IN THE SUPREME COURT OF MISSISSIPPI

NO. 2011-IA-01763-SCT

BEN U. BOWDEN, TOM VAUGHN, DEBRA VAUGHN, VAUGHN & BOWDEN, PA f/k/a VAUGHN, BOWDEN & WOOTEN, PA, LOWRY DEVELOPMENT, LLC AND JIM LOWRY — **APPELLANTS**

VERSUS

DIANE YOUNG, CHERIE BROTT BLACKMORE AND PAUL BLACKMORE — **APPELLEES**

CONSOLIDATED WITH:
2011-IA-01783-SCT

JIM LOWRY — **APPELLANT**

VERSUS

DIANE YOUNG — **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI FIRST JUDICIAL DISTRICT

CORRECTED AND AMENDED BRIEF OF APPELLANTS, BEN U. BOWDEN, TOM VAUGHN, DEBRA VAUGHN AND VAUGHN & BOWDEN, f/k/a VAUGHN, BOWDEN & WOOTEN, PA

ORAL ARGUMENT IS REQUESTED

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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 the case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Honorable Richard W. McKenzie, Senior Status Judge

2. Joe Sam Owen, Attorney for Thomas E. Vaughn, Benjamin U. Bowden, Debra Vaughn, and Vaughn & Bowden, PA f/k/a Vaughn Bowden & Wooten, P.A.;

3. Thomas E. Vaughn, Esquire, Appellant;

4. Benjamin U. Bowden, Esquire, Appellant;

5. Eric D. Wooten, Esquire, Appellant;

6. Debra Vaughn, Appellant;

7. Diane Young, Appellee;

8. Cherie Brott Blackmore, Appellee;

9. Paul Blackmore, Appellee;

10. Jim Lowry, Lowry Development, LLC, Appellant;

11. Carroll Ingram, Esquire, Ingram Wilkinson, PLLC, Attorney for Lowry Development, LLC

12. Joseph Songy, Esquire, Sheldon & Parker, PLLC, Attorney for Lowry Development, PLLC

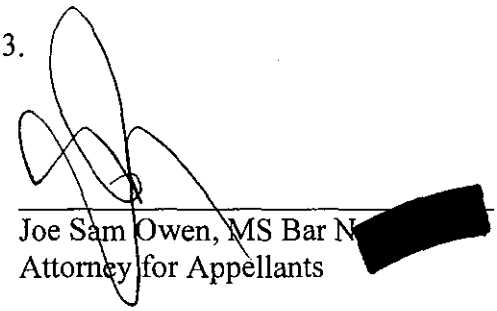
13. William L. McDonough, Jr., Copeland, Cook, Taylor & Bush, Attorney for Lowry Development, PLLC

14. Garry J. Rhoden, Esquire, The Rhoden Firm, Attorney for Diane Young, Cherie Brott Blackmore, and Paul Blackmore;

15. Louis Watson, Jr. and Louis H. Watson, Jr., PA, Attorney for Diane Young, Cherie Brott Blackmore, and Paul Blackmore,

16. Larry E. Parrish, Esquire, Attorney for Diane Young, Cherie Brott Blackmore, and Paul Blackmore

So certified, this the 7th day of January, 2013.



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REQUEST FOR ORAL ARGUMENT

Ben Bowden, Tom Vaughn, Debra Vaughn and Vaughn and Bowden, P.A. request oral argument. This appeal involves important questions of Mississippi law regarding the immunity afforded by the Mississippi Worker's Compensation Act to employers and co-employees. Specifically, the appellants submit that the trial court misread and misapplied this Court's ruling in *Franklin Corporation v. Tedford*, 18 So. 3rd 215 (Miss. 2009); and if the trial court in this case misconstrued this Court's ruling in *Tedford,* there is certainly a likelihood that other trial courts could, likewise, misapply this ruling. Accordingly, this appeal involves important questions related to the current status of the worker's compensation immunity on actions by an employee against his/her employer and co-employees.

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STATEMENT OF THE ISSUES

Whether the trial court erred in failing to grant the motion to dismiss filed by the Defendants/Appellants wherein the Defendants contend that the actions filed by the Plaintiffs, Young and Blackmore, are either barred by the one-year statute of limitations, Miss. Code Ann. § 15-1-35, or by the immunity afforded these Defendants under the Mississippi Worker's Compensation Act, Miss. Code Ann. § 71-3- 9.

I. STATEMENT OF THE CASE

This matter is before this Court upon the Court's grant of an interlocutory appeal on behalf of Defendants, Benjamin U. Bowden, Debra Vaughn, Tom Vaughn and Vaughn & Bowden, PA, f/k/a Vaughn, Bowden & Wooten, PA ("V&B").

The issue is whether the trial court erred in failing to grant the Motion to Dismiss filed by these Defendants pursuant to M.R.C.P. Rule 12(b) as the Defendants/Appellants contend that these actions are either barred by the one year statute of limitations, *Miss. Code Ann. § 15-1-35,* or by the immunity afforded to these Defendants under the Mississippi Workers' Compensation Act ("MWCA"), *Miss. Code Ann. § 71-3-9.*

This action arises out of a claim by two (2) former employees against their employer, V&B, a Gulfport law firm, as well as its individual partners, Eric Wooten, Ben Bowden, Tom Vaughn, and office administrator, Debra Vaughn. (R. 12; RA. 14; RE. 2, 8.) The Plaintiffs allege exposure to mold and other purported contaminates while in the scope of their employment. Joined as additional Defendants are Jim Lowry and/or Lowry Development, LLC, the owner and landlord of the building in which the law firm was located in the year 2009. The Plaintiffs' claims against the law firm and its managerial personnel are totally distinct from the claims against the landlord and the issues regarding the claims against the landlord are not raised in this appeal.

The Plaintiffs, Diane Young ("Young") and Cherie Blackmore ("C. Blackmore")[1] were employees of the law firm and contend that they were exposed to harmful mold, sewer gas, as well as a natural gas leak emanating from the building where they were employed by the law firm. (R. 16, 67; RE. 2.)[2]

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[1] Cherie Blackmore will be referred to as "C. Blackmore" distinguishing her from her husband, Paul Blackmore, who is a Plaintiff by virtue of his derivative claims from Cherie's alleged injury.

[2] There are two separate lawsuits filed by the same Plaintiffs involved in this appeal, Cause No. 2011-00083

C. Blackmore alleges exposure to mold while working in a building on 23rd Avenue in Gulfport, where a number of V&B employees were located post Hurricane Katrina, and she further alleges that she was again exposed to mold when the firm moved into its permanent building on 25th Avenue in Gulfport, Mississippi, in 2009. (RA. 140; RE. 8.) Young, on the other hand, was only employed by the firm from August 2009 until December 2009 and thus alleges that all her exposure to mold was at the second building, the 25th Avenue building. (RA. 26; RE. 8.)

While C. Blackmore and Young made and reported a claim against V&B for their alleged injuries in December 2009, they did not file their Complaint in this cause until March, 2011, some fifteen months later. (R. 123; RE 2.) There is no question that the Plaintiffs were aware of their alleged condition and its alleged cause, at least, by December 2009 given that the Plaintiffs' legal counsel put V&B on notice of the Plaintiffs' claims on December 28, 2009. (R. 123; RE. 2.) Further, C. Blackmore filed a Petition to Controvert with the Mississippi Workers' Compensation Commission on February 11, 2010 alleging entitlement to workers' compensation benefits for exposure to "toxic mold" while in the employ of Vaughn, Bowden & Wooten, PA. (R. 181.)

Defendants, V&B, Tom Vaughn, Debra Vaughn, and Ben Bowden, filed a Motion to Dismiss pursuant to Rule 12(b) contending that the Plaintiffs' actions were precluded under Mississippi law as the actions were unintentional, and since the Defendants are the employer and co-employees of the Plaintiffs, their exclusive remedy against these Defendants is the MWCA, *Miss. Code Ann. § 71-3-9.* Alternatively, if the plaintiffs contend that the workers' compensation immunity is not applicable, alleging that the actions were intentional torts, then they were untimely filed pursuant to *Miss. Code*

(RE. 2.) and Cause No. 2011-0082. (RE. 8.) Each of these records commences with Page 1 and is sequentially numbered to their conclusion. For the purposes of clarity, when citing Cause No. 2011-0083, the Appellants will cite the record as R. followed by the page number. When citing Cause No. 2011-0082, the Appellants will cite this record as "RA." followed by the page number.

Ann. § 15-1-35, the one year statute of limitations applicable to the specific claims alleged by the Plaintiffs. (RA. 172-179; RE. 10.)

The workers' compensation exclusive remedy statute, *Miss. Code Ann. § 71-3-9*, provides that the sole and exclusive remedy of an employee against her employer and co-employees is pursuant to the MWCA unless the claim is such that the employer or co-employees performed the acts with the "actual intent" to injure the specific employees. However, if the employee alleges that the acts committed were intended to cause specific harm to that employee, then those acts are governed by *Miss. Code Ann. § 15-1-35* and must be filed within one year from the date that they occurred.

The Plaintiffs have filed a multiplicity of actions against either their former employer, V&B, its managerial personnel or the landlord, Lowry Development, LLC/Jimmy Lowry. The first action was filed in March 2010 by these Plaintiffs against the landlord, Lowry Development, LLC, only.[3] Subsequently on March 11, 2011, these Plaintiffs filed an action again against Lowry Development, LLC, but this time included as a Defendant the employer, V&B. (R. 12-164; RE. 2.)[4] On the same day, March 11, 2011, the Plaintiffs filed a third Complaint against the individual principals of V&B, as well as the office administrator, and the principal of Lowry Development, LLC. (RA. 14-163; RE. 8.)[5] This appeal does not involve any claims against the landlord, Lowry Development, LLC, or its principal, Jim Lowry, thus the action filed solely against those parties is not at issue and not before the Court. The two actions against the employer and employees respectively are essentially the same

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[3] *Cherie Brott Blackmore, and husband, Paul Blackmore vs. Lowry Development, LLC,* Cause No. A2401-2010-107 in the Circuit Harrison County, Mississippi, First Judicial District, filed March 10, 2010 and *Diane Young vs. Lowry Development, LLC,* Cause No. A2401-2010-164 in the Circuit Harrison County, Mississippi, First Judicial District, filed May 19, 2010

[4] *Diane Young, Cherie Brott Blackmore and Paul Blackmore vs. Vaughn, Bowden & Wooten, PA and Lowry Development, LLC,* Cause No. A2401-2011-0083 in the Circuit Court of Harrison County, Mississippi, First Judicial District. (R. 12; RE 2.)

[5] *Diane Young, Cherie Brott Blackmore and Paul Blackmore vs. Eric Wooten, Ben U. Bowden, Debra*

Complaint and both were heard on a Motion to Dismiss in a consolidated fashion. (R. 125-186; RA. 172-179; RE. 4, 10.)

The counts in the Complaint that are directed at these Defendants are Counts for "Battery"; "Intentional Infliction of Emotional Distress"; "Aiding and Abetting"; and "Conspiracy to Commit Battery and Intentional Infliction of Emotional Distress." (RA. 14-163; RE. 8.)

These Defendants filed a Motion to Dismiss Pursuant to Rule 12(b), which the trial court denied without opinion. (R. 700; RA. 745; RE. 6, 12.) These Defendants submit that the trial court erred in failing to grant these Defendants' Motion to Dismiss as the actions of the Plaintiffs are precluded by the exclusivity of the MWCA and were also untimely filed under the applicable statute of limitations.

II. STATEMENT OF THE FACTS

As a result of Hurricane Katrina, the offices of Allen, Vaughn, Cobb & Hood ("AVCH"), the former law firm in which Tom Vaughn, Ben Bowden and Eric Wooten were shareholders, located on the 12th floor of the Hancock Bank building in Gulfport, Mississippi, were severely damaged and uninhabitable. (R. 45; RE. 2.) AVCH was forced to move from its office to various buildings throughout the Gulfport community as the law firm was unable to adequately house all of its personnel in one location, due to the shortage of office space. (R. 45; RE. 2.)

In the aftermath of the storm, Defendants, Tom Vaughn, Ben Bowden and Eric Wooten, withdrew from the law firm in 2006 and established a new law firm, Vaughn, Bowden & Wooten, PA. (R. 44; RE. 2.) Plaintiff C. Blackmore was an employee of Allen, Vaughn, Cobb & Hood but withdrew from that law firm to join the new firm, Vaughn, Bowden & Wooten. (R. 44; RE. 2.)

Vaughn, Tom Vaughn and Jim Lowry, Cause No. A2401-2011-0082 in the Circuit Court of Harrison County, Mississippi, First Judicial District. (R. 14; RE 8.)

Plaintiff Young joined V&B much later, August 2009, and remained with the law firm only until December 2009.

During the year 2006, V&B had to locate employees at two locations, being unable to find adequate housing in a single building. (R. 44; RE. 2.) One of the locations selected was a building on 23rd Avenue in Gulfport ("the 23rd Avenue building"), which housed numerous employees including Plaintiff C. Blackmore, a paralegal. (R. 14; RE. 2.) C. Blackmore alleges she was exposed to toxic mold at the office location on 23rd Avenue, which was leased to the law firm by a third person, who is not a party to any of these actions. (R. 14; RE. 2.)

In 2009, the law firm moved into what was intended to be a permanent location on 25th Avenue in Gulfport ("the 25th Avenue building") and was finally able to consolidate all of its personnel in this building owned by Defendant Lowry and leased to V&B. (R. 63; RE. 2.) Interestingly, C. Blackmore contends that she was also exposed to mold at the new location, the 25th Avenue building. (R. 69; RE. 2.) Thus she contends that she was exposed to mold at the building on 23rd Avenue, as well as the building on 25th Avenue.

The 25th Avenue building was a restoration of a century old building by Defendant Lowry, which was reconstructed under specific instructions and limitations by the Mississippi Department of Archives and History ("MDAH"), as well as the City of Gulfport. (R. 61; RE. 2.) One of the requirements of MDAH was that the outer walls and the street front plate glass windows, as well as the other exterior features remain intact for historical purposes.

Upon the law firm's move to the 25th Avenue building in February 2009, there were ongoing construction issues between the landlord, Lowry, and the law firm, one of which involved some leaking or leaching of water through the century old brick walls into two individual offices of the firm, the personal offices of Tom Vaughn and Debra Vaughn. (R. 69; RE. 2.) The law firm repeatedly complained to the landlord that the water intrusion through the back wall of the building

needed repair. (R. 69; RE. 2.) The landlord engaged in numerous attempts to seal the building and to prevent the water entrainment into the building, but was unsuccessful until some period after the law firm vacated the building in December 2009. (R. 69-70; RE. 2.)

In addition, during the summer of 2009, the employees of the law firm noticed the smell of natural gas in the building, which was somewhat odd as natural gas was not used by the law firm. (R. 75, 95; RE. 2.) During the investigation by the Gulfport Fire Department at the request of V&B, it was discovered that the leak was coming from a neighboring building, a bakery, which had a gas line that had not been properly sealed. (R. 97; RE. 2.) The issue was remedied. (R. 97; RE. 2.) In addition, on a couple of occasions, due to the old foundation and issues with a hundred year old sewer system, the sewer line backed up in one of the restrooms, flooding the restroom, which was immediately cleaned and repaired by the landlord. (R. 69; RE. 2.)

Ultimately, feeling great frustration at the landlord's unsuccessful attempts to resolve the water leaking into the offices of Tom Vaughn and Debra Vaughn, the law firm made the decision to move from the building in early fall 2009 after having only been in the building approximately six months. (R. 132; RE. 2.) It took several months for the firm to locate suitable space and to effect the move.

The law firm moved into the now completely renovated Hancock Bank building in downtown Gulfport, in early December 2009. After the 2009 Christmas holidays, Plaintiff C. Blackmore failed to return to the law firm advising the firm that she was having health problems as a result of exposure to mold. On December 28, 2009, legal counsel representing Young and C. Blackmore wrote V&B advising that C. Blackmore and Young were having health issues as a result of exposure to mold while in the employ of the firm, were seeking medical treatment and intended to file a lawsuit against the law firm and the landlord. (R. 123-124; RE. 2.) Being advised of this allegation, the law firm filed a notice with the Mississippi Workers' Compensation Commission. Subsequently,

both C. Blackmore and Young filed Petitions to Controvert with the Mississippi Workers' Compensation Commission that are presently pending. (R. 181; RE. 4.)

C. Blackmore pursued a workers' compensation claim before the Mississippi Workers' Compensation Commission, but upon realizing that she was not disabled from work, became disenchanted with the workers' compensation remedy and filed a third party action against the landlord in March 2010. Approximately fifteen months after knowledge of their alleged condition and their withdrawal from the law firm, these Plaintiffs filed two additional complaints, which are the complaints presently before this Court, again naming as a defendant, the landlord, Lowry, but adding as additional parties in the new complaints their former employer, V&B, its three partners, Eric Wooten, Ben Bowden and Tom Vaughn, and the firm's office administrator, Debra Vaughn. (RA. 14-183; RE. 8.)

III. SUMMARY OF THE ARGUMENT

The claims made by the Plaintiffs in the complaint against these Defendants, the former employer and co-employees, are alleged intentional acts. The four counts alleged against these Defendants are "Battery"; "Intentional Infliction of Emotional Distress"; "Aiding and Abetting"; and "Conspiracy to Commit Battery and Intentional Infliction of Emotional Distress." All of the actions alleged by these Plaintiffs against the employer or co-employee Defendants were alleged to be intentional acts, undoubtedly in an attempt to overcome the workers' compensation immunity. Clearly, if the Plaintiffs allege any of the acts for which they are making a claim were not intentional, then the Plaintiffs' sole remedy against these Defendants is a Petition to Controvert under the MWCA and the claims against these Defendants in these Complaints are barred by the immunity granted to the employer and co-employees pursuant to the MWCA, *Miss. Code Ann. § 71-3-9 (Rev. 2000).*

Additionally, the intentional actions as pleaded by the Plaintiffs against these Defendants are all governed by *Miss. Code Ann. § 15-1-35* and were required to have been filed within one year of the acts. The last possible alleged exposure to these Plaintiffs was in December 2009, the time of their departure from the employer, at which time they were making a claim against the employer for these alleged injuries. Unquestionably, in December 2009, the Plaintiffs were aware of their alleged condition and the alleged cause being related to their employment. Yet the Complaint in this matter was not filed until March 11, 2011, some fifteen months later, clearly beyond the one year statute of limitations.

Accordingly, reviewing the Complaint in the light most favorable to the Plaintiffs and accepting for the purposes of 12(b) relief all well pleaded facts by the Plaintiffs, there simply is no means of recovery by the Plaintiffs under the Complaints against these Defendants.

IV. ARGUMENT

A. Standard of Review

When this Court is called upon to consider a trial court's grant or denial of a Motion to Dismiss, this Court should apply a *de novo* standard of review. *Park on Lakeland Drive, Inc. v. Spence,* 941 So. 2d 203, 206 (Miss. 2006). Further, this Court should consider the allegations of the Complaint to be taken as true. These Defendants submit that the Complaints, on their face, fail to state a cause of action for which these Plaintiffs can recover from these Defendants for the reasons referenced above and fully discussed hereinafter.

B. All Actions Alleged By The Plaintiffs Against The Employer And The Co-Employee Defendants Were Not Timely Filed And Are Barred By The Applicable Statute Of Limitations, *Miss. Code Ann. § 15-1-35.*

All of the actions the Plaintiffs allege against the Employer and Co-Employee Defendants must be intentional acts to withstand the workers' compensation immunity. Clearly, if the Plaintiffs allege that any of the acts for which they are making a claim were not intentional then those acts are barred by the immunity granted by the Mississippi Workers' Compensation Act as will be hereinafter discussed in greater detail.

In the Plaintiffs' attempt to avoid the workers' compensation immunity, the Plaintiffs have alleged that the acts by these Defendants were intentional. The specific counts are 1) the infliction of emotional distress; 2) battery; 3) conspiracy to commit battery; and 4) aiding and abetting. (R. 12-169; RA. 14-163; RE. 2, 8.) As such, all of these actions are governed by *Miss. Code Ann. § 15-1-35*, which requires that an action for these torts must be filed within one year after the cause of action occurred.

As to the battery count, the statute, by its very language, enumerates battery (Counts Two and Five) as an action governed by the statute.

As to the Plaintiffs' claims for intentional infliction of emotional distress (Count Three), this Court has made it clear that the one year prescription under § 15-1-35 applies. *Jones v. Fluor Daniel Services Corp.*, 32 So. 3d 417, 423 (Miss. 2010). See also *Jones v. B.L. Development Corp.*, 940 So. 2d 961, 965 (Miss. Ct. App. 2006); *Bellum v. PCE Constructors Inc.*, 407 F.3d 734 (5th Cir. 2005).

In regard to the conspiracy count, the statute of limitations to be applied to a claim of civil conspiracy is the statute of limitations that is applicable to the underlying wrong that Defendants are alleged to have conspired to commit. *16 Am.Jur.2d Conspiracy § 65 (2012).* While these Defendants are unable to find any cited Mississippi case addressing the statute of limitations as it

relates to conspiracy, the authorities in other jurisdictions uniformly hold that the statute of limitations to be applied to an allegation of conspiracy is the same as the limitation on the underlying tortious activity. *Varner v. Peterson Farms*, 371 F.3d 1011, 1016 (8th Cir. 2004); *Ammaung v. City of Chester,* 494 F.2d 811, 814 (3rd Cir. 1974); *Roach Mfg. Corp. v. North Star Industries, Inc.,* 630 F.Supp.2d 1004, 1007 (E.D. Ark. 2009).

In regard to the claim of aiding and abetting, these Defendants have been unable to find an independent cause of action in Mississippi for aiding and abetting. However, assuming such a claim exists under Mississippi law, that claim would also be a derivative action and would adopt the statute of limitations for the underlying tortious act in the same fashion as a claim for conspiracy referenced above.

Accordingly, there can be no dispute that the last harmful act alleged by the Plaintiffs occurred, at least, before the time of their termination from employment in December 2009. (R. 123-124; RE. 2.) Plaintiffs C. Blackmore and Young were placed on administrative leave in 2009 as a direct result of VBW being placed on notice by the Plaintiffs' legal counsel, at that time, Alex Brady, that the Plaintiffs intended to file a lawsuit against the employer, V&B, as well as the former landlord and current client of the law firm, Lowry Development, LLC[6], for their alleged exposure to mold while in the workplace. (R. 125; RE. 2.) Accordingly, the Plaintiffs were placed on administrative leave at that time pending the resolution of the Plaintiffs' claims against the firm's client. Thus all claims by the Plaintiffs must have been filed no later than December 2010, and the

[6] At that time, December 2009, VBW was representing Lowry Development, LLC, in a major case that had been appealed to the Fifth Circuit Court of Appeals after a lengthy jury trial and was back on remand for a new trial. Thus, it became apparent to VBW that it would be a conflict of interest to allow the employees who had an adverse position against the firm's client, Lowry Development, LLC, to have access, which could not be prevented, to Lowry Development's file, documents and other materials. Thus, the Plaintiffs were placed on administrative leave, but were later terminated.

filing of these Complaints in March 2011 were untimely and subject to dismissal on the face of the Complaint as a matter of law.

C. The Plaintiffs' Claims Are Governed By The Mississippi Workers' Compensation Act, Thus These Defendants Have Immunity from the Common Law Claims Alleged in the Complaint.

Even if the Plaintiffs' claims could survive the statute of limitations defense, their claims are barred by the exclusivity provision of the Mississippi Workers' Compensation Act, *Miss. Code Ann. § 71-3-9.* The Mississippi Workers' Compensation Act provides, in pertinent part, "The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer [or its other employees] to the employee." *Id.* The lone exception to workers' compensation immunity in Mississippi is when the act by the employer or the plaintiffs' co-employees is "intentional."

The definition of "intentional" for the purposes of workers' compensation immunity has been the subject of great debate. Mississippi, in accord with the overwhelming majority of other jurisdictions, has steadfastly held that the only acts by the employer or co-employees that are deemed "intentional" and thus fall outside the workers' compensation immunity are those acts that are "designed to bring about the injury." *Franklin Corporation v. Tedford,* 18 So. 3d 215, 232 (Miss. 2009); *Griffin v. Futorian Corp.,* 533 So. 2d 461 (Miss. 1988); *Stevens v. FMC Corp.,* 515 So. 2d 928 (Miss. 1987); *Bevis v. Linkous Constr. Co.,* 2002-CA-100134-COA (Miss. Ct. App. 2003); *Mullins v. Big Lane Operating Company,* 778 F.2d 277 (5th Cir. 1985) [applying Mississippi law, workers' compensation immunity precluded a common law action where it was alleged that the employer intentionally withheld safety equipment].

In *Franklin Corp. v. Tedford, supra,* this Court once again rejected the invitation of the Plaintiff to depart from the long accepted definition of "intentional acts" for the purposes of workers'

compensation immunity in Mississippi. This Court in *Tedford* reaffirmed that in order for a claim by the employee to overcome the workers' compensation immunity, the plaintiff must allege and prove that there was "actual intent on the part of employer or co-employees to injure the employee." This Court refused to apply the broader definition recognized by a small minority of states that the immunity may be overcome by proving that the employer or co-employees committed acts that were "substantially certain to cause injury or death."

In accord, a leading treatise on workers' compensation law, *Larson's Workers' Compensation Law,* states:

> Since the legal justification for the common-law action is the nonaccidental character of the injury from the defendant employer's standpoint, the common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury.
>
> Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering employees to perform an extremely dangerous job, willfully failing to furnish a safe place to work, fostering a "culture" of alcohol use at off-premises after-hours company events, willfully violating a safety statute, failing to protect employees from crime, refusing to respond to an employee's medical needs and restrictions, or withholding information about worksite hazards, the conduct still falls short of the kind of actual intention to injure that robs the injury of accidental character.

6-103 Larson's Workers' Compensation Law § 103.03 (2012).

As *Larson's* observes, for the purposes of workers' compensation immunity, all but a handful of states recognize that the "intentional" exception to exclusivity defines the definition of "intentional" as acts committed with the "actual intent to injure" as opposed to a very small minority of states that define "intentional" as acts that are "substantially certain" to cause injury. See *6-103 Larson's Workers' Compensation Law § 103.03, FN1 (2010).*

The editor of *Larson's* points out that while the majority position on this issue might seem strict, the test is "not the degree of gravity or depravity of the employer's conduct," but rather the intent to deliberately inflict harm on the employee. *6-103 Larson's Workers' Compensation Law § 103.03 (2012).* An example used by *Larson's* was the intentional removal of a safety device which results in an accidental injury later. Clearly, the act itself was intentional but it was not done with the deliberate purpose of harming the worker and thus is subject to workers' compensation immunity.

As the rationale for the majority opinion on this issue, *Larson's* points out that while the definition of "intentional" for the purposes of workers' compensation immunity might seem unduly harsh, it is not used for the purpose of determining whether the conduct of the employer or co-employee is compensable, the issue is whether it is so egregious as to take it out of the normal balancing of remedies provided by the workers' compensation concept.

The workers' compensation system was enacted as a means to provide a predictable compensation program for employees' workplace injuries irrespective of the cause of the harm. That is to say, that most workers' compensation acts routinely award recovery to employees that were injured at no fault of the employer or co-employees and indeed in many cases affords benefits for injuries sustained as a result of the employee's own misconduct or negligent conduct. The tradeoff, in those instances, is that the act affords immunity to the employer. As *Larson* points out, "As to the other objective, reducing litigation, every presumption is on the side of avoiding the imposition of the complexities and uncertainties of court litigation on the compensation process." *Id.* To allow the employee to maintain a common law action against his fellow workers or employer risks the evisceration of the workers' compensation program and upset the balance of sacrifices between the employer and employee.

Significantly, the Plaintiffs in the Complaints *sub judice* do not even plead that the alleged acts of V&B or its employees were committed with the "intent of inflicting an injury" on these

Plaintiffs. The Plaintiffs pleaded that the acts of V&B and the Plaintiffs' co-employees were such that they were "substantially certain to cause injury." (R. 154 – para. 786, 787, 788, 789; RE. 2.) Accordingly, the Complaints fail to state a cause of action on their face as they allege that the acts were such that they were substantially certain to result in injury as opposed to alleging that the alleged acts were committed with the "conscious and deliberate intent to inflict an injury." Thus, the trial court erred in failing to grant a Motion to Dismiss as to these Defendants for failure of the Complaint to state a cause of action on the face of the Complaint.

IV. CONCLUSION

In summary, in order for the Plaintiffs to overcome the Mississippi Workers' Compensation statutory immunity from common law actions against the employer and co-employees, it is necessary that the Plaintiffs allege and prove that these co-employees committed the alleged acts with the actual intent to injure Young and Blackmore. The Plaintiffs did not plead nor do the facts that they allege indicate that any of these Co-Employee Defendants intended to injure Young or Blackmore. The absence of any such allegation is fatal to the Plaintiffs' case as to these Defendants.

Moreover, even if the Plaintiffs properly pleaded a cause of action that would survive the workers' compensation immunity, the Plaintiffs' claims were filed outside the time prescribed by the one year statute of limitations and therefore are barred. Clearly, all of the alleged acts against these Defendants occurred no later than December 2009, the time at which the Plaintiffs were no longer subjected to either building, the 23rd Avenue or the 25th Avenue building. This is bolstered by the fact that the Plaintiffs' then attorney, Alex Brady, wrote to the Plaintiffs' employer, VBW, and made a demand upon same to pay for the damages and the claims alleged by the Plaintiffs in December 2009. (R. 123-124; RE. 2.) Yet, the Complaint was not filed until March 11, 2011, approximately fifteen months later.

Accordingly, the claims of the Plaintiffs are not intentional as defined by the MWCA and thus the Plaintiffs' exclusive remedy is under the compensation act. Further, the claims alleged in the Complaint against these Defendants are subject to the one year statute of limitations and were not timely filed. Thus, on the face of the Complaints themselves, these Defendants are entitled to a dismissal of this action.

RESPECTFULLY SUBMITTED, this the 7th day of January, 2013.

VAUGHN & BOWDEN, PA f/k/a VAUGHN, BOWDEN & WOOTEN, PA, THOMAS VAUGHN, BENJAMIN BOWDEN and DEBRA M. VAUGHN, Appellants

BY: OWEN, GALLOWAY & MYERS, PLLC
Their Attorneys

BY: _____
Joe Sam Owen, MS Bar No. [redacted]

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CERTIFICATE OF SERVICE

I hereby certify that I served the Appellants' Brief upon the following counsel at their usual and customary business mailing address as follows:

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Senior Status Judge
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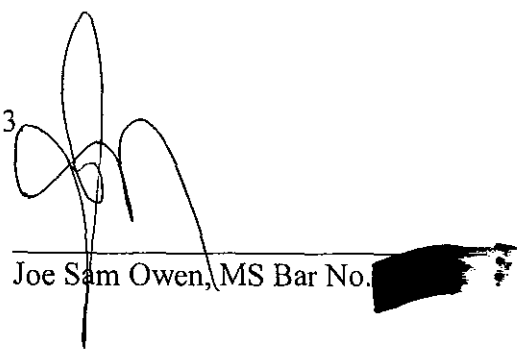
So certified, this, the 7th day of January, 2013.



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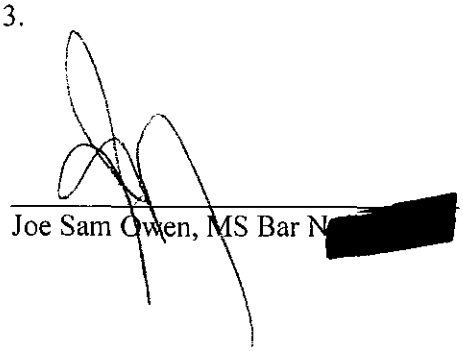
CERTIFICATE OF FILING

Pursuant to M.R.A.P. Rule 25(a), I hereby certify that I forwarded, for filing, the original and three (3) true and correct copies of the above and foregoing Corrected and Amended Brief of Appellants, via United States Postal Service, postage prepaid, to the following:

Honorable Kathy Gillis
Clerk, Supreme Court of Mississippi
P.O. Box 249
Jackson, Mississippi 39205-0249

I further certify that, pursuant to M.R.A.P. Rule 28(m), that I have also mailed an electronic copy of the above and foregoing on an electronic disk, saved in Adobe Portable Document Format (.pdf).

So certified, this, the 7th day of January, 2013.



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