

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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(Tracking No. 2012-210194)

APR 23 2012

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Diane S. Goodstein, Circuit Court Judge

Unpublished Opinion No. 2011-UP-517 (S.C. Ct. App. November 29, 2011)

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.

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CERTIFICATE OF COUNSEL

A certificate of appellate exhaustion under SCACR 242(d)(1) is not required of Counsel for Respondents.

QUESTIONS PRESENTED

- I. Does the decision of the Court of Appeals warrant this Court's discretionary review under the considerations of SCACR 242(b)?
- II. Did the Court of Appeals err in affirming the trial court's summary judgment order?

Pursuant to SCACR 242(f), all Respondents jointly submit this Return in opposition to the Petition for Writ of Certiorari.

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 action,¹ 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 limited liability company 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).

The Court of Appeals affirmed the judgment of the circuit court. Norman M. McLean, et. al. v. James B. Drennan, III as Personal Representative of the Estate of Elizabeth McLean Pence, et. al., Unpublished Opinion No. 2011-UP-517 (S.C. Ct. App. November 29, 2011).
Petitioners seek a writ of certiorari to review that decision.

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 Return. 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 sole ownership of a part of the Caw Caw Swamp property.

The Cannon Bridge Road property (less 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 had only a remainder interest in the Cannon Bridge Road property in 1999, which interest was subject to the possibility that Lennon McLean would be survived by issue.

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”). Brother Norman McLean died without issue in 2004 as noted above.

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 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 trust.⁸ 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. In this litigation, Petitioners have asserted that the settlement of the trust litigation somehow brought other Orangeburg properties into the trust.

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 Decision By The Court Of Appeals Does Not Warrant Further Review Pursuant To SCACR 242(b).

The South Carolina Appellate Court Rules provide that a “writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” SCACR 242(b). Typically, the grant of certiorari is limited to cases wherein: (1) there are novel questions of law; (2) there is a dissent in the decision of the court of appeals; (3) the decision by the court of appeals is in conflict with a prior decision of this Court; (4) substantial constitutional issues are directly involved; or (5) a federal question is included, and the decision by the court of appeals conflicts with a decision of the Supreme Court of the United States. SCACR 242(b); *see also* Toal, Vafai & Muckenfuss, Appellate Practice in South Carolina (2d Ed.) at p. 276.

Contrary to the substantive issues outlined in SCACR 242(b) of the South Carolina Appellate Court Rules, this case involves no dissenting opinion in the intermediate appellate court (SCACR 242(b)(2)) and presents no substantial constitutional issues (SCACR 242(b)(4)) or federal questions (SCACR 242(b)(5) (where Court of Appeal’s decision on federal question is in conflict with the United States Supreme Court)). The present case simply does not fit within any of these categories, and no “special and important” reason exists to merit further review.

Of course, the Petitioner attempts to suggest that this matter involves novel and important questions of law. SCACR 242(b)(1). The alleged novelty and importance suggested by the petition is three-fold: the need to reinforce the integrity of judicial orders, the dual capacity of Respondent Brogdon as an attorney-in-fact and trustee, and the potential application of SCRCF 60 to shorten a longer statutory limitations period. While every case involves its own unique set of facts and circumstances, these issues are not new and the suggested novelty is contrived.

First, the integrity of judicial orders and their enforcement is no more new than the Supreme Court's decision in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). And while the petition boldly, but inexplicably, claims that "It is undisputed that Respondents ignored the language of the 2002 Order and Settlement Agreement", Petition at page 23, *this is totally disputed by everyone except the Petitioners* who have chosen to misconstrue the meaning of that Order and Agreement.

Contrary to Petitioner's misconstruction, the Court of Appeals decision concluded that "As a result of the court-approved settlement of prior litigation involving the Trust, the two disputed Orangeburg properties were transferred as part of the Estate of Elizabeth McLean Pence and not as part of the Trust." Opinion at page 2. This is the same conclusion reached by the trial court: "In this case the Plaintiffs have claimed that the Settlement Agreement...somehow made theproperties subject to the terms of the Trust. This Court disagrees." (ROA p. 10, Summary Judgment Order p. 10). The failure of the trial court and the Court of Appeals to join in Petitioner's misconstruction of the underlying settlement agreement and corresponding order does not render this matter a novel threat upon the integrity of judicial orders.

Petitioner's second novelty claim is based upon Respondent Brogdon's dual service as both an attorney-in-fact for Elizabeth McLean Pence and as Trustee for the Pence Family Trust created by Elizabeth McLean Pence. These fiduciary roles are not new creations and are certainly not new to interpretation in the jurisprudence of this State. What is new, but wholly unsupported by any legal authority of this State, is the Petitioner's position that the fiduciary duty owed to the trust obligated Respondent Brogdon to reach out and secure property not yet in the trust using his status as agent for Elizabeth McLean Pence – even though his fiduciary duty as that agent is to protect the principal's best interest and preserve her estate, not to fulfill her

apparent gifting desires by diminishing her estate. Moreover, this unsupported theory was not even reached by the Court of Appeals which noted that the statute of limitations issue alone was dispositive. Opinion at page 3 footnote 1 (citing Futch v. McAllister Towing of Georgetown, Inc, 335 S.C. 598, 613, 518 S.E. 2d 591, 598 (1999))(additional issues need not be addressed where one issue is dispositive).¹⁰

Now, Petitioner would have this Court reach beyond the dispositive issue found by the trial court and confirmed by the Court of Appeals and ignore the principle of judicial restraint -- for the sole purpose of considering a theory of liability that is both unsupported and inconsistent with the known scope of separate and distinct fiduciary roles under existing law. Novelty as used by SCACR 242(b)(1) should not include matters lacking in merit.

The final purported novelty asserted by Petitioner is the application of SCRCP 60 of the South Carolina Rules of Civil Procedure to allegedly shorten a longer statutory limitations period. The Petitioner suggests that the applicable period is either 10 years under S.C. Code § 15-3-340 (for actions to quiet title) or 20 years under S.C. Code §15-3-520(b) (for actions on sealed instruments).

Of course, the Court of Appeals applied a one year limitations period and noted that this period was applicable both under Rule 60 whereby the Trustee had one year “to take action in the prior litigation to ensure that the disputed properties became assets of the Trust” and applicable under the South Carolina Probate Code, S.C. Code § 62-3-803(2009), whereby any

¹⁰ As discussed more completely in Argument II below, this faulty theory of synergistic duties (where 1+1=3) is only one of several issues that did not even need to be reached in the Court of Appeals’ succinct opinion. Another example is the alleged scope of duties and their breach by Respondents Drennan and Wachovia. These issues will be more fully briefed if this Court issues the writ sought by Petitioners while this response will attempt to be limited and focused on the unnecessary review sought of the Court of Appeals’ decision.

party had one year to present a claim against the Estate of Elizabeth P. Pence for the properties alleged to be wrongfully included in that Estate. Unpublished Opinion at page 2.

Again, there is nothing new or novel about the provisions of Rule 60 or the Probate Code applied by the Court of Appeals. The 20-year sealed instrument statute urged by the Petitioner is not new either -- with statutory history and interpretive cases dating back to the 19th Century. See Strain v. Babb, 30 S.C. 342, 9 S.E. 271 (1889). Moreover, the case law rejecting the general applicability of this statute to every legal document or agreement is not new. See, e.g. Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 609 S.E. 2d 548 (Ct. App. 2005).

While Petitioner continues to argue that Treadaway v. Smith, 325 S.C. 367, 479 S.E.2d 849 (Ct. App. 1997), and not Lasch is most applicable to the trust litigation settlement, the Lasch decision makes it clear that it is the nature of the underlying instrument that controls the applicability of S.C. Code § 15-3-520(b) and not relation to a court order. And while 20 year enforceability of parent – child responsibilities in a family court decree is to be expected, continued uncertainty involving court settlements and the resolution of trust/estate matters would wholly undermine the purpose of the limitations in Rule 60 and the Probate Code. This is not expected or desirable -- as the Lasch court concluded. Petitioners' desire to undermine or change sound and settled law is not a novelty in need of attention.

The ten-year statute of limitation now¹¹ 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

¹¹ 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.”¹² 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.

Petitioner also suggests that the Court of Appeals failed to follow prior decisions of this Court. SCACR 242(b)(3). Specifically, it is suggested that the Court of Appeals decision conflicts with prior decisions of this Court, such as Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009), with regard to the appropriate standard to be followed in considering summary judgment. While the Court of Appeals’ opinion is abbreviated, it does cite to three cases, including one of this Court, involving the consideration of summary judgment. Moreover, the opinion accurately paraphrases the holding of this Court that “a trial court may grant summary judgment if there is no genuine issue as to any material fact....” Unpublished

S.C. 79, 529 S.E.2d 6 (2000). For thoroughness of response, but without conceding the Appellants waiver of the argument, Respondents address the substance of Appellants’ argument for the ten-year statute of limitation.

¹² 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.

Opinion at page 2 (citing Epstein v. Coastal Timber Co., 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011)(which quotes the standard directly from SCRCP 56(c)).

In addition, the case of Martin v. Companion HealthCare Corp., 357 S.C. 570, 593 S.E.2d 624 (Ct. App. 2004), cited in the Court of Appeals opinion, applies the summary judgment standard in a statute of limitations' context. In affirming the trial court's grant of summary judgment, Chief Judge Hearn (now sitting on this Court) joined by Judge Kittredge (also now on this Court) applied the appropriate standard of Rule 56 citing this Court's decision in Cunningham ex. rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003). The Martin opinion affirming summary judgment was not reviewed on Petition for Certiorari by this Court. 2005 S.C. LEXIS 393 (denial of petition without opinion).

There is nothing in the Court of Appeals abbreviated opinion here that indicates application of a summary judgment standard inconsistent with Hancock. To the contrary, the opinion contains language taken straight from SCRCP 56(c) and there are cases cited in accord with Hancock. Certainly this Court should not presume that the Court of Appeals failed to apply the correct standard – particularly when the opinion indicates to the contrary.

While the elements enumerated in SCACR 242(b) are not the exclusive bases upon which this Court may decide to grant or deny certiorari, no other reason exists for this Court to grant Appellant's Petition. The ruling of the Court of Appeals does not present the significant or far-reaching issues contemplated by SCACR 242(b). Moreover, the analysis by the Court of Appeals is straight-forward and does not involve new or emerging legal doctrines or issues of general public importance sufficient to justify certiorari review. Accordingly, this case is not appropriate for review by this Court, and Appellant's Petition should be denied.

II. The Court Of Appeals Was Correct – Appellants Are Bound By Trustee And Any Action For Relief Related To Trustee’s Conduct Was Begun Too Late.

The Scope Of This Response

As a preliminary matter, it is noted that much of the Petition to this Court addresses the merits of decisions made by the trial court and not reached by the Court of Appeals – like the scope of certain alleged duties, for example. The Court of Appeals opinion is limited to two primary issues: first, the binding effect of the trustee’s litigation settlement on the Petitioners as contingent beneficiaries – such that they cannot undo the settlement wherein the trustee compromised the trust litigation¹³; and second, the running of the statute of limitations with regard to claims seeking damages and an accounting.¹⁴

Thus, the Petition goes beyond the alleged errors of the Court of Appeals and the alleged need for this Court’s review related to those alleged errors. In this response, the Respondents

¹³ That litigation was settled -- not by acquiring additional properties into the trust, but by divesting the trust of certain properties.

¹⁴ While the statute of limitations part of the Court of Appeals’ opinion expressly only references the summary judgment for Brogdon, all of Petitioners’ causes of action seeking damages or accounting are subject to the general statutory time limits on the initiation of claims as found in S.C. Code § 15-3-530. This also includes Petitioners’ fourth (breach of fiduciary duty against Brogdon, Drennan, and Wachovia), fifth (accounting against Brogdon), sixth (breach of contract against Drennan and Wachovia), and eighth (unjust enrichment directed at all Respondents) causes of action. Moreover, the same awareness that triggered the statute on the Brogdon causes of action would also trigger the statute for the sixth cause of action.

The Petitioners’ first (quiet title), second (quiet title), third (declaratory judgment), and seventh (constructive trust) causes of action all seek non-monetary relief and all these claims implicate the finality protection given to the trust litigation settlement and the Elizabeth P. Pence estate. While the Court of Appeals’ opinion does not expressly address these three causes of action, it does implicitly reject the misconstruction of the underlying settlement and order upon which these claims depend. By holding that the Petitioners are bound by the trustee’s failure to “ensure that the disputed properties became assets of the Trust”, the Court of Appeals implicitly rejected any notion that the properties *were* assets of the trust as urged by Petitioners.

and the absence of any need to review that opinion; Respondents will fully address the merits of any matters raised by the Petitioners in briefing before this Court if the writ is granted. For now, Respondents will try to avoid a lengthy and thorough re-briefing of all possible issues.

The Court Of Appeals Opinion Is Sound.

The Trustee Did Bind Beneficiaries.

In its opinion, the Court of Appeals correctly observed that the “Appellants, as contingent beneficiaries, were bound by the actions of Respondent James E. Brogdon, Sr., (Brogdon) in his capacity as trustee of the Trust Agreement of Elizabeth McLean Pence (the Trust).” Opinion at page 1 (citing to and quoting from S.C. Code § 62-1-403(2)(ii), S.C. Code § 62-7-103(2)(A), and S.C. Code § 62-7-303(a)(4)). This observation is unchallenged in Petitioner’s present Petition.

Implicitly dismissing the Petitioner’s urged misconstruction of the underlying settlement agreement in the trust litigation,¹⁵ the Court of Appeals relied on the Trustee’s ability to bind such contingent beneficiaries in order to further conclude that the Petitioners “are bound by Brogdon’s failure to take action in the prior litigation to ensure that the disputed properties became assets of the Trust.” Correspondingly, the recipients of the disputed properties through the estate Elizabeth P. Pence are bound by the unchallenged chain of title to those properties.

¹⁵ Under the Petitioner’s urged construction of the underlying settlement agreement, the disputed properties *were made assets of the Trust* by the agreement and corresponding order. Thus, the Trustee’s alleged failure was not enforcing the existing agreement by pursuing Elizabeth P. Pence and her estate for recovery of the properties that were inventoried and transferred as part of the estate. Even under this construction, not accepted by the trial court or the Court of Appeals, there would be a one year limit to pursue claims against the estate; hence, the Court of Appeals provided a citation to the Probate Code § 62-3-803(providing one-year to present claims against an estate) to parallel the one year deadline provided by SCRCP 60 which would govern any effort by the Trustee to alter or correct the underlying trust settlement and order.

The Time Period For Action Did Run.

Petitioners seek to escape the binding effect of the prior settlement – or at least the property-transferring effect of that settlement as it was applied¹⁶ – by seeking a larger period of time for their pursuit of the properties through their first (quiet title), second (quiet title), third (declaratory judgment), and seventh (constructive trust) causes of action. Petitioners assert their claim to additional time by advocating for some longer statutory period (other than the year provided by SCRCP 60 and the Probate Code, S.C. Code § 62-3-803) since clearly nothing was done in the year following the settlement order (dated February 26, 2002) or the year following Elizabeth P. Pence’s death (August 26, 2002). Neither SCRCP 60 or the Probate Code has a “discovery rule” delay provision.

While the Court of Appeals opinion is very succinct, its application of the one year provisions found in SCRCP 60 and the Probate Code is straight forward and sound. In their petition, the Petitioners urge two alternatives – the twenty year period allowed by S.C. Code § 15-3-520(b) for actions on sealed instruments and the ten year period allowed by S.C. Code § 15-3-340 for actions to quiet title.

As discussed in Argument I above, the case law restricting application of the statutory exception for sealed instruments is clear and sound. Our Courts have rejected allowing this narrow statutory provision to swallow the broader more general provisions also found in the Code and procedural rules.

The ten-year statute of limitation now 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 may

¹⁶ In their petition, Petitioners only assert that they are entitled to additional time if the underlying settlement and order *did* transfer the disputed properties to the Trust as they assert. See Petition Section C. Thus, Petitioners are not seeking additional time now to alter, amend, or correct the underlying settlement and order.

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.” As noted earlier, 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.

Even if applicable, 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 S.C. 79, 529 S.E.2d 6 (2000). For thoroughness of response, but without conceding the Appellants waiver of the argument, Respondents have addressed the substance of Appellants’ argument for the ten-year statute of limitation.

Moreover, 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.

The Statute Was Triggered No Later Than Spring 2003

Petitioners also assert that a delay in their discovery of potential claims to damages and accounting would render any such claims against Respondents timely. With regard to the triggering knowledge of the Petitioners that initiated the limitations period, the Court of Appeals noted that “Appellants’ own deposition testimony” confirmed that “Appellants knew or should have known Brogdon was acting on their behalf when he participated in the settlement of the Trust litigation in February 2002.” The Petition does not deny these deposition admissions but rather urges that the statute would not be triggered at the time of settlement but only upon awareness of the Trustee’s failure to implement their misconception of that settlement within the following year. Of course, undenied contemporaneous awareness of the settlement terms¹⁷ would alert an *appropriate* document-constructionist that the desired properties *were not included* by the agreement or order.

Even adopting the Petitioners’ view that the settlement and order did render the disputed properties a part of the Trust – which the Court of Appeals implicitly rejected (as Petitioners correctly note), the record is clear that, by April of 2003 – over one year after their undenied contemporaneous knowledge of the settlement terms, the Petitioners were on record notice in Orangeburg County that the properties had not been transferred to the Trust and were inventoried

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

The Petition to this Court seeks to re-visit all the other potential sources of triggering knowledge (such as the Jay Jackson letters) which did not even need to be reached by the Court of Appeals. The Petition, however, like the previous Briefs from Appellants in the Court of Appeals, does not deny or address the record notice in April of 2003 regarding the status of the disputed properties.

as assets of the estate of Elizabeth McLean Pence;¹⁸ thus, they knew then that the Trustee had failed to implement *their* construction of the Trust settlement. The action here was begun *over* three years later in December of 2003. As the trial court and Court of Appeals concluded, that was too late.

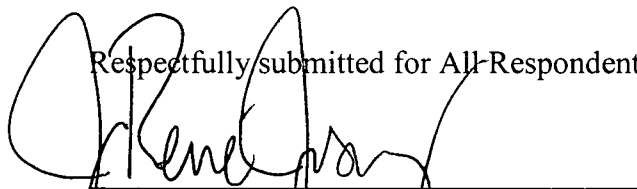
18 R. pp. 137 – 162 (Ancillary filings of both Elizabeth McLean Pence and Elizabeth P. Pence estates).

CONCLUSION

Based on the foregoing, Respondents respectfully urge the Court to deny Petitioners' Petition for a Writ of Certiorari.

April 20th, 2012

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

(Tracking No. 2012-210194)

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Unpublished Opinion No. 2011-UP-517 (S.C. Ct. App. November 29, 2011)

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.

CONSOLIDATED PROOF OF SERVICE

On behalf of all Respondents, the undersigned certifies that he has mailed a copy of the Consolidated Return to Petition for Certiorari and this Proof of Service to all counsel listed below this 20th day of April 2012, with proper postage attached thereto:

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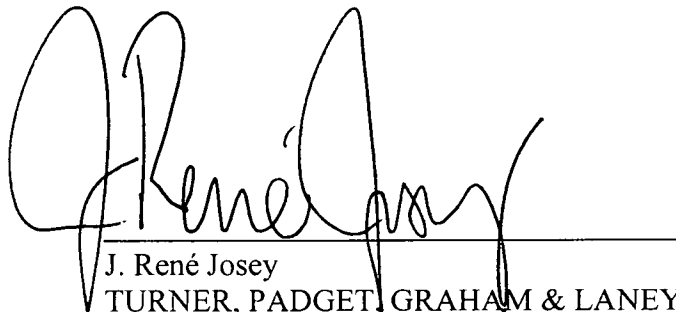
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