 S.E.2d 167 (2006); *Gibson v. Northfield Ins. Co.*, 219 W.Va. 40, 631 S.E.2d 598 (2005); *State v. Euman*, 210 W.Va. 519, 558 S.E.2d 319 (2001); *State ex rel. Hechler v. Christian Action Network*, 201 W.Va. 71, 491 S.E.2d 618 (1997); *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995); and *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984). This maxim means that “. . . the express mention of one thing implies the exclusion of another . . .” Syl. Pt. 3 of *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984). “The *expressio unius* maxim is premised upon an assumption that certain omissions from a statute by the Legislature are intentional.” *Phillips v. Larry’s Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 647 S.E.2d 920 at 928 (2007).

Here the West Virginia Legislature specifically indicated the single circumstance which could toll the statute of repose, and that is via *West Virginia Code* § 55-2-21. In applying the

maxim of *expressio unius* to the application of *West Virginia Code* § 55-2-6a, and given the fact that the Legislature set out only a single method for tolling the statute and no others, it must be understood that the Legislature did not intend the statute of repose to be tolled by any method other than via *West Virginia Code* § 55-2-21. This means that the principles of equitable estoppel, the discovery rule, and *West Virginia Code* § 55-2-17, are all inapplicable.

E. Undisputed Facts Support Circuit Court's Grant of Summary Judgment

The factual basis for the Circuit Court's is entirely appropriate when considering the language of *West Virginia Code* § 55-2-6a and the undisputed facts.

Although the Appellant complains that the Court did not consider all of the facts they presented in their response to the Appellee's motion for summary judgment, it is evident from a review of *West Virginia Code* § 55-2-6a that only certain facts need be considered where the statute is applicable. The statute provides in pertinent part that, "No action . . . may be brought more than ten years *after the performance or furnishing of such services or construction . . .*" (Emphasis supplied.) *Id.* This Court has considered that language and held that the ten year time limit ". . . commences on the date the improvement is occupied or accepted by the owner of the real property, whichever occurs first." Syl. Pt. 1 of *Stone v. United Engineering, A Division of Wean, Incorporated*, 197 W.Va. 347, 475 S.E.2d 439 (1996).

Here the Appellee and contractor initially sold the house at issue on February 23rd, 1994. The Appellants filed suit against the Appellee and others on October 1st, 2004. Therefore, it isn't that the Circuit Court failed to consider the facts presented by the Appellants or failed to consider those facts in a light most favorable to the Appellant. It is simply that, in determining that *West*

Virginia Code § 55-2-6a is applicable, the only relevant facts for the Circuit Court's consideration were the date on which the construction was completed, the date the house was turned over to the original purchasers by the Appellee and the date on which suit was filed by the Appellants. These dates are reflected in the Circuit Court's order granting the Appellees' motion for summary judgment.

It is useful to look again to the of *Shirkey v. Mackey*, 184 W.Va. 157 at 159, 399 S.E.2d 868 at 870 (1990), for guidance. Mackey had purchased a lot in Raleigh County, built a home on the property and then sold it to Clyde and Delores Ingram (hereinafter referred to as "the Ingrams") on September 16, 1976. After several subsequent purchase of the real property, it came into the possession of Emogene and David Shirkey (hereinafter referred to as "the Shirkeys"). The Shirkey filed suit against Mackey on August 8, 1988 "... seeking damages for negligence and "breach of [an] implied warranty of habitability and fitness for the use of said premises as a family home.'" *Id.* at 869, 158.

Mackey for summary judgment, arguing that over ten years had passed between the date he sold real property in 1976 and the Shirkeys filed suit in 1988, pursuant to *West Virginia Code* § 55-2-6a. The Circuit Court of Raleigh County granted the motion and this Court reaffirmed the Raleigh County Circuit Court's Order. *Id.* at 870, 159.

Here, it is undisputed that after completing construction, the Appellant sold the house on February 23, 1994, to the first owners and co-defendants, the Jordans. *See* Exhibit A, attached to "Defendant J.D. Marion's Motion for Summary Judgment." It is also undisputed that several years after having purchased the aforementioned residence from the Jordans, the Appellants filed the underlying complaint on October 1, 2004. These are the only facts the Circuit Court needed

to consider in applying the Architect and Builders' Statute of Repose. As was the case in *Shirkey*, since more than ten years passed between the two dates, *West Virginia Code* § 55-2-6a acts as a bar to the Appellants' suit against the Appellee and the grant of summary judgment in favor of the Appellees was appropriate.

Furthermore, as for the argument that the Circuit Court failed to address the Appellant's arguments concerning equitable estoppel, the same principal applies as it did with the statement of facts. As has already been illustrated, equitable estoppel is inapplicable to the statute of repose. Therefore, no matter how well argued, there was no need for the Circuit Court to consider legal arguments which are not relevant to the legal issues at hand.

Finally, it is necessary to stress that the *West Virginia Rules of Civil Procedure* do not require a Circuit Court to hold a hearing on a motion for summary judgment. Indeed, the opposite is true. Rule 56 of the *West Virginia Rules of Civil Procedure* provides that "[t]he judgment sought shall be *rendered forthwith* if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Emphasis supplied.)

IV. CONCLUSION/PRAYER

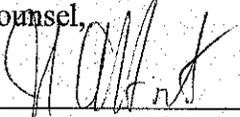
West Virginia's Architects' and Builders' Statute of Repose, as codified in West Virginia Code § 55-2-6a, is applicable to the Appellants' underlying claims for damages, which all stem from alleged deficiencies in the design of the subject home's foundation. The language of the statute precludes any suit for such damages ten years after the construction is complete, without exception. Any viable exceptions to the application of the statute must necessarily be provided

for by the West Virginia Legislature through the language of the statute itself.

The lower court properly granted the Appellee's Motion for Summary Judgment and denied the Appellants' Motion Alter or Amend. Wherefore, for the foregoing reasons, the Appellee respectfully asks that this Court affirm the lower court's judgment.

J. D. Marion, Appellee

By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CERTIFICATE OF SERVICE

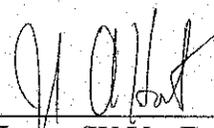
I, H. Jerome Sparks, counsel for J. D. Marion, do hereby certify that on this 13th day of November 2007, I served a true and correct copy of the foregoing "**BRIEF OF THE APPELLEE, J.D. MARION**" upon counsel of record, by U.S. Mail, First Class, postage prepaid and addressed as follows:

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