

IN THE SUPREME COURT OF MISSISSIPPI

NO: 2011-CA-01311

TOM AND CONSANDRA CHRISTMAS

Appellants

VERSUS

EXXON MOBIL CORPORATION
A NEW JERSEY CORPORATION

Appellee

APPEAL FROM THE CIRCUIT COURT OF WILKINSON COUNTY

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TOM CHRISTMAS AND
CONSANDRA J. CHRISTMAS

FILED

APPELLANTS

VS.

JUL 11 2012

2011-CA-01311

EXXON MOBIL CORPORATION,
A NEW JERSEY CORPORATION

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

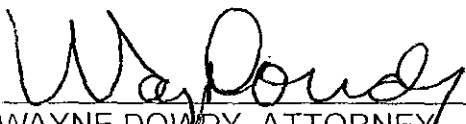
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Tom Christmas, Appellant
2. Cassandra Christmas, Appellant
3. Wayne Dowdy, Attorney for Appellants
4. Exxon Mobil Corporation, Appellee
5. Gene D. Berry, Attorney for Appellee
6. Jeffery P. Reynolds, Attorney for Appellee
7. David Mantor, Attorney for Appellee

THIS the 2ND day of July, 2012.

Respectfully submitted,

TOM and CASSANDRA CHRISTMAS, APPELLANTS

BY: 
 WAYNE DOWDY, ATTORNEY
 OF RECORD FOR APPELLANTS

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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CONSANDRA J. CHRISTMAS

APPELLANTS

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TABLE OF CONTENTS

	<u>PAGE</u>
CERTIFICATE OF INTERESTED PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii,iv
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
A. NATURE OF THE CASE, THE COURSE OF PROCEEDINGS, AND ITS DISPOSITION IN THE COURT BELOW	2
B. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW	2
SUMMARY OF THE ARGUMENT	7
STANDARD OF REVIEW	9
ARGUMENT AND AUTHORITIES	10
CONCLUSION	21
CERTIFICATE OF SERVICE	22

TABLE OF AUTHORITIES

<u>I. CASES</u>	<u>PAGE</u>
<i>Davis v. Hoss</i> , 869 So.2d 397 (Miss. 2004)	15
<i>Donald v. Amoco Production Co.</i> , 735 So.2d 161 (Miss. 1999)	20
<i>E. Mississippi State Hosp. v. Adams</i> , 947 So.2d 887 (Miss. 2007)	10
<i>Empire Abrasive Equip. Corp. v. Morgan</i> , 87 So.3d 455 (Miss. 2012)	10
<i>Estate of Grimes ex rel. Grimes ex rel. Wrongful Death Beneficiaries v. Warrington</i> , 982 So.2d 365 (Miss. 2008)	10
<i>Flores v. Elmer</i> , 938 So.2d 824 (Miss. 2006)	16
<i>Gale v. Thomas</i> , 759 So.2d 1150 (Miss. 1999)	10
<i>Huss v. Gayden</i> , 991 So.2d 162 (Miss. 2008)	16
<i>Hutzel v. City of Jackson</i> , 33 So.3d 1116 (Miss. 2010)	10
<i>Jacox v. Circus Circus Miss., Inc.</i> , 908 So.2d 18, 183 (Miss. Ct. Ap. 2005)	9
<i>Meadows v. Blade</i> , 36 So.3d 1225 (Miss. 2010)	10
<i>Meadows v. Kendall Blade, M.D. and Mississippi Baptist Health Systems, Inc.</i> , 36 So.3d 1225 (Miss. 2010)	10,14
<i>Moss v. Batesville Casket Co.</i> , 925 So.2d 393,398 (Miss. 2006)	9

MS Credit Center, Inc. v. Horton,
926 So.2d 167, 180 (Miss. 2006) 10,14

Parham v. Moore,
552 So.2d 121,124 (Miss. 1989) 16

Spann v. Diaz,
987 So.2d 443 (Miss. 2008) 10

Stuart v. Univ. of Mississippi Med. Ctr.,
21 So.3d 544 (Miss. 2009) 10

Sutherland v. Estate of Ritter,
959 So.2d 1004 (Miss. 2007) 16

II. STATUTES

Miss Code Ann. § 11-1-58 14

Miss. Code Ann. § 15-1-49 10

Miss. R. Civ.P. 56(c) 9

STATEMENT OF THE ISSUES

POINT 1.

THE CIRCUIT COURT ERRED IN FINDING THAT THE STATUTE OF LIMITATIONS
BARRED PLAINTIFFS' CLAIMS

POINT 2.

THE TRIAL COURT ERRED IN FINDING THAT THE "PRIOR TRESPASS DOCTRINE"
BARRED PLAINTIFFS' CLAIMS

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and its Disposition in the Court Below

On August 11, 2008 the Plaintiffs filed a Complaint against the Defendant in the Circuit Court of Wilkinson County, Mississippi claiming damages as a result of private nuisance.

On September 29, 2008, the Defendant filed it's Answer and Affirmative Defenses.

Between September 29, 2008, and May 16, 2011, extensive discovery was conducted by both parties to the lawsuit.

On May 16, 2011, the Defendant filed its Motion for Summary Judgment.

On June 22, 2011, a hearing was held on the matter and an Order Granting Defendants Motion for Summary Judgment was entered.

On June 23, 2011, the Court entered a Final Judgment of Dismissal With Prejudice.

On July 11, 2011, the Appellants filed their Notice of Appeal to the Supreme Court of the State of Mississippi.

B. Statement of Facts Relevant to the Issues Presented for Review

The Appellants, Tom and Consandra Christmas, husband and wife, are residents of Wilkinson County, Mississippi. They owned a home in the Town of Woodville, but wanted to purchase rural property on which to build a new home. In 2003, a friend told them about 35 acres of land with two ponds. The property owner, who lived in Covington, Louisiana, negotiated with Mr. and Mrs. Christmas, and the property was purchased on December 3, 2003 for \$72,000.00. The property had been owned by seller's parents since at least 1970. (R-26, Exhibit 12 to Robert Crook Deposition). Mr. and Mrs. Christmas

made application to a bank in Woodville for a real estate loan. As part of the bank's loan process, an inspection was made of the 35 acre tract by a property evaluator. The inspector was asked to comment on the condition of adjacent properties, and the bank's inspector noted that adjacent properties consisted of "timber and cattle land." (R-14, Exhibit 11 to Robert Crook Deposition).

Unknown to Mr. and Mrs. Christmas, along the West boundary of the 35 acres, there existed a larger tract of property originally known as Rogers' Cattle and Landfarm, which had been purchased by Exxon in 2001. Since 1980, Rogers' Landfarm was used exclusively for the disposal of waste water treatment plant sludges from the Baton Rouge refinery of Exxon Company, USA. (R-28, Exhibit 18 to Robert Crook Deposition) In 1980, the Mississippi Air & Water Pollution Control Commission found that the volume of waste oil sludges treated at the site was approximately 100-140 tons per day delivered by 18-wheel trucks during both night and day. The waste consisted of approximately 4% oil, 11% solids, and 85% water. The solids contained some metals, including copper, chromium, vanadium, cobalt, mercury, and lead. Nineteen (19) retention ponds had been built on the site to handle stormwater and rainfall runoff, and these ponds are in close proximity to the Christmas property. (R-28, Exhibit 18 to Robert Crook Deposition)

Mr. and Mrs. Christmas have testified that they had no knowledge that the property they purchased was adjacent to the Exxon site. Mr. and Mrs. Christmas extensively cleaned their property, ran a water line and septic tank, constructed a barn with new fences and placed several buildings on it. An architect was hired to prepare house plans for their new home. A sale was arranged for their house in Woodville in 2007. Mr. and Mrs. Christmas moved after their house was sold, into a mobile home on the 35 acres.

At about the time they moved full-time onto the property in 2007, Mr. and Mrs. Christmas learned about the Exxon facility adjoining their property, and also became alarmed and concerned about the number of alligators in the vicinity. Mr. Christmas, during his deposition taken by Exxon in 2010, explained how he first learned about the alligator infestation next to his property.

- A. It may have been three years ago when I really felt I found out what it was, was I was hunting on my property and one of my dogs went under the fence and got over there. I think I went around, and the guy was at the gate, and I told him I think I have a dog on their property
- Q. Uh-huh (affirmative response).
- A. And I think he told me he worked for Exxon, and he said he didn't have a problem with it.
- Q. Go and get your dog?
- A. Go and get my dog. I got in the truck with him, and we rode around. I said, "Well I could just drive my truck." He said, "No you can't drive your truck in here," and I don't remember the guy's name. He said, "This place is infested with alligators, and we can't even go out there by ourselves at one time." I said, "Really?" And -
- Q. Who was this now?
- A. Some guy that worked for Exxon. He works there handling the wells and whatever. He works for Exxon. I don't know his name.
- Q. All right. How did you know - -
- A. All I want - - because we had a conversation, and we talked. I asked him, I said, "What - - what you doing?" He said, "Well we - - we come in here, and keep the wells up, and we do this and we do that, certain things." And he - - I got in the truck with him, and he said, "Let's go look," and I told him no, I could just drive around because I didn't want him to go away from his work, you know. He said, "No, you've got to go with me because," he said, "we have a procedure, it have to have two people." And he said "This place is infested with alligators." So we drove around and there's several ponds all over the place.
- Q. Uh-huh (affirmative response).

A. - - and we got to talking about it, and he said, "Man they've got alligators in here as long as this pickup truck."

Mr. Christmas also testified "About that time when he was there in 2007, that's when I realized I had a serious alligator problem, somewhere during about that time, give or take."

(R-13, Deposition of Tom Christmas, Page 13)

A former waste site employee, Frederick Coleman, who worked there from 1984 to 1999, testified that Exxon devised a plan to bring alligators and other animals into the site. Exxon employees admitted to Mr. Coleman that alligators had been brought up from Louisiana and introduced into the waste site. In his affidavit, Mr. Coleman stated that "The reason the alligators were placed at the site was, if the alligators started dying or becoming ill after being exposed to the refinery waste sludge, then this would indicate a possible problem for humans exposed to the toxic waste sludge. The alligators were transported from Louisiana in wooden crates. One of the male alligators was injured while being transported in the wooden crate and lost it's leg as a result. After the alligators were introduced into the site, the alligator population grew and the worker personally observed many, many alligators at the site, ranging from 6-10 feet long." (R-11, Affidavit of Frederick Coleman)

After inquiries were received from Mrs. Christmas, in 2007, the Mississippi Department of Wildlife, Fisheries and Parks (MDWFP) conducted an alligator population survey at Exxon's Centreville waste site. The survey found that there are nineteen (19) water impoundments or ponds on the property. The ponds were surveyed to count or census the total number of alligators and document their size within each pond on the property. The census indicated eight-five (85) surface acres of water in the nineteen (19)

ponds. The total number of alligators included in the census number was eighty-four (84). MDWFP noted that some alligators were not encountered due to obstruction of visibility, and some alligators were not visible because they were not at the surface. These were not included in the census number. Sixty-nine percent (69%) of the census population was in the 1-4 foot size class, and nineteen percent (19%) of the census population was in the 4-8 foot size class. MDWFP's report, indicating that no alligators over eight feet were observed, concluded that several are believed to exist according to facility personnel. The MDWFP report indicated "this is a high density to exist in the wild. Habitat conditions are favorable to support alligators," and "it is reasonable to expect that some alligators may/will disburse successfully from the property to adjacent suitable habitat." In its report, MDWFP offered to assist in the harvesting of alligators. (R-14, Exhibit 11 to Robert Crook Deposition)

Following the MDWFP census, the Mississippi Department of Environmental Quality notified Exxon's site manager, that while MDWFP had authority regarding the management of alligators, a DEQ regulation "prohibits Exxon from growing food chain crops on the landfarm during the operating life, closure and post-closure care periods of the site," and added that "MDEQ would advise Exxon and MDWFP to insure no alligator meat is allowed for human consumption." (R-14, Exhibit 11 to Robert Crook Deposition)

Mr. and Mrs. Christmas continued to observe numerous alligators around the two ponds on their property and decided to abandon their plans to construct a home on the property.

Their Complaint was filed in the Circuit Court of Wilkinson County on August 11, 2008 alleging nuisance. Specifically the Plaintiffs charged that the Defendant property

"has been infested with large numbers of alligators", the alligators are seen near or on Plaintiff's property, and that "such infestation of alligators constitutes a nuisance."

After the Plaintiff's case was filed, numerous depositions were taken by the Defendant, extensive interrogatories were propounded by the Defendant and responses were delivered by the Plaintiffs, documents were requested and produced by both parties, experts were retained and deposed by both parties and other additional discovery was conducted. A pre-trial order was completed by both parties to the lawsuit prior to the trial. On June 22, 2011 the Circuit Court entered an Order granting the Defendants Motion for Summary Judgment.

SUMMARY OF THE ARGUMENT

A. Statute of Limitations

In general , a claim for nuisance must be brought within three years of the accrual of the cause of action since no other period or limitation is prescribed. At the time a complaint is filed, a defendant must timely raise all affirmative defenses, but if the defense is one which would terminate the litigation, the defendant must also timely pursue the enforcement of the defense. A defendant's failure to timely and reasonably raise and pursue the enforcement of an affirmative defense which would serve to terminate the litigation, coupled with active participation in the litigation, will ordinarily serve as a waiver of the defense. Finding that the statute of limitations barred the plaintiffs' claims, the trial court granted summary judgment for the defendant herein approximately three (3) years after this lawsuit was filed. During the course of this litigation, the defendant noticed and/or participated in the depositions of numerous individuals, filed motions to compel discovery

and participated in hearings on same, prepared and filed a pre-trial order, issued and served trial subpoenas, and engaged in massive amounts of correspondence with plaintiffs' counsel and others. By virtue of it's failure to timely pursue the statute of limitations defense, coupled with it's active participation in this litigation, the defendant waived any statute of limitations defense to this action and the trial court erred when it granted summary judgment on that basis.

B. Discovery Rule Tolls the Statute of Limitations

In the alternative, should this Court find that the defendant did not waive it's statute of limitations defense, the trial court erred in granting summary judgment for the defendant by it's failure to apply the discovery rule which tolls the statute of limitations until the injured party knew or should have known of an actionable injury. This Court has held that under the discovery rule, the central inquiry concerns the time that the injured party discovers, or should have discovered by the exercise of reasonable diligence, that he probably has an actionable injury. Therefore, the proper focus of the inquiry in this lawsuit is not when the Christmases knew of the presence of the alligators on the property, but rather when the Christmases knew that Exxon had willfully imported the alligators onto the property. Mississippi substantive jurisprudence requires questions of disputed fact, such as when with reasonable diligence an injured party might have known or discovered the alleged act, omission or neglect which caused his injury, to be decided by juries. When the Christmases knew that Exxon had knowingly placed dangerous, wild animals upon their property is a question of material fact which should properly have been decided by a jury and which precluded summary judgment.

C. Doctrine of Prior Trespass

In general, the sale of land does not transfer the right to sue for damages caused by a trespass or nuisance that occurred prior to the purchaser's acquisition. However, where a prior trespass results in damages unknown at the time of the sale and not reflected in the purchase price, the prior trespass doctrine does not apply. In such a circumstance the purchasers may bring an action for damages caused by the trespass or nuisance. It is a genuine issue of material fact whether the purchase price for the land purchased by the plaintiffs herein reflected the damages caused by Exxon's willful placement of dangerous, wild animals upon it's property. This question of material fact should properly have been decided by a jury and precluded summary judgment for the defendant.

STANDARD OF REVIEW

A trial court's grant of summary judgment is reviewed de novo. *Moss v. Batesville Casket Co.*, 935 So.2d 393, 398 (Miss. 2006). The standard by which the Court reviews the grant or denial of summary judgment is the same standard applied by the trial court pursuant to Rule 56(c) of the Mississippi Rules of Civil Procedure. *Jacox v. Circus Circus Miss., Inc.*, 908 So.2d 18, 183 (Miss. Ct. App. 2005). A motion for summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Miss. R. Civ. P. 56 (c) .

ARGUMENT AND AUTHORITIES

A. The Lower Court Erred When It Granted Summary Judgment for the Defendants Based Upon the Statute of Limitations

In general , a claim for nuisance must be brought within three years of the accrual of the cause of action since no other period or limitation is prescribed. Miss Code Ann. § 15-1-49. At the time a complaint is filed, a defendant must timely raise all affirmative defenses, but if the defense is one which would terminate the litigation, such as statute of limitations defense, the defendant must also timely pursue the enforcement of the defense. A defendant's failure to timely and reasonably raise and pursue the enforcement of an affirmative defense which would serve to terminate the litigation, coupled with active participation in the litigation, will ordinarily serve as a waiver of the defense. MS

Credit Center, Inc. v. Horton, 926 So.2d 167, 180 (Miss.2006); Estate of Grimes ex rel. Grimes ex rel. Wrongful Death Beneficiaries v. Warrington, 982 So. 2d 365 (Miss. 2008); E. Mississippi State Hosp. v. Adams, 947 So. 2d 887 (Miss. 2007); Gale v. Thomas, 759 So. 2d 1150 (Miss. 1999); Hutzel v. City of Jackson, 33 So. 3d 1116 (Miss. 2010); Meadows v. Blake, 36 So. 3d 1225 (Miss. 2010); Empire Abrasive Equip. Corp. v. Morgan, 87 So. 3d 455 (Miss. 2012); Stuart v. Univ. of Mississippi Med. Ctr., 21 So. 3d 544 (Miss. 2009); Spann v. Diaz, 987 So. 2d 443 (Miss. 2008). This lawsuit was filed on August 11, 2008. The Defendant filed it's Answer and Affirmative Defenses on September 29, 2008. As is reflected in the General Docket and the record, between service of Defendant's Answer and the date the trial court entered it's Order Granting Summary Judgment for the Defendant, the Defendant actively participated in this litigation as follows:

- On September 29, 2008, Defendant filed it's Answer and Affirmative Defenses.
- On January 22, 2009, Defendant filed it's Notice of Service of Discovery, consisting of interrogatories propounded to the plaintiffs, request for production of documents and request for admissions.
- On March 17, 2009, the Court entered an Order Granting Defendant's Motion to Compel Discovery.
- On May 11, 2009, Defendant filed it's Motion to Enforce Order Granting Defendant's Motion to Compel Discovery.
- On May 13, 2009, Defendant filed it's Motion for Production of Documents.
- On June 9, 2009, Defendant requested, and the Clerk issued, Subpoena Duces Tecum to Alan D. Ryan Real Estate, the listing agent for the property at issue herein.
- On June 15, 2009, the Defendant propounded its Second Set of Interrogatories and Requests for Production to the Plaintiffs.
- On June 18, 2009, the Defendant requested, and the Clerk issued, Subpoenas Duces Tecum to Robert Morgan, President, Wilkinson County Board of Supervisors, and to United Research Services.
- On June 26, 2009, Defendant requested, and the Clerk issued, Subpoena Duces Tecum to Barbara Brown, the seller of the property at issue herein.
- On September 25, 2009, Defendant filed it's Motion for Rule 37 Dismissal With Prejudice and Response to Plaintiffs' Motion to Compel.
- On September 30, 2009, Defendant filed it's Notice for Hearing on Motion for Rule 37 Dismissal.

- On October 8, 2009, Defendant requested, and the Clerk issued, Subpoena Duces Tecum to Ronald John Senko, Attorney at Law, Woodville, Mississippi, the attorney who closed the sale of the property at issue herein.
- On October 19, 2009, Defendant filed it's Supplemental Response to Plaintiff's Motion to Compel and Rebuttal to Plaintiffs' Response to Motion for Rule 37 Dismissal.
- On May 6, 2010, the video deposition of Plaintiff Consandra Christmas was taken at the instance of the Defendant.
- On May 12, 2010, the video deposition of Plaintiff Tom Christmas was taken at the instance of the Defendant.
- On August 31, 2010, the video deposition of Frederick Coleman, a former employee of Roger's Landfill who had worked on the landfill adjacent to the Plaintiffs' property, was taken at the instance of the Defendant.
- On December 15, 2010, Defendant mailed to the Court a proposed Scheduling Order in this case, which was set for trial beginning June 27, 2011.
- On April 7, 2011, Defendant filed it's Trial Witness List.
- On April 13, 2011, the deposition of Robert Crook, expert for the Plaintiffs, was taken at the instance of the Defendant.
- On April 21, 2011, Defendant's Amended Trial Witness List was filed.
- On April 22, 2011, Defendant filed it's Notice of Video Deposition of Carlos Lee.
- On April 22, 2011, Defendant filed it's Notice of Video Deposition of Henry Darden.
- On April 27, 2011, the deposition of Henry Darden, an adjoining landowner, was taken at the instance of the Defendant.

- On April 27, 2011, Defendant filed it's Motion to Exclude the Testimony of Robert L. Crook, Plaintiffs' expert witness.
- On April 28, 2011, Defendant filed it's Notice of Service of Third Request for Admissions.
- On May 2, 2011, the video deposition of Carlos Lee, a local law enforcement official, was taken at the instance of the Defendant.
- On May 2, 2011, Defendant filed it's Notice of Service of Expert Designation of Leroy Hunt and Notice of Service of Expert Report of Defendant's Expert Leroy Hunt.
- On May 6, 2011, Defendant filed it's Supplemental Witness List.
- On May 16, 2011, Defendant filed it's Motion for Summary Judgment.
- On May 16, 2011, trial subpoenas were issued at the Defendant's request for the following: Ricky Flynt, Alan Ryan, Earl McNabb, Charlie Geske, Hazel Arbuthnot and Malcolm Burkes.
- On May 17, 2011, Defendant filed it's Motion in Limine to Exclude Certain Inadmissible Evidence.
- On June 10, 2011, Defendant filed it's Supplement to Defendant's Motion for Summary Judgment in Light of Issues Raised by the Court at a hearing on Defendant's Motion for Summary Judgment.
- On June 22, 2011, the Court entered an Order Granting Defendant's Motion for Summary Judgment. (R-1)

In the Order Granting Summary Judgment, the trial court found that the statute of limitations barred the plaintiffs' claims and summary judgment was granted in favor of the

Defendant. This Court, however, has held that a defendant's failure to raise and pursue the enforcement of any affirmative defense which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver. MS Credit Center, Inc. v. Horton, 926 So.2d 167, 180 (Miss.2006). In Horton, the defendant delayed pursuing their right to compel arbitration for eight months while participating in the litigation process. Id. at 180-81. This Court held "that-absent extreme and unusual circumstances-an eight month unjustified delay in the assertion and pursuit of any affirmative defense or other right, which, if timely pursued, could serve to terminate the litigation, coupled with active participation in the litigation process, constitutes waiver as a matter of law." Id. At 181. In Meadows v. Kendall Blake, M.D. and Mississippi Baptist Health Systems, Inc., 36 So.3d 1225 (Miss.2010), this Court found that even though the hospital and physician defendant asserted an available affirmative defense (lack of strict compliance with certain provisions of the Mississippi Tort Claims Act) in their respective answers, the defendant failed to further assert or pursue the affirmative defense until they filed a Joint Motion to Dismiss based on that defense some two years after the lawsuit was filed. In finding that the defendant had waived their affirmative defense, the Court noted that "[d]uring this two-year delay, Baptist and Blake also actively participated in the litigation process. They filed a motion for partial summary judgment, participated in discovery, filed a motion to compel, entered into three scheduling orders and designated experts." Id. at 1232-33. "In that Baptist and Blake actively participated in the litigation of the merits of this case for two years without pursuing their defense of the [Plaintiffs'] lack of strict compliance with Section 11-1-58, and in that there are no extreme and unusual circumstances, Baptist and Blake waived the defense." Id. At 1233. This Court reversed the trial court's grant of

Defendant's Motion to Dismiss and remanded the case for further proceedings. In this lawsuit, the Defendant asserted a statute of limitations defense in a one-sentence paragraph of it's Answer and Affirmative Defenses. Defendant filed a motion to dismiss for discovery violations, filed motions to compel discovery, noticed and participated in at least six depositions, propounded extensive discovery to which the Plaintiffs responded, entered into a scheduling order, prepared a pre-trial order, designated an expert witness and filed his expert report, filed a motion in limine to exclude certain evidence, filed a trial witness list and supplemented that witness list, and subpoenaed trial witnesses. The same rule of law must hold true in this case as in Horton and Blake. Because the Defendant actively participated in the litigation of the merits of this case for three years without pursuing it's statute of limitations defense, and because there are no extreme and unusual circumstances, the Defendants waived the statute of limitations defense and the trial court erred in granting summary judgment on Defendant's claim that the statute of limitations barred the action. The Plaintiffs respectfully request that this Court reverse the trial court's Order Granting Summary Judgment for the Defendant and remand this case to the Circuit Court of Wilkinson County, Mississippi.

B. The Lower Court Erred When It Granted Summary Judgment for the Defendant Based Upon the Statute of Limitations Because the Discovery Rule Tolls the Statute of Limitations

In the alternative, should this Court find that the defendant did not waive it's statute of limitations defense, the trial court erred in granting summary judgment for the defendant by it's failure to apply the discovery rule which tolls the statute of limitations until the injured party knew or should have known of an actionable injury. Davis v. Hoss, 869 So. 2d 397

(Miss. 2004); Flores v. Elmer, 938 So. 2d 824 (Miss. 2006); Sutherland v. Estate of Ritter, 959 So. 2d 1004 (Miss. 2007); Huss v. Gayden, 991 So. 2d 162 (Miss. 2008). In Huss, this Court held that under the discovery rule, the central inquiry concerns the time that the injured party discovers, or should have discovered by the exercise of reasonable diligence, that he probably has an actionable injury. Huss v. Gayden, 991 So. 2d 162, 166 (Miss. 2008). The proper focus of the inquiry in this lawsuit is not when the Christmases knew of the presence of the alligators on the property, but rather when the Christmases knew that Exxon had willfully and knowingly imported the alligators onto the property. Mississippi substantive jurisprudence requires questions of disputed fact, such as when with reasonable diligence an injured party might have known or discovered the alleged act, omission or neglect which caused his injury, to be decided by juries. Huss at 168. See also Parham v. Moore, 552 So.2d 121, 124 (Miss.1989). When the Christmases knew that the Defendant had knowingly and willfully placed dangerous, wild animals upon Defendant's property is a question of material fact which should properly have been decided by a jury and which precluded summary judgment for the Defendant.

C. The Lower Court Erred When It Granted Summary Judgment for the Defendant Because There are Genuine Issues of Fact Regarding When the Plaintiffs Knew of the Presence of the Alligators

The Defendant contends that the statute of limitations began to run on the Plaintiffs' claim for nuisance prior to the Christmas's purchase of the property because their real estate agent allegedly informed them before the purchase that he thought an alligator may have attacked and injured his horse. Plaintiff Consandra Christmas, however, testified repeatedly in her deposition taken in this matter that she did not know about the alligators

until 2007. She further testified, admittedly slightly inconsistently under intense questioning, that she had no recollection of the realtor giving her information about his horse being injured by an alligator. It is the role of the jury to determine what the Christmases knew about the alligators, and when they knew it. Id. A large part of that determination will hinge on the credibility of the Plaintiffs Tom and Consandra Christmas, as well as the credibility of their real estate agent. There are genuine issues of material fact regarding what the Christmases knew about the alligators, and when they knew it, which should have precluded summary judgment for the Defendants. Plaintiff Consandra Christmas testified to the following in her deposition:

I. Whether the realtor told her about the alligators

The realtor states in an affidavit that he told the Christmases about the presence of alligators on the property, but Mrs. Christmas denies this numerous times. (*R-53*, deposition transcript of Consandra Christmas at page 53 at line 15 [hereafter 53:15], attached hereto in its entirety as Exhibit A).

A. "I wouldn't have bought or have agreed, I don't think, to buy a property with something I would fear." (63:5)

A. "I know that [the realtor] did not warn us about this [the alligators], because I wouldn't have bought this property with the alligators—" (63:24, 25, 64:2)

II. When she first learned of the alligators

Q. When did you first learn that there were any alligators on the property? (75:1)

A. Shortly after we bought the property, we started seeing alligators. (75:4)

Q. Okay. So just to make sure I'm clear, you didn't—you say you didn't see any gators—

A. I didn't see any, no.

Q. -before you bought the property?

A. No, I didn't. (75:24-76:3)

Q. Okay. So from 2003 to 2007, you didn't see an alligator?

A. No, because it took us a while, like I said, to clean it up, and shortly after we got the place, you know, in the condition that we could do some things out there, that's when I really, you know, started spending some more time, more time like out there, and that's when I noticed the alligators then more, yes. (92:15-23)

Q. Okay. And I'm sure you believe that all--that there were alligators living on Exxon's property when you bought [your property]?

A. Yeah, after I found out, yeah, when we had purchased the property is when we found out about the alligators. (195:12)

III. Whether the realtor told her his horse was injured by an alligator

In an affidavit, the realtor, Mr. Alan Ryan, claims that he told Consandra Christmas he owned a horse, which was kept on the property, that had been injured by an alligator.

Q. So he did tell you that he thought his horse was hurt by an alligator before you bought the property? (241:4)

A. He speculated an alligator--maybe an alligator, maybe one. As you said today, there are alligators all over the state, but he never told us anything about there are alligators over maybe on Exxon's side that we think is traveling from pond to pond. (241:7)

Q. Okay. But that--but when I asked you earlier if he mentioned anything to you about his horse getting hurt by an alligator, you said he didn't. I just want to know which it is. (241:13)

A. I don't remember you asking me if he told me about his horse getting hurt by an alligator. You might have asked me if he said anything about an alligator or something like that, but--or you asked me if he said he had an al--I mean he had a horse on the property. (241: 17)

Q. I read [from the realtor's affidavit], "I told the Christmases that a horse I owned and kept on the property they were purchasing may have been injured by an alligator." (241:23)

A. Uh-huh (affirmative response).

Q. And you said that's false.

A. Uh-huh (affirmative response).

Q. So, it's not false when he said that.

A. Well, he never--let me--let me correct myself or make it more clear. He never told me like there was--to let me know that there was alligators. You

know, I mean, I might tell you if you come on my property now, there—there might be a rattlesnake, you know, but I didn't tell you that I have a snake farm or a snake bed somewhere. (242:15)

Q. Yes, ma'am. We're not communicating very well. This is what I want to know. I want to make sure we all are. (242:16)

A. Uh-huh (affirmative response).

Q. Mr. Ryan said in the second sentence of paragraph D. of his affidavit, "Specifically, I told the Christmases that a horse I owned and kept on the property they were purchasing may have been injured by an alligator." Now, are you saying he's lying there or is he telling the truth?

A. I don't remember him telling me that. He might have told my husband, but I don't remember Alan telling me about an alligator. Now, he could have told my husband that. You know, I don't remember him really telling me about an alligator. (243:1)

Mrs. Christmas testified repeatedly that she did not know of the alligators on her property prior to 2007. She testified that she does not remember the realtor telling her about an alligator. Under intense questioning by counsel for the Defendant, if Mrs. Christmas made what could be viewed as slightly inconsistent statements in her deposition regarding whether her realtor told her his horse had been injured by an alligator, it is proper for the jury, whose province it is to make determinations of credibility after observing the witness's demeanor and believability, to decide which statement to believe. Id.

There are genuine issues of material fact regarding what the Christmases knew about the alligators, and when they knew it. Those issues of material fact should have precluded summary judgment for the Defendants.

D. The Lower Court Erred When It Granted Summary Judgment Based Upon the Doctrine of Prior Trespass

In general, the sale of land does not transfer the right to sue for damages caused by a trespass or nuisance that occurred prior to the purchaser's acquisition. However, where a prior trespass results in damages unknown at the time of the sale and not

reflected in the purchase price, the prior trespass doctrine does not apply. In such a circumstance the purchasers may bring an action for damages caused by the trespass or nuisance. Donald v. Amoco Production Co., 735 So.2d 161 (Miss.1999). It is a genuine issue of material fact whether the damages to the property were known at the time of the sale; i.e. whether the price for the land purchased by the plaintiffs herein reflected the damages caused by the Defendant's willful placement of dangerous, wild animals upon Defendant's property. There is no evidence whatsoever in the record that the Plaintiffs paid a lower price for the property as a result of the presence of the alligators upon Defendant's property. This question of material fact should properly have been decided by a jury and should have precluded summary judgment for the defendant.

CONCLUSION



In light of the foregoing argument, Mr. and Mrs. Christmas respectfully request that this Court reverse the trial court's ruling and remand this case to the trial court for further proceedings.

Respectfully submitted,

TOM CHRISTMAS and CONSANDRA CHRISTMAS
APPELLANTS

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CERTIFICATE OF SERVICE

I, Wayne Dowdy, attorney for the Appellants, Tom Christmas and Consandra Christmas, do hereby certify that I have this day caused to be mailed, by United States mail, postage prepaid, a true and correct copy of the Brief of Appellants, Tom Christmas and Consandra Christmas, to the following:

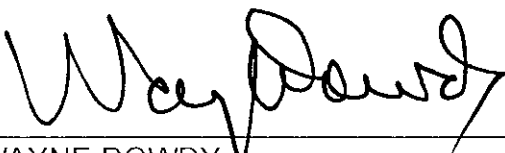
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THIS the 2nd day of July, 2012.



WAYNE DOWDY