

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED

JUN 27 2013

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

S.C. Supreme Court

Larry B. Hyman, Jr., Circuit Court Judge  
Case No. 2010-CP-26-4112

Elisa Narruhn.....Respondent

v.

Alea London Limited and Anderson  
General Insurance.....Defendants

Of whom, Alea London Limited is.....Petitioner

---

**Alea London Limited’s Petition for  
Rehearing Pursuant to Rule 221(a), SCACR**

---

Alea London Limited (“Alea”) hereby petitions this Court pursuant to Rule 221(a), SCACR, for rehearing of the matter decided by Opinion No. 27270 issued June 12, 2013 (“Opinion”). The basis of this Petition is that the Court, in ruling that Alea did not have standing under Rule 60(b), overlooked and misapprehended the fact that Alea had constitutional standing to challenge the Special Referee’s order. The circuit court held that (1) Alea’s Rule 60(b) motion was untimely, (2) that it did not have authority to rule on Alea’s Rule 60(b) motion, and (3) that Alea did not have standing under Rule 60(b). In the Opinion, this Court reversed the circuit court as to grounds (1) and (2), but affirmed the circuit court’s finding that Alea did not have standing. This affirmance is in error.

The Court’s statement that Alea has “retained all of its defenses and rights under the insurance contract” has no bearing upon the subject petition. As discussed below, the central

issue of constitutional standing is that Alea was injured from the deprivation of its right to procedural due process. The Court's acknowledgement that Alea has retained its defenses does not change the fact that it was deprived of its right to procedural due process. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978) (noting that analysis of procedural due process "does not depend upon the merits of a claimant's substantive assertions").

Alea is a real party in interest, thus it is axiomatic that it had standing in the supplementary proceedings because a ruling in that venue could affect its rights. "A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action." *Anchor Point, Inc. v. Shoals*, 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992). Section 15-39-350 of the South Carolina Code of Laws recognizes the fact that Alea had standing by providing that the Special Referee had the authority to require Alea to appear or require Respondent's counsel to provide notice to Alea.<sup>1</sup> Had Alea been required to appear by the Special Referee or provided notice by Respondent's counsel, it could have made an appearance as a real party in interest and its standing would not have been questioned. The fact that the Special Referee did not require Alea to appear or that Respondent's counsel did not provide notice to Alea cannot deprive Alea of standing to file a Rule 60(b) motion. Nonetheless, that is the practical impact of this Court's opinion. This cannot be the law.

---

<sup>1</sup> S.C. Code Ann. § 15-39-350 provides:

After the issuing or return of an execution against property of the judgment debtor or of any one of several debtors in the same judgment and upon an affidavit that any person or corporation has property of such judgment debtor or is indebted to him in any amount exceeding ten dollars, the judge may by an order require such person or corporation, or any officer or member thereof, to appear at a specified time and place and answer concerning such property or indebtedness. The judge may also, in his discretion, require notice of such proceeding to be given to any party to the action in such manner as may seem to him proper.

This holding will have far reaching, unintended consequences. The failure to provide Alea notice by the Special Referee or Respondent's counsel, if sanctioned by this Court, could become a pattern by which indebted individuals and entities, not just insurance companies, are deprived of their rights to be heard in supplementary proceedings in which their assets are subjected to a judgment holder's reach. The unintended consequences of this Court's Opinion are significant. For the reasons stated below, Alea respectfully submits that this Court misapprehended the law applicable to this case and should grant this Petition for Rehearing.

#### **I. ALEA HAS CONSTITUTIONAL STANDING<sup>2</sup>**

The circuit court held that, "Alea . . . is not a party to the Order it seeks to overturn and thus does not have standing to ask the Court for relief." The undisputed fact is that Alea was not a party to the supplementary proceedings.<sup>3</sup> This is not Alea's fault, but rather that of the Special Referee and Respondent's counsel because neither provided it notice. Nonetheless, Alea had constitutional standing to file a Rule 60(b) motion and need not have been a party in the supplementary proceedings to do so. This Court misapprehended the substance of Petitioner's argument and overlooked the law concerning constitutional standing and facts relevant to determining if a party has such standing. In South Carolina, standing may exist by (1) statute,

---

<sup>2</sup> This issue is preserved and properly before this Court. By filing the motion in the circuit court, Alea asserted that it had standing to seek the requested relief. The circuit court based its ruling, in part, on standing. Alea challenged that ruling throughout its briefing before this Court, citing the principles of constitutional standing. Respondent challenged Alea's standing in her responsive brief. Alea responded to that challenge in its reply brief. Finally, this Court ruled against Alea solely on the issue of standing. The issue of Alea's standing is properly before this Court.

<sup>3</sup> If Alea had been a party – or otherwise had notice and an opportunity to be heard – there would have been no violation of its right to Due Process and the motion and this appeal would never have been initiated. Of course, for the purposes of Rule 60(b)'s "party" requirement, Alea is a captioned party to the case wherein the Rule 60(b) Motion was filed. Also, and as further argued herein, Alea is a real party in interest to the Special Referee's Order.

(2) the public policy exception, or (3) the principles of constitutional standing. See *Youngblood v. South Carolina Dept. of Social Services*, 402 S.C. 311, \_\_\_, 741 S.E.2d 515, 518 (2013). In this appeal, Alea argues that it filed its Rule 60(b) motion pursuant to constitutional standing, not standing based in statute or public policy.

This Court has held that a party has constitutional standing if it establishes the following three elements:

To possess constitutional standing, first, a party must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992)). Second, a causal connection must exist between the injury and the challenged conduct. *Id.* Finally, it must be likely that a favorable decision will redress the injury. *Id.*

*Youngblood*, 741 S.E.2d at 518. As recognized by this Court, the requirements for constitutional standing in South Carolina mirror those established by the Supreme Court of the United States.<sup>4</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992).

The principles of constitutional standing are determined by the facts of each case. In this case, Alea presented evidence to the circuit court and to this Court that was sufficient to establish that Alea had constitutional standing to file its Rule 60(b) motion. The Court's decision to

---

<sup>4</sup> According to the Supreme Court of the United States:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted).

affirm the circuit court's finding that Alea lacked standing under Rule 60(b) misapprehends the fact that Alea has satisfied each of the three elements required to establish constitutional standing.

**A. Alea has suffered an injury-in-fact which was a concrete, particularized, and actual or imminent invasion of a legally protected interest.**

First, Alea "suffered an injury-in-fact which [was] a concrete, particularized, and actual or imminent invasion of a legally protected interest." *Youngblood*, 741 S.E.2d at 518. Alea was injured by the Special Referee's impairment of its contractual rights without notice and an opportunity to be heard. See Brief at 11-16, 20-21. As the Supreme Court of the United States has held, the right to procedural due process is "'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions." *Carey v. Piphus*, 435 U.S. at 266 (1978). This Court has likewise held that, "[t]he fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (internal citation omitted). In this case, Alea was not provided the fundamental elements of due process, and this Court's present ruling insures that it never will.

**B. There is a causal connection between Alea's injury and the challenged conduct.**

The second factor a party must satisfy in order to establish that it has constitutional standing is that there must be a "causal connection [between] the injury and the challenged conduct." *Youngblood*, 741 S.E.2d at 518. As described above, Alea was injured by not receiving notice and the opportunity to be heard before the Special Referee entered an order impairing Alea's contract rights. The challenged conduct is the Special Referee's and

Respondent's counsel's failure to provide notice of a hearing affecting Alea's rights.<sup>5</sup> There is a causal link between the injury and the challenged conduct because the impairment of Alea's contract rights without notice and the opportunity to be heard arose from the Special Referee's and Respondent's counsel's failure to provide notice. These causal relations are extensively detailed in Petitioner's Brief. See, pp. 3, 8, 10, 12, 13, 15, 17, 19, 20, 21, 22, 23. The issue was also addressed to the circuit court, as reflected in the Record. R. 188-190, 194, 279-280, 283.

**C. A favorable decision by the circuit court would have provided redress for the injuries that Alea has suffered.**

Finally, the third requirement for constitutional standing is that a party must show that a "favorable decision will redress the injury." *Youngblood*, 741 S.E.2d at 518. A favorable ruling on Alea's Rule 60(b) motion would redress its injury because it would receive notice and opportunity to be heard on the question of whether an insured's rights under a contract, if any, could be assigned to Respondent. Recognition by this Court that Alea has constitutional standing will afford it these basic rights.

**II. THE COURT'S ANALYSIS CONCERNING THE ASSIGNABILITY PROVISIONS OF THE CONTRACT IS AN ADVISORY OPINION AND SHOULD BE WITHDRAWN**

Alea was a real party in interest and therefore had constitutional standing to challenge the Special Referee's order assigning RKC's rights to Respondent. As a real party in interest, Alea had standing to pursue a Rule 60(b) motion to set aside the Special Referee's order. In this

---

<sup>5</sup> Alea recognizes that S.C. Code Ann. § 15-39-350 provides that a Special Referee may require an indebted party to appear or that it be given notice of a hearing "in such manner as may seem to him proper." This Court could deem that this grant of discretion is a violation of due process. However, Alea recognizes that "statutes are to be construed in favor of constitutionality, and the court will presume a legislative act is constitutionally valid unless a clear showing to the contrary is made." *Harkins v. Greenville County*, 340 S.C. 606, 620, 533 S.E.2d 886, 895 (2000); quoting *Bradley v. Hullander*, 277 S.C. 327, 330, 287 S.E.2d 140, 141 (1982). Thus, Alea suggests that such discretion is not – in and of itself – a violation of due process, but that the failure to provide notice was a violation of due process under the facts of this case.

Court's discussion of Alea's standing it intimated that the Special Referee's assignment could be effective without Alea's consent. The Court's discussion of consent appears to flow from the premise that Alea could not have been injured by the Special Referee's order because it had no say to begin with. That premise rests upon a misconception of injury. As the Supreme Court of the United States noted, the requirement of procedural due process is "'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions." *Carey*, 435 U.S. at 266. "[T]he importance to organized society that procedural due process be observed [means that] the denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Id.*

Because it misapprehended the law and failed to recognize that Alea had constitutional standing, this Court undertook an analysis of the law of assignability. The transfer provision of the policy did not pertain to the issues of timeliness, authority or standing. Accordingly, it was not necessary to the Court's decision. For that reason it is an advisory opinion and should be withdrawn. The prohibition against advisory opinions is a long-standing principle of this Court. *See Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975) ("It is elementary that the courts of this State have no jurisdiction to issue advisory opinions."); *In re Chance*, 277 S.C. 161, 161, 284 S.E.2d 231, 231 (1981) (noting South Carolina appellate courts have "consistently refrained" from issuing purely advisory opinions).

The Court's assignability analysis presents a risk of prejudice to Alea. The Court noted that an "argument [regarding the assignment of rights] is not properly before this Court since the circuit court denied the motion for reasons related to timeliness, authority and standing." *Narruhn v. Alea London Limited*, Op. No. 27270 (S.C. Sup. Ct. filed June 12, 2013) (Shearouse Adv. Sh. No. 26 at 103). Nonetheless, this Court's discussion could prejudice Alea. The issue of

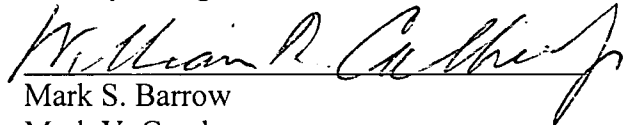
whether an insurance policy effectively limits the transfer of rights arising under it is one that deserves and requires full adversarial litigation, briefing, and review. This is true because a court must consider and determine: (1) What happens to the insured's contractual duties? (2) When may those duties be transferred? (3) Whether such a transfer increases the insured's risk? 4) Who pays the premium if the coverage continues? For these reasons, an advisory opinion from this Court is improper and has the definite potential to prejudice Alea.

### CONCLUSION

This Court should rehear *Narruhn v. Alea London Limited*. Alea has established the requirements for constitutional standing. It suffered an injury, there is a causal connection between that injury and the challenged conduct, and a favorable ruling on Alea's Rule 60(b) motion will redress its injury. Furthermore, this Court's opinion as to the assignability of rights under the insurance contract violates the prohibition against advisory opinion and should be withdrawn.

Respectfully submitted,

Sweeny, Wingate & Barrow, P.A.



Mark S. Barrow  
Mark V. Gende  
William R. Calhoun, Jr.  
1515 Lady Street  
Post Office Box 12129  
Columbia, South Carolina 29211  
(803) 256-2233

June 27, 2013

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

In the Supreme Court

RECEIVED

JUN 27 2013

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

S.C. Supreme Court

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2010-CP-26-4112

Elisa Narruhn.....Respondent

v.

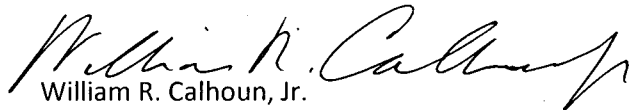
Alea London Limited and Anderson General Insurance.....Defendants

Of whom, Alea London Limited is.....Petitioner

**PROOF OF SERVICE .**

I certify that I have served the Petition for Rehearing of Alea London Limited on Elisa Narruhn by depositing a copy of it in the United States Mail, postage prepaid, on June 27, 2013, addressed to her attorney of record, Gene M. Connell, Jr.; KELAHER, CONNELL & CONNOR, P.C.; Post Office Drawer 14547; Surfside Beach, S.C. 29587-4547. Defendant Anderson General Insurance was served on the same day by mailing it, postage prepaid, to its attorney of record, Susan Taylor Wall; McNair Law Firm, P.A.; Post Office Box 1431, Charleston, S.C. 29402.

June 27, 2013



William R. Calhoun, Jr.  
Sweeny Wingate & Barrow, P.A.  
Post Office Box 12129  
Columbia, S.C. 29211  
(803) 256-2233  
Attorney for Petitioner