IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-00533

ROBERT S. ROBERTSON — APPELLANT

VERSUS

CHÂTEAU LeGRAND PROPERTY OWNERS' ASSOCIATION, INC. — APPELLEE

APPEAL FROM

CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

BRIEF OF APPELLEE

(ORAL ARGUMENT IS NOT REQUESTED)

WILLIAM V. WESTBROOK, III
[redacted]
COPELAND, COOK, TAYLOR & BUSH, P.A.
Post Office Box 10
Gulfport, Mississippi 39502-0010
(228) 863-6101
(228) 868-9077 FAX

Attorney for Appellee

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-00533

ROBERT S. ROBERTSON **APPELLANT**

VERSUS

CHATEAU LEGRAND PROPERTY OWNERS ASSOCIATION, INC. **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record 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.

1. Robert S. Robertson (Appellant)
2. Château LeGrand Property Owners' Association, Inc. (Appellant)
3. Wayne L. Hengen (Attorney for Appellant)
4. William V. Westbrook, III (Attorney for Appellee)
5. Copeland, Cook, Taylor & Bush, P.A. (Attorneys for Appellee)
6. Honorable Margaret Alfonso (Harrison County Chancery Court Judge)
7. Stephen Ward (Former Board Member and Plaintiff in Related Case)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF ISSUES

1. Did the Chancery Judge properly deny Robertson's claims and grant a liability judgment in favor of the Association based on an appropriate "balance of the equities" analysis where the evidence, as a whole, demonstrated that Robertson's "continuing trespass," claim was barred by the statute of limitations, the doctrine of laches, and the doctrine of "unclean hands," or alternatively, because Robertson was never the victim of any "continuing" tort, or because the *Ward* judgments are *res judicata*, or because condominium maintenance fees and assessments are not properly subject to set-off or other forms of self-help remedy like that resorted to by Robertson for the past 17 years?

2. Did Robertson fail to prove that the Amended Declarations were invalid? Alternatively, was this claim precluded by contrary stipulations made on behalf of Robertson in *Ward*, or on the basis of the doctrine latches or the statute of limitations, or because highly technical inequitable arguments designed to evade obligations to fellow property owners in restricted developments are disfavored, or because of the inequities which would result if a governing document of the Condominium were invalidated nearly 30 years after it was publicly recorded and relied upon by dozens of other unit owners, or on the basis of the doctrine of equitable estoppel, because Robertson himself has granted a deed invoking the same instrument?

3. Were Robertson's claims relating to restrictions imposed upon his use of his Condominium timeshare units while his maintenance fees and assessments remain unpaid properly rejected pursuant Miss. Code Ann. §89-9-27 and the identical provisions of Article II, §1(b) and Article VI, §8 of the Original and Amended Declarations, the Condominium's governing By-laws and pursuant to the broad's remedial purposes and permissible interpretation of similar

Condominium governing documents? Alternatively, should Robertson be estopped from complaining about policy implemented the same board that Robertson himself Robertson abandoned, and on the basis of the statute of limitations and latches, since Robertson was aware of this policy at least five years before he filed suit?

4. Was Robertson properly required to pay the cost of transcribing the limited additional portions of the record on appeal designated by the Association where Robertson's cursory designation conspicuously omitted relevant but unfavorable evidence relating to *Ward* and Robertson's pervasive inequitable conduct underpinning the Trial Court's "balancing of equity" determination that Robertson came into Court with "unclean hands" and was properly denied all relief requested?

STATEMENT OF THE CASE

Nature of the Case

This dispute is between the nonprofit Defendant/Counter-Plaintiff/Appellee, Château LeGrand Property Owners' Association ("Château LeGrand" or "the Association") and one of its member condominium unit owners, the Appellant and Plaintiff below, Robert S. Robertson, a retired Morgan City, Louisiana lawyer and municipal judge ("Robertson"). At issue is Robertson's liability for his four (4) units' maintenance fees and assessments,--"the financial life-blood" of the Association--which he has refused to pay since at least March or April 1991. This appeal is from a bifurcated trial liability only judgment in favor of the Association and against Robertson for maintenance fees and assessments owed by him since May 16, 1999, the amount which will be determined and a subsequent damage phase trial.

Course of the Proceedings

Château LeGrand Condominium was chartered in 1980. Robertson has owned two "wholly-owned" units and two "timeshare" week interests in the condominium since 1981-82. Although the Condominium's governing documents and the deeds to Robertson's units, all filed of record in the early 1980s, impose an obligation on each unit and unit owner to pay maintenance fees and assessments to financially support and maintain the Condominium and it's common area amenities, Robertson has not voluntarily paid anything to support the Condominium since 1991.

In 1991, and 1993 Robertson became involved in disputes with a former non-party manager, Clyde Ambercrombie ("Ambercrombie") and his non-party companies which then managed the Condominium. Robertson's chronic failure to pay Condominium maintenance fees and special assessments at that time contributed to a financial crisis which prompted Ambercrombie to threaten Robertson and others with foreclosure and to close the Condominium.

In 1993, Robertson joined the "takeover" board of directors of what is today the Appellee Condominium owners' Association entity, and ousted Ambercrombie and his companies. At about the same time, Robertson also became a consenting Plaintiff in a case styled "*Stephen Ward, et al. vs. Gulf Landing Resort, Inc., et al.,*" Civil Action Number 22,159 (hereafter: "*Ward*"). In this related case, the "takeover board" sued Ambercrombie and his companies for declaratory relief and an accounting. This case was pending in the Chancery Court of Harrison County from 1993 until 1998. Robertson participated briefly until the *Ward* parties stipulated to and agreed to a 1993 foreclosure moratorium. Afterwards, he abandoned his board position, refused to pay any portion of his outstanding fees, and went home to Louisiana, where he remained from 1993 until 1999. He did not participate in the *Ward* trial, which concluded with the Condominium being reorganized and "reconstituted" under the supervision of a court-appointed receiver in 1997-1998. In 1998, a requisite

number of unit owners other than Robertson and the new board retroactively ratified and approved the actions taken by the "takeover" board from 1993 up to that time. These actions were approved in a final judgment in *Ward*, from which no appeal was taken.

Robertson returned to the Condominium in 1998 to attend one of a series of member meetings called to approve a much-needed proposed SBA loan to the Condominium. Although his fellow members present at that meeting unanimously approved the request, Robertson said nothing but refused to pay his share of the assessment, because in his opinion, the Condominium lacked authority to impose an assessment payable over more than one year. Robertson subsequently refused to pay any portion of his share of subsequent special assessments, including those imposed to repair the Condominium after Hurricane Katrina.

In 1999, Robertson was elected to the governing board, but consistently took action in his own self-interest instead of the other unit owners that he represented. In late 1999, a resolution was passed suspending his board voting rights, until he paid his past due fees. He sued the Association a few days later in January 2000. The Association counterclaimed for his unpaid fees.

Robertson maintains that the Association "trespassed" in his units since the early 1990s, entitling him to damages. He also disputes the validity of a 1981 amendment to the Condominium's Declarations, and the Condominium's restrictions imposed upon the use of his timeshares for non-payment of fees. Foreclosures of Robertson's units have been enjoined by the Trial Court pending a conclusion of this case.

In 2003 and 2004, Robertson earned approximately $30,000 renting out his units, even though his "guests" utilized the Condominium's swimming pool, parking lot and other amenities,

for which Robertson paid the Association nothing. He continued doing so until Hurricane Katrina. At the expense of other owners, the Condominium has been restored and reopened.

After a lengthy period of discovery, numerous motions, and an interruption occasioned by Hurricane Katrina, the case was finally tried for 10 days in 2006. In January 2007, Harrison County Chancery Judge Margaret Alfonso entered a liability only judgment in favor of the Association and against Robertson for his unpaid fees dating back to 1999 and dismissing all of Robertson's claims on equitable grounds. With respect to Robertson, the judgment finds, *inter alia*, that 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." This result was certified for appeal pursuant to Miss. R. Civ. P. 54(b).

The Association accepted this determination and was ready to proceed to a determination of the amount of damages owed by Robertson. For most of the next two years, however, Robertson contested the judgment against him in motions made pursuant to Miss. R. Civ. P. 59 and 60, which were overruled. He then unsuccessfully disputed his liability for the cost of transcribing the additional portions of the record designated on appeal by the Association pursuant to Miss. R. App. P. 10(b)(4). This appeal followed. Robertson's brief was filed January 22, 2009, shortly after the second anniversary of the Judgment.

Robertson, who will be 76 years old in November[1] and is retired, now resides alone in one of his wholly-owned units. He still refuses to pay any portion of maintenance fees and assessments which the 2007 Judgment found that he has owed on his units since 1997. The Trial Court's injunctive order precluding the Association from foreclosing Robertson's units remains in effect under bond.

---

[1] Trial Transcript ("TR") at TR 3: 2-4.

Statement of the Facts

Château LeGrand is a privately owned beach front condominium in Biloxi. In August 1980, it was converted by a non-party developer from an existing hotel into 50 platted units pursuant to the Mississippi Condominium Law, Title 89, Chapter 9 of the Miss. Code of 1972.

Robertson's deeds reflect that on August 26, 1981, he initially acquired "interval ownership" or "timeshare" interests in the 52nd Unit Week of Platted Unit 507/Living Unit[2] 504 and the 27th Unit Week of Platted Unit 509/Living Unit 502. Château LeGrand Record Excerpt ("CLGRE") 3-4 (Trial Ex. C34).[3] Seven months later, on March 11, 1982, he acquired the first of two wholly owned units, Platted Unit 101/Living Unit 110. CLGSRE 1-2. Five weeks thereafter, on April 23, 1982, Robertson and a former co-owner acquired the second wholly owned unit, Platted Unit 304/Living Unit 307. CLGSRE 5-12. All deeds expressly incorporate and are subject to the Condominium's Amended Declarations of Covenants, Conditions and Restrictions, dated August 17, 1981 and filed of record on August 20, 1981. (hereafter:"the Amended Declarations")[4], CLGRE 13-53.

Article VI, §1 of the Amended Declarations imposes an obligation upon every unit and unit owner for "annual assessments" and "special assessments for capital improvements." CLGRE 24. Section 8 thereof, CLGRE 27, entitled "effect of nonpayment of assessments" states:

> The Association may bring an action at law against the Owner, who is personally obligated to pay the same, or foreclose the lien against the property or both. No owner may waive or otherwise escape liability for the assessments provided for

---

[2] Each unit is so identified by two numbers, because of a discrepancy between the platted unit numbers and the numbers on each physical unit. All subsequent references in this brief will be to the Living Unit number of each unit.

[3] Robertson's trial exhibits are prefixed with the letter "R," while the Association's begin with "C."

[4] The Condominium's June 4, 1980 By-Laws and Original Declarations dated June 4, 1980 are also a part of the record. Ex. R 29 and R30, respectively.

herein by non-use of the common area or abandonment of his unit and no owner may voluntarily resign from membership.

For a decade after he purchased his units, Robertson visited the Condominium between two to four times a year. TR 34:4-8. Prior to 1991, Unit 110 was regularly rented to third parties by former managers with Robertson's written consent. TR 591:18-593:10. Robertson never formally terminated this authorization. TR 592:25-27.

Robertson admitted that on August 31, 1984, he conveyed a one week "timeshare" interest in his Unit 110 to a Mr. and Mrs. Juransinski by means of a deed, Ex.'s C-35 and R-6, expressly referencing the Amended Declarations. He did so even though he claimed to have previously read the Amended Declarations, and voiced contemporaneous concerns about them to the developer. TR 514: 8- 515:21; 518: 29- 520: 21. However, Robertson took no action in any court to challenge the validity of the Amended Declarations at the time. TR 520: 28-521:7.

Robertson's daughter was refused access to Unit 307 in the spring of 1991 by a non-party former manager, Ambercrombie, acting through his non-party Mississippi corporation, Gulf Landing Resort, Inc. ("Gulf Landing").[5] TR 34:11-35:2; 593:13-27. His daughter was allowed into the unit after Robertson paid what was owed. TR 595: 6-13.[6] Robertson subsequently terminated utilities services in Units 110 and 307[7], and did not visit the Condominium again until his chronic failure to pay fees contributed to another financial crisis in early 1993. TR 35: 2-12; 54:8-55:16.

---

[5] According to publicly available information on the Secretary of State's website, this corporation (Business ID# 521619) was chartered on February 5, 1985 and administratively dissolved on October 14, 1994. Ambercrombie was not a party to and did not participate in the present litigation in any way.

[6] Ambercrombie testified in *Ward* that Robertson was chronically behind in payment of his maintenance fees. Ex. C-21 (excerpt from Ambercrombie's testimony).

[7] Utility service to wholly owned units is metered and is the direct financial responsibility of the owner. Timeshare unit utilities are paid by the Association, and recouped through annual maintenance fees.

Ambercrombie announced plans to foreclose Robertson's units and threatened to close the financially troubled Condominium by the end of March 1993, according to1992-93 Gulf Landing minutes. Ex. C-4, CLGRE 55, ¶ 6, 57 (amounts owed by Robertson) and 58. Fearful of losing their investments, a "takeover" board of unit owners headed by Mr. Stephen Ward ("Ward"), responded by suing Gulf Landing and Ambercrombie in the Chancery Court of Harrison County Mississippi on April 2, 1993 in a case styled "*Stephen Ward, et al. vs. Gulf Landing Resort, Inc., et al.,*" Civil Action Number 22,159. They demanded an accounting and other relief. Ex. C-5 (p. 1 of *Ward* Complaint). CLGRE 54 (first page). Ambercrombie countered by placing Gulf Landing in bankruptcy, and asserting a counterclaim.

On April 24, 1993 the "takeover" board: (1) declared a temporary foreclosure moratorium; (2) terminated Ambercrombie and Gulf Landing as manager; and (3) elected the Appellant, Robertson, to the "takeover" board. CLGRE 65-67 (excerpt from Ex. C-4). Ward spoke by telephone several times, and later met with Robertson in person on the evening of April 29, when he says Robertson agreed that Unit 110 could be used as a replacement manager's on-site residence in exchange for credit against Robertson's past due account. TR 898: 1-24; 905:9-906:1; 990:26-991:7.

On April 30, Ward, Robertson and the "takeover" board's attorney, Robert Tyler, ("Tyler") confronted Ambercrombie at the Condominium, and gave him written notice of his termination. Ex. C-8. This was a "dramatic day" that Ward vividly recalled. TR 906:10-50. At the same time, photographs, Ex. R-76, were taken of a musical band that Ambercrombie had housed in Robertson's Unit 110, without Robertson's consent. TR 86:10-87:28; 910:4-911:10; 1038 13-21. Robertson was unable to recall exactly what happened on April 30. TR 534: 19-29, but admitted "it could have happened, but I don't recall it... I may have been there. I don't recall it." TR 532:23-533:10; 533:20-27; 534:1-12.

Ms. Esta McCrory ("McCrory") was hired as a new "on-site" manager. She needed a place to live. Prior to trial, Robertson testified: "I did not give Ms. McCrory or Mr. Ward consent to be in my unit [110]." Ex. C-72. At trial, Robertson first stated at TR 98:21-100:13, that McCrory moved into 110 with his consent. Later, at TR 145:17-25;162:13-16, he denied giving such consent. On cross, he reverted to his original story that he consented to McCrory's use of Unit 110. TR 797:16-801:8.

Ward testified that on May 3, 1993 he had a 17 minute phone conversation with Robertson discussing Robertson becoming an additional *Ward* Plaintiff. TR 910:17-911:10. The next day, May 4, Robertson was added as a Plaintiff. Ex. C-6 (pp. 1-2 of Amended *Ward* Complaint). CLGRE 68-69. Robertson did not sign the Amended Complaint. However, he repeatedly met with Tyler, who signed his name to the Complaint. TR 70:2-71:2; Ex. C. 57 (Tyler's fee bill). Robertson admitted "if Mr. Tyler says I gave him permission [to sign], then I gave him permission." TR 68:19-29; 525:22- 527:10; 541:4-13. Robertson never attempted to withdraw from the *Ward* litigation, and so his name appears on pleadings up to the final judgment in that case. TR 883:25-889:28.

Robertson complained to Ward in 1993 that "Ambercrombie [had] used his [Robertson's] weeks and had not given him any money for the rent." TR 915: 27-916: 16. Paragraph 11 of the *Ward* Amended Complaint consistently alleges that Ambercrombie rented out units which did not belong to him and converted the proceeds. Robertson later inconsistently asserted exactly the same claim against the Association in ¶ VI of his Complaint filed seven years later. Ex. C.-27, p.3. ¶ VI. CLGRE 72.

On May 6, 1993 the *Ward* parties stipulated to a foreclosure moratorium. CLGRE 80-82 (excerpt from Ex. C-11). Robertson witnessed this. TR 615:7-26; 810: 5-22; 908:17-26. At first, he insisted that he was in the courtroom merely "as an observer" and that he "didn't know" Tyler, his own attorney. TR 528: 18-24. He couldn't recall being prepped by Tyler to participate on May 6,

but once again admitted "if [Tyler] says that I did, then I will go along with it." TR 529:29-530:1. Ward recalled that Robertson "was going to testify according to his actual knowledge on his units and the fact that Clyde [Ambercrombie] was actually occupying his units when we took over on April the 30th. He was one of our main witnesses." TR 906:26-907:1; 909:4-910:16.

May 15, 1993, minutes, Ex. C-13, p. 5, CLGRE 83-92, reflect that Ambercrombie had locked Robertson out of his Unit 307, and that Robertson made or seconded numerous motions (underscored) including several directed against Ambercrombie. That same day, Ward and a fellow board member told Robertson that the board expected him to pay what he owed. Robertson replied "let me get home and see what kind of money I've got and I will see if I can pay anything on it." TR 79:23-80:28. No payment was forthcoming, however. A May 21 letter from the board, Ex. C-14, CLGRE 93-96, encourages unit owners to "catch up back fees" and "if you do not expect to use your unit, seriously consider putting it up for rent, which would help out our [the takeover board's] cash flow and bring in some money for you." [8]

Robertson last attended a board meeting on June 14, 1993. Ex. C-15 (minutes). He submitted no resignation. The July 24, 1993 minutes, Ex. C-16, CLGRE 97-98, reflect Mr. Robertson's absence, and state at p. 2, "that Mr. Robertson must be notified of the current balance due, *taking into account all credits for rentals applied to his account*, and that he must take care of this balance within 30 days if he is to continue on the board....." (Emphasis added). The referenced "credits" resulted from McCrory's residential occupancy of Unit 110 with Robertson's consent after May 30, 1993.

---

[8]Enclosed with this letter was a form (CLGRE 95-96) that Robertson proposed at the May 15 meeting, intended to document each owner's position about delinquent fees. Robertson never submitted any such form documenting his position.

Ex. C-18, CLGRE 99-109, is a July 27, 1993 certified mail letter from the other "takeover" directors to Robinson. It references a lengthy discussion of Robertson's "fee balance," on June 14-15, and Robertson's commitment that he would be sending at least a part of the fees right away. The letter continues by reminding Robertson of the Association's "serious straits... with respect to cash flow..." Enclosed with this letter are itemized statements of account for Robertson's units. Unit 110's statement (CLGRE 101-104)[9] is the only one which reflects any "rental income" credits. Robertson ignored his receipt of this letter, TR 784: 24-786:5, as he did with respect to similar letter sent to him throughout the 1990s. TR 935: 15- 938:233; 1019: 23- 1023:21.

At p. 4 of Ex. C-19 (August 21, 1993 minutes) the board deferred action on Robertson for 30 days. By that time, the board was facing another major financial crisis because tax titles on many units were about to mature. Ward and others (but not Robertson) personally loaned the organization approximately $76,000 to meet these and other cash flow requirements. TR 965:16-966:26.

Robertson's board position was declared vacant on September 18, 1993. Ex. C-20, p. 2.

Robertson never visited the Condominium between 1993 and 1998. He never paid the Association anything because, in his opinion "there was no valid maintenance fees passed at any time ...." TR 683:20-684:13; 785: 29-786:9.

Ex. C-67 are November 8, 1994 minutes indicating that Unit 110 should be charged for cable and that wholly owned units were being charged for a newly purchased Essex phone system.[10]

---

[9]Unit 110 was billed as Unit 110A and 110B on these statements in recognition of the fact that Robertson himself had subdivided the unit in the early 1980's.

[10]The Essex phone system was purchased by the takeover board. Charges for "telephone"on Robertson's units are for his unit share of the purchase price for the system.

Ex. C-69 are three November 15, 1995 letters sent by certified mail and received by Robertson. Unit 110A's past due balance then owed was $3,748.31. CLGRE 110-114, Unit 110B owed $7,106.22. Unit 307 owed $15,850.50. The higher 307 balance reflects the absence of any rental credits, for that unit. TR 972:21-974:21. Robertson did not respond to these letters. TR 974:22-975:1. Unit 110's rental was facilitated by means of cable TV and telephone service, but no similar add ons were charged on the other units. See, e.g., Ex. C-47.

Ward was tried for 23 days over a period of 21 months, during which 15 witnesses (including four accountants) testified and 96 documentary exhibits were introduced. On July 10, 1997 former Chancery Court Judge Tom Teel issued a lengthy Judgment. Ex. C.-23. CLGRE 115-151. At p. 2 ¶ 4 (CLGRE 116), p.12, fn 7 (CLGRE 126-127) and pp. 19-20 (CLGRE 133-134), Robertson is identified as a Plaintiff and two-time board member who "was not present during the trial of this cause." At p. 19, fn. 12 (CLGRE 133), it was found that "Robertson...failed to pay maintenance fees and special assessments over the years." At page 3 (CLGRE 117, ¶¶ 7-13), Gulf Landing and five other corporations, plus Ambercrombie, are identified as Defendants. Ambercrombie represented each Defendant corporation, the histories of which are detailed at pp. 5-18, CLGRE 119-132. The Association's separate history is described at pp. 15-20, CLGRE 129-134. The last two pages (CLGRE 150-151) document the Court's appointment of a local attorney, Virgil Gillespie, Esq. ("Gillespie"), as a reorganizing "receiver" for the Condominium. Gillespie was charged with making sure that "whatever entity is currently managing the Resort is an appropriate entity"; that "the Receiver shall began the process to make sure that...unit owners who have not paid their assessments, pay...."; and that "the receiver should give notice of the special homeowners meeting for the purpose of electing a Board of Directors, amending the Declarations and what other business the members wish to entertain" and that "once a proper Board of Directors is voted into office, the

receiver shall be allowed to turn over operation of the Resort functions and seek the dissolution of the Receivership." *Id.*

A November 5, 1997 *Ward* Order, Ex. C-29, CLGRE 152-154, confirms that Gillespie was then serving as receiver and implementing the Court's 1997 order. At ¶ 3, the Court found that "associational voting is controlled by the *Amended Declarations*...." (Emphasis added). Gillespie was directed to notice a special meeting of the homeowners association for the purpose of electing a new board of directors and thereafter, the newly elected board of directors were ordered to meet to transfer operation of the resort from the receiver to the new board.

Gillespie's receivership terminated on November 12, 1998. Ex. C-61, CLGRE 155-156. His final report, Ex. C-33, CLGRE 157-189 (excerpts), documents adjustments in annual maintenance fees, special assessments and other actions taken by the "takeover" board between 1993 and 1998. At p. 4, ¶XVIII, CLGRE 161, Gillespie reported that by February 1998, the property and its financial affairs were sufficiently stabilized to call a re-organizational meeting. A total of 71% of the whole unit owners, not including Robertson, attended a March 14, 1998 meeting where the Association was reinstated and a new board was elected. CLGRE 179-189. A directors' meeting followed on May 26, 1998. CLGRE 167-178. At both meetings, the parties present (not including Robertson) unanimously passed the following resolution: "that the [owners and newly elected directors] ratify, approve and reinstate all of the former Board of Directors' and officers' assessments for maintenance fees for weekly and whole owned units..." The 71% vote of the owners was valid for all purposes, notwithstanding Robertson's absence.[11]

---

[11] The Amended Declarations, Ex. C-26, p. p. 12–14, Article VI, §§ 3 (b) and § 4, provide that increases in annual maintenance fees exceeding 5% and any special assessment for capital improvements require a 2/3 favorable vote. Therefore, the 71% vote at the March 14 meeting was sufficient to ratify all such prior actions of the takeover board.

Ex. C-39 are the minutes of an October 24, 1998, Special Unit Owners' meeting called by Gillespie to consider needed repairs to the resort costing $265,000. The meeting was recessed until November 14, 1998 because 2/3 of the unit owners failed to approve the proposed assessment.

The November 14, 1998 meeting failed to result in a favorable vote, so the meeting was recessed until January 16, 1999. Exhibit C-40. This was the first meeting Robertson attended since 1993.

On November 18, 1998, the board considered a proposed $200,000 loan to finance the needed repairs. Ex. C-41. CLGRE 190-193. At p.3 it is noted that because certain homeowners were voting notwithstanding the fact that they were delinquent. The board voted to pursuant to Article VII, § 1(b) of the Amended Declarations to suspend voting rights of delinquent members.

On November 12, 1998, a Judgment was entered in *Ward*. See Ex. C-61. CLGRE 155-156. The parties were given 10 days at ¶2 to file objections to Gillespie's final report. The Order declares that the Condominium has a newly elected board prepared to resume control of the property. No objections were filed. No appeal was taken, which concluded the *Ward* case.

On December 17, 1998, Ward, by then again a director, wrote Robertson informing him that "a substantial balance of past maintenance fees remains outstanding on Unit 307. In an effort to amicably resolve the balance due, the [Association] is offering to lease Unit 307 at the monthly rental rate of $1000. All rental proceeds would be applied against the balance due until paid in full and the [Association] would agree to suspend foreclosure action while the lease remains in place." Ex. C-47, CLGR 194. Robertson did not respond.

Seventy one percent of unit owners including Robertson attended a January 16, 1999 meeting where a $168,600 SBA loan was approved, by a seemingly unanimous voice vote. Ex, C-42. CLGRE 224-226. At trial, Robertson admitted that he voiced no objection before, during or after the voice

vote, even though he thought that multi-year assessments necessary to repay the loan were illegal. TR 679:11-28.

On March 14, 1999, Robertson was elected to the board again. Ex. C-48. He accepted this office despite still owing substantially past-due amounts.

In March 1999, the Association, acting through another law firm, initiated foreclosure actions against Robertson's units pursuant to Miss. Code Ann. § 89-9-21 (1972). The foreclosure complaints were subsequently dismissed because of technical defects and thereafter re-filed by another law firm. Judge Alfonso enjoined these foreclosures, pending a conclusion of this case.

Ex. C-47 includes a May 21, 1999 letter to Robertson. CLGRE 196. Robertson was then contending (in spite of the 1998 affirmative unit owners' vote and curative rulings in *Ward*) that the 1991-98 maintenance fees were invalid and that the Association owed him $200,000. The letter invited Robertson to present his calculation to the board for consideration. Robertson never provided the requested calculations.

Ex. C-47, CLGRE 197-228 further documents the Association's repeated good faith efforts to negotiate a solution with Robertson during 1999. An August 1999 analysis of Robertson's accounts by Matturi reflected a $52,859.75 balance due from Robertson through the end of 1998. CLGRE 197-208. Robertson was invited to "submit your calculations to the Board so that both positions may be addressed." No substantive response was forthcoming. Instead, Robertson requested an accounting beginning with a "zero balance and proceeding forward to the end." A Matturi memo further indicating that she had asked Robertson to produce records to support his position, but that Robertson had failed to do so. On September 8, 1999, the Association requested Robertson to produce "copies of pre-1994 POA records relating to his units," including "ledger cards and/or any other documents that substantiate the balances of the accounts at December 31, 1993."

Robertson did not respond to this letter. On September 8, 1999, the Association furnished Robertson with Matturi's updated analysis beginning with a zero balance (as of 1990) and proceeding forward through December 31, 1998. Per Matturi's review, Robertson still owed $64,993.45, after application of rental credits. CLGRE 213-223. Robertson never responded to this letter, either.

At an October 20, 1999 board meeting, Robertson opposed a needed special assessment for interior renovations. Robertson demanded a second opinion after reviewing an written opinion from the Association's attorney, Tyler, that Robertson's delinquent status disqualified him from voting as a director. Robertson was asked, but declined to temporarily step down as a director unless and until he paid what he owed. Ex. C-63. CLGRE 227-227. A special meeting of the members was called for December 9, 1999 "for the purpose of resolving the issue of the appropriateness of standing Board members to serve on the board while delinquent in maintenance fees due to the POA."

Ex. C-52, CLGRE 229, is an October 29, 1999 second attorney opinion letter confirming that Robertson was properly disqualified from voting because of his delinquent status.

At the December 9, 1999 special owners meeting, Robertson unsuccessfully challenged a proxy for an absent unit owner. He then asserted that the meeting was improperly called and therefore, illegal, and despite the *Ward* ruling otherwise, that timeshare unit owners had no right to vote. These objections were overruled after which a motion was then made to adopt the following policy: "Directors ... should be required to satisfy any balances due... and keep their maintenance the account balance with the Property Owners Association current."Notwithstanding the fact that voting rights for delinquent members may be suspended by Article VII, § 1(b) of the By-laws, Robertson was allowed to vote. The policy was adopted. Ex. C- 53. CLGRE 231-232.

Robertson's Complaint initiating the present lawsuit was filed shortly thereafter on January 26, 2000. Ex. C.-27. CLGRE 70-79. Robertson admitted at trial that he had never paid any maintenance fees or annual assessments since April or March of 1991. TR 839:15-17.

In 2003-04, Robertson began renting out his wholly-owned units to third parties. He earned and kept approximately $30,000, even though his "guests" utilized the Condominium's swimming pool, parking lot and other amenities, for which Robertson paid nothing. He continued this practice until 2005. Hurricane Katrina forced the temporary closure of the Condominium . TR 835:19-837:26. At the expense of other owners, it has since reopened.

The liability only phase of the present case was tried in 1996 for a total of 10 days before Judge Alfonso. On January 22, 2007, she issued an extensive 29 page Judgment (Robertson's Record Excerpts 67-94). Although the Judgment covers other matters, those which are relevant to this appeal are: (1) at pages 22-23, the Court declared that the 1980 Declarations and 1981 Amended Declarations were the controlling documents for the Condominium; (2) at pages 23-27, the Court found that Mississippi's three-year "catchall" statute of limitations, Miss. Code Ann. §15-1-49 (1972) and the doctrines of latches and "unclean hands" barred Mr. Robertson's claims against the Association; (3) at pages 26-27, it was held that the Association possessed requisite authority to suspend non-paying owners' space banking rights to use "timeshare" or "interval ownership" condominiums, and (4) at page 28, that the Association was held entitled to proceed against Robertson on the basis of its counterclaim for all amounts owed to the Condominium since May 16, 1999. Robertson also disputes Judge Alfonso's post-judgment ruling requiring him to pay the cost of transcribing additional portions of the record on appeal.

SUMMARY OF THE ARGUMENT

1. The Judgment resulted from "equitable balancing" which is reviewed under the familiar "abuse of discretion" standard.

2. Robertson's "continuing trespass" claim was properly barred by the statute of limitations, the doctrine of laches, and the doctrine of "unclean hands." Robertson discovered Ambercrombie's unauthorized use of Unit 110 and that Ambercrombie had changed the lock on his Unit 307 in May or June of 1993, so such claims were time barred after 1996. Additionally, the unappealed 1997-1998 *Ward* judgments are *res judicata* to Robertson's claims based on circumstances predating those judgments. Equitable estoppel could also have been properly invoked to preclude such claims. The Association never committed a true "continuing trespass" after May 30, 1993. Robertson gave McCrory permission to occupy Unit 110 in May 1993. Unit 307 was not rented. Robertson's right of access to his timeshare units was for only one week per year per unit. Consequently, there was nothing consistent or "continuous" according the evidence relied upon by the trial court. Numerous Mississippi cases properly apply the statute of limitations where, as here, a complaining party has actual or constructive notice of the conditions complained of, that takes no timely action. The argument that "latches is never applicable when a claim has not been barred by the statute of limitations," is wrong because this rule applies only where "time is the only factor."The three-year statute of limitations ran at least four years before Robertson filed suit and the Judgment cites multiple additional equitable grounds for refusing Robertson relief, in addition to the passage of time. The Association timely and repeatedly raised its statute of limitations defense in pleadings and otherwise. An interlocutory partial summary judgment ruling, which was never certified as final pursuant to Miss. R. Civ. P. 54, was no bar to the Trial Court's decision on this issue. Robertson's appeal for this Court to "follow the law" should result in an affirmation of the rule well recognized

elsewhere that a condominium unit owner may not properly challenge the legality of the common expense assessment by refusing to pay it, and that absent an adjudication by a court of competent jurisdiction to the contrary, such charges are not subject to set off or some other form of self-help remedy like that resorted to by Robertson for the past 17 years.

3. Robertson failed to prove that the Amended Declarations were invalid. Further, the 1997 *Ward* Judgment recognizes that the parties to that case, including Robertson, agreed the Amended Declarations "are the controlling, recorded documents for the resort." This aspect of the trial court's ruling can also be affirmed alternatively based on latches and the statute of limitations. Robertson's highly technical arguments challenging the validity of the Amended Declarations are indistinguishable from those made by the unsuccessful defendant subdivision property owners in an effort to similarly avoid their obligations under a similar set of subdivision covenants in *Journeay v. Berry,* 953 So.2d 1145 (Miss. App. 2007). A contrary determination on this issue would call into question the validity of the titles of numerous other unit owners who have relied on and abided by the Amended Declarations for nearly 3 decades. Equitable estoppel may be applied, if necessary, since Robertson himself was a grantor in a 1984 deed expressly invoking the Amended Declarations.

4. Robertson's arguments relating to the use of his condominium timeshare units, are yet another example of arguments that the Judgment properly rejected on equitable grounds. The Condominium has a contract with a non-party, Resorts Condominiums International ("RCI"). By virtue of his timeshare ownership in the Condominium, Robertson is also a member of RCI. Robertson admitted that according to his personal contract with RCI, which is in evidence, his right to "space bank" his Condominium unit with RCI, i.e., to authorize someone else to use his unit at Château LeGrand in exchange for his using someone else's condominium elsewhere, is dependent upon his being in financial good standing with Château LeGrand. This has never been so, and the

Association properly incurs no liability for truthfully advising RCI that Robertson is not in good standing whenever asked about his status. Otherwise, Robertson complains about being denied access to these timeshare units by the Association, which precluded his access to them so long as he remains in default. The Association did so pursuant Miss. Code Ann. §89-9-27 and the identical provisions of Article II, §1(b) and Article VI, §8 of the Original and Amended Declarations. This action by the Association is consistent with the Mississippi statute, this Condominium's governing documents and the broad's remedial purposes and permissible interpretation of similar condominium governing documents discussed in various cases in the corresponding section of this brief. Even if this were not so, the "lockout" policy complained of was implemented by Robertson's own takeover board in 1995. The actions of that board taken between 1993 and 1998, were ratified by a requisite majority of unit owners other than Robertson during the 1998 "reconstitution" of the Association, which was subsequently ratified by the Court in a 1998 judgment in *Ward*. Since Robertson benefitted from the 1993-98 stipulated foreclosure moratorium in *Ward*, while inconsistently urging his fellow unit owners to pay maintenance fees and assessments which he personally refused to pay, equitable estoppel should additionally preclude this argument. Finally, since the lockout policy was implemented and spread on the Association's board minutes in 1995, this claim could have been held properly barred by the statute of limitations and latches.

5. Robertson's last argument that he should not have been required to pay the cost of transcribing the additional portions of the record on appeal designated by the Association ignores that the Judgment against him is based upon the employment of equity by the Trial Court, and not a consideration of the technical legal arguments presented by his brief. Judge Alfonso relied upon the extensive evidence of chronic inconsistent and inequitable conduct on the part of Robertson that gave him "unclean hands" in her Court. Since the "parties" are obligated to provide this Court with

a complete record adequate to review the judgment appealed from, the Association rightfully cross-designated the "relevant" evidence missing from Robertson's cursory designation of the record. Judge Alfonso reasonably exercised her discretion to require Robertson to pay the additional cost of the record, which actually relates to her findings and supports the results reached.

For these reasons, the Association submits that Robertson's arguments are not well taken and that the Judgment should be affirmed in respects.

ARGUMENT

1. Standard of Review

If a Chancery Judge has correctly considered the applicable law, this Court employees an abuse of discretion standard when reviewing a Chancellor's decision. *McNeil v. Hester*, 753 So.2d 1057, 1063 (Miss. 2000). This Court will not disturb a Chancellor's findings unless the Chancellor was manifestly erroneous. *Rice v. Pritchard*, 611 So.2d 869, 872 (Miss. 1992) (citing *Mullins v. Ratcliff*, 515 So.2d 1183, 1189 (Miss. 1987)). "As the finder of fact, the chancellor also judges the weight and credibility to be accorded the evidence." *Davis v. Smith*, 922 So.2d 814, 819(¶ 26) (Miss. Ct. App. 2005). This Court has also held that it is not the job of this Court to redetermine questions of fact resolved by the Chancellor. *Johnson v. Black*, 469 So.2d 88, 90 (Miss. 1985).

Moreover, a Chancellor may be affirmed where she reaches a correct result under the law and facts, though for the wrong reason. *Reed v. Weathers Refrigeration and Air Conditioning, Inc.*, 759 So.2d 521, 526 (Miss. App. 2000); *Patel v. Telerent Leasing Corp.*, 574 So.2d 3 (Miss. 1990).

Finally, where, as here, a Chancery Judge bases a decision on the equities of the situation before the Trial Court, this Court "will review solely whether the Chancery Court erred in its employment of equity." *See, R.K. v. J.K.*, 946 So.2d 764, 773 (Miss. 2007). At ¶¶ 19-26 of the opinion, this Court rejected the husband's argument that the Trial Judge applied erroneous legal

standards because the trial judge based its decision on other grounds, looking instead to the equity of the situation. This Court found that the Trial Judge applied the correct legal standard of equity and found sufficient evidence to warrant a refusal to award remedy demanded by the husband, while ordering him to pay arrears and to continue the payments to his ex-wife. A similar "equities of the situation" result was reached by the Trial Court in the case at bar. Thus, the sole proper issue for consideration is the same as that case: which is whether the Trial Court correctly employed equity based on all the evidence.

2. 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 claims for damages and other relief against the Association.

Section 15-1-49 states in pertinent part:

> (1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of action accrued, and not after.
>
> (2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

Laches is properly invoked when "one party neglects to assert a right or claim, and such neglect, when taken together with any lapses of time and other circumstances causing prejudice to the adverse party, operates as a bar in a court of equity." *Bailey v. Estate of Kemp,* 955 So.2d 777, 784 (¶ 28) (Miss. 2007). The party asserting the defense 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." *Id.* at 784(¶ 29).

In order to assert a claim of equitable estoppel, one must show a "(1) belief and reliance on some representation; (2) change of position as a result of the representation; and (3) detriment or

prejudice caused by the change of position." *Mound Bayou Sch. Dist. v. Cleveland Sch. Dist.*, 817 So.2d 578, 583 (¶ 15) (Miss. 2002) (citing *Covington County v. Page*, 456 So.2d 739, 741 (Miss. 1984)).

The Judgment, at ¶ 28, finds that Robertson failed to pay fees and assessments after April 1991, and never visited the Condominium between 1991 until 1993. In 1993, he discovered firsthand that Ambercrombie was housing his band members in Unit 110 without his consent, and had changed the lock on Unit 307. Robertson personally helped oust Ambercrombie and served, albeit temporarily, on the "takeover" board. Therefore, the Trial Judge correctly concluded "that since he knew about prior rentals as early as May or June of 1993, the statute of limitations on any of his claims regarding trespass prior to his 1993 discovery expired as of 1996 and are time-barred...." This is exactly what the evidence shows according to the proper statute of limitations, so there was no abuse of discretion here. See, *Fortenberry v. Wilkerson*, 222 Miss. 70, 73, 75 So.2d 274, 275 (Miss. 1954) ("Prevention of a multiplicity of suits is one of the duties and powers of equity.").

Additionally, a comparison of the Amended Complaint against Ambercrombie and Gulf Landing in *Ward*, Ex. C-6, with Robertson's 2000 Complaint against the Association, Ex. C.-27, demonstrates that Robertson inconsistently asserted claims for unauthorized access to his units prior to April 30, 1993 against the different Defendants in both cases. This is an additional basis why the Trial Court's equitable result was correct. See, *Standard Oil Co. v. Crane*, 199 Miss. 69, 84, 23 So.2d 297, 301 (Miss. 1945) (subsequently overruled on unrelated grounds).

Res judicata is also fundamental to the equitable and efficient operation of the judiciary and "reflects the refusal of the law to tolerate a multiplicity of litigation." *Little v. V & G Welding Supply, Inc.*, 704 So.2d 1336, 1337 (Miss. 1997). It is a doctrine of public policy "designed to avoid the 'expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance

on judicial action by minimizing the possibilities of inconsistent decisions.' " *Montana v. United States,* 440 U.S. 147, 153-54, 99 S.Ct. 970, 973-74, 59 L.Ed.2d 210 (1979). The courts can not revisit adjudicated claims and "all grounds for, or defenses to recovery that were available to the parties in the first action, regardless of whether they were asserted or determined in the prior proceeding, are barred from re-litigation in a subsequent suit under the doctrine of *res judicata.*" *Alexander v. Elzie,* 621 So.2d 909, 910 (Miss. 1992).

For the bar of *res judicata* to apply in Mississippi there are four identities which must be present: (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); *Dunaway v. W.H. Hopper & Assocs., Inc.,* 422 So.2d 749, 751 (Miss. 1982). Here, all four identities are present with respect to Robertson's claims against Ambercrombie and Gulf Landing pre-dating the 1993 "takeover." The same is true with respect to his challenge to the validity of the Amended Declarations, which were stipulated to be the governing documents on his behalf in *Ward* and were ratified as such by a requisite majority of unit owners during the *Ward* receivership, which concluded without an appeal approximately a year before Robertson filed the present action. These prior adjudications bar Robertson's inconsistent claims in this case because they are "premised upon the same body of operative fact as was previously adjudicated." *See, Harrison v. Chandler-Sampson Ins., Inc.,* 891 So.2d 224, 234 (Miss. 2005). The Judgment, particularly at ¶ 28, is plainly additionally correct on the basis of *res judicata.*

The Judgment also relies on the doctrine of unclean hands. The doctrine mandates that "he who comes into equity must come with clean hands." *Thigpen v. Kennedy,* 238 So.2d 744, 746 (Miss. 1970); *O'Neill v. O'Neill,* 551 So.2d 228, 233 (Miss. 1989) ("[t]he meaning of this maxim is

to declare that no person as a complaining party can have the aid of a court of equity when his conduct with respect to the transaction in question has been characterized by wilful inequity....").

The Judgment's "unclean hands" finding against Robertson is analogous to what happened to other condominium unit owners who similarly unilaterally refused to pay assessments in *Pooser v. Lovett Square Townhomes Owners' Ass'n*, 702 S.W.2d 226 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.). There, a condominium association sued the developers and architects of the condominium over a leaky roof. In order to fund immediately needed repairs, the Association passed a special assessment. The dissenting unit owners were aware of the Association's suit, but refused to pay the special assessment, choosing instead to fix their roofs at their expense, which they then attempted to offset against the homeowners' assessment. The Texas courts refused to permit this, concluding that the dissenting owners "cannot seek credit in equity with unclean hands." *Id.*, at 230. Judge Alfonso was plainly correct in finding that Robertson similarly came into Court with unclean hands.

The doctrine of equitable estoppel could have additionally been applied by the Trial Court to bar Robertson from seeking to avoid his obligations to his Condominium. "The doctrine of equitable estoppel is based upon fundamental notions of justice and fair dealing." *O'Neill*, 551 So.2d at 232. The Court has identified two elements that must be satisfied: "(1) that he [a party] has changed his position in reliance upon the conduct of another; and (2) that he has suffered detriment caused by his change of position in reliance upon such conduct." *Id.* at 232 (citing *PMZ Oil Co. v. Lucroy*, 449 So.2d 201, 206 (Miss. 1984)). In *PMZ Oil*, 449 So.2d at 206, this Court stated "[w]henever in equity and good conscience persons ought to behave ethically toward one another the seeds for a successful employment of equitable estoppel have been sown." The evidence cited in the Judgment and in this brief shows that Robertson, even when serving as a director of the

Association, consistently acted in his own self-interest, to the detriment of the Association, and his fellow unit owners.

The doctrine of judicial estoppel could also have been properly relied upon by the Trial Court to foreclose certain claims asserted by Robertson. *See, In re Estate of Richardson,* 905 So.2d 620, 637 (Miss. 2004) ("Judicial estoppel precludes a party from asserting a position, benefitting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation."); *Dockins v. Allred,* 849 So.2d 151, 155 (Miss. 2003) ("Because of judicial estoppel, a party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation." *Id.*). This doctrine could have and should have properly been invoked by the Judgment to foreclose Robertson from re-litigating his pre-1993 claims properly asserted against Ambercrombie, et al., as well as his challenges to the lawfulness of the Amended Declarations and the actions of himself and the other members of the "takeover" board between 1993 and the reconstitution of the Association in 1998.

Like the husband in *R.K. v. J.K.*, Robertson attempts to sidestep his chronic personal inequitable conduct with an argument that the Trial Judge applied the "incorrect legal standard" by not adopting his "continuing trespass" theory. But as in *R.K. v. J.K.*, this alternative legal argument is not well taken because it was not the actual basis of the decision against him. Even if this were not so, this doctrine would not properly apply under the facts of this case.

"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 v. Sneed,* 638 So.2d 1252, 1256 (Miss. 1994) (quoting *Stevens v. Lake,* 615 So.2d 1177, 1183 (Miss. 1993). Ambercrombie's unauthorized use of Units 110 and 307 was an original violation about which Robertson had first-hand knowledge in 1991 when his daughter was refused access to Unit 307, and

again when Robertson and others ousted Ambercrombie and threw his band members out of Unit 110 on April 30, 1993. The Trial Court properly concluded that Robertson's opportunity to do something about these discrete occurrences lapsed in 1996.[12]

The best evidence that any rental or any other activity with respect to Mr. Robertson's units was never "continuing," at any time after the Association took over in 1993 appear in Exhibit C- 47, in the form of an August 12, 1999 analysis of the POA's records as of December 31, 1998 performed by the accountant hired by Gillespie in *Ward*. CLGRE 197-224. With respect to Unit 307, this analysis shows that the Association engaged in no third-party rental activity of this unit between 1994 and 1998.[13] This confirms Ward's testimony that the Association never rented Unit 307 to third parties after April 30, 1993. TR 974:18-21. Robertson likewise candidly confessed that he had no idea whether or if Unit 307 was occupied without his consent after May 30, 1993. TR 830:6-833:18. In short, there was no "trespass," continuing or otherwise, proved at trial with respect to this unit.

---

[12] Robertson's repeated attempts to present irrelevant evidence at trial relating to the pre-1993 actions of Ambercrombie and Gulf Landing and was timely and properly objected to by the Association. See, e.g., TR 116: 2-123; Ex. R-10; R-11; TR 825: 3-20

[13] Every Unit 307 charge shown is for "maintenance fees," "special assessment", "telephone" "interest" or "repair." The maintenance fees and assessments are those set by the "takeover" board between 1994 and 1998. These are the same fees and assessments ratified and approved in 1998 by a requisite vote of the unit members at the conclusion of Mr. Gillespie's tenure as receiver in *Ward*. The "telephone" expenses are the result of the Association's decision, reflected in the November 8, 1994 "takeover" board minutes, to install an Association owned "Essex" central phone switching system in all units. This is another act of the "takeover" board ratified in 1998 by the unit owners in *Ward*. The "interest charges" are authorized by the Amended Declarations, stipulated to be the controlling documents for the condominium in *Ward*. The two isolated "repair" charges shown were incurred more than three years before Robertson filed suit in January 2000.

Unit 110 was informally subdivided by Robertson himself in the early 1980s,[14] and was thereafter treated for record-keeping purposes as two different "wholly-owned" units referred to as Units 110A and 110B. This is the same unit that Robertson himself rented out for years with the assistance of previous non-party managers before Ambercrombie. This arrangement was never formally terminated by Robertson. This is the same unit that McCrory occupied as her residence in exchange for rental credit at about the time that Robertson abandoned his board duties in 1993. Maturri's analysis for this unit documents sporadic short term rental activity to a variety of third parties, and related charges,[15] for which Robertson received itemized disclosed credit against his outstanding and unpaid balance. Even in Unit 110, however, rental activity was never concealed from Robertson, nor was it incapable of detection or continuous.

The "continuous trespass" theory is even more implausible when applied to Robertson's two "timeshares" or "interval ownership" units. Robertson testified that he didn't know how many times, if any, his timeshare unit weeks were rented to others during his unit weeks. TR 833: 20-26. As their deeds demonstrate, Robertson acquired the right to use these two units for one week per year. Different owners used them during the other 51 weeks of each year. As found in the Judgment, Robertson was properly denied access to them after 1993 because he refused to pay his maintenance fees and assessments. There is nothing "continuous" about something that only occurs one week per year.

---

[14] The Condominium's plat was never amended to Robertson's division of Unit 110. Robertson attempted to blame this on Ben Adams, a representative of the original developer who was conveniently long deceased by the time of trial. TR 27:15-28:6.

[15] As with Unit 307, this unit shows periodic charges for "telephone", "maintenance fee" "late charge" and "interest" entries, which would been incurred even if the unit had been unoccupied. The additional charges for "pest control," "cable-TV," occasional "carpet cleaning," and "electricity," facilitated the rental activity for which Robertson received credit.

Robertson's argument is reminiscent of that asserted by the plaintiff property owners in *McCain v. Memphis Hardwood Flooring Co.*, 725 So.2d 788 (Miss. 1998) overruled on other grounds by *Stockstill v. Gammill*, 943 So.2d 35 (Miss. Oct. 26, 2006). They argued that a one-year statute of limitations applicable to wrongful cutting of trees should not be applied because they failed to discover missing trees removed by the defendants within a year. This Court disagreed:

> The discovery rule may be applied when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act....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. Thus, application of a judge-made discovery rule would be inappropriate in the instant case.

McCain, 725 So.2d at 794.

Application of a similar discovery rule advocated by Robertson would be equally inappropriate. No expertise was necessary for him to "discover" after May 30, 1993 that Unit 110--and no other unit--was being rented by the very same board that he deserted, by the manager that he voted to hire.[16] All Robertson had to do was read his mail, call or visit the Condominium.[17] Letters like the one dated July 27, 1993 from the Association (Ex. C-18) enclosing itemized statements for

---

[16] McCrory is still the Condominium's manager today. Ward testified and explained how a comparison of the 1995 and 1993 demand letters mailed to Robertson (Ex. C.-69 and C-18) demonstrate the absence of any rental activity in units other than 110 at TR 972:22- 976:11. In that unit, the outstanding balance owed fluctuated because of rental credits. The same was not true of any other unit. The only credits ever posted against Unit 307's steadily increasing unpaid balance, for example, were to reimburse Robertson for his purchase of two cameras in 1993 for the purpose of photographing Ambercrombie's activity to support the *Ward* case. TR 974:5-21.

[17] He could also have visited the Condominium, or called the manager, McCrory, at any time. Ward testified that except for a couple of months while the phone system was being checked, the Condominium's phone number had never changed since 1993. TR 975:13-24. Robertson was never physically barred from visiting the Condominium after 1993. TR 998:8 – 12.

Robertson's units, clearly disclosed the rental credits for Unit 110. Similar statements were sent regularly to Robertson's Morgan City address throughout the 1990s. Ex. C- 69. CLGRE 110-114.

One chargeable with inquiry notice is "'chargeable with notice, equivalent in law to knowledge, of all those further relevant facts which such inquiry, if pursued with reasonable diligence, would have disclosed.' " *Credit Lyonnais New York v. Koval,* 745 So.2d 837, 842(¶ 27) (Miss. 1999) (quoting *Crawford v. Brown,* 215 Mis. 489, 503, 61 So.2d 344, 350 (1952)). Since Robertson received regular statements disclosing the rental activity in Unit 110, the Judgment properly found that he was chargeable with inquiry notice that triggered the running of the statute of limitations long before he finally filed suit in 2000.

Winters v. AmSouth Bank, 964 So.2d 595 (Miss. App. 2007) is a concealed fraud case where the Court declined to apply the continuing tort doctrine. Nothing was concealed by the Association from Robertson.

Other distinguishable cases relied upon by Mr. Robertson in support of his argument are *Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144, 149 (Miss. 1998); *McCorkle v. McCorkle,* 811 So.2d 258, 264 (Miss. Ct. App. 2005) and *Baldwin v. Holliman,* 913 So.2d 400, 409 (Miss. Ct. App. 2005). *Smith*, like *Winters,* is another case involving allegations of concealed fraud in which the Court declined to apply the continuing tort doctrine. *McCorkle* holds that the son's actions were part of the same tort, which the father could not have discovered through reasonable diligence, within the applicable statute of limitations. Robertson had repeated *actual* notice of the circumstances complained of within the statute of limitations which he admittedly ignored. *Baldwin,* which was overruled in *Windham v. Latco of Mississippi, Inc.*, 972 So.2d 608 (Miss. 2008) (en banc), involved latent construction deficiencies, which are just like the invisible contamination in *Donald.*

Opposing counsel next contends at page 19 of his brief, that *Currie v. Natchez, J. & C.R. Co.*, 61 Miss. 725, 1884 WL 3416 (Miss. 1884), "held that the landowner had previously forbidden the railroad from entering her land and could not by acquiescence thereafter obtain the right to do so." *Currie* actually held that it was reversible error for the Trial Court to exclude testimony by railroad employees that the complaining landowner verbally agreed to dedicate a railroad right-of-way over the land in controversy, and promised verbally to sign a writing to this effect when requested. This was a valid defense to the plaintiff's claim for trespass, which the jury was entitled to consider, so the landowner's judgment was vacated. *Id.*, at 1884 WL 3416*3. *Currie* was not the first or the last case to recognize an acquiescence defense to this type of claim. *See, New Orleans, J. & G.N.R. Co. v. Moye,* 1860 WL 3164 (Miss. Err. App 1860); *Marlon Investment Company v. Conner*, 246 Miss. 343, 349, 149 So.2d 312, 314, 315 (1963); *White v. Mississippi Power & Light Co.*, 196 So.2d 343, 349-35 or other cases (Miss. 1967). The factual findings at ¶¶ 28-29, pp.24-25 of the Judgment are exactly like the wrongfully excluded testimony in *Currie*. Proof that the Association believed and understood that it had permission to rent out Mr. Robertson's Unit 110 is a *Currie*-type affirmative defense to Mr. Robertson's "trespass" claim, which was properly received into evidence. Still other Mississippi cases hold that the statute of limitations bars trespass claims where the circumstances giving rise to the claim were known or readily discoverable by the complaining party. *See, e.g., London v. Braxton,* 233 Miss. 514, 522, 102 So.2d 683, 686 (Miss. 1958); *Johnson v. Kansas City Southern Ry. Co.*, 208 Fed. Appx. 292, 296, 2006 WL 3371772, *2 (5th Cir. 2006). The Judgment properly finds that Robertson had ample notice of the alleged trespass and did nothing until long after the statute of limitations lapsed.

Robertson next argues at page 20-24, based on *Clanton v. Hathorn,* 600 So.2d 963 (Miss. 1992), that "laches is never applicable when a claim has not been barred by the statute of

limitations." This is not so either because, "the rule just stated only applies when time is the only factor." *Morgan v. Morgan*, 431 So.2d 1119, 1122 (Miss. 1983) citing *Sojourner v. Sojourner*, 247 Miss. 342, 153 So.2d 803, *suggestion of error overruled*, 247 Miss. 342, 156 So.2d 579 (1963). In *Morgan*, heirs of a deceased grantor brought suit in 1980 to cancel a 1966 forged quitclaim deed and to cancel all claims of title or interest asserted by another heir and an oil company under the same forged instrument. It was held by this Court that the trial court was not manifestly wrong in concluding that complainants had responsibility to investigate possibility of forgery to preclude injury to others; that their failure to do so until a well was drilled and gas discovered would have caused great financial loss to one defendant, and, because of their unreasonable delay in making their claims known, they were estopped by laches to assert their claim. The factors, in addition to time, considered by the *Morgan* trial court were: (a) their contemporaneous knowledge that the grantor under the 1996 deed was mentally incapacitated at the time of the conveyance, which triggered a duty on the part of the plaintiffs to investigate the possibility of the forgery to preclude injury to others, and (b) their failure to do so until after a well was drilled and gas was discovered causing great potential financial loss to the oil company, supported the defendant's laches defense.

As in *Morgan*, from the Court's opinion below, it is obvious that consideration was given to factors in addition to the element of time in the case at bar. At ¶ 28 of the Judgment, it is noted that Robertson stopped paying assessments in 1991 and stop going to the Condominium to check on his units between 1991 and 1993. After he discovered Ambercrombie's unauthorized use of his units, Robertson took no timely action against Ambercrombie and failed to participate in the *Ward* trial. In ¶ 29, it is correctly observed that between 1993 in 1998, when Robertson claimed that he did not know his Unit 110 was being rented out, Robertson was given timely notice of this activity by means of the Association's July 27, 1993 letter; that regular statements were thereafter sent out to all owners regarding their credits and balances; that even though Robertson knew that his units had been rented out by Ambercrombie prior to 1993, he abandoned his position on the takeover

board in 1993 knowing that the Condominium was in bad financial shape, while accusing the other board members of being only interested in timeshares; that Robertson voluntarily stayed away from the Condominium for the next five years after receiving notice in July 1993 that rental was being derived from Unit 110; that a simple investigation would have revealed the use of his unit, as there was no fraudulent concealment of such use; that the Association sent Robertson records of rental credits, and by doing nothing for five years after such notice, Robertson engaged in actual or passive acquiescence in the performance of the act complained of. Therefore, the situation is plainly the same as in *Morgan*, and the limited rule in *Clanton* does not apply.[18]

At pp. 24-25, Robertson claims that the Association "did not raise its affirmative defenses after they were pled," This is simply incorrect. The second affirmative defense *timely* and properly raised pursuant to Miss. R. Civ. P. 8(c) in the Association's April 27, 2000 Answer was: "The claims asserted by the Plaintiff are barred in whole or in part by the applicable statutes of limitation." *MS Credit Ctr., Inc. v. Horton*, 926 So.2d 167 (Miss. 2006) is not relevant because no arbitration agreement is involved in this case. Judge Alfonso obviously did not share opposing counsel's view that the statute of limitations defense was waived because she observed during the trial that it was "well established" that no such waiver had occurred. TR 108:18-24. *Trotter v. Trotter*, 490 So.2d 827, 834 (Miss. 1986), involved a Chancellor's determination of issues other than a statute of limitations defense which were "beyond the scope of the pleadings..." in a will contest case. Well pled affirmative defenses do not "vanish" from the scope of the pleadings; indeed even if "a defendant's pretrial motion that seeks a ruling on an affirmative defense which has not been included

---

[18] Even if this were not so, *Clanton* is an adverse possession case where the adverse possessor was sued nine years after assuming control over the disputed property. *Johnson v. Kansas City Southern Ry. Co., supra*, holds that the adverse possession statute of limitations does not apply in a case where, as here, the plaintiff is seeking damages. At 600 So.2d 966,*Clanton* expressly recognizes that: "Miss. Code Ann. § 15-1-13 (1972) is our familiar ten-year adverse possession statute." As explained previously, the § 15-1-49 statute of limitations applicable here is 3 years, not 10 years, so the Association's laches defense was properly asserted long after § 15-1-49 limitations period lapsed.

in the pleadings ... [it] should be evaluated under the same rule as would apply if that defense was raised at trial. Under Rule 15(b), the evidence and the defense should be accepted unless the objecting party can 'satisfy the court that the admission of such evidence [in support of the affirmative defense] would prejudice the maintaining of the action or defense.'" *Rankin v. Clements*, 905 So.2d 710, 715 (¶ 18) (Miss. Ct. App. 2004) (overruled on other grounds) (emphasis added). No such showing was even attempted by Robertson.

The excerpt from Court's Order filed May 31, 2005, referenced at page 25 of the opposing brief, was an interlocutory partial summary judgment ruling by Judge Alfonso, which was never certified as final for appeal purposes pursuant to Miss. R. Civ. P. 54(b). Mississippi courts (at the trial and appellate levels) treat a partial summary judgment as an interlocutory order and not as a final judgment. *See Hobgood v. Koch Pipeline Southeast, Inc.*, 769 So.2d 838, 841(¶ 10) (Miss. Ct. App. 2000). "[S]ince no final judgment was entered, the action was not terminated and the summary judgment order remains "subject to revision at any time." Miss. R. Civ. P. 54(b)." *Bierman v. Kreunen*, 912 So.2d 498, 501 (Miss. App. 2005). After hearing the evidence at trial which she had not had an opportunity to consider in 2005, Judge Alfonso properly disregarded this prior erroneous finding in her final Judgment.

Robertson concludes his first argument at page 26 with a general assertion that the Judgment is inequitable and invites this Court to "follow the law."

"[O]ne 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." *Perry v. Bridgetown Community Ass'n, Inc.*, 486 So.2d 1230, 1233 (Miss. 1986) *citing W. Hyatt, Condominium and Homeowners Association Practice: Community Association Law* 35 (1981). Condominium maintenance fees and assessments are the "financial lifeblood" of any such organization. *See, Park Place East Condominium Ass'n v. Hovbilt, Inc.*, 279 N.J. Super. 319, 323, 652 A.2d 781, 783 (N.J.

Super. Ch. 1994). If Robertson truly believed in following the law, he would have long ago conceded that his obligation to pay restrictive covenant based maintenance fees or assessments to a condominium or a homeowners' association is well settled under Mississippi law. *See, Alexander v. Wardlow,* 910 So.2d 1141 (Miss. App. 2005).

To this end, it has been recognized that "a condominium unit owner may not challenge the legality of a common expense assessment by refusing to pay it." *Blood v. Edgar's, Inc.,* 36 Mass. App. Ct. 402, 405, 410 (1994). On the contrary, a condominium homeowner's obligation to pay his condominium fees is universally recognized to be unconditional. *See, e.g., Leslie T. Riggin v. English Village Condominiums,* 1999 WL 1847405, 1 (Del. Com. Pl. 1999) *Park Centre Condominium Council v. Epps,* 1997 WL 817875, 2 (Del. Super. 1997); *Agassiz West Condo. Ass'n,* 527 N.W.2d 244 (N.D. Supr. 1995); *Park Place Estates Homeowners Ass'n v. Naber,* 29 Cal. App.4th 427, 35 Cal. Rptr.2d 51 (Cal. App.1994); *Forest Villas Condo. Ass'n v. Camerio,* 205 Ga. App. 617, 422 S.E.2d 884 (Ga. App.1992); *Trustees of the Prince Condo. Trust v. Prosser,* 412 Mass. 723, 592 N.E.2d 1301 (Mass. Supr. 1992); *Rivers Edge Condo. Ass'n v. Rere, Inc.,* 390 Pa. Super. 196, 568 A.2d 261 (Pa. Super. 1990); *Abbey Park Homeowners Ass'n v. Bowen,* 508 So.2d 554 (Fla. App. 1987); *Pooser v. Lovett Square Townhomes Owners' Ass'n,* 702 S.W.2d 226 (Tex. App. 1985); *Newport West Condo. Ass'n,* 134 Mich. App. 1, 350 N.W.2d 818 (Mich. App. 1984). *But see Kirktown Homes Ass'n v. Arey,* 812 S.W.2d 198 (Mo. App. 1991). The reason why this is so is fundamental to the nature of a condominium:

> Whatever grievance a unit owner may have against the condominium trustees must not be permitted to affect the collection of lawfully assessed common area expense charges. A system that would tolerate a unit owner's refusal to pay an assessment because the unit owner asserts a grievance, even a seemingly meritorious one, would threaten the financial integrity of the entire condominium operation. For the same reason that taxpayers may not lawfully decline to pay lawfully assessed taxes because of some grievance or claim against the taxing governmental unit, a condominium unit owner may not decline to pay lawful assessments.

Trustees of the Prince Condo. Trust v. Prosser, 412 Mass. 723, 592 N.E.2d 1301, 1302 (Mass. Supr. 1992).

"Absent an *adjudication* by a court of competent jurisdiction that the condominium association's adoption of its budget or imposition of its assessment was accomplished in bad faith or in excess of its authority, condominium charges by the unit owners organization are not subject to set-off or some other form of self-help remedy" *Baker v. Monga,* 32 Mass. App. Ct. 450, 453-54 (1992) (emphasis added); *Davey v. Moorshead,* 2001 WL 197943, 2 (Mass. App. Ct. 2001) (same); *Board of Trustees of 87 St. Botolph Street Condominium Trust v. Cohen,* 2007 WL 3261301 (Mass. Super. 2007) (same).

There are an ever increasing number of condominium associations in this state that can ill afford to be the victim of owners like Robertson. It is hoped that this Court will "follow the law" by reiterating the holding of *Alexander v. Wardlow,* and similar cases.

3. Validity of the Amended Declarations.

At pages 27-29, opposing counsel attacks the Court's findings at ¶ 24 on pages 21 and 22 of the Judgment, making the argument that there is no evidence that the Amended Declarations were properly adopted in 1981.

The Court concluded otherwise, correctly noting that the parties in the *Ward* case agreed that the both the Original and Amended Declarations "are the controlling, recorded documents for the condominium," and that although Robertson argued that the Amended Declarations are invalid in the case at bar, he presented no evidence regarding their alleged invalidity. Judgment at pp. 21-22, ¶ 24. The short answer to Robertson's argument is that a contrary stipulation or agreement made by or on behalf of a party in previous litigation is likewise an appropriate basis for *res judicata. See, e.g., Taylor v. Taylor,* 835 So.2d 60 (Miss., 2003) (Consent judgments receive same force as regular judgments, for purpose of binding parties under collateral estoppel and *res judicata).* The fact that the opposing parties in the 1997 *Ward* Judgment stipulated and agreed that the Amended Declarations were governing and binding upon the Condominium is reflected at Page 23, footnote 13 of the 1997Judgment. See, Ex. C-23, p.23, ¶ 1. CLGRE 137.

A "consent judgment acquires the incidents of, and will be given the same force and effect as, judgments rendered after litigation. It is binding and conclusive, operating as *res judicata* and an estoppel to the same extent as judgments after contest." *Guthrie v. Guthrie,* 233 Miss. 550, 556-57,102 So.2d 381, 383 (1958). Robertson acknowledged that his name appears as one of the Plaintiffs in the in the *Ward* 1997 Final Judgment (Ex. C-23). CLGRE 115-151. TR 542: 18-26. That is the same judgment that contains the acknowledgment that the *Ward* parties, including Robertson himself, stipulated the validity of the Amended Declarations. Therefore, the 1997 *Ward* judgment is *res judicata* to Robertson's attempt to re-litigate this issue again in the case at bar, which was filed in 2000.

Even if the Trial Court had not found that Robertson's claim was barred by the *Ward* stipulation, the reference to the previously filed Amended Declarations in every one of his deeds gave him at least constructive notice of the covenants as early as 1982. See, *Hearn v. Autumn Woods Office Park Property Owners Ass'n,* 757 So.2d 155, 159 (Miss. 1999); *Mississippi State Highway Comm'n v. Cohn,* 217 So.2d 528, 533 (Miss. 1969). Robertson's technical attack upon the validity of the Amended Declarations is just like the unsuccessful objections to the validity of subdivision covenants raised by the defendant property owners attempting to avoid their covenant obligations to their fellow owners in *Journeay v. Berry,* 953 So.2d 1145 (Miss. App. 2007). There, the developer recorded covenants misnaming the developer. This mistake was corrected in deeds, but the covenant was never properly amended to reflect the correct name. The Court of Appeals held at ¶ ¶ 18-19 that this defect did not serve to invalidate the covenants. Robertson's arguments properly suffered the same fate below.

Moreover, as in *Morgan v. Morgan, supra*, Robertson's own testimony demonstrates that he was well aware of the Amended Declarations shortly after they were publicly recorded in the early 1980s. Being a lawyer himself, Robertson obviously knew or is chargeable with knowledge that if he wished to question the validity of the Amended Declarations, he should have done so shortly after he received four deeds referencing these declarations and the early 1980s, and not nearly 20 years later, following the conclusion of the *Ward* case where the validity of these same documents were stipulated on his behalf and on behalf of the Association, which he has twice served as a director, since 1993. *See also, Stepanek v. Roth*, 418 So.2d 74 (Miss. 1982) (plaintiffs were barred by laches from enforcing restrictive covenant where defendants had violated covenants for periods from three to ten years).

Equitable estoppel can also be properly applied to foreclose this argument, if necessary. When Robertson accepted conveyance of his units containing the reference to the Amended Declarations, he acknowledged and assumed all of the obligations described in those covenants, including the obligation to pay maintenance fees and assessments. *See, Goode v. Village of Woodgreen Homeowners Ass'n*, 662 So.2d 1064, 1074 (Miss. 1995). In 1984, Robertson personally signed a timeshare deed to a third-party purchaser of half of his Unit 110 expressly incorporating the Amended Declarations. If Robertson were to prevail in his challenge to the Amended Declarations, he would potentially adversely impact the rights of all other owners, particularly timeshare owners, whose form of ownership was first authorized under the Amended Declarations. Regardless of what he might say, Robertson's first recorded deeds were timeshare deeds, the form of ownership he now seeks to imperil nearly 27 years after the instrument creating them was publicly recorded. Having acknowledged the validity of the Amended Declarations as both a grantor and grantee of interest in

this Condominium, Robertson should be equitably estopped from challenging their validity. *See, Miller v. Culpepper*, 556 So.2d 1074, 1078 (Miss. 1990); *White Cypress Lakes Development Corporation v. Hertz*, 541 So.2d 1031, 1035-36 (Miss. 1989); *PMZ Oil Company v. Lucroy*, 449 So.2d 201, 207-208 (Miss. 1984).

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

Opposing counsel next argues that the Association may not properly suspend an owners space banking rights with the RCI [Resort Condominiums International] group for non-payment of assessments, on the theory that no such right is conferred upon the Association by the Condominium Declarations. This is an attack upon the Court's legal conclusions at page 26-27, ¶ 30 of the Judgment, where the Court, concluded that there was "no reason that Article II, Section 1(b)[19] may not be liberally construed to allow for suspension of non-paying owners' space banking rights with RCI. Under the Clean Hands Doctrine, one who refuses to pay condominium assessments in Mississippi might not come into a court of equity seeking free vacations in Hawaii." *Id.*

"RCI brokers the exchanges of vacation timeshares among owners and between resorts and visitors." *Turner v. Resort Condominiums Intern.*, LLC 2006 WL 1990379, *2 (S.D. Ind. 2006). Other courts have correctly recognized that "[i]n order to utilize the RCI system, a membership in RCI was required, and all [condominium unit owners home resort] fees had to be paid before an exchange request would be processed. *State v. Shade,* 104 N.M. 710, 721, 726 P.2d 864, 875 (N.M. App. 1986) (subsequently overruled on unrelated grounds).

---

[19] This identical provisions of Article II, Section 1(b) of the Original and Amended Declarations read "Every owner shall have the right and the easement of enjoyment in and to the common areas which of the appurtenant to shall pass with title to every unit, subject to the following provisions: .....(b) the right of the Association to suspend the voting rights and right to use of the said facilities by an owner for any period during which any assessment against his unit remains unpaid....." Association's trial exhibits C-25 and C-26.

At all relevant times, the Association has operated under a similar RCI contract. Ex. C-046. At the same time, Mr. Robertson had a concurrent separate individual agreement with RCI, which is part of the same exhibit. The Association's independent relationship with RCI is described A Article 4.1.2. Robertson's Agreement, at page 3, in the second paragraph under the header "using the RCI week's exchange program, states:

> Exchange privileges may be denied or a Confirmation canceled if an RCI Week's Member's Home Resort maintenance fee assessments or similar charges have not been paid as established by the Member's Home Resort...."

Robertson candidly confirmed at TR 32:9–22 that his responsibility according to the paragraph quoted above "was to pay legal and reasonable maintenance fees." He further accurately described the consequences for failing to do so at TR 190:4-14:

> In order for me to space bank my units, I must have my maintenance fees paid or they will refuse the space bank, and the Association is the one that reports to RCI because RCI doesn't know if I had paid my maintenance fees or not...If I paid the maintenance fees, they report yes and RCI lets me space bank my unit and exchange. If they report no, then RCI comes back to me and says you have a problem with the Association, straighten it out in then you can space bank with us.

Robertson, for the first time at trial, also complained over the Association's repeated objections, about being physically locked out of his timeshare units. TR. 201: 7- 217:14. Judge Alfonso never expressly ruled on the Association's objection one way or another other than noting that it was in the record. TR 217:13-14. This claim is another example of affirmative relief demanded by Robertson that Judge Alfonso declined for equitable reasons, as in *R.K. v. J.K.*, *supra.* Credible evidence supports the affirmation of this determination even if it is not specifically addressed in the Chancellor's final judgment. *See, Williams v. King,* 860 So.2d 847, 849 (Miss. App. 2003). Furthermore, Robertson testified that the lockout policy that he complained of was implemented pursuant to a resolution of the "takeover board," which he thought was passed

sometime in 1995 or 1996. TR. 703: 22-25. Robertson's attorney confirmed that the resolution complained of was passed on December 13, 1995, and appears in the record as Ex. R. 31. Since Judge Alfonso's discussion of the related "space banking" claim appears at page 26 in ¶ 29 of the Judgment, which is part of the same section beginning after the first paragraph in ¶ 26 on page 23 discussing the "statute of limitations/latches" issues, it appears that she concluded that the "lockout" challenge was properly time barred by §15-1-49, as well.

Moreover, since the December 13, 1995 resolution of the board complained of, Ex. R. 31, is one of the resolutions subsequently ratified in 1998 by the unit owners and "reconstituted" board of directors elected during the receivership proceeding in *Ward*, this claim is properly barred by *res judicata*, as well as the "business judgment" standard commonly associated with corporate law and condominium and subdivision rule making. *See, e.g., City of Picayune v. Southern Regional Corp.*, 916 So.2d 510, 523 (Miss. 2005). ("[C]ourts will not interfere in matters involving merely the judgment of the majority in exercising control over corporate affairs."); *Papalexiou v. Tower West Condominium*, 167 N.J. Super. 516, 527, 401 A.2d 280, 285-286 (N.J. Super. Ch. 1979) ("Business judgment" rule relied upon to affirm dismissal of the dissenting condominium unit owner's challenge to lien imposed upon his unit for non-payment of special assessment approved by the governing board).

The Associations' witnesses testified at trial that whenever RCI inquired about whether or not Robertson's "maintenance fees or similar charges" had been paid, RCI was correctly informed that Robertson had not done so. Robertson admits that he hasn't paid maintenance fees or assessments for at least 17 years. Therefore, Robertson's complaints about "privileges" or

"confirmations" being canceled by RCI, based on the Association's correct advice to RCI that he was delinquent in "maintenance fees or similar charges," are entirely his own fault.

With respect to the Court's interpretation of Article II, Section 1(b) of the Declarations, it should first be remembered that declarations of this kind must be liberally construed pursuant to the mandate of Miss. Code Ann. § 89-9-27. Language to the same effect is included in the preamble to Article IV of the Original and Amended Declarations, which reads: "[i]t is the intention of the Declaration that the Association be free and uninhibited in the exercise of its rights and duties hereunder, and to such and the words "management and control" shall be given their broadest possible meaning." CLGRE 17 (Article IV, opening ¶).

Section 89-9-27 has never been construed in any reported Mississippi cases. A similar general grant of authority to a homeowners association was analyzed by the court in *Schaefer v. Eastman Community Ass'n*, 150 N.H. 187, 836 A.2d 752 (N.H. 2003). In that case, dissenting homeowners attempted to prohibit the Association from closing a commonly owned ski facility on the grounds that the Association lacked express authority to do so. The New Hampshire Supreme Court disagreed and upheld the Association's right to close the amenity based on general language from the declarations. *Id.* 836 A.2d 752, 755-756.

The Association's By-Laws are Ex. R-20/C-24. CLGRE 233-244. Examination of this document, discloses that it confers broad management powers similar to those construed in *Schaefer*, so the power to ensure the financial stability or pursue the best interest of the Association is likewise conferred upon the governing body of the Association. See particularly CLGRE 237-238, Article VII § 2 ¶ (c) (l). Article VI, § 8 of the Original and Amended Declarations, CLGRE 27, both provide: "No owner may waive or otherwise escape liability for the assessments provided for herein by non-use of the common area or abandonment of his unit and no owner may voluntarily resign

from membership." This Court's construction of Article II, Section 1(b), CLGRE 15, is reasonable reading, because the "facilities" from which a delinquent member may be suspended from using for non-payment of assessments obviously includes both the "common area" and the units themselves. Indeed, the very next section, Article II, § 2, CLGRE 15-16, draws the same distinction by referring separately to the "right of enjoyment of the Common Area *and the facilities*," (emphasis added). "Common Area," is defined in Article I, § 4 as "property included in the 'properties' except for the actual units themselves...." Therefore, in this context, "facilities" obviously means everything other than the common area, which, by definition, includes "the actual units themselves...."

There are other strong equitable reasons to support the Court's collusion on this issue. Pursuant to the Agreed Stipulation of May 6, 1993 in the *Ward*, case, Ex. C-11, CLGRE 80-82, all parties in *Ward* agreed, among other things, "that there would be a moratorium on foreclosures until such time as we get to the final hearing in Court." This moratorium was reported by the "takeover" board to all unit owners in the same May 9, 1993 letter announcing Robertson's election to that board. Ex. C-12. The moratorium continued in effect until at least until late 1998, according to ¶ X of Gillespie's June 1, 1998 receiver's report to the Court in *Ward*. Ex. C-33. CLGRE 160. Robertson was a board member when the stipulated moratorium went into effect. Therefore, the Trial Court properly concluded that it was patently inequitable for him to contend in hindsight at trial that the Association's exclusive remedy for non-payment of maintenance fees and assessments was foreclosure, when he was one of the individuals responsible for implementing, and certainly benefitting from this moratorium.

Robertson's conflicting positions on the subject of foreclosures are quite similar to the inequitable conduct of the administratrix plaintiff in *In re Estate of Richardson, supra.* The administratrix initially listed an illegitimate deceased child's father and his kindred daughter-in-law as wrongful death beneficiaries in a pleading. After securing the court's permission to settle the deceased child's claim, the administratrix then filed another petition seeking to disinherit the

illegitimate deceased child's biological father and his daughter-in-law. This Court refused to allow this, holding that such inconsistent conduct was barred under the doctrines of "unclean hands," equitable estoppel, and judicial estoppel. Robertson's "flip flop" on the Association's ability to foreclose against delinquent owners like himself is indistinguishable. See also, *Sta-Home Home Health Agency, Inc. v. Umphers*, 562 So.2d 1258, 1263 (Miss. 1990) (An injunction—or any other relief--should not issue where the party seeking it "has pursued a course of conduct that precipitated the trouble....").

Finally, since Robertson admitted being knowingly locked out of his timeshare since 1995, his claim in this regard was already barred by the general statute of limitation when suit was filed in 2000, and is yet another example of conduct on his part foreclosing this claim based on latches.

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

At pages 32-37, Robertson argues that the Trial Court should not have required him to pay the cost of transcribing the additional portions of the record designated for appeal purposes by the Association.[20]

The complete procedural history of the ruling complained of is not described in Robertson's brief. What actually happened was another example of how Robertson has obstinately and unnecessarily prolonged and complicated these proceedings: Robertson's original Notice of Appeal, CP 101-102, raised four (4) "issues,"one of which (CP 101, #3) was subsequently abandoned. His original designation of the record, CP 103-104, listed one interlocutory and one final judgment, two excerpts from testimony of Robertson and McCrory and 11 of Robertson's trial exhibits. The

[20]Per the order filed by this Court on February 27, 2009, the Association's motion to strike this issue, which was not certified for interlocutory appeal, was denied without opinion.

Association replied with a "restatement" of these original issues, consistent with the final judgment, CP106- 111, and a supplemental designation of six clerk's papers, six portions of the trial transcript and a motion hearing transcript, and 51 of the Association's trial exhibits, CP 112- 116. Robertson then filed a motion for order requiring the Association to pay the expense of transcribing the additional portions of the record. CP 121-135, which included an amended designation of the record by the Appellant. CP 133-134. The amended designation specified for clerk's papers, all trial testimony of Robertson and McCrory, and 18 trial exhibits, 17 of which were Robertson's. CP 133-134. The Association responded, appropriately pointing out why Robertson's extremely limited and one-sided amended designation did not satisfy Miss. R. App. P. 10(b)(4)'s "relevance evidence" standard. CP 136- 143. Thereafter, Robertson filed his amended designation of the record, CP 146-150, and amended statement of issues on appeal (deleting his original issue #3), CP 151-152. The Association submitted a second supplemental Appellee's designation of relevant portions of the record, appropriately deleting portions of the records relating to the issue abandoned by Robertson, CP 153- 158, and a responsive pleading again explaining why the additional portions of the record designated by the Association were "relevant" but not included in the Appellant's amended designation. CP 159-226. Robertson filed two more responses, CP 227-239, and insisted upon oral argument on his motion seeking to require the Association to pay additional costs. Following the hearing on this motion on July 1, 2008, which occurred nearly 18 months after the January 22, 2007 judgment in favor of the Association, the Trial Court entered an order, CP 240-247 overruling Robertson's motion.

Rule 10(b)(4) of the Mississippi Rules of Appellate Procedure provides:

> 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.

Miss. R. App. P. 10(b)(4) (emphasis added).

"To the appellant falls the duty of insuring that the record contains sufficient evidence to support his assignments of error on appeal ." *Miss. Dep't of Mental Health v. Hall,* 936 So.2d 917, 928 (¶ 34) (Miss. 2006) (quoting *Dillard's, Inc. v. Scott,* 908 So.2d 93, 99 (¶ 19) (Miss. 2005)). If the appellant fails to provide a complete record on appeal, it is the appellee's obligation to supply the missing portions of the record. *Norwood v. Extension of Boundaries of City of Itta Bena,* 788 So.2d 747, 752 (Miss. 2001).

An appellant's extremely limited and one-sided record excerpt designation has always been questionable. See, *Miller Transporters Limited v. Johnson,* 252 Miss. 244, 250, 172 So.2d 542, 545 (Miss. 1965). If, as in *Miller Transporters* and *Norwood*, the appellee makes no counter designation, "there is no presumption that assigned errors would be cured by other evidence or instructions not designated by the appellant." *Miller Transporters,* 172 So.2d, at 545. A *failure* to include substantial supporting evidence necessary for this Court's review cannot be cured by resorting to speculation as to the contents thereof. *Lambert v. State,* 524 So.2d 576, 579 (Miss. 1988); *Carstarphen v. Jones,* 108 Miss. 704, 67 So. 177 (1915); *Wilson v. Brown,* 94 Miss. 608, 47 So. 545 (1908). Thus, counter designation is the only sanctioned procedure for inclusion into the appellate record of material which, though omitted from designation by the Appellant, is sought to be incorporated by the Appellee maximum do likewise , to avoid waiver of the Appellant's rights on appeal. The rule requires that the additional parts designated by the Appellee shall be *at the expense of the Appellant* unless the Appellant obtains from the Trial Court an order requiring the Appellee to pay the expense.

Judge Alfonso plainly denied Robertson's motion to shift the cost to the Association for very good reasons.

The Association never designated the entire record; instead, it began with a partial designation and thereafter made good-faith efforts to exclude portions of the transcript of the lengthy trial and trial exhibits (such as those relating to the issue on appeal subsequently abandoned by Robertson). The Trial Court applied the correct "relevant to the issues raised by the Appellant" test and properly denied Robertson's motion. *See, e.g., Grice v. Grice,* 726 So.2d 1242, 1256-1257 (Miss. App. 1998); *Queen v. Queen,* 551 So.2d 197, 204 (Miss. 1989). As explained at the beginning of this brief, evidence which is relevant for this purpose is not restricted to evidence supporting Robertson's rejected legal arguments, as he maintains. Instead, as explained in ¶19 of *R.K. v. J.K., relevant* evidence is all evidence relating to the plenary "employment of equity" analysis actually employed by the Trial Court. *Id.* 946 So.2d, at 772-773. This ruling is reviewed under the familiar abuse of discretion standard. *See, Wilson v. Greyhound Bus Lines, Inc.,* 830 So.2d 1151, 1157, ¶ 15 (Miss. 2002).

Robertson's original designation included evidence relating to his subsequently abandoned issue, and only a very few of his own exhibits supporting his "statement of issues," that did not fully or accurately reflect the Trial Court's ruling against him. Accordingly, the Association designated the other evidence referenced in the Judgment which supported the result reached *against* Robertson (but not any evidence relating to issues which were resolved against the Association, which were not appealed). Robertson then abandoned one issue, after which the Association deleted those portions of the record which it could identify that related to that abandoned issue. Even then, Robertson's amended designation still presented only minimal evidence supporting his position only, rather than

the actual "equitable balancing" analysis employed by the Trial Court. This is why the Association submits that Judge Alfonso was clearly correct in requiring Robertson to bear the additional cost of providing this Court with a complete *relevant* records reflecting the actual result reached below.

Obviously, relevant evidence concerning prior related litigation should be included in the record on appeal in appropriate circumstances. *See, Progressive Gulf Ins. Co. v. Dickerson And Bowen, Inc.*, 965 So.2d 1050, 1051, fn. 1 (Miss. 2007); *Irby v. Travis*, 935 So.2d 884, 942, ¶¶ 187-88 (Miss. 2006) (*en banc*). Judgments having bearing on the issues on appeal should always be part of the record. *See, Whitley v. City of Pearl*, 994 So.2d 857, 861, ¶ 15 (Miss. App. 2008); *Howard v. Howard*, 968 So.2d 961, 967, fn. 1 (Miss. App. 2007). The most glaring omission from Robertson's cursory designations is the *complete absence* of *relevant* pleadings, judgments, orders and exhibits from the *Ward* case. The Trial Court discussed *Ward* at least13–nearly half–of the 29 pages of the judgment here on appeal. See, pp. 3-6, 17-23, 25, and 27. If Robertson's limited designations were the only record on appeal, this Court would hardly know *Ward* took place, much less that material issues were actually addressed and resolved by that prior litigation. Robertson was rightly required to pay the cost of remedying this self-serving omission.

Robertson similarly failed to designate abundant evidence in the record documenting and supporting the actual basis for the Trial Court's rejection of his novel "continuing trespass" and "time-share" access claims, which are grounded equally on the statute of limitations, latches and the "unclean hands" doctrine. Robertson's limited designation improperly and conspicuously omitted the *relevant* fact specific evidence which convinced the Trial Court that he was actually aware of, or could easily have discovered the conditions he complained of, notwithstanding his intentions otherwise. *See, e.g., Magee v. Garland*, 799 So.2d 154, 159, ¶¶ 17-19 (Miss. App. 2001) (record

property owner's claim, opposing adverse possessors' suit to quiet title, that he did not know that the adverse possessors were using his property was contradicted by record testimony including that of the record owner). The Association's supplemental designation of evidence contradicting Robertson's self-serving professed ignorance of the conditions he complained of properly served the same purpose.

Therefore, like the complaining appellants in *Grice v. Grice* and *Queen v. Queen*, Robertson was properly and equitably required to pay the additional cost of transcribing those portions of the record designated by the Association, based on the proper mode of review which is "whether the Chancery Court erred in its employment of equity." *R.K. v. J.K.*, 946 So.2d at 773.

CONCLUSION

The Trial Court, based on the equity of the situation, properly denied all relief requested by Robertson's complaint based on laches, the statute of limitations, equitable estoppel, judicial estoppel, *res judicata*, and other amply supported equitable grounds. Even so, the Trial Court did grant some relief to Robertson by rejecting the Association's claim that Unit 110 should be treated as a legitimately subdivided unit for assessment fee purposes, which the Association has not disputed. After Robertson conspicuously failed and refused to designate a complete record accurately reflecting the evidence on which the Judgment is actually based, the Association timely and properly "filled in the blanks" with the rest of the *relevant* evidence as Rule 10(b)(4) requires. Under these circumstances, the Trial Court did not abuse its discretion by requiring Robertson to pay the

additional cost of preparing this portion of the record. Accordingly, the Association prays that this Court will affirm the Judgment in all respects.

Respectfully submitted,

CHATEAU LeGRAND PROPERTY OWNERS ASSOCIATION, INC.

BY: COPELAND, COOK, TAYLOR & BUSH, P.A.

BY: _____
WILLIAM V. WESTBROOK, III

WILLIAM V. WESTBROOK, III
[redacted]
COPELAND, COOK, TAYLOR & BUSH, P.A.
Post Office Box 10
Gulfport, Mississippi 39502-0010
(228) 863-6101
(228) 868-9077 FAX

CERTIFICATE OF SERVICE

I, WILLIAM V. WESTBROOK, III, attorney for Appellee, Château LeGrand Property Owners Association, Inc., certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to:

Honorable Margaret Alfonso
Chancery Court Judge
Post Office Box 986
Gulfport, Mississippi 39502-0986

Wayne L. Hengen, Esq.
Hengen & Hengen
979 Howard Avenue
Biloxi, Mississippi 39530

THIS 25th day of March, 2009.

WILLIAM V. WESTBROOK, III