

**IN THE COURT OF APPEALS 03/26/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00010 COA**

**CONSOLIDATED WITH**

**NO. 94-CA-00011 COA**

**JUNA BRASHER AND GWEN WINDHAM**

**APPELLANTS**

**v.**

**THE 1906 COMPANY, A MISSISSIPPI CORPORATION, D/B/A VISUAL ARTS STUDIO,  
AND JOHN C. THOMSON, D/B/A VISUAL ARTS STUDIO**

**APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. WALTER M. O'BARR

COURT FROM WHICH APPEALED: FORREST COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

WAYNE HYNUM

ATTORNEYS FOR APPELLEES:

FRANK W. TRAPP, LUTHER T. MUNFORD, ANGELA M. MCLAIN, DORRANCE  
AULTMAN, VICTOR A. DUBOSE, ALAN W. PERRY, AND JANET MCMURTRAY

NATURE OF THE CASE: CIVIL: INVASION OF PRIVACY

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT FOR THE DEFENDANTS

BEFORE BRIDGES, P.J., PAYNE, AND McMILLIN, JJ.

BRIDGES, P.J., FOR THE COURT:

Gwen Windham and Juna Brasher were allegedly videotaped in various stages of being undressed without their knowledge or permission at the Visual Arts Studio in Hattiesburg. They filed a complaint against the studio, the 1906 Company, and John Thomson. The lower court granted summary judgment to the Defendants because Windham and Brasher filed their complaint more than one year after they learned of their claim. Windham and Brasher appeal arguing that a one-year statute of limitations does not apply to their claim. We disagree and affirm the decision of the lower court.

#### STATEMENT OF THE FACTS

The 1906 Company is a family owned company in Hattiesburg, which primarily bottles Coca-Cola products. Richard S. Thomson, Sr. was the Chairman of the Board of Directors. He and his wife jointly owned five (5) of the eight (8) outstanding shares of stock in the company. His three children each had a trust which owned one share of stock.

The Thomsons' youngest child, John, was apparently a troubled young man with a history of alcoholism and drug addiction. He was treated on at least three (3) separate occasions for his addictions. He was finally placed in a halfway house, where he stayed under supervision of counselors for approximately one year. When he returned home, John asked his father to help him open up a photography studio. The 1906 Company opened Visual Arts Studio in Hattiesburg for John to operate. Approximately \$120,000.00 was spent by the company for the new Visual Arts studio. Another \$300,000.00 was spent by the company on equipment for the photography business. The primary business of the studio was to be the production of training program videos for medical personnel. Additionally, John took still photographs of women who were interested in "becoming models."

Sometime in July of 1991, John allegedly asked Gwen Windham to come to the studio and model for some photographs. Windham claims that she went to the studio approximately six (6) times in July to have pictures made. During her photography sessions, she made numerous clothing changes in the studio dressing room where she was at many times completely nude. Windham maintains that John told her it was necessary that she not wear underwear during her sessions to avoid "panty lines" in her photographs.

In August, John allegedly approached Juna Brasher and asked her to let him photograph her at the studio. Brasher claims that John specifically asked her to wear a "bodysuit" so that she could not wear underwear. Brasher also maintains that she made various clothes changes in the dressing room at the studio in the nude.

Not long after the photograph sessions with Brasher and Windham, John accidentally gave one of his customers a videotape that contained nude, dressing room photographs of the customer, instead of the posed, clothed shots that she was expecting to receive. The girl notified the Hattiesburg Police Department in November 1991 that John was secretly videotaping and photographing girls while they were changing clothes in the dressing room at the studio. The police obtained a search warrant and raided the studio. Numerous pornographic videotapes and other materials were found that were

produced by John and copyrighted by the Visual Arts Studio. The police also discovered that John was incorporating his secretly taped videos of the girls undressing at the studio into his pornographic movies.

It was also discovered that John was able to videotape these unsuspecting women in the dressing room because he had a "microcamera" about the size of an ink pen, hidden in the dressing room, that was attached by cable to monitors and video equipment in another room. The microcamera was purchased by Hattiesburg Coca-Cola Bottling Company.

The Hattiesburg Police Department assumed the task of identifying the women in the dressing room videotapes. John refused to cooperate, and pleaded the Fifth Amendment whenever he was asked to identify the girls on the tapes. The search received immediate and extensive media coverage. Reports of the search, seizure, and later, civil complaints were in numerous newspapers, and on television and radio shows.

Windham and Brasher contacted their attorney that month. Windham then went to the police department to determine whether she was on any of the tapes. She was told that she was not. Apparently, Brasher never contacted the police to determine whether she was on any of the tapes. No evidence was introduced to show that either of the women was on any of the tapes.

By the summer of 1992, at least fifteen (15) civil lawsuits claiming damages from John's conduct had been filed by other plaintiffs. All of these lawsuits were settled. Windham and Brasher both filed suit in May of 1993, over one year after they learned of John's actions. The lower court granted the Defendants a summary judgment stating that both Windham and Brasher's claims were barred because they were filed after the applicable statute of limitations. The lower court also opined that summary judgment was appropriate because the Plaintiffs could prove no damages. Windham and Brasher now appeal arguing that the one-year statute of limitations on their claim did not apply, and if it did, it was tolled by fraudulent concealment.

## ARGUMENT AND DISCUSSION OF THE LAW

### I. WHETHER THE LOWER COURT ERRED IN FINDING THAT THE INVASION OF PRIVACY CLAIM WAS BARRED BY A ONE-YEAR STATUTE OF LIMITATIONS.

On appeal, Brasher and Windham contend that the lower court incorrectly ruled that their claims were barred by the one-year statute of limitations as stated in section 15-1-35 of the Mississippi Code. That section specifically mandates:

All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menance, and all actions for slanderous words concerning the person or title, for failure to employ, and for libels, shall be commenced within one (1) year next after the cause of such action accrued, and not after.

Miss. Code Ann. § 15-1-35 (1972). There has been some confusion in the case law regarding which intentional torts are subject to the one-year statute of limitations of section 15-1-35, and which are not. In an effort to clear up some of the confusion surrounding the statute, the Mississippi Supreme Court discussed the statute at length in *Nichols v. Tri-State Brick & Tile Co.*, 608 So. 2d 324, 327 (Miss. 1992). In that case, the court held:

Even a casual reading of the statute leads inescapably to the conclusion that it does not cover, and was not intended to cover, all intentional tortious conduct . . . Clearly then, the fact that wrongful conduct is alleged to be intentional does not determine which statute controls . . . Where [as in previous cases] the conduct alleged may be fairly categorized as one of the enumerated torts, the one-year statute applies. Otherwise, it does not. We will not squeeze all intentional wrongs into the actions enumerated.

*Id.* at 332-33.

In other words, the statute cannot be circumvented merely by creatively renaming the cause of action. Invasion of privacy is not specifically enumerated in the statute. Thus, we now look to the *City of Mound Bayou v. Johnson* case. In that case the court held that where a cause of action is *substantially like the torts enumerated in section 15-1-35*, for which no specific statute has been provided, that cause falls under the constraints of the one-year limitations period of section 15-1-35. *City of Mound Bayou v. Johnson*, 562 So. 2d 1212, 1217 (Miss. 1990). We must then decide whether Windham and Brasher's claim of invasion of privacy is substantially like one of the torts enumerated in section 15-1-35.

In *Young v. Jackson*, the Mississippi Supreme Court specifically held it had "recognized that the one-year statute of limitations applies in invasion of privacy actions, the same as in actions for libel or slander." *Young v. Jackson*, 572 So. 2d 378, 382 (Miss. 1990). This holding has been reiterated by the Fifth Circuit in *Tichenor v. Roman Catholic Church*, F.3d 953, 961 (5th Cir. 1994) and the Southern Federal District Court of Mississippi in *Campbell v. Jackson Business Forms Co.* See *Campbell v. Jackson Business Forms Co.*, 841 F. Supp. 772, 774 (S.D. Miss. 1994) ("Before 1990, federal courts questioned which statute of limitations applied to invasion of privacy claims in Mississippi. *Young v. Jackson* resolved the dispute . . . conclusively stating that the one-year statute of limitations set forth in Miss. Code Ann. § 15-1-35 applies to common-law invasion of privacy claims."); *Watkins v. United Parcel Serv., Inc.*, 797 F. Supp. 1349, 1360 (S.D. Miss. 1992) ("action based on an invasion of privacy has a one year statute of limitations"), *aff'd*, 979 F.2d 1535 (5th Cir. 1992); *Mize v. Harvey Shapiro Enters., Inc.*, 714 F. Supp. 220, 224 (N.D. Miss. 1989) (although not solely relying on that ground, invasion of privacy action barred by one-year statute of limitations); *Wildmon v. Hustler Magazine, Inc.*, 508 F. Supp. 87, 88 (N.D. Miss. 1980) ("clear that the one-year limitation provision found in Miss. Code Ann. § 15-1-35 governs" action for libel, slander, and invasion of privacy); *Andrews v. GAB Business Serv., Inc.*, 443 F. Supp. 510, 513 (N.D. Miss. 1977) . Accordingly, this claim is barred by the one-year statute of limitations.

## II. WHETHER THE CLAIMS OF "DECEIT, OUTRAGE AND FRAUDULENT CONCEALMENT" FALL UNDER THE ONE-YEAR STATUTE OF LIMITATIONS.

Windham and Brasher next argue that the torts of deceit, outrage, and fraudulent concealment are not among the torts listed in section 15-1-35, and therefore are not barred by a one-year statute of limitations. We disagree. First, the supposed claims of deceit and outrage are nothing more than a part of the invasion of privacy previously alleged. Mere refusal to style the cause brought in a recognized statutory category provides "no escape from the bar of the statute of limitations applicable to intentional torts." *Dennis v. Travelers Ins. Co.*, 234 So. 2d 624, 626 (Miss. 1970). Although Windham and Brasher give several different names to their claims, all are based on the same alleged tortious conduct. The same facts are alleged as to each count. Indeed, these claims closely relate to the tort of intentional infliction of emotional distress. Our federal court has held that the tort of intentional infliction of emotional distress is the same type of tort enumerated under statute section 15-1-35. *Campbell*, 841 F. Supp. at 774; *Childers v. Beaver Dam Plantation, Inc.*, 360 F. Supp. 331, 333 (N.D. Miss. 1973) (suit alleging negligence but which is "in essence" a suit to recover on the intentional torts of libel and slander barred by the one-year statute). Thus, these claims also fall under the one-year statute of limitations and are also barred.

### III. WHETHER THE STATUTE OF LIMITATIONS WAS TOLLED BY FRAUDULENT CONCEALMENT.

Brasher and Windham next contend that if the one-year statute of limitations applies to their claims, the statute was tolled by "fraudulent concealment" of the claim by John and the 1906 Company. We disagree.

Under the Mississippi Code, the statute of limitations may be tolled by the fraudulent conduct of a person liable to another who is entitled to a cause of action:

If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

Miss. Code Ann. § 15-1-67 (1972). In order to establish fraudulent concealment there must be shown some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim. *Reich v. Jesco, Inc.*, 526 So. 2d 550, 552 (Miss. 1988).

It is clear that the 1906 Company took no action to conceal the existence of a camera in the studio dressing room after John was arrested. The company did nothing to impede the police investigation, nor did it ever assert any privilege under the Fifth Amendment. Windham and Brasher have failed to identify any act or conduct of the company which could constitute fraudulent concealment of their cause of action.

They next argue that because John exercised his constitutional rights and refused to answer questions in lawsuits filed prior to their cause, John fraudulently concealed their claim. We disagree. Fraudulent

concealment is defined as the nondisclosure of information which another party is *legally bound to disclose*. *Guastella v. Wardell*, 198 So. 2d 227, 230 (Miss. 1967). There is no duty to disclose privileged information. *Wilson v. Retail Credit Co.*, 325 F. Supp. 460, 465 (S.D. Miss. 1971). The privilege against self-incrimination is among those contemplated by Rule 26(b)(1) of the Mississippi Rules of Civil Procedure. *In re Knapp*, 536 So. 2d 1330, 1334 (Miss. 1988). Therefore, a civil defendant's valid exercise of the privilege against self-incrimination is not a "wrongful concealment" that would toll the statute of limitations. *See Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1464-65 (5th Cir. 1992) (trial court did not abuse discretion in excluding evidence of defendant's invocation of Fifth Amendment on issue of fraudulent concealment); *see also S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 191 (3d Cir. 1994) ("refusal to respond to discovery in such circumstances is proper and does not justify the imposition of penalties"); 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1280, at 515 (1990) ("Constitution prevents a federal court from imposing any sanction that has the effect of forcing the person invoking the privilege to answer"). Thus, there could be no fraudulent concealment claim arising from John's invocation of the Fifth Amendment.

#### CONCLUSION

It is clear to this Court that Windham and Brasher did not file their complaint in a timely manner and are therefore barred from bringing their suit against the Defendants.

**THE JUDGMENTS OF THE FORREST COUNTY CIRCUIT COURT ARE AFFIRMED.  
ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.**

**FRAISER, C.J., THOMAS, P.J., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND  
SOUTHWICK, JJ., CONCUR. BARBER, J., NOT PARTICIPATING.**