

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2012CP4602008

Eileen Critcher

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 SEP 24 2013

Susan Critcher Rhodes
 Belinda Critcher
 Thomas

Wanda C Akers
 Roy G Critcher

SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: The Court

Attorney for: Plaintiff Defendant
 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.
- 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: _____
- 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: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

Order Denying Plaintiff's Rule 59(e) Motion

This order 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.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/S. Jackson Kimball

Circuit Court Judge

3063

Judge Code

16
 8/21/2013

Date

For Clerk of Court Office Use Only

This judgment was entered on **August 21, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on **August 21, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Sean Francis Cronin PO Box 1025 Rock Hill, SC 29731
John Martin Foster PO Box 106 Rock Hill, SC 297316106

B. Michael Brackett PO Box 100261 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

2012-CP-46-2008

Eileen Critcher,

Plaintiff,

v.

Susan Critcher Rhodes, individually and as
Personal Representative of the Estate of
Roy G. Critcher; Wanda C. Akers and
Belinda Critcher Thomas;

Defendants

**Order Denying Plaintiff's
Rule 59(e) Motion**

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DAVID H. BRANTON
C.C.P. & G.S.
YORK COUNTY, SC

This matter came before me on August 15, 2013, upon Plaintiff's Motion for Reconsideration of the Court's order granting summary judgment dated June 20, 2013. Plaintiff was represented by J. Martin Foster, and Defendants were represented by B. Michael Brackett.

Plaintiff timely filed and served a Rule 59(e) Motion asking the Court to reconsider the ruling of the June 20, 2013 Order, and to alter or amend the Order to deny summary judgment to the Defendants. Plaintiff raised three grounds for relief, which are addressed separately in the following discussion. Based on the record presented, and the arguments of counsel, I make the following findings and conclusions.

DISCUSSION

1. Tolling of the statute of limitations.

Plaintiff asserts that S.C. Code Ann. §62-3-802(b) (1976, as amended) suspended or tolled the running of the statute of limitations with respect to claims against decedent Roy Critcher, and that the tolling of the limitations period also applies to claims against the other Defendants. Initially, I note that a party cannot use a motion to alter or amend a judgment to present to the lower court an issue the party could have raised prior to judgment but did not. *Gartside v. Gartside*, 383 S.C. 35, 682 S.E.2d 621 (Ct. App. 2009).

The issue of tolling pursuant to §62-3-802(b) was not presented to the court during the summary judgment hearing on May 16, 2013. At the hearing, the only statute of limitation

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argument presented was that the limitations period was tolled by S.C. Code Ann. §15-3-30 (1976, as amended), because Defendant Rhodes is a resident of Virginia. That issue was addressed and decided in the summary judgment Order. Plaintiff's related argument is that the tolling period provided by §62-3-802(b) of the Probate Code operates with respect to claims against the other defendants, who are not deceased. This argument was not presented to the Court at the summary judgment hearing, and cannot be raised for the first time in a Rule 59(e) motion. Therefore, it fails, and is not addressed herein.

Plaintiff also argued that the statute of limitations as to the conversion claim against Defendant Rhodes, which is based upon the August, 2008, withdrawal of \$41,000 from Plaintiff's bank account, would not have started to run until after Plaintiff made a demand for its return, and Defendant Rhodes refused to surrender the property. The argument is premised on the theory that Plaintiff believed the withdrawal to be lawful initially. This argument was not made, expressly or by implication, at the summary judgment hearing. Additionally, the argument does not change the facts established in Plaintiff's deposition, which conclusively shows that as of October 31, 2008, Plaintiff was on notice that funds were missing, without her prior consent, from the relevant bank account, some of which she claims was hers.

It is the notice of the unauthorized withdrawal, not the ultimate characterization of the taking as a conversion, that caused the limitations period to commence. Plaintiff does not deny that at that time she thought she had a claim against someone.

Consequently, Plaintiff had three years from October 31, 2008, to commence an action against whomever she thought had taken her money. The tort of conversion is subject to the three year limitations period. *Hennes v. Shaw*, 397 S.C. 391, 725 S.E.2d 501 (Ct. App. 2012).

2. Additional affidavit of Plaintiff.

Plaintiff attached to her Motion for Reconsideration a proffered affidavit given by the Plaintiff, and now asserts that the affidavit should be "accepted and taken into account" by the Court. I find and conclude that the Affidavit is not now admissible with respect to the summary judgment proceedings for the following reasons:

a. No Rule 56(f) affidavit was presented to the Court at the May 16, 2013 hearing. Rule 56(f) specifies the procedure for obtaining a continuance of a summary judgment motion to obtain rebuttal evidence not presently available. That procedure was not followed.



b. Even had Plaintiff's affidavit been presented to the Court at the hearing, it would nevertheless have been untimely. Rule 56(c) provides that opposing affidavits be served not later than two days before the hearing. *See West v. Gladney*, 341 S.C. 127, 533 S.E.2d 334 (Ct.App. 2000) (trial court may disregard an opposing affidavit that is served on the day of the hearing when more than two months passed between the time that the motion for summary judgment was served until the hearing, the opposing affidavit was filed on the day of the hearing and no good cause was shown for failure to timely file the affidavit.)

c. Plaintiff's full deposition transcript was before the Court at the hearing, so that Plaintiff's sworn testimony was part of the record.

d. No motion was made at the summary judgment hearing for a continuance in order that Plaintiff could present additional information in rebuttal to the motion.

e. Plaintiff's proffered affidavit offers nothing substantively in addition to her deposition testimony. And, to the extent that Plaintiff's affidavit contradicts her prior deposition testimony, the affidavit must be disregarded in determining whether a genuine issue of fact exists. *See Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004); 9 C.J.S. *Judgments* §266. It is repetitive and cumulative. To the extent that it contains hearsay (§5 of the affidavit), such cannot be considered by the court in deciding the motion. Materials used to support or oppose a summary judgment motion, such as affidavits, deposition testimony and documents, must set forth facts that would be admissible in evidence at trial. *Hall v. Fedor*, 349 S.C. 649, 561 S.E.2d 654 (Ct. App. 2002).

In any event, Defendants' motion for summary judgment was served on March 8, 2013, and the hearing was not held until May 16, 2013, or more than two months after notice of the motion. The motion disclosed that Defendants were relying on Plaintiff's deposition testimony to support the motion. Plaintiff had ample to time to submit whatever evidence she desired in opposition to the motion.

3. Additional time for discovery.

Finally, Plaintiff argues that discovery was ongoing, making the hearing on the motion premature. Plaintiff argues that the summary judgment order should therefore be vacated so that additional discovery can be sought and submitted for consideration. This ground is related to the second ground addressed above with respect to the showing required by Rule 56(f), SCRPC.

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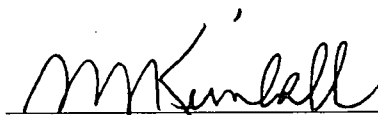
Concerning discovery, Plaintiff did assert that counsel was still attempting to get documentation from the bank, that a forensic accounting "probably" would be done, and that Plaintiff had not managed to assemble all the facts necessary to determine of the property in dispute. This general statement, not made in the form of a motion, is legally insufficient. A party claiming that summary judgment is premature because the party has not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence, creating a genuine issue of material fact for trial. *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 677 S.E.2d 32 (Ct. App. 2009).

I find and conclude this explanation to be insufficient. As already stated, Plaintiff has had ample time in this action, as well as in an earlier Probate Court action, to assemble relevant evidence to support her allegations in this case. Thus, I find and conclude that Plaintiff has not satisfied the *Guinan* standards.

In summary, upon considering the entire record and arguments of counsel, I find no matter presented that was not addressed by the court in the prior order, either expressly, or by clear implication. I further find no basis for reconsideration or amendment of the Court's ruling in the prior Order. Therefore, it is ordered that Plaintiff's Motion pursuant to Rule 59(e), SCRPC, be denied.

AND IT IS SO ORDERED.

August 16, 2013



S. Jackson Kimball
Special Circuit Court Judge
York County