STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-46-02008

Eileen Critcher, ... Appellant,

v.

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

RESPONDENTS' BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Appellant (Plaintiff below) failed to make a sufficient showing to the trial court to delay the summary judgment decision on the ground of incomplete discovery. (Appellant's Issue on Appeal No. 1.)

2. Appellant's appeal from the trial court's ruling on the hearsay contained in Appellant's proffered affidavit is legally insufficient to warrant a reversal because, even if the trial court's ruling was in error, the trial court's decision that the Appellant's affidavit was not admissible and was not proper for the trial court's consideration was based on more than the hearsay ground and no appeal has been taken from the additional grounds. (Appellant's Issue on Appeal No. 2.)

3. The doctrine of equitable estoppel does not avoid the operation of the Statute of Limitations in this case. (Appellant's Issue on Appeal No. 3.)

4. Appellant's argument with respect to the doctrine of nonstatutory equitable tolling is not preserved for appellate review because it was not presented to and decided by the trial court. (Appellant's Issue on Appeal No. 4.)

STATEMENT OF THE CASE

Appellant filed a claim against her late husband's (Roy Critcher) estate in the York County Probate Court on May 27, 2011. (R. 194.) By Order dated January 20, 2012, the claims against the decedent/his estate and against Defendant Rhodes, individually and as

personal representative, and against Defendant Akers were dismissed. (R. 196-200.)[1] No appeal was taken from this Order.

The above-captioned action (2012-CP-46-02008) was filed on June 12, 2012. (R. 2, l. 31-32; and p. 18.) The original caption on the Complaint identified the defendants as: Susan Critcher Rhodes, Susan Critcher Rhodes as Personal Representative of the Estate of Roy G. Critcher, and Roy G. Critcher. On June 18, 2012, the Defendants' moved to dismiss the Complaint as against Defendants Rhodes, as Personal Representative, and Roy G. Critcher, then deceased. (R. 39-40.)

By Order dated September 24, 2012, the trial court granted the motion to dismiss and granted leave to the Appellant to file an Amended Complaint to make the change to the caption. (R. 11-12.)

Appellant thereafter served an Amended Complaint, dated September 6, 2012. (R. 19-33) The caption identified the Defendants as Susan Critcher Rhodes, individually and as Personal Representative of the Estate of Roy G. Critcher,[2] Wanda C. Akers and Belinda Critcher Thomas.

Defendants answered the Amended Complaint on or about October 17, 2012. (R. 34-38.)

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[1] Respondent Thomas herein was not a party to the original claim.

[2] The Amended Complaint erroneously named Rhodes, in her capacity as Personal Representative, as a defendant notwithstanding the September 24, 2012 Order that had dismissed Rhodes, in that capacity, from the action.

Appellant's deposition was taken on March 4, 2013. (R. 79.)

On March 8, 2013, Respondents served their Motion for Summary Judgment. (R. 41-42.)

The Court gave notice that the Summary Judgment motion would be heard on May 16, 2013 at 2:00 PM.

On May 9, 2013, Respondents served their Memorandum of Law in Support of Motion for Summary Judgment and filed Plaintiff's Answers to Interrogatories and Plaintiff's deposition transcript for use at the motion hearing. (R. 43-44; 79-246; 247-254.)

The Summary Judgment Motion was argued on May 16, 2013. (R. 267.)

By Order dated June 20, 2013 the motion was granted. (R. 1-6.)

On July 12, 2013 Appellant served her Rule, 59(e), SCRCP, Motion to Alter or Amend Judgment. (R. 66-71.)

Appellant's Rule 59(e) Motion was heard by the trial court on August 15, 2013. (R. 291.)

By Order dated August 16, 2013, Appellant's Rule 59(e) Motion was denied. (R. 7-10.)

Appellant's Notice of Appeal was served on September 21, 2013.

STANDARD OF REVIEW

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. Bass v. Gopal, Inc., 395 S. C. 129, 133, 716 S.E.2d 910, 912 (2011).

Summary Judgment Law. Rule 56(c), SCRCP, provides that summary judgment may be granted if a review of all documents submitted to the court shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. In determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Bass, 395 S.C. at 133-134, 716 S.E.2d at 912. Where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a scintilla of evidence to withstand a motion for summary judgment. Id. However, a nonmoving party must do more than show a metaphysical doubt about the material facts and must set forth specific facts showing a genuine issue for trial. Russell v. Wachovia Bank, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (internal citations omitted.) . However, "where a heightened burden of proof is required, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 329 673 S.E.2d 801, 803 (2009). This principle of law applies to a proceeding for the appointment of guardian and/or conservator for which the clear and convincing evidence standard applies. The court must determine from the evidence presented on the summary judgment motion whether "reasonable minds could differ" as to whether each required element of the cause of action had been sufficiently shown. See AJG

Holdings, LLC v. Dunn, 392 S.C. 160, 171, 708 S.E.2d 218, 224 (Ct. App. 2011) (internal citations omitted.)

To survive a summary judgment motion by the defendant in a lawsuit, the plaintiff must offer some evidence that a genuine issue of material fact exists for each element of the claim at issue except for those elements that are either uncontested or agreed to by stipulation. Kase v. Ebert, 392 S.C. 57, 707 S.E.2d 456, 458 (Ct. App. 2011). Summary judgment can be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 114-115, 410 S.E.2d 537, 545 (1991).

STATEMENT OF THE FACTS

From the trial court's Summary Judgment Order, the facts are summarized as follows:

> Plaintiff's Amended Complaint generally alleges that Plaintiff had funds on deposit in a joint bank account with Roy Critcher, the Decedent, and that one or more of the Defendants improperly withdrew money from that account prior to Decedent's death, thereby converting Plaintiff's funds. There are numerous causes of action, alleging entitlement to relief on different legal theories; however, all are predicated upon the same facts.

(R. 2, l. 17-21.)

From Respondents' Memorandum of Law in Support of Motion for Summary Judgment, the facts in the case are set out, using Appellant's deposition testimony:[3]

The Plaintiff was married to Decedent Roy Critcher until his death on September 1, 2010. (R. 84, l. 17-18 and p. 87, l. 19 -23). The Defendants are Roy Critcher's children from a prior marriage, thus they are the Plaintiff's step-children. (R. 86, l. 5-12.)

Plaintiff's Amended Complaint generally alleges that Plaintiff had funds on deposit in a joint bank account with the Decedent, and that one or more of the Defendants improperly withdrew money from that account prior to Decedent's death, thereby converting Plaintiff's funds. (R. 19-33.) The particular causes of action are:

1st Conspiracy - Roy Critcher and Susan Rhodes conspired to make the improper withdrawal(s);

2nd Conspiracy - Roy Critcher and Defendants Rhodes, individually, Akers and Thomas conspired to make the improper withdrawal(s);

3rd Conspiracy - Defendants Rhodes, individually, Akers and Thomas (without Roy Critcher) conspired to make the improper withdrawal(s);

4th Breach of Fiduciary Duty - that Defendant Rhodes, individually, owed fiduciary duties to Decedent Roy Critcher and that the alleged improper withdrawal(s) were in violation of those fiduciary duties;

5th Breach of Fiduciary Duty - Roy Critcher owed fiduciary duties to the Plaintiff and that the alleged improper withdrawal(s) were in violation of those fiduciary duties;

6th Conversion - that improper withdrawals made by Defendant Rhodes, individually,

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[3] Cites are to Appellant's deposition transcript.

constituted a conversion of joint account funds belonging to Roy Critcher and the Plaintiff;

7th Conversion - that the improper withdrawals made by Defendant Rhodes, individually, were shared with Defendant Akers and Thomas and constituted a conversion of funds by all three;

8th Fraud - That Decedent Roy Critcher committed fraud against Plaintiff by representing that he would retitle bank accounts to include Plaintiff as a co-owner while not having the true intent to do so;

9th Constructive Fraud - that Decedent Roy Critcher committed constructive fraud against Plaintiff by representing that he would retitle bank accounts to include Plaintiff as a co-owner while not having the true intent to do so;

10th Constructive Trust - that a constructive trust be declared and imposed on any funds now held by Defendant Rhodes, individually, that came from the alleged improper withdrawals;

11th Constructive Trust - that a constructive trust be declared and imposed on any funds now held by Defendants Rhodes, individually, and Akers and Thomas that came from the alleged improper withdrawals.

Facts and timeline:

mid- 1970s Plaintiff and Roy Critcher married (her 3rd marriage; his 2nd) (R. 85, l. 16-19); each had children from prior marriages (R. 85, l. 20 to p. 86, l. 12);

1980 +/- Plaintiff and Roy Critcher moved to York County; the residence was purchased in the late 1970s using money from Roy Critcher's mother (R. 84,

l. 19 to p. 85, l. 2 and p. 114, l. 4-11); the real property was titled solely in Roy Critcher's name (R. 113, l. 2-7); Plaintiff attended the closing and knew or had the opportunity to know how the property was being titled (R. 113, l.8 to p. 114, l.3);

1980 to 1997 +/- Plaintiff worked in the hospitality industry (R. 83, l. 19 to p. 84, l. 8); she retired in approximately 1997; her last employment was the Rock Hill Howard Johnson (R. 83, l. 24 to p. 84, l. 12);

1980 to 2000+/- Roy Critcher worked as a heavy equipment sales agent; he retired in approximately 2000 (R. 98, l. 1 to p. 99, l. 8);

2-5-02 Roy Critcher executed a Durable General Power of Attorney naming his daughter Susan Rhodes (one of the Defendants) as attorney-in-fact; the POA gave Rhodes the power and authority to deal with Roy's bank accounts "to the same extent that I might do if personally present and acting;" it also granted the power and authority "to make gifts and other transfers for less than adequate consideration in money or money's worth, including the power to make gifts to my attorney-in-fact, his or her spouse, issue, grandchildren, brothers or sisters;" (R. 109, l. 2 to p. 110, l. 23; R. 202-205, ¶ 4 and 14);

2000's Roy Critcher and Plaintiff had a joint checking account at Wachovia (acct. no. 9156) into which Roy Critcher's monthly social security benefit, Roy Critcher's dividends from his retirement investment account, and Plaintiff's monthly social security benefit were deposited, and commingled, (R. 119, l. 20 to p. 120, l. 5 and p. 122, l.20 to p.123, l.3; p. 133, l. 1-6). This account

was the general family operating account from which the couple's regular bills and expenses were paid. (R. 122, l. 20 to p. 123, l. 3).

Plaintiff also testified at deposition that there was a savings account at Wachovia. (account no. 3899). Plaintiff was not certain what funds were deposited to the savings account, but she believed that some of Roy's bonus money or money he had inherited from his mother may have been in the account. (R. 117, l. 14 - 20 and p. 118, l. 21 - 24). And, she believed that on occasion, when the balance in the joint checking account was more than was needed for customary expenses, Roy would transfer funds from the joint checking account to the savings account. (R. 120, l. 6-19). **Plaintiff identified the Wachovia savings account as account no. 3899.** (R. 133, l. 7-14);

2008 Plaintiff thought her name was on the Wachovia savings account (account no. 3899), but learned in 2008 that her name was not on that account; it was titled solely in Roy Critcher's name. Plaintiff insisted, if not demanded, that Roy put her (Plaintiff's) name on the bank accounts. Plaintiff threatened Roy with divorce if he did not. (R. 111, l. 19 to p. 112, l. 19 and p. 114, l. 15 to p. 115, l. 4);

8-1-08 $41,000 was withdrawn from Wachovia acct. no. 3899. (R. 137, l. 9 to p. 139, l. 17; R. 240.) On that date the only account owner on Wachovia's records was Roy G. Critcher. (Neither Plaintiff's nor Defendant Rhodes' names were then on the account.) (R. 249 and p. 137, l. 13 to p. 138, l. 7).

Plaintiff testified that she believes that Rhodes, as attorney-in-fact for Roy, made the August 1, 2008 withdrawal with Roy's knowledge and consent. (R. 138, l. 16 to p. 141, l. 4). This is the only specific transaction that Plaintiff could identify at her deposition as being an allegedly improper transaction that is the subject of her Amended Complaint. (R. 139, l. 2-17). (She admitted that a second transaction about which she alleged Rhodes had made an improper withdrawal was in fact a transaction that Plaintiff, herself, made. (R. 144, l. 12 to p. 147, l. 20). (See the October 30 and 31, 2008 transactions described below.)

8-25-08 to 10-30-08 Sometime and somehow in this period, Plaintiff's name was added to acct. no. 3899 making her a joint account owner with Roy Critcher. (R. 141, l. 5 to p. 142, l. 4; R. 240 and 242);

10-30-08 Plaintiff visited the Wachovia branch bank where she signed a withdrawal slip and withdrew $13,541.39 from acct. no. 3899, leaving $2,500.93 in the account. On that date, Plaintiff was identified on Wachovia records as one of the account owners for acct. no. 3899. (R. 144, l. 14 to p. 145, l. 3; and R. 242);

10-31-08 Plaintiff opened a new account at Wachovia, acct. no. 8263, in the names of Roy and Eileen Critcher, and transferred the $2,500.93 from acct. no. 3899 to the new account. This closed acct. no. 3899. (R. 146, l. 9 to p. 147, l. 20; R. 246). Plaintiff's answers to interrogatories identified the $2,500.93 withdrawal as having been an improper withdrawal made by Defendant

Rhodes. Plaintiff admitted her mistake in her deposition. (R. 145, l. 1 to p. 147, l. 20) **This left the $41,000 withdrawal on August 1, 2008 as the only transaction that Plaintiff could identify as the subject of her Amended Complaint involving Defendant Rhodes.** (R. 137, l. 9 to p. 139, l. 17; and p. 143, l. 11-20). Although she testified that she has questions about other funds, she could not provide information about specific transactions that involved Rhodes, individually. (R. 143, l. 11-20; p. 150, l. 2-5);

7-15-09 Roy executed a Last Will and Testament that named Rhodes to serve as personal representative, and Defendant Akers as alternate personal representative, if needed; devised personal property and household effects to Plaintiff; required the personal representative to sell the residence and add all the net proceeds of sale to the rest and residue estate; and provided that the first $250,000 of the rest and residue estate be distributed to Roy's three children jointly and the balance be shared ½ to his surviving children and ½ to Plaintiff. (R. 183-189);

1-11-10 Roy executed a First Codicil that changed the distribution provisions of his July 15, 2009 last will to now provide that after the residence is sold, the rest and residue estate, including the proceeds from the sale of the residence, be divided into two equal shares with one share to be distributed to Plaintiff and one share to be distributed jointly to Roy's children. The provisions of the 2010 codicil are more favorable to Plaintiff than the 2009 last will. (R. 191-

192);

9-1-10 Roy Critcher died. (R. 87, l. 19-20);

9-28-10 Roy Critcher's probate estate was opened, and Rhodes was appointed as personal representative. (R. 87, l. 24 to p. 88, l. 4);

Next eight months Because the will and codicil devised more than ½ of the estate to Plaintiff, she did not file an elective share claim;

5-27-11 Plaintiff filed a claim against Roy's estate for "amounts converted from the Decedent and Claimant's funds by his Personal Representative during Decedent's lifetime" and for "fraud and misinformation supplied to the Creditor/Claimant [Plaintiff herein] by Decedent and /or his agents." (R. 194; p. 94, l. 6-13 and p. 96, l. 1-22);

1-20-12 By Order of the York County Probate Court, the Plaintiff's claim against Roy's estate was dismissed. The ground for the dismissal as to the estate was that the claim/Petition for Allowance of Claim was untimely and was time-barred. The claim, insofar as it alleged a claim against the Personal Representative, was dismissed because the claim alleged actionable conduct that occurred during the Decedent's lifetime involving non-probate assets. (R. 196-200); there was no appeal from this Order;

5-20-12 Plaintiff commenced the above-captioned action in circuit court by filing the original Summons and Complaint. (R. 126, l. 2-6; and p. 18);

9-24-12 By Order of the Circuit Court, the Defendants' motion to dismiss the original Complaint was granted, but Plaintiff was given the right to file an Amended

Complaint with respect to claims against Rhodes individually; however, claims against Roy Critcher, and against Rhodes, in her capacity as personal representative, were dismissed **with prejudice**; the Order permitted amendment to pursue claims against Rhodes, individually, for actions that occurred before Roy's death; the Plaintiff filed an Amended Complaint that added causes of action against Rhodes and added Akers and Thomas as Defendants. (R. 207-210; and p. 19-33);

10-17-12 Defendants served interrogatories and requests for production;

1-23-13 Plaintiff served answers to Defendants' interrogatories and responses to Defendants' requests for production;

2-18-13 Defendants served Notice of Deposition for Plaintiff's deposition;

3-4-13 Plaintiff's deposition was taken;

3-8-13 Defendants' motion for summary judgment served;

4-24-13 Clerk of court served notice of summary judgment motion hearing for May 16, 2013;

5-7-13 Plaintiff served her first discovery (interrogatories and requests for production);

5-16-13 motion hearing held;

6-20-13 Order granting Motion for Summary Judgment executed.

Appellant clearly admitted that she is seeking damages for transactions that occurred before Mr. Critcher's death. (R. 128, l. 1-17.) And, Appellant's claims have nothing to do with anything that Respondent Akers or Respondent Thomas did or said. (R. 97, l. 4-25; p.

129, l. 3-8; p. 155, l. 5-13). In fact, Appellant testified that she does not know why Akers and Thomas are even named as Defendants. (R. 97, l. 22-25). This leaves only her causes of action against Respondent Rhodes individually.

ARGUMENT

1. Appellant (Plaintiff below) failed to make a sufficient showing to the trial court to delay the summary judgment decision on the ground of incomplete discovery. (Appellant's Issue on Appeal No. 1.)

Respondents' Motion for Summary Judgment was served on March 8, 2013. (R. 41-42.)

Respondents' Memorandum of Law in Support of Motion for Summary Judgment was served on May 9, 2013. (R. 43-65.)

The hearing on Respondents' Motion for Summary Judgment was held on May 16, 2013. (R. 1, first paragraph; and p. 267.)

Appellant did not file a Return to the Motion either before or during the hearing; in fact, Appellant filed no other submissions of any nature at the time in opposition to the motion; however, Appellant's deposition transcript and Answers to Defendants' Interrogatories were before the trial court, having been filed by Respondents in support of the motion. (R. 79-246; p. 247-254; and p. 1, second paragraph).

The first mention of discovery during the May 16, 2013 hearing was when Appellant's counsel said ". . . we have grounds here also to claim delayed discovery . . . ." (R. 277, l. 4-5.) The next mention of discovery was later in the argument when Appellant's counsel was arguing that the issue with respect to ownership of the funds on deposit in the

joint bank account was "who owns what, who contributed what." (R. 280, l. 9-14.) He then said "[b]ut the point simply being is a matter of discovery. It is a matter of why I believe in this case, not only the documentation from the bank, which we're still attempting to get, but take instead, probably forensic accounting." [sic]. Appellant's counsel then proceeded to argue that there was not a scheduling order in place with a deadline for completion of discovery and that "[w]e have not managed to assemble all the facts necessary for even Mr. Brackett to argue or me to defend on the question of who owned what." (R. 280, l. 16-23.)

The next and last mention of discovery was when the undersigned attorney for Respondents argued that a Rule 56(f), SCRCP, showing had not been made. (R. 287, l. 12-20.)

Appellant made no motion to the trial court to continue the hearing and made no showing pursuant to Rule 56(f), SCRCP. There having been no Rule 56(f), SCRCP, motion or attempted showing that further discovery was warranted, the June 20, 2013 Order for Summary Judgment did not address the issue of alleged incomplete discovery. (R. 1-6.) In her Rule 59(e), SCRCP, Motion to Alter or Amend Judgment, dated July 12, 2013, Appellant raised the issue of "ongoing" discovery, in ground no. 3 of the motion and argued that a decision on the motion was premature while discovery was incomplete. (R. 68, ¶ 3.) In the Court's Order Denying Plaintiff's Rule 59(e), SCRCP, Motion, dated August 16, 2013, the trial court applied the law of Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 677 S.E.2d 32 (Ct.App. 2009) to conclude that Appellant had not satisfied the conditions for delaying a summary judgment decision to allow additional time for discovery, notwithstanding that a formal Rule 56(f) motion had not been made. (R. 7-10, Section 3.)

Guinan, 383 S.C. at 56, 677 S.E.2d at 54-55, holds that a party claiming summary judgment is premature because she 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 and create a genuine issue of material fact. The Appellant did not do this. Appellant's argument to the trial court was essentially that if she is allowed to look for other evidence she might find something to create a genuine issue of fact. This argument does not come close to satisfying the Guinan standards, and the trial court's ruling was a correct application of the law.

On a related matter, the Appellant has not identified her untimely affidavit as an issue on appeal, but may attempt to incorporate it into her argument that further discovery should have been allowed. (R. 70-71.) In its Order Denying Plaintiff's Rule 59(e), SCRCP, Motion, dated August 16, 2013, the trial court ruled that the affidavit was not admissible subsequent to the hearing on the summary judgment motion for five separate and independent reasons: (1) it did not comply with Rule 56(f), SCRCP; (2) it was untimely pursuant to Rule 56(c), SCRCP; (3) Appellant's deposition transcript was already before the court so that her sworn testimony was already of record; (4) no motion for continuance was made at the summary judgment hearing to allow for an additional affidavit; (5) the proffered affidavit offered nothing of substance in addition to her deposition testimony, because if the affidavit contradicts her prior deposition testimony the affidavit should be disregarded, and because paragraph 5 of the affidavit contained inadmissible and unusable hearsay. (R. 7-10, section 2.)

Consequently, Appellant did not make a showing to the trial court that satisfied the

Rule 56(f), SCRCP, requirements or the requirements of Guinan, and the proffered affidavit cannot be used now in an effort to create an issue of fact.

2. **Appellant's appeal from the trial court's ruling on the hearsay contained in Appellant's proffered affidavit is legally insufficient to warrant a reversal because, even if the trial court's ruling was in error, the trial court's decision that the Appellant's affidavit was not admissible and was not proper for the trial court's consideration was based on more than the hearsay ground and no appeal has been taken from the additional grounds. (Appellant's Issue on Appeal No. 2.)**

In ruling that Appellant's proffered affidavit could not be considered by the Court in deciding the summary judgment motion, the trial court's Order expressed five separate grounds for the ruling, one of which was that paragraph 5 contained hearsay, leaving nothing else of substance. (R. 7-10, section 2.) The five grounds for the ruling with respect to Appellant's proffered affidavit were (1) it did not comply with Rule 56(f), SCRCP; (2) it was untimely pursuant to Rule 56(c), SCRCP; (3) Appellant's deposition transcript was already before the court so that her sworn testimony was already of record; (4) no motion for continuance was made at the summary judgment hearing to allow for an additional affidavit; and (5) the proffered affidavit offered nothing of substance in addition to her deposition testimony, because if the affidavit contradicts her prior deposition testimony the affidavit should be disregarded, and because paragraph 5 of the affidavit contained inadmissible and unusable hearsay. (R. 7-10, section 2.)

Appellant has only appealed the hearsay ground. In Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 80 (2d ed. 2002) it is explained that:

> "[i]t is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. . . [f]ailure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. . .[a]n unappealed order, right or wrong, is ordinarily the law of the case. . . where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." (Internal citations omitted.).

Consequently, the hearsay issue need not be reached for analysis or decision because the other unappealed grounds for disregarding the affidavit are now the law of the case. The proffered affidavit cannot be considered.

3. The doctrine of equitable estoppel does not avoid the operation of the Statute of Limitations in this case. (Appellant's Issue on Appeal No. 3.)

Appellant argues in her Brief (p. 10, l. 12-15) that she was induced into an untimely legal action by assurances made by her late husband - the decedent who is not a party to this case. The actual allegations are in paragraphs 30 and 31 of the Amended Complaint : "she [Appellant] demanded that, in fairness, her name be added to the said savings account and the other property held by him. .. [i]n response to such demand, Roy G. Critcher promised to add her name to the savings account and property held by him." (R. 19-33, ¶ 30 and 31.) She then further alleged that her name was added to the savings account by Mr. Critcher and a new will was executed that was represented to treat Appellant more fairly. Appellant alleged that she did not receive a deed that placed an interest in the Lake Wylie property in

her name. (R. 19-33, ¶ 31.)[4]

The elements of equitable estoppel are explained in Town of Kingstree v. Chapman, 405 S.C. 282, 747 S.E.2d 494 (Ct.App. 2013):

> The elements of equitable estoppel for " the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001). The elements as to the party estopped are: (1) conduct by the party estopped amounting to a false representation or concealment of material facts; (2) the intention such conduct be acted upon by the other party; and (3) actual or constructive knowledge of the true facts. Id. " The burden of proof is upon the party who asserts an estoppel." Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 122, 145 S.E.2d 922, 927 (1965).

A review of the relevant events:[5]

2008 Plaintiff thought her name was on the Wachovia savings account (account no. 3899), but learned in 2008 that her name was not on that account; it was titled solely in Roy Critcher's name. Plaintiff insisted, if not demanded, that Roy put her (Plaintiff's) name on the bank accounts. Plaintiff threatened Roy with divorce if he did not. (R. 111, l. 19 to p. 112, l. 19 and p. 114, l. 15 to p. 115, l. 4);

8-1-08 $41,000 was withdrawn from Wachovia acct. no. 3899. (R. 137, l. 9 to p. 139, l. 17; and R. 240.) On that date the only account owner on Wachovia's records was Roy G. Critcher. (Neither Plaintiff's nor Defendant Rhodes'

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[4] Note that Appellant did not ask, and no representation was made, that the alleged wrongful withdrawals would be returned to the account. The only demand was that Appellant's name be added to the account and to the title to the house.

[5] Cites are to Appellant's deposition transcript.

name was then on the account.) (R. 240 and p. 137, l. 13 to p. 138, l. 7). Plaintiff testified that she believes that Rhodes, as attorney-in-fact for Roy, made the August 1, 2008 withdrawal with Roy's knowledge and consent. (R. 138, l. 16 to p. 141, l. 4). This is the only specific transaction that Plaintiff could identify at her deposition as being an allegedly improper transaction that is the subject of her Amended Complaint. (R. 139 l. 2-17). (She admitted that a second transaction about which she alleged Rhodes had made an improper withdrawal was in fact a transaction that Plaintiff, herself, made. (R. 144, l. 12 to p. 147, l. 20). See the October 30 and 31, 2008 transactions described below.)

8-25-08 to 10-30-08 Sometime and somehow in this period, Plaintiff's name was added to acct. no. 3899 making her a joint account owner with Roy Critcher. (R. 141, l. 5 to p. 142, l. 4; and R. 240 and 242);

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10-31-08 Plaintiff opened a new account at Wachovia, acct. no. 8263, in the names of Roy and Eileen Critcher, and transferred the $2,500.93 from acct. no. 3899 to the new account. This closed acct. no. 3899. (R. 146, l. 9 to p. 147, l. 20; R. 246). Plaintiff's answers to interrogatories identified the $2,500.93 withdrawal as having been an improper withdrawal made by Defendant

Rhodes. Plaintiff admitted her mistake in her deposition. (R. 145, l. 1 to p. 147, l. 20.) **This left the $41,000 withdrawal on August 1, 2008 as the only transaction that Plaintiff could identify as the subject of her Amended Complaint involving Defendant Rhodes.** (R. 137, l. 9 to p. 139, l. 17; p. 143, l. 11-20). Although she testified that she has questions about other funds, she could not provide information about specific transactions that involved Rhodes, individually. (R. 143, l. 11-20; p. 150, l. 2-5);

7-15-09 Roy executed a Last Will and Testament that named Rhodes to serve as personal representative, and Defendant Akers as alternate personal representative, if needed; devised personal property and household effects to Plaintiff; required the personal representative to sell the residence and add all the net proceeds of sale to the rest and residue estate; and provided that the first $250,000 of the rest and residue estate be distributed to Roy's three children jointly and the balance be shared ½ to his surviving children and ½ to Plaintiff (R. 183-189);

1-11-10 Roy executed a First Codicil that changed the distribution provisions of his July 15, 2009 last will to now provide that after the residence is sold, the rest and residue estate be divided into two equal shares with one share to be distributed to Plaintiff and one share to be distributed jointly to Roy's children. The provisions of the 2010 codicil are more favorable to Plaintiff than the 2009 last will (R. 191-192);

9-1-10 Roy Critcher died. (R. 87, l. 19-20);

9-28-10 Roy Critcher's probate estate was opened and Rhodes was appointed as personal representative. (R. 87, l. 24 to p. 88, l. 4);

Next eight months Because the will and codicil devised more than ½ of the estate to Plaintiff, she did not file an elective share claim;

5-27-11 Plaintiff filed a claim against Roy's estate for "amounts converted from the Decedent and Claimant's funds by his Personal Representative during Decedent's lifetime" and for "fraud and misinformation supplied to the Creditor/Claimant [Plaintiff herein] by Decedent and /or his agents." (R. 194; p. 94, l. 6-13 and p. 16, l. 1-22);

1-20-12 By Order of the York County Probate Court, the Plaintiff's claim against Roy's estate was dismissed. The ground for the dismissal as to the estate was that the claim/Petition for Allowance of Claim was untimely and was time-barred. The claim, insofar as it alleged a claim against the Personal Representative, was dismissed because the claim alleged actionable conduct that occurred during the decedent's lifetime involving non-probate assets (R. 196-200); and

5-20-12 Plaintiff commenced the above-captioned action in circuit court by filing the original Summons and Complaint. (R. 126, l. 2-6; and p. 18).

Evidence presented to the trial court bearing on equitable estoppel.

The only evidence before the trial court that can be said to have come from the Appellant was her deposition transcript and her answers to Defendants' Interrogatories.[6] Her

[6] Each was submitted to the trial court by the Respondents and not by the Appellant.

Amended Complaint was not verified, and her proffered affidavit was rejected for various reasons explained in the Order Denying Rule 59(e), SCRCP, Motion. (R. 19-33; and p. 7-10.)

An examination of Appellant's evidence (not her lawyer's oral arguments to the trial court) reveals that Appellant did not offer evidence to the trial court on all elements of equitable estoppel. Summary judgment can be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

No showing of lack of means of knowledge.

Appellant did not show that she lacked the knowledge and **means of knowledge** of the truth as to facts in question with respect to having her name added to the accounts or to having her name added as owner of the home. In her own brief Appellant represents that she became aware in or about August, 2008 that the savings account was only in Mr. Critcher's name. (Appellant's Amended Initial Brief, p. 6, l. 2-3.) Appellant then demanded, under threat of divorce, that her name be added to the savings account and the other property held by Mr. Critcher. (Appellant's Amended Initial Brief, p. 6, l. 3-4.)Thereafter, her name was added to the savings account, and Mr. Critcher changed his last will to increase the devise left to Appellant. (Appellant's Amended Initial Brief, p. 6, l. 5-7; and R. 88, l. 7 to p. 91, l. 2.) The change to the last will gave Appellant a much larger interest in the estate

(greater than 50%), which included the value of house. (R. 183-189 and 191-192.)

Appellant admitted that her name was added to the savings account. No harm - no foul. Additionally, there is no evidence that Appellant ever inquired at the bank as to how the subject account was titled. There is no evidence that Appellant bothered to ask Mr. Critcher to confirm that he had taken steps to treat her more fairly with respect to the other assets. Before the events of 2008, Mr. Critcher had not misrepresented anything to the Appellant because there had been no representations at all about how assets were titled.

> Q. . . .what information, misinformation or fraud did Mr. Critcher personally practice on you.
> A. Well, he, he let me know nothing about what we had in the bank or nothing. I mean he took care of everything.
> Q. Okay.
> A. I trusted him to the fullest.
> Q. So, so your testimony is that he never told you anything . . .
> A. No.
> Q. . . . about the, about the nature of the bank accounts?
> A. No.
> Q. Did you ask him to tell you?
> A. No.
> . . .
> Q. Did he . . . did you ever go to him and say, Roy, tell me how much money is in these various bank accounts?
> A. No, I didn't. I trusted him.

(R. Appendix p. 1, l. 6- R. p.96, l. 10.)

There is no evidence that Appellant made demands of Mr. Critcher with respect to the content of his last will, but Appellant testified that she did demand that she receive a title interest in the marital home. Appellant admits that the last will was thereafter changed in a way that was more favorable to her, but apparently she does not recognize how the changed last will impacted the disposition of the marital residence.

Mr. Critcher's July 15, 2009 last will devised all of his personal property according

to his List of Gifts, a/k/a personal property memorandum, if any, and in default of such list, to the Appellant. There is no evidence that such a List of Gifts was ever executed or discovered. (R. 183-184, Article II.) The residence was required to be sold by the personal representative, and after payment of commissions and costs of sale, the first $250,000 was devised to his children who survive him, and the balance was devised to his children and to Appellant, with recognition of Appellant's elective share. (R. 184-185, Articles III and IV.) This estate plan provided only that Appellant would receive her one-third elective share.

On January 11, 2010, Mr. Critcher executed a First Codicil to his July 16, 2009 last will. The Codicil altered the rest and residue devise (the net proceeds from the sale of the home.) It did not affect the devise of the personal property to Appellant, but it devised a much larger share of the proceeds from the sale of the residence to the Appellant. (R. 191-192.) With Appellant to receive all of the personal property and one-half of the rest and residue, Appellant would receive more than her one-half intestate share, and much more than her elective share. Appellant would receive more than 50% of the estate assets (including one-half of the proceeds from the home), and Mr. Critcher's children would share the remainder of the estate assets. S.C. Code Ann. § 62-2-102.

There is no evidence that Appellant lacked the means to obtain information about the titling of assets or about Mr. Critcher's change to his last will. She apparently knew that her name had been added to the savings account. And, she knew that she had not received a deed to the marital home. Yet, there is no evidence that she asked Mr. Critcher about the status of title. The failure to inquire when there is no obstacle to making inquiry does not satisfy the lack of means of knowledge element for equitable estoppel. Michaels v. Travelers

Indem. Co., 683 N.Y.S.2d 640, 642 (1999) ("Plaintiff apparently made no inquiry of defendant to ascertain the status of his policy subsequent to his tender of the partial payment and, thus, cannot maintain that he lacked knowledge or the means of knowledge as to the facts in question"); Continental Ins. Co. v. Stewart & Stevenson Services, Inc., 306 S.W.2d 415, 424 (Tex.Civ.App. 1957) ("In this case no false representation was made nor was there any concealment of any material facts. The defendant had knowledge that a claim was being asserted by Stewart & Stevenson and **had the means of obtaining further information concerning the claim by simply making inquiry** of Stewart & Stevenson.") (emphasis added.)[7]

No showing of conduct amounting to false representation or concealment with respect to the withdrawn funds.

Likewise, there is no evidence that Mr. Critcher's conduct, or Respondent Rhodes' conduct, constituted a misrepresentation or concealment. Mr. Critcher added Appellant's name to the savings account, and he altered his estate plan by executing a codicil that devised more than one-half of his estate (including the sales proceeds of the home) to Appellant. His conduct, according to the evidence, was that he did what was asked of him.

With respect to Respondent Rhodes' conduct, it is important to recognize that Roy Critcher, the person whose assurance is the basis of Appellant's claim, is not the Defendant against whom equitable estoppel is now being asserted. Appellant is trying to assert equitable estoppel against Respondent Rhodes because of an alleged assurance given by a

[7] Notwithstanding Appellant's demands and threat of divorce, Appellant and Mr. Critcher continued to live together as husband and wife until Mr. Critcher's death in September 2010. (R. 87, l. 19-23.)

third person who is not a party to the action, namely Mr. Critcher. There is no evidence that Respondent Rhodes made any assurance or representation to Appellant that worked an inducement on Appellant to delay commencement of the action against Respondent Rhodes. Appellant now complains about the alleged improper withdrawal of funds, but at the time in question, late 2008, Appellant's demands to Mr. Critcher were not about the withdrawals but rather about having Appellant's name added to the title of assets.

The alleged improper withdrawal about which Appellant has sued Respondent Rhodes is therefore distinct from the demands made on Mr. Critcher which form the basis of the equitable estoppel argument. There is no evidence, or allegation, that a demand was made on Mr. Critcher to return funds alleged to have been improperly withdrawn by Mr. Critcher or by Respondent Rhodes as agent for Mr. Critcher, and there is no evidence that Mr. Critcher made any representation, by speech or conduct, that the funds would be returned. What the evidence does show is that Appellant now seeks to have Respondent Rhodes (not Mr. Critcher) return money that Appellant knew on October 30, 2008 was missing.

> Q. So as of October 30, 2008, you knew that money you thought should have been in that account was not there.
> A. Right.

(R. 154, l. 22-25.)

Consequently, equitable estoppel cannot serve as a basis to prevent Respondent Rhodes from asserting the three-year statute of limitations in defense of the action commenced against her (not Mr. Critcher) for alleged wrongful withdrawals from a joint account.

4. Appellant's argument with respect to the doctrine of nonstatutory equitable tolling of the Statute of Limitations is not preserved for appellate review because it was not presented to and decided by the trial court. (Appellant's Issue on Appeal No. 4.)

The only argument Appellant made to the trial court with respect to tolling the Statute of Limitations was that statutory tolling, S.C. Code Ann. § 15-3-30, tolled the running of the limitations period because Respondent Rhodes is a resident of Virginia. Section 15-3-30 reads:

> If when a cause of action shall accrue against any person he shall be out of the State, such action may be commenced within the terms in this chapter respectively limited after the return of such person into this State. And if, after such cause of action shall have accrued, such person shall depart from and reside out of this State or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

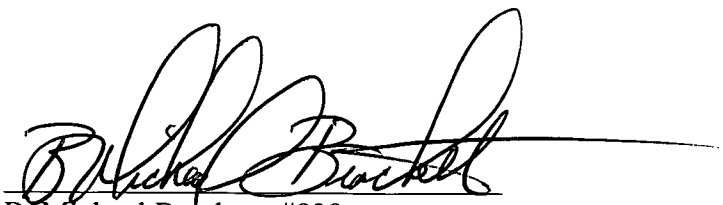
Appellant offered the case of Francis v. Mauldin, 215 S.C. 374, 55 S.E.2d 337 (1949), as supporting precedent for the argument. (R. 277, l. 8 to p. 279, l. 15; p. 284, l. 7 to p. 286, l. 4.) Appellant's counsel admitted that at all times relevant to this action Respondent Rhodes was a resident of Virginia. (R. 285, l. 7-14.) In its Summary Judgment Order, the trial court addressed only statutory tolling, namely the operation of S.C. Code Ann. § 15-3-30, on the question of tolling the Statute of Limitations. (R. 5, l. 9-15.) Nonstatutory equitable tolling was not addressed in the Order because it had not been presented to the trial court previously.

In Appellant's Rule 59(e), SCRCP, motion, nonstatutory equitable tolling was not raised. (R. 66-69.) In Ground no. 1 of the motion, Appellant argued that the Statute of Limitations began to run after the date found by the trial court and that the Probate Code,

specifically S. C. Code Ann. 62-3-802(B), tolled the running of the Statute for eight months for claims against the Decedent and that the case of Garrett v. Weinberg, 48 S.C. 28, 26 S.E. 3 (1896) caused the tolling as to the Decedent to apply to non-Decedent co-Defendants. These arguments were not made at the summary judgment hearing and could not be raised for the first time in a Rule 59(e), SCRCP, motion. The trial court so held, relying on Gartside v. Gartside, 383 S.C. 35, 682 S.E.2d 621 (Ct.App. 2009). (R. 7, l. 21 to p. 8, l. 22.) The trial court's rulings on these issues have not been appealed herein. And, Appellant has not appealed the trial court's ruling with respect to the operation, or non-operation, of S.C. Code Ann. § 15-3-30 in this case.

CONCLUSION

For the foregoing reasons, the trial court's Order granting Respondents' Motion for Summary Judgment and the trial court's Order Denying Appellant's Rule 59(e), SCRCP, Motion, should be affirmed.



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June 30, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
JUN 30 2014
SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-46-02008

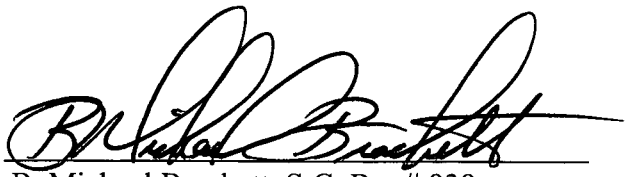
Eileen Critcher, ... Appellant,

v.

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

RULE 211(a)
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Respondents' Final Brief complies with Rule 211(b), SCACR.



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