

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Unpublished Opinion No.: 2011-UP-517 (S.C. Ct.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.

PETITIONERS' REPLY TO CONSOLIDATED RETURN TO PETITION FOR CERTIORARI

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

RECEIVED

MAY 01 2012

S.C. SUPREME COURT

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 Padgett 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

I. CERTIORARI MUST BE GRANTED BECAUSE PROPER LEGAL ANALYSIS OF THE 2002 ORDER COMPELS REVERSAL

The decision whether certiorari should be granted begins with a review of Judge Lockemy's 2002 Order confirming the settlement of the Trust Litigation (collectively with its attached settlement agreement referred to as the "2002 Order"). If, as Petitioners assert, these documents are correct and favor Petitioners, then certiorari must be granted. If the 2002 Order is vague or open to several interpretations, then the Court must delve into the intent of the parties. Resolving the intent of the parties is a question of fact, which means that summary judgment was inappropriate and certiorari must be granted.

Because the plain language of the 2002 Order favors Petitioners, Respondents ignore it in their Return. Paragraph 8 of the 2002 Order is titled, "Separate Accounting for Orangeburg Realty." (R. p.34) This title shows that the Orangeburg real property would be treated differently than other disputed assets. Paragraph 8 further states "the Trust property will consist of ... the Orangeburg real property." (emphasis added) (R. p. 34) The use of the word "will" is mandatory and contemplates future action. The 2002 Order expressly states that the reason for this separate treatment of the Orangeburg property is because Petitioner's aunt intended for them to have this land. (R. p.34)

Respondents also ignore Exhibit B of the 2002 Order. Exhibit B lists each property belonging to the Trust. (R. pp.38-39) It lists the Gramling tract that was deeded into the Trust before Petitioner's aunt's death. (R. p. 39 ("Parcel 17")) It also lists the Caw Caw Swamp property that was not deeded into the Trust before Petitioner's aunt's death. (R. p. 39 ("Parcel 15, Parcel 16")) Exhibit B could not be more clear. It specifically states that the Caw Caw Swamp property is part of the Trust. Respondents only explanation of Exhibit B's inclusion of the Caw Caw Swamp property is

that it is mistaken.

These portions of the 2002 Order explicitly state that Petitioners were to receive the Orangeburg property and specifically list this property. Based on this language (which was drafted by Respondent Drennan), Petitioners are correct in asserting that the 2002 Order favored them.

Because the 2002 Order is specific and favors Petitioners, Respondent's arguments concerning the 2002 Order and Settlement Agreement must ignore this language. Respondents consistently refer to the intent and "focus" of the documents. (Return, p. 7, ln. 3) Respondents repeatedly contend that the thrust of the 2002 Order was for the Trust to return property to the Estate. This line of argument cannot succeed if the documents are only examined on their face. By making an intent argument, Respondents essentially concede that documents drafted by them are vague or open to multiple interpretations. Respondents cannot explain Exhibit B of the 2002 Order without claiming it contains a mistake. When documents cannot be construed solely on their face, courts must then determine the intent of the parties. This determination necessarily involves a question of fact. See Department of Natural Resources v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299 (2001).

The Court of Appeals failed to undertake this analysis. Even under Respondents' arguments, the intent of the parties to the 2002 Order must be determined because it contains a mistake or is vague. Therefore, the necessary conclusion to be drawn from either side's arguments is that genuine issues of material fact exist concerning the 2002 Order. Certiorari should be granted to correct this error.

II. CERTIORARI SHOULD BE GRANTED TO ADDRESS THE IMPORTANCE AND NOVELTY OF PETITIONER'S ISSUES

This complex case with its unique facts raises multiple important and novel issues. First, it is undisputed that Respondents ignored a Circuit Court order that they now claim was mistaken. Even assuming that Respondents are correct about the intent of the 2002 Order, parties and lawyers cannot take it upon themselves to correct a court order. They were required to seek the trial court's approval. While the importance of obeying court orders is not a new issue, it is certainly a vitally important issue and the Court should grant certiorari to emphasize this point.

Second, the issue of Brogdon's dual capacity as trustee and power of attorney is new. Respondents deny the novelty of this issue by stating that the duties of attorneys-in-fact and trustees have been addressed many times. However, Respondents have not pointed to any authority discussing how an attorney-in-fact's duties can overlap with a trustee's duties when one person wears both hats. Brogdon attempts to avoid liability by wearing his attorney-in-fact hat to avoid his duties to the McLeans. He conveniently casts aside his role as trustee when arguing that he had no duties to ensure that properties were deeded into the Trust. An individual should not be able to close his eyes to his duties to all of the parties he has agreed to protect by pitting one of his roles against another. The Court should grant certiorari to determine the extent of Brogdon's simultaneous duties.

Finally, the Court should grant certiorari to address the unique application of Rule 60 in this matter. The trial court and the Court of Appeals applied Rule 60 against Petitioners when, as demonstrated above, the 2002 Order was in their favor. Rule 60 was also applied to shorten limitations periods created by statute. This application is true whether the three-year statute of limitations for breach of fiduciary duty is applied or whether the longer property or sealed instrument

limitations periods are applied. The circumstances of this case would allow the Court to clarify Rule 60's scope and how it should be interpreted with longer limitations periods.

III. THE COURT OF APPEALS ERRED IN ITS DETERMINATION THAT BROGDON'S ROLE AS TRUSTEE FORECLOSES PETITIONERS' CLAIMS

The primary basis of the Court of Appeals' slender opinion is that Brogdon, as their trustee, bound Petitioners and that Petitioners were on record notice of their claims upon their filing of the 2002 Order. As stated above, the foundation of the Court of Appeals' reasoning rests on an erroneous review of the 2002 Order. When a correct legal analysis of the 2002 Order is undertaken, the foundation of the Court of Appeals' opinion crumbles.

Besides this erroneous interpretation of the 2002 Order, several other factors compel a later starting date for the limitations period. First, for the Petitioners to receive the Orangeburg property under the trust, both Elizabeth P. Pence and Lennon McLean would have to die without issue. Elizabeth P. Pence died six months after the 2002 Order. Lennon McLean died in 2004. Because of these contingencies, triggering the Petitioners' limitations period upon the issuance of the 2002 Order is premature.

Second, Respondent Drennan was in control of when these properties were distributed. Drennan served as personal representative of the Pence estate and represented Wachovia as its attorney. Drennan distributed the contested Orangeburg property in 2004. The recording of these deeds in 2004 is the proper trigger for Petitioners' limitations period. Respondents should not benefit by their own control of when these properties were distributed, especially when Drennan had actual notice of Petitioners' claims.

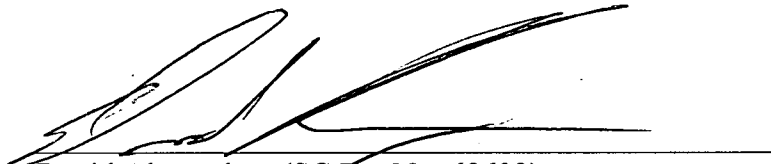
Finally, the timing of the distribution of the Gramling tract shows that Petitioners were not

on notice of their rights in 2002. Respondents agree the Gramling tract was part of the trust. Petitioners did not receive title to the Gramling tract until 2006. Had the Petitioners received the Gramling tract without the other properties immediately after the 2002 Order, such a fact would support Respondents' arguments concerning the 2002 Order. But the long delay in receiving a property that was not in dispute buttresses Petitioners' assertion that the 2002 Order could not have been immediately acted upon and cannot trigger the application of Rule 60.

III. CONCLUSION

The Court should grant certiorari to correct the fundamental errors in the Court of Appeals' opinion. A grant of certiorari would allow the Court to address the Court of Appeals' misconstruction of the 2002 Order and the other important and novel issues presented by this case. For these reasons and those stated in the original Petition, the Court should grant certiorari and consider these matters.

April 30, 2012



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 PETITIONERS

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

(Tracking No. 2012-210194)

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.

PROOF OF SERVICE

I certify that I have served the Petitioner's Reply To Consolidated Return To Petition For
Certiorari on the following parties by depositing a copy of it in the United States Mail, postage
prepaid, on April 30, 2012, 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

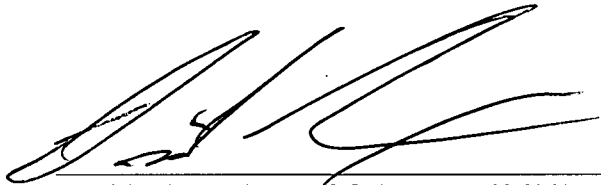
Jeffrey L. Payne, Esq.
Turner Padgett Graham and Laney, PA
PO Box 1473
Columbia, SC 29201
Attorney for James E. Brogdon, Sr.

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.

The Hon. Jenny Kitchings
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

April 30, 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

CULBERTSON + ALEXANDER, LLC
114 Manly Street (29601)
Post Office Box 1904
Greenville, SC 29602
864.370.8222

April 30, 2012

The Honorable Daniel Shearhouse
Clerk of Court, South Carolina Supreme Court
Supreme Court Building
1231 Gervais St.
Columbia, SC 29211

RECEIVED

MAY 01 2012

S.C. SUPREME COURT
pm 4-30-12

Re: Norman McLean, et al. v. James Drennan, et al.
Case No.: 2009-CP-13-4986
Court of Appeals Tracking No. 2009134986

Dear Mr. Shearhouse:

Enclosed for filing please find Petitioner's Reply To Consolidated Return To Petition For Certiorari, and Proof of Service of Same.

By copy of this letter, I am serving opposing counsel with the Petition only.

Very Truly Yours,



David Alexander

- c. John Jay James, II, Esq.
Harry R. Easterling, Esq.
Edward Bilbro Davis, Esq.
James Randall Davis, Esq.
Jeffrey L. Payne, Esq.
Matthew H. Henrickson, Esq.
W. Cliff Moore, III, Esq.