

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2009-CA-01586

**ANGELA HUMPHRIES AND
KEVIN FROMME**

APPELLANTS

VS.

**PEARLWOOD APARTMENTS PARTNERSHIP,
A MISSISSIPPI LIMITED PARTNERSHIP,
CALHOUN DEVELOPMENT, INC., MAC-RE, LLC,
CALHOUN PROPERTY MANAGEMENT, INC.**

APPELLEES

**ON APPEAL FROM THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI
(CIVIL ACTION NO. 2006-49-C)**

BRIEF OF APPELLEES

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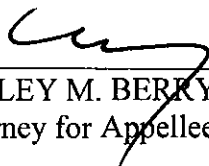
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APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities 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 Justices of the Court of Appeals may evaluate possible disqualification or recusal.

1. Angela Humphries and Kevin Fromme, Appellants
2. James D. Bell and the law firm of Bell & Associates, P.A., attorney for Appellants
3. Pearlwood Apartments Partnership and MAC-RE, LLC, Appellees
4. Kelley M. Berry, Elise B. Munn, and the law firm of Berry & Munn, P.A., attorneys for Appellees
5. Honorable William E. Chapman, III, Rankin County Circuit Court Judge, Post Office Box 1885, Brandon, Mississippi 39043



KELLEY M. BERRY
Attorney for Appellees

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STATEMENT OF THE CASE

Angela Humphries and Kevin Fromme filed their Complaint in this matter against Pearlwood Apartments Partnership and MAC-RE, LLC on February 23, 2006. (R.12-13). The Appellees ("Pearlwood") filed separate answers on June 8, 2005. (R. 21-28). Pearlwood Apartments Partnership owns the Pearlwood Apartments, and MAC-RE, LLC manages the complex (R. 157). On February 17, 2009, Pearlwood filed a Motion for Summary Judgment and Memorandum in Support Thereof requesting summary judgment based upon the expiration of the applicable statute of limitations contained in Miss. Code Ann. § 15-1-49 (R. 68-93). Pearlwood also filed separate motions to amend their answers in order to include the statute of limitations defense. (R. 94-115). The motions to amend filed by Pearlwood were granted on June 17, 2009. (R. 148), and Pearlwood's Amended Answers were filed on June 22, 2009. (R.164-171).

Angela and Kevin filed their Response to the Motion for Summary Judgment on March 20, 2009 (R. 118) and filed an Additional Response to the Motion for Summary Judgment on June 15, 2009 (R. 132) and a Second Additional Response on June 18, 2009 (R. 150). Pearlwood filed a Rebuttal to Angela and Kevin's Response to the Motion for Summary Judgment on March 30, 2009 (R.122). Pearlwood also filed a Supplemental Rebuttal to the Additional Response and to the Second Additional Response on July 16, 2009 (R. 175). A Motion to Amend their Complaint was filed by Angela and Kevin on June 12, 2009, but said motion was never ruled upon. (R.126). Pearlwood filed an Opposition to Angela and Kevin's Motion to Amend their Complaint on July 16, 2009 (R. 172). The Court entered its Order granting Summary Judgment on August 3, 2009 (R. 179). The Court entered its Order denying Angela and Kevin's Motion to Reconsider on September 8, 2009 (R.191).

SUMMARY OF THE ARGUMENT

Angela and Kevin assert that the lower court erred when it granted the Defendants' Motion for Summary Judgment on the basis of the three-year statute of limitations found in Miss. Code Ann. § 15-1-49. Angela and Kevin contend that the three-year statute of limitations does not apply because they believe that multiple acts of flooding of their home constitute a continuing tort sufficient to toll the three-year statute of limitations.

While Angela and Kevin are correct that continued and repeated acts of wrongful conduct may constitute a continuing tort, the continuing tort doctrine does not apply here. Their argument fails because it is premised on continual "ill effects" from an original wrongful act. In Angela and Kevin's Complaint, they complain in paragraph 6 that "in the construction and maintenance of the Pearlwood Apartments, the natural flow of rain water was negligently disrupted so that drainage now flows into the home of the Plaintiffs" (R. 13). It is the contention of Angela and Kevin that the apartments were constructed and maintained negligently. The sworn testimony of Angela and Kevin in this action shows that they discovered, or reasonably should have discovered, their alleged injuries and cause of action no later than October 2002. Even if there existed a heightened standard that required a "belief" or "knowledge" of the cause of Angela and Kevin's alleged injuries, which there does not, Angela and Kevin "knew" the alleged cause of their injury at the very latest in December 2002. Since this action was not filed until February 23, 2006, their claims are time-barred.

ARGUMENT

The three-year statute of limitations found in Miss. Code Ann. § 15-1-49 bars the claims brought by Angela Humphries and Kevin Fromme against Pearlwood as a result of flooding of their home. More than three years passed between the time that Angela and Kevin suspected,

knew and believed that flooding of their home had been caused by Pearlwood, and the filing of the Complaint.

The testimony of both Angela and Kevin establishes that they discovered or should have discovered their alleged injuries no later than October 2002. (R. 75-91, 93). In fact, they came to believe that the house had flooded and that the flooding was caused by the actions and/or inactions of Pearlwood as early as August or September, 2002 according to their deposition testimony. (R. 77). However, taking Angela and Kevin's discovery responses as true, their home flooded in October 2002 for the first time since they had moved in. Further, Angela and Kevin testified that their neighbors informed them within a couple of days of the damage in October 2002 that the house began flooding after trees were cut to make way for Pearlwood Apartments. (R.81-85). Accordingly, the statute of limitations applicable to the allegations in this matter began to run no later than October 2002. That is the time that Angela and Kevin were on notice as to their damages and injuries as a result of flooding and that the flooding was allegedly caused by Pearlwood.

Angela and Kevin spoke to their neighbors after the house began to flood and inquired of the neighbors as to the potential cause. The neighbors informed Angela and Kevin that the house had not flooded prior to the trees behind the house being cut when the apartments were built. (R. 81, 83). Kevin testified that the first time the house flooded after he and Angela moved in was two to three months after they had moved into the house. (R. 77). Angela also testified that she and Kevin moved into the home on either June 13, 2002 or the day following. (R. 93). Angela testified that the first time that the house flooded after they moved in was in October 2002. (R. 93). The Complaint in this matter was filed on or about February 23, 2006. (R.12). Since Angela and Kevin were on notice of a potential claim against Pearlwood no later than October 2002, the three-year statute of limitations pursuant to Miss. Code Ann. § 15-1-49 would have

expired no later than the end of October 2005. Accordingly, the claims are time-barred under Miss. Code Ann. § 15-1-49.

An action accrues and the limitations period begins to run under Miss. Code Ann. § 15-1-49 when a plaintiff “discovered, or by reasonable diligence should have discovered, the injury.” Miss. Code Ann. § 15-1-49(2). The standard to impute a plaintiff with knowledge required to cause the statute to run is not that he “knows with certainty” that he has an actionable injury. *PPG Architectural Finishes, Inc. v. Lowery*, 909 So.2d 47, 51 (Miss. 2005) (internal citations omitted). In *Lowery*, the Supreme Court reversed the trial court’s denial of the Defendants’ Motion for Summary Judgment pursuant to Miss. Code Ann. § 15-1-49. The Supreme Court held that a plaintiff is only required to have known or reasonably should have known that some negligent conduct had occurred. The standard is not that a plaintiff knows with certainty that the conduct was legally negligent or negligent as a matter of law. *Id.* The statute began to run when plaintiffs came to know or should have known that they had a potential cause of action. The testimony of Angela and Kevin demonstrates that this was in October 2002.

It is settled Mississippi law that a “cause of action accrues and the limitation period begins to run when the Plaintiff can reasonably be held to have knowledge of the injury...” *Owens Illinois, Inc. v. Edwards*, 573 So.2d 704, 709 (Miss.1990). See also, *Sims v. Bear Creek Water Association*, 923 So.2d 230 (Miss. App. 2005). Even though § 15-1-49 does not require a plaintiff to discover the legal cause of his alleged injury to trigger the statute of limitations, if such a requirement did exist, Kevin testified that he satisfied himself that the flooding was the fault of Pearlwood sometime before the first frost after he and Angela moved in. He further testified that was in 2002 and was no later than December 2002. (R. 90-91). The undisputed testimony of Angela and Kevin shows that their cause of action accrued at the absolute very latest, giving them every benefit of the doubt, in December 2002. (R. 90-91, 93). Even assuming

a date of December 31, 2002, the statute of limitation on their alleged claims expired no later than the end of December 2005. Since the Complaint in this matter was not filed until February 23, 2006, the claims at issue are time-barred.

Angela and Kevin apparently try in their brief to take the position that Pearlwood failed to take steps to stop the flooding of their home and that this was a continuing tort. Contrary to this position, the statute of limitations begins to run at the time of the wrongful act that allegedly causes the injuries, in this case, the construction of the apartment complex. The repeated acts of flooding referred to by Angela and Kevin constitute continuing or repeated injuries which do not toll the three-year statute of limitations.

Angela and Kevin cite *Pierce v. Cook*, 992 So.2d 612, 619 (Miss.2008) in which the Court stated:

We previously have defined the continuing tort doctrine as follows:

[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. (Emphasis added.)

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. *Stevens v. Lake*, 615 So.2d 1177 (Miss. 1993) (emphasis in original) (quoting C.J.S. Limitations of Actions § 177 at 230-31 (1987)) (Emphasis added). A few years after *Stevens*, we again addressed the continuing tort doctrine in *Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144 (Miss. 1998). Addressing our decision in *Stevens*, we stated:

Indeed, we opined that continuing or repeated injuries can give rise to liability even if they persist outside the time period for the initial injury, but we noted that the defendant must commit repeated acts of wrongful conduct. *Stevens*, 615 So.2d at 1183 (citing *Hendrix v. City of Yazoo City*, 911 F.2d 1102 (5th Cir. 1990)). We have held that we will not apply the continuing tort doctrine when harm reverberates from one wrongful act or omission. *Id*

Smith, 726 So. 2d at 148-149 Miss.1998).

While Angela and Kevin cite *Pierce* for the proposition that there were omissions on the part of Pearlwood that caused the flooding of their home, *Pierce* is instructive as emphasized above because it confirms that a statute of limitations will not be tolled by a continuing wrong or by continual ill effects, and that in order for a statute to be tolled, the defendant must commit repeated acts of wrongful conduct. Now that summary judgment has been granted against them, Angela and Kevin assert that the flooding did not result from one wrongful act but instead by repeated and continued conduct. This argument fails under the pleadings and facts specific to this case as well as under the law as explained in *Pierce*. Additional flooding could not create new causes of action.

Angela and Kevin also cite an unpublished Mississippi Court of Appeals case that considered the continuing tort doctrine. *Robertson v. Chateau LeGrand Property Owner's Association, Inc.*, 2008-CA-0053-COA is instructive as to why the claims of Angela and Kevin are distinguishable from a matter where the continuing tort doctrine does apply. In *Robertson*, the Court was faced with claims of continuing trespass. The trespass in *Robertson* arose from the fact that a condominium association continued to rent the condominium in question. This involved repeated affirmative acts on the part of the association in the form of actually renting the condominium repeatedly and allowing guests to enter into the condominium units. In addition, the association made affirmative acts and went into the condominium units in questions to turn on the cable, telephone, and electricity. *Robertson* at paragraph 18. The continuing tort doctrine may have applied in *Robertson* only because there were specific affirmative additional, repeated acts of alleged wrongful conduct. Here, the apartments were constructed and Angela and Kevin believed that the apartment complex was responsible for the flooding of their house at the very latest in December 2002. Even though Angela and Kevin allege that the maintenance of

the apartments was also at fault, they knew or believed that the manner in which the apartment complex was maintained, or the lack thereof, was the cause of their flooding no later than December 2002. Accordingly, the continuing tort doctrine cannot and does not apply in this matter.

A subsequent injury from the same negligence does not being a new statute of limitations. Despite Angela and Kevin's assertions in the brief to the contrary, an alleged failure to remedy on any particular date does not begin a new cause of action that has a new statute of limitations. The cause of action in this matter accrued when Angela and Kevin discovered their flooding problems. As set forth above, this was in October 2002; however, giving every benefit of the doubt to Angela and Kevin, they each believed that Pearlwood was liable for the flooding of their house at the very latest in December 2002.

Baldwin v. Holliman, 913 So.2d 400 (Miss. App. 2005) involved a couple, the Baldwins, who brought suit against their home builder and Lowndes County as a result of damage to their home caused by flooding. The lower court in *Baldwin* granted summary judgment to both Holliman and Lowndes County. *Id* at 405. Summary Judgment was granted to Lowndes County based on operation of the statute of limitations. The Baldwins appealed and the Court of Appeals held that the "Baldwins asked Lowndes County to remedy their problem in 1992. In 1992, Lowndes County told the Baldwins that the County could not remedy the drainage problems. The Baldwins' claim accrued in 1992, and the statute of limitations began to run. The Baldwins' claim expired three years later. There is no merit to the alleged error." *Id* at 408. The Court of Appeals also addressed the Baldwins' claim of error that the lower court committed reversible error by failing to apply the doctrine of continuing torts in order to toll the statute of limitations. *Id* at 409. Citing *Smith v. Sneed*, 638 So.2d 1252 (Miss. 1994), the Court of Appeals held that

““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.” *Smith*, 638 So.2d 1256 (quoting *Stevens v. Lake*, 615 So.2d 1177, 1183 (Miss. 1993)) If we apply the doctrine of continuing injury to the present facts, the Baldwins would have a perpetual cause of action accruing every time a sufficient volume of rain accumulates in their yard.” *Id* at 410. (Emphasis added)

As in *Baldwin*, under Angela and Kevin’s theory, their cause of action would never be time-barred. The alleged negligent actions and failure to act on the part of Pearlwood occurred more than three years prior to the filing of the Complaint. The fact that another flooding event occurred fewer than three years prior to the filing of the Complaint does not and cannot change Mississippi case law which holds that a cause of action accrues and the statute of limitations begins to run when a plaintiff knows or believes that he or she has a cause of action.

Continued injury cannot toll the statute of limitations. Angela and Kevin’s own testimony show that they knew and/or believed that Pearlwood was the cause of their injuries absolutely no later than December 2002. (R. 90-91). Since the suit was not filed until February 23, 2006, this matter is time-barred.


CONCLUSION

Pearlwood respectfully submits that the claims of Angela Humphries and Kevin Fromme are barred by the three-year statute of limitations found at Miss. Code Ann. § 15-1-49. The continuing tort doctrine does not apply in this matter and the lower court’s grant of summary judgment in favor of Pearlwood should be affirmed.

Respectfully submitted,

PEARLWOOD APARTMENTS PARTNERSHIP
AND MAC-RE, LLC

BY: 

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BERRY & MUNN, P.A.
Attorney for Appellees


CERTIFICATE OF SERVICE

I, Kelley M. Berry, do hereby certify that a true and correct copy of the foregoing response has been served via United States Mail, postage prepaid, to:

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Rankin County Circuit Court Judge
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This the 20th day of April, 2010.



KELLEY M. BERRY