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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas
G.D. Morgan, Circuit Court Judge

Appellate Case No. 2024-001391

John Sloan, individually, and on behalf of all others similarly situated, and NOLAS Trading Co., Inc., Plaintiffs,

of which John Sloan, individually, and on behalf of all others similarly situated is the Appellant,

v.

Clemson University, and its Life Trustees E. Smyth McKissick III, David E. Dukes, Cheri M. Phyfer, Mark S. Richardson, William “Bill” C. Smith, Jr., Kim Wilkerson, and David H. Wilkins, Respondents.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DO THE GOVERNING CLEMSON UNIVERSITY LIFE TRUSTEES VIOLATE THE SOUTH CAROLINA CONSTITUTION'S PROHIBITIONS AGAINST BOTH APPOINTMENT OF PUBLIC OFFICERS TO UNLIMITED TERMS AND AGAINST SERVICE OF PUBLIC OFFICERS FOR UNLIMITED TERMS?
- II. DOES COMPLYING WITH THE S.C. CONSTITUTION'S TERM LIMITS FOR PUBLIC OFFICERS IMPAIR THE OBLIGATION OF CONTRACTS?
- III. SHOULD PRINCIPLES OF EQUITABLE DEVIATION REQUIRE THE TRUSTEES TO SERVE TERMS OF SOME SPECIFIED PERIOD?

STATEMENT OF THE CASE

The late Edward D. Sloan, Jr. filed suit against Clemson University and its “Life Trustees” for violation of the South Carolina Constitution (R. at 58).¹ During the litigation, Edward D. Sloan Jr. died, and his son John Sloan joined his late father’s public interest litigation as a plaintiff (R. pp. 45-56).^{2 3} The individual Defendants are “Life Trustees,” or “successor trustees” of Clemson University’s board (R. p. 58).⁴ They are named as Defendants in their official capacities. Clemson University has 13 trustees, and 7 are “Life Trustees,” who have been serving for life (R. pp. 58-60).

Two Constitutional provisions forbid any state officer to be elected or appointed to office for life or for an indeterminate term. “**No person** may be elected or appointed to office in this State **for life or during good behavior**, but the **terms** of **all officers must be for some specified period** except officers in the militia.” S.C. Constitution, art. VI, § 1 (emphasis added). “**No person** shall be elected or appointed to office in this State **for life or during good behavior**, but the **terms** of **all officers shall be for some specified period**, except Notaries Public and officers in the Militia.” S.C. Constitution, art. XVII, §1.B (emphasis added).

Plaintiffs challenge the life-time appointments and service of the Life Trustees and seek to enforce the S.C. Constitution’s governing provisions.

On February 21, 2020, Plaintiffs petitioned the South Carolina Supreme Court to take this case in its original jurisdiction. The Court denied the Petition in an equally divided vote (R. pp. 20-32).⁵

¹ Complaint, par. 1.

² Form 4 Order entered July 27, 2021

³ Plaintiff NOLAS Trading Company has ceased doing business and has been dismissed as an Appellant.

⁴ Complaint, par. 4.

⁵ Order entered April 3, 2023, p. 5.

Plaintiffs filed suit in Greenville County Circuit Court (R. p. 24).⁶ Defendants moved to dismiss under SCRCF 12(b)(6), without filing an Answer (R. pp. 64-109).

Plaintiffs served discovery requests (R. pp. 150-153). In the Plaintiffs' Requests for Production of Documents, they requested that Defendants (R. pp. 152-153):

4. Produce any agreement among the Life Trustees or Successor Trustees relating or referring to their voluntarily termination of service.
5. Produce any communication from any Life Trustee or Successor Trustee, to the Board of Trustees or any other Trustee, dated from 1990 to the present, relating or referring to any Life Trustee or Successor Trustee's voluntary termination of service.
6. Produce a copy of any communication by or on behalf of the Board of Trustees, the Life Trustees or Successor Trustees to any State legislator addressing the length of the terms of service of the Life Trustees or Successor Trustees, and any response received from any State legislator.
7. Produce a copy of any communication between or among the Life Trustees or Successor Trustees addressing the length of the terms of service of the Life Trustees or Successor Trustees.
8. Produce a copy of any communication by or on behalf of the Board of Trustees, the Life Trustees or Successor Trustees to the Attorney General addressing the length of the terms of service of the Life Trustees or Successor Trustees, and any response received.

Defendants moved for a protective order asking that they not be required to respond to discovery requests until after the court had ruled on the Motions to Dismiss (R. pp. 122-139; Transcript, p. 27, ll. 21-24, R. p. 180, ll. 21-24). The Circuit Court granted the Protective Order (R. pp. 41-43). However, responses to these requests might have produced admissions and other statements that could have supported the legal claims.

In nearly identical Motions to Dismiss, the Defendants raised five grounds to the Greenville County Circuit Court (R. pp. 64-109): (1) Plaintiffs lack standing; (2) Plaintiffs failed

⁶ Order entered April 3, 2023, p. 5

to state a justiciable controversy; (3) the Court lacks subject matter jurisdiction; (4) improper venue; and (5) failure to state facts sufficient to constitute a cause of action (R. pp. 64-109).⁷

However instead of taking up the motion, the Greenville County Circuit Court transferred the litigation to the Pickens County Probate Court (R. pp. 33-40).⁸

Accordingly, the Pickens County Probate Court heard the Motions to Dismiss (R. pp. 20).⁹ The Court granted Plaintiffs public importance standing (R. pp. 25-27).¹⁰ The Court also ruled that Plaintiffs had stated a justiciable controversy (R. p. 27).¹¹ However, the Court ruled that the Plaintiffs had failed to state facts sufficient to constitute a cause of action and dismissed the case under SCRCP 12(b)(6) (R. pp. 27-32).¹²

Defendants had not yet filed an Answer or responded to the Plaintiffs' standard interrogatories or requests for production. Plaintiffs had received no opportunity to amend the complaint or conduct any discovery. This action did not benefit from the usual pretrial development, or the refining, perfecting, and maturing that ordinarily develops in the process of litigation. Even though the Probate Court ruled that this action raises issues of great public importance, the minimal factual record consists solely of Plaintiffs' initial, unamended Complaint.

Even so, the Probate Court dismissed the case **with prejudice** (R. pp. 20-32).

The Order of Dismissal contains several components: **First**, the Court ruled that the life trustees were not "public officers" within the meaning of the Constitution because they were not "elected or appointed" (R. pp. 28-29)¹³ **Second**, the Court found that the life trustees were not

⁷ Motions to Dismiss filed August 26, 2020

⁸ Order entered September 28, 2021, in Civil Action Number 2020-CP-23-03178.

⁹ Order entered April 3, 2023, p. 1.

¹⁰ Order entered April 3, 2023, pp. 6-8

¹¹ Order entered April 3, 2023, p. 8.

¹² Order entered April 3, 2023, pp. 8-13.

¹³ Order entered April 3, 2023, pp. 9-10.

“public officers” within the meaning of S.C. Code Ann. § 8-1-10 (R. p. 10).¹⁴ **Third**, the Court ruled that requiring the life trustees to comply with the Constitution would impair the obligation of contracts, meaning the terms of the Thomas G. Clemson Will, as accepted by the General Assembly (R. p. 30).¹⁵ The Court concluded: “For all these reasons, the Court agrees with Defendants that, as a matter of law, the Successor Trustees as established under the Clemson Will are constitutional and that Plaintiffs have failed to state facts sufficient to constitute a cause of action (R. p. 32).”¹⁶ The Court then dismissed the case with prejudice. *Id.*

The 7 life trustees constitute a majority of the 13 trustees on the Clemson University Board of Trustees (R. p. 60, par. 8). Accordingly, they have controlling authority on the Board. For 130 years, the life trustees have been making important management and governance decisions for the University, and for the last several years, they have been directing the expenditure of more than \$100 million a year of state taxpayer funds, while serving in violation of the Constitution (R. p. 58, par. 3). They have manifested every intention to continue serving unlimited terms.

Appellant contends that both Defendants’ appointments and Defendants’ service as life trustees violate the Constitution. Appellant contends that the life trustees are public officers, that they are serving in violation of the Constitution, that it is possible for the life or successor trustees to serve in compliance with both the will of Thomas G. Clemson and the Constitution, and if they can serve Constitutionally while meeting the purposes of the Will, they must do so.

¹⁴ Order entered April 3, 2023, p. 10.

¹⁵ Order entered April 3, 2023, p. 11.

¹⁶ Order entered April 3, 2023, p. 13.

Plaintiffs appealed the Probate Court's dismissal to the Circuit Court, and the Circuit Court affirmed the Probate Court and all of its reasoning (R. pp. 1-19). Appellant now appeals the decisions of the Probate Court and the Circuit Court.

STATEMENT OF THE FACTS

The will of Thomas G. Clemson established Clemson University and provided for seven Life Trustees who constitute a majority on Clemson University's thirteen-member Board. The will provides:

The following named gentlemen, seven in number, shall be seven of the Board of Trustees, to wit: . . . , and the State, if it accepts the donation, shall never increase the Board of Trustees to a number greater than thirteen in all, **nor shall the duties of said board be taken away** or conferred upon any other man or body of men. The seven trustees appointed by me **shall always have the right**, and the **power is hereby given them** and their successors, which right the legislature shall never take away or abridge, to **fill all vacancies** which may occur **in their number by death**, resignation, refusal to act or otherwise. But the Legislature may provide, as it sees proper, for the appointment or election of the other six trustees, if it accepts the donation. And I do hereby request the seven trustees above named, or such of them **as may be living**, or may be willing to act, to meet as soon after my death as practicable, and organize, and at once to **fill all vacancies** that may have occurred, and to exert themselves to effectuate my purposes as herein set forth.

Last Will & Codicil of Thomas Green Clemson, Item 2 (emphasis added) (R. p. 141).

Accordingly, each originally named trustee served for life, or until he became unwilling. In addition, the Life Trustees are a self-perpetuating public body. When one Life Trustee dies or resigns, the remaining Life Trustees nominate and elect a replacement.

Thomas G. Clemson died on April 6, 1888. The General Assembly enacted the Act of Acceptance November 27, 1889, accepting the bequest "subject to the terms and conditions of the said will." *Id.*, Section 1. Statutes of South Carolina, Vol. XX, p. 277 (R. p. 21).¹⁷

The Act of Acceptance states, "**That said college shall be under the management and control of a board of thirteen trustees**, composed of the seven members nominated by said will and their successors and six members to be elected by the Legislature in Joint Assembly every

¹⁷ Order entered April 3, 2023, p. 2.

fourth year after the first election.” *Id.* Section 3 (emphasis added). S.C. Code Ann. § 59-119-40. Accordingly, the governing board consists of seven life trustees, serving indeterminate terms, and six trustees serving four-year terms (R. pp. 57-61; pp. 140-147)

Furthermore, the will and the Act of Acceptance provide that the trustees of Clemson University will provide “management and control” for the University (R. pp. 140-147). S.C. Code Ann. § 59-119-40.

The board of trustees . . . shall prescribe the course of study, declare the professorships, elect the professors and define their duties and fix their salaries and make all rules and regulations for the government of the university. It may employ such superintendent, head workman and laborers for the farm, shops and grounds as may be necessary and fix their compensation.

S.C. Code Ann. § 59-119-50.

A few years after the board’s inception, South Carolina had adopted the Constitution of 1895 that disallowed terms of public service for lifetime or during good behavior. Accordingly, the current life trustees were appointed to service in violation of the South Carolina Constitution, and life trustees have been serving in violation of the South Carolina Constitution since its adoption in 1895 (R. p. 60).¹⁸ These life trustees govern the University and the city of Clemson, making major decisions for the University and the city, and overseeing the expenditure of more than \$100 million a year of taxpayer funds in violation of the S.C. Constitution.

Over the past 130 years, these trustees’ decisions have transformed the University from the “Clemson Agricultural College of South Carolina” to a broader, liberal arts “Clemson University.” These trustees have concluded the emphasis on military service, opened admission to women students, opened admission to African-American students, undertaken significant building projects, and overseen the exponential growth in the student body, the faculty, and the

¹⁸ Complaint, par. 13.

administration and the increased national stature of its sports programs. All these decisions exercised the sovereign authority of the State of South Carolina. Accordingly, these life trustees have been serving as public officers. In fact, under the governance of the trustees, Clemson University expended more than \$123 million in State public funds in fiscal year 2018, and more than \$136 million in fiscal year 2019 (R. p. 58).¹⁹ The life trustees are “public officers,” and they serve terms of service which are not for “some specified period” in violation of the Constitution. Accordingly, their **appointment** is unconstitutional, and their **service** is unconstitutional.

¹⁹ Complaint, par. 3.

STANDARD OF REVIEW

The Circuit Court ruled: “On appeal from the final order of the probate court, the circuit court should apply the same standard of review that the Supreme Court or Court of Appeals would apply on appeal. In re Est. of Boynton, 355 S.C. 299, 302, 584 S.E.2d 154, 155 (Ct.App. 2003)” (Order entered July 31, 2024, p. 6, R. p. 6).

When reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, **the appellate court applies the same standard of review as the trial court.** *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). If the facts alleged and inferences reasonably deducible from the allegations set forth in the complaint, viewed in the light most favorable to the plaintiff, **entitle him to relief on any theory,** dismissal under Rule 12(b)(6) is improper. *Id.* **The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action.** *Id.* at 395, 645 S.E.2d at 248.

* * *

When reviewing a motion to dismiss for failure to state facts sufficient to constitute a cause of action, **the pleadings must be construed liberally,** and all well pled **facts must be presumed true.** *Charleston County School Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011).

Doe v. Bishop of Charleston, 407 S.C. 128, 134, 754 S.E.2d 494, 497-98 (2014) (footnotes omitted) (emphasis added).

ARGUMENTS

I. GOVERNING CLEMSON UNIVERSITY LIFE TRUSTEES VIOLATE THE SOUTH CAROLINA CONSTITUTION'S PROHIBITIONS AGAINST BOTH APPOINTMENT OF PUBLIC OFFICERS TO UNLIMITED TERMS AND AGAINST SERVICE OF PUBLIC OFFICERS FOR UNLIMITED TERMS.

Although recognizing the great public importance of the S.C. Constitution's provisions governing appointment to and service for unlimited terms of service by public officials and the need for guidance on these provisions, the Probate Court ruled that the Complaint fails to state facts sufficient to constitute a cause of action under SCRCP 12(b)(6). The Circuit Court affirmed. These rulings were in error.

Appellant alleges that the life trustees were appointed in violation of the S.C. Constitution which prohibits terms for life or S.C. public officers.

"No person shall be elected or appointed to office in this State **for life or during good behavior**, but the **terms of all officers shall be for some specified period**, except Notaries Public and officers in the Militia." S.C. Constitution, art. XVII, §1.B

"No person may be **elected or appointed** to office in this State for life or during good behavior, but the **terms of all officers must be for some specified period** except officers in the militia." S.C. Constitution, art. VI, § 1 (emphasis added).

The life trustees have been serving in violation of these provisions, while overseeing the expenditure of more than \$100 million a year in taxpayer funds. These allegations of unconstitutional conduct state facts sufficient to constitute a constitutional violation.

A. The governing Clemson University life trustees are "public officers," under the well-recognized South Carolina common law definition.

Although S.C. Constitution, art. XVII, §1.B, art. VI, § 1 do not define the term "officers" or "office," the S.C. Supreme Court has ruled that when an enacted law does not define a term within its provisions, the General Assembly is presumed to have intended the common law

definition of the term. *Coakley v. Tidewater Constr. Corp.*, 194 S.C. 284, 288, 9 S.E.2d 724, 726 (1940). Likewise, the General Assembly is presumed to be aware of the common law. *Caughman v. Columbia YMCA*, 212 S.C. 337, 344, 47 S.E.2d 788, 791 (1948) (cited for guidance in *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 197-98 (1997) (because Highway Patrol officers “are charged with the discretionary exercise of the sovereign power,” they are public officials)).²⁰

As used in these S.C. Constitution provisions which Appellant seeks to enforce, the South Carolina common law defines “**public officer**.”

We have held that a **public officer** is “[o]ne who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent.”

Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907) (emphasis added). In applying this definition to the trustees serving indefinite terms on Clemson’s governing board, four questions arise. Are the Clemson trustees:

1. **charged by law**
2. **with duties involving an exercise of some part of the sovereign power (either small or great)**
3. **in the performance of which the public is concerned**
4. **and which are continuing, and not occasional or intermittent.**

1. **The Clemson trustees fall within the S.C. common law definition of “public officer” as defined in *Belue*, because they *are* charged by the Act of Acceptance and the statutes that assign powers to the trustees to manage and control Clemson, a state university and municipality.**

First, as the Court ruled, the first element of the definition of “public officer,” that the officer be “**charged by law**,” applies to the life trustees serving on Clemson’s governing board.

Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907) (emphasis added). **The Act of**

²⁰ In *Bridgers*, the Court addressed the common law definition of “public official” and quoted and drew guidance from the common law definition of “public officer” recognized in *State v. Belue*. In the case at bar, the *Belue* Court’s recognition of the common law definition of “public officer” applies more exactly to art. XVII, §1.B Section and art. VI, § 1 of the S.C. Constitution which govern “public officers” and which Appellant seeks to enforce.

Acceptance states, “That said college shall be under the management and control of a board of thirteen trustees.” *Id.* Section 3 (emphasis added). S.C. Code Ann. § 59-119-40. Statutes of South Carolina, Vol. XX, p. 277.

In addition, the South Carolina Code sets out many of the Board’s responsibilities that demonstrate that the Trustees are “charged. By law” as public officers. Title 59, chapter 119 governs Clemson University. Section 1 governs matters including organization, powers, property, income and charges the trustees by law to manage and control oversight of certain duties with some limitations

The board of trustees is hereby declared to be a body politic and corporate, under the name and style of Clemson University. It shall have a corporate seal, which it may change at its discretion, and in its corporate name it may contract for, **purchase and hold property**, for the purposes of Sections 59-119-10 to 59-119-70 and may **take any property or money** given or conveyed by deed, devise or bequest to said university and **hold the same for its use and benefit**; provided, however, that the conditions of such gifts or conveyances shall in no case be inconsistent **with the purposes of** Sections 59-119-10 to 59-119-70 and that the board **shall not by the acceptance thereof incur any obligation on the part of the State**. It shall **securely invest all funds** and keep all property which may come into its possession and may **sell any of the personal property** not subject to the trust and reinvest the same in such way **as it deems best** for the interest of said university. **It may sue and be sued and plead and be impleaded in its corporate name** and may do **all things necessary** to carry out the provisions of Sections 59-119-10 to 59-119-70 and **may make bylaws** for this purpose if it deems it necessary.

S.C. Code Ann. § 59-119-60 (emphasis added). The statute declares that the Board of Trustees, **as a whole**, consisting of all 13 trustees, is a body politic, including not only those trustees elected by the General Assembly, but also the life trustees.

2. The duties of the Clemson trustees “involve some exercise of the sovereign power (either small or great).

”Second, as the second element of the *Belue* Court’s common law definition of “public officer” requires, the duties charged to the trustees of the governing board of Clemson “involve

some exercise of the sovereign power (either small or great).” *Sanders v. Belue*, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907) (emphasis added). This provision charges the trustees with significant sovereign power to:

- buy and sell real estate for the University. S.C. Code Ann. § 59-119-70.
- determine by a two-thirds vote when and how to direct expenditures of funds appropriated to the University. S.C. Code Ann. § 59-119-140.
- make an annual report to the General Assembly of these expenditures. S.C. Code Ann. § 59-119-140.
- exercise perpetual control of the municipality of Clemson as the municipality’s board. S.C. Code Ann. § 59-119-310 and -320.
- employ a magistrate with criminal jurisdiction. *Id.*
- license the sale of Clemson goods and merchandise. S.C. Code Ann. § 59-119-330.
- .appoint constables and municipal police officers. S.C. Code Ann. § 59-119-340.
- issue revenue bonds which are exempt from taxation. S.C. Code Ann. § 59-119-520 and 540
- borrow up to \$500 million in revenue bonds for athletic facilities for which neither the trustees or any other person is personally responsible, and which are governed by state law and tax exempt. S.C. Code Ann. § 59-119-940. -960, -970, 980.

These significant public duties of the governing trustees **involve an exercise of some sovereign power (either small or great)** in the name of Clemson University. S.C. Code Ann. § 59-119-10 *ff.* *Sanders v. Belue*, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907) (emphasis added).

In addition, the trustees of the governing board of Clemson University, as the governing body for the City of Clemson, commission police officers, an exercise of sovereign power. S.C. Code Ann. § 59-119-340. It would be anomalous if the police officers for the City of Clemson were deemed public officials by the *Bridgers* Court, but the trustees who commission them and to whom these police officers report, were **not** public officers. *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 197-98 (1997)

Accordingly, in all these duties, these governing trustees are “charged by law with duties involving an exercise of some part of the sovereign power (either small or great). *Sanders v. Belue*, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907) (emphasis added).

3. The public is concerned with their duties involving some exercise of the sovereign power (either small or great) as charged by law to the governing trustees of Clemson.

Third, the governing trustees of Clemson fall within the common law definition of “public officer” because the “**public is concerned**” with the sovereign duties they exercise. The University is a public university, and because it is spending more than a \$100 million a year of taxpayer funds, the public is concerned with how these trustees exercise the duties with which they been entrusted (R. p. 60, par. 13).

4. The duties are continuing and not occasional or intermittent.

The trustees at Clemson University serve terms of either four years or currently, they serve life terms (R. p. 60, par. 8). Accordingly, these duties assigned to the Board of Trustees are continuing. They are not occasional or intermittent. They are ongoing, year after year.

Having met the four factor test, trustees meet the definition of public officials as set out in *Sanders v. Belue*, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907).

B. The governing Clemson University life trustees also fall within the definition of “public officers” under S.C. Code Ann. § 8-1-10.

Appellant contends that the Probate Court erred when it determined that the life trustees are not “public officers” under S.C. Code Ann. § 8-1-10 governing officers and employees: **“Public officers” defined.** “The term ‘public officers’ shall be construed to mean all . . . trustees of the various colleges of the State.” S.C. Code Ann. § 8-1-10 (emphasis added).

This is the first section in Title 8 titled “Public Officers and Employees.” “The term ‘public officers’ shall be construed to mean all . . . trustees of the various colleges of the State.” *Id.*,

(emphasis *added*). Accordingly, Clemson’s governing trustees, including the life trustees, are “public officers,” governed by S.C. Constitution, art. VI, § 1 and S.C. Constitution, art. XVII, §1.B of the S.C. Constitution.

Even so, the Probate Court ruled (R. p. 29):

The Court finds that a reasonable reading of the Constitutional provisions at issue is that “elected” means voted on either by the populace or General Assembly and appointed means by either the Governor or General Assembly. Other types of college trustees (including the legislatively appointed trustees at Clemson) would be subject to the provisions. However, the Will Trustees, are not “elected or appointed” as contemplated by the Constitution, as the original seven were named by a private bequest and have been self-perpetuating ever since.”²¹

This ruling overlooks as governing both the common law definition and the statutory definitions of “public officer,” the latter of which specifically include “**all** . . . trustees of the various colleges of the State.” *Id.* (emphasis added). Even though the first life trustees were appointed directly by a testamentary trust, as soon as they took office and began public service as trustees of Clemson University’s governing board, they became “public officers,” under both the common law and statutory definitions (R. pp. 140-149). In addition, as established in the Act of Acceptance, the trustees of Clemson University provide “management and control” for the University. S.C. Code Ann. § 59-119-40. Statutes of South Carolina, Vol. XX, p. 277. Accordingly, the life trustees violate the following provisions of the S.C. Constitution in their unlimited terms as they were appointed and are serving.

“No person may be **elected or appointed** to **office** in this State for life or during good behavior, but the **terms** of all **officers** must be for **some specified period** except officers in the militia.”

S.C. Constitution, art. VI, § 1 (emphasis added). Article 6 pertains to “officers” and the subsection to “eligibility to office and terms.”

²¹ Order entered April 3, 2023, p. 10.

“No person shall be **elected or appointed** to **office** in this State for life or during good behavior, but the **terms** of all **officers** shall be **some specified period**, except Notaries Public and officers in the Militia.”

S.C. Constitution, art. XVII, §1B (emphasis added). (Article 17 pertains to “miscellaneous matters” and the subsection to “property, terms of office, and dueling.”)

Accordingly, the S.C. Constitution requires that public officers may **not** be appointed to office “for life or during good behavior,” but must serve a term “for some specified period.” *Id.* There are two circumstances governed by each of these constitutional provisions: one deals with the appointment, and the other deals with the service (“for some specified period”). *Id.* Both the appointment and the service must be limited temporally. Accordingly, the “life trustees” violate both provisions in both appointment and service.

1. The lower courts erred in interpreting “elected or appointed.”

The Probate Court ruled that the successor trustees were not “elected or appointed” within the meaning of the S.C. Constitution (R. p. 29).

The Court finds that a reasonable reading of the Constitutional provisions at issue is that “elected” means voted on either by the populace or General Assembly and appointed means by either the Governor or General Assembly. Other types of college trustees (including the legislatively appointed trustees at Clemson) would be subject to the provisions. However, the Will Trustees, are not “elected or appointed” as contemplated by the Constitution, as the original seven were named by a private bequest and have been self-perpetuating ever since.”²²

Appellant respectfully submits that the Probate Court mis-defined the terms “elected or appointed.” Many officials in South Carolina are “elected or appointed” by means other than the Governor or General Assembly as articulated by the Probate Court. For instance, municipal police officers are “elected or appointed” to their positions, neither by the populace, nor by the General Assembly, nor by the Governor. *State v. Carter*, 324 S.C. 383, 478 S.E.2d 86, 87 (Ct. App. 1996).

²² Order entered April 3, 2023, p. 10.

“As noted above, police officers are public officials. Some constables are “elected or appointed,” but not in the limited methods suggested by the Probate Court. *State v. Messervy*, 86 S.C. 503, 68 S.E. 766, 767 (1910).

In the event of a vacancy on the agricultural commodities board, “the remaining members shall select a qualified person for **appointment** by the commission to fill the unexpired term.” S.C. Code Ann. § 46-17-230 (emphasis added). When a new judicial circuit is created, members of boards or commissions are “elected or appointed to such board or commission as is now provided for by law.” S.C. Code Ann. § 8-11-100. County Councils also appoint members of various boards and commissions. Accordingly, public officers may be elected or appointed by a number of public officers and bodies, and not just by the Governor and General Assembly as the Probate Court ruled.

2. The Clemson will “appoints” the initial seven governing life trustees, and the life trustees appoint successor governing life trustees.

The Thomas G. Clemson will “appoints” the initial seven trustees.

The seven trustees **appointed by me** shall always have **the right**, and the power is hereby given them and their successors, which right the legislature shall never take away or abridge, **to fill all vacancies** which may occur in their number by death, resignation, refusal to act or otherwise.

Last Will & Codicil of Thomas Green Clemson, Item 2; R. pp. 140-147 (emphasis added).

Accordingly, the initial seven governing life trustees, governing a public college, were appointed to be “public officers.” The successor trustees have the right to “fill all vacancies.” They, as public officers themselves, do this by **appointing and electing** additional successor trustees. The life trustees appointed and elected the successor trustees, who elect and appoint still more successor trustees (R. pp. 57-61; R. pp. 143).

Counsel for Clemson University stated in his argument before the Probate Court, “And so they [the successor trustees] were never elected, they were – you know, **they were appointed by their predecessors as set forth in the will**” (R. p. 187, ll. 6-9).²³ Counsel for Clemson University added, “certainly **they are serving the public. They’ve been appointed** – they been appointed through a trust” (R. p. 188, ll. 7-8)²⁴ *Id.* The successor trustees were “appointed,” and they serve the public as governing trustees of a state university. Accordingly, they are “public officials.” S.C. Code Ann. § 8-1-10. Under the common law definitions, a person “elected or appointed” is one “**in the possession of any public office** and performing the duties connected therewith.” *Jackson v. White*, 218 S.C. 311, 316, 62 S.E.2d 776, 778 (1950) (emphasis added).

3. The successor governing trustees’ power to resign demonstrates that they were appointed.

“A person cannot resign an office to which he has not been **elected or appointed**, since the word ‘resignation’ implies that the person resigning has been **elected or appointed** to the office from which he resigns * * *.’ 43 Am.Jur., Sec. 169, Page 25.” *Jackson v. White*, 218 S.C. 311, 316, 62 S.E.2d 776, 778 (1950).

The *Jackson* Court cited additional authorities that reasoned that a man must be elected or appointed before he can resign:

Of like import is the case of *People ex rel. Dibelka v. Reinberg*, 263 Ill. 536, 105 N.E. 715, 717, L.R.A., 1915E, 401, Ann.Cas.1915C, 343. In that case it was held that where a mayor authorized to appoint a Board of Education procured undated resignations from his prospective appointees, the resignations, though not recalled by the appointees after the appointment, were ineffectual. The court said:

‘The authorities do not appear to be numerous upon the question, as in the nature of things such a question would rarely arise, but all the authorities we have been able to find hold **a man cannot resign an office before he is an officer**. Mechem on Public Officers (section 410) says: ‘Upon the principle that one cannot resign what he does not yet possess, it is held that

²³ Transcript, p. 34, ll. 6-9 (emphasis added).

²⁴ Transcript, p. 35, ll. 7-8 (emphasis added).

one who has not been elected to a public office cannot resign the same, or, if elected, cannot resign until the time has arrived when he is entitled by law to possess the same and he has taken the oath and given the required bond and entered upon the discharge of his duties.’ 23 Am. & Eng. Ency. of Law, 421, *In re Corliss*, 11 R.I. 638, 23 Am.Rep. 538, and *Miller v. Board of Supervisors of Sacramento County*, 25 Cal. 93, are to the same effect. In our judgment the rule announced in these authorities is sound, but if no authority could be found upon the question it would seem the only conclusion which could be reached is that **a man cannot resign an office to which he has not been elected or appointed.** It was never contemplated that where the law conferred the power to appoint, but not to remove, the power to remove might be conferred by requiring a person, before appointment, to place his resignation in the hands of the appointing power. Such a paper is invalid when signed, and lapse of time cannot render it valid.’

Jackson v. White, 218 S.C. 311, 318-19, 62 S.E.2d 776, 779 (1950) (emphasis added).

Accordingly, any person holding an office and discharging its duties was “elected or appointed” to it.

The Clemson will specifically records that the trustees can leave the office through “death, **resignation**, refusal to act or otherwise.” Last Will & Codicil of Thomas Green Clemson, Item 2 (emphasis added). Accordingly, if the initial governing lifetime trustees and their successors can resign, then they have been “elected or appointed” to that office. The successor trustees are “public officers” who are subject to the constitutional provisions regarding the appointment or election of public officers.

C. The governing Clemson University life trustees’ unlimited terms violate the S.C. Constitution, art. VI, § 1 and art. XVII, §1.B.

“[T]he terms of all officers must be for some specified period.” Just as the Trustees’ **appointment** to indefinite terms violates the S.C. Constitution, so also their **service** of lifetime or indefinite terms violate the Constitution. “[T]he **terms** of all officers must be for **some specified period.**” S.C. Constitution, art. VI, § 1 (emphasis added); S.C. Constitution, art. XVII, § 1B (emphasis added).

In summary, Respondents allege, without factual evidence, without the benefit of discovery, and contrary to the procedural rules governing motions under Rule 12(b)(6), that the governing life trustees of Clemson have agreed informally among themselves to refrain from service past age 75. Appellant objects to this factual assertion, because it is not within the four corners of the Complaint, and therefore it may not be considered in any way in response to a 12(b)(6) Motion to Dismiss.

The Probate Court references this allegation in the Order and states that it did not consider this allegation in its decision, but it was before the Probate Court. (Probate Court Order entered April 3, 2023, p. 10, n. 7). Even so, , this fact, in the light most favorable to Appellant, tends to show that the governing life trustees of Clemson recognize the beneficial policy of limiting their terms. Discovery would allow Appellant and the Court to examine the evidence related to this assertion and other potential evidence that demonstrates these are public officers and that they have been serving indefinite and unlimited terms.

The ruling on a Rule 12(b)(6), SCRPC, motion to dismiss must be based solely upon the allegations set forth in the complaint. *Baird v. Charleston County*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999); *Washington v. Lexington County Jail*, 337 S.C. 400, 405, 523 S.E.2d 204, 206 (Ct.App.1999). A 12(b)(6) motion should not be granted if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.

Carolina Care Plan, Inc. v. United HealthCare Services, Inc., 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004). Furthermore, Appellant has not been permitted to explore this factual assertion through the discovery process. At Respondents' request, Appellant was stonewalled from pursuing responses to their legitimate discovery requests.

Accordingly, the Appellant's allegation that the governing life trustees' unlimited terms of service are unconstitutional states facts sufficient to constitute a cause of action under Rule 12(b)(6).

II. COMPLYING WITH THE SOUTH CAROLINA CONSTITUTION'S TERM LIMITS FOR PUBLIC OFFICERS DOES NOT IMPAIR THE OBLIGATION OF CONTRACTS.

The Probate Court erred in concluding that requiring the governing life trustees to comply with the S.C. Constitution would impair the obligation of contracts. The Probate Court ruled:

If the “public officer” statute was intended to apply to the Will Trustees as Plaintiffs argue, it would be unconstitutional as applied. The Will Trustee structure was a fundamental term of the bequest to the State and these constitutional provisions, combined with the statute, would operate retroactively to substantially impair this material provision in the contract between Mr. Clemson and the state. As a result, this Court declines to interpret the “public officer” statute in the manner advocated by plaintiff.

The will **does not explicitly require** the trustees’ appointment to be lifetime terms, nor does it explicitly require their service to be of unlimited terms. Under the Thomas G. Clemson will, vacancies may occur “by death, **resignation**, refusal to act **or otherwise**.” Accordingly, the Thomas G. Clemson will **would allow** for terms of service of “some specified period.” The successor Trustees can and should comply with **both** the Thomas Clemson will **and** the Constitution by serving terms of “some specified period.”

A. The 1868 S.C. Constitution allowed public officers to serve during good behavior.

The 1868 S.C. Constitution prohibited public officers from serving for life, but they could serve during “good behavior.” “No office shall be created the appointment to which shall be for a longer time than good behavior.” S.C. Constitution of 1868, § 32 (emphasis added). The standard of 1868 Constitution differs from the standard established later in the S.C. Constitution of 1895, which **prohibits** terms of service for life or during “good behavior.” *Id.* (emphasis added).

B. The 1895 S.C. Constitution changed the requirements for terms of appointment and terms of service for public officers.

An opinion from 1912 rules that the S.C. Constitution of 1895 amended this rule from the Constitution of 1868:

“Prior to the adoption of the Constitution of 1895, offices in this state might be held during good behavior. The purpose of Section 11, art. 1, was **to change this rule**, and make the term **a limited one** so as to make office holders more amenable to the elective or appointive power.”

State v. Bowden, 92 S.C. 393, 75 S.E. 866, 872 (1912) (Sease, Circuit Judge, concurring and attaching the original opinion) (emphasis added). Accordingly, although the Act of Acceptance did not violate the Constitution of 1868 when it was enacted, the Constitution of 1895 prohibits unlimited appointments and unlimited length of service. “Although many officers may be reelected and others reappointed, no offices have lifetime tenure or an indefinite term ‘for good behavior.’” *The South Carolina State Constitution: a Reference Guide*, Cole Blease Graham, Jr., Reference Guides to the State Constitutions of the United States, 43, G. Alan Tarr, Series Editor, Praeger Publishing, 2007, p. 205. As such, the governing life trustees, or successor trustees, appointed or serving after 1895 have been appointed and have been serving in violation of the 1895 Constitution. From 1895 forward, they can no longer be appointed for life or during good behavior, and their service must be for “some specified period.” In conclusion, the governing life trustees can and should comply with both the Clemson will and the S.C. Constitution.

III. PRINCIPLES OF EQUITABLE DEVIATION SHOULD REQUIRE THAT THE GOVERNING CLEMSON UNIVERSITY “SUCCESSOR TRUSTEES” SERVE TERMS OF “SOME SPECIFIED PERIOD.”

Respondents argue that because Thomas G. Clemson donated the land for Clemson University through his will, Clemson University is thereby a charitable testamentary trust and/or the result of a charitable trust or both. Respondents rely on “the protections of charitable trusts found in the South Carolina Probate Code” as a defense against the arguments of the Appellant. Joint Brief of the Respondents in the Circuit Court, p. 10.

Respondents also rely on *Hopkins v. Clemson Agricultural College*: (“[T]he state holds the fee in the 814 acres contained in the Fort Hill place, and has founded and is maintaining the ‘Clemson Agricultural College of South Carolina’ by and through ‘the board of trustees,’ as its agents, in accordance with the terms of the trust, created in the will of Mr. Clemson, and specifically accepted by the state.”) 77 S.C. 12, 57 S.E. 551, 558 (1907) *rev’d sub nom. on other grounds by Hopkins v. Clemson Agr. Coll. of S.C.*, 221 U.S. 636, 31 S. Ct. 654, 55 L. Ed. 890 (1911), and *overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). Joint Brief of the Respondents in the Circuit Court, p. 13.

This proposition follows from South Carolina common law. “Properties conveyed to a public charity are also impressed with a charitable trust.” *South Carolina Dept. of Mental Health v. McMaster*, 372 S.C. 175, 182, 642 S.E.2d 552, 555 (2007).

At the request of the Respondents, the Circuit Court of Greenville County transferred this case to the Probate Court of Pickens County, finding that the case required the judicial construction of a will and/or charitable trust, or as proceedings “concerning the internal affairs of trusts.” S.C. Code §§ 62-1-302(a)(1), 62-7-201(a). Accordingly, Respondents claim that Clemson is a charitable trust. Joint Brief of the Respondents in the Circuit Court, pp. 7-14.

A. Clemson University, a charitable trust, is subject to equitable deviation.

Respondents' Brief raises the doctrine of equitable deviation:

Under South Carolina law, the General Assembly cannot terminate or alter a charitable trust. *S.C. Dep't of Mental Health v. McMaster*, 372 S.C. 175, 183, 642 S.E.2d 552, 556 (2007). Rather, any **changes must be approved by a court of equity** since supervision of a charitable trust is an 'an inherent judicial function and is not a matter for the legislature.' *Id.*

Joint Brief of the Respondents in the Circuit Court, p. 14 (emphasis added). "Changes . . . approved by a court of equity" refers to the doctrine of equitable deviation.

Respondents also cite the case of *Epworth Children's Home v. Beasley*, 365 S.C. 157, 616 S.E.2d 710 (2005). Joint Brief of the Respondents in the Circuit Court, pp. 17, 22. In that case, the Supreme Court explained the doctrine of equitable deviation and how it applies to charitable trusts.

[O]ur appellate courts have approved of and applied the doctrine of equitable deviation, which "**permits deviation from a term of the trust if, owing to circumstances not known to the settlor and not anticipated by him,** compliance would defeat or substantially impair the accomplishment of the purposes of the trust. Under these circumstances a court may direct or permit a trustee to accomplish acts that are unauthorized or even forbidden by the terms of the trust." *Colin McK. Grant Home*, 292 S.C. at 473, 349 S.E.2d at 659 (allowing trustees to deviate from original terms of charitable trust by selling six homes built in Charleston to serve needy, elderly, white Presbyterians and investing proceeds of sale with income distributed as housing subsidy to elderly, needy Presbyterians of all races).

When circumstances change, it is not always required "that the details of the plan laid down in the will must be followed to the letter. The **main purpose [of the will and testamentary trust] being kept in view, considerable flexibility will always be allowed in the details of the execution of a trust,** so as to adapt it to the changed conditions." *Mars*, 93 S.C. at 466, 77 S.E. at 135 (refusing to allow trustees of John de la Howe School to deviate from original terms of charitable trust contained in 1797 will by devoting funds to college scholarships instead of early education, but explaining trustees could establish a school at a different location, which could work in conjunction with public school system to teach agricultural and mechanical arts); *see also S.C. Natl. Bank*, 260 S.C. 327, 195 S.E.2d 835 (allowing trustees to deviate from original terms of charitable trust contained in a 1947 will to provide college funds to "deserving students of Greenville City High Schools" to include such students attending all high schools

within a reorganized, consolidated, and much-changed school district encompassing most of Greenville County in 1970s when the trust provision took effect); *Furman Univ. v. McLeod*, 238 S.C. 475, 120 S.E.2d 865 (1961) (allowing university trustees, in light of changed conditions related to growth of city, advent of automobile, and changes in neighborhood, to deviate from trust established by nineteenth century deeds by selling original college sites and relocating university to area outside city).

Id., 365 S.C. 157, 169-170, 616 S.E.2d 710, 716-17 (emphasis added).

Other South Carolina rulings have also established that after a trust is created, and circumstances materially change, a court issue an order by which some provisions establishing the trust are changed, to ensure that the trust continues to operate, in keeping with the purposes of the trust and the wishes of the settlor (the doctrine of equitable deviation). “This State has, however, long recognized the doctrine of equitable deviation, which permits the strict terms of a trust to be altered when changed circumstances so require to effectuate the trust’s purpose.” *Colin McK. Grant Home v. Medlock*, 292 S.C. 466, 470, 349 S.E.2d 655, 657 (1986).

Equitable deviation permits deviation from a term of the trust if, owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purposes of the trust. Under these circumstances a court may direct or permit a trustee to accomplish acts that are unauthorized or even forbidden by the terms of the trust.

Id. 292 S.C. 466, 473, 349 S.E.2d 655, 659 (1986). Accordingly, Clemson University is subject to the doctrine of Equitable Deviation.

B. Equitable deviation is a doctrine for the courts.

The doctrine of equitable deviation is to be implemented by the courts, rather than by the General Assembly.

Property subject to a charitable trust may not be terminated or altered by the General Assembly, but rather, must be approved by the court. *Smith v. Moore*, 225 F.Supp. 434 (E.D.Va.1963) (legislature cannot terminate a charitable trust, nor seek to control its disposition under doctrine of *cy pres*; however this does not mean that Legislature cannot properly reserve to the judicial branch the power to do so); see also *Second Ecclesiastical Society of Hartford v. Attorney General*, 133 Conn. 89, 48 A.2d 266 (1946) (supervision of charitable trusts is an **inherent judicial**

function and is not a matter for the legislature. As a **court of equity**, the court possesses the authority to carry out the **intent of the donor** of a charitable trust).

This Court has previously applied the doctrine of **equitable deviation**, which **“permits deviation from a term of the trust if, owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purposes of the trust.”** Under these circumstances **a court may direct or permit a trustee to accomplish acts that are unauthorized or even forbidden by the terms of the trust.”** *Epworth Children’s Home v. Beasley*, 365 S.C. 157, 169, 616 S.E.2d 710, 716–717 (2005), citing *Colin McK. Grant Home v. Medlock*, 292 S.C. 466, 473, 349 S.E.2d 655, 659 (Ct.App.1986) (allowing trustees to deviate from original terms of charitable trust by selling six homes built in Charleston to serve needy, elderly, white Presbyterians and investing proceeds of sale with income distributed as housing subsidy to elderly, needy Presbyterians of all races).

S.C. Dep’t of Mental Health v. McMaster, 372 S.C. 175, 183-84, 642 S.E.2d 552, 556-57 (2007) (emphasis added). Accordingly, courts of equity can use the doctrine of equitable deviation to change the strict terms of a charitable trust to fulfill the wishes and purposes of the settlor of the trust.

“A court is authorized to deviate from the terms of a trust to carry out the **settlor’s intent**.” *All Saints Parish, Waccamaw v. Protestant Episcopal Church*, 358 S.C. 209, 227, 595 S.E.2d 253, 263 (2004) (emphasis added). “Considerable flexibility will always be allowed in the details of the execution of a trust, so as to adapt it to the changed conditions.” *S.C. Dep’t of Mental Health v. McMaster*, 372 S.C. 175, 184, 642 S.E.2d 552, 557 (2007). “[T]he Court of Equity has the power upon a proper showing, to permit a deviation from the strict terms of a trust if necessary or advisable to carry out **the purposes thereof**.” *Furman University v. McLeod*, 238 S.C. 475, 490, 120 S.E.2d 865, 872 (1961) (emphasis added).

If “many changes have taken place since the testator’s death,” the court can apply the doctrine of equitable deviation. *South Carolina Nat. Bank v. Bonds*, 260 S.C. 327, 332, 195 S.E.2d 835, 837-838, 68 A.L.R.3d 983 (1973). The *Bonds* case involved the estate of Joseph E. Serrine,

which established scholarships for deserving students who graduated from the high schools in the City of Greenville. Young Knox White and others brought a challenge. Between the time that Serrine established the trust and the time the challenge arose, the school system in Greenville had undergone several changes including, “the total reorganization of the public school system of Greenville County,” 260 S.C. at 332-333, “eighty-two (82) school districts in Greenville County were consolidated into one countywide school district,” 260 S.C. at 333, and in 1970, there was “the implementation of busing plans to achieve racial integration.” 260 S.C. at 335. The court found that these amounted to “a change in conditions which the Testator could not have reasonably anticipated.” 260 S.C. at 336, 195 S.E.2d at 839. The Court ruled,

However, in spite of all the changes which have taken place since the Testator’s death and the inequities which would necessarily result from a literal application of the will, this Court is aware that there are limitations on its authority and that a distribution of these funds must be **in accord with the intent of the Testator**. The role of this Court is simply to ascertain and effectuate the intention of the Testator. In trying to effectuate this intention, however, there is no question that **where conditions have substantially changed, the Court is allowed considerable discretion**.

Id., 260 S.C. at 337, 195 S.E.2d at 840 (emphasis added). The Court further reasoned:

‘The court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust; and in such case, if necessary to carry out the purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust.’ Restatement (Second) of Trusts s 381(d); accord 89 C.J.S. Trusts s 87(b).

Id., 260 S.C. at 341, 195 S.E.2d at 842 (emphasis added). The Court then worked toward the conclusion:

After a careful study of the will in light of the circumstances existing at the Testator’s death, I am convinced that the Testator’s primary purpose was to create a perpetual memorial to his mother and father by aiding deserving high school graduates in pursuit of their education. It is only natural that the Testator chose the Greenville City School District as the logical administrative entity through which he could channel his philanthropic desires. With the **many changes** which have

taken place since the Testator's death, as hereinabove detailed, it is obvious that if the terms of the trust were literally complied with and the beneficiaries limited to the graduates of 'Greenville City High Schools,' the **Testator's main purpose** would be defeated rather than effectuated. **Under the authority granted to this Court to deviate from the strict terms of a trust** in such situations, the problem before the Court is to designate the most effective method of administering same in order **to assure that the Testator's desires will be fulfilled.**

Id., 260 S.C. at 341-342, 195 S.E.2d at 842-843 (emphasis added). The Court then issued this ruling:

[T]he deserving graduates of **all the high schools** administered by the County School Board including the fourteen (14) high schools now located within the consolidated district and any other high schools which may be located in the future or come within the administration of the Board, **should be eligible** to participate in the trust fund. After careful deliberation, I have concluded that under the present factual conditions, this is the only logical method of administering the trust so as **to fully effectuate the Testator's intent and purpose** and such method is hereby adopted and approved by this Court.

Id., 260 S.C. at 342-343, 195 S.E.2d at 843 (emphasis added).

Appellant respectfully suggests that **the S.C. Constitutional change** established by the S.C. Constitution of 1895, which forbids lifetime appointments, and forbids lifetime service, is a substantial change that Thomas G. Clemson **could not have foreseen**. Accordingly, this unforeseen change is sufficient to empower a court of equity to invoke the doctrine of Equitable Deviation to require that the "Will Trustees" or "Successor Trustees" be appointed for a definite term, and not to be appointed for, or serve for, an indefinite term, or for life.

As a consequence, the current governing life trustees were appointed in violation of the S.C. Constitution and the current life trustees have been serving in violation of the S.C. Constitution, while overseeing the expenditure of more than \$100 million a year in taxpayer funds. Accordingly, these allegations demonstrate a constitutional violation.

Appellant does **not** seek to enlarge the number of trustees, or to alter the balance of seven trustees who are the successors of the original trustees appointed by Mr. Clemson, as was the

factual suggestion when the Attorney General concluded that the General Assembly could not increase the number of trustees on Clemson's board. *See* Op. S.C. Att'y Gen., 1978 WL 34673, at *1 (Jan. 26, 1978). Joint Brief of Respondents in the Circuit Court, p. 14.

The will does not **explicitly** require the trustees' appointment to be lifetime terms, nor does it **explicitly** require their service to be for unlimited terms. Under the Thomas G. Clemson will, vacancies may occur "by death, **resignation**, refusal to act **or otherwise**." Accordingly, the **purpose and intent** of the Thomas G. Clemson will **would allow** for terms of service of "some specified period." And even if the Court concludes otherwise, under the doctrine of equitable deviation, this Court should rule that the current successor life trustees can and must comply with **both** the Thomas Clemson will **and** the S.C. Constitution by serving terms of "some specified period."

CONCLUSION

"If the facts alleged and inferences reasonably deducible from the allegations set forth in the complaint, **viewed in the light most favorable to the plaintiff**, entitle him to **relief on any theory**, dismissal under Rule 12(b)(6) is improper." *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 497-98 (2014) (footnotes omitted) (emphasis added). Appellant respectfully suggests that dismissal of this case was improper, and certainly, dismissal **with prejudice** was improper.

The Clemson University governing life trustees are "public officers" both the common law and statutory definitions. *Sanders v. Belue*, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). S.C. Code Ann. § 8-1-10. The Board of Trustees is a "body politic." S.C. Code Ann. § 59-119-60. The governing life trustees are **appointed** for life in violation of the S.C. Constitution. "No person may be elected or appointed to office in this State **for life**. I, art.VI,§ 1; art. XVII, §1B

(emphasis added). In addition, the governing life trustees are **serv**ing unlimited terms of service in violation of the S.C. Constitution. “[T]he terms of all officers **must** be for some specified period.” S.C. Constitution, Art.VI,§ 1 and art. XVII, §1B (emphasis added).

The Thomas G. Clemson will does not explicitly require unlimited or lifetime terms. Accordingly, it is possible for the governing life trustees to comply both with the Thomas G. Clemson will, and the S.C. Constitution. If it is possible to comply with both, then they must comply with both.

The principles of equitable deviation require that the governing Clemson University successor trustees serve some terms of “some specified period.”

Accordingly, Appellant prays the Court to reverse the grant of the Respondents’ Motions to Dismiss, to rule that Appellant has stated facts sufficient to constitute a cause of action under Rule 12 (b)(6), and to remand the action for further proceedings, including the discovery process, and to grant Appellant such other and further relief as the Court deems just and proper.

In the alternative, Appellant prays the Court to reverse the ruling of a dismissal **with prejudice**, to allow for amendment of the Complaint, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,
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