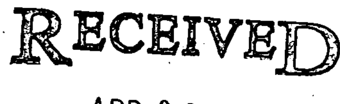
THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT



APR 0 2 2012

S.C. Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Honorable Diane S. Goodstein, Circuit Judge

Unpublished Opinion No.: 2011-UP-517 (S.C. Ct.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

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

v.

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

AMENDED APPENDIX

Volume 4 of 5

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

Other Counsel of Record:

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

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 Padget Graham and Laney, PA
PO Box 1473
Columbia, SC 29201
Attorney for James E. Brogdon, Sr.

W. Cliff Moore, III, Esq.
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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 STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY

Court of Common Pleas

Honorable Diane S. Goodstein, Circuit Judge

Case No.: 2006-CP-38-1523

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

v.

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

RECORD ON APPEAL

Volume 4 of 4

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Jr. and Cheri (Cheryl) Brown Thompson

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

STATE OF SOUTH CAROLINA,)
)
COUNTY OF ORANGEBURG.)

IN THE COURT OF COMMON PLEAS
2006-CP-38-1523

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

Plaintiffs,

versus

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

Defendants.

ANSWER OF THE DEFENDANT MARLBORO ACADEMY, INC.

The Defendant Marlboro Academy, Inc. would respectfully answer the Complaint as follows:

1. All allegations of the Complaint not specifically admitted herein are denied.

2. Defendant admits the allegations of Paragraphs 1-18 of the Complaint.

3. On information and belief, Defendant admits the allegations of Paragraph 19-26 of the Complaint.

ATTEST: TRUE COPY
[signature]
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

4. On information and belief, Defendant admits the allegations of Paragraphs 27-32 of the Complaint.

5. On information and belief, Defendant admits the allegations of Paragraph 33-38 of the Complaint.

6. Defendant admits the allegations of Paragraphs 39-46 of the Complaint.

7. Defendant denies those portions of Paragraph 47 of the Complaint which allege that the Cannon Bridge Road Property and the Caw Caw Swamp Property became part of the Trust. Defendant admits that Brogdon as Trustee conveyed the Gramling Property to the Trust, that it was thus a part of the Trust, and was subject to the Settlement Agreement.

8. Defendant denies the allegations of Paragraph 48 of the Complaint.

9. Defendant admits the allegations of Paragraph 49 of the Complaint.

10. Defendant denies that the transfer effected by the deed of distribution described in Paragraph 50 of the Complaint is invalid.

11. Defendant denies that the transfers effected by the deeds described in Paragraph 51 of the Complaint are invalid.

12. Defendant denies that the transfer effected by the deed described in Paragraph 52 of the Complaint is invalid.

13. Defendant denies that the transfer effected by the deed described in Paragraph 53 of the Complaint is invalid.

14. Defendant denies that the transfer effected by the deed described in Paragraph 54 of the Complaint is invalid.

15. Defendant denies that the transfer effected by the deed described in Paragraph 55 of the Complaint is invalid.

16. Defendant denies that the transfer effected by the deed described in Paragraph 56 of the Complaint is invalid.

17. Defendant denies that the transfer effected by the deed described in Paragraph 57 of the Complaint is invalid.

18. Defendant denies the allegations of Paragraphs 58-61 of the Complaint except to admit that the Thompsons and Money to Go, LLC have an interest in the Caw Caw Swamp Property.

19. Defendant denies the allegations of Paragraphs 62-65 of the Complaint except to admit that it, James J. Pence, Jr. as Personal Representative of the Estate of Stephen Pence, and Easterling own fee simple title to an undivided one-half interest in the Cannon Bridge Road Property.

20. Defendant denies the allegations of Paragraph 66-68 of the Complaint.

21. Defendant denies the allegations of Paragraphs 69-74 of the Complaint except to admit that Brogdon as Trustee of the Trust Agreement of Elizabeth McLean Pence dated May 28, 1999, would have owed to those Plaintiffs who were beneficiaries of the said Trust a fiduciary duty to carry out the terms of the Trust in accordance with applicable law.

22. Defendant has no knowledge with respect to the allegations set forth in Paragraphs 75-78 of the Complaint and therefore denies these allegations.

23. Defendant denies the allegations of Paragraphs 79-83 of the Complaint.

24. Defendant denies the allegations of Paragraphs 84-86 of the Complaint.

25. Defendant denies the allegations of Paragraphs 87-89 of the Complaint.

FOR A FIRST DEFENSE

26. The admissions, denials and allegations of Paragraphs 1-25 hereof are re-alleged and incorporated herein by reference.

27. The Settlement Agreement was intended to apply only to those properties previously conveyed by Brogdon to the Trust and which were a part of the Trust corpus at the time of the Settlement Agreement. The Caw Caw Swamp Property and the Cannon Bridge Road Property were never conveyed by Brogdon to the Trust, were never a part of the Trust corpus, and were therefore not subject to the Settlement Agreement.

28. The inclusion of the Caw Caw Swamp Property on Exhibit B of the Settlement Agreement was a mutual mistake and the actual settlement was executed and implemented without reference to the Caw Caw Swamp Property and its value.

FOR A SECOND DEFENSE

29. The admissions, denials, and allegations of Paragraphs 1-28 hereof are re-alleged and incorporated herein by reference.

30. Defendant has taken title to a fractional portion of the Cannon Bridge Road Property and has received a portion of the proceeds of sale of the Caw Caw Swamp Property in its capacity as the primary beneficiary of the Elizabeth P. Pence Trust which in turn was the primary beneficiary and devisee under the Last Will and Testament of Elizabeth P. Pence.

31. Plaintiffs have alleged that the said Elizabeth P. Pence, before her death, and Wachovia Bank National Association as the Personal Representative of her estate and as the Trustee of her Trust breached contractual obligations imposed by the Settlement Agreement to convey title to the Cannon Bridge Road Property and the Caw Caw Swamp Property to Brogdon as Trustee for the benefit of the Plaintiffs.

32. Any such breach of contract would have occurred on or shortly after February 26, 2002, the date that the Settlement Agreement was judicially approved.

33. Plaintiffs' Summons and Complaint were not filed until December 20, 2006.

34. Section 15-3-530(1) of the Code of Laws of South Carolina requires actions for breach of contract to be filed within three years of the acts constituting the alleged breach.

35. This action was filed more than three years after the acts constituting the alleged breach of contract and is therefore barred.

FOR A THIRD DEFENSE

36. The admissions, denials and allegations of Paragraph 1-35 are re-alleged and incorporated herein by reference.

37. Plaintiffs have alleged that Elizabeth P. Pence, through whom Defendant claims an interest in the Cannon Bridge Road Property and a portion of the proceeds from the sale of the Caw Caw Swamp Property, contracted with Brogdon as Trustee to convey the said properties to the Trust, which allegation Defendant denies.

38. Elizabeth P. Pence died on August 26, 2002. Wachovia Bank National Association duly qualified as Personal Representative of her estate and on September 16, 2002 first caused to be published in the *Marlboro Herald* Notice to creditors as required by Section 62-3-801 of the Code of Laws of South Carolina (1976).

39. Neither Plaintiffs nor Brogdon filed a claim against the Estate of Elizabeth P. Pence within the time limit required by Section 62-3-803 of the Code of Laws of South Carolina.

40. Failure of the Plaintiffs or Brogdon to file such claim within the said statutory time limit operates as a bar to Plaintiffs' claim now against this Defendant, which is, or claims through, a devisee of the Estate of Elizabeth P. Pence.

FOR A FOURTH DEFENSE

41. The admissions, denials and allegations of Paragraph 1-40 are re-alleged and incorporated herein by reference.

42. The Settlement Agreement provided that the Brogdon Trust Agreement, through whom Plaintiffs claim, would pay its proportionate share of federal and South Carolina estate taxes in the estate tax proceedings for the Estate of Elizabeth McLean Pence.

43. On information and belief, the Estate of Elizabeth McLean Pence, and not the Brogdon Trust, paid all federal and South Carolina estate taxes attributable to the values of the Cannon Bridge Road Property and the Caw Caw Swamp Property, which payment would have diminished the inheritance of Elizabeth P. Pence and ultimately the amount devised to this Defendant.

44. In the event that this Court finds that either, both, or any portion of the Cannon Bridge Road Property and Caw Caw Swamp Property are rightfully the property of the Plaintiffs Defendant is entitled to an accounting for all estate taxes paid by the Estate of Elizabeth McLean Pence and the Brogdon Trust and to have set off against any sums or property due by Defendant to Plaintiffs the amount of the estate taxes paid by the Estate of Elizabeth McLean Pence, with respect to the values of the Cannon Bridge Road Property and the Caw Caw Swamp Property, together with interest thereon from the date of payment at an interest rate to be determined by the Court.

WHEREFORE, the Defendant having fully answered the Complaint prays that this Court:

1. Find for this Defendant with respect to all causes of action pertaining to it and dismiss the Complaint with respect to it so that it has marketable title

to its interest in the Cannon Bridge Road Property and so that it is entitled to retain its share of the proceeds from the sale of the Caw Caw Swamp Property.

2. In the alternative, award as a set off to any judgment by Plaintiffs pertaining to the properties received by the Defendant federal and South Carolina estate taxes paid by the Estate of Elizabeth McLean Pence with respect to such portions of the Cannon Bridge Road Property and the Caw Caw Swamp Property as this Court may find belong rightfully to the Plaintiffs.

3. Award to this Defendant its costs and expenses in defending this action.

PAULLING & JAMES, LLP

Darlington, S. C.
March 21, 2007

BY ____________________
John Jay James, II
SC Bar #2949
Paulling & James, LLP
112 Cashua Street
P. O. Box 507
Darlington, SC 29540
843-393-3881 (Telephone)
843-393-6089 (Fax)
pjlaw507@bellsouth.net (Email)

STATE OF SOUTH CAROLINA,)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG.) 2006-CP-38-1523

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

Plaintiffs,

versus

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

Defendants.

ANSWER OF THE DEFENDANT HARRY R. EASTERLING, JR.

The Defendant Harry R. Easterling, Jr. would respectfully answer the Complaint as follows:

1. All allegations of the Complaint not specifically admitted herein are denied.

2. Defendant admits the allegations of Paragraphs 1-18 of the Complaint.

3. On information and belief, Defendant admits the allegations of Paragraph 19-26 of the Complaint.

ATTEST: TRUE COPY
[signature]
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

4. On information and belief, Defendant admits the allegations of Paragraphs 27-32 of the Complaint.

5. On information and belief, Defendant admits the allegations of Paragraph 33-38 of the Complaint.

6. Defendant admits the allegations of Paragraphs 39-46 of the Complaint.

7. Defendant denies those portions of Paragraph 47 of the Complaint which allege that the Cannon Bridge Road Property and the Caw Caw Swamp Property became part of the Trust. Defendant admits that Brogdon as Trustee conveyed the Gramling Property to the Trust, that it was thus a part of the Trust, and was subject to the Settlement Agreement.

8. Defendant denies the allegations of Paragraph 48 of the Complaint.

9. Defendant admits the allegations of Paragraph 49 of the Complaint.

10. Defendant denies that the transfer effected by the deed of distribution described in Paragraph 50 of the Complaint is invalid.

11. Defendant denies that the transfers effected by the deeds described in Paragraph 51 of the Complaint are invalid.

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16. Defendant denies that the transfer effected by the deed described in Paragraph 56 of the Complaint is invalid.

17. Defendant denies that the transfer effected by the deed described in Paragraph 57 of the Complaint is invalid.

18. Defendant denies the allegations of Paragraphs 58-61 of the Complaint except to admit that the Thompsons and Money to Go, LLC have an interest in the Caw Caw Swamp Property.

19. Defendant denies the allegations of Paragraphs 62-65 of the Complaint except to admit that he, Marlboro Academy, Inc., and James J. Pence, Jr. as Personal Representative of the Estate of Stephen Pence, own fee simple title to an undivided one-half interest in the Cannon Bridge Road Property.

20. Defendant denies the allegations of Paragraph 66-68 of the Complaint.

21. Defendant denies the allegations of Paragraphs 69-74 of the Complaint except to admit that Brogdon as Trustee of the Trust Agreement of Elizabeth McLean Pence dated May 28, 1999, would have owed to those Plaintiffs who were beneficiaries of the said Trust a fiduciary duty to carry out the terms of the Trust in accordance with applicable law.

22. Defendant has no knowledge with respect to the allegations set forth in Paragraphs 75-78 of the Complaint and therefore denies these allegations.

23. Defendant denies the allegations of Paragraphs 79-83 of the Complaint.

24. Defendant denies the allegations of Paragraphs 84-86 of the Complaint.

25. Defendant denies the allegations of Paragraphs 87-89 of the Complaint.

FOR A FIRST DEFENSE

26. The admissions, denials and allegations of Paragraphs 1-25 hereof are re-alleged and incorporated herein by reference.

27. The Settlement Agreement was intended to apply only to those properties previously conveyed by Brogdon to the Trust and which were a part of the Trust corpus at the time of the Settlement Agreement. The Caw Caw Swamp Property and the Cannon Bridge Road Property were never conveyed by Brogdon to the Trust, were never a part of the Trust corpus, and were therefore not subject to the Settlement Agreement.

28. The inclusion of the Caw Caw Swamp Property on Exhibit B of the Settlement Agreement was a mutual mistake and the actual settlement was executed and implemented without reference to the Caw Caw Swamp Property and its value.

FOR A SECOND DEFENSE

29. The admissions, denials, and allegations of Paragraphs 1-28 hereof are re-alleged and incorporated herein by reference.

30. Defendant has taken title to a fractional portion of the Cannon Bridge Road Property as set forth in Deed from Stephen Pence recorded September 12, 2006 in Book 1168, Page 35 in the office of the Clerk of Court for Orangeburg County, S.C.

31. Plaintiffs have alleged that the said Elizabeth P. Pence, before her death, and Wachovia Bank National Association as the Personal Representative of her estate and as the Trustee of her Trust breached contractual obligations imposed by the Settlement Agreement to convey title to the Cannon Bridge Road Property and the Caw Caw Swamp Property to Brogdon as Trustee for the benefit of the Plaintiffs.

32. Any such breach of contract would have occurred on or shortly after February 26, 2002, the date that the Settlement Agreement was judicially approved.

33. Plaintiffs' Summons and Complaint were not filed until December 20, 2006.

34. Section 15-3-530(1) of the Code of Laws of South Carolina requires actions for breach of contract to be filed within three years of the acts constituting the alleged breach.

35. This action was filed more than three years after the acts constituting the alleged breach of contract and is therefore barred.

FOR A THIRD DEFENSE

36. The admissions, denials and allegations of Paragraph 1-35 are re-alleged and incorporated herein by reference.

37. Plaintiffs have alleged that Elizabeth P. Pence, through whom Defendant claims an interest in the Cannon Bridge Road Property, contracted with Brogdon as Trustee to convey the said properties to the Trust, which allegation Defendant denies.

38. Elizabeth P. Pence died on August 26, 2002. Wachovia Bank National Association duly qualified as Personal Representative of her estate and on September 16, 2002 first caused to be published in the *Marlboro Herald* Notice to creditors as required by Section 62-3-801 of the Code of Laws of South Carolina (1976).

39. Neither Plaintiffs nor Brogdon filed a claim against the Estate of Elizabeth P. Pence within the time limit required by Section 62-3-803 of the Code of Laws of South Carolina.

40. Failure of the Plaintiffs or Brogdon to file such claim within the said statutory time limit operates as a bar to Plaintiffs' claim now against this Defendant, who claims an interest in said property under a deed from Stephen Pence recorded September 12, 2006 in Book 1168, Page 35 in the office of the Clerk of Court for Orangeburg County, S.C.

FOR A FOURTH DEFENSE

41. The admissions, denials and allegations of Paragraph 1-40 are re-alleged and incorporated herein by reference.

42. The Settlement Agreement provided that the Brogdon Trust Agreement, through whom Plaintiffs claim, would pay its proportionate share of federal and South Carolina estate taxes in the estate tax proceedings for the Estate of Elizabeth McLean Pence.

43. On information and belief, the Estate of Elizabeth McLean Pence, and not the Brogdon Trust, paid all federal and South Carolina estate taxes attributable to the values of the Cannon Bridge Road Property and the Caw Caw Swamp Property, which payment would have diminished the inheritance of Elizabeth P. Pence and ultimately the amount devised to this Defendant.

44. In the event that this Court finds that either, both, or any portion of the Cannon Bridge Road Property and Caw Caw Swamp Property are rightfully the property of the Plaintiffs Defendant is entitled to an accounting for all estate taxes paid by the Estate of Elizabeth McLean Pence and the Brogdon Trust and to have set off against any sums or property due by Defendant to Plaintiffs the amount of the estate taxes paid by the Estate of Elizabeth McLean Pence, with respect to the values of the Cannon Bridge Road Property and the Caw Caw Swamp Property, together with interest thereon from the date of payment at an interest rate to be determined by the Court.

WHEREFORE, the Defendant having fully answered the Complaint prays that this Court:

1. Find for this Defendant with respect to all causes of action pertaining to him and dismiss the Complaint with respect to him so that he has marketable title to his interest in the Cannon Bridge Road Property.

2. In the alternative, award as a set off to any judgment by Plaintiffs pertaining to the properties received by the Defendant federal and South Carolina estate taxes paid by the Estate of Elizabeth McLean Pence with respect to such portions of the Cannon Bridge Road Property and the Caw Caw Swamp Property as this Court may find belong rightfully to the Plaintiffs.

3. Award to this Defendant his costs and expenses in defending this action.

GOLDBERG & EASTERLING, P.A.

Marlboro, S. C.
March 29, 2007

BY Harry R. Easterling Sr.
Harry R. Easterling, Sr.
SC Bar #1828
116 N. Liberty Street
P. O. Drawer 655
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843-479-2878 (Telephone)
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STATE OF SOUTH CAROLINA,)
COUNTY OF ORANGEBURG.)

IN THE COURT OF COMMON PLEAS
2006-CP-38-1523

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

Plaintiffs,

versus

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

Defendants.

CERTIFICATE OF SERVICE BY MAIL

Personally appeared before me Patricia M. Bundy who being fully sworn, deposes and says: That she is a secretary for Goldberg & Easterling, P.A., attorneys for the Defendant Harry R. Easterling, Jr. in the above captioned matter; that on March 29, 2007, a copy of the attached Answer of the Defendant Harry R. Easterling, Jr., and this Certificate of Mailing was placed in

ATTEST: TRUE COPY
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

an envelope, with postage prepaid, and mailed to the following:

Cecil H. Nelson, Jr., Esquire
David Alexander, Esquire
P. O. Box 2384
Greenville, SC 29602

Patricia M. Bundy

SWORN to before me this
29th day of March, 2007.

_____________ (L.S.)
Notary Public for SC
My commission expires 8-25-08

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
C/A # 2006-CP-38-1523

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

Plaintiffs,

v.

James B. Brennan, 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.

Defendants.

REQUESTS TO ADMIT

TO: DAVID ALEXANDER, ESQUIRE, ATTORNEY FOR THE PLAINTIFFS

Pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, please admit or deny within thirty (30) days, the truthfulness of the following matters:

1. William McLean received Exhibit A from Scott & Associates, P.C. in February, 2002.
2. Bill McLean received Exhibit B from Scott & Associates, P.C. in February, 2002.
3. Bill McLean sent Exhibit C to Munford Scott on February 25, 2002.
4. Bill McLean received Exhibit D from Scott & Associates, P.C. in February 2002.

Flor 666230v1

5. The fax number for Bill McLean's place of employment in February of 2002 was (803) 929-7945.

Florence, South Carolina

October 17, 2007

TURNER, PADGET, GRAHAM & LANEY, P. A.

By: ______________________

Jeffrey L. Payne
1831 West Evans Street, Fourth Floor
Post Office Box 5478 (29502)
Florence, South Carolina 29501
(843) 662-9008
Email: jpayne@turnerpadget.com

ATTORNEYS FOR THE DEFENDANT JAMES E. BROGDON, SR., AS TRUSTEE OF THE TRUST AGREEMENT OF ELIZABETH MCLEAN PENCE DATED MAY 28, 1999

Flor 666230v1

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
C/A # 2006-CP-38-1523

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

Plaintiffs,

v.

James B. Brennan, 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.

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of October 2007, served a copy of the foregoing **Requests to Admit** on behalf of James E. Brogdon, Sr., upon counsel of record by mailing copies, postage prepaid, to:

David Alexander, Esquire
Culbertson & Alexander, LLC
P.O. Box 1904
Greenville, SC 29602

Florence, South Carolina

October 18, 2007

Vevelyn L. Bradley
VEVELYN L. BRADLEY
Secretary for Jeffrey L. Payne

Flor 666255v1

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2006-CP-38-1523

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

Plaintiffs,

vs.

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.,

Defendants.

PLAINTIFFS' RESPONSES TO DEFENDANT'S REQUESTS TO ADMIT

TO: THE DEFENDANT, JAMES E. BROGDON, SR., AS TRUSTEE OF THE TRUST AGREEMENT OF ELIZABETH MCLEAN PENCED DATED MAY 28, 1999 BY AND THROUGH HIS ATTORNEY, JEFFREY L. PAYNE:

Pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, Plaintiffs, hereby submits their Responses to Defendant's Requests to Admit as follows:

1. William McLean received Exhibit from Scott & Associates, P.C. in February, 2002.

RESPONSE: Admitted.

2. Bill McLean received Exhibit B from Scott & Associates, P.C. in February, 2002.

RESPONSE: Admitted.

3. Bill McLean sent Exhibit C to Munford Scott on February 25, 2002.

RESPONSE: Admitted.

4. Bill McLean received Exhibit D from Scott & Associates, P.C. in February, 2002.

RESPONSE: Denied.

5. The fax number for Bill McLean's place of employment in February of 2002 was (803) 929-7945.

RESPONSE: Admitted.

By: ______________________

J.J. Andrighetti (SC Bar # 72741)
David Alexander (SC Bar # 68632)
Post Office Box 1904
Greenville, SC 29602
864/370-8222 Fax 864/370-8227
ATTORNEYS FOR THE PLAINTIFFS

Greenville, South Carolina
November 16, 2007

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

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

vs.

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.,
Defendants.

C.A. No.: 2006-CP-38-1523

CERTIFICATE OF SERVICE

I do hereby certify that on this 16th day of November, 2007, I served **PLAINTIFFS' RESPONSES TO DEFENDANT'S REQUESTS TO ADMIT** by placing copies of same in the United States Mail, first class, postage prepaid, addressed as follows:

Jeffrey L. Payne, Esq.
Turner Padget Graham and Laney, PA
PO Box 1473
Columbia, SC 29201

J.J. Andrighetti

November 16, 2007

Return: James [illegible] III
Attorney at Law
P.O. Box [illegible]
Spartanburg, SC 2930[illegible]

03/601

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

PROBATE COURT

IN THE MATTER OF ESTATE OF ELIZABETH McLEAN PENCE

CASE NUMBER 2003ES3800047

CORRECTIVE DEED OF DISTRIBUTION

WHEREAS, the decedent died on 10/03/99, and her sole heir at law, Elizabeth P. Pence, survived her but thereafter died on 8/26/02; and,

WHEREAS, the estate of the decedent is being administered in the Probate Court for Marlboro County, South Carolina in File #2000ES3400078; and,

WHEREAS, the grantee herein is either a beneficiary or heir at law, as appropriate, of the decedent; and,

WHEREAS, the undersigned Personal Representative is the duly appointed and qualified fiduciary in this matter; and,

NOW, THEREFORE, in accordance with the laws of the State of South Carolina, the Personal Representative has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release to:

Name: WACHOVIA BANK, N.A.
PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH P. PENCE
Address: P.O. Box 700
Charleston, SC 29402

'03 FEB 14 PM 12 11
GAIL LAHEY
REGISTER OF DEEDS
ORANGEBURG CO. S.C.

the following described property situate in ORANGEBURG COUNTY, SOUTH CAROLINA:

SEE EXHIBIT "A" ATTACHED HERETO

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises/Property belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises/Property unto the said Wachovia Bank, N.A., Personal Representative of the Estate of

0149-00-03-007
ENTERED IN THIS OFFICE OF ASSESSOR
MAP 0149 SHEET 00 BLOCK 03 PARCEL 010
THIS 14 DAY OF February 2003
ORANGEBURG COUNTY: MARION LLOYD, COUNTY ASSESSOR

0697 183

Elizabeth P. Pence, its successors and assigns forever.

IN WITNESS WHEREOF, the undersigned, as Personal Representative of the estate of the decedent, has executed this Deed, this 11 day of February, 2003.

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF

Theresa B. Lassiter

James W. Shive

Estate of: ELIZABETH McLEAN PENCE

By [signature]
JAMES B. DRENNAN
PERSONAL REPRESENTATIVE

STATE OF SOUTH CAROLINA)
) ACKNOWLEDGMENT
COUNTY OF SPARTANBURG)

The foregoing instrument was acknowledged before me this 11th day of February, 2003 by James B. Drennan, Personal Representative.

Theresa B. Lassiter
Notary Public, State of S.C.
My commission expires 6-30-05

BK 0971 PG 184

EXHIBIT "A"

DEED OF DISTRIBUTION ELIZABETH McLEAN PENCE ESTATE

All that certain piece, parcel or tract of land, situate, lying and being in School District 5 (outside) Limestone Township, Orangeburg County, South Carolina, containing 120.11 acres, being more fully and clearly shown and delineated as Tracts 2-A and 2-B on a plat of 569.52 acres surveyed for Norman McLean, et al., by Richard L. Stroman, RLS, of Edisto Surveyors, Inc., dated December 1, 1993 and filed in the office of the RMC for Orangeburg County in Plat Book 70L, at page 437, said Tract 2-A being allotted to Elizabeth M. Pence and bounded and measuring as follows:

Tract 2-A
On the NORTHWEST by Tract 1, allotted to James Lennon McLean, and measuring thereon a total of 3,456.88 feet; on the EAST by the run of Caw Caw Swamp and measuring thereon a total of 2,342.66 feet; on the SOUTHEAST by Tract 3 on said plat, being allotted to Norman M. McLean, and measuring thereon a total of 3,797.6 feet; on the WEST by Tract 5 on said plat, property of Norman M. McLean, and measuring thereon 1,126.52 feet (TMS 0149-00-03-007-000). **ALSO:** #0950184

Tract 2-B
All that certain piece, parcel or tract of land, situate, lying and being in School District 5 (outside) Limestone Township, Orangeburg County, South Carolina, containing 54.80 acres, and being more fully and clearly shown and delineated on the plat hereinabove referred to as Tract 2-B. Said tract being allotted to Elizabeth M. Pence and being bounded and measuring as follows: on the NORTH by Tract 1, said tract being allotted to James Lennon McLean, and measuring thereon 2,096.86 feet; on the EAST by Tract 5 on said plat, property of Norman M. McLean, and measuring thereon 1,039.45 feet; on the SOUTH by Tract 3 on said plat, being allotted to Norman M. McLean, and measuring thereon 1,902.74 feet; and on the WEST by property of Carolyn F. Jackson and measuring thereon 1,364.05 feet (TMS 0149-00-03-010-000). #0950185

Also all easements for ingress and egress as set forth in that order dated August 31, 1994 and filed in the Office of the Clerk of Court for Orangeburg County on September 2, 1994, and shown on the division survey plat for Norman McLean, et al., by Richard L. Stroman, RLS, of Edisto Surveyors, Inc., dated December 1, 1993 and filed in the office of the RMC for Orangeburg County in Plat Book 70L at page 437.

This being the identical property conveyed to Elizabeth McLean Pence (as Elizabeth M. Pence) in partition by O. Davie Burgdorf, Master in Equity for Orangeburg County, South Carolina, by deed recorded September 16, 1994 in Deed Book 608 at page 351, RMC Office for Orangeburg County.

STATE OF SOUTH CAROLINA)
)　　WAIVER OF RIGHT TO SERVE AS TRUSTEE
COUNTY OF MARLBORO)

WHEREAS, Elizabeth M. Pence, a resident of Marlboro County, South Carolina, acting through her attorney-in-fact, James E. Brogdon, established a certain Trust Agreement on the 28th day of May, 1999, naming James E. Brogdon as the initial Trustee; and

WHEREAS, Elizabeth M. Pence thereafter died on October 3, 1999; and

WHEREAS, ARTICLE VII(1) of said Trust Agreement provides that, in the event that James E. Brogdon should become unable or unwilling to serve as Trustee, Wachovia Bank and William N. McLean are to serve as successor Trustees; and

WHEREAS, William N. McLean wishes to make known his intention not to serve as a successor Trustee in the event that James E. Brogdon should become unable or unwilling to serve as Trustee.

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS that William N. McLean does hereby now and forever WAIVE THE RIGHT TO SERVE AS A SUCCESSOR TRUSTEE under the Elizabeth M. Pence Trust Agreement dated May 28, 1999.

SIGNED at 12:00 pm, 1333 Main St, Columbia, SC this 25th day February, 2002.

WITNESSES:

[signature]
[signature]

[signature]
William N. McLean

Exhibit "C"

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

Appeal From Orangeburg County
Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2011-UP-517
Heard October 20, 2011 – Filed November 29, 2011

AFFIRMED

David Alexander, of Greenville, for Appellants.

Edward Bilbro Davis, of Charlotte, Harry R. Easterling, Sr., of Bennettsville, James Randall Davis, of Lexington, Jeffrey L. Payne and J. Rene Josey, both of Columbia, John J. James, II, of Darlington, Matthew H. Henrikson, of Greenville, and W. Cliff Moore, III, of Columbia, for Respondents.

PER CURIAM: Appellants Norman M. McLean, James N. McLean, Marie McLean-Choi, William N. McLean, Robert L. McLean, and JL McLean Properties, LLC (collectively Appellants) appeal from the grant of summary judgment in favor of Respondents. We affirm.

1. As to the grant of summary judgment in favor of Respondents James B. Drennan, III, Wachovia Bank National Association, Marlboro Academy, Inc., Charles P. Thompson, Jr., Cheri Brown Thompson, Money to Go, LLC, James J. Pence, Jr., and Harry R. Easterling, Jr., we find 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). See S.C. Code Ann. § 62-1-403(2)(ii) (Supp. 2010) ("[I]n judicially supervised settlements .

. . orders binding a trustee bind beneficiaries of the trust . . . in proceedings involving creditors or other third parties . . . ."); S.C. Code Ann. § 62-7-103(2)(A) (2009) (defining beneficiary as a person that "has a present or future beneficial interest in a trust, vested or contingent"); S.C. Code Ann. § 62-7-303(a)(4) (2009) ("[A] trustee may represent and bind the beneficiaries of the trust with respect to questions or disputes involving the trust."). 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. See S.C. Code Ann. § 62-3-1101 (Supp. 2010) ("A compromise of a controversy as to admission to probate of an instrument offered for formal probate as the will of a decedent . . . if approved by the court after hearing, is binding on all the parties . . . . An approved compromise is binding even though it may affect a trust . . . ."). Thus, we find Appellants are bound by Brogdon's failure to take action in the prior litigation to ensure that the disputed properties became assets of the Trust. See Rule 60(b), SCRCP (noting a motion for relief from judgment for mistake, inadvertence, surprise, or excusable neglect must be made not more than one year after entry of the judgment); S.C. Code Ann. § 62-3-803 (2009) (setting forth a one-year statute of limitations for presenting a claim against a decedent's estate).

2. As to the grant of summary judgment in favor of Brogdon, we find there is no question of material fact based on Appellants' own deposition testimony 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. See S.C. Code Ann. § 62-7-104(a) (2009) ("[A] person has knowledge of a fact if the person: (1) has actual knowledge of it; (2) has received a notice or notification of it; or (3) from all the facts and circumstances known to the person at the time in question, has reason to know it."); Epstein v. Coastal Timber Co., 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011) (noting a trial court may grant summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law); Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011) ("Under the discovery rule, the three-year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct.") (internal quotation

marks omitted); Martin v. Companion Healthcare Corp., 357 S.C. 570, 576, 593 S.E.2d 624, 627 (Ct. App. 2004) ("[W]e approach this inquiry by deciding whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.") (internal quotation marks omitted).[1]

AFFIRMED.

HUFF and PIEPER, JJ., and CURETON, A.J., concur.

[1] Based on our disposition herein, we need not consider the remaining issues on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting where one issue is dispositive, the remaining issues need not be addressed).

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Honorable Diane S. Goodstein, Circuit Judge

RECEIVED
DEC 14 2011
SC Court of Appeals

Case No.: 2006-CP-38-1523

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

v.

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

APPELLANTS' PETITION FOR REHEARING *EN BANC*

Appellants petition this Court for a rehearing *en banc* based on the grounds that the Court mistakenly interpreted Judge Lockemy's Order confirming the settlement of the 2002 Trust Litigation. The Court also failed to consider the Appellants' arguments regarding the propriety of summary judgment in favor of Brogdon against all of the Appellants. Had the Court not committed these two errors, then the Court would have been compelled to consider the other issues on appeal. A Memorandum in Support of Petition for Rehearing is being filed contemporaneously in support of this Petition.

The Court should rehear this matter *en banc* as it involves important questions regarding the interpretation of court orders and the statute of limitations.

Respectfully,

December 14, 2011

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ATTORNEY FOR THE APPELLANTS

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Honorable Diane S. Goodstein, Circuit Judge

Case No.: 2006-CP-38-1523

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

The Court based its ruling on only two grounds. First, the Court summarily declared that Appellants were foreclosed by Brogdon's failure to timely ask the trial court in the Trust Litigation to alter or amend its judgment. Second, the Court ruled that Appellants' statute of limitations began running against Brogdon in 2002 when the Trust Litigation was settled. In reaching these conclusions, the Court ignores that the language of the Settlement Agreement is in the Appellants' favor. Respondents' arguments regarding the intent of the settlement are factual and must be made to a jury. At the summary judgment stage, both Respondents and the Court must take the language

of the Settlement Agreement as it was written and confirmed by Judge Lockemy.

I. THE COURT MUST ADDRESS THE ACTUAL LANGUAGE OF THE TRUST LITIGATION'S SETTLEMENT AGREEMENT

The Court failed to address the fact that the plain language of the Settlement Agreement favored the Appellants. If the McLeans' 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. Under the language of the settlement, the McLeans believed that Brogdon had protected their interests.

A. The Settlement Agreement Stated in General Terms that the Orangeburg Property would Belong to the Trust

The language of the 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. Paragraph Eight of the Settlement Agreement states:

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

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

(R. pp. 34-35.) (emphasis added) This language is mandatory and prospective. It says the Trust's real property will consist of the Orangeburg property. It admits and acknowledges that M.Pence's intention was for the McLeans to have the Orangeburg property.

B. The Settlement Agreement Specifically Identified Orangeburg Property in the Trust

The Settlement Agreement also specifically identifies property that "will" be part of the Trust in its exhibit. (R. 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 property that would belong to the Trust after confirmation of the settlement.

Respondents now claim that inclusion of the Caw Caw Swamp property in this exhibit was a mistake. Even if Respondents' contention is correct, this is a mistake that benefitted the McLeans. The party with an obligation to seek correction of such a mistake was Drennan, not the McLeans (and not Brogdon). The Court's reasoning in this matter would require that the McLeans seek to overturn part of the Settlement Agreement that was in their favor. This conclusion is illogical and can only be reached by accepting the Respondents' arguments concerning the intent of the settlement.

Construing the intent of the parties is a classic jury issue and is not appropriate for summary judgment. Respondents are free to present evidence and make arguments to a jury regarding the

intent of the parties. But such arguments cannot be persuasive at the summary judgment stage, especially when it is undisputed that Drennan drafted the Settlement Agreement. (R. 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). Especially at the summary judgment stage, the Court was required to construe any alleged errors in the Settlement Agreement against Drennan.

C. The Court Ignored Appellants' Reliance on the Language of the Settlement Agreement

The Appellants relied on the Settlement Agreement's mandate that they would receive the Orangeburg property. As part of the settlement, Bill McLean, who was named as a successor trustee, was required to execute a waiver of his right to serve as successor trustee. Bill McLean testified that he reviewed the settlement documents and saw that he and his siblings were to receive the Orangeburg County property, then executed the waiver and returned it. (R. pp. 446, 554.) Bill McLean's waiver was included as an exhibit to the Settlement Agreement.

The McLeans justifiably relied on the language of the Settlement Agreement as it was in their favor and protected their interests. The effect of the Court's ruling means that the McLeans should have anticipated in 2002 that Drennan was going to defy Judge Lockemy's Order and that Brogdon would be either complicit in Drennan's acts or negligent in protecting the McLeans. Such a conclusion is manifestly unreasonable.

II. THE STATUTE OF LIMITATIONS AGAINST BROGDON COULD NOT HAVE BEGUN RUNNING IN 2002

The Court's one-sentence ruling regarding claims against Brogdon appears to conclude that Appellants' statute of limitations began running with the signing of the Settlement Agreement in 2002. Again, the Court's conclusion is based on the erroneous assumption that the Settlement Agreement was unfavorable to the McLeans. The McLeans' limitations period against Brogdon could not have started until 2004, when the deeds to some of the Respondents were recorded.

A. The McLeans Reasonably Believed that Brogdon had Protected Their Interests in the Settlement Agreement

As argued above, a reasonable person reading the Settlement Agreement in 2002 would have concluded that the McLeans would receive the Orangeburg property. The general language in the Settlement Agreement states as much. The Settlement Agreement's exhibit specifically lists the Caw Caw Swamp and Gramling properties as belonging to the Trust. The McLeans assumed that Brogdon had protected their interests with this settlement.[1]

Therefore, the McLeans' statute of limitations could not have started running against Brogdon when he signed the Settlement Agreement. Appellants' limitations period began running when they were put on notice of Brogdon's acquiescence in Drennan's unilateral and unauthorized amendment of the court-approved Settlement Agreement. The two McLean siblings who were deposed testified that they had no notice of Brogdon's acquiescence until they saw the recorded

[1] 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.

deeds to the Respondents in 2004. Therefore, genuine issues of fact exist on the question of notice.

B. No Evidence Exists Charging Some of the Appellants with Notice of Claims in 2002

Respondents will likely again point to the Jay Jackson letters in an attempt to start the limitations period on all of the Appellants in 2002. Even if the Court were to accept Respondents' arguments concerning the Jay Jackson letters as to Norman and Jim McLean, there is no evidence in the record that Bill McLean, Bob McLean, or Marie McLean-Choi saw those letters or knew of their existence. The Court cannot impute knowledge of the Jay Jackson letters to these Appellants without any evidence. The notice of each Appellant must be considered individually. Instead of engaging in such an analysis, the Court summarily assumed that all McLeans had notice just because one of them may have had notice. Such an inference is not allowed in the context of summary judgment.

C. The Court Failed to Construe the Circumstances Following the Execution of the Settlement Agreement in Appellants' Favor

In concluding that the McLeans should have taken action in 2002, the Court ignored two important facts. First, the McLeans' right to receive the Orangeburg property was contingent upon P. Pence having no issue. She was still alive at the time of the settlement. Second, it took over four years from the date of the settlement for the McLeans to receive one of their aunt's properties from Brogdon. The Gramling property was the only Orangeburg property deeded into the Trust before M. Pence's death. The McLeans did not receive title to the Gramling property until after the Caw Caw Swamp and Cannon Bridge Road properties had been deeded to some of the Respondents. Even though there was no question that the McLeans were to receive the Gramling property, Brogdon did not record the McLeans' Gramling deed until August 21, 2006 (after the intervention

of counsel on the McLeans' behalf). The Court failed to consider this evidence in a light favorable to the McLeans as explaining the delay in their actions.

III. CONCLUSION

Since the outcome of the 2002 settlement of the Trust Litigation favored the McLeans, the foundation of the Court's reasoning for its opinion crumbles. The Court cannot simply ignore the actual wording of the court-approved Settlement Agreement. If the Court agrees to rehear this case and properly considers the language of the Settlement Agreement in the light most favorable to the McLeans, the Court must then consider all of Appellants' arguments on appeal. Once the Court corrects this crucial error, the Court should determine that the trial court's grant of summary judgment must be reversed and this case should be remanded for trial.

Respectfully,

December 14, 2011

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
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Honorable Diane S. Goodstein, Circuit Judge

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

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing *En Banc* and Memorandum in Support of Same on the following parties by depositing a copy of it in the United States Mail, postage prepaid, on December 14, 2011, addressed to their attorneys of record as indicated below:

Matthew H. Henrikson, Esq.
Clarkson Walsh Rheney & Terrell
Post Office Box 6728
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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.

James Randall Davis, Esq.
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Lexington, SC 29701
Attorney for Money to Go, LLC

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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.

December 14, 2011

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ATTORNEY FOR THE APPELLANTS

THE STATE OF SOUTH CAROLINA
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APPEAL FROM ORANGEBURG COUNTY
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RESPONSE TO PETITION FOR REHEARING, ON BEHALF OF RESPONDENTS WACHOVIA BANK, NATIONAL ASSOCIATION, AND JAMES B. DRENNAN, III

January 4, 2012

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Despite the clear reasoning and bases set forth in this Court's Opinion of November 29, 2011 (the "Opinion"), Appellants have petitioned this Court for a rehearing. Rule 221(a) of the South Carolina Appellate Court Rules requires that any petition for rehearing "state with particularity the points supposed to have been overlooked or misapprehended by the court." Moreover, Appellants seek a rehearing *en banc* as may be suggested pursuant to Rule 219(b) of the SCACR. As noted in Rule 219(a), a rehearing *en banc* is "not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Here, Appellants have pointed to no panel opinion inconsistent with the instant panel opinion, and have not presented any questions of policy important to the public at large. For the reasons discussed below, no rehearing of any kind is warranted in this case.

THE COURT OF APPEALS CORRECTLY HELD THAT THE APPELLANTS ARE BOUND BY THE ACTIONS OR INACTION OF THE TRUSTEE, JAMES BROGDON

In affirming summary judgment in favor of Respondents James B. Drennan, III (Drennan), and Wachovia Bank, National Association (Wachovia), this Court held, in part: "Appellants, as contingent beneficiaries, were bound by the actions of Respondent James E. Brogdon, Sr., (Brogdon) in his capacity as trustee of the Trust Agreeement of Elizabeth McLean Pence (the Trust). . . . Appellants are bound by Brogdon's failure to take action in the prior litigation to ensure that the disputed properties became assets of the Trust." In its Opinion, the Court cites multiple statutes to support its reasoning, including S.C. Code § 62-1-403(2)(ii) (Supp. 2010); S.C. Code Ann. § 62-7-103(2)(A) (2009); S.C. Code Ann. § 62-7-303(a)(4) (2009); S.C. Code Ann. § 62-3-1101 (Supp. 2010); S.C. Code Ann. § 62-3-803 (2009); and Rule 60(b), SCRCP.

Appellants claim that they are entitled to rehearing because this Court mistakenly interpreted Judge Lockemy's Order confirming the settlement of the 2002 Trust Agreement based on factual arguments from the Respondents. See Appellants' Petition for Rehearing *En Banc*; Appellants' Memorandum in Support of Petition for Rehearing, p. 1. Appellants are wrong. Appellants do not and cannot dispute the following bases supporting this Court's Opinion:

1. Brogdon was the trustee of the 2002 Trust Agreement of Elzabeth McLean Pence (the Trust), of which Appellants were beneficiaries.
2. According to Appellants' own arguments in this case and this appeal, Brogdon represented the interests of the Appellants in the 2002 Trust Litigation: ". . . Brogdon failed in his duty as Trustee to protect [Appellants'] interest. As a party to the Trust Litigation, Brogdon was required to obtain the best result possible for the trust's beneficiaries. . . ." See Appellants' Initial Appellate Brief, p. 11.
3. S.C. Code Ann. § 62-7-303(a)(4) (2009), cited by this Court in its Opinion, states that "a trustee may represent and bind the beneficiaries of the trust with respect to questions or disputes involving the trust."
4. Brogdon testified that the Trust Settlement Agreement that he negotiated and signed on behalf of the Appellants did not convey the subject property into the Trust:

Q:	What was your understanding of what was supposed to happen to the Caw Caw property as a result of this settlement?
A:	As a result of the settlement?
Q:	Yes sir.
A:	It would be owned by the estate.
Q:	Okay. And why is that?
A:	Because it was not in the trust.

(R. 673, Brogdon Depos. p. 68.)

5. S.C. Code Ann. § 62-1-403(2)(ii) (Supp. 2010), cited by this Court in its Opinion, states that "in judicially supervised settlements . . . orders binding a trustee bind beneficiaries of the trust . . . in proceedings involving creditors or other third parties . . . ."
6. Brogdon and his counsel were aware in 2002 that no more property would be conveyed to the Trust, and never filed any motion or claim, or took any other action, to recover any of the subject property on behalf of the Trust.
7. Rule 60(b), SCRCP, cited by this Court in its Opinion, requires that a motion for relief from judgment for mistake, inadvertence, surprise, or excusable neglect must be made not more than one year after entry of the judgment.
8. S.C. Code Ann. § 62-3-803(2) (2009), cited by this Court in its Opinion, sets forth a one-year statute of limitations for presenting a claim against a decedent's estate.

In short, Appellants admit that Brogdon represented their interests in the 2002 Trust Litigation and Settlement Agreement; Brogdon has stated unequivocally that the Trust Agreement he negotiated and signed on behalf of the Appellants was not intended to convey the subject property into the Trust; and Brogdon never took any action to convey such property into the Trust or to allege or correct any mistake in the Trust Settlement Agreement. Brogdon, as Trustee, did not file a motion for relief from judgment within one year of entry of the 2002 Lockemy Order, and never filed any claim against the Estate of Elizabeth P. Pence, who died on August 26, 2002. This Court correctly affirmed that the Appellants are bound by the actions and inactions of Brogdon as their Trustee, and its reasoning and conclusions are not dependent on any alleged mistaken or factual interpretation of the 2002 Trust Litigation Settlement Agreement and Order.

CONCLUSION

This Court's Opinion correctly addressed dispositive issues raised by the Appeal. Rehearing is not warranted or needed.

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Honorable Diane S. Goodstein, Circuit Judge

Case No: 2006-CP-38-1523

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

v.

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

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PROOF OF SERVICE

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TO PETITION FOR REHEARING

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Having received a clear indication from this Court that their claims are barred by both the actions of the trustee and by the applicable statute of limitations, the Appellants have asked this Court for a rehearing.[1] Rule 221(a) of the South Carolina Appellate Court Rules requires any petition for rehearing "state with particularity the points supposed to have been overlooked or misapprehended by the court."

I. OPINION CORRECTLY APPLIES TWO POSSIBLE ONE-YEAR DEADLINES

A. If the Lockemy Order Required Property Transfer into the Trust

In an effort to satisfy Rule 221(a), the Appellants' petition suggest the Court overlooked the plain language and true meaning of the Judge James Lockemy Order of 2002 – the Order that ended trust litigation between Elizabeth P. Pence (daughter of settlor) and the Pence Family Trust (a trust created and funded by Elizabeth McLean Pence). Appellants contend that the Lockemy Order required the transfer of Orangeburg real property by Elizabeth P. Pence (or her Estate) into the Pence Family Trust. The petition for rehearing suggests that by overlooking this alleged property-transfer requirement of the Lockemy Order, this Court's opinion fails to address Appellants' reliance on that requirement and reliance on the trustee to satisfy that requirement.

This Court's opinion does not hold that the Lockemy Order imposed such a property-transfer requirement, but the opinion does not ignore the Appellants' argument. To the contrary,

[1] Appellants' petition is actually captioned as one of rehearing *en banc* as may be suggested pursuant to Rule 219(b) of the SCACR. As noted in Rule 219(a), a rehearing *en banc* is "not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Here, Appellant has pointed to no panel opinion inconsistent with the instant panel opinion, and while the matters herein are certainly important to these litigants, they do not involve questions of policy important to the public at large. Of course, Respondents do not feel a rehearing of any kind is needed -- as addressed by the responses herein.

the opinion addresses the applicable deadline even if there was an assumed – for the sake of argument -- "failure" by Brogdon[2] to transfer property in accordance with this erroneous interpretation of the Lockemy Order.[3]

If the Lockemy Order imposed a property transfer requirement upon Elizabeth P. Pence (or her Estate) as the Appellants suggest, then Rule 60(b) relief was not needed to address the Lockemy Order – as the Appellants also suggest. This Court's opinion directly addressed this possibility; specifically, the opinion cites to S.C. Code § 62-3-803.[4] While the brevity of the opinion may not thoroughly explain the impact of the statute, it was nevertheless clearly considered and applied.

Under the Appellants' theory of the case, the settlement agreement in the trust litigation contractually obligated Elizabeth P. Pence, who was still alive at the time of settlement, to

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[2] Unpublished Opinion No. 2011-UP-517 (November 29, 2011), page 2, Section 1 ("Thus, we find Appellants are bound by Brogdon's failure to take action in the prior litigation to ensure that the disputed properties became assets of the Trust.").

[3] Because the binding effect of the one-year deadlines on parties to the trust litigation (whether by Rule 60(b) or by Code §62-3-803), this Court did not need to discuss the erroneous interpretation of the Lockemy Order advocated by Appellants and the Court expressly declined to reach that discussion. Opinion footnote 1. The holding of this Court is valid even accepting the Appellants' unwarranted extrapolation of the Lockemy Order.

As the Respondents have already briefed, the 2002 Lockemy Order *did not* and *could not* require Brogdon's transfer of Orangeburg properties not already vested in the Pence Family Trust. The entire thrust of the trust litigation (and settlement) was a challenge to the trust *as it existed* in an effort to remove things from that trust – not put new properties into that trust. Following the death of the settlor and the concurrent extinguishment of her Power of Attorney appointment of an agent, Brogdon had no power to transfer property of Elizabeth McLean Pence's estate (*could not*) and the estate's personal representative, daughter Elizabeth P. Pence, clearly had no motive, desire or consideration to put more estate property into the trust she challenged! In response to the current Petition for Rehearing, this Court should smply hold, as a matter of law, the Order *did not* require property transfer into the trust. See Appellant Brogdon's Brief, page 23, footnote 42.

[4] The impact of this statute was also raised in Appellant Brogdon's Brief, page 13, footnote 27.

transfer the other Orangeburg properties into the trust corpus.[5] Accordingly, a breach of contract claim could have been brought by trustee Brogdon against Elizabeth P. Pence or against her subsequent estate (as asserted in Complaint ¶¶ 79-83, R. pp. 57 – 58) based upon *her* conduct while alive – failing to transfer property as required (again *arguendo*) by her settlement agreement.

Thus, under S.C. Code § 62-3-803, there still was only one year from the August 26, 2002 death of Elizabeth P. Pence for trustee Brogdon to assert a claim to the desired Orangeburg property using a contract theory against her Estate. Any such claims would therefore have to be presented against her Estate no later than August 26, 2003, a year after her death. This action was filed in December 2006 – over 3 years later.

B. <u>If the Lockemy Order Mistakenly Failed To Require Property Transfer</u>

This Court's opinion, filed November 29, 2011, also addressed the possibility that the Lockemy Order did not require property transfer. The Court did not actually interpret the Lockemy Order one way or the other – as either requiring or not requiring property transfer; instead, the opinion merely held that, *if* the Lockemy Order mistakenly failed to require the property transfer suggested by the Appellants, the Appellants were bound by the actions of the trustee and the passage of one-year under Rule 60(b), SCRCP which would require any motion for relief be made within one year of the date of 2002 Order. No such action was taken.

[5] Again, this is totally contrary to Elizabeth P. Pence's purpose in bringing a legal action challenging the trust validity.

II. RUNNING OF THE LIMITATIONS PERIOD AGAINST BROGDON

As a second area of alleged error or misapprehension, the Petition for Rehearing suggests it was wrong to affirm the trial court's holding that claims against trustee Brogdon were barred by the applicable statute of limitations. Again the Court's opinion does not address the more fundamental holding of the trial court, also thoroughly briefed by Respondent Brogdon, that there is simply no evidence to support a claim that Brogdon breached any duty owed to the Appellants. The opinion simply correctly holds that assuming, *arguendo*, there was a breach, this action comes too late.

A. Appellants Are Judicially Estopped From Denying Limitations Trigger

The Court of Appeals opinion, despite its brevity, notes that Appellants knew or should have known Brogdon was acting on their behalf in the settlement of the trust litigation. Appellants suggest this conclusion is inconsistent with the legal obligation to view controverted facts in the light most favorable to the non-moving party. At the same time they seek to deny such knowledge or awareness that would trigger the limitations period, however, the Appellants affirmatively assert that they "justifiably relied on the language of the Settlement Agreement" and that they "believed that Brogdon had protected their interests" under the language of the settlement. Appellants' Memorandum in Support of Rehearing, pages 4 and 2. They can't have it both ways; indeed, the Appellants should be judicially estopped from advocating such inconsistent positions. This same inconsistency was present in the Appellants' trial court presentation as pointed out in Brogdon's Brief at page 17 (text accompanying footnote 32).

Of course, this Court's opinion did not let the Appellants have it both ways. Rather than rely on judicial estoppel, as the Court still could, the Court simply pointed out how the

Appellants denial knowledge of the non-transfer of Orangeburg properties was inconsistent with uncontroverted facts from their own testimony.

B. Deed Filing Delay And Survival of Elizabeth P. Pence Do Not Toll Statute

In their Petition for Rehearing, Appellants suggest that the survival of Elizabeth P. Pence until August 26, 2002 (6 months after the Lockemy Order) and the delay in recording the Gramling Place deed into the trust until August 2006 (over 6 years after the Grantor's death) are both circumstances warranting a delay in the triggering of the limitations period.

With regard to the circumstances allegedly warranting a delay in the onset of the limitations period, they do not. As noted in Brogdon's Brief, the real question is whether, viewing all evidence in the light most favorable to Appellants, there is any question of material fact that the Appellants knew or had reason to know of the non-transfer of properties into the Pence Family Trust by December 20, 2003 (three years prior to date of filing). Relying solely on uncontroverted evidence, some of which is applicable to each of the Appellants, there is no question that they were on notice of non-transfer before December 2003.

C. Appellants Were On Record Notice And Actual Notice In Spring 2003

Specifically, regardless of the 6 months that Elizabeth P. Pence lived after the trust litigation settlement, and regardless of any delay in actually recording the Gramling Place deed, the Appellants were on uncontroverted record notice in the Spring of 2003 -- through ancillary filings in Orangeburg Probate Court -- that the desired properties had not been transferred into the Pence Family Trust. Appellants have not and can not explain how these two irrelevant circumstances act to remove their expressly stated knowledge of and reliance upon the trust settlement or remove their record notice of non-transfer of their desired properties. Nothing in

the record suggests the delay in filing of the Gramling deed lead the Appellants to safely assume there were other unrecorded transfers; to the contrary, such an assumption would not be reasonable or safe. The only conclusion to be drawn from the absence of recorded deeds is that transfers have not occurred and Appellants should act.

Of course, in addition to stated awareness of the settlement language and uncontroverted record notice of no property transfers, the record also contains evidence of actual knowledge of the Appellants that the desired properties had not been transferred. Coincidentally, this evidence indicates that the Appellants *did* act – they took steps to express their interest in purchasing the property.

Actual notice of the property ownership was admitted by Appellant Norman McLean when he testified in his deposition that he had authorized attorney Jay Jackson in 2002 to write of the family interest in purchasing the property. Norman McLean testified that he gave Jackson this authorization with the knowledge of his children (the other Appellants). A January 17, 2003 follow-up letter by Jay Jackson openly copied Appellant Jim McLean. Also uncontroverted is that Appellant Will McLean attended a meeting regarding the trust litigation and executed a February 25, 2002 waiver. Appellants admitted Bill McLean's receipt of trust settlement documents in February 2002. In the first Jay Jackson letter September 27, 2002, counsel represents that he was asked to review the trust settlement documents by Jim McLean.

D. <u>Variations in Each Appellants' Knowledge Is Not Zero Knowledge For Any One</u>

Finally, Appellants seek to distinguish Marie McLean-Choi, William N. McLean, Robert L. McLean in order to argue that the conclusion of knowledge is particularly unsupported for these Appellants. While Robert, Marie, and William may not be copied with or mentioned

specifically in the Jay Jackson letters, their father testified that they were aware of the efforts. Moreover, the letters themselves purport to be on behalf of the entire family. Moreover, William was on direct notice of the trust litigation settlement documents having executed a waiver form as part of that settlement. And through present counsel, all Appellants are represented as having contemporaneous awareness of and reliance upon the trust settlement language. And again, the record notice available through the ancillary filings in Orangeburg Probate Court applies equally to all the Appellants – not just those expressly copied with the Jay Jackson letters.

CONCLUSION

This Court's Opinion correctly addressed dispositive issues raised by the Appeal and Rehearing is not needed.

TURNER, PADGET, GRAHAM & LANEY, P.A.

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December 30, 2011

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ATTORNEYS FOR RESPONDENT BROGDON

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Honorable Diane S. Goodstein, Circuit Judge

Case No. 2006-CP-38-1523

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v.

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IN THE COURT OF APPEALS

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COURT OF COMMON PLEAS
HONORABLE DIANE S. GOODSTEIN, CIRCUIT COURT JUDGE

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Versus

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INTRODUCTION

Rule 221(a) of the SCACR requires that any petition for rehearing "state with particularity the points supposed to have been overlooked or misapprehended by the Court."[1] With respect to this Court's November 29, 2011, opinion, Appellants assert that the Court ignored that "the language of the Settlement Agreement [was] in the Appellants' favor." This oversight, Appellants argue, caused the Court to rule incorrectly in favor of Respondents. For the reasons stated herein, Respondents disagree.

COURT DID NOT IGNORE APPELLANTS' ARGUMENT

Appellants argue that the Court did not consider that the Order of Circuit Judge James Lockemy (which was memorialized into a court-approved Settlement Agreement) required Elizabeth P. Pence (through whose estate Respondents claim as beneficiaries) to transfer the Caw Caw Swamp and Cannon Bridge Road properties[2] to the Elizabeth McLean Pence Trust. To the contrary, while the Court's opinion did not rule that the Settlement Agreement required or did not require both or either of these properties to be transferred to the Trust, the opinion did not ignore Appellants' argument. As Appellants admit, and as the Court's opinion stated, Appellants were bound by what Mr. Brogdon did or did not do.[3]

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[1] Appellants' petition is captioned as one for a rehearing en banc, as provided for by Rule 219 of the SCACR. Respondents note that Appellants have not cited any inconsistent ruling by other panel of this Court nor any question of exceptional importance as set forth by Rule 219(a). Respondents of course believe that no rehearing of any kind is needed.

[2] Respondents note that Appellants' petition makes no argument with respect to the Cannon Bridge Road property which was in no way mentioned in the Settlement Agreement.

[3] Decision with respect to Respondents does not hinge on whether Brogdon breached any duty to Appellants, and if so, when the applicable limitations period would have began for Appellants to bring an action against Brogdon.

If, as Appellants assert, the Settlement Agreement requires either or both of these disputed properties to be transferred to the Trust, then Appellants[4] or Brogdon would not have needed Rule 60(b) relief. However, when Elizabeth P. Pence failed to comply with the Settlement Agreement (as interpreted by Appellants), Brogdon or Appellants should have timely filed a claim for beach of contract either against Mrs. Pence in her lifetime or in her estate proceedings. The Court's opinion specifically cites S.C. Code Ann. §62-3-803 (2009) which provides for the barring of claims not timely filed. While the brevity of the court's opinion was such that the impact of this statute was not fully explained, the statute was nevertheless clearly considered and applied.

If on the other hand, the Settlement Agreement did not impose a property transfer requirement[5] and if this were in error, then Mr. Brogdon or Appellants should have filed a timely Rule 60(b) motion to have the court-approved Settlement Agreement corrected. No such filing was made.

This Court's opinion covered both possible interpretations by holding that "Appellants are bound by Brogdon's failure to take action in the prior litigation to insure that the disputed properties became assets of the Trust." The opinion cited both Rule 60(b) SCRCP and S.C. Code Ann. §62-3-803 (2009) to support this holding.

CONCLUSION

This Court's opinion correctly addressed the dispositive issues raised by the appeal and rehearing is not needed.

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[4] By indicating their reliance of the Settlement Agreement, Appellants effectively date their knowledge of the matter so they could have timely sought relief. In any event, they are bound by the actions or inactions of Brogdon.

[5] Respondents believe that the Trial Court ruled that it did not. The court's opinion did not address this issue because resolution of the case did not require that it do so (see footnote one of the Court's opinion).

Bennettsville, South Carolina
January 3, 2012

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THE STATE OF SOUTH CAROLINA,

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Bennettsville, South Carolina
January 3, 2012

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BY: Harry R. Easterling

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ATTORNEY FOR RESPONDENTS
JAMES J. PENCE, JR., AS
PERSONAL REPRESENTATIVE
OF THE ESTATE OF STEPHEN
PENCE; AND HARRY R.
EASTERLING, JR.

THE STATE OF SOUTH CAROLINA,

IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS
HONORABLE DIANE S. GOODSTEIN, CIRCUIT COURT JUDGE

CASE NO. 2006-CP-38-1523

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

Versus

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

RESPONDENT MARLBORO ACADEMY'S, INC., RESPONSE TO PETITION FOR REHEARING

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INTRODUCTION

Rule 221(a), SCACR requires that any petition for rehearing "state with particularity the points supposed to have been overlooked or misapprehended by the Court."[1] With respect to this Court's November 29, 2011, opinion, Appellants assert that the Court ignored that "the language of the Settlement Agreement [was] in the Appellants' favor." This oversight, Appellants argue, caused the Court to rule incorrectly in favor of Respondent. For the reasons stated herein, Respondent disagrees.

COURT DID NOT IGNORE APPELLANTS' ARGUMENT

Appellants argue that the Court did not consider that the Order of Circuit Judge James Lockemy (which was memorialized into a court-approved Settlement Agreement) required Elizabeth P. Pence (through whose estate Respondent claims as a beneficiary) to transfer the Caw Caw Swamp and Cannon Bridge Road properties[2] to the Elizabeth McLean Pence Trust. To the contrary, while the Court's opinion did not rule that the Settlement Agreement required or did not require both or either of these properties to be transferred to the Trust, the opinion did not ignore Appellants' argument. As Appellants admit, and as the Court's opinion stated, Appellants were bound by what Mr. Brogdon did or did not do.[3]

---

[1] Appellants' petition is captioned as one for a rehearing en banc, as provided for by Rule 219, SCACR Respondent notes that Appellants have not cited any inconsistent ruling by another panel of this Court nor any question of exceptional importance as set forth by Rule 219(a). Respondent of course believes that no rehearing of any kind is needed.

[2] Respondent notes that Appellants' petition makes no argument now with respect to the Cannon Bridge Road property which was in no way mentioned in the Settlement Agreement.

[3] Decision with respect to Respondent does not hinge on whether Brogdon breached any duty to Appellants, and if arguably so, when the applicable limitations period would have begun for Appellants to bring an action against Brogdon.

If, as Appellants assert, the Settlement Agreement requires either or both of these disputed properties to be transferred to the Trust, then Appellants[4] or Brogdon would not have needed Rule 60(b) relief. However, when Elizabeth P. Pence failed to comply with the Settlement Agreement (as interpreted by Appellants), Brogdon or Appellants should have timely filed a claim for breach of contract either against her in her lifetime or in her estate proceedings. The Court's opinion specifically cites S.C. Code Ann. §62-3-803 (2009) which provides for the barring of claims not timely filed. While the brevity of the Court's opinion was such that the impact of this statute was not fully explained, it was nevertheless clearly considered and applied.

If on the other hand, the Settlement Agreement did not impose a property transfer requirement[5] and if this were in error, then Brogdon or Appellants should have filed a timely Rule 60(b) motion to have the court-approved Settlement Agreement corrected. No such filing was made.

This Court's opinion covered both possible interpretations by holding that "Appellants are bound by Brogdon's failure to take action in the prior litigation to insure that the disputed properties became assets of the Trust." The opinion cited both Rule 60(b), SCRCP and S.C. Code Ann. §62-3-803 (2009) to support this holding.

CONCLUSION

This Court's opinion correctly addressed the dispositive issues raised by the appeal and rehearing is not needed.

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[4] By indicating their reliance on the Settlement Agreement, Appellants effectively date their knowledge of the matter so that they could have timely sought relief. In any event, they are bound by the actions or inactions of Brogdon.

[5] Respondent believes that the Trial Court ruled that it did not. The Court's opinion did not address this issue because resolution of the case did not require that it do so (see footnote one of the Court's opinion).

Darlington, South Carolina
January 3, 2012

Paulling & James

BY: [signature]

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THE STATE OF SOUTH CAROLINA,

IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS
HONORABLE DIANE S. GOODSTEIN, CIRCUIT COURT JUDGE

CASE NO. 2006-CP-38-1523

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

Versus

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

PROOF OF SERVICE

I certify that I have served Respondent Marlboro Academy's, Inc., Response to Petition for Rehearing by depositing copies of the same in the United States mail, postage prepaid, on January 3, 2012, to all counsel of record at the following addresses:

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January 4, 2012

Via U.S. Mail

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: McLean, Norman, et al. v. Drennan, James, et al.
Civil Action No. 2006-CP-38-1523
Court of Appeals Tracking No: 2009134986
Our File No. 168-00009

Dear Ms. Gee:

We are in receipt of the Respondent Brogdon's Response to the Petition for Rehearing as well as the Respondents Pence and Easterling's Response to the Petition for Rehearing in the above-referenced matter. As attorney for Respondents Charles P. Thompson, Jr. and Cheri (Cheryl) Brown Thompson, we hereby join in those Responses. I have spoken with Randy Davis, the attorney for Money to Go, LLC, who also joins in Respondents Brogdon, Pence and Easterling's Responses.

Sincerely,

Jenkins M. Mann

JMM/jas

cc: David Alexander
Matthew H. Henrikson
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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Honorable Diane S. Goodstein, Circuit Judge

Case No.: 2006-CP-38-1523

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

v.

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

APPELLANTS' REPLY TO RESPONDENTS' RETURNS TO PETITION FOR REHEARING

Appellants ask the Court to rehear this appeal on the basis that the Court's opinion failed to address the fact that Judge Lockemy's Order confirming the settlement of the Trust Litigation is in the favor of the Appellants. Brogdon's inaction concerning an order in his beneficiaries' favor cannot, especially at the summary judgment stage, trigger any statutes of limitation that would bar Appellants' claims. Respondents' violation of Judge Lockemy's Order in 2004 is the event that triggered the statute of limitations.

I. RESPONDENTS WRONGLY CONTEND THAT THE OUTCOME OF THE TRUST LITIGATION IS IRRELEVANT

Respondents argue that whether the Court determines that Judge Lockemy's Order makes the Orangeburg County property part of the Trust is irrelevant to the Court's decision. Respondents base this contention on Brogdon's inaction. This argument is invalid because:(1) regardless of Brogdon's action or inaction, Respondents were not free to ignore a court order and (2) Brogdon was not required to take action to correct an order that was in the favor of his beneficiaries.

A. Respondents Cannot Ignore an Order of the Court

If the effect of Judge Lockemy's Order was that the Orangeburg County properties were part of the Trust, then Respondents Drennan and Wachovia were not free to attempt transfer of these properties without relief from the Order. The attempted transfers to the other Respondents was a violation of Judge Lockemy's Order. The plain language of the Order states that the Gramling and Caw Caw Swamp party were part of the Trust as a result of the settlement. The plain language of the Order also states that the intention of the Settlement Agreement was to give effect to M. Pence's intention that all of the Orangeburg Property should go to the McLeans.[1] Despite the Order, Drennan and Wachovia attempted transfer of these properties to the other Respondents.

Regardless of whether Brogdon acted or not, Drennan and Wachovia could not attempt these transfers without the court's permission. Respondents appear to argue that because Brogdon did not object to their actions, they were relieved from complying with the express terms of the Settlement

[1] Respondents contention that the Cannon Bridge Road property is not covered by the Order is incorrect. The general language of the Order is clear that all Orangeburg real property is part of the Trust. This, of course, includes the Cannon Bridge Road property. No logical reason has been offered why the Cannon Bridge Road property would not be treated the same as the other two Orangeburg properties. Had the McLeans received the Cannon Bridge Road property, Respondents would have no argument that Judge Lockemy's Order had been violated. Conversely, transfer to third parties was a violation of the Order.

Agreement. Once the Settlement Agreement became an order of the court, the parties needed the court's permission to vary from its strictures. Contracts may be modified by mutual consent, but orders must be modified by judges. Even if, as Drennan and Wachovia claim, the language in the Order concerning the Orangeburg property is mistaken, that does not relieve them of their responsibility to abide by its terms. Before attempting a transfer to third parties, Drennan and Wachovia were required to ask the circuit court to modify its Order. Respondents cannot rely on Brogdon's inaction as an excuse for their failure to abide by an order of the court.

B. The One-Year Limitations Periods of Rule 60 and the Probate Code Do Not Apply

Respondents incorrectly argue that the Court's Opinion addresses the application of the limitations periods of Rule 60 and section 62-3-803 of the Probate Code. Had the Court addressed the fact that Judge Lockemy's Order was in the McLeans' favor, it necessarily would have found that neither limitations periods applied. As has been briefed extensively, Appellants' position is that neither the McLeans nor Brogdon were required to file a Rule 60 motion. Logic dictates that neither Brogdon nor the McLeans should have taken action under Rule 60 to correct an order stating that they were to receive the Orangeburg property.

Much the same reasoning applies to the Probate Code's limitations period. A court order had already been issued stating that the Orangeburg properties were part of the Trust. Neither Brogdon nor the McLeans were required to file a claim against either M.Pence or P.Pence's estate because, as a result of the Trust Litigation, the Orangeburg property was not part of those estates. Respondents would have Brogdon re-litigate these claims in a different court after already receiving a favorable order.

Furthermore, a jury issue exists as to whether Respondents should be allowed to avoid claims which they created, but obscured from the McLeans until after the time allowed by § 62-3-803 had

expired. Drennan represented P.Pence in the Trust Litigation, drafted the Settlement Agreement, and represented Wachovia as personal representative of P.Pence's estate. Viewing the facts in the light most favorable to the McLeans, Drennan had actual knowledge that the McLeans were entitled to the Orangeburg County property.

Finally, P.Pence's estate was bound by Judge Lockemy's Order. As stated above, Respondents were not free to disregard Judge Lockemy's Order. This same reasoning applies equally to P.Pence's estate. Whether or not any probate claim was filed is irrelevant. P.Pence's estate is not relieved from seeking judicial modification of an order they believe is mistaken by any failure of Brogdon to file a claim against the estate.. The obligation to abide by Judge Lockemy's Order did not expire at the same time as the Probate Code's limitations period.

II. THE LIMITATIONS PERIOD AGAINST BROGDON BEGAN IN 2004

Brogdon incorrectly argues that Appellants' position regarding his liabilty is inconsistent. At the conclusion of the Trust Litigation in 2002, Appellants could not have known of the existence of any claims against Brogdon. Respondents were entitled to rely on Judge Lockemy's Order to believe their interests had been protected and that claims against Brogdon arising from his failure to deed properties into the trust before M.Pence's death had been cured. Prior to M. Pence's death, Brogdon could have transferred the Caw Caw Swamp and Cannon Bridge Road properties into the Trust along with the Gramling property with specific deeds or with a "catch-all" provision including all property she owned in Orangeburg County. See Dargan v. Tankersley, 380 S.C. 480, 488, 671 S.E.2d 73, 77 (2008) (holding "catch-all" provisions in deeds validly transfer property). Brogdon testified that the deed for him to transfer the Caw Caw Swamp property into the Trust was prepared before M.Pence died, but admitted that it was never executed. (R. p. 677.) Appellants could not have known that Brogdon's failure to deed the properties into the trust had caused them any harm until

2004 when deeds to other parties were recorded.

CONCLUSION

For the reasons stated above and for the reasons stated in Appellants' Memorandum in Support of Petition for Rehearing *En Banc*, Appellants' request the Court to rehear this matter and reverse the judgment of the trial court.

January 14, 2012

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Honorable Diane S. Goodstein, Circuit Judge

Case No.: 2006-CP-38-1523

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

v.

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PROOF OF SERVICE

I certify that I have served Appellants' Reply to Respondents' Returns to Petition for Rehearing *En Banc* and Appellants' Motion to Accept Reply to Return for Petition for Rehearing After Deadline on the following parties by depositing a copy of it in the United States Mail, postage prepaid, on January 14, 2012, addressed to their attorneys of record as indicated below:

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The South Carolina Court of Appeals

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The Honorable Diane Schafer Goodstein
Orangeburg County
Trial Court Case No. 2006-CP-38-01523

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded.

It is, therefore, ordered that the Petition for Rehearing be denied.

Huff, J.

Pieper, J.

Cureton, J.

Columbia, South Carolina

cc:
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Harry R. Easterling, Sr., Esquire
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FILED
February 24, 2012