

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Civil Action No.: 2017-CP-38-1218

Anne Wiggins Smith,

Plaintiff,

vs.

John L. Wiggins, III, individually and as
Trustee of the John L. Wiggins, Jr. Revocable
Trust, and Margaret Eugenia Utsey Wiggins,
individually and as Trustee of the Margaret
Eugenia Utsey Wiggins Revocable Trust,

Defendants.

**ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS FOR FAILURE
TO PROSECUTE AND GRANTING
DEFENDANTS’ JOHN L. WIGGINS, III,
INDIVIDUALLY AND AS TRUSTEE OF
THE JOHN L. WIGGINS, JR.
REVOCABLE TRUST MOTION FOR
SUMMARY JUDGMENT**

This matter came before the Court on Defendant John L. Wiggins, III, individually and as Trustee of the John L. Wiggins, Jr. Revocable Trust’s (hereinafter, “Defendant”) motion to dismiss pursuant to the South Carolina Rules of Civil Procedure 12(b)(4) and 12(b)(6) that was filed on July 25, 2023 and Defendant John L. Wiggins, III, individually and as Trustee of the John L. Wiggins, Jr. Revocable Trust’s motion for summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure for an order dismissing this case with prejudice based on the applicable statute of limitations filed on September 29, 2023.

Motion to Dismiss for Failure to Prosecute

This case has been pending since 2017. This is family probate litigation whereby a daughter/sister is suing her mother and brother involving a family trust with allegations that the family trust was improperly financially managed due to loans made to the brother. This Court notes that family disputes can be much more difficult than litigation between strangers. This case is no exception. However, the natural difficulty of this case is made much more difficult by

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Plaintiff's failure to timely pursue her action. **This case is six years old.** At the time the Covid Pandemic hit, the case was already three years old. Defendants have provided a significant amount of discovery to Plaintiff, and it is clear from correspondence that Plaintiff had already received a significant amount of financial documentation prior to filing her lawsuit in 2017. See Affidavit of attorney Jack Cordray.

Defendants filed their first motion to dismiss for failure to prosecute in January 2022 asking the Court to dismiss this matter due to Plaintiff's failure to provide damages information or an expert report. On May 23, 2022, this Court entered a scheduling order that directed Plaintiff to name an expert and provide an expert report by June 30, 2022 ***or the case would be dismissed.*** Plaintiff failed to comply with the deadline and to this day, still has not provided an expert report. Instead of an expert report, counsel for Plaintiff provided a letter to counsel for Defendant from accountant Ronny Burkett dated June 30, 2022 requesting additional documents from Defendant before a report could be generated. See June 30, 2022 Letter from Ronny Burkett. When Defendants subpoenaed Ronny Burkett's file, it was apparent that Plaintiff did not formally retain Mr. Burkett until March 7, 2022, almost five years after filing this lawsuit. Further, the subpoena responses showed that Mr. Burkett did not receive any information from Plaintiff until June 9, 2022.

After still not receiving a report from Mr. Burkett or a damages amount, Defendants filed a second motion to dismiss for failure to prosecute, which this Court heard on October 10, 2023. Many members of the Wiggins family, including the Plaintiff's son, appeared at the hearing in support of Defendants. Even today, there is no official report by an expert ***or an alleged damages amount submitted by Plaintiff.***

While a typical plaintiff is not normally required to have an expert report and can certainly go forward without retaining an expert, Plaintiff in this matter has for years asserted that she would provide a claimed damages amount and thus a demand to Defendant once she had an expert report. However, now, 16 months after the deadline of June 30, 2022, Plaintiff has still failed to produce an expert report, and even more importantly a claimed damages amount. Although it is well known, the Court notes that the fifth standard interrogatory listed in Rule 33(b)(5) is, “Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party.” While many plaintiffs need some time to develop their damages amount, this is not one of those cases. The allegations are regarding the financial management of a trust and specifically loans that were made years before the case was filed. A financial analysis could have been done of the financial issues years ago.

What is unacceptable is that the Defendants in this matter have spent thousands of dollars on legal fees and a significant amount of time without knowing the amount of damages that Plaintiff claims she is owed. Not understanding the basic information, which as to what damages amount Plaintiff is claiming, stalls the entire case. Defendants are understandably reluctant to take Plaintiff’s deposition without knowing this amount. What continues to trouble the Court is that Plaintiff clearly did not retain Ronny Burkett in a timely fashion even after this Court’s May 23, 2022 Order.

Defendant wrote the Court on August 26, 2022 pointing out that the vast majority of the documents requested in Ronny Burkett’s June 30, 2022 letter had already been produced to Plaintiff, in some instances years prior. See August 26, 2023 letter. On October 6, 2023, Plaintiff

produced an affidavit from Ronny Burkett raising completely new financial issues and again noting a lack of information. Most importantly, Mr. Burkett's affidavit did not include a damage amount.¹

“The plaintiff has the burden of prosecuting her action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with her cause.” *McComas v. Ross*, 368 S.C. 59, 63, 626 S.E.2d 902, 904 (Ct.App. 2006) citing *Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983). “In granting dismissal for failure to prosecute, there must be some showing of indifference to the rights of defendant.” *Id.* citing *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996).

Mrs. Wiggins died on September 7, 2022. This Court finds it very unfortunate that this matter could not have been resolved during Mrs. Wiggins final years. Mrs. Wiggins' Estate has been opened, but having this matter linger years later without a clear understanding of the alleged damages not only impacted Mrs. Wiggins' last years but also the rest of her family as they try to move on after her death. Indeed, many of Mrs. Wiggins' grandchildren appeared at the hearing in support of their father and uncle Defendant John Wiggins. Tens of thousands of dollars have been spent on legal fees to defend this matter, not to mention the emotional toll this has taken on a family. It is now more than 16 months past the June 30, 2022 deadline the Court set for the Plaintiff's expert damages report. This Court has given Plaintiff every chance to put up a damages number, which she continues to fail to do. This Court has no choice but to dismiss Plaintiff's case for failure to prosecute her claims.

¹ This Court takes no issue with Ronny Burkett who this Court has generally found to be a well-respected financial expert. However, this Court notes that Mr. Burkett's opinions and the timing of his opinions are only as good as the information supplied to Mr. Burkett on a timely basis.

Motion for Summary Judgment

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a party is entitled to summary judgment “if the evidence before the court shows 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.” *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 459, 892 S.E.2d 297, 299 (2023) (internal alterations omitted). “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Id.* (quoting *Lanham v. Blue Cross & Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 361–62, 563 S.E.2d 331, 333 (2002)). “.... ‘[I]t is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.’ ” *Kitchen Planners, LLC*, 440 S.C. at 459, 892 S.E.2d at 299 (quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). “Summary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of limitations.” *Allwin v. Russ Cooper Associates, Inc.*, 426 S.C. 1, 12, 825 S.E.2d 707, 712 (Ct.App. 2019) citing *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453 (Ct.App. 2014); see *Kreutner v. David*, 320 S.C. 283, 286-87, 465 S.E.2d 88, 90 (1995). Based on this standard, the Court has reviewed the facts presented to determine whether the case should be dismissed because Plaintiff filed her claim beyond the applicable statute of limitations.

The S.C. Code Ann. § 62-7-1005 of the Probate Code limits claims against a trustee to one year after a beneficiary, in this case Plaintiff, received a report that “adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.” See § 62-7-1005(a)(b). Documents that “detail the status” of a trust are sufficient to

put a beneficiary on notice of a potential claim. See *Mayer v. M.S. Bailey & Son*, 347 S.C. 353, 360, 555 S.E.2d 406, 409-410 (Ct.App. 2001) (dismissing a beneficiary's claims against a trustee according to both a one and a three year statute when the suit was initiated more than three years and one year after receiving the trust bank statements).

Plaintiff filed this action on September 14, 2017. The Complaint includes causes of action, but each cause of action in essence is based on a claim that Defendants breached their fiduciary duty related to loans made by Defendant John Wiggins while acting as Trustee of the John L. Wiggins, Jr. Revocable Trust as well as other non-specific claims related to the financial management of the John L. Wiggins, Jr. Revocable Trust. See the Complaint.

Pursuant to Plaintiff's own communications by and through her attorney and husband Glenn Smith ("Mr. Smith"), Plaintiff received a report of the assets of the John L. Wiggins Revocable Trust in September 2014. Specifically, by email dated September 5, 2014, Mr. Smith acknowledges that Plaintiff "has just received what appears to be an evaluation by McGregor and Company of the interest of Anne, Jane and Johnny in and to the estate of their mother at the time of her death." See Email dated 9/5/2014 from F. Glenn Smith to Jack D. Cordray attached as Exhibit B to Jack D. Cordray's affidavit dated October 6, 2023 ("Cordray Affidavit"). The McGregor and Company letter lists in detail all of the assets owned by the John L. Wiggins Revocable Trust as of August 25, 2014. See McGregor and Company letter to John L. Wiggins dated August 25, 2014 ("McGregor Report") attached as Exhibit A to Cordray Affidavit. The McGregor Report specifically lists notes receivable to John L. Wiggins, III as well as accrued interest receivable to John L. Wiggins, III and a note receivable to Jane W. Thompson. See the McGregor Report. Specifically, the McGregor Report values the John L. Wiggins Trust at \$1,535,167. *Id.* Further, the McGregor Report also lists in detail the assets contained in the

Margaret Wiggins Revocable Trust.² In an email dated September 9, 2014, Mr. Smith, as attorney for the Plaintiff, notes that the McGregor Report references loans payable by John Wiggins and Jane Thompson. See Exhibit B to Cordray Affidavit.

The Court finds the following undisputed facts: 1) the McGregor Report included a listing of the assets of the John L. Wiggins, Jr. Revocable Trust and 2) that Plaintiff received the McGregor Report as of September 5, 2014 pursuant to own attorney/husband's communication. Thus, the only resulting conclusion of law, pursuant to S.C. Probate Code § 62-7-1005(a)(b), is that Plaintiff's statute of limitations ran at least by September 5, 2015.

However, by Plaintiff's own admission in her brief filed in opposition to the Motion for Summary Judgment, she was aware of the loans or some type of taking of funds from the Trust as early as June 2014. Plaintiff notes, "Defendant continued [allegedly taking monies for his personal use] until June 30, 2014, after he had been caught and confronted." See Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment and Motion to Dismiss p. 3. Therefore, by Plaintiff's own admission, she filed her complaint more than three years after when she knew or should have known of her claim pursuant to S.C. Code Ann. 15-3-530(1) and (5) and certainly more than the one year statute of limitations established in the South Carolina Probate Code.

Even assuming the Probate Code's one year statute of limitations does not apply, the discovery rule, which requires a plaintiff to commence an action within three years of when the person knew or by the exercise of reasonable diligence should have known that he had a cause of action, bars Plaintiffs action, which was brought more than three years after Defendant has allegedly been "caught" in June 2014. See *Dean v. Ruscon Corp.*, 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996). The fact that the injured party may not fully comprehend the extent of the damage

² The Margaret Wiggins Revocable Trust was revocable until Mrs. Wiggins death on September 7, 2022.

is immaterial. *Id.* Where a plaintiff has sufficient evidence to put the plaintiff on notice of the injury, which, if developed would have revealed defects, the time to bring an action begins to run. See *Republic Contracting Corp. v. S.C. Dep't of Highways & Pub. Transp.*, 332 S.C. 197, 207-208, 503 S.E.2d 761, 766-67 (Ct.App. 1998). By the Plaintiff's own admissions, she knew or should have known that there was an alleged issue with the trust's financial management as of June 2014. Plaintiff did not initiate her lawsuit until September 2017.

By applying either the applicable one-year statute of limitations or the three year statute of limitations to the evidence, namely Plaintiff's own correspondence and filings, Plaintiff's claims are barred by the statute of limitations and summary judgment is appropriate in favor of Defendants.

Therefore, in conclusion, Defendant's Motion to Dismiss and Motion for Summary Judgement is hereby GRANTED.

Accordingly, IT IS HEREBY ORDERED that this matter be dismissed with prejudice.

(Judge's signature page to follow)

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017-CP-38-01218

Anne W. Smith
PLAINTIFF(S)

John L. Wiggins, III, et al.
DEFENDANT(S)

Submitted by: Amy L.B. Hill
Attorney for : [] Plaintiff [x] Defendant
or
[] Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- [] JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
[x] DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. [] See Page 2 for additional information.
[] ACTION DISMISSED (CHECK REASON): [] Rule 12(b), SCRPC; [] Rule 41(a), SCRPC (Vol. Nonsuit); [] Rule 43(k), SCRPC (Settled); [] Other
[] ACTION STRICKEN (CHECK REASON): [] Rule 40(j), SCRPC; [] Bankruptcy; [] Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [] Other
[] STAYED DUE TO BANKRUPTCY
[] DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): [] Affirmed; [] Reversed; [] Remanded; [] Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: [x] See attached order (formal order to follow) [] Statement of Judgment by the Court:

ORDER INFORMATION

This order [x] ends [] does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Table with 3 columns: Judgment in Favor of (List name(s) below), Judgment Against (List name(s) below), Judgment Amount To be Enrolled (List amount(s) below). Rows show empty cells with a dollar sign in the amount column.



Orangeburg Common Pleas

Case Caption: Annie W. Smith VS John L. Wiggins Jr. , defendant, et al

Case Number: 2017CP3801218

Type: Order/Other

So Ordered

James B. Jackson, Jr. 3077 Master in Equity