

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**No. 2011-CA-00164**

**ANDREW AND JAN TOWNES**

**Appellants/Plaintiffs**

**VERSUS**

**RUSTY ELLIS, BUILDER, INC.**

**Appellee/Defendant**

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**APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY  
HONORABLE MALCOLM O. HARRISON, CIRCUIT JUDGE, PRESIDING  
CASE NO. 251-08-550CIV**

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**REPLY BRIEF OF APPELLANTS**

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**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**  
**No. 2011-CA-00164**

**ANDREW AND JAN TOWNES**

**Appellants/Plaintiffs**

**V.**

**RUSTY ELLIS, BUILDER, INC.**

**Appellee/Defendant**

**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:

1. Honorable Malcolm O. Harrison, Former Hinds County Circuit Court Judge;
2. Honorable Bill Gowan, Current Hinds County Circuit Court Judge;
3. Andrew and Jan Townes, Appellants/Plaintiffs;
4. Samuel C. Kelly, Esq.; Lindsey S. Wiseman, Esq.; and BRUNINI, GRANTHAM, GROWER & HEWES, PLLC, Counsel for Appellants/Plaintiffs;
5. Joseph T. Getz, Esq. and LESS, GETZ & LIPMAN, PLC, Counsel for Appellants/Plaintiffs;
6. Rusty Ellis Builder, Inc., Appellee/Defendant; and
7. Phil B. Abernethy, Esq. and BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, Counsel for Appellee/Defendant.

Dated, this the 8<sup>th</sup> day of February, 2012.

  
Samuel C. Kelly

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## SUMMARY OF THE ARGUMENT

Rusty Ellis Builder, Inc. (“REB”) argues -- **without any authority or support** -- that MISS. CODE ANN. § 15-1-5 applies to the New Home Warranty Act in MISS. CODE ANN. § 83-58-1 *et seq.* by way of MISS. CODE ANN. § 15-1-41. At the same time, REB does not dispute that by its plain language § 15-1-5 *only applies* to limitation periods in Title 15, Chapter 1. Further, REB ignores the fact that **§ 15-1-41 has been applied only to common law construction claims, never to statutory claims.**

In an effort to stretch § 15-1-41 beyond its intended scope, REB misstates the holdings in several cases it cites regarding statutory claims. The property at issue in such cases was neither “products” nor “goods” but rather “real property.” Therefore, the products liability statute and the Uniform Commercial Code did not apply. Since the statutes did not apply, the claims were treated as common law claims, subject to the common law limitation period of § 15-1-41. Thus, there is **no authority** establishing that § 15-1-41 applies to the New Home Warranty Act. Because REB fails to offer any authority that § 15-1-41 applies to the New Home Warranty Act, and because REB agrees that § 15-1-5 cannot reach outside its chapter, **the New Home Warranty Act is unaffected by § 15-1-5.** Therefore, the Tolling Agreement is valid and enforceable, preserving the Townes’ claim.

Further, REB supports its argument with cases involving tolling agreements which *shortened* and essentially created their own limitation periods. **REB ignores the fact that the Tolling Agreement in this case actually satisfies the requirements of Mississippi law.** Not only does the Tolling Agreement *not* create its own limitation period as prescribed by law, the Tolling Agreement acknowledges the limitation periods publicly created by the State of Mississippi. Therefore, the Tolling Agreement does not change the limitation period, as argued by REB.

REB admits tolling agreements may arrange for accrual of claims. However, REB confuses the timing of accrual for claims under the New Home Warranty Act. As the statute requires, the Townes' claims could not accrue until they had given REB a reasonable opportunity to make repairs after having notified REB of the defects with the Townes' agreement. REB delayed accrual when it executed the Tolling Agreement to allow time to inspect the Residence, recommend repairs, and make the necessary repairs. Not until it became evident that REB would not make repairs, or that the parties could not come to an agreement on the repairs did the Townes' claims accrue. **REB disregards the fact that the Tolling Agreement arranged for accrual of the Townes' claims, consistent with the New Home Warranty Act.**

REB's arguments regarding equitable estoppel are also without merit. REB tries to place the Townes in a stronger bargaining position, claiming that Howard L. Ellis, president of REB, was an unsophisticated and unrepresented layman. To the contrary, the law, particularly the **New Home Warranty Act, deems REB to have knowledge of the warranties and even imposes upon REB an obligation to notify its homeowners of its requirements.** Further, as confirmed by the Tolling Agreement, Ellis personally had knowledge and induced the Townes to delay filing suit. Even more, *neither party* was represented by counsel at the time they entered the Tolling Agreement. Therefore, REB's defense of the Townes' equitable estoppel claim also fails as a matter of law.

Accordingly, for all the reasons set forth in the Townes principal brief and this reply, summary judgment should be reversed.

## ARGUMENT

**A. REB Failed to Cite Any Authority that MISS. CODE ANN. § 15-1-5 Applies to the Townes' Claims In MISS. CODE ANN. § 83-58-1 et seq.**

The majority of Rusty Ellis Builder, Inc.'s ("REB") brief<sup>1</sup> hinges upon the erroneous assumption that MISS. CODE ANN. § 15-1-5<sup>2</sup> affects the limitation period defined in the New Home Warranty Act (the "Act"), MISS. CODE ANN. § 83-58-5.<sup>3</sup> See Appellee's Br. at 8-20.<sup>4</sup>

REB argues that MISS. CODE ANN. § 15-1-41,<sup>5</sup> the limitation period for *common law* construction claims applies to the *statutory* claims created under the New Home Warranty Act,

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<sup>1</sup> With the exception of REB's estoppel argument, which fails for other reasons, REB's entire brief requires an unsubstantiated, inferential leap involving application of MISS. CODE ANN. § 15-1-41, which is not applicable to the Townes' statutory claims. See Appellee's Br. at 8-20.

<sup>2</sup> MISS. CODE ANN. § 15-1-5 prohibits contractual *changes* to those limitation periods set forth in Title 15, Chapter 1. See MISS. CODE ANN. § 15-1-5; see also Appellants' Br. at 9-10 (discussing the statute's self-restricted applicability to its own chapter), 10-13 (discussing its restriction on *changes* to, rather than suspensions of, limitation periods).

<sup>3</sup> The Act grants, in relevant part, a six-year warranty that the residence will be free from major structural defects. MISS. CODE ANN. § 83-58-5(1)(b).

<sup>4</sup> Throughout this Reply Brief, citations to the record on appeal are shown as "R. \_\_\_"; citations to the hearing transcript are shown as "Tr. \_\_\_"; citations to the Record Excerpts are shown as "R.E. \_\_\_"; citations to the Townes' principal brief are shown as "Appellants' Br. \_\_\_"; and citations to REB's brief are shown as "Appellee's Br. \_\_\_."

<sup>5</sup> MISS. CODE ANN. § 15-1-41 sets a six-year limitation period for general common law construction deficiencies.

which has its own defined limitation period.<sup>6</sup> See Appellee's Br. at 8-20. As a result, REB further contends that § 15-1-5 applies to render the Tolling Agreement null and void. REB's argument is unsupported by law.

REB agrees that § 15-1-5 applies **only** to limitation periods prescribed in Title 15, Chapter 1. See MISS. CODE ANN. § 15-1-5; see also Appellants' Br. at 9-10 and accompanying references (explaining more fully the self-restricted reach of § 15-1-5); Appellee's Br at 8-20 (failing to refute fact that § 15-1-5 only applies to its own chapter). Simply put, by its very terms, § 15-1-5 does not apply to the New Home Warranty Act in § 83-58-1 *et seq.*

REB attempts to stretch § 15-1-5 to § 83-58-1 *et seq.* through § 15-1-41. However, **REB failed to set forth any authority** establishing that the Act's warranties were subject to § 15-1-41

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<sup>6</sup> REB also makes two misplaced arguments, which can be quickly addressed:

First, REB attempts to stress the terminology of § 15-1-41 as a "statute of repose." See *infra* note 7. Mississippi considers any difference in statutes of limitation and repose as a "distinction without a difference." Appellants' Br. at 8 (quoting *Windham v. Latco of Mississippi, Inc.*, 972 So. 2d, 608 (Miss. 2008)). Plus, even if Mississippi were to recognize any materially difference, **statutes of repose are supposed to be longer than statutes of limitation**. For example, in the medical malpractice context, see GA. CODE ANN. § 9-3-71 (Supp. 2011) (two-year statute of limitations, five-year statute of repose); FLA. STAT. ANN. § 95.11 (Supp. 2011) (two-year statute of limitations, four-year statute of repose, and seven-year discovery-of-fraud limitation period); MASS. ANN. LAWS ch. 260, § 4 (Supp. 2011) (three-year statute of limitations, seven-year statute of repose). Moreover, the statutes of limitation and statutes of repose listed above were set within the **same title, chapter, and section**. Further, REB even points out that if the Act could be affected by MISS. CODE ANN. § 15-1-41 (which it cannot, as described herein), the **Act's limitation period would be inappropriately longer than the limitation period of § 15-1-41**. See Appellee's Br. at 12, n. 6 (noting MISS. CODE ANN. § 15-1-41 allows six years, while the Act allows six years and thirty days based on REB's calculation).

Second, REB tries to prevent the Court from performing its **fundamental function of interpreting law**. See Appellee's Br. at 14. The Court aptly interprets in places where a statute may be silent. For example, in the context of limitation periods, the Court has interpreted MISS. CODE ANN. § 15-1-35, which sets a one-year limitation period for expressly listed intentional torts, by including others which fit the bill but were not expressly listed under § 15-1-35. See, e.g., *Jones v. Fluor Daniel Servs. Corp.*, 32 So. 3d 417, 422 (Miss. 2010) (confirming that intentional infliction of emotion distress has a one-year statute of limitations under § 15-1-35, even though the statute does not list the claim). Therefore, despite § 15-1-5 not applying to the Act in § 83-58-1 *et seq.*, by its own terms, the Court may certainly confirm this intent.

as alleged. Appellee's Br. at 8-20. Rather, REB attempts to argue that because a number of cases in the construction context applied § 15-1-41, then the Act is subject to the same, regardless of the fact that the Act has its own clearly established limitation period. Appellee's Br. at 13-14. Further, the cases cited by REB are in the commercial context, not the residential consumer context covered by the New Home Warranty Act.

The cases REB relies upon *all* involve *common law* claims -- a fact which REB plainly ignores. Appellee's Br. at 13-14. REB fails to cite even one case demonstrating that the New Home Warranty Act was subject to anything other than its own limitation period. Appellee's Br. at 8-20. Furthermore, REB cites not one case where any statutory claim was subject to the common-law limitation period of § 15-1-41. Appellee's Br. at 8-20. Quite the opposite: every case REB depends on involved *only* common law claims, which, for that reason, were subject to § 15-1-41's common-law limitation period. *See Reich v. Jesco, Inc.*, 526 So. 2d 550, 552 (Miss. 1988) (common law "ten year limited warranty" claim and common law tort and contract claims); *J. Criss Builder, Inc. v. White*, 35 So. 3d 541 (Miss. Ct. App. 2009) (common law claims based in tort and contract).

REB alleged that *Ferrell, Moore, and Trust Co. Bank* stand for the proposition that products liability claims are covered by § 15-1-41. Appellee's Br. at 13, n.8. REB also argues that *Theunissen* holds that a Uniform Commercial Code ("U.C.C.") claim is subject to § 15-1-41. Appellee's Br. at 13, n.8. Contrary to REB's argument, in each respective case REB cites, this Court, the Fifth Circuit, and a federal district court all held that the products liability and U.C.C. statutes *did not apply* because the subject property was not "products" or "goods," respectively. *See Ferrell v. River City Roofing, Inc.*, 912 So. 2d 448, 457 (Miss. 2005) ("[A]n 'improvement to real property' is not a 'product,' and therefore, 'an action based on strict products liability will not lie.") (citing *Moore v. Jesco, Inc.*, 531 So. 2d 815, 817 (Miss. 1988) (products liability statute

inapplicable because chicken houses were fixtures not “products”)); *Trust Co. Bank v. U.S. Gypsum Co.*, 950 F.2d 1144, 1151-52 (5th Cir. 1992) (same; permanent fireproofing materials constituted “real property” not “products”); *Theunissen v. GSI Group*, 109 F. Supp. 2d 505, 510-11 (N.D. Miss. 2000) (determining that because the subject grain bin was affixed to real property and was virtually immobile, it constituted real property, rendering inapplicable any claim under the U.C.C.).

**Because the product liability statutes did not apply, the remaining claims were based on common law.** *Ferrell*, 912 So. 2d at 457; *Moore*, 531 So. 2d at 817; *Trust Co. Bank*, 950 F.2d at 1151-52; *Theunissen*, 109 F. Supp. 2d at 511. For that reason, the *common law* claims were subject to the common-law limitation period of MISS. CODE ANN. § 15-1-41. *Id.* **These cases only demonstrate that common-law construction claims have a common-law limitation period. REB cited no authority showing that claims under the New Home Warranty Act -- or any statutory claims, for that matter -- would be subject to the common-law limitation period.** Further, to subject a statutory claim, which sets up its own limitation period, to a whole other limitation period from another title and chapter is illogical. In the end, REB has provided no basis for the Townes’ statutory claims to succumb to § 15-1-41.

Furthermore, § 15-1-41 was REB’s sole basis for trying to subject the Townes’ statutory claims to § 15-1-5. Appellee’s Br. at 8-20. As noted, § 15-1-5 applies only to limitation periods within Title 15, Chapter 1, including § 15-1-41. *See* MISS. CODE ANN. § 15-1-5; *see also* Appellants’ Br. at 9-10 and accompanying references (explaining more fully the self-restricted reach of § 15-1-5); Appellee’s Br at 8-20 (failing to refute fact that § 15-1-5 only applies to its own chapter and operating under rule in application).

REB fails to establish that § 15-1-41 has any effect on the New Home Warranty Act contained in § 83-58-1, *et seq.* Consequently, § 15-1-5 cannot apply to § 83-58-1, *et seq.*

**Therefore, even assuming § 15-1-5 precluded tolling agreements, the Townes' statutory claims -- not affected by §§ 15-1-5 or 15-1-41 -- were preserved by the Tolling Agreement.**

Because REB could not demonstrate that the Townes' statutory claims were affected by § 15-1-5 or § 15-1-41, **REB failed to establish summary judgment as a matter of law.** See Miss. R. Civ. P. 56. Therefore, giving the Townes "the benefit of every reasonable doubt" and drawing all inferences in the Townes' favor (*see* Appellants' Br. at 8) summary judgment should not have been granted.

**B. Even If MISS. CODE ANN. § 15-1-5 Applies, the Tolling Agreement is Valid and Enforceable Under Mississippi Law.**

Assuming MISS. CODE ANN. § 15-1-5 applies to the Townes' statutory claims, the Tolling Agreement is in accordance with MISS. CODE ANN. § 15-1-5. See Appellants' Br. at 10-13 and accompanying references. REB's argument that the Tolling Agreement "changes" the applicable limitation periods fails for two reasons.

***1. The Tolling Agreement Does Not Change the Limitation Period Because It Does Not Create Its Own Time Limitation; Rather, It Applies Mississippi Law.***

There is a clear distinction between the Tolling Agreement at issue and the cases cited in the Townes' principal brief where the parties contractually *shortened* the limitation period. See Appellee's Br. at 18. The Tolling Agreement does not create or impose its own time limitation. R. at 77-81; R.E. 6 at 62-66. On the contrary, **the Tolling Agreement directly references application of the limitation periods set by the laws of the State of Mississippi:**

All applicable statutes of limitations or other similar time periods (including, but not limited to all applicable statutes of repose or the doctrine of laches) with respect to any claim . . . **under Mississippi law . . .**

R. at 78; R.E. 6 at 63.

This Court has held that § 15-1-5 was violated because the parties literally *wrote into the contract* that the limitation period would be for “X” number of years. *See Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732 (Miss. 2007), *overruled on other grounds, Covenant Health Rehab of Picayune, L.P. v. Moulds*, 14 So. 3d 695 (Miss. 2009) (*creating* a one-year limitation period when Mississippi law allowed three years); *Pitts v. Watkins*, 905 So. 2d 553 (Miss. 2005) (same); *Latham v. U.S. Fidelity & Guar. Co.*, 267 So. 2d 895 (Miss. 1972) (writing in a one-year limitation period when the law provided for six years). In stark contrast, the Tolling Agreement at issue here simply suspends the limitation periods under Mississippi law to allow the parties time to work out the appropriate repairs needed without instigating litigation. Appellants’ Br. at 10-13; R. at 77-81; R.E. 6 at 62-66. **The Tolling Agreement contains no changes to the Mississippi limitation periods**, but, in fact, relies upon the limitation periods set by Mississippi law. R. at 78; R.E. 6 at 63.

Further, in the cases cited, the Court found the agreements in question were one-sided and forced unsophisticated parties to contract away their right to sue. To the contrary, the purpose and effect of the parties’ Tolling Agreement here was “to engage in a review and analysis of the structural settlement issues in order to determine an agreed upon repair” and in “hope to avoid the immediate need of the filing of a lawsuit.” R. at 77; R.E. 6 at 62.

REB tries to characterize its president Howard L. Ellis (“Ellis”) as an unsophisticated and unrepresented layman. Appellee’s Br. at 3. Pursuant to the law and in practice, Ellis surely was not.<sup>7</sup> *See infra* pp. 10-12 (discussing REB’s years of experience and presumed knowledge of the

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<sup>7</sup> REB’s status as an unsophisticated layman is also contradicted by his actions. For example, although the parties agreed to the terms of the Tolling Agreement on December 13, 2004 and made no substantive changes thereafter (*see* Appellants’ Br. at 14; R. 61, 74-76; R.E. 6 at 46, 59-61), REB questionably withheld its signature until January 5, 2005, exactly one (1) day after it believed the warranty would have expired. R. at 77; R.E. 6 at 62. Although these dates are genuinely disputed, there is no doubt that REB is anything but an unsophisticated layman.

Act, including the requirement that REB notify homeowners of the Act's warranties). Moreover, Andrew Townes was unrepresented at the time he and Ellis reached the terms of the Agreement on December 13, 2004. *See infra* pp. 10-12; R. at 61, 74-75; R.E. 6 at 46, 59-60. Consequently, as the builder, REB was certainly more knowledgeable and in the stronger bargaining position.

Not only did the Tolling Agreement comply with Mississippi law by making no changes to the limitation periods, instead expressly referencing the publicly created periods, the Tolling Agreement satisfies the policy criteria of seeking to avoid litigation and practicing good faith and fair dealing. Therefore, the Tolling Agreement preserved the Townes' claims, and summary judgment should be reversed.

**2. *REB Does Not Dispute that Tolling Agreements Arranging for Accrual Are Appropriate, Which Was the Exact Effect of the Subject Tolling Agreement.***

Tolling agreements which merely set up the date or condition upon which claim accrual occurs are proper under Mississippi law because they do not "change" the limitation period. *See* Appellee's Br. at 19-20; *see also* Appellants' Br. at 11-13. REB mistakenly argues that Townes' claim accrued "when [the Townes] learned of the . . . construction defects from their engineer's August 24, 2004 report." Appellee's Br. at 20. **REB ignores that the Act would not allow the Townes to sue until a number of prerequisites occurred**, including but not limited to the Townes' written notice to REB within ninety (90) days after learning of the defects and affording REB "a reasonable opportunity" "to repair the defect[s]" before instigating a lawsuit. *See* Act §§ 83-58-7, 83-58-17; Appellants' Br. at 13.

It is undisputed that the Townes timely notified REB of the defects. Appellants' Br. at 14; Appellee's Br. at 20. Pursuant to the Tolling Agreement, the accrual of Townes' claims was delayed while REB inspected the Residence, noted the defects, and **promised to repair the defects**. *Id.* Pursuant to the Act, the Townes' claims could not accrue -- and the Townes'

therefore could not commence a lawsuit -- until it reasonably appeared negotiations regarding repairs had failed. Appellants' Br. at 13.

These are exactly the circumstances for which the Tolling Agreement provided. Appellants' Br. at 11-13. *See* Tolling Agreement, R. at 77; R.E. 6 at 62 (stating the purpose "to determine an agreed upon repair" after "review and analysis of the structural settlement issues"). Therefore, the Tolling Agreement made no changes to the limitation periods, but simply defined the accrual of the Townes' claims. *See* Appellants' Br. at 13. Accordingly, the Tolling Agreement validly preserved the Townes' claims, warranting reversal of summary judgment.

**C. Notwithstanding the Tolling Agreement, Which Preserved the Townes' Claims, REB Has Failed to Establish Any Defense to Its Wrongful Conduct.**

REB's defense to the Townes' equitable estoppel claim rests on the premise that Ellis is an unsophisticated layman and that the Townes were represented by counsel when the parties entered the Tolling Agreement

***1. REB, Deemed a Sophisticated Party Under the Law, Induced the Townes into Delaying Litigation.***

REB tries to characterize Ellis as a layman (*see* Appellee's Br. at 3), when in fact Ellis' posturing and maneuvering led to the current lawsuit. Appellants' Br. at 15-18. Indeed, Ellis knew full well that he was inducing the Townes to delay filing suit. Specifically, Ellis inspected the Residence as he was obligated to do under the New Home Warranty Act. Appellants' Br. at 14. As the Townes both testified, Ellis then recommended certain necessary repairs and agreed to toll the limitation period while the parties negotiated the details. Appellants' Br. at 14; R. 61, 74-76; R.E. 6 at 46, 59-61. These events confirm that Ellis, acting on behalf of REB, is indeed a sophisticated builder of large residential houses.

Additionally, not only was REB charged with knowing the law (*see* Appellee's Br. at 25), the **law actually required REB to provide notice to its homeowners of its requirements** under the New Home Warranty Act. Section 83-58-7 of the Act provides, in relevant part:

The builder shall give the owner written notice of the requirements of this chapter . . . . If the builder does not provide such notice, the warranties . . . shall be extended . . . [until] notice was given.

*See also* Appellants' Br. at 18. Therefore, it was REB's responsibility to know -- and to relay to the homeowner -- that the home would be free from major structural defects for six years. *See* New Home Warranty Act § 83-58-5. Thus, as a homebuilder, REB is by definition a sophisticated party with knowledge of its responsibilities to home buyers.

Moreover, this was not REB's first building endeavor. REB has been in the practice of **building homes for over 25 years**<sup>8</sup> -- and building nice homes at that. Surely, those who build homes in Meadowbrook Highlands, the location of the Residence in question, are experienced and sophisticated builders. Appellants' Br. at 3. REB clearly was aware of its responsibilities under the Act and understood the implications of the Tolling Agreement. REB should not be allowed to plead ignorance in an effort to now avoid an Agreement it willingly and knowingly signed.

***2. Neither Party Was Represented By Counsel at the Time the Parties Entered the Tolling Agreement.***

REB ignores the fact that when the parties reached the Tolling Agreement on December 13, 2004, **neither party was represented by counsel**. Only Andrew Townes and Ellis were present when they reached the terms of the agreement. Appellants' Br. at 14; R. 61, 74-76; R.E. 6 at 46, 59-61. Ellis even agrees he had no substantive changes from the "meeting of the minds"

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<sup>8</sup> Rusty Ellis Builder, Inc. was established in 1985. *See* [www.sos.ms.gov/](http://www.sos.ms.gov/) (last visited Dec. 22, 2011).

on December 13, 2004, making only a technical modification to the company name. Appellee's Br. at 5 (citing Jan Townes' Affidavit, R. 74-75; R.E. 6 at 59-60).

In sum, Ellis was not an unsophisticated party under the law. The parties were unrepresented at the time they entered the Tolling Agreement. Consequently, REB's argument related to the Townes' claims of equitable estoppel and other issues fails as a matter of law. As set forth in the Townes' principal brief (*see* Appellants' Br. at 14-18), the Townes are entitled to reversal for any number of reasons, including but not limited their compliant actions under the Act,<sup>9</sup> REB's fraudulent concealment,<sup>10</sup> and/or equitable estoppel.<sup>11</sup> At a minimum, a material issue of fact exists on Townes' claims based on REB's misconduct which precluded summary judgment.

### CONCLUSION

For all of the reasons set forth in its principal brief and this reply, summary judgment should be reversed. REB's brief failed to set forth evidence or authority refuting the fact that the Tolling Agreement preserved the Townes' claims. Moreover, the law deemed REB a

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<sup>9</sup> *See* Appellants' Br. at 14-15. *See also DiMa Homes, Inc. v. Stuart*, 873 So. 2d 140 (Miss. Ct. App. 2004). In *DiMa Homes*, the Court pointed out the Act's requirement "that the owner give the builder an opportunity to correct the claimed problems." *Id.* at 144-45. In that case, when the builder provided *no response* to the homeowners' notice, three months was a reasonable waiting period prior to filing suit. *Id.* at 142, 145. By contrast, REB responded to the Townes' notice with false representations that it would correct the defects, so that the Townes would not and could not file suit. *See supra* pp. 10-11 regarding accrual. Full compliance justifies reversal of summary judgment in the Townes' favor.

<sup>10</sup> *See* Appellants' Br. at 15-16. Additionally, REB bases its defense to fraudulent concealment on the mistaken assumption regarding accrual. *See supra* pp. 10-11.

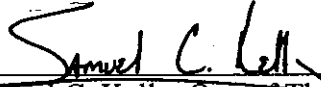
<sup>11</sup> In attempting to distinguish *Harrison Enterprises v. Trilogy Communications, Inc.*, 818 So. 2d 1088 (Miss. 2002) from the facts presented here, REB ignores the fact that equitable estoppel occurred notwithstanding any tolling agreement, just as the Townes pray for presently. *See* Appellee's Br. at 23; Appellants' Br. 16-17. REB also overlooks the fact that it gave the Townes repeated assurances that it would make repairs in order to withhold the Townes from filing suit, which in *Harrison*, satisfied the element of justifiable reliance. Appellants' Br. at 17.

sophisticated party with both parties unrepresented when they reached the Tolling Agreement, which defeats REB's sole basis for defending its conduct.

THIS, the 8<sup>th</sup> day of February, 2012.

Respectfully submitted,

ANDREW AND JAN TOWNES

  
~~Samuel C. Kelly, One of Their Attorneys~~

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**CERTIFICATE OF SERVICE**

I, Samuel C. Kelly, do hereby certify that I have this day served, via United States mail, postage prepaid, a true and correct copy of the foregoing pleading or other paper on the following:

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Honorable Bill Gowan  
Hinds County Circuit Judge  
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Jackson, MS 39225

THIS, the 8<sup>th</sup>-day of February, 2012.

  
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Samuel C. Kelly