

IN THE SUPREMECOURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01586

**ANGELA HUMPHRIES and
KEVIN FROMME**

APPELLANTS

V.

**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)**

REPLY BRIEF OF APPELLANTS

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REPLY ARGUMENT

The Appellees (hereafter “Pearlwood”) would have this Court conclude that Kevin and Angela’s case fails because supposedly all of the repeated incidents of flooding of their home emanate from one alleged wrongful act of negligent construction of its apartments uphill (including cutting the trees), thus obviating the continuing tort doctrine (Appellees’ brief at p.7). This argument completely ignores the fact that, in addition to the trees being cut and the apartments being built, a retention pond was constructed with storm drains and catch basins connecting to it, resulting in a new and separate series of wrongful acts or omissions of improper maintenance which continued to cause repeated flooding downhill. When Angela and Kevin learned of these matters in discovery (R. 160, 182-184), learning of the City of Pearl’s written demands that Pearlwood remedy its failure to properly maintain the pond and storm drains, they attempted to amend their Complaint (R. 126). However, the lower Court did not rule on this motion, but did allow Pearlwood to amend its Answer to raise the statute of limitations of Miss. Code Ann. § 15-1-49 as a defense (R. 148).

Not surprisingly, Pearlwood makes no mention in its brief of flooding caused by the retention pond and storm drains, but instead seeks to argue that the flooding relates to only one event in time, the construction of the apartment complex. In doing so, it also cites *Pierce v. Cook*, 992 So.2d, 612, 619 (Miss. 2008), as did Kevin and Angela, but for the contrary proposition that the flooding of their home is a continuing ill effect from an “original violation” going back to the apartment construction. Only by disregarding the repeated additional wrongful acts or omissions, including the nature of the flooding as a continuing trespass, can Pearlwood hope to further its position that the continuing tort doctrine does not apply.

Pearlwood claims that *Robertson v. Chateau LeGrand Property Owner's Association, Inc.* 2008-CA-0053-COA, is distinguishable from Angela and Kevin's claim in that "[t]he continuing tort doctrine may have applied in *Robertson* only because there were specific affirmative additional, repeated acts of alleged wrongful conduct" (Appellee's brief at p.6), which conduct was a continuing trespass, whereas in the present case Pearlwood clings to the notion that the repeated flooding here all goes back to one original event, i.e., the "same negligence" (Appellee's brief at p.7). However, Pearlwood ignores the fact that as a continuing trespass, the statute of limitations for the flooding caused by Pearlwood's wrongful acts or omissions "...does not begin to run from the date of the original wrong, but rather gives rise to successive causes of action each time there is an interference with a person's property." *Robertson* at ¶ 24. More to the point, while Pearlwood seems to imply that the flooding of Angela and Kevin's home was not a continuing trespass because it differed from *Robertson's* affirmative acts of wrongful conduct, this Court has previously found that repeated flooding caused by failure to clean out ditches of growth and debris is conduct of omission which rises to the level of a continuing trespass. The Court stated in *O.D. Lauck, d/b/a Meridian Park Cemetery v. Joe Gilbert*, 173 So.2d 626, 637 (Miss. 1965):

The authorities all agree that one whose property has been injured or destroyed by water, due to the wrongful act or omission of another, may maintain an action for the recovery of the damages sustained. Also, the wrongful flooding of land may be enjoined, in a proper case. Such flooding has frequently been restrained on the ground that it constituted a continuing or recurrent trespass or nuisance. 56 Am.Jur., Waters section 442 (1947). (Emphasis added)

In the instant case, the repeated flooding of Angela and Kevin's home caused by the wrongful conduct or omissions of Pearlwood continues to occur (R.120,121) and constitutes a continuing trespass, as in *Robertson* and *Lauck*, giving rise to successive causes of action each time their home is flooded. Their claim, therefore, is not barred by the three year statute of limitations.

Pearlwood's reliance on *Baldwin v. Holliman*, 913 So.2d 400 (Miss. App. 2005) is simply misplaced. The flooding to the Baldwin home did not constitute a continuing trespass by an adjoining landowner, but was rather the subject of claims against the builder for improper construction and the County for improper drainage of rain on the Baldwin property, not for flooding constituting a trespass caused by wrongful conduct or omission of an adjoining landowner. Pearlwood quotes the Court (Appellant's brief at p.8) as stating that the Baldwins would have a perpetual cause of action from rain accumulating in their yard if the continuing tort doctrine was applied, but the Court went on to make clear that "[t]he Baldwins' harm did not arise from any repeated wrongful conduct by Lowndes County." *Id.* at 410.

Pearlwood opines in its brief that under Angela and Kevin's theory, their cause of action would never be time-barred, seeming to imply that the Court should therefore "shut them down." Conversely, however, what would really occur here should the Court accept Pearlwood's position would be the freedom to perpetually commit the tort of continuing trespass against Angela and Kevin as downhill homeowners, as indeed, the flooding of their home continues to occur (R.120, 121). Pearlwood has it in its own hands to end any "perpetual cause of action" against it by ending the continued flooding of its neighbor's home.

CONCLUSION

Angela and Kevin respectfully submit that their claims against Pearlwood constitute claims of continuing torts or continuing trespass for the flooding of their home, and that as such their claims are not time-barred by the three year statute of limitations of Miss. Code Ann. § 15-1-49. The lower court's grant of summary judgment against Angela and Kevin should be reversed, and this matter should be remanded so that they may proceed with their claims.

Respectfully submitted,
ANGELA HUMPHRIES AND KEVIN FROMME

By: _____

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CERTIFICATE OF SERVICE

I, James D. Bell, do hereby certify that I have caused to be mailed, via United States mail, postage prepaid, a true and correct copy of the foregoing instrument to:

Kelly Berry, Esq.
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Honorable William E. Chapman, III
Rankin County Circuit Court Judge
Post Office Box 1885
Brandon, Mississippi 39043

SO CERTIFIED this the 5 day of May, 2010.

James D. Bell
Attorney for Appellants