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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Deadra L Jefferson, Circuit Court Judge**

Case No. 2010-CP-10-4533

**Wheeler M Tillman Appellant,
-vs-
Samuel E Tillman, Personal Representative for the
Estate of Moye M Tillman, Deceased, and
Samuel E Tillman, Individually, Respondents.**

PETITION FOR REHEARING

**Wheeler M. Tillman
Attorney for Appellant Pro Se
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**RECEIVED
JUN 03 2013
SC Court of Appeals**

Petition for Rehearing

Appellant petitions for a rehearing, as follows:

A. Opinion Overlooks and Fails to Address Admissions of Defendant Brother which show No Prejudice to the Defendants by reason of mother's death

Wheeler alleged in the Complaint, Paragraph 52, as follows:

52. Defendant Samuel E Tillman, in making these further promises and warranties, informed Plaintiff that *he knew Moye M Tillman was not going to pay Plaintiff for Plaintiff's share while she was alive and that she did not want Defendant Samuel E Tillman to pay Plaintiff after she died.* (Italics added by the undersigned)

To which Defendant Brother Answered, Paragraph 37, as follows:

37. Answering the allegations of Paragraph 52 of the Complaint, Defendant [as an individual] denies "making these further promises and warranties" but would *admit the remaining allegations.* (Explanation in brackets supplied by the undersigned.) (Italics added by the undersigned.)

According to the Defendant Brother's admissions here, the mother died knowing that she owed the obligation to Wheeler and died instructing Defendant Brother not to pay Wheeler. Before she died, and when she died, Defendant Brother here admits the statements of the mother. How is it conceivable that any further statements from the mother would aid the Defendant Brother if she were alive? Given the admitted statements of the mother while she lived, made to Defendant Brother, there can be no defenses to

which the Brother is deprived by reason of the mother's death. She admitted the obligation and instructed Defendant Brother not to pay. Given these admissions, the mother's death simply cannot impose prejudice upon or to the Brother as recited in the opinion. Absent such prejudice, laches cannot attach to bar Wheeler's claims for imposition of a constructive trust or for unjust enrichment.

B. Opinion Misapprehends the Conclusion Inferred from the fact that Wheeler was "a practicing attorney in this area during the relevant time period".

While Wheeler does not dispute he was "a practicing attorney in the area during the relevant time period" he does dispute the Conclusion which the Opinion infers from this fact. "Summary judgment is appropriate when it is clear that there is no genuine issue of material fact *and the conclusions and inferences to be drawn from the facts are undisputed.*" SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789, at 792 (1990). (Italics supplied by the undersigned)

An equal conclusion from this fact that Wheeler was a practicing attorney during this time is that based upon all of his years of practice and his conversations with Defendant Brother there was another method of recovery for Wheeler, instead

of litigation. Using his experience from the years of his practice and knowing his Brother for all the years in existence, surely it is reasonable that Wheeler made a conscious decision to wait until after the death of the mother to obtain his recovery. Why engage in litigation with its attendant negative emotional consequences when recovery was the object? Litigation was not the object and was the least favorable option, given the knowledge acquired by a practicing attorney/son and brother. That's the conclusion which the Court should adopt as it is reasonable and favors the non-moving party.

C. Given the admissions of Defendant Brother in his Answer, linkage in the Opinion of Wheeler's claim against mother's Estate and Wheeler's claim against Defendant Brother is without precedent.

In creating a constructive trust equity seeks to vindicate right and justice or frustrate fraud. Halbersberg v. Berry, 302 S.C. 97, 394 S.E.2d 7, at 13 (S.C. App. 1990), Whitmire v. Adams, 273 S.C. 453, 257 S.E.2d 160 (1979) According to Defendant Brother's admissions, the mother died with her fraudulent intent to deny Wheeler his funds still on her lips by instructing Brother not to pay the obligation. She did not tell him she had a defense or did not owe the money. Indeed, after her death, when Brother became the owner of Wheeler's funds in Brother's own name, Brother still conceded he was going to recognize Wheeler's

entitlement and pay. This dispute reached the appellate level over the Brother's dispute of the amount, not the Brother's dispute over the entitlement. The Opinion, wrongfully it is urged, now invokes a dispute over the entitlement, something the Brother initially never questioned. "[Defendant Brother] told me [Wheeler] repeatedly he [Defendant Brother] recognized this money as mine [belonging to Wheeler] and that [Defendant Brother] was going to pay." R. pg 87, paragraph 6, Letter from Wheeler Tillman to Shirrese Brockington [Defendant Brother's Probate Attorney], dated 1/13/2010. (Explanations in brackets supplied by the undersigned.) Also, "He [Defendant Brother] has indicated his [Defendant Brother] his willing (sic)[willingness] to pay this disputed claim." R. pg 82, paragraph 1, Letter from Wheeler Tillman to Shirrese Brockington, dated 10/27/2009. [Explanations in brackets supplied by the undersigned]

The Opinion says that

A determination of constructive trust being held by Brother cannot be reached without also concluding that Mother wrongfully withheld the value of Wheeler's ownership interest. The same holds true for Wheeler's claim of unjust enrichment.

The Opinion also says:

Wheeler would be entitled to claim funds ultimately held by Brother as a constructive trust only if these funds were held by Mother in constructive trust for Wheeler.

Given the Brother's admissions both before and after Brother

became the owner of the funds, Appellant can find no precedent for the linkage of the Wheeler's two claims, one against the Estate and one against the Brother. Even after the Mother's death it can be inferred from Brother's admissions that the Brother controlled the funds, that Brother recognized the claims of Wheeler and that Brother was going to pay Wheeler's claims from funds which he now owned. These inferences arise from the transactions and communications between the Brother and Wheeler, not from the communications and/or admissions from the Mother.

"The inquiry into the applicability of laches is highly fact-specific and each case must be judged by its own merits. . . ." Emery v Smith, 361 S.C. 207, at 208, 603 S.E.2d 598 (S.C. App. 2004) The equity of the events occurring between the Brother and Wheeler after the Mother's death can only be fairly judged after a trial and should not be dismissed via the paralyzing grant of a Motion for Summary Judgment based upon a novel theory of "linkage" between the two Defendants.

D. Delay was caused by Defendant Brother and not Wheeler

If Wheeler is right - that Brother represented he would pay Wheeler's claims and not to worry about pressing the claims against the Mother while she lived - it would have been disloyal and foolish for Wheeler to have pursued his claims against the

Mother while she lived. Under such factual findings it would also be reasonable to infer that Wheeler relied upon those representations by the Brother and, upon such reliance, it would be unfair to apply laches to a situation salted with misleading (recanted?) representations by the Brother. Only a trial upon the events occurring between Wheeler and the Brother will suffice for a fair determination of such a "newly" created constructive trust and/or claim for unjust enrichment or not. Under the specific facts of this case the burden of delay should not be shifted back upon the shoulders of the non-moving party.

In Cornetta v United States, 851 F.2d 1373 (Fed. Cir. 1988) the Federal Court rejected the notion that the Defendant (who made concessions about the obligation) could rely on a presumption of prejudice, or shift the burden to plaintiff to show lack of prejudice if delay is long, to support the affirmative defense of laches. Id at 1378

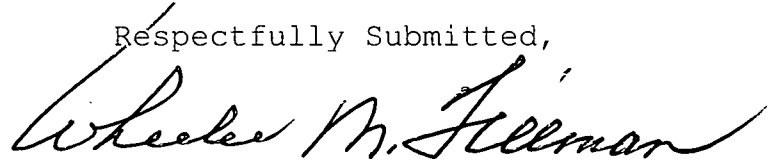
The Opinion further says:

Wheeler has made no showing or allegations that Brother's alleged agreements in 2006 and 2009 to personally pay Wheeler the amount Wheeler claimed was due him for his interest in the boyhood home amounted to a separate constructive trust held by Brother for Wheeler, or that these alleged agreements support recovery based upon an unjust enrichment.

To the contrary, the Complaint allegations show that the Brother made the various statements to Wheeler both before and after the

death of the Mother that Brother was going to pay. The Motion for Summary Judgment paralyzes Appellant's effort at proof. A trial should be allowed upon these allegations.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Wheeler M. Tillman". The signature is fluid and cursive, with a large initial "W" and a long, sweeping tail.

Wheeler M Tillman

Attorney Pro Se

North Charleston, SC

Dated: **Wednesday, May 29, 2013**

**THE STATE OF SOUTH CAROLINA
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**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Deadra L Jefferson, Circuit Court Judge**

Case No. 2010-CP-10-4533

**Wheeler M Tillman Appellant,
-VS-
Samuel E Tillman, Personal Representative for the
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Samuel E Tillman, Individually, Respondents.**

**CERTIFICATE OF SERVICE
(Petition for Rehearing)
(Mailed: Wednesday, 5/29/2013)**

I hereby certify that I have mailed one copy of the **Petition for Rehearing**, dated Wednesday, May 29, 2013, to the Defendants' Counsel in this case, with first class postage affixed and pre-paid, on **Wednesday** the **29th** day of **May 2013**, as follows:

**Joseph S Brockington, P.A.
171 Church St, Suite 160
Charleston, SC 29401**

**TILLMAN LAW FIRM
ATTORNEYS FOR APPELLANT PRO SE**

By: *Wheeler M. Tillman*
WHEELER M TILLMAN

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SC COURT OF APPEALS

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Wheeler M Tillman*

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* Admitted to practice in SC since 1966
Former SC State Legislator
Former Judge Advocate, USAF
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Wednesday, May 29, 2013

SC Court of Appeals

P O Box 11629
Columbia, SC 29211

Re: **Wheeler M Tillman -vs- Samuel E Tillman, Personal Representative for
the Estate of Moye M Tillman, Deceased, and Samuel E Tillman,
Individually
Appellate Case #2011-194886**

Subject: **(1) Filing Petition for Rehearing**

Dear Clerk's Office:

I am Appellant Pro Se. The Opinion in this case was filed 5/15/2013. I received copies of that Opinion on 5/17/2013. Enclosed for filing are an original and six copies of a Petition for Rehearing. I have left the original unbound. Our law firm check for \$25.00 filing fee is also enclosed.

Sincerely,



Wheeler M Tillman

Cell: (843) 442-9435

xc (with copy of Petition for Rehearing):

Opposing Counsel

Joseph S Brockington, P.A.

171 Church St, Suite 160
Charleston, SC 29401

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