

85809

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

RECEIVED

Frank R. Addy, Jr., Circuit Court Judge

FEB 01 2018

SC Court of Appeals

Trial Court Case No.: 2011-CP-01-109

Appellate Case No.: 2015-001660

Robert E. Smith, and William K. Smith Appellants

v.

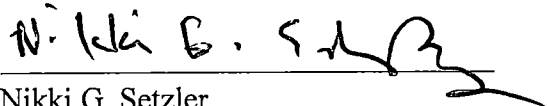
Erskine College Respondent

NOTICE OF MOTION AND MOTION TO RECONSIDER

BY:



James Randall Davis; SC Bar No. 1580
DAVIS | FRAWLEY, LLC
140 East Main Street, P.O. Box 489
Lexington, South Carolina 29071
(803)359-2512



Nikki G. Setzler
SETZLER & SCOTT, PA
1708 Augusta Road, P.O. Box 4024
West Columbia, South Carolina 2917
(803)796-1285

Lexington, South Carolina
February 1, 2018

ATTORNEYS FOR APPELLANTS

**RECONSIDERATION POINTS
PURSUANT TO RULE 221 OF THE
SOUTH CAROLINA APPELLATE COURT RULES**

1. The Court of Appeals failed to find that Erskine College gave proper notice to the Appellants' ancestors of Erskine College's decision to repudiate the certificates.
2. The Court of Appeals failed to find that the actions of Erskine College was not a repudiation of its certificate obligation.
3. The Court of Appeals failed to apply the law of bilateral contracts to its defense of laches in that Erskine College does not have a unilateral right to modify the contract it had with Appellants' ancestors.
4. The Court of Appeals failed to provide legal precedent that laches was a bar in an action for specific performance of a contract where an investment contract was involved.

CASE INDEX

CASE	PAGE
Alumnae Ass'n of William Penn High Sch. for Girls v. Univ. of Pennsylvania, 306 Pa. 283, 288, 159 A. 449, 450 (1932).....	7
Archambault v. Sorouse, 218 S.C. 500, 63 S.E.2d 459 (1951)	2
Bement v. Armstrong (Tenn. Ch. App.) 39 S. W. 899.....	3
Engel v. Mathley 48 NE2d 463, 467 (Ind. Ct. App. 1943).....	6
Ex Parte Stokes. 256 S.C. 260, 182 S.E.2d 306 (1971).....	2
Fanning v. Bogacki, 111 S.C. 376, 98 S.E. 137 (1919).....	5
Florence City-County Airport Comm'n v. Air Terminal Parking Co., 283 S.C. 337, 341, 322 S.E.2d 471. 473 (<u>Ct.App.1984</u>).....	5
Foxworth v. Murchinson Net Bank, 136 S.C. 458, 134 S.E. 482 (1926).....	3
<i>Hellams v. Prio</i> , 64 S.C. 298, 42 S.E. 106.....	5
<i>Hubbard v. Manhattan Trust Co.</i> , 87 F. 51, 30 CCA. 520.....	5
Mid-State Trust, II v. Wright, 323 S.C. 303, 307, 474 S.E.2d 421, 423 (S.C. 1971)....	6
Morgan v. United States, 113 U.S. 476, 501 (1885).....	6, 7
Parker v. Shecut, 340 S.C. 460, 479, 531 S.E.2d 546, 556 (Ct. App. 2000) <u>rev'd</u> , 349 S.C. 226, 562 S.E.2d 620 (2002).....	3
Provident Life and Ace. Ins. co. v. Driver, 451 S.E.2d 924. 929 (S.C. Ct. App. 1994)...	6
Sautter v. Public Serv. Auth., 354 S.C. 397, 406, 581 S.E.2d 161 (2003).....	5
Shute v. Shute, 82 S.C. 264, 64 S.E. 145; note, Ann. Cas. 1914b, p. 314.....	5
 OTHER AUTHORITIES	
17A Am.Jr.2d Contracts §737, at 749-50 (1991).....	4
27 Am.Jr.2d Equity §155 (1966).....	6
Blacks Law Dictionary 130 (6 th ed. Abr. 1995).....	3
Pomeroy's Eq. Juris., sec. 1408.....	5

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Appellants state the *points* overlooked or misapprehended by the Court of Appeals in its decision in this matter.

The Court of Appeals issued the following in its decision as the reasons for affirming the decision of the lower court. The Court stated as follows:

"We find Erskine's decision following the Civil War to accept the certificates as only a partial payment of tuition triggered Appellants' obligation to demand Erskine honor the certificates in full. Appellants received notice of Erskine's decision through publication in local periodicals, and since Erskine's decision, Appellants and their ancestors failed to assert their alleged rights under the certificates for well over 100 years. Appellants offer no explanation for the delay other than they were allowing their "investment" to grow. This is an unreasonable explanation for such a long delay in light of Erskine's public decision to significantly devalue the certificates. Further, enforcement of the certificates in the present day would prejudice Erskine. After a delay of over 100 years following the decision to devalue the certificates, Erskine reasonably believed the certificates no longer had value and no one would attempt to redeem them for full tuition. Under such a reasonable belief, Erskine understandably failed to account for such a large liability in its budget and having to compensate for such liability would be a significant burden for Erskine. As a result, Erskine would be prejudiced by enforcing the certificates after such an unreasonable delay. Thus, Erskine carried its burden of establishing the elements of laches, and the trial court properly refused to enforce the certificates based on laches."

"Specifically, with regard to Appellants claim that under their action could not be barred by laches because the certificates were a contract or bond investment, we disagree. In an equitable action for specific performance, laches can bar enforcement of a contract or bond

investment if the defendant can establish a prejudicial delay that was unreasonable under the circumstances. See *id.* (recognizing the defense of laches could bar a claim for specific performance of a contract). Thus, even if Appellants' certificates were a contract or bond investment, Appellants were obligated to pursue their rights under the certificates within a reasonable time following Erskine's decision, made shortly after the Civil War, to devalue the certificates. Therefore, we reject Appellants' claim that under their action to enforce the certificates could not be barred by laches."

The points overlooked or misapprehended by the Court are as follows:

1. The Court of Appeals failed to find that Erskine College gave proper notice to the Appellants' ancestors of Erskine College's decision to repudiate the certificates.
2. The Court of Appeals failed to find that the actions of Erskine College was not a repudiation of its certificate obligation.
3. The Court of Appeals failed to apply the law of bilateral contracts to its defense of laches in that Erskine College does not have a unilateral right to modify the contract it had with Appellants' ancestors.
4. The Court of Appeals failed to provide legal precedent that laches was a bar in an action for specific performance of a contract where an investment contract was involved.

I.

MEMORANDUM OF LAW Notice Requirement Argument

As the Court of Appeals has stated in its decision, the defense of laches does not apply for the failure to assert a right until there is a reason or situation that demand assertion. *Ex parte Stokes*, 256 S.C. 260, 182 S.E.2d 306 (1971). Furthermore, there can be no laches "[s]o long as there is no knowledge of the wrong committed and no refusal to embrace opportunity to ascertain facts, there can be no laches." *Archambault v. Sorouse*, 218 S.C. 500, 63 S.E.2d 459 (1951).

Erskine College failed to give proper notice of its alleged repudiation of its certificate obligation. South Carolina common law indicates that repudiation by publishing in the newspaper may not suffice to properly convey a repudiation. "The repudiation must be communicated to the other party to the transaction, and not merely to the agent." *Foxworth v. Murchison Nat. Bank*, 136 S.C. 458, 134 S.E. 428, 432 (S.C. 1926) (citing *Bement v. Armstrong* (Tenn. Ch. App.) 39 S. W. 899.). There is no evidence to suggest that Reverend Castles was directly informed of Erskine College's intent to redeem Sub-Certificates at a lesser value.

II.

ACTION OF ERSKINE COLLEGE WAS NOT A VALID REPUDIATION

American Jurisprudence suggests that a repudiation creating the right to sue immediately for breach must be "of the whole contract or a promise or obligation going to the whole consideration, and it must be distinct, unequivocal, and absolute." Erskine College, in its time of financial difficulty following the Civil War, published a statement in the Telescope newspaper stating that, "It is proposed to honor the Certificates of Scholarships so far as the resources of the College will admit." Plaintiffs' Exhibit 9. This statement constitutes an assurance of Erskine's desire to honor the Scholarships if able, and gave reasonable belief that better circumstances in later years would permit full recognition of the Sub-Certificates. Thus, it's a faltering on an absolute repudiation of Erskine College's contractual duties. Those better circumstances now exist, and Appellants are now seeking its legal remedy to have the contract's validity confirmed.

South Carolina courts recognize this as the common law of South Carolina specifically, "A party to a contract breaches it by "fail[ing] to carry out [a] term, promise, or condition of the contract." *Parker v. Shecut*, 340 S.C. 460, 479, 531 S.E.2d 546, 556 (Ct. App. 2000) rev'd, 349 S.C. 226, 562 S.E.2d 620 (2002) (reversed on other grounds) (citing Blacks Law Dictionary 130 (6th ed. Abr. 1995)). Breach of a contract cannot occur until the party *actually fails* to carry out

performance when due, not simply indicate that he does not intend to perform if requested. Erskine College's notice that it would only honor Sub-Certificates for partial tuition, when submitted for redemption, can only amount to anticipatory breach of contract as to Reverend Castles because Reverend Castles reserved his right for performance of Erskine's duty under the contract.

Furthermore, under the law of anticipatory breach and repudiation, a party who has received indication of repudiation is not obligated to file suit immediately, nor does a statute of limitations or laches defense begin to run against his claim. Again, American Jurisprudence is precise in its explanation of this common law of contracts. American Jurisprudence states:

"... repudiation entitles the nonrepudiating party to claim damages for total breach. There is no necessity in such case for a tender of performance, or compliance with conditions precedent, or waiting for the time of performance to arrive, *although this is optional.*" 17A Am.Jur.2d *Contracts* §737, at 749-50 (1991)(emphasis added).

III. BILATERAL CONTRACT CANNOT BE UNILATERALLY REVOKED

The investment contract between Erskine and its investors constitutes a bilateral contract. In bilateral contracts both parties exchange promises to perform, as opposed to unilateral contracts, where acceptance can only be accomplished by performance. Section 4 of the Plan of Endowment demonstrate a clear bilateral contract. It reads,

4. "No sales of limited scholarships shall be binding, either on the purchaser, or on the Board of Trustees, until scholarships amounting in fifty thousand dollars are sold, (due notice whereof shall be given in the public prints,) after which time all contracts for scholarships made previous to that date shall be binding on the parties concerned, shall become due, and bear interest. On the payment of Scholarship subscribers or purchasers of the same shall be furnished with a certificate, signed by the President and Secretary of the Board of Trustees of the said Erskine College, guaranteeing the said subscribers the privileges, enumerated by the resolutions of the Board, according to their respective subscriptions. [Plaintiffs' Exhibit 1].

The South Carolina Supreme Court has stated that no rule of law "allows a party to alter the terms of a bilateral contract by unilateral modification. It is well established that '[a] written contract may be modified by a subsequent agreement of the parties, provided the subsequent agreement contains all the requisites of a valid contract.'" *Sautter v. Public Serv. Auth.*, 354 S.C. 397, 406, 581 S.E.2d 161 (S.C., 2003) (citing *Florence City-County Airport Comm'n v. Air Terminal Parking Co.*, 283 S.C. 337, 341, 322 S.E.2d 471, 473 (Ct.App.1984)). The only way in which Erskine could modify the terms of Reverend Castles' investment was to reach a mutual agreement with the bearer of the Certificate. There is no evidence of any kind suggesting such an agreement to modification. [Transcript of Record, p. 54 line 5-13].

IV. LACHES IS NOT A BAR TO AN INVESTMENT CONTRACT

The Court of Appeals relying upon *Fanning v. Bogacki*, 111 S.C. 376, 98 S.E. 137 (1919) as authority that laches is a defense in an investment contract case based on the equitable action of specific performance. This case states as follows: "Are the plaintiffs barred by laches? What constitutes laches is not decided by length of time alone, but the question must be determined by the facts and circumstances of each case and according to right and justice. The doctrine of laches is applied to prevent the commission of a wrong. *Shute v. Shute*, 82 S.C. 264, 64 S.E. 145; note, Ann. Cas. 1914b, p. 314; *Hellams v. Prio*, 64 S.C. 298, 42 S.E. 106; *Hubbard v. Manhattan Trust Co.*, 87 F. 51, 30 CCA. 520. And the party who desires to maintain an objection founded on the other's laches must show himself to have been "ready, desirous, prompt and eager." Pomeroy's Eq. Juris., sec. 1408. This oral contract is valid at common law and in morals, and justice requires that it be enforced. The length of time over which it extended is not laches, because the contract itself contemplates a long length of time before its complete performance."

Appellants' respectfully argue that this case supports their position that laches is not a bar in an investment contract such as ours. This case involved an oral contract and our contract in our case was an adhesive perpetual contract (Trial Court found the contract to be perpetual) and *Fanning* held that laches was not a defense because of the long length of time of the contract which is the primary issue in this case.

Appellants state the following reasons why laches is not a defense in an investment contract case.

That laches cannot be properly applied to investment vehicles such as bearer bonds because the nature of the investment does not create a circumstance that demands assertion. See *Mid-State Trust, II v. Wright*, 323 S.C. 303, 307, 474 S.E.2d 421, 423 (S.C. 1971); *Provident Life and Ace. Ins. co. v. Driver*, 451 S.E.2d 924, 929 (S.C. Ct. App. 1994). As the investments are perpetually valid on their face, the "age" of the investment does not equate to a "delay" by the investor in seeking redemption.

There is nothing in the Certificate of Scholarship, the Sub-certificates, or the Endowment Plan which demonstrates any uncertainty as to the validity of the investment due to time, nor is there any indication that an investor has a periodic duty to inquire about his investment. These Certificates were purposeful, explicit, and signed by the President and Treasurer of the College. American Jurisprudence speaks conclusively to such a circumstance where the rights are already acknowledged. "A party cannot be charged with laches or lack of diligence in asserting rights which have been accorded full recognition." 27 Am. Jur. 2d Equity § 155 (1966) (citing *Engel v. Mathley* 48 NE2d 463, 467 (Ind. Ct. App. 1943)).

Also, the Court in *Morgan v. Unites States* demonstrates that the nature of the instrument determines whether it can be rendered unenforceable by stale demand. The United

State Supreme Court, in its discussion of bearer bonds and negotiable paper, stated:

"the rule as to ordinary negotiable paper, payable on demand, is that it is not due, without demand, until after the lapse of a reasonable time within which to make demand; and what the length of that reasonable time is, may vary according to the circumstances of particular cases, and must be governed very largely by the intension of the parties, as manifested in the character of the paper itself, and the purposes for which it is known to have been created and put into circulation. " *Morgan v. United States*, 113 U.S. 476, 501 (1885).

Also, Pennsylvania Supreme Court case on a similar issue, which stated "the acceptance of the endowment and of the terms under which it was given constitute a covenant for the duration of the existence of the donee hospital and its successors." *Alumnae Ass'n of William Penn High Sch. for Girls v. Univ. of Pennsylvania*, 306 Pa. 283, 288, 159 A. 449, 450 (1932). This again shows that an endowment investment, in exchange for a service unrestricted in duration, is valid.

CONCLUSION

Respectfully submitted for the reasons stated, the Court should rule that laches is not a defense to Erskine College's certificate obligation and that laches is not a bar to Appellants' action for specific performance in this case.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Trial Court Case No.: 2011-CP-01-109

Appellate Case No.: 2015-001660

RECEIVED

FEB 01 2018

SC Court of Appeals

Robert E. Smith, and William K. Smith Appellants

v.

Erskine College Respondent

PROOF OF SERVICE

I certify that I have served the Notice of Motion and Motion to Reconsider, to the attorney for the Respondent, by placing them in the U.S. postal mail, postage pre-paid on February 1, 2018, addressed to its attorney of record, Roy R. Hemphill, Esquire, P. O. Box 1547, Greenwood, SC 29648.


James Randall Davis
randy@oldcourthouse.com
DAVIS FRAWLEY, LLC
140 East Main Street (29072)
Post Office Box 489
Lexington, South Carolina 29071
Tel: (803) 359-2512
Attorney for Appellants