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Wheeler M Tillman*
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COPY

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* Admitted to practice in SC since 1966
Former SC State Legislator
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Wednesday, July 17, 2013

S. C. Supreme Court
P O Box 11330
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
SC Court of Appeals Case #2011-194886**

Subject: **Filing Petition for Writ of Certiorari**

Dear Clerk's Office:

I represent Appellant Pro Se. Enclosed is the Petition for a Writ of Certiorari in this case, together with the filing fee, Appendix, Record on Appeal, and Appellant's Brief in the SC Court of Appeals, together with a Proof of Service for this Petition being mailed to the Respondents and the Clerk's Office with the S.C. Court of Appeals.

One copy of the Petition for a Writ of Certiorari is unbound, along with an unbound copy of the Appendix and the Record on Appeal. If there are any further matters to which I need to attend in this filing please let me know. Please call me on my cell if needed.

Sincerely,

Wheeler Tillman

Wheeler M Tillman
Cell: (843) 442-9435

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JUL 22 2013

SC Court of Appeals

S. C. Supreme Court

P O Box 11330
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
SC Court of Appeals Case #2011-194886**

Subject: **Filing Petition for Writ of Certiorari**

Wednesday, July 17, 2013

Enclosures:

1. Petition for Writ of Certiorari (7 copies, including one unbound)
2. Appendix, (2 copies, including one unbound) as follows:
 - a. Decision of the SC Court of Appeals, filed 5/15/2013
 - b. Petition for Rehearing, in the SC Court of Appeals, dated 5/29/2013
 - c. Decision of the SC Court of Appeals, filed 6/20/2013
3. Record on Appeal (2 copies, including one unbound)
4. Final Brief of Appellant in the SC Court of Appeals (2 copies, including one unbound)
5. Proof of Service for Mailing Petition for Writ of Certiorari, mailed on Thursday, 7/18/2013
6. Tillman Law Firm Litigation Account Check, for filing fee, \$100.00

xc (with enclosures #1 & #5 only):

**SC Court of Appeals
Attn: Jenny Abbott Kitchings
Clerk of Court**

~~P O Box 11629
Columbia, SC 29211~~

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

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**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Wheeler M Tillman Appellant,

-vs-

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

**SC Court of Appeals Case No. 2011-194886
Case No. 2010-CP-10-4533**

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

Petition for Writ of Certiorari

**Wheeler M. Tillman
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North Charleston, SC 29406-9839**

**Office: (843) 569-0212
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RECEIVED

JUL 22 2013

SC Court of Appeals

To the Supreme Court of South Carolina:

Appellant (Wheeler) now moves and petitions this Honorable Supreme Court for a Writ of Certiorari to review the decisions of the S.C. Court of Appeals in this case.

Certification

A petition for rehearing was requested by the Appellant and was made and finally ruled on by the S.C. Court of Appeals, their adverse decision denying a rehearing having been filed on June 20, 2013.

Questions Presented

1. Does the doctrine of laches apply to bar claims for a constructive trust of money and/or unjust enrichment of money against a decedent (Mother) and/or against her son (Brother) when the Mother gave dying instructions to Brother which recognized the Mother's obligation to Wheeler and further instructed Brother not to pay Wheeler's claims, there being no requisite prejudice to the Mother's Estate or to Brother, individually by reason of the Mother's death before claims were put in litigation?
2. Do admissions in Brother's Answer that Mother's statements to Brother before she died recognized her obligation to Wheeler and further instructed Brother not to pay her obligation to Wheeler after her death negate the requisite prejudice to the decedent's Estate and to Brother, individually, so as to prevent

the doctrine of laches being applied against Wheeler and thereby bar his claims for a constructive trust of money and/or unjust enrichment of money against the Estate and/or Brother, individually?

3. There having been no trial by reason of the granting of a summary judgment against Wheeler, should the separate claims asserted by Wheeler for a constructive trust for money and/or unjust enrichment for money against Brother, individually, based upon communications and transactions between Brother and Wheeler both before and after the death of the Mother prevent the application of the doctrine of laches against the Wheeler so as to bar his claims for a constructive trust of money and/or unjust enrichment of money by Brother, individually?

4. When the Court of Appeals mentions that Wheeler was "a practicing attorney in this area during the relevant time period" and thereby infers Wheeler knew he was supposed to place his claims in litigation against the Mother while she lived - is this the only reasonable inference from this fact? Or, is Wheeler entitled to the alternate reasonable inference that as a "practicing attorney in this area during the relevant time period" such experience, coupled with the representations made by the Brother that Brother would pay Wheeler's claims, afforded a basis for Wheeler to make a recovery without litigation after the Mother died and not before?

5. Given the allegations of the Complaint, was the delay in starting litigation over Wheeler's claims for a constructive trust of money and/or unjust enrichment for money, attributable to the Wheeler or his Brother?

Statement of the Case

Wheeler seeks to recover his interest from either Respondents in the amount of \$30,000.00, plus interest thereon. Wheeler seeks to impose a constructive trust for money upon either or both Respondents. Alternatively, Wheeler seeks to establish unjust enrichment for money by either or both Respondents who acquired his interest at separate times.

In 1973 Wheeler purchased an interest in his boyhood home (a 1/10th undivided interest). He paid his mother \$7,000.00 for this interest. (R. p. 20, lines 4-10) Eighteen months later the Wheeler married. (R. p. 21, lines 11-12) In December 1980 Wheeler experienced domestic trouble. (R. p. 21, line 13) In January 1981 Wheeler re-conveyed his interest in the boyhood home back to his mother. (R. p. 20, lines 13-17) Mother paid nothing for the re-conveyance. (R. p. 20, lines 18-19) The re-conveyance was not a gift to the mother. (R. p. 20, lines 20-21) The mother was to hold the interest in her name until Wheeler requested its return. (R. p. 21, lines 1-5) Wheeler made this re-conveyance to shield himself from unwarranted claims in the

domestic litigation in which he found himself. (R. p. 21, lines 6-10)

Later, Wheeler made several demands for the return of his interest. Dates and circumstances of his demands have not been determined by the evidence, nor by the allegations in the pleadings. (R. p. 21, lines 19-22)

In September 2005 the mother sold the real property for \$300,000.00. (R. p. 22, lines 1-3; R. p. 27, lines 1-3) Mother placed the net proceeds in an interest bearing account. (R. p. 22, lines 14-16) In 2006 mother added Brother's name to her interest bearing bank accounts. (R. p. 27, lines 11-15) After being added to the mother's accounts, in 2006, Brother told Wheeler that Brother would pay Wheeler's interest (now \$30,000.00, as claimed) after their mother died. (R. p. 28, lines 1-10) In October 2009, upon the mother's death, Brother became the owner of all the money in the interest bearing accounts of the mother. (R. p. 84, lines 24-25) He made no contributions to these bank accounts and performed no services in exchange for the money. (R. p. 27, lines 16-17) In 2009, after acquiring ownership of the money, Brother again told Wheeler that Brother would pay Wheeler's interest even over the pre-death objection of the mother. (R. p. 28, lines 11-19)

Wheeler has never been paid.

Wheeler filed suit in June 2010 against the mother's Estate and against Brother personally. Respondents filed an Amended Motion for Summary Judgment, which was granted adverse to Wheeler. There was no trial. There were no depositions. Discovery was never concluded. The trial Court ruled adversely to Wheeler in both the original Order and the Rule 59(e) Motion to Alter. The S.C. Court of Appeals affirmed the trial court's decisions on May 15, 2013, and denied Wheeler's Petition for Rehearing on June 20, 2013.

ARGUMENTS

a. Lack of Prejudice

1. Does the doctrine of laches apply to bar claims for a constructive trust of money and/or unjust enrichment of money against a decedent (Mother) and/or against her son (Brother) when the Mother gave dying instructions to Brother which recognized the Mother's obligation to Wheeler and further instructed Brother not to pay Wheeler's claims, there being no requisite prejudice to the Mother's Estate or to Brother, individually by reason of the Mother's death before claims were put in litigation?

2. Do admissions in Brother's Answer that Mother's statements to Brother before she died recognized her obligation to Wheeler and further instructed Brother not to pay her obligation to Wheeler after her death negate the requisite prejudice to the decedent's Estate and to Brother, individually, so as to prevent the doctrine of laches being applied against Wheeler and thereby bar his claims for a constructive trust of money and/or unjust enrichment of money against the Estate and/or Brother, individually?

Wheeler's claims are based solely on money - not land, not construction improvements and not other property purchased with Wheeler's money. Mother gave a deed to Wheeler for his interest. Her deed was recorded in the Registry of Deeds Office. (R. p. 20, lines 4-12; R. p. 25, lines 5-13) Her deed contains Mother's receipt of Wheeler's money. Wheeler's gave a deed of re-conveyance to Mother. His deed of re-conveyance was recorded in the Registry of Deeds Office. (R. p. 20, lines 13-17; R. p. 25, lines 14-18) Wheeler's deed shows no consideration was paid by Mother for the re-conveyance and he alleged it was not a gift. (R. p. 20, lines 20-21) Calculation of any amount due Wheeler is arithmetic and does not require testimony from the Mother as long as she acknowledged owing Wheeler the money and made a final (dying?) decision that he was not to be paid after she died. She stated both of these facts to Brother before she died, both admitted in the Answer of Brother. (R. p. 28, lines 15-19; R. p. 35, lines 20-23) These allegations follow:

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 Wheeler)

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 Wheeler.) (Italics added by the Wheeler.)

A party seeking to establish laches must show (1) delay, (2) unreasonable delay, and (3) prejudice. *Hallums v Hallums*, 296 S.C. 195, 199, 371 S.E.2d 525, 528 (1988). The burden of proving these elements is on the moving party (Brother). *Emery v Smith*, 361 S.C. 207, 208, 603 S.E.2d 598 (Ct. App. 2004).

Wheeler argues no prejudice occurred to Mother or Brother which was caused by any delay in filing litigation to enforce Wheeler's claims for money.

In the facts of the case on appeal, the Mother (her Estate) has admitted all facts which are relevant about the Mother's knowledge. Defendant Answer 37 (R. p. 35) to Appellant's Complaint 52. (R. p. 28) Those admissions are (1) Mother knew about Wheeler's share (2) Mother was not going to pay Wheeler while she lived (3) Mother told Brother not to pay Wheeler after she died (4) Mother knew Wheeler did not waive his claim (5) Mother knew she did not "trade off" Wheeler's claim.

Brother's Answer, in essence, says that before Mother died she acknowledged to Brother (a) she owed Wheeler the money and (b) instructed Brother not to pay Wheeler after she died. For

this reason - lack of prejudice - Wheeler argues the doctrine of laches should not be applied so as to bar his claims for money for a constructive trust and/or unjust enrichment.

The Federal Courts have specifically addressed this "prejudice" issue. "Of course, delay alone does not constitute laches." Brundage v. United States, 504 F.2d 1382, ___ Ct. Cl. ___ (1974), at 1386. See Gutierrez v. Waterman S.S.Corp., 373 U.S. 206, 215, 83 S.Ct. 1185, 1191, 10 L.Ed. 2d 297 (1963) ("test of laches is prejudice to the other party"); Gardner v Panama R.R. Co., 342 U.S. 29, 31, 72 S.Ct. 12, 13, 96 L.Ed. 31 (1951) ("where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief"). Even lengthy delay does not eliminate the prejudice prong of the laches test. See, e.g. Tyler v. United States, 600 F.2d 786, 789, 200 Ct. Cl. 387 (1979).

In Cornetta v United States, 851 F.2d 1373 (Fed. Cir. 1988), there is an in depth discussion of two types of prejudice. The first is "Defense prejudice". The second is "Economic prejudice". The Lower Courts' opinions in the instant appeal do not discuss these two types. But, there is certainly no economic prejudice to the Estate or Brother, individually, caused by the delay in filing suit. The mother and Brother had the money. They were was earning interest on the money, including the Wheeler's funds. And, there is no evidence or allegations that

the Estate or Brother, individually, suffered economically by reason of the length of time in bringing suit.

"Defense prejudice" can arise from loss of records, destruction of evidence, fading memories, or unavailability of witnesses. In Cornetta the Court put aside the "Defense prejudice" issue "in view of the government's concession". Id., at 1378. Here in the instant appeal, the Lower Courts probably bottomed their Opinions on the death of the mother and her unavailability, although this is not made quite clear by the Opinions. However, the Lower Courts do not specifically say how the "missing" testimony, or what "missing" testimony, of the dead mother would benefit the Estate or the Brother, individually, "in view" of the Estate's concessions/admissions. See Answer 37 (R. p. 35) to Complaint 52 (R. p. 28). What more relevant testimony from the mother would show prejudice to her Estate or the Brother, individually, by reason of her death given these admissions?

On the shifting of the presumptions, the Cornetta Court said this:

. . . we reject the notion that the government can 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. Cornetta, at 1378.

In the case of Emery v Smith, 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004) the Emery Court put it this way: "Importantly, delay alone in assertion of a right does not, in and of itself, constitute laches." Emery also says:

Under the doctrine of laches, if a party, knowing his rights does not seasonable assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights. *Id*, at 208.

Since Wheeler's claims are founded on money - not land, not construction improvements, not other types of personal property - Wheeler further argues that neither Mother nor Brother entered into obligations or otherwise detrimentally changed either of their positions because of any delay in asserting the claims. Neither suffered any adversity. They simply put the money in the bank and earned interest on the money, without any further action by Mother or Brother. Their "use" of the money was not in anyway related to any delay in asserting Wheeler's claims in Court. The Mother's death prior to filing suit deprived neither Brother nor the Estate of anything, given the statements made by Mother to Brother before she died.

b. "Linkage" Between Claims

3. There having been no trial by reason of the granting of a summary judgment against Wheeler, should the separate claims asserted by Wheeler for a constructive trust for money and/or unjust enrichment for money against Brother, individually, based upon communications and transactions between Brother and Wheeler both before and after the death of the Mother prevent the application of the doctrine of laches against the Wheeler so as to bar his claims for a constructive trust of money and/or unjust enrichment of money by Brother, individually?

In essence the Decision of the Court of Appeals says that Wheeler's claims against the Mother must be first established before Wheeler can assert his claims against the Brother. And, it does not matter what conversations and transactions occurred between the Brother and Wheeler about the money. It is alleged that some of those conversations and transactions occurred between Wheeler and Brother before Mother died, and some occurred after Mother died. This is a novel issue in South Carolina. Wheeler has alleged separate matters existing between Brother and himself with respect to Wheeler's claims for money in this matter. (R. p. 24-31) There has been no trial on the evidence existing between Wheeler and his Brother by reason of the granting of Summary Judgment. There is no laches law in South Carolina which ties one claim to the other. And, the lack of trial evidence affords no basis to judge this novel issue.

c. Inferences from being a Practicing Attorney

4. When the Court of Appeals mentions that Wheeler was "a practicing attorney in this area during the relevant time period" and thereby infers Wheeler knew he was supposed to place his claims in litigation against the Mother while she lived - is this the only reasonable inference from this fact? Or, is Wheeler entitled to the alternate reasonable inference that as a "practicing attorney in this area during the relevant time period" such experience, coupled with the representations made by the Brother that Brother would pay Wheeler's claims, afforded a basis for Wheeler to make a recovery without litigation after the Mother died and not before?

d. Was Delay caused by Wheeler or Brother?

5. Given the allegations of the Complaint, was the delay in starting litigation over Wheeler's claims for a constructive trust of money and/or unjust enrichment for money, attributable to the Wheeler or his Brother?

Issues 4 and 5: If Wheeler is right - that Brother represented he would pay Wheeler's claims and not to worry about pressing the claims against the Mother in Court 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 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 for money and/or claim for unjust enrichment for money, or not. A trial will also produce evidence which will enlighten what representations were made and which party (Wheeler or Brother) caused the delay. Absent a trial, under the specific facts of this appeal the burden of delay should not be shifted back upon the shoulders of the non-moving party.

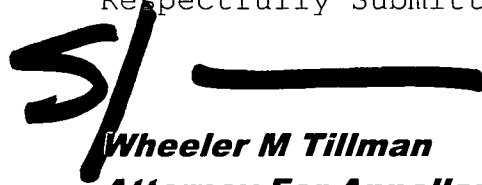
In Cornetta v United States, 851 F.2d 1373 (Fed. Cir. 1988) the Federal Court rejected the notion that the Defendant (who made concessions about the obligation) could rely on a presumption of prejudice, or shift the burden to plaintiff to show lack of prejudice if delay is long, to support the affirmative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

The Opinion of the S.C. Court of Appeals 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 Wheeler's effort at proof. A trial should be allowed upon these allegations.

Respectfully Submitted,

A large, bold, handwritten signature in black ink, appearing to be 'S/ [redacted]'.

Wheeler M Tillman
Attorney For Appellant Pro Se

North Charleston, SC

Dated: **Wednesday, July 17, 2013**

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

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

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**SC Court of Appeals Case No. 2011-194886
Case No. 2010-CP-10-4533**

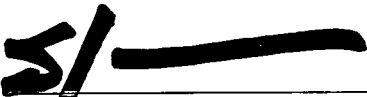
**Wheeler M Tillman Appellant,
-vs-
Samuel E Tillman, Personal Representative for the
Estate of Moye M Tillman, Deceased, and
Samuel E Tillman, Individually, Respondents.**

**PROOF OF SERVICE
(Petition for Writ of Certiorari)**

I certify that I have served a copy of the **PETITION FOR WRIT OF CERTIORARI** in this case on the Respondents and the S.C. Court of Appeals, by depositing one copy in the United States Mail, with first class postage prepaid, on **Thursday, July 18, 2013**, addressed as follows:

**SC Court of Appeals
Attn: Jenny Abbott Kitchings
Clerk of Court
P O Box 11629
Columbia, SC 29211**

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

By: 
**WHEELER M. TILLMAN
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