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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Honorable Diane S. Goodstein, Circuit Judge

---

Unpublished Opinion No.: 2011-UP-517 (S.C. Ct.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

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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.

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# AMENDED APPENDIX

Volume 1 of 5

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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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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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# RECORD ON APPEAL

**Volume 1 of 4**

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| STATE OF SOUTH CAROLINA, | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FIRST JUDICIAL CIRCUIT |
| COUNTY OF ORANGEBURG. | ) | 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. | ) | **ORDER GRANTING SUMMARY JUDGMENT** |
| | ) | |
| 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. | ) | |

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ORANGEBURG COUNTY
CLERK OF COURT
2009 JUL 14 A 10:54

This matter came before the Court on the motion of Defendants James B. Drennan, III, as Personal Representative of the Estate of Elizabeth McLean Pence ("Drennan"); James E. Brogdon, Sr, as Trustee of the Trust Agreement of Elizabeth McLean Pence dated May 28, 1999 ("Brogdon"); Wachovia Bank, National Association ("Wachovia"), as Personal Representative of the Estate of Elizabeth P. Pence, and as Trustee of the Elizabeth P. Pence Trust; Marlboro Academy, Inc.; Charles P. Thompson, Jr., Cheri (Cheryl) Brown Thompson (hereinafter collectively referred to as the "Thompsons") and Money to Go, LLC ("Money"); James J. Pence, Jr., as Personal Representative of the Estate of Stephen Pence; and Harry R. Easterling, Jr. for summary

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CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, seeking dismissal of Plaintiffs' alleged claims for breach of contract and breach of fiduciary duty. The Court conducted a hearing on the motion on May 12, 2008 and heard the arguments of counsel, considered the briefs submitted by the parties, and reviewed the Court's file and discovery record. The Court has determined that all the Defendants motion for summary judgment should be granted for the reasons set forth herein.

## FINDINGS OF FACT

The Court bases its ruling on the following uncontested facts:

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

2. On May 28, 1999, pursuant to the power of attorney, Brogdon created a Revocable Trust Agreement for M. Pence and thereafter transferred to himself as Trustee of that Trust certain real properties in Marlboro and Orangeburg Counties along with liquid assets of substantial value. The properties which are the subject of this litigation (the "Caw Caw Swamp" property and the "Cannon Bridge Road" property) were never transferred to this Trust. The only Orangeburg County property transferred to this Trust was the "Grambling Road" property. This Trust Agreement provided lifetime benefits for M. Pence. The Trust became irrevocable at the death of M. Pence and thereafter provided for lifetime benefits to M. Pence's daughter, Elizabeth P. Pence (hereinafter "P. Pence"). The Trust further provided that at the death of P. Pence, the trust assets were to go to her issue, and, if there were no issue of P. Pence, the Orangeburg County real estate held by the Trust was to go to the issue of Norman M. McLean (and all other assets were to go to Clemson University and Coker College).

3. On October 3, 1999, M. Pence died. Her estate was administered in the Probate Court of Marlboro County. The Caw Caw Swamp and Cannon Bridge Road properties were

administered as a part of the Estate of M. Pence (and passed to P. Pence pursuant to the Will of M. Pence).

4. On October 19, 2000, P. Pence brought suit against Brogdon, Clemson University, and Coker College to contest the validity of the May 28, 1999, Trust Agreement and the property transfers thereto (the "Trust Litigation"). The present Plaintiffs were not parties to the Trust Litigation.

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

6. Wachovia Bank was not a party to the Trust Litigation or a signatory to the Settlement Agreement.

7. Neither the Plaintiffs nor Drennan were signatories or parties to the Settlement Agreement.

8. On August 26, 2002, P. Pence died without issue surviving. Her Will and revocable trust agreement left her estate to Marlboro Academy, Inc. Her estate was administered in the Probate Court for Marlboro County. Her spouse, Stephen Pence, filed an elective share

claim and thus became entitled to a portion of her estate. Included among the assets of her estate were the Caw Caw Swamp property and one-half remainder interest in the Cannon Bridge Road property.

9. Wachovia Bank was personal representative of P. Pence's estate as well as trustee of her revocable trust agreement.

10. Plaintiffs were not, and do not claim to be, beneficiaries under M. Pence's will or under P. Pence's Will, or under P. Pence's Trust.

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

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

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

13. The Compromise and Settlement Agreement and Orangeburg property referenced in attorney Jackson's letter are the same Settlement Agreement and property that are the subject of Plaintiffs' claims in this lawsuit.

14. On October 1, 2002, Mr. Drennan responded to Mr. Jackson and explained in detail why the Caw Caw Swamp was not a part of the Trust. On October 21, 2002, Mr. Jackson responded to Mr. Drennan in a letter copied to plaintiff Jim McLean, stating in part:

> I have discussed the matter with my clients and they do accept the fact that the Caw Caw property and the Cannon Bridge Road property in which Elizabeth had a remainder interest were not put into the trust. Therefore, we accept that title to those properties passed through the Wills of Elizabeth Pence, the mother and Elizabeth Pence, the daughter. Therefore, the purpose of this letter is simply [to] assure you that we do accept and agree with the matters set forth in your letter of October 1, 2002.....
>
> Additionally, we would like to let you know and would ask that you let the beneficiaries of Ms. Pence's [P. Pence's] Will know that my client's [sic] are willing to purchase these two pieces of property in order to keep them in the family. My clients' first choice would be to purchase the remainder interest of the Cannon Bridge Road property in which the [sic] Lennon McLean has a life estate. Secondly, my clients would also be interested in purchasing the Caw Caw property, but believe that they would probably have to do so after the timber was cut and sold on thereon. I would appreciate your forwarding this information to the appropriate persons to determine whether or not they might be willing to sell these Orangeburg properties.

15. On January 17, 2003, Mr. Jackson again wrote Mr. Drennan, in a letter copied to plaintiff Jim McLean, reiterating the fact that "my clients here in Orangeburg are interested in purchasing the Orangeburg County property owned by the late Elizabeth Pence."

16. Along with the Jackson-Drennan correspondence, the deposition testimony of attorney Jackson and various Plaintiffs demonstrate Plaintiffs' notice and knowledge at least by October of 2002 of the issues set forth in Plaintiffs' Complaint, including that the Caw Caw Swamp and Cannon Bridge Road properties were not in the Trust and were not deemed to be subject to the February 26, 2002 Settlement Agreement by the representatives of the estate of P. Pence For example:

(a) James N. McLean knew, while M. Pence was alive, that the Grambling Road property had been transferred to the trust and that the Caw Caw Swamp and Cannon Bridge Road properties had not. (James McLean Deposition, pp. 18-20);

(b) Attorney Jackson testified that he discussed with Norman McLean the contents of his various letters exchanged with James Drennan (James Jackson Deposition, pp. 17-18 and 21-23).

(c) Norman McLean testified that he discussed the matters addressed in the Jackson-Drennan correspondence with Mr. Jackson and with his children, that Jackson was authorized to communicate to Drennan the McLean children's interest in purchasing the subject property, and that the McLean children were aware that Norman McLean asked Jackson to convey to Drennan their interest in the subject property. (Norman McLean Deposition, pp. 45-58 and 76-78).

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

(a) James McLean knew while M. Pence was alive that the Gramling Road property had been transferred to the trust and that the Caw Caw Swamp and Cannon Bridge Road properties had not. (James McLean Deposition, pages 18-20).

(b) On February 25, 2002 William McLean signed a document releasing his right to be a successor co-trustee to Mr. Brogdon and he received at that time what he described as a "partial faxed copy of the Settlement Agreement." (William McLean Deposition, pages 27-29).

(c) On February 25, 2002, William McLean knew that the Trust Litigation had been settled by the parties (McLean responses to Brogdon's Request to Admit).

(d) James McLean testified that he was aware that his brother William "had to go to Florence and meet with some people because he was a backup trustee or something." (James McLean Deposition, page 25).

(e) Norman McLean testified he discussed the matters addressed in the Jackson-Drennan correspondences with Mr. Jackson and with his children. (Norman McLean Deposition, pages 45-58).

(f) Mr. Jackson testified that he discussed the contents of the various letters with Norman McLean. (James Jackson Deposition, pages 17-18 and 21-23).

(g) Mr. Jackson testified to his belief that copies of the letters were sent to James McLean (who was shown to be a copy recipient). (James Jackson Deposition, pages 23-24).

18. On July 23, 2004, Wachovia Bank as personal representative of the Estate of Pence, Jr. sold the Caw Caw Swamp property to defendants Thompson and Money to Go, LLC. The net proceeds of this sale were later distributed in part to Marlboro Academy, Inc. At the time of these conveyances, there was nothing in the Orangeburg County Public Records that placed anyone on notice of the claims the Plaintiffs now assert to the Caw Caw Swamp property.

19. On October 25, 2004, Wachovia Bank as trustee of the revocable trust agreement of Pence, Jr. issued to Marlboro Academy, Inc. a deed of distribution for a one-third (1/3) remainder interest in the Cannon Bridge Road property.

20. Stephen Pence acquired an undivided one-sixth interest in remainder in and to the Cannon Bridge Road property by Deed of Distribution dated October 13, 2004 and recorded in Book 1066, Page 38 in the office of the Register of Deeds for Orangeburg County, S.C.

21. Stephen Pence conveyed a one-twelfth fractional interest in the Cannon Bridge Road Property without notice of the Plaintiffs' claim to Harry R. Easterling, Jr. by deed dated March 9, 2005 and recorded September 12, 2006 in Book 1168, Page 35 in the office of the Clerk of Court for Orangeburg County, S.C. Stephen Pence therefore retained the ownership of an undivided one-twelfth fractional interest in said property. This undivided one-twelfth interest in the Cannon Bridge Road Property was owned by Stephen Pence at his death and passed under his last Will and Testament to his father and mother as may be determined by reference to a copy thereof filed in the office of the Judge of Probate for Orangeburg County, South Carolina.

22. On December 20, 2006, Plaintiffs filed this lawsuit, alleging claims against Drennan for breach of contract and breach of fiduciary duty solely in his capacity as Personal Representative of the Estate of M. Pence.

23. On December 19, 2006, Plaintiffs filed this suit, claiming in effect that the February 26, 2002 Settlement Agreement and Order required P. Pence to transfer to the revocable trust agreement of M. Pence the Caw Caw Swamp property and her interest in the Cannon Bridge Road property, the conveyance to Stephen Pence of a one sixth remainder interest in the Cannon Bridge Road property and his subsequent transfer of a portion thereof to Harry R. Easterling, Jr., that the receipt by Marlboro Academy, Inc. of a portion of the proceeds from the sale of the Caw Caw Swamp property and a one third remainder interest in the Cannon Bridge Road property resulted in unjust enrichment and that the purported transfers of these properties should be set aside. They further claim that Brogdon has mismanaged the trust assets by failing to transfer the Caw Caw Swamp and Grambling Road properties to the Trust.

24. Plaintiffs are all members of the McLean family from Orangeburg, South Carolina. Norman McLean ("Norman") is the father of James N. McLean ("Jim"), Marie McLean-Choi ("Marie"), William N. McLean ("Bill"), and Robert L. McLean ("Bob"). JL

McLean Properties, LLC is a company set up by the McLean siblings to jointly own their investment properties.

25. Norman's father was James L. McLean. James L. McLean had three children, Norman, James L. McLean, Jr. ("Lennon"), and M. Pence. James L. McLean farmed timber in Orangeburg County and owned multiple properties.

26. Before his death, James L. McLean took steps to distribute his property to his children and also provide for Lennon, who was disabled. On July 3, 1954, title to the Gramling Place property was consolidated in Norman and M. Pence. In transactions occurring on July 3 and July 7, 1954, title to the Cannon Bridge Road property was vested as follows: 125 acres in fee simple to Lennon; the remaining acreage to Lennon for life, with the remainder to Lennon's issue, and if no issue exist, to M. Pence and Norman in fee. The Caw Caw Swamp property was devised to Norman, M. Pence, and Lennon, as tenants-in-common, through James L. McLean's will. In 1994, the Caw Caw Swamp property was partitioned between Norman, M. Pence, and Lennon. Lennon died without issue in 2004.

27. The Plaintiffs in this matter allege their rights to the Orangeburg property passed from M. Pence to P. Pence and arises out of the Trust of P. Pence. Specifically, that Orangeburg land in the Trust of P. Pence would go to Norman McLean's issues if P. Pence died without issues.

**CONCLUSIONS OF LAW**

**A. Summary Judgment Standard**

"A trial court should grant a motion for summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Regions Bank v. Shmauch, 354 S.C. 648, 659, 582

S.E.2d 432 (Ct.App. 2003) (quoting Rule 56(c), SCRCP). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. See Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct.App.2001). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Regions Bank, supra, citing SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990).

**B. Rule 60(b) SCRCP**

In this case the Plaintiffs have claimed that the Settlement Agreement, which was approved by the Marlboro County Court of Common Pleas on February 26, 2002, somehow made the Caw Caw Swamp and Cannon Bridge Road properties subject to the terms of the Trust. This Court disagrees. The Settlement Agreement made no mention whatsoever of the Cannon Bridge Road property. While the Caw Caw Swamp property, which was never deeded to the Trust, was listed on the schedule of real properties attached to the Settlement Agreement, the Court finds that Schedule B was for valuation purposes to set forth the basis of the agreed upon 60%/40% division. The Caw Caw Swamp property was owned by P. Pence at the time, and the Settlement Agreement clearly imposed no requirement on her to add property to the Trust.

The fact that the Settlement Agreement became a Court Order is significant because of the time limitations prescribed by Rule 60(b) SCRCP ("Rule 60(b)). Under Rule 60(b), Plaintiffs were required to file a motion within one year from the date of the entry of the Order, i.e., by

February 26, 2003, to correct any mistakes in the Order. Plaintiffs apparently contend that the Settlement Agreement mistakenly omitted the requirement that P. Pence add property to the Trust. The Plaintiffs, or those through whom they claim, failed to timely file the requisite Rule 60(b) motion to correct or clarify the Order.

Rule 60(b) was enacted to ensure finality to litigants and other parties relying on orders issued by the courts of this State. Their attempt through this lawsuit at this late date to do what was required by Rule 60(b) is time barred. The Plaintiffs cannot sit idly by for nearly five years and then attempt to set aside the numerous transactions that have occurred in reliance upon the Order. Consequently the Court grants the Defendants motion for summary judgment.

The Plaintiffs also contend that they as beneficiaries of the Trust are not bound by the Order and they have the right to challenge the Order and Settlement Agreement nearly five years after the entry of the Order. The Plaintiffs' argument is countered by S.C. Code Ann. § 62-1-403(2)(ii) which provides that an order binding a trustee also binds beneficiaries in proceedings involving third parties and §62-1-403(3)(i) which provides that sufficient notice is given where notice is given to every interested person or to one who can bind an interested person as described in 2(i) or 2(ii) above. (Emphasis added.) Further, this statute provides that "a trustee may represent and bind the beneficiaries of the trust with respect to questions or disputes involving the trust." S.C. Code Ann. § 62-7-303(a)(4). The Court also notes that a number of the Plaintiffs were on actual notice of the Agreement and Order within the Rule 60(b) time period. William McLean received a copy of the Order on February 25, 2002 and in fact waived his right to serve as trustee of the M. Pence Trust on the same date which is attached to the Court Order as exhibit C of the incorporated Settlement Agreement. Jim McLean was aware that his brother, Bill McLean, went to Florence to sign the waiver to serve as trustee for the M. Pence Trust. Deposition of James McLean, p. 25. Jim McLean and Norman M. McLean discussed the

situation with attorney Jay Jackson and Jim McLean was the recipient of his correspondences in the September-October, 2002 time period. In a January 2003 letter, Jay Jackson states his clients were willing to purchase the Caw Caw Swamp property and to make sure the heirs of P. Pence are aware of the offer. As such, the Plaintiffs were bound by the Order of February 26, 2002 and were obligated by Rule 60 to voice their objections thereto within one year of the Order.

**C. Probate Code Creditor Claims Statutes**

Assuming arguendo that the Plaintiffs were not required to timely file a Rule 60(b) motion to obtain the relief they now seek, the Plaintiffs would have been required to timely file a claim in the probate proceedings of P. Pence in order to pursue the claims they now make, which they also failed to do.

Section 62-3-801(a) of the Code requires a personal representative upon his or her appointment to publish a Notice to Creditors once a week for three weeks in a newspaper of general circulation in the county announcing the appointment and address and notifying creditors of the estate to present their claims within eight months after the date of first publication of the notice or be forever barred. Wachovia Bank as personal representative of the Estate of P. Pence published the required notice in the Marlboro Herald on September 16, 23 and 30, 2002, notifying those with potential claims against the P. Pence estate to present their claims within eight months after the date of first publication of the notice or be forever barred. No such claims were filed or otherwise presented.

Section 62-3-803(a) of the Code provides further:

> "(a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statutes of limitations, are barred against the estate, the personal representative and the heirs and devisees of the decedent, unless presented within the earlier of the following dates: (1) one year after the decedent's death, or (2)

within the time provided by Section 62-3-801(b) for creditors who are given actual notice and within the time provided in Section 62-3-801(a) for all creditors barred by publication." [Emphasis added]

Plaintiffs clearly did not comply with the aforesaid Code provisions. Their first and only effort to file a claim was the filing of this lawsuit on December 19, 2006. Their claim became barred on May 16, 2003. Their failure to comply with the aforesaid provisions is an absolute bar to any recovery which they may have against Marlboro Academy, Inc. as well as the other Defendants. See Matter of Estate of Tollison, S.C. 132, 463 S.E. 2d 611 (S.C. App. 1995) wherein the court states that "Section 62-3-803 is a non-claim statute... Thus, unless the statute is complied with the creditor's claim is barred." 463 S.E. 2d at 613.

As Plaintiffs admit, any duty owed by P. Pence was contractual in nature and arose before she died. Therefore §62-3-803(a) applies. Further, Plaintiffs' claims in the case at bar, which Plaintiffs allege are founded on contract and tort, are barred under § 62-3-803(a). Section 62-3-803 of the Probate Code is a nonclaim statute, barring all claims not timely filed against the estate, including assets distributed to the beneficiaries of the estate. See A. McCoy's v. Garner, 281 S.C. 378, 380, 315 S.E.2d 812 (Ct.App.1984) (decided under predecessor Code section 21-15-640, holding that it "is a nonclaim statute which bars all claims which are not timely filed against an estate...[including] assets distributed to the beneficiaries of the estate."), citing Moultis v. Degen, 279 S.C. 1, 301 S.E.2d 554 (1983); cited in Tollison v. Tollision, 320 S.C. 132, 135, 463 S.E.2d 611 (Ct.App.1995) ("Section 62-3-803 is a nonclaim statute," as was predecessor Code section 21-15-640); see also Carolina Easter Grain Corp. v. Houck, 284 S.C. 224, 226, 325 S.E.2d 75 (Ct.App.1985) (predecessor Code "section 21-15-640 is a nonclaim statute. That is, a creditor who fails to file a verified claim against the estate within five months of publication of the notice to creditors is forever barred from asserting his claim.").

Wachovia published the requisite notice in the Marlboro Herald in September of 2002. None of the Plaintiffs file any claim for the subject property after the publishing of the notice. Plaintiffs filed this lawsuit more than four years later, on December 20, 2006. As such, Plaintiffs' claims are forever barred under the nonclaim statute set forth in § 62-3-803 of the South Carolina Probate Code.

**D. Drennan Owes No Duty to Plaintiffs**

As to Defendant Drennan, Plaintiffs' claims against Drennan are barred by the fact that Drennan, as Personal Representative of the Estate of M. Pence, owed no duty to the Plaintiffs. With regard to the alleged breach of fiduciary duty claim, Plaintiffs are not—and do not claim to be—beneficiaries under M. Pence's Will. Plaintiffs have not demonstrated any basis for the existence of a fiduciary relationship between themselves and Drennan. As discussed by our Court of Appeals in Regions Bank v. Schmauch, supra:

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

354 S.C. 648, 670-671 (citations omitted). Drennan was sued solely in his capacity as Personal Representative of the Estate of M. Pence. His duties as Personal Representative of the Estate of M. Pence extended to only the Estate and its beneficiaries, which did not include the Plaintiffs. The Court therefore finds that there was no fiduciary relationship between the Plaintiffs and Drennan and that no other legal duty existed between them. Similarly, with regard to Plaintiffs' alleged breach of contract claim against Drennan, neither the Plaintiffs nor Drennan were parties or signatories to the Settlement Agreement on which the Plaintiffs purportedly base their breach

of contract claim. Drennan merely represented P. Pence in the litigation which resulted in the Settlement Agreement. As such, Drennan's duties regarding the Settlement Agreement flowed to only his client, P. Pence, and he owed no duty to the Plaintiffs, fiduciary, contractual or legal. In any event, Drennan was not sued in his capacity as attorney for P. Pence, or even as attorney for the Personal Representative of the Estate of P. Pence but solely in his capacity as Personal Representative of the Estate of M. Pence.

Also, the Court finds as a matter of law that Drennan had a right to rely on the written representations of attorney James Jackson, who identified himself as representing what Mr. Drennan could reasonably have interpreted as "the McLeans", the persons with a potential interest in the Caw Caw Swamp property. It is clear from the correspondence that Mr. Jackson represented to Drennan that those persons with a potential interest in the property agreed with Drennan's position that the property in question was never *actually* part of the Trust and that Mr. Jackson's clients thus had no interest in the property. Accordingly, given the communications between Mr. Jackson and Drennan, the Plaintiffs would be estopped from now taking a position contrary to the one set forth by Mr. Jackson.

Moreover, even if any duty existed between Drennan and the Plaintiffs, the record lacks any evidence whatsoever that any such duty was breached. As Personal Representative of the Estate of Elizabeth McLean Pence, Drennan did not dispose of any of the subject property but rather filed the appropriate deeds of distribution to P. Pence's estate according to the terms of M. Pence's will. Deeds of distribution are not transfers of property because title to real property passes immediately upon death. They are simply evidence that the estate has released the right to access the property for payment of estate debts and expenses. S.C. Code § 62-3-709(B). As Personal Representative of the Estate of Elizabeth McLean Pence, Drennan had no other contact or dealings with the subject property. The existence of a duty owed is a question of law for the

Court. Doe v. Greenville County School District, 375 S.C. 63, 651 S.E. 2d 305 (2007). As a matter of law, Drennan owed no duty to the Plaintiffs in his capacity as personal representative.

**E. Wachovia Owes No Duty to Plaintiffs**

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

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

354 S.C. 648, 670-671 (citations omitted). This Court finds that there was no fiduciary relationship between the Plaintiffs and Wachovia.

Similarly, with regard to Plaintiffs' alleged breach of contract claim against Wachovia, Wachovia was not a party or signatory to the Settlement Agreement on which the Plaintiffs purportedly base their breach of contract claim. As such, Wachovia owed no contractual duty to the Plaintiffs. Plaintiffs' purported claims against Wachovia for breach of fiduciary duty and breach of contract should be dismissed.

**F. Statute of Limitation**

Even if the Plaintiffs were not required to timely file a Rule 60(b) motion to obtain the relief they now seek, the Plaintiffs had three years to bring their suit for breach of fiduciary duty, against Brogdon. S.C. Code Ann. § 15-3-530. The Plaintiffs' deadline for filing their action began to run on the date the Plaintiffs knew or should have known of an alleged breach of any fiduciary duty or of an alleged breach of the Settlement Agreement.

As above stated, §62-1-403(2)(ii) provides that a Court order that is binding on a Trustee is binding on the trust beneficiaries in proceedings involving third parties. Thus, the starting date for the running of the statute of limitations would be February 26, 2002 and since Plaintiffs filed this action long after that date, their claim is further barred by §15-3-530(i).

Plaintiffs however claim that they had no actual notice of the court order of February 26, 2002 and that therefore the statute of limitations would not begin to run until they had either actual notice or such notice as would put a reasonable person on notice of the Agreement and Order. The depositions of Bill McLean, Norman McLean and Jim McLean show that each of them had some knowledge about what was or was not in the Trust by October 2002 and that each knew, or had reason to know that the Caw Caw Swamp and Cannon Bridge Road properties were not in the Trust and were not deemed to be subject to the Settlement Agreement by those administering the Trust and the Estate of M. Pence. William McLean admits in his deposition that he was the spokesperson for the Plaintiffs and possessed the most knowledge about the Trust and the Settlement Agreement. William McLean admitted in his deposition and in the Plaintiffs' responses to Brogdon's Requests to Admit that he received a faxed copy of the Settlement Agreement in February 2002 and was informed that the court would be approving the Settlement Agreement. As a result of that correspondence he signed an agreement to waive any right to serve as a successor trustee under the Trust and requested further information concerning the

Trust and the Settlement. He certainly knew of the Order and its potential ramifications to the Plaintiffs.

In addition to personal knowledge described above, the Plaintiffs' previous lawyer Jay Jackson also had knowledge of the Settlement Agreement and the fact that the Plaintiffs had no rights to the property in dispute pursuant to the Trust or Settlement Agreement. Mr. Jackson corresponded with other lawyers about the Settlement Agreement on multiple occasions between September 2002 and January 2003. This correspondence, along with the Plaintiffs' own deposition testimony, demonstrates Bill N. McLean, Norman M. McLean, and Jim McLean had notice and knowledge of the basis for their claims alleged in this litigation. See Deposition of William McLean p. 27-29; Deposition of James McLean p. 18-20 and 25; and Deposition of Norman McLean p. 45-58; See also Deposition of James B. Jackson, Jr. p. 17-18, 21-24. Further, in the January 2003 letter from Jay Jackson to Drennan, the Plaintiffs wished to make an offer to buy the Orangeburg land and ask Drennan to communicate the offer to the heirs of P. Pence. The three-year general statute of limitations began to run at that time when the Plaintiffs knew or should have known of their claims against the Defendants. By waiting until December 19, 2006 to file suit, Plaintiffs waited too long and they are now barred by S.C. Code Ann. § 15-3-530 from bringing this action.

Plaintiffs further argue that this case is not controlled by the three year statute of §15-3-530(1) governing contract actions but instead by §15-3-520(b) which provides for a 20-year statute of limitations for actions upon sealed instruments. S. C. Code Ann. §19-1-160 provides: "Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto." Thus, §19-1-160 "imposes a

statutory rule of evidence and requires that the determination of whether a non-sealed instrument should be considered a sealed instrument be gleaned from the instrument." Carolina Marine Handling, Inc. vs. Lasch, 363 S.C. 169, 173, 609, S.E. 2d 548, 550, 551 (Ct.App. 2005).

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

The facts here and the facts of Carolina Marine Handling, Inc., supra., are nearly identical. In that case our Court of Appeals found that the use of a "boilerplate attestation clause, by itself is not sufficient evidence that the parties intended that the instrument be sealed and thus subject to the 20 year limitations statute". The Court opined that to find otherwise "would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state. We adhere to our general three-year statute of limitations for contract actions in this state." 609 SE 2d at 552.

For all of these reasons, the Defendants are entitled to summary judgment since the Plaintiffs failed to comply with Rule 60(b) SCRCP, the requisite three year statute of limitations mandated by S.C. Code Ann. § 15-3-530, and the Probate Statute of Limitations. The Plaintiffs failed to seek appropriate relief from the Settlement Agreement entered as an Order, failed to commence this action within three years of notice of a breach of a fiduciary duty or breach of contract owed to them.

**G. Failure to Transfer Property to Trust**

The Plaintiffs have alleged that the Defendant Brogdon breached his fiduciary duty as trustee of the Trust by failing to transfer M. Pence's interest in the Cannon Bridge Road Property and the Caw Caw Swamp Property to the Trust before M. Pence's death. The Plaintiffs, as beneficiaries of the Trust, argue that they were owed certain duties from Brogdon, as Trustee. While Brogdon agrees generally that trust beneficiaries are entitled to certain duties from a trustee related to handling and administration of a trust, he strongly disagrees that he owes any duties to the beneficiaries to transfer any particular assets to the trust. This Court agrees with Brogdon and concludes that Brogdon does not owe any duties to the beneficiaries of the Trust regarding the transfer of property into the Trust based upon these facts.

The creation and administration of trusts in South Carolina are governed by the Uniform Trust Code which became effective January 1, 2006. Nothing in the South Carolina Uniform Trust Code creates a responsibility for a trustee to be sure that the settlor transfers property into the trust. A settlor is "a person, including a testator, who creates, or contributes property to, a trust." S. C. Code Ann. § 62-7-103(14). The settlor transfers his or her interest in the trust property to the beneficiaries and the trustee holds legal title to the property under an express or implied agreement to apply it to the benefit of another. 76 Am. Jur. 2d *Trusts* § 2. The South Carolina Uniform Trust Code's definition of a trustee, unlike the definition of a settlor above, does not include any responsibility to transfer property into a trust. S. C. Code Ann. § 62-7-103(19).

Trustees in South Carolina have many duties, most of them running to the benefit of the beneficiaries of the trust. These duties include the following: 1) the duty to administer the trust in good faith according to its terms, S. C. Code Ann. § 62-7-801, 2) the duty of loyalty to administer the trust solely in the interest of the beneficiaries and to place the interests of the

beneficiaries above the trustee's own interest and the interests of others, S. C. Code Ann. § 62-7-802 and Official Comment thereto, 3) the duty to manage, distribute, and invest trust property impartially, without regard to various beneficiaries' interest, S. C. Code Ann. § 62-7-803, 4) the duty to prudently administer the trust using reasonable care, skill, and caution in managing and distributing the trust, S. C. Code Ann. § 62-7-804, 5) the duty to control and protect trust property, S.C. Code Ann. § 62-7-809, 6) the duty to keep adequate records of the trust and to keep trust property separate from other property possessed by the trustee, S. C. Code Ann. § 62-7-810, 7) the duty to enforce and defend any claims made against the trust, S. C. Code Ann. § 62-7-811, and 8) the duty to keep beneficiaries reasonably informed about the administration of the trust and to respond in a timely manner to requests for information from the beneficiaries, S. C. Code Ann. § 62-7-813.

The statutory review of the duties of a trustee makes clear that it is the settlor, not the trustee, who is responsible for transferring property into a trust. A trustee has the power to "collect trust property and *accept or reject additions to the trust property from a settlor* or any other person." S. C. Code Ann. § 62-7-816(1)(emphasis added). The Official Comments to this section further repeat that this power of the trustee is simply a collection ability. Moreover, the extensive listing of trustee powers in the Uniform Trust Code does not include the power to transfer property into the trust without affirmative action by the settlor. The powers of a trustee are created by statute and the trust document itself. S.C. Code Ann. §§ 62-7-815 & 816 and Official Comments thereto. In the present case, no such power to transfer property into the trust exists in the trust document or the relevant statutory provisions.

In their Complaint and in deposition testimony, the Plaintiffs have suggested that Brogdon owed them a duty to transfer the Cannon Bridge Road Property and the Caw Caw Swamp Property into the Trust before M. Pence's death. Under the law of South Carolina, no

such duty exists. A trustee does not have the power to make property a part of the trust without the settlor effectuating such a transfer.

The Plaintiffs further argue that the Power of Attorney executed by M. Pence in favor of Brogdon created a duty for Brogdon to transfer the Cannon Bridge Road Property and the Caw Caw Swamp Property into the Trust. The South Carolina Probate Code provides that "[t]he attorney in fact has a fiduciary relationship with the principal and is accountable and responsible as a fiduciary." S.C. Code Ann. § 62-5-501 (A) (Supp. 2007). Neither the Probate Code nor the case law of South Carolina has extended this duty to third parties similarly situated to the Plaintiffs. This principle is also stated in the Restatement of Agency. "An agent who intentionally or negligently fails to perform duties to his principal *is not thereby liable to any person whose economic interests are thereby harmed.*" Restatement (Second) of Agency, § 357 (emphasis added).

The law simply does not create a duty to the Plaintiffs arising out of the Power of Attorney from M. Pence to Brogdon. The Power of Attorney, which was signed 10 months before the creation of the Trust, is silent regarding any specific instructions to transfer any real property to the Trust. Instead, the Power of Attorney document uses standard language to provide Brogdon with general powers available to most attorneys-in-fact. The Plaintiffs have pointed to no law or language in the Power of Attorney which creates a duty on Brogdon, as attorney-in-fact for M. Pence, to act in a way which benefits the Plaintiffs. Any breach of fiduciary duty claim against Brogdon as attorney-in-fact must have been brought by M. Pence or her estate, assuming such a claim existed at all. No such claims have been made. As such, this Court finds that no fiduciary duty exists between Brogdon and the Plaintiffs arising from the Power of Attorney and it failed to create a responsibility to transfer property into the Trust.

The defendant Brogdon is entitled to summary judgment on the Plaintiffs' claim that he breached a fiduciary duty by failing to transfer certain property into the Trust. Brogdon had no duty as trustee to transfer any property into the Trust. As attorney-in-fact for Pence Sr, all of Brogdon's fiduciary responsibilities run to M. Pence, not the Plaintiffs.

**H. Mismanagement of Trust Assets**

The Plaintiffs have also alleged that Brogdon breached a fiduciary duty to the Plaintiffs, as beneficiaries of the Trust, by mismanaging the Trust property, failing to protect the Plaintiffs' interests therein, and failing to properly account for trust assets. As discussed hereinabove, a trustee has a duty to properly manage and invest the assets of the trust, a duty of loyalty to the beneficiaries, a duty to carry out the terms of the trust in good faith, and a duty to account for the trust. Brogdon does not deny these responsibilities. However, the Plaintiffs have presented no evidence whatsoever to show that Brogdon failed in these duties.

When questioned on how Brogdon mismanaged the assets of the trust, the Plaintiffs have been unable to provide any actual allegations of specific wrongdoing. Norman M. McLean's response, when asked what Brogdon had done to mismanage the trust, was: "I haven't been keeping up with that as far as managing the trust. I think I might have a little idea what you talking about, but not enough to even discuss. I think I know about where you're coming from on that, but I can't really—don't have enough knowledge to talk about it." (Depo. of Norman M. McLean, p. 107, l. 22-p. 108, l. 6). Another Plaintiff, Jim McLean, stated "I don't know remember the particulars on that," when asked how Brogdon mismanaged trust assets. (Depo. of James N. McLean, p. 62, ll. 24-25). The Plaintiffs have failed to provide a response to Brogdon's Interrogatory seeking specifics of mismanagement.

Further, Brogdon has provided all information regarding the finances of the Trust to the Plaintiffs. The Uniform Trust Code provides for a report, not a formal accounting, and only requires providing beneficiaries with copies of relevant statements and documents. S.C. Code Ann. § 62-7-813(c) and Official Comments thereto. Plaintiffs have made no specific claims for information not already provided.

With no actual evidence supporting claims for mismanagement of trust assets, the Defendant Brogdon is entitled to summary judgment in his favor. The Plaintiffs may not stand on the mere allegations of their Complaint to defeat summary judgment. Dependence on the vague responses to deposition questions that "something" might have constituted mismanagement, with no specifics given, is simply not enough. Such responses constitute the infamous "mere scintilla of evidence" which cannot defeat a summary judgment motion. Thus, the Defendant Brogdon's Motion for Summary Judgment on the claims of breach of fiduciary duty and for an accounting should be granted.

**I. Bona Fide Purchasers for Value without Notice of Plaintiffs' Claims**

As an additional ground for Summary Judgment, I find as a matter of law that the Defendants Thompson and Money to Go, LLC are bona fide purchasers for value of the Caw Caw Swamp Property without notice of the claims that the Plaintiffs now advance and therefore take title to the same free and clear of any interests or claims which Plaintiffs now assert. Liberty Loan Corp. of Darlington, S.C. v. Mumford, 283 S.C. 134, 140, 322 S.E.2d 17, 21 (Ct. App. 1984) (holding that "whenever in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified").

Under South Carolina Law, to claim the status of a bona fide purchaser, a party must show: "(1) he has actually paid in full the purchase money …; (2) he purchased and acquired the

legal title, or the best right to it; and (3) he purchased bona fide, *i.e.*, in good faith and with integrity of dealing, without notice of a lien or defect." Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006). The first two of these elements are undisputed: 1) the Defendants Thompson and the Defendant Money each paid the full purchase price to Wachovia Bank as personal representative of the Estate of P. Pence, and (2) in exchange for and thereby acquiring legal title to separate tracts of land that, if combined, are what the Court refers to as the Caw Caw Swamp Property. The third element, that the purchase be bona fide, *i.e.* in good faith and without notice of a lien or defect, also does not appear to be disputed in the record.

There are two basic forms of notice by which a purchaser may be charged with knowledge of the rights of another in real property: actual notice and constructive/inquiry notice. Id. at 118, 628 S.E.2d at 875. Under clearly established South Carolina law, a purchaser of real property has actual notice of a title defect or other claim, lien, or interest adverse to his own only when:

> [H]e actually knows about the defect or claim, or when a reasonable person, if made aware of the same information known to the buyer, would be charged with actual notice of the defect or claim. Actual notice may consist of facts or conditions observed by a prospective purchaser as well as information conveyed orally or in writing to him.

Id. The complaint in the instant matter does not allege any fact or theory of recovery indicating Defendants Thompson or the Defendant Money had actual notice of a title defect, adverse claim, or other interest with regard to the Caw Caw Swamp Property. Likewise, there is no indication anywhere in the record that Defendants Thompson or the Defendant Money had any actual notice of a title defect, adverse claim, or other interest in the Caw Caw Swamp Property at the time of their purchase. As such, as a matter of law in South Carolina, the Defendants Thompson and the Defendant Money did not have actual notice of the Plaintiffs' instant claims to the Caw Caw Swamp Property at the time of their purchase.

Constructive notice, under South Carolina law, is a legal inference imputed to a person whose knowledge of facts is sufficient to put him on inquiry and, if these facts were pursued with due diligence, they would lead to other undisclosed facts. Id. at 119, 628 S.E.2d at 876. In the context of a real estate transaction, constructive or inquiry notice "is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world." Id. at 119-120, 628 S.E.2d at 876. The South Carolina Supreme Court has been "most exacting in determining what actions satisfy the requirements of inquiry notice ... [having] denied subsequent purchasers comfort under the umbrella of a bona fide purchaser when the exercise of prudence would have avoided the difficulty." Id. at 121, 628 S.E.2d at 876. In each instance, it appears only to be documents in the public record which provide constructive or inquiry notice to a real estate purchaser sufficient to defeat the umbrella of a bona fide purchase defense.

In the instant matter, Plaintiffs have not alleged, and cannot otherwise adduce a single document in the public record which should have properly placed the Defendants Thompson or the Defendant Money on constructive or inquiry notice. In fact, none of the deeds, mortgages or other instruments set forth in the chain of title outlined in Plaintiffs' Complaint references or otherwise alludes to Plaintiffs' now-claimed interest in the Caw Caw Swamp Property. The trust litigation and Probates of the Estates of M. Pence and P. Pence are only reflected in the public records in Marlboro County. There is nothing in the Orangeburg County public records that places anyone on notice of the claims Plaintiffs now assert to the Caw Caw Swamp Property. There were ancillary administrations for both the Estates of M. Pence and P. Pence in Orangeburg County. Nothing in these ancillary administrations provides constructive or inquiry notice of the Plaintiffs' now-asserted claims to the Caw Caw Swamp Property. The Plaintiffs point to a reference to the October 19, 2000 trust litigation in the Inventory and Appraisal, a

certified copy of which is filed in the Orangeburg County ancillary administration, as constructive notice of the Plaintiffs' claim to the Caw Caw Swamp Property. The filing to which the Plaintiffs make reference provides a specific list of assets affected by the litigation. There is no reference to the Caw Caw Swamp Property in that filing. In fact, there is no reference to any real property in Orangeburg County in that filing. The ancillary administrations only further provide and corroborate the uncontested link in the chain of title to the Caw Caw Swamp Property. As such, as a matter of law, Defendants Thompson and the Defendant Money are bona fide purchasers of the Caw Caw Swamp Property without notice of the claims that the Plaintiffs now advance and, therefore, hold title to the Caw Caw Swamp Property free and clear of any interests or claims which the Plaintiffs now assert.

**IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED** based on the foregoing, that the Defendants are entitled to summary judgment under SCRCP 56, and accordingly all claims against the Defendant's are hereby dismissed with prejudice.

**AND IT IS SO ORDERED!**

Diane S. Goodstein
Presiding Judge, First Judicial Circuit

This 18 day of June, 2009.

STATE OF SOUTH CAROLINA )
)
COUNTY OF MARLBORO )

Elizabeth P. Pence, Individually and as Personal Representative of the Estate of Elizabeth McLean Pence, deceased,

Plaintiff,

vs.

James E. Brogden, Individually and as Trustee under Trust Agreement of Elizabeth M. Pence dated May 28, 1999 Coker College, and Clemson University,

Defendants

COURT OF COMMON PLEAS
CASE NO. 00-CP-34-354

A CERTIFIED TRUE COPY
William B. Gunnels
CLERK OF COURT
MARLBORO COUNTY

ORDER APPROVING COMPROMISE AND SETTLEMENT

This matter comes before this Court upon petition of the Plaintiff, Elizabeth P. Pence, requesting approval of a Compromise and Settlement Agreement between the parties in the above entitled matter. With a Summons and Petition filed in the Marlboro County, South Carolina Probate Court on October 19, 2000, Elizabeth P. Pence, also known and therein designated as Elizabeth McL. Pence ("Pence"), individually and as Personal Representative of the Estate of Elizabeth McLean Pence ("Decedent"), filed an action against James E. Brogden (hereinafter referred to as "Brogden" or as "Trustee"), Clemson University ("Clemson") and Coker College ("Coker"), Respondents, contesting the validity of a Trust Agreement established by Respondent Brogden on May 28, 1999 in the name of and on behalf of the Decedent (the "Pence Trust") pursuant to powers given to him in a Durable Power of Appointment signed by Elizabeth McLean Pence on July 30, 1998, to which said Pence Trust Brogden transferred assets belonging to the Decedent prior to her death.

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MARLBORO COUNTY, S.C.
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This action was thereafter removed to this Court under the provisions of South Carolina Code §62-1-302.

The parties have now reached certain understandings and agreements in full settlement of all claims made or which might have been made by Pence in any way arising out of the death of the Decedent and/or the matters alleged in the Petition herein.

The Court finds that a good faith controversy exists as to the creation of the Pence Trust as exhibited by the filing of the above referenced petition in the Marlboro County Probate Court, and that the proposed compromise is in the best interest of all of the parties hereto.

The Court finds that the attached Compromise and Settlement Agreement is in good faith and that the effect of the Agreement is just and reasonable.

NOW, THEREFORE IT IS HEREBY ORDERED that the Agreement is approved and that the execution of such Agreement by all fiduciaries subject to this Court's jurisdiction is hereby ratified.

IN WITNESS WHEREOF, the parties set their hands and seals this _____ day of February, 2002.

James E. Lockemy, Presiding
Judge, Fourth Judicial Circuit

February 26, 2002.

Bennettsville, SC

STATE OF SOUTH CAROLINA )
)
COUNTY OF MARLBORO )

COMPROMISE AND
SETTLEMENT AGREEMENT

WHEREAS, by Summons and Petition filed in the Marlboro County, South Carolina Probate Court on October 19, 2000, Elizabeth P. Pence, also known and therein designated as Elizabeth McL. Pence ("Pence"), individually and as Personal Representative of the Estate of Elizabeth McLean Pence ("Decedent"), filed an action against James E. Brogdon (hereafter referred to as "Brogdon" or as "Trustee"), Clemson University ("Clemson") and Coker College ("Coker"), Respondents, contesting the validity of a Trust Agreement established by Respondent Brogdon on May 28, 1999 in the name of and in behalf of the Decedent (the "Pence Trust") pursuant to powers given him in a Durable Power of Attorney signed by Elizabeth McLean Pence on July 30, 1998, to which said Trust Brogdon transferred assets belonging to the Decedent prior to her death; and

WHEREAS, said action was thereafter removed to the Court of Common Pleas for Marlboro County where it is now pending under Civil Action number 00-CP-34-354; and

WHEREAS, the parties have now reached certain understandings and agreements in full settlement of all claims made or which might have been made by Pence in any way arising out of the death of the Decedent and/or the matters alleged in the Petition herein.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that, in consideration of the sum of One Dollar to each in hand paid by the others, the receipt and sufficiency of which is hereby acknowledged, and the mutual covenants and agreements herein

contained, Pence, Brogdon, Clemson and Coker have agreed as follows, effective this __ day of January, 2002:

1. **DISTRIBUTION FROM TRUST TO PENCE ESTATE.** The parties have agreed that in order to resolve the disputes between them, Brogdon, as Trustee, will convey and distribute to Pence, as Personal Representative of the Decedent's Estate, Trust assets having a value equal to sixty (60%) percent of the value of all of the Trust assets, determined as provided below, and the remaining forty (40%) of the Trust assets will be retained by the Trustee, in trust, upon the terms, conditions, uses and trusts set forth in the Trust Agreement.

2. **ASSIGNMENT BY PENCE.** Upon approval of this Agreement by the Court pursuant to paragraph 11 below, if not sooner, Pence, in her individual capacity, will execute a revocable Trust Agreement in the form attached hereto, marked Exhibit "A" (the "Revocable Trust"). Pence is the sole beneficiary of the Decedent's Estate, and as such will ultimately receive all assets of the Estate, including the Trust assets to be distributed by the Trustee to Decedent's Estate pursuant to paragraph 1 above. In order to minimize probate costs and to expedite the transfer of the Trust assets to the Revocable Trust, Pence, individually and as Personal Representative, hereby authorizes and directs that the Trustee convey and distribute to the Trustees of said Revocable Trust for her use and benefit all property and interests in property which may be distributable to the Estate under this Agreement, and to that end she does hereby assign unto said Trustees the right to receive and receipt for all assets which may be due her in and by the terms of this Agreement.

3. **VALUATION OF TRUST ASSETS.** For purposes of this Agreement, the Trust

assets shall be valued as follows:

(a) All real property shall be valued at the same values reported for federal estate tax purposes in the Decedent's estate, **excluding** any timber thereon, which shall be separately valued as provided in subparagraph (c) below. The Trust real properties and their values are set forth in Exhibit "B" attached hereto.

(b) The remaining Trust assets, other than timber, shall be valued as of the close of business on the last day of the calendar month in which this Agreement is approved by the Court as provided below.

(c) The value of the timber on the Trust real property shall be deemed to be the sum of (i) the net proceeds received for such timber upon its sale pursuant to paragraph 4 below, after deducting from the sale proceeds the cost of reseeding and the costs and expenses of sale, plus (ii) the appraised value of any immature timber not cut, such appraised value to be established in the manner set forth in paragraph 4 below.

4. **SALE OF TIMBER.** Immediately after Court approval of this Agreement, all merchantable timber on the Trust real property shall be sold by the Trustee and, in the event that the Marlboro County real property is conveyed to her by the Trustee prior to selling the timber thereon, by Pence, and Pence and the Trustee shall select one or more Registered Foresters to assist in the harvesting of such timber and to appraise any timber not cut because not mature. Following the initial harvest of merchantable timber on the Orangeburg County real property, Trustee shall thereafter periodically harvest timber thereon in accordance with the recommendations of the Registered Forester who assists in the harvesting of the Orangeburg

timber.

5. **TIME OF PAYMENT/DISTRIBUTION.** All distributions and payments due Pence from the Trust shall be made as follows:

(a) Non-Timber Assets: As soon as is practicable, but not later than the 15th day of the calendar month following the month in which the Court approves this Agreement as provided in paragraph 11 below, the Trustee shall transfer and distribute to Pence assets of the Pence Trust having a value equal to sixty (60%) percent of the value of the Trust's assets, other than timber, valued as provided in paragraph 3 above. The assets to be distributed to Pence shall include the Marlboro County real property now owned by the Trust, at its value as shown on Exhibit "B". All Orangeburg County, South Carolina real property which is owned by the Trust shall be retained in trust by the Trustee.

(b) Timber: The Trustee shall pay Pence sixty (60%) percent of the net proceeds arising from the sale of the Trust's timber assets, as and when timber sales are made pursuant to paragraph 4 above. In the event that the Trustee conveys the Marlboro County real property to Pence prior to selling the timber thereon, Pence shall receive and shall account for the proceeds of such sale and shall remit to the Trustee forty (40%) percent of the net proceeds arising from the sale of such timber. Following the final timber sale, the amounts due each of the parties shall be reconciled, and if either has received less than the full amount of his or her prorata share of the timber sales, the other shall pay such deficit, plus interest at the rate of seven (7%) percent.

6. **BROGDON AS TRUSTEE.** Brogdon shall continue to serve as Trustee of the Trust for so long as he is able and willing to do so, and he shall be entitled to receive reasonable

compensation for his services as Trustee, in such amount as may be agreed to by and between Pence and Brogdon. Prior to the submission of this Agreement to the Court, William N. McLean, designated as a successor Co-Trustee in ARTICLE VII(1) of the Trust, will have executed a Waiver of Right to Serve, a copy of which is attached hereto, marked Exhibit "C", and in the event that Brogdon should become unable or unwilling to serve as Trustee, Wachovia Bank, or any duly designated successor corporate Trustee, shall serve as sole Trustee of the Trust.

**7. CLOSING OF I E. PENCE ESTATE.** Following approval of this Agreement by the Court, Brogdon, who is now serving as Personal Representative of the Estate of L. E. Pence in theMarlboro County Probate Court, shall take such steps as may be required in order to bring the administration of said estate to a close, and shall distribute any remaining assets to Pence, as Personal Representative of Decedent's estate.

**8. SEPARATE ACCOUNTING FOR ORANGEBURG REALTY.** Following the approval of this Agreement by the Court and the distributions to Pence as provided herein, the 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.

9. **TREATMENT OF ESTATE TAXES.** (a) In the event that it is finally determined in the estate tax proceedings relating to the Decedent's estate that additional estate taxes are due by reason of her death, such additional taxes shall be borne by the parties as follows:

(i) any additional estate tax which may be due because of an increase in the fair market value of any asset of the Decedent's taxable estate which is to be retained in trust by the Trustee, including any interest due thereon, shall be paid in full by the Trust. Any additional estate tax which may be due to an increase in the fair market value of any other asset shall be paid in full by Pence, as Personal Representative of the Decedent's estate.

(ii) any additional estate tax, including interest, which may be due for any other reason shall be apportioned between the Trust and Decedent's estate, with the Trust bearing that proportion of such additional estate tax as the value of the Trust, after making all distributions due Pence hereunder, bears to the total value of the Decedent's taxable estate, as finally determined, and the estate bearing the remainder of such additional tax.

(b) In the event that the Decedent's estate should receive any refund of estate taxes paid, such refund shall be apportioned between the estate and the Pence Trust, each to receive a portion of such refund in proportion to its contribution towards payment of such estate taxes; provided, sixty (60%) percent of any refund to which the Pence Trust may receive shall be distributed to Pence as part of the distributions due her under paragraph 1 above.

10. **MUTUAL RELEASES.** Each of the parties does hereby release, relieve and forever discharge the others, and such others' heirs, successors and assigns, of and from any and all further liability for or on account of any and all claims heretofore made arising out of or in any way connected with the death of Decedent and the creation and administration of the Trust, and each party agrees to execute and deliver any and all additional releases or other instruments which may be reasonably necessary to accomplish the full and complete release of the others of and from all claims heretofore made or which could have been made by them, rising out of or in any way connected with the death of Decedent and the creation and administration of said Trust. Each of the parties shall be responsible for his or her own attorneys' fees.

11. **COURT APPROVAL.** This Agreement shall be subject to the approval of the Court of Common Pleas for Marlboro County pursuant to the provisions of South Carolina Code Section 62-3-1102. When this Agreement is submitted to the Court for approval, the proposed ratifying Order attached hereto, marked Exhibit "D", shall be submitted to the Court together with such testimony as may be needed by the Court to establish the reasonableness and finality of this Agreement.

12. **EXECUTION IN COUNTERPARTS.** Copies of this Agreement may be executed separately by the parties, and this Agreement shall be deemed to be fully executed and binding and effective for all purposes when each of the parties has signed a counterpart hereof. All such counterparts, taken together, shall constitute a single agreement.

13. **BINDING EFFECT/AMENDMENT.** This Agreement shall be binding upon and

shall inure to the benefit of the parties, their respective heirs, successors and assigns, and it may not be amended except by mutual agreement reduced to writing.

**IN WITNESS WHEREOF,** the parties have hereunto set their hands and seals this ___ day of January, 2002.

**WITNESSES:**

ELIZABETH P. PENCE, Individually and as Personal Representative of the Estate of Elizabeth McLean Pence, deceased.

JAMES E. BROGDON, Individually and as Trustee under Trust Agreement of Elizabeth McLean Pence dated May 28, 1999

CLEMSON UNIVERSITY

By: _____

Its Associate General Counsel

COKER COLLEGE

By: _____

Its General Counsel

## REAL ESTATE OF ELIZABETH M. PENCE TRUST
## VALUED AS OF DATE OF DEATH

| | |
|---|---|
| Parcel 1. 50 acres off Highway S35-122 (Bradley Road), Marlboro County, SC. Tax map 22-01-02-14. | 27,000.00 |
| Parcel 2. 61.28 acres on both sides of Academy Rd. Marlboro County, SC, near Bennettsville. Tax map 22-01-02-15. . | 36,000.00 |
| Parcel 3. 186.32 acres on both sides of Academy Rd., Marlboro County, SC, near Bennettsville. Tax map 22-01-02-27. | 127,000.00 |
| Parcel 4. 47.7 acres on dirt road, Marlboro County, SC. Tax map 22-01-02-26. . | 20,000.00 |
| Parcel 5. 135.7 acres on both sides of Academy Road, Marlboro County, SC, near Bennettsville. Tax map 22-01-02-28. | 121,000.00 |
| Parcel 6. 178.53 acres on Pence Rd., Marlboro County, SC. Tax map 22-01-02-29. | 110,000.00 |
| Parcel 7. 28.3 acres on Beverly Creek Rd., Marlboro County, SC. Tax map 22-01-02-30. | 19,000.00 |
| Parcel 8.65.82 acres, both sides of Academy Rd., Marlboro County, SC. Tax map 28-00-02-19. | 69,000.00 |
| Parcel 9. 64 acres off Academy Rd, on field road. Tax map 28-00-02-23. | 36,000.00 |
| Parcel 10. 13.9 acres in SW corner of Academy Rd. and Hwy S35-22 (Bennettsville Firetower Rd.) Tax map 28-00-02-37. | 28,000.00 |
| Parcel 11. 20.75 acres fronting on Hwy. S35-22 (Bennettsville-Firetower Rd.) Tax map 28-00-02-39. | 31,000.00 |
| Parcel 12. 123.1 acres on both sides of S35-48 (East Main Street Extension) 3 miles northeast of Bennettsville, Marlboro County, SC. Tax map 28-00-02-50. | 76,000.00 |

Exhibit "B"

REAL ESTATE OF ELIZABETH M. PENCE TRUST
VALUED AS OF DATE OF DEATH

| | |
|---|---|
| Parcel 13. 44 acres off Hwy S35-22 (Bennettsville Firetower Rd.). Access by dirt road known as Manship Rd. Tax map 29-00-01-14. | 27,000.00 |
| Parcel 14. Residence and 87 acres on Academy Road, Marlboro County, SC. Tax map 28-00-02-20. | 329,000.00 |
| Parcel 15. 54.8 acres, more or less off Highway 21 near Caw Caw Swamp, having no road frontage, Orangeburg County, SC. | 27,500.00 |
| Parcel 16. 120.11 acres, more or less, off Highway 21, near Caw Caw Swamp, Orangeburg County, SC, having no road frontage. | 60,000.00 |
| Parcel 17. 307.99 acres on Highway 33 at Interstate Highway I-26, Orangeburg County, SC. | 1,540,000.00 |
| **TOTAL** | **2,683,500.00** |

Exhibit "B"

STATE OF SOUTH CAROLINA )
)
COUNTY OF MARLBORO )

WAIVER OF RIGHT TO SERVE AS TRUSTEE

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

WITNESSES:

William N. McLean

Exhibit "C"

| | |
|---|---|
| STATE OF SOUTH CAROLINA | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | 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,<br><br>Plaintiffs,<br><br>vs.<br><br>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.,<br><br>Defendants. | **COMPLAINT**<br><br>**(Jury Trial Demanded)** |

FILED FOR RECORD
CLERK OF COURT
ORANGEBURG, S.C.
2006 OCT 20 PM 12:09

The Plaintiffs above named, complaining of the Defendants herein, allege as follows:

1. Plaintiffs James N. McLean, Marie McLean-Choi, William N. McLean, and Robert L. McLean are the children of Plaintiff Norman M. McLean.

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

2. Plaintiff Norman M. McLean is the son of James L. McLean, who died on May 25, 1955. James L. McLean and his wife, Sophronia McLean, had three children, Plaintiff Norman M. McLean, James L. McLean, Jr. (deceased), and Elizabeth McLean Pence (deceased).

3. Plaintiffs Norman M. McLean, James N. McLean, and Marie McLean-Choi are residents of Orangeburg County, South Carolina.

4. Plaintiff Robert L. McLean is a resident of Anderson County, South Carolina.

5. Plaintiff William N. McLean is a resident of Richland County, South Carolina.

6. James L. McLean, Jr. died on April 25, 2004, without issue.

7. Elizabeth McLean Pence died on October 3, 1999. Elizabeth McLean Pence was survived by one child, Elizabeth P. Pence, who died on August 26, 2002.

8. Elizabeth P. Pence died without issue, but was survived by her husband, Stephen Pence, who died in 2005.

9. Plaintiff JL McLean Properties, LLC, is a South Carolina Corporation with its principal place of business in Orangeburg County.

10. Defendant James B. Drennan, III ("Drennan") is a resident of Spartanburg County, South Carolina.

11. Defendant James E. Brogdon, Sr. ("Brogdon") is a resident of Marlboro County, South Carolina.

12. Defendant Wachovia Bank, National Association ("Wachovia") is a corporation organized under the laws of a state other than South Carolina with its principal place of business in North Carolina.

13. Defendant Marlboro Academy, Inc. ("Marlboro Academy") is a South Carolina corporation with its principal place of business in Marlboro County, South Carolina.

14. Defendants Charles P. Thompson, Jr. and Cheri (Cheryl) Brown Thompson (collectively, "Thompsons") are residents of Orangeburg County, South Carolina.

15. Defendant Money to Go, LLC, is a South Carolina corporation with its principal place of business in Orangeburg County, South Carolina.

16. Defendant James J. Pence, Jr. is the personal representative of the Estate of Stephen Pence, which is currently an open estate in New Hanover County, North Carolina.

17. Defendant Harry Easterling, Jr. ("Easterling") is a resident of Marlboro County, South Carolina.

18. As the real property at issue in this lawsuit is located in Orangeburg County, and the majority of the Plaintiffs, Defendants, and other witnesses are located in Orangeburg County, jurisdiction and venue are proper in this Court.

**I. The McLean Family Land**

19. During his lifetime, James L. McLean operated a timber business and acquired several large tracts of land in Orangeburg County.

20. Three of these tracts of land are known as the Gramling Place Property, the Cannon Bridge Road Property, and the Caw Caw Swamp Property.

**A. Gramling Place Property**

21. The Gramling Place Property is described as follows:

> All that certain piece, parcel or tract of land, situate, lying and being in School District No. 5, Orangeburg County, South Carolina, containing two hundred eight and five-tenths (208.5) acres, more or less, and bounded as follows: On the North

by lands of Huffman (lands formerly of M. W. Gramling and Atlantic Coast Line Railway); on the East by lands formerly of M. W. Gramling, now of McLean and lands of Mrs. Ella Till; on the South by lands of Mrs. Ella Till, lands of McLean, lands of Inabinet; lands now or formerly of Collier; and on the West by lands now or formerly of Collier, lands of L. E. Gramling and lands now or formerly of Allen.

ALSO:

All that certain piece, parcel or tract of land, situate, lying and being in School District No. 5, Orangeburg County, South Carolina, containing eleven and eight-tenths (11.8) acres, more or less, and bounded on the North by Mt. Lebanon Public Road which separates this tract from the tract hereinabove described; on the East by the tract hereinabove described; on the Southeast by lands of Mrs. Ella Till; and on the West by the tract hereinabove described.

ALSO:

All that certain piece, parcel or tract of land, situate, lying and being in School District No. 5, Orange Township, Orangeburg County, South Carolina, containing one hundred fifteen (115) acres, more or less, and bounded on the Northwest by the Atlantic Coast Line Railroad; on the East and Northeast by lands of Bull Swamp (Colored) Baptist Church, Little Bull Swamp Creek, the run of the Creek being the line, to the center of the Old Cameron or Mt. Lebanon Road, thence along the said Old Cameron or Mt. Lebanon Road to lands of Roy M. Gramling and Jack Gramling (formerly of McLean), thence along the East and Southeast by lands of the said Roy M. and Jack Gramling (formerly McLean); and on the Southwest by a County Road separating this tract from lands of Mrs. Ella Till and lands of Sophronia McLean.

Being the same property conveyed to Elizabeth McLean Pence by deed of Norman M. McLean dated May 16, 1959, recorded June 8, 1959, in the Office of the Clerk of Court for Orangeburg County, South Carolina in Deed Book 225 at Page 411.

22. The Gramling Place Property was acquired in four separate transactions. Sophronia E. McLean acquired 303 acres from Marion W. Gramling on June 16, 1945, by deed recorded at Book 135, Page 7 (with corrective deed recorded at Book 160, Page 310). Sophronia E. McLean acquired 11.8 acres from Herbert L. Till on July 13, 1945, by deed recorded at Book 135, Page 100. The children of James L. McLean acquired 248 acres by Master's deed on

November 13, 1947, recorded at Book 150, Page 92. The children of James L. McLean acquired 115 acres from Annie Z. Gramling, Laurie F. Gramling, and Ernest S. Gramling on October 27, 1953, by deed recorded at Book 184, Page 107.

23. On July 3, 1954, title to these four tracts of land was consolidated in Elizabeth O. McLean and Norman M. McLean. This deed is recorded at Book 195, Page 591.

24. On May 16, 1959, Norman M. McLean conveyed his half interest in the 303 acre tract (which had been reduced to 208.5 acres), the 11.8 acre tract, and the 115 acre tract to Elizabeth McLean Pence, by deed recorded at Book 225, Page 411.

25. On May 28, 1999, Elizabeth McLean Pence conveyed these three tracts to the trust administered by Brogdon. This deed is recorded at Book 761, Page 209.

26. On August 16, 2006, Brogdon conveyed these tracts from the trust to Marie McLean-Choi, James N. McLean, William N. McLean, and Robert L. McLean by deed recorded at Book 1165, Page 19.

**B. Cannon Bridge Road**

27. The Cannon Bridge Road Property, containing a total of 736.1 acres, is described as follows:

> All that certain piece, parcel or lot of land, situate, lying and being in Zion Township, Orangeburg County, South Carolina, containing two hundred twenty-six and 6/10ths (226.6) acres, more or less, bounded as follows: On the North by lands of Willie W. Murphy and lands formerly belonging to the estate of D. Lewis, on the East by North Edisto River and lands of Mrs. Mary M. Jeffcoat, on the South by lands of Mrs. Mary M. Jeffcoat, on the West by lands now or formerly of the estate of D. Lewis, being all of my interest in that certain tract of land containing two hundred forty-six (246) acres, more or less, conveyed to James L. McLean as trustee by R. L. McLeod and James L. McLean by their deed dated the 7th day of January, 1931, and recorded in the Office of the Clerk of Court for Orangeburg County, South Carolina, in Deed Book 89, at page 219;

ALSO, All that certain piece, parcel or tract of land, situate, lying and being in Zion Township, Orangeburg County, State of South Carolina, containing one hundred twenty-two (122) acres, more or less, and bounded as follows: On the North and Northeast by that certain tract of land containing one hundred twenty-five (125) acres this day conveyed to James L. McLean, Jr., on the East by the Cannon Bridge Public Road, and on the South by lands formerly of McLeod and McLean Lumber Company, Thomas Brickle, John Brickle and Mrs. S. Riley, and on the Northwest by the right of way of the Atlantic Coast Line Railroad Company;

ALSO, All that certain piece, parcel or tract of land, situate, lying and being in Zion Township, Orangeburg County, South Carolina, containing sixty-seven (67) acres, more or less, bounded as follows: On the North and West by lands now or formerly of the estate of Minerva Jeffcoat, on the South by lands of John Simpson and lands of the estate of Elijah Hughes and on the East by lands now or formerly of J. M. Brickle; being all of my right, title and interest in that certain tract of land containing one hundred (100) acres, more or less, conveyed to James L. McLean as Trustee by Flora C. Miller by her deed dated the 28th day of January, 1941, and recorded in the Office of the Clerk of Court for Orangeburg County in Deed Book 106, page 527;

ALSO, All that certain piece, parcel or tract of land, situate, lying and being in Zion Township, Orangeburg County, State of South Carolina, containing one hundred forty-three (143) acres, more or less, bounded on the North by lands of James L. McLean, on the East by North Edisto River on the South by lands of the estate of J. B. Brickle and lands of James L. McLean, on the West by lands of James L. McLean; the same being the northern portion of Tract B on plat made by Styles R. Mellichamp, Surveyor, dated November 29, 1901, of the lands of Mrs. M. M. Jeffcoat and Miss N. C. Joyner; this tract includes a small portion of Tract A on said plat that was conveyed to Zadie E. Brickle by Mrs. Bert Jennings;

ALSO, All that certain piece, parcel or tract of land, situate, lying and bing in Zion Township, County and State aforesaid, containing five and 5/10ths (5.5) acres, more or less, and bounded on the North by lands of James L. McLean, on the East by lands of James L. McLean, on the South by lands now or formerly of Zadie E. Brickle and on the West by lands of James L. McLean; said tract of land being the southern portion of Tract B shown on a plat made by Styles R. Mellichamp, Surveyor, dated November 19, 1901, of the lands of Mrs. M. M. Jeffcoat and Miss N. C. Joyner; this tract of the tract last above described being the same lands conveyed to James L. McLean as Trustee by Zadie E. Brickle by her deed dated October 7, 1936, and recorded in the Office of the Clerk of Court for Orangeburg County in Deed Book 99, at page 329;

ALSO, All that certain piece, parcel or tract of land, situate, lying and being in Zion Township, County and State aforesaid, containing forty-seven (47) acres, more or less, bounded on the North by lands now or formerly of Zadie E. Brickle, the run of the branch being the line, on the East and South by lands of James L. McLean, Trustee, formerly of Flora C. Ayers, on the West by lands of James L. McLean, Trustee, more fully described on a plat made by S. D. Moss, Surveyor, dated October 14, 1935, the said plat being added to a plat of McLeod and McLean recorded in the Office of the Clerk of Court for Orangeburg County, in Plat Book 6, at page 22, being the same land conveyed by Zadie E. Brickle to James L. McLean, Trustee, by her deed dated October 18, 1935, and recorded in the Office of the Clerk of Court for Orangeburg County in Deed Book 94, at page 303.

All that certain tract or parcel of land, situate, lying and being in School District No. 5, Zion Township, Orangeburg County, South Carolina, containing one hundred and twenty-five acres (125) bounded as follows: on the East by lands of Central Electric Power Cooperative, Inc., lands of Suburban Farm Service Co., and Cannon Bridge Public Road, on the South and Southwest by other lands of grantors, on the Northwest and North by Atlantic Coast Line Railroad Company and Charlie Thomas.

28. James L. McLean acquired the Cannon Bridge Road Property in four separate transactions from January 7, 1931, to January 28, 1941.

29. On July 3 1954, James L. McLean, Sophronia McLean, Elizabeth McLean Pence, and Norman M. McLean deeded 125 acres of the Cannon Bridge Road Property in fee simple to James L. McLean, Jr. (hereinafter, the "125 Acre Tract"). This deed is recorded at Book 195, Page 588, in the Register of Mesne Conveyances in Orangeburg County.

30. On July 7, 1954, James L. McLean, Sophronia McLean, Elizabeth McLean Pence, James L. McLean, Jr., and Norman M. McLean deeded the remaining acreage of the Cannon Bridge Road Property to James L. McLean, Jr. for life (hereinafter, the "Cannon Bridge Road Property"). This deed is recorded at Book 195, Page 595, in the Register of Mesne Conveyances

in Orangeburg County. This deed provides that the remainder shall go to James L. McLean, Jr.'s issue, and if none exists, then to Elizabeth McLean Pence and Norman M. McLean in fee.

31. On August 9, 2001, by quitclaim deed, Norman M. McLean conveyed his interest in the Cannon Bridge Road Property to his four children. This deed is recorded at Book 883, Page 253, in the Register of Mesne Conveyances in Orangeburg County.

32. On December 23, 2004, by quitclaim deed, Marie McLean-Choi, James N. McLean, William N. McLean, and Robert L. McLean conveyed their interest in the Cannon Bridge Road Property to JL McLean Properties, LLC.

**C. The Caw Caw Swamp Property**

33. Originally consisting of 524.63 acres, James L. McLean acquired the Caw Caw Swamp Property in two transactions. He acquired the first from Kate Bennett by deed dated January 31, 1931, and recorded at Book 90, Page 81, in the Register of Mesne Conveyances in Orangeburg County. He acquired the second from Margaret R. Gressette by deed dated February 25, 1946, and recorded at Book 138, Page 19, in the Register of Mesne Conveyances in Orangeburg County.

34. At the time of his death, James L. McLean by will devised the Caw Caw Swamp Property in equal shares to Elizabeth McLean Pence, Norman M. McLean, and James Lennon McLean, Jr., as tenants in common.

35. On May 13, 1994, Norman M. McLean filed a partition action in Orangeburg County, seeking division of the Caw Caw Swamp Property between himself and his two siblings. The suit was captioned Norman M. McLean v. Elizabeth McLean Pence, and Elizabeth McLean

Pence, individually and as Conservators for James Lennon McLean, and Barney Houser for James Lennon McLean, a person mentally incapacitated, CA No. 94-CP-38-318.

36. On September 2, 1994, the Honorable O. Davie Burgdof, Master-in-Equity for Orangeburg County, ordered the property partitioned.

37. On September 14, 1994, Judge Burgdof issued deeds to Elizabeth McLean Pence, Norman M. McLean, and James Lennon McLean. These deeds are recorded, respectively, at Book 608, Pages 351, 355, and 359, in the Register of Mesne Conveyances in Orangeburg County.

38. The tracts deeded to Elizabeth McLean Pence, hereinafter referred to as the "Caw Caw Swamp Property," containing a total of 174.91 acres is described as follows:

> 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 174.91 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 McLean 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 theron a total of 3,797.6 feet; and on the WEST by Tract 5 on said plat, property of Norman M. McLean, and measuring thereon 1,126.52 feet. ALSO:
>
> 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 McLean 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.

## II. The Trust Litigation

39. On July 30, 1998, Elizabeth McLean Pence gave Brogdon a durable Power of Attorney.

40. On May 28, 1999, under the powers granted to him by the durable power of attorney, Brogdon established the Trust of Elizabeth McLean Pence. This trust provided that if prior to final distribution of the trust, Elizabeth P. Pence and all of her issue were deceased, the "McLEAN family land in Orangeburg County, S.C." was to be distributed to "issue of the Settlor's brother."

41. After her mother's death, on October 19, 2000, Elizabeth P. Pence brought a lawsuit in Marlboro County, captioned Elizabeth P. Pence, Individually and as Personal Representative of the Estate of Elizabeth McLean Pence, deceased v. James E. Brogdon, Individually and as Trustee under Trust Agreement of Elizabeth McLean Pence dated May 28, 1999, Coker College, and Clemson University, CA No. 00-CP-34-354 (hereinafter the "Trust Litigation"). In the Trust Litigation, Elizabeth P. Pence contested the validity of the trust established by Brogdon.

42. In the Trust Litigation, Elizabeth P. Pence was represented by Drennan. Brogdon and the trust were represented by Munford Scott.

43. On February 26, 2002, the parties to the Trust Litigation settled all of their claims and the settlement was confirmed by order of the Honorable James E. Lockemy.

44. The settlement agreement which ended the Trust Litigation provided as follows:

> [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.

Compromise and Settlement Agreement, pages 5-6, at paragraph 8 (emphasis added). The Compromise and Settlement Agreement is attached as Exhibit 1 to the Complaint.

45. At the time of the settlement, the Gramling Property had already been deeded into the trust. Exhibit B of the settlement lists the Gramling Property and Caw Caw Swamp Property as part of the trust estate.

46. Drennan's signature appears on the Compromise and Settlement Agreement as a witness to the signature of Elizabeth P. Pence.

47. Pursuant to the terms of the Trust, the intent of Elizabeth McLean Pence, and the Compromise and Settlement Agreement, the Gramling Property, Cannon Bridge Road Property, and the Caw Caw Swamp Property became part of the Trust.

48. Defendants Wachovia, Drennan, and Brogdon knew that the properties were part of the Trust and therefore became the rightful property of Plaintiffs.

**III. Invalid Purported Transfers of the McLean Family Land**

49. Drennan was the Personal Representative of the Estate of Elizabeth McLean Pence. Wachovia was the Personal Representative for the Estate of Elizabeth P. Pence and also the trustee for the trust of Elizabeth P. Pence. Drennan represented Wachovia in these capacities.

50. On October 13, 2004, Drennan, as Personal Representative of the Estate of Elizabeth McLean Pence, executed a purported deed of distribution for "½ interest in remainder" in the Cannon Bridge Road Property from her estate to Wachovia Bank, as Personal Representative of the Estate of Elizabeth P. Pence. This deed is recorded at Book 1066, Page 34, in the Register of Mesne Conveyances in Orangeburg County. This transfer is invalid.

51. On the same day, October 13, 2004, Wachovia Bank, as Personal Representative of the Estate of Elizabeth P. Pence, executed a purported deed of distribution for "1/3 interest in remainder" in the Cannon Bridge Road Property from her estate to Wachovia Bank, as Trustee of the Estate of Elizabeth P. Pence and "1/6 interest in remainder" to Stephen Pence. This deed is recorded at Book 1066, Page 38, in the Register of Mesne Conveyances in Orangeburg County. Thereafter, Stephen Pence conveyed a 1/12 interest to Harry Easterling, Jr. These transfers are invalid.

52. Twelve days later, on October 25, 2004, Wachovia Bank, as trustee of Elizabeth P. Pence, purported to transfer a "1/3 interest in remainder" in the Cannon Bridge Road Property to Marlboro Academy. This deed is recorded at Book 1066, Page 42, in the Register of Mesne Conveyances in Orangeburg County. This deed shows that the conveyance was made for only nominal consideration. This transfer is invalid.

53. On July 23, 2004, Wachovia, as Personal Representative of the Estate of Elizabeth P. Pence, purported to deed Tract 2-A of the Caw Caw Swamp Property to Money to Go, LLC. This deed is recorded at Book 1050, Page 319, in the Register of Mesne Conveyances in Orangeburg County. This transfer is invalid.

54. On July 23, 2004, Wachovia, as Personal Representative of the Estate of Elizabeth P. Pence, purported to deed Tract 2-B of the Caw Caw Swamp Property to the Thompsons. This deed is recorded at Book 1050, Page 304, in the Register of Mesne Conveyances in Orangeburg County. This deed bears a stamp stating that it was prepared by Drennan. This transfer is invalid.

55. On July 15, 2004, Marlboro Academy purported to deed Tract 2-B of the Caw Caw Swamp Property to the Thompsons. This deed is recorded at Book 1050, Page 308, in the Register of Mesne Conveyances in Orangeburg County and states that Marlboro Academy "has or may have an interest" in the property. This deed bears a stamp stating that it was prepared by Drennan. This transfer is invalid.

56. On July 15, 2004, Marlboro Academy purported to deed Tract 2-A of the Caw Caw Swamp Property to Money to Go, LLC. This deed is recorded at Book 1050, Page 316, in the Register of Mesne Conveyances in Orangeburg County and states that Marlboro Academy

"has or may have an interest" in the property. This deed bears a stamp stating that it was prepared by Drennan. This transfer is invalid.

57. On July 21, 2004, Stephen Pence purported to deed Tract 2-B of the Caw Caw Swamp Property to the Thompsons. This deed is recorded at Book 1050, Page 310, in the Register of Mesne Conveyances in Orangeburg County. This transfer is invalid.

**FOR A FIRST CAUSE OF ACTION**

**(Action to Quiet Title - Thompsons and Money to Go, LLC )**

58. The allegations of Paragraphs 1 through 57 hereof are realleged and incorporated herein by reference.

59. Upon information and belief, Plaintiffs James N. McLean, Marie McLean-Choi, William N. McLean, and Robert L. McLean hold beneficial title to the Caw Caw Swamp Property which is vacant.

60. Upon information and belief, the Thompsons and Money To Go, LLC, have or may claim an interest in the Caw Caw Swamp Property.

61. That the Plaintiffs are informed and believe that they are entitled to an order quieting title to the Caw Caw Swamp Property and determining and declaring the deeds to the Thompsons and Money To Go, LLC to be null and void and confirming title to the Plaintiffs.

**FOR A SECOND CAUSE OF ACTION**

**(Action to Quiet Title - Marlboro Academy, James J. Pence, Jr., as Personal Representative of the Estate of Stephen Pence, and Easterling)**

62. The allegations of Paragraphs 1 through 61 hereof are realleged and incorporated herein by reference.

63. Upon information and belief, Plaintiffs James N. McLean, Marie McLean-Choi, William N. McLean, and Robert L. McLean, and/or JL McLean Properties, LLC hold beneficial title to the Cannon Bridge Road Property which is vacant.

64. Upon information and belief, Defendants Marlboro Academy, James J. Pence, Jr. as Personal Representative of the Estate of Stephen Pence, and Easterling have or may claim an interest in the Cannon Bridge Road Property.

65. That the Plaintiffs are informed and believe that they are entitled to an order quieting title to the properties and determining and declaring the deeds to Defendants Marlboro Academy; Stephen Pence, and Easterling to be null and void and confirming title to the Plaintiffs.

**FOR A THIRD CAUSE OF ACTION**

**(Declaratory Judgment)**

66. The allegations of Paragraphs 1 through 65 hereof are realleged and incorporated herein by reference.

67. The Plaintiffs ask for an Order from the Court declaring the transfers of the above-referenced property to the Defendants null and void and that all such transfers be set aside.

68. The Plaintiffs ask for an Order from the Court requiring Defendants to execute quitclaim deeds for any alleged interest in the property to the Plaintiffs.

**FOR A FOURTH CAUSE OF ACTION**
**(Breach of Fiduciary Duty - Drennan, Brogdon, Wachovia)**

69. The allegations of Paragraphs 1 through 68 hereof are realleged and incorporated herein by reference.

70. Defendants Drennan, as Personal Representative of the Estate of Elizabeth McLean Pence, Brogdon, as Trustee of the Trust Agreement of Elizabeth McLean Pence dated May 28, 1999, and Wachovia, as Personal Representative of the Estate of Elizabeth P. Pence, and Wachovia, as Trustee of the Elizabeth P. Pence Trust owed Plaintiffs a fiduciary duty.

71. Defendant Brogdon breached his fiduciary duty by failing to timely transfer the Cannon Bridge Road Property and the Caw Caw Swamp Property into the Elizabeth McLean Pence Trust, by mismanaging the trust property, and by failing to protect the trust beneficiaries' interests by preventing the invalid transfers of Plaintiffs' property.

72. Defendants Drennan and Wachovia breached their fiduciary duties to the Plaintiffs by knowingly transferring property which they knew rightfully belonged to Plaintiffs to Defendants Money to Go, LLC, Stephen Pence, Marlboro Academy, and the Thompsons.

73. Defendants Brogdon, Drennan, and Wachovia's actions have proximately caused damages to Plaintiffs.

74. Plaintiffs are entitled to recover their actual, consequential, and punitive damages as well as attorneys' fees from Defendants Brogdon, Drennan, and Wachovia.

**FOR A FIFTH CAUSE OF ACTION**
**(Accounting - Brogdon)**

75. The allegations of Paragraphs 1 through 74 hereof are realleged and incorporated herein by reference.

76. Plaintiffs hereby request a full and total accounting of the Elizabeth McLean Pence Trust to be completed and performed according to generally accepted accounting principals.

77. Upon completion of the accounting, Plaintiffs are informed and believe that they are entitled to an Order of this Court requiring the return of any and all income and property which should have been distributed to them under the terms of the Trust and has not been distributed.

78. Further, to the extent that property and/or funds are found to have been converted, misappropriated, or misapplied, Plaintiffs are entitled to a judgment against Defendant Brogdon in an amount equal to said funds and/or property.

**FOR A SIXTH CAUSE OF ACTION**
**(Breach of Contract - Drennan, Wachovia)**

79. The allegations of Paragraphs 1 through 78 hereof are realleged and incorporated herein by reference.

80. The settlement agreement from the Trust Litigation constitutes a valid and binding contract on behalf of the trust's beneficiaries and Defendants Drennan, the Estate of Elizabeth P. Pence, and Wachovia as Trustee of the Elizabeth P. Pence Trust.

81. Defendants Drennan, Wachovia, as Personal Representative of the Estate of Elizabeth P. Pence, and Wachovia as Trustee of the Elizabeth P. Pence Trust breached this contract by transferring Plaintiffs' property to Defendants Money to Go, LLC, Marlboro Academy, Stephen Pence, and the Thompsons.

82. Defendants' actions have proximately caused Plaintiffs damages resulting from this breach.

83. Plaintiffs are entitled to recover their actual and consequential damages as well as attorneys' fees from Defendants.

**FOR A SEVENTH CAUSE OF ACTION**
**(Constructive Trust)**

84. The allegations of Paragraphs 1 through 83 hereof are realleged and incorporated herein by reference.

85. Because of Defendants' breaches of fiduciary duty, the Court should declare a constructive trust over the Cannon Bridge Road Property and the Caw Caw Swamp Property in favor of Plaintiffs.

86. The evidence showing a breach of fiduciary duty is clear and convincing and a constructive trust is necessary because it would be inequitable to allow the Cannon Bridge Road Property and the Caw Caw Swamp Property to be retained by those Defendants who purport to hold legal title to such property.

**FOR AN EIGHTH CAUSE OF ACTION**
**(Unjust Enrichment)**

87. The allegations of Paragraphs 1 through 86 hereof are realleged and incorporated herein by reference.

88. Defendants have been unjustly enriched in that they have sold or are in possession of property that rightly belongs to the Plaintiffs.

89. Plaintiffs are entitled to recover the Cannon Bridge Road Property and the Caw Caw Swamp Property or the value thereof, plus attorneys fees and costs of this action.

WHEREFORE, the Plaintiffs pray that this Court:

(a) Declare the deeds to Charles P. Thompson, Jr. and Cheri (Cheryl) Brown Thompson, Marlboro Academy, Harry Easterling, Jr., the Estate of Elizabeth P. Pence, Wachovia as Trustee of the Elizabeth P. Pence Trust, and Money To Go, LLC to be null and void and confirm title to the above-referenced properties in the names of Plaintiffs James N. McLean, Marie McLean-Choi, William N. McLean, and Robert L. McLean;

(b) In the alternative, a judgment against Defendants for the value of the property wrongly transferred, and for attorneys' fees and the costs of this action

(c) Such other and further relief as may be just and proper.

**NELSON & CULBERTSON, LLC**

By: _____

Cecil H. Nelson, Jr. (SC Bar # 4182)
David Alexander (SC Bar # 68632)
Post Office Box 2384
Greenville, SC 29602
864/232-3766 Fax 864/235-1420
ATTORNEYS FOR THE PLAINTIFFS

Greenville, South Carolina
December 19, 2006

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>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,<br><br>Plaintiffs,<br><br>-vs-<br><br>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 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.,<br><br>Defendants. | Civil Action No.: 2006-CP-38-1523<br><br>**ANSWER OF DEFENDANT MONEY TO GO, LLC** |

The Defendant Money To Go, LLC (hereinafter referred to as "This Defendant"), answering the allegations of the Complaint, alleges as follows:

**FOR A FIRST DEFENSE TO ALL CAUSES OF ACTION**

1. Each and every allegation of the Complaint not specifically admitted, qualified or otherwise explained is denied.

2. This Defendant denies, upon information and belief, the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 57, of the Complaint and demands strict proof thereof.

3. This Defendant admits the allegations contained in paragraphs 12, 15, 18 of the Complaint.

4. This Defendant denies the allegations contained in paragraphs 53, 56, 59, 61, 67, 68, 85, 86, 88 and 89 of the Complaint.

5. This Defendant is informed and believes that paragraph 58, 62, 66, 69, 75, 79, 84, and 87 of the Complaint requires no response.

6. In regards to paragraph 60 of the Complaint, This Defendant alleges that Money To Go, LLC owns fee simple title without any claim by the Plaintiffs in Tract 2-A referred to in paragraph 38 of the Complaint.

7. This Defendant is informed and believed that paragraphs 63, 64, 65, 70, 71, 72, 73, 74, 76, 77, 78, 80, 81, 82, and 83 does not apply to This Defendant.

**FOR A SECOND DEFENSE**

8. The allegations of paragraphs one (1) through seven (7) of the First Defense are reasserted and realleged as fully as if set forth verbatim herein, insofar as they are not inconsistent with the allegations of this Second Defense.

9. This Defendant, Money To Go, LLC, is a good faith purchaser for value.

WHEREFORE, having fully answered the Complaint of the Plaintiff, This Defendant prays that the same be dismissed with costs assessed to the Plaintiff.

NICHOLSON, DAVIS, FRAWLEY,
ANDERSON, & AYER, LLP

By: _____
James Randall Davis
140 East Main Street, Post Office Box 489
Lexington, South Carolina 29072
Phone No.: (803) 359-2512

Lexington, South Carolina
3-5, 2007

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>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,<br><br>Plaintiffs,<br><br>-vs-<br><br>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 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.,<br><br>Defendants. | ) | Civil Action No.: 2006-CP-38-1523<br><br>**CERTIFICATE OF SERVICE** |

I, Nicole T. Price, a paralegal with the law firm of NICHOLSON, DAVIS, FRAWLEY, & AYER, LLC, do hereby certify that I have served the following with the foregoing **ANSWER OF DEFENDANT MONEY TO GO, LLC,** by mailing a copy of same, postage prepaid and return address clearly indicated on said envelope, to them at the following address:

David Alexander, Esquire
Post Office Box 2384
Greenville, South Carolina 29602

on this 5th day of March, 2007 all in accordance with Rule 5 (b)(1) of the South Carolina Rules of Civil Procedure.

Nicole T. Price
NICHOLSON, DAVIS, FRAWLEY,
ANDERSON & AYER, LLC
140 East Main Street
Lexington, South Carolina 29071
ATTORNEYS FOR DEFENDANT
MONEY TO GO, LLC

| | |
|---|---|
| STATE OF SOUTH CAROLINA | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | 2006-CP-38-1523 |
| Norman M. McLean; James N. McLean; Marie McLean-Choi; William N. McLean; Robert L. McLean; and JL McLean Properties, LLC<br><br>Plaintiffs,<br><br>v.<br><br>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.,<br><br>Defendants. | **WACHOVIA BANK'S ANSWER TO COMPLAINT** |

**FIRST DEFENSE**

Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action.

**SECOND DEFENSE**

Defendant Wachovia Bank, National Association ("Wachovia"), as Personal Representative of the Estate of Elizabeth P. Pence and Trustee of the Elizabeth P. Pence Trust, answers the correspondingly numbered paragraphs of the Complaint as follows:

1. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

2. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

3. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

4. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

5. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

6. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

7. Admitted, upon information and belief.

8. Admitted, upon information and belief.

9. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

10. Admitted, upon information and belief.

11. Admitted, upon information and belief.

12. Admitted.

13. Admitted, upon information and belief.

14. Admitted, upon information and belief.

15. Admitted, upon information and belief.

16. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

17. Admitted, upon information and belief.

18. Paragraph 18 of the Complaint states a legal conclusion to which no response is required. To the extent Wachovia is required to respond, the allegations of paragraph 18 of the Complaint are denied.

19. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

20. Wachovia is generally aware of three tracts of land periodically referred to by some as the Gramling Place Property, the Cannon Bridge Road Property and the Caw Caw Swamp Property. Except as specifically admitted, the allegations of paragraph 20 of the Complaint are denied.

21. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

22. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

23. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

24. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

25. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

26. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

27. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

28. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

29. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

30. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

31. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

32. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

33. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

34. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

35. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

36. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

37. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

38. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

39. Admitted, upon information and belief.

40. It is admitted, upon information and belief, that Brogdon established the Trust of Elizabeth McLean Pence on May 28, 1999. Said trust is a written document, the terms of which speak for themselves. Except as specifically admitted, the allegations of paragraph 40 of the Complaint are denied.

41. Admitted, upon information and belief.

42. Admitted, upon information and belief.

43. Admitted, upon information and belief.

44. The settlement agreement is a written document, the terms of which speak for themselves. Except as specifically admitted, the allegations of paragraph 44 of the Complaint are denied.

45. The settlement agreement is a written document, the terms of which speak for themselves. Except as specifically admitted, the allegations of paragraph 45 of the Complaint are denied.

46. The settlement agreement is a written document, the terms of which speak for themselves. Except as specifically admitted, the allegations of paragraph 46 of the Complaint are denied.

47. Paragraph 47 of the Complaint states a legal conclusion that does not require any response. To the extent a response is required, Wachovia denies the allegations of paragraph 47 of the Complaint.

48. Denied.

49. Admitted.

50. Wachovia admits, upon information and belief, that the described transfer occurred, the deed for which is a written document, the terms of which speak for themselves. Wachovia denies that such transfer is invalid, and denies any further allegations of this paragraph not specifically admitted.

51. Wachovia admits, upon information and belief, that the described transfers occurred, the deed for which is a written document, the terms of which speak for themselves. Wachovia denies that such transfers are invalid, and denies any further allegations of this paragraph not specifically admitted.

52. Wachovia admits, upon information and belief, that the described transfer occurred, the deed for which is a written document, the terms of which speak for themselves. Wachovia denies that such transfer is invalid, and denies any further allegations of this paragraph not specifically admitted.

53. Wachovia admits, upon information and belief, that the described transfer occurred, the deed for which is a written document, the terms of which speak for themselves. Wachovia denies that such transfer is invalid, and denies any further allegations of this paragraph not specifically admitted.

54. Wachovia admits, upon information and belief, that the described transfer occurred, the deed for which is a written document, the terms of which speak for themselves. Wachovia denies that such transfer is invalid, and denies any further allegations of this paragraph not specifically admitted.

55. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

56. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

57. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

**FIRST CAUSE OF ACTION**

58. Wachovia's responses to paragraphs 1 through 57 above are incorporated herein by reference.

59. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

60. Admitted, upon information and belief.

61. Denied, upon information and belief.

**SECOND CAUSE OF ACTION**

62. Wachovia's responses to paragraphs 1 through 61 above are incorporated herein by reference.

63. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

64. Admitted, upon information and belief.

65. Denied, upon information and belief.

**THIRD CAUSE OF ACTION**

66. Wachovia's responses to paragraphs 1 through 65 above are incorporated herein by reference.

67. Plaintiffs' request for an Order speaks for itself, but should be denied.

68. Plaintiffs' request for an Order speaks for itself, but should be denied.

**FOURTH CAUSE OF ACTION**

69. Wachovia's responses to paragraphs 1 through 68 above are incorporated herein by reference.

70. Denied.

71. Wachovia lacks sufficient knowledge to admit or deny the allegations contained in this paragraph of the Complaint, and therefore denies the same.

72. Denied.

73. Denied.

74. Denied.

**FIFTH CAUSE OF ACTION**

75. Wachovia's responses to paragraphs 1 through 74 above are incorporated herein by reference.

76. Plaintiffs' request for an accounting speaks for itself, and should be denied.

77. Denied.

78. Denied.

**SIXTH CAUSE OF ACTION**

79. Wachovia's responses to paragraphs 1 through 78 above are incorporated herein by reference.

80. Paragraph 80 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Wachovia denied the allegations of paragraph 80 of the Complaint.

81. Denied.

82. Denied.

83. Denied.

**SEVENTH CAUSE OF ACTION**

84. Wachovia's responses to paragraphs 1 through 83 above are incorporated herein by reference.

85. Denied.

86. Denied.

**EIGHTH CAUSE OF ACTION**

87. Wachovia's responses to paragraphs 1 through 86 above are incorporated herein by reference.

88. Denied.

89. Denied.

**AFFIRMATIVE DEFENSES**

Wachovia, as further and separate defenses to plaintiffs' Complaint, alleges the following affirmative defenses:

**FIRST AFFIRMATIVE DEFENSE**
(Failure to State a Cause of Action)

The Complaint fails to state facts sufficient to constitute a cause of action against Wachovia.

**SECOND AFFIRMATIVE DEFENSE**
(Statutes of Limitation)

Plaintiffs' alleged claims against Wachovia are time barred by the applicable statutes of limitations, specifically including the limitations period for filing a claim under the South Carolina Probate Code.

**FOURTH AFFIRMATIVE DEFENSE**
(Equitable Defenses)

Plaintiffs' rights and claims against Wachovia, if any, are barred, in whole or in part, by the equitable defenses of laches, unclean hands, waiver and estoppel.

**FIFTH AFFIRMATIVE DEFENSE**
(Lack of Standing)

Plaintiffs' remaining claims are barred to the extent plaintiffs lack standing to bring such claims or are not otherwise the real parties in interest.

**SIXTH AFFIRMATIVE DEFENSE**
(No Breach of Any Contract)

Plaintiffs' remaining claim is barred to the extent plaintiffs have not, and cannot, identify any contractual obligation that Wachovia has breached.

**SEVENTH AFFIMATIVE DEFENSE**
(No Knowledge of Allegedly Invalid Transfers)

Wachovia denies Plaintiffs' allegations that the subject property transfers were invalid, and specifically avers that it had no actual knowledge that it such transfers were invalid, as alleged by the Plaintiffs.

**ADDITIONAL AFFIRMATIVE DEFENSES**

Wachovia hereby reserves the right to assert any affirmative defenses raised by other parties named in this matter, as well as any additional affirmative defenses based on the facts and evidence disclosed.

**WHEREFORE**, Wachovia prays:

1. That plaintiffs' alleged claims against Wachovia be dismissed and plaintiffs have and recover nothing from Wachovia;

2. That the costs of this action be taxed against the plaintiffs, and, to the extent permitted by law, Wachovia recover its attorneys' fees; and

3. That the Court grant such other and further relief as it deems just and proper.

This the 7th day of March, 2007.

Edward B. Davis (S.C. State Bar No. 16713)
*Attorney for Defendant Wachovia*

OF COUNSEL:
BELL, DAVIS & PITT, P.A.
227 West Trade Street, Suite 2160
Charlotte, NC 28202
Telephone: 704/227-0400
Facsimile: 704/227-0178

## CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this pleading in the above-entitled action upon the addressee(s) listed below by:

( ) Hand-delivering a copy thereof to the attorney(s);

or

(✓) Depositing a copy hereof in a postpaid wrapper in a post office or official depository by first class mail under the exclusive care and custody of the United States Post Office Department properly addressed to the addressee(s) below;

or

(✓) Facsimile.

This the 7th day of March, 2007.

Edward B. Davis

Addressee(s):

David Alexander, Esq.
Nelson & Culbertson, LLC
P.O. Box 2384
Greenville, SC 29602

| | | |
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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF ORANGEBURG | ) | 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,<br>Plaintiffs,<br><br>v.<br><br>James B. Drennan, III, as Pesonal 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, NA, as Personal Representative of the Estate of Elizabeth P. Pence, Wachovia Bank, NA, 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.,<br>Defendants. | ) | **AMENDED ANSWER AND CROSSCLAIM OF THE DEFENDANTS, CHARLES P. THOMPSON, JR. AND CHERI (CHERYL) BROWN THOMPSON** |

The Defendants, Charles P. Thompson, Jr. and Cheri (Cheryl) Brown Thompson, answering the Plaintiff's Complaint and crossclaiming against the Defendant Wachovia Bank, NA, in its capacity as Personal Representative of the Estate of Elizabeth P. Pence, alleges as follows:

Each and every allegation not specifically admitted, qualified or explained is denied.

References to paragraphs in this Answer are references to the paragraphs of the Plaintiff's Complaint unless specifically stated otherwise.

**FOR A FIRST DEFENSE TO ALL CAUSES OF ACTION**

1. As to the allegations contained in paragraph 1, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

2. As to the allegations contained in paragraph 2, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

3. As to the allegations contained in paragraph 3, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

4. As to the allegations contained in paragraph 4, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

5. As to the allegations contained in paragraph 5, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

6. As to the allegations contained in paragraph 6, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

7. As to the allegations contained in paragraph 7, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

8. As to the allegations contained in paragraph 8, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

9. As to the allegations contained in paragraph 9, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

10. As to the allegations contained in paragraph 10, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

11. As to the allegations contained in paragraph 11, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

12. As to the allegations contained in paragraph 12, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

13. As to the allegations contained in paragraph 13, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

14. These Defendants admit the allegations contained in paragraph 14.

15. As to the allegations contained in paragraph 15, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

16. As to the allegations contained in paragraph 16, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

17. As to the allegations contained in paragraph 17, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

18. As to the allegations contained in paragraph 18, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

19. As to the allegations contained in paragraph 19, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

20. As to the allegations contained in paragraph 20, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

21. As to the allegations contained in paragraph 21, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

22. As to the allegations contained in paragraph 22, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

23. As to the allegations contained in paragraph 23, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

24. As to the allegations contained in paragraph 24, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

25. As to the allegations contained in paragraph 25, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

26. As to the allegations contained in paragraph 26, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

27. As to the allegations contained in paragraph 27, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

28. As to the allegations contained in paragraph 28, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

29. As to the allegations contained in paragraph 29, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

30. As to the allegations contained in paragraph 30, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

31. As to the allegations contained in paragraph 31, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

32. As to the allegations contained in paragraph 32, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

33. As to the allegations contained in paragraph 33, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

34. As to the allegations contained in paragraph 34, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

35. As to the allegations contained in paragraph 35, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

36. As to the allegations contained in paragraph 36, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

37. As to the allegations contained in paragraph 37, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

38. As to the allegations contained in paragraph 38, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

39. As to the allegations contained in paragraph 39, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

40. As to the allegations contained in paragraph 40, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

41. As to the allegations contained in paragraph 41, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

42. As to the allegations contained in paragraph 42, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

43. As to the allegations contained in paragraph 43, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

44. As to the allegations contained in paragraph 44, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

45. As to the allegations contained in paragraph 45, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

46. As to the allegations contained in paragraph 46, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

47. As to the allegations contained in paragraph 47, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

48. As to the allegations contained in paragraph 48, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

49. As to the allegations contained in paragraph 49, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

50. As to the allegations contained in paragraph 50, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

51. As to the allegations contained in paragraph 51, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

52. As to the allegations contained in paragraph 52, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

53. As to the allegations contained in paragraph 53, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

54. As to the allegations contained in paragraph 54, these Defendants admit that Wachovia, as Personal Representative of the Estate of Elizabeth P. Pence, made, executed and delivered a deed to them conveying Tract 2-B of the Caw Caw Swamp

Property. These Defendants also admit that the deed is recorded in Book 1050 at 304 in the Office of the Register of Deeds for Orangeburg County. The balance of the allegations contained in paragraph 54 are denied.

55. As to the allegations contained in paragraph 55, these Defendants admit that Marlboro Academy made, executed and delivered a deed to them conveying Tract 2-B of the Caw Caw Swamp Property. These Defendants also admit that the deed is recorded in Book 1050 at Page 308 in the Office of the Register of Deeds for Orangeburg County. The balance of the allegations contained in paragraph 55 are denied.

56. As to the allegations contained in paragraph 56, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

57. As to the allegations contained in paragraph 57, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

58. In response to the allegations contained in paragraph 58, these Defendants incorporate the responses to paragraphs 1 through 57 of the Complaint contained herein.

59. These Defendants deny the allegations contained in paragraph 59.

60. As to the allegations contained in paragraph 60, these Defendants admit that they claim an interest in the real property the Plaintiffs refer to as the Caw Caw Swamp Property but do not have sufficient information or knowledge to form a belief as to the balance of the allegations contained in paragraph 60 and therefore deny them.

61. As to the allegations contained in paragraph 61, these Defendants deny that the Plaintiffs are entitled to an Order granting title to the Caw Caw Swamp Property

and declaring the deed to the Defendants Thompson null and void and confirming Plaintiffs' title claim, but as to the remaining allegations contained in paragraph 61, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

62. In response to the allegations contained in paragraph 62, these Defendants incorporate the responses to paragraphs 1 through 61 of the Complaint contained herein.

63. As to the allegations contained in paragraph 63, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

64. As to the allegations contained in paragraph 64, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

65. As to the allegations contained in paragraph 65, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

66. In response to the allegations contained in paragraph 66, these Defendants incorporate the responses to paragraphs 1 through 65 of the Complaint contained herein.

67. To the extent the allegations contained in paragraph 67 relate to these Defendants, they are denied.

68. To the extent the allegations contained in paragraph 68 relate to these Defendants, they are denied.

69. In response to the allegations contained in paragraph 69, these Defendants incorporate the responses to paragraphs 1 through 68 of the Complaint contained herein.

70. As to the allegations contained in paragraph 70, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

71. As to the allegations contained in paragraph 71, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

72. As to the allegations contained in paragraph 72, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

73. As to the allegations contained in paragraph 73, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

74. As to the allegations contained in paragraph 74, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

75. In response to the allegations contained in paragraph 75, these Defendants incorporate the responses to paragraphs 1 through 74 of the Complaint contained herein.

76. As to the allegations contained in paragraph 76, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

77. As to the allegations contained in paragraph 77, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

78. As to the allegations contained in paragraph 78, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

79. In response to the allegations contained in paragraph 79, these Defendants incorporate the responses to paragraphs 1 through 78 of the Complaint contained herein.

80. As to the allegations contained in paragraph 80, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

81. As to the allegations contained in paragraph 81, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

82. As to the allegations contained in paragraph 82, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

83. As to the allegations contained in paragraph 83, these Defendants do not have sufficient information or knowledge to form a belief as to the allegations contained therein and therefore denies them.

84. In response to the allegations contained in paragraph 84, these Defendants incorporate the responses to paragraphs 1 through 83 of the Complaint contained herein.

85. As to the allegations contained in paragraph 85, these Defendants deny that there is any basis to support the declaration of a constructive trust over these Defendants' interest in the Caw Caw Swamp Property. These Defendants do not have sufficient information or knowledge to form a belief as to the balance of the allegations contained in paragraph 85 and therefore deny them.

86. As to the allegations contained in paragraph 86, these Defendants deny any allegations relating to their interest in the Caw Caw Swamp Property. These Defendants do not have sufficient information or knowledge to form a belief as to the balance of the allegations contained in paragraph 86 and therefore deny them.

87. In response to the allegations contained in paragraph 87, these Defendants incorporate the responses to paragraphs 1 through 86 of the Complaint contained herein.

88. To the extent the allegations contained in paragraph 88 relate to these Defendants, they are denied.

89. To the extent the allegations contained in paragraph 89 relate to these Defendants, they are denied.

**FOR A SECOND DEFENSE TO ALL CAUSES OF ACTION**

90. The allegations contained in paragraphs 1 through 89 are alleged as if repeated verbatim.

91. The Plaintiffs fail to state facts sufficient to constitute a cause of action.

**FOR A THIRD DEFENSE TO ALL CAUSES OF ACTION**

92. The allegations contained in paragraphs 1 through 91 are alleged as if repeated verbatim.

93. The documents on which the Plaintiffs rely in advancing their interest in Tract 2-B of the Caw Caw Swamp Property are not recorded in the public records of Orangeburg County, South Carolina.

**FOR A FOURTH DEFENSE TO ALL CAUSES OF ACTION**

94. The allegations contained in paragraphs 1 through 93 are alleged as if repeated verbatim.

95. The Defendants Thompson are bona fide purchasers for value of Tract 2-B of the Caw Caw Swamp Property without notice of the claims that the Plaintiffs now advance.

**FOR A FIFTH DEFENSE TO ALL CAUSES OF ACTION**

96. The allegations contained in paragraphs 1 through 95 are alleged as if repeated verbatim.

97. The Plaintiffs claims are barred by the doctrine of estoppel.

**FOR A SIXTH DEFENSE TO ALL CAUSES OF ACTION**

98. The allegations contained in paragraphs 1 through 97 are alleged as if repeated verbatim.

99. The Plaintiffs claims are barred by the doctrine of waiver.

**FOR A SEVENTH DEFENSE TO ALL CAUSES OF ACTION**

100. The allegations contained in paragraphs 1 through 99 are alleged as if repeated verbatim.

101. The Plaintiffs claims are barred by the doctrine of laches.

**FOR AN EIGHTH DEFENSE TO ALL CAUSES OF ACTION**

102. The allegations contained in paragraphs 1 through 101 are alleged as if repeated verbatim.

103. Stephen Pence conveyed all of his right, title and interest in Tract 2-B of the Caw Caw Swamp Property the Defendants Thompson by his Title to Real Estate dated July 21, 2004 and recorded in the Office of the Register of Deeds for Orangeburg County in Book 1050 at page 310 on July 23, 2004.

**FOR A NINTH DEFENSE TO THE SEVENTH CAUSE OF ACTION**

104. The allegations contained in paragraphs 1 through 103 are alleged as if repeated verbatim.

105. The imposition of a constructive trust would not result in equitable treatment of the interest of the Defendants Thompson in Tract 2-B of the Caw Caw Swamp Property.

**FOR A NINTH DEFENSE TO THE EIGHTH CAUSE OF ACTION**

106. The allegations contained in paragraphs 1 through 105 are alleged as if repeated verbatim.

107. The Plaintiffs have conferred no benefit upon the Defendants Thompson.

**FOR A TENTH DEFENSE AND BY WAY OF CROSS-CLAIM AGAINST WACHOVIA BANK, NATIONAL ASSOCIATION.**
**(Negligence)**

108. Charles P. Thompson, Jr. and Cheri (Cheryl) Brown Thompson (hereinafter "Cross-Claimants") reassert and reallege each and every response and allegation above, not inconsistent herewith, as if restated fully herein.

109. As the Personal Representative of the Estate of Elizabeth P. Pence and as Grantor of Tract 2-B of the Caw Caw Swamp Property, Wachovia had a duty to insure

that it could validly transfer Tract 2-B of the Caw Caw Swamp Property to Cross-Claimants.

110. Wachovia, as Personal Representative of the Estate of Elizabeth P. Pence and as Grantor of Tract 2-B of the Caw Caw Swamp Property negligently breached that duty in the following particulars:

a) In failing to convey good title;

b) In failing to communicate to Cross-Claimants that it was unable to convey good title;

c) In failing to adequately investigate and verify whether it was authorized to convey Tract 2-B;

d) In failing to provide accurate information to the Cross-Claimants regarding the status of title to Tract 2-B;

e) And in other such particulars as to be revealed during discovery and at trial.

111. Wachovia's breach of its duty to the Cross-Claimants proximately caused damage to Cross-Claimants in that they have incurred, and will continue to incur, attorney's fees, costs, potential settlements or judgments against them, including but not limited to a possible loss of ownership of Tract 2-B, and potential lost value of the appreciation of Tract 2-B.

112. As a result of Wachovia's negligent, grossly negligent, reckless, and/or intentional conduct, Cross-Claimants are entitled to damages in the amount of attorney's fees to date plus those incurred in the future, costs, lost profits from future sale of the premises, and the amount of any judgments or settlements paid to Plaintiff, plus punitive damages in an amount to be determined by the trier of fact.

**FOR AN ELEVENTH DEFENSE AND BY WAY OF CROSS-CLAIM AGAINST WACHOVIA BANK, NATIONAL ASSOCIATION.**
**(Negligent Misrepresentation)**

113. Cross-Claimants reassert and reallege each and every response and allegation above, not inconsistent herewith, as if restated fully herein.

114. Wachovia made false representations and/or statements to Cross-Claimants regarding the title to Tract 2-B.

115. Wachovia had a pecuniary interest in making those representations and/or statements, in that Wachovia received a benefit from the sale of Tract 2-B.

116. As Personal Representative of the Estate of Elizabeth P. Pence and as Grantor of Tract 2-B, Wachovia owed a duty of care to Cross-Claimants to insure that the information they provided to them for the purpose of purchasing Tract 2-B was truthful and accurate.

117. Wachovia breached that duty of care to Cross-Claimants by failing to provide them with truthful, accurate information.

118. Cross-Claimants justifiably relied on the representations of Cross-Claimants in purchasing Tract 2-B.

119. Cross-Claimants have suffered a pecuniary loss as a result of their reliance on the representations of Wachovia and have been forced to incur attorney's fees and costs and will continue to incur attorney's fees, costs and/or potential settlements or judgments against them.

**FOR A TWELFTH DEFENSE AND BY WAY OF CROSS-CLAIM AGAINST WACHOVIA BANK, NATIONAL ASSOCIATION.**
**(Breach of Contract / Breach of the Covenants and Warranties of Deed)**

120. Cross-Claimants reassert and reallege each and every response and allegation above, not inconsistent herewith, as if restated fully herein.

121. By deed dated July 23, 2004, Wachovia covenanted and warranted the following to Cross-Claimants regarding Tract 2-B:

a) That Wachovia possessed title to Tract 2-B;

b) That Wachovia had the power to convey title to Tract 2-B;

c) That encumbrances and defects in title to Tract 2-B would not arise;

d) That should any encumbrances or defects in title to Tract 2-B arise, Wachovia would defend Cross-Claimants against those claims;

e) And other such particulars as may be revealed at trial.

122. Wachovia breached those warranties in the following particulars:

a) In not possessing title to Tract 2-B;

b) In not having the power to convey title to Tract 2-B;

c) In conveying title to Tract 2-B subject to encumbrances and defects not disclosed by Wachovia;

d) In failing to defend Cross-Claimants from defects in title which have arisen to Tract 2-B;

e) And in other such particulars as may be revealed at trial.

123. As a result of Wachovia's breach of the covenants and warranties of deed, Cross-Claimants are entitled to damages in the amount of attorney's fees to date plus those incurred in the future, costs, lost profits from future sale of the premises, and the amount of any judgments or settlements paid to Plaintiff.

**FOR A THIRTEENTH DEFENSE AND BY WAY OF CROSS-CLAIM AGAINST WACHOVIA BANK, NATIONAL ASSOCIATION.**
**(Contractual and/or Equitable Indemnification)**

124. Cross-Claimants reassert and reallege each and every response and allegation above, not inconsistent herewith, as if restated fully herein.

125. By deed dated July 23, 2004, Wachovia warranted to "forever defend all and singular the said premises unto the Grantees [Charles P. Thompson, Jr. and Cheri

(Cheryl) Brown Thompson] against the Grantor and its successors and assigns lawfully claiming or to claim the same of any part thereof."

126. On December 20, 2006 Plaintiffs filed this lawsuit against Cross-Claimants alleging that Cross-Claimants do not possess valid title to Tract 2-B and are wrongfully in possession thereof.

127. As a result of this current litigation, Cross-Claimants have had to incur, and will have to incur, attorney's fees and costs, and will have to pay any settlements or judgments entered against them.

128. Cross-Claimants believe that they are contractually and/or equitably entitled to indemnification from Wachovia to the extent that they have been subjected to attorney's fees, liability, verdicts and judgments to the Plaintiffs due to the exclusive negligence of Wachovia.

129. Cross-Claimants have been damaged by the actions and inactions of Wachovia and are entitled to a judgment against Wachovia in the amount of Cross-Claimants' attorneys fees and costs incurred to date and those to be incurred, plus the costs of any settlement or judgment paid by Cross-Claimants to the Plaintiffs.

WHEREFORE, having fully answered the Complaint of the Plaintiffs, Defendants pray that Plaintiffs' Complaint be dismissed with prejudice, for attorney's fees, the costs of this action, and for such other and further relief as the Court deems just and proper. As to the cross-claims against Wachovia, Cross-Claimants pray for the following relief:

On its first cause of action by way of cross-claim for negligence against Wachovia;

a) Actual damages

b) Punitive damages;

c) Such further relief as the Court deems just and proper.

On its second cause of action by way of cross-claim for negligent

misrepresentation against Wachovia;

a) Actual damages;

b) Punitive damages;

c) Such further relief as the Court deems just and proper.

On its third cause of action by way of cross-claim for breach of contract / breach of the covenants and warranties of deed against Wachovia;

a) Actual damages;

b) Attorney's fees;

c) Costs;

d) Such further relief as the Court deems just and proper.

On its fourth cause of action by way of cross-claim for contractual and/or equitable indemnity against Wachovia;

a) Actual damages;

b) Attorney's fees;

c) Costs;

d) Such further relief as the Court deems just and proper.

W. Cliff Moore, III
Attorneys for the Defendant
Ellis, Lawhorne and Sims, P.A.
P.O. Box 2285
Columbia, SC 29202
Telephone: (803) 254-4190

Columbia, SC
March 27, 2007

STATE OF SOUTH CAROLINA )
)
COUNTY OF ORANGEBURG )

IN THE COURT OF COMMON PLEAS

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,

Plaintiffs,

v.

James B. Drennan, III, as Pesonal 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, NA, as Personal Representative of the Estate of Elizabeth P. Pence, Wachovia Bank, NA as Trustee of the Elizabeth P. Pence, Wachovia Bank, NA, 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**

The undersigned does certify that on the 27th day of March, 2007, that she did mail by U.S. Postal Service, regular mail, a copy of **AMENDED ANSWER AND COUNTERCLAIM OF THE DEFENDANTS, CHARLES P. THOMPSON, JR. AND CHERI (CHERYL) BROWN THOMPSON,** to the following:

James Randall Davis, Esquire
Nicholson Davis Frawley Anderson & Ayer
P.O. Box 489
Lexington, SC 29071-0489

Cecil S. Nelson, Jr., Esq
David Alexander, Esq
P.O. Box 2384
Greenville SC 29602

Monica Mulvey McGee
Paralegal

| | |
|---|---|
| STATE OF SOUTH CAROLINA, )<br>)<br>COUNTY OF ORANGEBURG. ) | IN THE COURT OF COMMON PLEAS<br>2006-CP-38-1523 |
| Norman N. McLean; James N. McLean; Marie McLean -Choi; William N. McLean; Robert L. McLean; and JL McLean Properties, LLC,<br><br>Plaintiffs,<br><br>versus<br><br>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.,<br><br>Defendants. | ANSWER OF THE DEFENDANT<br>JAMES J. PENCE, JR.,<br>AS PERSONAL REPRESENTATIVE<br>OF THE ESTATE OF STEPHEN PENCE |

The Defendant James J. Pence, Jr., as Personal Representative of the Estate of Stephen Pence, 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.

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 he as Personal Representative of the Estate of Stephen Pence, Marlboro Academy, Inc., 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 his son, Stephen Pence, has received his spousal elective share of the estate 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 received by 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 as Personal Representative of the Estate of Stephen Pence and dismiss the Complaint with respect to him as Personal Representative of the Estate of Stephen Pence so that he as Personal Representative of the

Estate of Stephen Pence has marketable title to this interest in the Cannon Bridge Road Property and so that the Estate of Stephen Pence 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 the costs and expenses incurred by the Estate of Stephen Pence in defending this action.

GOLDBERG & EASTERLING, P.A.

Bennettsville, S. C.
March 28, 2007

BY: Harry R. Easterling

Harry R. Easterling, Sr.
SC Bar #1828
116 N. Liberty Street
P. O. Drawer 655
Bennettsville, SC 29512
843-479-2878 (Telephone)
843-479-2879 (Fax)
gandelaw@bellsouth.net (Email)

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF ORANGEBURG | ) | 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, | ) | |
| | ) | **ANSWER OF JAMES B. DRENNAN, III TO PLAINTIFFS' COMPLAINT (Jury Trial Requested)** |
| 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. Pencer Trustee, Marlboro Academy, Inc., Charles P. Thompson, Money To Go, LLC, James J. Pence, Jr. as Personal Representative of the Estate of Stephen Pence, and Harry R. Easterling, Jr., | ) | |
| Defendants. | ) | |

The Defendant, James B. Drennan, III, (hereinafter "Defendant"), by and through his undersigned attorneys, answers the Plaintiffs' Complaint as follows:

**FOR A FIRST DEFENSE**

1. This Defendant denies each and every allegation of the Complaint not hereinafter specifically and unconditionally admitted; he has insufficient information upon which to admit or deny the allegations of paragraphs 1 through 6 and 9 of the Complaint.

2. He admits upon information and belief the allegations of paragraphs 7 and 8; he admits the allegations of paragraph 10 of the Complaint.

3. He has insufficient information upon which to admit or deny the allegations of paragraphs 11 through 17 of the Complaint.

4. Answering the allegations of paragraph 18 of the Complaint, this paragraph sets forth legal conclusions which this Defendant is required neither to admit nor deny.

5. Answering the allegations of paragraphs 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38 of the Complaint, this Defendant craves reference to the records of the Orangeburg County Register of Mesne Conveyances.

6. Answering the allegations of paragraphs 39 and 40 of the Complaint, this Defendant craves reference to the document as alleged.

7. Answering the allegations of paragraphs 41, 42, 43, and 44 of the Complaint, this Defendant craves reference to the records of the Marlboro County Clerk of Court and the Settlement Agreement as it actually exists.

8. Answering the allegations of paragraphs 45 and 46 of the Complaint, this Defendant craves reference to the documents alleged as they actually exist.

9. This Defendant denies the allegations of paragraphs 47 and 48 of the Complaint.

10. Answering the allegations of paragraph 49 of the Complaint, this Defendant craves reference to the Probate documents as they exist.

11. Answering the allegations of paragraphs 50, 51, 52, 53, 54, 55, 56, and 57 of the Complaint, this Defendant craves reference to the records of the Orangeburg County Register of Mesne Conveyances as they actually exist, however, as to each such transaction as pled, the Defendant denies that the transfer alleged is invalid.

12. Upon information and belief, this Defendant is not required to answer paragraphs 58 through 68 as they do not set forth any allegations against this Defendant; to the extent that a

response is required to any of the allegations in those paragraphs, this Defendant denies the same and demands strict proof thereof.

13. Answering the allegations of paragraph 69 of the Complaint, this Defendant realleges paragraphs 1 though 12 above as if set forth herein verbatim.

14. Answering the allegations of paragraph 70 of the Complaint, this paragraph sets forth legal conclusions which this Defendant is required neither to admit nor deny.

15. This Defendant denies the allegations of paragraphs 71, 72, 73, and 74 of the Complaint.

16. Upon information and belief, this Defendant is not required to answer the allegations of paragraphs 75 through 78 of the Complaint; to the extent that a response is required to those paragraphs, this Defendant denies the allegations in those paragraphs and demands strict proof thereof.

17. Answering the allegations of paragraph 79 of the Complaint, this Defendant realleges paragraphs 1 through 16 above as if set forth herein verbatim.

18. Answering the allegations of paragraph 80 of the Complaint, that paragraph sets forth legal conclusions which this Defendant is required neither to admit nor deny.

19. This Defendant denies the allegations of paragraphs 81, 82, and 83 of the Complaint.

20. Answering the allegations of paragraph 84 of the Complaint, this Defendant realleges paragraphs 1 through 19 above as if set forth herein verbatim.

21. This Defendant denies the allegations of paragraphs 85 and 86 of the Complaint.

22. Answering the allegations of paragraph 87 of the Complaint, this Defendant realleges paragraphs 1 through 21 above as if set forth herein verbatim.

23. This Defendant denies the allegations of paragraphs 88 and 89 of the Complaint, being the remaining paragraphs of the Complaint.

**FOR A SECOND DEFENSE**

24. Further answering the Complaint and as an additional defense thereto, this Defendant alleges and shows that the Plaintiffs' claims are barred by the applicable Statute of Limitations including, but not limited to, South Carolina Code §§ 62-3-803 and 15-3-530 (1).

**FOR A THIRD DEFENSE**

25. Further answering the Complaint and as an additional defense thereto, this Defendant alleges and shows that the Caw Caw Swamp property was listed as a trust asset in the trust litigation settlement agreement by mistake, and it was not the intent of the parties that the Caw Caw Swamp property or any other property not already in said trust be added thereto, and that the settlement agreement was implemented without treating the Caw Caw Swamp property as a trust asset because that property was never in the Trust and it was not intended to be added to such trust by the settlement agreement.

WHEREFORE, having fully answered the Plaintiffs' Complaint, this Defendant prays that the same be dismissed with costs and for such other and further relief as the Court may deem just and proper.

**Clarkson, Walsh, Rheney & Terrell, P.A.**

Matthew H. Henrikson, Esquire (S.C. Bar #7897)
Post Office Box 6728
Greenville, SC 29606
Phone (864) 232-4400
Fax (864) 235-4399
mhenrikson@cwrtlaw.com
Attorneys for Defendant James B. Drennan, III

Greenville, SC
March 31, 2007

STATE OF SOUTH CAROLINA )
COUNTY OF ORANGEBURG )

IN THE ☐ COURT OF COMMON PLEAS
☐ FAMILY COURT

CASE NO. 2006-CP-38-1523

Norman M. McLean, et al.,

☐Plaintiff,
v.

James B. Drennan, III,
☒Defendant,
check box above indicating submitting party

MOTION INFORMATION FORM
AND COVER SHEET

FILED FOR RECORD
IN THE CLERK OF COURT'S OFFICE
ORANGEBURG, S.C.
2008 MAR -6 A 11:35

| name, S.C. Bar no. and address of plaintiff's attorney | name, S.C. Bar no. and address of defendant's attorney |
|---|---|
| David Alexander, Esquire<br>Post Office Box 2384<br>Greenville, South Carolina 29602<br>telephone: fax:<br>e-mail: other: | James Randall Davis, Esquire<br>Post Office Box 489<br>Lexington, South Carolina 29071<br>telephone: fax;<br>e-mail: other: |

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

**SECTION I: Hearing Information**

Nature of Motion: Motion for Summary Judgment.
Estimated Time Needed: 30 minutes
Court Reporter Needed: YES / NO

**SECTION II: Motion Type**

☐ Written motion attached
☒ Form Motion –
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Defendant

March 4, 2008
Date submitted

**SECTION III: Motion Fee**

☐ PAID - AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child Support or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other:

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE
CODE: Date:

**CLERK'S VERIFICATION**

DATE FILED

Collected by: _____
(print name)

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

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

SCCA/233 (1/2003)

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | ) | |
| Norman M. McLean, James N. McLean, Marie McLean-Choi, William N. McLean, Robert L. McLean, and JL McLean Properties, LLC, | ) | Civil Action No.: 2006-CP-38-1523 |
| Plaintiffs, | ) | |
| -vs- | ) | NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT |
| 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 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: | ) | |

FILED FOR RECORD
ORANGEBURG S.C.
2006 MAR -6 AM 10: 35
ATTEST TRUE COPY
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

TO: DAVID ALEXANDER, ESQUIRE, ATTORNEY FOR PLAINTIFFS:

The Defendant, Money to Go, LLC, through their undersigned counsel, hereby move this Court, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for an Order granting Summary Judgment against the Plaintiffs. The Defendant Money to Go, LLC, moves upon the grounds that (1) Plaintiffs' action is barred by Section 15-3-530(1) of the Code of Laws of South Carolina (1976) and (2) Plaintiffs' action is further barred by Section 62-3-803(a) of the Code of Laws of South Carolina (1976). The Defendant Money to Go, LLC move upon the basis that there is no genuine issue of material fact regarding the application of the three year statute of limitations imposed by Section 15-3-530(1) of the Code measured from the date on which the Plaintiffs had actual and/or constructive knowledge of their purported rights under the Settlement Agreement and that there is no genuine issue of material facts regarding the application of the South Carolina Probate Code's claims statute as set forth in Section 62-3-803(a) of the Code to the facts of this case, since Plaintiffs filed no claim within the time prescribed by the said Section. The Defendant Money to Go, LLC further moves on the basis that it is a good faith purchaser for value of property in Orangeburg County and had no actual or constructive notice of a claim on the subject property by the Plaintiffs.

In support of its Motion, the Defendant Money to Go, LLC make reference to the pleadings and all exhibits thereto, all discovery in this matter, any affidavits which have been filed or may be filed before the hearing in this matter, and the governing procedural and substantive law of the State of South Carolina.

Based on the foregoing, the Defendant Money to Go, LLC submit that there is no genuine issue of material fact and that they are entitled to judgment in their favor as matter of law.

AND IT IS SO MOVED.

NICHOLSON, DAVIS, FRAWLEY, ANDERSON, & AYER, LLC

By:_____

James Randall Davis
140 East Main Street, Post Office Box 489
Lexington, South Carolina 29072
Phone No.: (803) 359-2512

ATTORNEYS FOR MONEY TO GO, LLC

Lexington, South Carolina
3-3, 2007

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG )

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 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.

Civil Action No.: 2006-CP-38-1523

CERTIFICATE OF SERVICE

FILED FOR RECORD
LISA W. MIZELL
CLERK OF COURT
ORANGEBURG, S.C.
06 MAR -6 AM 10:35

I, Nicole T. Price, a paralegal with the law firm of NICHOLSON, DAVIS, FRAWLEY, & AYER, LLC, do hereby certify that I have served the following with the foregoing **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**, by mailing a copy of same, postage prepaid and return address clearly indicated on said envelope, to them at the following address:

David Alexander, Esquire
Post Office Box 2384
Greenville, South Carolina 29602

John Jay James, II, Esquire
Post Office Box 507
Darlington, South Carolina 29540

Jeffrey L. Payne, Esquire
Post Office Box 1473
Columbia, South Carolina 29201

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

Matthew H. Henrikson, Esquire
Post Office Box 6728
Greenville, South Carolina 29606

Edward B. Davis, Esquire
227 W. Trade Street, Suite 2160
Charlotte, North Carolina 28202

W. Cliff Moore, III, Esquire
Post Office Box 2285
Columbia, South Carolina 29202

on this 4th day of March, 2008 all in accordance with Rule 5 (b)(1) of the South Carolina Rules of Civil Procedure.

Nicole T. Price

Nicole T. Price
NICHOLSON, DAVIS, FRAWLEY,
ANDERSON & AYER, LLC
140 East Main Street
Lexington, South Carolina 29071
ATTORNEYS FOR DEFENDANT
MONEY TO GO, LLC

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG )

Norman M. McLean et al ) CASE NO.
☐ Plaintiff ) 2006–CP-38-1523

v. ) MOTION AND ORDER INFORMATION FORM AND COVER SHEET

James B. Drennan, III Et Al )
☒ Defendant. )

| Plaintiff's Attorney: | Defendant's Attorney: |
|---|---|
| David Alexander, Esquire., Bar No.<br>Address:<br>Culbertson & Alexander, LLC<br>P. O. Box 1904<br>Greenville, SC 29602<br>phone: 864-370-8222 fax:<br>e-mail: other: | W. Cliff Moore , Bar No.<br>Address:<br>P. O. Box 2285, Columbia, SC 29202<br>phone: 803-254-4190 fax:<br>e-mail: other: |

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: Motion for Summary Judgment
Estimated Time Needed:15 Court Reporter Needed: ☐ YES / ☒ NO

**SECTION II: Motion/Order Type**

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐Plaintiff / ☒Defendant — March 13, 2008 Date submitted

**SECTION III: Motion Fee**

☒ PAID – AMOUNT: 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

**CLERK'S VERIFICATION**

Collected by:

☐ MOTION FEE COLLECTED:

Date Filed:

FILED FOR RECORD
LISA W. MIZELL
CLERK OF COURT
ORANGEBURG, SC
2008 MAR 27 P 1:43

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

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA )
)
COUNTY OF ORANGEBURG )

IN THE COURT OF COMMON PLEAS

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,

Plaintiffs,

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, NA, as Personal Representative of the Estate of Elizabeth P. Pence, Wachovia Bank, NA, 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.

**DEFENDANTS CHARLES P. THOMPSON, JR. AND CHERI (CHERYL) BROWN THOMPSON'S MOTION FOR SUMMARY JUDGMENT**

FILED FOR RECORD
LISA W. HIZELL
CLERK OF COURT
ORANGEBURG, SC
2008 MAR 27 P 1:43

**TO: DAVID ALEXANDER, ATTORNEY FOR THE PLAINTIFF:**

NOTICE is hereby given that the undersigned as attorney for the Defendants, Charles P. Thompson, Jr. and Cheri Brown Thompson, will move before this Honorable Court for Orangeburg County at the Orangeburg County Courthouse on the tenth day after service hereof, or as soon thereafter as may be convenient to Court and Counsel for an Order on the grounds that there is no genuine issue of material fact and that the

ATTEST: TRUE COPY

Defendants Charles P. Thompson, Jr. and Cheri (Cheryl) Brown Thompson are entitled to judgment as a matter of law for the reason that:

1. The Plaintiffs' claims were not made within the three (3) years of Plaintiffs' actual or constructive knowledge of the claims;

2. The Plaintiffs failed to assert their claims in the appropriate probate court proceedings; and

3. There was no reference to the Plaintiffs' alleged intent in the real property to which the Plaintiffs' refer to as the "Caw Caw Swamp Property" in the public records of Orangeburg County prior to the deed of a portion of that property to Charles P. Thompson, Jr. and Cheri (Cheryl) Brown Thompson.

This motion is based on the pleadings and the exhibits to the pleadings, the discovery in this matter, affidavits and the certified copies of the attached documents from the Orangeburg County Probate Court.

Respectfully Submitted,

W. Cliff Moore, III
Attorney for the Defendants, Charles P. Thompson, Jr. and Cheri Brown Thompson

**Ellis, Lawhorne and Sims, P.A.**
P.O. Box 2285
Columbia, SC 29202
Phone: (803) 254-4190

Columbia, SC
March 13, 2008

PROBATE COURT

STATE OF SOUTH CAROLINA
COUNTY OF MARLBORO

IN THE MATTER OF ELIZABETH MCLEAN PENCE

CASE NUMBER 2000ES3400078

ATTEST: A TRUE COPY

Judge of Probate, Orangeburg County, South Carolina

FIDUCIARY LETTERS

- ☒ PERSONAL REPRESENTATIVE
- ☐ GUARDIANSHIP
- ☐ CONSERVATORSHIP
- ☐ TRUSTEESHIP
- ☐ _____

On the 9th day of October, 2002 JAMES B. DRENNAN was/were appointed and qualified as Fiduciary(ies) of the above matter by this court, with all the authority granted to a fiduciary by law.

NOW, THEREFORE, LETTERS are issued, as evidence of such appointment, qualification, and authority of the above fiduciary(ies) to do and perform all acts which may be authorized by law.

RESTRICTIONS:
NONE

FILED FOR RECORD
LISA W. MIZELL
CLERK OF COURT
ORANGEBURG, SC
2002 MAR 27 P 4:43
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

Executed this 9th day of October, 2002

Do not accept a copy of this certificate without the raised seal of the Probate Court.

P. Mark Heath
P. MARK HEATH, PROBATE JUDGE

CERTIFIED A TRUE COPY

P. Mark Heath
P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

FORM #140PC (1/91)
62-3-103, 62-5-304, 62-5-421, 62-7-201

ATTEST: A TRUE COPY
Judge of Probate, Orangeburg County, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF MARLBORO

PROBATE COURT

IN THE MATTER OF Estate of Elizabeth M. Pence
CASE NUMBER 2000ES3506678

**APPLICATION FOR**

(check any that apply)

**PETITION FOR**

INFORMAL
[X] PROBATE OF WILL
[X] APPOINTMENT

FORMAL
[] TESTACY
[] APPOINTMENT

| | |
|---|---|
| Applicant/Petitioner: | ELIZABETH McL. PENCE |
| Address: | 2001 Academy Road, Bennettsville, SC 29512 |
| Telephone | (843) 479-0460 |

**I. ALL APPLICANTS/PETITIONERS MUST COMPLETE THIS SECTION.**

1. Nature of interest of undersigned: daughter of decedent and sole devisee under will.

2. Decedent Information

| | |
|---|---|
| Name: | Elizabeth M. Pence |
| Social Security Number: | [redacted] |
| Date of Birth: | 09/03/23 |
| Date of Death: | 10/03/1999 |
| Age at date of death: | 76 |
| Domicile at date of death: | Marlboro (County) S.C. (State) |

3. Venue for this proceeding is proper in this county because:

[X] Decedent was domiciled in this county at date of death.
[] Decedent was not domiciled in South Carolina, but property of Decedent was located in this county at date of death.
[] Decedent has a right to take legal action in this county because:

4a. Names and addresses of devisees, including dates of birth of minors:

| Name | Date of Birth | Address | Relationship to Decedent |
|---|---|---|---|
| Lawrence E. Pence | Deceased | | Husband |
| Elizabeth McL. Pence | Adult | 2001 Academy Rd., Bennettsville, SC 29512 | Daughter |
| | | | |
| | | | |
| | | | |
| | | | |

4b. Names and addresses of intestate heirs who are not devisees, including dates of birth of minors:

| Name | Date of Birth | Address | Relationship to Decedent |
|---|---|---|---|
| N/A | | | |
| | | | |
| | | | |
| | | | |

COPY
CERTIFIED A TRUE COPY
CLERK OF COURT, ORANGEBURG COUNTY, SOUTH CAROLINA

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

5. Did decedent have any change of marital status or the birth or adoption of any children after execution of the will (if one exists), or has any child of the decedent been born since his death, or any birth of a child of the decedent anticipated? (This includes illegitimate children.)

[ ] NO [X] YES If yes, please explain on page 3.

6. To the best of your knowledge, was the decedent a patient in a South Carolina Mental Health facility during his/her lifetime?

[X] NO [ ] YES If yes, please explain on page 3.

7. Has a guardian or conservator ever been appointed for this person?

[X] NO [ ] YES

8. Has a personal representative of the decedent been appointed prior to this date in this state or elsewhere?

[X] NO [ ] YES If yes, please state details, including name and address of such Personal Representative, on page 3.

9. Have you received or are you aware of any demands for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere?

[X] NO [ ] YES If yes, please state details, including names and addresses, on page 3.

10. Have more than ten years passed since the decedent's death?
[X] NO [ ] YES If yes, please state circumstances authorizing tardy probate on page 3.

11. The decedent died with a personal estate of about the value of TO BE DTERMINED and real estate of about the value of TO BE DETERMINED. (A full inventory and appraisement, Form #350PC, must be filed within 90 days.) If decedent was a non-resident, please attach South Carolina Tax Commission Form ET 101.

12. After the exercise of reasonable diligence, are you aware of any unrevoked will and/or codicil(s), other than the one(s) attached hereto, relating to property in this State?

[X] NO [ ] YES If yes, please explain on page 3 and then proceed to Section II.

II. **IF A WILL EXISTS, PLEASE COMPLETE THIS SECTION.**

1. Regarding the decedent's will:

[X] the original is attached
[ ] the original is in the Court's possession
[ ] an authenticated copy of a will probated in another jurisdiction is attached
[ ] an authenticated copy of a will not probated in another jurisdiction is attached
[ ] the will is lost, destroyed, or otherwise unavailable; however, a description of its contents is attached

2. Do you believe, to the best of your knowledge, the will described above was validly executed?
[X] YES [ ] NO If no, please explain on page 3.

3. The date of execution of the will was: 05/03/83.
codicil(s): .

4. Are you aware of any instrument or document amending or revoking the will?
[X] NO [ ] YES If yes, please explain on page 3.

5. Have you exercised reasonable diligence to determine there is no instrument or document revoking the will?
[X] YES [ ] NO If no, please explain on page 3.

6. Do you believe the will defined in "1" above is the decedent's last will?
[X] YES [ ] NO If no, please explain on page 3.

CERTIFIED A TRUE COPY

P. Mark Heath



Form #300PC (1/91)
62-3-203, 62-3-301, 62-3-303, 62-3-401, 62-3-402, 62-3-409, 62-3-414, 62-3-601, 62-3-704, 44-23-1090, 44-23-1120,

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455

COMPLETE EXPLANATION(S) FOR QUESTIONS IN SECTIONS I AND II HERE.
(If more space is required use additional sheet.)

5. Decedent's husband, Lawrence E. Pence, died after the subject will was signed.

III. IF APPLYING FOR INFORMAL OR FORMAL APPOINTMENT, PLEASE COMPLETE THE FOLLOWING.

1. The name(s) and address(es) of the proposed Personal Representative(s) is/are: ELIZABETH McL. PENCE, 2001 Academy Road, Bennettsville, SC 29512

2. Priority for this appointment is:

[] named as Primary Personal Representative in will or nominee of Primary Personal representative
[] named as Alternate Personal Representative in will or nominee of Alternate Personal Representative
[] surviving spouse of decedent who is devisee of decedent or nominee of said spouse
[X] other devisee of decedent (describe): Sole devisee under will.
[] or nominee of said devisee
[] surviving spouse of decedent or nominee of said spouse
[] other heir of decedent (describe) or nominee of said heir
[] creditor (forty-five days after death must have passed) or nominee of creditor
[] other (describe):
[] nominee of any of the above

3. List below the names of any other persons, if any, having a prior or equal right of appointment (see priority above).

None

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

4. ALL APPLICANTS/PETITIONERS MUST COMPLETE VERIFICATION.

## VERIFICATION

The undersigned, being sworn, states that the facts set forth in the foregoing statement are true to the best of the undersigned's knowledge, information and belief; and hereby submits to the Court's jurisdiction in this matter.

SWORN to before me this 26 day of April, 2000.

Notary Public for South Carolina
My commission expires: 2/10/2010

Signature: Elizabeth McLean Pence

Name: ELIZABETH McL. PENCE

Signature: _____

Name:

## ORDER OF INFORMAL PROBATE

IT IS HEREBY ORDERED that the above application for probate of a will be [X] GRANTED [ ] DENIED informally this 3 day of May, 2000.

P. Mark Heath
~~Probate Judge~~, Probate Court Judge

## ORDER FOR HEARING ON FORMAL PETITION

IT IS HEREBY ORDERED that a hearing on this matter be set for:

DATE:

TIME:

PLACE:

Pursuant to Section 62-1-401, the petitioner is ordered to give notice of this hearing to all interested persons at least twenty (20) days prior to the hearing.

Executed this _____ day of _____, 2000.

_____

Probate Court Judge

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512



Form #300PC (1/91)
62-3-203, 62-3-301, 62-3-303, 62-3-401, 62-3-402, 62-3-409, 62-3-~~601~~ 62-3-601,
62-3-704, 44-23-1090, 44-23-1120,

## ORDER OF FORMAL TESTACY

On hearing of the above petition, this Court finds that the person is deceased, venue is proper, and the proceeding was commenced within appropriate time limits.
The Court further finds that
[ ] the decedent died intestate. The heirs are:

[ ] the decedent died testate. IT IS THEREBY ORDERED that the Last Will and Testament of the above-named decedent, dated 05/03/83, be admitted formally to probate.

Executed this _____ day of _____, 2000.

_____
Probate Court Judge

[ ] SEE ATTACHED ORDER

## ORDER OF APPOINTMENT

IT IS HEREBY ORDERED that the above application/petition for appointment be granted upon the filing of a bond as appropriate, qualification and acceptance.

Executed this 3 day of May, 2000.

P. Mark Heath
~~Betty Jo Harris~~, Probate Court Judge

## QUALIFICATION AND STATEMENT OF ACCEPTANCE

I accept this appointment and agree to perform the duties and discharge the trust of the office of Personal Representative of this estate.

Signature: X Elizabeth McLean Pence
Name: Elizabeth McL. Pence
Address: 2001 Academy Road
Bennettsville, SC 29512
Telephone (O)
(H) (843) 479-0460

Signature:
Name:
Address:
Telephone (O)
(H)
Attorney: James B. Drennan III
Address: 101 W. St. John St., Ste. 203, Spartanburg, SC 29306
Telephone: (864)591-2030

CERTIFIED A TRUE COPY
P. Mark Heath
P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUN
PO Box 455
Bennettsville, SC 29512

Form #300PC (1/91)
62-3-203, 62-3-301, 62-3-303, 62-3-401, 62-3-402, 62-3-409, 62-3-414, 62-3-601, 62-3-704, 44-23-1090, 44-23-1120,

ATTEST: Return ... Attorney ... P.O. Box 1 Spartanburg, SC 29304

03 601

REGISTER OF DEEDS ORANGEBURG COUNTY SOUTH

PROBATE COURT

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

ATTEST: A TRUE COPY
Judge of Probate, Orangeburg County, South Carolina

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 AM 12 11
REGISTER OF DEEDS
ORANGEBURG CO., S.C.
GAIL LANEY

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 19 DAY OF February 2003
ORANGEBURG COUNTY: MARION LLOYD, COUNTY ASSESSOR

BK 0611 PG 113

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. Stone

Estate of: ELIZABETH McLEAN PENCE

By James B. Drennan
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 6-30-08

BK0971E2161

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: #0950884

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). #0950885

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.

BK 0 [illegible] 135

STATE OF SOUTH CAROLINA

PROBATE COURT

COUNTY OF MARLBORO

ATTEST A TRUE COPY
Judge of Probate, Orangeburg County, South Carolina

IN THE MATTER OF ESTATE OF ELIZABETH McLEAN PENCE

CASE NUMBER 2000ES3400078

APPLICATION/PETITION FOR SUCCESSOR PERSONAL REPRESENTATIVE
[X] INFORMAL [ ] FORMAL

Applicant/Petitioner: James B. Drennan, III

The previous/original application/ petition is adopted, except as noted on the attachment.

The name(s) and address(es) of the most recent duly qualified and acting Personal Representative for this estate is/was:

Elizabeth McL. Pence (sometimes known as Elizabeth P. Pence)

If not previously filed with the Court, a copy of the above Personal Representative's death certificate, resignation or termination of appointment is attached.

The name(s) and address(es) of the proposed successor Personal Representative(s) is/are:

James B. Drennan, III
103 Lafayette Street
Spartanburg, SC 29302

Priority for this appointment is:

[ ] named as Personal Representative in will
[ ] surviving spouse of decedent who is devisee of decedent
[ ] other devisee of decedent (describe):_____
[ ] surviving spouse of decedent
[ ] other heir of decedent
(describe):_____
[ ] creditor (Forty-five days after death must have lapsed)
[x] other(describe): attorney for the Estate

FORM #333PC (1/89)
62-3-203, 62-3-301 (5) & (6), 62-3-613

CERTIFIED TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

VERIFICATION

The undersigned, being sworn, states that the facts set forth in the foregoing statement are true to the best of the undersigned's knowledge, information and belief; and hereby submits to the Court's jurisdiction in this matter.

SWORN to before me this 1st day of October, 2002.

Signature: James B. Drennan, III

Name: James B. Drennan, III
Address: 103 Lafayette Street
Spartanburg, SC 29302
Telephone (O):864/582-0708
(H):864/585-8559

Notary Public for South Carolina
My Commission Expires: 6-30-03

---

ORDER FOR HEARING

IT IS HEREBY ORDERED that a hearing on this matter be set for:

DATE:

TIME:

PLACE:

Pursuant to Section 62-1-401, the petitioner is ordered to give notice of this hearing to all interested persons at least twenty (20) days prior to the hearing.

Executed this _____ day of _____, 19___.

_____
Probate Court Judge

Form #333PC (1/89)



CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

ORDER OF APPOINTMENT

IT IS HEREBY ORDERED that the above application/petition for successor Personal Representative(s) be [ ] GRANTED [ ] DENIED.

Executed this 9th day of [redacted], 2002.

P. Mark Heath

Mark Heath, Probate Court Judge

---

QUALIFICATION AND STATEMENT OF ACCEPTANCE

I accept this appointment and agree to perform the duties and discharge the trust of the office of Personal Representative of this estate and I waive the right to receive Personal Representative commissions or fees for my services as Personal Representative.

Signature: James B Drennan III
Name: James B. Drennan, III
Address: 103 Lafayette Street
Spartanburg, SC 29302
Telephone (O): 864/582-0708
(H): 864/585-8559

Signature: _____
Name:
Address:

Telephone (O):
(H):

Attorney:
Address:

Telephone:

Form #333PC (1/89)

CERTIFIED A TRUE COPY
PAGE 3 OF 3
P. Mark Heath
P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

STATE OF SOUTH CAROLINA
COUNTY OF MARLBORO

IN THE MATTER OF ESTATE OF ELIZABETH McLEAN PENCE

CASE NUMBER 2000ES3400078

PROBATE COURT

ATTEST A TRUE COPY
JUDGE OF PROBATE
Judge of Probate, Orangeburg
County, South Carolina

# INVENTORY AND APPRAISEMENT

[ ] ORIGINAL
[X] SUPPLEMENTAL #1

Personal Representative(s): James B. Drennan
Decedent's Social Security No.: [redacted]
Decedent's Date of Death: 11/18/00

Was there a will? [x] YES [ ] NO
Domicile at death:
Marlboro SC
(county) (state)

The undersigned, being sworn, states: That the following schedules contain a complete and accurate inventory and appraisement of all real and personal property of this estate so far as the undersigned is informed; that he/she has estimated and appraised all listed property at its fair market value, according to the best of his/her knowledge and ability.

SWORN to before me this 10th day of December 2002.

Theresa B. Lawrence
Notary Public for South Carolina
My Commission Expires: 6-30-03

Signature: James B Drennan
Name: James B. Drennan
Address: P.O. Box 891
Spartanburg, SC 29304
Telephone (O): 864/582-0708
(H): 864/585-8559

Attorney: James B. Drennan III
Address: P.O. Box 891
Spartanburg, SC 29304
Telephone: (864)582-0708

Signature:
Name:
Address:
Telephone (O):
Telephone (H):

For estates of decedents, the gross fair market valuation of all assets, regardless of situs, should be given as of the date of death. List all out-of-state assets on appropriate schedules. A Supplemental Inventory should be utilized for correcting, adjusting or adding to an original inventory. A qualified and disinterested appraiser may be employed to ascertain the value of any asset, the value of which may be subject to reasonable doubt. If an appraiser is employed, his/her name and address should be indicated with the item or items he/she appraised.

Within ninety (90) days following appointment, a copy of the inventory and appraisement shall be sent to each interested person who requests it, and the original inventory filed with the Probate Court.

## RECAPITULATION

| | Out-of-state | In-state |
|---|---|---|
| Schedule A - Real Estate | $ | $ 897,033.00 |
| Schedule B - Stocks and Bonds | | 18,996.00 |
| Schedule C - Mortgages, Notes and Cash | | 22,641.00 |
| Schedule D - Insurance on Decedent's Life | | 0.00 |
| Part 1 - Payable to Estate | | 18,023.00 |
| Part 2 - Payable to Beneficiary | | 0.00 |
| Schedule E - Jointly Owned Property | | 4,007,068.00 |
| Schedule F - Other Miscellaneous | | 0.00 |
| Schedule G - Transfers during Decedent's Life | | 0.00 |
| Schedule H - Powers of Appointment | | 0.00 |
| Schedule I - Annuities | | |
| TOTAL GROSS VALUE | $ | 4,963,761.00 |
| ENCUMBRANCES | ( | 0.00 ) |
| TOTAL NET VALUE | $ | 4,963,761.00 |

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512



Form #350PC (1/91)
62-3-704, 62-3-706, 62-3-707, 62-3-708, 62-3-1203

NOTE: WHEN COMPLETING THE FO[illegible]ING SCHEDULES, PLEASE REMEMBER [illegible]IST ALL ASSETS, REGARDLESS OF SITUS. ALL OUT-OF-STATE AS[illegible] MUST BE DISCLOSED.

SCHEDULE A - Real Estate (All interest in real property except those held with right of survivorship) (If none, so state.) (For jointly owned property with right of survivorship, see Schedule E)

| Item No. | Description | Tax Assessor's Fair Market Value for year of Decedent's Death | Appraised Value | Appraised Value of Decedent's Interest |
|---|---|---|---|---|
| 1 | 296.1 ac Academy Rd., Bennettsvile, SC (tax map 28-00-02-22) including timber | | | 193,140.00 |
| 2 | 174.11 ac near Caw Caw Swamp, Orangeburg County, SC (tax map 0149-00-03, parcels 007 and 010) including timber | | | 703,893.00 |
| 3 | Contingent ½ remainder interest in 694.8 ac tract in Orangeburg County, SC (tax map 0169-00-02-012) | | | 0.00 |

TOTAL SCHEDULE A
(also enter under recapitulation, page 1) $897,033.00

SCHEDULE B - Stocks and Bonds (If none, so state.) (For jointly owned property with right of survivorship, see Schedule E)

| Item No. | Description | Face Value | Appraised Value |
|---|---|---|---|
| 1 | 353 shares Bank of America | | 18,996.00 |

TOTAL SCHEDULE B
(also enter under recapitulation, page 1) $18,996.00

SCHEDULE C - Mortgages, Notes and Cash (If none, so state.) (For jointly owned property with right of survivorship, see Schedule E)

| Item No. | Description | Face Value |
|---|---|---|
| 1 | Checking account Wachovia Bank | 22,641.00 |

CERTIFIED A TRUE COPY

TOTAL SCHEDULE C
(also enter under recapitulation, page 1) $22,641.00

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

(If more space is required, insert tax schedules or additional sheets of same size.)
Form #350PC (1/91) PAGE 2 OF 6

SCHEDULE D - Insurance (If none, so state.)
Part 1 - Life Insurance Payable to the Estate

| Item No. | Description | Face Value |
|---|---|---|
| | none | |

TOTAL PART 1 (also enter under recapitulation, page 1) $0.00

Part 2 - Life Insurance Payable to Beneficiaries

| Item No. | Description | Beneficiary | Value |
|---|---|---|---|
| 1 | New York Life | daughter | 18,023.00 |

TOTAL PART 2 (also enter under recapitulation, page 1) $18,023.00

SCHEDULE E - Jointly owned Property (with right of survivorship) (If none, so state.)

NOTE: You must complete Schedule E if the decedent owned any property jointly with right of survivorship at the time of death, whether or not the decedent's interest is includible in the gross estate.

Percentage includible:
1 - Joint interest held by decedent and spouse - the amount included is one-half (50%) of the value in all cases.
2 - Other joint interest - Generally you must include the full value of the jointly owned property in the gross estate. However, the full value should not be included if you can show that a part of the property originally belonged to the other tenant(s). The amount included is the amount of the decedent's contribution to the joint account(s).

| Item No. | Description | Joint Owner(s) | Percentage Includible | Appraised Value of Decedent's Interest |
|---|---|---|---|---|
| | none | | | |

TOTAL SCHEDULE E (also enter under recapitulation, page 1) $0.00

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

(If more space is required, insert tax schedules or additional sheets of same size.)
Form #350PC (1/91)

SCHEDULE F - Miscella[illegible]s Personal Property (tan[illegible]e personal property, employment bonus or a[illegible]rd, interest in a partner[illegible]ip or unincorporated business, articles or collections having either artistic or intrinsic value, etc.) (If none, so state.) (For jointly owned property with right of survivorship, see Schedule E.)

| Item No. | Description | Face Value |
|---|---|---|
| 1 | Household furnishing, jewelry, personal effects | 75,000.00 |
| 2 | Interest in L. E. Pence estate | 1,195;600.00 |
| 3 | Claim against Revocable Trust dated 5/28/99 (See Schedule and Explanation attached) | 2,736,468.00 |

TOTAL SCHEDULE F (also enter under recapitulation, page 1) $ 4,007,068.00

SCHEDULE G - Transfers During Decedent's Life - Transfers intended to take effect at death. United States Government Bonds "Payable on Death", Trust created by Decedent in which income for life was retained, Power to revoke or other incidents of ownership retained, life insurance transfers, Lifetime transfers of real property in which Decedent retained a life estate or other incidents of ownership. (If none, so state.)

| Item No. | Description | Face Value |
|---|---|---|
| | none | |

TOTAL SCHEDULE G (also enter under recapitulation, page 1) $0.00

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

(If more space is required, insert tax schedules or additional sheets of same size.)
Form #350PC (1/91)

ESTATE OF ELIZABETH McLEAN PENCE
CASE NUMBER 2000ES3400078

Inventory and Appraisement
Schedule F
Item 3

Schedule and Explanation of Claim against Revocable Trust dated 5/28/99

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

As a result of the Court-approved settlement ( a copy of which has been filed in this Court), certain trust assets were to be returned to the Decedent's estate, and by the Settlement Agreement Elizabeth P. Pence, as Personal Representative and as sole beneficiary of the estate, authorized the direct transfer of the trust assets to a revocable Trust she had established on February 1, 2002. The assets transferred by Mr. Brogdon, as Trustee of the May 28, 1999 Revocable Trust, to the Elizabeth P. Pence Revocable Trust dated February 1, 2002 and to Elizabeth P. Pence personally, as sole beneficiary, were as follows:

| | |
|---|---|
| Bonds | $1,460,294.00 |
| Marlboro County real property (see Exhibit "A") | 1,056,000.00 |
| Cash | 18,066.00 |
| Cash to Elizabeth P. Pence | 37,365.00 |
| 60% of timber sales, Marlboro and Orangeburg Counties | 164,743.00 |
| Total | 2,736,468.00 |

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

Exhibit "A"
Marlboro County, S.C.

| | |
|---|---|
| Parcel 1. 50 acres off Highway S35-122 (Bradley Road), Marlboro County, SC. Tax map 22-01-02-14. | 27,000.00 |
| Parcel 2. 61.28 acres on both sides of Academy Rd. Marlboro County, SC, near Bennettsville. Tax map 22-01-02-15. | 36,000.00 |
| Parcel 3. 186.32 acres on both sides of Academy Rd., Marlboro County, SC, near Bennettsville. Tax map 22-01-02-27. | 127,00.00 |
| Parcel 4. 47.7 acres on dirt road, Marlboro County, SC. Tax map 22-01-02-26. | 20,000.00 |
| Parcel 5. 135.7 acres on both sides of Academy Road, Marlboro County, SC, near Bennettsville. Tax map 22-01-02-28. | 121,000.00 |
| Parcel 6. 178.53 acres on Pence Rd., Marlboro County, SC. Tax map 22-01-02-29. | 110,000.00 |
| Parcel 7. 28.3 acres on Beverly Creek Rd., Marlboro County, SC. Tax map 22-01-02-30. | 19,000.00 |
| Parcel 8.65.82 acres, both sides of Academy Rd., Marlboro County, SC. Tax map 28-00-02-19. | 69,000.00 |
| Parcel 9. 64 acres off Academy Rd, on field road. Tax map 28-00-02-23. | 36,000.00 |
| Parcel 10. 13.9 acres in SW corner of Academy Rd. and Hwy S35-22 (Bennettsville Firetower Rd.) Tax map 28-00-02-37. | 28,000.00 |
| Parcel 11. 20.75 acres fronting on Hwy. S35-22 (Bennettsville Firetower Rd.) Tax map 28-00-02-39. | 31,000.00 |
| Parcel 12. 123.1 acres on both sides of S35-48 (East Main Street Extension) 3 miles northeast of Bennettsville, Marlboro County, SC. Tax map 28-00-02-50. | 76,000.00 |

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

| | |
|---|---|
| Parcel 13. 44 acres off Hwy S35-22 (Bennettsville Firetower Rd.). Access by dirt road known as Manship Rd. Tax map 29-00-01-14. | 27,000.00 |
| Parcel 14. Residence and 87 acres on Academy Road, Marlboro County, SC. Tax map 28-00-02-20. | 329,000.00 |

CERTIFIED A TRUE COPY

P. Mark Heath

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PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

SCHEDULE H - Powers of Appointment - Property over which Decedent possessed a Power of Appointment, both real and personal, whether Testamentary or otherwise. (If none, so state.)

| Item No. | Description | Face Value |
|---|---|---|
| | none | |

TOTAL SCHEDULE H
(also enter under recapitulation, page 1) $0.00

SCHEDULE I - Annuities (If none, so state.) (IRA's, Keogh, etc.)

| Item No. | Description | Face Value |
|---|---|---|
| | none | |

TOTAL SCHEDULE I
(also enter under recapitulation, page 1) $0.00

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

(If more space is required, insert tax schedules or additional sheets of same size.)
Form #350PC (1/91)

ENCUMBRANCES (e.g., mortgages, liens, judgments, etc., but not general debts of the estate) - List specific assets encumbered.

| Item No. | Schedule & Item Number Encumbered Thereby | Description & Amount |
|---|---|---|
| | none | |

TOTAL ENCUMBRANCES (also enter under recapitulation, page 1) $0.00

## MANIFESTLY NON-TAXABLE

(To be executed by the Probate Court Judge in those cases where it appears that the estate is not REPORTABLE to the South Carolina Tax Commission under the provisions of the Estate Tax Laws of the State of South Carolina, i.e., the total gross value is indicated to be less than prescribed limits.)

It appears from the foregoing record of the above captioned estate on file in the Probate Court of this County, such estate is not reportable to the South Carolina Tax Commission.

Executed this _____ day of _____, 2001.

MARK HEATH
Probate Court Judge

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

(If more space is required, insert tax schedules or additional sheets of same size.)
Form #350PC (1/91)

ATTEST: A TRUE COPY

Judge of Probate, Orangeburg County, South Carolina

STATE OF SOUTH CAROLINA )
)
COUNTY OF ORANGEBURG )
)
IN RE: THE ESTATE OF )
ELIZABETH MCLEAN PENCE )
)

IN THE PROBATE COURT

CERTIFICATION

Pursuant to Section 62-3-301 and Section 62-3-402 of the Code of Laws of South Carolina, 1976, as amended, and as the same pertain, it is certified and acknowledged that a certified copy of: **Last Will and Testament, Petition, Petition for Successor Personal Representative, Inventory and Appraisement, Fiduciary Letters, Copy of Death Certificate** of and in the above captioned, have been duly filed of record in the Probate Court of and for this County in Case File Number 2003ES3800047

GIVEN under my Hand, and the Official Seal of this Probate Court, effective this the 6TH day of FEBRUARY, 2003.

JUDGE OF PROBATE FOR ORANGEBURG COUNTY, SOUTH CAROLINA

# ORANGEBURG COUNTY PROBATE COURT

ORANGEBURG COUNTY COURTHOUSE
190 GIBSON STREET, SUITE 105
ORANGEBURG, S.C. 29116-9000
TELEPHONE (803) 533-6280
FAX (803) 533-6279

VIVIAN E. ROSS-BENNETT
PROBATE JUDGE

ATTEST: A TRUE COPY

Judge of Probate, Orangeburg County, South Carolina

**Full Payment**

| | | | |
|---|---|---|---|
| DATE: | 2/6/2003 | TIME: | 5:20:54PM |
| CLERK: | CBrown | RECEIPT NUMBER: | 54983 |
| IN THE MATTER OF: | Pence, Elizabeth M. | CASE NUMBER: | 2003ES3800047 |
| RECEIVED FROM: | Dennis Shaw & Drennan, | PAYMENT TYPE: | Check |

| Court Costs | | | TOTAL PAID: | BALANCE DUE: |
|---|---|---|---|---|
| CC | Court Cost | $25.00 | $25.00 | $0.00 |

DENNIS, SHAW & DRENNAN, P.A.
ATTORNEYS AT LAW
103 LAFAYETTE STREET
REPLY TO: POST OFFICE BOX 891
SPARTANBURG, S.C. 29304-0891
TELEPHONE (864) 582-0708
FAX (864) 582-0934

ATTEST: A TRUE COPY
Judge of Probate, Orangeburg County, South Carolina

January 30, 2003

JAMES W. SHAW, P.A.*
JAMES B. DRENNAN, III, P.A.*
ANTHONY H. RANDALL, P.A.*
*CERTIFIED SPECIALIST IN ESTATE PLANNING & PROBATE LAW
*ALSO ADMITTED IN NORTH CAROLINA

R. RAY DENNIS
*RETIRED*

Hon. Vivian Ross-Bennett
Probate Judge for Orangeburg County
P.O. Drawer 9000
Orangeburg, SC 29116

Dear Judge Ross-Bennett:

I am the Personal Representative of the Estate of Elizabeth McLean Pence, which is being administered in Marlboro County, South Carolina. We recently discovered that the decedent owned real property in Orangeburg County, so I am going to enclose certified copies of her will, the Application for Probate and other pertinent documents from the Marlboro County Probate Court files.

I will also enclose a Certification form which I would like for you to return to me so that I might file it in Marlboro County. If you will assign an estate file number to the estate, I will prepare an appropriate Deed of Distribution covering the Orangeburg real property.

Please give me a call if you have any questions. We called ahead and determined that the filing fee would be $20.00, so a check in that amount is enclosed.

With kindest personal regards,

Sincerely yours,

James B. Drennan, III

JBD, III/tl
Enclosures

ATTEST: A TRUE COPY
PROBATE COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

ATTEST: A TRUE COPY
Judge of Probate, Orangeburg County, South Carolina

# Last Will and Testament

## of

ATTEST TRUE COPY
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

ELIZABETH M. PENCE

I, Elizabeth M. Pence, of the County of Orangeburg, State of South Carolina, being of sound and disposing mind and memory, do hereby make, publish and declare this my Last Will and Testament, revoking all instruments of a testamentary nature heretofore made by me.

ITEM I.

I direct my Executor, as soon as practical after my death, to pay all outstanding claims against my estate which are just and legally demandable, and to provide and pay for my funeral and burial expense.

ITEM II.

After the payment of all my just and lawful debts, I give, devise and bequeath to my daughter, Elizabeth McL. Pence, that portion of my estate which will equal the maximum sum allowed at the time of my death for the equivalent exemption of Unified Credit as provided under the laws of the United States for federal estate tax purposes. My Executor is specifically authorized and empowered to select from the assets of my estate a sufficient sum which will fulfill this devise or bequest either in realty or personalty, or a combination of both, and transfer same to my daughter by good and sufficient deed, bills of sale or whatever instrument as may be required to vest title in my daughter, absolutely and in fee simple estate. My Executor's decision as to the properties to be selected shall be final and binding upon all concerned.

It is my intention in making this devise or bequest to utilize the maximum equivalent exemption of the Unified Credit as may be applicable at the time of my death for federal estate tax purposes.

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNT
PO Box 455
Bennettsville, SC 29512

absolutely and in fee simple estate. Should my husband, L. E. Pence, predecease me, then I give, devise and bequeath all the rest and residue of my estate to my daughter, Elizabeth McL. Pence, absolutely and in fee simple estate.

ITEM IV.

I hereby nominate, constitute and appoint my husband, L. E. Pence, as Executor of this my Last Will and Testament, and do specifically waive the necessity of his filing bond.

IN WITNESS WHEREOF I HAVE HEREUNTO SET MY HAND AND SEAL THIS 3rd DAY OF May, 1983.

Elizabeth M. Pence

Elizabeth M. Pence

signed, sealed, published and declared by Elizabeth M. Pence, to be her Last Will and Testament, the execution of this Will being in the presence of us, who at her request and in her presence, and in the presence of each other, have subscribed our names as witnesses:

Mary Catherine M. Odom

Ralph L. Kelly

William A. Rogers

CERTIFIED A TRUE COPY

C. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

1. ELIZABETH McLEAN PENCE — 2. Female — 3. October 3, 1999

4. [redacted] — 5a. AGE - Last Birthday (Years): 76 — UNDER 1 YEAR: 5b. Months / Days — UNDER 1 DAY: 5c. Hours / Minutes — 6. DATE OF BIRTH (Mo., Day, Year): Sept. 3, 1923 — 7. BIRTHPLACE (City and State or Foreign Country): Cordova, SC

8. WAS DECEDENT EVER IN U.S. ARMED FORCES? (Yes or No): No

8a. PLACE OF DEATH (Check only one; see instructions on other side) — HOSPITAL: ☐ Inpatient ☐ ER/Outpatient ☐ DOA — OTHER: ☐ Nursing Home ☒ Residence ☐ Other (Specify)

9. FACILITY NAME (If not institution, give street and number): 2001 Academy Road — 9c. CITY, TOWN, OR LOCATION OF DEATH: Bennettsville — 9d. COUNTY OF DEATH: Marlboro

10. MARITAL STATUS - Married, Never Married, Widowed, Divorced (Specify): Widowed — 11. SURVIVING SPOUSE (If wife, give maiden name): ———— — 12a. DECEDENT'S USUAL OCCUPATION (Give kind of work done during most of working life. Do not use retired): Homemaker — 12b. KIND OF BUSINESS/INDUSTRY: Domestic

13a. RESIDENCE - STATE: SC — 13b. COUNTY: Marlboro — 13c. CITY, TOWN, OR LOCATION: Bennettsville — 13d. STREET AND NUMBER: 2001 Academy Road — 13e. INSIDE CITY LIMITS? (Yes or No): No

13f. ZIP CODE: 29512 — 14. Was Decedent of Hispanic Origin? (Specify Yes or No - If yes, specify Cuban, Mexican, Puerto Rican, etc.): ☐ Yes ☒ No (Specify) — 15. RACE - American Indian, Black, White, etc. (Specify): White — 16. DECEDENT'S EDUCATION (Specify only highest grade completed) Elementary/Secondary (0-12): — College (1-4 or 5+): 4

PARENTS — 17. FATHER'S NAME First / Middle / Last: James Lennon McLean — 18. MOTHER'S NAME First / Middle / Maiden Surname: Sophronia Hartzog

19a. INFORMANT'S NAME (Type/Print): Elizabeth Pence — 19b. MAILING ADDRESS (Street and Number or Rural Route Number, City or Town, State, Zip Code): 2001 Academy Road, Bennettsville, SC 29512

DISPOSITION — 20a. METHOD OF DISPOSITION: ☒ Burial ☐ Cremation ☐ Removal from State ☐ Donation ☐ Other (Specify) — 20b. PLACE OF DISPOSITION (Name of cemetery, crematory, or other place): Tatum Cemetery — 20c. LOCATION - (City or Town, State): Tatum, SC

21a. FUNERAL DIRECTOR OR PERSON ACTING AS SUCH (Signature): Glenn Evans — 21b. FUNERAL DIR. LICENSE NO.: 1548 — 21c. NAME AND ADDRESS OF FACILITY: Whitner-Evans Funeral Home, 507 East Main, Bennettsville, SC 29512 — 21d. LICENSE NUMBER (If facility): 39

21e. EMBALMER (Signature): Glenn Evans — 21f. EMBALMER LICENSE NO.: 1313

CERTIFIER — Complete items 22a-c only when certifying physician is not available at time of death to certify cause of death. — 22a. To the best of my knowledge, death occurred at the time, date, and place stated. Signature and Title: [signature] M.D. — 22b. LICENSE NUMBER: 20547 — 22c. DATE SIGNED (Month, Day, Year): 10-13-99

23. TIME OF DEATH: 5:10 P M — 24. DATE PRONOUNCED DEAD (Month, Day, Year): 10-03-99 — 25. WAS CASE REFERRED TO MEDICAL EXAMINER/CORONER? (Yes or No): Yes

CAUSE OF DEATH — 27. PART I. Enter the diseases, injuries, or complications that caused the death. Do not enter the mode of dying, such as cardiac or respiratory arrest, shock, or heart failure. List only one cause on each line. — Approximate Interval Between Onset and Death

Immediate cause (Final disease or condition resulting in death): a. SEPTIC SHOCK

Sequentially list conditions, if any, leading to immediate cause. Enter UNDERLYING CAUSE (disease or injury that initiated events resulting in death) LAST:
b. DUE TO (OR AS A CONSEQUENCE OF): URINARY TRACT INFECTION
c. DUE TO (OR AS A CONSEQUENCE OF): PARKINSON'S DISEASE & DEMENTIA
d.

PART II. Other significant conditions contributing to death but not resulting in the underlying cause given in Part I. — 28a. AUTOPSY (Yes or No): No — 28b. IF YES, WERE AUTOPSY FINDINGS CONSIDERED IN DETERMINING CAUSE OF DEATH? (Yes or No)

29. MANNER OF DEATH: ☐ Natural ☐ Accident ☐ Suicide ☐ Homicide ☐ Pending Investigation ☐ Could not be Determined — 30a. DATE OF INJURY (Month, Day, Year) — 30b. TIME OF INJURY — 30c. INJURY AT WORK? (Yes or No) — 30d. DESCRIBE HOW INJURY OCCURRED

30e. PLACE OF INJURY - (Home, Farm, Street, Factory, Office, etc.) (Specify) — 30f. LOCATION (Street and Number or Rural Route Number, City or Town, State)

CERTIFIER (Check only one): ☒ CERTIFYING PHYSICIAN (Physician certifying cause of death) ☐ MEDICAL EXAMINER ☐ CORONER ☐ PRONOUNCING AND CERTIFYING PHYSICIAN (Physician both pronouncing death and certifying to cause of death) — 32. NAME OF ATTENDING PHYSICIAN IF OTHER THAN CERTIFIER

31. SIGNATURE AND TITLE OF CERTIFIER. To the best of my knowledge, death occurred at the time, date and place, and due to the cause(s) and manner stated. — 33a. EDUARDO A. DONATO, JR., M.D. [signature] — 33b. LICENSE NUMBER: 20547 — 33c. DATE SIGNED (Month, Day, Year): 10-13-99

34. NAME AND ADDRESS OF PERSON WHO SIGNED IN 33a. (Type/Print): 102 LIMPSAW ST., BENNETTSVILLE SC 29512

REGISTRAR — 35. REGISTRAR'S SIGNATURE: Patricia G. Lane — 36. DATE FILED (Month, Day, Year): Oct. 18, 1999

ATTEST: A TRUE COPY
Judge of Probate, Orangeburg County, South Carolina

I HEREBY CERTIFY THIS IS A TRUE COPY OF THE RECORD ON FILE IN THE MARLBORO COUNTY HEALTH DEPARTMENT.
NOV 03 1999
Robert W. Griffin
COUNTY REGISTRAR

ATTEST: A TRUE COPY
PROBATE COURT
Judge of Probate, Orangeburg County, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF MARLBORO

IN THE MATTER OF ESTATE OF ELIZABETH P. PENCE

CASE NUMBER 2002ES34 00183

APPLICATION FOR PETITION FOR

(check any that apply)

INFORMAL
[X] PROBATE OF WILL
[X] APPOINTMENT

FORMAL
[] TESTACY
[] APPOINTMENT

| | |
|---|---|
| Applicant/Petitioner: | Wachovia Bank, N.A. |
| Address: | P.O. Box 700, Charleston, SC 29402 |
| Telephone | 843/937-4655 |

I. ALL APPLICANTS/PETITIONERS MUST COMPLETE THIS SECTION.

1. Nature of interest of undersigned: appointed personal representative by will

2. Decedent Information

| | |
|---|---|
| Name: | ELIZABETH P. PENCE |
| Social Security Number: | [redacted] |
| Date of Birth: | 12/31/62 |
| Date of Death: | 08/26/02 |
| Age at date of death: | 39 |
| Domicile at date of death: | Marlboro SC |
| | (County) (State) |

3. Venue for this proceeding is proper in this county because:

[x] Decedent was domiciled in this county at date of death.
[] Decedent was not domiciled in South Carolina, but property of Decedent was located in this county at date of death.
[] Decedent has a right to take legal action in this county because:

4a. Names and addresses of devisees, including dates of birth of minors:

| Name | Date of Birth | Address | Relationship to Decedent |
|---|---|---|---|
| Wachovia Bank, N.A. Trustee under Trust dtd 2/1/02 | n/a | 1426 Main St, Columbia, SC 29226 | trustee |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

4b. Names and addresses of intestate heirs who are not devisees, including dates of birth of minors:

| Name | Date of Birth | Address | Relationship to Decedent |
|---|---|---|---|
| Stephen Pence | adult | 2001 Academy St, Bennettsville SC | husband |
| | | | |
| | | | |
| | | | |
| | | | |

(use additional sheet if necessary)

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

illegitimate children.)

[X] NO [] YES If yes, please explain on page 3.

6. To the best of your knowledge, was the decedent a patient in a South Carolina Mental Health facility during his/her lifetime?

[] NO [x YES If yes, please explain on page 3.

7. Has a guardian or conservator ever been appointed for this person?

[x] NO [] YES

8. Has a personal representative of the decedent been appointed prior to this date in this state or elsewhere?

[x] NO [] YES If yes, please state details, including name and address of such Personal Representative, on page 3.

9. Have you received or are you aware of any demands for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere?

[x] NO [] YES If yes, please state details, including names and addresses, on page 3.

10. Have more than ten years passed since the decedent's death?
[x] NO [] YES If yes, please state circumstances authorizing tardy probate on page 3.

11. The decedent died with a personal estate of about the value of to be determined and real estate of about the value of to be determined. (An inventory and appraisement, Form #350PC, must be filed within 90 days.) If decedent was a non-resident, please attach South Carolina Tax Commission Form ET 101.

12. After the exercise of reasonable diligence, are you aware of any unrevoked will and/or codicil(s), other than the one(s) attached hereto, relating to property in this State?

[x] NO [] YES If yes, please explain on page 3 and then proceed to Section II.

II. IF A WILL EXISTS, PLEASE COMPLETE THIS SECTION.

1. Regarding the decedent's will:

[x] the original is attached
[ ] the original is in the Court's possession
[] an authenticated copy of a will probated in another jurisdiction is attached
[] an authenticated copy of a will not probated in another jurisdiction is attached
[] the will is lost, destroyed, or otherwise unavailable; however, a description of its contents is attached

2. Do you believe, to the best of your knowledge, the will described above was validly executed?
[x] YES [] NO If no, please explain on page 3.

3. The date of execution of the will was: 02/01/02.
codicil(s): .

4. Are you aware of any instrument or document amending or revoking the will?
[x] NO [] YES If yes, please explain on page 3.

5. Have you exercised reasonable diligence to determine there is no instrument or document revoking the will?
[x] YES [] NO If no, please explain on page 3.

6. Do you believe the will defined in "1" above is the decedent's last will?
[x] YES [] NO If no, please explain on page 3.

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

#6 The decedent was admitted to one or more S.C. mental health facilities during the last several years.

III. IF APPLYING FOR INFORMAL OR FORMAL APPOINTMENT, PLEASE COMPLETE THE FOLLOWING:

1. The name(s) and address(es) of the proposed Personal Representative(s) is/are:

Wachovia Bank, N.A., PO Box 700, Charleston, SC 29402

2. Priority for this appointment is:

[X] named as Primary Personal Representative in will or nominee of Primary Personal representative
[] named as Alternate Personal Representative in will or nominee of Alternate Personal Representative
[] surviving spouse of decedent who is devisee of decedent or nominee of said spouse
[] other devisee of decedent (describe):
[] or nominee of said devisee
[] surviving spouse of decedent or nominee of said spouse
[] other heir of decedent (describe) or nominee of said heir
[] creditor (forty-five days after death must have passed) or nominee of creditor
[] other (describe):
[] nominee of any of the above

3. List below the names of any other persons, if any, having a prior or equal right of appointment (see priority above).

none

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

## VERIFICATION

The undersigned, being sworn, states that the facts set forth in the foregoing statement are true to the best of the undersigned's knowledge, information and belief; and hereby submits to the Court's jurisdiction in this matter.

SWORN to before me this 4 day of September, 2002.

Notary Public for South Carolina
My Commission expires: _____

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires June 17, 2009
GERRY A. DEVINE

Signature: _____

Name: Mack Cornett, Trust Officer, Wachovia Bank, N.A.

Signature: _____

Name:

## ORDER OF INFORMAL PROBATE

IT IS HEREBY ORDERED that the above application for probate of a will be [] GRANTED [] DENIED informally this 9th day of September, 2002.

P. Mark Heath
Mark Heath
Probate Court Judge

## ORDER FOR HEARING ON FORMAL PETITION

IT IS HEREBY ORDERED that a hearing on this matter be set for:

DATE:

TIME:

PLACE:

Pursuant to Section 62-1-401, the petitioner is ordered to give notice of this hearing to all interested persons at least twenty (20) days prior to the hearing.

Executed this _____ day of _____, 2002.

_____
Mark Heath
Probate Court Judge

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

Form #300PC (1/91)

## ORDER OF FORMAL TESTACY

On hearing of the above petition, this Court finds that the person is deceased, venue is proper, and the proceeding was commenced within appropriate time limits.
The Court further finds that
[] the decedent died intestate. The heirs are:

[] the decedent died testate. IT IS THEREBY ORDERED that the Last Will and Testament of the above-named decedent, dated _____, be admitted formally to probate.

Executed this _____ day of _____, 2002.

Mark Heath
Probate Court Judge

[] SEE ATTACHED ORDER

## ORDER OF APPOINTMENT

IT IS HEREBY ORDERED that the above application/petition for appointment be granted upon the filing of a bond as appropriate, qualification and acceptance.

Executed this 9th day of September, 2002.

P. Mark Heath
Mark Heath
Probate Court Judge

## QUALIFICATION AND STATEMENT OF ACCEPTANCE

I accept this appointment and agree to perform the duties and discharge the trust of the office of Personal Representative of this estate.

Signature: Mack Cornett

Name: Mack Cornett, Trust Officer
Wachovia Bank, N.A.

Address: PO Box 700
Charleston, SC 29402

Telephone (O) 843/937-4655
(H)

Signature:

Name:

Address:

Telephone (O)
(H)

Attorney: James B. Drennan III

Address: 103 Lafayette St.
Spartanburg, SC 29302

Telephone: (864)582-0708

CERTIFIED A TRUE COPY
P. Mark Heath
P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUN
PO Box 455
Bennettsville, SC 29512

Form #300PC (1/91)

PROBATE COURT

STATE OF SOUTH CAROLINA
COUNTY OF MARLBORO

ATTEST: A TRUE COPY

Judge of Probate, Orangeburg County, South Carolina

IN THE MATTER OF ESTATE OF ELIZABETH P. PENCE

CASE NUMBER 2002ES34-00183

# INVENTORY AND APPRAISEMENT

✓ ORIGINAL
SUPPLEMENTAL # _____

Personal Representative(s): Wachovia Bank, National Association

Decedent's Social Security Number: [redacted]
Was there a will? ✓ Yes No
Decedent's Date of Death: August 26, 2002
Domicile at death: Marlboro (county) South Carolina (state)

The undersigned, being sworn, states: That the following schedules contain a complete and accurate inventory and appraisement of all real and personal property of this estate so far as the undersigned is informed; that he/she has estimated and/or appraised all listed property at the fair market value, according to the best of his/her knowledge and ability.

SWORN to before me this 11 day of March, 2003.

Gerry A. Devine
Notary Public for South Carolina
My Commission Expires: _____

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires June 17, 2009
GERRY A. DEVINE

Signature: CM Cox
Name: Wachovia Bank, National Association
Address: PO Box 700
Charleston, SC 29402
Telephone (O): 843-937-4655

Attorney: James B. Drennan, III
Address: 103 Lafayette Street
Spartanburg, SC 29304
Telephone (O): 864-582-0708

For estates of decedents, the gross fair market valuation of all assets, regardless of situs, should be given as of the date of death. List all out-of-state assets on appropriate schedules. A Supplemental Inventory should be utilized for correcting, adjusting, or adding to an original inventory. A qualified and disinterested appraiser may be employed to ascertain the value of any asset, the value of which may be subject to reasonable doubt. If an appraiser is employed, his/her name and address should be indicated with the item or items he/she appraised.

**Within ninety (90) days following appointment, a copy of the inventory and appraisement shall be sent to each interested person who requests it, and the original inventory filed with the Probate Court.**

## RECAPITULATION

| | Out-of-state | In-state |
|---|---|---|
| Schedule A - Real Estate | $ | $ 515,001.00 |
| Schedule B - Stocks and Bonds | | 150,134.50 |
| Schedule C - Mortgages, Notes and Cash | | 21,481.25 |
| Schedule D - Insurance on Decedent's Life: Part 1 - Payable to Estate | | 25,000.00 |
| Part 2 - Payable to Beneficiary | | 0.00 |
| Schedule E - Jointly Owned Property | | 38,527.50 |
| Schedule F - Other Miscellaneous | | 79,595.60 |
| Schedule G - Transfers during Decedent's life | | 0.00 |
| Schedule H - Powers of Appointment | | 0.00 |
| Schedule I - Annuities | | 0.00 |
| TOTAL GROSS VALUE | | $ 829,739.85 |
| ENCUMBRANCES | | (0.00) |
| TOTAL NET WORTH | | $ 829,739.85 |

CERTIFIED A TRUE COPY
P. Mark Heath
P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

FORM #350PC (V91)
62-3-704, 62-3-706, 62-3-707, 62-3-708, 62-3-1203

CASE NUMBER:

NOTE: WHEN COMPLETING THE FOLLOWING SCHEDULES, PLEASE REMEMBER TO LIST ALL ASSETS, REGARDLESS OF SITUS. ALL OUT-OF-STATE ASSETS MUST BE DISCLOSED.

**SCHEDULE A — Real Estate** (All interest in real property except those held with right of survivorship) (If none, so state.) (For jointly owned property with right of survivorship, see schedule E)

| Item No. | Description | Tax Assessor's Fair Market Value for year Decedent's Death | Appraised Value | Appraised Value of Decedent's Interest |
|---|---|---|---|---|
| 1. | 120.1 Acres Orangeburg County<br>TM# 0149-00-03-007.000<br>US 21 North of Orangeburg off County Road #1327 | | | $305,000.00 |
| 2. | 54.80 Acres Orangeburg County<br>TM# 0149-00-03-010.000<br>US 21 North of Orangeburg off County Dirt Road #1327 | | | $210,000.00 |
| 3. | Contingent Remainder Interest<br>226.6, 122, 67, 143, 5.5, 47 acres located in Orangeburg County, TM# 0169-00-02-012 | | | $1.00 |

TOTAL SCHEDULE A (also enter under recapitulation, page 1) $ 515,001.00

**SCHEDULE B – Stocks and Bonds** (If none, so state.) (For jointly owned property with right of survivorship, see schedule E)

| Item No. | Description | Face Value | Appraised Value |
|---|---|---|---|
| | See Schedule attached | | $150,134.50 |

TOTAL SCHEDULE B (also enter under recapitulation, page 1) $ 150,134.50

**SCHEDULE C - Mortgages, Notes and Cash** (If none, so state.) (For jointly owned property with right of survivorship, see schedule E)

| Item No | Description | Value |
|---|---|---|
| 1. | New York Life Checking Account #9370723440 | $21,481.25 |

TOTAL SCHEDULE C (also enter under recapitulation, page 1) $ 21,481.25

CERTIFIED A TRUE COPY

(If more space is required, insert tax schedules or additional sheets of same size.)

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

CASE NUMBER:

SCHEDULE D – Insurance (If none, so state.)

Part 1 – Life Insurance Payable to the Estate

| Item No. | Description | Value |
|---|---|---|
| 1. | Acacia Life Insurance Company<br>Policy 4011124468TA | $25,000.00 |

TOTAL PART 1 (also enter under recapitulation, page 1) $ 25,000.00

Part 2 – Life Insurance Payable to Beneficiaries

| Item No. | Description | Beneficiary | Value |
|---|---|---|---|
| None | | | |

TOTAL PART 2 (also enter under recapitulation, page 1) $ 0.00

**SCHEDULE E** – Jointly owned Property (with right of survivorship) (If none, so state.)

NOTE: You must complete Schedule E if the decedent owned any property jointly with right of survivorship at the time of death, whether or not the decedent's interest is includible in the gross estate.

Percentage includible:

1 – Joint interest held by decedent and spouse – the amount included is one-half (50%) of the value in all cases.

2 – Other joint interest – Generally you must include the full value of the jointly owned property in the gross estate. However, the full value should not be included if you can show that a part of the property originally belonged to the other tenant(s). The amount included is the amount of the decedent's contribution to the joint account(s).

| Item No. | Description | Joint Owner(s) | Percentage Includible | Appraised Value of Decedent's Interest |
|---|---|---|---|---|
| 1. | 2001 BMW 4-Door, Model 75L<br>VIN# WBAGJ03421DD74744 | Stephen Pence | 50% | $30,625.00 |
| 2. | 1998 Chevrolet 4-Door, Model K15<br>VIN# GNFK16R4WG136837 | Stephen Pence | 50% | $7,902.50 |

TOTAL SCHEDULE E (also enter under recapitulation, page 1) $ 38,527.50

CERTIFIED A TRUE COPY

(If more space is required, insert tax schedules or additional sheets of same size.)

FORM #350PC (1/91) Page 3 of 6

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455

CASE NUMBER:

SCHEDULE F – Miscellaneous Personal Property – (tangible personal property, employment bonus or award, interest in a partnership or unincorporated business, articles or collections having either artistic or intrinsic value, etc.) (If none, so state.) (For jointly owned property with right of survivorship, see schedule E.)

| Item No. | Description | Value |
|---|---|---|
| 1. | Household Personal Property | $52,725.00 |
| 2. | Jewelry | $19,129.00 |
| 3. | Coins | $25.37 |
| 4. | 1C System Refund | $100.00 |
| 5. | Accrued Income from Trust Account 2019007724 | $2,616.23 |
| 6. | Estimated Cash Receivable from Estate of Elizabeth M. Pence | $5,000.00 |

TOTAL SCHEDULE F (also enter under recapitulation, page 1) $ 79,595.60

SCHEDULE G – Transfers During Decedent's Life – Transfers intended to take effect at death. United States Government Bonds "Payable on Death", Trust created by Decedent in which income for life was retained, life insurance transfers. Lifetime transfers of real property in which Decedent retains a life estate or other incidents of ownership. (If none, so state.)

| Item No. | Description | Value |
|---|---|---|
| 1. | Elizabeth P. Pence Revocable Trust dated February 1, 2002 (Non-Probate Assets) | $0.00 |

TOTAL SCHEDULE G (also enter under recapitulation, page 1) $ 0.00

(If more space is required, insert tax schedules or additional sheets of same size.)

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P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

CASE NUMBER:

SCHEDULE H – Powers of Appointment – Property over which Decedent possessed a Power of Appointment both real and personal, whether Testamentary or otherwise. (If none, so state.)

| Item No. | Description | Value |
|---|---|---|
| None | | $0.00 |

TOTAL SCHEDULE H (also enter under recapitulation, page 1) $ 0.00

SCHEDULE I – Annuities (IRA's, Keogh's, etc.) (If none, so state.)

| Item No. | Description | Beneficiary | Value |
|---|---|---|---|
| None | | | $0.00 |

TOTAL SCHEDULE I (also enter under recapitulation, page 1) $ 0.00

(If more space is required, insert tax schedules on additional sheets of same size.)

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P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

CASE NUMBER:

| ENCUMBRANCES | (e.g., mortgages, liens, judgments, etc., but not general debts of the estate) – List specific assets encumbered | |
|---|---|---|
| Item No. | Schedule & Item Number Encumbered Thereby | Description & Amount |
| None | | $0.00 |

TOTAL ENCUMBRANCES (also enter under recapitulation, page 1) $ 0.00

MANIFESTLY NON-TAXABLE

(To be executed by the Probate Court Judge in those cases where it appears that the estate is not REPORTABLE to the South Carolina Tax Commission under the provisions of the Estate Tax Laws of the State of South Carolina, i.e., the total gross value is indicated to be less than prescribed limits.)

It appears from the foregoing record of the above captioned estate on file in the Probate Court of this County, such estate is not reportable to the South Carolina Tax Commission.

Executed this 17 day of March, 2003.

P. Mark Heath
Probate Court Judge

CERTIFIED A TRUE COPY

(If more space is required, insert tax schedules or additional sheets of same size.)

P. Mark Heath
P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

FORM #350PC (1/81) Page 6 of 6

Estate Valuation
ELIJAH RATSON 2/21/03
MACK CORNETT SC9377

Date of Death: 08/26/2002
Valuation Date: 08/26/2002
Processing Date: 02/21/2003

Account: 2001899796
Report Type: Date of Death
Number of Securities: 7
File ID: 22222

| | Shares or Par | Security Description | High/Ask | Low/Bid | Mean and/or Adjustments | Div and Int Accruals | Security Value |
|---|---|---|---|---|---|---|---|
| 1) | 25000 | CHARLESTON CNTY S C HOSP FACS HOSP FAC (160900GP5)<br>FT Intr.<br>DTD: 07/15/1992 Mat: 10/01/2019 5.5%<br>08/26/2002 | 102.19500 | 102.18900 A/B | 102.192000 | 553.82 | 25,548.00 |
| | | Int: 04/01/2002 to 08/26/2002 | | | | | |
| 2) | 25000 | GREENVILLE HOSP SYS S C HOSP F HOSP FAC (3960B0CQ4)<br>FT Intr.<br>DTD: 06/01/1993 Mat: 05/01/2011 5.5%<br>08/26/2002 | 102.99800 | 102.85900 A/B | 102.879000 | 439.24 | 25,719.75 |
| | | Int: 05/01/2002 to 08/26/2002 | | | | | |
| 3) | 5000 | GREENVILLE HOSP SYS S C HOSP F HOSP FAC (396080CR2)<br>FT Intr.<br>DTD: 06/01/1993 Mat: 05/01/2016 5.5%<br>08/26/2002 | 101.75400 | 101.60300 A/B | 101.678500 | 87.85 | 5,083.93 |
| | | Int: 05/01/2002 to 08/26/2002 | | | | | |
| 4) | 5000 | ROCK HILL S C HSG DEV CORP MUL MULTIFAM (772225AA6)<br>FT Intr.<br>DTD: 11/01/1990 Mat: 07/01/2010 7.5%<br>08/26/2002 | 101.49400 | 101.49400 A/B | 101.469000 | 57.29 | 5,073.45 |
| | | Int: 07/01/2002 to 08/26/2002 | | | | | |
| 5) | 40000 | SOUTH CAROLINA ST PUB SVC AUTH REF REV B (837147KT3)<br>FT Intr.<br>DTD: 09/01/1993 Mat: 01/01/2014 5%<br>08/26/2002 | 102.45900 | 102.44500 A/B | 102.452000 | 305.56 | 40,980.80 |
| | | Int: 07/01/2002 to 08/26/2002 | | | | | |
| 6) | 35000 | SPARTANBURG CNTY S C HEALTH SV REF REV B (846851AT0)<br>FT Intr.<br>DTD: 11/01/1995 Mat: 04/15/2025 5.3%<br>08/26/2002 | 101.42700 | 101.17700 A/B | 101.302000 | 675.01 | 35,455.70 |
| | | Int: 04/15/2002 to 08/26/2002 | | | | | |
| 7) | 10000 | SPARTANBURG CNTY S C G.O. BDS (846846QC5)<br>OTC<br>DTD: 06/01/1991 Mat: 08/01/2004 6.3%<br>08/26/2002 | 101.10400 | 101.10300 A/B | 101.103500 | 43.75 | 10,110.35 |
| | | Int: 08/01/2002 to 08/26/2002 | | | | | |
| | | | | | | $2,162.52 | $147,971.98 |

Total Value:
Total Accrual:
Total: $150,134.50

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
BENNETTSVILLE, SC 29512



This report was produced with EstateVal, a product of Estate Valuations & Pricing Systems, Inc. If you have questions, please contact EVPS Systems at (618) 313-6300 or www.evpsystems.com

STATE OF SOUTH CAROLINA
COUNTY OF MARLBORO

PROBATE COURT

IN THE MATTER OF ELIZABETH P. PENCE

CASE NUMBER 2002ES3400183

FIDUCIARY LETTERS

- ☒ PERSONAL REPRESENTATIVE
- ☐ GUARDIANSHIP
- ☐ CONSERVATORSHIP
- ☐ TRUSTEESHIP
- ☐ _____

On the 9th day of September, 2002

MACK CORNETT, WACHOVIA BANK, N.A.

was/were appointed and qualified as Fiduciary(ies) of the above matter by this court, with all the authority granted to a fiduciary by law.

NOW, THEREFORE, LETTERS are issued, as evidence of such appointment, qualification, and authority of the above fiduciary(ies) to do and perform all acts which may be authorized by law.

**RESTRICTIONS:**
NONE

Executed this 9th day of September, 2002

Do not accept a copy of this certificate without the raised seal of the Probate Court.

P. Mark Heath

P. MARK HEATH, PROBATE JUDGE

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

FORM #140PC (1/91)
62-3-103, 62-5-304, 62-5-421, 62-7-201

ATTEST: A TRUE COPY

Judge of Probate, Orangeburg County, South Carolina

PROBATE COURT

STATE OF SOUTH CAROLINA

COUNTY OF MARLBORO

IN THE MATTER OF ESTATE OF ELIZABETH P. PENCE

CASE NUMBER 2002ES34 183

PROOF OF
[X] WILL
[ ] CODICIL #

The undersigned witness to the will, being duly sworn, says that the instrument exhibited to the undersigned as the Last Will and Testament/Codicil of Elizabeth P. Pence, deceased, is the same instrument that the decedent executed and that the undersigned and Carrie Peele subscribed as attesting witnesses on the 1st day of February, 2002; that the decedent either signed the instrument in the presence of the attesting witnesses or acknowledged in the presence of the attesting witnesses that the decedent had previously signed the instrument; that the witnesses, in the presence of the decedent and in the presence of each other, subscribed their names to the instrument as attesting witnesses; and that the undersigned believes the decedent was married or eighteen (18) or more years of age and of sound mind at the time.

Signature: James B. Drennan III
Name: JAMES B. DRENNAN, III
Address: 103 Lafayette Street
Spartanburg, SC 29302

Telephone (O): 864/582-0708
(H): 864/585-8559

SWORN to before me this 19th day of September, 2002.

Steven B. Ford, Notary Public, State of S.C
My commission expires 2-28-09

Form #303PC (7/87)
SCPC 3-405, guide to 3-406

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

DENNIS, SHAW & DRENNAN, L
ATTORNEYS AT LAW
103 LAFAYETTE STREET
REPLY TO: POST OFFICE BOX 891
SPARTANBURG, S.C. 29304-0891
TELEPHONE (864) 582-0708
FAX (864) 582-0934

ATTEST: A TRUE COPY
Judge of Probate, Orangeburg
County, South Carolina

April 3, 2003

JAMES W. SHAW, P.A.*
JAMES B. DRENNAN, III, P.A.*
ANTHONY H. RANDALL, P.A.*
*CERTIFIED SPECIALIST IN ESTATE PLANNING & PROBATE LAW
*ALSO ADMITTED IN NORTH CAROLINA

R. RAY DENNIS
*RETIRED*

Hon. Vivian Ross-Bennett
Probate Judge for Orangeburg County
P.O. Drawer 9000
Orangeburg, SC 29116

Re: Estate of Elizabeth P. Pence

Dear Judge Ross-Bennett:

Elizabeth P. Pence died a resident of Marlboro County on August 26, 2002, and she owned real property in Orangeburg County.

I have obtained certified copies of Mrs. Pence's will, the Application for Probate and Appointment, the Inventory and Appraisement filed by Wachovia Bank, N.A., Personal Representative, the fiduciary letters issued by the Probate Court in Marlboro County, and Mrs. Pence's Death Certificate, all of which are enclosed herewith.

I will also enclose a Certification form which I would appreciate your signing and sending back to me so that I can file it with the Probate Court in Marlboro County.

If you have any questions about any of the enclosures, or if you need anything further, please let me know. Our check payable to your order in the amount of $20.00 is enclosed to cover what I believe will be the filing costs.

With kindest personal regards,

Sincerely yours,

James B. Drennan, III

JBD,III/tl
Enclosures
cc: Mr. Mack Cornett
Mr. Wellon S. Hunter

ATTEST: A TRUE COPY

Judge of Probate, Orangeburg County, South Carolina

STATE OF SOUTH CAROLINA )
)
COUNTY OF ORANGEBURG )
)
IN RE: THE ESTATE OF )
ELIZABETH P. PENCE )
)

IN THE PROBATE COURT

CERTIFICATION

Pursuant to Section 62-3-301 and Section 62-3-402 of the Code of Laws of South Carolina, 1976, as amended, and as the same pertain. it is certified and acknowledged that a certified copy of: **Last Will and Testament, Proof of Will, Petition. Inventory and Appraisement, Fiduciary Letters and Copy of Death Certificate** of and in the above captioned, have been duly filed of record in the Probate Court of and for this County in Case File Number

GIVEN under my Hand, and the Official Seal of this Probate Court, effective this the 7th day of April, 2003.

Vivian G. Kornegay

JUDGE OF PROBATE FOR ORANGEBURG COUNTY, SOUTH CAROLINA

ATTEST: A TRUE COPY

SEP 06 2002

Judge of Probate, Orangeburg County, South Carolina

COUNTY REGISTRAR

TYPE/PRINT IN PERMANENT BLACK INK. FOR INSTRUCTIONS SEE OTHER SIDE OR HANDBOOK

STATE OF SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

# CERTIFICATE OF DEATH

STATE BIRTH NUMBER | STATE FILE NUMBER

DECEDENT

1. DECEDENT'S NAME: First: Elizabeth; Middle: McLean; Last: Pence; Suffix: Pence
2. SEX: Female
3. DATE OF DEATH (Month, Day, Year): Aug. 26, 2002
4. SOCIAL SECURITY NUMBER: [redacted]
5a. AGE - Last Birthday (Years): 39
5b. If UNDER 1 YEAR (Months)
5c. If UNDER 1 DAY (Days)
6. DATE OF BIRTH (Month, Day, Year): Dec. 31 1962
7. BIRTHPLACE (City and State or Foreign Country): Florence SC
8. WAS DECEDENT EVER IN U.S. ARMED FORCES? (Yes or No): No
9. PLACE OF DEATH (Check only one): ☒ Hospital ☐ ER/Outpatient ☐ DOA ☐ Nursing Home ☐ Residence ☐ Other (Specify)
9a. FACILITY NAME (If not institution, give street and number): Marlboro Park Hospital
9b. CITY, TOWN, OR LOCATION OF DEATH: Bennettsville
9c. COUNTY OF DEATH: Marlboro
10. MARITAL STATUS (Married, Never Married, Widowed, Divorced (Specify)): Married
11. SURVIVING SPOUSE (If wife, give maiden name): Steven Pence
12a. DECEDENT'S USUAL OCCUPATION (Give kind of work done during most of working life. Do not use retired): Homemaker
12b. KIND OF BUSINESS/INDUSTRY: Domestic
13a. RESIDENCE - STATE: SC
13b. COUNTY: Marlboro
13c. CITY, TOWN, OR LOCATION: Bennettsville
13d. STREET AND NUMBER: 2001 Academy Road
13e. INSIDE CITY LIMITS? (Yes or No): No
13f. ZIP CODE: 29512
14. WAS DECEDENT OF HISPANIC ORIGIN? (If yes, specify Cuban, Mexican, Puerto Rican, etc.): ☐ Yes ☒ No (Specify)
15. RACE - White, Black, Asian, American Indian, etc. (Specify): White
16. DECEDENT'S EDUCATION (Specify only highest grade completed - Elementary/Secondary (1-12) or College (1-4 or 5+)): 14
17. FATHER'S NAME: First: Lawrence; Middle: Edmond; Last: Pence
18. MOTHER'S NAME: First: Elizabeth; Maiden Surname: McLean

DISPOSITION

19. INFORMANT'S NAME (Type/Print): Steven Pence
20. MAILING ADDRESS (Street and Number or Rural Route Number, City or Town, State, Zip Code): 2001 Academy Road Bennettsville SC 29512
20a. METHOD OF DISPOSITION: ☒ Burial ☐ Cremation ☐ Removal from State ☐ Donation ☐ Other (Specify)
20b. PLACE OF DISPOSITION (Name of cemetery, crematory, or other place): Tatum Cemetery
20c. LOCATION - City or Town, State: Tatum SC
21. FUNERAL DIRECTOR OR PERSON ACTING AS SUCH (Signature): [signature]
21a. FUNERAL DIR. LICENSE NO: 1548
21b. NAME AND ADDRESS OF FACILITY: Wortier-Evans Funeral Home 507 East Main Street Bennettsville SC 29512
21c. LICENSE NUMBER (If applicable): 39
22. EMBALMER (Signature): [signature]
22a. EMBALMER LICENSE NO: 1609

PRONOUNCING PHYSICIAN ONLY

23. Complete items 23a-c only when certifying physician is not available at time of death to certify cause of death.
23a. To the best of my knowledge, death occurred at the time, date, and place stated.
23b. Signature and Title
23c. LICENSE NUMBER
23d. DATE SIGNED (Month, Day, Year)

CAUSE OF DEATH

24. TIME OF DEATH: 2:45 PM
25. PRONOUNCED DEAD (Time): 2:45 PM
26. WAS CASE REFERRED TO MEDICAL EXAMINER/CORONER? (Yes or No): No

See Instructions On Other Side For Definition Of Cause

27. PART I. Enter the diseases, injuries, or complications that caused the death. Do not enter the mode of dying, such as cardiac or respiratory arrest, shock, or heart failure. List only one cause on each line.
Approximate Interval Between Onset and Death
Immediate Cause (Final disease or condition resulting in death): a. Cardiac Arrest
Sequentially list conditions, if any, leading to immediate cause. Enter UNDERLYING CAUSE (disease or injury that initiated events resulting in death) LAST: b. DUE TO (OR AS A CONSEQUENCE OF):
c. DUE TO (OR AS A CONSEQUENCE OF):
d. DUE TO (OR AS A CONSEQUENCE OF):
28. PART II. Other significant conditions contributing to death but not resulting in the underlying cause given in PART I.
28a. AUTOPSY (Yes or No): No
28b. WERE AUTOPSY FINDINGS CONSIDERED IN DETERMINING CAUSE OF DEATH? (Yes or No): No
29. MANNER OF DEATH: ☐ Natural ☐ Accident ☐ Suicide ☐ Homicide ☐ Pending Investigation ☐ Could not be determined
29a. DATE OF INJURY (Month, Day, Year)
29b. TIME OF INJURY
29c. INJURY AT WORK? (Yes or No)
29d. DESCRIBE HOW INJURY OCCURRED
29e. PLACE OF INJURY - (Home, Farm, Street, Factory, Office Bldg., etc.) (Specify)
29f. LOCATION (Street and Number or R.F.D. Number, City or Town, State)

CERTIFIER

30a. CERTIFIER (Check only one): ☐ CERTIFYING PHYSICIAN (Physician certifying cause of death) ☐ MEDICAL EXAMINER ☐ CORONER ☐ PRONOUNCING AND CERTIFYING PHYSICIAN (Physician both pronouncing death and certifying to cause of death)
30b. NAME OF ATTENDING PHYSICIAN IF OTHER THAN CERTIFIER
31. SIGNATURE AND TITLE OF CERTIFIER (To the best of my knowledge, death occurred at the time, date and place and due to the cause(s) stated.)
32. LICENSE NUMBER
33. DATE SIGNED (Month, Day, Year): 8-29-02
34. NAME AND ADDRESS OF PERSON WHO SIGNED IN 33a (Type/Print): SHAVIAT IFTIKHAR 913 Oakwood St Bennettsville SC 29512

REGISTRAR

35. REGISTRAR'S SIGNATURE: [signature]
36. DATE FILED (Month, Day, Year): SEP 05 2002

DHEC 670
Rev. 1990

ATTEST: A TRUE COPY

Judge of Probate, Orangeburg County, South Carolina

STATE OF SOUTH CAROLINA )
) LAST WILL AND TESTAMENT
COUNTY OF MARLBORO )

I, ELIZABETH P. PENCE, a resident of the County of Marlboro, [redacted] State of South Carolina, being of full age and sound and disposing mind and memory, do hereby make, publish and declare this as and for my Last Will and Testament, hereby revoking any and all testamentary instruments heretofore made by me.

ITEM I

I direct that all my just debts, secured and unsecured, be paid as soon as practicable after my death.

EPP
CRP

ITEM II

I give and bequeath all of my tangible personal property of every kind including but not limited to furniture, appliances, furnishings, pictures, silverware, china, glass, books, jewelry, wearing apparel, boats, automobiles, and other vehicles and all policies of fire, burglary, property damage, and other insurance on or in connection with use of this property, in accordance with such signed memorandum as may be left with this my Will at the time of my death. In the event or to the extent that this disposition of my said tangible personal property is for some reason ineffective, then any tangible personal property not effectively disposed of by memorandum shall become a part of the rest and residue of my estate, disposed of in ITEM III below.

ITEM III

I give, devise and bequeath all the rest, residue and remainder of my property and estate, real, personal or mixed, wherever situate and whether now owned by me or acquired by me after the execution of this Will, to the Trustees of the Trust Agreement executed by me, as Settlor, on the 1 day of Feb. 2002

CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

2002, in which I named myself and WACHOVIA BANK, N.A. as the initial Trustees, to be held, managed and distributed as therein provided.

ITEM IV

I hereby nominate, constitute and appoint WACHOVIA BANK, N.A. as Personal Representative of this my Last Will and Testament to serve without bond and to receive compensation for its services in accordance with its standard schedule of fees in effect at the time of my death.

ITEM V

In addition to the powers conferred by statute or general rules of law, and with the direction that a grant of specific powers shall not be construed as a limitation of general powers granted herein by statute or law, my Personal Representative shall be authorized and empowered, with respect to any and all property at any time constituting part of my estate, to hold and retain such property, to sell and dispose of same at public or private sale, at such prices and upon such terms as my Personal Representative shall deem proper; to compromise, settle and/or adjust any claim or demand by or against my estate and to agree to any rescission or modification of any contract or agreement affecting such estate; to invest and reinvest in any kind of property, real and personal, without limitation to the class of investments in which personal representatives may be authorized by statute or rule of court; to exercise any option or privilege to convert securities belonging to my estate personally or by proxy; to become a party to any reorganization, liquidation, consolidation or other capital readjustment; to cause securities of my estate to be registered in the name of a nominee; to employ a custodian or agent to manage real property belonging to my estate; to lease any such real



CERTIFIED A TRUE COPY
P. Mark Heath
P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

property regardless of the fact that the term of any such lease may extend beyond the period of administration of my estate; to borrow money for the benefit of my estate and to pledge or mortgage any property so held as security therefor; to make partition, division or distribution of my estate in kind or in cash or partly in kind and partly in cash; to effectively disclaim, in whole or in part, any and all gifts, devises or bequests to me made if in the discretion of my Personal Representative such disclaimer is to the advantage of my estate or the beneficiaries of my estate; and to do all other acts which may be necessary or appropriate in the discretion of my Personal Representative for the proper and advantageous management, investment and distribution of my estate all of which may be done without order of or report to any Court.

ITEM VI

I have intentionally made no provision in this my Will for my husband, STEPHEN PENCE, for reasons which he will understand.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 1 day of ~~January,~~ Feb. 2002.

Elizabeth P. Pence (Seal)
ELIZABETH P. PENCE

Signed, sealed, declared and published by ELIZABETH P. PENCE as her Last Will and Testament, in the presence of us, the subscribing witnesses, who at her instance and request and in her presence and in the presence of each other have hereunto set our hands the day and year aforesaid.

Raleigh NC.



CERTIFIED A TRUE COPY

P. Mark Heath

P. MARK HEATH
PROBATE JUDGE FOR MARLBORO COUNTY
PO Box 455
Bennettsville, SC 29512

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF ORANGEBURG | ) | 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,.

Plaintiffs,

v.

James B. Drennan, III, as Pesonal 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, NA, as Personal Representative of the Estate of Elizabeth P. Pence, Wachovia Bank, NA as Trustee of the Elizabeth P. Pence, Wachovia Bank, NA, 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**

FILED FOR RECORD
LISA W. MIZELL
CLERK OF COURT
ORANGEBURG, SC
2008 MAR 27 P 1:43

The undersigned does certify that on the 18th day of March, 2008, that she did cause to have served by U.S. Postal Service, regular mail, a copy of Defendants Thompsons' Notice of Motion and Motion for Summary Judgment, to the following:

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

ATTEST: TRUE COPY
CLERK OF COURT
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Monica Mulvey McGee
Paralegal

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | |
| COUNTY OF ORANGEBURG ) | 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, Plaintiffs, v. James B. Drennan, III, as Pesonal 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, NA, as Personal Representative of the Estate of Elizabeth P. Pence, Wachovia Bank, NA, 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. | **MEMORANDUM IN SUPPORT OF DEFENDANTS CHARLES P. THOMPSON, JR. AND CHERI (CHERYL) BROWN THOMPSON'S MOTION FOR SUMMARY JUDGMENT** |

The Defendants Charles P. Thompson, Jr. and Cheri (Cheryl) Brown Thompson ("Defendants Thompson"), hereby submit this Memorandum in support of their Motion for Summary Judgment.

## FACTS

Viewing the facts in the light most favorable to the non-moving party, the record reveals the following: On July 30, 1998 Elizabeth McLean Pence ("Lib Pence") gave Defendant James E. Brogdon, Sr. ("Brogdon") a durable power of attorney. Shortly thereafter, on May 28, 1999, Brogdon, as Lib Pence's agent, created and executed the Trust of Elizabeth McLean Pence ("Lib Pence Trust") and conveyed three parcels in Orangeburg County into the Lib Pence Trust: a 208.5 acre parcel, an 11.8 acre parcel, and an 88.1 acre parcel (collectively "the Gramling Place Property"). Several other properties located in Orangeburg County owned by Lib Pence at the time of the creation and execution of the Lib Pence Trust and which are the subject of this litigation – specifically, the properties Plaintiffs refer to as the "Caw Caw Swamp Property" and the "Cannon Bridge Road Property" – were never transferred into the Trust.

The Lib Pence Trust provided that Lib Pence's daughter, Elizabeth P. Pence ("Elizabeth Pence"), would receive all income from the trust during her lifetime and that at Elizabeth Pence's death the assets of the Lib Pence Trust would be divided evenly among Elizabeth Pence's living issue. If, however, Elizabeth Pence died without living issue, the "McLean family land in Orangeburg County, SC" was to be distributed to the issue of Norman M. McLean.

Lib Pence died on October 3, 1999. Shortly thereafter, on October 19, 2000, Elizabeth Pence commenced litigation challenging the validity of the Lib Pence Trust. Plaintiffs in the instant action were not a party to that action. On February 26, 2002, the parties to that action – the Estate of Lib Pence, the Lib Pence Trust, and Elizabeth Pence – entered into a Settlement Agreement. The Caw Caw Swamp Property and the Cannon

Road Property were not at the time, nor were they ever, assets of the Lib Pence Trust and therefore were not subject to the October 19, 2000 trust litigation or the February 26, 2002 Settlement Agreement between the parties.

On August 26, 2002, Elizabeth Pence died without surviving issue. Defendant Wachovia Bank was approved as the personal representative of the Estate of Elizabeth Pence. On July 23, 2004, Wachovia Bank, as personal representative of the Estate of Elizabeth Pence, sold Tract 2-B of the Caw Caw Swamp Property to Defendants Thompson.

On December 20, 2006, Plaintiffs filed this lawsuit against Defendants Thompson alleging that Defendants Thompson do not possess valid title to Tract 2-B of the Caw Caw Swamp Property and are wrongfully in possession thereof. Specifically, Plaintiffs have raised four causes of action against Defendants Thompson: a Quiet Title action; a Declaratory Judgment claim; a Constructive Trust claim; and a claim for Unjust Enrichment. On March 13, 2008, Defendants Thompson moved this Court for Summary Judgment as to all of Plaintiffs' claims against them on the grounds that 1) the Defendants Thompson were bona fide purchasers for value without notice of the Plaintiffs' instant claims and that 2) Plaintiffs' claims against Defendants Thompson are time-barred by the 3-year statute of limitations and the applicable Probate Code. This matter is now before the Court on Defendants Thompson's motion.

## DISCUSSION

### STANDARD FOR SUMMARY JUDGMENT

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d

868, 874 (2001). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Peterson v. West American Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. *Regions Bank v. Schmauch*, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003).

## I. Defendants Thompson are Bona Fide Purchasers for Value Without Notice of Plaintiffs' Claims.

The Defendants Thompson are bona fide purchasers for value of Tract 2-B of the Caw Caw Swamp Property without notice of the claims that the Plaintiffs now advance and therefore take title to the same free and clear of any interests or claims which Plaintiffs now assert. *Liberty Loan Corp. of Darlington, S.C. v. Mumford*, 283 S.C. 134, 140, 322 S.E.2d 17, 21 (Ct. App. 1984) (holding that "whenever in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified").

Under South Carolina Law, to claim the status of a bona fide purchaser, a party must show: "(1) he has actually paid in full the purchase money ...; (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased bona fide, *i.e.*, in good faith and with integrity of dealing, without notice of a lien or defect." *Spence v. Spence*, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006). The first two of these elements are undisputed: 1) On July 23, 2004, Defendants Thompson paid the full purchase price of

$82,000.00 to Wachovia Bank as personal representative of the Estate of Elizabeth Pence, (2) in exchange for and thereby acquiring legal title to Tract 2-B of the Caw Caw Swamp Property. The third element, that the purchase be bona fide, *i.e.* in good faith and without notice of a lien or defect, also does not appear to be disputed in the record.

There are two basic forms of notice by which a purchaser may be charged with knowledge of the rights of another in real property: actual notice and constructive/inquiry notice. *Id.* at 118, 628 S.E.2d at 875. Under clearly established South Carolina law, a purchaser of real property has actual notice of a title defect or other claim, lien, or interest adverse to his own only when:

> [H]e actually knows about the defect or claim, or when a reasonable person, if made aware of the same information known to the buyer, would be charged with actual notice of the defect or claim. Actual notice may consist of facts or conditions observed by a prospective purchaser as well as information conveyed orally or in writing to him.

*Id.* The complaint in the instant matter does not allege *any* fact or theory of recovery indicating Defendants Thompson had actual notice of a title defect, adverse claim, or other interest with regard to the Caw Caw Swamp Property. Likewise, there is no indication anywhere in the record that Defendants Thompson had *any* actual notice of a title defect, adverse claim, or other interest in the Caw Caw Swamp Property at the time of their purchase. As such, for the purposes of summary judgment, as a matter of law in South Carolina, the Defendants Thompson did not have actual notice of the Plaintiffs' instant claims to the Caw Caw Swamp Property at the time of their purchase.

Constructive notice, under South Carolina law, is a legal inference imputed to a person whose knowledge of facts is sufficient to put him on inquiry and, if these facts were pursued with due diligence, they would lead to other undisclosed facts. *Id.* at 119;

628 S.E.2d at 876. In the context of a real estate transaction, constructive or inquiry notice "is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world." *Id.* at 119-120, 628 S.E.2d at 876. The South Carolina Supreme Court has been "most exacting in determining what actions satisfy the requirements of inquiry notice ... [having] denied subsequent purchasers comfort under the umbrella of a bona fide purchaser when the exercise of prudence would have avoided the difficulty." *Id.* at 121, 628 S.E.2d at 876. In each instance, it appears only to be documents in the public record which provide constructive or inquiry notice to a real estate purchaser sufficient to defeat the umbrella of a bona fide purchase defense.

In the instant matter, Plaintiffs have not alleged, and cannot otherwise adduce a single document in the public record which should have placed the Defendants Thompson on constructive or inquiry notice. In fact, none of the deeds, mortgages or other instruments set forth in the chain of title outlined in Plaintiffs' Complaint references or otherwise alludes to Plaintiffs' now-claimed interest in the Caw Caw Swamp Property. The fiasco and fallout related to the October 19, 2000 trust litigation and Probates of the Estates of Lib Pence and Elizabeth Pence are only reflected in the public records in Marlboro County. There is nothing in the Orangeburg County public records that places anyone on notice of the claims Plaintiffs now assert to the Caw Caw Swamp Property. There were ancillary administrations for both the Estates of Lib Pence and Elizabeth Pence in Orangeburg County, certified true copies of which are attached to these Defendants' Motion for Summary Judgment. Nothing in these ancillary administrations provides constructive or inquiry notice of the Plaintiffs' now-asserted claims to the Caw

Caw Swamp Property. In fact, the ancillary administrations provide and corroborate the uncontested link in the chain of title to the Caw Caw Swamp Property. As such, as a matter of law, Defendants Thompson are bona fide purchasers of the Caw Caw Swamp Property without notice of the claims that the Plaintiffs now advance and, therefore, hold title to the Caw Caw Swamp Property free and clear of any interests or claims which the Plaintiffs now assert.

II. **Plaintiffs' Claims are Barred by the Applicable Statutes of Limitations.**

Plaintiffs' claims are barred both by the three year statue of limitations provided by §15-5-530(1) of the South Carolina Code and by the Probate Code claims statutes (§62-3-801 and §62-3-803(a) of the South Carolina Code).

A. Plaintiffs Claims are Barred by §15-3-530(1).

Plaintiffs' claims are, in effect, claims as a purported third-party beneficiary to the February 26, 2002 Settlement Agreement. Plaintiffs contend that they were unaware of the breach of contract rights that they now claim until approximately July 2004 when Wachovia Bank, as personal representative of the Estate of Elizabeth Pence, sold the Caw Caw Swamp Property. Plaintiffs' testimony, however, belies this claim and clearly demonstrates that the Plaintiffs knew, or had reason to know, that the Caw Caw Swamp Property and Cannon Bridge Road Property were not in the Lib Pence Trust and were not subject to the February 26, 2002 Settlement Agreement. The record reveals the following:

1) James McLean knew, while Lib Pence was still alive, that the Gramling Road Property had been deeded to the Lib Pence Trust and

that the Caw Caw Swamp and Cannon Bridge Road properties had not. (Deposition of James McLean, page 18-20).

2) William McLean, on February 25, 2002, signed a document releasing his right to be a successor co-trustee to Mr. Brogdon and he received at that time what he described as a "partial faxed copy of the Settlement Agreement." (Deposition of William McLean, pages 27-29).

3) Perhaps most notably, after Elizabeth Pence's death, on September 27, 2002, October 1, 2002, October 21, 2002, and January 17, 2003, James Jackson, the McLean family lawyer, and James Drennan, attorney for Elizabeth Pence's personal representative Wachovia Bank, exchanged several letters regarding the fact that the Caw Caw Swamp Property and the Cannon Bridge Property were not part of the Settlement Agreement. Specifically, on October 21, 2002, the McLean's attorney wrote the following to Mr. Drennan:

> I have discussed the matter with my clients and they do accept the fact that the Caw Caw property and the Cannon Bridge Road property in which Elizabeth had a remainder interest were not put into the trust. Therefore, we accept that title to those properties passed through the Wills of Elizabeth Pence, the mother, and Elizabeth Pence, the daughter. (October 21, 2002 Letter from James B. Jackson to James B. Drennan).

James Jackson's October 21, 2002 letter to James Drennan clearly establishes that, at the latest, the statute of limitations began to run for the Plaintiffs' instant claims on October 21, 2002. It is a well-settled principle of law that the knowledge of an attorney is imputed to his clients:

> Because the rules of agency apply to the relation of attorney and client, generally notice to an attorney is notice to the client who employs him or her, and knowledge of an attorney is knowledge of, or is imputed to, the client. This rule applies in a criminal as well as in a civil case.
>
> The client is deemed bound by the acts of his or her lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney. The client generally is held to know what his or her attorney knows and should communicate to the client, and the fact that the attorney has not actually communicated his or her knowledge to the client is immaterial. 7A *CJS Attorney and Client*, §224. (internal citations omitted).

Accordingly, Plaintiffs' claims in the instant action became time-barred on October 21, 2005, three years after the McLean family attorney acknowledged (and effectively waived) Plaintiffs' instant claims. Plaintiffs did not bring the instant action until December 20, 2006. This action is, therefore, barred by the statute of limitations.

B. Plaintiffs' Claims are Barred by §62-3-803(a)

Section 62-3-801(a) of the South Carolina Code requires that a personal representative publish a Notice to Creditors once a week for three weeks in newspaper of general circulation, notifying creditors of the estate to present their claims within eight months after the date of first publication of the notice or be forever barred. Wachovia, as personal representative of the Estate of Elizabeth Pence, published such notice in the *Marlboro Herald* on September 16, 23, and 30, 2002.

Section 62-3-803(a) of the South Carolina Code provides:

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

for creditors who are given actual notice and within the time provided in Section 62-2-801(a) for all creditors barred by publication."

Plaintiffs clearly did not comply with requirements of §62-3-801 and §62-3-803. The instant litigation was not filed until December 19, 2006, more than three years after their claim was time-barred by the Probate Code. Therefore, pursuant to these statutes, Plaintiffs' claims against the Defendants Thompson were barred on May 16, 2003, eight months after Wachovia's first publication of Notice to Creditors. Plaintiffs' failure to file the instant action on or before May 16, 2003 is an absolute bar to their recovery against the Defendants Thompson. Furthermore, as discussed above, the letters between the McLean family attorney and James Drennan, attorney for Elizabeth Pence's personal representative Wachovia Bank, clearly indicate that Plaintiffs were aware, well within the statutory period for filing their claim against the Estate of Elizabeth Pence, that those administering the Estate had taken the position that the Caw Caw Swamp Property and the Cannon Bridge Road Property were not subject to the Settlement Agreement.

**CONCLUSION**

For the foregoing reasons, the Defendants Thompson respectfully request that this Court grant their motion for summary judgment and dismiss Plaintiffs' action with prejudice.

W. Cliff Moore, III
Attorneys for the Defendant
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P.O. Box 2285
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Telephone: (803) 254-4190

Columbia, SC
May 08, 2008

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF ORANGEBURG | ) | 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, Plaintiffs, | ) | |
| v. | ) | **CERTIFICATE OF SERVICE** |
| James B. Drennan, III, as Pesonal 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, NA, as Personal Representative of the Estate of Elizabeth P. Pence, Wachovia Bank, NA as Trustee of the Elizabeth P. Pence, Wachovia Bank, NA, 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. | ) | |

The undersigned does certify that on May 8, 2008, that she did cause to have served by U.S. Postal Service, regular mail and by email, a copy of Defendants Thompsons' Brief in Support of their Motion for Summary Judgment, to the following:

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Monica Mulvey McGee
Paralegal

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE ☒ COURT OF COMMON PLEAS
☐ FAMILY COURT

Norman M. McLean, et at
☐ Plaintiff

v.

James E. Brogdon, Sr., et al
☒ Defendant
check box above indicating submitting party

CASE NO.
2006 - CP - 38 - 1523

**MOTION INFORMATION FORM AND COVER SHEET**

| name, S.C. Bar no. and address of plaintiff's attorney | Name, S.C. Bar no. and address of defendant's attorney |
|---|---|
| Cecil H. Nelson, Jr./David Alexander<br>Post Office Box 2384<br>Greenville, SC 29602<br>telephone: fax:<br>e-mail: other: | Jeffrey L. Payne/C. Pierce Campbell<br>Post Office Box 5478<br>Florence, SC 29502<br>telephone:843-662-9008 fax:843-667-0828<br>e-mail: other: |

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: Motion for Summary Judgment
Estimated Time Needed: 30
Court Reporter Needed: YES / NO

**SECTION II: Motion Type**

☒ Written motion attached
☐ Form Motion --
I hereby move for relief or action by the court as set forth in the attached proposed order.

C. O. [illegible] 1-28-2008
Signature of Attorney for Plaintiff / Defendant Date submitted

**SECTION III: Motion Fee**

☒ PAID – AMOUNT:$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☒ Other:

| JUDGE'S SECTION | |
|---|---|
| ☐ Motion Fee to be paid upon filing of the attached order.<br>☐ Other: | JUDGE<br>CODE: _____ Date: _____ |

**CLERK'S VERIFICATION**

DATE FILED

Collected by: _____
(print name)

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

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.

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

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO: CECIL H. NELSON, JR., ESQUIRE AND DAVID ALEXANDER, ESQUIRE, ATTORNEYS FOR PLAINTIFFS:

The Defendant, James E. Brogdon, Sr., Trustee of the Trust Agreement of Elizabeth McLean Pence dated May 28, 1999 ("Brogdon"), through its undersigned counsel, hereby moves this Court, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for an Order granting summary judgment against the Plaintiffs. The Defendant Brogdon so moves upon the basis that there is no genuine issue of material fact regarding the Defendant Brogdon's actions, and a determination of any breach of fiduciary duty should be determined by this Court as a matter of law. The Defendant Brogdon owed no duty to the Plaintiffs to ensure that property was

transferred into the Trust for which he was Trustee. Further, Plaintiffs have presented no evidence regarding any mismanagement of the Trust assets for which the Defendant Brogdon was the Trustee.

For the foregoing reasons, the Defendant Brogdon submits that there is no genuine issue of material fact and that he is entitled to judgment in his favor as a matter of law. In support of his Motion, the Defendant Brogdon craves reference to the pleadings and all exhibits thereto, all discovery in this matter, any Affidavits which have been filed or may be filed before the hearing of this matter, any memoranda which may be submitted before the hearing of this matter, and the governing procedural and substantive law of the State of South Carolina.

AND IT IS SO MOVED.

Florence, South Carolina

January 28, 2008

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

By: _____

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

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 28th day of January, 2008, served a copy of the foregoing **Notice of Motion and Motion for Summary Judgment** on behalf of James E. Brogdon, Sr., upon counsel of record by mailing copies, postage prepaid, to:

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Secretary to Jeffrey L. Payne/
C. Pierce Campbell

Flor 707630v1

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

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.

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

**MEMORANDUM IN SUPPORT OF DEFENDANT JAMES E. BROGDON, SR.'S MOTION FOR SUMMARY JUDGMENT**

The Defendant James E. Brogdon, Sr, as Trustee of the Trust Agreement of Elizabeth McLean Pence dated May 28, 1999 (hereinafter "Brogdon"), hereby submits this Memorandum in support of his Motion for Summary Judgment.

## FACTS

In May 1999, Elizabeth McLean Pence ("Lib Pence") contacted her life-long accountant James Brogdon ("Brogdon") and requested his assistance in putting certain parcels of real estate that she owned in Orangeburg and Marlboro County into a trust. Particularly, Lib Pence wanted

to prevent her daughter, Elizabeth P. Pence ("Elizabeth Pence"), from owning this property outright after Lib Pence's death, as Elizabeth Pence had physical and mental problems. Lib Pence provided Brogdon with old deeds to the real estate she wanted protected and informed Brogdon that she wanted to put the property into a trust. Brogdon contacted Munford Scott, a trust and estate lawyer in Florence, South Carolina, to assist with the preparation of a trust. Scott, Brogdon, and Lib Pence worked together to create a trust according to Lib Pence's wishes. Brogdon, as power of attorney holder for Lib Pence, executed the Trust of Elizabeth McLean Pence dated May 28, 1999 ("Lib Pence Trust") and conveyed a 208.5 acre parcel, an 11.8 acre parcel, and an 88.1 acre parcel, all located in Orangeburg County (collectively "the Gramling Place Property"), to the Lib Pence Trust along with numerous parcels in Marlboro County.

The Lib Pence Trust provided that Elizabeth Pence would receive all income from the trust during her life, among other things, and at her death in the event she had children, the trust would be divided into shares for her children. The Lib Pence Trust further provided that in the event Elizabeth Pence died without issue, the trust would be distributed, with the Plaintiffs receiving "McLean family land in Orangeburg County, SC" and the balance paid equally to Clemson University and Coker College.

Lib Pence died on October 3, 1999. Shortly after Lib Pence's death, Elizabeth Pence learned of the Lib Pence Trust and filed a petition challenging the validity of the Lib Pence Trust. Protracted litigation between the Estate of Lib Pence, the Lib Pence Trust, and Elizabeth Pence occurred and was resolved in January 2002 pursuant to a settlement agreement ("Settlement Agreement") approved by the court on February 26, 2002. (See Tab 1) On February 25, 2002, William McLean on behalf of the Plaintiffs was notified of the settlement of

the trust litigation and was provided with a copy of the Settlement Agreement and the Lib Pence Trust.

The Settlement Agreement provided that 60% of the trust assets would be transferred to Elizabeth Pence with the remaining 40% remaining in the Lib Pence Trust. Pursuant to the Settlement Agreement, property worth 60% of the value of all trust assets was conveyed to Elizabeth Pence and the trust retained 40% of the value of the assets, which included the Grambling Place Property. As the parties to the Trust Litigation attempted to divide the property pursuant to the Settlement Agreement, the parties learned that the only property in Orangeburg County owned by the Lib Pence Trust was the Gramling Place Property. The parties effectuated settlement and divided the trust assets using the values of the assets actually owned by the Trust. The Estate of Lib Pence, the Lib Pence Trust and Elizabeth Pence all agreed to the division of the assets and pursuant to the Settlement Agreement the Lib Pence Trust retained the Grambling Place Property which was worth over $1.5 million.

In addition to the Gramling Place Property, Lib Pence owned parcels of land with 226.6, 122, 67, 143, 5.5, 47, and 125 acres respectively, all located in Orangeburg County and known collectively as the Cannon Bridge Road Property. Lib Pence also owned 174.9 acres in Orangeburg County known as the Caw Caw Swamp Property. Lib Pence's interest in the Cannon Bridge Road Property and the Caw Caw Swamp Property passed to her daughter Elizabeth Pence pursuant to the terms of her will.

Six months after the approval of the Settlement Agreement, Lib Pence died on August 26, 2002. The properties received by Elizabeth Pence as a distribution from her mother's estate thereafter passed pursuant to the terms of her own will. After Elizabeth Pence's death, the Plaintiffs became successor beneficiaries of the Lib Pence Trust and ultimately received the

Gramling Place Property from the Lib Pence Trust. At the time of Lib Pence's death, the Gramling Place Property was valued at over $1.5 million.

The Plaintiffs have now brought various claims against Brogdon alleging, among other things, that he should have transferred Lib Pence's interest in the Cannon Bridge Road Property and the Caw Caw Swamp Property to the Lib Pence Trust before Lib Pence's death and that he has mismanaged the assets of the Trust.

## ANALYSIS

### STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001). While the court must view the evidence in the light most favorable to the Plaintiff, the Plaintiff cannot defeat summary judgment by relying on mere allegations in their Complaint. Rule 56(e), SCRCP; Id.; Shupe v. Settle, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994). Instead, the Plaintiff must set forth specific facts showing there is a genuine issue of material fact. Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994). The trial judge is not required to single out some small piece of evidence and attach to it a great significance when that evidence is introduced solely to create an issue of fact that is not genuine. Main v. Corley, 281 S.C. 525, 315 S.E.2d 406 (1984). In other words, the Plaintiff must present more than a mere scintilla of evidence to overcome a Defendant's Motion for Summary Judgment. Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994).

### FAILURE TO TRANSFER PROPERTY TO TRUST

The Plaintiffs have alleged that the Defendant Brogdon breached his fiduciary duty as trustee of the Trust by failing to transfer Lib Pence's interest in the Cannon Bridge Road

Property and the Caw Caw Swamp Property to the Trust before Lib Pence's death. The Plaintiffs, as beneficiaries of the Trust, argue that they were owed certain duties from Brogdon, as Trustee. While Brogdon agrees generally that trust beneficiaries are entitled to certain duties from a trustee related to handling and administration of a trust, he strongly disagrees that he owes any duties to the beneficiaries to transfer any assets to the trust.

The creation and administration of trusts in South Carolina are governed by the Uniform Trust Code which became effective January 1, 2006. Nothing in the South Carolina Uniform Trust Code creates a responsibility for a trustee to be sure that the settlor transfers property into the trust. A settlor is "a person, including a testator, who creates, or contributes property to, a trust." S. C. Code Ann. § 62-7-103(14) (See Tab 2 for a copy of Section 62-7-103). The settlor transfers his interest in the trust property to the beneficiaries and the trustee holds legal title to the property under an express or implied agreement to apply it to the benefit of another. 76 Am. Jur. 2d *Trusts* § 2.(See Tab 3). The South Carolina Uniform Trust Code's definition of a trustee does not include any responsibility to transfer property into a trust. S. C. Code Ann. § 62-7-103(19).

Trustees in South Carolina have many duties, most of them running to the benefit of the beneficiaries of the trust. These duties include the following: 1) the duty to administer the trust in good faith according to its terms, S. C. Code Ann. § 62-7-801 (See Tab 4), 2) the duty of loyalty to administer the trust solely in the interest of the beneficiaries and to place the interests of the beneficiaries above the trustee's own interest and the interests of others, S. C. Code Ann. § 62-7-802 and Official Comment thereto(See Tab 5), 3) the duty to manage, distribute, and invest trust property impartially, without regard to various beneficiaries' interest, S. C. Code Ann. § 62-7-803 (See Tab 6), 4) the duty to prudently administer the trust using reasonable care, skill,

and caution in managing and distributing the trust, S. C. Code Ann. § 62-7-804 (See Tab 7), 5) the duty to control and protect trust property, S.C. Code Ann. § 62-7-809 (See Tab 8), 6) the duty to keep adequate records of the trust and to keep trust property separate from other property possessed by the trustee, S. C. Code Ann. § 62-7-810 (See Tab 9), 7) the duty to enforce and defend any claims made against the trust, S. C. Code Ann. § 62-7-811 (See Tab 10), and 8) the duty to keep beneficiaries reasonably informed about the administration of the trust and to respond in a timely manner to requests for information from the beneficiaries, S. C. Code Ann. § 62-7-813. (See Tab 11)

The statutory listing of the duties of the trustee make clear that it is the settlor, not the trustee, who is responsible for transferring property into the trust. A trustee has the power to "collect trust property and *accept or reject additions to the trust property from a settlor* or any other person." S. C. Code Ann. § 62-7-816(1)(emphasis added) (See Tab 12). The Official Comments to this section further repeat that this power of the trustee is simply a collection ability. Also, the extensive listing of trustee powers in the Uniform Trust Code does not include the power to transfer property into the trust without affirmative action by the settlor.

In their Complaint and in deposition testimony, the Plaintiffs have suggested that Brogdon owed them a duty to transfer the Cannon Bridge Road Property and the Caw Caw Swamp Property into the Lib Pence Trust before Lib Pence's death. Under the law of South Carolina, no such duty exists. A trustee does not have the power to make property a part of the trust without the settler effectuating such a transfer. The defendant Brogdon is entitled to summary judgment on the Plaintiffs' claim that he breached a fiduciary duty by failing to transfer certain property into the Lib Pence Trust.

MISMANAGEMENT OF TRUST ASSETS

The Plaintiffs have also alleged that Brogdon breached a fiduciary duty to the Plaintiffs, as beneficiaries of the Lib Pence Trust, by mismanaging the Lib Pence Trust property and failing to protect the Plaintiffs' interests therein. As discussed hereinabove, a trustee has a duty to properly manage and invest the assets of the trust, a duty of loyalty to the beneficiaries, and a duty to carry out the terms of the trust in good faith. Brogdon does not deny these responsibilities. However, the Plaintiffs have presented no evidence whatsoever to show that Brogdon failed in these duties.

When questioned on how Brogdon mismanaged the assets of the trust, the Plaintiffs have been unable to provide any actual allegations of specific wrongdoing. Norman M. McLean's response, when asked what Brogdon had done to mismanage the trust, was: "I haven't been keeping up with that as far as managing the trust....I think I might have a little idea what you talking about, but not enough to even discuss. I think I know about where you're coming from on that, but I can't really—don't have enough knowledge to talk about it.". (Depo. of Norman M. McLean, p. 107, l. 22-p. 108, l. 6). Another Plaintiff, James L. McLean, stated "I don't know remember the particulars on that," when asked how Brogdon mismanaged trust assets. (Depo. of James L. McLean, p. 62, ll. 24-25). The Plaintiffs have not provided a response to Brogdon's Interrogatory seeking specifics of mismanagement.

With no actual evidence supporting claims for mismanagement of trust assets, the Defendant Brogdon is entitled to summary judgment in his favor. The Plaintiffs may not stand on the mere allegations of their Complaint to defeat summary judgment. Dependence on the vague responses to deposition questions that "something" might have constituted

mismanagement, with no specifics given, is simply not enough. Such responses constitute the infamous "mere scintilla of evidence" which cannot defeat a summary judgment motion.

## CONCLUSION

The Defendant Brogdon is entitled to summary judgment in his favor on the claims for breach of fiduciary duty by the Plaintiffs. Brogdon did not owe a duty to the Plaintiffs to transfer property into the Lib Pence Trust on his own accord. There is no evidence that Brogdon ever mismanaged the assets of the Lib Pence Trust or violated his duty of loyalty to the beneficiaries of the Lib Pence Trust. No genuine issue of material fact on these points exists. As such, the Plaintiffs' claims against Brogdon for breach of fiduciary duty must fail as a matter of law.

Florence, South Carolina

May 5, 2008

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

By: _____

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

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.

INDEX


1. Compromise and Settlement Agreement dated January 2002 (with Exhibits).
2. S.C. Code § 62-7-103.
3. 76 Am. Jur. 2d *Trusts* § 2
4. S.C. Code § 62-7-801.
5. S.C. Code § 62-7-802.
6. S.C. Code § 62-7-803.
7. S.C. Code § 62-7-804.
8. S.C. Code § 62-7-809.

9. S.C. Code § 62-7-810.

10. S.C. Code § 62-7-811

11. S.C. Code § 62-7-813.

12. S.C. Code § 62-7-816

STATE OF SOUTH CAROLINA )
) IN THE x COURT OF COMMON PLEAS
□ FAMILY COURT
COUNTY OF ORANGEBURG )

Norman M. McLean et al, ) Case No. C/A No. 06-CP-38-1523
)
□ Plaintiff(s), ) MOTION INFORMATION FORM AND COVER SHEET
)
Versus )
Estate of Stephen Pence et al )
)
X Defendant(s). )

name, S.C. Bar no. and address of plaintiff's attorney

Plaintiff's Attorney: David Alexander
Bar No:
Address: P. O. Box 1904
Greenville, SC 29602
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name, S.C. Bar no. and address of defendant's attorney

Defendants' Attorney Harry R. Easterling
Bar No. 1828
Goldberg & Easterling, P.A.
P. O. Box 655
Bennettsville, SC 29512
Telephone: (843) 479-2878;
Fax: (843) 479-2879
Attorney for Estate of Stephen Pence and Harry R. Easterling, Jr.

X MOTION HEARING REQUESTED (attach written motion and complete SECTION I and III)
□ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment
Estimated Time Needed: 45minutes Court Reported Needed: YES X / NO □

SECTION II: Motion Type

X Written motion attached
□ Form Motion -
I hereby move for relief or action by the court as set forth in the attached proposed order.

Harry R. Easterling
Signature of Attorney for /Defendant

2/15/2008
Date submitted

SECTION III: Motion Fee

X PAID - AMOUNT: $25.00
□ EXEMPT: □ Rule to Show Cause in Child or Spousal Support
□ Domestic Abuse or Abuse and Neglect
□ Indigent Status
□ State Agency v. Indigent Party
□ Sexually Violent Predator Act
□ Post-Conviction Relief
□ Motion for Stay in Bankruptcy
□ Motion for Publication Motion for Execution (Rule 69, SCRCP)
□ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:_____
□ Other:

JUDGE'S SECTION

□ Motion Fee to be paid upon filing of the attached order.
□ Other:

JUDGE CODE _____ DATE _____

CLERK VERIFICATION

DATE FILED

Collected by:_____
(print name)
□ MOTION FEE COLLECTED: _____
□ CONTESTED-AMOUNT DUE: _____

| | |
|---|---|
| STATE OF SOUTH CAROLINA, | IN THE COURT OF COMMON PLEAS |
| | 2006-CP-38-1523 |
| COUNTY OF ORANGEBURG. | |
| Norman M. McLean; James N. McLean; Marie McLean -Choi; William N. McLean; Robert L. McLean; and JL McLean Properties, LLC, | |
| Plaintiffs, | |
| versus | NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT |
| 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. | |

TO: DAVID ALEXANDER, ESQUIRE; ATTORNEY FOR PLAINTIFFS

The Defendants, James J. Pence, Jr., as Personal Representative of the Estate of Stephen Pence; and Harry R. Easterling, Jr., through their undersigned counsel, hereby move this Court, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for an Order granting Summary Judgment against the Plaintiffs. The Defendants James J. Pence, Jr., as Personal Representative of the Estate of Stephen Pence; and Harry R. Easterling, Jr. move upon the grounds that (1) Plaintiffs' action is barred by Section 15-3-530(1) of the Code of Laws of South Carolina (1976) and (2)

Plaintiffs' action is further barred by Section 62-3-803(a) of the Code of Laws of South Carolina (1976). The Defendants James J. Pence, Jr., as Personal Representative of the Estate of Stephen Pence; and Harry R. Easterling, Jr. move upon the basis that there is no genuine issue of material fact regarding the application of the three year statute of limitations imposed by Section 15-3-530(1) of the Code measured from the date on which the Plaintiffs had actual and/or constructive knowledge of their purported rights under the Settlement Agreement and that there is no genuine issue of material fact regarding the application of the South Carolina Probate Code's claims statute as set forth in Section 62-3-803(a) of the Code to the facts of this case, since Plaintiffs filed no claim within the time prescribed by the said Section.

In support of its Motion, the Defendants James J. Pence, Jr., as Personal Representative of the Estate of Stephen Pence; and Harry R. Easterling, Jr. make reference to the pleadings and all exhibits thereto, all discovery in this matter, any affidavits which have been filed or may be filed before the hearing in this matter, and the governing procedural and substantive law of the State of South Carolina.

Based on the foregoing, the Defendant s James J. Pence, Jr., as Personal Representative of the Estate of Stephen Pence; and Harry R. Easterling, Jr. submit that there is no genuine issue of material fact and that they are entitled to judgment in their favor as a matter of law.

AND IT IS SO MOVED.

GOLDBERG & EASTERLING, P.A.

BY Harry R. Easterling, Sr.

Bennettsville, S. C.
February 15, 2008

Harry R. Easterling, Sr.
SC Bar #1828
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ATTORNEY FOR DEFENDANTS
JAMES J. PENCE, JR., PERS. REP.
OF ESTATE OF STEPHEN PENCE
AND HARRY R. EASTERLING, JR.

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA,<br><br>COUNTY OF ORANGEBURG. | ) | IN THE COURT OF COMMON PLEAS<br>2006-CP-38-1523 |
| Norman N. McLean; James N. McLean; Marie McLean -Choi; William N. McLean; Robert L. McLean; and JL McLean Properties, LLC,<br><br>Plaintiffs,<br><br>versus | ) | CERTIFICATE OF SERVICE BY MAIL |
| 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.,<br><br>Defendants. | ) | |

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 James J. Pence, Jr., as Personal Representative of the Estate of Stephen Pence and Defendant Harry R. Easterling, Jr., in the above-captioned matter; that on February 15, 2008, a copy of the attached Notice of Motion and Motion for Summary Judgment and Cover Sheet of the Defendant James J. Pence, Jr., as Personal Representative of the Estate of Stephen Pence, and Defendant Harry R.

Easterling, Jr. and this Certificate of Mailing was placed in an envelope, with postage prepaid, and mailed to the following:

✓David Alexander, Esquire
P. O. Box 1904
Greenville, SC 29602

John Jay James, II, Esquire
Paulling & James, LLP
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Jeffrey L. Payne, Esquire
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W. Cliff Moore, III, Esquire
Ellis, Lawhorne & Sims, PA
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Patricia M. Bundy

SWORN to before me this
15th day of February, 2008.

_____(L.S.)
Notary Public for SC
My commission expires 8/17/2012

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA,<br><br>COUNTY OF ORANGEBURG. | ) | IN THE COURT OF COMMON PLEAS<br>2006-CP-38-1523 |
| Norman M. McLean; James N. McLean; Marie McLean-Choi; William N. McLean; Robert L. McLean; and JL McLean Properties, LLC,<br><br>Plaintiffs,<br><br>versus<br><br>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.,<br><br>Defendants. | ) | BRIEF OF THE DEFENDANTS JAMES J. PENCE AS PERSONAL REPRESENTATIVE AND HARRY R. EASTERLING, JR IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT UNDER SCRCP RULE 56 |

The Defendants, James J. Pence as Personal Representative of the Estate of Stephen Pence and Harry R. Easterling, Jr., respectfully submit this Brief in support of each Defendant's Motion for Summary Judgment.

## FACTS

The facts and timeline relevant to this Motion may be summarized as follows:

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

2. On May 28, 1999, pursuant to the power of attorney, Brogdon created a Revocable Trust Agreement for Pence, Sr. and thereafter transferred to himself as Trustee of that Trust certain real properties in Marlboro and Orangeburg Counties along with liquid assets of substantial value. The properties which are the subject of this litigation (the "Caw Caw Swamp" property and the "Cannon Bridge Road" property) were never transferred to this Trust. The only Orangeburg County property transferred to this Trust was the "Grambling Road" property. This Trust Agreement provided lifetime benefits for Pence, Sr. The Trust became irrevocable at the death of Pence, Sr. and provided for lifetime benefits to the daughter of Pence, Sr., Elizabeth P. Pence (hereinafter "Pence, Jr."). The Trust provided further that at the death of Pence, Jr. the trust assets were to go to her issue, and, if there were no issue of Pence, Jr., the Orangeburg County real estate held by the Trust was to go to the issue of Norman M. McLean (and all other assets were to go to Clemson University and Coker College).

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

4. On October 19, 2000, Pence, Jr. brought suit against Brogdon, Clemson University, and Coker College to contest the validity of the May 28, 1999 Trust

Agreement and the property transfers thereto. Plaintiffs were not a party to this action.

5. On February 26, 2002, the parties entered into a court-approved Settlement Agreement. Pursuant to this Agreement, sixty percent (60%) of the trust assets were to be distributed to Pence, Jr. (or to Wachovia Bank as Trustee under a revocable trust agreement created by Pence, Jr.) and forty percent (40%) of the trust assets, to include specifically the Orangeburg real property held by the Trust, were to remain in the trust of Pence, Sr. and be administered and distributed according to its terms. Plaintiffs now contend that this Settlement Agreement subjected the Caw Caw Swamp and Cannon Bridge Road properties to the revocable trust agreement of Pence, Sr.

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

7. On September 16, 2002, September 23, 2002 and September 30, 2002 the Marlboro Herald published Notice to Creditors as required by Section 62-3-801 of the South Carolina Code of Laws (the "Code"). The affidavit of publication is

attached as Exhibit 1. No claims were filed within the eight month period prescribed by Section 62-3-803 of the Code.

8. On July 23, 2004, Wachovia Bank as personal representative of the Estate of Pence, Jr. sold the Caw Caw Swamp property to defendants Thompson and Money to Go, LLC. The net proceeds of this sale were later distributed in part to Marlboro Academy, Inc.

9. On October 25, 2004, Wachovia Bank as trustee of the revocable trust agreement of Pence, Jr. conveyed to Marlboro Academy, Inc. a one-third (1/3) remainder interest in the Cannon Bridge Road property.

10. Stephen Pence acquired an undivided one-sixth interest in remainder in and to the Cannon Bridge Road property by Deed of Distribution dated October 13, 2004 and recorded in Book 1066, Page 38 in the office of the Register of Deeds for Orangeburg County, S.C.

11. Stephen Pence conveyed a one-twelfth fractional interest in the Cannon Bridge Road Property to Harry R. Easterling, Jr. by deed dated March 9, 2005 and recorded September 12, 2006 in Book 1168, Page 35 in the office of the Clerk of Court for Orangeburg County, S.C. Stephen Pence therefore retained the ownership of an undivided one-twelfth fractional interest in said property.

12. On December 19, 2006, Plaintiffs filed this suit, claiming in effect that the February 26, 2002 Settlement Agreement required Pence, Jr. to transfer to the revocable trust agreement of Pence, Sr. the Caw Caw Swamp property and her interest in the Cannon Bridge Road property and that the receipt by Defendants Marlboro Academy, Inc. and Stephen Pence of a portion of the proceeds from the

sale of the Caw Caw Swamp property and the conveyances of the fractional remainder interests in the Cannon Bridge Road property to the Defendants Marlboro Academy, Inc., Stephen Pence and Harry R. Easterling, Jr. resulted in unjust enrichment and that the purported transfers of these properties should be set aside.

ARGUMENTS OF LAW

Any responsibility or liability of James J. Pence as Personal Representative of the Estate of Stephen Pence and Harry R. Easterling, Jr. to the Plaintiffs is founded upon Plaintiffs' allegation that the February 26, 2002 Settlement Agreement between Pence, Jr. and Brogdon, et al, imposed upon Pence, Jr. the contractual obligation to put into the trust created by Pence, Sr., or otherwise subject to the terms thereof, the Caw Caw Swamp property and her interest in the Cannon Bridge Road property. These properties were not transferred to the said trust by Pence, Sr. and were owned by her at the time of her death on October 3, 1999. James J. Pence as Personal Representative and Harry R. Easterling, Jr. and all of the other Defendants deny Plaintiffs' allegations that the Settlement Agreement created such a requirement.

In this proceeding the only issue is whether Plaintiffs have timely pursued any claim they may have. We respectfully submit that they have not. Plaintiffs' claims are barred both by the Probate Code claims statutes (§§62-3-801 and 62-3-803(a) of the Code) and by the three year statute of limitations provided by §15-3-530(1) of the Code.

PROBATE CODE CLAIMS STATUTE

Section 62-3-801(a) of the Code requires a personal representative upon his appointment to publish a Notice to Creditors once a week for three weeks in a newspaper of general circulation in the county announcing the appointment and address and notifying creditors of the

estate to present their claims within eight months after the date of first publication of the notice or be forever barred. Wachovia Bank as personal representative of the Estate of Pence, Jr. published such a notice in the Marlboro Herald on September 16, 23 and 30, 2002. See Exhibit 1.

Section 62-3-803(a) of the Code provides further:

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

Any duty owed by Pence, Jr. was contractual in nature and arose before she died. Therefore §62-3-803(a)(1) applies.

Plaintiffs clearly did not comply with the aforesaid Code provisions. Their first and only effort to file a claim was the filing of this lawsuit on December 19, 2006. Their claim became barred on May 16, 2003. Their failure to comply with the aforesaid provisions is an absolute bar to any recovery which they may have against James J. Pence as Personal Representative and Harry R. Easterling, Jr.

The purpose of the claims statutes is to facilitate orderly and expeditious settlement of decedent's estates. No conceivable injustice or inequity is visited upon Plaintiffs by application

of these provisions. The McLean family lawyer James B. Jackson, Jr. on October 21, 2002 wrote James B. Drennan, III, the attorney for Wachovia Bank in its capacity as personal representative of the estate of Pence, Jr. as follows:

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

Mr. Jackson went on to write:

"Additionally, we would like to let you know and would ask that you let the beneficiaries of Ms. Pence's Will know that my clients are willing to purchase these two pieces of property in order to keep them in the family." Attached hereto as Exhibits 2, 3, 4 and 5 are correspondences of James Jackson to James Drennan of September 27, 2002; correspondence of Mr. Drennan to Mr. Jackson of October 1, 2002; correspondence of Mr. Jackson to Mr. Drennan of October 21, 2002; and correspondence of Mr. Jackson to Mr. Drennan of January 17, 2003.

Thus, well within the time for filing claims against the estate of Pence, Jr. the family attorney for the McLeans and at least some of the Plaintiffs were aware that those administering the estate of Pence, Jr. had taken the clear position that the two properties were not subject to the Settlement Agreement.

STATUTE OF LIMITATION [§15-3-530(1)]

Plaintiffs' claims against James J. Pence as Personal Representative and Harry R. Easterling, Jr. are barred not just by the Probate Code claims statute but also by the statute of limitations governing actions on contracts (§15-3-530(1) – three years).

Since Plaintiffs were in effect third party beneficiaries to the contract (and not actual parties), the limitations period would begin to run not necessarily on the date of the Settlement Agreement but on the date that Plaintiffs knew of the Agreement or by the exercise of reasonable diligence should have known of the Agreement. See e.g. Martin vs. Companion Healthcare Corp., (S.C. App 2004), 593 SE 2d 624.

While Plaintiffs contend that they were ignorant of the breach of any contract rights which they might have until mid-2004 when Wachovia Bank sold the Caw Caw Swamp property, the depositions of William McLean, Norman McLean and James McLean show that each of them had some knowledge about what was or was not in the revocable trust agreement of Pence, Sr. by January, 2003 and that each knew, or had reason to know, that the Caw Caw Swamp and Cannon Bridge Road properties were not in the trust and were not deemed to be subject to the February 26, 2002 Settlement Agreement by the representatives of the estate of Pence, Jr. The depositions show the following:

(1) James McLean knew, while Pence, Sr. was alive, that the Grambling Road property had been deeded to the trust agreement of Pence, Sr. and that the Caw Caw Swamp and Cannon Bridge Road properties had not. [Deposition of James McLean, page 18-20]

(2) William McLean on February 25, 2002 signed a document releasing his right to be a successor co-trustee to Mr. Brogdon and he received at that time what he

described as a "partial faxed copy of the Settlement Agreement". [Deposition of William McLean, pages 27-29] James McLean testified that he knew that his brother William "had to go to Florence and meet with some people because he was a backup trustee or something." [Deposition of James McLean, page 25]

(3) Following the death of Pence, Jr. there occurred the correspondences of September 27, 2002, October 1, 2002, October 21, 2002 and January 17, 2003 between James Jackson, the McLean family lawyer, and James Drennan, the lawyer for Wachovia Bank as personal representative of the estate of Pence, Jr. Norman McLean (the father of the other McLean plaintiffs) testified that he discussed the matters addressed in these letters with Mr. Jackson and that he discussed the matters with his children. [Deposition of Norman McLean, pages 45-58]. Mr. Jackson testified that he discussed the contents of the various letters with Norman McLean [Deposition of James B. Jackson, Jr., pages 17-18 and 21-23]. The letters of Mr. Jackson (September 27, October 21 and January 17) showed James McLean as a copy recipient. Mr. Jackson testified to his belief that copies were sent to James McLean [Deposition of James B. Jackson, Jr., pages 23-24]

The record is replete with evidence that by January 17, 2003, various Plaintiffs had actual knowledge, or knowledge which would have put a person of common knowledge or experience on notice, that those administering the estate of Pence, Jr. had taken the position that the Caw Caw Swamp and Cannon Bridge Road properties were not subject to the terms of the trust agreement of Pence, Sr. nor to the terms of the Settlement Agreement. By waiting until

December 19, 2006 to file suit, Plaintiffs have waited too long and they are now barred by §15-3-530(1) of the Code from bringing this action.

## CONCLUSION

Plaintiffs' action against James J. Pence as Personal Representative and Harry R. Easterling, Jr. is barred by application of Section 62-3-801 and 62-3-803(a) of the Code. Plaintiffs' action is further barred by application of Section 15-3-530(1) of the Code. No genuine issues of material fact exist with respect to the applicability of either or both of these limitations statutes. The Defendants James J. Pence as Personal Representative and Harry R. Easterling, Jr. are entitled to Summary Judgment under Rule 56 of the South Carolina Rules of Civil Procedure.

GOLDBERG & EASTERLING, PA

Bennettsville, S. C.
May 5, 2008

BY Harry R. Easterling

Harry R. Easterling
SC Bar #1828
116 N. Liberty Street
P. O. Box 655
Bennettsville, SC 29512
843-479-2878 (Telephone)
843-479-2879 (Fax)
gandelaw @bellsouth.net (Email)
ATTORNEY FOR THE DEFENDANTS
JAMES J. PENCE AS PERSONAL
REPRESENTATIVE AND
HARRY R. EASTERLING, JR.

STATE OF SOUTH CAROLINA
COUNTY OF MARLBORO

PROBATE COURT

IN THE MATTER OF ELIZABETH P. PENCE

CASE NUMBER 2002ES3400183

## NOTICE TO CREDITORS

### *NOTICE TO CREDITORS OF ESTATES

All persons having claims against the following estates are required to deliver or mail their claims to the indicated Personal Representatives (PR), appointed to administer these estates, AND to file their claims on Form #371PC, with the Probate Court for MARLBORO COUNTY at P.O. Box 455 BENNETTSVILLE, SC 29512 on or before the date that is 8 months after the date of the first publication of this Notice to Creditors, or such persons shall be forever barred as to their claims. All claims are required to be presented in written statements, indicating the name and address of claimant, basis of the claim, amount claimed, date when the claim will become due, nature of any uncertainty as to the amount claimed and date when due, and description of any security as to the claim.

Estate: ELIZABETH P. PENCE
Case Number: 2002ES3400183
Personal Representative: MACK CORNETT, WACHOVIA BANK, N.A.
Address: P.O. Box 700
Charleston, SC 29402
Attorney, if applicable: JAMES B. DRENNAN, III
Address: 103 Lafayette Street
Spartanburg, SC 29302
Date of Death: 08/26/2002

**INSTRUCTIONS:** Publication to be in MARLBORO HERALD a newspaper of general circulation in MARLBORO COUNTY. Publish only this (*) portion of this form. Notice may be combined by listing individualized statements of the information concerning each of the estates under one heading consisting of the notice text. Publish once a week for three successive weeks.

File a copy of this form with proof of its publications with Probate Court.

## CERTIFICATE OF PUBLICATION

I hereby certify that on these dates 09-16, 09-23, and 09-30-02, I did publish the Notice to Creditors in MARLBORO HERALD, a newspaper of general circulation in MARLBORO COUNTY in accordance with law.

SWORN to before me this 1st day of October, 2002.

Susana Kornelius
Notary Public for South Carolina
My commission expires: Notary Public, South Carolina, State at Large My Commission Expires June 27, 2006

Signature: Lynn H. Smith
Name: Lynn H. Smith
Address:

Telephone (O):
Telephone (H):

CERTIFIED A TRUE COPY
of Original on file in this Court.

P. Mark Heath
P. Mark Heath
Probate Judge for Marlboro County
Attested By: MMS

FORM #370PC
SCPC 3-704, 3-801, 3-804

Exhibit 1

STATE OF
SOUTH CAROLINA
COUNTY OF MARLBORO
IN THE MATTER OF
VERA BRISTOW BECOTE
SHARON LEE HATCHER
ELIZABETH P. PENCE
CASE NUMBER:
2002ES3400179
2002ES3400182
2002ES3400183
IN THE PROBATE COURT
NOTICE TO CREDITORS
NOTICE TO CREDITORS
OF ESTATES

All persons having claims against the following estates are required to deliver or mail their claims, to the indicated Personal Representatives (PR) appointed to administer these estates, AND to file their claims on Form #371PC with the Probate Court for MARLBORO COUNTY at P.O. BOX 455 BENNETTSVILLE, SC 29512, on or before the date that is 8 months after the date of the first publication of this Notice to Creditors, or such persons shall be forever barred as to their claims. All claims are required to be presented in written statements, indicating the name and the address of claimant, basis of the claim, amount claimed, date when the claim will become due, nature of any uncertainty as to the amount claimed and date when due, and a description of any security as to the claim.

Estate:
VERA BRISTOW BECOTE
Case Number: 2002ES3400179
Personal Representative:
ALVIN C. BECOTE
Address: 4071 Hwy. #381
South, Blenheim, SC 29516
Attorney: Ralph Kelly
Address: P.O. Box 1341
Bennettsville, SC 29512
Date of Death: 04/28/1995
Estate:
SHARON LEE HATCHER
Case Number: 2002ES3400182
Personal Representative:
CHARLES F. HATCHER
Address: 4029 Hwy. 177
Wallace, SC 29596
Date of Death: 06/06/2002
Estate:
ELIZABETH P. PENCE
Case Number: 2002ES3400183
Personal Representative:
MACK CORNETT,
WACHOVIA BANK, N.A.
Address: P.O. Box 700
Charleston, SC 29402
Attorney:
JAMES B. DRENNAN, III
Address: 103 Lafayette Street
Spartanburg, SC 29302
Date of Death: 08/26/2002
M9:16,23,30

CERTIFIED A TRUE COPY
of Original on file in this Court.

P. Mark Heath
P. Mark Heath
Probate Judge for Marlboro County
Attested By: MMS

YARBOROUGH, HUTTO & JACKSON
ATTORNEYS AT LAW
198 DOCKET STREET, N.E.
POST OFFICE BOX 2268
ORANGEBURG, SOUTH CAROLINA 29116-2268

YARBOROUGH
LD E. HUTTO
B. JACKSON, JR.

TELEPHONE:
(803) 534-0626
(803) 534-0852
FAX:
(803) 536-2175

September 27, 2002

James B. Drennan, III, Esquire
Dennis, Shaw & Drennan, LLC
103 Lafayette Street
Spartanburg, S.C. 29304-0891

Re: Elizabeth M. Pence Estate

Dear Jim:

Pursuant to your request of August 30, 2002, I am enclosing a copy of the deed from O. Davie Burgdorf, Master-in-Equity for Orangeburg County to Elizabeth M. Pence which seems to convey the Caw Caw Swamp property to her and provides a legal description therein. It seems to me that the 120.11 acres and the lot shown as tract 2-A would be Caw Caw Swamp property. The remaining piece seems to me to be in Limestone Township which is probably a different piece of property. I trust that this will provide you the information you need to prepare the Deed of Distribution.

Additionally, I have been asked by Jim McLean, who is the son of Norman McLean, to review a number of documents that he provided me which includes the Elizabeth Pence Trust agreement prepared by attorney J. Munford Scott, Jr. dated May of 1999 and the Order Approving Compromise and Settlement with the attached Compromise and Settlement Agreement which was the result of a lawsuit filed in Marlboro in case number 00-CP-34-354. In reading the Compromised and Settlement agreement, which was approved by Judge Lockemy, in paragraph 8 entitled "Separate Accounting For Orangeburg Reality", its says that in the event that Elizabeth P. Pence dies without children that the intent was for the Orangeburg real property to be distributed to the issue of Norman M. McLean. Therefore, it appears to me on the face of this matter that since Ms. Pence died recently without children that the Order and Settlement Agreement would require that the Orangeburg property be distributed from her estate or from the trust or both to the children of Norman McLean. I would appreciate your letting me know your position in regards to that matter so that I can advise my clients appropriately.

With kind regards, I am

Sincerely,

James B. Jackson, Jr.

JBJjr/ddb

EXHIBIT
Exhibit 2

DENNIS, SHAW & DRENNAN, LLC
ATTORNEYS AT LAW
103 LAFAYETTE STREET
REPLY TO: POST OFFICE BOX 891
SPARTANBURG, S.C. 29304-0891
TELEPHONE (864) 582-0708
FAX (864) 582-0934

October 1, 2002

ES W. SHAW, P.A.
ES B. DRENNAN, III, P.A.··
THONY H. RANDALL, P.A.···
MITTED IN MASSACHUSETTS
ED SPECIALIST IN ESTATE PLANNING, PROBATE & TRUST LAW
ADMITTED IN NORTH CAROLINA

R. RAY DENNIS·
OF COUNSEL

James B. Jackson, Jr., Esq.
Yarborough, Hutto & Jackson
Attorneys at Law
P.O. Box 2268
Orangeburg, SC 29116-2268

Re: Estate of Elizabeth M. Pence

Dear Jay:

I appreciate your sending me a copy of the deed by which Elizabeth M. Pence acquired the two properties which comprise the Caw Caw Swamp property.

I was disappointed at the comments which you made in your letter of September 27th regarding your construction of the Compromise and Settlement Agreement which was reached in connection with the Brogdon trust litigation. I believe that I have already explained to you why the Caw Caw Swamp property is not covered by that Settlement Agreement and it will not, therefore, be included in the Orangeburg County property which passes to your clients, the McLeans.

What I told you previously is that Hall Yarborough had advised me that the Caw Caw Swamp property was part of the Orangeburg County property which had been transferred into the Brogdon trust. If I have not already given you a copy of his letter to me to that effect, I can do so.

Acting upon the information which had been given to me by Mr. Yarborough, I believed that the Caw Caw Swamp property was part of the Brogdon trust and I included it on the estate tax return as property belonging to that trust, but taxable as part of Mrs. Pence's estate.

When we settled the Brogdon trust litigation, I still was under the impression that the Caw Caw Swamp property was in the Brogdon trust. It was only after the Court had approved the Settlement Agreement that Mr. Brogdon advised me for the first time that the Caw Caw Swamp property had never been transferred into his trust and it was not, therefore, subject to the Settlement Agreement.

Since the purpose of the Settlement Agreement was to divide up the Brogdon trust property and end the trust litigation, it has no effect on any property which was not trust

EXHIBIT
Exhibit 3

property at the time the Settlement Agreement was entered into. If it had been intended that the Caw Caw Swamp property be made subject to the trust and to the provisions of the Settlement Agreement which will cause the trust's Orangeburg County property to go to your clients, there would have been a provision to that effect in the Settlement Agreement.

I believe that Hall Yarborough made an honest mistake when he told me that the Caw Caw Swamp property was part of the Brogdon trust, but his mistake is not going to inure to the benefit of your firm's clients and to the detriment of my client, whom he was effectively representing when he undertook to do the work for me.

If your clients have an interest in purchasing this property from Mrs. Pence's estate, I will be glad to discuss that with you.

With kindest regards,

Sincerely yours,

JBD,III/tl
CC: Freeman W. Coggins, Jr., Senior Vice President
Mack Cornett, Trust Officer

James B. Drennan, III

YARBOROUGH, HUTTO & JACKSON
ATTORNEYS AT LAW
198 DOCKET STREET, N.E.
POST OFFICE BOX 2268
ORANGEBURG, SOUTH CAROLINA 29116-2268

LL YARBOROUGH
ONALD E. HUTTO
ES B. JACKSON, JR.

TELEPHONE:
(803) 534-0626
(803) 534-0852
FAX:
(803) 536-2175

October 21, 2002

James B. Drennan, III, Esquire
*Dennis, Shaw & Drennan, LLC*
103 Lafayette Street
Spartanburg, S.C. 29304-0891

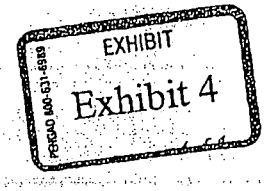
Re: Estate of Elizabeth M. Pence Estate

Dear Jim:

This is to advise that I am in receipt of your letter of October 1, 2002 and I appreciate your again explaining this situation to me. Unfortunately, I did remember that you had made some explanation to me regarding this matter but I could not remember all of the details and I appreciate your putting those in writing. I apologize for making you go to this efforts but I appreciate your letter.

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

The additional purpose of this letter is to request that you provide us with a copy of the Will of Elizabeth Pence, the daughter, because we do not have a copy of that document. Additionally, we would like to let you know and would ask that you let the beneficiaries of Ms. Pence's Will know that my client's are willing, to purchase these two pieces of property in order to keep them in the family. My clients first choice would be to purchase the remainder interest of the Cannon Bridge Road property in which the Lennon McLean has a life estate. Secondly, my clients would also be interested in purchasing the Caw Caw property but believe that they would probably have to do so after the timber was cut and sold on thereon. I would appreciate your forwarding this



information to the appropriate persons to determine whether or not they might be willing to sell these Orangeburg properties.

With kind regards, I am

Sincerely,

James B. Jackson, Jr.

JBJjr/ddb

cc: Jim McLean

YARBOROUGH, HUTTO & JACKSON
ATTORNEYS AT LAW
198 DOCKET STREET, N.E.
POST OFFICE BOX 2268
ORANGEBURG, SOUTH CAROLINA 29116-2268

, YARBOROUGH
ALD E. HUTTO
B. JACKSON, JR.

TELEPHONE:
(803) 534-0626
(803) 534-0852
FAX:
(803) 536-2175

January 17, 2003

James B. Drennan, III, Esquire
*Dennis, Shaw & Drennan, LLC*
103 Lafayette Street
Spartanburg, S.C. 29304-0891

Re: Estate of Elizabeth M. Pence Estate

Dear Jim:

This is to reconfirm my telephone conversation with you in which I indicated that my clients here in Orangeburg are interested in purchasing the Orangeburg County property owned by the late Elizabeth Pence. You indicated to me on the telephone that you would make sure that the heirs of her estate are aware of my clients' desires so that in the event they wish to sell the property, they will make sure that my clients do have an opportunity to purchase this property. In addition, I want to again ask you to please forward me a copy of Elizabeth Pence's Will so that my clients can have the opportunity to review it for themselves. Your cooperation in this matter is greatly appreciated.

With kind regards, I am

Sincerely,

James B. Jackson, Jr.

JBJjr/ddb

cc: Jim McLean

Exhibit 5

| | |
|---|---|
| STATE OF SOUTH CAROLINA, | IN THE COURT OF COMMON PLEAS |
| | 2006-CP-38-1523 |
| COUNTY OF ORANGEBURG. | |
| Norman N. McLean; James N. McLean; Marie McLean -Choi; William N. McLean; Robert L. McLean; and JL McLean Properties, LLC, | |
| Plaintiffs, | |
| versus | CERTIFICATE OF SERVICE BY MAIL |
| 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. | |

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 James J. Pence, Jr., as Personal Representative of the Estate of Stephen Pence and Defendant Harry R. Easterling, Jr., in the above-captioned matter; that on May 6, 2008, a copy of the attached Brief of the Defendants, James J. Pence, as Personal Representative of the Estate of Stephen Pence, and Harry R. Easterling, Jr. in Support of Motion for Summary Judgment Under SCRCP Rule

56, and this Certificate of Mailing was placed in an envelope, with postage prepaid, and mailed to the following:

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

John Jay James, II, Esquire
Paulling & James, LLP
P. O. Box 507
Darlington, SC 29540

Jeffrey L. Payne, Esquire
Turner, Padget, Graham & Laney, P.A.
P. O. Box 1473
Columbia, SC 29201

James R. Davis, Esquire
Nicholson, Davis, Frawley, Anderson & Ayer
P.O. Box 489
Lexington, SC 29701

Matthew H. Henrikson, Esquire
Clarkson, Walsh, Rheney & Terrell
P. O. Box 6728
Greenville, SC 29606

Edward B. Davis, Esquire
Bell, Davis & Pitt, PA
227 W. Trade Street, Suite 2160
Charlotte, NC 28202

W. Cliff Moore, III, Esquire
Ellis, Lawhorne & Sims, PA
P. O. Box 2285
Columbia, SC 29202

Patricia M. Bundy

SWORN to before me this
6th day of May, 2008.

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

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF ORANGEBURG | ) | IN THE COURT OF COMMON PLEAS<br>CASE NO. 2006 CP 38-1523 |
| ☐Plaintiff Norman M. McLean, et al | ) | |
| v. | ) | MOTION INFORMATION FORM<br>AND COVER SHEET |
| ☒Defendant Marlboro Academy, Inc., et al | ) | |

| | | | |
|---|---|---|---|
| Plaintiff's Attorney<br>Bar No.<br>Address:<br><br>Phone: 864-370-8222<br><br>e-mail:<br>david@culbertsonalexander.com | David Alexander<br><br>P.O. Box 1904<br>Greenville, SC 29602<br>Fax:<br><br>Other: | Defendant's Attorney<br>Bar No. 2949<br>Address<br><br>Phone: 843-393-3881<br><br>email:pjlaw507@bellsouth.net | John Jay James, II<br><br>P. O. Box 507<br>Darlington, SC 29540<br>Fax: 843-393-6089<br><br>Other |

☒ MOTION HEARING REQUESTED (attach written motion and compete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

**SECTION I: Hearing Information**

Nature of Motion: Notice of Motion and Motion for Summary Judgment
Estimated Time Needed: Thirty Minutes Court Reporter Needed? ☒ YES / ☐

**SECTION II: Motion Type**

☒ Written motion attached
☐ Form Motion - -
I hereby move for relief by the Court as set forth in the attached Motion for Summary Judgment.

John Jay James, II — February 13, 2008
Signature of Attorney for ☐ Plaintiff / ☒ Defendant — Date Submitted

**SECTION III: Motion Fee**

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse or Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request or Court; or, reduced to writing from motion made in open Court per Judge's instructions
- Name of Court Reporter:
☐ Other:

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE
CODE: Date:

**CLERK'S VERIFICATION**

Date Filed:
Collected by:
☐ MOTION FEE COLLECTED:
☐ CONTESTED – AMOUNT DUE:

| | |
|---|---|
| STATE OF SOUTH CAROLINA, )<br>)<br>COUNTY OF ORANGEBURG. ) | IN THE COURT OF COMMON PLEAS<br>2006-CP-38-1523 |
| Norman M. McLean; James N. McLean; Marie McLean -Choi; William N. McLean; Robert L. McLean; and JL McLean Properties, LLC,<br><br>Plaintiffs,<br><br>versus<br><br>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.,<br><br>Defendants. | NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT |

TO: DAVID ALEXANDER, ESQUIRE, ATTORNEY FOR PLAINTIFFS

The defendant, Marlboro Academy, Inc. through its undersigned counsel, hereby moves this Court, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for an Order granting Summary Judgment against the Plaintiffs. The Defendant Marlboro Academy, Inc. moves upon the grounds that (1) Plaintiffs' action is barred by Section 15-3-530(1) of the Code of Laws of South Carolina (1976) and (2) Plaintiffs' action is further barred by Section 62-3-803(a) of the Code of Laws of South Carolina (1976). The Defendant Marlboro Academy, Inc.

moves upon the basis that there is no genuine issue of material fact regarding the application of the three year statute of limitations imposed by Section 15-3-530(1) of the Code measured from the date on which the Plaintiffs had actual and/or constructive knowledge of their purported rights under the Settlement Agreement and that there is no genuine issue of material fact regarding the application of the South Carolina Probate Code's claims statute as set forth in Section 62-3-803(a) of the Code to the facts of this case since Plaintiffs filed no claim within the time prescribed by the said Section.

In support of its Motion, the Defendant Marlboro Academy, Inc. makes reference to the pleadings and all exhibits thereto, all discovery in this matter, any affidavits and memoranda which have been filed or may be filed before the hearing in this matter, and the governing procedural and substantive law of the State of South Carolina.

Based on the foregoing, the Defendant Marlboro Academy, Inc. submits that there is no genuine issue of material fact and that it is entitled to judgment in its favor as a matter of law.

AND IT IS SO MOVED.

PAULLING & JAMES, LLP

Darlington, S. C.
February 13, 2008

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)
ATTORNEY FOR THE DEFENDANT
MARLBORO ACADEMY, INC.

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

I, John Jay James, II, do hereby certify that I have on this date served a copy of the Notice of Motion and Motion for Summary Judgment on behalf of Marlboro Academy, Inc., upon counsel of record by mailing copies, postage prepaid to:

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

Jeffrey L. Payne, Esquire
Turner, Padget, Graham & Laney, PA
P. O. Box 5478
Florence, SC 29502

James R. Davis, Esquire
Nicholson, Davis, Frawley, Anderson & Ayer
P. O. Box 489
Lexington, SC 29071

Matthew H. Henrikson, Esquire
Clarkson Walsh Rheney & Terrell, PA
P. O. Box 6728
Greenville, SC 29606

Edward B. Davis, Esquire
Bell, Davis & Pitt, PA
227 West Trade St., Suie 2160
Charlotte, NC 28202

W. Cliff Moore, III, Esquire
Ellis, Lawhorne & Sims, PA
P. O. Box 2285
Columbia, SC 29202

Harry R. Easterling, Sr., Esquire
Goldberg & Easterling, PA
P. O. Drawer 655
Bennettsville, SC 29512

February 2008
Darlington, S. C.

JOHN JAY JAMES, II
Attorney for Plaintiff
Darlington Veneer Company
SC Bar #2949
112 Cashua Street
P. O. Box 507
Darlington, S. C. 29540
(803) 393-3881

| | |
|---|---|
| STATE OF SOUTH CAROLINA, )<br>)<br>COUNTY OF ORANGEBURG. ) | IN THE COURT OF COMMON PLEAS<br>2006-CP-38-1523 |
| Norman M. McLean; James N. McLean; Marie McLean-Choi; William N. McLean; Robert L. McLean; and JL McLean Properties, LLC,<br><br>Plaintiffs,<br><br>versus<br><br>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.,<br><br>Defendants. | BRIEF OF THE DEFENDANT MARLBORO ACADEMY, INC. IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT UNDER SCRCP RULE 56 |

The Defendant, Marlboro Academy, Inc., respectfully submits this Brief in support of its Motion for Summary Judgment.

## FACTS

The facts and timeline relevant to this Motion may be summarized as follows:

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

2. On May 28, 1999, pursuant to the power of attorney, Brogdon created a Revocable Trust Agreement for Pence, Sr. and thereafter transferred to himself as Trustee of that Trust certain real properties in Marlboro and Orangeburg Counties along with liquid assets of substantial value. The properties which are the subject of this litigation (the "Caw Caw Swamp" property and the "Cannon Bridge Road" property) were never transferred to this Trust. The only Orangeburg County property transferred to this Trust was the "Grambling Road" property. This Trust Agreement provided lifetime benefits for Pence, Sr. The Trust became irrevocable at the death of Pence, Sr. and provided for lifetime benefits to the daughter of Pence, Sr., Elizabeth P. Pence (hereinafter "Pence, Jr."). The Trust provided further that at the death of Pence, Jr. the trust assets were to go to her issue, and, if there were no issue of Pence, Jr., the Orangeburg County real estate held by the Trust was to go to the issue of Norman M. McLean (and all other assets were to go to Clemson University and Coker College).

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

4. On October 19, 2000, Pence, Jr. brought suit against Brogdon, Clemson University, and Coker College to contest the validity of the May 28, 1999 Trust Agreement and the property transfers thereto. Plaintiffs were not a party to this action.

5. On February 26, 2002, the parties entered into a court-approved Settlement Agreement. Pursuant to this Agreement, sixty percent (60%) of the trust assets

were to be distributed to Pence, Jr. (or to Wachovia Bank as Trustee under a revocable trust agreement created by Pence, Jr.) and forty percent (40%) of the trust assets, to include specifically the Orangeburg real property held by the Trust, were to remain in the trust of Pence, Sr. and be administered and distributed according to its terms. Plaintiffs now contend that this Settlement Agreement subjected the Caw Caw Swamp and Cannon Bridge Road properties to the revocable trust agreement of Pence, Sr.

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

7. On September 16, 2002, September 23, 2002 and September 30, 2002 the Marlboro Herald published Notice to Creditors as required by Section 62-3-801 of the South Carolina Code of Laws (the "Code"). The affidavit of publication is attached as Exhibit 1. No claims were filed within the eight month period prescribed by Section 62-3-803 of the Code.

8. On July 23, 2004, Wachovia Bank as personal representative of the Estate of Pence, Jr. sold the Caw Caw Swamp property to defendants Thompson and Money to Go, LLC. The net proceeds of this sale were later distributed in part to Marlboro Academy, Inc.

9. On October 25, 2004, Wachovia Bank as trustee of the revocable trust agreement of Pence, Jr. conveyed to Marlboro Academy, Inc. a one-third (1/3) remainder interest in the Cannon Bridge Road property.

10. On December 19, 2006, Plaintiffs filed this suit, claiming in effect that the February 26, 2002 Settlement Agreement required Pence, Jr. to transfer to the revocable trust agreement of Pence, Sr. the Caw Caw Swamp property and her interest in the Cannon Bridge Road property and that the receipt by Marlboro Academy, Inc. of a portion of the proceeds from the sale of the Caw Caw Swamp property and a one third remainder interest in the Cannon Bridge Road property resulted in unjust enrichment and that the purported transfers of these properties should be set aside.

ARGUMENTS OF LAW

Any responsibility or liability of Marlboro Academy, Inc. to the Plaintiffs is founded upon Plaintiffs' allegation that the February 26, 2002 Settlement Agreement between Pence, Jr. and Brogdon, et al, imposed upon Pence, Jr. the contractual obligation to put into the trust created by Pence, Sr., or otherwise subject to the terms thereof, the Caw Caw Swamp property and her interest in the Cannon Bridge Road property. These properties were not transferred to the said trust by Pence, Sr. and were owned by her at the time of her death on October 3, 1999. Marlboro Academy, Inc. and all of the other Defendants deny Plaintiffs' allegations that the Settlement Agreement created such a requirement.

In this proceeding the only issue is whether Plaintiffs have timely pursued any claim they may have. We respectfully submit that they have not. Plaintiffs' claims are barred both by the Probate Code claims statutes (§§62-3-801 and 62-3-803(a) of the Code) and by the three year statute of limitations provided by §15-3-530(1) of the Code.

PROBATE CODE CLAIMS STATUTE

Section 62-3-801(a) of the Code requires a personal representative upon his appointment to publish a Notice to Creditors once a week for three weeks in a newspaper of general circulation in the county announcing the appointment and address and notifying creditors of the estate to present their claims within eight months after the date of first publication of the notice or be forever barred. Wachovia Bank as personal representative of the Estate of Pence, Jr. published such a notice in the Marlboro Herald on September 16, 23 and 30, 2002. See Exhibit 1.

Section 62-3-803(a) of the Code provides further:

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

Any duty owed by Pence, Jr. was contractual in nature and arose before she died. Therefore §62-3-803(a)(1) applies.

Plaintiffs clearly did not comply with the aforesaid Code provisions. Their first and only effort to file a claim was the filing of this lawsuit on December 19, 2006. Their claim became barred on May 16, 2003. Their failure to comply with the aforesaid provisions is an absolute bar to any recovery which they may have against Marlboro Academy, Inc.

The purpose of the claims statutes is to facilitate orderly and expeditious settlement of decedent's estates. No conceivable injustice or inequity is visited upon Plaintiffs by application of these provisions. The McLean family lawyer James B. Jackson, Jr. on October 21, 2002 wrote James B. Drennan, III, the attorney for Wachovia Bank in its capacity as personal representative of the estate of Pence, Jr. as follows:

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

Mr. Jackson went on to write:

"Additionally, we would like to let you know and would ask that you let the beneficiaries of Ms. Pence's Will know that my clients are willing to purchase these two pieces of property in order to keep them in the family." Attached hereto as Exhibits 2, 3, 4 and 5 are correspondence of James Jackson to James Drennan of September 27, 2002; correspondence of Mr. Drennan to Mr. Jackson of October 1, 2002; correspondence of Mr. Jackson to Mr. Drennan of October 21, 2002; and correspondence of Mr. Jackson to Mr. Drennan of January 17, 2003.

Thus, well within the time for filing claims against the estate of Pence, Jr. the family attorney for the McLeans and at least some of the Plaintiffs were aware that those administering the estate of Pence, Jr. had taken the clear position that the two properties were not subject to the Settlement Agreement.

STATUTE OF LIMITATION [§15-3-530(1)]

Plaintiffs' claims against Marlboro Academy, Inc. are barred not just by the Probate Code claims statute but also by the statute of limitations governing actions on contracts (§15-3-530(1) – three years).

Since Plaintiffs were in effect third party beneficiaries to the contract (and not actual parties), the limitations period would begin to run not necessarily on the date of the Settlement Agreement but on the date that Plaintiffs knew of the Agreement or by the exercise of reasonable diligence should have known of the Agreement. See e.g. Martin vs. Companion Healthcare Corp., (S.C. App 2004), 593 SE 2d 624.

While Plaintiffs contend that they were ignorant of the breach of any contract rights which they might have until mid-2004 when Wachovia Bank sold the Caw Caw Swamp property, the depositions of William McLean, Norman McLean and James McLean show that each of them had some knowledge about what was or was not in the revocable trust agreement of Pence, Sr. by January, 2003 and that each knew, or had reason to know, that the Caw Caw Swamp and Cannon Bridge Road properties were not in the trust and were not deemed to be subject to the February 26, 2002 Settlement Agreement by the representatives of the estate of Pence, Jr. The depositions show the following:

(1) James McLean knew, while Pence, Sr. was alive, that the Grambling Road property had been deeded to the trust agreement of Pence, Sr. and that the Caw Caw Swamp and Cannon Bridge Road properties had not. [Deposition of James McLean, page 18-20]

(2) William McLean on February 25, 2002 signed a document releasing his right to be a successor co-trustee to Mr. Brogdon and he received at that time what he described as a "partial faxed copy of the Settlement Agreement". [Deposition of

William McLean, pages 27-29]. In response to Requests for Admission by Brogdon, William McLean further admitted receiving on February 25, 2002 from attorney Munford Scott a copy of the trust agreement of Pence, Sr. and a copy of the Settlement Agreement. James McLean testified that he knew that his brother William "had to go to Florence and meet with some people because he was a backup trustee or something." [Deposition of James McLean, page 25].

(3) Following the death of Pence, Jr. there occurred the correspondences of September 27, 2002, October 1, 2002, October 21, 2002 and January 17, 2003 between James Jackson, the McLean family lawyer, and James Drennan, the lawyer for Wachovia Bank as personal representative of the estate of Pence, Jr. Norman McLean (the father of the other McLean plaintiffs) testified that he discussed the matters addressed in these letters with Mr. Jackson and that he discussed the matters with his children. [Deposition of Norman McLean, pages 45-58]. Mr. Jackson testified that he discussed the contents of the various letters with Norman McLean [Deposition of James B. Jackson, Jr., pages 17-18 and 21-23]. The letters of Mr. Jackson (September 27, October 21 and January 17) showed James McLean as a copy recipient. Mr. Jackson testified to his belief that copies were sent to James McLean [Deposition of James B. Jackson, Jr., pages 23-24]

The record is replete with evidence that by January 17, 2003, various Plaintiffs had actual knowledge, or knowledge which would have put a person of common knowledge or experience on notice, that those administering the estate of Pence, Jr. had taken the position that the Caw Caw Swamp and Cannon Bridge Road properties were not subject to the terms of the trust agreement of Pence, Sr. nor to the terms of the Settlement Agreement. By waiting until

December 19, 2006 to file suit, Plaintiffs have waited too long and they are now barred by §15-3-530(1) of the Code from bringing this action.

CONCLUSION

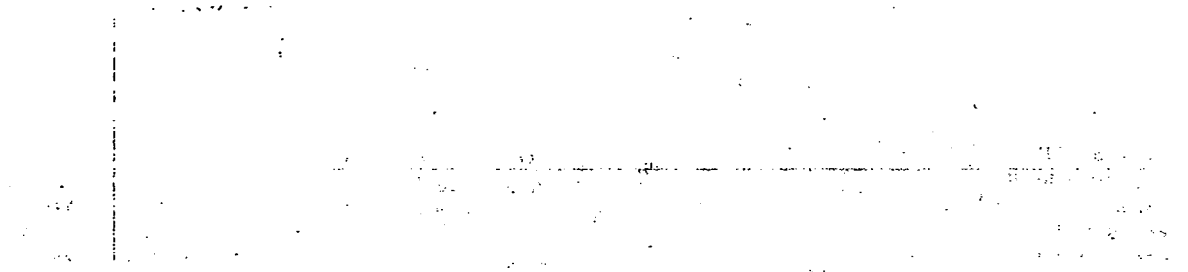
Plaintiffs' action against Marlboro Academy, Inc. is barred by application of Section 62-3-801 and 62-3-803(a) of the Code. Plaintiffs' action is further barred by application of Section 15-3-530(1) of the Code. No genuine issues of material fact exist with respect to the applicability of either or both of these limitations statutes. The Defendant Marlboro Academy, Inc. is entitled to Summary Judgment under Rule 56 of the South Carolina Rules of Civil Procedure.

Darlington, S. C.
May 5, 2008

PAULLING & JAMES, LLP

BY: _____
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SC Bar #2949
Paulling & James, LLP
112 Cashua Street
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Darlington, SC 29540
843-393-3881 (Telephone)
843-393-6089 (Fax)
pjlaw507@bellsouth.net (Email)
ATTORNEY FOR THE DEFENDANT
MARLBORO ACADEMY, INC.

# 1



PROBATE COURT

ATE OF SOUTH CAROLINA
UNTY OF MARLBORO

HE MATTER OF ELIZABETH P. PENCE

SE NUMBER 2002ES3400183

## NOTICE TO CREDITORS

### *NOTICE TO CREDITORS OF ESTATES

All persons having claims against the following estates are required to deliver or mail their claims to the indicated sonal Representatives (PR), appointed to administer these estates, AND to file their claims on Form #371PC, with the bate Court for MARLBORO COUNTY at P.O. Box 455 BENNETTSVILLE, SC 29512, or before the date that is 8 months after the date of the first publication of this Notice to Creditors, or such persons shall be ver barred as to their claims. All claims are required to be presented in written statements, indicating the name and address laimant, basis of the claim, amount claimed, date when the claim will become due, nature of any uncertainty as to the ount claimed and date when due, and description of any security as to the claim.

ate: ELIZABETH P. PENCE
e Number: 2002ES3400183
sonal Representative: MACK CORNETT, WACHOVIA BANK, N.A.
dress: P.O. Box 700
Charleston, SC 29402
rney, if applicable: JAMES B. DRENNAN, III
dress: 103 Lafayette Street
Spartanburg, SC 29302
e of Death: 08/26/2002

**INSTRUCTIONS:** Publication to be in MARLBORO HERALD a newspaper of general circulation in ARLBORO COUNTY. Publish only this (*) portion of this form. Notice may be combined by listing individualized statements of information concerning each of the estates under one heading consisting of the notice text. Publish once a week for three ccessive weeks.

File a copy of this form with proof of its publications with Probate Court.

### CERTIFICATE OF PUBLICATION

I hereby certify that on these dates 09-16, 09-23, and 09-30-02, I did publish the ce to Creditors in MARLBORO HERALD, a newspaper of general circulation in MARLBORO COUNTY in ordance with law.

ORN to before me this 1st day of October, 2002.

Susana Karvelis
tary Public for South Carolina
commission expires Notary Public, South Carolina, State at Large
My Commission Expires June 27, 2006

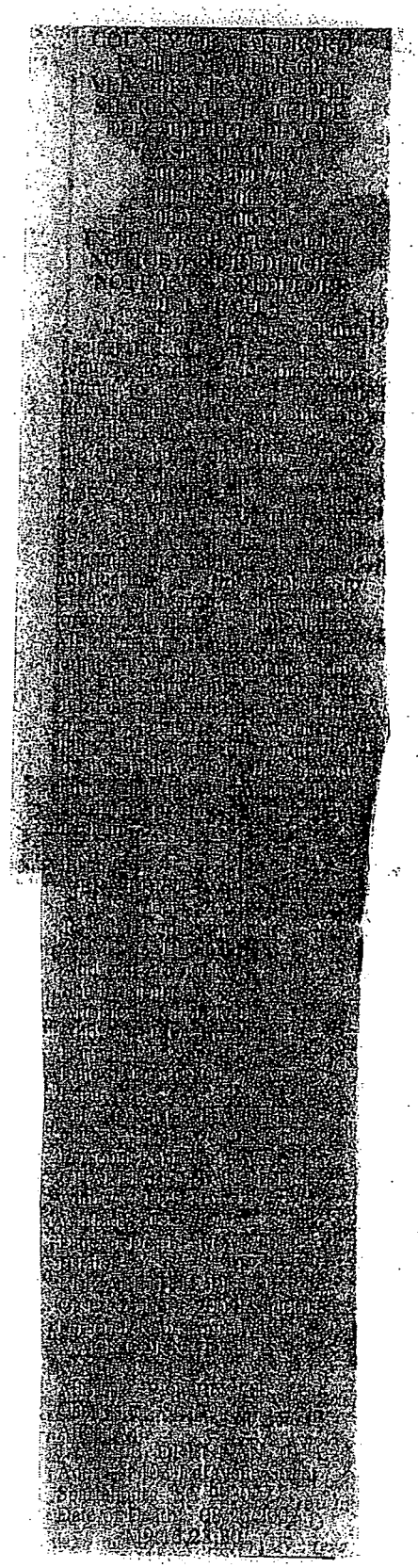
Signature: Lynn N. Smith
Name: Lynn N. Smith
Address:

Telephone (O):
Telephone (H):

CERTIFIED A TRUE COPY
of Original on file in this Court.

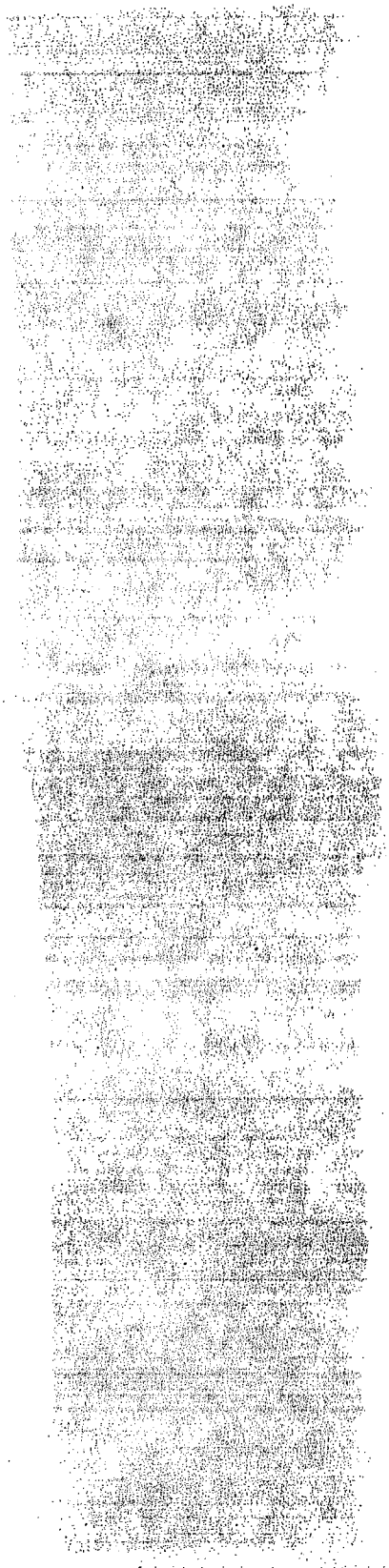
P. Mark Heath
P. Mark Heath
Probate Judge for Marlboro County
Attested By: MMS

RM #370PC
PC 3-704, 3-801, 3-804



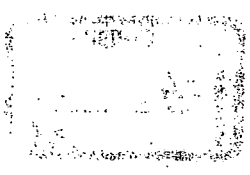
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of Original on file in this Court.

P. Mark Heath
Probate Judge for Marlboro County
Attested By: mhs



# 2

3





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RONALD E. HUTTO
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September 27, 2002

James B. Drennan, III, Esquire
Dennis, Shaw & Drennan, LLC
103 Lafayette Street
Spartanburg, S.C. 29304-0891

Re: Elizabeth M. Pence Estate

Dear Jim:

Pursuant to your request of August 30, 2002, I am enclosing a copy of the deed from O. Davie Burgdorf, Master-in-Equity for Orangeburg County to Elizabeth M. Pence which seems to convey the Caw Caw Swamp property to her and provides a legal description therein. It seems to me that the 120.11 acres and the lot shown as tract 2-A would be Caw Caw Swamp property. The remaining piece seems to me to be in Limestone Township which is probably a different piece of property. I trust that this will provide you the information you need to prepare the Deed of Distribution.

Additionally, I have been asked by Jim McLean, who is the son of Norman McLean, to review a number of documents that he provided me which includes the Elizabeth Pence Trust agreement prepared by attorney J. Munford Scott, Jr. dated May of 1999 and the Order Approving Compromise and Settlement with the attached Compromise and Settlement Agreement which was the result of a lawsuit filed in Marlboro in case number 00-CP-34-354. In reading the Compromised and Settlement agreement, which was approved by Judge Lockemy, in paragraph 8 entitled "Separate Accounting For Orangeburg Reality", its says that in the event that Elizabeth P. Pence dies without children that the intent was for the Orangeburg real property to be distributed to the issue of Norman M. McLean. Therefore, it appears to me on the face of this matter that since Ms. Pence died recently without children that the Order and Settlement Agreement would require that the Orangeburg property be distributed from her estate or from the trust or both to the children of Norman McLean. I would appreciate your letting me know your position in regards to that matter so that I can advise my clients appropriately.

With kind regards, I am

Sincerely,

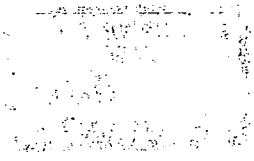
James B. Jackson, Jr.

JBJjr/ddb

DEFENDANT'S EXHIBIT 3 Hearing J. McLean

EXHIBIT #3

# 4



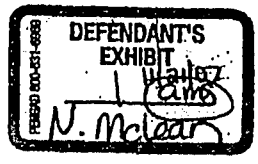
DENNIS, SHAW & DRENNAN, LLC
ATTORNEYS AT LAW
103 LAFAYETTE STREET
REPLY TO: POST OFFICE BOX 891
SPARTANBURG, S.C. 29304-0891
TELEPHONE (864) 582-0708
FAX (864) 582-0934

October 1, 2002

JAMES W. SHAW, P.A.
JAMES B. DRENNAN, III, P.A.**
ANTHONY H. RANDALL, P.A.***
*ALSO ADMITTED IN MASSACHUSETTS
**CERTIFIED SPECIALIST IN ESTATE PLANNING, PROBATE & TRUST LAW
***ALSO ADMITTED IN NORTH CAROLINA

R. RAY DENNIS*
*OF COUNSEL*

James B. Jackson, Jr., Esq.
Yarborough, Hutto & Jackson
Attorneys at Law
P.O. Box 2268
Orangeburg, SC 29116-2268




Re: Estate of Elizabeth M. Pence

Dear Jay:

I appreciate your sending me a copy of the deed by which Elizabeth M. Pence acquired the two properties which comprise the Caw Caw Swamp property.

I was disappointed at the comments which you made in your letter of September 27th regarding your construction of the Compromise and Settlement Agreement which was reached in connection with the Brogdon trust litigation: I believe that I have already explained to you why the Caw Caw Swamp property is not covered by that Settlement Agreement and it will not, therefore, be included in the Orangeburg County property which passes to your clients, the McLeans.

What I told you previously is that Hall Yarborough had advised me that the Caw Caw Swamp property was part of the Orangeburg County property which had been transferred into the Brogdon trust. If I have not already given you a copy of his letter to me to that effect, I can do so.

Acting upon the information which had been given to me by Mr. Yarborough, I believed that the Caw Caw Swamp property was part of the Brogdon trust and I included it on the estate tax return as property belonging to that trust, but taxable as part of Mrs. Pence's estate.

When we settled the Brogdon trust litigation, I still was under the impression that the Caw Caw Swamp property was in the Brogdon trust. It was only after the Court had approved the Settlement Agreement that Mr. Brogdon advised me for the first time that the Caw Caw Swamp property had never been transferred into his trust and it was not, therefore, subject to the Settlement Agreement.

Since the purpose of the Settlement Agreement was to divide up the Brogdon trust property and end the trust litigation, it has no effect on any property which was not trust

property at the time the Settlement Agreement was entered into. If it had been intended that the Caw Caw Swamp property be made subject to the trust and to the provisions of the Settlement Agreement which will cause the trust's Orangeburg County property to go to your clients, there would have been a provision to that effect in the Settlement Agreement.

I believe that Hall Yarborough made an honest mistake when he told me that the Caw Caw Swamp property was part of the Brogdon trust, but his mistake is not going to inure to the benefit of your firm's clients and to the detriment of my client, whom he was effectively representing when he undertook to do the work for me.

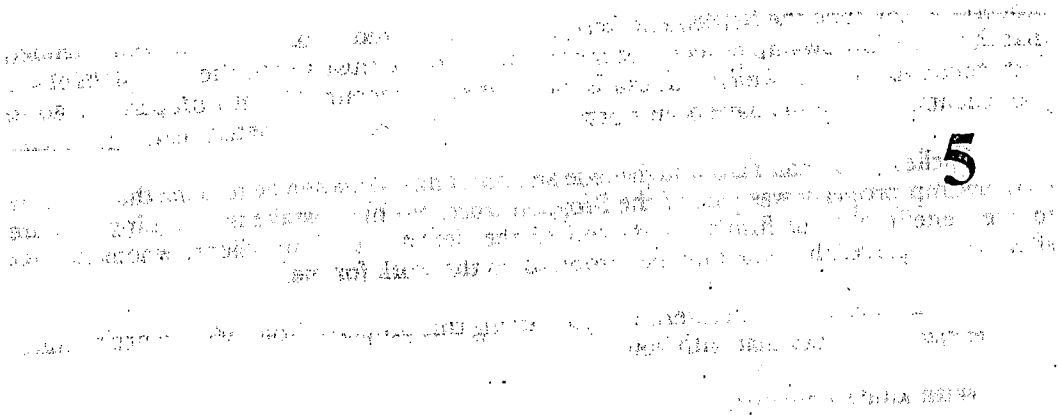
If your clients have an interest in purchasing this property from Mrs. Pence's estate, I will be glad to discuss that with you.

With kindest regards,

Sincerely yours,

JBD,III/tl
CC: Freeman W. Coggins, Jr., Senior Vice President
Mack Cornett, Trust Officer

James B. Drennan, III



YARBOROUGH, HUTTO & JACKSON
ATTORNEYS AT LAW
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October 21, 2002

James B. Drennan, III, Esquire
***Dennis, Shaw & Drennan, LLC***
103 Lafayette Street
Spartanburg, S.C. 29304-0891

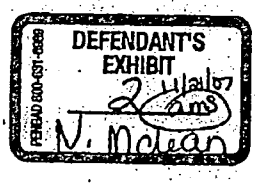
Re: Estate of Elizabeth M. Pence Estate

Dear Jim:

This is to advise that I am in receipt of your letter of October 1, 2002 and I appreciate your again explaining this situation to me. Unfortunately, I did remember that you had made some explanation to me regarding this matter but I could not remember all of the details and I appreciate your putting those in writing. I apologize for making you go to this efforts but I appreciate your letter.

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

The additional purpose of this letter is to request that you provide us with a copy of the Will of Elizabeth Pence, the daughter, because we do not have a copy of that document. Additionally, we would like to let you know and would ask that you let the beneficiaries of Ms. Pence's Will know that my client's are willing, to purchase these two pieces of property in order to keep them in the family. My clients first choice would be to purchase the remainder interest of the Cannon Bridge Road property in which the Lennon McLean has a life estate. Secondly, my clients would also be interested in purchasing the Caw Caw property but believe that they would probably have to do so after the timber was cut and sold on thereon. I would appreciate your forwarding this






information to the appropriate persons to determine whether or not they might be willing to sell these Orangeburg properties.

With kind regards, I am

Sincerely,

James B. Jackson, Jr.

JBJjr/ddb

cc: Jim McLean

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198 DOCKET STREET, N.E.
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January 17, 2003

James B. Drennan, III, Esquire
***Dennis, Shaw & Drennan, LLC***
103 Lafayette Street
Spartanburg, S.C. 29304-0891

Re: Estate of Elizabeth M. Pence Estate

Dear Jim:

This is to reconfirm my telephone conversation with you in which I indicated that my clients here in Orangeburg are interested in purchasing the Orangeburg County property owned by the late Elizabeth Pence. You indicated to me on the telephone that you would make sure that the heirs of her estate are aware of my clients' desires so that in the event they wish to sell the property, they will make sure that my clients do have an opportunity to purchase this property. In addition, I want to again ask you to please forward me a copy of Elizabeth Pence's Will so that my clients can have the opportunity to review it for themselves. Your cooperation in this matter is greatly appreciated.

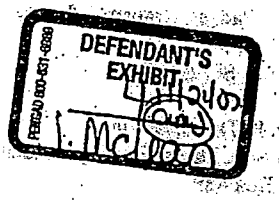
With kind regards, I am

Sincerely,

James B. Jackson, Jr.

JBJjr/ddb

cc: Jim McLean



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.

CERTIFICATE OF MAILING

I, John Jay James, II, do hereby certify that I have on this date served a copy of the Brief in support of Motion for Summary Judgment on behalf of Marlboro Academy, Inc., upon counsel of record by mailing copies, postage prepaid to:

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

Jeffrey L. Payne, Esquire
Turner, Padget, Graham & Laney, PA
P. O. Box 5478
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James R. Davis, Esquire
Nicholson, Davis, Frawley, Anderson & Ayer
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P. O. Box 2285
Columbia, SC 29202

Harry R. Easterling, Sr., Esquire
Goldberg & Easterling, PA
P. O. Drawer 655
Bennettsville, SC 29512

May 5 2008
Darlington, S. C.

JOHN JAY JAMES, II
Attorney for Plaintiff
Darlington Veneer Company
SC Bar #2949
112 Cashua Street
P. O. Box 507
Darlington, S. C. 29540
(803) 393-3881

STATE OF SOUTH CAROLINA )
)
COUNTY OF ORANGEBURG )

IN THE COURT OF COMMON PLEAS

Norman M. McLean, et al
☒ Plaintiff

v.

Wachovia Bank, Et Al
☒ Defendant.

CASE NO.
2006-CP-38-1523

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

| Plaintiff's Attorney: | Defendant's Attorney: |
|---|---|
| David Alexander, Bar No.<br>Address:<br>Culbertson & Alexander, LLC<br>110 Williams Street<br>Greenville, SC 29601<br>phone: 864-370-8222 fax: 864-370-8227<br>e-mail: david@culbertsonalexander.com other: | Edward B. Davis, Bar No. 16713<br>Address:<br>Bell, Davis & Pitt, P.A.<br>227 West Trade Street, Suite 2160<br>Charlotte, NC 28202<br>phone: 704-227-0129 fax: 704-227-0178<br>e-mail: ward.davis@belldavispitt.com other: |

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: Notice of Motion and Motion for Summary Judgment
Estimated Time Needed:45 minutes Court Reporter Needed: ☒ YES / ☐ NO

**SECTION II: Motion/Order Type**

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☑ Defendant — Date submitted: 2/22/08

**SECTION III: Motion Fee**

☒ PAID – AMOUNT: 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

**CLERK'S VERIFICATION**

Date Filed:

Collected by: _____

SCCA/233 (11-03)

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

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,

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.,

Defendants.

**DEFENDANT WACHOVIA'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

**TO: DAVID ALEXANDER, ESQUIRE, ATTORNEY FOR THE PLAINTIFFS:**

Defendant WACHOVIA BANK, NATIONAL ASSOCIATION ("Wachovia"), as Personal Representative of the Estate of Elizabeth P. Pence, and as Trustee of the Elizabeth P. Pence Trust, by and through undersigned counsel, will at such time and place as counsel may be heard, move that this Court grant Summary Judgment in favor of Wachovia against the Plaintiffs pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, on the basis that there is no genuine issue of material fact regarding Wachovia's actions, and that the determination of whether Wachovia owed or breached any fiduciary duty to the Plaintiffs, or whether Wachovia owed or breached any contractual duty to the Plaintiffs, is a matter of law to be determined by the Court.

Furthermore, the Complaint herein was not filed within the period required by applicable statutes of limitation, including without limitation the applicable limitations periods set forth in Titles 15 and 62 of the Code of Laws of South Carolina.

Moreover, Plaintiffs, through their counsel—a member of the South Carolina Bar purporting to represent one or more of the Plaintiffs—explicitly advised Wachovia counsel, defendant James B. Drennan ("Drennan"), that the Plaintiffs accepted the fact that they had no rights to the real property which is the subject of this action and that they agreed with the contention that the Plaintiffs did not possess the rights which they now allege. As a matter of law it was reasonable for Drennan and Wachovia to rely upon such representations on behalf of the Plaintiffs and to act as they did, and the Plaintiffs are now estopped from changing their position.

The foregoing Motion will be based upon all of the pleadings and exhibits thereto, all discovery taken and served, and any affidavits or memoranda which may be served prior to the hearing.

This the 22nd day of February, 2008.

Edward B. Davis (S.C. State Bar No. 16713)
*Attorney for Wachovia Bank, National Association*

OF COUNSEL:

BELL, DAVIS & PITT, P.A.
227 West Trade Street, Suite 2160
Charlotte, NC 28202
Telephone: 704/227-0400
Facsimile: 704/227-0178

::ODMA\PCDOCS\DOCS\410697\1

**CERTIFICATE OF SERVICE**

I do hereby certify that on the date below, I served the attached pleading on the addressee(s) listed below via:

✓ U.S. Mail, first class, postage prepaid;

or

___ Hand delivery;

or

___ Facsimile;

or

___ Email.

This 22nd day of February, 2008.

Edward B. Davis

Addressee(s):

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

Harry R. Easterling, Sr.
Goldberg & Easterling, P.A.
Post Office Drawer 655
Bennettsville, South Carolina 29512

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Pauling & James, LLP
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Matthew H. Henrikson
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Jeffrey L. Payne
John M. Scott, III
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James Randall Davis
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Ellis Lawhorne & Sims, P.A.
Post Office Box 2285
Columbia, South Carolina 29202

::ODMA\PCDOCS\DOCS\410697\1

| | |
|---|---|
| STATE OF SOUTH CAROLINA | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | 2006-CP-38-1523 |
| Norman M. McLean; James N. McLean; Marie McLean-Choi; William N. McLean; Robert L. McLean; and JL McLean Properties, LLC<br><br>Plaintiffs,<br><br>v.<br><br>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.,<br><br>Defendants. | **DEFENDANT WACHOVIA'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** |

Defendant Wachovia Bank, National Association, as Personal Representative of the Estate of Elizabeth P. Pence, and as Trustee of the Elizabeth P. Pence Trust ("Wachovia"), has moved the Court for entry of an Order granting it summary judgment on plaintiffs' claims against it, for breach of contract and breach of fiduciary duty. Wachovia is entitled to judgment as a matter of law because:

(i) Plaintiffs' claims are barred the applicable statutes of limitation, in that Plaintiffs were keenly aware of the issues about which they now complain at least as early as September of 2002—and even raised them through counsel at that time—yet did not file their Complaint in this matter until December 20, 2006, alleging the exact same entitlement to property they asserted in 2002 through counsel;

(ii) Plaintiffs' counsel explicitly advised Wachovia's counsel in October of 2002 that plaintiffs accepted the fact that they had no rights to the real property which is the subject of this action, and even inquired about purchasing the property that they now claim in their Complaint "rightfully belonged to Plaintiffs." ;

(iii) As a matter of law Wachovia has not breached any duty to the Plaintiffs.

**FACTS**

Given the statute of limitations problems with Plaintiffs' claims, it is important to note some key dates established in the record:

- May 28, 1999—pursuant to a power of attorney, Defendant James E. Brogdon, Sr. ("Brogdon") created the Revocable Trust Agreement (the "Trust Agreement") for Elizabeth McLean Pence ("Lib Pence")

- October 3, 1999—Lib Pence died, and her estate was administered in the Probate Court of Marlboro County. The Caw Caw Swamp and Cannon Bridge Road properties, which are the subject of this litigation, were administered as a part of Lib Pence's, and passed to her daughter, Elizabeth P. Pence ("Elizabeth P.") under Lib Pence's will.

- October 19, 2000—Elizabeth P. brought suit against Brogdon, Clemson University, and Coker College to contest the validity of the May 28, 1999 Trust Agreement and the property transfers thereto. The current Plaintiffs were not parties to this litigation (the "Trust Litigation").

- February 26, 2002—The parties to the Trust Litigation entered into a court-approved Compromise and Settlement Agreement. Pursuant to this Agreement, sixty percent (60%) of the trust assets were to be distributed to Elizabeth P. (or to Wachovia as Trustee under a revocable trust agreement created by Elizabeth P.) and forty percent (40%) of the trust assets, to include specifically the Orangeburg real property held by the Trust, were to remain in the trust of Lib Pence and be administered and distributed according to its terms. It is this Compromise and

Settlement Agreement that the current Plaintiffs contend should subject the Caw Caw Swamp and Cannon Bridge Road properties to the revocable trust agreement of Lib Pence.

- August 26, 2002—Elizabeth P. died without issue surviving. Her Will and revocable trust agreement left her estate to Marlboro Academy, Inc. The Caw Caw Swamp property and one-half remainder interest in the Cannon Bridge Road property were assets of the estate. Wachovia was personal representative of her estate as well as trustee of her revocable trust agreement.

- September 16, 2002, September 23, 2002 and September 30, 2002—The Marlboro Herald published Notice to Creditors of Elizabeth P.'s estate. No claims were filed within the statutory eight-month period.

- September 27, 2002—Attorney Jay Jackson ("Jackson"), on behalf of Plaintiff Norman McLean, and his son, Plaintiff James McLean, wrote to Defendant James B. Drennan, III ("Drennan"), who represented Wachovia, inquiring about his clients' potential rights to the subject property. Exhibit A hereto.

- October 1, 2002—Drennan responded to Jackson, explaining in details how the subject property passed and why Jackson's clients were not entitled to the property. Exhibit B hereto.

- October 21, 2002—Jackson responded to Drennan's October 1 letter, stating unequivocally that his clients "accept and agree with the set forth in your letter of October 1, 2002, thereby accepting the fact that the Plaintiffs were not entitled to the subject property. Exhibit C hereto.

- July 23, 2004—Wachovia, as personal representative of the Estate of Elizabeth P., sold the Caw Caw Swamp property to defendants Thompson and Money to Go, LLC. The net proceeds of this sale were later distributed in part to Marlboro Academy, Inc.

- October 25, 2004—Wachovia, as trustee of the revocable trust agreement of Elizabeth P., conveyed to Marlboro Academy, Inc. a one-third (1/3) remainder interest in the Cannon Bridge Road property.

- December 19, 2006, Plaintiffs filed this suit, based on the exact same issues addressed in Jay Jackson's letter of 27 September 2002 to James Drennan, and subsequent correspondence.

Plaintiffs' claims in this matter are all based on their assertion that they were entitled to the subject property that they now seek to recover. As expressed in paragraph 72 of their Complaint, Plaintiffs claim that the subject property "rightfully belonged" to them, and that Defendants' failure to transfer the property to them was in violation of their claims to the property. The fundamental problem with Plaintiffs' assertion is that these issues were raised and examined in detail in 2002 between counsel for Plaintiffs and counsel for defendants, at which time Plaintiffs explicitly acknowledged, in a letter from their counsel to Wachovia's counsel on 21 October 2002, that they accepted Defendants' position that Plaintiffs were not entitled to the property and that they accepted Defendants' position on the matter. See Exhibits hereto. The 21 October 2002 letter from plaintiffs' counsel, Jay Jackson, to Wachovia's counsel, Jim Drennan, stated:

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

See Exhibit C hereto.

Despite this explicit, unequivocal communication to Wachovia's counsel in 2002, Plaintiffs filed this lawsuit in December of 2006, based on the exact same issues and documents

addressed in the 2002 correspondence, and now, more than four years later, reversing course and claiming that the subject property "rightfully belonged" to them.[1]

## LEGAL ANALYSIS

### A. Summary Judgment Standard

The standard for deciding a summary judgment motion under South Carolina Rule of Civil Procedure 56(c) is familiar, but instructive: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." Id.

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

### B. Statute of Limitations

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

> **Statutes [of limitation] are designed to promote justice by forcing parties to pursue a case in a timely manner. Parties should act before memories dim,**

[1] Plaintiffs make a half-hearted attempt to explain the letter away by claiming that attorney Jay Jackson was not acting on their behalf, despite the clear language of the letter, and attorney Jackson's testimony to the contrary.

> **evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs.**
>
> **Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose ... is to protect potential defendants from protracted fear of litigation.**

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

1. Section 15-3-530

Under S.C. Code § 15-3-530, the statute of limitations for claims of breach of contract and breach of fiduciary duty is three years. The contract Plaintiffs claim Defendants breached is the trust litigation Compromise and Settlement Agreement, which Plaintiffs claim Defendants breached by denying them the ownership and possession of the property to which they claimed to be entitled. Plaintiffs' breach of fiduciary duty claims are based on the same alleged failure by Defendants to protect Plaintiffs' alleged rights to the subject property.

It is undisputed and undeniable that at least some of the plaintiffs were keenly aware that they were being denied their alleged ownership and possession of the subject property as far back as September of 2002. The Settlement Agreement that plaintiffs now claim was breached was the very subject of the exchange of letters between Plaintiffs' counsel and James Drennan, beginning with Jay Jackson's letter of 27 September 2002. Indeed, Jackson's 27 September 2002 states:

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

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

See Exhibit A hereto.

Plaintiffs have sued Defendants, including Wachovia in its capacity as Personal Representative of the Estate of Elizabeth P. Pence and as Trustee of the Elizabeth P. Pence Trust, based on the issues raised in this letter. James Drennan was acting as Wachovia's counsel when these letters were exchanged in 2002. It is crystal clear that the alleged property rights which the Plaintiffs are now claiming and seeking to enforce are **EXACTLY THE SAME ALLEGED PROPERTY RIGHTS RAISED IN ATTORNEY JAY JACKSON'S LETTER OF SEPTEMBER 27, 2002.**

Given the more than four years that passed between Jackson's 27 September 2002 letter and the filing of this lawsuit, Plaintiffs' claims are barred by the applicable statutes of limitation.

**2. Probate Code**

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

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

In waiting until 20 December 2006 to file the current lawsuit, despite getting notice and even corresponding in 2002 with various Defendants through counsel, the Plaintiffs clearly did not meet the requirements set forth in the Probate Code governing the filing of such claims. Accordingly, all of their claims to the subject property should be dismissed.

C. **Estoppel**

Notwithstanding the foregoing, even without the statute of limitations problems that bar Plaintiffs' claim, Plaintiffs are also estopped from filing suit against Wachovia and other defendants after explicitly stating to Wachovia's counsel that they agreed with Wachovia's position. It is tantamount to giving someone permission to do something, and then suing them for doing it. The law does not allow such injustice born out of a plaintiff's own representations or actions. As stated by the Supreme Court in Kelly v. McCray, 278 S. C. 88, 90, 292 S. E.2d 587, --- (1982):

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

Citing General Motors Acceptance Corp. v. Herlong, 248 S. C. 55, 159 [149] S. E.2d 51 (1966); also citing South Carolina State Highway Department v. Metts, 270 S. C. 73, 240 S. E.2d 816 (1978).

The present case is a classic case for equitable estoppel. Through attorney Jay Jackson's 21 October 2002 letter, Plaintiffs represented to Wachovia's counsel that they accepted and agreed with Wachovia's position that plaintiff's were not entitled to the property at issued, and

Wachovia had no reason to doubt Jay Jackson's statements. In reliance on such representations, which demonstrated that there was not dispute as to the disposition of the subject property, Wachovia ultimately sold the property, a clear change of position that the plaintiffs now seek to reverse.

## CONCLUSION

The property rights and Compromise and Settlement Agreement which Plaintiffs purport to enforce in this lawsuit are exactly the same property rights and Agreement about which Plaintiffs communicated with James Drennan in September and October of 2002, at which time the Plaintiffs ultimately "accepted and agreed" with the position set forth by Drennan, who was representing Wachovia. Plaintiffs claims are barred by the applicable statutes of limitation, as well as principals of estoppel, justice and common sense.

Respectfully submitted this 7th day of May, 2008.

Edward B. Davis (S.C. State Bar No. 16713)
*Attorney for Wachovia Bank, National Association*

OF COUNSEL:

BELL, DAVIS & PITT, P.A.
227 West Trade Street, Suite 2160
Charlotte, NC 28202
Telephone: 704/227-0400
Facsimile: 704/227-0178

**CERTIFICATE OF SERVICE**

I do hereby certify that on the date below, I served the attached pleading on the addressee(s) listed below via:

___ U.S. Mail, first class, postage prepaid;

or

___ Hand delivery;

or

___ Facsimile;

or

✓ Email.

This 9th day of May, 2008.

Edward B. Davis

Addressee(s):

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

Harry R. Easterling, Sr.
Goldberg & Easterling, P.A.
Post Office Drawer 655
Bennettsville, South Carolina 29512

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Lexington, South Carolina 29071

W. Cliff Moore, III
Ellis Lawhorne & Sims, P.A.
Post Office Box 2285
Columbia, South Carolina 29202

::ODMA\PCDOCS\DOCS\418207\1

# EXHIBIT A

YARBOROUGH, HUTTO & JACKSON
ATTORNEYS AT LAW
198 DOCKET STREET, N.E.
POST OFFICE BOX 2268
ORANGEBURG, SOUTH CAROLINA 29116-2268

F. HALL YARBOROUGH
RONALD E. HUTTO
JAMES B. JACKSON, JR.

TELEPHONE:
(803) 534-0626
(803) 534-0852
FAX:
(803) 536-2175

September 27, 2002

James B. Drennan, III, Esquire
Dennis, Shaw & Drennan, LLC
103 Lafayette Street
Spartanburg, S.C. 29304-0891

Re: Elizabeth M. Pence Estate

Dear Jim:

Pursuant to your request of August 30, 2002, I am enclosing a copy of the deed from O. Davie Burgdorf, Master-in-Equity for Orangeburg County to Elizabeth M. Pence which seems to convey the Caw Caw Swamp property to her and provides a legal description therein. It seems to me that the 120.11 acres and the lot shown as tract 2-A would be Caw Caw Swamp property. The remaining piece seems to me to be in Limestone Township which is probably a different piece of property. I trust that this will provide you the information you need to prepare the Deed of Distribution.

Additionally, I have been asked by Jim McLean, who is the son of Norman McLean, to review a number of documents that he provided me which includes the Elizabeth Pence Trust agreement prepared by attorney J. Munford Scott, Jr. dated May of 1999 and the Order Approving Compromise and Settlement with the attached Compromise and Settlement Agreement which was the result of a lawsuit filed in Marlboro in case number 00-CP-34-354. In reading the Compromised and Settlement agreement, which was approved by Judge Lockemy, in paragraph 8 entitled "Separate Accounting For Orangeburg Reality", its says that in the event that Elizabeth P. Pence dies without children that the intent was for the Orangeburg real property to be distributed to the issue of Norman M. McLean. Therefore, it appears to me on the face of this matter that since Ms. Pence died recently without children that the Order and Settlement Agreement would require that the Orangeburg property be distributed from her estate or from the trust or both to the children of Norman McLean. I would appreciate your letting me know your position in regards to that matter so that I can advise my clients appropriately.

With kind regards, I am

Sincerely,

James B. Jackson, Jr.

JBJjr/ddb

DEFENDANT'S EXHIBIT 3 Identification J. McLean

EXHIBIT #3

# EXHIBIT B

DENNIS, SHAW & DRENNAN, LLC
ATTORNEYS AT LAW
103 LAFAYETTE STREET
REPLY TO: POST OFFICE BOX 891
SPARTANBURG, S.C. 29304-0891
TELEPHONE (864) 582-0708
FAX (864) 582-0934

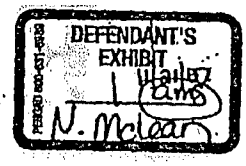
October 1, 2002

JAMES W. SHAW, P.A.
JAMES B. DRENNAN, III, P.A.**
ANTHONY H. RANDALL, P.A.***
*ALSO ADMITTED IN MASSACHUSETTS
**CERTIFIED SPECIALIST IN ESTATE PLANNING, PROBATE & TRUST LAW
*** ALSO ADMITTED IN NORTH CAROLINA

R. RAY DENNIS*
OF COUNSEL

James B. Jackson, Jr., Esq.
Yarborough, Hutto & Jackson
Attorneys at Law
P.O. Box 2268
Orangeburg, SC 29116-2268

DRAFT




Re: Estate of Elizabeth M. Pence

Dear Jay:

I appreciate your sending me a copy of the deed by which Elizabeth M. Pence acquired the two properties which comprise the Caw Caw Swamp property.

I was disappointed at the comments which you made in your letter of September 27th regarding your construction of the Compromise and Settlement Agreement which was reached in connection with the Brogdon trust litigation: I believe that I have already explained to you why the Caw Caw Swamp property is not covered by that Settlement Agreement and it will not, therefore, be included in the Orangeburg County property which passes to your clients, the McLeans.

What I told you previously is that Hall Yarborough had advised me that the Caw Caw Swamp property was part of the Orangeburg County property which had been transferred into the Brogdon trust. If I have not already given you a copy of his letter to me to that effect, I can do so.

Acting upon the information which had been given to me by Mr. Yarborough, I believed that the Caw Caw Swamp property was part of the Brogdon trust and I included it on the estate tax return as property belonging to that trust, but taxable as part of Mrs. Pence's estate.

When we settled the Brogdon trust litigation, I still was under the impression that the Caw Caw Swamp property was in the Brogdon trust. It was only after the Court had approved the Settlement Agreement that Mr. Brogdon advised me for the first time that the Caw Caw Swamp property had never been transferred into his trust and it was not, therefore, subject to the Settlement Agreement.

Since the purpose of the Settlement Agreement was to divide up the Brogdon trust property and end the trust litigation, it has no effect on any property which was not trust

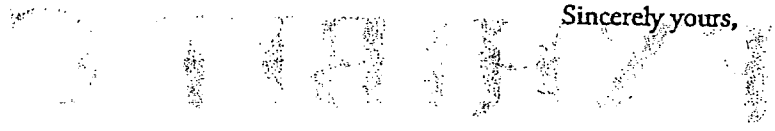
property at the time the Settlement Agreement was entered into. If it had been intended that the Caw Caw Swamp property be made subject to the trust and to the provisions of the Settlement Agreement which will cause the trust's Orangeburg County property to go to your clients, there would have been a provision to that effect in the Settlement Agreement.

I believe that Hall Yarborough made an honest mistake when he told me that the Caw Caw Swamp property was part of the Brogdon trust, but his mistake is not going to inure to the benefit of your firm's clients and to the detriment of my client, whom he was effectively representing when he undertook to do the work for me.

If your clients have an interest in purchasing this property from Mrs. Pence's estate, I will be glad to discuss that with you.

With kindest regards,

Sincerely yours,



JBD,III/tl
CC: Freeman W. Coggins, Jr., Senior Vice President
Mack Cornett, Trust Officer

James B. Drennan, III

# EXHIBIT C

YARBOROUGH, HUTTO & JACKSON
ATTORNEYS AT LAW
198 DOCKET STREET, N.E.
POST OFFICE BOX 2268
ORANGEBURG, SOUTH CAROLINA 29116-2268

F. HALL YARBOROUGH
RONALD E. HUTTO
JAMES B. JACKSON, JR.

TELEPHONE:
(803) 534-0626
(803) 534-0852
FAX:
(803) 536-2175

October 21, 2002

James B. Drennan, III, Esquire
***Dennis, Shaw & Drennan, LLC***
103 Lafayette Street
Spartanburg, S.C. 29304-0891

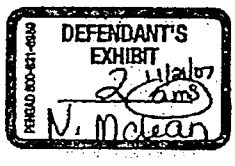
Re: Estate of Elizabeth M. Pence Estate

Dear Jim:

This is to advise that I am in receipt of your letter of October 1, 2002 and I appreciate your again explaining this situation to me. Unfortunately, I did remember that you had made some explanation to me regarding this matter but I could not remember all of the details and I appreciate your putting those in writing. I apologize for making you go to this efforts but I appreciate your letter.

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

The additional purpose of this letter is to request that you provide us with a copy of the Will of Elizabeth Pence, the daughter, because we do not have a copy of that document. Additionally, we would like to let you know and would ask that you let the beneficiaries of Ms. Pence's Will know that my client's are willing, to purchase these two pieces of property in order to keep them in the family. My clients first choice would be to purchase the remainder interest of the Cannon Bridge Road property in which the Lennon McLean has a life estate. Secondly, my clients would also be interested in purchasing the Caw Caw property but believe that they would probably have to do so after the timber was cut and sold on thereon. I would appreciate your forwarding this






information to the appropriate persons to determine whether or not they might be willing to sell these Orangeburg properties.

With kind regards, I am

Sincerely,

James B. Jackson, Jr.

JBJjr/ddb

cc: Jim McLean

# EXHIBIT D



YARBOROUGH, HUTTO & JACKSON
ATTORNEYS AT LAW
198 DOCKET STREET, N.E.
POST OFFICE BOX 2268
ORANGEBURG, SOUTH CAROLINA 29116-2268

F. HALL YARBOROUGH
RONALD E. HUTTO
JAMES B. JACKSON, JR.

TELEPHONE:
(803) 534-0626
(803) 534-0852
FAX:
(803) 536-2175

January 17, 2003

James B. Drennan, III, Esquire
*Dennis, Shaw & Drennan, LLC*
103 Lafayette Street
Spartanburg, S.C. 29304-0891

Re: Estate of Elizabeth M. Pence Estate

Dear Jim:

This is to reconfirm my telephone conversation with you in which I indicated that my clients here in Orangeburg are interested in purchasing the Orangeburg County property owned by the late Elizabeth Pence. You indicated to me on the telephone that you would make sure that the heirs of her estate are aware of my clients' desires so that in the event they wish to sell the property, they will make sure that my clients do have an opportunity to purchase this property. In addition, I want to again ask you to please forward me a copy of Elizabeth Pence's Will so that my clients can have the opportunity to review it for themselves. Your cooperation in this matter is greatly appreciated.

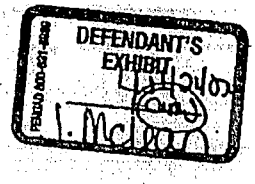
With kind regards, I am

Sincerely,

James B. Jackson, Jr.

JBJjr/ddb

cc: Jim McLean



| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF ORANGEBURG<br><br>Norman M. McLean, James N. McLean, Marie McLean-Choi, William N. McLean, Robert L. McLean, and JL McLean Properties, LLC<br>☐ Plaintiff<br><br>v.<br><br>James B. Drennan, III, as Personal Representative of the Estate of Elizabeth McLean Pence, et al.<br>☐ Defendant. | IN THE COURT OF COMMON PLEAS<br><br>CASE NO.<br><br>2006-CP-38-1523<br><br>MOTION AND ORDER INFORMATION FORM AND COVER SHEET |

| Plaintiff's Attorney: | Defendant's Attorney: |
|---|---|
| David Alexander, Esquire, Bar No.<br>Address:<br>Culbertson & Alexander, LLC<br>110 Williams Street<br>Greenville, SC 29601<br>phone: 864-370-8222 fax: 864-370-8227<br>e-mail: david@culbertsonalexander.com other: | Matthew H. Henrikson, Bar No. 7897<br>Address:<br>CLARKSON WALSH RHENEY & TERRELL,<br>P.O. Box 6728<br>Greenville, South Carolina 29606<br>phone: 864-232-4400 fax: 864-235-4399<br>e-mail: mhenrikson@cwrtlaw.com other: |

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: Notion of Motion and Motion for Summary Judgment
Estimated Time Needed: 45 minutes Court Reporter Needed: ☒ YES / ☐ NO

**SECTION II: Motion/Order Type**

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — Date submitted: 2/12/08

**SECTION III: Motion Fee**

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
Name of Court Reporter:
☐ Other:

| JUDGE'S SECTION | |
|---|---|
| ☐ Motion Fee to be paid upon filing of the attached order.<br>☐ Other: | JUDGE<br>CODE: Date: |

**CLERK'S VERIFICATION**

Date Filed:
Collected by:

☐ MOTION FEE COLLECTED:
☐ CONTESTED – AMOUNT DUE:

STATE OF SOUTH CAROLINA )
)
COUNTY OF ORANGEBURG )

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. Pencer Trustee, Marlboro Academy, Inc., Charles P. Thompson, Cheri 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.

IN THE COURT OF COMMON PLEAS

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

**NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

**TO: DAVID ALEXANDER, ESQUIRE, AND ATTORNEY FOR THE PLAINTIFFS:**

The Defendant, JAMES B. DRENNAN, III, as Personal Representative of the Estate of Elizabeth McLean Pence, by and through his undersigned attorney will at such time and place as counsel may be heard, move that this Court grant Summary Judgment in favor of this Defendant

against the Plaintiffs pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. This Defendant so moves upon the basis that there is no genuine issue of material fact regarding this Defendant's actions, and that the determination of whether this Defendant breached any fiduciary duty owed to the Plaintiffs herein or whether he breached any contract with the Plaintiffs is a matter of law to be determined by the Court. The Complaint herein alleges that this Defendant is liable to Plaintiffs on account of certain alleged "transfers" of real property belonging to Plaintiffs, and the only deed of any kind to which this Defendant was alleged to be a party was the deed of distribution referred to in paragraph 50 of the Complaint, which said deed of distribution was not a conveyance of title under the S.C. Code Ann. §62-3-907 but a release of the personal representative's power over title to real property, the title to which passed at the moment of Elizabeth McLean Pence's death to her heirs or devisees pursuant to S.C. Code Ann. §62-3-101. This Defendant was not a party to any of the other "transfers" which the Complaint alleges constituted breaches of fiduciary duty (Complaint paragraph 72) or breach of contract (Complaint paragraphs 80 and 81). Moreover, this Defendant was explicitly advised by a member of the South Carolina Bar purporting to represent one or more of the Plaintiffs that the Plaintiffs were satisfied that they had no rights under the Settlement Agreement to the real property which is the subject of this action and that they agreed with this Defendant's contention that the Plaintiffs did not possess the rights which they now allege, and that as a matter of law it was reasonable for this Defendant to rely upon such advice and to act as he did, and the Plaintiffs are now estopped to change their position. This Motion is further based on the fact that the Complaint herein was not filed within the period required by applicable statutes of limitation, measured from the date on which the Plaintiffs had actual and/or constructive knowledge of their purported rights under the Settlement Agreement which concluded the trust litigation.

The foregoing Motion will be based upon all of the pleadings and exhibits thereto, all discovery taken and served, and any affidavits or memorandum which may be served upon you prior to the hearing.

RESPECTFULLY SUBMITTED,

Matthew H. Henrikson (S.C. Bar #7897)
CLARKSON WALSH RHENEY & TERRELL, P.A.
P.O. Box 6728
Greenville, SC 29606
864-672-7115
864-235-4399 (fax)
mhenrikson@cwrtlaw.com
ATTORNEYS FOR DEFENDANT DRENNAN

February 12, 2008
Greenville, South Carolina

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | |
| COUNTY OF ORANGEBURG ) | 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, ) | |
| ) | **CERTIFICATE OF SERVICE** |
| 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. Pencer Trustee, Marlboro Academy, Inc., Charles P. Thompson, Cheri 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. ) | |

I hereby certify that I have, this date written below, served the within **Motion for Summary Judgment** upon counsel for the Plaintiffs and Defendants, by depositing a copy thereof in the United States Mail and via email, postage prepaid, and addressed as follows:

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

John M. Scott, III, Esquire
**Turner Padget Graham and Laney, P.A.**
P.O. Box 5478
Florence, South Carolina 29501

Harry R. Easterling, Sr., Esquire
**Goldberg & Easterling, P.A.**
P.O. Drawer 655
Bennettsville, South Carolina 29512

Edward Bilbro Davis, Esquire
**Bell Davis & Pitt, P.A.**
227 West Trade Street
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Jeffrey L. Payne, Esquire
**Turner Padget Graham and Laney, P.A.**
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Darlington, South Carolina 29540

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**Ellis Lawhorne & Sims, P.A.**
P.O. Box 2285
Columbia, South Carolina 29202

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

**CLARKSON, WALSH, RHENEY & TERRELL, P.A.**

Deborah Leirer
Legal Assistant for Matthew H. Henrikson

Signed this 12th day of February, 2008.
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

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.

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

**ORDER**
(As to Defendant James E. Brogdon, as Trustee)

This matter came before me for a hearing on May 12, 2008 in Orangeburg, South Carolina. Motions for summary judgment were made and heard on behalf of the defendants on that date. Counsel and many of the parties themselves were present. After careful consideration of the facts of the case and the applicable law, the Motion for Summary Judgment filed on behalf of the Defendant James E. Brogdon, Sr, as Trustee of the Trust Agreement of Elizabeth McLean Pence dated May 28, 1999 (hereinafter "Brogdon"), is hereby **GRANTED**.

## FINDINGS OF FACT

The facts necessary to the resolution of this matter are not in dispute and may be summarized as follows:

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

2. On May 28, 1999, pursuant to the power of attorney, Brogdon created a Revocable Trust Agreement for Pence, Sr. ("Trust") and thereafter transferred to himself as Trustee of that Trust certain real properties in Marlboro and Orangeburg Counties along with liquid assets of substantial value. The properties which are the subject of this litigation (the "Caw Caw Swamp" property and the "Cannon Bridge Road" property) were never transferred to this Trust. The only Orangeburg County property transferred to this Trust was the "Gramling Road" property. This Trust provided lifetime benefits for Pence, Sr. The Trust became irrevocable at the death of Pence, Sr. and thereafter provided for lifetime benefits to the daughter of Pence, Sr., Elizabeth P. Pence (hereinafter "Pence, Jr."). The Trust provided further that at the death of Pence, Jr. the trust assets were to go to her issue, and, if there were no issue of Pence, Jr., the Orangeburg County real estate held by the Trust was to go to the issue of Norman M. McLean (and all other assets were to go to Clemson University and Coker College).

3. On October 3, 1999, Pence, Sr. died. Her estate was administered in the Probate Court of Marlboro County. The Caw Caw Swamp and Cannon Bridge Road

properties were administered as a part of the Estate of Pence, Sr. (and passed to Pence, Jr. pursuant to the Will of Pence, Sr.).

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

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

6. On August 26, 2002, Pence, Jr. died without issue surviving. Her Will and revocable trust agreement left her estate to Marlboro Academy, Inc. Her estate was administered in the Probate Court for Marlboro County. Her spouse, Stephen Pence, filed an elective share claim and thus became entitled to a portion of her

estate. Included among the assets of her estate were the Caw Caw Swamp property and one-half remainder interest in the Cannon Bridge Road property. Wachovia Bank was personal representative of her estate as well as trustee of her revocable trust agreement.

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

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

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

9. On October 1, 2002, Mr. Drennan responded to Mr. Jackson and explained why the Caw Caw Swamp was not a part of the Trust. On October 21, 2002, Mr. Jackson responded to Mr. Drennan as follows:

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

10. On January 17, 2003, Mr. Jackson again wrote Mr. Drennan expressing the interest of his clients in purchasing the Orangeburg County property owned by the late Elizabeth Pence.

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

a. James McLean knew while Pence, Sr. was alive that the Gramling Road property had been transferred to the Trust and that the Caw Caw Swamp and Cannon Bridge Road properties had not. (James McLean Deposition, pages 18-20).

b. On February 25, 2002 William McLean signed a document releasing his right to be a successor co-trustee to Mr. Brogdon and he received at that time what he described as a "partial faxed copy of the Settlement Agreement." (William McLean Deposition, pages 27-29).

c. On February 25, 2002, William McLean knew that the Trust Litigation had been settled by the parties. (McLean responses to Brogdon's Request to Admit).

d. James McLean testified that he was aware that his brother William "had to go to Florence and meet with some people because he was a backup trustee or something." (James McLean Deposition, page 25).

e. Norman McLean testified he discussed the matters addressed in the Jackson-Drennan correspondences with Mr. Jackson and with his children. (Norman McLean Deposition, pages 45-58).

f. Mr. Jackson testified that he discussed the contents of the various letters with Norman McLean. (James Jackson Deposition, pages 17-18 and 21-23).

g. Mr. Jackson testified to his belief that copies of the letters were sent to James McLean (who was shown to be a copy recipient). (James Jackson Deposition, pages 23-24).

12. On July 23, 2004, Wachovia Bank as personal representative of the Estate of Pence, Jr. sold the Caw Caw Swamp property to defendants Thompson and Money to Go, LLC. The net proceeds of this sale were later distributed in part to Marlboro Academy, Inc.

13. On October 25, 2004, Wachovia Bank as trustee of the revocable trust agreement of Pence, Jr. issued to Marlboro Academy, Inc. a deed of distribution for a one-third (1/3) remainder interest in the Cannon Bridge Road property.

14. On December 19, 2006, Plaintiffs filed this suit, claiming in effect that the February 26, 2002 Settlement Agreement and Order required Pence, Jr. to transfer

to the revocable trust agreement of Pence, Sr. the Caw Caw Swamp property and her interest in the Cannon Bridge Road property and that the receipt by Marlboro Academy, Inc. of a portion of the proceeds from the sale of the Caw Caw Swamp property and a one third remainder interest in the Cannon Bridge Road property resulted in unjust enrichment and that the purported transfers of these properties should be set aside. They further claim that Brodgon has mismanaged the trust assets by failing to transfer the Caw Caw Swamp and Grambling Road properties to the Trust.

## CONCLUSIONS OF LAW

### Standard for Summary Judgment

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001). While this court must view the evidence in the light most favorable to the Plaintiffs, the Plaintiffs cannot defeat summary judgment by relying on mere allegations in their Complaint. Rule 56(e), SCRCP; Id.; Shupe v. Settle, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994). Instead, the Plaintiffs must set forth specific facts showing there is a genuine issue of material fact. Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994). This court is not required to single out some small piece of evidence and attach to it a great significance when that evidence is introduced solely to create an issue of fact that is not genuine. Main v. Corley, 281 S.C. 525, 315 S.E.2d 406 (1984). In other words, the Plaintiffs must present more than a mere scintilla of evidence to overcome a Defendant's Motion for Summary Judgment. Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994).

Rule 60(b) SCRCP

In this case the Plaintiffs have claimed that the Settlement Agreement, which was approved by the Marlboro County Court of Common Pleas on February 26, 2002, somehow made the Caw Caw Swamp and Cannon Bridge Road properties subject to the terms of the Trust. This Court disagrees. The Settlement Agreement made no mention whatsoever of the Cannon Bridge Road property. While the Caw Caw Swamp property, which was never deeded to the Trust, was listed on the schedule of real properties attached to the Settlement Agreement, the Court finds that Schedule B was for valuation purposes to set forth the basis of the agreed upon 60%/40% division. The Caw Caw Swamp property was owned by Pence Jr. at the time, and the Settlement Agreement clearly imposed no requirement on her or anyone else to add property to the Trust.

The fact that the Settlement Agreement became a Court Order is significant because of the time limitations prescribed by Rule 60(b) SCRCP ("Rule 60(b)"). Under Rule 60(b), Plaintiffs were required to file a motion within one year from the date of the entry of the Order, i.e., by February 26, 2003, to correct any mistakes in the Order. Plaintiffs apparently contend that the Settlement Agreement mistakenly omitted the requirement that Pence Jr add the properties at issue to the Trust. The Plaintiffs, or those through whom they claim, failed to timely file the requisite Rule 60(b) motion to correct or clarify the Order.

Rule 60(b) was enacted to ensure finality to litigants and other parties relying on orders issued by the courts of this State. Their attempt through this lawsuit at this late date to do what was required by Rule 60(b) is time barred. The Plaintiffs cannot sit idly by for nearly five years and then attempt to set aside the numerous transactions that have occurred in reliance upon the Order. Consequently the Court grants the Defendant Brogdon's motion for summary judgment.

The Plaintiffs also contend that they as beneficiaries of the Trust are not bound by the Order and they have the right to challenge the Order and Settlement Agreement nearly five years after the entry of the Order. The Plaintiffs' argument is undercut by S.C. Code Ann. § 62-1-403(2)(ii) which provides that an order binding a trustee also binds beneficiaries in proceedings involving third parties and §62-1-403(3)(i) which provides that sufficient notice is given where notice is given to every interested person or to one who can bind an interested person as described in 2(i) or 2(ii) above. (emphasis added) The Court also notes that several of the Plaintiffs were on actual notice of the Agreement and Order within the Rule 60(b) time period. William McLean received a copy of the Order on February 25, 2002 and Norman McLean discussed the situation with attorney Jay Jackson and was the recipient of his correspondences in the September-October, 2002 time frame. As such, the Plaintiffs were bound by the Order of February 26, 2002 and were obligated by Rule 60 to voice their objections thereto within one year of the Order.

Statute of Limitations

Even if the Plaintiffs were not required to timely file a Rule 60(b) motion to obtain the relief they now seek, the Plaintiffs had three years to bring their suit for breach of fiduciary duty, against Brogdon. S.C. Code Ann. §15-3-530. The Plaintiffs' deadline for filing their action began to run on the date the Plaintiffs knew or should have known of an alleged breach of any fiduciary duty by Brogdon or of an alleged breach of the Settlement Agreement.

As above stated, §62-1-403(2)(ii) provides that a Court order that is binding on a Trustee is binding on the trust beneficiaries in proceedings involving third parties. Thus, the starting date for the running of the statute of limitations would be February 26, 2002 and since Plaintiffs filed this action long after that date, their claim is further barred by §15-3-530(i).

Plaintiffs however claim that they had no actual notice of the court order of February 26, 2002 and that therefore the statute of limitations would not begin to run until they had either actual notice or such notice as would put a reasonable man on notice of the Agreement and Order.

Even under this theory, Plaintiffs fail. While Plaintiffs contend that they were ignorant of the breach of any fiduciary duty by Brogdon until mid-2004 when Wachovia Bank sold the Caw Caw Swamp property, the depositions of William McLean, Norman McLean and James McLean show that each of them had some knowledge about what was or was not in the revocable trust agreement of Pence, Sr. by October, 2002 and that each knew, or had reason to know, that the Caw Caw Swamp and Cannon Bridge Road properties were not in the trust and were not deemed to be subject to the February 26, 2002 Settlement Agreement by the representatives of the estate of Pence, Jr.

The record is replete with evidence that by October, 2002, various Plaintiffs had actual knowledge, or knowledge which would have put a person of common knowledge or experience on notice, that those administering the estate of Pence, Jr. had taken the position that the Caw Caw Swamp and Cannon Bridge Road properties were not subject to the terms of the Trust of Pence, Sr. nor to the terms of the Settlement Agreement. By waiting until December 19, 2006 to file suit, Plaintiffs have waited too long and they are now also barred by §15-3-530(1) of the Code from bringing this action.[1]

[1] Plaintiffs further argue that this case is not controlled by the three year statute of §15-3-530(1) governing contract actions but instead by §15-3-520(b) which provides for a 20-year statute of limitations for actions upon sealed instruments. S. C. Code Ann. §19-1-160 provides: "Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto." Thus, §19-1-160 "imposes a statutory rule of evidence and requires that the determination of whether a non-sealed instrument should be considered a sealed instrument be gleaned from the instrument." Carolina Marine Handling, Inc. vs. Lasch, 363 S.C. 169, 173, 609, S.E. 2d 548, 550, 551 (S.C. Court of App. 2005).

The instrument in the case *sub judice*—the Settlement Agreement dated February 26, 2002—is not sealed. Plaintiffs' argument that it is intended as a sealed instrument is founded solely upon the language immediately preceding the signatures of

For all of these reasons, Brogdon is entitled to summary judgment since the Plaintiffs failed to comply with Rule 60(b) SCRCP and the requisite three year statute of limitations mandated by S.C. Code Ann. § 15-3-530. The Plaintiffs failed to seek appropriate relief from the Settlement Agreement entered as an Order, failed to commence this action within three years of notice of a breach of a fiduciary duty owed to them.

Failure to Transfer Property to Trust

The Plaintiffs have alleged that Brogdon breached his fiduciary duty as trustee of the Trust by failing to transfer Pence Sr's interest in the Cannon Bridge Road Property and the Caw Caw Swamp Property to the Trust before Pence Sr's death. The Plaintiffs, as beneficiaries of the Trust, argue that they were owed certain duties from Brogdon, as Trustee. While Brogdon agrees generally that trust beneficiaries are entitled to certain duties from a trustee related to handling and administration of a trust, he strongly disagrees that he owes any duties to the beneficiaries to transfer any assets to the trust. This Court agrees with Brogdon and concludes that Brogdon does not owe any duties to the beneficiaries of the Trust regarding the transfer of property into the Trust.

The creation and administration of trusts in South Carolina are governed by the Uniform Trust Code. Nothing in the South Carolina Uniform Trust Code creates a responsibility for a trustee to be sure that the settlor transfers property into the trust. A settlor is "a person, including a testator, who creates, or contributes property to, a trust." S. C. Code Ann. § 62-7-103(14). The settlor transfers his interest in the trust property to the beneficiaries and the trustee holds legal

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the parties: "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this ___ day of January, 2002." The Settlement Agreement contains no other evidence that the parties intended this to be a sealed instrument.

The facts here and the facts of Carolina Marine Handling, Inc., supra, are nearly identical. In that case our Court of Appeals found that the use of a "boilerplate attestation clause, by itself is not sufficient evidence that the parties intended that the instrument be sealed and thus subject to the 20 year limitations statute". The Court opined that to find otherwise "would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state. We adhere to our general three-year statute of limitations for contract actions in this state." 609 SE 2d at 552.

title to the property under an express or implied agreement to apply it to the benefit of another. 76 Am. Jur. 2d *Trusts* § 2. The South Carolina Uniform Trust Code's definition of a trustee, unlike the definition of a settlor above, does not include any responsibility to transfer property into a trust. S. C. Code Ann. § 62-7-103(19).

Trustees in South Carolina have many duties, most of them running to the benefit of the beneficiaries of the trust. These duties include the following: 1) the duty to administer the trust in good faith according to its terms, S. C. Code Ann. § 62-7-801, 2) the duty of loyalty to administer the trust solely in the interest of the beneficiaries and to place the interests of the beneficiaries above the trustee's own interest and the interests of others, S. C. Code Ann. § 62-7-802 and Official Comment thereto, 3) the duty to manage, distribute, and invest trust property impartially, without regard to various beneficiaries' interest, S. C. Code Ann. § 62-7-803, 4) the duty to prudently administer the trust using reasonable care, skill, and caution in managing and distributing the trust, S. C. Code Ann. § 62-7-804, 5) the duty to control and protect trust property, S.C. Code Ann. § 62-7-809, 6) the duty to keep adequate records of the trust and to keep trust property separate from other property possessed by the trustee, S. C. Code Ann. § 62-7-810, 7) the duty to enforce and defend any claims made against the trust, S. C. Code Ann. § 62-7-811, and 8) the duty to keep beneficiaries reasonably informed about the administration of the trust and to respond in a timely manner to requests for information from the beneficiaries, S. C. Code Ann. § 62-7-813.

The statutory listing of the duties of the trustee make clear that it is the settlor, not the trustee, who is responsible for transferring property into the trust. A trustee has the power to "collect trust property and *accept or reject additions to the trust property from a settlor* or any other person." S. C. Code Ann. § 62-7-816(1)(emphasis added). The Official Comments to this

section further repeat that this power of the trustee is simply collection ability. Moreover, the extensive listing of trustee powers in the Uniform Trust Code does not include the power to transfer property into the trust without affirmative action by the settlor. The powers of a trustee are created by statute and the trust document itself. S.C. Code Ann. §§ 62-7-815 & 816 and Official Comments thereto. In the present case, no such power to transfer property into the trust exists in the trust document or the relevant statutory provisions.

In their Complaint and in deposition testimony, the Plaintiffs have suggested that Brogdon owed them a duty to transfer the Cannon Bridge Road Property and the Caw Caw Swamp Property into the Trust before Pence Sr's death. Under the law of South Carolina, no such duty exists. A trustee does not have the power to make property a part of the trust without the settlor effectuating such a transfer.

The Plaintiffs further argue that the Power of Attorney executed by Pence Sr in favor of Brogdon created a duty for Brogdon to transfer the Cannon Bridge Road Property and the Caw Caw Swamp Property into the Trust. The South Carolina Probate Code provides that "[t]he attorney in fact has a fiduciary relationship with the principal and is accountable and responsible as a fiduciary." S.C. Code Ann. § 62-5-501 (A) (Supp. 2007). Neither the Probate Code nor the case law of South Carolina has extended this duty to third parties similarly situated to the Plaintiffs. This principle is also stated in the Restatement of Agency, "An agent who intentionally or negligently fails to perform duties to his principal *is not thereby liable to any person whose economic interests are thereby harmed.*" Restatement (Second) of Agency, § 357 (emphasis added).

The law simply does not create a duty to the Plaintiffs arising out of the Power of Attorney from Pence Sr to Brogdon. The Power of Attorney, which was signed 10 months

before the creation of the Trust, is silent regarding any specific instructions to transfer any real property to the Trust. Instead, the Power of Attorney document uses standard language to provide Brogdon with general powers available to most attorneys-in-fact. The Plaintiffs have pointed to no law or language in the Power of Attorney which creates a duty on Brogdon, as attorney-in-fact for Pence Sr, to act in a way which benefits the Plaintiffs. Any breach of fiduciary duty claim against Brogdon as attorney-in-fact must have been brought by Pence Sr or her estate, assuming such a claim existed at all. No such claims have been made. As such, this Court finds that no fiduciary duty exists between Brogdon and the Plaintiffs arising from the Power of Attorney and it did not create a responsibility to transfer property into the Trust.

Brogdon is entitled to summary judgment on the Plaintiffs' claim that he breached a fiduciary duty by failing to transfer certain property into the Trust. Brogdon had no duty as trustee to transfer any property into the Trust. As attorney-in-fact for Pence Sr, all of Brogdon's fiduciary responsibilities run to Pence Sr, not the Plaintiffs.

Mismanagement of Trust Assets

The Plaintiffs have also alleged that Brogdon breached a fiduciary duty to the Plaintiffs, as beneficiaries of the Trust , by mismanaging the Trust property, failing to protect the Plaintiffs' interests therein, and failing to properly account for trust assets. As discussed hereinabove, a trustee has a duty to properly manage and invest the assets of the trust, a duty of loyalty to the beneficiaries, a duty to carry out the terms of the trust in good faith, and a duty to account for the trust. Brogdon does not deny these responsibilities. However, the Plaintiffs have presented no evidence whatsoever to show that Brogdon failed in these duties.

When questioned on how Brogdon mismanaged the assets of the Trust, the Plaintiffs have been unable to provide any actual allegations of specific wrongdoing. Norman M. McLean's

response, when asked what Brogdon had done to mismanage the trust, was: "I haven't been keeping up with that as far as managing the trust....I think I might have a little idea what you talking about, but not enough to even discuss. I think I know about where you're coming from on that, but I can't really—don't have enough knowledge to talk about it." (Depo. of Norman M. McLean, p. 107, l. 22-p. 108, l. 6). Another Plaintiff, James L. McLean, stated "I don't know remember the particulars on that," when asked how Brogdon mismanaged trust assets. (Depo. of James L. McLean, p. 62, ll. 24-25). The Plaintiffs have not provided a response to Brogdon's Interrogatory seeking specifics of mismanagement.

Further, Brogdon has provided all information regarding the finances of the Trust to the Plaintiffs. The Uniform Trust Code provides for a report, not a formal accounting, and only requires providing beneficiaries with copies of relevant statements and documents. S.C. Code Ann. § 62-7-813(c) and Official Comments thereto. Thus, there is no need for Brogdon to provide any further accounting than what has already been provided and the Plaintiffs have made no claims for information not already provided.

With no actual evidence supporting claims for mismanagement of trust assets, the Brogdon is entitled to summary judgment in his favor. The Plaintiffs may not stand on the mere allegations of their Complaint to defeat summary judgment. Dependence on the vague responses to deposition questions that "something" might have constituted mismanagement, with no specifics given, is simply not enough. Such responses constitute the infamous "mere scintilla of evidence" which cannot defeat a summary judgment motion. Thus, Brogdon's Motion for Summary Judgment on the claims of breach of fiduciary duty and for an accounting should be granted.

## CONCLUSION

Brogdon is entitled to summary judgment in his favor on the claims for breach of fiduciary duty and for an accounting by the Plaintiffs. The Plaintiffs have failed to seek relief from the Order and failed to bring their claims within the applicable statute of limitations. Moreover, Brogdon did not owe a duty to the Plaintiffs to transfer property into the Trust on his own accord. There is no evidence that Brogdon ever mismanaged the assets of the Trust or violated any fiduciary duty to the beneficiaries of the Trust. Brogdon has provided the required information to comply with his reporting and accounting responsibilities. No genuine issues of material fact on any of these points exist. As such, the Plaintiffs' claims against Brogdon for breach of fiduciary duty and for an accounting fail as a matter of law.

Brogdon's Motion for Summary Judgment on all causes of action against him is hereby **GRANTED**.

St. George, South Carolina
_____, 2008

_____
The Honorable Diane Schafer Goodstein
Presiding Judge, First Judicial Circuit

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| STATE OF SOUTH CAROLINA, )<br>)<br>COUNTY OF ORANGEBURG. ) | IN THE COURT OF COMMON PLEAS<br>2006-CP-38-1523 |
| Norman M. McLean; James N. McLean; Marie McLean-Choi; William N. McLean; Robert L. McLean; and JL McLean Properties, LLC,<br><br>Plaintiffs,<br><br>versus<br><br>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.,<br><br>Defendants. | ORDER<br>(as to the Defendants, Charles P. Thompson, Jr., Cheri (Cheryl) Brown Thompson and Money to Go, LLC) |

This matter is before the Court on the motions of the Defendants Charles P. Thompson, Jr., Cheri (Cheryl) Brown Thompson (hereinafter collectively referred to as the "Thompsons") and Money to Go, LLC ("Money") for summary judgment under Rule 56, SCRCP seeking dismissal of Plaintiffs' claims pertaining to properties sold to the Thompsons and Money by the Defendant Wachovia Bank Retail Association as personal representative of the Estate of Elizabeth P. Pence. This matter was heard by the Court on May 12, 2008. W. Cliff Moore, III appeared as counsel for the Defendants Thompson, James Randall Davis appeared as counsel for

the Defendant Money, and David Alexander appeared as counsel for the Plaintiffs. The other Defendants made similar, but not identical, Motions for Summary Judgment. The Court considered the pleadings, deposition testimony of various parties and witnesses, and the briefs and arguments of counsel. The Court has determined that the motions for summary judgment by the Defendants Thompson and Money should be granted for the reasons set forth herein.

## FINDINGS OF FACT

The facts necessary to the resolution of this matter are not in dispute and may be summarized as follows:

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

2. On May 28, 1999, pursuant to the power of attorney, Brogdon created a Revocable Trust Agreement for Pence, Sr. and thereafter transferred to himself as Trustee of that Trust certain real properties in Marlboro and Orangeburg Counties along with liquid assets of substantial value. The properties which are the subject of this litigation (the "Caw Caw Swamp" property and the "Cannon Bridge Road" property) were never transferred to this Trust. The only Orangeburg County property transferred to this Trust was the "Gramling Road" property. This Trust Agreement provided lifetime benefits for Pence, Sr. The Trust became irrevocable at the death of Pence, Sr. and thereafter provided for lifetime benefits to the daughter of Pence, Sr., Elizabeth P. Pence (hereinafter "Pence, Jr."). The Trust provided further that at the death of Pence, Jr. the trust assets were to go to her issue, and, if there were no issue of Pence, Jr., the Orangeburg County real

estate held by the Trust was to go to the issue of Norman M. McLean (and all other assets were to go to Clemson University and Coker College).

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

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

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

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

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

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

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

9. On October 1, 2002, Mr. Drennan responded to Mr. Jackson and explained why the Caw Caw Swamp was not a part of the Trust. On October 21, 2002, Mr. Jackson responded to Mr. Drennan as follows:

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

10. On January 17, 2003, Mr. Jackson again wrote Mr. Drennan expressing the interest of his clients in purchasing the Orangeburg County property owned by the late Elizabeth Pence.

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

a. James McLean knew while Pence, Sr. was alive that the Gramling Road property had been transferred to the trust and that the Caw Caw Swamp and Cannon Bridge Road properties had not. (James McLean Deposition, pages 18-20).

b. On February 25, 2002 William McLean signed a document releasing his right to be a successor co-trustee to Mr. Brogdon and he received at that time what he described as a "partial faxed copy of the Settlement Agreement." (William McLean Deposition, pages 27-29).

c. James McLean testified that he was aware that his brother William "had to go to Florence and meet with some people because he was a backup trustee or something." (James McLean Deposition, page 25).

d. Norman McLean testified he discussed the matters addressed in the Jackson-Drennan correspondences with Mr. Jackson and with his children. (Norman McLean Deposition, pages 45-58).

e. Mr. Jackson testified that he discussed the contents of the various letters with Norman McLean. (James Jackson Deposition, pages 17-18 and 21-23).

f. Mr. Jackson testified to his belief that copies of the letters were sent to James McLean (who was shown to be a copy recipient). (James Jackson Deposition, pages 23-24).

12. On July 23, 2004, Wachovia Bank as personal representative of the Estate of Pence, Jr. sold the Caw Caw Swamp property to defendants Thompson and Money for value. The net proceeds of this sale were later distributed in part to Marlboro Academy, Inc. At the time of these conveyances, there was nothing in the Orangeburg County Public Records that placed anyone on notice of the claims the Plaintiffs now assert to the Caw Caw Swamp property.

13. On October 25, 2004, Wachovia Bank as trustee of the revocable trust agreement of Pence, Jr. issued to Marlboro Academy, Inc. a deed of distribution for a one-third (1/3) remainder interest in the Cannon Bridge Road property.

14. On December 19, 2006, Plaintiffs filed this suit, claiming in effect that the February 26, 2002 Settlement Agreement and Order required Pence, Jr. to transfer to the revocable trust agreement of Pence, Sr. the Caw Caw Swamp property and her interest in the Cannon Bridge Road property and that the receipt by Marlboro

Academy, Inc. of a portion of the proceeds from the sale of the Caw Caw Swamp property and a one third remainder interest in the Cannon Bridge Road property resulted in unjust enrichment and that the purported transfers of these properties should be set aside.

FINDINGS OF LAW

A. Summary Judgment Standard.

Summary Judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E. 2d 857, 860 (2002). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George vs. Fabri, 345 S.C 440, 452, 5648 S.E. 2d 868, 874 (2001).

B. Rule 60(b) SCRCP

In this case the Plaintiffs have claimed that the Settlement Agreement, which was approved by the Marlboro County Court of Common Pleas on February 26, 2002, somehow made the Caw Caw Swamp and Cannon Bridge Road properties subject to the terms of the Trust. This Court disagrees. The Settlement Agreement made no mention whatsoever of the Cannon Bridge Road property. While the Caw Caw Swamp property, which was never deeded to the Trust , was listed on the schedule of real properties attached to the Settlement Agreement, the Court finds that Schedule B was for valuation purposes to set forth the basis of the agreed upon 60%/40% division. The Caw Caw Swamp property was owned by Elizabeth Pence at the time, and the Settlement Agreement clearly imposed no requirement on her to add property to the Trust .

The fact that the Settlement Agreement became a Court Order is significant because of the time limitations prescribed by Rule 60(b) SCRCP ("Rule 60(b)). Under Rule 60(b), Plaintiffs

were required to file a motion within one year from the date of the entry of the Order, i.e., by February 26, 2003, to correct any mistakes in the Order. Plaintiffs apparently contend that the Settlement Agreement mistakenly omitted the requirement that Elizabeth Pence add the properties at issue here to the Trust . The Plaintiffs, or those through whom they claim, failed to timely file the requisite Rule 60(b) motion to correct or clarify the Order.

Rule 60(b) was enacted to ensure finality to litigants and other parties relying on orders issued by the courts of this State. Their attempt through this lawsuit at this late date to do what was required by Rule 60(b) is time barred. The Plaintiffs cannot sit idly by for nearly five years and then attempt to set aside the numerous transactions that have occurred in reliance upon the Order. Consequently the Court grants the Defendant Brogdon's motion for summary judgment.

The Plaintiffs also contend that they as beneficiaries of the Trust are not bound by the Order and they have the right to challenge the Order and Settlement Agreement nearly five years after the entry of the Order. The Plaintiffs' argument is undercut by S.C. Code Ann. § 62-1-403(2)(ii) which provides that an order binding a trustee also binds beneficiaries in proceedings involving third parties and §62-1-403(3)(i) which provides that sufficient notice is given where notice is given to every interested person or to one who can bind an interested person as described in 2(i) or 2(ii) above. (Emphasis added.) The Court also notes that various of the Plaintiffs were on actual notice of the Agreement and Order within the Rule 60(b) time period. William McLean received a copy of the Order on February 25, 2002 and Norman McLean discussed the situation with attorney Jay Jackson and was the recipient of his correspondences in the September-October, 2002 time frame. As such, the Plaintiffs were bound by the Order of February 26, 2002 and were obligated by Rule 60 to voice their objections thereto within one year of the Order.

C. Probate Code Creditor Claims Statutes

Assuming arguendo that the Plaintiffs were not required to timely file a Rule 60(b) motion to obtain the relief they now seek, the Plaintiffs would also have been required to timely file a claim in the probate proceedings of Pence, Jr. in order to pursue the claims they now make, which they also did not do.

Section 62-3-801(a) of the Code requires a personal representative upon his appointment to publish a Notice to Creditors once a week for three weeks in a newspaper of general circulation in the county announcing the appointment and address and notifying creditors of the estate to present their claims within eight months after the date of first publication of the notice or be forever barred. Wachovia Bank as personal representative of the Estate of Pence, Jr. published such a notice in the Marlboro Herald on September 16, 23 and 30, 2002.

Section 62-3-803(a) of the Code provides further:

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

As Plaintiffs admit, any duty owed by Pence, Jr. was contractual in nature and arose before she died. Therefore §62-3-803(a) applies.

Plaintiffs clearly did not comply with the aforesaid Code provisions. Their first and only effort to file a claim was the filing of this lawsuit on December 19, 2006. Their claim became barred on May 16, 2003. Their failure to comply with the aforesaid provisions is an absolute bar to any recovery which they may have against Marlboro Academy, Inc. See Matter of Estate of Tollison, S.C. 132, 463 S.E. 2d 611 (S.C. App. 1995) wherein the court states that "Section 62-3-803 is a non-claim statute... Thus, unless the statute is complied with the creditor's claim is barred." 463 S.E. 2d at 613.

D. STATUTE OF LIMITATION [§15-3-530(1)]

Plaintiffs' claims against Marlboro Academy, Inc. are barred not just by their failure to timely file a Rule 60(b) motion and their failure to comply with the Probate Code Creditor claims statutes but also by the three-year statute of limitations governing actions on contracts [§15-3-530(1)]

As above stated, §62-1-403(2)(ii) provides that a Court order that is binding on a Trustee is binding on the trust beneficiaries in proceedings involving third parties. Thus, the starting date for the running of the statute of limitations would be February 26, 2002 and since Plaintiffs filed this action long after that date, their claim is further barred by §15-3-530(i).

Plaintiffs however claim that they had no actual notice of the court order of February 26, 2002 and that therefore the statute of limitations would not begin to run until they had either actual notice or such notice as would put a reasonable man on notice of the Agreement and Order.

Even under this theory, Plaintiffs fail. While Plaintiffs contend that they were ignorant of the breach of any contract rights which they might have until mid-2004 when Wachovia Bank sold the Caw Caw Swamp property, the depositions of William McLean, Norman McLean and James McLean show that each of them had some knowledge about what was or was not in the

revocable trust agreement of Pence, Sr. by October, 2002 and that each knew, or had reason to know, that the Caw Caw Swamp and Cannon Bridge Road properties were not in the trust and were not deemed to be subject to the February 26, 2002 Settlement Agreement by the representatives of the estate of Pence, Jr.

The record is replete with evidence that by October, 2002, various Plaintiffs had actual knowledge, or knowledge which would have put a person of common knowledge or experience on notice, that those administering the estate of Pence, Jr. had taken the position that the Caw Caw Swamp and Cannon Bridge Road properties were not subject to the terms of the trust agreement of Pence, Sr. nor to the terms of the Settlement Agreement. By waiting until December 19, 2006 to file suit, Plaintiffs have waited too long and they are now also barred by §15-3-530(1) of the Code from bringing this action.[1]

E. BONA FIDE PURCHASERS FOR VALUE WITHOUT NOTICE OF PLAINTIFFS' CLAIMS.

As an additional ground for Summary Judgment, I find as a matter of law that the Defendants Thompson and Money are bona fide purchasers for value of the Caw Caw Swamp Property without notice of the claims that the Plaintiffs now advance and therefore take title to the same free and clear of any interests or claims which Plaintiffs now assert. *Liberty Loan*

[1] Plaintiffs further argue that this case is not controlled by the three year statute of §15-3-530(1) governing contract actions but instead by §15-3-520(b) which provides for a 20-year statute of limitations for actions upon sealed instruments. S. C. Code Ann. §19-1-160 provides: "Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto." Thus, §19-1-160 "imposes a statutory rule of evidence and requires that the determination of whether a non-sealed instrument should be considered a sealed instrument be gleaned from the instrument." Carolina Marine Handling, Inc. vs. Lasch, 363 S.C. 169, 173, 609, S.E. 2d 548, 550, 551 (S.C. Court of App. 2005).

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

The facts here and the facts of Carolina Marine Handling, Inc., supra., are nearly identical. In that case our Court of Appeals found that the use of a "boilerplate attestation clause, by itself is not sufficient evidence that the parties intended that the instrument be sealed and thus subject to the 20 year limitations statute". The Court opined that to find otherwise "would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state. We adhere to our general three-year statute of limitations for contract actions in this state." 609 SE 2d at 552.

*Corp. of Darlington, S.C. v. Mumford*, 283 S.C. 134, 140, 322 S.E.2d 17, 21 (Ct. App. 1984) (holding that "whenever in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified").

Under South Carolina Law, to claim the status of a bona fide purchaser, a party must show: "(1) he has actually paid in full the purchase money ...; (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased bona fide, *i.e.*, in good faith and with integrity of dealing, without notice of a lien or defect." *Spence v. Spence*, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006). The first two of these elements are undisputed: 1) the Defendants Thompson and the Defendant Money each paid the full purchase price to Wachovia Bank as personal representative of the Estate of Elizabeth Pence, and (2) in exchange for and thereby acquiring legal title to separate tracts of land that, if combined, are what the Court refers to as the Caw Caw Swamp Property. The third element, that the purchase be bona fide, *i.e.* in good faith and without notice of a lien or defect, also does not appear to be disputed in the record.

There are two basic forms of notice by which a purchaser may be charged with knowledge of the rights of another in real property: actual notice and constructive/inquiry notice. *Id.* at 118, 628 S.E.2d at 875. Under clearly established South Carolina law, a purchaser of real property has actual notice of a title defect or other claim, lien, or interest adverse to his own only when:

> [H]e actually knows about the defect or claim, or when a reasonable person, if made aware of the same information known to the buyer, would be charged with actual notice of the defect or claim. Actual notice may consist of facts or conditions observed by a prospective purchaser as well as information conveyed orally or in writing to him.

*Id.* The complaint in the instant matter does not allege any fact or theory of recovery indicating Defendants Thompson or the Defendant Money had actual notice of a title defect, adverse claim, or other interest with regard to the Caw Caw Swamp Property. Likewise, there is no indication

anywhere in the record that Defendants Thompson or the Defendant Money had any actual notice of a title defect, adverse claim, or other interest in the Caw Caw Swamp Property at the time of their purchase. As such, as a matter of law in South Carolina, the Defendants Thompson and the Defendant Money did not have actual notice of the Plaintiffs' instant claims to the Caw Caw Swamp Property at the time of their purchase.

Constructive notice, under South Carolina law, is a legal inference imputed to a person whose knowledge of facts is sufficient to put him on inquiry and, if these facts were pursued with due diligence, they would lead to other undisclosed facts. *Id.* at 119, 628 S.E.2d at 876. In the context of a real estate transaction, constructive or inquiry notice "is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world." *Id.* at 119-120, 628 S.E.2d at 876. The South Carolina Supreme Court has been "most exacting in determining what actions satisfy the requirements of inquiry notice . . . [having] denied subsequent purchasers comfort under the umbrella of a bona fide purchaser when the exercise of prudence would have avoided the difficulty." *Id.* at 121, 628 S.E.2d at 876. In each instance, it appears only to be documents in the public record which provide constructive or inquiry notice to a real estate purchaser sufficient to defeat the umbrella of a bona fide purchase defense.

In the instant matter, Plaintiffs have not alleged, and cannot otherwise adduce a single document in the public record which should have properly placed the Defendants Thompson or the Defendant Money on constructive or inquiry notice. In fact, none of the deeds, mortgages or other instruments set forth in the chain of title outlined in Plaintiffs' Complaint references or otherwise alludes to Plaintiffs' now-claimed interest in the Caw Caw Swamp Property. The trust litigation and Probates of the Estates of Lib Pence and Elizabeth Pence are only reflected in the public records in Marlboro County. There is nothing in the Orangeburg County public records

that places anyone on notice of the claims Plaintiffs now assert to the Caw Caw Swamp Property. There were ancillary administrations for both the Estates of Lib Pence and Elizabeth Pence in Orangeburg County. Nothing in these ancillary administrations provides constructive or inquiry notice of the Plaintiffs' now-asserted claims to the Caw Caw Swamp Property. The Plaintiffs point to a reference to the October 19, 2000 trust litigation in the Inventory and Appraisal, a certified copy of which is filed in the Orangeburg County ancillary administration, as constructive notice of the Plaintiffs' claim to the Caw Caw Swamp Property. The filing to which the Plaintiffs make reference provides a specific list of assets affected by the litigation. There is no reference to the Caw Caw Swamp Property in that filing. In fact, there is no reference to any real property in Orangeburg County in that filing. The ancillary administrations only further provide and corroborate the uncontested link in the chain of title to the Caw Caw Swamp Property. As such, as a matter of law, Defendants Thompson and the Defendant Money are bona fide purchasers of the Caw Caw Swamp Property without notice of the claims that the Plaintiffs now advance and, therefore, hold title to the Caw Caw Swamp Property free and clear of any interests or claims which the Plaintiffs now assert.

CONCLUSION

The Court finds that the Plaintiffs' action as to the Defendants Thompson and the Defendant Money is barred by their failure to timely file a Rule 60(b) motion. The Court further finds that the Plaintiffs' action is barred by reason of their failure to present a claim against the Estate of Pence, Jr. within the eight months period prescribed by §62-3-801. The Court further finds that the Plaintiffs' action is also barred by reason of their failure to commence this action within the three-year limitations period prescribed by §15-3-530(1). The Court also finds that the Defendants Thompson and the Defendant Money are bona fide purchasers for value of the Caw Caw Swamp Property without notice of the claims the Plaintiffs now advance and therefore

own the Caw Caw Swamp Property free of those claims. The Defendants Thompson and the Defendant Money's Motion for Summary Judgment on all causes of action against them is hereby GRANTED.

St. George, South Carolina

December , 2008

The Honorable Diane S. Goodstein
Presiding Judge of the First Judicial Circuit

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

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.

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

ORDER
(as to the Defendants James J. Pence, Jr. and Harry R. Easterling, Jr.)

This matter is before the Court on the motions of the Defendants James J. Pence, Jr. and Harry R. Easterling, Jr. for summary judgment under SCRCP56 seeking dismissal of Plaintiffs' claims pertaining to properties devised to Marlboro Academy, Inc. under the Last Will of Elizabeth P. Pence and later partially conveyed to Stephen Pence and Harry R. Easterling, Jr.. This matter was heard by the Court on May 12, 2008. Harry R. Easterling appeared as counsel for Defendants James J. Pence, Jr. as Personal Representative and Harry R. Easterling, Jr. and David Alexander appeared as counsel for the Plaintiffs. The other Defendants made similar, but

not identical, motions for summary judgment. The Court considered the pleadings, deposition testimony of various parties and witnesses, and the briefs and arguments of counsel. The Court has determined that the motions for summary judgment of Defendants James J. Pence, Jr. as Personal Representative and Harry R. Easterling, Jr. should be granted for the reasons set forth herein.

## FINDINGS OF FACT

The facts necessary to the resolution of this matter are not in dispute and may be summarized as follows:

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

2. On May 28, 1999, pursuant to the power of attorney, Brogdon created a Revocable Trust Agreement for Pence, Sr. and thereafter transferred to himself as Trustee of that Trust certain real properties in Marlboro and Orangeburg Counties along with liquid assets of substantial value. The properties which are the subject of this litigation (the "Caw Caw Swamp" property and the "Cannon Bridge Road" property) were never transferred to this Trust. The only Orangeburg County property transferred to this Trust was the "Gramling Road" property. This Trust Agreement provided lifetime benefits for Pence, Sr.. The Trust became irrevocable at the death of Pence, Sr. and thereafter provided for lifetime benefits to the daughter of Pence, Sr., Elizabeth P. Pence, (hereinafter "Pence, Jr."). The Trust provided further that at the death of Pence, Jr. the trust assets were to go to her issue, and, if there were no issue of Pence, Jr., the Orangeburg County real

estate held by the Trust was to go to the issue of Norman M. McLean (and all other assets were to go to Clemson University and Coker College).

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

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

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

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

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

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

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

9. On October 1, 2002, Mr. Drennan responded to Mr. Jackson and explained why the Caw Caw Swamp was not a part of the Trust. On October 21, 2002, Mr. Jackson responded to Mr. Drennan as follows:

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

10. On January 17, 2003, Mr. Jackson again wrote Mr. Drennan expressing the interest of his clients in purchasing the Orangeburg County property owned by the late Elizabeth Pence.

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

a. James McLean knew while Pence, Sr. was alive that the Gramling Road property had been transferred to the trust and that the Caw Caw Swamp and Cannon Bridge Road properties had not. (James McLean Deposition, pages 18-20).

b. On February 25, 2002 William McLean signed a document releasing his right to be a successor co-trustee to Mr. Brogdon and he received at that time what he described as a "partial faxed copy of the Settlement Agreement." (William McLean Deposition, pages 27-29).

c. James McLean testified that he was aware that his brother William "had to go to Florence and meet with some people because he was a backup trustee or something." (James McLean Deposition, page 25).

d. Norman McLean testified he discussed the matters addressed in the Jackson-Drennan correspondences with Mr. Jackson and with his children. (Norman McLean Deposition, pages 45-58).

e. Mr. Jackson testified that he discussed the contents of the various letters with Norman McLean. (James Jackson Deposition, pages 17-18 and 21-23).

f. Mr. Jackson testified to his belief that copies of the letters were sent to James McLean (who was shown to be a copy recipient). (James Jackson Deposition, pages 23-24).

12. On July 23, 2004, Wachovia Bank as personal representative of the Estate of Pence, Jr. sold the Caw Caw Swamp property to defendants Thompson and Money to Go, LLC. The net proceeds of this sale were later distributed in part to Stephen Pence.

13. On October 25, 2004, Wachovia Bank as trustee of the revocable trust agreement of Pence, Jr. issued to Marlboro Academy, Inc. a deed of distribution for a one-third (1/3) remainder interest in the Cannon Bridge Road property.

14. Stephen Pence acquired an undivided one-sixth interest in remainder in and to the Cannon Bridge Road property by Deed of Distribution dated October 13, 2004 and recorded in Book 1066, Page 38 in the office of the Register of Deeds for Orangeburg County, S.C.

15. Stephen Pence conveyed a one-twelfth fractional interest in the Cannon Bridge Road Property to Harry R. Easterling, Jr. by deed dated March 9, 2005 and

recorded September 12, 2006 in Book 1168, Page 35 in the office of the Clerk of Court for Orangeburg County, S.C. Stephen Pence therefore retained the ownership of an undivided one-twelfth fractional interest in said property.

16. On December 19, 2006, Plaintiffs filed this suit, claiming in effect that the February 26, 2002 Settlement Agreement and Order required Pence, Jr. to transfer to the revocable trust agreement of Pence, Sr. the Caw Caw Swamp property and her interest in the Cannon Bridge Road property and that the receipt by Stephen Pence of a portion of the proceeds from the sale of the Caw Caw Swamp property and a one sixth remainder interest in the Cannon Bridge Road property resulted in unjust enrichment and that the purported transfers of these properties should be set aside. Plaintiffs also claimed that the subsequent receipt by Harry R. Easterling, Jr. from Stephen Pence of a one twelfth remainder interest in the Cannon Bridge Road property resulted in unjust enrichment and that that purported transfer of these properties should also be set aside.

FINDINGS OF LAW

A. Summary Judgment Standard.

Summary Judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E. 2d 857, 860 (2002). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George vs. Fabri, 345 S.C 440, 452, 5648 S.E. 2d 868, 874 (2001).

Any responsibility or liability of James J. Pence, Jr. as Personal Representative and Harry R. Easterling, Jr. to the Plaintiffs is founded upon Plaintiffs' allegation that the February 26, 2002 Settlement Agreement between Pence, Jr. and Brogdon, et al, imposed upon Pence, Jr. the

contractual obligation to put into the trust created by Pence, Sr., or otherwise subject to the terms thereof, the Caw Caw Swamp property and her interest in the Cannon Bridge Road property. These properties were not transferred to the said trust by Pence, Sr. and were owned by her at the time of her death on October 3, 1999. These properties passed to Pence, Jr. under the terms of the Will of Pence, Sr.

B. Rule 60(b) SCRCP

In this case the Plaintiffs have claimed that the Settlement Agreement, which was approved by the Marlboro County Court of Common Pleas on February 26, 2002, somehow made the Caw Caw Swamp and Cannon Bridge Road properties subject to the terms of the Trust. This Court disagrees. The Settlement Agreement made no mention whatsoever of the Cannon Bridge Road property. While the Caw Caw Swamp property, which was never deeded to the Trust, was listed on the schedule of real properties attached to the Settlement Agreement, it was owned by Elizabeth Pence at the time, and the Settlement Agreement clearly imposed no requirement on her to add property to the Trust.

The fact that the Settlement Agreement became a Court Order is significant because of the time limitations prescribed by Rule 60(b) SCRCP ("Rule 60(b)). Under Rule 60(b), Plaintiffs were required to file a motion within one year from the date of the entry of the Order, i.e., by February 26, 2003, to correct any mistakes in the Order. Plaintiffs apparently contend that the Settlement Agreement mistakenly omitted the requirement that Elizabeth Pence add the properties at issue here to the Trust . The Plaintiffs, or those through whom they claim, failed to timely file the requisite Rule 60(b) motion to correct or clarify the Order.

Rule 60(b) was enacted to ensure finality to litigants and other parties relying on orders issued by the courts of this State. Their attempt through this lawsuit at this late date to do what was required by Rule 60(b) is time barred. The Plaintiffs cannot sit idly by for nearly five years

and then attempt to set aside the numerous transactions that have occurred in reliance upon the Order. Consequently the Court grants the motions for summary judgment of Defendants James J. Pence, Jr. as Personal Representative and Harry R. Easterling, Jr.

The Plaintiffs also contend that they as beneficiaries of the Trust are not bound by the Order and they have the right to challenge the Order and Settlement Agreement nearly five years after the entry of the Order. The Plaintiffs' argument is undercut by S.C. Code Ann. § 62-1-403(2)(ii) which provides that an order binding a trustee also binds beneficiaries in proceedings involving third parties and § 62-1-403(3)(i)which provides that sufficient notice is given where notice is to every interested party or to one who can bind an interested person as described in 2(i) or 2(ii) above. (Emphasis added). The Court also notes that various of the Plaintiffs wre on actual notice of the Agreement and Order within the Rule 60(b) time period. William McLean received a copy of the Order on February 25, 2002 and Norman McLean discussed the situation with attorney Jay Jackson and was a receipt of his correspondences in the September-October, 2002 time frame. As such, the Plaintiffs were bound by the Order of February 26, 2002 and were obligated by Rule 60 to voice their objections thereto within one year of the Order.

C. Probate Code Creditor Claims Statutes

Assuming arguendo that the Plaintiffs were not required to timely file a Rule 60(b) motion to obtain the relief they now seek, the Plaintiffs would also have been required to timely file a claim in the probate proceedings of Pence, Jr. in order to pursue the claims they now make, which they also did not do.

Section 62-3-801(a) of the Code requires a personal representative upon his appointment to publish a Notice to Creditors once a week for three weeks in a newspaper of general circulation in the county announcing the appointment and address and notifying creditors of the estate to present their claims within eight months after the date of first publication of the notice

or be forever barred. Wachovia Bank as personal representative of the Estate of Pence, Jr. published such a notice in the Marlboro Herald on September 16, 23 and 30, 2002.

Section 62-3-803(a) of the Code provides further:

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

As Plaintiffs admit, any duty owed by Pence, Jr. was contractual in nature and arose before she died. Therefore §62-3-803(a) applies.

Plaintiffs clearly did not comply with the aforesaid Code provisions. Their first and only effort to file a claim was the filing of this lawsuit on December 19, 2006. Their claim became barred on May 16, 2003. Their failure to comply with the aforesaid provisions is an absolute bar to any recovery which they may have against James J. Pence, Jr. as Personal Representative and Harry R. Easterling, Jr. See Matter of Estate of Tollison, S.C. 132, 463 S.E. 2d 611 (S.C. App. 1995) wherein the court states that "Section 62-3-803 is a non-claim statute... Thus, unless the statute is complied with the creditor's claim is barred." 463 S.E. 2d at 613.

D. STATUTE OF LIMITATION [§15-3-530(1)]

Plaintiffs' claims against James J. Pence, Jr. as Personal Representative and Harry R. Easterling, Jr. are barred not only by their failure to timely file a Rule 60(b) motion and their

failure to comply with the Probate Code Creditor claims statutes but also by the three-year statute of limitations governing actions on contracts [§15-3-530(1)]

As above stated, §62-1-403(2)(ii) provides that a Court order that is binding on a Trustee is binding on the trust beneficiaries in proceedings involving third parties. Thus, the starting date for the running of the statute of limitations would be February 26, 2002 and since Plaintiffs filed this action long after that date, their claim is further barred by §15-3-530(i).

Plaintiffs however claim that they had no actual notice of the court order of February 26, 2002 and that therefore the statute of limitations would not begin to run until they had either actual notice or such notice as would put a reasonable man on notice of the Agreement and Order.

Even under this theory, Plaintiffs fail. While Plaintiffs contend that they were ignorant of the breach of any contract rights which they might have until mid-2004 when Wachovia Bank sold the Caw Caw Swamp property, the depositions of William McLean, Norman McLean and James McLean show that each of them had some knowledge about what was or was not in the revocable trust agreement of Pence, Sr. by October, 2002 and that each knew, or had reason to know, that the Caw Caw Swamp and Cannon Bridge Road properties were not in the trust and were not deemed to be subject to the February 26, 2002 Settlement Agreement by the representatives of the estate of Pence, Jr.

The record is replete with evidence that by October, 2002, various Plaintiffs had actual knowledge, or knowledge which would have put a person of common knowledge or experience on notice, that those administering the estate of Pence, Jr. had taken the position that the Caw Caw Swamp and Cannon Bridge Road properties were not subject to the terms of the trust agreement of Pence, Sr. nor to the terms of the Settlement Agreement. By waiting until

December 19, 2006 to file suit, Plaintiffs have waited too long and they are now also barred by §15-3-530(1) of the Code from bringing this action.[1]

CONCLUSION

The Court finds that the Plaintiffs' action as to the Defendants James J. Pence, Jr. as Personal Representative and Harry R. Easterling, Jr. is barred by their failure to timely file a Rule 60(b) motion. The Court further finds that the Plaintiffs' action is barred by reason of their failure to present a claim against the Estate of Pence, Jr. within the eight months period prescribed by §62-3-801. The Court further finds that the Plaintiffs' action is also barred by reason of their failure to commence this action within the three-year limitations period prescribed by §15-3-530(1). The Motions for Summary Judgment of Defendants James J. Pence, Jr. as Personal Representative and Harry R. Easterling, Jr. on all causes of action against them are hereby GRANTED.

St. George, South Carolina

December , 2008

The Honorable Diane S. Goodstein
Presiding Judge of the First Judicial Circuit

[1] Plaintiffs further argue that this case is not controlled by the three-year statute of §15-3-530(1) governing contract actions but instead by §15-3-520(b) which provides for a 20-year statute of limitations for actions upon sealed instruments. S. C. Code Ann. §19-1-160 provides: "Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto." Thus, §19-1-160 "imposes a statutory rule of evidence and requires that the determination of whether a non-sealed instrument should be considered a sealed instrument be gleaned from the instrument." Carolina Marine Handling, Inc. vs. Lesch, 363 S.C. 169, 173, 609, S.E. 2d 548, 550, 551 (S.C. Court of App. 2005).

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

The facts here and the facts of Carolina Marine Handling, Inc., supra., are nearly identical. In that case our Court of Appeals found that the use of a "boilerplate attestation clause, by itself is not sufficient evidence that the parties intended that the instrument be sealed and thus subject to the 20 year limitations statute". The Court opined that to find otherwise "would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state. We adhere to our general three-year statute of limitations for contract actions in this state." 609 SE 2d at 552.

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| STATE OF SOUTH CAROLINA, )<br>)<br>COUNTY OF ORANGEBURG. ) | IN THE COURT OF COMMON PLEAS<br>2006-CP-38-1523 |
| Norman M. McLean; James N. McLean; Marie McLean-Choi; William N. McLean; Robert L. McLean; and JL McLean Properties, LLC,<br><br>Plaintiffs,<br><br>versus<br><br>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.,<br><br>Defendants. | ORDER<br>(as to the Defendant Marlboro Academy, Inc.) |

This matter is before the Court on the motion of the Defendant Marlboro Academy, Inc. for summary judgment under SCRCP56 seeking dismissal of Plaintiffs' claims pertaining to properties devised to Marlboro Academy, Inc. under the Last Will of Elizabeth P. Pence. This matter was heard by the Court on May 12, 2008. John Jay James, II appeared as counsel for Defendant Marlboro Academy, Inc. and David Alexander appeared as counsel for the Plaintiffs. The other Defendants made similar, but not identical, Motions for Summary Judgment. The Court considered the pleadings, deposition testimony of various parties and witnesses, and the

briefs and arguments of counsel. The Court has determined that Defendant Marlboro Academy, Inc.'s motion for summary judgment should be granted for the reasons set forth herein.

## FINDINGS OF FACT

The facts necessary to the resolution of this matter are not in dispute and may be summarized as follows:

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

2. On May 28, 1999, pursuant to the power of attorney, Brogdon created a Revocable Trust Agreement for Pence, Sr. and thereafter transferred to himself as Trustee of that Trust certain real properties in Marlboro and Orangeburg Counties along with liquid assets of substantial value. The properties which are the subject of this litigation (the "Caw Caw Swamp" property and the "Cannon Bridge Road" property) were never transferred to this Trust. The only Orangeburg County property transferred to this Trust was the "Gramling Road" property. This Trust Agreement provided lifetime benefits for Pence, Sr. The Trust became irrevocable at the death of Pence, Sr. and thereafter provided for lifetime benefits to the daughter of Pence, Sr., Elizabeth P. Pence (hereinafter "Pence, Jr."). The Trust provided further that at the death of Pence, Jr. the trust assets were to go to her issue, and, if there were no issue of Pence, Jr., the Orangeburg County real estate held by the Trust was to go to the issue of Norman M. McLean (and all other assets were to go to Clemson University and Coker College).

3. On October 3, 1999, Pence, Sr. died. Her estate was administered in the Probate Court of Marlboro County. The Caw Caw Swamp and Cannon Bridge Road

properties were administered as a part of the Estate of Pence, Sr. (and passed to Pence, Jr. pursuant to the Will of Pence, Sr.).

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

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

6. On August 26, 2002, Pence, Jr. died without issue surviving. Her Will and revocable trust agreement left her estate to Marlboro Academy, Inc. Her estate was administered in the Probate Court for Marlboro County. Her spouse, Stephen Pence, filed an elective share claim and thus became entitled to a portion of her estate. Included among the assets of her estate were the Caw Caw Swamp

property and one-half remainder interest in the Cannon Bridge Road property. Wachovia Bank was personal representative of her estate as well as trustee of her revocable trust agreement.

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

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

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

9. On October 1, 2002, Mr. Drennan responded to Mr. Jackson and explained why the Caw Caw Swamp was not a part of the Trust. On October 21, 2002, Mr. Jackson responded to Mr. Drennan as follows:

> "I have discussed the matter with my clients and they do accept the fact that the Caw Caw property and the Cannon Bridge Road property in which Elizabeth had a remainder interest were not put into the trust. Therefore,

we accept that title to those properties passed through the Wills of Elizabeth Pence, the mother and Elizabeth Pence, the daughter. Therefore, the purpose of this letter is simply [to] assure you that we do accept and agree with the matters set forth in your letter of October 1, 2002."

10. On January 17, 2003, Mr. Jackson again wrote Mr. Drennan expressing the interest of his clients in purchasing the Orangeburg County property owned by the late Elizabeth Pence.

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

a. James McLean knew while Pence, Sr. was alive that the Gramling Road property had been transferred to the trust and that the Caw Caw Swamp and Cannon Bridge Road properties had not. (James McLean Deposition, pages 18-20).

b. On February 25, 2002 William McLean signed a document releasing his right to be a successor co-trustee to Mr. Brogdon and he received at that time what he described as a "partial faxed copy of the Settlement Agreement." (William McLean Deposition, pages 27-29).

c. James McLean testified that he was aware that his brother William "had to go to Florence and meet with some people because he was a backup trustee or something." (James McLean Deposition, page 25).

d. Norman McLean testified he discussed the matters addressed in the Jackson-Drennan correspondences with Mr. Jackson and with his children. (Norman McLean Deposition, pages 45-58).

e. Mr. Jackson testified that he discussed the contents of the various letters with Norman McLean. (James Jackson Deposition, pages 17-18 and 21-23).

f. Mr. Jackson testified to his belief that copies of the letters were sent to James McLean (who was shown to be a copy recipient). (James Jackson Deposition, pages 23-24).

12. On July 23, 2004, Wachovia Bank as personal representative of the Estate of Pence, Jr. sold the Caw Caw Swamp property to defendants Thompson and Money to Go, LLC. The net proceeds of this sale were later distributed in part to Marlboro Academy, Inc.

13. On October 25, 2004, Wachovia Bank as trustee of the revocable trust agreement of Pence, Jr. issued to Marlboro Academy, Inc. a deed of distribution for a one-third (1/3) remainder interest in the Cannon Bridge Road property.

14. On December 19, 2006, Plaintiffs filed this suit, claiming in effect that the February 26, 2002 Settlement Agreement and Order required Pence, Jr. to transfer to the revocable trust agreement of Pence, Sr. the Caw Caw Swamp property and her interest in the Cannon Bridge Road property and that the receipt by Marlboro Academy, Inc. of a portion of the proceeds from the sale of the Caw Caw Swamp property and a one third remainder interest in the Cannon Bridge Road property resulted in unjust enrichment and that the purported transfers of these properties should be set aside.

## FINDINGS OF LAW

A. Summary Judgment Standard.

Summary Judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E. 2d 857, 860 (2002). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George vs. Fabri, 345 S.C 440, 452, 5648 S.E. 2d 868, 874 (2001).

Any responsibility or liability of Marlboro Academy, Inc. to the Plaintiffs is founded upon Plaintiffs' allegation that the February 26, 2002 Settlement Agreement between Pence, Jr.. and Brogdon, et al, imposed upon Pence, Jr. the contractual obligation to put into the trust created by Pence, Sr., or otherwise subject to the terms thereof, the Caw Caw Swamp property and her interest in the Cannon Bridge Road property. These properties were not transferred to the said trust by Pence, Sr. and were owned by her at the time of her death on October 3, 1999. These properties passed to Pence, Jr. under the terms of the Will of Pence, Sr.

B. Rule 60(b) SCRCP

In this case the Plaintiffs have claimed that the Settlement Agreement, which was approved by the Marlboro County Court of Common Pleas on February 26, 2002, somehow made the Caw Caw Swamp and Cannon Bridge Road properties subject to the terms of the Trust. This Court disagrees. The Settlement Agreement made no mention whatsoever of the Cannon Bridge Road property. While the Caw Caw Swamp property, which was never deeded to the Trust , was listed on the schedule of real properties attached to the Settlement Agreement, the Court finds that Schedule B was for valuation purposes to set forth the basis of the agreed upon 60%/40% division. The Caw Caw Swamp property was owned by Elizabeth Pence at the time,

and the Settlement Agreement clearly imposed no requirement on her to add property to the Trust.

The fact that the Settlement Agreement became a Court Order is significant because of the time limitations prescribed by Rule 60(b) SCRCP ("Rule 60(b)). Under Rule 60(b), Plaintiffs were required to file a motion within one year from the date of the entry of the Order, i.e., by February 26, 2003, to correct any mistakes in the Order. Plaintiffs apparently contend that the Settlement Agreement mistakenly omitted the requirement that Elizabeth Pence add the properties at issue here to the Trust. The Plaintiffs, or those through whom they claim, failed to timely file the requisite Rule 60(b) motion to correct or clarify the Order.

Rule 60(b) was enacted to ensure finality to litigants and other parties relying on orders issued by the courts of this State. Their attempt through this lawsuit at this late date to do what was required by Rule 60(b) is time barred. The Plaintiffs cannot sit idly by for nearly five years and then attempt to set aside the numerous transactions that have occurred in reliance upon the Order. Consequently the Court grants the Defendant Marlboro Academy's motion for summary judgment.

The Plaintiffs also contend that they as beneficiaries of the Trust are not bound by the Order and they have the right to challenge the Order and Settlement Agreement nearly five years after the entry of the Order. The Plaintiffs' argument is undercut by S.C. Code Ann. § 62-1-403(2)(ii) which provides that an order binding a trustee also binds beneficiaries in proceedings involving third parties and §62-1-403(3)(i) which provides that sufficient notice is given where notice is given to every interested person or to one who can bind an interested person as described in 2(i) or 2(ii) above. (Emphasis added.) The Court also notes that various of the Plaintiffs were on actual notice of the Agreement and Order within the Rule 60(b) time period. William McLean received a copy of the Order on February 25, 2002 and Norman McLean

discussed the situation with attorney Jay Jackson and was the recipient of his correspondences in the September-October, 2002 time frame. As such, the Plaintiffs were bound by the Order of February 26, 2002 and were obligated by Rule 60 to voice their objections thereto within one year of the Order.

C. Probate Code Creditor Claims Statutes

Assuming arguendo that the Plaintiffs were not required to timely file a Rule 60(b) motion to obtain the relief they now seek, the Plaintiffs would also have been required to timely file a claim in the probate proceedings of Pence, Jr. in order to pursue the claims they now make, which they also did not do.

Section 62-3-801(a) of the Code requires a personal representative upon his appointment to publish a Notice to Creditors once a week for three weeks in a newspaper of general circulation in the county announcing the appointment and address and notifying creditors of the estate to present their claims within eight months after the date of first publication of the notice or be forever barred. Wachovia Bank as personal representative of the Estate of Pence, Jr. published such a notice in the Marlboro Herald on September 16, 23 and 30, 2002.

Section 62-3-803(a) of the Code provides further:

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

and within the time provided in Section 62-3-801(a) for all creditors barred by publication." [Emphasis added]

As Plaintiffs admit, any duty owed by Pence, Jr. was contractual in nature and arose before she died. Therefore §62-3-803(a) applies.

Plaintiffs clearly did not comply with the aforesaid Code provisions. Their first and only effort to file a claim was the filing of this lawsuit on December 19, 2006. Their claim became barred on May 16, 2003. Their failure to comply with the aforesaid provisions is an absolute bar to any recovery which they may have against Marlboro Academy, Inc. See Matter of Estate of Tollison, S.C. 132, 463 S.E. 2d 611 (S.C. App. 1995) wherein the court states that "Section 62-3-803 is a non-claim statute... Thus, unless the statute is complied with the creditor's claim is barred." 463 S.E. 2d at 613.

D. STATUTE OF LIMITATION [§15-3-530(1)]

Plaintiffs' claims against Marlboro Academy, Inc. are barred not just by their failure to timely file a Rule 60(b) motion and their failure to comply with the Probate Code Creditor claims statutes but also by the three-year statute of limitations governing actions on contracts [§15-3-530(1)]

As above stated, §62-1-403(2)(ii) provides that a Court order that is binding on a Trustee is binding on the trust beneficiaries in proceedings involving third parties. Thus, the starting date for the running of the statute of limitations would be February 26, 2002 and since Plaintiffs filed this action long after that date, their claim is further barred by §15-3-530(i).

Plaintiffs however claim that they had no actual notice of the court order of February 26, 2002 and that therefore the statute of limitations would not begin to run until they had either actual notice or such notice as would put a reasonable man on notice of the Agreement and Order.

Even under this theory, Plaintiffs fail. While Plaintiffs contend that they were ignorant of the breach of any contract rights which they might have until mid-2004 when Wachovia Bank sold the Caw Caw Swamp property, the depositions of William McLean, Norman McLean and James McLean show that each of them had some knowledge about what was or was not in the revocable trust agreement of Pence, Sr. by October, 2002 and that each knew, or had reason to know, that the Caw Caw Swamp and Cannon Bridge Road properties were not in the trust and were not deemed to be subject to the February 26, 2002 Settlement Agreement by the representatives of the estate of Pence, Jr.

The record is replete with evidence that by October, 2002, various Plaintiffs had actual knowledge, or knowledge which would have put a person of common knowledge or experience on notice, that those administering the estate of Pence, Jr. had taken the position that the Caw Caw Swamp and Cannon Bridge Road properties were not subject to the terms of the trust agreement of Pence, Sr. nor to the terms of the Settlement Agreement. By waiting until December 19, 2006 to file suit, Plaintiffs have waited too long and they are now also barred by §15-3-530(1) of the Code from bringing this action.[1]

## CONCLUSION

[1] Plaintiffs further argue that this case is not controlled by the three year statute of §15-3-530(1) governing contract actions but instead by §15-3-520(b) which provides for a 20-year statute of limitations for actions upon sealed instruments. S. C. Code Ann. §19-1-160 provides: "Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto." Thus, §19-1-160 "imposes a statutory rule of evidence and requires that the determination of whether a non-sealed instrument should be considered a sealed instrument be gleaned from the instrument." Carolina Marine Handling, Inc. vs. Lasch, 363 S.C. 169, 173, 609, S.E. 2d 548, 550, 551 (S.C. Court of App. 2005).

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

The facts here and the facts of Carolina Marine Handling, Inc., supra., are nearly identical. In that case our Court of Appeals found that the use of a "boilerplate attestation clause, by itself is not sufficient evidence that the parties intended that the instrument be sealed and thus subject to the 20 year limitations statute". The Court opined that to find otherwise "would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state. We adhere to our general three-year statute of limitations for contract actions in this state." 609 SE 2d at 552.

The Court finds that the Plaintiffs' action as to the Defendant Marlboro Academy, Inc. is barred by their failure to timely file a Rule 60(b) motion. The Court further finds that the Plaintiffs' action is barred by reason of their failure to present a claim against the Estate of Pence, Jr. within the eight months period prescribed by §62-3-801. The Court further finds that the Plaintiffs' action is also barred by reason of their failure to commence this action within the three-year limitations period prescribed by §15-3-530(1). The Defendant Marlboro Academy, Inc.'s Motion for Summary Judgment on all causes of action against it is hereby GRANTED.

St. George, South Carolina

December , 2008

The Honorable Diane S. Goodstein
Presiding Judge of the First Judicial Circuit

STATE OF SOUTH CAROLINA )
)
COUNTY OF ORANGEBURG )

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
2006-CP-38-1523

NORMAN M. McLEAN; JAMES N. McLEAN; MARIE McLEAN-CHOI; WILLIAM N. McLEAN; ROBERT L. McLEAN; AND J.L. 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 TRUSTEE OF THE ELIZABETH P. PENCE TRUST; MARLBORO ACADEMY, INC.; CHARLES P. THOMPSON, JR., CHERL (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.

TRANSCRIPT OF RECORD

MAY 12, 2008
ST. GEORGE, SOUTH CAROLINA

B E F O R E:

THE HONORABLE DIANE S. GOODSTEIN, JUDGE

A P P E A R A N C E S:

DAVID ALEXANDER, ESQUIRE
ATTORNEY FOR THE PLAINTIFFS

ELIZABETH B. HARRIS, CVR
CIRCUIT COURT REPORTER

A P P E A R A N C E S:

EDWARD B. DAVIS, ESQUIRE
ATTORNEY FOR DEFENDANT WACHOVIA

JAMES RANDALL DAVIS, ESQUIRE
ATTORNEY FOR DEFENDANT MONEY TO GO

HARRY R. EASTERLING, SR., ESQUIRE
ATTORNEY FOR DEFENDANT EASTERING

MATTHEW H. HENRICKSON, ESQUIRE
ATTORNEY FOR DEFENDANT DRENNAN

JOHN J. JAMES, II, ESQUIRE
ATTORNEY FOR DEFENDANT MARLBORO ACADEMY

W. CLIFF MOORE, III, ESQUIRE
ATTORNEY FOR DEFENDANTS THOMPSON AND THOMPSON

JEFFREY L. PAYNE, ESQUIRE
ATTORNEY FOR DEFENDANT BROGDON

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# E X H I B I T S

| NO. | DESCRIPTION | I.D. | EV. |
|---|---|---|---|

**NO EXHIBITS INTRODUCED.**

THE COURT: All right, and this is Wachovia's motion for summary judgment.

MR. E.B. DAVIS: I believe you got a number of them.

THE COURT: Hold on.

(A PAUSE.)

THE COURT: Suffice it to say, many of the defendants have a motion for summary judgement because I am looking at Mr. Brogdon's, and I'm looking at Wachovia's, and I'm looking at the estate's and Easterling's. Typically, normally someone on behalf of the defendant sort of takes the bull by the horns, so to speak, and beginning the argument. Would that be you, Mr. Henrickson?

MR. HENRICKSON: I'd be delighted to do it.

(DEFENSE COUNSELORS CONFER BRIEFLY.)

MR. HENRICKSON: Well, I'll take a shot at it then.

THE COURT: All right.

MR. HENRICKSON: Your Honor, this case, the facts really are not terribly in dispute, I don't think. This case sort of starts off with Elizabeth McLean Pence, who lived in Marlboro County. And toward the end of her life, she created a durable power of attorney and gave power of attorney to James Brogdon, who was an accountant in Sumter I believe at the time. And in that power -- from that power of attorney, Mr. Brogdon created a trust, and into that trust there were some assets, including a large piece

of property in Orangeburg County called Gramling Place property.

Now, that trust was created in, I believe, 1999. Shortly thereafter, Ms. Pence passed away. She passed away having an only child, who I'll refer to as Elizabeth Pence Pence because she married someone else named Pence, a distant cousin, I think.

In any event, at that point the daughter hired the defendant in this case who I represent, James Drennan. And Mr. Drennan was hired to essentially attack the validity of the trust and try to get as much of the assets out of the revocable trust that had been created pursuant to this durable power of attorney, to get it back into the mother's estate. And so that litigation started, I believe, in the year 2000.

In early 2002, a settlement was reached and a settlement was approved by Judge Lockemy whereby approximately sixty percent of the value of the property in the trust was taken out of the trust and put back into the mother's estate. Forty percent was left in the trust and that was it.

Now shortly thereafter, it came to Mr. Drennan's attention that -- he believed that a piece of property was in the trust which -- called the Caw Caw Swamp property, another large tract of timberland in Orangeburg County. He

originally was under the impression that that piece of property was in the trust, but learned from Mr. Brogdon after the settlement that that piece of property had never been deeded to the trust. So, it remained in the mother's estate.

There was also a third piece of property that we're -- we'll hear about today called the Cannon Bridge Road property in which the mother owned a remainder interest which had not vested at that time. That interest was never deeded to the trust.

So, I think it's undisputed that of the pieces of property that you're going to hear about that today, the only piece of property that was ever deeded to the trust was the, was the Gramling Place property. The other two were not.

There was, there are some exhibits in the memoranda that have been supplied to Your Honor. There was -- shortly in September or October of 2002, several months after this settlement, the question arose about specifically the Caw Caw Swamp property and whether or not that property was part of the trust. There were some letters, and if you would look at the brief of the defendant Marlboro Academy, Inc., has some, has some tabbed exhibits.

Starting with Exhibit 2, there is correspondence

between James Drennan and a lawyer in Orangeburg, Jay Jackson, where Mr. Drennan explains to Mr. Jackson about the Caw Caw Swamp property and that it was not ever part of the trust. Mr. Jackson then wrote back to Mr. Drennan, telling him that he had spoken with his clients -- i.e., the McLean family, essentially the plaintiffs in this case. That he had discussed this matter with his clients and that they accept the fact the Caw Caw Swamp and the Cannon Bridge Road property in which the mother had a remainder interest were not put into the trust, and I'm reading directly from Mr. Jackson's letter:

> Therefore, we accept that title to those properties passed through the wills of Elizabeth Pence the mother and Elizabeth Pence the daughter. Therefore, the purpose of this letter is to simply assure you that we do accept and agree with the matters set forth in your previous letter, which essentially to that effect. That these pieces of property were not part of the trust.

Acting on that representation from a member of the South Carolina Bar who purported to represent the McLean family, essentially the -- and let me explain that the McLean family is this. Ms. Pence the mother had a brother

named Norman McLean, and his children are the plaintiffs in this case. Their argument in this case is that somehow there was some obligation by one or more the defendants to put all of the Orangeburg property owned by the mother into this trust at some point, even though they admit that there was never -- the two pieces that we talked about specifically were not deeded into the trust.

Based on that representation from the lawyer who purported to represent the McLean family, Mr. Drennan, the defendant who I represent, was at that point, he agreed to be the personal representative of the mother's estate to -- because the daughter passed away shortly thereafter -- to close up the mother's estate. He issued deeds of distribution to the Caw Caw Swamp property and the Cannon Bridge Road remainder interest to the daughter's estate.

I think Wachovia was the personal representative of the daughter's estate, and then the daughter's estate sold those pieces of property in various forms, and Mr. Davis can explain that. Some of the defendants can explain that a little better.

So, that property was sold out of the family, so to speak, and that is really why we're here today because the McLean family has brought -- specifically against Mr. Drennan - a cause of action for breach of fiduciary duty and breach of contract. And I don't know how Your Honor

wants to tackle this. Do you want to -- those are basically the facts, as I understand it.

There's also a statute of limitations argument in that it's clear that a representative of the family, lawyer for the family acknowledged that these properties were not in the trust in October of 2002. The lawsuit was not brought until December of 2006. And so we all feel that the statute of limitations, that notice was clearly established in October of 2002. More than the three years has passed, and so their claims should be waived on those grounds.

Mr. Drennan is here and is prepared to testify to these facts and to answer any questions the court may have and undergo any cross-examination from anyone if Your Honor would like me to do that. Or if you want to hear from the rest of the other defendants because everyone has sort of a slightly different flavor of argument in their defense because defendants in this case include the people who ultimately purchased the property out of the estate and so forth. So, if I could ask for some guidance from the Judge?

THE COURT: Sure. Absolutely, and again you represent Mr. Drennan?

MR. HENRICKSON: Yes.

THE COURT: You filed a motion for summary judgment.

MR. HENRICKSON: I did.

THE COURT: Take it away.

MR. HENRICKSON: Okay. I'd like to call Mr. Drennan to the stand.

THE COURT: You want to call Mr. Drennan to the stand?

MR. HENRICKSON: Yes.

THE COURT: This is a motion for summary judgment.

MR. HENRICKSON: Right.

THE COURT: I've got to do it on the record.

MR. HENRICKSON: We have the record.

THE COURT: Okay.

MR. HENRICKSON: Right?

THE COURT: I mean, so has he been deposed?

MR. HENRICKSON: He's not been deposed and that -- he has not been deposed, and that's a problem.

THE COURT: He doesn't have an affidavit?

MR. HENRICKSON: No, ma'am. I mean, I've, I've called witnesses before in motions for summary judgement.

THE COURT: Oh, I'm sure you have. I'm sure you have, but here is what's going through my mind. You're going to call him. We're going to have cross-examination, and he is going to be on the stand for days in this motion for summary judgement, and I'm a little bit concerned about.

Yes?

MR. ALEXANDER: Your Honor, I'm not really sure that Mr. Drennan needs to be called. I have some different

facts I will probably bring up to the court. But I think Mr. Henrickson is basically correct that a lot of the facts are not disputed in this case. Some key facts are, and we can relate the deposition testimony on those facts. But I'm not sure that Mr. Drennan testifying at this point is going to add anything to their arguments, which are basically statute of limitations.

THE COURT: Okay, and you are?

MR. ALEXANDER: I'm David Alexander.

THE COURT: Mr. Alexander, tell me who you represent.

MR. ALEXANDER: I represent the plaintiffs, Your Honor.

THE COURT: And you represent the McLeans?

MR. ALEXANDER: Yes, Your Honor.

THE COURT: Okay. All right, let's try it this way.

MR. HENRICKSON: Sure.

THE COURT: Anybody representing your client disagree materially with what Mr. Henrickson has just said as the factual basis?

MR. ALEXANDER: Well, I'll bring up ---

THE COURT: You have a difference.

MR. ALEXANDER: I do. I'll bring up different facts.

THE COURT: Tell me what your difference is.

MR. ALEXANDER: Okay. I think you really need a little bit more background context to be able to place

this, this argument in its proper posture, Your Honor. I figure you have to start back a long ways, back in the fifties because it's important to understand what the phrase McLean family land means. James McLean was the father ---

THE COURT: Wait a minute. Hold on. You want to go back to the fifties. I'm looking for a record on a motion for summary judgment. I think I'm in big trouble; I don't know why I feel that way, but I absolutely feel strongly that I'm in big trouble. Hold on.

So, is it your position, Mr. Alexander, that there are material issues of fact in this case?

MR. ALEXANDER: Absolutely, Your Honor.

THE COURT: And that summary judgement is not appropriate?

MR. ALEXANDER: Absolutely, Your Honor.

THE COURT: Okay. Let me ask this question, Mr. Alexander. Would you take the proffer of facts as given to me by Mr. Henrickson as being what Mr. Drennan would testify to if he was to testify?

MR. ALEXANDER: Yes, Your Honor. Based on what Mr. Henrickson has already said, I think he has accurately stated what Mr. Drennan is going to say.

THE COURT: Okay. Very well.

All right, Mr. Henrickson, how about that? In other

words, instead of your client having to testify and be cross-examined *ad nauseam*, what Mr. Alexander has said is that he believes that your client would testify consistent with what you've just told the court?

MR. HENRICKSON: Let me just make sure I haven't left anything out important. Apparently I haven't.

THE COURT: Okay.

MR. HENRICKSON: In that case, Your Honor, I think that the two issues as to Mr. Drennan specifically are breach of contract and breach of fiduciary duty. And as Your Honor knows, the law is pretty clear. A fiduciary relationship is created when someone reposes trust in someone else to do something they have an affirmative obligation to do. There was -- I don't think there are any facts upon which the court can drawn an inference, even in light more favorable to the plaintiff, that there was a fiduciary relationship between Mr. Drennan and the McLean family who are the plaintiffs in this case.

THE COURT: Well, let's see now. Mr. Drennan was the personal representative of the estate of?

MR. HENRICKSON: Elizabeth McLean, who was the mother in this case and essentially the aunt and sister of the plaintiffs.

THE COURT: All right, so Elizabeth McLean Pence?

MR. HENRICKSON: Elizabeth McLean Pence. I'm sorry,

Your Honor.

THE COURT: Okay, Elizabeth McLean Pence. Not Pence Pence but Pence.

MR. HENRICKSON: Right, Pence.

THE COURT: Right, mom.

MR. HENRICKSON: The mom.

THE COURT: Not the daughter.

MR. HENRICKSON: Just the mother.

THE COURT: And he's the, he was the attorney for daughter.

MR. HENRICKSON: He was the attorney for the daughter in trying to -- in the suit that attempted to invalidate the trust, the mother's trust.

THE COURT: Right.

MR. HENRICKSON: And then after that was settled and the daughter then passed shortly thereafter, he became the personal representative ---

THE COURT: Of the mom.

MR. HENRICKSON: --- of the mom's estate because the daughter had been a personal representative of the mom's estate.

THE COURT: Gotcha.

MR. HENRICKSON: So, he did that.

THE COURT: Okay.

MR. HENRICKSON: The McLean family, the Orangeburg

family would not have taken under either the mother's or the daughter's will at all. So, they're not ---

THE COURT: Okay, they were not beneficiaries?

MR. HENRICKSON: They were not beneficiaries at all.

THE COURT: Okay.

MR. HENRICKSON: They were beneficiaries only of this trust.

THE COURT: Okay.

MR. HENRICKSON: That the mother had created.

THE COURT: Okay.

MR. HENRICKSON: That was the subject of the lawsuit that was settled and approved by Judge Lockemy.

THE COURT: Okay. Okay.

MR. HENRICKSON: So, there is no, there is no evidence of fiduciary relationship between the plaintiffs and Mr. Drennan in this case, and the court should dismiss that cause of action against Mr. Drennan.

THE COURT: Okay.

MR. HENRICKSON: The second cause of action against Mr. Drennan is a breach of contract, and there is no contract in the case. I think from what I've gathered from the depositions and from the pleadings is that the plaintiffs are contending that the settlement agreement constituted a contract and that somehow Mr. Drennan, as the lawyer for the daughter in that lawsuit, was somehow a

party to the contract. But he's being sued in his capacity as a personal representative of the mother's estate specifically. And so that would -- he's not being sued in his capacity as a lawyer for the daughter. So, I don't think that, I don't think that that argument stands either. I don't think that a settlement agreement necessarily in this case that's been approved by the circuit court and settles a lawsuit becomes a contract. I think the McLean family -- trying to stretch the legal definition of contract so that they can claim that they were somehow third-party beneficiaries.

What that argument boils down to is that there is language in the settlement agreement that refers to, quote, all Orangeburg property. And the plaintiffs are trying to bootstrap that language, all Orangeburg property, to go back outside of the trust and take all the Orangeburg property from the mother's estate and somehow say that that's included in the trust litigation settlement. While they admit -- and it's undisputed that the only Orangeburg property that was even in the trust that could ever have been subject to any settlement was the Gramling Place property which, about which there is no dispute.

And so that's I think where the plaintiffs are trying to argue that this is a contract, and I think that they fail in that regard. There is no evidence in the record,

first of all, I think from which the court could draw an inference that there was a contract that involved Jim Drennan in any way. He was simply the lawyer who represented a party to that settlement.

And then what would defeat that argument completely, I think, would be Jay Jackson's letters where he purports to represent the McLeans. And he agrees and that -- he agrees that the Caw Caw Swamp property and the Cannon Bridge Road property are clearly not part of the estate, not part of the trust, and so they should pass through the mother's estate, as they did.

Of course Mr. Drennan I think would have every right to rely on the representation of a member of the South Carolina Bar. He would certainly be ethically proscribed from trying to go behind that and check with these plaintiffs individually. So, I think that the fact that -- and if Your Honor looked at those letters, that that clearly establishes a reasonable basis for what Mr. Drennan did, which was at that point allow the property to pass through the mother's estate to the daughter's estate.

THE COURT: Okay. Now ---

MR. HENRICKSON: And for those -- sorry.

THE COURT: No, go ahead.

MR. HENRICKSON: And for reasons -- and Mr. Drennan, who, you know, was on the committee that essentially wrote

the probate code in South Carolina. He's very, very well versed in this. This is what he does. He would testify in greater detail and a lot more elaborately, and it would sound a lot more intelligent than what I have just said. But I think the two causes of action against him fail for those reasons, and I believe that he's entitled to summary judgement from this court.

THE COURT: And that's outside, that's even outside the statute of limitations argument.

MR. HENRICKSON: All of it's outside the statute of limitations which, which we contend would be a three-year period which started at the very latest October 21st of 2002 when Mr. Jackson wrote Mr. Drennan and said we agree with you.

THE COURT: And finally - I'm sorry.

MR. HENRICKSON: No problem.

THE COURT: Finally, was there a claim filed by the McLean family in Pence, Ms. Pence Pence, and Ms. Pence's estates for these properties?

MR. HENRICKSON: There was not.

THE COURT: Okay.

MR. HENRICKSON: And other counsel, those issues are closer to home for them, but my understanding is no, no probate claims were ever filed.

THE COURT: Okay. Thank you so much.

Yes, sir. Thank you so much, Mr. Alexander.

MR. ALEXANDER: Okay, I think it's probably easier if we just go issue by issue.

THE COURT: I think it is, if you don't mind. It's going to work you to death, but I think it will be better for me.

MR. ALEXANDER: I think that's better. I don't have to make out seven or ten, however many summary judgment arguments I have to make. But let me do give you a little bit more background, Your Honor.

THE COURT: Okay. Okay.

MR. ALEXANDER: All this property we're talking about was owned by James McLean, who is -- Bill McLean, who is sitting right here beside me, that was his grandfather.

THE COURT: Okay.

MR. ALEXANDER: And James McLean had three children: Elizabeth McLean, Norman McLean, and Lennon McLean. And Elizabeth McLean married Mr. Pence and moved away to Marlboro County, became Elizabeth McLean Pence. That Pence name is what lends a lot of the confusion in this case.

Mr. McLean in the fifties, James McLean, began distributing his property. And one of the reasons he did this was he was going to look out for his son Lennon, who was mentally disabled. And so he set property up in such a way that he had a life estate, for example, on the Cannon

Bridge Road property so that he would be taken care of, and distributed some of the other property to Norman McLean and Elizabeth McLean.

All right, that's important because it's important to know where Elizabeth McLean got this property, and that's because of the language that's in this trust that Mr. Brogdon set up. In the trust, it says:

> McLean family land in Orangeburg, South Carolina, thereof the issue of the settler's brother in equal shares if any of said issue shall predecease Elizabeth Pence and to those issue per [inaudible].

So, in the trust agreement that was set up in 1999, it's very clear that she intended for this land which came from her father to stay in the family, which is all based in Orangeburg. Norm McLean lived in Orangeburg. I believe two of his children also.

Mr. Brogdon testified at his deposition that it was absolutely her intent that all of her property, not just the Orangeburg real property, make it into the trust. And that it was her intent that the Orangeburg property make its way to the McLean kids if her daughter had no issue. I don't think that fact is disputed.

Mr. Brogdon even testified that there was a deed drawn up for the Gramling property which isn't in dispute today,

but there was also a deed drawn up for a piece of property called the Caw Caw Swamp property. That deed was ready for him to sign except Ms. Pence died. He didn't sign it in time.

So, the settlement -- excuse me, the trust litigation comes along and is pending in Marlboro County, and it looked like it went on for about two years. And one thing I think Mr. Henrickson left out that's very important is some of the language from the settlement agreement. And the settlement agreement says that the McLean family land and the Orangeburg real property, in order to give effect of the intension of the decedent as expressed in that trust provision which I just read you, shall be distributed to Norman McLean's kids.

And then, and this is also very, very important, Your Honor. You have to flip back to the back of the settlement agreement. It is a list of the property that's going to be in the trust, and it lists out -- most of this property was in Marlboro County. And then you get to the end and you see the Gramling property, which is in the trust. But also listed in this settlement agreement was the Caw Caw Swamp property.

And so from that point, I think you can see that the intension there was absolutely that the Orangeburg property at the time of this settlement agreement was going to be

distributed as Elizabeth McLean intended: to the children of Norman McLean. So, that's why that background is so important.

Now, Mr. Henrickson makes an argument about breach of contract. I think it's pretty standard law that settlement agreements are contracts. They're governed by contracts just like any other agreement between parties.

And the idea that it's a third-party beneficiary, well I'm not so sure that's even necessary to reach because another important fact at the time of this settlement agreement was that in the trust litigation, they noticed in the trust that Bill McLean, right here, was listed as a successor trustee to Mr. Brogdon.

Well, the parties agree that Bill McLean would be removed as the successor trustee, and actually had him sign a waiver of his right to serve at the time this settlement agreement was consummated. And so Bill McLean, in his waiver of that right to serve, is a very key portion of that settlement. So, I think he is right there in the mix of it, and it's not even any -- it's not necessary at all to resort to a third-party beneficiary inquiry.

In breach of fiduciary duty, I think another interesting point here, Your Honor, is based on the settlement agreement, you can view the settlement agreement as a contract between heirs. That it's binding on the

personal representative. And in that case, Mr. Drennan would have a fiduciary duty to the heirs, which -- as a result of the terms of this settlement agreement to make sure that that property got where Elizabeth McLean wanted it to go, which was to Norm McLean's kids.

A lot to throw at you, Judge, I know. It's a confusing case.

THE COURT: Well, let me stop you right there because my understanding was -- and, Mr. Alexander, I guess if -- you've altered what I thought after Mr. Henrickson spoke. What you are telling me is that pursuant to the terms of the agreement put on the record and published in open court before Judge Lockemy, that the Caw Caw property was listed as property in the trust?

MR. ALEXANDER: Correct, Your Honor.

THE COURT: Okay, and was it published before Judge Lockemy? Was it considered to be property that already was in the trust, or was to be conveyed to the trust?

MR. ALEXANDER: You know, I think that could read both -- be read both ways, Your Honor. Mr. Brogdon testified in his deposition that he never told Mr. Drennan that this property was in the trust.

Mr. Drennan's a very accomplished attorney. He could have simply performed a title search in Orangeburg County and figured out for himself what property was or was not in

the trust. There is a letter back and forth between Mr. Drennan before the settlement agreement is consummated where Mr. Drennan asks for various valuations concerning the inventory of the property and asked which property might be in the trust and which is in the estate. Mr. Brogdon goes through and writes estate, trust, estate, trust by each of these pieces of property.

So, I think that's evidence there that Mr. Drennan was at least on notice at that point of what was in the trust and what's in the estate. And that's important because then that blows the argument that the settlement agreement only deals with the property that's in the trust and not -- doesn't encourage -- or excuse me, doesn't require property to be conveyed into the trust to effect the intension of Elizabeth McLean.

THE COURT: Okay. All right. So, in summary, the material issues of fact have to do with whether or not the Caw Caw property was to be placed in the trust. And whether or not as the personal representative of Ms. Pence, McLean Pence, that Mr. Drennan breached his fiduciary duty by failing to assure that the Caw Caw property was in the trust.

MR. ALEXANDER: Correct, Your Honor. Correct, Your Honor, and I think there are issues of fact that relate to all of those points that need to be decided by the jury.

MR. HENRICKSON: Your Honor, can I -- if I could just respond to that briefly? I don't think that the plaintiffs are really arguing that Mr. Drennan was responsible for what was in the trust or not. Mr. Drennan had nothing to do with the creation of the trust. His sole job with respect to the trust was to have it invalidated to get property out of the trust.

I think what might be being glossed over here a little bit is that there may have been at some point an intent to put the Caw Caw Swamp property into the trust. But when Ms. Pence the mother died, then that froze everything where it existed at that time. At the time of her death, Mr. Brogdon, who had a power of attorney -- obviously the power of attorney expires at her death. He could then no longer put property in the trust or take property out of the trust. So, at the point of her death, and Mr. Alexander will not disagree with this, the Caw Caw Swamp property was not in the trust.

The trust litigation and the trust settlement had to do only with property that was legally and legitimately in the trust. It couldn't affect any other property.

There was a scrivener's error that listed the Caw Caw Swamp property in a listing of assets of the trust. Maybe because at some point there was an intent prior to Ms. Pence's, the mother's death to put that in there. But the

point is is that at the time of her death, it was not in the trust. And so it was discovered after the settlement that the Caw Caw Swamp property had never been transferred into the trust, and that was accomplished by a title search.

But what Mr. Drennan did at that point was he communicated with a lawyer who represented that he -- who represented that he was the lawyer for the family and that the family agreed that the Caw Caw Property and the Cannon Bridge Road property were not in that trust. And so their lawyer is telling Mr. Drennan this property was not in the trust, and we understand that, and we agree with you, and now they are suing him because they've changed their minds and that's just not fair.

And what Mr. Drennan did was he saw -- he had that agreement from their lawyer saying we agree with you. And based on that, he allowed the property to pass through the estate because it had never, ever been in the trust.

And now they've had a change of heart. They want to come back and sue him for doing what he was told he could do. And that's, that's why Mr. Drennan is entitled to summary judgement in this case. And of course all of this happens outside of the three-year statute.

But just in that response, Judge, there can be no breach of contract because while settlement agreements may

be contracts between the parties, lawyers are never parties to settlement agreements. And to try to say that Mr. Drennan is somehow a party to the settlement confounds all understanding of law. He was the -- he represented a party. That's what a lawyer does. There is no contract.

And there was no breach of fiduciary duty because as the personal representative of the mother's estate, his only fiduciary duty was to the estate and the beneficiaries of the estate, of which the McLean family were not.

MR. ALEXANDER: And, Your Honor, that's why I said he was personal representative of the estate.

A few other points, too. You know, I think that's something that's very important for a jury to decide here is whether that is a scrivener's error, as Mr. Henrickson said. That was an error that was easily avoidable. You would think that if you had litigated a case for two years, you would know which property was in the trust and which property isn't. And there is certainly, based on communications, written communications between Mr. Brogdon and Mr. Drennan, reason to believe that Mr. Drennan may well have known that Caw Caw nor Cannon Bridge Road had been deeded into the trust.

And finally, Your Honor, there's the language in the settlement agreement itself that doesn't say the Gramling property. Doesn't say Caw Caw. It says the Orangeburg

real property in order to give effect to Ms. McLean's intent. And I think right there the meaning of that I think is a classic issue of fact for the jury to decide.

THE COURT: All right, and read me that part of the agreement.

MR. ALEXANDER: The settlement agreement, Your Honor?

THE COURT: Yes.

MR. ALEXANDER: Certainly, and I think, is it in -- who's got it as an exhibit?

MR. E.B. DAVIS: It was in William McLean's deposition, Exhibit 2.

MR. ALEXANDER: Jay, isn't the settlement agreement an exhibit in yours?

MR. PAYNE: Exhibit 1 on mine.

MR. ALEXANDER: Exhibit 1 to Mr. Brogdon's memorandum, Your Honor.

THE COURT: Okay, got it.

MR. ALEXANDER: And it's page 5, paragraph 8 under the heading "Separate Accounting for Orangeburg Realty."

THE COURT: Yes.

MR. ALEXANDER: Your Honor, I'm also handing up an exhibit to Mr. Brogdon's deposition. That's the trust agreement, and you can see how those two paragraphs relate.

(A PAUSE.)

MR. ALEXANDER: And I guess I also need to address the

Jay Jackson letters now. I guess there are really two arguments I think that the defendants are making with regard to these letters. One, that it was reasonable for them to act when they did in reliance on these letters. And, two, there's a statute of limitations argument which I think we'll probably get to here in a little bit.

On the reasonableness of that, Your Honor, again I'd say that's a jury question. If you know something is not true and you convince someone that it is true -- in this case, that the McLean kids weren't supposed to get this property -- that doesn't necessarily mean that you believe that it's true. You still know it's not true. I think it's a question for the jury to decide: whether it's reasonable to believe or reasonable to rely on letters from someone who you've convinced that something is true.

And another thing that's important to remember about these letters, Your Honor, is the way this correspondence began. It began with Mr. Drennan writing to Mr. Jackson, asking him to do some title work for him; that's how this whole series of letters began. So, in the context of Mr. Jackson doing some work for Mr. Drennan, he later writes back this letter saying Mr. Norm McLean accepts and agrees with your position on this issue.

Something else Mr. Henrickson has said, too, that I take strong issue with is the idea that Jay Jackson

represented the McLean family. In their -- in all of the McLeans that have been deposed, testimony, they have all stated unequivocally that Mr. Jackson did not represent them on this issue. Mr. Jackson says that the only person he spoke with was Norman McLean. That he did not speak with Jim McLean or any of the other kids on this issue. So, there, Your Honor, you're in a classic parent-authority agency issue where you need some kind manifestation from the principal that this agent is acting for you.

There's no evidence of that in this case. And so again I think again you're right there with an issue of fact for the jury to decide. What is the scope of the authority of this, of these Jay Jackson letters? Did he act for all the McLeans? Those are issues that a jury needs to decide.

THE COURT: Okay. All right.

MR. HENRICKSON: If I can just make one last point? Mr. Alexander is sort of proceeding from the false premise that there was a deed of the Caw Caw Swamp property to the trust at some point. And you can have all the intent in the world, and if I will all my property to my cat and then at the last minute before my death I decide I want my dog to have it, if I don't change my will, that's too bad. The cat gets it. And what happens here is that Ms. Pence died at a time it may be have -- it may be been incomplete in

terms of transferring property, but she died, and that froze everything in time at that point.

Mr. Alexander has sort of left the door open that there might have been some deed that is filed of the Caw Caw Swamp property to the trust, but they've already admitted that that did not exist. They have to admit that there was never, ever a deed for the Caw Caw Swamp or the Cannon Bridge property into the trust. It was never, ever in the trust.

Whether it was her intent to give this to the cat instead of the dog doesn't make any difference. It was never done in any testamentary document. And Mr. Drennan, whether he had the right to rely on a lawyer in South Carolina who said, quote:

> I discussed this matter with my clients, and they do accept the fact that the Caw Caw Swamp and Cannon Bridge property were not put into the trust.

I just cannot see how a lawyer cannot rely on that. He has nowhere else to go. He can't go talk to all the members of the McLean family and see if they voted yes or no. All he can do is rely on what the member of the South Carolina Bar tells him. Mr. Drennan is clearly entitled to summary judgment.

THE COURT: Okay. All right.

Now, who's going to get to the statute of limitations issue? Is anybody going to do that?

MR. E.B. DAVIS: I'll be glad to do that one.

THE COURT: Have you got that? Okay.

MR. E.B. DAVIS: I'll be glad to do that one.

THE COURT: All right.

MR. E.B. DAVIS: Edward Davis on behalf of Wachovia Bank, Your Honor.

THE COURT: All right.

MR. E.B. DAVIS: Wachovia in this case is sued, and it's on the face of the complaint, sued in its capacity as personal representative of Elizabeth P. Pence's estate, the daughter.

THE COURT: Pence Pence.

MR. E.B. DAVIS: Pence Pence.

THE COURT: Okay.

MR. E.B. DAVIS: The daughter and as trustee of Elizabeth P. Pence's trust.

THE COURT: Okay.

MR. E.B. DAVIS: Didn't serve in either capacity for Elizabeth the mother.

THE COURT: Okay.

MR. E.B. DAVIS: That will be important. It is important but especially important when I get to that argument.

Let me start with the statute of limitations, Your Honor. And it's -- in my humble opinion, the most important thing about the Jay Jackson letters is that it makes clear that the plaintiffs, or at least one of the plaintiffs, and I'll get to what he testified about. At least Norman McLean, there's one thing that we all agree on is that Jay Jackson represented Norman McLean. I think we'll agree on that. That was his testimony.

THE COURT: Who's his?

MR. E.B. DAVIS: Jay Jackson was deposed.

THE COURT: Okay.

MR. E.B. DAVIS: And he said I represented Norman McLean. I talked to Norman McLean. He kind of hedged on whether he'd talked to the kids. Said that the reason he referred to clients plural in multiple letters was a typo, and he copied Jim McLean on the letters.

But let me get to the point. If you look at Jay Jackson's September 27, 2002, letter, it was Exhibit B to our brief. It was also an exhibit to the Marlboro Academy brief. The issues that Mr. Jackson is addressing are the exact issues that we're here litigating in May of 2008 on a complaint that was filed in December of 2006. Mr. Jackson said this September 27, 2002:

Additionally, additionally, I've been asked by Jim McLean ---

Which begs the question how he never could have talked to Jim McLean about this.

> Additionally, I've been asked by Jim McLean, who is the son of Norman McLean, to review a number of documents.

Now, I won't read this whole paragraph here, Your Honor, but he refers to the compromising settlement agreement three times. He's been asked to review it. He's looked at it, and he's raising the question about what the Orangeburg real property is. That's what you've heard, Your Honor, Your Honor has heard this morning that we're here arguing now. And so if nothing else, and I think it is something else, but if nothing else, the Jay Jackson letters make clear that the plaintiffs were on actual notice that they might have claims. And the timing of this, Your Honor, is that it's within two months of Elizabeth P. Pence's death. It's still within the statutory period for them to file a claim against her estate, which they never did. And so they're aware of it.

In terms of who had talked to whom and who knew what about Jay Jackson's letters, Jay Jackson said, well, it was a typo. I don't know why I copied Jim McLean on it. Norman McLean probably told me to copy him on my letters. I only talked to Norman.

Well, we deposed Mr. McLean, Norman McLean, the father

of the four other plaintiffs. And he was asked whether he talked to his children about the contents of these letters. Here's a question I asked him: And so in that paragraph of the letter when Mr. Jackson ---

MR. ALEXANDER: Edward, where are you?

MR. E.B. DAVIS: I'm sorry, it's page 77 of Norman's deposition.

MR. ALEXANDER: Thanks.

MR. E.B. DAVIS: Sorry about that.

And so in that paragraph of the letter when Mr. Jackson refers to his clients, is he referring to you and your children?

Answer: He didn't have any clients in this matter really. Nobody had hired him for any of this. It was just a matter of asking to write a letter and see if he could find out what was going on up there and to inform them for this for me.

Question: All right, but just so we're clear.

Answer: They didn't ask me to do this. No, I did it.

Question: But you did ask Mr. Jackson to make that communication in the third paragraph?

And that's referring to they raise in the third paragraph of the October 21st letter that since they don't have any rights to the property, they're interested in purchasing it.

Answer: Right, of this letter.

Answer: I did, right.

Question: Did your children know that you were asking Mr. Jackson?

Answer: Right, they did, right.

So, Norman McLean testified that he communicated with his children about the contents of these letters. And I was specifically referring to the October 21st letter in that question, which is the key letter that we accept, an authorized letter.

So, if nothing else, these letters show that the knowledge was there more than four years before they filed this lawsuit. That's the three-year statute of limitations for breach of contract, the three-year statute of limitations for breach of fiduciary duty, and obviously the eight-month period for a claim under the probate code.

To put a point on the probate code issue, Your Honor, I don't think there's any dispute. It's an exhibit to one of the briefs that Wachovia, as personal representative of Elizabeth P.'s estate, published it. It was in the Marlboro County paper. No claims were filed by any of

these plaintiffs, no explanation for that.

On the estoppel or reasonableness argument, I don't want to rehash that. But again just to reiterate, you've got a member of the South Carolina Bar saying he represents clients plural. And it's in the plaintiffs' complaint that Wachovia knew or should have known that they shouldn't sell that property. That Drennan knew or should have known that he shouldn't transfer that property. Why that's a reasonable allegation when they've been told by a member of the South Carolina Bar we accept. We agree. It seems to fall directly under equitable estoppel. They relied to their detriment on a representation. They didn't have any reason to think anything else. They transferred the property, and now they're being sued for it.

Last point, and this is unique to Wachovia, Your Honor, but I think it's pretty direct and that is getting back to the capacity with which Wachovia has been sued. They've been sued as personal representative of Elizabeth P.'s estate and as the trustee of the Elizabeth P. Pence trust. The plaintiffs don't even claim to be beneficiaries under either of those. So, how there's any fiduciary duty from Wachovia to those plaintiffs is beyond me.

On the contract claim, if you look at the compromise and settlement agreement, Mr. Alexander has tried to explain how he contends that the plaintiffs in a roundabout

sort of way be considered parties to that agreement. Well, Wachovia certainly wasn't a party to that agreement.

So, you've got, if you look at the signature page of what's alleged to be this contract, you've got parties that -- or parties that aren't signatories to the contract suing another party that's not a signatory to the contract. Elizabeth P. signed the contract. She was alive, of course, and now Wachovia as personal representative of her estate as her trustee has been sued for breach of contract, and they allege that this is the contract. So, Wachovia is entitled to summary judgement, Your Honor.

THE COURT: Okay. Thank you.

Yes, sir, Mr. Alexander.

MR. ALEXANDER: Okay, all right, first thing I want to talk about is the statute of limitations is the defendants all seem pretty clear that a three-year statute of limitation applies. Well, it doesn't, Your Honor. There's another statute of limitation that applies in this case, and that's the twenty-year statute of limitations for sealed instruments. This is 15-3-520(b), and sealed instruments are defined as documents where the parties intend to lay their hands on their seals.

Well, there's a case, and I'll hand up a copy of that case for you, Your Honor. Several of them for you, but I think this case makes very clear that it is the twenty-year

sealed instrument statute of limitations that applies. The name of the case is *Treadaway vs. Smith*.

This case dealt with a separation agreement very similar to the settlement agreement in this case in 1974, and the settlement agreement provided that the husband was supposed to pay for kids' college way down the road. In 1993, the wife sued the husband on it and asserted the sealed instrument statute of limitations. And just like in our case, the document was confirmed by a court.

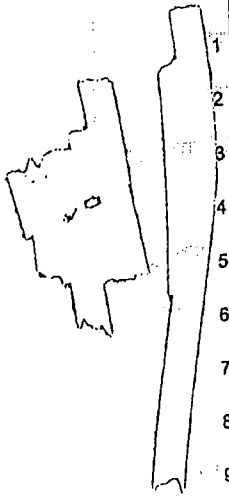
In this case, it certainly wasn't the circuit court of Marlboro County. It was a Haitian Court, making it part of a Haitian divorce decree, and the court found in this case that it was a sealed instrument relying on language that said: Witness whereof, the parties have heretofore set their respective hands and seals. Same language that's on this agreement, Your Honor. And certainly I think that if a separation agreement in a Haitian divorce can be a sealed instrument, then certainly a settlement agreement between multiple sophisticated parties that is confirmed by the circuit court in Marlboro County, I think that's a, that's a sealed instrument as well. And if you've got a twenty-year statute of limitations, then you don't even need to consider all these issues regarding the Jay Jackson letter.

Now, if you, if you decide that you don't think this is a sealed instrument, there's a lot of questions about

the Jackson letters and whether the clock really starts with the Jackson letters. Bill McLean testified in his deposition that they first know that there was a problem in 2004 when they saw that these properties had been transferred from these estates to the third parties. They saw the record of that in an Orangeburg County paper, and with that as the first notice to my clients, then the lawsuit is certainly tired.

I think it's a big jury issue, Your Honor, what my clients knew about these Jay Jackson letters. I've made that argument before already. Did Jackson represent them all? He said he didn't. He said he never talked to Jim McLean. He said he never even met Robert McLean. He said he'd never talked to Marie McLean about this, certainly not to Bill McLean. Norm McLean said he didn't authorize him to write these letters; Norm McLean said he didn't represent him on these letters. He was just trying to find out some information. So, I think those are all issues that a jury needs to decide is whether the plaintiffs knew about these letters and whether that action started the three-year clock, if you decide that a three-year clock applies.

And I think it's also important, Your Honor, for you to think about it this way. What if all these plaintiffs didn't have the last name McLean? What if they were all



business partners and they weren't related? What if they hated each other? If one knows about it, does that mean that the other one is charged with it? No. You've got to show that if you're going to deprive somebody of their right to bring a case about this, then you've got to show that they had no -- that they knew exactly about these letters, and there's no evidence of that. So, I don't think you can start the clock with the Jay Jackson letters.

THE COURT: Okay.

MR. ALEXANDER: And I'll address the probate code very briefly, Your Honor.

THE COURT: Okay.

MR. ALEXANDER: I think that argument's pretty easy. They're talking about the notice to creditors which is published.

The McLean kids weren't creditors. They thought that their rights were being protected by the settlement agreement. If their rights were protected by the settlement agreement, there's nothing more for them to do. Why in the world would they ever file a claim as a creditor? That statute simply doesn't apply to their cause.

THE COURT: Okay.

MR. E.B. DAVIS: Your Honor, just a quick response. The contract under the seal, I feel like I've got one hand

tied behind my back because that's the first time we've heard about this. It wasn't pled, that we believe there may be a case that distinguishes and goes into more detail about what needs to be beside a signature for it to be considered under seal. But my first gut reaction is that that was not what was pled. But I'll leave that as it may, and someone else may want to address that.

Regarding the notice to the plaintiffs, Jay Jackson was unequivocal that he represented Norman McLean. Norman McLeod made an interesting distinction that he didn't represent me, but I asked him to write the letter. Norman McLean also testified that he spoke to his children about the contents of the letter. So, you've got one plaintiff on notice testifying that he talked to the other plaintiffs. I think the discovery rule would say that at the very least, the statute runs from there, and I'll leave it there.

MR. ALEXANDER: One brief response, Your Honor.

THE COURT: Okay.

MR. ALEXANDER: I think Norman's testimony is not nearly unequivocal as Mr. Davis would suggest. On page 54 of his deposition, he's asked whether or not he was discussing these issues with his children. Norman McLean responds:

Yes, but not, not everything and not every

-- in other words we don't get together and have a conference. I might discuss with one and not the other. So, another one might would say something, then contact somebody. I can't speak for all of them.

And that goes exactly to my point of if you, if you know -- if none of these people were related, then one knows, does another one know?

One other point to remember, too, is that at the time of these Jay Jackson letters, Norman McLean didn't have any interest in these properties. He'd already conveyed by quitclaim deed in 2001 all of his interest to these kids. So, his interest in this property was solely as a matter of a father just inquiring about the McLean family land. To charge him with a duty to notify all of his kids about property that he didn't have any interest in I think goes too far for a summary judgement standard.

THE COURT: Okay. All right, who's next?

MR. JAMES: Your Honor, I'll speak.

THE COURT: Okay.

MR. JAMES: I'm Jay James, and I represent Marlboro Academy.

THE COURT: Okay.

MR. JAMES: Elizabeth Pence Pence in her will, and then she had a trust agreement, a living trust agreement

that the will poured into, she left her estate to Marlboro Academy. She died in August of 2002. The Caw Caw Swamp property was listed as an asset of her estate. The Cannon Bridge Road property, her remainder interest was listed as an asset of her estate.

Wachovia Bank was the personal representative of her estate. Wachovia Bank published the notice to creditors in the Marlboro paper in September of 2002. These correspondences between Mr. Jackson and Mr. Drennan occurred in September and October of 2002. The eight months would have run in May of 2003.

At best, the plaintiffs are alleging that Elizabeth Pence, who claimed title to these two properties, was under an obligation created somehow by the settlement agreement, I suppose, to convey them to the trust. Well, they were, in fact, a creditor. They had to file a claim within that eight-month period or be barred, and that's very clearly what the statute says. They are barred if they don't do it. They didn't do it.

As a result of that, Wachovia Bank as personal representative did what a normal person, personal representation should do: that is, administer the asset. They sold the Caw Caw property, Caw Caw Swamp property pursuant to a power of sale. They had every right to. They distributed the proceeds to my client and to the

husband of Ms. Pence Pence, which they were supposed to do, in a timely fashion. They distributed the remainder interest in the Cannon Bridge Road property to my client.

My client has received the inheritance to which it was entitled and has changed its position in reliance upon this because nobody filed a claim within the eight months. Nobody even filed a lawsuit within three years of any relevant date.

If you go back and start undoing estates at this late date, nobody can ever rest. I think the eight-month statute clearly applies here. We own the property. We were an adversary to the Brogdon trust. We were an adversary to those who claimed the Brogdon trust gave them rights that we didn't agree with. They needed to come accost us within the time period that the law allows.

I don't know who knew what, but some of the McLeans knew a lot. Norman McLean certainly knew a lot. William McLean was the backup trustee. In February of 2002, he signed a document to relinquish his rights. That he testified that he received a partial faxed copy of the settlement agreement. His brother James McLean said that he knew that his brother was going to Florence to talk about that trust. Norman McLean testified that he kept his children informed. These people deny that Jay Jackson was representing them, but Jay Jackson was informing some of

them of a whole lot of things, and Norman McLean testified that he was keeping his children informed.

Your Honor, I think the three-year statute applies, and I think the eight-month probate court claim statute absolutely bars these people's claims. Thank you.

THE COURT: Thank you very much.

All right, yes.

MR. ALEXANDER: I'll make a quick response to Mr. James's argument. It's the same probate argument whether or not my clients are creditors and had to file a notice.

Mr. James brings up the point that Bill McLean receives copies of the settlement agreement at the time he waives his right to serve as successor trustee. Well, of course he did. He was relying on that. He read these documents that said that the Orangeburg real property was coming to him and his siblings. He thought everything was fine. That's exactly why he didn't file any kind of claim against the estates. That's why he's not a creditor. That has already been litigated. It's exactly what Mr. James says. They absolutely were adversaries, but that issue was decided in the trust litigation, and that was what my clients were relying on.

MR. JAMES: Your Honor, if I give the bank a note for $100,000, I promise to pay them, but the bank had better file a claim against my estate, against my executor or it's

out. If it's a secured claim, they might have rights to the security. But the fact that I've signed a document does not cause the claim statute not to apply.

THE COURT: All right, anybody else want to start, take the first pass at the summary judgment?

MR. PAYNE: Anybody got anything to add on statute of limitations?

I'm going to, I'm going to change it up just a little bit, Your Honor. I'm Jeff Payne here today on behalf of Mr. James Brogdon, who's sitting back here on the third row, along with Jim Brogdon. He's an accountant over in Bennettsville, and he's been sued for breaching of a fiduciary duty to the McLean family, who were beneficiaries of this trust.

The grounds that I've been able to ascertain from the complaint -- they haven't answered my discovery -- three things. One, not putting the Caw Caw Swamp property into the trust. That's their claim. He breached his fiduciary duty by not putting it into the trust. Mismanaging assets, and not subsequently preventing transfers of property through Elizabeth Pence's estate.

Not putting the property into trust is not a breach of fiduciary duty. Mr. Brogdon, when he was wearing his power of attorney hat and was helping out Ms. Pence do her estate planning, his duties were owed to Ms. Pence or ultimately

to her estate when she died. Anybody who wants to complain about him not putting something into the trust, that was who could do it, the estate of Ms. Lib Pence, but not these beneficiaries. They have no right to complain about what he did helping her out with that power of attorney. He's a trustee of a trust, and when he's wearing his trustee hat, he's got a duty to administer the assets that are in his trust, to do whatever it takes to oversee those assets. But the fact that something was not in there, he's got no duty to do -- to look after these beneficiaries.

In fact, if it wasn't for Mr. Brogdon in resolving this litigation and setting up this trust, they would have never received this Gramling property which is worth a million and a half dollars. But the kindness that he gets in return is he's getting sued for not putting a $100,000 piece of property into this trust.

He's done nothing while he was the trustee that they've been able to show me that he's done wrong. They've claimed mismanagement of assets. I've asked them all. What has he done wrong? Well, I really don't. I hadn't seen. We've given them accountings. They've all testified that there's nothing been done wrong. The only issue really here is is there a legal duty from a trustee to a beneficiary to convey property to that trust, and there isn't, just is not.

Now, when they ultimately resolved the settlement agreement issue, the settlement says sixty/forty. Whatever's in there, whatever the trust assets were divided up sixty/forty. Sixty to Elizabeth's estate. Forty percent will stay in here.

Well, the one Orangeburg piece of property was worth approximately forty percent, and it stayed in there. It worked out just as everybody had thought. The only thing they can seize on is this one little error by Mr. Drennan where he wrote it on an exhibit. But the fact is it wasn't in the -- this property was never in there. He can't all of a sudden convey property into the trust to make it happen.

When they're divvying up the property, they -- he told them it's not in there. There's nothing to convey. I'm going to put this $1.5 million piece of property in here that they now have and they now don't want to give back, by the way. They haven't offered to give us back the property, yet they're complaining what's not there, and they didn't take their final distribution check that we sent out to everybody, and then they sued him.

But I've been unable to locate any kind of statutory or case law that says a trustee has got a fiduciary duty to a beneficiary to put something into that trust. I've, I haven't seen a brief.

THE COURT: Who is the maker of the trust?

MR. PAYNE: The principal here, Ms. Elizabeth -- I mean, Ms. Lib Pence.

THE COURT: All right, and ---

MR. PAYNE: So, he -- I'm sorry. She, she came to him, and he went and helped her with her estate planning is what, what it ultimately happened.

He testified she gave me a deed. I went and had the title prepared. The title abstractor, who just happens to be Mr. Jay Jackson's law partner who is now dead, he came back and discovered there's another piece of property here. Does she want to do that? Mr. Brogdon went back to her to get that conveyed into the trust, get the deed and all prepared.

She died, so it never got in there. Nobody disputes that, but the fact is he didn't have a duty to these folks to make sure it got into the trust.

THE COURT: The maker of the trust is?

MR. PAYNE: Lib Pence, the mom, the mother.

THE COURT: Lib Pence, all right, and the durable power of attorney, did it address any obligations regarding the trust?

MR. PAYNE: No. It was just to do whatever's in her best interest.

THE COURT: Okay, her best interest?

MR. PAYNE: Right.

THE COURT: Okay, and is there anything in the power of attorney that addresses any responsibilities regarding the trust, any management regarding the trust?

MR. PAYNE: No, ma'am.

THE COURT: Okay. Any completion of her obligations or desires vis-a-vis the trust?

MR. PAYNE: Not, not that I'm aware of. I'll go back and look at that, Your Honor.

THE COURT: Okay. So, as the -- so, then the sole maker of the trust was Lib Pence?

MR. PAYNE: Yes, ma'am.

THE COURT: All right.

(A PAUSE.)

THE COURT: Yes, sir. Got it.

MR. ALEXANDER: Thank you, Your Honor. I think you hit on the right point, and that's the several hats that Mr. Brogdon was wearing. He was the power attorney. He was the one that had the trust drawn up. He knew what was supposed to happen with the trust. In fact, on page 28 of Mr. Brogdon's deposition, he testified. The question was: Did she tell you this? Let me back up a second. Was this trust contemplated at the time of the durable power of attorney? Answer.

THE COURT: Say that one more time because you were

going a little bit fast.

MR. ALEXANDER: I'm sorry. The question was:

> Was this trust contemplated at the time of the durable power of attorney?

The answer from Mr. Brogdon was:

> It was discussed. It was in discussion. All of this was in discussion even before the power of attorney.

So, Mr. Brogdon knew at the time that all these documents were created what he was supposed to be doing, and that was create this trust, get all of her property into the trust.

Mr. Payne's argument about the trustee having no duty to get this property into the trust is a little bit misleading, Your Honor. In his brief, basically what he has done is taking the list, statutory list of trustee powers that's in the probate code and says, well, where does it say exactly convey property in the trust? That's not in here. But there is a general power granted by the probate code that gives a trustee broad ability to do all sorts of things, basically anything an actual person can do. And there's also a specific duty in the probate code that requires a trustee to take control and to safeguard the trust property.

And in a situation like this, Your Honor, where you

have a trustee who is also the power of attorney who engaged the lawyer, a lawyer that he dealt with on a regular basis to draw up these instruments, then I think it's a very clear question of fact as to whether or not Mr. Brogdon, who knew that these properties were supposed to be in there, that he's testified that he knew these properties were supposed to be in there, whether or not he could have taken these steps to get that property in there in a timely fashion.

MR. HENRICKSON: Your Honor.

THE COURT: Come on, Mr. Henrickson, up you come.

MR. HENRICKSON: Just had a, just a couple of things that haven't been talked of which I think are important.

One, we all learned the first days of wills and trusts that when a person dies, the title to real property divests immediately to the beneficiary, and that's what happened in this case. As soon as the mother died, the title to the Caw Caw and the Cannon Bridge property went immediately to the daughter. So, there was -- nobody but her could put this in the trust, and no -- she wasn't going to do that.

And so to argue that somehow Mr. Brogdon or Mr. Drennan had some obligation to then put that property in the trust at any the point after the mother's death is an absurd argument because the title goes immediately to the daughter. It's her property.

Now, what -- the only thing that Mr. Drennan did was, as personal representative of the mother's property, is he did a deed of distribution which is not a transfer of property. It is simply a memorandum of record that shows that the estate essentially releases the property. It then becomes a part of the chain of title, and the property is then by title and record, notice goes to the devisee.

Mr. Brogdon was never the representative of the daughter's, personal representative of the daughter's estate. He did not preside over any of the selling of this property out to anybody else.

And the other thing I needed to mention is that the plaintiffs never, ever relied on the scrivener's error because once it was discovered, then the communication between Mr. Drennan and Mr. Jackson took, took place. It was clear to Mr. Drennan that they understood the Caw Caw property and the Cannon Ridge property were not in the estate. And what's further evidence is that the -- I think Exhibit 5 to Mr. James's brief is an additional letter dated January 17, 2003, where Mr. Jackson is kind of chasing Mr. Drennan down, saying don't forget my people want to buy this property that belonged to Elizabeth Pence in Orangeburg County. So, and what the letter says is:

> This is to reconfirm my telephone conversation to you in which I indicated my

clients here in Orangeburg are interested in purchasing the Orangeburg property owned by the late Elizabeth Pence, the mother. You indicated to me on the telephone that you would make sure the heirs of her estate, the daughter, are aware of my clients' desire so that in the event they wish to sell the property, they will make sure that my clients do have an opportunity to purchase the property.

So, that's just further evidence that the whole family knows what's going on. They know the property's not in the trust. They want to try to buy the property if they can, and this is just -- I don't think that the court can, even taking everything in the light most favorable to the plaintiff, I don't think there are any inferences whatsoever that can defeat these motions for summary judgement. It's clear and plain and in the record. Thank you for listening, Judge. I appreciate it.

THE COURT: Oh, not at all.

MR. HENRICKSON: Oh, okay.

THE COURT: Up you go.

MR. HENRICKSON: Sure.

THE COURT: All right, Mr. Henrickson, all right, let me see if I can -- because here's what, here's what I am

recalling, and of course in his argument regarding the filing of claims for estates, Mr. Alexander really gives me pause. And I'm going to talk to him about that in a little bit about the importance of filing claims because I distinctly remember many years ago. I was actually practicing law, and I'll never forget that there was a doctor who died, and there was a malpractice case. And because the putative plaintiff in the malpractice case had failed to file the claim, that malpractice case was gone, irrespective of the statute of limitations because there was a failure to file the claim with the doctor's estate. Remember that case? It was a long time ago.

MR. HENRICKSON: I'm vaguely remembering that maybe that the plaintiff failed to for the survival action. Of course there was a wrongful death, it's obviously under a different ---

THE COURT: Not against the doctor, not against the doctor.

MR. HENRICKSON: It was not a wrongful death case? Okay.

THE COURT: And it had to do with the fact that the -- that's how strong that probate claim was, and I remember being shocked by that, that the probate claim was stronger than the statute of limitations as would exist in Common Pleas. I just remember that. Now, maybe the new code has

changed that, but I just remember how strong that was.

MR. HENRICKSON: Mr. Drennan, who wrote the code, can answer that question for you.

THE COURT: I know that. I know that, but I distinctly remember that.

So, so here's where we are, and this is what I need you to help me do because you gave me the first recitation of the facts, all right? We've got the first Ms. Pence has passed. We've got the second Ms. Pence, Pence Pence, daughter, who retained Mr. Drennan to have property released from the trust. As much property as can be released, have it released from the trust. And then there is an agreement which is placed on the record, and there's a question about what that is. In any event, once it's published to the court, because it becomes also a court order.

MR. HENRICKSON: Right.

THE COURT: And the nature of what that is, is it merely an agreement? Is it an agreement, or is it a court order? In the family court, it is not an agreement; it is a court order. But be that as it may, we have an agreement which is put on the record before Judge Lockemy, and I gather approved and becomes the order of the court. And then Ms. Pence Pence passes away, and at that point the property, the Caw Caw property passes to Ms. Pence Pence.

MR. HENRICKSON: Well, it passed to the daughter upon the mother's death.

THE COURT: Exactly. So, it remains with the daughter at the time of her -- irrespective of the litigation. See what I'm saying?

MR. HENRICKSON: Right.

THE COURT: Even assuming *arguendo* - this is where I am. Even assuming *arguendo* that there was something in the court, there was an agreement, and that's where the question is. Is there a scrivener's error or not a scrivener's error, the Caw Caw property, okay?

MR. HENRICKSON: Okay.

THE COURT: Assume for the moment that it is not a scrivener's error. It's on there, and then Ms. Pence Pence dies and there's not a claim filed. Can they now raise the issue? Has the statute passed because of the eight-month period having passed?

MR. HENRICKSON: I think they're barred. I think the eight -- I think, as you pointed out, the eight-month statute is strong.

But, I mean, in order for the Caw Caw Swamp inclusion to be on that list to be a fact and not a scrivener's error, there has to be a deed that is signed by Ms. Pence the mother transferring the property into the trust prior to her death. It's been admitted that there is none.

THE COURT: But what if in the -- what if that was the point of the litigation and in the litigation, Ms. Pence Pence said okay, we'll negotiate something and it goes on the list? It's either a -- part of you, half of you say it's a scrivener's error. The other half said no, no, it was a point, it was a part and parcel of the settlement, right?

MR. HENRICKSON: There is -- I understand that. There is no evidence whatsoever, and there has to be more than a scintilla of evidence. There is no evidence that that was the intent of the parties to the contract. In fact, to the contrary, and if ---

THE COURT: You're talking about to the settlement?

MR. HENRICKSON: To the settlement agreement, and if -- in fact, to the contrary, Mr. Drennan would testify that his object and the daughter's object was not to put any property in the trust but to pull property out of the trust. And so there is no evidence whatsoever that they -- that that was part of the argument.

THE COURT: So.

MR. HENRICKSON: Part of the agreement.

THE COURT: Okay, what if it was? Don't you have to file a claim?

MR. HENRICKSON: You still have to file a claim, I believe, but that's, that would just be inventing a legal

fiction. But I understand if we want to go down the legal fiction road, then I think he would still have to file a claim.

THE COURT: But they're telling me it's a question of intent and a question of fact for the jury. Was that -- because it's on the documents, because it was published in open court, because it's on the exhibit, that it was to be placed into the estate, that that's a question of fact for the jury. So, even if it is, even so, even if they are correct and she passed away and it hadn't happened, do you have to file a claim?

MR. HENRICKSON: Well, I would say that that does not create a question of fact as to whether or not Mr. Drennan breached a contract to which he was not a party and to which plaintiffs were not a party.

THE COURT: Right.

MR. HENRICKSON: And it does not address or create a question of fact as to whether or not Mr. Drennan breached a ---

THE COURT: Fiduciary duty.

MR. HENRICKSON: --- fiduciary duty which he owed only to the estate. And so whether there is a, whether there's a question of fact somewhere ---

THE COURT: The estate of Ms. Pence Pence.

MR. HENRICKSON: The mother.

THE COURT: Right, the mother.

MR. HENRICKSON: The estate of the mother. He was only the personal representative of the estate of the mother.

THE COURT: Okay.

MR. HENRICKSON: So, his fiduciary duty would have been to the estate and that estate's sole beneficiary, the daughter. And so whether there is a question of fact, it does not -- there is not one as it relates to the two causes of action against Mr. Brennan.

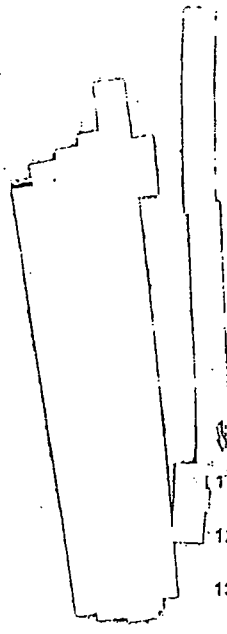
THE COURT: I'm with you.

MR. HENRICKSON: And to, and to further, further that argument, the reason that there isn't a question of fact whether or not this was a scrivener's error is the overwhelming evidence in the Jay Jackson letters.

And frankly it doesn't matter what Mr. McLean thought or what Mr. -- what their arrangement really was. Mr. Jackson took it upon himself to affirmatively represent to Jim Drennan as the apparent agent of these people, and Mr. Drennan reasonably acted on that. And, in fact, all he did in reliance on that was he filed a deed of distribution from the mother's estate to the daughter. That's all he did. He did not transfer any property anywhere.

THE COURT: Got it. Got it. Okay.

MR. HENRICKSON: Thank you.



THE COURT: Yes, sir.

MR. ALEXANDER: Very interesting point I think that Your Honor was raising was the fact that this settlement agreement was a court order. It came essentially in the order of Judge Lockemy's. And then after this order is issued, their argument is well, Mr. Drennan discovers this error and decides to unilaterally undo a court order. He didn't go back to the court and ask them to reform their order, ask them to reform the settlement agreement. He decided to undo it. He was going to do it however he thought that it should have been done.

And so I think to make the jump from that, from them essentially undoing an order of the court that the McLean family thought was in their favor and was going to get them this property, I don't know. To jump from there, that this litigation had been settled and they could reply that. The fact that now they've got to make another claim arguing the same thing in the probate proceedings, I think that's too big a leap, Your Honor, especially summary judgment.

MR. HENRICKSON: If Your Honor will just look at page -- or paragraph 5 of the settlement agreement.

THE COURT: Okay.

MR. HENRICKSON: The language that I think is operative here is it says: The assets to be distributed to Pence -- and that's the daughter -- shall include the

Marlboro County real property now owned by the trust. And it's shown on Exhibit B:

> All Orangeburg County, South Carolina real property which is owned by the trust shall be -- remain in the trust by the trustee.

And so the language of the settlement agreement itself limits it to the Gramling Road property because that is the only property which is owned by the trust, and that is the specific language in the settlement agreement. So, the settlement -- so there can be no inference that the settlement agreement encompasses any property other than the property which had been legally deeded, the Orangeburg property legally deeded to the trust. And it's already been admitted that the only piece of property that falls in that description is the Gramling Road property.

MR. ALEXANDER: But, Your Honor, that's controverted by paragraph 8 of the settlement agreement which specifically references the language in the trust document which I've handed up to the court. So, I think that that's -- it's not nearly as clear as Mr. Henrickson's point that he was trying to make.

MR. HENRICKSON: I disagree with that. Your Honor can read those two. You can't create something -- you can't deed something that, that -- you can't say a trust owns something that hasn't been deeded to it period.

THE COURT: Okay. Yes.

MR. MOORE: Your Honor, Cliff Moore here representing Charles Thompson and Cheryl Thompson. I'm the end of the story.

My clients own part of the Caw Caw Swamp property now, and they were deeded title to that property by Wachovia as personal representative of the estate of Pence Pence. And we're here to argue that we're bone fide purchasers for value of that property with no notice of any of this.

The proceedings that have been described to you, the estate probates as well as the trust litigation, all happened over in Marlboro County. Caw Caw Swamp property is in Orangeburg County, and if you look at the pleadings that have been advanced by the plaintiffs, they provide the chain of title for the Caw Caw Swamp property, and everything in there is exactly right. None of that, though, makes reference to any of the claims the McLean family now advances.

The only thing that they could possibly hang their hats on is in one of the estates, there is reference to the trust litigation. But the description in the ancillary administration in Orangeburg County of what that litigation was about doesn't mention any Orangeburg County property.

I've filed copies of -- certified true copies of both the estate filings from Orangeburg County with our motion

for summary judgment, and that's the only thing that's in there. There's a reference to some Orangeburg County timber interests, proceeds from the sale of timber in Orangeburg County, but no mention of the property. So, my client has come in and has purchased this property without notice of these claims. There's no question that they paid value. The value is recited in the deed.

And our point is everybody else can continue on. We just want to go home. We bought this piece of property, and we think we are entitled to title to that property. We bought it without notice, and I think that we're entitled to summary judgement.

THE COURT: And closed, and closed. Your clients not only entered into a contract of sale. They closed.

MR. MOORE: Well, they purchased the property on July 23, 2004.

THE COURT: Okay. All right.

MR. MOORE: And they owned the property.

THE COURT: Took deed. They took deed to it.

MR. MOORE: Yes.

THE COURT: Okay.

MR. MOORE: Thank you, Your Honor.

THE COURT: Yes, sir.

MR. MOORE: We piggy back on everything else anybody else said.

THE COURT: Indeed. Absolutely.

MR. ALEXANDER: I think this just may be my last statement as well, Your Honor.

THE COURT: Okay.

MR. ALEXANDER: I want to make sure I draw the court's attention to the document that was filed in Orangeburg that Mr. Moore has talked about. That's the inventory appraisement that was filed in the estate of Elizabeth McLean Pence, and it specifically references trust litigation, and then on the next page the document handed to you is a description of that litigation. And I think it's again for the jury to decide whether or not a prudent attorney performing a title search on this property would go get that probate file and go get the settlement agreement and read that settlement agreement.

If you read that settlement agreement, you see the Caw Caw property listed as going to the McLeans. I think that does put them on notice, Your Honor. So, I don't think they can claim the status of a bone fide purchaser of value.

MR. MOORE: Your Honor, I would call attention to your last sentence in that description. It's an attachment to the schedules and it says:

> The assets transfer, assets transferred by Mr. Brogdon as trustee of the May 28, 1999,

revocable trust to the Elizabeth P. Pence revocable trust dated February 1, 2002, and to Elizabeth P. Pence personally as sole beneficiary whereas follows.

And that's the listing of the assets. It mentions bonds. That's not our property. Marlboro County real property, cash, cash to Elizabeth Pence, and sixty percent of timber sales. Nowhere in there is the word Caw Caw Swamp property mentioned. Nowhere in there is there any Orangeburg County real estate interest mentioned other than the proceeds from timber sales.

The settlement agreement was not filed in Orangeburg County. This is the only thing filed in Orangeburg County, this page that you have here. I'll agree with counsel on that. That's it, and this does not put anybody on notice of the fact that there is a claim interest in the Caw Caw Swamp property by anybody. In fact, if you look earlier in the schedules, you'll see that the Caw Caw Swamp property is listed as an asset of the estate. What is listed here, and what this is an explanation for is a claim against a revocable trust dated May 28, 1999.

Now, again had they filed a claim with the estate, that claim would have been part of the certified record that would have been filed in the ancillary administration, but they didn't file a claim. So, someone searching the

county records of Orangeburg County would not find anything except what's in front of you. And there's no mention of it as the Caw Caw Swamp property being related to the McLeans and the McLeans have any interest in that piece of property.

THE COURT: Yes, sir.

MR. ALEXANDER: Then again, Your Honor, I just think that raises a good question. If I'm the lawyer performing the title search for the Thompsons and I see that there was litigation regarding this estate, I'm going to get that settlement agreement. I'm going to go ask my title abstractor to go up there and get that file so I can see it for myself and decide for myself what that compromised settlement agreement says. When you look at it, that's when they're put on notice of my clients' claims.

THE COURT: We have movement.

MR. J.R. DAVIS: May it please the court? I'm going to get some water here.

(A PAUSE.)

MR. J.R. DAVIS: Your Honor, my client is Money to Go, LLC, and we are also a -- Randy Davis for that defendant. We're a purchaser just like Mr. Moore's client was, and our defense is -- deals with being a good-faith purchaser for value.

From either the pleadings or from the depositions, it

is clear that Money to Go did buy 120 acres which was part of a 174 acre tract that Elizabeth Pence number 1 got when the partition action occurred back in 1994. This tract of land again was owned by, I think, James McLean and then it went to the three kids. And as part of the partition in 1994, this Caw Caw tract came to Elizabeth number 1. My client purchased 120 acres of that. So, again, we -- our defense is a good-faith purchaser for value.

We've also filed a motion for summary judgment on statute of limitations, and also the claim issue, but what I want to talk about is the, is the good-faith purchaser.

THE COURT: Okay.

MR. J.R. DAVIS: Again, we have a deed to the property in 2004. It was purchased for $132,000 and consideration was paid. An attorney was involved in the transaction. As you can see from the face of that deed, an Orangeburg attorney was involved representing the purchaser. I think Money to Go, LLC, can prove they are a purchaser. That being a good-faith purchaser, I think that requires obviously ordinary consideration by them to make sure they have the titled checked. Again; by the face of the document, that there you can that an Orangeburg attorney was involved in the transaction, and they pay money for it.

Now, in regards to having some sort of knowledge of the claim by the plaintiffs, it's either got to be through

actual knowledge or constructive notice. The deposition of at least one of the plaintiffs, I think William McLean, indicated that he and his family had no, had no evidence that the defendant Money to Go, LLC, had any knowledge of this litigation. They didn't have any proof that they -- that defendant knew of any, any of these problems through actual notice. So, we're really getting down to the constructive notice situation as Mr. Moore has argued.

From the record that's in Orangeburg, what you have on this title is really starting in 1950, '55 is when Mr. McLean passed away, James. You've got his estate filed, and then you've got the partition action in 1994, and then you've got the ancillary papers on Elizabeth number 1, which includes her will. It does include the warrant of appraisement and I think includes her date of death. Obviously as you have said, Your Honor, that when she passed away, this property passed to Elizabeth number 2. There's also filed in Orangeburg her ancillary estate, which includes the will, her date of death, and warrant of appraisement. And then eventually the property was conveyed from her, the second Ms. Pence's estate, over to Wachovia as PR of her estate and eventually to Money to Go, and that's the chain of title.

I would submit to you that under constructive notice, using reasonable care, there's nothing in that chain of

title that we just said that pick -- that would give anybody any fear of this title being clean of the litigation which occurred in Marlboro in regards to the warrant of appraisement, as Mr. Moore stated.

What's key to it is there is reference to litigation. But if you are a title examiner and you're checking out a title -- and I've done a few myself in past years -- you see specifically in that warrant of appraisement is the fact that the Caw Caw property is listed as a piece of property that that lady owned at the time of her death. If I were an abstractor, I'd be in a position to say I'm comfortable that, you know, I know that she passed away and she said she owns the property, she owns it, and we would not have to go any further to determine the ownership. But -- and so there's really nothing else that an examiner could pick up that would give any fear of a problem with this title.

In an exercise in ordinary care, I think that the evidence would be that they've done that in this situation. Again, there is no connection between this defendant and McLean family. They didn't know each other, so it's no transaction where people knew each other. So, it's really getting down to the evidence that exists as to the actual notice and the constructive notice which I made the argument on. Thank you.

THE COURT: Thank you so much, Mr. Davis.

Yes, sir, you want to speak to that?

MR. ALEXANDER: It'd be the same. It's the same argument, Your Honor.

THE COURT: It would be the same, same argument, okay. Very well.

MR. EASTERLING: Your Honor, pleased to be here before you and to speak on behalf in my clients, James J. Pence, Jr., as personal representative of the estate of Stephen Pence, and Harry R. Easterling, Jr. These are two parties who each own 1/12 interest in the Cannon Bridge Road property, also in Orangeburg County.

I began to represent Stephen Pence, the husband of Pence Pence, and as part of the representation, we've filed a claim for the spouse's elective share for Stephen Pence to take a spouse's elective share of the estate of Elizabeth Pence Pence. And as part of the settlement of that estate, Stephen Pence received an undivided 1/6 interest in the Cannon Bridge Road property. And as part of a fee consideration, my son received one-half of that other share.

And thing that's most interesting to me about this case is that the McLean family has paid no consideration for anything that it is seeking to claim. If the McLean family is entitled to something, they must somehow present

a claim and be successful in this courtroom. There's nothing of record until this lawsuit came forward to show that they were claiming this interest in the Cannon Bridge Road property.

I think unquestionably if the McLean family has a claim to the Cannon Bridge Road property, it was presented too late. Unquestionably, the two statutes of limitation apply, the three-year statute, and also the probate statute, the eight-month statute. There's nothing of record. If you are a title examiner and you check the title to this property, there's nothing to put anyone on notice.

Value was paid for the interest of Harry R. Easterling, Jr. And clearly the statute of limitations applies to the Cannon Bridge Road property. There was no mention of that in all this discussion and argument that's been presented to you about any listing or any scrivener's error relating to that property. Clearly it was not part of the trust litigation that was referenced in earlier argument. And we would ask that the court clearly as regards to Cannon Bridge Road property find that the statute of limitations would be barred. Thank you.

THE COURT: Thank you.

Yes, sir.

MR. ALEXANDER: Actually just the same responses, Your

Honor. I think all my previous arguments apply to Mr. Easterling's argument.

THE COURT: Okay. Thank you very much.

Anybody else?

MR. JAMES: And, Your Honor, I would to make one final small point, and I think it's already been stated in the briefs. But the Probate Court Claims Statute is a protection not only to the personal representative but to the beneficiary. Our statute is very specific on that, and there is case law that confirms that.

THE COURT: You would not be surprised if you had a claim for a malpractice. You'd better file it when the doctor dies with the eight-month period.

MR. JAMES: Well, I don't venture into the realm of medical malpractice.

THE COURT: Yes, sir, I know.

MR. JAMES: But I think you'd better file it within the eight months.

THE COURT: Yes. In other words, if you have a claim, you'd best file it.

MR. JAMES: And I think there's something in the claims statute about insurance coverage...

THE COURT: Okay. Great. All right. I'm now trying to think, gosh, how I would like -- how I want to proceed. Mr. Alexander, it's tough for you because you have so many

different parties and so many proposed orders that you would have to draft. I'm fairly mindful of that. But I think that, I think that I'm going to ask for proposed orders, but I think, and let me hear from you about this. What I'm contemplating is having those that made the motion for summary judgement draft their proposed orders, and then let you have an opportunity to address your proposed orders and then send those to me.

And the reason for it is I'm looking for an issue of material fact, and I need to know what you maintain it is when it gets right down to it, and so that is what I'm contemplating doing.

MR. ALEXANDER: Okay.

THE COURT: I think I've, hopefully I have telegraphed -- I think that there is with some of the parties the connection potentially back to your clients is stronger than other individuals, and you are aware of that. And so I think that just to be sure that I have the benefit of your, what you maintain are the material issues of fact, I think that probably is the better way to handle it.

So, I think what I'm going to ask is that within thirty days that the proposed orders be provided to Mr. Alexander. Of course to me so I can began my study and my review of those orders as well. And then, Mr. Alexander, tell me how long you need to respond to them.

MR. ALEXANDER: Fifteen days.

THE COURT: No. Thirty for sure, for sure.

MR. ALEXANDER: That's fine, Your Honor. Well, if it suits Your Honor, what I would contemplate doing with my proposed order is not give you seven, eight or nine proposed orders. Just sort of how we attacked it today and break it down issue by issue as to how applies to each of the defendants.

THE COURT: That's fine with me. However you do that is fine. But I think for my review, I'd rather have separate ones from you all. I really think that would be better for me because there so many people who are -- usually people are pretty similarly situated, but that is absolutely not correct. So many of the defendants -- obviously the purchasers stand in the same shoes, but that's about it. So, I think I'd prefer having it that way. Excellent. Thank you all so much.

Now, do this for me, too. I've got the deposition excerpts that you've done as attachments to your memorandum, but if you think there are any additional ones that you think are important, please be sure that you've enclosed those as well for me. Thank you everybody.

**--- END OF TRANSCRIPT OF RECORD ---**

## CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR ORANGEBURG COUNTY, SOUTH CAROLINA, ON THE 12TH DAY OF MAY, 2008.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

_____

ELIZABETH B. HARRIS, CVR

COLUMBIA, SOUTH CAROLINA

JANUARY 8TH, 2010