

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Honorable Diane S. Goodstein, Circuit Judge

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S.C. Supreme Court

Unpublished Opinion No.: 2011-UP-517 (S.C. Ct.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 PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Appellants are attempting to recover their family's land from the Respondents. The real property in question had been in Appellants' family since the 1950s. Appellants' aunt owned the property and it is undisputed that she intended for Appellants to have this property after her death. Even after litigation in 2002 confirmed that Appellants were to receive this property, it wound up in the hands of Respondents.

A. Background on the McLean Family and its Real Property

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").

To place this litigation in its proper context, it is necessary to have some knowledge of the McLean family tree. Many of the names are similar and can be confusing. Norman's father was James L. McLean. James L. McLean had three children, Appellant Norman, James L. McLean, Jr. ("Lennon"), and Elizabeth McLean Pence ("M. Pence"). M. Pence had one daughter, Elizabeth Pence ("P. Pence").

James L. McLean farmed timber in Orangeburg County and owned multiple properties. Three of those properties are important to 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 and in his will, James L. McLean took steps to distribute his property to his children and also provide for Lennon, who was disabled. Norman, M. Pence, and Lennon all received some interest in these properties.

CERTIFICATE OF COUNSEL

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

QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED IN ITS SUMMARY CONCLUSION THAT THE OUTCOME OF THE TRUST LITIGATION IN 2002 WAS UNFAVORABLE TO APPELLANTS.

II. WHETHER A CORRECT INTERPRETATION OF THE 2002 MARLBORO COUNTY ORDER WOULD REQUIRE THE CONSIDERATION OF APPELLANTS' REMAINING ISSUES ON APPEAL.

III. WHETHER THE ISSUES PRESENTED BY THIS CASE MERIT A WRIT OF CERTIORARI

Lennon died without issue in 2004.¹

B. Creation of M.Pence's Trust

M. Pence lived in Marlboro County, South Carolina. 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 Respondent James E. Brogdon, Sr. ("Brogdon"). After the death of her husband, M. Pence gave Brogdon a durable power of attorney dated July 30, 1998. (App. p. 1115.) On May 28, 1999, Brogdon established a trust for M. Pence's property (the "Trust"). (App. 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. (App. 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—not M.Pence's daughter, P.Pence-- was named by the Trust as a successor trustee.

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 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. (App. 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

¹ This discussion is greatly simplified for the Court's convenience. Later transactions divided some of these properties between Norman, M. Pence, and Lennon. Currently in dispute are M. Pence's interests in these properties.

execute it prior to M. Pence's death. (App. p. 677.) The Cannon Bridge Road property was not deeded into the Trust by Brogdon prior to M. Pence's death.

C. The Trust Litigation

M. Pence died on October 3, 1999. 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"). (App. p. 30.) The Settlement Agreement was confirmed by the order of the Honorable James E. Lockemy (the "Order.") (App. p. 28.) The language of the Settlement Agreement, which became part of Judge Lockemy's Order, is crucial to an understanding of case currently before the Court. The Order basically states that P. Pence was to receive her mother's Marlboro County real property and Appellants were to receive the Orangeburg real property through the Trust.

The language of the Order and Settlement Agreement favors the McLeans by unambiguously stating that they would receive the Orangeburg Property through the Trust. Paragraph Eight of the Order and 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.

(App. pp. 34-35.) Drennan drafted the Settlement Agreement. (App. p. 673.) On August 26, 2002, P. Pence died without issue which meant Appellants should have received the Orangeburg real property.

Buttressing this general language in the Order, an exhibit to the Order and Settlement Agreement listed the real property that would belong to the Trust upon its confirmation by the Court. (App. pp. 38-39.) This exhibit specifically listed the Gramling Place and Caw Caw Swamp properties as items that would be Trust assets after the settlement. The exhibit did not list the Cannon Bridge Road property.

The McLeans saw that the settlement of the Trust Litigation was favorable to them and relied on this fact. 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. (App. pp. 446, 554.) Bill McLean's waiver was included as an exhibit to the Order and Settlement Agreement.

Unfortunately, the McLean siblings never received title to M. Pence's interests in the Caw Caw Swamp property and the Cannon Bridge Road property. Instead, these properties were deeded from M. Pence's estate to P. Pence's estate. (App. 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. (App. 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. These deeds were recorded in 2004 and this was the first record notice Appellants had of their claims. Pence later deeded a portion of his alleged interest in Cannon Bridge Road to Harry Easterling, Jr. (“Easterling”). (App. pp. 45-50.)

D. The Current Litigation in the Court of Common Pleas

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. (App. pp. 41-59.) Defendants timely answered and denied all of the Appellants’ allegations. Respondents all filed Motions for Summary Judgment.

On July 14, 2009, the Honorable Diane S. Goodstein issued her Order granting summary judgment to Respondents. (App. p. 1.) Judge Goodstein’s Order contained multiple grounds for her ruling, but her primary basis was that the one-year time limit of Rule 50 of the South Carolina Rules of Civil Procedure barred Appellants’ claims. Appellants appealed, disputing the trial court’s primary holding and all of its alternative bases for its ruling.

E. The Court of Appeals’ Opinion

Appellants and Respondents briefed and presented oral argument on all of the rulings in trial court’s Order. The Court of Appeals issued a one-page unpublished per curiam opinion that contained no recitation of the facts and no articulation of its reasoning. The Court of Appeals summarily concluded that Brogdon’s actions in the Trust Litigation bound the McLeans and that

their claims were therefore time-barred. The Court of Appeals also concluded that Appellants' claims against Brogdon were time-barred. No other basis or explanation appears in the Court of Appeals' opinion. It failed to discuss the McLean's primary contention that the settlement of the Trust Litigation was in their favor.

Appellants filed a Petition for Rehearing En Banc, asserting that the Court of Appeals misapprehended the outcome of the Trust Litigation. Appellants argued that this error led to the court's erroneous conclusions regarding the time-barring of Appellants' claims and the court's refusal to consider Appellants' arguments. Appellants' petition was denied and this Petition for Writ of Certiorari timely followed.

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN ITS SUMMARY CONCLUSION THAT THE OUTCOME OF THE TRUST LITIGATION IN 2002 WAS UNFAVORABLE TO APPELLANTS.

The Court of Appeals failed to address the fact that the plain language of the Settlement Agreement favored the Appellants. The court's opinion summarily concluded that Brogdon's failure to take action to obtain the disputed properties for the Trust in the Trust Litigation bound Appellants and their claims are now time-barred. However, if, as Appellants assert, their interests were protected by the Settlement Agreement, then they would have had no reason to question Brogdon's failure in 2002 to seek relief from the Order. The appellate court's failure to apprehend this key distinction caused the error in its opinion.

A. The Language of the 2002 Order and Settlement Agreement

The language of the Order and Settlement Agreement protected the McLeans in both general and specific terms. Its general language acknowledged M.Pence's undisputed intention that the McLeans were to receive the Orangeburg property. It stated, "[T]he Trust property will consist of (a) the Orangeburg real property." (App. pp. 34-35.) (emphasis added) This language is mandatory and prospective. It says the Trust's real property will consist of the Orangeburg property.

Furthermore, the language of the Order and Settlement Agreement states the purpose of this provision. It states that the purpose is "to give effect to the intention of" M.Pence's intention that the McLeans were to receive the Orangeburg property. (App. pp. 34-35.) These two provisions clearly show the general intent and purpose of the Order and Settlement Agreement was

to comport with M. Pence's wish that the McLeans receive the Orangeburg property.

The Order and Settlement Agreement also specifically identifies property that "will" be part of the Trust in its exhibit. (App. pp. 38-39.) This exhibit identified the Gramling and Caw Caw Swamp properties as Orangeburg property that was part of the Trust. This language in the exhibit could not be any clearer. It specifically identifies real property that would belong to the Trust after confirmation of the settlement. This exhibit lists the Gramling and Caw Caw Swamp property.

Upon reading the Order, neither Brogdon nor the McLeans would have had 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." (App. 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." (App. p. 448.)

B. Questions of Intent are Inappropriate for Summary Judgment

Respondents claim that the Order and Settlement Agreement were simply mistaken as to whether the Orangeburg property was in the Trust. They claimed the intent of the Order and Settlement Agreement was to reclaim property from the Trust, not add property to it. After the issuance of the Order, Respondents Drennan and Wachovia took no steps to correct this mistake. They simply ignored it and proceeded to claim the Orangeburg property. Drennan and Wachovia were not free to ignore an Order of the court. If the Order and Settlement Agreement were mistaken, then Respondents were required to return to the court and have the mistake corrected by a judge.

The Court of Appeals' opinion did not address this issue, but implicitly decided that the Order and Settlement Agreement were unfavorable to Appellants. The only way to reach this conclusion would be to (1) ignore the language of the Order, or (2) make a determination regarding the intent of the Order. Either line of reasoning compels reversal. The determination of intent is a question of fact. See Department of Natural Resources v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299 (2001). Furthermore, Drennan drafted the Settlement Agreement. (App. p. 673) Since Drennan was the document's drafter, any ambiguities must be construed against him and the Respondents. "Ambiguous language in a contract, however, should be construed liberally and interpreted strongly in favor of the non-drafting party." Bazzle v. Green Tree Financial Corp., 351 S.C. 244, 262, 569 S.E.2d 349 (2002). At the summary judgment stage, resolution of this question of fact was inappropriate and should have been reserved for a jury.

C. Assuming the Order and Settlement Agreement was in Appellants' Favor, then Appellants' Claims are not Time-barred

The McLeans assumed that Brogdon had protected their interests with this settlement. They would have had no reason to question the outcome of the Trust Litigation in 2002 or attempt to require Brogdon to address the Order and Settlement Agreement. Therefore, Appellants' limitations period could not have begun in 2002. Instead, their limitations period began running in 2004, when deeds to the Respondents were recorded. It was not until this point that Appellants had any notion that the terms of the Order and Settlement Agreement would be unilaterally disregarded by the Respondents.

The two McLean siblings who were deposed testified that they had no notice they would not receive the Orangeburg property until they saw the recorded deeds to the Respondents in 2004. Therefore, genuine issues of fact exist on the question of notice. This beginning of the limitations

period makes Appellants' claims timely against both Brogdon and the other Respondents.

The McLeans' claims against Brogdon also stem from his failure to deed these properties into the Trust before M. Pence's death. These claims were tolled during the time period in which the McLeans would reasonably have believed Brogdon's breach of fiduciary duty had been cured by the Settlement Agreement's mandate that they receive their aunt's Orangeburg property. Therefore, the McLeans' statute of limitations could not have started running against Brogdon when he signed the Settlement Agreement.

For these reasons, the Court should grant certiorari to consider this incorrect conclusion of the Court of Appeals regarding the meaning of the Order and Settlement Agreement and the effect of a proper interpretation on the beginning of Appellants' limitations period.

II. DETERMINING THAT THE 2002 ORDER AND SETTLEMENT AGREEMENT WAS FAVORABLE TO APPELLANTS WOULD HAVE NECESSITATED CONSIDERATION OF APPELLANTS' REMAINING ARGUMENTS

The Court of Appeals declined to consider the remaining issues on appeal because of its holding regarding the 2002 Order and Settlement Agreement. If the Court grants certiorari, it will necessarily consider these other issues.

A. The Trial Court Erred In Holding That The Creditor Claims Provisions Of The Probate Code Bar The Appellants' Claims

If the Court grants certiorari, it will need to consider the trial court's ruling that § 62-3-803(a) of the probate code bars Appellants' 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. The existence of a prior court order on this issue obviates the need for a claim under the probate code.

The trial court also ignored 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.

Even if the Trust Litigation cannot eliminate the need for 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.

B. The Trial Court Failed To Apply The Correct Limitations Period

The Court of Appeals also failed to consider Appellants' argument that the correct statute of limitations was not three years, but twenty years. Section 15-3-520(b) of the South Carolina Code 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." (App. 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 did not concern a court order and should be distinguished on that point. 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, the trial court should have applied a ten-year limitations period to the McLeans' quiet title actions. See S.C. Code Ann. § 15-3-340. 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. Therefore, the McLeans' claims against these Respondents were timely and the Court should reverse the ruling of the trial court.

C. The Trial Court Erred In Holding That The Jay Jackson Letters Triggered the Statute of Limitations

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. (App. p. 4-5.) However, Jackson denied representing any of the McLean siblings and testified that he did not even know Bill or Bob McLean. (App. pp. 813-14.)

Reliance on the Jackson letters was error at the summary judgment stage. Genuine issues of fact exist with respect to when the McLeans learned of their claims and the trial court 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. (App. p. 814.) Jackson testified that he did not know Bill McLean. (App. p. 814.) Jackson testified that he had never dealt with Marie McLean-Choi on any issues related to this case. (App. p. 814.) Jackson testified that he had never spoken to Jim McLean regarding any issue related to this case. (App. pp. 813-14.)

The trial court also ignored the testimony of the McLeans regarding their contact with 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. (App. pp. 1042-44.) Bill McLean also testified that he had never seen these letters prior to this litigation. (App. 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. (App. p. 551.) Jim McLean testified that he did not recall discussing the Jackson letters with his father in 2002. (App. 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 improperly imputed notice of 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.

D. 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.

E. 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.

F. 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. (App. p. 649.) Brogdon admitted that he knew it was M. Pence's intention that the McLean siblings receive the Orangeburg property. (App. 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. (App. 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. (App. 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

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).

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. (App. 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. (App. pp. 630-31.) He knew that it was M. Pence's intention that the McLeans receive the Orangeburg real property. (App. 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.

G. 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 Appraisalment of M. Pence's estate. (App. pp. 1134-35.) The Inventory and Appraisalment 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. (App. 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.

(App. 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.

III. THE ISSUES PRESENTED BY THIS CASE MERIT THE GRANT OF A WRIT OF CERTIORARI

The Court should grant a writ of certiorari because of the important and novel issues presented by this case. First, the Court of Appeals' opinion failed to consider the plain language of an order of the Court of Common Pleas. Questions regarding the interpretation of orders of this State's trial courts are of paramount importance. It is undisputed that Respondents ignored the language of the 2002 Order and Settlement Agreement. Refusing to address this issue means that parties are free to disregard orders issued by this State's judiciary and do not have to seek Court approval to correct any alleged errors. This Court should take this opportunity to reinforce the integrity of the judiciary's orders.

Second, this case involves novel questions regarding the liability to beneficiaries when an individual serves in a dual capacity as attorney-in-fact and trustee. The Appellants' claims against Brogdon for failing to transfer the Orangeburg properties into the Trust prior to M.Pence's death squarely present this interesting issue. The Court should carefully consider this issue and provide guidance on the duties borne by an individual in this position.

Third, this case presents important and novel questions regarding applicable statutes of limitation. Specifically, the current decision by the Court of Appeals places individuals in jeopardy of losing their rights because of the possibility of the application of the shorter limitations period contained in Rule 60. This case would also allow the Court to decide whether actions based on court orders are proper under the twenty-year limitations period of section 15-3-520(b) of the South Carolina Code.

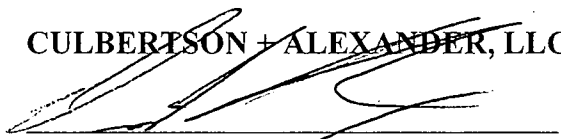
Finally, the Court of Appeals' decision conflicts with the Court's decisions regarding the appropriate standard for summary judgment in Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009). In Hancock, the Court stated, "[I]n cases applying the preponderance of the evidence burden of proof, 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. In this case, multiple issues of fact were decided against Appellants when far more than a scintilla of evidence existed to support their claims. The Court should use this case to reinforce its holding in Hancock and affirm the rights of litigants to a full and fair trial of their cases to a jury.

IV. CONCLUSION

For the reasons stated above, the Court should grant Appellants' Petition for a Writ of Certiorari.

Respectfully,

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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)

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APR 18 2012
S.C. SUPREME COURT

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 PROOF OF SERVICE

I certify that I have served the Amended Petition for a Writ of Certiorari on the following parties by depositing a copy of it in the United States Mail, postage prepaid, on March 30, 2012, addressed to their attorneys of record as indicated below:

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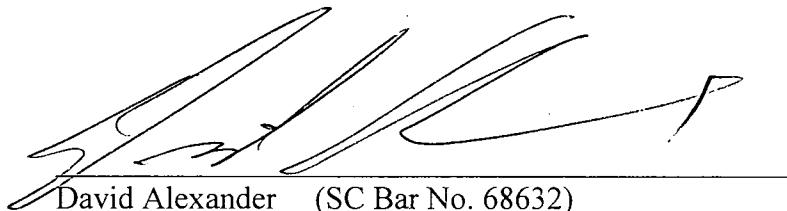
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