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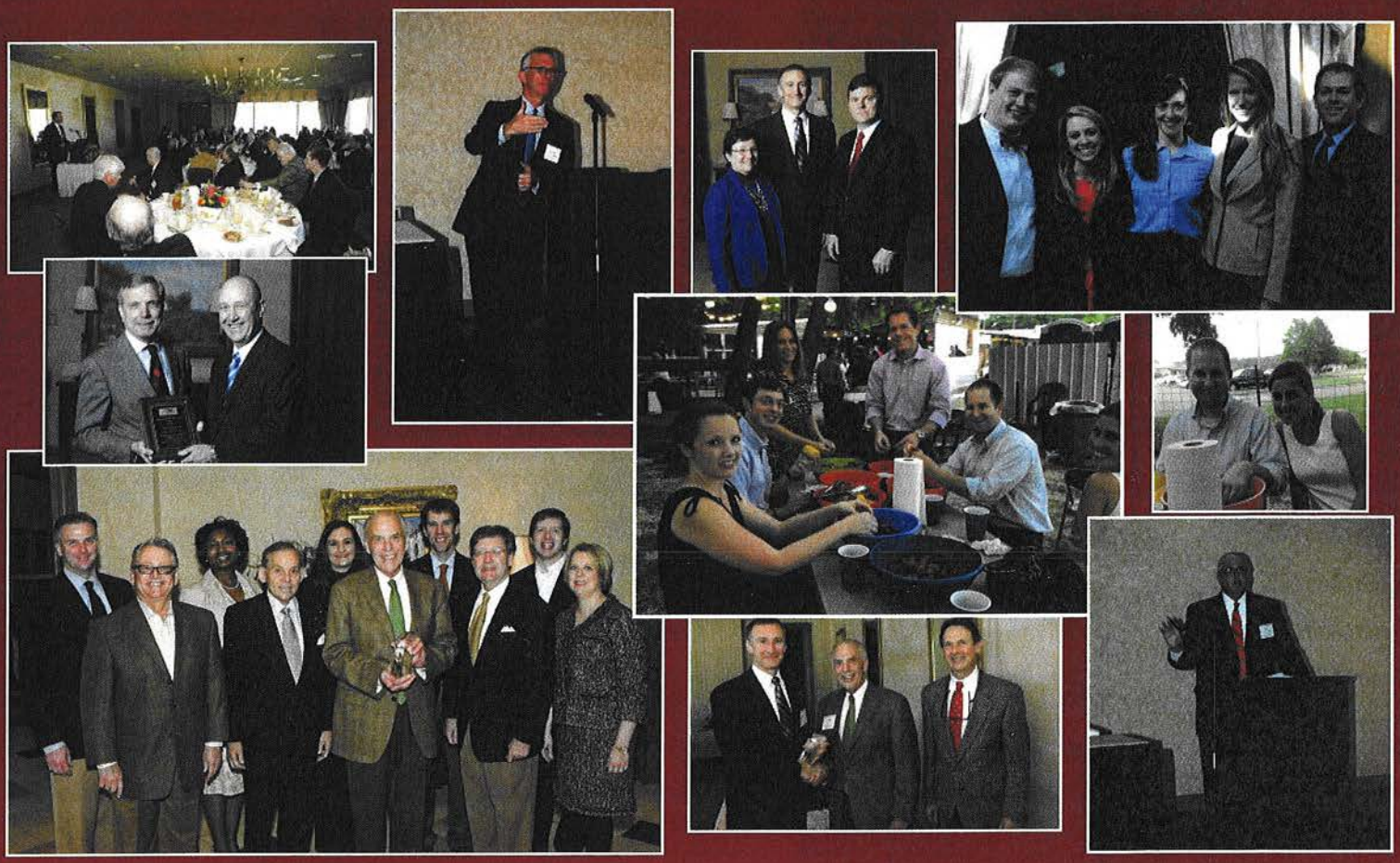

2012 - A Year to Remember

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Homebuilder Liability in Mississippi:
Why Homebuilders Should Not be Liable for Defective Component Products

By Kathryn Breard Platt

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Mississippi builders provide an implied warranty that the home was built in a workmanlike manner and is suitable for habitation. Additionally, the builder has a common law duty to perform with care, skill and reasonable experience, and a negligent failure to observe any of these is a tort as well as a breach of contract. *Parker v. Thornton*, 596 So.2d 854, 857 (Miss. 1992). However, there must be a distinction between a construction defect that results in a breach of warranty and a defect in a component product a builder could not reasonably discover.

A prime example of the inequity in holding a builder liable for a defective component product is seen in the recent Chinese Drywall litigation. The large demand for drywall after Hurricanes Katrina and Rita lead to a shortfall of the product, which in turn led to a larger import of the Chinese product. Defective Chinese Drywall caused severe damage to homes, and the damage was not just to the drywall itself. The drywall's emissions corroded copper and other metals, causing damage to electrical systems, appliances, and electronics. Some people also reported health problems from exposure to sulfur emissions. As a result, thousands of people joined in class action lawsuits against the Chinese Drywall manufacturers, as well as distributers, retailers, homebuilders, and installers, alleging – among other things – strict liability for a product defect, general negligence, breach of warranty, and breach of contract.

When assessing the implications for the manufacturers and sellers of drywall, liability for the defective product is obvious: the purpose of strict product liability laws is to place liability on the manufactures and sellers who place a defective product into the stream of commerce. But what about homebuilder liability? Mississippi law does not place a duty on a builder to inspect component products for latent defects. More importantly, Mississippi law has held that improvements to real property are not "products," and therefore, an action for strict products liability will not lie. Nevertheless, Mississippi homebuilders were flooded with drywall claims.

Recently, Knauf Plasterboard Tianjin Co. entered into a landmark settlement wherein it agreed to pay over half a billion dollars to settle homeowner claims. The settlement finances complete remediation, including replacement of Knauf's defective drywall, wiring, appliances, electronics and all other components damaged by the drywall; alternatively, homeowners may receive a discounted cash payment in lieu of remediating their homes. The settlement also pays for the homeowners' legal fees, and it establishes a $30 million fund to cover claims arising from foreclosures, short sales and personal injury. It appears the settlement will relieve builders from litigation involving the Knauf product, although the outcome will not be known until the settlement is perfected and cases are dismissed. Despite the settlement, and noting that the class action lawsuits will remain for homeowners whose homes have other brands of Chinese Drywall, Mississippi homebuilders should be entitled to dismissal in such lawsuits in the future. This article addresses issues arising out of such claims and some applicable history.

Statutes of Limitation versus Statutes of Repose

Most cases addressing products liability in the context of construction claims analyzed the statute of limitations issue and whether the defective condition appears in a "product" or an "improvement to real property" for purposes of Mississippi's statute of repose for construction deficiencies, Miss. Code Ann. §15-1-41.

"Statutes of limitations" and "statutes of repose" operate to prevent the right to bring an action, but they are not the same. In Mississippi, the statute of limitations for general negligence and strict products liability do not begin to run until the injury accrues; a plaintiff has three years from the date of injury or from the date the plaintiff knew or should have known of the injury to bring suit. *Wolfe v. Dal-Tile Corp.*, 876 F.Supp. 116, 121 (S.D. Miss. 1995); Miss. Code Ann. §15-1-49. Conversely, a statute of repose "cuts off the right of action after a specified period of time...regardless of the time of the accrual of the cause of action or of notice of the invasion of a legal right." *Windham v. Latco of Mississippi, Inc.*, 972 So.2d 608, 611 (Miss. 2008) (citation omitted).

Section 15-1-41 states in part, "No action may be brought to recover damages for injury to property, real or personal, or for an injury to the person, arising out of any deficiency in the design, planning, supervision or observation of construction, or construction of an improvement to real property, ... against any person, firm or corporation performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than six (6) years after the written acceptance or actual occupancy or use, whichever occurs first, of such improvement by the owner thereof..." (emphasis added). This limitations period is a statute of repose. *Theunissen v. GSI Group*, 109 F.Supp.2d 505, 509 (N.D. Miss. 2000). While Section 15-1-41 has been held to apply to both patent and latent defects, *Reich v. Jesco, Inc.*, 526 So.2d 550, 552 (Miss. 1988), the Mississippi Court of Appeals recently held the statute of limitations for homebuilder negligence was three years from the date the owner took possession of the home. *Smith v. DiMa Homes, Inc.*, 74 So.3d 377, 378 (Miss. App. 2011). The ruling in *Smith* did not address Section 15-1-41 or its affect on the general negligence statute of limitations; nevertheless, the ruling appears

contrary to Mississippi precedent, because the *Smith* Court applied a strict three years from the date of occupancy.

History of Products Liability in Mississippi Prior to the MPLA

Prior to 1966, Mississippi law did not provide a strict liability cause of action against manufacturers of products; privity of contract was required for a consumer to maintain an action against a manufacturer. *Ford Motor Co. v. Myers*, 151 Miss. 73, 117 So. 362 (Miss. 1928). The law changed in 1966 with *State Stove Manufacturing Co. v. Hodges*, 189 So.2d 113 (Miss. 1966), cert. denied, 386 U.S. 912, 87 S.Ct. 860, 17 L.Ed.2d 784 (1967). *State Stove* involved the destruction of plaintiffs' home when an electric water heater – manufactured by State Stove and installed by contractors Yates and Gary – exploded only eight months after plaintiffs moved in. Yates and Gary were contractors and operators of a hardware store. The Mississippi Supreme Court held that State Stove was not liable under Restatement (Second), Torts, Section 402A because the water heater as manufactured was not in a defective condition unreasonably dangerous to the consumer and because it was not expected to reach the consumer without a substantial change in its condition. When the water heater left State Stove, it included instructions and detailed drawings on how to install a combination temperature and pressure relief value with the heater. *Id.* at 122. The Court found Yates and Gary liable because they did not follow State Stove's instructions and drawings for installing the combination valve, thus resulting in the explosion and plaintiffs' damages. *Id.* Moreover, Yates and Gary were not mere installers; they owned the hardware store that sold the heater to plaintiffs, and therefore, they were also sellers. *Id.* at 123.

State Stove recognized Mississippi was the only State at that time to enforce privity of contract. Seeing "no rational basis for continuance," the Mississippi Supreme Court overruled *Ford Motor Co.* and abolished privity of contract in a lawsuit by a consumer against a manufacturer. 189 So.2d at 116. Moreover, by adopting the Restatement, Mississippi recognized strict liability as a theory of recovery against manufacturers. *Id.* at 118. Pursuant to *State Stove*, if the product "left the defendant's control in a dangerously unsafe condition, or was not reasonably safe, or was unsafe for its intended use, the defendant was liable whether or not he was at fault in creating that condition, or in failing to discover and eliminate it." *Id* at 121.

Subsequent to *State Stove*, three Mississippi Supreme Court cases held a homebuilder was only strictly liable to the original purchaser with whom he had privity, thus deciding a home was not a product to which the rule of strict liability in tort applied. *Oliver v. City Builders, Inc.*, 303 So.2d 466 (Miss. 1974) (action by remote purchaser against builder for cracks in floor and walls); *Brown v. Elton Chalk, Inc.*, 358 So.2d 721 (Miss. 1978) (action by remote purchaser against builder for construction defects); *Hicks v. Greenville Lumber Company, Inc.*, 387 So.2d 94 (Miss. 1980) (action by remote purchaser against builder for defective "T" joint under home). *Oliver*, *Brown* and *Hicks* were overruled when the privity requirement was abolished in *Keyes v. Guy Bailey Homes, Inc.*, 439 So.2d 670 (Miss. 1983). In *Keyes*, following the current trend in other jurisdictions, the Mississippi Supreme Court held a builder may be liable on the basis of negligence or the breach of an implied warranty to a second or subsequent purchaser of the home. *Id.* at 671. The Court also stated, "we have already recognized that a first purchaser should be able to recover damages from the builder if the builder was in some way at fault for the loss. That is how it should be." *Id.* at 672 (emphasis added). The Court further pointed out that the Mississippi legislature abandoned the privity requirement in all such actions via Miss. Code Ann. § 11-7-20, and moreover, Miss. Code Ann. §15-1-41 provided a statute of repose, giving builders a definite limit of time on their exposure. *Id.* at 673.

In 1979, the Fifth Circuit, applying Mississippi law, held that those who merely provide repairs and installation of a component product, and thereby do not create or aggravate the defective condition, could not be held strictly liable. *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 604 F.2d 950, 955 (5th Cir. 1979) (distinguishing *State Stove* since the installer in *State Stove* also supplied the part and was therefore a seller). The Court reasoned:

> [T]he reasons for imposing strict liability on a manufacturer do not apply equally to a furnisher of services upon whom liability is sought to be imposed for defects neither created nor aggravated by it. Such liability is imposed on manufacturers to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves
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> In some cases an installer or repairer might be in better position than the consumer of a product to detect dangerous defects in a product, but in many cases such a contractor would not have the knowledge necessary to recognize such defects or the opportunity to detect them in the course of furnishing services. Imposing a duty to discover and warn of dangers would require them more fully to examine the products they service, and to pass on the cost of this additional service not ordered by the consumer.

Id. at 955-56 (internal quotation marks and citations omitted).

In 1987, the Mississippi Supreme Court was faced with a statutes of limitations question where an oil refinery worker brought suit against a contractor to recover for injuries sustained in an explosion that occurred in 1983. *Smith v. Fluor Corp.*, 514 So.2d 1227 (Miss. 1987). Smith alleged the defendant contractor, Fluor, negligently and defectively designed, manufactured and installed the pre-heater/heat exchanger unit and associated valves and piping which caused the explosion. Fluor, who had not been on the premises since 1958, claimed Smith's action was barred by Miss. Code Ann. 15-1-41, which then provided a ten year limitations period. *Id.* at 1228-29. The Court analyzed whether the heat exchanger was an appliance or product rather than an improvement to real property and held the heat exchanger was so interconnected with the building equipment at the time the refinery was constructed, that it was "an improvement to real property" as opposed to a "product," thereby limiting the time within which an action had to be brought for "deficiency in the construction of an improvement to real property." *Id.* at 1229-30.

The next year, the Mississippi Supreme Court decided *Moore v. Jesco, Inc.*, where poultry farmers brought a strict liability action against a chicken house designer and construction company. 531 So.2d 815 (Miss. 1988). The chicken houses were designed by AMCA and Varco-Pruden and constructed by Jesco; plaintiffs alleged the houses were defective in their design, manufacture, materials, warnings and construction. *Id.* at 816. The *Jesco* Court

held that the component parts of the chicken houses were "improvements to real property" and not "products," and therefore, as a matter of law, "an action based on strict products liability will not lie." *Id.* at 817 (Citing *Smith, supra*).

In another "improvements" versus "products" case, the Fifth Circuit found fire-proofing materials were covered by the statute of repose. *Trust Co. Bank v. U.S. Gypsum Co.*, 950 F.2d 1144 (5th Cir. 1992). In *Trust Co. Bank*, the building owner sued the manufacturer of asbestos-containing fireproofing materials, seeking costs for asbestos abatement 22 years after construction of the building was completed. 950 F.2d at 1146. Plaintiff argued Section 15-1-41 did not protect manufacturers from products liability actions and that asbestos containing materials are not improvements to real property. *Id.* at 1151. The Fifth Circuit opined, "[W]hile it is true that some states have denied repose protection to the manufacturers of defective building products, Mississippi is not one of those states." *Id.* The Court's reasoning was based on the express language of Section 15-1-41, and it held the express language of 15-1-41 includes manufacturers who furnish the design for improvements to real property. *Id.* Moreover, because fireproofing materials increased the value of the building and made it more useful, they constituted an improvement of real property, and thus Section 15-1-41 acted to shield the manufacturer from liability. *Id.* at 1152. Even though *Trust Co. Bank* has not been overruled, subsequent cases decided by the Mississippi Supreme Court indicate the holding is erroneous.

The MPLA

State Stove provided the framework for Mississippi products liability claims until the adoption of the Mississippi Products Liability Act (MPLA) in 1993. While common law strict liability, as laid out in *State Stove*, is no longer the authority on the necessary elements of a products liability action, the concept of strict liability is still quite alive within the statute, and the principles in *State Stove* are a driving force in products liability actions even after adoption of the statute. *Huff v. Shopsmith, Inc.*, 786 So.2d 383, 387 (Miss. 2001) (citation omitted). "Whether an action is labeled 'statutory products liability' or 'strict liability' matters little since the basic precepts are largely the same. *Id.*

Under the MPLA, a product may be defective when 1) the product's manufacture deviated in a material way from product specifications, 2) the product failed to contain adequate warnings or instructions, 3) the product was defectively designed, or 4) the product failed to comply with an express warranty or representation upon which the claimant relied. In addition, a claimant must prove the defective condition rendered the product unreasonably dangerous and proximately caused claimants' damages. Miss. Code Ann. §11-1-63. The express language of the MPLA states that liability extends to manufacturers and sellers of a product, and in order to recover under the MPLA, a claimant must prove the product left the control of the manufacturer or seller in a defective condition. Miss. Code Ann. §11-1-63 (a). It must be noted, however, that the economic loss doctrine prohibits recovery in tort for damage to the product itself. *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 736 So.2d 384, 387 (Miss.App. 1999). This does not mean that consumers who suffer loss or damage to only the product are without recourse; contract law and the law of warranties provide consumers adequate remedies at law. *Id.*; *see also McKee v. Bowers Window & Door Co., Inc.*, 64 So.3d 926 (Miss. 2011). But note, however, the statute of limitation for a breach of warranty for goods is six years from the tender of delivery. Miss. Code Ann. §75-2-725.

The MPLA and its Application to Construction Claims

Even though the common law strict liability elements annunciated in *State Stove* were abrogated by the MPLA, *State Stove* and its predecessors remain important cases to examine in the context of construction law and liability for product defects, because the *State Stove* Court went so far to hold, "the appropriate standards of responsibility are well stated in [the Restatement] which we adopt insofar as it applies to a manufacturer of a product *and to a contractor who builds and sells a house with the product in it.*" 189 So.2d at 118 (emphasis added). Yet, strict liability for a product defect is understood to apply against manufacturers and sellers of a product, and sellers must be in the business of selling such a product. Importantly, in *State Stove*, Yates and Gary played a dual role: seller and homebuilder. *Id.* at 123. Accordingly, the Court's broad reach of strict liability – extending it to contractors – is not in accord with the Court's analysis and reasons for holding Yates and Gary liable.

Mississippi State and Federal Courts have since distinguished "products" from "improvements to real property," although – again – most cases have analyzed the issue with respect to statutes of repose. In the pivotal case of *Moore v. Jesco*, the Mississippi Supreme Court held that component parts of chicken houses were "improvements to real property" and not "products," and therefore, as a matter of law, "an action based on strict products liability will not lie." 531 So.2d at 817. Noting the limitation period applies to patent and latent deficiencies, the Court found the limitations period began to run on the date of occupancy. *Id.* The plaintiffs argued, in the alternative, that defendants were "suppliers of products" or materialmen and thus not protected by Section 15-1-41, which the Court rejected. *Id.* The Court was correct in upholding summary judgment, because the Statute of Repose explicitly applied to the designer and contractor. However, the manufacturer of component parts was not a defendant, and the Court did not address whether a separate component product falls outside the Statute of Repose.

In *Wolfe v. Dal-Tile Corp.*, a waitress sued a tile supplier for negligence, strict liability and breach of implied warranted for injuries she sustained in 1986 when she fell on the tile at her place of employment. 876 F.Supp. 116 (S.D. Miss 1995). Noting that the Mississippi Supreme Court had not addressed the issue of whether a supplier is protected by the statute of repose, the federal court made an *Erie* guess on how the Mississippi Supreme Court would rule. *Id.* at 118. The Court looked at several cases, including *Moore*, *Smith* and *Trust Co. Bank*, and held plaintiff's strict liability claim should be dismissed because the tile at issue was an improvement. *Id.* at 121. The Court did not address the MPLA and its application to plaintiff's claims. Nevertheless, the Court made an important observation in Footnote 5:

> [T]he statement made by the *Moore* court that strict products liability actions could not be maintained in cases involving "improvements to real property" as opposed to products was clearly the holding of the case and not dictum. *In the opinion of this Court the fallacy of that decision is that material sold can be both "a product" and "an improvement to real property."* It does not logically follow that either term is exclusive of the other. If this Court had the authority to certify this question

to the Mississippi Supreme Court, it would.

Id. at 121, fn 5 (emphasis added).

When assessing liability for a "product defect" the first inquiry should be "whether the defendant is a manufacturer or seller in the business of selling a defective product." *Scordino v. Hopeman Bros., Inc.*, 662 So.2d 640, 642 (Miss. 1995) (citation omitted). The *Scordino* Court was called upon to determine "whether a joiner subcontractor, in the business of installing shipboard furniture, beds, box berthing, non-structural bulkheads, overheads, installation, etc., is strictly liable or negligent as a manufacturer or a seller under the [Restatement] for installing and supplying asbestos paneling as required under the subcontract." 662 So.2d at 641-41. The Court examined cases in other jurisdictions which "stand for the proposition that a contractor/subcontractor is not a seller, within the scope of the [Restatement], and is therefore not liable for any component parts it may supply in compliance with the performance of a job or service." *Id.* at 645. It also distinguished *State Stove*, pointing out the Yates and Gary "were in the chain of delivery of the product in a different capacity than a mere contractor and that capacity was, inarguably, a seller." *Id.* at 643. The Court concluded the defendant, as a subcontractor, merely supplied the materials to complete the service for which it was hired pursuant to the contract between the parties, and thus, it was not liable under the Restatement. *Id.* at 645. Moreover, because the subcontractor did not know of the hazards of the asbestos paneling, nor was there evidence that it should have known of the hazards, it was not negligent in its failure to warn of the hazards of asbestos. *Id.* at 646-47.

While *Scordino* analyzed the terms "manufacturer" and "seller" in light of the Restatement and without addressing the MPLA, the analysis and conclusions are sound. The implications of the case should be that one who merely supplies a product to incorporate in a building project should not be held liable for defects in that product where the person neither knew nor should have known of the product's defective condition.

In *McIntyre v. Farrel Corp.*, the Fifth Circuit certified a question to the Mississippi Supreme Court: whether Miss. Code Ann. §15-1-41 provides repose protection to a manufacturer of a piece of industrial machinery which becomes incorporated into a factory. 680 So.2d 858 (Miss. 1996). In *McIntyre*, plaintiff was injured when his left hand was caught in a piece of equipment at his employer's tire plant. *Id.* at 858. The machinery was manufactured by Farrel and sold to the original owner of the plant in 1938; the owner then sold the plant to plaintiff's employer in 1987. *Id.* at 859. The Mississippi Supreme Court answered that a large piece of industrial machinery may constitute an improvement to real property under Mississippi case law; however, "the intent of the Legislature in passing §15-1-41 is most logically understood as having been to provide repose protection to parties such as architects, contractors, and engineers who are engaged in the construction business." *Id.* at 860-61. Thus, this logical understanding of the Legislature's intent "will in most cases render irrelevant the fact that a given piece of machinery constitutes an improvement to real property for the purposes of §15-1-41." *Id.* The Court went on:

> [A] logical analysis of the statute, along with a review of the persuasive authority on point, leads inescapably to the conclusion that the Legislature did not intend for manufacturers to be within the protected class of parties under §15-1-41... There is no rational basis for the Legislature to have concluded that manufacturers of products which, for whatever reason, become attached to real property should be faced with a lesser degree of liability than that faced by manufacturers of more mobile products.

Id. at 862. Indeed, "[b]asing liability or a lack thereof on the extent to which a product is attached to real property is so arbitrary as to shock the conscience." *Id.* at 864. As a result, *McIntyre* steers away from the overly broad holding of *Moore* without addressing the case or overruling it.

In *Theunissen v. GSI Group*, a farm laborer lost part of his leg when his foot became entangled in an unguarded auger under the floor of a grain bin; he sued the company that designed, planned and supplied the materials for the grain bin. 109 F.Supp.2d 505 (N.D. Miss. 2000). The parties did not dispute that GSI was not the designer, seller or manufacturer of the under floor auger, but instead, Theunissen averred GSI should have "designed out" any hazards that may have been created by the auger. *Id.* at 511. Noting *McIntyre* held that Section 15-1-41 does not afford protection to manufacturers, the Court found GSI should not be classified as an original equipment manufacturer since it did not ship a completed piece of equipment; GSI's role was "in the nature of designer, planner and supplier of an improvement" and thus within the protection of Section 15-1-41. *Id.*

In *Ferrell v. River City Roofing, Inc.*, plaintiff brought suit in 2001 against defendants for faulty workmanship and defective roofing. 912 So.2d 448 (Miss. 2005). The roofing contractor, River City, sought summary judgment since it installed the roof in 1993. *Id.* at 450-51. Citing to *Smith, Phipps* and other cases, the Mississippi Supreme Court analyzed whether a new roof is an improvement to real property and found that, at the time of completion, the roof was a valuable addition "amounting to more than a mere repair, which was intended to enhance the value of Ferrell's building." *Id.* at 456. Moreover, relying on *Moore*, the Court reiterated that an action based on strict products liability will not lie. *Id.* at 458. *Ferrell* is distinguishable from other cases in that the defendant was a roofing contractor and plaintiff claimed the roof as a whole was defective. The roof was deemed an improvement, not a product, but the issue of "whether the roofing materials were products for which a manufacturer could be held liable" was not addressed.

In *Winkel v. Windsor Windows and Doors*, plaintiffs filed suit in 2002 against the window manufacturer, stucco producer and contractor who installed the stucco exterior on their home in 1995; the window manufacturer moved for summary judgment based on the statute of repose. 983 So.2d 1055, 1056 (Miss. 2008). Windsor designed the windows and supplied a general bulletin for the installation of the windows in homes with stucco exteriors, and the subcontractor who installed the windows followed Windsor's instructions. *Id.* at 1057. *Winkel* reaffirmed *McIntyre*, found *Wolfe* and *Theunissen* unpersuasive, and in reversing summary judgment, held that manufacturers of mass-produced products who supply general installation instructions are not covered by Section 15-1-41, because they do not furnish the required particularized design of an improvement to real property which results in protection under the statute. *Id.* at 1058-59.

In *McKee v. Bowers Window & Door Co., Inc.*, homeowners filed suit against their home builder (Ellington), window seller (Bowers) and window manufacturer (Weather Shield) alleging windows were a defective product. 64 So.3d 926 (Miss. 2011). Ellington instructed the McKees to look at windows at Bowers, and the McKees

ultimately purchased Weather Shield windows, which Ellington installed. *Id.* at 928. The McKees alleged their home had problems other than the windows, and not only were the windows a defective product, they were not installed correctly. *Id.* at 930. After discovery and designation of experts, Bowers and Weather Shield filed for summary judgment claiming the McKees could not establish the necessary elements to prove the windows were defective, and both motions were granted by the trial court. *Id.* at 931. In affirming dismissal of Weather Shield, the Mississippi Supreme Court reasoned:

> In 1993, the Mississippi legislature promulgated the Products Liability Act and codified what had formerly been common law strict liability.... Since that time products liability claims have been specifically governed by statute...
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> In order for the McKees' design-defect claim to survive Weather Shield's "Motion for Summary Judgment," they must establish that, when the windows left Weather Shield's control, there are genuine issues of material fact regarding whether the windows were (1) "designed in a defective manner;" (2) which rendered them "unreasonably dangerous" to the McKees; (3) that the "defective and unreasonably dangerous condition ... proximately caused" the McKees' damages; (4) that the damages were not caused by an "inherent characteristic" of the wooden windows which "cannot be eliminated without substantially compromising the product's usefulness or desirability" and which an "ordinary person" would recognize; (5) that Weather Shield knew or should have known of the "danger that caused the damage;" and (6) that "there existed a feasible design alternative that would have to a reasonable probability prevented the harm" without also "impairing the utility, usefulness, practicality or desirability of" the windows. Miss. Code Ann. §11–1–63(a), (b), & (f) (Rev.2002).
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> This Court finds that the McKees offer only mere proof of damage following the use of the Weather Shield windows. The fact that their windows leaked and rotted is insufficient for this design-defect claim to survive Weather Shield's "Motion for Summary Judgment."

Id. at 937-98 (internal quotations and citations omitted). The Court also affirmed Bowers' dismissal based on the same analysis, and added that Bowers did not exercise substantial control over the design, testing, manufacture, packaging or labeling of the windows; alter or modify the windows; or have actual or constructive knowledge of a defective condition of the windows. *Id.* at 939. While the MPLA does not abrogate a statutory cause of action for breach of implied warranty or any warranty claims, the McKees did not make such claims against Weather Shield or Bowers. *Id.* at 940. The *McKee* case does not mention *Moore*, but it demonstrates that a homeowner may sue a product manufacturer of a defective component part so long as the elements of the MPLA are satisfied.

Builders and Installers Should Not be Liable for Defective Component Parts

When a builder or installer contracts to provide a service, there is an implied warranty that the work was performed in a workmanlike manner. *DiMa Homes, Inc. v. Stuart*, 873 So.2d 140, 145 (Miss.App. 2004) (citations omitted). Additionally, the Mississippi New Home Warranty Act, Miss. Code Ann. §83-58-1, *et. seq.*, provides homeowners with a one year statutory warranty for defects due to noncompliance with building standards and a six year statutory warranty for major structural defects. Miss. Code Ann. §83-58-5(1). The Act does not explicitly apply to component products which fall under the MPLA. To date, the Mississippi Supreme Court has not analyzed the MPLA and New Home Warranty Act together. Nevertheless, a builder or installer should not liable for products covered under the MPLA unless he altered the product, sold the product, or knew or should have known of the product's dangerous condition.

Moore (decided pre-MPLA) is still good law and supports the proposition that a home, as a whole, is not a product subject to the MPLA. *McIntyre* and *Theunissen* (decided post-MPLA) steer away from *Moore's* holding that *all* improvements to real property are excluded from a strict liability cause of action, thus alleviating the concern addressed by the *Wolfe* Court in Footnote 5. Moreover, the *McKee* court analyzed the MPLA with respect to improvements to real property, making it clear that a homeowner may sue a seller or manufacturer of a component part, but the homeowner must satisfy the elements of the MPLA. While *Ferrell* (post-MPLA) restated *Moore's* holding that a strict products liability action will not lie for improvements to real property, *Ferrell* must be distinguished. The issue decided in *Ferrell* concerned a roofing contractor's negligent installation of a roof. The court properly found the contractor was a person protected under Miss. Code Ann. §15-1-41, and because more than six years had passed since the roof was installed, plaintiff's claim was barred. The roof as a whole was not a "product", and applying *Moore*, it was not subject to products liability law. *Ferrell* did not address whether the manufacturer of the roofing materials was liable for a product defect.

Analysis of these cases leads to the following conclusion: a home, roof or other completed improvement to real property constructed by a builder is not a "product" for purposes of strict products liability. However, the individual component parts (drywall, wood, windows, roofing materials, furnace, appliances, etc.) remain subject to the MPLA so that the manufacturers and sellers of these component parts do not escape strict liability through Miss. Code Ann. §15-1-41 after the passage of six years. This is not to say that the builder completely escapes liability for component parts: if the builder negligently installs the component part and that negligent installment leads to plaintiff's damages, then the builder has breached his implied warranty, and plaintiff must bring his claim within six years.

In the context of Chinese Drywall, builders unknowingly placed defective Chinese Drywall in thousands of homes. They were not aware of the latent defects, nor should they have been. They had no duty to inspect the component parts for latent defects either. The primary claim made by homeowners was not one of defective installation, but rather, was one of strict products liability. While it is true the homeowners also claimed the builders/installers breached the implied warranty of habitability, the underlying cause of the inhabitability was the defective drywall. The builders should not be liable for such a condition. It is no different than the situation where the builder properly installs gas fireplace (an improvement), and unbeknownst to him, it is defective, causing a fire that burns the home down. Holding a builder liable for latent defects of component parts of a structure places an unreasonable burden on the builder and goes against the intent of the MPLA and the New Home Warranty Act. ■