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

BRIEF OF THE APPELLANT

(ORAL ARGUMENT IS NOT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal, to-wit:

1. Robert S. Robertson
2. Chateau LeGrand Property Owners' Association, Inc.

Wayne L. Hengen

WAYNE L. HENGEN
Attorney for Robert S. Robertson

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STATEMENT OF THE ISSUES

1. Whether or not the doctrine of laches, or knowledge, or notice, or acquiescence is applicable where a claim for continuing trespass has not been barred by the statute of limitations.

2. Whether or not ROBERTSON presented evidence that the Amended Declaration of Covenants, Conditions and Restrictions is invalid.

3. Whether or not the ASSOCIATION has the authority to "lock out" ROBERTSON from his interval-owned units.

4. Whether or not the ASSOCIATION should be ordered to pay the expense of the additional parts of the record it designated.

STATEMENT OF THE CASE

Nature of the Case

This is a continuing trespass case against a condominium association whereby ROBERTSON, a fee simple owner of both whole and interval-owned units, seeks equitable relief and damages. The case includes issues regarding the validity of the condominium's Amended Declaration of Covenants, Conditions, and Restrictions, and the authority of the ASSOCIATION to "lock-out" ROBERTSON from his two (2) fee simple interval-owned units. ROBERTSON has also raised the issue of whether or not the ASSOCIATION should be ordered to pay the expense of the additional parts of the record it designated.

Course of the Proceedings

ROBERTSON filed his Complaint on January 26, 2000, to which the ASSOCIATION filed its Answer on May 1, 2000. Discovery was propounded by ROBERTSON. On October 31, 2001, the ASSOCIATION filed a Motion for Summary Judgment based on a counterclaim it did not file. The Motion was responded to by ROBERTSON, and the matter was heard after which an Order was entered on April 3, 2002, by Chancellor Bise transferring the case to Circuit Court.

On May 16, 2002, the ASSOCIATION filed an Amended Answer and Counterclaim which was responded to by ROBERTSON. On December 3, 2002, the Circuit Court entered an Order transferring the matter back to Chancery, and it was accepted by Chancellor Alfonso.

The ASSOCIATION filed a Revised Motion for Summary Judgment on May 30, 2003, which was responded to by ROBERTSON. Chancellor Alfonso consolidated the case before Chancellor Bise with the case before her by Order of August 18, 2003. On August 12, 2004, Chancellor Alfonso denied the ASSOCIATION'S Revised Motion for Summary Judgment, and subsequently entered ORDER REGARDING ADDITIONAL ISSUES on May 31, 2005.

On July 22, 2005, an ORDER was entered appointing a CPA as the Court's expert in the case. On that same date a TEMPORARY RESTRAINING ORDER was entered prohibiting foreclosure on ROBERTSON'S property. On August 8, 2006, an ORDER was entered bifurcating liability and damages.

The liability portion of the trial commenced on August 21, 2006, and recessed on August 24, 2006, commencing again on November 6, 2006, and going through November 9, 2006, ending on December 6, 2006. JUDGMENT was entered on January 22, 2007.

Disposition of the Case

The JUDGMENT states that both the DECLARATION and the AMENDED DECLARATION are the controlling documents for the condominium. It also states that ROBERTSON'S Unit 110 is a single unit and that the ASSOCIATION had no authority to assess it as two units. It states that there is no merit to the ASSOCIATION'S claim that ROBERTSON'S suit is a derivative action. It also states that ROBERTSON'S claims of continuing trespass are without merit because same are barred by the statute of limitations, laches, knowledge, notice, and acquiescence. (Presumably, there is merit to ROBERTSON'S claims for trespass which are not barred by the statute of limitations.) It also states that the ASSOCIATION may suspend a non-paying owner's space-banking

rights which is taken to mean that the Trial Court also states that the ASSOCIATION can "lock out" ROBERTSON from his fee simple interval-owned units if he is delinquent in paying fees. Finally, the JUDGMENT states that the ASSOCIATION'S claims against ROBERTSON that are prior to May 16, 1999, are barred, and that all other relief sought is denied.

On February 1, 2007, ROBERTSON filed a MOTION TO ALTER OR AMEND JUDGMENT which was responded to by the ASSOCIATION. ROBERTSON also filed a MOTION FOR RELIEF FROM JUDGMENT which was also responded to by the ASSOCIATION.

On February 29, 2008, Chancellor Alfonso denied ROBERTSON'S MOTIONS, and on March 28, 2008, he filed his NOTICE OF APPEAL.

Statement of the Facts

The facts as set out by Chancellor Alfonso in her JUDGMENT of January 22, 2007, are not disputed by ROBERTSON and are hereby adopted. It is the ruling on the law that is being appealed. However, for the convenience of the Court, and with the understanding that it is in compliance with Rule 28(a)(4) of the Mississippi Rules of Appellate Procedure, here follows the statement of facts relevant to the issues presented for review with references to the JUDGMENT:

In his Complaint, ROBERTSON alleges that the ASSOCIATION leased, rented, and used, without authority or consent, his two (2) condominium (whole-owned) units and failed to account for or pay to him the money collected. He also contends that the ASSOCIATION prohibited him from using his two (2) other units which were interval-

owned units sometimes referred to as timeshares. The ASSOCIATION contends that it lawfully utilized ROBERTSON'S units because he did not pay fees and assessments since at least 1992 and that ROBERTSON owes more to the ASSOCIATION than the ASSOCIATION has collected from using his units. ROBERTSON acquired his units subject to the ASSOCIATION'S Declaration of Covenants, Conditions and Restrictions in the early 1980's. (RE:16-17; CP:67-68).

ROBERTSON testified that from the date of purchase until the early 1990's, he regularly visited his properties. In 1991, while he was back home in Morgan City, Louisiana, his daughter tried to but was barred by the manager, Abercrombie, from using his Unit 307. ROBERTSON resolved that problem, but he stopped visiting the property that year because of disagreements with the manager, bad financial conditions in his hometown, and the effects of Hurricane Andrew on other properties that he owned. He cut off the utilities and did not return until 1993 when Stephen Ward, a director on the Board of the ASSOCIATION, called him to an April 24, 1993, meeting. ROBERTSON decided to go so that he could address the matter of a bill he received with two (2) charges for his Unit 110, one for 110A and one for 110B. At the meeting, he was named to the Board and then automatically added to a list of plaintiffs in a suit previously filed against the manager, Abercrombie, and others. He attended only two (2) more Board meetings and then stopped attending because it turned out that the Board was only interested in the interval-owned unit owners. (RE:20-21; CP:71-72).

ROBERTSON testified that when he went to the meeting in April, 1993, he found employees of Abercrombie, rock band members, in his Unit 110. He evicted them. Esta McCrory, manager at the time, told him that Abercrombie had been using and renting his units and gave him reservation sheets showing dates. (RE:21, 39-40; CP:72, 90-91). He

testified that he gave permission twice for use of his units, once to McCrory for use short-term until she could find a place to live after being evicted by Abercrombie and once in 1999 when he again found people in his units. (RE:21-22; CP:72-73). ROBERTSON testified that he made no agreement at all with the ASSOCIATION or Ward about renting his units. (RE:22; CP:73).

The Board minutes of July 24, 1993, state that discussions were had with ROBERTSON about his fees and assessments past due since early 1991 and that ROBERTSON would send a check and work out an agreement about the rest, but he said that after being threatened by them. (RE:21-22; CP:72-73). ROBERTSON sent no payment, and there is no record of any agreement in the minutes. (RE:22, 40; CP:73, 91). ROBERTSON did not visit his units between 1993 and 1998 and did not know they were being rented out. (RE:40-41; CP:91-92).

ROBERTSON testified that the ASSOCIATION has only two (2) legal remedies for his not paying fees and assessments: the ASSOCIATION can sue him for the money, or it can foreclose on his units. He also stated that there is nothing in the By-Laws or the Declaration permitting a "lock-out" policy regarding the interval-owned units which the Board enacted as stated in its December 13, 1995, minutes. ROBERTSON found that the ASSOCIATION had even rented out his interval-owned units without his consent. (RE:22-23; CP:73-74). The ASSOCIATION had a rental agreement form, but ROBERTSON testified that he never signed one. (RE:24; CP:75). The Board minutes of November 8, 1994, mention telephone and cable rates charged to ROBERTSON'S Unit 110(A&B), but they had been turned off by him between 1991 and 1999. He stated that it is obvious that the ASSOCIATION had them turned back on and had control of and were trespassing on his units. He did not authorize cleaning service, pest control, or

repairs, and the ASSOCIATION never advised him that they were having these services performed. The ASSOCIATION never told him that he was being charged for these services. (RE:25; CP:76). When questioned specifically about his whole-owned Unit 307 and its use by the ASSOCIATION, ROBERTSON answered that there were reservation sheets and phone bills indicating use by the ASSOCIATION. (RE:27; CP:78). Even Board Members, Daigle and his wife, stayed in Unit 110, and there was no agreement with ROBERTSON for them to so do. (RE:32; CP:83).

Stephen Ward, an ASSOCIATION director, testified that the ASSOCIATION regularly gave ROBERTSON credit for its rentals of his property throughout the 1990's, and that it even sent bills to him showing the credits with deductions made for utilities, telephone, and pest control, together with a 30% commission deduction. (RE:30; CP:81). But, ROBERTSON stated that he received little mail from the ASSOCIATION over the years. (RE:26; CP:77). Ward also testified that regardless of the various names of the entities that functioned as the homeowner association, it operated under the same governing documents: the By-Laws, the Declaration, and the Amended Declaration. (RE:28, 31; CP:79, 82).

The ASSOCIATION'S Declaration signed June 4, 1980, states in Article IX, Section 3, that it may be amended by an instrument signed by not less than sixty-six and two-thirds (66 2/3%) percent of the unit owners. Article I, Section 2, states that an owner is the record owner, whether one or more persons or entities, of a fee simple title to any unit which is part of the property. The Amended Declaration was signed by the President and the Secretary, but there is no statement or minutes to ascertain whether it was a valid amendment. (RE:36-37; CP:87-88; E: R-030, R-055). ROBERTSON testified that the

Amended Declaration permits interval-ownership for which the original Declaration has no provision, and that by so doing, the whole-ownership is diluted. (RE:24; CP:75).

SUMMARY OF THE ARGUMENT

1.

WHETHER OR NOT THE DOCTRINE OF LACHES, OR KNOWLEDGE, OR NOTICE, OR ACQUIESCENCE IS APPLICABLE WHERE A CLAIM FOR CONTINUING TRESPASS HAS NOT BEEN BARRED BY THE STATUTE OF LIMITATIONS.

A continuing tort such as continuing trespass gives rise to liability even if it persists beyond the original limitations period. It is continuing trespass if it consists of repeated acts of trespass. The limitations begin to run from the date of the last trespass. Recovery is based on the theory that all trespasses are part of one continuing act.

Trespass is governed by the "catch all" statute of limitations of three (3) years after the cause accrued. The trespass here accrued in 1999 when the last act of trespass was committed. The trespass began in 1991 and continued every year until the last act. Suit was filed by ROBERTSON in 2000, within months of the last act of trespass by the ASSOCIATION in 1999 and well within the limitation period.

Neither knowledge nor notice that the trespass was being committed bars a claim for damages for continuing trespass because the statute of limitations does not begin to run until the last act. The claim can be pursued until the statute becomes a bar, notwithstanding knowledge and notice. Not pursuing a claim while the statute is running does not constitute acquiescence.

Laches is not a defense to an action if the plaintiff proceeds within the period of limitation. Laches is never applicable when a claim has not been barred by the statute of limitations. The party pleading laches must show: (1) a delay in asserting a claim, (2) that the delay was not excusable, and (3) that there was undue prejudice to the party opposite. If the party pleading laches fails to raise and pursue this affirmative defense, it

is waived, especially if raising and pursing it would terminate litigation, such as laches would do. If waived, it is no longer a matter before the court – it is beyond the scope of the pleadings prohibiting the court from basing its ruling on it. Affirmative defenses are for parties, not courts.

Those in control in property owner associations are fiduciaries in the discharge of their responsibilities. They should never be able to get away with a continuing trespass of an owner's property. If they try, equity is to follow the law.

2.

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

ROBERTSON offered into evidence the Declaration which provided that it may be amended by an instrument signed by not less than sixty-six and two-thirds (66 2/3%) percent of the unit owners, or by the Declarant at any time prior to the sale of the first unit. He also offered into evidence the Warranty Deed showing that the first sale was over two (2) weeks prior to the date of the Amended Declaration which he also offered into evidence. He also offered into evidence the By-Laws which provides as does the Declaration that all holders of first deeds of trust must provide written consent and approval for any amendment. There is no instrument showing that sixty-six and two-thirds (66 2/3%) percent of the unit owners agreed to the Amended Declaration nor is the Amended Declaration so signed, nor is there any document showing the written consent and approval of the holders of the first deeds of trust. These things are also required by statute, and ROBERTSON has the right to raise the issue at any time. ROBERTSON presented evidence that the Amended Declaration is not valid.

3.

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

There is no authority in the Declaration or By-Laws (or even the Amended Declaration) whereby the ASSOCIATION can "lock-out" ROBERTSON from his interval-owned units. Likewise, there is no authority in law whereby the Trial Court can modify, add to, or subtract from the terms of a contract. In fact, the Trial Court is by law specifically prohibited from so doing. For not paying assessments, the ASSOCIATION may only sue or foreclose to collect, or it may do both. It has no authority to "lock-out" ROBERTSON from his fee simple interval-owned units for not paying, and the Trial Court is prohibited from modifying or adding such to the Declaration or By-Laws.

4.

WHETHER OR NOT THE ASSOCIATION SHOULD BE ORDERED TO PAY THE EXPENSE OF THE ADDITIONAL PARTS OF THE RECORD IT DESIGNATED.

The additional parts of the record designated by the ASSOCIATION are unnecessary and irrelevant. These parts add over $4,000.00 to ROBERTSON'S cost of less than $300.00. The Trial Court accepts the ASSOCIATION'S argument that this Appellate Court needs these added portions to fully appreciate the surrounding circumstances by which it was impacted. No law supports that as a valid reason. This Appellate Court is to accept facts specifically found by the Trial Court. ROBERTSON spent time, money, and effort to limit the volume and bulk of the record. The ASSOCIATION used the exorbitant cost as a weapon against ROBERTSON.

ARGUMENT

1.

WHETHER OR NOT THE DOCTRINE OF LACHES, OR KNOWLEDGE, OR NOTICE, OR ACQUIESCENCE IS APPLICABLE WHERE A CLAIM FOR CONTINUING TRESPASS HAS NOT BEEN BARRED BY THE STATUTE OF LIMITATIONS.

This Court sets out the "continuing tort" doctrine as follows:

> "It is true that continuing or repeated injuries can give rise to liability even if they persist beyond the limitations period for the initial injury. *See Hendrix v. City of Yazoo City*, 911 F.2d 1102 (5th Cir.1990); C.J.S., Limitations of Actions §177 at 230-32 (1987). This principle applies, however, in situations where the defendant commits repeated acts of wrongful conduct, not where harm reverberates from a single, one-time act or omission:
>
> > "[W]here a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury, or when the tortious acts cease. Where the tortious act has been completed, or the tortious acts have ceased, the period of limitations will not be extended on the ground of a continuing wrong.
> >
> > "A 'continuing tort' is one inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation.
>
> "C.J.S., Limitations of Actions § 177 at 230-31; see also *Hendrix*, 911 F.2d at 1102 (where violation occurs outside limitations period but is closely related to violations occurring within the period, recovery is permitted on theory that all violations are part of one continuing act)." Stevens

> v. Lake, 615 So.2d 1177, 1183 (Miss. 1993). (Emphasis in text not added here.)

Every Supreme Court or Court of Appeals decision in the Mississippi Digest after Stevens dealing with this doctrine cites Stevens for authority. Smith v. Franklin Custodian Funds, Inc., 726 So.2d 144, 148-149 (Miss. 1998); McCorkle v. McCorkle, 811 So.2d 258, 264 (Miss. App. 2001); Baldwin v. Holliman, 913 So.2d 400, 410 (Miss. App. 2005); Randolph v. Lambert, 926 So.2d 941, 945 (Miss. App. 2006); and Winters v. AmSouth Bank, 964 So.2d 595, 600 (Miss. App. 2007).

As set out in the Trial Court's JUDGMENT, ROBERTSON stopped going to his units from 1991 until 1993. When he returned in 1993, he learned that the ASSOCIATION had been continuously renting out his units during that entire time. (RE:39-40; CP:90-91). He removed the trespassers, locked up, and went back to Morgan City. (RE:21; CP:72). ROBERTSON stopped going to his units again between 1993 and 1999 and did not know that they were being continuously rented out during that time either. (RE:40; CP:91). These facts from the JUDGMENT ROBERTSON does not dispute, and in fact, he agrees that they are the facts. But while the Trial Court holds that there was no agreement between ROBERTSON and the ASSOCIATION for use or rental of his units, it holds that ROBERTSON'S claim of continuing trespass was time-barred pursuant to Miss. Code Ann. §15-1-49 and was otherwise without merit. (RE:40-41; CP:91-92).

The Trial Court takes the position that ROBERTSON had knowledge and notice of the trespass, acquiesced, and was thereby guilty of laches. (RE:38-39, 41; CP:89-90, 92). However, neither knowledge nor notice nor acquiescence nor laches applies while the wrongful conduct, here continuing trespass, was being committed. The Trial Court finds, and the fact is that the trespass continued from 1991 through 1999. (RE:39-41;

CP:90-92). According to the Stevens case, supra, Miss. Code Ann. §15-1-49 did not begin to run until the date of the last trespass in 1999. This limitations statute provides as follows:

> "(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after." Miss. Code Ann. §15-1-49(1).

Trespass is one of those actions for which no other period of limitation is prescribed. The last act of trespass here was in 1999. ROBERTSON filed his COMPLAINT on January 26, 2000. ROBERTSON'S claim was filed within months of the last act and therefore is not time-barred.

Every time the ASSOCIATION used or put someone in ROBERTSON'S units, whole or interval-owned, it committed a separate cause of action. It was wrongful conduct continuously repeated. Each time it trespassed, it re-upped on the three (3) year "catch-all" statute of limitations until the date of the last trespass in 1999.

As stated above, this tort involves continuing or repeated wrongful acts, and where outside the limitations period, that they are closely related to wrongful acts occurring within the period. A continuing tort sufficient to toll a statute of limitations is not a tort occasioned by continual ill effects from an original violation. There must be continual or repeated wrongful acts. Stevens at 1183. For example, the Court in the Stevens case agreed with the trial court that there was no continuing tort committed by the defendant against the plaintiffs. There, the plaintiffs contended that the failure of a trust created by the defendant caused financial detriment resulting in bankruptcy. The plaintiffs took the position that regardless of when the original act of negligence accrued, a new cause of action accrued with each year's financial loss, and that recovery should be permitted for all losses occurring during those years preceding the filing of their

complaint. The Court, however, stated that the doctrine of continuing torts does not apply in situations where the harm reverberates from a single one-time act or omission. It applies only in situations where the defendant commits repeated acts of wrongful conduct. Id. The record here shows that there were repeated trespasses by the ASSOCIATION each and every year from 1991 into 1999, not just one trespass in 1991 causing ROBERTSON to suffer damages into the year 1999. (RE:39-41; CP:90-92).

Consider also the McCorkle case above cited. The facts show that after the father sold timber to a timber company from property that he owned, his son contended that the timber company had taken unfair advantage influencing his father to sell. The son pursued a vendetta against the timber company by trying to show that his father was incompetent to enter into the contract. In 1994, the son began years of wrongful acts which included putting his father through two (2) commitment proceedings, making four (4) attempts to have him picked up by the Veterans Administration as mentally ill, and accusing him of saying that he was going to kill the doctors that treated his wife who had died three (3) years previous. The father sued the son on grounds including intentional infliction of emotional distress and outrageous conduct which were found to be subject to a one (1) year statute of limitations. The son defended on the statute, but the Court found that the continuing tort doctrine and the facts of the case clearly indicated that the father filed his claim in a timely fashion even though the son's wrongful conduct began in August, 1994, and the father did not file his complaint until March, 1998.

The Court stated that the father's complaint was filed just seven (7) months after the son's second application for commitment. The filing was sufficient to toll the statute of limitations and was clearly within the one (1) year statutory limit from the date of the last wrongful act. The Court went on to state that though the first commitment hearing

and its related subsequent events prior to the second commitment hearing occurred outside the one (1) year limitation period, the violation was closely related to the violations occurring within the limitations period. Recovery was permitted on the theory that all of the violations were part of one continuing act. The Court cited the Stevens case. But for the proper application of the continuing tort doctrine, the cause of action by the father against the son would have been barred by August, 1995, one year after it began in August, 1994. However, the Court there properly applied the doctrine.

There is no exception in the cases cited above or in any case that the undersigned can find allowing for the application of knowledge, notice, acquiescence, or laches to bar recovery under the facts and circumstances of the case sub judice. In fact, it appears that these things are specifically excluded when the doctrine of continuing torts is applicable as it is here. The Trial Court finds that ROBERTSON was given notice and had knowledge by the ASSOCIATION'S letter of July 27, 1993, that his Unit 110 was being rented. (RE:40; CP:91). It then finds that since ROBERTSON did nothing after receiving the letter, he engaged in "actual or passive acquiescence" making his claim of continuing trespass to be without merit. It is submitted that such finding is not pursuant to Mississippi law. In support, we again direct this Court to McCorkle. The son's wrongful conduct began in August, 1994, with the first commitment proceeding against his father. Within approximately one (1) week, doctors examined the father and declared him mentally competent, and the commitment was dismissed. Notwithstanding, the son's wrongful conduct was repeated when in March, 1995, he requested again that the Veterans Administration pick his father up as mentally incompetent. The son repeated his wrongful conduct numerous other times culminating with the events in September, 1997, when he filed a second application for commitment which was also dismissed. It

cannot be argued that the father did not have knowledge or notice. He had knowledge, and he had notice. He was served to appear in court. He underwent mental examinations. There is no doubt that the father had knowledge and notice of what was being done to him. However, the discovery rule of knowledge and notice did not apply. In other words, there was no "latent injury or disease" requiring the Court to apply the discovery rule that provides that the cause of action does not accrue until the plaintiff has discovered or by reasonable diligence should have discovered, the injury. McCorkle at 263-264; Miss. Code Ann. §15-1-49(2). Besides, "If the claim is a continuing tort, the statute of limitations does not begin to run until the date of the last injury." Randolph at 945. That does not mean the date of the knowledge or the notice of the injury.

If knowledge or notice were relevant, then because there was no question that the father had knowledge and notice of what happened to him when the first commitment was filed in August, 1994, he would have been barred from filing the suit as he did in March, 1998, because the one (1) year statute of limitations would have run. Knowledge and notice are not relevant and, accordingly, are not bars to recovery.

The son in McCorkle undertook repeated acts of wrongful conduct against his father just like the ASSOCIATION undertook repeated acts of wrongful conduct against ROBERTSON. The father had knowledge and notice, and the Trial Court here finds that ROBERTSON had knowledge and notice. (RE:41; CP:92). If knowledge and notice could not bar the recovery of the father against the son, how could they bar ROBERTSON'S recovery against the ASSOCIATION? The answer is that they can not. The wrongful conduct of the ASSOCIATION in committing repeated acts of trespass against ROBERTSON is no more a case of "latent injury or disease" than the wrongful

conduct of the son against the father in McCorkle. Accordingly, contrary to the JUDGMENT, Miss. Code Ann. §15-1-49(2) is not applicable.

For comparison, we refer again to McCorkle. The father also sued the son for invasion of privacy for unlawfully obtaining his medical records. Invasion of privacy also has a one (1) year statute of limitations. The son argued that the cause of action began to run from the time of the injury and not from the time that the injury was discovered. Id. at 265. The Court disagreed and considered the issue to be analogous to the law of defamation. The Court concluded that the discovery rule was applicable because of the son's surreptitious activities which the father did not know about until after the one (1) year statute had run and which could not have been discovered even with reasonable diligence. In fact, the father's attorney did not find that the son had obtained the records until November 25, 1997, even though it was requested from the Veterans Administration in 1995 and in early 1996. It is acknowledged that if it was not for the discovery rule, many cases in which defendants act in secret would be barred by the statute of limitations, but the discovery rule has no application here. The discovery rule does not trump a continuing tort.

The JUDGMENT cites Board of Educ. of Lamar County v. Hudson, 585 So.2d 683, 687-688 (Miss. 1991), for knowledge and notice stating that ROBERTSON received statements and a letter and must be charged with knowledge that his units were being rented throughout the period of time at issue because,

> ". . . [W]hatever is enough to excite attention, or put a party on inquiry, is notice of everything to which such attention or inquiry might reasonably lead." Hudson at 687-688. (RE:41; CP:92).

But Hudson is simply not applicable here. Knowledge and notice are irrelevant here. The statute had not run and did not run before ROBERTSON filed suit. Even if he

had knowledge and his attention was excited or he was put on inquiry, he still had the right to file suit within three (3) years from the date of the last trespass, and he did that. Besides, the Hudson case was about the Board of Education of Lamar County suing to void a lease of 16th Section land because a 99-year lease of 3.5 acres for a one-time fee of $150.00 was an illegal donation of land held in public trust. That it waited 30 years was irrelevant. The Board could not be guilty of laches.

Again, the continuing trespass tort committed by the ASSOCIATION against ROBERTSON does not "involve latent injury or disease". The discovery rule, that is, knowledge and notice, does not apply.

Regarding acquiescence, consider Currie v. Natchez, J. & C. R. R. Co., 61 Miss. 725 (1884). The Court there held that the law, which was embodied in a jury instruction, was correct and should have been given. The law in that instruction reads as follows:

> "If Mrs. Currie had previously forbidden defendants to enter upon her land, as testified by her, they could not by acquiescence obtain the right to do so." Currie at 730-731.

There is nothing that says that this is not the law today. Here, ROBERTSON had forbidden the ASSOCIATION from entering his property and had even removed persons placed there by the ASSOCIATION. He locked up. He turned off the utilities. And he left. The ASSOCIATION could not by any perceived acquiescence with or without ROBERTSON'S knowledge or notice obtain the right thereafter to enter his property, use it, and rent it, according to the law in Currie.

The Trial Court holds that ROBERTSON engaged in "actual or passive acquiescence" constituting laches barring his claim. (RE:41; CP:92). But, just as Miss. Code Ann. §15-1-49(2), is not applicable as stated above, neither is the case which the Trial Court cites for that language, Stepanek v. Roth, 418 So.2d 74, 76 (Miss. 1982). The

Stepanek case is a restrictive covenants case, not a trespass case. Limitation of action regarding a restrictive covenants case is not within the purview of Miss. Code Ann. §15-1-1, et seq. In fact, that is actually set out in the case with the citation to Am. Jur. 2d:

> "The party seeking equitable relief for violation of a restrictive covenant must not be guilty of laches. What acts, or failure to act, upon the part of the complainant will amount to such laches as will bar the right to relief must depend largely upon the facts of the particular case, ... Generally, however, mere delay or lapse of time in bringing suit does not in itself constitute laches. For instance, it has been held that laches was not established where the period between the violation of the restriction and the action to enforce it was as great as 12 years; whereas a lapse of 5 weeks, in connection with other circumstances, has been declared sufficient to bar a plaintiff from injunctive relief." Stepanek at 75.

There is no five (5) week statute of limitations in Mississippi law, and twelve (12) years is far beyond that which is provided by Miss. Code Ann. §15-1-1, et seq. A restrictive covenants case is handled differently, and Stepanek provides some of the law regarding same. But it is not applicable here. The Trial Court actually includes language so stating in the quote set out in the JUDGMENT:

> "No better statement of the rule or summary as applicable to restrictive covenants has been made . . . ." Stepanek at 76. (RE:38-39; CP:89-90).

The Stepanek case has no application here, nor does acquiescence. The case sub judice is not a restrictive covenants case. It is a continuing tort case.

Regarding laches, this Court is cited to the case of Clanton v. Hathorn, 600 So.2d 963 (Miss. 1992). A landlady sued her former tenant who encroached onto her property after she sold to him some of her land so that he could set up his home site. He spent some $16,000.00. She was well aware of the money being spent and all of the things that were done to her property. She did nothing for nine years and then filed suit to confirm

title and remove clouds. He claimed laches and other defenses. The Court said no way.

The Court then went on to say:

> "In legal as well as surveying theory, a boundary enjoys exactness and may be so fixed. When theory translates into fact, right becomes entitlement to exclude, which is as great on the periphery as at the core. Each landowner is entitled to exclude others from the square inch most near the edge, as from the home place or fertile fields near the center. And so the Chancery Court held, although in a sense the case appears much ado about not very much: the worthlessness of the slough where Canton dredged dirt and built his pond, the small value of the pickup truck-sized driveway encroachment, and the ground occupied by the four inch sewer line notwithstanding, these are property in which Hathorn has undisputed rights, reminding us:
>
> > "Property, a creation of law, does not arise from value, although exchangeable, - a matter of fact. . . . Property depends upon exclusion by law of interference. . . .
>
> "*International News Service v. Associated Press*, 248 U.S. 215, 146, 39 S.Ct. 68, 75, 63 L.Ed.211, 223 (1918) (Holmes, J., concurring)." Clanton at 965.
>
> "Clanton does claim the Chancery Court erred when it rejected his equitable defenses, principal of which are laches and equitable estoppel. The factual predicate of Clanton's appeal is the same on all points. He argues he made the improvements at some $16,000.00 expense and that Hathorn, who was well aware of what he had done, did nothing for nine years, thus equity should stay her hand. Clanton sees great weight in his nine-year acquiescence claim." Clanton at 965-966. (Footnotes omitted.)
>
> ". . . [L]aches is not a defense to an action if the plaintiff proceeds within the period of the applicable statute of limitations. (Citations omitted.) It is difficult to imagine a case where we would credit a laches defense on an adverse claim to real property on grounds other than those set forth in the statute and our cases reading same. Of course, it is not necessary that we address so sweeping a point, it being sufficient that today's is not such a case." Clanton at 966.
>
> "Assuming arguendo his theory has credence, laches imports unreasonable delay plus prejudice. Clanton

> ignored that he made his encroachments and put out his money back in 1978. Whatever may have been the case had Hathorn allowed Clanton to use this land for nine years and then invest $16,000.00 in improving it, the nine-year acquiescence theory packs no present punch. To the contrary, Clanton has enjoyed the use of Hathorn's property for nine years without interference or rent." Clanton at 966.

ROBERTSON'S suit against the ASSOCIATION is not really any different than Hathorn's suit against Clanton after Clanton encroached for nine (9) years. The ASSOCIATION continually trespassed on ROBERTSON'S property time after time, continuously for (coincidentally) almost nine (9) straight years. Merely months after the trespass ceased, he filed his suit. During the entire nine (9) years, the ASSOCIATION enjoyed the use of ROBERTSON'S property with hardly any interference. In fact, it actually took rent. It certainly did not pay rent. There was no acquiescence by ROBERTSON not filing suit for some nine (9) years any more than there was by Hathorn.

The Clanton case sets out the law that laches is not a defense to an action if the plaintiff proceeds within the period of the applicable statute of limitations. Clanton at 965-966. That the Clanton case deals with encroachment does not take away from its statement of black letter law that laches is never applicable when a claim has not been barred by the statute of limitations. The claim made by ROBERTSON is not barred by the statute of limitations because he filed in January, 2000, within months after the last trespass was committed by the ASSOCIATION in 1999. He had three (3) years in which to file. He filed in less than one (1) year. Laches cannot apply to ROBERTSON any more than it applied to Hathorn because the statute of limitations had not run. This black letter law regarding laches can also be found in other cases. Bailey v. Estate of Kemp, 955 So.2d 777, 783 (Miss. 2007); Durr v. Durr, 912 So2d 1033, 1038 (Miss. App. 2005);

Brown v. Brown, 822 So.2d 1119, 1121-22 (Miss. App. 2002); Miss. Depart. of Human Services v. Molden, 644 So.2d 1230, 1232 (Miss. 1994); West End Corp. v. Royals, 450 So.2d 420, 425 (Miss. 1984). We note that the cases on laches do not say that most of the time laches is not applicable when a claim has not been barred by the statute of limitations. They say it is never applicable.

It is noteworthy to point out that the Court in Clanton also dismissed any significance to the fact that the property owner knew or should have known of the encroachments made by the defendant. It was of no consequence because the statute of limitations had not run. Clanton at 966. It, likewise, is of no consequence here.

Accordingly, ROBERTSON'S claim filed within months following the last wrongful act committed against him by the ASSOCIATION was well within the three (3) year statute of limitations. Under the law that repeated wrongful acts are part of one continuing wrongful act, recovery by ROBERTSON against the ASSOCIATION is permitted all the way back to the first act that occurred in 1991. Knowledge and notice are irrelevant. Acquiescence does not grant any right or authority, and laches is never applicable when a claim has not been barred by the statute of limitations.

With further regard to laches, the Court in Clanton stated that, "laches imports unreasonable delay plus prejudice" and said that, ". . . , Clanton has enjoyed the use of Hathorn's property for nine years without interference or rent." Clanton at 966. In Bailey, above cited, the Court set out the following:

> "In determining whether laches can be applied, the court looks to three considerations. The party seeking to invoke the doctrine of laches must show: (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 at 784.

The Trial Court here holds that since ROBERTSON knew about the use of his units from 1991 as of 1993, his claims were barred in 1996 by Miss. Code Ann. §15-1-49. (RE:40; CP:91). It then holds that since ROBERTSON knew of the use from 1993 through 1999 and did nothing, he engaged in "actual or passive acquiescence in the performance of the act complained of" and his claim of continuing trespass was without merit. (RE:41; CP:92).

Even if these rulings are to be taken to mean that the Trial Court was showing that ROBERTSON delayed in asserting a right or claim, the Trial Court does not address whether or not the delay was excusable, nor does it address undue prejudice to the ASSOCIATION. If not addressed, there is none. Regarding particularly undue prejudice, and using the words of the Court in Clanton: "To the contrary, the ASSOCIATION has enjoyed the use of ROBERTSON'S property for nine (9) years without interference or rent". Clanton at 966.

There is then the question of the failure of the ASSOCIATION to raise its affirmative defenses after they were pled. Consider the following case which cites MS Credit Center, Inc. v. Horton, 926 So.2d 167, 180 (Miss. 2006):

> "Our holding today [in *Horton*] is not limited to assertion of the right to compel arbitration. A defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver." East Mississippi State Hosp. v. Adams, 947 So.2d 887, 891 (Miss. 2007).

In that case, the defendants participated fully in the litigation for over two years, including discovery and the filing and opposition to various motions. The Court held that the defendants had waived their defenses. Here, the ASSOCIATION pled the affirmative defense of laches in its Answer filed May 1, 2000, but never pursued it. Never. The case

is beginning its tenth (10^{th}) year. Also, the ASSOCIATION participated fully in the litigation during the entire nine (9) years it has been pending including responding to and propounding discovery, and filing and opposing numerous motions. Pursuing this affirmative defense would have certainly terminated litigation. But it failed to so do. Had it so done, the appeal could have been taken and the issue resolved many years ago.

There is next the question of whether or not the Trial Court can even render a ruling based on affirmative defenses that have been waived. It is submitted that the answer is no, it cannot so do. Affirmative defenses are for the party to raise and pursue, not the Court. Rule 8(c), Mississippi Rules of Civil Procedure. If an affirmative defense is pled, but not pursued, and therefore waived, it is no longer part of the party's pleading and not a matter before the court. Adams at 891. 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).

Further, in its JUDGMENT, the Trial Court ruled against ROBERTSON on his claim of continuing trespass. However, by its ORDER REGARDING ADDITIONAL ISSUES filed May 31, 2005, the Trial Court actually ruled in ROBERTSON'S favor. While the ORDER speaks for itself, it is noted that the factual and legal basis is the same there as set out here. The Trial Court stated:

> "It appears from the documents presented that both wholly owned and time share 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).

Even though this ORDER is not a "final judgment" on the issue as is allowed under Rule 54(b) of the Mississippi Rules of Civil Procedure, it is consistent with the JUDGMENT except for the Trial Court's misapplication of the doctrine of laches, knowledge, notice, and acquiescence.

Finally, while we certainly agree that the maxim, "Equity aids the vigilant and not those who slumber on their rights," has application in some cases, this is not one of them. By applying it to ROBERTSON, the Trial Court overlooks his prolonged battles with cancer, the Louisiana oil crisis that impacted his practice and his business, and hurricanes of which we know plenty. (RE:20; CP:71). It also overlooks the fiduciary duty owed by the ASSOCIATION to ROBERTSON. Perry v. Bridgetown Community Assoc., Inc., 486 So.2d 1230 (Miss. 1986). There it was stated:

> "This Court notes that one of the unique characteristics of a homeowners association is mandatory membership. Upon taking title to a lot the property owner automatically becomes a member of the association and is subject to the obligations of membership and enforcement of the covenants. W. Hyatt, Condominium and Homeowners Association Practice: Community Association Law 35 (1981).
>
> "Thus, it can be reasoned that the existence of the homeowners association begins when the documents creating the association are recorded. Hyatt, supra at 39 n. 12. The roles of developer and lot owners are specified in the creating documents, and those individuals in control become fiduciaries in the discharge of these responsibilities to carry out the purpose of the association. Hyatt, supra at 40." Perry at 1233.

We submit that if a Chancery Court maxim does apply, the appropriate one is, "Equity follows the law." §40 Griffith, Miss. Chancery Practice. ROBERTSON did. The ASSOCIATION did not. We would ask that this Court's ruling reflect that.

2.

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

The Trial Court summarily states in its JUDGMENT that ROBERTSON "presented no evidence" regarding the invalidity of the Amended Declaration. (RE:37; CP:88). However, it was ROBERTSON who introduced into evidence and gave testimony on the By-Laws, the Declaration, and the Amended Declaration which speak for themselves clearly demonstrating that the Amended Declaration is invalid. (E: R-029, R-030, R-055).

The Declaration, as the Trial Court correctly points out in its JUDGMENT, provides at Article IX as follows:

> "Section 3. Amendment. The covenants and restrictions of this Declaration shall run with and bind the land, for a term of twenty (20) years from the date this Declaration is recorded, after which time they shall automatically be extended for successive periods of ten (10) years. This Declaration may be amended during the first twenty (20) year period by an instrument signed by not less than sixty-six and two-thirds (66 2/3%) percent of the unit owners, and thereafter, by an instrument signed by not less than seventy-five (75%) percent of the unit owners. Provided, this Declaration may be amended by Declarant at any time prior to the sale of the first unit. Any amendment must be recorded." (E: R-030).

The Declaration was signed and notarized on June 4, 1980. (E: R-030). The Amended Declaration was signed and notarized on August 17, 1981, within the stated 20 year period. (E: R-055). For the Amended Declaration to be valid, it must be signed or there must be "an instrument signed by not less than sixty-six and two-thirds (66 2/3 %) percent of the unit owners. . . ." It is not so signed and no such instrument was produced

by the ASSOCIATION. ROBERTSON cannot produce what does not exist. He can not prove a negative. It is not in evidence, so for the purposes of this case, it does not exist. Therefore, the Amended Declaration is not valid under this provision.

The Declaration may also be amended by the Declarant, but the Declarant must do so prior to the sale of the first unit. According to the evidence presented by ROBERTSON, the first units were sold by the Warranty Deed from Chateau LeGrand Development Corporation to Vacation Condominium Partnership Fund. (E: R-056). That deed was signed and notarized on July 31, 1981, some 17 days prior to the signing and notarizing of the Amended Declaration. (E: R-055). Therefore, the Amended Declaration is not valid under this provision either.

Moreover, both the Declaration at Article XI(c) and the By-Laws at Article XIII, Section 5(c) require the written consent and approval of all holders of first deeds of trust to modify or amend any material or substantial provision. (E: R-030, R-029). There is no such document or instrument evidencing this consent or approval and none showing in some fashion that such is not required or stating that there were no holders of first deeds of trust, if there were none.

These things are likewise required by statute. Miss. Code Ann. §89-9-9. The statute also requires that same be recorded in the office of the chancery clerk. Id.

ROBERTSON has as an owner the specific right to enforce these provisions at this time. The Declaration provides at Article IX:

> "Section 1. Enforcement. The Association, or any Owner, shall have the right to enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration and the By-Laws and Articles of Incorporation of the Association. Failure by the Association or by any owner to enforce any covenant or

> restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter." (E: R-030).

What more could ROBERTSON do in presenting evidence to show that the Amended Declaration was not valid? It is submitted that he really could do nothing else. ROBERTSON did present evidence showing the invalidity of the Amended Declaration, and the evidence in fact clearly shows that the Amended Declaration is by law invalid.

Consider also the fiduciary duty owed by the ASSOCIATION. See page 26 hereinabove.

3.

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

The Trial Court takes the position that because the ASSOCIATION "has been in dire straits for years due in large measure to owners' nonpayment of assessments," it sees no reason why Article II, Section 1(b) of the Declaration may not be so liberally construed as to allow for suspension of non-paying owners' space banking rights. (RE:42; CP:93). The Trial Court also denies all relief not specifically granted. (RE:43; CP:94). Presumably, regarding the interval-owned units, the Trial Court, for the same reason, takes the position that the ASSOCIATION has the authority to "lock-out" ROBERTSON from his fee simple interval-owned units. (RE:23; CP:74).

No such authority is granted in the Declaration, so the Trial Court simply adds it citing Miss. Code Ann. §89-9-27 which states:

> "Any deed, declaration, or plan for a condominium project shall be liberally construed to facilitate the operation of the project, and its provisions shall be presumed to be independent and severable."

However, "liberally construed" as used in this statute does not give a court the authority to add to or subtract from written covenants as it deems reasonable. While chancery courts do have the inherent power to shape decrees and judgments so as to effect justice between parties, the principal of equity does not extend so far as to allow courts to change agreements. Griffin v. Tall Timbers Development, Inc., 681 So.2d 546, 555 (Miss. 1996). This decision states that "[c]ourts do not have the power to make contracts where none exist, nor to modify, add to, or subtract from the terms of one in existence." Id. It goes on to state:

> "The power of the chancellor to substitute his own judgment for that found in the original covenant, or the power of the court of equity, when considering the validity of covenants or bylaws, to alter the substance of a writing, is not reflected in the case law of this or any other jurisdiction brought to the attention of this Court." Id.

As correctly pointed out by the Trial Court, Article VI, Section 8 of the Declaration provides that the ASSOCIATION may bring an action at law against the owner who has not paid his assessment or foreclose the lien against his property, or both. (RE:41-42; CP:92-93). But, no amount of statutory liberal construing can give the power to the Court to extend those two remedies of the ASSOCIATION to include "locking out" a fee simple owner from his property. Griffin at 555. Besides, one must ask how locking an owner out of his property instead of suing or foreclosing alleviates the financial "dire straits". It puts no money in the ASSOCIATION account. It fixes nothing.

The Trial Court cites the Clean Hands Doctrine against ROBERTSON stating that "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). Maybe it is actually the ASSOCIATION who has violated the Doctrine by continually trespassing onto private property, using and renting ROBERTSON'S units, and now seeks the protection of the Court from ROBERTSON who is suing it for damages. Furthermore, ROBERTSON does not seek free vacations in Hawaii or anywhere else. He is the fee simple title holder of two (2) interval owned units. He paid for them and for any trips for which he desires to exchange them. ROBERTSON has sought nothing for free. He does, however, seek justice, but that has not been free either.

4.

WHETHER OR NOT THE ASSOCIATION SHOULD BE ORDERED TO PAY THE EXPENSE OF THE ADDITIONAL PARTS OF THE RECORD IT DESIGNATED.

On July 18, 2008, the Trial Court denied ROBERTSON'S MOTION FOR ORDER REQUIRING APPELLEE TO PAY EXPENSES. (CP:240).

Ultimately, ROBERTSON paid a total of $4,364.40 when his cost would have been less than $300.00. (CP:253).

Rule 10 of the Rules of Appellate Procedure controls here. Rule 10(b)(2) provides in pertinent part as follows:

> "[I]f the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion."

ROBERTSON does not so urge on appeal. ROBERTSON accepts the findings of fact of the Trial Court, but appeals because the conclusion is not supported by the law.

Rule 10(b)(4) provides as follows:

> "*Statement of Issues.* Unless the entire record, except for those matters identified in (b)(3) of this Rule, is to be included, the appellant shall, within the seven (7) days time provided in (b)(1) of this Rule, file a statement of the issues the appellant intends to present on the appeal and shall serve on the appellee a copy of the designation and of the statement. Each issue in the statement shall be separately numbered. If the appellee deems inclusion of other parts of the proceedings to be necessary, the appellee shall, within 14 days after the service of the designation and the statement of the appellant, file with the clerk and serve on the appellant and the court reporter a designation of additional parts to be included. The clerk and reporter shall prepare the additional parts at the expense of the appellant unless the appellant obtains from the trial court an order requiring the appellee to pay the expense."

The ORDER of July 18, 2008, above referenced, sets out the chronology of events leading to the Trial Court's ruling and need not be repeated here in full. (CP:240). ROBERTSON accepts and concedes to the Trial Court's findings of fact. 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" authority of the ASSOCIATION. He needs only the JUDGMENT appealed from and a prior ORDER, the By-Laws, the Declaration, the Amended Declaration, and one deed. He needs no testimony. He needs no other clerk's papers. He needs no other exhibits. It is sufficient to argue laches and the "lock-out" policy using only the law and the JUDGMENT. The law and the Exhibits are sufficient to argue that ROBERTSON did in fact present evidence that the Amended Declaration is invalid. The hundreds and hundreds of other pages costing ROBERTSON over $4,000.00 are simply unnecessary and not relevant.

Rule 10(b)(4) of the Rules of Appellant Procedure above set out provides that if the ASSOCIATION as Appellee deems inclusion of more of the record to be necessary, it need only file its designation. But the Rule does grant ROBERTSON the right to pursue an order requiring the ASSOCIATION to pay the expense. ROBERTSON is the Appellant. The ASSOCIATION is not the Appellant and is not even a Cross-Appellant. That which is designated by the ASSOCIATION is quite unnecessary and quite irrelevant unless perhaps the ASSOCIATION was the Appellant.

Notwithstanding, the Trial Court holds that:

> ". . . [T]his matter is a case of 'significant complexity' and that Judge Robertson's Second Amended Designation of the Record leaves out significant portions which the Court on appeal would need to fully appreciate the surrounding circumstances which impacted the Court's findings and conclusions." (CP:246).

A search has revealed no case that supports this statement. Where the Trial Court makes its findings of fact and they are accepted by ROBERTSON, why would this Court need portions of the record "to fully appreciate the surrounding circumstances which impacted this Court's findings and conclusions", and why would ROBERTSON have to pay for it? The law does not require such, and in fact, it has been said that unless manifestly wrong, the appellate court accepts facts specifically found where no request was made for amended or additional findings pursuant to Rule 52(b) of the Mississippi Rules of Civil Procedure. Bodne v. King, 835 So.2d 52, 57 (Miss. 2003). No Rule 52(b) request was made by either party. As stated, ROBERTSON accepts the Trial Court's findings of fact. Accordingly, the findings will not be challenged by ROBERTSON as being manifestly wrong. The findings of fact will not, and in fact, can not, be challenged by the ASSOCIATION either. The ASSOCIATION did not appeal. Accordingly, it is understood that this Court accepts the facts specifically found by the Trial Court, and there is no need for additional portions of the record to be included in order for this Court to "fully appreciate the surrounding circumstances which impacted (the Trial Court's) findings and conclusions."

A brief review of the Second Supplemental Designation made by the ASSOCIATION will clearly show how frivolous it is. It has designated one of its motions and one of its responses to a motion, almost all testimony, and nearly every single exhibit it placed into evidence including corporate registration records, pleadings, rulings, a stipulation, testimony excerpts, letters, attorney invoices from a completely different suit, Board minutes, deeds, and the like. Then following the Trial Court's ruling favoring its position, the ASSOCIATION designated even more testimony. (CP:153). For the most part, the ASSOCIATION designated the entire record except

ROBERTSON'S exhibits. Ironically, most of ROBERTSON'S Exhibits are the ASSOCIATION'S documents including almost all of its rent receipts, reservation records, invoices and the like showing its continuous trespass on ROBERTSON'S property.

This Court has taken a strong position against such frivolous designations of irrelevant portions of the record. Consider the following:

> "The appellant, through its designation of record and through its motion to limit designation and limit costs, attempted to rectify these excessive costs early on, but the trial court and this Court in reviewing the motion and the argument made did not have or did not scrutinize the record at that time. Only after receiving the record and through a belaboring page by page review and analysis, did this Court realize that the costs required to be paid by the appellant had been manipulated in such a way as to discourage any appeal. Not only does the cost and the record discourage appeal, but in the instant case, the cost caused laborious review by this Court, delay, confusion, and disgust. Suffice it to say that the cost of appeal and the cost of a designated record should never be used as an offensive or defensive weapon in litigation. This Court has reviewed and modified the rules of the Court to attempt to avoid cost problems, such as arose in the instant case, for future cases.
>
> "Again, while it appears that the record and the record costs were so constructed and manipulated to discourage appeals and possibly to expedite the City's desire to annex, the result is and has been to add unusual delay and unusual review.
>
> "In the pages that follow, the Court rules on the merits of the City of Meridian petition for annexation which without the cost problems is a rather simple case and could have been decided by this Court months and possibly years sooner if not for the cost problems." Mun. Boundaries of Meridian v. City of Meridian, 662 So.2d 597, 600 (Miss. 1995).

The Court there found that the appellant should not have been assessed with all of the costs of the appeal and in its ruling, more fairly assessed them. Id at 619.

Three years later, this Court cited the holdings from a 1985 case to make its point that the bulk of transcripts must be reduced stating the following:

> "We are aware that many appealing attorneys routinely designate the entire course of trial proceedings for transcription, wholly without regard to the nature of the issue to be raised on appeal. The time has come for this practice to stop. We have repeatedly urged the parties to an appeal and their counsel to reduce the bulk of transcripts
>
> > 'by excluding or omitting portions of the testimony or exhibits not relevant to the issues raised on appeal.' *City of Mound Bayou v. Ray Collins Const. Co.,* 457 So.2d 337, 343 (Miss. 1984).
>
> "What we said in *Mound Bayou* was an 'urging' from this Court. What we say here should be taken as a warning." Grice v. Grice, 726 So.2d 1242, 1256 (Miss. App. 1998), citing Byrd v. F-S Prestress, Inc., 464 So.2d 63, 69 (Miss. 1985).

What happened in the Meridian case has happened here. There, the Court said this:

> "Suffice it to say that the cost of appeal and the cost of a designated record should never be used as an offensive or defensive weapon in litigation." Meridian at 600.

Over $4,000.00 in irrelevant and unnecessary portions of a trial record is a serious weapon. It caused considerable delay, and at the beginning, chilled ROBERTSON'S desire and ability to appeal. It was the ASSOCIATION'S way to punish him for daring to appeal. ROBERTSON pursued his right to obtain an order requiring the ASSOCIATION to pay, but the effort was in vain. ROBERTSON did all that he could to reduce the bulk of the record and the expense associated with it. He spent time, money, and effort, but to no avail. The Court in Meridian said it was disgusted. Id. This Court should also be disgusted.

CONCLUSION

It is requested that this Court reverse the Chancellor's ruling that ROBERTSON'S claims of continuing trespass are without merit, and render in favor of ROBERTSON that the ASSOCIATION is guilty of continuing trespass from 1991-1999 warranting damages to be awarded in the next stage of the case.

It is also requested that this Court reverse the Chancellor's ruling that ROBERTSON presented no evidence regarding the invalidity of the Amended Declaration and render in favor of ROBERTSON'S position that same is invalid having not been properly adopted.

It is further requested that this Court reverse the Chancellor's ruling that the ASSOCIATION'S "lock-out" policy is permitted by the Declaration and the By-Laws and render a decision that the "lock-out" policy is not permitted.

It is finally requested that this Court reverse the Chancellor's ruling denying that the ASSOCIATION should be ordered to pay any of the expenses of its designation of the record and render a decision that the ASSOCIATION should reimburse to ROBERTSON every dollar of the cost of that which it designated and include in its decision an order that the ASSOCIATION pay the attorney's fees incurred by ROBERTSON in this appeal, or some reasonable portion thereof, which amount will be no less than Twenty-Seven Thousand Five Hundred Dollars ($27,500.00) being one hundred (100) hours at Two Hundred Seventy-Five Dollars ($275.00) per hour, which order should be based in part not only on the frivolous designation and use of unnecessary and irrelevant portions of the record but also the frivolous and unreasonable way in which it proceeded with this litigation. See Course of the Proceedings, pp. 2-3 above, and Docket Sheet in the Clerk's Papers and at RE:1-15.

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 BRIEF OF THE APPELLANT to the following:

Hon. Margaret Alfonso
Chancery Court Judge
P.O. Box 986
Gulfport, Mississippi 39502

Hon. William V. Westbrook, III
Bryant, Dukes & Blakeslee, PLLC
P.O. Box 10
Gulfport, Mississippi 39502-0010

This the 22nd day of January, 2009.

Wayne L. Hengen
WAYNE L. HENGEN