IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-00533

ROBERT S. ROBERTSON — APPELLANT

VERSUS

CHATEAU LEGRAND PROPERTY OWNERS' ASSOCIATION, INC. — APPELLEE

APPEAL

FROM THE CHANCERY COURT OF

HARRISON COUNTY, SECOND JUDICIAL DISTRICT,

MISSISSIPPI

REPLY BRIEF

(ORAL ARGUMENT IS NOT REQUESTED)

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1. Reply to: "Standard of Review."

The ASSOCIATION claims that the Trial Court based its decision on the equities of the situation. It states that this Court "will review solely whether the chancery court erred in its employment of equity." The ASSOCIATION cites R.K. v. J.K., 946 So.2d 764 (Miss. 2007), for authority and submits that the sole proper issue for consideration is "whether the Trial Court correctly employed equity based on all the evidence." Id. at 772-773. (See 21- 22, BRIEF OF APPELLEE.)

The ASSOCIATION is incorrect in its premise, and the R.K. v. J.K. case is not applicable here. The issues there involved a liquidated damages provision in the Property Settlement Agreement, i.e., the privilege of deducting certain attorney's fees from alimony payments based on certain acts, together with issues of contempt, child support payments, and arrears. It involved both the Federal District Court and the Chancery Court. It surrounded the wife planting a recording device in the husband's car which recorded various confidential conversations prior to divorce. The Property Settlement Agreement set out certain monetary provisions in the event litigation arose regarding the recordings as a result of the wife's instigation or encouragement or in the event she provided assistance regarding the recordings directly or indirectly in some litigation.

Several months after the entry of the Judgment of Divorce, the long time friend of and legal counsel to the husband filed a suit for wiretapping fraud against the wife. She responded with a petition to modify the Agreement to allow her to defend herself from the allegations in the Federal Court suit. The wife's relief was denied. Thereafter, she counterclaimed in the Federal Court suit for conspiracy, abuse of process, and conversion. The husband even intervened in the

suit which made him subject to her Counterclaim. She sought admissibility of certain of the tapes, the court granted her motion, and upon trial, the jury found that the wife proved abuse of process and conversion.

Thereafter, the husband's attorney advised the wife that the husband was going to discontinue payments to recoup his legal fees pursuant to the Property Settlement Agreement. She filed for contempt, and upon hearing, the Chancery Court found the husband in contempt for willfully and intentionally violating the Agreement by failing to make the payments, chose not to enforce the liquidated damages provision, and then found that the wife did not commit a material breach because she had a right to participate in her own defense. The Court held that her breach was not willful or contemptuous, and therefore, no attorney's fees were granted to him. Because the husband's actions were willful, attorney's fees were granted to her. On reconsideration, the Chancery Court reversed the finding of contempt against the husband "citing to the inequitable result" of imposing contempt and awarding fees against him but not her. Id. at 771. The husband was, however ordered to pay arrears and continue the payments. Both parties appealed.

R.K. claims that the provision is liquidated damages; J.K. claims that it is a penalty. This Court stated, "Since the chancery court based its decision on neither of these, instead looking to the equity of the situation, this Court will review solely whether the chancery court erred in its employment of equity." Id. at 772-773. The point is that the chancery court specifically based its decision on equity. This Court's review recognized that while the wife attempted with all good faith to uphold the Agreement, such was not the case with regard to the husband. Both the Chancery Court and the Federal District Court found that the husband actually assisted in the creation of the situation presenting the wife with a "Hobson's choice". Id. at 773. (Webster's defines "Hobson's choice" as an apparent choice when in reality there is no alternative; it is named after Thomas Hobson, an English liveryman, who insisted that the

client must take the horse nearest the stable door, or take none at all.) The Court stated the following:

> "She could act in such a manner possibly perceived as a breach of the Agreement, or she could sit idly by, defenseless, while R.K.'s close, long time friend, ultimately joined by R.K., charged her with violation of a federal statute.
>
> "In light of R.K.'s participation in the federal action against J.K. and R.K.'s own violation of the section he seeks to enforce, the chancery court properly considered equity in examining the dispute." Id. at 773-774.

The Court found that the Chancery Court did not abuse its discretion and applied the correct legal standard of equity. R.K. at 773-774.

The ASSOCIATION relies heavily on this case throughout its BRIEF OF APPELLEE, but the Trial Court here did not rely on it or on anything similar. In fact, the Trial Court makes no mention at all of the "legal standard of equity" nor can it be determined from the JUDGMENT that it looked to "the equity of the situation" at all. Actually, the Trial Court here specifically chose not to so do. It relied solely and only on the law and very clearly so stated. This is quite different from the R.K. v. J.K. case. The Trial Court ruled that ROBERTSON'S claims of continuing trespass are without merit based upon laches, knowledge, notice, and acquiescence. (RE:39-41; CP:90-92). The Trial Court ruled that ROBERTSON presented no evidence regarding the invalidity of the Amended Declaration. (RE:37; CP:88). The Trial Court did not enter an order specifically regarding the ASSOCIATION'S position that it could lock him out of his interval-owned units for failure to pay assessments, although it did mention this when it set out ROBERTSON'S testimony in its JUDGMENT and then denied all other relief. (RE:23, 43; CP:74, 94). Also, the Trial Court ruled that ROBERTSON had to pay for the ASSOCIATION'S designation stating that such would be needed by this Court to "fully

appreciate the surrounding circumstances which impacted this Court's findings and conclusions". (CP:246).

Also, ROBERTSON did not leave the ASSOCIATION with a "Hobson's choice". Throughout its BRIEF OF APPELLEE, the ASSOCIATION tries to sell the argument that the Trial Court was forced to base its decision on the equity of the situation and apply a standard of equity. However, ROBERTSON did not put the ASSOCIATION in a position of having no alternative but to trespass on his property to obtain payment of the assessment. The Declaration clearly states that it can either sue or foreclose to obtain the assessments. (See Article VI, Section 8, of the Declaration). (E:R-030). It voluntarily and affirmatively chose to do neither. It chose instead to trespass. That was not a decision forced upon it by ROBERTSON or anyone else. Accordingly, there was no "Hobson's choice" here, and the Trial Court did not need to resort to a standard of equity to make its decision in this case. The Trial Court based its decision on the law. It just incorrectly applied that law as we set out in BRIEF OF THE APPELLANT.

With regard to the other citations in this portion of the ASSOCIATION'S argument, it would appear that the law is correctly stated. We would, however, emphasize that all of the law cited by the ASSOCIATION is predicated on a trial court correctly applying the law. A better statement of the standard of review for this Court is as follows:

> "On review, we generally defer to a chancery court's findings of fact unless they are manifestly wrong or clearly erroneous. *Saliba v. Saliba*, 753 So.2d 1095, 1098 (Miss. 2000). We use a de novo standard of review when examining questions of law decided by a chancery court. *Id.*" Bailey v. Estate of Kemp, 955 So.2d 777, 781 (Miss. 2007).

ROBERTSON accepts the Trial Court's findings of fact, and under the standard of review set out immediately hereinabove, this Court defers to those findings unless manifestly wrong or clearly erroneous. He also accepts that this Court will use a de novo standard of review

when examining questions of law decided by the Trial Court. We expect that the de novo review will result in a ruling that supports ROBERTSON'S position.

2. Reply to : "The Judgment correctly applies equity by holding that Mississippi's three-year 'catchall' statute of limitations, Miss. Code Ann. §15-1-49 (1972) and the doctrines of *res judicata*, latches and 'unclean hands' barred Robertson's claim for damages and other relief against the Association."

The JUDGMENT here is based upon the Trial Court's application of the law without the need to look to the equity of the situation and without the need to apply the standard of equity, and it did not do so. (See ROBERTSON'S argument above.)

The first thing to clear up is that R. Clyde Abercrombie was a representative of and manager for Gulf Landing Resort, the name by which the condominium and property owners association were known prior to the "take over" by the ASSOCIATION from Abercrombie and his companies. Prior to the "take over", Abercrombie was effectively the ASSOCIATION. (RE:19; CP:70). The lawsuit filed by ROBERTSON against the ASSOCIATION includes the ASSOCIATION as it existed both before and after the "take over". Arguments by the ASSOCIATION that Abercrombie somehow was different from the ASSOCIATION are simply not true. The continuous trespass by the ASSOCIATION included that period during which the ASSOCIATION had Abercrombie serving as manager and also included that time when the ASSOCIATION had Esta McCrory serving in that position. It is ROBERTSON'S position, and it is the finding of the Trial Court, that the ASSOCIATION committed trespass on his property from 1991 through 1999. (RE:39-41; CP:90-92). Arguments made by the ASSOCIATION to the contrary are incorrect. (See pages 26-28, 32-33, BRIEF OF APPELLEE.)

The ASSOCIATION correctly sets out Miss. Code Ann. §15-1-49(1) and (2), identified as the "catch-all" three (3) year statute. The discovery rule, argued as being applicable here, by the ASSOCIATION, is a body of law that grew out of litigation involving Miss. Code Ann. §15-

1-49(2). That section provides that if the action involves latent injury or disease, the cause does not accrue until the "plaintiff has discovered, or by reasonable diligence, should have discovered, the injury". The trespass by the ASSOCIATION in ROBERTSON'S units was not latent, and while he had knowledge and notice, although very little of that, the discovery rule has no application in this case. The reason is simple. The ASSOCIATION continually trespassed in his units from 1991 through 1999. (RE:39-41; CP:90-92). "If the claim is a continuing tort, the statute of limitations does not begin to run until the date of the last injury." Randolph v. Lambert, 926 So.2d 941, 945 (Miss. App. 2006). That law does not mean that the statute of limitations begins to run on the date of the knowledge or the notice or the discovery of the injury. So, contrary to the ASSOCIATION'S contention, ROBERTSON does not advocate application of the discovery rule. (See page 29, BRIEF OF APPELLEE.) Further, the ASSOCIATION'S statement that the statute of limitations bars trespass claims where the circumstances giving rise to the claim were known or readily discoverable does not consider a continuing trespass. (See page 31, BRIEF OF APPELLEE.) (In lieu of repeating law already cited, please see specifically pages 16-19, BRIEF OF THE APPELLANT.)

The ASSOCIATION appears to take the position that the discovery rule negates the continuing tort doctrine. The ASSOCIATION cites no law supporting that position, and none can be found by the undersigned.

In effect, both the discovery rule and the continuing tort doctrine expand the primary three (3) year limitation period. If the action involved a latent injury and it was not discovered, and by reasonable diligence could not have been discovered until two (2) years after it was committed, then the primary three (3) year statute expands to a five (5) year statute of limitations. In a similar way, the three (3) year statute of limitations is expanded by the continuing tort doctrine.

Here, the ASSOCIATION trespassed in 1991 and in every year through 1999 with no three (3) year period where no trespass was committed. In fact, the trespass was every month if not every week, and sometimes every day. Therefore, the statute of limitations did not begin to run until 1999, the date of the last trespass. ROBERTSON had three (3) years at that point in which to file his complaint. As pointed out in BRIEF OF THE APPELLANT, ". . . recovery is permitted on theory that all violations are part of one continuing act." Stevens v. Lake, 615 So.2d 1177, 1183 (Miss. 1993). Accordingly, the one continuing act covered a period from 1991 through 1999, and ROBERTSON filed his suit in 2000, only months after the last act of trespass, well within the requisite three (3) year period. The three (3) year period was effectively expanded by the unlawful acts of the ASSOCIATION in continually trespassing on ROBERTSON'S property from three (3) years to eleven (11) years, that is from 1991 until three (3) years after 1999, which is 2002. The continuing tort doctrine applies to those trespasses committed by the ASSOCIATION not only with ROBERTSON'S whole-owned units, but also with his interval-owned units, notwithstanding the ASSOCIATION'S claims that neither Unit 307 nor the interval-owned units were the subject of trespass by it. (See pages 12, 18, and 27-28, BRIEF OF APPELLEE.) The record will speak for itself. To what extent trespass was committed regarding these units is an issue to be resolved in the damages portion of the trial. Even though his interval ownership of each of his two (2) units was for one (1) week out of a year, it was a fee simple ownership. Where the record shows trespass by the ASSOCIATION each year for that one (1) week period, then it must be a considered a continuous trespass.

The McCain case cited by the ASSOCIATION is as it states, a case regarding the discovery rule. It is not a case that says that the discovery rule trumps the continuing tort doctrine. McCain v. Memphis Hardwood Flooring Co., 725 So.2d 788 (Miss. 1988). There, trees were cut in May through July of 1991, but legal action was not taken until August 5, 1993.

It was claimed that it was not discovered until July, 1993, that the trees had even been cut. At issue was the application of the tree cutting statutes which were penalty statutes with a statute of limitations of twelve (12) months from the time the injury was committed. This Court explained that it has applied the discovery rule where the plaintiff was precluded from discovering harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question. It also stated that the discovery rule may be applied, as the ASSOCIATION submits here, when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act. But there, it concluded that the discovery rule was inappropriate. Id. at 794. It held that,

> "An owner of trees requires no unique expertise to realize when his trees have been taken without his permission. Neither is the taking of such trees without consent of an owner a secretive or inherently undiscoverable act, which justifies the discovery rule." Id.

More importantly, the case dealt with a one time act of cutting trees in 1991 and not any continual series of unlawful acts of cutting trees year after year. Perhaps more significantly, this is a case about a statutory penalty, and pursuant to Miss. Code Ann. §15-1-33, the action must be commenced within one (1) year next after the offense was committed, and not after.

Accordingly, the McCain case proves nothing for the ASSOCIATION in its position regarding the discovery rule. Again, the ASSOCIATION cites no case, and ROBERTSON can cite no case to this Court that stands for the proposition that the continuing tort doctrine is trumped by the discovery rule, or for that matter, trumped by notice or knowledge, either one of which is another way of referring to and arguing for the discovery rule. It would be fair to say that the doctrine and the rule are mutually exclusive.

In furtherance of its effort to convince the Court of its position regarding the continuing tort doctrine, the ASSOCIATION cites Winters v. AmSouth Bank, 964 So.2d 595 (Miss. App. 2007). The ASSOCIATION states in its BRIEF that nothing was concealed by the ASSOCIATION from ROBERTSON. That is not completely true, but such is not a comment

subject to degrees of truth. The fact is, it is irrelevant. In Winters, income beneficiaries argued for the application of the continuing tort doctrine while the Bank argued for the discovery rule. The Court held that each wrongful act or omission that was alleged by the income beneficiaries was identifiable and distinct and that the complaint pointed to numerous instances of alleged wrongful or negligent conduct, but none were continual. The income beneficiaries argued that the effects of the multiple wrongful or negligent acts combined to produce an ongoing monetary loss. The Court held that although the ill effects of the Bank may be continual, they did not warrant the application of the continuing tort doctrine. The Court did not address the discovery rule. Id at 600. The Winters case does, however, demonstrate the mutual exclusivity of the doctrine and the rule. Also, the case is distinct from the case sub judice because even the Trial Court here recognized that the ASSOCIATION committed continuous acts of trespass on ROBERTSON'S property. (RE:39-41; CP:90-92). [See also ORDER REGARDING ADDITIONAL ISSUES of May 31, 2005. (CP:4-6).]

About the ORDER REGARDING ADDITIONAL ISSUES of May 31, 2005, it is acknowledged that it is no more than an interlocutory partial summary judgment ruling by the Trial Court which is subject to revision. ROBERTSON stated as much in the last paragraph on page 25 of BRIEF OF THE APPELLANT. However, it is not acknowledged, and, in fact, not accurate that the Trial Court disregarded this ruling. The ruling as set out on page 25 of BRIEF OF THE APPELLANT is as follows, to-wit:

> "It appears from the documents presented that both wholly owned and time shared units were repeatedly rented out or exchanged over a period of time. The Court finds that this conduct falls under the Continuing Tort Doctrine." (CP:4-6).

ROBERTSON then states in his BRIEF OF THE APPELLANT at page 25 that the ruling by the Trial Court is consistent with the JUDGMENT except for its misapplication of the doctrine of laches, and knowledge, notice, and acquiescence. (RE:39-41; CP:90-92).

The ASSOCIATION also states that the law cited by ROBERTSON that "laches is never applicable when a claim has not been barred by the statute of limitations," is not so and cites Morgan v. Morgan, 431 So.2d 1119, 1122 (Miss. 1983). As the ASSOCIATION sets out, the Court in Morgan cited Sojourner v. Sojourner, 153 So.2d 803, suggestion of error overruled, 156 So.2d 579 (Miss. 1963). The Sojourner case states that the rule cited above "applies only when time is the only factor." Id., 156 So.2d at 580. However, the ten-year statute of limitations in that case had not run and did not begin to run until three (3) years after the subject conveyance in 1949, i.e. 1952, because that was the agreement. 153 So.2d at 807. All had knowledge. That the suit was not filed until nine (9) years later in 1961 was of no consequence. It was within the statutory time allowed. It was error to apply laches. Id., and 156 So.2d at 580.

In the Morgan case, suit was brought in 1980 to cancel a quitclaim deed from 1966. The Trial Court found that the deed was a forgery and that was not questioned on appeal. The question was whether or not the claims against the oil company as to its rights to the oil, gas and minerals were estopped by laches. There was no discussion of the statute of limitations because much like the case cited in the JUDGMENT by the Trial Court here, Stepanek v. Roth, 418 So.2d 74 (Miss. 1982), there was no applicable statute of limitations.

This Court in Morgan did give consideration to various factors in addition to the element of time which was a total of fourteen (14) years between the signing of the Deed and the filing of the suit. The conclusion was that laches applied. The period of time was considered as was the fact that the oil company would suffer financial loss if the claim against it was allowed after so long a period of time. (There was no continuing tort.)

The law is that laches is never applicable when a claim has not been barred by the statute of limitations, even if those limitations are extended by virtue of a continuing tort as was suffered by ROBERTSON here. Otherwise, what good is the statute of limitations. It could

always be argued that the plaintiff should have filed his claim sooner. Under Miss. Code Ann. §15-1-49(1), does not the plaintiff have the right to file his claim the day before the three (3) year period runs even if he knew the act was committed three (3) years previous. If the plaintiff files the day before the statute runs, is he guilty of laches? According to the Clanton case among others, he is not. Clanton v. Hathorn, 600 So.2d 963 (Miss. 1992). [The Clanton case is not cited in BRIEF OF THE APPELLANT to assert the adverse possession statute of limitations, but to demonstrate that one still may bring an action toward the end of the limitation period notwithstanding knowledge of the act complained of at the beginning of the period. So the case of Johnson v. Kansas City Southern Ry. Co., 208 Fed. Appx. 292 (5th Cir. 2006) is irrelevant.] If a continuing trespass began in 1991 and did not cease until 1999, and during that time, trespassers were thrown out on two (2) different occasions, and the plaintiff lived in a neighboring state and was not on the property itself, and he trusted the very entity that committed the trespasses which was in a fiduciary capacity to him to not violate its Declaration, is he not within his rights to file within three (3) years after the trespass ceased? Would he not have had the right to file as late as one (1) day before three (3) years after the last trespass? The answer must be yes, otherwise, there is no statute of limitations, and there is no continuing tort doctrine.

Consider further Sojourner, 156 So.2d at 580. This Court does clarify its position on laches by first stating that no period of time short of the statute of limitations can be used as supporting any laches which will constitute a bar to a lawsuit, and then says that such applies only when time is the only factor. It then goes on to say that the trial court committed error when it applied laches even though there was a delay that was so long that a party to the transaction had died making it difficult or impossible to defend the case. 156 So.2d at 580. The statute there was ten (10) years long. The suit was filed within the statutory period. 153 So.2d

807. One would think that such a delay with such serious consequences would certainly warrant the application of laches. However, the statute had not run, so laches could not apply.

With further regard to the affirmative defense of laches, the ASSOCIATION properly sets out what the party seeking to invoke the doctrine must show, which is the following:

(1) A delay in asserting a right or claim;

(2) That the delay was not excusable; and

(3) That there was undue prejudice to the party against whom the claim is asserted. Bailey v. Estate of Kemp, 955 So.2d 777, 784 (Miss. 2007).

It was the ASSOCIATION that pled the doctrine of laches and who was under a duty to prove the elements. ROBERTSON has already addressed this. (See pages 23-24, BRIEF OF THE APPELLANT.) Nowhere in BRIEF OF APPELLEE is it shown that the ASSOCIATION proved the elements of this affirmative defense, and as stated by ROBERTSON, the Trial Court does not address these elements. (See page 24, BRIEF OF THE APPELLANT.)

The ASSOCIATION next takes issue with ROBERTSON'S position regarding the law in Curry v. Natchez, J.& C.R.R. Co., 61 Miss. 725 (1884). ROBERTSON sets out the law on page 19 of BRIEF OF THE APPELLANT. The law set out there was actually not the law in the jury instruction as mistakenly stated there. The Court stated that the jury instruction was inaccurate. The Court went on to state that if Curry had previously forbidden the railroad company to enter upon her land, then they could not by acquiescence obtain the right to do so. Id. at 730-731. This case represents that such is the law. However, the ASSOCIATION makes its argument using this case by stating that this Court held that it was reversible error for the trial court to exclude testimony by railroad employees that Curry verbally agreed to dedicate a railroad right-of-way over the land in controversy and promised verbally to sign a document to this effect when requested. The ASSOCIATION uses this argument to state that the factual findings in the

JUDGMENT of the case sub judice are exactly like the wrongfully excluded testimony in Curry, that proof that the ASSOCIATION believed and understood that it had permission to rent out ROBERTSON'S property is a Curry-type affirmative defense to ROBERTSON'S trespass claim. However, the Trial Court here in its JUDGMENT set out that, notwithstanding WARD'S testimony that ROBERTSON agreed that the ASSOCIATION could rent out his property and credit him with rental income, there was "no written evidence memorializing an agreement, and the Court cannot find that there was one." (RE:40; CP:91). Moreover, and more specifically, the Trial Court did not find or hold that the ASSOCIATION "believed and understood" that it had permission, much less that such created some right in the Association.

The ASSOCIATION also addresses the Clean Hands Doctrine. It cites a Texas case, but no Mississippi case. It submits that the case is applicable because ROBERTSON came into Court with unclean hands just as the dissenting unit owners in the Texas case did. There, some owners fixed their own roofs at their own expense and then attempted to offset their expense against the special assessment of the condominium. The Texas Court denied the owners' claim because they are not allowed to seek credit in equity with unclean hands. The ASSOCIATION emphasizes this position citing Massachusetts cases for the proposition that condominium charges are not subject to set-off or some other form of self-help remedy. (See 36, BRIEF OF APPELLEE).

The fact is though that ROBERTSON did not attempt set-off or any self-help remedy, and the JUDGMENT does not address these things in any way whatsoever as regards ROBERTSON. The JUDGMENT did address "offset" as regards the ASSOCIATION. It stated that the ASSOCIATION used ROBERTSON'S units and collected rent to "offset" assessments due from ROBERTSON. (RE:17; CP:68). The JUDGMENT also cited the Clean Hands Doctrine, but only when it addressed an argument made by ROBERTSON that since the sole

remedies of the ASSOCIATION are to sue or foreclose for failure to pay assessments, that the ASSOCIATION does not have the authority to refuse to let him space bank with the RCI system. However, that issue was not appealed. In addressing the issue, the JUDGMENT states that the ASSOCIATION is not limited to simply suing or foreclosing on the owner who does not pay assessments. The JUDGMENT states that the Declaration may be construed liberally enough to allow for suspension of ROBERTSON'S space banking rights with RCI and then says, "Under the Clean Hands Doctrine, one who refuses to pay condominium assessments in Mississippi may not come into a court of equity seeking free vacations in Hawaii." (RE:42; CP:93). Nowhere else in the JUDGMENT does the Trial Court cite the Clean Hands Doctrine other than when addressing space banking rights. (See further discussion by ROBERTSON on this issue at pages 30-31, BRIEF OF THE APPELLANT.) Noticeably missing from that portion of the JUDGMENT dealing only with the statute of limitations and laches is any conclusion of law dealing with the Clean Hands Doctrine. That is, for the most part, because the Trial Court stated in its JUDGMENT that ROBERTSON'S claims of continuing trespass are without merit due to laches, knowledge, notice, and acquiescence.

The ASSOCIATION next addresses the affirmative defense of res judicata. Contrary to its position, the JUDGMENT was silent as to that affirmative defense and, more particularly, it is not mentioned whatsoever in paragraph 28 or 29 of the JUDGMENT. (RE:39-41; CP:90-92). The only time res judicata is even mentioned in the JUDGMENT is when it sets out that the ASSOCIATION argued that the Ward Judgment is res judicata with respect to this case and precludes any claim by ROBERTSON that his Unit 110 is a single unit. (RE:37; CP:88). Even there, the Trial Court stated that it need not reach the preclusive effect of Ward, and then addressed the one issue of whether or not Unit 110 was a single unit. Besides, this affirmative

defense must fail because the four (4) identities that are required to prove res judicata were not met. Those identities are as follows, to-wit:

(1) Identity of the subject matter of the action;

(2) Identity of the cause of action;

(3) Identity of the parties to the cause of action; and

(4) Identity of the quality or character of a person against whom the claim is made. Quinn v. Estate of Jones, 818 So.2d 1148, 1151 (Miss. 2002).

Not one of the four (4) identities exists between the Ward case and the case sub judice. The contrast is as follows:

(1) The identity of the subject matter in Ward was control of the condominium. (RE:19; CP:70). The identity of the subject matter in the case sub judice is unauthorized lease, rental and use of ROBERTSON'S property. (RE:16-17; CP:67-68).

(2) The identity of the cause of action in Ward was a suit to stop foreclosures, remove the manager and his companies, appoint a receiver to do an accounting, to recover assessments, unauthorized expenditures, and other costs due to misappropriation and commingling of funds, use of association funds for unrelated business, unauthorized debt creation, and non-payment of taxes resulting in foreclosures. (RE:19; CP:70). The identity of the cause of action in the case sub judice is a suit for continuing trespass, including lock-out of ROBERTSON from his fee simple-owned property. (RE:16; CP:67).

(3) The identity of the parties in Ward were the Board of Directors of the ASSOCIATION in their official and individual capacities including ROBERTSON as plaintiffs and Abercrombie and his companies as defendants. (RE:19; CP:70). The identity of the parties in the case sub judice are ROBERTSON as plaintiff and the ASSOCIATION as defendant.

(4) The identity of the quality or character of the persons against whom the claims were made in Ward was the manager of the condominium and his companies. (RE:19; CP:70). The identity of the quality or character of the

> persons against whom the claims were made in the case sub judice is the governing body of the condominium.

By no stretch can it be said that any one of the identities exist. Where they, or any one of them, do not exist, there is no res judicata. Quinn at 1151. Accordingly, there is no res judicata here.

The ASSOCIATION argues equitable estoppel stating that the doctrine "could have additionally been applied by the Trial Court." The fact is that equitable estoppel was not applied by the Trial Court. Moreover, it could not have been applied by the Trial Court. As set out by the ASSOCIATION in its BRIEF OF APPELLEE, it must be shown that there was:

(1) A belief and reliance on some representation;

(2) A change of position as a result of the representation; and

(3) A detriment or prejudice caused by the change of position. Mound Bayou Sch. Dist. v. Cleveland Sch. Dist., 817 So.2d 578, 583 (Miss. 2002).

Nowhere does the ASSOCIATION set out that it met this burden of proof. (See pages 22 and 25-26, BRIEF OF APPELLEE.) However, by arguing it, the question must be asked, "What representation was made by ROBERTSON that was believed in or relied upon by the ASSOCIATION causing it to change its position which resulted in a detriment or prejudice to it?" The JUDGMENT states that there was no written evidence memorializing an agreement between ROBERTSON and the ASSOCIATION for rental of his units, and even stated that "the Court cannot find that there was one." (RE:40; CP:91). So the representation could not have been any agreement between these parties.

It must be remembered that ROBERTSON filed this lawsuit because of the illegal continuing trespass committed on his property by the ASSOCIATION. The ASSOCIATION'S defense is that it could utilize ROBERTSON'S property and collect the rents to offset the assessments he was not paying. (RE:16, 17; CP:67, 68). Since there was no agreement between

these parties for the ASSOCIATION to use ROBERTSON'S units, (RE:40; CP:91), and both the Declaration and the Amended Declaration provide that the sole remedies of the ASSOCIATION for an owner's non-payment of assessments are foreclosure and bringing an action at law, (RE:41; CP:92), the claim for continuing trespass is valid, and there is nothing by way of equitable estoppel that would bar it.

A better argument would be that it was actually ROBERTSON who relied upon the ASSOCIATION to abide by its own Declaration and fulfill its fiduciary duty to him when he was not at his property between 1991 and 1998, which reliance he made to his detriment because the ASSOCIATION, in his absence, without his consent or agreement, commandeered his units and the rent therefrom illegally, meaning that the ASSOCIATION should be barred from its defense.

The ASSOCIATION also relies on judicial estoppel and states that it "could have and should have properly been invoked" to bar ROBERTSON'S claims. But again, the Trial Court not only chose not to base its JUDGMENT on judicial estoppel, but it could not have based its JUDGMENT on judicial estoppel. Again, the ASSOCIATION is trying to put ROBERTSON in a position of being a participant in the Ward suit. However, ROBERTSON took no part in those proceedings. (RE:40; CP:91). Accordingly, ROBERTSON is not re-litigating any issues. Moreover, one of the elements of judicial estoppel is that the party must have benefited from the position previously taken. The ASSOCIATION does not set out the benefit that ROBERTSON was to have received from some position it says he took in the Ward suit. But because he was a non-participant, there would have been no position from which he could benefit. Judicial estoppel is not applicable here.

The ASSOCIATION responds to ROBERTSON'S position that it failed to raise its affirmative defenses after they were pled and attempts to distinguish the case that was cited, but ROBERTSON stands by his position set out at pages 24 and 25 of BRIEF OF THE

APPELLANT and stands by the case. MS Credit Center, Inc., v. Horton, 926 So.2d 167 (Miss. 2006). It was not ROBERTSON'S job in this litigation to call up for hearing the affirmative defenses raised by the ASSOCIATION. That job belongs to the one who raised those defenses. ROBERTSON'S position regarding the holding in Trotter also remains the same. If it is not a matter before the Court, it is not a matter upon which the Court can rule. It would be considered beyond the scope of the pleadings. Trotter v. Trotter, 490 So.2d 827, 833-34 (Miss. 1986). The ASSOCIATION did not call the affirmative defenses up for hearing, so they are waived, and therefore, the Trial Court could not rule based upon them or any one of them.

Finally, the ASSOCIATION appears to submit on the one hand the premise that if ROBERTSON does not pay assessments, that the ASSOCIATION can commandeer his units and the rent acquired from their use instead of suing him or foreclosing on his units as their own Declaration sets out it must do, and on the other hand that ROBERTSON does not have the remedy of suing for continuing trespass when the ASSOCIATION voluntarily makes that election. However, no amount of law cited on pages 34, 35, or 36 of BRIEF OF APPELLEE supports that premise.

To more accurately state the conclusion using some of what the ASSOCIATION said, ROBERTSON states, "There are an ever increasing number of condominium owners in this state that can ill afford to be the victim of associations like Chateau LeGrand. He is hopeful that this Court will follow the law as set out in the BRIEF OF THE APPELLANT."

3. Reply to : "Validity of the Amended Declaration."

The Trial Court addressed the Amended Declaration in a mere sixteen (16) lines in its JUDGMENT covering only part of two (2) pages. (RE:36-37; CP:87-88). In those sixteen (16) lines, the Trial Court correctly set out the procedure for amendment as provided in the

Declaration at Article IX, Section 3. (E:R-030). It also stated that the Ward JUDGMENT noted that the Amended Declaration was signed by the President and the Secretary of the development corporation, but there was no statement or minutes to ascertain whether or not it was a valid amendment. It then stated that the parties in the Ward suit agreed that the original Declaration and By-Laws and the Amended Declaration are the controlling documents for the condominium. Nothing in the Ward JUDGMENT reduces that to an order, a decision, or a ruling. The Trial Court then ruled that although ROBERTSON argued that the Amended Declaration is invalid, "He presented no evidence regarding its alleged invalidity." (RE:36-37; CP:87-88). The Trial Court then ruled that the Declaration, the By-Laws, and the Amended Declaration are the controlling documents for the condominium. (RE:43; CP:94). The issue drawn from this portion of the JUDGMENT is correctly stated in BRIEF OF THE APPELLANT as follows:

> "WHETHER OR NOT ROBERTSON PRESENTED EVIDENCE THAT THE AMENDED DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS IS INVALID."

It was briefed on pages 22-29, BRIEF OF THE APPELLANT. It sets out that ROBERTSON, in fact, did present very substantial evidence that the Amended Declaration of Covenants, Conditions, and Restrictions was invalid, notwithstanding any footnote in prior litigation involving different parties upon which no order was drawn which can be seen as nothing more than a stipulation of sorts for that litigation alone. That the issue of validity has not been bought up before by ROBERTSON or anyone else cannot constitute a waiver. (See the Declaration at Article IX, Section 1.) As set out in BRIEF OF THE APPELLANT, ROBERTSON cannot produce what does not exist. What does not exist is "an instrument signed by not less than sixty-six and two-thirds (66 2/3) percent of the unit owners . . . ." What also cannot be produced is written consent and approval of all holders of first deeds of trust as is required at Article XI(c) of the Declaration and Article XIII, Section 5(c) of the By-Laws. (E:R-

030 and R-029). The invalid Amended Declaration cannot be made valid by any act on the part of ROBERTSON committed in reliance on its validity or by any act or ratification by the Board acting outside the parameters of its Declaration. (E:R-030).

The bottom line is that ROBERTSON did, in fact, present evidence showing the invalidity of the Amended Declaration, and by that set forth in BRIEF OF THE APPELLANT, the Amended Declaration is invalid. The elements of res judicata are set forth hereinabove. ROBERTSON'S argument that it is not applicable is adopted here. The elements of equitable estoppel are also set forth hereinabove. ROBERTSON'S argument that it is not applicable is adopted here as well. Moreover, regarding equitable estoppel, it must be pointed out that there will be no detriment or prejudice caused by any change of position. In fact, holding that the Amended Declaration is invalid would enhance the value of the interval-owned property because a "timeshare" is a less desirable form of ownership. The deeds would still be good because they are fee simple deeds. Each owner would be a fractional owner, an interval owner of some week of some unit that is allowed for interval ownership. The fact is that at this time, the plat of Chateau LeGrand shows only fifty (50) units in the complex. That plat was never amended to allow for "timeshares". (RE:18; CP:69). The plat would not have to be amended if each owner of an interval-owned unit was an interval owner, a fractional owner, as opposed to the owner of some timeshare. Accordingly, and notwithstanding the position taken by the ASSOCIATION at page 38 of BRIEF OF APPELLEE, there would be no adverse impact on the rights of the owners.

4. **Reply to : "The Court's rulings that the ASSOCIATION may suspend an owners space banking rights with the RCI group and lock-out timeshare unit owners for non-payment of assessments is plainly correct."**

ROBERTSON'S third issue is,

> "WHETHER OR NOT THE ASSOCIATION HAS THE AUTHORITY TO "LOCK-OUT" ROBERTSON FROM HIS INTERVAL-OWNED UNITS."

ROBERTSON elected not to include the issue regarding space banking because he knows that RCI was only reacting to what the ASSOCIATION reported to it.

Regarding "lock-out", while the ASSOCIATION claims ROBERTSON was never physically barred from the condominium, he was indeed barred from his interval-owned units. (See page 29, BRIEF OF APPELLEE.) It is ROBERTSON'S position that since he is the fee simple interval owner of two (2) units, he cannot be locked out of this property where there is no agreement by the Declaration or otherwise anymore than he can be locked out of his whole-owned units where he does not pay assessments. The Declaration states that the sole remedies of the ASSOCIATION for an owner's non-payment of assessments are foreclosure and bringing an action at law against the owner. (See Article VI, Section 8, of the Declaration.) (E:R-030). As set out on pages 30-31 of BRIEF OF THE APPELLANT, that cannot be expanded to include locking an owner out of the units that he owns in fee simple.

Nor is ROBERTSON'S claim regarding the matter barred by the statute of limitations. The act of barring him constitutes a continuing tort as addressed hereinabove and in BRIEF OF THE APPELLANT. The interval-owned units of ROBERTSON were also subject to continuing trespass as previously set out.

The elements of res judicata are not met, and the ASSOCIATION'S argument regarding same is responded to with the same argument set forth hereinabove.

Regarding the "business judgment" standard, there is no case that refers to such that means that the law can be ignored. The law here is the Declaration, and the Declaration provides that the ASSOCIATION may sue or foreclose. It does not provide for lock-out. The same response is submitted to the ASSOCIATION'S argument that the preamble grants it the right to lock ROBERTSON out.

The ASSOCIATION argues that it has the power to lock-out in part because it has the power to insure the financial stability of the condominium. But if it was properly exercising that power, it would have sued ROBERTSON or foreclosed on his property in 1991 or in any year thereafter that through 1999, prior to ROBERTSON having to sue them for unlawfully trespassing on his property and locking him out of his interval-owned units.

The ASSOCIATION then tries to justify the lock-out policy by referring to Article II, Section 1(b), of the Declaration in submitting that the term "facilities" includes the private, fee simple, whole-owned, or interval-owned units themselves. (E:R-030). However, Article II, Section 1(a), of the Declaration identifies "facilities" as the term is used in Article II, Section 1(b), and says that every owner has a right to enjoyment of the Common Area subject to the right of the Association to charge reasonable admission and other fees for the use of "any facility, recreational or otherwise, situated upon the Common Area". (E:R-030). There can be no confusion that ROBERTSON'S private, fee simple, whole-owned or interval-owned units are not included, nor are those of anyone else. They are not situated "upon the Common Area". The New Hampshire case cited by the ASSOCIATION is not relevant. The amenity closed was a ski facility, not an owner's private, fee simple-owned property.

The ASSOCIATION then tries to submit that there are equitable reasons to support the Trial Court's JUDGMENT, but they must fail as set forth hereinabove. More particularly is the ASSOCIATION'S argument that the Trial Court concluded that it was inequitable for

ROBERTSON to contend that the exclusive remedy for non-payment of assessments was foreclosure when he was one of those who implemented a moratorium on foreclosures. (See page 43, BRIEF OF APPELLEE.) The Trial Court made no such conclusion. It has been ROBERTSON'S contention from the beginning that the Declaration must be followed. The Declaration provides that the sole remedies of the ASSOCIATION for an owner's non-payment of assessments are foreclosure or bringing an action at law against the owner. (See Article VI, Section 8, of the Declaration.) Foreclosure was not the only remedy. The Trial Court recognized this in its ruling when it said that it acknowledged the stipulation that stayed foreclosures, and then at the same time, it pointed out that the stipulation did not prevent the ASSOCIATION from suing ROBERTSON for past due balances. (RE:42; CP:93). The ASSOCIATION did neither. There was no "flip flop" by ROBERTSON nor did he benefit from the stay of foreclosures. The ASSOCIATION should have been more careful about its representations here and well as at other places in its BRIEF OF APPELLEE. It must also be remembered that the ASSOCIATION'S constant references to ROBERTSON being elected to the Board are references to a Board that elected an owner who had not paid his assessments. ROBERTSON was actually put on the Board twice. What does that say about the Board?

5. Reply to : "Robertson was properly ordered to pay the expenses of transcribing the additional parts of the record designated by the Association, which were relevant and supported the actual result reached by the Judgment."

ROBERTSON accepts the Trial Court's findings. He narrowed the issues to the application of laches to continuing trespass, the evidence presented that the Amended Declaration is invalid, and the "lock-out" by the ASSOCIATION of ROBERTSON from his property. The record that ROBERTSON designated is all that this Court needs on this appeal for these issues. The law that supports this position is stated clearly enough on pages 32-36 in

BRIEF OF THE APPELLANT. Nothing set out by the ASSOCIATION says that ROBERTSON'S position is not correct. As pointed out in his reply to the ASSOCIATION'S other positions hereinabove, the ASSOCIATION does not have the authority to read into a JUDGMENT that which is not there. And, it did so repeatedly, notwithstanding its citation to the law that says "that it is not the job of this Court to redetermine questions of fact resolved by the Chancellor." See page 21, BRIEF OF APPELLEE, citing Johnson v. Black, 469 So.2d 88, 90 (Miss. 1985).

A review was made of the ASSOCIATION'S SECOND SUPPLEMENTAL DESIGNATION. It could not be found that any of the Clerk's papers designated were used in the BRIEF OF APPELLEE. The testimony of only two (2) of the five (5) witnesses designated were used, and only thirty-five (35) of the fifty (50) Exhibits appear to have been referenced by the ASSOCIATION. A full one-third (1/3) of its DESIGNATION was not used. Hundreds and hundreds of pages are now obviously irrelevant to this appeal costing ROBERTSON a lot of money unnecessarily. Moreover, almost all of that which was referenced by the ASSOCIATION was referenced not in its "ARGUMENT", but in its "Statement of the Facts", where it apparently felt compelled to recite numerous things that were not relevant to the issues on appeal in order to use the designated material. [See Rule 28(a)(4), Rules of Appellant Procedure, which states that the statement of facts are to be relevant to the issues presented for review.] In the "ARGUMENT", only the testimony of ROBERTSON and WARD were used and only twelve (12) of the fifty (50) exhibits. No designated Clerk's Papers were used. Even some of the Exhibits referenced were not relevant. Some references were not designated, and some were mis-referenced. The "Course of the Proceedings" portion wrongfully stated numerous things represented as facts, but with no reference to the record presumably because such was not required. It is not justifiable that all Ward exhibits were necessary to prove that Ward took

place. The Trial Court referred to Ward when necessary, and ROBERTSON accepted the findings. Nor is it justifiable to designate a myriad of documents in an effort to try to show that the Trial Court applied the standard of equity when the JUDGMENT is clear that the Trial Court did not so do. All of this makes ROBERTSON'S argument more valid that he should not have to pay for the ASSOCIATION'S DESIGNATION. (See pages 32-36, BRIEF OF THE APPELLANT.)

CONCLUSION

ROBERTSON adopts here the CONCLUSION set out in his BRIEF OF THE APPELLANT, although now considerably more than one hundred (100) hours has been spent by the undersigned on this appeal. The BRIEF OF APPELLEE is fifty (50) pages in length with ninety-eight (98) cases cited along with some eleven (11) other authorities. It was an arduous task to prepare the REPLY. Part of it must include a response to the inaccurate characterization of JUDGE ROBERT S. ROBERTSON. He is a friendly, respectful, and respected member of the bar and the bench. It is regretful that a different picture has been painted. A review of the Case History will clearly show it was not ROBERTSON that "obstinately and unnecessarily prolonged and complicated these proceedings." All things considered, his patience in dealing with this is admirable. Perhaps that will appear evident, but a decision not to respond may inadvertently lend credibility to the unprofessional remarks in BRIEF OF APPELLEE.

CERTIFICATE OF SERVICE

I, WAYNE L. HENGEN, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing REPLY BRIEF to the following:

Hon. Margaret Alfonso
Chancery Court Judge
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Hon. William V. Westbrook, III
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This the 30th day of April, 2009.

Wayne L. Hengen
WAYNE L. HENGEN