

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Honorable Diane S Goodstein, Circuit Judge

Unpublished Opinion No 2011-UP-517 (S C Ct App filed Nov 29, 2011)

Norman M McLean, James N McLean, Marie McLean-Choi, William N McLean,
Robert L McLean, and JL McLean Properties, LLC Petitioners,

v

James B Drennan, III as Personal Representative of the Estate of Elizabeth McLean Pence,
James E Brogdon, Sr As Trustee of the Trust Agreement of Elizabeth McLean Pence dated May
28, 1999, Wachovia Bank National Association as Personal Representative of the Estate of
Elizabeth P Pence, Wachovia Bank National Association as Trustee of the Elizabeth P Pence
Trust, Marlboro Academy, Inc , Charles P Thompson, Jr , Cheri (Cheryl) Brown Thompson,
Money to Go, LLC, James J Pence, Jr , as Personal Representative of the Estate of Stephen
Pence, and Harry R Easterling, Jr Respondents

AMENDED APPENDIX

Volume 5 of 5

David Alexander (SC Bar No 68632)
CULBERTSON + ALEXANDER, LLC
Post Office Box 1904 (29602)
114 Manly Street
Greenville, South Carolina 29601
david@culbertsonalexander.com
Telephone (864) 370-8222
Facsimile (864) 370-8227
ATTORNEY FOR THE PETITIONERS

Other Counsel of Record

Matthew H Henrikson, Esq
Clarkson Walsh Rheney & Terrell
Post Office Box 6728
Greenville, South Carolina 29606
Attorney for James B Drennan, III

Harry R Easterling, Sr Esq
Goldberg & Easterling, PA
PO Drawer 655
Bennettsville, SC 29512
Attorney for James J Pence, Jr and
Harry R Easterling, Jr

Jeffrey L Payne, Esq
Turner Padget Graham and Laney, PA
PO Box 1473
Columbia, SC 29201
Attorney for James E Brogdon, Sr

John J James, II, Esq
Pauling & James, LLP
PO Box 507
Darlington, SC 29540
Attorney for Marlboro Academy, Inc

James Randall Davis, Esq
Nicholson Davis Frawley Anderson & Ayer
PO Box 489
Lexington, SC 29701
Attorney for Money to Go, LLC

Edward B Davis, Esq
Bell Davis & Pitt, PA
227 W Trade Street, Suite 2160
Charlotte, NC 28202
Attorney for Wachovia Bank

W Cliff Moore, III, Esq
Ellis Lawhorne & Sims, PA
PO Box 2285
Columbia, SC 29202
Attorney for Charles P Thompson, Jr and Cheri
(Cheryl) Brown Thompson

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Robert L McLean, and JL McLean Properties, LLC Appellants,

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Pence and Harry R Easterling, Jr Respondents

FINAL BRIEF OF APPELLANT

August 30, 2010

David Alexander (SC Bar No 68632)
CULBERTSON + ALEXANDER, LLC
Post Office Box 1904 (29602)
110 Williams Street
Greenville, South Carolina 29601
david@culbertsonalexander.com
Telephone (864) 370 8222
Facsimile (864) 370-8227
ATTORNEY FOR THE APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I Whether the trial court erred in its application of Rule 60 of the South Carolina Rules of Civil Procedure
- II Whether the trial court erred in holding that the creditor claims provisions of the South Carolina Probate Code bar the Appellants' claims
- III Whether the trial court failed to apply the correct limitations period
- IV Whether the trial court erred in holding that no genuine issue of material fact exists as to the date the statute of limitations began to run
- V Whether the trial court erred in holding that Drennan reasonably relied on the Jackson letters
- VI Whether the trial court erred in holding that Drennan and Wachovia did not owe Appellants any duties
- VII Whether the trial court erred in holding that Brogdon did not owe Appellants any duties
- VIII Whether the trial court erred in finding that no genuine issue of material fact existed as to whether money to go or the thompsons were on record notice of appellants' claims to the property

STATEMENT OF THE CASE

On December 20, 2006, the Appellants filed a Complaint against the Respondents alleging the following causes of action: (1) quiet title, (2) declaratory judgment, (3) breach of fiduciary duty, (4) accounting, (5) breach of contract, (6) constructive trust, and (7) unjust enrichment. (R pp 41-59) Defendants timely answered and denied all of the Appellants' allegations.

Respondents all filed Motions for Summary Judgment. On May 12, 2008, a hearing was held on Respondents' Motions before the Honorable Diane S. Goodstein. At the hearing, the Appellants and Respondents presented argument and evidence, including excerpts of deposition transcripts. The court took the matter under advisement. Subsequently, Judge Goodstein asked the parties to submit proposed orders. On July 14, 2009, Judge Goodstein issued her Order granting summary judgment to Respondents. (R p 1) Appellants timely filed a Notice of Appeal.

STATEMENT OF FACTS

This appeal involves the right to property in Orangeburg County owned by the McLean family since before 1955. Many of the background facts are undisputed in this matter. Appellants are all members of the McLean family from Orangeburg, South Carolina. Norman McLean ("Norman") is the father of James N. McLean ("Jim"), Marie McLean-Choi ("Marie"), William N. McLean ("Bill"), and Robert L. McLean ("Bob"). JL McLean Properties, LLC is a company set up by the McLean siblings to jointly own their investment properties. Collectively, this brief will refer to the aforementioned parties as "the McLeans."

To place this litigation in its proper context, it is necessary to have some knowledge of the McLean family tree. Norman's father was James L. McLean. James L. McLean had three children, Norman, James L. McLean, Jr. ("Lennon"), and Elizabeth McLean Pence ("M. Pence"). James L. McLean farmed timber in Orangeburg County and owned multiple properties. Three of those properties are at issue in this appeal: the Gramling Place property, the Cannon Bridge Road property, and the Caw Caw Swamp property. James L. McLean, or his immediate family, acquired these properties before his death in 1955.

Before his death, James L. McLean took steps to distribute his property to his children and also provide for Lennon, who was disabled. On July 3, 1954, title to the Gramling Place property was consolidated in Norman and M. Pence. In transactions occurring on July 3 and July 7, 1954, title to the Cannon Bridge Road property was vested as follows: 125 acres in fee simple to Lennon, the remaining acreage to Lennon for life, with the remainder to Lennon's issue, and if no issue exist, to M. Pence and Norman in fee. The Caw Caw Swamp property was devised to Norman, M. Pence, and Lennon as tenants-in-common through James L. McLean's will. In 1994, the Caw Caw Swamp

property was partitioned between Norman, M Pence, and Lennon. Lennon died without issue in 2004.

After her marriage, M Pence moved to Marlboro County, South Carolina. M Pence had one daughter, Elizabeth Pence ("P Pence"). In addition to the property interest in her family land in Orangeburg County, M Pence owned numerous properties in Marlboro County. M Pence's accountant was James E. Brogdon, Sr. ("Brogdon"). After the death of her husband, M Pence gave Brogdon a durable power of attorney dated July 30, 1998 (R p 1115). On May 28, 1999, Brogdon established a trust for M Pence's property (the "Trust") (R p 1095). Brogdon was the trustee. Brogdon testified at his deposition that it was M Pence's intention that all of her real property be conveyed into the Trust (R p 649). In fact, Brogdon conveyed almost all of M Pence's property into the Trust by deeds which he executed as M Pence's power of attorney. Brogdon was assisted by an attorney in drafting the Trust and conveying property into the Trust. Bill McLean was named by the Trust as a successor trustee. M Pence died on October 3, 1999.

The Trust generally provided that P Pence was to receive income from the Trust for her life, and if she had any issue, that the Trust property would go to such issue. If P Pence had no issue, the Trust property was to be distributed to charitable entities. The important exception to this was M Pence's Orangeburg County real property. The Trust provided that if P Pence died without issue, then the "McLEAN family land in Orangeburg County, S C" was to be distributed to Norman's issue (R p 1103). Prior to M Pence's death, Brogdon deeded the Gramling Place property into the Trust. Brogdon testified that a deed had been prepared to convey the Caw Caw Swamp property into the Trust, but that he did not execute it prior to M Pence's death (R p 677). The Cannon Bridge Road property was not deeded into the Trust by Brogdon prior to M Pence's

death

On October 19, 2000, P Pence brought a lawsuit in Marlboro County, captioned Elizabeth P Pence, Individually and as Personal Representative of the Estate of Elizabeth McLean Pence, deceased v James E Brogdon, Individually and as Trustee under Trust Agreement of Elizabeth McLean Pence dated May 28, 1999, Coker College, and Clemson University, CA No 00-CP-34-354 (the "Trust Litigation") In the Trust Litigation, P Pence contested the validity of the trust established by Brogdon P Pence was represented by defendant James B Drennan, III ("Drennan") Drennan represented P Pence on a contingency basis, receiving a percentage of property he recovered from the Trust

On February 26, 2002, the parties settled the Trust Litigation with a written agreement (the Settlement Agreement") (R p 30) The Settlement Agreement was confirmed by the order of the Honorable James E Lockemy (the "Order) (R p 28) Paragraph Eight of the Settlement Agreement reads as follows (emphasis added)

[T]he Trust property will consist of (a) the Orangeburg real property, including any timber not cut because not merchantable, and (b) other investments In order to give effect to the intention of the Decedent, as expressed in ARTICLE VI(3) of the Trust, that the Orangeburg real property be distributed to the issue of the Settlor's brother (Norman M McLean) per stirpes in the event that Pence does not have children or other issue to receive final distribution of the Trust property, the Trustee will separately account for the Orangeburg real property, and any proceeds therefrom in the event of sale, so that in the event that Pence should leave no issue to receive final distribution of the Trust property in accordance with the terms of the Trust,

such real property, as from time to time constituted including the proceeds therefrom should it or any part of it be sold, shall pass to the issue of the Decedent's said brother, and the remaining Trust property shall pass to Clemson and Coker in equal shares, as provided in said Trust

(R pp 34 35) Drennan drafted the Settlement Agreement (R p 673) On August 26, 2002, P Pence died without issue

An exhibit to the Settlement Agreement listed the Trust's real property (R pp 38 39) This exhibit listed the Gramling Place and Caw Caw Swamp properties It did not list the Cannon Bridge Road property As part of the settlement, Bill McLean who was named as a successor trustee, was required to execute a waiver of his right to serve as successor trustee Bill McLean testified that he reviewed the settlement documents and saw that he and his siblings were to receive the Orangeburg County property, then executed the waiver and returned it (R pp 446, 554) Bill McLean's waiver was included as an exhibit to the Settlement Agreement

The McLean siblings never received title to M Pence's interest in the Caw Caw Swamp property or the Cannon Bridge Road property Instead these properties were deeded from M Pence's estate to P Pence's estate (R pp 45-50) From P Pence s estate, the Caw Caw Swamp and Cannon Bridge Road properties were ultimately deeded to several of the Respondents (R pp 45 50) Specifically, Money to Go, LLC ("Money to Go') and Charles and Cheryl Thompson (the ' Thompsons'') received portions of the Caw Caw Swamp Property Portions of the Cannon Bridge Road property were deeded to Marlboro Academy, Inc ("Marlboro Academy'') and Stephen Pence Pence later deeded a potion of his alleged interest in Cannon Bridge Road to Harry Easterling, Jr (Easterling'') (R pp 45-50)

The trial court found that the McLeans were on notice of the Respondents' claims to these properties in the fall of 2002, when Drennan and Orangeburg attorney Jay Jackson ("Jackson") exchanged letters. Three letters were exchanged between Drennan and Jackson discussing title issues with respect to Caw Caw Swamp and Cannon Bridge Road property (R p 4 5). However, Jackson denied representing any of the McLean siblings and testified that he did not even know Bill or Bob McLean (R pp 813-14). The deeds conveying the Caw Caw Swamp and Cannon Bridge Road properties were recorded in 2004 (R pp 45 50). The McLeans claim that they had no notice that they would not receive these properties until these deeds were recorded.

ARGUMENT

I STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law ” Hancock v Mid South Mgmt Co., 381 S C 326, 329 673 S E 2d 801 802 (2009) “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party ” Id. “[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment ” Id. at 330 673 S E 2d at 803

The preponderance of the evidence burden of proof applies to all of the McLeans’ causes of action Therefore, pursuant to the Court’s ruling in Hancock the McLeans were only required to submit a scintilla of evidence to defeat Respondents Motion for Summary Judgment

II THE TRIAL COURT ERRED IN ITS APPLICATION OF RULE 60

Any Alleged Mistakes in the Order Were in Favor of the McLeans

It is axiomatic that only a party aggrieved by a court order would ask the court for relief under Rule 60 Here, the Settlement Agreement and Order were in the McLeans favor The mistakes in the Order disadvantaged Respondents See Ex Parte South Carolina Dep’t Rev., 350 S C 404, 408 n 1, 566 S E 2d 196 198, n 1 (Ct App 2002) (stating that Rule 60 is only for parties seeking relief *from* a judgment, not seeking to enforce it) Therefore any alleged mistakes in the Order should have been corrected by Drennan and Wachovia, not the McLeans Rule 60 simply cannot apply to bar the McLeans’ claims because the Order was in their favor and from their point of view, did not need

correcting

The Order ruled in favor of the McLeans as to the Orangeburg Property. First, the Order recognizes that it was M. Pence's intention that the McLeans have the Orangeburg property. The Order states, "In order to give effect to the intention of the Decedent, as expressed in ARTICLE VI(3) of the Trust, that the Orangeburg real property be distributed to the issue of the Settlor's brother (Norman M. McLean), per stirpes, in the event that Pence does not have children (R. p. 34.) Second, the Order states in mandatory language that 'the Trust property will consist of (a) the Orangeburg real property." (R. p. 34.) Finally, the Order lists the real property in the Trust in Exhibit B (R. pp. 38-39.) It is undisputed that the Order states that the Caw Caw Swamp and Gramling properties are in the Trust.

Upon reading the Order, the McLeans would have had no reason to challenge it with a Rule 60 Motion. The Order decided that the Orangeburg property is theirs. The McLeans had no reason to question this decision. Bill McLean testified that he saw a draft of the Order and understood that it "basically validated that the Orangeburg property would be coming to us." (R. p. 446.) Bill McLean stated that in his opinion, the Order would 'be keeping the Orangeburg property in the family, which would've been—you know, I believe would be an intent of why it was listed as such to begin with." (R. p. 448.)

Drennan now contends that the Order contained a mistake—confirming the Caw Caw Swamp Property as part of the Trust in Exhibit B. Drennan prepared the Settlement Agreement (R. p. 673.) If the Order contained a mistake, then Drennan was required to ask the court to correct it. Once a settlement agreement becomes an order of the court, the parties lose the power to modify its terms without court approval. If a mistake exists, the court—not the parties—must fix it.

Drennan made no effort to have the Court fix this alleged mistake. In fact, Drennan completely ignored this part of the Order. Without seeking approval from the court, Drennan appropriated the Caw Caw Swamp and Cannon Bridge Road property for the estates of the Pences. It was Drennan, not the McLeans, who should have used Rule 60 to modify the Order. Therefore the McLeans should not be barred from instituting their claims by Rule 60's time limits.

**The Cannon Bridge Road Property's Absence from Exhibit B Did Not Require the
McLeans to File a Rule 60 Motion**

Rule 60's time limits do not bar the McLeans' claims to the Cannon Bridge Road property. While the Cannon Bridge Road property is not specifically mentioned in the Order, the intent of the Order is clear that the McLeans were to receive it. The Order specifically states the parties' intention to give effect to M. Pence's wish that the Orangeburg property go to the McLeans. No rationale exists to treat the Cannon Bridge Road property differently than the Caw Caw Swamp property. Respondents will likely seize on the fact that Exhibit B failed to mention the Cannon Bridge Road property. However, this distinction is immaterial and is not a sufficient basis for treating the Cannon Bridge Road property differently than the Caw Caw Swamp property. Neither were formally deeded into the Trust, but the Order explicitly states that Caw Caw Swamp is part of the Trust. Respondents cannot articulate any reason why Caw Caw Swamp would be included in the Trust and Cannon Bridge Road would not.

When the Order is viewed as giving effect to M. Pence's wishes that the McLeans receive the Orangeburg property, Cannon Bridge Road's absence from Exhibit B is not a 'mistake' that would trigger the McLeans' duty to file a Rule 60 motion. The McLeans reasonably relied on the Order's general language stating that they were to receive the Orangeburg real property. Treating the

Cannon Bridge Road property the same as Gramling and Caw Caw Swamp would not run counter to the Order's dictates. Again, any effort to deprive the McLeans of any Orangeburg real property would require modification of the Order and would require Drennan, not the McLeans, to file a Rule 60 motion.

Alternatively, Brogdon Was Required to Use Rule 60 to Protect the McLeans

Assuming for purposes of this argument that the McLeans were bound by Rule 60's time limits, then Brogdon failed in his duty as Trustee to protect their interests. As a party to the Trust Litigation, Brogdon was required to obtain the best result possible for the trust's beneficiaries. Brogdon was required to understand the impact of the Order and ensure that Drennan complied with the Order. When Drennan failed to follow the Order with respect to the Orangeburg property, Brogdon should have either asked the Court to enforce the Order or seek clarification from the Court as to its terms. Brogdon did neither. He acquiesced in Drennan's unilateral modification of the court's order and allowed Drennan to appropriate the Orangeburg property for the estates.

Had Brogdon contested Drennan's efforts, the issues related to the effect of the Order and the disposition of the Orangeburg property would have been timely litigated. Instead, if the Court now finds that Rule 60's time limits bar the McLeans' claims, Brogdon's inaction has prejudiced the McLeans' ability to protect their rights. Therefore, among Brogdon's other failures to protect the McLeans, the Court must add this dereliction if it affirms the trial court's ruling as to Rule 60.

III THE TRIAL COURT ERRED IN HOLDING THAT THE CREDITOR CLAIMS PROVISIONS OF THE PROBATE CODE BAR THE APPELLANTS' CLAIMS

The trial court held that § 62-3-803(a) of the probate code bars the McLeans' claims. The trial court's ruling ignores that the McLeans' claims were *actually litigated* against M. Pence's estate and that P. Pence, through the Settlement Agreement and Order, agreed to be bound by the result of that litigation.

P. Pence initiated the Trust Litigation both in her capacity as personal representative of M. Pence's estate and as an individual. Brogdon, as Trustee, defended the lawsuit on behalf of the Trust and its beneficiaries, including the McLeans. Not only the validity of the Trust, but the right of the McLeans to the Orangeburg real property was litigated in that action. To find that the McLeans' claims are barred by the probate code would be tantamount to a requirement that claimants file two actions: first, to litigate their claims, second, to enforce their claims. The McLeans, through Brogdon as Trustee, certainly litigated their right to the Orangeburg property. They reasonably relied on the Order confirming the settlement to bind the estate of M. Pence and P. Pence and were not required to re-file their claims with the probate court.

Even if the Trust Litigation cannot be considered as a claim under the probate code, a genuine issue of material fact exists as to whether section 62-3-803(a) applies to the McLeans' claims. Section 62-3-803(a) bars certain claims against an estate if a verified claim is not filed within certain time limits. Viewing the facts in the light most favorable to the McLeans, the McLeans could not reasonably have known of their claims during the notice period referenced in § 62-3-803(a). As far as the McLeans knew, their rights were protected under the Settlement Agreement and they had no "claim" within the meaning of the probate code against either M. Pence

or P Pence's estates

The McLeans were entitled to rely on the Order and that the Respondents would abide by the terms of the Order. The McLeans cannot be charged with notice of their claims until they could have reasonably known that Respondents acted contrarily to the Order. The act that puts the McLeans on notice of their claims is the recording of the conveyances of Caw Caw Swamp and Cannon Bridge Road. These deeds were recorded in 2004, which is when the McLeans' limitations period began.

Furthermore, a jury issue exists as to whether Respondents should be allowed to avoid claims which they created, but obscured from the McLeans until after the time allowed by § 62-3 803 had expired. "[A] defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct." RWE NUKEM v ENSR Corp., 373 S.C. 190, 198 S.E.2d 730, 734 (2007) (internal quotations omitted). Drennan represented P Pence in the Trust Litigation. Viewing the facts in the light most favorable to the McLeans, Drennan had actual knowledge that the McLeans were entitled to the Orangeburg County property.

Drennan became the personal representative for M Pence after M Pence's death. Wachovia retained Drennan to serve as the attorney for the bank in both its capacity as P Pence's personal representative and as P Pence's trustee. Therefore, Drennan's knowledge of the McLeans' claims is imputed to these entities. The trial court held that the McLeans' claims were barred by the probate code in 2003, however it was not until 2004 that the deeds conveying the disputed properties were transferred. A jury could reasonably conclude that the existence and timing of the McLeans' claims were controlled solely by Drennan. Drennan should be estopped from asserting the probate limitations period as a defense because he controlled when the deeds conveying the Orangeburg

property were recorded. Therefore, the Court should reverse the trial court's ruling as to the applicability of the probate code limitations period.

IV THE TRIAL COURT FAILED TO APPLY THE CORRECT LIMITATIONS PERIOD

As an alternative ruling, the trial court held that the three-year statute of limitations period of §15-3-530 of the South Carolina Code applies to the McLeans' claims. This ruling was erroneous and should be reversed. Two longer limitations periods apply to the McLeans' claims. This lawsuit is timely under both of those periods.

A Twenty-Year Limitations Period Applies

The twenty-year statute of limitations period provided by § 15-3-520(b) applies to the McLeans' claims. Section 15-3-520(b) states that a twenty-year limitations period applies to "an action on a sealed instrument." S.C. Code Ann. § 15-3-520(b). All of the McLeans' claims are derivative of the Order and Settlement Agreement, which is a "sealed instrument" under § 15-3-520(b).

The Settlement Agreement contains language demonstrating that it is a sealed instrument. It states that "the parties have hereunto set their hands and seals." (R. p. 37.) The Order confirming the Settlement Agreement also contains this language before Judge Lockemy's signature. Furthermore, the Order contains the stamp and seal of the Circuit Court upon filing. In Treadaway v. Smith, the Court held that a separation agreement incorporated into a Haitian divorce decree was a sealed instrument. See 325 S.C. 367, 377-78, 479 S.E.2d 849, 855 (Ct. App. 1997). The Haitian divorce decree was issued in 1974. See id. In 1993, the plaintiff in Treadaway filed a breach of contract action based on the separation agreement. The defendant argued the breach of contract

limitations period should apply. The Court disagreed, finding that the Haitian divorce decree was a sealed instrument, and applied the twenty year limitations period.

The Settlement Agreement and Order contain similar language to that of the Haitian divorce decree reviewed in Treadaway. Furthermore, the Order contains the stamp of the Court of Common Pleas. The obligations contemplated by the separation agreement in Treadaway and the Settlement Agreement and Order both continue well past three years. Under the Settlement Agreement, the Trust was to continue, and would have continued for a number of years but for the untimely death of P. Pence. The Settlement Agreement also creates a separate trust for P. Pence, the existence of which was to last well beyond three years. Therefore, the sealed instrument limitations period applies.

The trial court mistakenly relied upon the ruling of Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005). The trial court relied on Lasch for its conclusion that the Order and Settlement Agreement are not sealed instruments. Lasch stands for the principle that boiler-plate contract language regarding seals cannot transform an everyday contract into a sealed instrument. See id. at 174-75, 609 S.E.2d at 551-52. However, Lasch is distinguishable on a very important point. Lasch did not concern a court order.

The document at issue in Lasch was a lease. The only evidence in Lasch that the lease was intended to be a sealed instrument was "the standard attestation 'IN WITNESS WHEREOF, the parties have hereunto set their hands and seals.'" Id., at 174. 609 S.E.2d at 551. Without any other evidence indicating an intent to create a sealed instrument, the Court properly declined to transform a boiler plate lease into a sealed instrument.

In this case, the document at issue is effectively, a court order. The only case in South

Carolina to interpret § 15 3-520(b) as it applies to court orders is Treadaway. The trial court mistakenly disregarded Treadaway in its analysis. The Court's discussion of Treadaway in Lasch further supports the application of the twenty-year limitations period. The Lasch Court emphasized that the document in Treadaway "included future, contingent obligations" much as the Order here contemplates the continuing existence of the Trust. Id., at 173, 609 S E 2d at 551. Furthermore, the Lasch case also states that an inquiry into the parties' intent can be necessary to determine whether a document is a sealed instrument. At the very least, a genuine issue of material fact exists whether the Order and the Settlement Agreement is a sealed instrument. Therefore, the trial court's ruling should be reversed.

Alternatively, a Ten-Year Limitations Period Applies

The McLeans filed quiet title actions against the Thompsons, Money to Go, LLC, Marlboro Academy, James J. Pence, Jr., as Personal Representative of the Estate of Stephen Pence, and Easterling. These are equitable claims and are not barred by the three-year statute of limitations on which the trial court relied. The applicable limitations period for the McLeans' quiet title actions is ten years. See S.C. Code Ann. § 15 3-340. Therefore, the McLeans' claims against these Respondents were timely and the Court should reverse the ruling of the trial court.

V THE TRIAL COURT ERRED IN HOLDING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO THE DATE THE STATUTE OF LIMITATIONS BEGAN TO RUN

The trial court erred in finding that the Jackson letters triggered the statute of limitations.¹ The trial court ignored genuine issues of fact with respect to when the McLeans learned of their claims and failed to view the evidence in the McLeans' favor. The trial court improperly imputed knowledge from Jackson to Norman McLean, to the children of Norman McLean, and between the children of Norman McLean. At the summary judgment stage, the Respondents bore the burden of proving that no genuine issue of material fact existed with regard to each individual McLean's knowledge of their claims. The trial court ignored the summary judgment standard on this factual issue.

First, the trial court improperly concluded that Jackson represented all of the McLeans. To reach this conclusion, the trial court ignored Jackson's testimony on his contact with the McLeans. Jackson testified that he did not know Bob McLean (R p 814). Jackson testified that he did not know Bill McLean (R p 814). Jackson testified that he had never dealt with Marie McLean-Choi on any issues related to this case (R p 814). Jackson testified that he had never spoken to Jim McLean regarding any issue related to this case (R pp 813-14).

The trial court also ignored the testimony of the McLeans regarding their contact with

¹ On Page 17 of its Order, the trial court also mistakenly asserts that the statute of limitations began running when Bill McLean read the Settlement Agreement and Order in February 2002. The trial court again commits the same logical error as in its analysis of Rule 60—assuming that the Settlement Agreement and Order were unfavorable to the McLeans and triggered their duties to contest it. The McLeans' duties could not be triggered until they can be reasonably charged with notice that Respondents intended to prevent them from receiving the Orangeburg real property.

Jackson about this case. While the October 21, 2002, Jackson letter purports to copy Jim McLean, Jim McLean testified that he had never seen the letter before the commencement of this litigation (R pp 1042-44). Bill McLean also testified that he had never seen these letters prior to this litigation (R pp 472-73). Respondents cannot point to any evidence in the record showing that Marie McLean, Choi, or Bob McLean ever saw the Jackson letters at the time they were written or even knew of their existence.

The trial court also ignored the testimony of Bill and Jim McLean regarding conversations with their father regarding the issues surrounding the Trust. Bill McLean testified that he did not have any conversations with his father (or his siblings) about the contents of the Jackson letters in 2002 (R p 551). Jim McLean testified that he did not recall discussing the Jackson letters with his father in 2002 (R p 1045). Instead of finding that their testimony created a genuine issue of material fact, the trial court instead chose to rely on the vague testimony of Norman McLean that he had discussed these matters with his children. At the summary judgment stage, such a finding is impermissible. The trial court should have viewed the evidence in the light most favorable to the McLeans and ruled that a genuine issue of material fact existed as to whether the Jackson letters placed the McLeans on notice of their claims in 2002.

The trial court also seems to have improperly imputed notice of their claims between family members. Each of the McLeans is a plaintiff in this action and is entitled to their own individual adjudication of their rights. Nothing in the law imputes knowledge of facts between family members. Even if the Court were to find that Norman and Jim McLean knew of the Jackson letters in 2002, there is no evidence that Bill, Marie, or Bob McLean knew of these letters. Without any such evidence as to specific facts placing them on notice of their claims in 2002, the trial court

improperly charged them with knowledge of the Jackson letters. For these reasons, the trial court's conclusions of law based on factual findings regarding the Jackson letters must be reversed.

VI THE TRIAL COURT ERRED IN HOLDING THAT DRENNAN REASONABLY RELIED ON THE JACKSON LETTERS

The trial court erroneously ruled that Drennan was entitled to summary judgment because he reasonably relied on the Jackson letters' assertion that the McLeans were not contesting his alleged view of the Settlement Agreement. Whether or not Drennan acted reasonably is an issue for a jury. A jury could easily conclude that Drennan knew the terms of the Order and Settlement Agreement and knew that he had circumvented the requirements of both documents. Furthermore, this holding necessitates a finding that Jackson acted as the agent for all of the McLeans. As previously stated, the evidence conflicts as to whether any of the McLeans knew about Jackson's letters and who, if anyone, Jackson represented. Drennan has not pointed to any evidence showing a manifestation from the principal (each individual McLean) that would allow him to rely on Jackson's letters. Agency may not be proved only by the declarations and conduct of the alleged agent. See R&G Construction, Inc. V Lowcountry Regional Transp. Auth., 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000). Therefore, the trial court's holding as to this issue should be reversed.

VII THE TRIAL COURT ERRED IN HOLDING THAT DRENNAN AND WACHOVIA DID NOT OWE APPELLANTS ANY DUTIES

The trial court erroneously ruled that Drennan and Wachovia did not owe any legal duties to the McLeans. This holding is patently mistaken. The Trust Litigation was between the Trust of which the McLeans were beneficiaries, and the Estate of M. Pence. Drennan became the personal representative of the Estate of M. Pence after P. Pence's death. Drennan has been sued in his capacity as personal representative of the Estate of M. Pence.

The Trust Litigation also included P. Pence as a party in her individual capacity. Wachovia is sued in its capacity as personal representative of P. Pence's estate. P. Pence was the sole beneficiary under M. Pence's estate. The Settlement Agreement and Order also specifically contemplated the creation of the P. Pence trust. The Settlement Agreement and Order required Brogdon to transfer Marlboro County property to P. Pence's trust. Wachovia is the trustee of the P. Pence trust.

The Settlement Agreement, which is a contract, certainly creates legal duties flowing from all of these entities to both the Trust and to its beneficiaries (the McLeans). Furthermore, the Settlement Agreement became a court order, which created duties in the estates and trusts to abide by the court's ruling as to the Orangeburg real property. Pursuant to the terms of the Settlement Agreement and the Order, the Pence estates and trust owed the McLeans a legal duty to see that they received the Orangeburg real property. The trial court erred in allowing Drennan and Wachovia to hide from this responsibility and ignoring the capacities of the parties who have been sued. Drennan and Wachovia both wore several hats during the years when the Orangeburg property was being fought over and subsequently transferred. They cannot avoid liability by repeatedly switching hats.

to camouflage their culpability. Therefore, the trial court's finding that no legal duty existed flowed from Drennan and Wachovia to the McLeans should be reversed.

VIII THE TRIAL COURT ERRED IN HOLDING THAT BROGDON DID NOT OWE APPELLANTS ANY DUTIES

The trial court incorrectly held that Brogdon was entitled to summary judgment because no duty exists requiring a trustee to transfer assets into a trust. Brogdon rightly states that only a settlor can transfer property to a trust. However, in this case, Brogdon acted as both trustee and *de facto* settlor. Brogdon became the *de facto* settlor through his actions as M. Pence's attorney-in-fact.

Brogdon knew that M. Pence wanted the Trust to be created and engaged an attorney to draft the Trust's documents. Brogdon transferred all real property into the trust under authority granted him by M. Pence's power of attorney. In his deposition, Brogdon admitted that all real property owned by M. Pence was to be transferred into the Trust. (R. p. 649.) Brogdon admitted that he knew it was M. Pence's intention that the McLean siblings receive the Orangeburg property. (R. pp. 637-674.)

More importantly, Brogdon took the steps necessary to ensure the McLeans would receive the Caw Caw Swamp property but negligently failed to consummate the transaction. Brogdon stated that he discovered the existence of the Caw Caw Swamp property at the time the Gramling property was deeded into the Trust. (R. p. 664.) The Gramling deed was dated May 28, 1999. M. Pence did not die until four months later, on October 3, 1999. Brogdon admitted that a deed had actually been prepared for him to transfer the Caw Caw Swamp property into the Trust. (R. p. 677.) However, Brogdon never signed the deed. Had Brogdon signed that deed, the McLeans would have received

the Caw Caw Swamp property ²

Under the unique circumstances presented in this case it seems clear that Plaintiffs can show that Brogdon owed them a duty as beneficiaries of the Trust to ensure that the Orangeburg property was deeded into the Trust. It is undisputed that Brogdon understood the responsibilities given him by M Pence with respect to her real property. Brogdon testified that he knew that M Pence wanted all of her real property to go into the Trust (R p 649). He knew that M Pence did not want P Pence to have control over the property because of concerns over P Pence s mental condition (R pp 630 31). He knew that it was M Pence s intention that the McLeans receive the Orangeburg real property.

Q Was it her intention that this land, this McLean family land would be [the McLeans] if her daughter didn t have any issue?

A That s correct.

Q Did she tell you that?

A Yes.

(R p 637) With Brogdon s knowledge, and considering the broad grant of power to Brogdon by M Pence it would inequitable to allow him to avoid responsibility for failing to secure the Orangeburg property for the Trust by finding that no duty flows from him to the Trust s beneficiaries. Otherwise, Brogdon s wrong would be without a legal remedy.

The trial court also found that no genuine issue of material fact existed as to whether Brogdon mismanaged the Trust s assets. Brogdon owed the McLeans the duty to protect and preserve the rights of the Trust to its property. After the Settlement Agreement and Order, the Trust

² Brogdon could also have used a “catch all” provision to transfer any property M Pence owned in Orangeburg County to the Trust. See Dargan v Tankersley, 380 S C 480 488 671 S E 2d 73, 77 (2008).

had the duty to ensure that it received the Orangeburg property Brogdon testified that he knew this was the outcome of the Trust Litigation

Q What was the gist of the settlement?

A The gist of the settlement was that the property in Marlboro County would go to [P Pence] And the Orangeburg County property would go—would be held in trust until [P Pence] s death and then would go to the nieces and nephews of [M Pence] or the niece and nephews

(R p 660) Brogdon also admitted seeing a letter from Drennan to the Trust s attorney claiming that the Caw Caw Swamp property was not part of the Trust (R pp 682-83 and pp 796 97)

Despite this knowledge, Brogdon failed to assert the Trust s rights under the Settlement Agreement Brogdon testified that he just “forgot about” the Caw Caw Swamp property (R pp 677 78) Brogdon could have required Drennan and Wachovia to follow through on the terms of the Settlement Agreement, but he did not Instead, he abandoned the Caw Caw Swamp and Cannon Bridge Road properties to Drennan and Wachovia This represented a serious dereliction of his duties to the Trust’s beneficiaries As stated earlier, if any of the trial court s rulings barring the McLeans’ claims due to the statute of limitations are upheld by this Court, Brogdon s inaction will have permanently prejudiced the McLeans’ rights Therefore, the Court should reverse the trial court s determination that Brogdon neither owed nor breached duties owed to the McLeans

IX THE TRIAL COURT ERRED IN FINDING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO WHETHER MONEY TO GO OR THE THOMPSONS WERE ON RECORD NOTICE OF APPELLANTS' CLAIMS TO THE PROPERTY

The trial court mistakenly ruled that Money to Go and the Thompsons were bona fide purchasers for value. Money to Go and the Thompsons purchased the Caw Caw Swamp property. In order to obtain bona fide purchaser status, Money to Go and the Thompsons were required to prove that no genuine issue of material fact existed that could show they had notice of the McLeans' claims. See Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006). The McLeans do not dispute whether these Respondents paid true consideration, therefore the only issue is whether a title examination in Orangeburg County would place these Respondents on notice of the McLeans' claims.

The trial court failed to properly consider the records of M. Pence's estate that were filed in Orangeburg County. Present in the public records of Orangeburg County is the Inventory and Appraisement of M. Pence's estate (R. pp. 1134-35). The Inventory and Appraisement contains two references to the Trust Litigation. In Schedule F, it lists a "Claim Against Revocable Trust" and directs the reader to an attached explanation (R. p. 1134). The attached explanation states as follows:

During the lifetime of the Decedent, on May 28, 1999, a Revocable Trust was established in her name by James Brogdon, acting under a Power of Attorney given him by the Decedent. The validity of this trust was challenged by the Personal Representative of the Decedent's estate in an action filed in this Court and subsequently removed to Common Pleas Court. On February 26, 2002, the Court of Common Pleas approved a Compromise and Settlement Agreement which concluded

this action

(R p 1135) This explanation specifically mentions the Settlement Agreement which confirms the McLeans claims to the Caw Caw Swamp property in Exhibit B

A prudent title researcher, having seen this mention of the Trust Litigation would have obtained a copy of the Settlement Agreement from the Marlboro County court The Settlement Agreement, specifically Exhibit B, lists the Caw Caw Swamp property as belonging to the Trust This evidence creates a genuine issue of material fact as to Money to Go and the Thompson s notice The trial court failed to view the mention of the Trust Litigation in Orangeburg's public records as a fact in the McLeans favor The trier of fact could reasonably conclude that this document required a title researcher to obtain and review the Settlement Agreement Carrying the factual inference one step further, a review of the Settlement Agreement could be found by the trier of fact to place the title researcher on notice of the McLeans claims Therefore, a genuine issue of material fact exists as to whether Money to Go and the Thompsons are bona fide purchasers and the trial court s judgment must be reversed

CONCLUSION

For the reasons stated above, the judgment of the trial court should be REVERSED and this case should be remanded for trial before a jury

August 30, 2010



David Alexander (SC Bar No 68632)
CULBERTSON + ALEXANDER LLC
Post Office Box 1904 (29602)
110 Williams Street
Greenville, South Carolina 29602
david@culbertsonalexander.com
Tel (864) 370 8222/Fax (864) 370-8227
ATTORNEY FOR THE APPELLANTS

THE STATE OF SOUTH CAROLINA
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Court of Common Pleas

Honorable Diane S. Goodstein, Circuit Judge

Case No. 2006-CP-38 1523

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Robert L. McLean and JL McLean Properties, LLC Appellants

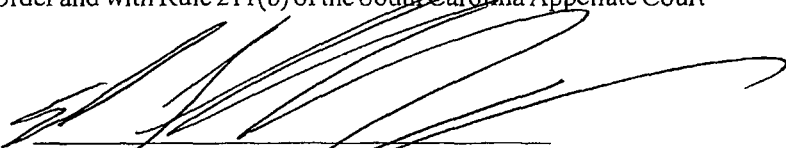
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Trust, Marlboro Academy, Inc., Charles P. Thompson, Jr., Cheri (Cheryl) Brown Thompson
Money to Go, LLC, James J. Pence, Jr., as Personal Representative of the Estate of Stephen
Pence and Harry R. Easterling, Jr. Respondents

CERTIFICATE OF COMPLIANCE

I certify that the Final Brief of Appellant and Final Reply Brief of Appellant comply with
Supreme Court's August 13, 2007 Order and with Rule 211(b) of the South Carolina Appellate Court
Rules.

August 30, 2010



David Alexander (SC Bar No. 68632)
CULBERTSON + ALEXANDER, LLC
Post Office Box 1904 (29602)
110 Williams Street
Greenville, South Carolina 29601
david@culbertsonalexander.com
Telephone (864) 370-8222
Facsimile (864) 370 8227
ATTORNEY FOR THE APPELLANTS

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Money to Go, LLC, James J. Pence, Jr., as Personal Representative of the Estate of Stephen
Pence and Harry R. Easterling, Jr. Respondents

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant and Final Reply Brief of Appellant
on the following parties by depositing a copy of it in the United States Mail, postage prepaid, on
August 30, 2010, addressed to their attorneys of record as indicated below:

Matthew H. Henrikson, Esq.
Clarkson Walsh Rheney & Terrell
Post Office Box 6728
Greenville, South Carolina 29606
Attorney for James B. Drennan, III

James Randall Davis, Esq.
Nicholson Davis Frawley Anderson & Ayer
PO Box 489
Lexington, SC 29701
Attorney for Money to Go, LLC

Harry R. Easterling, Sr., Esq.
Goldberg & Easterling, PA
PO Drawer 655
Bennettsville, SC 29512
Attorney for James J. Pence, Jr. and
Harry R. Easterling, Jr.

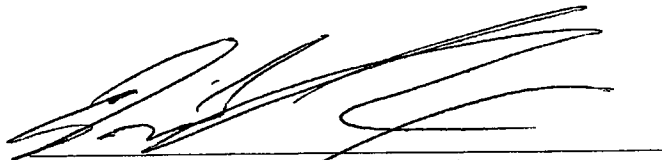
Edward B. Davis, Esq.
Bell Davis & Pitt, PA
227 W. Trade Street, Suite 2160
Charlotte, NC 28202
Attorney for Wachovia Bank

Jeffrey L. Payne, Esq
Turner Padgett Graham and Laney PA
PO Box 1473
Columbia, SC 29201
Attorney for James E. Brogdon Sr

W. Cliff Moore III Esq
Ellis Lawhorne & Sims PA
PO Box 2285
Columbia SC 29202
Attorney for Charles P. Thompson, Jr. and
Cheri (Cheryl) Brown Thompson

John J. James, II, Esq
Pauling & James, LLP
PO Box 507
Darlington, SC 29540
Attorney for Marlboro Academy Inc

August 30, 2010



David Alexander (SC Bar No. 68632)
CULBERTSON + ALEXANDER, LLC
Post Office Box 1904 (29602)
110 Williams Street
Greenville, South Carolina 29601
david@culbertsonalexander.com
Telephone (864) 370 8222
Facsimile (864) 370 8227
ATTORNEY FOR THE APPELLANTS

**THE STATE OF SOUTH CAROLINA
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Honorable Diane S Goodstem, Circuit Court Judge

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(Cheryl) Brown Thompson, Money to Go, LLC, James J Pence, Jr, as Personal
Representative of the Estate of Stephen Pence, and Harry R. Easterling,
Jr .. Respondents**

PROOF OF SERVICE

**I certify that I have served the Final Brief of Respondents Money To Go, LLC and
Charles P Thompson, Jr and Chen (Cheryl) Brown Thompson on the following parties by
depositing a copy of it in the United States Mail, postage prepaid, on August 26, 2010,
addressed to their attorney of record as indicated below**

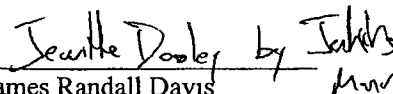
**Matthew H Hennickson, Esquire
Clarkson Walsh Rhency & Terrell
P O Box 6728
Greenville, SC 29606
Attorney for James B Drennan, III**

**J Rene Josey/Jeffrey L. Payne
Turner, Padgett, Graham & Laney, P.A.
P O Box 5478
Florence, SC 29502-5478
Attorneys for James E Brogdon, Sr**

Harry R Easterling, Sr Esquire
Goldberg & Easterling PA
P O Drawer 655
Bennettsville SC 29512
Attorney for James J Pence, Jr and
Harry R Easterling Jr

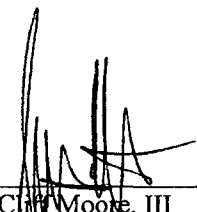
David Alexander, Esquire
Culbertson & Alexander LLC
P O Box 1904
Greenville, SC 29602
Attorney for Appellants

August 25, 2010


James Randall Davis
SC Bar No 1580
A Jewitte Dooley
SC Bar No 77694
DAVIS, FRAWLEY, ANDERSON,
McCAULEY, AYER FISHER, & SMITH
LLC
140 East Main Street
Post Office Box 489
Lexington South Carolina 29071
ATTORNEYS FOR RESPONDENT
MONEY TO GO LLC

Edward B Davis Esquire
Bell Davis & Pitt PA
227 W Trade Street, Suite 2160
Charlotte, NC 29202
Attorney for Wachovia Bank

John J James, Esquire
Pauling & James, LLP
P O Box 507
Darlington, SC 29540
Attorney for Marlboro Academy, Inc


W Clay Moore, III
SC Bar No 4067
Jenkins M Mann
SC Bar No 74894
ELLIS LAWHORNE & SIMS P A
1501 Main Street
Post Office Box 2285
Columbia, South Carolina 29202
Telephone 803-254-4190
Facsimile 803 779-4749
ATTORNEYS FOR RESPONDENT
CHARLES P THOMPSON, JR AND
CHERI (CHERYL) BROWN THOMPSON

THE STATE OF SOUTH CAROLINA
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(Cheryl) Brown Thompson Money to Go, LLC James J Pence, Jr, as Personal
Representative of the Estate of Stephen Pence and Harry R Easterling,
Jr Respondents

CERTIFICATE OF COMPLIANCE

I do hereby certify that the Final Brief of Respondents Money to Go, LLC and
Charles P Thompson, Jr and Chen (Cheryl) Brown Thompson filed and served on August
25, 2010 complies with Rule 211(b) SCACR

Jewitte Dooley
James Randall Davis
SC Bar No 1580
A Jewitte Dooley
SC Bar No 77694
DAVIS FRAWLEY ANDERSON
McCAULEY, AYER FISHER & SMITH
LLC
140 East Main Street
Post Office Box 489
Lexington South Carolina 29071
ATTORNEYS FOR RESPONDENT
MONEY TO GO, LLC

W. Clifton Moore III
W Clifton Moore III
SC Bar No 4067
Jenkins M Mann
SC Bar No 74894
ELLIS, LAWHORNE & SIMS P A
1501 Main Street
Post Office Box 2285
Columbia, South Carolina 29202
Telephone 803 254-4190
Facsimile 803-779 4749
ATTORNEYS FOR RESPONDENT
CHARLES P THOMPSON, JR AND
CHERI (CHERYL) BROWN THOMPSON

Columbia South Carolina
August 25 2010

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FINAL BRIEF OF RESPONDENTS MONEY TO GO, LLC, CHALES P THOMPSON, JR. AND CHERI (CHERYL) BROWN THOMPSON

James Randall Davis
SC Bar No. 1580
A. Jewitte Dooley
SC Bar No. 77694
DAVIS, FRAWLEY ANDERSON,
McCAULEY, AYER, FISHER &
SMITH, LLC
Post Office Box 489
Lexington, South Carolina 29071
Phone (803) 359-2512
Fax (803) 356-1138
ATTORNEYS FOR MONEY TO
GO, LLC

-AND

W. Cliff Moore III
SC Bar No. 4067
Jenkins M. Mann
SC Bar No. 74894
ELLIS, LAWHORNE & SIMS, P.A.
Post Office Box 2285
Columbia, South Carolina 29202
Telephone 803-254-4190
Facsimile 803-779-4749
ATTORNEYS FOR CHARLES P
THOMPSON, JR. AND CHERI
CHERYL BROWN THOMPSON

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Argument IV

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**THE LOWER COURT PROPERLY CONCLUDED THAT
MONEY TO GO AND THE THOMPSONS WERE BONA
FIDE PURCHASERS FOR VALUE WITHOUT NOTICE OF
APPELLANTS' CLAIMS**

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STATEMENT OF ISSUES ON APPEAL

- 1 DID THE LOWER COURT CORRECTLY CONCLUDE THAT THIS ACTION WAS NOT TIMELY FILED PURSUANT TO RULE 60 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE?
- 2 DID THE LOWER COURT CORRECTLY CONCLUDE THAT THIS ACTION WAS NOT TIMELY FILED PURSUANT TO THE SOUTH CAROLINA PROBATE CODE?
- 3 DID THE LOWER COURT CORRECTLY CONCLUDE THAT A THREE YEAR STATUTE OF LIMITATIONS APPLIED TO THIS ACTION AND THAT IT WAS NOT TIMELY FILED PURSUANT TO S C CODE §15-3-530?
- 4 DID THE LOWER COURT CORRECTLY CONCLUDE THAT MONEY TO GO AND THE THOMPSONS WERE BONA FIDE PURCHASERS FOR VALUE WITHOUT NOTICE OF APPELLANTS CLAIMS?

STATEMENT OF THE CASE

On December 20, 2006, Norman M. McLean, James N. McLean, Marie McLean-Choi, William N. McLean, Robert L. McLean, and JL McLean Properties, LLC (Appellants) filed suit in the Orangeburg County Court of Common Pleas naming as defendants Money to Go, LLC (Money to Go), Charles P. Thompson, Jr. and Cheri (Cheryl) Brown Thompson (Thompsons) along with numerous other defendants (R pp 41-59). In their Complaint, Appellants asserted an action to quiet title, an action for declaratory judgment, an action for a constructive trust and an action for unjust enrichment against Money to Go and the Thompsons claiming ownership or the value of Tracts 2-A and 2-B of the Caw Caw Swamp Property (R pp 41-59). Money to Go served its Answer on March 5, 2007, asserting two defenses, including a defense of a good faith purchaser for value (R pp 60-62). The Thompsons also filed and timely served their Answer, asserting two defenses, including a good faith purchaser for value and that the statute of limitations barred the Appellants' claims. The Thompsons subsequently amended their Answer on March 28, 2007, and asserted thirteen defenses, including again the defenses of good faith purchaser for value and the statute of limitations as a bar to Appellants' claims (R pp 74-95).

On March 6, 2007, and March 13, 2008, Money to Go and the Thompsons filed their motions for summary judgment under Rule 56, SCRPC, seeking dismissal of Appellants' claims relating to Tracts 2-A and 2-B of the Caw Caw Swamp Property (R pp 108-112, R pp 113-164). The summary judgment motion was argued before Judge Diane S. Goodstein on May 12,

2008 (R pp 1-27) The Court issued its Order on or about July 14, 2009 granting Summary Judgment to the Defendants (R pp 1-27)

Appellants filed and served a timely Notice of Appeal on July 30, 2009

STATEMENT OF FACTS

This appeal involves the ownership of three properties in Orangeburg County the Gramling Place Property, the Cannon Bridge Road Property and the Caw Caw Swamp Property. Presently the Appellant Norman M McLean s issue own the Gramling Place Property Marlboro Academy Inc Harry Easterling Jr and the Estate of Stephen Pence own the Cannon Bridge Road Property, and Money to Go, LLC (Money to Go) and Charles and Cheryl Thompson (Thompson”) own Tracts 2-A and 2 B of the Caw Caw Swamp Property, respectively

At one time all three pieces of property were owned by Elizabeth McLean Pence (M Pence) who intended for the properties to be placed in the Trust of Elizabeth McLean Pence (Trust) prior to her death. However, only the Gramling Place Property was actually put into the Trust. The Caw Caw Swamp Property and the Cannon Bridge Road Property were never transferred into the Trust—a fact that is undisputed by all parties.

On June 30, 1998, M Pence, who at the time owned all three properties, gave James E Brogdon (Brogdon) a durable power of attorney. On May 28, 1999, Brogdon created and executed the Trust and conveyed the Gramling Place Property into the Trust. The Trust provided for Elizabeth P Pence (P Pence) M Pence s daughter to receive all income from the Trust during P Pence s lifetime, and upon her death, the assets of the Trust would be divided evenly among P Pence s living issue. Respondent William N “Bill” McLean, one of Norman M McLean s sons, was named as successor trustee. If P Pence died without living issue, the “McLean family land in Orangeburg County” was to be distributed to Norman M McLean s issue per stirpes.

M Pence died on October 3, 1999. Shortly thereafter, her estate was probated in the Marlboro County Probate Court and pursuant to her will the Caw Caw Swamp Property passed to P Pence. On October 19, 2000 more than a year after M Pence's death, P Pence commenced litigation challenging the validity of the Trust ("Trust Litigation"). Appellants were not a party to that action and the only properties before the court in that litigation were the properties which had been deeded to the Trust. On February 26, 2002, the parties to the Trust Litigation entered into a Settlement Agreement whereby 60% of the trust assets were to be removed from the Trust and distributed to P Pence and the remaining 40% of the Trusts assets were to stay in the Trust.

Again the Gramling Road property was the only Orangeburg property owned by the Trust. The deeds to both the Caw Caw Swamp Property and the Cannon Road Property were still in M Pence's name at the time of her death and as such, they passed to P Pence through M Pence's will and were not subject to the October 19, 2000 Trust Litigation or the February 26, 2002 Settlement Agreement. One of the exhibits to the Settlement Agreement, however erroneously listed the Caw Caw Swamp Property, but not the Cannon Road Property as included in the Trust's property assets. As part of the Settlement Agreement, Respondent Bill McLean received the proposed Settlement Agreement and waived his right to serve as successor trustee.

On August 26, 2002, P Pence died without issue and Wachovia Bank became the personal representative of her estate. Pursuant to the Trust, the Appellants received the Gramling Place Property. Pursuant to §62-3-801 of the South Carolina Code Annotated on September 16, 23, and 30, 2002 Wachovia published notice to creditors in the Marlboro Herald, notifying creditors of the estate of P Pence to present their claims within 8 months of notice or be forever barred. No claims were filed within the eight months.

Beginning on September 27, 2002 after [being] asked by Jim McLean who is the son of Norman McLean, to review a number of documents includ[ing] the Trust [A]greement, attorney James Jackson (Jackson) corresponded with James B Drennan III (Drennan) (R p 4) On October 1, 2002 Drennan responded to Jackson explaining that the Caw Caw Swamp Property was never deeded to the Trust On October 21 2002 Jackson replied by letter first noting [my clients] do accept that the Caw Caw property and the Cannon Bridge Road property in which Elizabeth had a remainder interest were not put in the trust [W]e accept that title to those properties passed through the Wills of [M Pence] and [P Pence] and then offering to purchase the properties (R p 5) Again on January 17, 2003, Jackson reiterated his clients interest in purchasing both the Caw Caw Swamp Property and the Cannon Bridge Road Property In all of these letters Jackson mentions his clients' and copies Jim McLean (these letters hereinafter may sometimes be referred to collectively as Jackson/Drennan Letters)

On July 23, 2004 over two years after the Settlement Agreement and P Pence s death, Wachovia Bank as personal representative of the P Pence s estate sold Tract 2-A of the Caw Caw Swamp Property to Money to Go and Tract 2-B of the Caw Caw Swamp Property to the Thompsons

The Appellants commenced the present action on December 19, 2006 more than two years after Wachovia conveyed the Caw Caw Swamp Property to the Thompsons and Money to Go, more than four years after P Pence s death, after Bill McLean s waiver, after Jackson/Drennan Letters, and after Wachovia gave notice to creditors in the Marlboro Herald, and more than six years after M Pence s death and after the Trust Litigation

STANDARD OF REVIEW

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56, SCRPC *Companion Prop and Cas Ins Co v Airborne Express Inc*, 369 S C 388 390, 631 S E 2d 915 916 (Ct App 2006)(citing *Cowburn v Leventis* 366 S C 20, 30, 619 S E 2d 437, 443 (Ct App 2005)) Summary judgment should be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law *Id* at 390-91, 631 S E 2d at 916([appellate court s] standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom)

ARGUMENT I

THE LOWER COURT PROPERLY CONCLUDED THAT THIS ACTION WAS NOT TIMELY FILED PURSUANT TO RULE 60 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE

In granting summary judgment the lower court properly reached the conclusion that as a matter of law this action was not timely filed pursuant to Rule 60 and this Court should affirm summary judgment on these grounds. It is undisputed that the Settlement Agreement became a Court Order on February 26, 2002 (hereinafter sometimes collectively referred to as Order and Settlement Agreement). Rule 60(b) SCRPC therefore applies and governs the time period a party has to make a motion for relief from an order. According to Rule 60(b), a motion to correct a mistake in an order must be made within one year from the date of entry of the order. Applying the mandated time limitations created by 60(b) to this case, Appellant would have had to file a motion to correct any alleged mistake in the Order and Settlement Agreement by February 26, 2003. Five years later Appellants' efforts to circumvent Rule 60(b)'s time limitations by filing this lawsuit are barred as a matter of law.

Appellants claim that there was not a mistake in the Order and Settlement Agreement but that if there was it was in their favor and they were therefore not aggrieved by the Order and Settlement Agreement and not required to file a Rule 60(b) motion. Specifically Appellants argue that the Order and Settlement Agreement required P. Pence to transfer all of the Orangeburg real property to the Trust because it provided that the Orangeburg real property be distributed to the issue of the Settlor's brother. First Appellants' argument completely disregards the fact that the Order and Settlement Agreement specifically states that "[a]ll Orangeburg County, South Carolina real property which is owned by the Trust shall be retained in trust by the Trustee" meaning that the application of the Order and Settlement Agreement was

only as to the property already owned by the Trust at the time the Order and Settlement Agreement was executed (R p 33) The only Orangeburg property that was in the Trust was the Gramling Road property It is undisputed that the Caw Caw Swamp Property was never deeded to the Trust

Second, Appellants fail to consider that the Trust Litigation creating the Order and Settlement Agreement only dealt with the property that was legally part of the Trust The Caw Caw Swamp Property was not deeded to the Trust during M Pence s life (R p 664, line 1-p 665, line 21) It is axiomatic in South Carolina that at death title divests immediately to the decedent s beneficiaries *JF Floyd Mortuary Inc v Newman*, 22 S C 421 424, 73 S E 2d 444 445 (1952) (*citing Galloway v Galloway* 76 S C 524, 57 S E 528 (1907)) Accordingly, when M Pence died title to the Caw Caw Swamp Property immediately passed to P Pence pursuant to the Last Will and Testament of M Pence (R pp 1128-1129) In effect Appellants are trying to bootstrap ‘ the Orangeburg real property language to address property outside of the Trust and the Trust Litigation and effectively take property from M Pence s estate The Trust clearly imposes no affirmative duty on the P Pence Trust to transfer the Caw Caw Swamp Property to the Trust Therefore if this was the intent of the Order and Settlement Agreement as Appellants allege it would have obviously contained a mistake requiring the Appellants to file a timely rule 60(b) motion

Further, Appellants contend that a scrivener s error listing the Caw Caw Swamp Property on an exhibit attached to the Order and Settlement Agreement made that property part of the Trust The trial court correctly determined that the exhibit was for valuation purposes only used to set forth the basis of the 60/40 division of assets (R p 10) Again, as outlined above according to the Order and Settlement Agreement 60% of the Trust assets were to be removed

from the Trust and distributed to P Pence and the remaining 40% of the Trusts assets were to stay in the Trust (R pp 28-40) The Gramling Road property the only Orangeburg property in the Trust, accounted for approximately 40% of the value of the Trust and it stayed in the Trust If the Court were to entertain Appellants' argument and consider the Caw Caw Swamp Property a part of the division, the value of Caw Caw Swamp Property added to the value of the Gramling Road property would well exceed 40% of the Trust property and the 60/40 division would not have been followed

Additionally, the Jackson/Drennan Letters specifically contradict Appellants' contention that they had no reason to challenge the Order and Settlement Agreement because they believed the Caw Caw Swamp Property was remaining in the Trust The Jackson/Drennan Letters, discussed extensively below, clearly establish that as of October 21, 2002 at the latest, Appellants were on notice that the Caw Caw Swamp Property had not been deeded into the Trust In an effort to counter the Jackson/Drennan Letters, Appellants rely on the deposition testimony of Appellant Bill McLean, in which he admits he received a copy of the Order, but claims that he misunderstood it His failure to understand the Order does not alleviate the time limitations imposed by Rule 60 In fact, the testimony cited by the Appellants in their brief simply corroborates that Appellant Bill McLean was on notice of the Order and Settlement Agreement and the Jackson/Drennan letters belie the Appellants' contention that they did not understand the Order or otherwise know that the Caw Caw Swamp Property was not part of the Trust

Finally, Appellants contend that if in fact they were bound by Rule 60(b) that Respondent Brogdon as trustee should have protected their interest Even if this were a valid argument this in no way implicates Respondents Money to Go or the Thompsons who were

good faith purchasers for value and who acquired their respective properties without notice of the claim Appellants now advance. As such, the lower court correctly found that the Appellants were bound by the one year statute of limitations prescribed by Rule 60(b), and their failure to make a timely motion is an absolute bar to their now-asserted claims.

ARGUMENT II

THE LOWER COURT PROPERLY CONCLUDED THAT THIS ACTION WAS NOT TIMELY FILED PURSUANT TO THE SOUTH CAROLINA PROBATE CODE

The trial court correctly held Appellants' claims were time-barred by the non claim statute of the South Carolina Probate Code. Section 62-3-801(a) of the South Carolina Probate Code requires that a personal representative publish notice to creditors once a week for three weeks in a newspaper of general circulation, notifying creditors of the estate to present their claims within eight months after the date of first publication of the notice or be forever barred. Wachovia as Personal Representative for the Estate of P. Pence published the required notice in the *Marlboro Herald* on September 16, 23, and 30, 2002 as prescribed by the statute. (R. p. 4)

A claim under the statute includes liabilities of the decedent or protected person whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator. S.C. Code Ann. § 62-1-201(4) (2009). The time requirements for making a claim against the estate are set out in § 62-3-803(a) of the South Carolina Probate Code which provides:

All claims against a decedent's estate which arose before the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis if not barred earlier by other statutes of limitations, are barred against the estate, the personal representative and the heirs and devisees of the decedent, unless presented within the earlier of the following dates: (1) one year after the decedent's death, or (2) within the time provided by Section 62-3-801(b) for creditors who are given actual notice and within the time provided in Section 62-2-801(a) for all creditors barred by publication."

Rather than a statute of limitations, this is a non-claim statute which bars all claims not timely filed against the estate. 64 Op. Att'y Gen. 1777, 296 (1963).

Appellants have conceded that any duty that can be alleged to be owed by P Pence was contractual in nature and arose before her death (R p 13) The trial court, therefore correctly applied § 62-3-803(a) and held that Appellants' instant claims were time barred Applying these statutes to the facts of this case, Appellants would have had to file by May 16, 2003, or their claim became time-barred The instant litigation was not filed until December 19, 2006, more than three and a half years after their claim was time-barred by the Probate Code The Appellants' failure to file the instant action on or before May 16, 2003 is an absolute bar to their recovery

Appellants, however, incorrectly contend their claims were litigated in the Order and Settlement Agreement and that they, therefore, did not have to also file a claim Appellants present no evidence at all that their alleged claim to the Caw Caw Swamp Property was litigated in the Trust Litigation In fact, to the contrary, the Trust Litigation was exactly that trust litigation, it was litigation over and involving only those assets that were legally and legitimately part of the Trust The Caw Caw Swamp Property could not have been and was not part of that litigation as it was never owned by the Trust

Appellants contend, in the alternative, that they did not know they had a claim against P Pence or her estate because they thought their rights were protected – i.e. that the Order and Settlement Agreement required P Pence to transfer assets into the Trust This contention is clearly contradictory to the facts in this case and is equally unavailing While Respondents specifically deny that the Order and Settlement Agreement put any contractual duty whatsoever on P Pence, assuming, *arguendo*, that it did in fact require her to transfer the Caw Caw Swamp Property into the Trust, the fact that she did not do so (which is undisputed) would have necessarily given rise to a claim against her estate The only issue then would be whether

Appellants were on notice that P Pence had not transferred the Caw Caw Swamp Property into the Trust prior to May 16 2003 Yet, as the record reveals Appellants were on notice that P Pence had not transferred the Caw Caw Swamp Property into the Trust no later than October of 2002 well within the time period for a claim against her estate Specifically the Jackson/Drennan Letters – correspondence between James Jackson, the McLean family lawyer, and Respondent James Drennan, attorney for P Pence s personal representative Wachovia Bank written in late 2002 and early 2003 – clearly indicate that the Appellants were on notice that the Caw Caw Swamp Property was never put into the Trust Specifically, on October 21, 2002, two months after P Pence’s death and thus within the statutory period allowed for claims, Jackson wrote

I have discussed the matter with my clients and they do accept the fact that the Caw Caw property and the Cannon Bridge Road property in which Elizabeth had a remainder interest were not put into the trust Therefore we accept that title to those properties passed through the Wills of Elizabeth Pence the mother, and Elizabeth Pence the daughter

(R p 1000)

The Respondents failure to comply with §62-3-803 and timely file a claim with the Court was not because they lacked notice that the Caw Caw Swamp Property had not been transferred to the Trust To the contrary, they were aware that the Caw Caw Swamp Property had not been deeded to the Trust by October of 2002 If, as they claim it was their understanding that the Order and Settlement Agreement required that P Pence transfer the property to the Trust they were aware that a claim against her estate existed well within the time period for filing, yet they did not file a claim Their failure to do so is an absolute bar to their instant claims as a matter of law

Finally, Appellants contend that the Respondent s should be estopped from claiming the statute of limitations as a defense if Appellants delay in bringing their instant claims was induced by the Respondents conduct First Respondents adamantly deny that they in any way induced Appellants to delay bringing the instant action, and Appellants present no evidence whatsoever in support of the claim Furthermore the authority cited by the Appellant for the proposition specifically deals with a statute of limitations defense Section 62-3-803 is not a statute of limitations, as mentioned above, but is a non-claim statute The time requirements imposed by a non claim statute cannot be extended by estoppel 31 Am Jur 2d *Executors and Administrators* § 607

As such the lower court correctly held that that there is no genuine issue of material fact regarding § 62-3-803 Appellants did not timely file a claim as required by the Probate Code Therefore, as a matter of law, the Respondents were—and are—entitled to summary judgment

ARGUMENT III

THE LOWER COURT PROPERLY CONCLUDED THAT A THREE YEAR STATUTE OF LIMITATIONS APPLIED TO THIS ACTION AND THAT IT WAS NOT TIMELY FILED PURSUANT TO S C CODE §15-3-530

A) The Three Year Statute of Limitations Under §15-3-530 Applies and Bars Appellants' Action

The trial court correctly held that even assuming *arguendo* the Appellants were not required to timely file a Rule 60(b) motion or file a claim within the time period provided in § 62-3-803, a three year statute of limitations applied and time-barred their instant claims. The Appellants have alleged four causes of action which are directed toward or implicate Respondents the Thompsons and Money to Go – their first (quiet title – Caw Caw Swamp Property), their third (Declaratory Judgment), their seventh (Constructive Trust) and their eighth (Unjust Enrichment) causes of action. Each of these claims is a claim as third-party beneficiaries to the Trust Litigation and P Pence estate. As such, these causes of action involve the finality protection given to the Order and Settlement Agreement or the P Pence Estate and are therefore subject to the three year statute of limitations imposed by § 15-3-530(1). According to S C Code Ann. § 15-3-530, these claims must be brought within three years from the date the party knew or should have known by exercise of reasonable diligence that a cause of action exists. *Martin v. Companion Healthcare Corp.*, 357 S C 570, 593 S E 2d 624 (Ct App 2004). The test is not whether the plaintiff knew he had a claim, but rather whether circumstances exist to put him on notice that a right has been invaded. *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S C 386-395, 593 S E 2d 183-187 (Ct App 2004). The purpose of this is to require the plaintiff to act with some promptness. *Id.* at 394-95, 593 S E 2d at 187.

As mentioned above in proceedings such as this involving third parties, a Court order binding the Trustee also binds the trust beneficiaries S C Code Ann § 62-1-403(2)(u) The binding Order and Settlement Agreement in this case was executed on February 26, 2002, at which point the statute of limitations began to run Appellants had until February 26 2005 to bring their instant claims Their failure to do so is an absolute bar to their instant claims

However, even assuming for the sake of argument that pursuant to § 62-1-403(2)(u), the three-year statute of limitations did not begin to run on February 26 2002 applying the *Rumpf* notice test to the facts in this case, Appellants were absolutely on notice no later than October of 2002, and any claim to the contrary is disingenuous ¹ The record reveals the following

- 1) Appellant James McLean knew, while P Pence was still alive, that the Gramling Road Property had been deeded to the Trust and that the Caw Caw Swamp and Cannon Bridge Road properties had not (R p 1026, line 3–p 1028, line 23) Appellant William McLean, on February 25 2002, signed a document releasing his right to be a successor to Brogdon and at that time received what he described as a ‘partial faxed copy of the Settlement Agreement ’ (R p 437, line 13 –p 439, line 20)
- 2) Perhaps most notably, the Jackson/Drennan Letters undeniably demonstrate Appellants were on notice of their instant claims by October 21, 2002, at which time Jackson, the McLean s attorney, wrote the following to Drennan

I have discussed the matter with my clients and they do accept the fact that the Caw Caw property and the Cannon Bridge Road property in which Elizabeth had a remainder interest were not put into the trust Therefore we accept that title to those properties

¹ Appellants contend that they were unaware of the breach of contract rights that they now claim until approximately July 2004 when Wachovia Bank as personal representative of the Estate of Elizabeth Pence sold the Caw Caw Swamp Property

passed through the Wills of Elizabeth Pence, the mother, and Elizabeth Pence, the daughter

(R pp 1000) In this same letter, Jackson goes on to note that his clients do accept that the properties were not put in trust and are willing to purchase these two properties (R pp 1000-1001)

Setting aside for the sake of argument, that Appellant James McLean knew during P Pence s life that she had not transferred the Caw Caw Swamp Property into the Trust and further setting aside that Appellant William McLean actually received a partial faxed copy of the Settlement Agreement' the Jackson/Drennan Letters clearly establish that, at the latest, the statute of limitations began to run for the Plaintiffs instant claims on October 21 2002 Despite Appellants strained argument that Jackson did not represent them, in all of these letters, Mr Jackson mentions his clients and copies Appellant James McLean Appellant Norman McLean even concedes during his deposition that his children knew he was asking Jackson to write a letter to Drennan to inquire about *purchasing* the Caw Caw Swamp Property (R p 918 line 23-p 922, line 8) In fact according to their own deposition testimony, by October of 2002 the Appellants knew or had reason to know that the Caw Caw Swamp Property was not part of the Trust (R p 437, line 13 -p 439 line 20, R p 1026, line 3-p 1028 line 23, p 1033 line 2-11, R p 918, line 23-p 922, line 8)

It is a well-settled principle of law that the knowledge of an attorney is imputed to his clients 7A C J S *Attorney and Client* § 224 Accordingly Appellants claims in the instant action became time-barred on October 21, 2005, three years after the McLean family attorney acknowledged (and effectively waived) Appellants' instant claims Appellants did not bring the instant action until December 20 2006 The lower court therefore, properly concluded that this action is barred by the statute of limitations

B) The Twenty Year Statute of Limitations Under § 15-3-520(b) Does Not Apply to this Action

The trial court correctly rejected the Appellants' argument that the twenty-year statute of limitations provided by S C Code Ann § 15-3-520(b) should apply. Section 15-3-520(b) allows for a twenty-year statute of limitations for actions upon sealed instruments. The determination of what is a sealed instrument is based on the intentions of the parties to create a sealed instrument. S C Code Ann § 19-1-160. There is absolutely no evidence in the record nor do Appellants argue that the parties to the Settlement Agreement intended to make this a sealed instrument.

The Appellants advance three reasons why the Order and Settlement Agreement are sealed instruments: 1) The language appearing before the signatures on both documents reads 'the parties have hereunto set their hands and seals,' 2) The Order contains the stamp and seal of the circuit court, and 3) The obligations contemplated by the Order and Settlement Agreement will continue for a period beyond three years. All of these reasons are incorrect and would otherwise be insufficient to create a sealed instrument.

First, the language appearing in the attestation clause that Appellants rely on is standard, boilerplate language common to all types of contracts, including non-sealed contracts. *Carolina Marine Handling Inc v Lasch*, 363 S C 169, 175, 609 S E 2d 548, 552 (Ct App 2005). There is nothing legally significant about the attestation clause in this case. Courts should only impose the twenty-year statute of limitations where the contract unmistakably shows intent to create a sealed instrument, otherwise the court would convert the twenty-year statute of limitations into the standard. *Id.* Again, Appellants set forth no facts or even argument that it was the intention of the parties to create a sealed instrument. Instead, Appellants erroneously rely on *Treadway v Smuth*, 325 S C 367, 479 S E 2d 849 (Ct App 1996) for the argument that the language in the Settlement Agreement somehow indicates that it should be treated as a sealed instrument.

Appellants fail to mention that the separation agreement at issue in *Treadway* included additional language, not included in the Settlement Agreement in this case. *Id.* at 378, 479 S.E.2d at 855. Specifically, in *Treadway*, immediately following the standard language in prominent type was 'SIGNED SEALED AND DELIVERED IN THE PRESENCE OF.' *Id.* This language does not appear anywhere in the Settlement Agreement in this case.

Second, the fact that the Settlement Agreement was made a court order and stamped by the Court of Common Pleas is not relevant to the decision of whether it is a sealed instrument. Appellants cite no authority for the notion that a Court order somehow becomes a sealed document when it is clocked in by the clerk's office. This argument has no merit; certainly, it cannot be Appellants' contention that every document stamped by the Court of Common Pleas is a sealed instrument with a twenty-year statute of limitations.

Lastly, the Appellants attempt to relate the obligations in the separation agreement in *Treadway* to the obligations in the Order and Settlement Agreement in this case. This argument is unpersuasive. As opposed to the separation agreement, which includes future, contingent obligations relating to the father's responsibility for the children's educational expenses, the Appellants do not and cannot point to any corresponding future obligations contemplated by the Trust. *Treadway* at 374-75, 419 S.E.2d at 853-54. Based on the above reasoning, the trial court correctly relied on *Carolina Marine* in making its decision to deny the Appellants' request to impose the twenty-year statute of limitations in this case.

C) The Ten Year Statute of Limitations Was Not Adequately Raised Below, Is Not Preserved For Appeal, and Is Otherwise Inapplicable

As a last effort, Appellants argue that alternatively, a ten-year statute of limitation applies pursuant to §15-3-340 S.C. Code Ann. This application of the statute was not raised at the trial court argument or in any of the Appellants' memoranda opposing summary judgment. It

should not be considered for the first time on appeal *See Wilder Corp v Wilke* 330 S C 71 497 S E 2d 731 (1998) While the Appellants did suggest that the ten year statute was applicable in their proposed order to the trial court there was no ruling from the trial court on this issue The issue, therefore was not properly raised to and ruled upon by the trial court and therefore, is not preserved for this appeal² *Great Games Inc v S C Dep t of Revenue*, 339 S C 79, 529 S E 2d 6 (2000)

² Without conceding Appellants waiver of these arguments the ten year statute of limitations provided for under §15-3-340 would be inapplicable even if it had been properly raised ruled upon and therefore preserved for this Court s review In *McKinnon v Summers* 224 S C 331 79 S E 2d 146 (1953) the Court took up nearly this identical issue At issue was an effort to recover real property by the nullification of a deed for alleged forgery The *McKinnon* Court held that the applicable statute of limitations was not the ten years provided for by §15-3-340 but rather the statute of limitations for fraud Similarly here Appellants seek to establish possession or title to the Caw Swamp Property by having transfers from the Estate of P Pence nullified because of an alleged breach of contract or breach of fiduciary duty Therefore the three year statute of limitations applicable to those actions must be applied to this case

ARGUMENT IV

THE LOWER COURT PROPERLY CONCLUDED THAT MONEY TO GO AND THE THOMPSONS WERE BONA FIDE PURCHASERS FOR VALUE WITHOUT NOTICE OF APPELLANTS' CLAIMS

Even if the Court were to reject the arguments put forth above that the Appellants claims are time barred the trial court correctly ruled as a matter of law, that Money to Go and the Thompsons are bona fide purchasers for value of the Caw Caw Swamp Property without notice of the Appellants' claims. As a result Money to Go and the Thompsons took title to the property free and clear of any interest or claims that the Appellants may now advance. *Liberty Loan Corp. of Darlington S.C. v. Mumford*, 238 S.C. 134, 140, 322 S.E.2d 17, 21 (Ct. App. 1984) (holding that "whenever in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified")

Under South Carolina law, a purchaser may claim status as a bona fide purchaser for value without notice of defect in his title, by showing (1) he has actually paid in full the purchase money, (2) he purchased and acquired the legal title, or the best right to it, and (3) he purchased bona fide, i.e. in good faith and with integrity of dealing, without notice of a lien or defect. *Spence v. Spence*, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006). The first two of these elements are undisputed. 1) On July 23, 2004, Money to Go and the Thompsons paid the full purchase price for their respective properties to Wachovia Bank as personal representative of the Estate of Elizabeth Pence, (2) in exchange for and thereby acquiring legal title to Tracts 2-A and 2-B of the Caw Caw Swamp Property.

Appellants concede that their only basis for a dispute in this matter is whether a title examination in Orangeburg would have put the Thompsons and Money to Go on notice of the Appellants' claims. (Appellants' Br. 24). In the context of a real estate transaction, there are two

types of notice actual and constructive/inquiry *Spence* at 118 628 S E 2d at 875 Appellants acknowledge no representative from Money to Go or the Thompsons had actual notice of the Appellants' claims The only issue then is whether or not the Thompsons and Money to Go were on constructive notice of the Appellants' claims relying on *Spence* the trial court correctly concluded that Money to Go and the Thompsons had no constructive notice of the claims Appellants now advance Constructive notice is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry, if these facts were pursued with due diligence, they would lead to other undisclosed facts *Id* at 119, 628 S E 2d at 876 In the context of a real estate transaction, it is the examination of the chain of title for accurately recorded documents that puts a party on constructive notice *Id* The purchaser is held to the standard of that of a 'reasonably cautious and prudent purchaser *Id* at 120 628 S E 2d at 876 However constructive notice will only be imputed to a purchaser if there is a showing that a properly conducted title examination would have disclosed an alleged interest or claim *Id* The defining question is would the title examination raise a "red flag" demanding further investigation *Id* at 121 628 S E 2d at 877

The chain of title as set forth in Appellants' Complaint indicates nothing of public record that would provide any notice to a title abstractor of Appellants' now-asserted claims to the Caw Caw Swamp Property Both M Pence and P Pence's ancillary estates filed in Orangeburg included the Caw Caw Swamp Property on Schedule A of the Inventory Appraisement detailing the assets of the estate Both estates list the Caw Caw Swamp Property as a specific separate asset owned by the decedents at the time of their deaths and not as having any involvement in the Trust Litigation A prudent title abstractor, exercising due diligence could have stopped right

there as they would have and could have properly concluded that there was a legitimate chain of title

In short, there is nothing in the Orangeburg County public records that places anyone on notice of the claims Appellants now assert to the Caw Caw Swamp Property. Nothing in either of the two ancillary estates provides constructive or inquiry notice of the Appellants' now-asserted claims to the Caw Caw Swamp Property. In fact, the ancillary estates provide and corroborate the uncontested link in the chain of title to the Caw Caw Swamp Property. As such, as a matter of law, the Thompsons and Money to Go are bona fide purchasers of the Caw Caw Swamp Property without notice of the claims that the Appellants now advance.

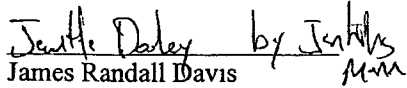
Appellants' brief does not even address this. Instead, Appellants' entire argument is based on Schedule F, the Miscellaneous section, of the ancillary estate of M. Pence filed in Orangeburg County, which references a claim in Marlboro County against the Trust. To be clear, the reference in Schedule F does not indicate what, if any, real property is involved in litigation. The mere mention of trust litigation would not raise a 'red flag' as, yet again, there was nothing filed in Orangeburg County in any way connecting the Caw Caw Swamp Property to the Trust involved in the litigation. It bears repeating: the Caw Caw Swamp Property had not been nor was it ever, deeded into the Trust and there was no document connecting the Caw Caw Swamp Property to the Trust Litigation – no deed of the property, no lis pendens on the property, no transcript of judgment, nothing which would in any way serve as notice that the Caw Caw Swamp Property was subject to the claims Appellants now advance. As such, the trial court correctly held that Money to Go and the Thompsons were bona fide purchasers for value without notice of the Appellants' claims and, therefore, hold title to Tracts 2-A and 2-B of the Caw Caw Swamp Property free and clear of any interests or claims which the Appellants now assert.

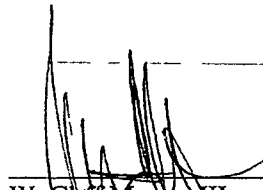
CONCLUSION

For the foregoing reasons, the trial court correctly concluded that the Respondents were entitled to summary judgment as a matter of law. Accordingly, this Court should affirm the lower court's ruling.

August 25, 2010

Respectfully submitted,


James Randall Davis
SC Bar No 1580
A Jewitte Dooley
SC Bar No 77694
DAVIS FRAWLEY ANDERSON
McCAULEY AYER FISHER, & SMITH LLC
140 East Main Street
Post Office Box 489
Lexington, South Carolina 29071
ATTORNEYS FOR RESPONDENT
MONEY TO GO LLC


W. Cliff Moore III
SC Bar No 4067
Jenkins M. Mann
SC Bar No 74894
ELLIS LAWHORNE & SIMS, P A
1501 Main Street
Post Office Box 2285
Columbia South Carolina 29202
Telephone 803-254-4190
Facsimile 803 779-4749
ATTORNEYS FOR RESPONDENT
CHARLES P THOMPSON, JR AND
CHERI (CHERYL) BROWN THOMPSON

THE STATE OF SOUTH CAROLINA,

IN THE COURT OF APPEALS

**APPEAL FROM ORANGEBURG COUNTY
DIANE S GOODSTEIN, CIRCUIT COURT JUDGE**

CASE NO 2006-CP-38-1523

**Norman M McLean, James N McLean, Marie McLean-Choi, William N McLean,
Robert L McLean, and JL McLean Properties, LLC** **Appellants**

versus

**James B. Drennan, III as Personal Representative of the Estate of
Elizabeth McLean Pence, James E. Brogdon, Sr as Trustee of the Trust
Agreement of Elizabeth McLean Pence dated May 28, 1999, Wachovia Bank
National Association, as Personal Representative of the Estate of
Elizabeth P Pence, Wachovia Bank National Association, as Trustee of
the Elizabeth P Pence Trust; Marlboro Academy, Inc., Charles P Thompson,
Jr., Cheri (Cheryl) Brown Thompson, Money to Go, LLC, James J Pence,
Jr., as Personal Representative of the Estate of Stephen Pence, and Harry R.
Easterling, Jr .. Respondents.**

**Final Brief of Respondents Marlboro Academy, Inc., James J Pence as Personal
Representative of the Estate of Stephen Pence, and Harry R. Easterling, Jr**

**Harry R. Easterling
Goldberg and Easterling, PA
P O Drawer 655
Bennettsville, SC 29512
843-479-2878 (Telephone)
Attorney for Respondents James
J Pence as Personal Representative
Of the Estate of Stephen Pence and
Harry R. Easterling, Jr**

**John Jay James, II
Paulling and James, LLP
P O Box 507
Darlington, SC 29540
843-393-3881 (Telephone)
Attorney for the Respondent
Marlboro Academy, Inc.**

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STATEMENT OF ISSUES ON APPEAL

- 1 Did the Trial Court correctly apply Rule 60(b) SCRCP (Rule 60(b)') so as to bar Appellants' present action as untimely?
 - 2 Did the Trial Court correctly apply S C Code Ann §62-3-803(a) (2009) so as to bar Appellants present action as untimely?
 - 3 Did the Trial Court correctly apply S C Code Ann §15-3 530 (2005) so as to bar Appellants' present action as untimely?
-

STATEMENT OF THE CASE

On December 20, 2006, the Appellants filed their Complaint against the Respondents alleging multiple causes of action against the various Respondents, with the causes of action for (i) quiet title, (ii) breach of contract, (iii) declaratory judgment, (iv) constructive trust, and (v) unjust enrichment being relevant to the Respondents Marlboro Academy, Inc., Harry R. Easterling, Jr. and James J. Pence, Jr. as Personal Representative of the Estate of Stephen Pence (with references hereafter to "the Respondents" to be to the three Respondents named in this sentence). Respondents timely answered the Complaint and denied all material allegations of the Complaint. Respondents further answered that Appellants' action was time barred by S. C. Code Ann. §62-3 803(a) (2009) and S. C. Code Ann. §15-3-530 (2005).

Respondents filed Motions for Summary Judgment. On May 12, 2008, a hearing was held on these Motions before the Honorable Diane S. Goodstein. At the hearing, the parties presented argument and evidence, including excerpts of deposition transcripts. The Court took the matter under advisement and subsequently asked the parties to argue also the application of Rule 60(b), SCRCP. Pursuant to Judge Goodstein's request, Respondents submitted Proposed Orders (R. Vol. 1, pp. 322-333 and pp. 310-321, Proposed Order of Marlboro Academy, Inc. and Proposed Order of Harry R. Easterling, Jr. and James J. Pence as Personal Representative of the Estate of Stephen Pence). On July 14, 2009, Judge Goodstein issued her Order granting summary judgment to Respondents on the issues of Rule 60(b), SCRCP, S. C. Code Ann. §62-3 803(a) and S. C. Code Ann. §15-3-530. On July 30, 2009, Appellants served their Notice of Appeal on Respondents.

As to the Respondents the amounts at issue are substantial the proceeds of sale of the Caw Caw Swamp property and its timber (approximately \$500,000 00) distributed in the estate proceedings of Elizabeth P Pence and title to an undivided one half interest in the Cannon Bridge Road property (value estimated to be in excess of \$500,000), also distributed in the estate proceedings of Elizabeth P Pence

STATEMENT OF FACTS

1 On July 30, 1998, Elizabeth McLean Pence (hereinafter "M Pence") gave to the Defendant James E Brogdon, Sr (hereinafter "Brogdon") a durable power of attorney

2 On May 28, 1999, pursuant to the power of attorney, Brogdon created a Revocable Trust Agreement for M Pence and thereafter transferred to himself as Trustee of that Trust certain real properties in Marlboro and Orangeburg Counties along with liquid assets of substantial value The properties which are the subject of this litigation (the "Caw Caw Swamp property and the "Cannon Bridge Road" property) were owned by M Pence but were not transferred to this Trust The only Orangeburg County property transferred to this Trust was the "Gramling Road" property This Trust Agreement provided lifetime benefits for M Pence The Trust became irrevocable at the death of M Pence and thereafter provided for lifetime benefits to the daughter of M Pence, Elizabeth P Pence (hereinafter "P Pence") The Trust provided further that at the death of P Pence the trust assets were to go to her issue, and, if there were no issue of P Pence, the Orangeburg County real estate held by the Trust was to go to the issue of Norman M McLean (and all other assets were to go to Clemson University and Coker College)

3 On October 3, 1999, M Pence died. Her estate was administered in the Probate Court of Marlboro County. The Caw Caw Swamp and Cannon Bridge Road properties were administered as a part of the Estate of M Pence (and passed to P Pence pursuant to the Will of M Pence).

4 On October 19, 2000, P Pence brought suit in the Court of Common Pleas for Marlboro County against Brogdon, Clemson University, and Coker College to contest the validity of the May 28, 1999 Trust Agreement and the property transfers thereto (hereafter the "trust litigation").

5 On February 26, 2002, the parties entered into a Settlement Agreement and this Agreement became a court order upon approval by the Honorable James E Lockemy (R Vol 1, pp 30-40 Settlement Agreement and R Vol 1, pp 28-29, Order). Pursuant to this Agreement/Order, sixty percent (60%) of the trust assets were to be distributed to P Pence (or to Wachovia Bank as Trustee under a revocable trust agreement created by P Pence) and forty percent (40%) of the trust assets, to include specifically the Orangeburg real property held by the Trust, were to remain in the trust of M Pence and be administered and distributed according to its terms. Subsequently the Trust was divided and distributed in accordance with the Agreement and Order. Plaintiffs now contend that this Settlement Agreement and Order subjected the Caw Caw Swamp and Cannon Bridge Road properties to the trust agreement of M Pence and that these properties should have been added to the Trust by P Pence, and held thereafter for ultimate distribution to them.

6 On March 21, 2002, Respondent Drennan (hereafter "Drennan"), as attorney for P Pence, wrote to J Munford Scott, attorney for Brogdon, and set forth a

proposed division of the assets of the M Pence Trust in accordance with the Settlement Agreement and Order. In that letter Drennan indicated that the Caw Caw Swamp was probably not an asset of the M Pence Trust, and proposed a division of assets as if it were not. (R Vol 2, pp 796-797, Exhibit 7 Brogdon Deposition). This proposed division was confirmed in a March 27, 2002 letter from Drennan to an assistant of Mr Scott, and Mr Scott himself confirmed this division in a letter to Drennan on May 9, 2003. (R Vol 2, pp 774-776, Exhibit 6, Brogdon Deposition).

7 On August 26, 2002, P Pence died without issue surviving. Her Will and revocable trust agreement left her estate to Marlboro Academy, Inc. Her estate was administered in the Probate Court for Marlboro County. Her spouse, Stephen Pence, filed an elective share claim and thus became entitled to a portion of her estate. Included among the assets of her estate were the Caw Caw Swamp property and one half remainder interest in the Cannon Bridge Road property. Wachovia Bank was personal representative of her estate as well as trustee of her revocable trust agreement.

8 On September 16, 2002, September 23, 2002 and September 30, 2002 the Marlboro Herald published Notice to Creditors as required by Section 62-3-801 of the South Carolina Code of Laws (the "Code"). No claims were filed within the eight month period prescribed by Sections 62-3-801 and 62-3-803 of the Code.

9 On September 27, 2002, James Jackson, Esq., on behalf of the Appellant James N McLean, wrote a letter to Drennan raising the issues which are the subject of this litigation stating in part as follows:

'I have been asked by Jim McLean, who is the son of Norman McLean, to review a number of documents that he provided me which includes the Elizabeth

Pence Trust agreement prepared by attorney J Munford Scott, Jr dated May of 1999 and the Order Approving Compromise and Settlement with attached Compromise and Settlement Agreement, which was the result of a lawsuit filed in Marlboro in case number 00 CP 34-354 In reading the Compromise and Settlement Agreement, which was approved by Judge Lockemy in paragraph 8 entitled 'Separate Accounting for Orangeburg Realty', it says that in the event that Elizabeth P Pence dies without children that the Order and Settlement Agreement would require that the Orangeburg property be distributed from her estate or from the trust or both to the children of Norman McLean I would appreciate your letting me know your position in regards to that matter so that I can advise my clients appropriately (R Vol 2, p 571, Exhibit 3, Deposition of William N McLean)

10 On October 1, 2002, Drennan responded to Mr Jackson and explained why the Caw Caw Swamp was not a part of the Trust (R Vol 3, pp 997-998, Exhibit 1, Deposition of Norman M McLean) On October 21, 2002, Mr Jackson responded to Drennan as follows

'I have discussed the matter with my clients and they do accept the fact that the Caw Caw property and the Cannon Bridge Road property in which Elizabeth had a remainder interest were not put into the trust Therefore, we accept that title to those properties passed through the Wills of Elizabeth Pence, the mother and Elizabeth Pence, the daughter Therefore, the purpose of this letter is simply [to] assure you that we do accept and agree with the matters set forth in your letter of October 1, 2002 ' (R Vol 3, pp 1000-1001, Exhibit 2 Deposition of Norman M McLean)

11 On January 17, 2003, Mr Jackson again wrote Drennan expressing the interest of his clients in purchasing the Orangeburg County property owned by P Pence (R Vol 3, p 1097, Exhibit 4, Deposition of James N McLean)

12 While the Appellants, to varying degrees, disclaim that attorney Jackson represented them or all of them, with respect to the aforesaid correspondences their depositions show they knew, or had reason to know, by October, 2002, that the Caw Caw Swamp and Cannon Bridge Road properties were not in the trust and were not deemed to be subject to the February 26, 2002 Settlement Agreement by the representatives of the estate of P Pence

a James McLean knew while M Pence was alive that the Gramling Road property had been transferred to the trust and that the Caw Caw Swamp and Cannon Bridge Road properties had not (R Vol 3, pp 1026 1028, James McLean Deposition)

b On February 25, 2002 William McLean signed a document releasing his right to be a successor co-trustee to Brogdon and he received at that time what he described as a "partial faxed copy of the Settlement Agreement " (R Vol 2, p 437, line 13-p 439 line 25 William McLean Deposition)

c James McLean testified that he was aware that his brother William ' had to go to Florence and meet with some people because he was a backup trustee or something " (R Vol 3, p 1033, lines 17 21, James McLean Deposition)

d Norman McLean testified he discussed the matters addressed in the Jackson Drennan correspondences with Mr Jackson and with his children (R Vol 3 p 919, lines 15 18, p 920, lines 13-19, p 925, lines 18-25 p 926, lines 1 10, p 928 lines

10-25, p 929 lines 1-25, p 930, lines 3-6 and lines 24-25 p 931, lines 1 25 and p 932, lines 9 17, Norman McLean Deposition)

e Mr Jackson testified that he discussed the contents of the various letters with Norman McLean (R Vol 2, p 824, lines 2-17, p 828, lines 14-24, James Jackson Deposition)

f Mr Jackson testified to his belief that copies of the letters were sent to James McLean (who was shown to be a copy recipient) (R Vol 2, p 830, lines 22-25- p 831, lines 1 10 James Jackson Deposition)

13 On July 23 2004, Wachovia Bank as personal representative of the Estate of P Pence sold the Caw Caw Swamp property to Respondents Thompson and Money to Go, LLC The net proceeds of this sale were later distributed to Respondent Marlboro Academy, Inc and Stephen Pence

14 On October 25, 2004 Wachovia Bank as trustee of the revocable trust agreement of P Pence issued to Respondent Marlboro Academy, Inc a deed of distribution for a one third (1/3) remainder interest in the Cannon Bridge Road property and to Stephen Pence a deed of distribution for an undivided one-sixth (1/6) remainder interest in Cannon Bridge Road property

15 By deed recorded September 12, 2006, Stephen Pence conveyed an undivided 1/12 interest in the Cannon Bridge Road property to Harry R Easterling Jr

16 On December 19, 2006, Appellants filed this suit, claiming in effect that the February 26 2002 Settlement Agreement and Order required P Pence to transfer to the trust agreement of M Pence the Caw Caw Swamp property and her interest in the Cannon Bridge Road property and that the receipt by Respondent Marlboro Academy,

Inc and Stephen Pence of the proceeds from the sale of the Caw Caw Swamp property and a one half remainder interest in the Cannon Bridge Road property resulted in unjust enrichment and that the purported transfers of these properties should be set aside

ARGUMENT

I INTRODUCTION

Appellants, and Brogdon through whom they claim, failed to assert any rights which they may have had under the Settlement Agreement and Order in a timely manner

The Trial Court's grant of summary judgment in favor of Respondents was correct

The Trial Court granted summary judgment to Respondents on the grounds (i) that the Appellants failed to move within one year from the date of the Settlement Agreement and Order as required by Rule 60(b) SCRPC, to correct the Order (by adding the requirement that P Pence transfer to the M Pence Trust the Caw Caw Swamp and Cannon Bridge Road properties), (ii) that the Appellants were barred by their failure to file a claim in the probate proceedings of P Pence as required by S C Code Ann §62-3-803(a) and (iii) that the Appellants were further barred because of their failure to initiate this action within the time limit imposed by S C Code Ann §15-3-530

As a preface to the arguments set forth below, Appellants, with respect to the Respondents, are bound by what Brogdon did or did not do. S C Code Ann §62-1-403(2)(ii) (2009) provides that an order binding a trustee also binds the beneficiaries in proceedings involving third parties. S C Code Ann §62-1-403(3)(i)(2009) provides that sufficient notice is given where notice is given to every interested person or to one who can bind an interested person. S C Code Ann §62-7-303(a)(4)(2009) provides that "a trustee may represent and bind the beneficiaries of the trust with respect to questions or

disputes involving the trust ” Thus, what the Appellants knew and when they knew it is not relevant to the questions before the court with respect to the Respondents Appellants are bound by the actions or inactions of Brogdon

II STANDARD OF REVIEW

The Trial Court correctly set forth and followed the standard for summary judgment as set forth in cases such as Regions Bank v Shonauch, 354 S C 648 582 SE 2d 432 (Ct App 2003), George v Fabri, 345 S C 440, 548 SE 2d 868 (2001), Trivelas v South Carolina Department of Transportation, 348 S C 125, 558 SE 2d 271 (Ct App 2001) and SSI Med Servs , Inc v Cox, 301 S C 493, 392 SE 2d 789 (1990) Basically the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law Once the moving party meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot rest on the mere allegations of the pleadings but must come forward with specific facts showing that there is a genuine issue for trial Respondents respectfully submit that they have shown the absence of evidentiary support for Appellants case on each issue and that Appellants have not shown specific facts establishing a genuine issue for trial

III THE TRIAL COURT CORRECTLY APPLIED RULE 60(b)

Rule 60(b) provides an aggrieved party a period of not more than one year in which to move the trial court for relief from a final judgment or order arising out of a mistake Judge Lockemy confirmed the Settlement Agreement by order dated February 26 2002 Appellants nor Brogdon made a Rule 60(b) motion In their brief Appellants

excuse this failure by pronouncing that they were the prevailing party. Respondents contend and submit that, to the contrary, Appellants have failed to proffer any evidence that would create a genuine issue for trial and that it is clear that Appellants did not prevail.

A brief recitation of relevant facts is useful here. In 1998, when Brogdon, as attorney in fact, set up the Trust of M. Pence, he transferred to the Trust many real estate parcels most in Marlboro County but one in Orangeburg County (the "Gramling tract").

Neither the Caw Caw Swamp property nor the Cannon Bridge Road property (in which M. Pence owned a remainder interest subject to divestment), were transferred to the Trust. While Brogdon testified that once he learned of the existence of the Caw Caw Swamp property he intended to transfer it to the Trust, he testified that this did not occur before M. Pence died (R. Vol. 2, p. 664 lines 9-25 and p. 677, lines 2-17, Deposition of Brogdon). Thus, the disposition of the Caw Caw Swamp property, the Cannon Bridge Road property and any other properties owned by M. Pence at her death passed to P. Pence pursuant to the Will of M. Pence. Appellants may argue that Brogdon breached some alleged duty to them by failing to timely transfer the Caw Caw Swamp property but they cannot and do not argue that Brogdon's unfulfilled intent as attorney in fact for M. Pence to transfer the Caw Caw Swamp property made it subject to the Trust and the Settlement Agreement/Order.

Appellants rely upon various references in the Settlement Agreement/Order to the 'Orangeburg real property' and to the reference in Schedule B of the Settlement Agreement/Order to the Caw Caw Swamp property to argue that the Caw Caw Swamp property and the Cannon Bridge Road property were to be transferred to the M. Pence

Trust by P Pence and then transferred to them at the death of P Pence without issue
The Appellants' reading of the Settlement Agreement/Order is clearly erroneous

The Settlement Agreement/Order stated in Paragraph 5(a) that "[a]ll Orangeburg County, South Carolina real property which is owned by the Trust shall be retained in trust by the Trustee" (emphasis added) (R Vol 1, p 33, Settlement Agreement) P Pence's purpose in bringing the trust litigation was to invalidate the trust and to void all transfers thereto Nothing in the Settlement Agreement/Order imposes any requirement on P Pence to add property to the trust References to the Orangeburg County real estate can be only to property owned by the Trust Appellants argue that the reference to the Caw Caw Swamp property on Schedule B confirms that it was to be a part of the Trust Schedule B was a listing of assets and values to be used in establishing the 60%-40% division of assets between what went to P Pence (60%) and what stayed in the M Pence trust (40%)

The correspondences of March 21, 2002, March 27 2002, and May 9, 2003 between Drennan and Munford Scott, the attorney for Brogdon, (R Vol 2, pp 796 797 pp 774-775, and pp 766-767, Exhibits 6 and 7, Brodgon Deposition) confirm without doubt that neither the Caw Caw Swamp property nor the Cannon Bridge Road property were subject to the Settlement Agreement/Order Brogdon, as trustee, bound Appellants by his actions The Settlement Agreement/Order was fully implemented on the basis that neither property was subject to it Indeed, if the two properties were subject to it, the 60%-40% division would not have worked because the values of the Gramling property, the Caw Caw Swamp property, and the Cannon Bridge Road property would have exceeded forty percent (40%) of the value of the M Pence Trust

Appellants lastly argue in effect that because the Settlement Agreement/Order expressly applied to some Orangeburg County real property it must also apply to the Cannon Bridge Road property, which was never deeded to the M Pence Trust and which was nowhere mentioned in the Settlement Agreement/Order. The Settlement Agreement was implemented by the parties without reference to the Cannon Bridge Road property and properly so. Again, the Appellants are bound by the actions of Brogdon, their Trustee.

Appellants' brief, at page 11, argues that Brogdon's failure to invoke Rule 60(b) is further evidence of his breach of duties allegedly owed to Appellants. Assuming arguendo that this is true, this in no way implicates Respondents who are devisees and assignees under the Will of P Pence.

Appellants submit that they have met their burden to submit a "mere scintilla" of evidence to withstand Respondents' motion for summary judgment (page 8 of Appellants' Brief). Respondents submit that they have not met this burden. The interpretation given to the Settlement Agreement/Order by Appellants requires the reader to ignore what the Agreement states – that the Orangeburg County property that is in the Trust shall be retained in trust by the Trustee. The Agreement applies only to real property already owned by the Trust and thus to be retained by the Trust. It further requires the reader to read into the Settlement Agreement/Order what is not there – that P Pence was required to transfer to the Trust valuable properties never deeded to it and inherited by her from M Pence. It further requires the reader to assume no significance to the fact that the Cannon Bridge Road property was mentioned not at all. Finally, any possible doubts as to whether the Caw Caw Swamp property is subject to the Settlement

Agreement/Order are resolved by Brogdon's participating in the implementation of the Agreement without respect to that property. If the Settlement Agreement/Order was meant to say what Appellants now claim it says, Brogdon should have made a timely Rule 60(b) motion. His failure to do so, for whatever reason, is binding upon Appellants, and they now likewise are time barred by Rule 60(b).

IV THE TRIAL COURT CORRECTLY APPLIED §62 3-803(a) TO BAR APPELLANTS' CLAIM AS UNTIMELY

It is undisputed that neither the Appellants nor Brogdon filed a claim within eight months of the first publication of Notice to Creditors in the estate proceedings of P Pence. S C Code Ann §62 3-803(a) provides that if a claim is not filed within the said eight months period, it is barred against the estate, the personal representative and the heirs and devisees.

The crux of Appellants' claim against the estate of P Pence sounds in contract - that P Pence in the Settlement Agreement agreed to convey to the M Pence Trust the Caw Caw Swamp and Cannon Bridge Road properties. At the time of her death, six months after the date of the Settlement Agreement, she had not done so, and thus she would have been in breach of her alleged contractual duties.

Appellants argue, without citation of any authority, that they had no 'claim' within the meaning of the Probate Code. S C Code Ann §62 1-201(4) (2009) defines the term "claim" to include "liabilities of the decedent or protected person whether arising in contract in tort or otherwise." S C Code §62 3-803(a) provides that "[a]ll claims against a decedent's estate which arose before the death of the decedent whether due or to become due, absolute or contingent liquidated or unliquidated founded on

contract, tort, or other legal basis” are barred unless presented within the required time periods

In this case Appellants are asserting the alleged rights of the M Pence Trust under the Settlement Agreement against the estate of P Pence. Since they nor Brogdon filed a timely claim, their action is barred.

Appellants argue that they were entitled to rely on the Settlement Agreement/Order without doing anything further until they received actual notice that Respondents acted contrary to the Settlement Agreement/Order. S C Code Ann §62-3 803(a) does not require actual notice of the death of a contract obligor nor an omission or commission constituting breach of contract. It applies to all claims which arose before the death of the decedent, whether due or to become due, absolute or contingent, liquidated or unliquidated.

Appellants finally argue that Drennan (whose conduct and knowledge are then imputed by Appellants to Wachovia, the personal representative of P Pence’s estate) acted in a way which would have misled P Pence’s estate and those who claim through it from acting timely to protect their rights under S C Code Ann §62-3 803. Appellants have not plead any such facts or cause of action. Their pleadings simply allege that Drennan and Wachovia breached their fiduciary duties to Appellants by knowingly transferring properties to the Respondents in this case. This conduct could not have misled Appellants (or Brogdon) into not filing a claim within the statutory time frame. These transfers occurred many months after the expiration of the claims filing period. No scintilla of evidence has been offered by Appellants on this issue.

S C Code Ann §62-3-803(a) (2009) is a “nonclaim statute”, as opposed to a statute of limitations. A McCoy’s Inc vs Garner, 251 S C 378, 315 SE 2d 812 (Ct App 1984). A nonclaim statute cannot be extended by the rule of waiver or estoppel and the estate’s personal representative cannot waive the requirements that creditors timely present their claims. 31 Am Jur 2d Executors and Administrators §607.

While the actual knowledge of the Appellants about the Settlement Agreement/Order and the time period in which they gained this knowledge is not determinative of the Rule 60(b) issue or the Probate Code claims issue (since Brogdon’s actions and inactions were binding on them), it is worthy of note that at least some of the Appellants and Jay Jackson, the attorney for at least some of them, knew everything needed in order to file a timely claim under S C Code Ann §62-3-803(a) and to make a timely motion under Rule 60(b), SCRCP. Reference is made to the correspondences between Jay Jackson and Drennan recited hereinabove and to the deposition testimony of various Appellants also cited hereinabove.

V THE TRIAL COURT CORRECTLY APPLIED S C CODE ANN §15-3-530(2005) TO BAR APPELLANTS’ CLAIM AS UNTIMELY.

In addition to the time bars of Rule 60(b) and the Probate Code claims statute, the Trial Court correctly ruled that the Appellants had three years from February 26, 2002, the date of the Settlement Agreement and Order, to commence their action for alleged breach of contract against the Respondents (R Vol 1, p 19 Order). S C Code Ann §15-3-530(1) provides that “an action upon a contract, obligation, or liability, express or implied,” is barred if not commenced within three (3) years.

The instrument in the case sub judice - the Settlement Agreement dated February 26, 2002 is not sealed. Plaintiffs' argument that the agreement is intended as a sealed instrument and thus controlled by S. C. Code Ann. §15-3-520(b) is founded solely upon the language immediately preceding the signatures of the parties, "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this ___ day of January, 2002." The Settlement Agreement contains no other evidence that the parties intended this to be a sealed instrument. Without something more than the boilerplate language 'set their hands and seals', our courts have ruled that the necessary intent to be governed by the 20 year statute of limitations does not exist.

Appellants in effect argue that they could have waited until February 25, 2022, to seek to enforce their alleged breach of contract claim. Already multiple transactions have occurred with respect to the Caw Caw Swamp property and the Cannon Bridge Road property (timber deeds, conveyances of fee simple title and estate settlement proceedings). Under Appellants' theory not only are these transactions in jeopardy but also any other transactions which might have occurred had they waited until February 25, 2022.

The facts here and the facts of Carolina Marine Handling, Inc. v. Lasch, 363 S. C. 169, 609 S. E. 2d 548 (Ct. App. 2005), are nearly identical. In that case our Court of Appeals found that the use of a "boilerplate attestation clause, by itself" (emphasis added), 609 S. E. 2d at 552, was not sufficient evidence that the parties intended that the instrument be sealed and thus subject to the 20 year limitations statute. The Court opined that to find otherwise 'would likely transform the twenty year statute of limitations into the standard period of limitations for most contract actions in this state. We adhere to our

general three year statute of limitations for contract actions in this state and acknowledge the availability of the twenty year limitation period where the contract clearly evidences an interest to create a sealed instrument 609 SE 2d at 552

Appellants next argue the application of the ten year statute of limitations under S C Code Ann §15-3 340

“No action for the recovery of real property or for the recovery of the possession of real property may be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action ’

This is the ten year adverse possession statute Appellants have never held title to the Caw Caw Swamp property nor to the one half undivided right title and interest in the Cannon Bridge Road property devised by M Pence to P Pence and ultimately devised and/or conveyed to the Respondents, nor have the Appellants alleged title by adverse possession Their argument is simply that the Settlement Agreement created a contractual duty on the part of P Pence to convey the property to the trust of M Pence

Appellants have thus failed to establish the required 10 years of title and possession necessary to satisfy the terms of SC Code Ann Section 15 3-340 There is no better evidence of this than their offers to purchase these properties from the Estate of P Pence as set forth in the letters of Attorney Jay Jackson on January 17, 2003 (R Vol 3, pp 1000-1001 Exhibit 2 Deposition of Norman M McLean, R Vol 3, p 1097, Exhibit 4, Deposition of James N McLean)

Respondents note further that the Trial Court did not rule on this issue. The issue is therefore not properly preserved for this Court's review. Great Games, Inc vs S C Dep't of Revenue, 339 S C 79, 529 Se 2d 6 (2000)

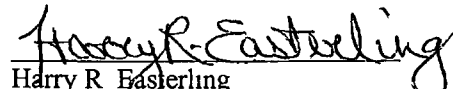
CONCLUSION

The Order of the Trial Court correctly addressed the issues raised by this appeal and should be affirmed

Respectfully submitted

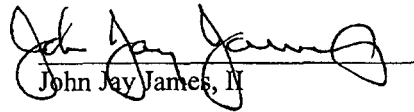
August 27, 2010


John Jay James, II
Paulling and James, LLP
P O Box 507
Darlington, SC 29540
843 393-3881 (Telephone)
Attorney for the Respondent
Marlboro Academy, Inc


Harry R. Easterling
Goldberg and Easterling, PA
P O Drawer 655
Bennettsville, SC 29512
843-479-2878 (Telephone)
Attorney for Respondents James J
Pence as Personal Representative
Of the Estate of Stephen Pence and
Harry R. Easterling, Jr

CERTIFICATE OF COUNSEL

The undersigned certify that this final Brief complies with Rule 211(b), SCACR


John Jay James, II


Harry R. Easterling

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas**

Honorable Diane S. Goodstein, Circuit Judge

Case No. 2006-CP-38-1523

**Norman M. McLean, James N. McLean, Marie McLean-Choi,
William N. McLean, Robert L. McLean, and JL McLean Properties, LLC**

Appellants,

v

**James B. Drennan, III, as Personal Representative of the Estate of Elizabeth
McLean Pence, James E. Brogdon, Sr., as Trustee of the Trust Agreement of
Elizabeth McLean Pence dated May 28, 1999, Wachovia Bank, National
Association, as Personal Representative of the Estate of Elizabeth P. Pence,
Wachovia Bank, National Association, as Trustee of The Elizabeth P. Pence
Trust, Marlboro Academy, Inc., Charles P. Thompson, Jr., Cheri (Cheryl)
Brown Thompson, Money to Go, LLC, James J. Pence, Jr., as Personal
Representative of the Estate of Stephen Pence, and Harry R. Easterling, Jr.**

Respondents

**FINAL JOINT BRIEF OF RESPONDENTS JAMES B. DRENNAN AND
WACHOVIA BANK NATIONAL ASSOCIATION**

**Matthew H. Henrikson (S.C. Bar No. 7897)
CLARKSON WALSH TERRELL
& COULTER, P.A.
Post Office Box 6728
Greenville, SC 29606
Telephone (864) 232-4400
Facsimile (864) 235-4399
mhenrikson@clarksonwalsh.com
ATTORNEYS FOR RESPONDENT
JAMES B. DRENNAN, III**

**Edward B. Davis (S.C. Bar No. 16713)
BELL, DAVIS & PITT, P.A.
227 West Trade Street, Suite 2160
Charlotte, NC 28202
Telephone (704) 227-0400
Facsimile (704) 227-0178
ward.davis@belldavispitt.com
ATTORNEYS FOR RESPONDENT
WACHOVIA BANK, N.A.**

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
DIANE S GOODSTEIN CIRCUIT COURT JUDGE

CASE NO 2006 CP 38 1523

Norman M McLean, James N McLean Marie McLean-Choi William N McLean Robert L
McLean and JL McLean Properties, LLC Appellants

versus

James B Drennan III as Personal Representative of the Estate of
Elizabeth McLean Pence James E Brogdon, Sr as Trustee of the Trust
Agreement of Elizabeth McLean Pence dated May 28, 1999, Wachovia Bank
National Association, as Personal Representative of the Estate of
Elizabeth P Pence, Wachovia Bank National Association as Trustee of
the Elizabeth P Pence Trust, Marlboro Academy, Inc , Charles P Thompson
Jr , Cheri (Cheryl) Brown Thompson, Money to Go, LLC, James J Pence
Jr , as Personal Representative of the Estate of Stephen Pence and Harry R
Easterling Jr Respondents

CERTIFICATE OF SERVICE

I hereby certify that I have, this date written below served the within Final Joint Brief of
Respondents James B Drennan and Wachovia Bank National Association upon counsel of record,
by depositing a copy thereof in the United States Mail and via email postage prepaid and addressed
as follows

David Alexander Esquire
Culbertson & Alexander, LLC
110 Williams Street
Greenville SC 29601

James Randall Davis Esquire
Nicholson Davis Frawley Anderson & Ayer
P O Box 489
Lexington, South Carolina 29071

McLean v Drennan
Case No 2006 CP-38 1523
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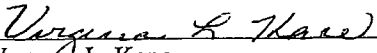
Harry R Easterling, Sr, Esquire
Goldberg & Easterling, P A
P O Drawer 655
Bennettsville South Carolina 29512

Jeffrey L Payne Esquire
Turner Padget Graham and Laney, P A
P O Box 5478
Florence South Carolina 29501

John J James, II Esquire
Pauling & James, LLP
P O Box 507
Darlington South Carolina 29540

W Cliff Moore, III Esquire
Ellis Lawhorne & Sims, P A
P O Box 2285
Columbia, South Carolina 29202

CLARKSON, WALSH, TERRELL, & COULTER P A



Virginia L Kane
Legal Assistant for Matthew H Henrikson

Signed this 1st day of September 2010
Greenville South Carolina

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STATEMENT OF ISSUES ON APPEAL

- I Whether the Trial Court properly applied Rule 60 of the South Carolina Rules of Civil Procedure in dismissing Appellants' claims against Wachovia Bank and James Drennan
- II Whether the Trial Court correctly held that the Appellants are bound by the actions of the trustee, James Brogdon
- III Whether the trial court correctly ruled that Appellants' claims against Wachovia Bank and James Drennan are barred by the various applicable statutes of limitation, including those set forth in S.C. Code § 15-3-530 and the South Carolina Probate Code
- ~~IV~~ Whether the Trial Court correctly ruled that Wachovia Bank owed no duty to the Appellants
- V Whether the Trial Court correctly ruled that James Drennan owed no duty to the Appellants
- VI Whether the Appellants' claims against Wachovia Bank and James Drennan are barred by the doctrine of equitable estoppel

STATEMENT OF FACTS

Elizabeth McLean Pence (‘ Lib Pence) died on October 3, 1999 Her heirs included her one child Elizabeth P Pence (‘ Pence Jr ’), and her brother, Norman McLean, and Norman’s children The case at bar centers around the question of whether certain Caw Caw Swamp property and Cannon Bridge Road property in Orangeburg County, South Carolina (the “Caw Caw Swamp Property” and “Cannon Bridge Road Property,” respectively), should have (1) passed through Lib Pence’s estate to her daughter, Pence Jr , or (2) passed through Lib Pence s Trust pursuant to a Revocable Trust Agreement created on May 28, 1999 (the “Trust Agreement” or “Trust’), and ultimately to Norman McLean and his children who are the Plaintiffs/Appellants in the case at bar

On October 20 2000 Lib Pence s daughter, Pence Jr , filed a lawsuit in the Probate Court of Marlboro County naming as defendants Clemson University, Coker College, and James E Brogdon Sr individually and in his capacity as Trustee of Lib Pence’s Trust (R 730 746 Petition) In this lawsuit Pence Jr challenged the validity of the Lib Pence Trust That lawsuit was settled when the parties entered into a settlement agreement that was approved by the Probate Court on February 26, 2002 (the “Trust Settlement Agreement”) (R 28-39, Compromise and Settlement Agreement) Brogdon signed this Trust Settlement Agreement individually and in his capacity as Trustee under the Trust Agreement of Elizabeth McLean Pence dated May 28 1999 ’ (R 37, Compromise and Settlement Agreement p 8) Wachovia was not a party to the Trust Settlement Agreement in any capacity

The Trust Settlement Agreement divided the assets of the Lib Pence Trust, with sixty percent (60%) of the trust assets to be distributed to Pence Jr (or to Wachovia as Trustee under a revocable trust agreement created by Pence Jr) and forty percent (40%) of the Trust assets to include specifically the Orangeburg real property already held by the Trust, to remain in the Lib

Pence Trust and be administered and distributed according to its terms. The current Plaintiffs/Appellants in the case at bar contend that the Trust Settlement Agreement somehow conveyed or should have conveyed, the Caw Caw Swamp and Cannon Bridge Road properties into the Lib Pence Trust, even though such property was not in the Trust at the time and therefore not a subject of the Trust Litigation.

It is undisputed that the Caw Caw Swamp Property and Cannon Bridge Road Property were never transferred into Lib Pence's Trust. Moreover, James Brogdon, the Trustee, testified in his deposition in this matter that the Trust Settlement Agreement was not intended to add any property to the Trust. Brogdon testified that the Caw Caw Swamp property was never part of Lib Pence's Trust, and therefore properly passed through Lib Pence's estate to her daughter, Pence Jr.

Q What was your understanding of what was supposed to happen to the Caw Caw property as a result of this settlement?

A As a result of the settlement?

Q Yes sir.

A It would be owned by the estate.

Q Okay. And why is that?

A Because it was not in the trust.

(R. 673, Brogdon Depos. p. 68.) Brogdon signed the Lib Pence Trust Settlement Agreement as Trustee of the Trust of which the Appellants were beneficiaries.

Subsequent correspondence after the execution and approval of the Trust Settlement Agreement confirm that the Caw Caw Swamp Property was not intended to be Trust property under the Trust Settlement Agreement. On March 21, 2002, James Drennan sent a letter to Brogdon's counsel, Munford Scott, stating that Drennan was proceeding with the division of

property pursuant to the Settlement Agreement on the basis that the Caw Caw Swamp Property was not an asset of the Trust (R 796 797) Subsequently on June 11, 2002 Drennan wrote another letter to Munford Scott's office stating in part, "I have now determined to my satisfaction that the Caw Caw swamp property is not in the trust of which Mr Brogdon is Trustee " (R 772 773)

On August 26, 2002, Pence Jr died without issue surviving Pence Jr's Will and revocable trust agreement left her estate to Marlboro Academy, Inc The Caw Caw Swamp Property and one-half remainder interest in the Cannon Bridge Road Property were assets of the estate Wachovia was personal representative of Pence Jr s estate as well as trustee of her revocable trust agreement On September 16 2002, September 23, 2002 and September 30, 2002, the Marlboro Herald published a Notice to Creditors of Pence Jr's estate (R 234-235) No claims were filed within the statutory eight-month period

On September 27, 2002, attorney James Jay Jackson ('Jackson) on behalf of Plaintiff Norman McLean, and his son, Plaintiff James McLean wrote to Drennan, who represented Wachovia, inquiring about his clients potential rights to the subject property (R 264) On October 1, 2002, Drennan responded to Jackson, explaining in detail how the subject property passed through Pence Jr's estate, and why Jackson's clients were not entitled to the property (R 266 267) On October 21, 2002, Jackson responded to Drennan's October 1 letter, stating unequivocally that his clients "accept and agree with the matters set forth in your letter of October 1 2002," thereby accepting the fact that the Plaintiffs were not entitled to the subject property (R 269 270) Jackson also inquired on behalf of his clients about purchasing the subject property (R 269 270) Norman McLean testified in his deposition that he discussed the content of these James Jackson letters with his children, and that Jackson was authorized to communicate to Dreenan the McLean children's interest in purchasing the subject property and that the

McLean children were aware that Norman McLean asked Jackson to convey to Drennan their interest in the subject property (R 919-932, 950 952, Norman McLean Depos , pp 45 58 and 76-78)

Neither Brogdon, as Trustee, nor any of the alleged beneficiaries of Lib Pence s Trust ever filed a motion under Rule 60(b), SCRCF, alleging that the court approved Trust Settlement Agreement was intended to transfer the Caw Caw Swamp Property or Cannon Bridge Road Property into Lib Pence's Trust

On July 23, 2004, Wachovia, as personal representative of the Estate of Pence Jr sold the Caw Caw Swamp Property to defendants Thompson and Money to Go LLC The net proceeds of this sale were later distributed in part to Marlboro Academy, Inc On October 25, 2004, Wachovia as trustee of the revocable trust agreement of Pence Jr conveyed to Marlboro Academy, Inc a one-third (1/3) remainder interest in the Cannon Bridge Road Property It is these conveyances which the Appellants now allege as the basis of their claims against Drennan and Wachovia

On December 20, 2006 Plaintiffs filed this suit as beneficiaries of Lib Pence's Trust, claiming that the subject property should have passed to them through Lib Pence s Trust rather than to Pence Jr through Lib Pence's estate, despite Brogdon's testimony to the contrary and the exchange of correspondence demonstrating that undisputed intent of the parties to the 2002 Settlement Agreement

ARGUMENT

I STANDARD OF REVIEW

“Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to judgment as a matter of law” Hancock v Mid-South Mgmt Co., 381 S C 326, 329, 673 S E 2d 801, 802 (2009) “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law” South Carolina Rule of Civil Procedure 56(c)

“Once the moving party meets the initial burden of showing an absence of evidentiary support for the opponent s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings Rather the nonmoving party must come forward with specific facts showing there is a genuine issue for trial ’ Regions Bank v Schmauch 354 S C 648 660, 582 S E 2d 432, 438 (2003), citing SSI Med Servs., Inc v Cox, 301 S C 493, 497, 392 S E 2d 789, 792 (1990) ‘ The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder ” George v Fabri, 345 S C 440, 452, 548 S E 2d 868, 874 (2001)

II THE TRIAL COURT CORRECTLY APPLIED RULE 60 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE IN DISMISSING PLAINTIFFS’ CLAIMS AGAINST DRENNAN AND WACHOVIA

In granting Drennan s and Wachovia’s respective motions for summary judgment, the Trial Court correctly concluded “Under Rule 60(b), plaintiffs were required to file a motion within one year from the date of the entry of the Order—i e , by February 26, 2003—to correct any mistakes in the Order’ (R 10-11, Order Granting Summary Judgment pp 10 11)

Appellants' failure to do so conclusively bars them from asserting claims against Drennan and Wachovia almost five years after entry of the 2002 Order

Rule 60 of the South Carolina Rules of Civil Procedure provides in relevant part

* * *

(b) Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud, etc On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons

~~(1) mistake, inadvertence, surprise, or excusable neglect,~~

* * *

The motion shall be made within a reasonable time and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment order, or proceeding, or to set aside a judgment for fraud upon the court During the pendency of an appeal, leave to make the motion must be obtained from the appellate court Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action

Here, despite knowing that the Caw Caw Swamp and Cannon Bridge Road properties were not owned by the Trust—both when the Settlement Agreement was executed and thereafter—Appellants failed to seek timely relief under Rule 60 to correct this alleged mistake, and their failure to do so is dispositive of the claims that they now seek to assert

In an attempt to circumvent the effect of the one-year requirement imposed by Rule 60, Appellants strain to argue that the 2002 Settlement Agreement and Order were “in their favor and, therefore “any alleged mistakes in the Order should have been corrected by Drennan and Wachovia not the McLeans ’ (Appellants Initial Brief, p 8) Stated differently Appellants seem to argue that the 2002 Settlement Agreement and Order do not contain a mistake from their

perspective because the ‘ Order decided that the Orangeburg property is theirs ’ (Appellants Initial Brief, p 9) However, the only way for the Lib Pence Trust and by extension Appellants, to ever take title to the Caw Caw Swamp and Cannon Bridge Properties would be if a provision in the Settlement Agreement and/or Order required Pence Jr to convey the property to the Trust Here, there is no dispute that (1) on February 26 2002, the day Judge Lockemy signed the Order the Caw Caw Swamp and Cannon Bridge properties were owned by Pence Jr and not the Trust and (2) there is nothing in the 2002 Settlement Agreement and Order requiring Pence Jr to convey the Caw Caw Swamp and Cannon Bridge properties to the Trust Further, as noted above, the Trustee James Brogdon, testified in his deposition that the Settlement Agreement was not intended to convey such properties to the Trust Such properties were to pass through Lib Pence’s estate Accordingly, absent a provision in the Settlement Agreement or Order requiring the property to be conveyed to the Trust Appellants cannot escape the unavoidable conclusion that they—or someone on their behalf—must have pursued a motion under Rule 60 to address the alleged omission

Not only do the 2002 Settlement Agreement and Order not require Pence Jr to convey any property to the Trust, the actual language of the Settlement Agreement demonstrates the fallacy of Appellants’ mistaken belief that the Caw Caw Swamp and Cannon Bridge Road properties were to somehow be conveyed to the Trust Appellants contend in their brief that “[u]pon reading the Order, the McLeans would have had no reason to challenge it with a Rule 60 Motion ” (See Appellants’ Brief p 9) However, Appellants fail to acknowledge that the Settlement Agreement specifically states that it is the “Orangeburg County, South Carolina real property *which is owned by the Trust*” which was to be “*retained*” in the Trust by the Trustee (R 33, Compromise and Settlement Agreement (emphasis added)) The Trustee and his counsel, Munford Scott, together with the Appellants knew that the Caw Caw Swamp and Cannon Bridge properties were

not actually owned by the Trust. If the Trust did not own these properties, they could not be "retained" by the trust and therefore, the only way to transfer ownership to the Trust would be by a modification to the Order and accompanying Settlement Agreement. It is important to note that the litigation which resulted in the 2002 Settlement Agreement and Order was commenced to contest the validity of the Trust, including the property that it owned. It would defy logic to conclude that Pence Jr. would have been required to convey property to the Trust when the litigation did not concern property owned by her.

Not only did Brogdon testify that the 2002 Settlement Agreement was not intended to add any property to the Lib Pence Trust and that the Caw Caw Swamp property passed through the estate of Lib Pence to her daughter, Pence Jr., but correspondence between James Drennan (counsel for Pence Jr.), Munford Scott (counsel for the Trustee) and James Jackson (counsel for the beneficiaries) specifically addresses the issue as to whether the Caw Caw Swamp and Cannon Bridge Road properties were owned by the Trust. Ultimately, the parties concluded that the allocation and disbursement of the assets of the Trust, pursuant to the terms of the 2002 Settlement Agreement and Order, were being accomplished without consideration of the Caw Caw Swamp and Cannon Bridge Road properties because they were not owned by the Trust. For example, on March 21, 2002, James Drennan sent a letter to Brogdon's counsel, Munford Scott, stating that Drennan was proceeding with the division of property pursuant to the Settlement Agreement on the basis that the Caw Caw Swamp Property was not an asset of the Trust. (R. 796-797, Brogdon Depos. Ex. 7). Brogdon testified in his deposition that he saw this letter. (R. 682-683, Brogdon Depos. pp. 77-78, and Ex. 7). Subsequently, on June 11, 2002, Drennan wrote another letter to Munford Scott's office stating, in part, "I have now determined to my satisfaction that the Caw Caw swamp property is not in the trust of which Mr. Brogdon is Trustee." (R. 772-773.)

Additionally on October 21, 2002, in response to a letter previously sent to him James Jackson wrote to Mr Drennan and stated

I have discussed the matter with my clients and they do accept the fact that the Caw Caw property and the Cannon Bridge Road property in which Elizabeth had a remainder interest were not put into the trust Therefore, we accept that title to those properties passed through the Wills of Elizabeth Pence, the mother and Elizabeth Pence the daughter Therefore the purpose of this letter is simply assure you that we do accept and agree with the matters set forth in your letter of October 1, 2002

(R 269-270)

Accordingly, beginning no later than March of 2002, all parties were aware that a question had been raised as to whether Caw Caw Swamp and Cannon Bridge properties were owned by the Trust and whether they were subject to the Settlement Agreement and Order If, at that time, the Trustee and Appellants were of the opinion that the Settlement Agreement and Order were intended to somehow establish that the Caw Caw Swamp and Cannon Bridge properties were to be owned by the Trust it was incumbent upon them to exercise their rights under Rule 60 and to petition the Court and ask that the Order be modified to reflect what they now insist was intended However, having sat idly by for nearly five years without raising an objection, the Appellants¹ are precluded from seeking relief against Drennan and Wachovia As the Trial Court noted in its Order, "Rule 60(b) was enacted to ensure finality to litigants and other parties relying on orders issued the courts of this State" (R 11, Order Granting Summary Judgment p 11) Accordingly, the Court should affirm the Trial Court's ruling that Appellants' failure to timely file a motion under Rule 60 entitled Drennan and Wachovia to summary judgment

¹ As discussed more fully below the Appellants as beneficiaries are bound by the Order because it was entered in a proceeding involving third parties See S C Code App 62 1 403(2)(ii) Further a trustee may represent and bind the beneficiaries of the trust with respect to questions or disputes involving the trust S C Code Ann § 62 7 303(a)(4)

III THE TRIAL COURT CORRECTLY HELD THAT THE APPELLANTS ARE BOUND BY THE ACTIONS OF THE TRUSTEE, JAMES BROGDON

Under S C Code Ann § 62 1-403(2)(ii), an order binding a trustee also binds beneficiaries of the Trust in proceedings involving third parties. Furthermore, under S C Code Ann § 62 7 303(a)(4), "a trustee may represent and bind the beneficiaries of the trust with respect to questions and disputes involving the trust." The Trial Court correctly applied this statute in holding that the Appellants in this case are bound by the 2002 Trust Settlement Agreement concerning the Lib Pence Trust, which Brogdon signed as Trustee. Brogdon has testified unequivocally that the Trust Settlement Agreement was not intended to make the Caw Caw Swamp Property part of the Lib Pence Trust (R 673, Brogdon Depos p 68). In order to change the Trust Settlement Agreement approved by the Court on February 26, 2002, it was incumbent upon the Appellants, or someone such as Brogdon acting on their behalf as Trustee, to seek to have the Order and Settlement Agreement changed. No such motion was ever filed.

Appellants admit in their brief in this matter that if they are bound by Rule 60, it was incumbent upon Brogdon seek relief under Rule 60 on their behalf. Brogdon failed in his duty as Trustee to protect [Appellants'] interest. As a party to the Trust Litigation, Brogdon was required to obtain the best result possible for the trust's beneficiaries. (Appellants' Brief, p 11)

As further evidence of the fact that the Appellants are bound by Brogdon as Trustee, consider the following argument from Appellants' initial brief:

Brogdon owed the McLeans the duty to protect and preserve the rights of the Trust to its property. After the Settlement Agreement and Order, the Trust had the duty to ensure that it received the Orangeburg property. Brogdon also admitted seeing a letter from Drennan to the Trust's attorney claiming that the Caw Caw Swamp property was not part of the Trust.

Despite this knowledge, Brogdon failed to assert the Trust's rights under the Settlement Agreement. This represented a serious dereliction of his duties to the Trust beneficiaries.

(Appellants' Brief pp. 22-23)

Under South Carolina law, the Appellants, as beneficiaries of the Lib Pence Trust of which Brogdon was Trustee, are bound by Brogdon's actions—or inactions—concerning the 2002 Trust Settlement Agreement and Order. The Trial Court correctly based its dismissal on *inter alia* the fact that neither the Appellants nor Brogdon sought Rule 60 relief in a timely manner concerning the Trust Settlement Agreement and Order.

IV THE TRIAL COURT CORRECTLY RULED THAT PLAINTIFFS' CLAIMS ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATION

As expressed by the Supreme Court of South Carolina in State ex rel. Condon v. City of Columbia

Statutes [of limitation] are designed to promote justice by forcing parties to pursue a case in a timely manner. Parties should act before memories dim, evidence grows stale, or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs.

Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose is to protect potential defendants from protracted fear of litigation.

339 S.C. 8, 19, 528 S.E.2d 408, 413-14 (2000), quoting in part Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996).

A S.C. Code § 15-3-530

Appellants' alleged claims against Drennan and Wachovia are for breach of contract and for breach of fiduciary duty. Under S.C. Code § 15-3-530, the statute of limitations for claims of breach of contract and breach of fiduciary duty is three years. The contract that Appellants claim

Wachovia and Drennan breached is the 2002 Trust Litigation Compromise and Settlement Agreement, which Appellants claim Wachovia and Drennan breached by denying them the ownership and possession of the property to which they claimed to be entitled (R 57, Complaint ¶¶ 80-81) Appellants' breach of fiduciary duty claims are based on the same alleged failure by Wachovia and Drennan to protect Appellants' alleged rights to the subject property (R 56, Complaint ¶¶ 70-72)

The Appellants did not file their Complaint in the case at bar until December 20, 2006, despite the fact that they had actual and/or imputed knowledge of the issues and claims set forth in their Complaint as far back as March of 2002. As discussed above, Brogdon—as Trustee of the Lib Pence Trust, of which Appellants were beneficiaries—engaged in communications regarding the fact that the property at issue was not in the Trust and was not intended to be in the Trust under the 2002 Settlement Agreement and Order. Furthermore, it is undisputed and undeniable that at least some of the Appellants were keenly aware that they were being denied their alleged ownership and possession of the subject property as far back as September of 2002. The Settlement Agreement that Appellants now claim was breached was the very subject of the exchange of letters between (i) Brogdon and Drennan beginning in March of 2002, and (ii) Appellants' counsel and Drennan, beginning with James Jackson's letter of 27 September 2002. Indeed, Jackson's 27 September 2002 states

I have been asked by Jim McLean, who is the son of Norman McLean, to review a number of documents that he provided me which includes the Elizabeth Pence Trust agreement prepared by attorney J. Munford Scott, Jr. dated May of 1999 and the Order Approving Compromise and Settlement with attached *Compromise and Settlement Agreement*, which was the result of a lawsuit filed in Marlboro in case number 00-CP-34-354. In reading the *Compromise and Settlement Agreement* which was approved by Judge Lockemy, in paragraph 8 entitled "Separate Accounting for Orangeburg Realty" it says that in the event that Elizabeth P. Pence dies without children that the *Order and Settlement Agreement* would require that the Orangeburg property be distributed from her estate or from the

trust or both to the children of Norman McLean I would appreciate your letting me know your position in regards to that matter so that I can advise my clients appropriately (emphasis added)

(R 264)

Appellants sued Drennan and Wachovia based on the issues raised in this Brogdon correspondence and Jackson correspondence in 2002 Brogdon was the Trust of the Trust of which Appellants are beneficiaries, and Jackson was their attorney It is clear that the alleged property rights which the Appellants are now claiming and seeking to enforce are the same alleged property rights and issues raised in all of this 2002 correspondence Given the more than four years that passed between this 2002 correspondence and the filing of this lawsuit, Appellants claims are barred by the applicable three year statute of limitation The Trial Court correctly ruled that the Appellants' claim are barred by, *inter alia*, the three year statute of limitations under S C Code § 15 3-530

B Probate Code

Appellants' claims are also similarly barred under the South Carolina Probate Code Under section 62 3-803(a) of the Code

“(a) All claims against a decedent s estate which arose before the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis if not barred earlier by other statutes of limitations, are barred against the estate the personal representative and the heirs and devisees of the decedent unless presented within the earlier of the following dates (1) one year after the decedent's death, or (2) within the time provided by Section 62-3-801(b) for creditors who are given actual notice and within the time provided in Section 62-3 801(a) for all creditors barred by publication (emphasis added)

Pursuant to § 62-3 801(a) Wachovia published the requisite notice in the Marlboro Herald on September 16 23 and 30, 2002, notifying those with potential claims against the Pence

Jr estate to present their claims within eight months after the date of first publication of the notice or be forever barred. No such claims were presented.

Appellants' claims in the case at bar, which Appellants allege are founded on contract and tort, are barred under § 62-3-803(a). Section 62-3-803 of the Probate Code is a nonclaim statute, barring all claims not timely filed against the estate, including assets distributed to the beneficiaries of the estate. See A. McCoy's v. Garner, 281 S.C. 378, 380, 315 S.E.2d 812 (Ct.App. 1984) (decided under predecessor Code section 21-15-640, holding that it "is a nonclaim statute which bars all claims which are not timely filed against an estate--[including] assets distributed to the beneficiaries of the estate"), citing Moulton v. Degen, 279 S.C. 130, 301 S.E.2d 554 (1983), cited in Tollison v. Tollison, 320 S.C. 132, 135, 463 S.E.2d 611 (Ct.App. 1995) ("Section 62-3-803 is a nonclaim statute" as was predecessor Code section 21-15-640), see also Carolina Easter Grain Corp. v. Houck, 284 S.C. 224, 226, 325 S.E.2d 75 (Ct.App. 1985) (predecessor Code "section 21-15-640 is a nonclaim statute. That is, a creditor who fails to file a verified claim against the estate within five months of publication of the notice to creditors is forever barred from asserting his claim").

Wachovia published the requisite notice in the Marlboro Herald in September of 2002. Appellants did not file any claim for the subject property. Appellants filed this lawsuit more than four years later, on December 20, 2006. As such, Appellants' claims are forever barred under the nonclaim statute set forth in § 62-3-803 of the South Carolina Probate Code.

C Trial Court Correctly Ruled that 2002 Settlement Agreement Was Not a Sealed Instrument

Appellants argue that their contract claims are not governed by the three year statute of §15-3-530(1) governing contract actions, but instead by §15-3-520(b) which provides for a 20-

year statute of limitations for actions upon sealed instruments. The Trial Court properly rejected this argument. (R. 18-19, Order Granting Summary Judgment pp. 18-19)

S.C. Code Ann. §19-1-160 provides: “Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto.” Thus, §19-1-160 “imposes a statutory rule of evidence and requires that the determination of whether a non-sealed instrument should be considered a sealed instrument be gleaned from the instrument.” Carolina Marine Handling, Inc. vs. Lasch, 363 S.C. 169, 173, 609, S.E.2d 548, 550, 551 (Ct. App. 2005).

The contract in the case *sub judice*—the Settlement Agreement dated February 26, 2002—is not a sealed instrument. Plaintiffs’ argument that it is intended as a sealed instrument is founded solely upon the language immediately preceding the signatures of the parties: “IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this ____ day of January, 2002.” The Settlement Agreement contains no other evidence that the parties intended this to be a sealed instrument.

This case is directly on point with Carolina Marine Handling, Inc., *supra*, in which the boilerplate attestation clause at issue was identical, word for word, with the clause at issue here: “IN WITNESS WHEREOF the parties have hereunto set their hands and seals.” In Carolina Marine, the S.C. Court of Appeals found that the use of a “boilerplate attestation clause, by itself is not sufficient evidence that the parties intended that the instrument be sealed and thus subject to the 20 year limitations statute.” The Court opined that to find otherwise “would likely transform the twenty year statute of limitations into the standard period of limitations for contract actions in this state. We adhere to our general three-year statute of limitations for contract actions in this

state 609 SE 2d at 552 The Trial Court properly concluded that the Settlement Agreement at issue in this case was not a contract under seal, and was therefore subject to the three year statute of limitations set forth in § 15-3-530

V THE TRIAL COURT CORRECTLY RULED THAT WACHOVIA OWED NO DUTY TO APPELLANTS

Appellants' claims against Wachovia are also barred by the fact that Wachovia Bank, as Personal Representative of the Estate of Elizabeth P Pence, and as Trustee of the Elizabeth P Pence Trust, owed no duty to the Appellants With regard to the alleged breach of fiduciary duty claim, Appellants are not—and do not claim to be—beneficiaries under Elizabeth P Pence's Will or her Trust Appellants have not demonstrated any basis for the existence of a fiduciary relationship between themselves and Wachovia As discussed by the Court of Appeals in Regions Bank v Schmauch, *supra*

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence A relationship must be more than casual to equal a fiduciary relationship As a general rule, a fiduciary relationship cannot be established by the unilateral action of one party The other party must have actually accepted or induced the confidence placed in him

354 S C 648, 670 671 (citations omitted) The existence of a duty owed is a question of law for the Court Doe v Greenville County School District, 375 S C 63, 651 SE 2d 305 (2007) The Trial Court correctly held that there was no fiduciary relationship between the Appellants and Wachovia

Similarly, with regard to Appellants' alleged breach of contract claim against Wachovia, Wachovia was not a party or signatory to the Settlement Agreement on which the Appellants purportedly base their breach of contract claim As such, Wachovia owed no contractual duty to

the Appellants. The Trial Court properly dismissed Appellants' purported claims against Wachovia for breach of fiduciary duty and breach of contract on the basis that Wachovia owed no duty to the Appellants.

VI THE TRIAL COURT CORRECTLY RULED THAT DRENNAN OWED NO DUTY TO THE APPELLANTS

Appellants argue that the Trial Court erroneously ruled that Drennan owed no duties to Appellants by asserting that the 2002 Trust Settlement Agreement created duties flowing from "all of these entities to both the Trust and to its beneficiaries" (Brief of Appellant p. 20). However, Drennan is being sued only in his capacity as Personal Representative of the Estate of Elizabeth McLean Pence (Lib Pence). As such, his duties as Personal Representative of the Lib Pence Estate extended to only the Estate and its beneficiaries (i.e., only Lib Pence's daughter, Pence Jr.), which did not include the Appellants. Appellants are not—and do not claim to be—beneficiaries under Lib Pence's Will.

The entire purpose of the Trust Litigation filed by Pence Jr. was contrary to Appellants' interest as beneficiaries of the Trust. To argue that somehow the personal Representative of Pence Jr.'s Estate had a duty to the beneficiaries of the very Trust under attack is manifestly without merit. Neither piece of property now claimed by Appellants was ever transferred to the Trust and accordingly could never have been the subject of the 2002 Settlement Agreement and Order. The Settlement Agreement extended only to those pieces of property *actually in* the Trust at the time of the litigation and settlement thereof. The initial mistaken inclusion of the Caw Caw Swamp property on a schedule of Trust assets during a time when the parties were working out which Trust assets were to be transferred back into the Estate in order to effect the 60-40 split

agreed to as part of the settlement – and then corrected as soon as it was discovered – does not create a transfer of real property into the Trust

Furthermore Appellants have not demonstrated any basis for the existence of a fiduciary relationship between themselves and Drennan as set forth in Regions Bank v Schmauch supra. The existence of a duty owed is a question of law for the Court Doe v Greenville County School District, 375 S C 63, 651 S E 2d 305 (2007). The Trial Court correctly found that as a matter of law, Drennan owed no duty to the Appellants, contractual, fiduciary, or legal. Moreover, there is

no evidence in the record of a breach of any possibly existing duty owed by Drennan to Appellants even if there was a duty owed. As Personal Representative of the Estate of Elizabeth McLean Pence, Drennan did not dispose of any of the subject property, but rather filed the appropriate deeds of distribution to Pence Jr's estate according to the terms of Pence Sr's will. Deeds of distribution are not transfers of property because title to real property passes immediately upon death. They are simply evidence that the estate has released the right to access the property for payment of estate debts and expenses. S C Code § 62-3 709(B). As Personal Representative of the Estate of Elizabeth McLean Pence, Drennan had no other contact or dealings with the subject property.

Accordingly, the Trial Court properly ruled that Drennan owed no duty to the Appellants.

VII APPELLANTS ARE EQUITABLY ESTOPPED FROM PURSUING THEIR ALLEGED CLAIMS AGAINST DRENNAN AND WACHOVIA

On July 23, 2004 Wachovia, as personal representative of the Estate of Pence Jr, sold the Caw Caw Swamp property to defendants Thompson and Money to Go LLC. Additionally, in October of 2004, Wachovia, as trustee of the revocable trust agreement of Pence Jr, conveyed its remainder interest in the Cannon Bridge Road property. Wachovia's counsel, Drennan, had

extensive correspondence with Appellants counsel, James Jackson and their Trustee Brogdon (and Brogdon s counsel Munford Scott) specifically addressing the fact that the 2002 Settlement Agreement and Order was being carried out without putting the Caw Caw Swamp Property or Cannon Bridge Road Property in the Lib Pence Trust By distributing and conveying the Caw Caw Swamp and Cannon Bridge properties, in reliance on the Settlement Agreement and Order, and the subsequent correspondence, Drennan and Wachovia prejudicially changed their position Accordingly in addition to reasons outlined in the Trial Court's Order, Plaintiffs are equitably stopped from pursuing their claims against Wachovia See S C R App Pro 208(b)(2) (stating that 'Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c))²

Appellants should be equitably estopped from pursuing their claims against Wachovia Initially, Appellants, through Brogdon, agreed to the terms of the Settlement Agreement Thereafter, with ample notice and opportunity to question the allocation of Trust property, Appellants acknowledged through Brogdon and through James Jackson specifically agreed with Drennan and Wachovia's position that the Caw Caw Swamp and Cannon Bridge Road properties were not part of the Trust and would not be considered in the division of Trust assets

On September 27, 2002, attorney James Jackson Esq , wrote a letter to the Defendant James B Drennan, III, Esq , who was representing Wachovia, raising the very same issues which are the subject of this litigation, stating, in part

I have been asked by Jim McLean, who is the son of Norman McLean, to review a number of documents that he provided me which includes the Elizabeth Pence Trust agreement prepared by attorney J Munford Scott, Jr dated May of 1999 and the Order Approving Compromise and Settlement with attached Compromise and Settlement Agreement, which was the result of a lawsuit filed in Marlboro in case

² Moreover Wachovia included this equitable estoppel argument in its summary judgment brief to the Trial court (R 260 261)

number 00-CP-34-354 In reading the Compromise and Settlement Agreement which was approved by Judge Lockemy, in paragraph 8 entitled "Separate Accounting for Orangeburg Realty", it says that in the event that Elizabeth P Pence dies without children that the Order and Settlement Agreement would require that the Orangeburg property be distributed from her estate or from the trust or both to the children of Norman McLean I would appreciate your letting me know your position in regards to that matter so that I can advise my clients appropriately (R 264)

The Settlement Agreement and Orangeburg property referenced in attorney Jackson's letter are the same Settlement Agreement and property that is the subject of Appellants' claims

On October 1, 2002, Mr Drennan responded to Mr Jackson and explained in detail why the Caw

Caw Swamp Property was not a part of the Trust On October 21, 2002, Mr Jackson responded to Mr Drennan in a letter copied to appellant Jim McLean, stating in part

I have discussed the matter with my clients and they do accept the fact that the Caw Caw property and the Cannon Bridge Road property in which Elizabeth had a remainder interest were not put into the trust Therefore we accept that title to those properties passed through the Wills of Elizabeth Pence, the mother and Elizabeth Pence, the daughter Therefore, the purpose of this letter is simply [to] assure you that we do accept and agree with the matters set forth in your letter of October 1, 2002

Additionally, we would like to let you know and would ask that you let the beneficiaries of Ms Pence's [Pence Jr's] Will know that my client's [sic] are willing to purchase these two pieces of property in order to keep them in the family My clients' first choice would be to purchase the remainder interest of the Cannon Bridge Road property in which the [sic] Lennon McLean has a life estate Secondly, my clients would also be interested in purchasing the Caw Caw property, but believe that they would probably have to do so after the timber was cut and sold on thereon I would appreciate your forwarding this information to the appropriate persons to determine whether or not they might be willing to sell these Orangeburg properties (R. 269-270)

On January 17, 2003, Mr Jackson again wrote Mr Drennan, in a letter copied to Appellant Jim McLean, reiterating the fact that "my clients here in Orangeburg are interested in purchasing the Orangeburg County property owned by the late Elizabeth Pence" Along with the Jackson Drennan correspondence, the deposition testimony of attorney Jackson and various Appellants demonstrates Appellants' actual notice and knowledge in September/October of 2002

that the Caw Caw Swamp and Cannon Bridge Road properties were not in the Trust and were not deemed to be subject to the February 26, 2002, Settlement Agreement by the representatives of the estate of Pence Jr. For example

- (a) James McLean knew, while Pence Sr. was alive, that the Grambling Road property had been transferred to the trust and that the Caw Caw Swamp and Cannon Bridge Road properties had not (R 1026-1028, James McLean Depos pp 18-20),
- (b) Attorney Jackson testified that he discussed with Norman McLean the contents of his various letters exchanged with James Drennan (R 824-825, 828-830 James Jackson Depo, pp 17-18, 21-23)
- (c) Norman McLean testified that he discussed the matters addressed in the Jackson Drennan correspondence with Mr. Jackson and with his children, that Jackson was authorized to communicate to Drennan the McLean children's interest in purchasing the subject property, and that the McLean children were aware that Norman McLean asked Jackson to convey to Drennan their interest in the subject property (R 919-932, Norman McLean Depos pp 45-58)

The law simply does not allow such injustice born out of a plaintiff's own representations or actions. As stated by Supreme Court

The principle of estoppel in equity stands on the very foundations of right and fair dealing, and it considers and weighs conduct of men in their dealings with each other and gives that effect and meaning to their actions which common sense and justice dictate. The essential elements of an equitable estoppel are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) action based thereon such as to change his position prejudicially.

Kelly v. McCray, 278 S. C. 88, 90, 292 S. E. 2d 587, --- (1982) (citing General Motors Acceptance Corp. v. Herlong, 248 S. C. 55, 159 [149] S. E. 2d 51 (1966), South Carolina State Highway Department v. Metts, 270 S. C. 73, 240 S. E. 2d 816 (1978))

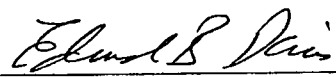
The case at bar presents the paradigm opportunity for application of the equitable estoppel doctrine. In reliance on the 2002 Settlement Agreement and Order, and Appellants' representations through counsel and their Trustee, Drennan and Wachovia, as personal

representative of the estate of Pence Jr and trustee of the revocable trust agreement of Pence Jr ultimately changed their position by distributing and selling the Caw Caw Swamp and Cannon Bridge Road properties To allow Appellants the relief that they seek in this litigation would prejudice Drennan and Wachovia Therefore in addition to the reasons cited by the Trial Court Appellants should be equitably estopped and summary judgment was appropriately granted in Drennan's and Wachovia's favor

CONCLUSION

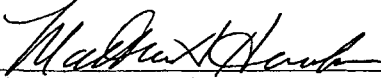
For the reasons stated above, the trial court's dismissal of Appellant's claims should be
AFFIRMED

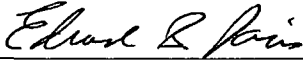

Matthew H Henrikson (S C Bar No 7897)
CLARKSON WALSH TERRELL
& COULTER, P A
Post Office Box 6728
Greenville, SC 29606
Telephone (864) 232-4400
Facsimile (864) 235-4399
mhenrikson@clarksonwalsh.com
ATTORNEYS FOR RESPONDENT
JAMES B DRENNAN III


Edward B Davis (S C Bar No 16713)
BELL, DAVIS & PITT, P A
227 West Trade Street Suite 2160
Charlotte NC 28202
Telephone (704) 227 0400
Facsimile (704) 227-0178
ward.davis@belldavispitt.com
ATTORNEYS FOR RESPONDENT
WACHOVIA BANK, N.A

CERTIFICATION OF COUNSEL

The undersigned certify that this Final Joint Brief complies with Rule 211(b) SCACR


Matthew H Henrikson


Edward B Davis

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Honorable Diane S. Goodstein, Circuit Judge

Case No. 2006-CP-38-1523

**Norman M. McLean, James N. McLean, Marie McLean-Choi, William N. McLean,
Robert L. McLean, and JL McLean Properties, LLC** **Appellants,**

v

**James B. Drennan, III as Personal Representative of the Estate of Elizabeth McLean
Pence, James E. Brogdon, Sr. as Trustee of the Trust Agreement of Elizabeth McLean
Pence dated May 28, 1999, Wachovia Bank National Association as Personal
Representative of the Estate of Elizabeth P. Pence, Wachovia Bank National Association
as Trustee of the Elizabeth P. Pence Trust, Marlboro Academy, Inc., Charles P.
Thompson, Jr., Cheri (Cheryl) Brown Thompson, Money to Go, LLC, James J. Pence,
Jr., as Personal Representative of the Estate of Stephen Pence, and Harry R. Easterling,
Jr.** **Respondents**

FINAL BRIEF OF RESPONDENT BROGDON

**J. RENÉ JOSEY
JEFFREY L. PAYNE
TURNER, PADGET, GRAHAM & LANEY, P.A.
P.O. Box 5478
Florence, SC 29502-5478
(843) 662-9008
Attorney for Respondent Brogdon**

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Jr , as Personal Representative of the Estate of Stephen Pence, and Harry R Easterling
Jr Respondents

PROOF OF SERVICE

The undersigned certifies that he is employed with the law firm of Turner, Padget,
Graham & Laney, P A , attorneys for Respondent Brogdon and that he has mailed a
copy of the Respondent s Final Brief, Certificate of Counsel and Proof of Service to all
counsel listed below this 30th day of August 2010, with proper postage attached
thereto

Matthew H Henrikson Esquire
Clarkson Walsh Rheney & Terrell
P O Box 6728
Greenville, SC 29606
Attorney for James B Drennan, III

James Randall Davis, Esquire
Nicholson Davis Frawley Anderson & Ayer
P O Box 489
Lexington, SC 29701
Attorney for Money to Go, LLC

Harry R Easterling Sr Esquire
Goldberg & Easterling PA
P O Drawer 655
Bennettsville, SC 29512
Attorney for James J Pence, Jr
and Harry R Easterling, Jr

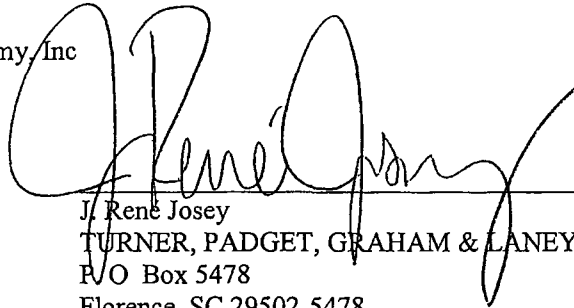
Edward B Davis Esquire
Bell Davis & Pitt PA
227 W Trade Street, Suite 2160
Charlotte NC 28202
Attorney for Wachovia Bank

David Alexander, Esquire
Culbertson & Alexander, LLC
P O Box 1904
Greenville SC 29602
Attorney for Appellants

W Cliff Moore, III, Esquire
Ellis Lawhorne & Sims PA
P O Box 2285
Columbia, SC 29202
Attorney for Charles P Thompson, Jr
and Cheri (Cheryl) Brown Thompson

John J James, II Esquire
Pauling & James, LLP
P O Box 507
Darlington SC 29540
Attorney for Marlboro Academy, Inc

August 30th, 2010



J. René Josey
TURNER, PADGET, GRAHAM & LANEY, P A
P O Box 5478
Florence, SC 29502 5478
(843) 662-9008
Attorneys for Respondent Brogdon

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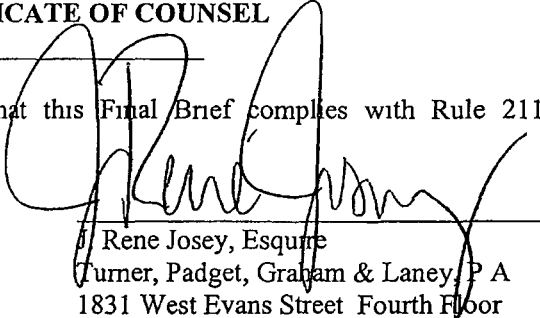
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Jr as Personal Representative of the Estate of Stephen Pence and Harry R Easterling,
Jr Respondents

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b),
SCACR

August 30th, 2010


Rene Josey, Esquire
Turner, Padgett, Graham & Laney, P A
1831 West Evans Street Fourth Floor
Post Office Box 5478
Florence South Carolina 29502-5478
(843) 662 9008

ATTORNEYS FOR RESPONDENTS

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<i>Coleman v Dunlap</i> , 306 S C 491, 495, 413 S E 2d 15 17 (1992)	8
<i>Dean v Ruscon</i> , 321 S C 360, 468 S E 2d 645 (1996)	15
<i>Fuller-Ahrens Partnership v South Carolina Dept of Highways and Public Transportation</i> 311 S C 177 427 S E 2d 920 (Ct App 1993)	17
<i>Great Games Inc v S C Dep t of Revenue</i> , 339 S C 79, 529 S E 2d 6 (2000)	20
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<i>Hooper v Ebenezer Senior Service and Rehab Center</i> , 377 S C 217 659 S E 2d 213 (Ct App 2008)	17
<i>In re Elkay Indus Inc</i> 167 B R 404, 408 (D S C 1994)	9
<i>McCoy s v Garner</i> , 281 S C 378, 380, 315 S E 2d 812 (Ct App 1984)	13
<i>McKinnon v Summers</i> , 224 S C 331, 79 S E 2d 146 (1953)	21
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STATEMENT OF ISSUES ON APPEAL

I Was the Appellants' Action Brought Too Late?

II Did the Respondent Brogdon Breach Any Duty To Appellants?

STATEMENT OF THE CASE

This is an action brought by Appellants heirs of James L McLean seeking a declaratory judgment and seeking to quiet title, among other causes of action¹ with regard to real properties once owned by Mr McLean in Orangeburg County R p 41 (Complaint) The Respondents include the personal representative and trustee for Elizabeth McLean Pence daughter of Mr McLean and one of the recipients of interests in the Orangeburg real properties The other Respondents are persons or entities alleged to have received interests in the Orangeburg real properties through the previous ownership interests of Elizabeth McLean Pence²

Each of the Respondents filed a motion for summary judgment³ – all of which were granted by the trial court ending the entire matter R pp 1 – 27 (Order of Judge Goodstein) This appeal followed R p 1151 (Notice of Appeal)

¹ Other claims include breach of fiduciary duty, accounting breach of contract, constructive trust, and unjust enrichment R pp 41 – 59 (Complaint)

² Also named as a party to this matter is JL McLean Properties, LLC – a corporation set up by some of the individual Appellants to jointly own investment properties Appellants Brief p 3 The children of Norman M McLean transferred their interest in some of the relevant property to this LLC in 2004 R p 48 (Complaint ¶ 32)

³ R p 178 (Respondent Brogdon's Motion for Summary Judgment), R p 248 (Respondent Wachovia Bank's Motion for Summary Judgment), R p 113 (Thompson Respondents' Motion for Summary Judgment), R p 194 (Personal Representative James Pence and Harry Easterling Motion for Summary Judgment) R p 219 (Respondent Marlboro Academy, Inc Motion for Summary Judgment), R p 273 (Drennan Motion for Summary Judgment) and R p 108 (Money To Go, LLC Motion for Summary Judgment)

STATEMENT OF FACTS

This litigation is focused on two parcels of real property in Orangeburg County the Caw Caw Swamp property and the Cannon Bridge Road property It is undisputed that Elizabeth McLean Pence had interests in these properties⁴, the dispute rests in what became of her interests

On May 28, 1999, after acquiring some interests in the Orangeburg properties described above,⁵ Elizabeth McLean Pence created a revocable trust that was to provide income to Elizabeth McLean Pence for the remainder of her life and then provide lifetime benefits to her daughter Elizabeth P Pence This trust is designated in the trust document as the "Pence Family Trust" – and shall be so referenced in this Brief R p 1101 (Article V, Pence Family Trust)

The Pence Family Trust provided that assets remaining in the Pence Family Trust at the death of Elizabeth P Pence were to go to the issue of Elizabeth P Pence if any, and if none then to Clemson University and Coker College with the exception of Orangeburg realty held by the Pence Family Trust That realty was to be distributed to the 'issue of the Settlor's brother'⁶

⁴ The Caw Caw Swamp property was left by James L McLean to his three children in 1955 as tenants in common pursuant to his will In 1994 the Caw Caw Swamp property was partitioned among the three children so that Elizabeth McLean Pence had an undivided interest to a part of the Caw Caw Swamp property

The Cannon Bridge Road property (about 125 acres deeded to Lennon McLean outright) was deeded to Lennon McLean for life and then to siblings Elizabeth McLean Pence and Norman Pence if Lennon died without issue Lennon died in 2004 without issue

⁵ Because Lennon McLean did not die without issue until 2004, Elizabeth McLean Pence only had a contingent remainder interest in the Cannon Bridge Road property in 1999

⁶ Although Elizabeth McLean Pence had two brothers, only brother Norman had children at the time the trust was created – those children are Appellants James N McLean ('Jim'), William N McLean ('Bill'), Robert L McLean ('Bob') and Marie McLean Choi ('Marie')

or if they were predeceased then to their issue per stirpes ” (Pence Family Trust Article VI § 3) R pp 1101 – 1103

James E Brogdon, Sr is a Certified Public Accountant practicing in Marlboro County South Carolina R p 611 line 11 p 612 line 24 (Brogdon Deposition) In this matter accountant Brogdon served as attorney in fact for Elizabeth McLean Pence from July 30, 1998 until her death on October 3, 1999 R p 1115 (Power of Attorney)

Pursuant to his appointment as attorney in-fact, it was accountant Brogdon who executed the Pence Family Trust – a trust that became irrevocable upon the death of Elizabeth McLean Pence (only a little over four months later) Brogdon was also named as trustee for this Pence Family Trust R pp 1098 – 1114 (Pence Family Trust Agreement)

At the time of Elizabeth McLean Pence’s death, neither the Caw Caw Swamp property or the contingent remainder interest in the Cannon Bridge property had been transferred to the Pence Family Trust A more valuable parcel of Orangeburg realty,⁷ also formerly owned by James L McLean, had, however, been placed in the Pence Family Trust simultaneous with the creation of the trust⁸ R p 1145 (Gramling Place Deed)

The will of Elizabeth McLean Pence provided that the property in her estate at death would pass to her daughter Elizabeth P Pence (free of any trust) R pp 1128 – 1129 (Will of Elizabeth McLean Pence, Items II and III) Thus the Caw Caw Swamp property and the Cannon Bridge Road property interest were administered as part of the estate of Elizabeth McLean Pence

⁷ In one schedule of valuations the Gramling Place with Interstate frontage, is valued at over \$1 5 million while the Caw Caw Swamp parcels together are valued at \$87 500 R p 39 (Exhibit B)

⁸ The Gramling Place was deeded to Elizabeth McLean Pence and Appellant Norman McLean by their father on July 3, 1954 Norman transferred his interest in the Gramling Place to Elizabeth McLean Pence in 1959

and transferred to the estate of Elizabeth P Pence R p 52 (Complaint ¶ 50 – Cannon Bridge Road), R pp 1175 – 1177 (Corrective Deed of Distribution dated 11 February 2003 for Caw Caw Swamp)

On October 19, 2000, after her mother s death and thus after her inheritance of property passed by her mother’s will Elizabeth P Pence initiated litigation (both individually and as personal representative of her mother s estate) in the Marlboro County Probate Court to challenge the validity of the Pence Family Trust created by her mother The litigation was subsequently removed to the Court of Common Pleas for Marlboro County pursuant to the provisions of S C Code § 62-1-302 The matter was designated by the Marlboro County Clerk of Court as case number 00 CP 34 354 (hereinafter the trust litigation”)

Prior to her death on August 26, 2002, Elizabeth P Pence agreed to settle the trust litigation The settlement was approved by order of the Circuit Court dated February 26, 2002 The court’s order incorporated and attached a document entitled “COMPROMISE AND SETTLEMENT AGREEMENT” which the order concluded was “approved and that the execution thereof by fiduciaries was ratified ’ R pp 28 – 29 (Settlement Order) The fiduciaries in the settled action included accountant Brogdon serving as trustee of the Pence Family Trust and plaintiff Elizabeth P Pence serving as personal representative for her mother’s estate

The February 2002 trust settlement agreement called for the division of Pence Family Trust assets with 40% retained in the existing Pence Family Trust and 60% distributed back through the estate of Elizabeth McLean Pence to a newly created revocable trust of Elizabeth P Pence R p 31 (Settlement Agreement ¶ 1) Paragraph 8 of the settlement agreement provided

that *after* distributions to Elizabeth P Pence (her new revocable trust) as provided in the agreement the [Pence Family] Trust property will consist of (a) the Orangeburg real property and (b) other investments This focus, on maintaining the Pence Family Trust's *existing ownership of Orangeburg Real Property* is echoed in paragraph 5(a) which provides in part, All Orangeburg County South Carolina real property *which is owned by the [Pence Family] Trust* shall be retained in trust by the Trustee (emphasis added)⁹ R p 33 (Settlement Agreement) Of course, these provisions are meaningfully consistent with the Pence Family Trust's ownership at the time of the valuable Gramling Place in Orangeburg County

⁹ This provision is consistent with the trust's actual ownership of the Orangeburg County Gramling Place The stated purpose of this provision was to maintain the trust ownership of Orangeburg real property whatever it might be by directing that the sixty percent of assets transferred to Elizabeth P Pence come from the non Orangeburg property of the trust, as the record confirms, this purpose was accomplished R p 382 lines 1-13 (Hearing Transcript)(unchallenged proffer of counsel that the Gramling Place property was worth approximately 40% of the total assets found in the Pence Family Trust at the time of settlement) The language of this paragraph does not expressly impose any obligation on the trust to acquire property it did not have to the contrary the express indication is that distributions are to be made *from* the trust *not to* the trust

ARGUMENT

I The Trial Court Was Correct – This Action Was Begun Too Late

In the case *sub judice*, the key allegation of the Appellants' complaint asserts that '[p]ursuant to the terms of the [Pence Family] Trust, the intent of Elizabeth McLean Pence, *and the Compromise and Settlement Agreement*, the Gramling Property Cannon Bridge Road Property and the Caw Caw Swamp Property became part of the [Pence Family] Trust ' ¹⁰ R p 52 (Complaint ¶ 47)(emphasis added) Based on this assertion Appellants seek to have post settlement transfers of the Cannon Bridge Road property and the Caw Caw Swamp property declared invalid R p 52 – 55 (Complaint, ¶¶ 49-68) Similarly Appellants seek to have a constructive trust imposed upon these properties R p 58 (Complaint, ¶¶ 84-86)

In the text itself, the Pence Family Trust *only* specifies that a Wachovia investment account shall be transferred into the trust R pp 1099 and 1114 (Pence Family Trust Article I and Schedule A) The Pence Family Trust document does not specify the inclusion of or direct the acquisition of any other property Whatever intent that Elizabeth McLean Pence may have had beyond the express words of the Pence Family Trust, her ability to express or effectuate any further intent was ended with her death – before the Pence Family Trust litigation even began ¹¹

Thus the relief sought by Appellants' complaint depends upon the third prong of the key allegation quoted above – and that is the Compromise and Settlement Agreement which was approved by the Circuit Court in 2002 and thereby incorporated into a final judgment of that trust

¹⁰ As discussed earlier, text accompanying footnote 8, the Gramling Property is not in dispute as it actually was added to the corpus of the Pence Family Trust during Elizabeth McLean Pence's lifetime R pp 1145 – 1150 (Gramling Property Deed)

¹¹ While the primary consideration in interpreting and applying a trust is to determine the settlor's intent, a court cannot look to parol or extrinsic evidence beyond the express words of the trust document absent some ambiguity Bowles v Bradley 319 S C 377 461 S E 2d 811 (1995)

litigation (Civil Action # 00 CP 34-354) In this litigation *the Appellants seek to have the Circuit Court amend the trust litigation settlement order to impose a requirement not found in the court approved agreement itself* – a requirement that all of the Orangeburg real property be placed into the Pence Family Trust (adding the Cannon Bridge Road property and the Caw Caw Swamp property) Such is the relief sought by Appellants first (quiet title) second (quiet title), third (declaratory judgment) and seventh (constructive trust) causes of action

A The Action Is Too Late Pursuant To SCRPC 60

Even if the Court in this matter had the authority in law or equity to impose such an asset transfer requirement,¹² the trial court concluded that it was too late to seek to have a new judge impose requirements not found in the original settlement order R pp 10 – 12 (Order) Allowing such delayed collateral revisions of settled orders and judgments would circumvent the sound policy of judgment finality and wreak havoc upon the stability of our civil justice system As this Court stated in Greenville Income Partners v Holman 308 S C 105 417 S E 2d 107 (Ct App 1992), to subject final judgments to attack outside the limited scope of Rule 60 “would unnecessarily make the validity of many judgments rather fragile ”

Absent fraud¹³ Rule 60 of the South Carolina Rules of Civil Procedure limits the time in which a judgment or order may be modified or changed to one year¹⁴ See Coleman v Dunlap,

¹² See *supra* note 22 and accompanying text for legal authority confirming trustee’s irrevocable ability to bind the trust and its beneficiaries

¹³ Fraud was not pleaded in this matter

¹⁴ SCRPC 60(b) provides in relevant part [T]he court may relieve a party or his legal representative from a final judgment order or proceeding for the following reasons

(1) mistake, inadvertence surprise or excusable neglect,

306 S C 491 495 413 S E 2d 15 17 (1992) As noted by this Court “limitations periods discourage [litigants] from sitting on their rights Carolina Marine Handling, Inc v Lasch, 363 S C 169 176 609 S E 2d 548 552 (Ct App 2005)(discussing statutes of limitations, not SCRCP)(quoting In re Elkay Indus , Inc., 167 B R 404 408 (D S C 1994)) The trial court here also observed that Rule 60 of the South Carolina Rules of Civil Procedure provides finality to litigation in our State R p 11 (Order) Such finality is needed by both litigants and others seeking to rely upon Court determinations and orders issued in our State

Appellants suggest that their present efforts are immune from the finality restrictions represented by Rule 60 Appellants suggest that there is no *adverse* “mistake ’ in the settlement order as envisioned by Rule 60 with regard to the Caw Caw Swamp property (Appellants’ Brief, pp 8 11) to the contrary, Appellants’ Brief incredibly asserts that the settlement order gives

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)

(3) fraud, misrepresentation, or other misconduct of an adverse party,

(4) the judgment is void,

(5) the judgment has been satisfied released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment order or proceeding was entered or taken A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment order or proceeding, or to set aside a judgment for fraud upon the court ’

them the relief they want and explicitly states that Caw Caw Swamp is part of the [Pence Family] Trust¹⁵ (Appellants' Brief p. 10). This is simply not true.

Judge Lockemy's one and a half page 2002 *settlement order* mentions no property, it only approves an attached settlement agreement. The attached *settlement agreement* also fails to mention any specific Orangeburg property. The settlement agreement incorporates a new revocable trust to be executed by Elizabeth P. Pence. The settlement agreement also references an attached Exhibit B.¹⁶

Exhibit B erroneously lists Orangeburg real property near Caw Caw Swamp as an asset of the 'Elizabeth M. Pence Trust' – it was not.¹⁷ Appellants are seeking to bootstrap this erroneous listing in collateral documentation, *not the court's settlement order*, into some kind of judicial directive of transference¹⁸; this fictitious conclusion is wholly unsupported by the record. Taking it one step further, Appellants also seek to bootstrap their claim to the unlisted Cannon

¹⁵ Trustee Brogdon agrees that a reasonable reading of the settlement order and settlement agreement contains no mistakes although an attachment to the agreement (Exhibit B) does contain a scrivener's error as discussed herein.

¹⁶ Nowhere in the trust litigation settlement order or the attached settlement agreement is there any requirement that any particular asset be placed into the Pence Family Trust, rather the agreement only specifies that "[Pence Family] Trust assets having a value equal to sixty (60%) percent of the value of all of the [Pence Family] Trust assets" will be conveyed to Elizabeth P. Pence as personal representative of her mother's estate – said assets to be placed in the new revocable trust. Thus, the only agreed transfer of assets is from within the assets already owned by the Pence Family Trust. R. p. 31 (Agreement ¶ 1).

¹⁷ Exhibit B is referenced in only two sentences of the settlement agreement (R. pp. 32 – 33 (¶ 3(b) and ¶ 5(a))) and each reference is solely for the purpose of setting property values; these values were to be used in accomplishing the division of property directed by the settlement agreement.

¹⁸ Appellants' Brief disingenuously represents that the Circuit Court approving the settlement agreement directly ordered such a transfer as well as every other word in the incorporated agreement (Appellants' Brief p. 9 (The Order states and the order lists)).

Bridge property to their bootstrapped claim to the Caw Caw Swamp property merely by asserting that [n]o rationale exists to treat [them] differently (Appellants Brief at 10 11) Respondent Brogdon can agree there is indeed no rationale reason – or cited legal authority – to treat either of these *unowned* properties as an asset of the Pence Family Trust

The parties to the settlement of the trust litigation had one year to seek court correction of any mistake If the failure to transfer the other Orangeburg properties into the Pence Family Trust corpus was a mistake or oversight requiring court action, as Appellants now claim trustee Brogdon could have moved the court under Rule 60 to modify or correct the trust litigation settlement order and require Elizabeth P Pence, as heir of the Elizabeth McLean Pence estate, to transfer those properties into the Pence Family Trust

In reality, the erroneous listing of the Caw Caw Swamp property on Exhibit B did not create an unfulfilled obligation for the property to be transferred, nor did it indicate some ambiguity in the settlement agreement or settlement order requiring clarification Perhaps this erroneous listing in Exhibit B did indicate an unfulfilled intent of Elizabeth McLean Pence¹⁹ which was no longer capable of fulfillment but it was not actionable by the wishful beneficiaries who chose to pursue this litigation after initially acknowledging this reality as early as 2002²⁰

¹⁹ Indeed trustee Brogdon testified that the intent of Elizabeth McLean Pence as related to him, was to eventually transfer all her property into the Pence Family Trust R p 649 (Brogdon Deposition) He even had prepared an additional deed to convey her interest in the Caw Caw Swamp property to the Pence Family Trust, but it never was executed R p 677 (Brogdon Deposition) As attorney in fact for Elizabeth McLean Pence, Brogdon may have owed a duty to Elizabeth McLean Pence to act more timely but that duty died with Elizabeth McLean Pence and was only actionable by Elizabeth McLean Pence or her estate – not these Appellants Of course, Elizabeth McLean Pence and her estate were not damaged by any delay in Brogdon gifting away her property interests

²⁰ After the death of Elizabeth P Pence, and well within a year of the trust litigation settlement order counsel purporting to represent one Appellant or more confirmed that his clients “accept that title to [Caw Caw Swamp and Cannon Bridge] properties passed through the Wills of

Finally Appellants can only criticize, without merit ²¹ trustee Brogdon's failure to move for relief under Rule 60 (Appellants Brief at 11, characterizing this as a 'dereliction'), because Brogdon had statutory authority as trustee to bind the Pence Family Trust for better or for worse, whether Appellants now like it or not ²² And even if trustee Brogdon's alleged 'dereliction' was an acquiescence in a "unilateral modification of the court's [settlement] order," ²³ which is denied that opinion does not alter the finality of the settlement judgment or create some alternative to circumvent the import of Rule 60 ²⁴

B The Action Is Barred By The South Carolina Probate Code

Based upon their key allegation described on page 6 of this Brief, Appellants seek to have declared invalid the transfers of the Cannon Bridge Road property and the Caw Caw Swamp

Elizabeth Pence the mother, and Elizabeth Pence, the daughter R p 871 (Jay Jackson October 21 letter)

²¹ Despite all its hyperbole, Appellants' Brief fails to cite any legal authority or precedent to support their claim that trustee Brogdon should have taken action under Rule 60 to enforce or clarify the trust litigation settlement order under the circumstances presented here

²² See S C Code § 62-7-303(a)(4) ("a trustee may represent and bind the beneficiaries of the trust with respect to questions or disputes involving the trust") see also Restatement (Second) of Judgments § 41(1)(a) and (2) (Trustee has representative capacity to preclusively bind beneficiaries even without notice) See, e.g. University of Southern California v Moran, 365 S C 270, 617 S E 2d 135 (Ct App 2005), see also Peoples Nat Bank of Rock Hill, S C v Rogers, 218 S C 11 61 S E 2d 391 (1950) (minors bound by guardian ad litem)

²³ Appellants' Brief p 11 Appellants' imagination in interpreting the trust litigation settlement knows no bounds Not only does Appellants' Brief unequivocally state that all Orangeburg property is expressly ordered to be included in the Pence Family Trust, the Brief suggests that any failure to make such transfers is a unilateral dereliction of such directives

²⁴ Again, fraud was not pleaded in this matter

property from the Elizabeth P Pence estate²⁵ R p 52 – 55 (Complaint, ¶¶ 49-68) Of course, finality of litigation is just as important in the Probate Court as it is in the Court of Common Pleas Thus the South Carolina Probate Code provides that claims²⁶ against an estate, like the Elizabeth P Pence estate, must be filed first with the Probate Court and must be filed in a timely²⁷ manner

As the trial court pointed out in her order, our Probate Code is known as a “nonclaim statute” – one which makes filing a timely claim with the probate court an absolute jurisdictional prerequisite to any subsequent assertion of the claim²⁸ R p 13 (Order) (citing McCoy’s v. Garner, 281 S C 378, 380, 315 S E 2d 812 (Ct App 1984), Tollison v Tollison, 320 S C 132 135 463 S E 2d 611 (Ct App 1995), and Carolina Eastern Grain Corp v Houck, 284 S C 224, 226, 325 S E 2d 75 (Ct App 1985)) In this case there was *no* claim filed by these Appellants

²⁵ The Appellants’ claim is not one against Elizabeth McLean Pence who passed her property interest in the Orangeburg properties to her daughter at Elizabeth McLean Pence’s death – prior to the trust litigation

²⁶ Claims are defined in the Probate Code as including “liabilities of the decedent arising in contract and liabilities of the estate which arise at or after the death of the decedent See S C Code § 62-1-201 (4)

²⁷ South Carolina Code § 62-3-803(a) provides that claims arising from decedent’s conduct prior to the decedent’s death, are time barred if not presented within the earlier of one year after decedent’s death or within the time allowed under § 62-3-801 (with variable provisions depending on type of notice given to creditors) To the extent that the trust litigation settlement agreement contractually obligated Elizabeth P Pence to transfer the other Orangeburg properties into the trust corpus, any breach of contract claim brought against her subsequent estate (as asserted in Complaint ¶¶ 79-83, R pp 57 – 58) would be based upon *her* conduct while alive Accordingly any claims subject to the statute’s limitations had to be presented no later than August 26 2003, a year after her death (and possibly earlier) This action was filed in December 2006

²⁸ S C Code § 62-3-804 outlines the instructions for filing a claim against an estate in Probate Court

with the Probate Court. Thus, the trial court properly concluded that this failure alone would bar the Appellants' claims. R pp 12 – 14 (Order)

Appellants continue their charade of settlement order misconstruction in an effort to avoid the application of the Probate Code as well. Specifically, Appellants argue that they did not need to file a claim in probate court because their claim to the Orangeburg properties was already litigated in the trust litigation – and there was no need to file a probate claim to enforce that earlier resolution. (Appellants' Brief at 12)

Appellants ignore that their claim now is against the Estate of Elizabeth P. Pence in that Elizabeth P. Pence failed to transfer the Orangeburg properties into the Pence Family Trust. If their misconstruction of the settlement order is to be applied, Appellants' claim is against the estate of Elizabeth P. Pence for not complying with the settlement order. This claim against the Estate of Elizabeth P. Pence was not part of the trust litigation, indeed Elizabeth P. Pence was still alive at the time. Again, no breach of the agreement claim was made by these Appellants in the Probate Court against the Estate of Elizabeth P. Pence; thus, this action is barred.²⁹

C. All of Appellants' Action Is Too Late Pursuant To The Applicable Civil Statute of Limitation

The relief sought by Appellants' first (quiet title), second (quiet title) third (declaratory judgment), and seventh (constructive trust) causes of action implicates the finality protection given to the trust litigation settlement and the Elizabeth P. Pence estate as discussed above. All

²⁹ In the Probate Code discussion of their Brief, Appellants also suggest that Respondents, or at least some of them, should be estopped from raising a statute of limitations defense because of some alleged conduct by those Respondents. Appellants' Brief at 13. This claim of estoppel of any applicable limitations period was not raised in trial court argument or in any memorandum of Appellants opposing summary judgment. It is not part of the record in this case. Accordingly, it should not be considered for the first time on appeal. See Wilder Corp. v. Wilke, 330 S. C. 71, 497 S. E. 2d 731 (1998).

of the Appellants' Causes of Action however fall subject to the general statutory time limits on the initiation of claims. This includes the fourth (breach of fiduciary duty) fifth (accounting), sixth (breach of contract) and eighth (unjust enrichment) causes of action.

Civil actions in this state must generally be brought within three years. S.C. Code § 15-3-530. Pursuant to the discovery rule, this time period does not begin to run until the Plaintiff knows or reasonably should know of the existence of a potential claim. See Dean v. Ruscon, 321 S.C. 360, 468 S.E.2d 645 (1996), Barr v. City of Rock Hill, 330 S.C. 640, 644-45, 500 S.E.2d 157, 160 (Ct. App. 1998).

Appellants here complain of the failure to include certain Orangeburg properties in the Pence Family Trust – asserting that the failure was either the result of a breach of the settlement agreement or a breach of fiduciary duty. Again, they also assert that such failure resulted in unjust enrichment, the need for a constructive trust, or the need to quiet title and/or declare property rights.

Appellants' action was filed 20 December 2006. Thus the question is whether Appellants knew or reasonably should have known, before 20 December 2003, that a claim might exist because the Orangeburg properties in question had *not* been transferred to the Pence Family Trust. So, is it reasonable, viewing all evidence in the light most favorable to the Appellants, to hold that the Appellants knew or had reason to know of the claims they now assert before 20 December 2003? Unquestionably.

Most notable, of course, are the letters of Orangeburg attorney Jay Jackson. On September 27, 2002, attorney Jay Jackson writes that he was asked by Appellant Jim McLean to review the trust settlement documents (admittedly received months earlier by Appellant Bill

McLean)³⁰ In this September 2002 letter Attorney Jackson asserts that the Orangeburg property [should] be distributed to the children of Norman McLean ' R p 866 (Jay Jackson September 27 letter)

Purporting to represent one or more of the Appellants Attorney Jackson confirmed on October 21 2002 with copy shown to Appellant Jim McLean that his clients "accept that title to [Caw Caw Swamp and Cannon Bridge] properties passed through the Wills of Elizabeth Pence, the mother, and Elizabeth Pence the daughter ' R p 871 – 872 (Jay Jackson October 21 letter)

Appellant Norman McLean testified³¹ that he authorized attorney Jackson, with the knowledge of his children, to write of their interest in purchasing the two properties "in order to keep them in the family ' R p 871 (Jay Jackson October 21 letter) A second letter written January 17 2003 with copy shown to Appellant Jim McLean, again states, ' my clients here in Orangeburg are interested in purchasing the Orangeburg County property owned by the late Elizabeth Pence " R p 874 (Jay Jackson January 17 2003 letter)

In addition to the Jay Jackson activity, Appellant Jim McLean testified that Appellant Will McLean was meeting with the Pence Family Trust attorney in Florence to discuss the litigation and Will s status as back-up trustee R p 1033 lines 12 21 (Deposition of Jim McLean) And Appellant Jim McLean was contemporaneously aware that "my cousin was filing a case against trusts or the will or something of my aunt And that she doesn't like the way it was structured And that basically my brother was asked to, I guess release himself as back up trustee or something like that R p 1034 lines 1-8 (Deposition of Jim McLean)

³⁰ In his deposition, attorney Jay Jackson testified that he did not discuss these matters with Appellant Jim McLean and only spoke with Norman M McLean R p 813 line 16 to p 814 line 23

³¹ R p 950 line 21 to p 952 line 10 (Deposition of Norman M McLean)

While Appellants now want to distance themselves from each other and attorney Jay Jackson in order to limit appearances of actual knowledge in 2002 and early 2003 regarding the Pence Family Trust and its affairs, trial counsel for Appellants did not deny that each of the Appellants had contemporaneous knowledge of the trust litigation settlement, rather he acknowledged that *[t]hey thought their rights were being protected by the settlement agreement*” R p 374 lines 16 18 (emphasis added)(Hearing Transcript)³²

Even absent the actual knowledge and awareness by several Appellants in October of 2002, it is reasonable to hold *all* Appellants reasonably should have known of all these matters of public record through the exercise of due diligence³³ as required by law. Both statute and case law put subsequent owners of realty on constructive notice of items in the chain of title before their ownership. See S C Code § 30-9-30, see e.g., Fuller-Ahrens Partnership v. South Carolina Dept. of Highways and Public Transportation, 311 S C 177 427 S E 2d 920 (Ct App 1993) (quoting 66 Am Jur 2d Records and Recording Laws § 104, at 404 (1973) ([T]he recording of a deed or other instrument entitled to be recorded is constructive notice to purchasers who subsequent to the recording acquire some interest or right in the property under the grantor ”))

Even if they did not know of the deaths of their relatives Elizabeth McLean Pence and Elizabeth P Pence in any other way, ancillary proceedings were opened for both estates in

³² Of course, Appellant Bill McLean executed a waiver of service as trustee on February 25, 2002 as part of the trust litigation settlement. R p 40 (Waiver form). As Appellants’ counsel described it, Appellant Bill McLean was right there in the mix of it” R p 355 lines 19-20 (Hearing Transcript). Appellants also answered requests to admit acknowledging Bill McLean’s receipt of copies of the Pence Family Trust the trustee waiver form, and the settlement agreement – all in February 2002. R p 1169 – 1174 (Requests to Admit and Responses).

³³ Potential claimants cannot wait idly on actual knowledge of claims, but must exercise reasonable diligence to identify claims promptly. See e.g. Hooper v. Ebenezer Senior Service and Rehab Center, 377 S C 217 659 S E 2d 213 (Ct App 2008). Rumpf v. Massachusetts Mut Life Ins Co., 357 S C 386, 593 S E 2d 183 (Ct App 2004).

Orangeburg County in February and April 2003 respectively thereby providing record notice to the Appellants R pp 137 – 162 (Ancillary filings of both estates) The estate of Elizabeth P Pence filed an inventory and appraisal that revealed both the ownership of the Caw Caw Swamp property and the contingent remainder interest in the Canon Bridge Road property³⁴

Thus when the trust litigation was settled in February 2002, it was known *as a matter of public record* (1) that the two desired properties were not owned by the Pence Family Trust,³⁵ (2) that the title to the properties had passed to Elizabeth P Pence, and (3) that the settlement agreement did *not* call for a transfer of those properties into the Pence Family Trust³⁶ By February of 2003 a year later, it was also known as a matter of public record that no party to the trust litigation had filed any kind of post judgment motion under Rule 60 or otherwise

³⁴ The transfer of these properties pursuant to the will of Elizabeth McLean Pence as filed in the Orangeburg ancillary proceedings occurred automatically as a matter of law See S C Code § 62 3-101 (devolution at death)

³⁵ The public record of ownership for the Caw Caw Swamp property continued to reflect Elizabeth McLean Pence Likewise, the public record of Elizabeth McLean Pence's undivided partial contingent remainder interest in the Cannon Bridge Road property remained unchanged from its' creation by deed in 1954 As reflected in the complaint, Appellant Norman M McLean was both a grantor and contingent remainder interest grantee in the 1954 deed – putting him on direct notice of the contents of the deed he executed R p 47 (Complaint ¶ 30 referencing Deed Book 195 Page 595) Appellant Norman M McLean knowingly shared in that undivided partial contingent remainder interest from 1954 to August 9, 2001 when he conveyed that interest to his four children – the other individual Appellants in this matter – thereby putting them on record notice of the similar interest of Elizabeth McLean Pence

³⁶ Appellants tortious construction notwithstanding, no reasonable reading of the trust litigation settlement agreement indicates an obligation by owner Elizabeth P Pence to transfer the Caw Caw Swamp property or Cannon Bridge Road remainder interest to the Pence Family Trust Appellants self-serving interpretation of the settlement agreement now does not control the notice created by a reasonable reading of the filed agreement at the time of filing (and following)

So no later than the Spring of 2003 the public record confirmed that the Appellants did not have the desired Orangeburg properties, and had no legal basis to acquire those properties³⁷ Despite these public facts, Appellants cling to their claim that ‘they had no notice that they would not receive these properties until [the contested] deeds were recorded [in 2004]’ Appellants’ Brief at 7

Realizing that they initiated this action too late Appellants seek to avoid the three-year statute of limitations in favor of a twenty or ten year period These provisions however, are not applicable to the case *sub judice* Most obviously, the breach of fiduciary duty claim against trustee Brogdon is a tort action – not an action to enforce a sealed instrument or an action to quiet title But these statutes also do not apply to the other causes of action as discussed below

The twenty-year statute, S C Code § 15-3-520(b), is applicable to actions based on a sealed instrument Relying on Carolina Marine Handling, Inc v Lasch, 363 S C 169 609 S E 2d 548 (Ct App 2005), the trial court here held that the trust settlement agreement with its boilerplate attestation clause, like that in Lasch, was not a sealed instrument triggering the longer statute R pp 18 – 19 (Order) In their brief, Appellants suggest that the court order approving the trust settlement renders this matter more like Treadaway v Smith 325 S C 367 479 S E 2d 849 (Ct App 1997), where a marital separation agreement incorporated into a Haitian divorce decree was considered a sealed instrument

This Court in Lasch confirmed, however, that the incorporation into a court order is not the determinative factor in reaching sealed instrument status The determinative factor is the

³⁷ Again, as much was acknowledged by McLean attorney Jay Jackson in his letter of October 21, 2002 Appellants suggestion that even more notice was needed, such as an additional statement of the objectively apparent reality, such as seems to be suggested by Appellants Brief note 1 is nonsense Accord Watters v Terminix Serv, Inc, 376 S C 632 658 S E 2d 110 (Ct App 2008)(even an error in an expert’s report did not delay the start of the statute of limitations where objective evidence of claim is clear)

instrument itself and the parties intent as gleaned from that agreement. Indeed, the Lasch Court did not find the incorporating order of Treadaway relevant and noted that the Treadaway agreement retained its separate contractual character because it was not merged into the divorce decree. Lasch 363 S C at 173 609 S E 2d at 551 n 2. Lasch found that being subject to a twenty year limitation period is to be expected in an agreement expressly addressing parent – child responsibilities like Treadaway. Id

Lasch clearly set about to limit any implications that Treadaway should be expanded to convert all agreements into sealed instruments open to a twenty-year statute of limitation. Lasch held that generic boilerplate language should not be allowed to “transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state.”

Appellants attempt to apply sealed status to any contract with “future, contingent obligations” would likewise result in transforming the twenty-year statute of limitations into the standard limitations period, this Court’s precedence is contrary to such a result. Appellants’ suggestion that a jury question is created with regard to the settlement agreement’s sealed status also ignores the Lasch directive that the intent to create sealed status is determined by the agreement language alone and nothing in the agreement *sub judice* allows deviation from the Lasche holding that attestation language is insufficient to create a sealed instrument.

The ten year statute of limitation now³⁸ suggested by the Appellants provides, in part
No action for the recovery of real property or for the recovery of the possession of real property

³⁸ The possible application of this statute was not raised in trial court argument or in any memorandum of Appellants opposing summary judgment. It is not part of the record in this case. Accordingly it should not be considered for the first time on appeal. See Wilder Corp v Wilke, 330 S C 71 497 S E 2d 731 (1998). Appellants did suggest the ten-year statute in their proposed order to the trial court but did not get a ruling from the trial court on this issue. Thus even if the unfiled proposed order is properly before the Court as part of the record, the issue is not properly preserved for this Court’s review. Great Games, Inc v S C Dep’t of Revenue, 339

may be maintained unless it appears that the plaintiff his ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action ' ³⁹ In McKinnon v Summers, 224 S C 331, 79 S E 2d 146 (1953) our Supreme Court determined that the real effort to recover possession or establish title in that case involved nullifying other deeds for alleged forgery, thus, the Court held that the applicable statute of limitations was more appropriately that for fraud and not the ten years found in this provision Similarly here, Appellants seek to establish possession or title to Orangeburg properties by having transfers from the Estate of Elizabeth McLean Pence nullified because of an alleged breach of contract or breach of fiduciary duty, hence, the three-year statute of limitations applicable to those theories must be applied in this case

S C 79 529 S E 2d 6 (2000) For thoroughness of response, but without conceding the Appellants waiver of the argument, trustee Brogdon addresses the substance of Appellants argument for the ten year statute of limitation

³⁹ Even on its face, this statute is of questionable application with regard to the Caw Caw Swamp property since none of these Appellants has possessed the partitioned Caw Caw Swamp property of Elizabeth McLean Pence since the partition action in 1994

II Respondent Brogdon Breached No Duty To Appellants

During his service as agent for Elizabeth McLean Pence, Brogdon owed a fiduciary duty to Elizabeth McLean Pence. See S C Code § 62-5-501 (A). This duty ended at her death just as his appointment as attorney-in-fact ended at her death. As noted above, any alleged breach of that duty, such as not acting promptly to execute documents as part of an intended estate plan, would be actionable, if at all, only for Elizabeth McLean Pence or her estate – not these Appellants. Appellants suggest that Brogdon's mere awareness of Elizabeth McLean Pence's intent, prior to her death in 1999, that Orangeburg real property pass to the McLeans created a duty not found in statute, not supported by any case and not created by any document.

The wishful desire of Appellants that the apparent intent of Elizabeth McLean Pence be carried out does not give rise to an enforceable testamentary act. And Trustee Brogdon's failure to transfer more into the Pence Family Trust corpus, while he had an effective appointment as attorney-in-fact, is no more actionable by these Appellants than the same failure by Elizabeth McLean Pence herself.⁴⁰

⁴⁰ The fiduciary duty owed by such an agent is one to serve in the principal's best interest – not one to fulfill charitable gifting desires that the principal might possess. Appellants seem to suggest that because Brogdon served as both attorney-in-fact for Elizabeth McLean Pence and trustee for the Pence Family Trust briefly at the same time then the duties owed as attorney-in-fact and those owed as trustee are both transmuted and synergized so that all duties are owed to everyone, this is not the law and Appellants cite no authority for this Court to create such an unanticipated result.

Neither the Probate Code nor the case law of South Carolina has extended the duty of an attorney-in-fact to third parties similarly situated to the Appellants. Simply stated, '[a]n agent who intentionally or negligently fails to perform duties to his principal *is not thereby liable to any person whose economic interests are thereby harmed*'. Restatement (Second) of Agency, § 357 (emphasis added). As noted by the trial court, the South Carolina Uniform Trust Code which comprehensively defines the duties of a trustee, does not include a duty of transferring property into the trust corpus. R. pp. 20 – 21 (Order).

As trustee of the Pence Family Trust Brogdon owed fiduciary duties to trust beneficiaries – including doing his best to protect their interest in the trust litigation. The Circuit Court's approval of the trust litigation settlement indicates that a good faith controversy exist[ed] ' and that the proposed compromise is in the best interest of all of the parties hereto ' Indeed, *but for* the Trustee's efforts to resolve the good faith controversy", the Pence Family Trust might have been declared invalid and regardless of whether one or three Orangeburg properties were in the Pence Family Trust, the Appellants here would have received nothing instead of the valuable Gramling Place that was preserved in the Pence Family Trust for their ultimate benefit.

While Appellants were not parties to that litigation, their authorized representative was – and the Court's order *conclusively* approves of his action in reaching the compromise. Thus, the settlement is no breach of fiduciary duty.

At least in part Appellants seem to agree that the settlement agreement itself is no breach of fiduciary duty because they insist the settlement awards them the additional property transfers they desire. Instead, they suggest the breach is Brogdon's failure to enforce their twisted manipulations of the settlement agreement and order.⁴¹ Trustee Brogdon has no duty, however to act in accordance with such perverse constructions of the settlement agreement and order⁴² –

⁴¹ Other than the claim that trustee Brogdon failed to acquire the desired Orangeburg properties, the Appellants could articulate no other basis for their "mismanagement claim. R p 981, line 22 – p 982, line 6 (Deposition of Norman M McLean), R p 1070 lines 24-25 (Deposition of Jim McLean). The Court therefore dismissed the mismanagement theory. R p 24 (Order). Appellants' Brief limits its claim of mismanagement to the failure to acquire the Orangeburg properties. Appellants' Brief at 22-23.

⁴² In fact, the trial court's dismissal of this entire matter should also be affirmed on the additional sustaining grounds (as allowed by SCACR 208(b)(2) and Rule 220(c)) that Appellants' misconstruction of the settlement agreement and order are simply wrong as a matter of law.

his actions in making the settlement were conclusively reasonable as approved by the Circuit Court's settlement order, his inaction to modify those terms later is not a breach of any duty

CONCLUSION

The trial court decision in this matter should be affirmed. The Appellants' action is untimely and barred under the South Carolina Rules of Civil Procedure, under the South Carolina Probate Code, and under the civil action limitations of the South Carolina Code. Moreover, the trial court is correct that trustee Brogdon breached no duty to secure assets for the

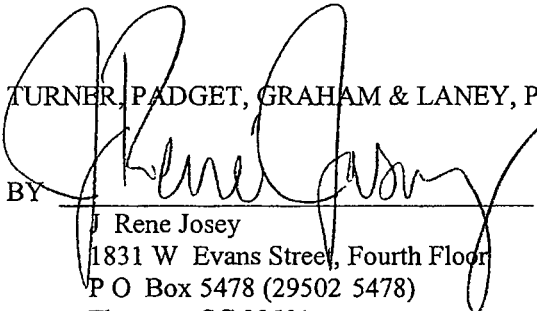
Pence Family Trust

Florence, South Carolina

August 30th 2010

TURNER, PADGET, GRAHAM & LANEY, P A

BY


Rene Josey
1831 W Evans Street, Fourth Floor
P O Box 5478 (29502 5478)
Florence, SC 29501
843-656-4451
843-413-5818 (fax)
rjosey@turnerpadget.com

ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Honorable Diane S. Goodstein Circuit Judge

Case No. 2006 CP 38 1523

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Robert L. McLean, and JL McLean Properties, LLC Appellants,

v

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James E. Brogdon, Sr. As Trustee of the Trust Agreement of Elizabeth McLean Pence dated May
28, 1999 Wachovia Bank National Association as Personal Representative of the Estate of
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Trust, Marlboro Academy, Inc., Charles P. Thompson, Jr., Cheryl (Cheryl) Brown Thompson,
Money to Go, LLC, James J. Pence, Jr., as Personal Representative of the Estate of Stephen
Pence, and Harry R. Easteling, Jr. Respondents

FINAL REPLY BRIEF OF APPELLANT

August 30, 2010

David Alexander (SC Bar No. 68632)
CULBERTSON + ALEXANDER, LLC
Post Office Box 1904 (29602)
110 Williams Street
Greenville, South Carolina 29601
david@culbertsonalexander.com
Telephone (864) 370 8222
Facsimile (864) 370 8227
ATTORNEY FOR THE APPELLANTS

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ARGUMENT

I APPELLANTS' CLAIMS ARE NOT BARRED BY ANY APPLICABLE LIMITATIONS PERIOD

In deciding whether any limitations period bars Appellants' claims, the Court must focus solely on the issues related to notice and Appellants' discovery of their claim. Respondents' briefs conflate the underlying merits of the action with what is needed to decide the limitations issues. Issues related to Appellants' notice are issues of fact. The Court must also apply the standard of review for summary judgment. If even a "mere scintilla of evidence" supports Appellants' claims, the trial court's judgment must be reversed. See Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

A Rule 60 Does Not Bar Appellants' Claims

In order for Rule 60 to apply, the Settlement Agreement and Order must contain a mistake. The McLeans contend that no mistake was made. Straining to use Rule 60 as a bar, Respondents attempt to convert their own alleged mistakes into a mistake made by the McLeans. Respondents acknowledge that if mistakes in the Settlement Agreement and Order were in the McLeans' favor, that Rule 60 would not bar their claims. The mistake alleged by the Respondents is inclusion of the Orangeburg Property in the Trust.

It is undisputed that the Order and Settlement Agreement states that it is honoring "the intention of the Decedent" that Appellants receive the Orangeburg Property (R pp 34-35). It is undisputed that the Order and Settlement Agreement lists the Caw Caw Swamp Property as belonging to the Trust. It is undisputed that the Caw Caw Swamp Property had not been deeded by Brogdon into the Trust. Two conclusions may be drawn from these facts: (a) the Order and

Settlement Agreement were correct and the McLeans were to receive the Orangeburg Property, or (b) Respondents made a mistake in drafting the Settlement Agreement and Order and should not have included this language

Either conclusion eliminates Rule 60 as a bar to the McLeans' claims. If the Order was correct, then certainly no Rule 60 motion would be required. If the Respondents erred in listing the Caw Caw Swamp Property as part of the trust and also erred in stating that they intended to give effect to M. Pence's intent that the McLeans receive the Orangeburg Property, then these mistakes aggrieved the Respondents, not the McLeans. Nothing in the Order and Settlement Agreement places the McLeans on notice of any errors.

If, as Respondents now claim, they discovered after the Marlboro County Circuit Court issued its Order that the Orangeburg Property was not part of the Trust, then they were required to ask the Court to amend its Order to correct their mistake. Respondents were not free to disregard the Order without returning to the court, but this is exactly what happened. Respondents would have Rule 60 apply to the McLeans, but not their own actions.

Respondents also erroneously use two arguments pertaining to the merits to support the trial court's conclusion as to Rule 60. First, Respondents ignore the mistakes they claim they committed and invent a new mistake--that the Order omitted a requirement that P. Pence convey property to the Trust. Second, Respondents argue that inclusion of the Caw Caw Swamp Property and Cannon Bridge Road Property would affect the 60/40 split of the property. These arguments bear on the meaning of the settlement and are for a jury to decide. Respondents are free to argue to the jury that if the settlement intended that the McLeans receive the Orangeburg Property, the settlement agreement would necessarily have contained specific language mandating a conveyance and would

have taken these distributions into account when computing the 60/40 split

Here, the question is whether the Order and Settlement Agreement *as written* contains an error prejudicing the McLeans. Any document can be made stronger by needless repetition. Respondents could invent any number of “mistakes” by omission—they could claim the Order and Settlement Agreement did not say when the properties were to be conveyed, the names of the parties taking title, exact legal descriptions, or who would bear the costs of transfer. But when focusing on the document as it actually exists, any alleged mistakes can only belong to the Respondents.

B The Probate Code Does Not Bar Appellants’ Claims

Respondents’ arguments concerning § 62-3 803(a) of the probate code ignores that the McLeans’ claims were *actually litigated* against M. Pence’s estate. Respondents’ arguments also ignore the fact that Drennan had actual knowledge of the McLeans’ claims. Drennan represented P. Pence in the Trust Litigation. He became M. Pence’s personal representative after P. Pence’s death. He represented Wachovia in its capacity as personal representative of P. Pence’s estate. Considering Drennan’s actual knowledge of the McLeans’ right to the Orangeburg Property, it would be inequitable to allow Respondents to hide behind § 62-3 803(a) and prevent Appellants’ claims from being heard on their merits.

C No Other Limitations Period Bars Appellants’ Claims

Without Rule 60 or the probate code, Respondents must rely on the Jackson letters to bar Appellants’ claims. Reliance on the Jackson letters at the summary judgment stage is improper. Multiple issues of fact exist as to whether the Jackson letters start the limitations clock for all of the McLeans. A jury must decide who Jackson represented (if anyone), whether any of the McLeans saw the Jackson letters, or whether the contents of their letters were communicated to any of the

McLean siblings Jim and Bill McLean testified that they did not recall ever seeing the Jackson letters (R pp 472-73, 1042-44) Jackson testified that he did not know Bob or Bill McLean (R p 814) Jackson testified that he had never dealt with Marie McLean Choi on any issues related to this case (R p 814) Jackson testified that he had never spoken to Jim McLean regarding any issue related to this case (R pp 813-14)

This evidence creates a genuine issue of material fact as to whether the Jackson letters triggered the limitations period. The jury must decide the factual issues related to the Jackson letters and the trial court erred in granting summary judgment. The Court need not reach the question of the applicability of other statutory limitations periods if a jury question exists on issues related to the Jackson letters.

II BROGDON BREACHED DUTIES OWED TO APPELLANTS

Genuine issues of material fact exist as to whether Brogdon breached his duties to the McLeans. From May 28, 1999 (the date the Trust was established), until the death of M Pence Brogdon served as **both** Trustee for the McLeans and attorney in fact for M Pence. He owed the McLeans a fiduciary duty as their Trustee. As M Pence's attorney in-fact, he had the power to act in the McLeans' interests and execute deeds conveying the Caw Caw Swamp and Cannon Bridge Road properties to the Trust. Had Brogdon done this, it is almost certain that the McLeans would now own these properties as they now own the Gramling property.

Brogdon attempts to avoid his responsibilities to the McLeans by stating that any duty to transfer properties into the Trust only flowed to M Pence. He states that M Pence's estate could have a cause of action against him for this breach, but not the McLeans. This argument ignores the undisputed fact that Brogdon was also the McLeans' Trustee at the same time he was M Pence's

attorney-in-fact Brogdon's duties as attorney-in-fact do not somehow negate or pause his duties as Trustee to the McLeans. A jury should be allowed to decide whether Brogdon's inaction breached his duties to the McLeans.

III ISSUES OF FACT EXIST AS TO WHETHER APPELLANTS ARE EQUITABLY ESTOPPED FROM ASSERTING THEIR CLAIMS

Relying on the Jackson letters, Drennan and Wachovia argue that equitable estoppel bars the McLeans' claims. Drennan and Wachovia are not entitled to the use of this equitable doctrine. As related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question (2) reliance upon the conduct of the party estopped and (3) prejudicial change in position. "Southern Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth.", 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993).

Drennan and Wachovia cannot prove that they changed their position in reliance on the Jackson letters. In order to prove a change in position, Drennan and Wachovia must first take the position that the Order and Settlement Agreement required them to ensure that the McLeans received the Orangeburg Property and that they intended to convey this property to the McLeans. Drennan and Wachovia have never taken such a position in this case.

An issue of fact also exists whether Drennan and Wachovia knew of the truth of the McLeans' claims. Drennan was intimately involved in the settlement of the Trust Litigation. His knowledge of the settlement is imputed to Wachovia. Jackson was not in a superior position as to the facts of the case. He could not mislead Drennan and Wachovia. Rather, Drennan had the means to know the truth of the McLeans' claims. Therefore, the Court should disregard Respondents' equitable estoppel argument.

IV ISSUES OF FACT EXIST WHETHER THE THOMPSONS AND MONEY TO GO, LLC ARE BONA FIDE PURCHASERS

The Thompsons and Money to Go, LLC admit that the issue of constructive notice hinges upon the prudence of a title abstractor (Respondents' Brief at 23-24) Whether a title researcher meets the standard of care is a classic issue of fact See Doe v American Red Cross, 297 S C 430, 433 36, 377 S E 2d 323, 325-27 (1989) (discussing standards of care for professionals) Appellants are entitled to have a jury decide whether Respondents' title research should reasonably have discovered the McLeans' claims Therefore, summary judgment was inappropriate on this ground

CONCLUSION

For the reasons stated above, the judgment of the trial court should be REVERSED and this case should be remanded for trial before a jury

August 30, 2010



David Alexander (SC Bar No. 68632)
CULBERTSON + ALEXANDER, LLC
Post Office Box 1904 (29602)
110 Williams Street
Greenville South Carolina 29602
david@culbertsonalexander.com
Tel (864) 370-8222/Fax (864) 370-8227
ATTORNEY FOR THE APPELLANTS

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant and Final Reply Brief of Appellant
on the following parties by depositing a copy of it in the United States Mail, postage prepaid, on
August 30, 2010, addressed to their attorneys of record as indicated below:

Matthew H. Hemikson, Esq.
Clarkson Walsh Rheney & Terrell
Post Office Box 6728
Greenville, South Carolina 29606
Attorney for James B. Drennan, III

James Randall Davis, Esq.
Nicholson Davis Frawley Anderson & Ayer
PO Box 489
Lexington, SC 29701
Attorney for Money to Go, LLC

Harry R. Easterling, Sr., Esq.
Goldberg & Easterling, PA
PO Drawer 655
Bennettsville, SC 29512
Attorney for James J. Pence, Jr. and
Harry R. Easterling, Jr.

Edward B. Davis, Esq.
Bell Davis & Pitt, PA
227 W. Trade Street, Suite 2160
Charlotte, NC 28202
Attorney for Wachovia Bank

Jeffrey L. Payne Esq
Turner Padgett Graham and Laney PA
PO Box 1473
Columbia SC 29201
Attorney for James E. Brogdon Sr

W. Cliff Moore III Esq
Ellis Lawhorne & Sims, PA
PO Box 2285
Columbia, SC 29202
Attorney for Charles P. Thompson Jr and
Cheri (Cheyl) Brown Thompson

John J. James, II, Esq
Pauling & James, LLP
PO Box 507
Darlington, SC 29540
Attorney for Marlboro Academy, Inc

July 7 2010



David Alexander (SC Bar No 68632)
CULBERTSON + ALEXANDER, LLC
Post Office Box 1904 (29602)
110 Williams Street
Greenville, South Carolina 29601
david@culbertsonalexander.com
Telephone (864) 370 8222
Facsimile (864) 370 8227
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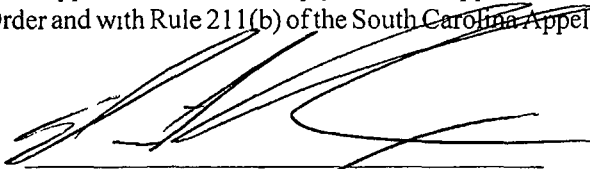
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Pence and Harry R Easterling, Jr Respondents

CERTIFICATE OF COMPLIANCE

I certify that the Final Brief of Appellant and Final Reply Brief of Appellant comply with
Supreme Court's August 13, 2007 Order and with Rule 211(b) of the South Carolina Appellate Court
Rules

August 30, 2010



David Alexander (SC Bar No 68632)
CULBERTSON + ALEXANDER, LLC
Post Office Box 1904 (29602)
110 Williams Street
Greenville, South Carolina 29601
david@culbertsonalexander.com
Telephone (864) 370 8222
Facsimile (864) 370-8227
ATTORNEY FOR THE APPELLANTS

THE STATE OF SOUTH CAROLINA
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APPEAL FROM ORANGEBURG COUNTY
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Honorable Diane S Goodstein, Circuit Judge

Unpublished Opinion No 2011 UP 517 (S C Ct App filed Nov 29, 2011)

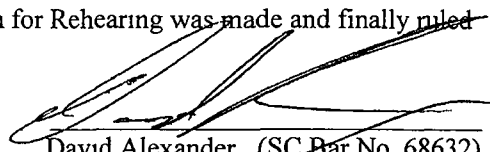
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Money to Go, LLC, James J Pence, Jr , as Personal Representative of the Estate of Stephen
Pence, and Harry R Easterling Jr Respondents

AMENDED CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled
on by the Court of Appeals on February 24, 2012



David Alexander (SC Bar No 68632)
CULBERTSON + ALEXANDER, LLC
Post Office Box 1904 (29602)
114 Manly Street
Greenville, South Carolina 29601
david@culbertsonalexander.com
Telephone (864) 370 8222
Facsimile (864) 370-8227
ATTORNEY FOR THE PETITIONERS



