THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY
COURT OF COMMON PLEAS

HONORABLE DOYET A. EARLY, III, CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2013-001856

JACQUELYNE HOLLANDER,.....APPELLANT,

V.

THE IRREVOCABLE TRUST ESTABLISHED BY JAMES BROWN ON AUGUST 1, 2000 AND RUSSELL L. BAUKNIGHT, AS TRUSTEE OF THE IRREVOCABLE TRUST ESTABLISHED BY JAMES BROWN ON AUGUST 1, 2000,.....DEFENDANTS,

OF WHOM RUSSELL L. BAUKNIGHT IS THE.....RESPONDENT.

RESPONDENT'S INITIAL BRIEF

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COUNTER-STATEMENT OF ISSUES ON APPEAL

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2. Whether the circuit court properly dismissed Appellant's complaint for failure to state a claim because the factual allegations affirmatively showed that the complaint was untimely under the applicable three year statute of limitations.

3. Whether Appellant waived her ability to complain of not being permitted to amend her complaint when the Appellant did not move the circuit court for the ability to amend her complaint.

STATEMENT OF THE CASE

This appeal follows from an order of the circuit court dismissing Ms. Jacquelyne Hollander's ("Hollander" or "Appellant") complaint, with prejudice, pursuant to the Rule 12(b)(6) motion of the Irrevocable Trust of James Brown and its Trustee, Russell L. Bauknight ("the Trust"). This case involves a question of ownership over the assets of the Trust. This case involves the fifth of six complaints[1] filed against the Estate and/or Trust of James Brown. Each complaint sought a declaratory judgment finding that Appellant and the late James Brown were partners based upon an oral agreement that occurred in the mid-1980s. Her complaint asks for a determination that she is the "surviving partner with James Brown"; "that the Trust assets are part of that partnership"; and that "as the sole surviving partner she is solely entitled to the Trust assets." (Complaint, p. 9 (R. p. ___). Hollander further alleged an entitlement to an accounting of the Trust assets. (Complaint, p. 10 (R. p.__).

The circuit court ruled that: (1) Hollander's complaint failed to state a cause of action under South Carolina law in that it did not allege the existence of a partnership, and (2) that the allegations contained within the complaint showed that the claims were barred by the applicable statute of limitations and were proper for dismissal pursuant to Rule 12(b)(6). (Order, pp. 3-5) (R. p. ___).

The procedural history of the case is as follows: the case began when the Trust was served with the complaint on May 14, 2012. On June 12, 2012, the Trust filed a motion to dismiss the complaint pursuant to Rules 12(b)(1), (3), and (6). On July 2, 2013, the circuit court heard oral argument on the motion to dismiss, or in the alternative

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[1] *See infra* Section I.A.

for summary judgment. (Transcript p. 42, R. p. ___). On August 8, 2013, the circuit court entered an order granting the motion to dismiss the complaint pursuant to Rule 12(b)(6). Hollander did not seek reconsideration of that order; rather, on August 27, 2013, she filed a notice of appeal. (Notice of Appeal R. p.___).

I. THE CIRCUIT COURT CORRECTLY DISMISSED THE COMPLAINT BECAUSE HOLLANDER FAILED TO ALLEGE THE EXISTENCE OF A PARTNERSHIP

A. History of the Litigation

In her opening brief, Hollander refers to prior litigation surrounding the allegations of her complaint and the legal claims asserted in this case. For purposes of completeness, the Trust will provide a complete list of previous litigation involving the claims that are being asserted in this case:[2]

1. *Jacquelyne Hollander v. The Estate of James Brown, et al.*, C/A No. 1:09-CV-02147 (U.S. District Court, Northern District of Illinois, Eastern Division).
    a. On April 6, 2009, Hollander files suit against the Estate, the State of South Carolina, and the former trustees of the James Brown Irrevocable Trust.
    b. On August 18, 2009, the District Court dismissed the complaint for lack of personal jurisdiction. (R.p. __).
2. *Jacquelyne Hollander v. The Estate of James Brown, Russell L. Bauknight*, C/A No. 1:09-CV-05234 (U.S. District Court, Northern District of Illinois, Eastern Division).

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[2] These cases were referenced at the July 2, 2013 motion hearing. (Transcript pp.41-42, R.p. __). For a more complete discussion of these cases, see *Hollander v. Early*, 2011 WL 9918820, at *1-3 (D.S.C. Dec. 22, 2011). The *Hollander v. Early* case was mentioned in Hollander's brief at page 5. It is not listed above because it did not seek the same relief sought in the above six actions.

a. On August 27, 2009, Hollander re-filed against only the Estate and Bauknight.

b. On October 15, 2009, the District Court dismissed the complaint for lack of personal jurisdiction. (R.p. __).

3. *Jacquelyne Hollander v. The Irrevocable Trust Established by James Brown in August 1, 2000, Russell L. Bauknight, The Estate of James Brown, Universal Music Group, Warner/Chappell Music*, 2:10-CV-03357 (U.S. District Court, Central District of California)

a. On May 5, 2010, Hollander re-filed against the Trust and Estate and two music companies.

b. On July 7, 2010, the District Court dismissed the complaint for lack of subject matter jurisdiction—the probate exception to federal subject matter jurisdiction. (R.p. ___).

4. *Jacquelyne Hollander v. The Irrevocable Trust Established by James Brown in August 1, 2000, Russell L. Bauknight, UMG Recordings Inc., Universal Music Group, Warner Music Group Inc., and Warner/Chappell Music Inc.*, 2:10-CV-07249 (U.S. District Court, Central District of California)

a. On September 29, 2010, Hollander re-filed, this time dropping the Estate of James Brown and adding two other music companies.

b. On June 30, 2011, the District Court dismissed the complaint for lack of subject matter jurisdiction—the probate exception to federal subject matter jurisdiction. (R.p. ___).

5. *Jacquelyne Hollander v. The Irrevocable Trust Established by James Brown in August 1, 2000, Russell L. Bauknight*, C/A No. 2012-CP-02-01059 (South Carolina Court of Common Pleas, Aiken County)

a. On April 30, 2012, Hollander re-filed against the Trust and Bauknight.

b. ***This is the subject complaint that is before this Court.***

c. On August, 7, 2013, the circuit court dismissed the complaint for failure to state a claim. (R.p. ___).

6. *Jacquelyne Hollander v. The Estate of James Brown, Russell Bauknight*, C/A No. 3:12-CV-50313 (U.S. District Court, Northern District of Illinois, Western Division).

   a. On August 13, 2012, ***after filing the subject complaint that is before this Court***, Hollander re-filed against the Estate and Bauknight in Illinois State Court. That case was subsequently removed to federal court.

   b. On February 7, 2013, the District Court dismissed the complaint for lack of personal jurisdiction. (R.p. __).

   c. On August 1, 2013, the District Court entered an award of ***sanctions*** pursuant to 28 U.S.C. § 1927. (R.p. ___).

B. The Factual Allegations

This case involves a purported legal claim to ownership of all of the musical assets of the late James Brown ("Brown") that are owned by the Trust. The premise of the claim is that Brown and the plaintiff created an oral "partnership" in the mid-1980s, and that the focus and purpose of that oral "partnership" ultimately morphed into the Trust. According to the plaintiff, since she allegedly helped create and form the idea of the Trust (allegedly a partnership), as the sole surviving partner (now that Brown is deceased), she is entitled to its entire holdings—all of the late James Brown's intellectual property that is held by the Trust. A summary of the pertinent allegations in the complaint follows.

Hollander alleges that in 1983, while living in Atlanta, Georgia, she was presented with the idea of helping to record a song that would be performed by the Atlanta Falcons. (Complaint, ¶ 9). The name of the song was "Atlanta be Rockin." (Complaint, ¶ 9). All proceeds from the song would be donated to the Georgia Alliance for Children, Inc. (Complaint, ¶ 9).

The Plaintiff sought out Brown to serve as a headliner for the song. In 1984, Brown agreed to donate his time and record the song. (Complaint, ¶ 12-13). The song was not immediately released. Rather, it was shelved until a time when the Atlanta Falcons were in the midst of a winning season. (Complaint, ¶ 15). While waiting on a winning season, the Plaintiff and Brown continued to work together in "various other charitable events helping children with handicaps and other maladies." (Complaint, ¶ 14).

According to the Complaint, the Atlanta Falcons were in a winning season in 1986. (Complaint, ¶ 15). During an Atlanta Falcons home game against the Washington Redskins, the record was released to the public. (Complaint, ¶ 15). At the half-time show of that game, Brown performed the song "Atlanta be Rockin." (Complaint, ¶ 16). After the game, the Plaintiff and Brown were in his limousine and she suggested the idea that the two form a "formal partnership to raise money for children." (Complaint, ¶ 17).

Plaintiff alleges that, thereafter, she and "Brown both used their notoriety and skills to accumulate money and contribute the money to various causes." (Complaint, ¶ 18). Hollander alleges that she and Brown "raised money in benefits for charities to aid victims of Leukemia, Muscular Dystrophy, The Spring Games, and aid for various underprivileged children both formally and informally." (Complaint, ¶ 18). She further alleges that they "participated in a Leukemia telethon with national coverage" and that they "together continued their charitable crusade and benefitted many organizations." (Complaint, ¶ 18).

Hollander's participation in their charitable endeavors ended in 1989 when she moved to Illinois. (Complaint, ¶ 21). According to her complaint, though, Brown

continued their charitable work by "giving turkeys to needy families and doing other charitable events." (Complaint, ¶ 21). According to the complaint, eleven years after ceasing her involvement in their charitable endeavors, and without her knowledge, Brown created the subject Trust. (Complaint, ¶ 22). According to Hollander, the Trust was an "extension" of their previous charitable endeavors. Although Brown passed away on December 25, 2006, Hollander alleges that she did not learn of the existence of the Trust, and that it was an alleged extension of her previous charitable work with Brown, until 2008.[3] (Complaint, ¶ 23).

C. Failure to State a Claim for Relief

The theory of this case is that Hollander and Brown created a partnership. The question before this Court is whether the allegations of Hollander's complaint support that theory. This Court is tasked with "construe[ing] [Hollander's] complaint in a light most favorable to [her] and determin[ing] if the facts alleged and the inferences reasonably deducible from the pleadings would entitle [her] to relief on any theory of the case." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). Applying the Rule 12(b)(6) standard, it is clear that the circuit court correctly dismissed Hollander's complaint.

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[3] In the complaint filed in *Hollander v. Early*, *supra* note 2, however, Appellant alleged that ***in 2007*** she began discussions with the South Carolina Attorney General's office regarding this precise claim. *See Hollander v. Early et al*, C/A No.: 1:11-CV-02620 (Docket Entry No. 1, Complaint, Paragraph 4). The docket may be accessed at https://ecf.scd.uscourts.gov. This Court may take judicial notice of pleadings. 31A C.J.S. EVIDENCE § 96 (2013) ("A court may take judicial notice of pleadings filed in a case to establish the fact of litigation."); *see also Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239-40 (4th Cir. 1989); Rule 201(f), SCRE ("Judicial notice may be taken at any stage of the proceeding.").

"A partnership is an association of two or more persons to carry on as co-owners a business ***for profit***." S.C. Code Ann. § 33-41-210 (emphasis added); *accord Moore v. Moore*, 360 S.C. 241, 260, 599 S.E.2d 467, 477 (Ct. App. 2004); *Wyman v. Davis*, 223 S.C. 172, 174, 74 S.E.2d 694, 698 (1953). "An essential element of a partnership . . . is that the partnership enterprise must be intended to make a profit." 59A AM. JUR. 2D PARTNERSHIP § 48 (2013).

A charitable endeavor, on the other hand, exists to benefit the public and is by definition, not for profit. S.C. JUR. CHARITIES § 6 ("It is clear, however, that the object and effect of any charitable gift or activity must be that it confers a public benefit, ***and that it not be for private profit***.") (emphasis added). Importantly, "[n]onprofit organizations may not be considered partnerships."[4] 59A AM. JUR. 2D PARTNERSHIP § 48; s*ee also Medlin v. Ebenezer Methodist Church*, 132 S.C. 498, 129 S.E. 830 (1925) (noting that "[a]n association, not engaged in business enterprises and the objects of which do not contemplate profit or loss, is not a partnership").

The allegations contained in Hollander's complaint, accepted as true, point to one inescapable conclusion: she and Brown worked together for charitable, not-for-profit purposes. Her complaint is devoid of any allegation that she and Brown intended to profit from their charitable endeavors. The complaint makes clear that Hollander and Brown sought to raise funds for charitable causes. (*E.g.*, Complaint,¶¶ 14,17-18). All of the inferences that are reasonably deducible from the complaint illustrate the not-for-profit motive of their collaboration. Accordingly, her legal conclusion that she and

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[4] The James Brown I Feel Good Trust is recognized by the Internal Revenue Service as a tax-exempt entity under section 501(c)(3) of the Internal Revenue Code.

Brown entered into a partnership fails as a matter of law, for she has affirmatively pleaded a not-for-profit, charitable endeavor.

The circuit court correctly identified the absence of a profit motive in Hollander's complaint and the affirmative allegations of her charitable endeavors. Hollander has failed to allege the existence of a partnership. Accordingly, the circuit court correctly dismissed her complaint.

D. Response to Hollander's Brief

Hollander seeks to avoid the legal ramifications of the factual history that she pled by arguing against the profit requirement of a partnership. In her brief, she notes that "while receipt of profits is automatically evidence of a partnership, lack of profits does not infer that no partnership exists." (Brief, p.11). Hollander further notes that the case law does not provide "that a partnership could not exist without profits." (Brief, p.12) ("There was never any determination in *Wyman*, nor in any other precedent, that a partnership could not exist without profits and it certainly did not define what profits are."). These arguments are meritless. "A partnership is an association of two or more persons to carry on as co-owners a business for profit." S.C. Code Ann. § 33-41-210; *accord Moore*, 360 S.C. at 260, 599 S.E.2d at 477; *Wyman*, 223 S.C. at 174, 74 S.E.2d at 698. Hollander has set forth the factual background of her relationship with Brown. Those allegations show that she and Brown were not seeking to profit from their collaboration; instead, the allegations show that they worked together for benevolent purposes. As a matter of law, Hollander's factual description of her relationship with Brown shows that the two did not form a partnership.

1. Commercial Co-Venturers or Professional Solicitors

Hollander seeks to convert her benevolent relationship into a partnership by a passing reference to the South Carolina Solicitation of Charitable Funds Act ("the Act"). (Brief, p. 10). Her references to this Act are legally unavailing. First, this issue is not preserved for appellate review. Second, her allegations are all centered upon conduct in Georgia, not South Carolina. Third, this Act was not in existence during the dates of her allegations. And fourth, the Act does not alter the factual history of the relationship with Brown—that is, the Act does not alter the fact that she and Brown worked for benevolent purposes.

a. Issue Preservation

During oral argument on the motion to dismiss, Hollander never raised this issue for the Court's consideration. The first time that Hollander raised this issue was in her post-hearing brief served on July 25, 2013. (Memorandum in Opposition, R.p. __). The circuit court subsequently signed the subject order on August 7, 2013, and did not address this argument. Hollander did not move the circuit court to rule on this argument. Instead, she filed a notice of appeal. (Notice of Appeal, R. p. __). Accordingly, this issue is not preserved for appellate review. *Great Games Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000) (noting that where a party fails to prompt the circuit court to rule on an issue via a Rule 59(e) motion, the issue is not preserved for appellate review).

b. Georgia Allegations

Hollander's allegations point to conduct in the state of Georgia, not South Carolina. (*E.g.*, Complaint, ¶ 17 (meeting following Atlanta Falcons game)). The Act

covers activities that occur in the State of South Carolina. The Act provides that, "a charitable organization which intends to solicit contributions within this State or have contributions solicited on its behalf must file a registration statement with the Secretary of State." S.C. Code Ann. § 33-56-30. Accordingly, the allegations of the complaint show that the Act does not apply here.

c. The Act was Enacted in 1994

Hollander's complaint provides that she and James Brown collaborated during the years 1984-1989. (Complaint, ¶¶ 12-13, 21). In 1994, the General Assembly passed Act 461, which amended the South Carolina Code of Laws by adding the subject Act. *See* 1994 SOUTH CAROLINA LAWS ACT 461 (S.B. 1062) (adding Chapter 56 to Title 33 of the South Carolina Code). Accordingly, notwithstanding the geographical failure of her argument, none of her allegations support the application of the Act to this case.

d. The Act is a Red Herring

The question before this Court is whether Hollander alleged the existence of a partnership. In an effort to evade that precise issue, Hollander cites two defined terms in the Act, and claims they apply to her. She asserts that, "[t]he work between Plaintiff and Brown, as pled in the Complaint, was that of 'professional solicitors' and 'commercial co-venturers.'" (Brief, at p.10). Hollander then goes on to cite the definitions of these two terms. The definition of these terms generally refers to a person that primarily works for profit but also seeks to do that work to raise money for charitable purposes, (commercial co-venturer), or a person that, "for monetary consideration" (professional solicitor), raises money for charitable purposes. Referencing these terms, however, does not change the question before this Court.

Hollander's complaint alleges that she formed a partnership with Brown. The allegations of the complaint show, however, that she and Brown were not seeking to profit from their collaboration; instead, the allegations show that they worked together for benevolent purposes. The Act has nothing to do with the question before this Court.

E. Conclusion

Hollander's complaint, accepted as true, describes a five year relationship with Brown. Her description of this relationship, and the inferences reasonably deducible therefrom, show that she and Brown worked together in order to raise money for charitable causes. These allegations refute Hollander's legal claim that she formed a partnership with Brown. While Hollander may wish that she formed a partnership with Brown, her allegations show that she did not. The order of the circuit court should be affirmed.

II. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE CLAIMS IN HOLLANDER'S COMPLAINT WERE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

The circuit court correctly concluded that the allegations of Hollander's complaint showed that her claims were barred by the statute of limitations. (Order, p. 4 (R. p. __). Under South Carolina law, where a party's pleadings show that the action is untimely, it is properly dismissed pursuant to Rule 12(b)(6). *Clearwater Trust v. Bunting*, 367 S.C. 340, 353, 626 S.E.2d 334, 340 (2006) (affirming dismissal pursuant to Rule 12(b)(6) based upon allegations in the complaint and application of statute of limitations); *see also Horton v. Carolina Medicorp*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (N.C. 1996).

A. Factual Allegations

Hollander's complaint alleges that she and James Brown formed a "partnership" in 1984. Hollander's participation in their "partnership" ended in 1989 when she moved to Illinois.[5] (Complaint, ¶ 21). According to her complaint, Brown continued their previous work by "giving turkeys to needy families and doing other charitable events." (Complaint, ¶ 21). Eleven years after ceasing her involvement in this work, and without her knowledge, Brown created the subject Trust. (Complaint, ¶ 22). According to Hollander, the Trust was an "extension" of their previous charitable endeavors. And although James Brown passed away on December 25, 2006, Hollander alleges that she did not learn of the existence of the Trust, and that it was an alleged extension of her previous charitable work with Brown, until 2008.[6] (Complaint, ¶ 23). Consequently, accepting the validity of her pleadings, Hollander received notice that she had a claim in 2008. She did not file this action, however, until April 30, 2012.

B. Statute of Limitations

The statute of limitations applicable to this action is found at S.C. Code Ann. § 15-3-530. Section 15-3-530 provides that a party has three years to file a civil action

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[5] Hollander's claims are also barred by the applicable statute of limitations for another reason. Assuming arguendo a partnership existed, when she moved to Illinois in 1989 and ceased her involvement in the partnership, that action constituted a dissolution of the partnership. S.C. Code. Ann. § 33-41-910 ("The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business."). Once dissolution occurs, the statute of limitations for a partnership accounting begins to run. *See McBrayer v. Mills*, 62 S.C. 36, 39 S.E. 788 (1901) (Paragraph "2" of the Opinion); *accord* AM. JUR. 2D § 690 ("The statute of limitations on the right to a partnership accounting begins to run at the time of dissolution . . . ."). Accordingly, this action is time-barred.

[6] *But see supra* note 3.

after the factual predicate for the action occurs. Although Hollander generally alleges that in 2009, she appeared in the civil action that formed the basis of the now vacated settlement agreement, she does not allege that she instituted legal action to pursue this claim at that time. In fact, in her Statement of the Case, Hollander confirms that she "was not a party to that action."[7] (Brief, p. 6). Hollander did not commence the subject action until over four years after she alleged that she learned of the violation of her rights. Accordingly, the circuit court correctly dismissed the complaint pursuant to Rule 12(b)(6).[8] *Clearwater Trust*, 367 S.C. at 353, 626 S.E.2d at 340.

C. Response to Hollander's Brief

Hollander argues that the circuit court should have applied the doctrine of equitable estoppel to toll the running of the statute of limitations. (Brief, pp.13-15). Her arguments assert that the conduct of the Attorney General, in consulting with her and later attempting to settle the family litigation, prevented her from pursuing these claims. (Brief, p. 13). These arguments are not preserved for appellate review. Issue preservation aside, these arguments are meritless.

1. Issue Preservation

Hollander did not make this argument at the hearing. The first time that Hollander raised the estoppel arguments was in her post-hearing brief served on July 25, 2013. (Memorandum in Opposition, R.p. __). The circuit court subsequently signed its

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[7] That statement is binding upon Hollander. Rule 208(b)(1)(C), SCACR ("Any matters stated or alleged in appellant's statement shall be binding on appellant.").

[8] Hollander's unsuccessful pursuit of this claim in Illinois and California does not impact the analysis. "When an action is dismissed without prejudice, the statute of limitations will bar another suit if the statute has run in the interim." *Davis v. Lunceford*, 287 S.C. 242, 243, 335 S.E.2d 798, 799 (1985).

order on August 7, 2013, and did not address this argument. Hollander did not move the circuit court to rule on this argument. Instead, she filed a notice of appeal. (Notice of Appeal, R. p. __). Accordingly, this issue is not preserved for appellate review. *Great Games Inc.*, 339 S.C. at 85, 529 S.E.2d at 9 (noting that where a party fails to prompt the circuit court to rule on an issue via a Rule 59(e) motion, the issue is not preserved for appellate review).

2. Equitable Estoppel Does Not Apply

Hollander argues that an assistant South Carolina Attorney General "misrepresented to Plaintiff that he would represent her interest before the Trial Court and that Appellant did not need to hire counsel to participate in the proceedings." (Brief, p. 13). She complains that after receiving those assurances, "months later [the assistant Attorney General] informed Appellant that she did not have a claim." (Brief, p. 13). Hollander further argues that the assistant Attorney General "disenfranchised Plaintiff in the litigation through his representations to the Court in negotiating the Settlement Agreement." (Brief, p. 13). These arguments are meritless, both legally and factually.

South Carolina law provides that, "a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced ***by the defendant's conduct***." *Kleckley v. Northwestern Nat. Cas. Co.*, 338 S.C. 131,136, 526 S.E.2d 218, 220 (2000) (emphasis added); *accord Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001) (emphasis added). A glaring omission in Hollander's argument, however, is any mention of the conduct of a ***defendant in this case***. Hollander does not assert that Russell L. Bauknight, or any other former trustee, ever engaged in conduct that caused

her to delay filing suit. Instead, her focus is exclusively upon the actions of the South Carolina Attorney General's office. The Trust is a private entity, and it is not controlled by the South Carolina Attorney General. Accordingly, as a matter of law, equitable estoppel does not apply to this case.

Even assuming that the conduct of the Attorney General could be imputed to the Trust, equitable estoppel still does not resuscitate Hollander's stale claim. The doctrine looks to the conduct of the defendant that caused the plaintiff to miss the statute of limitation window. *Kleckley*, 338 S.C. at 136, 526 S.E.2d at 220 (focusing on the conduct of the defendant that caused the plaintiff to delay filing suit timely). In this case, the alleged conduct of the Attorney General had nothing to do with Hollander's failure to timely file.

Hollander's allegations for the application of equitable estoppel revolve around a short window of time in late 2008 through early 2009. For example, Hollander alleges that the assistant Attorney General initially stated he would represent her interest but only "months" later informed her that she did not have a claim. She also alleges this conduct occurred during the timeframe when the now vacated settlement agreement was approved by the circuit court. The circuit court approved that settlement agreement "by [an] order of May 26, 2009." *Wilson v. Dallas*, 403 S.C. 411, 420, 743 S.E.2d 746, 751 (2013). These arguments are legally unavailing because the statute of limitations did not expire during this window of time; rather the statute of limitations expired (viewing ***this*** complaint in a light most favorable to Hollander) sometime in 2011.

Hollander's litigation history also belies any factual basis for an assertion of equitable estoppel. Beginning on April 6, 2009, Hollander began to file suit against the

Estate and Trust in various federal courts. For reasons known only to her, she did not institute legal action in South Carolina within the statute of limitations. Instead, she sought to litigate her claims in federal courts, notwithstanding the clear jurisdictional bars to those claims. No one has ever induced Hollander to delay filing suit.

D. Conclusion

The three years statute of limitations applies to the claims alleged in Hollander's complaint. On the face of her complaint, Hollander affirmatively states that she had knowledge of the basis for her claims in 2008.[9] On April 30, 2012, Hollander filed this action. It is untimely as a matter of law. The order of the circuit court should be affirmed.

III. AMENDMENT OF THE COMPLAINT

A. Hollander Waived Her Right to Request Amendment

Hollander argues that the circuit court should have allowed her to amend her complaint. In her brief, she notes that the "Trial Court dismissed the action with prejudice without any formal response or attempt at amendment. The Trial Court essentially failed to provide Appellant with a fair hearing on the merits of the Complaint." (Brief, p. 16). What she fails to mention, however, is that she did not file a motion to amend her complaint, or make this request via a Rule 59(e) motion. Accordingly, Hollander has waived this argument. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

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[9] *But see supra* note 3.

Any amendment of the Complaint would be futile. *See Higgins v. Medical Univ. of S.C.*, 326 S.C. 592, 604-05, 486 S.E.2d 269, 275 (Ct. App. 1997) (noting that a party should not be given leave to amend his complaint where it would have been futile). The Plaintiff intimates that if she were allowed to amend her complaint, she would allege that her working relationship with Brown—contrary to her repeated descriptions of a not-for profit, charitable endeavor—would be re-pled as a for-profit endeavor. This Court should not sanction this type of litigation conduct. *Cf. Quinn v. Sharon Corp.*, 343 S.C. 411, 416, 540 S.E.2d 474, 476 (Ct. App. 2000) (Anderson, J., concurring) ("A court must be able to rely on the statements made by the parties because truth is the bedrock of justice. Therefore, a litigant cannot "'blow both hot and cold.'"). Finally, regardless of how she would have re-pled her complaint, it is clear that it would be untimely under the applicable statute of limitations.

B. Memorandum in Support of the Motion to Dismiss

Hollander asserts in her brief that she was not provided an opportunity to respond to the Trust's memorandum in support of the motion to dismiss because she received a copy of the memorandum on the day of the motions hearing. (Brief, p.16). In this section of her argument she does not mention, however, that after the hearing the circuit court instructed each side to submit proposed orders, (Transcript, p. 47) R. p. ___), and that she submitted a memorandum in opposition to the Trust's motion, along with a proposed order. (Memorandum and Proposed Order, R. p. ___). She submitted those papers on July 25, 2013. (Memorandum and Proposed Order, R. p. ___). The circuit court signed the subject Order on August 7, 2013. (Order, p. 5). Accordingly, before the

circuit court issued its order Hollander did receive an opportunity to review the Trust's papers and to respond.

IV. CONCLUSION

The Plaintiff does not have a case. In her complaint, she has set forth a description of her working relationship with the late James Brown. That relationship, as described by Hollander, had a single purpose: benevolence. The purpose of their relationship precludes her claim that an oral partnership was created. The circuit court correctly dismissed the complaint.

The Plaintiff's complaint is untimely. Assuming arguendo that Hollander can state a claim—which she cannot—, her complaint is untimely as it was filed over three years after receiving notice of the factual basis for her claim. There are no grounds to toll the running of the statute of limitations. The circuit court correctly dismissed the complaint.

The Plaintiff has waived her right to seek amendment of her complaint. Moreover, any attempted amendment would be futile.

The Trust respectfully requests that this Honorable Court affirm the order of the circuit court.

Respectfully submitted,

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December 12, 2013

Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY
COURT OF COMMON PLEAS

HONORABLE DOYET A. EARLY, III, CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2013-001856

JACQUELYN HOLLANDER,.....APPELLANT,

V.

THE IRREVOCABLE TRUST ESTABLISHED BY JAMES BROWN ON AUGUST 1, 2000 AND RUSSELL L. BAUKNIGHT, AS TRUSTEE OF THE IRREVOCABLE TRUST ESTABLISHED BY JAMES BROWN IN AUGUST 1, 2000,.....DEFENDANTS,

OF WHOM RUSSELL L. BAUKNIGHT IS THE.....RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief by depositing a copy of same in the United States Mail, postage prepaid addressed to Appellant's attorney of record, O. Cyrus Hinton, Hinton and Associates, PA, Two Law Place, 235 East Main Street, Suite 110, Rock Hill, South Carolina 29730.

December 12, 2013

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