

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-000175
Circuit Case No. 2012-CP-10-1332

Betty Fisher, as Real Representative
for Alice Shaw-Baker.....Appellant

v.

Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd, and Peter Kouten, and Does 1 through 100, Defendants

Of whom Bessie Huckabee, Kay Passailague Slade, Sandra Byrd,
and Peter KoutenRespondents

INITIAL BRIEF OF APPELLANT

RECEIVED

MAY 27 2014

SC Court of Appeals

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I.

STATEMENT OF ISSUES ON APPEAL

1. WHETHER SOUTH CAROLINA'S PUBLIC POLICY REGARDING PROTECTION OF THE ELDERLY ESTABLISHES THIRD PARTY STANDING FOR APPELLANT.
2. WHETHER THE CIRCUIT COURT ERRED IN RULING THAT APPELLANT LACKED STANDING TO PURSUE DECEDENT'S SURVIVAL ACTIONS, WHEN CASE LAW AND ESTABLISHED EQUITABLE PRINCIPLES RELATING TO TRUST LAW AUTHORIZES A BENEFICIARY TO COMMENCE AN ACTION AS "TEMPORARY REPRESENTATIVE" FOR THE BENEFIT OF THE ESTATE.
3. WHETHER THE CIRCUIT COURT ERRED IN RULING THAT APPELLANT LACKED STANDING TO PURSUE DECEDENT'S SURVIVAL ACTIONS, DESPITE STATUTORY PROVISION IN SOUTH CAROLINA CODE ANN. § 15-5-90(1976) ALLOWING A "REAL REPRESENTATIVE" TO PURSUE A DECEDENT'S SURVIVAL ACTION.
4. WHETHER THE CIRCUIT COURT IMPROPERLY CONSIDERED THE MOTION FOR SUMMARY JUDGMENT AS TO RESPONDENT PETER KOUTEN, WHEN HE DID NOT IDENTIFY HIMSELF AS A PARTY IN THE

PLEADINGS AND DID NOT ADDRESS ANY ARGUMENTS INDIVIDUALLY.

5. WHETHER THE CIRCUIT COURT ERRED BY GRANTING SUMMARY JUDGMENT AS TO RESPONDENTS BESSIE HUCKABEE, KAY PASSAILAGUE SLADE, AND SANDRA BYRD, WHEN GENUINE ISSUES OF MATERIAL FACT EXISTED AS DEMONSTRATED BY APPELLANT'S EXPERT WITNESS DECLARATIONS AND LAY WITNESS DECLARATIONS.

6. WHETHER THE CIRCUIT COURT ERRED BY ALLOWING PETER KOUTEN TO ACT AS COUNSEL FOR BESSIE HUCKABEE, KAY PASSAILAGUE, AND SANDRA BYRD, WHEN HE WAS PREVIOUSLY COURT APPOINTED ATTORNEY/GUARDIAN AD LITEM FOR THE DECEDENT.

7. WHETHER THE CIRCUIT COURT ERRED IN CONSIDERING COUNSEL PETER KOUTEN'S ARGUMENT AS FACTUAL CONTENTIONS, WITHOUT RULING ON APPELLANT'S OBJECTIONS.

II.
STATEMENT OF THE CASE

"The old proverb that a man's home is his castle embodies a rich heritage of truth. All things in it or about it are as fine gold to them that dwell there. It is their palace to their friends, their refuge from toil and unkind foes. There they commune with the thoughts of the wise and virtuous, thrill under the spell of music, enjoy laughter and love. He who maliciously aims and attempts to destroy the peace and recreative value of a home robs its inmates of immeasurable riches and does an inestimable damage."¹

Alice Shaw-Baker died on February 25, 2009.

Thereafter, her home, her life's works, and those mementoes that she held dear became subject of litigation in both a Will Contest and this Survival action in the circuit court. In this action, Appellant Betty Fisher, Alice Shaw Baker's niece, sued Respondents Bessie Huckabee, Kay Passailague Slade, Sandra Byrd, and Attorney Peter Kouten (Hereinafter "Respondents") for alleged wrongdoing to Ms. Shaw Barker during her life.

Appellant brought this underlying action after discovering the "inestimable damage" that her aunt, Alice Shaw-Baker, suffered during the last years of her life as alleged in the Verified Complaint against Respondents. Said complaint included causes of actions for 1) Violation of Omnibus Adult Protection Act pursuant to S.C. Ann. Code § 43-35-5 et seq. ; 2) Breach of Fiduciary Duty; 3) Legal Malpractice; and for 4) Attorney

¹ See *Griffin v. Northridge*, 67 Cal.App.2d 69 (1944). While there is no comparable legal authority under South Carolina law, the principles set forth in the statutory scheme for Vulnerable Adults under the Omnibus Adult Protection Act, South Carolina Ann. Code § 43-35-5 et seq. demonstrates a commitment toward the Elderly in both the judicial and legislative setting. As argued herein, Appellant contends that it supports a private cause of action for recovery of damages to Alice Shaw-Baker. (See also, U.S. Const. Amends. IV and XIV, § 1 and S.C. Const. Art. I, § 3.)

Fees and Costs. ("Complaint") (R.____) The Complaint was filed on February 24, 2012-one day before the action would be barred by the Statute of Limitations.²

To preserve these causes of action, Appellant Betty Fisher ("Appellant") brought this survival action for Alice Shaw-Baker under South Carolina Ann. Code § 15-5-90 as "real representative" and based on her standing as an "heir at law."³ In addition to statutory authority, there is well established precedent concerning Appellant's standing to pursue the action as a "temporary representative" under equitable principles.

Other issues which impacted the briefing of this matter in the circuit court included analysis of the Public policy basis for permitting third parties to assert claims for Vulnerable Adults and/or decedents; Respondent Peter Kouten's waiver of the standing issue due to his failure to identify himself in these proceedings; the failure of the court to recognize Expert Opinion and Lay Evidence existed as to the alleged wrongdoing by Respondents to Alice Shaw Baker; Allowing Respondent Peter Kouten to Act as Counsel for the other Respondents when he had a non-waiveable adverse interest due to his prior appointment as Court Appointed Counsel and Guardian ad litem for the decedent Alice

² See November 28, 2012 transcript, R._____, p. 15, l. 20-25.

³ See *Duke, et al. v. Postal Telegraph Cable Co.*, 71 S. C. 95, 50 S.E. 675, 676 (1905).

Appellant is also petitioner in a Will Contest action entitled *In the Matter of Alice Shaw Baker Estate, Betty Fisher et al. v. Bessie Huckabee et al.*, case no. 2009-CP-10-3010. (R.____) This separate action seeks to remove the personal representative, Respondent Bessie Huckabee, and additional claims against Respondents Kay Passailague Slade and Sandra Byrd to recover Alice Shaw Baker's estate for the benefit of animal charities. This "Probate Action" continues to be prosecuted, however there have been several motions and previous Appellate review. Final determination of the issues in the probate action have not been decided.

Shaw Baker; and consideration of Argument as evidence during the circuit court without ruling on Appellant's objections.

On January 22, 2014, Appellant timely filed her notice of appeal seeking reversal of all *Orders Granting Summary Judgment*, including the final Order affirming prior order granting summary judgment in favor of defendant dated December 18, 2013. (R. ___)

If the circuit court's decision stands, the "immeasurable riches" of Alice Shaw Baker, including her hard work and charitable works in South Carolina, will be lost, as the Statute of Limitations has run. Therefore, the Estate of Alice Shaw Baker will not be able to recover for the harm that Alice Shaw Baker suffered during her lifetime. As the law is set forth herein, this result is neither correct nor justified by the facts and law of this case.

III. STATEMENT OF FACTS

a. Background Facts

Alice Shaw Baker had long been an important member of South Carolina's community. She was a member in good standing of her church. She volunteered her time rescuing animals. She had devoted her life to caring for animals and supporting animal charities. (R. ___)

She was born August 14, 1929 in San Francisco, California. Ms. Shaw-Baker was enlisted in the United States Navy for four years and, during her enlistment, stationed in Charleston, South Carolina.

Thereafter, Appellant alleges that Ms. Shaw-Baker worked for Charleston Memorial Hospital for approximately twenty years until her retirement. Appellant contends that Respondents Huckabee, Slade, and Byrd worked for Ms. Shaw Baker at

Charleston Memorial Hospital, and used their working relationship with Ms. Shaw Baker to gain information about her private life, her finances, and her estate plan. Furthermore, Respondents used this information to gain control over Ms. Shaw Baker's mind and her will, and to interfere with the known estate plan that Ms. Shaw Baker had established for the benefit and protection of animals.

As alleged in the Verified Complaint, Respondents Huckabee, Slade, and Byrd told Ms. Shaw Baker that they would help her when she was older, make sure she could stay home, and make sure that her health, personal and financial decisions were properly addressed. Also, Appellant alleged that Respondents falsely claimed that Slade owned an animal rescue in their effort to deceive Ms. Shaw Baker.

However, when that time came, they refused to help her. She was allowed to deteriorate and live in substandard conditions. They refused to call family and interfered with her medical treatment all leading to her early demise. Appellant contends that these actions constituted abandonment, neglect and led to unnecessary and unhealthy isolation.

It also promoted the involvement of the State and the filing of a conservatorship proceeding against Ms. Shaw Baker. (Conservatorship of Alice Shaw Baker, Case no. 2008-GC-10-088 ("Conservatorship case") .)

During these proceedings, the probate court appointed Respondent Attorney Peter Kouten as *Court Appointed Counsel*, Guardian Ad litem, and visitor to Alice Shaw Baker. However, Ms. Shaw Baker agreed to the appointment of her great niece as conservator/guardian in October 2008.

Thereafter, Appellant alleges that she discovered that Respondent Kouten dually represented the other Respondents while Alice Shaw Baker was still alive and at her

home, **and not merely after her death.** These actions are alleged to be in violation of Rules of Professional Conduct and were actions that were adverse to the wishes of Ms. Shaw Baker.

b. Procedural History

On or about February 24, 2012, Appellant filed a Complaint as real representative on behalf of Alice Shaw Baker. (R. ___)

Respondents ⁴ filed a *Motion for Summary Judgment and Dismissal of Action* on or about July 16, 2012. The grounds were: 1) that the claims were the same as under the Probate Action; 2) that Appellant failed to state a claim upon which relief can be granted; and 3) that Appellant had not "obtain[ed] a favorable determination" that she has standing. (R. ___) Appellant contends that Respondents modified these grounds to include "lack of jurisdiction, authority and standing to sue on behalf of the decedent." (R. ___) Thereafter, the court granted summary judgment on behalf of Respondents.

Respondent Kouten filed said motion as attorney for Respondents Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd. The *Motion for Summary Judgment* did not address the Legal Malpractice cause of action against Respondent Kouten, nor did it indicate that he was filing the motion on his own behalf. (R. ___)

In response, Appellant filed a Motion to Disqualify and Remove Opposing Counsel Peter Kouten due to Non-Waiveable Conflict of Interest on August 1, 2012. (R. ___)

⁴ These parties filed the motion as Respondents, instead of Defendants. The motion failed to reference *any* of the Respondents names in the motion, although Respondents Huckabee, Slade, and Byrd signed verifications. Respondent Kouten signed as *Attorney for Respondents*. (See R. ___) As set forth herein, Appellant continues to contest Respondent Peter Kouten's status as a party in the motion. (See below, § IV (d).)

____) Said Motion was based on Respondent Kouten's prior representation of the decedent Alice Shaw Baker in the Probate Court, Conservatorship matter.⁵

Appellant also filed a Return, Objection and Opposition by Plaintiff Betty Fisher, as Real Representative for Alice Shaw-Baker to Motion for Summary Judgment, and Dismissal of Action; Memorandum of Law ; Affidavits in Support filed Concurrently on November 26, 2012. ("Return") (R. ____) These documents included an Affidavit of Lisa Fisher Esquire with attached exhibits verifying the factual statements in the Return. (R. ____); Affidavit of Expert David Kessler and attached his Resume/CV. Said testimony outlined wrongdoing by Respondents (R. ____); Affidavit of Candace Rickborn also verified factual allegations supporting Appellant's claims (R. ____); and addressing the allegations of Legal Malpractice, Attorney Expert Mark W Hardee executed an affidavit with his attached CV filed in support of Appellant's Return. (R. ____)

On or about November 28, 2012, Respondents filed a Memorandum Supporting Summary Judgment and Dismissal and Opposing Disqualification and Removal of counsel. (R. ____)⁶

Appellant filed her Supplemental Memorandum in Opposition to the Motion for Summary Judgment and Dismissal of Action on December 7, 2012. (R. ____)

A Supplemental Memorandum Supporting Motion for Summary Judgment and Dismissal of Action was filed by Respondent Kouten on December 20, 2012. (R. ____)

⁵ Appellant brought this matter to this Court's attention in the prior appeal related to the underlying Will Contest matter, Case no. 2009-CP-10-3010.

⁶ Appellant filed objections to the procedurally deficient *Notice of Appearance* of Counsel W. Westbrook Wills. He filed no pleadings and did not argue at any of the hearings. (R. ____)

To preserve Appellant's rights, obtain the rationale of the Circuit Court, and avoid waiver, Appellant filed a Motion to Alter, Amend, Reconsider and Vacate Order of May 8, 2013. (R. ____; see *October 8, 2013 transcript* , R. ____, p. 5, 6) In support of that Motion, Counsel John Hughes Cooper filed Appellant's expert and lay affidavits and the same Exhibits supporting the original Return.⁷ The court amended the original order of May 8, 2013 on September 3, 2013 to correct a clerical error ending the probate action. ®. ____)

On October 18, 2013, Appellant filed a Supplemental Brief re: Motion by [Appellant] Betty Fisher to Alter, Amend, Reconsider and Vacate Order of May 8, 2013; Memorandum; Affidavit of John Hughes Cooper. (R. ____)

Respondent Kouten filed his Supplemental Memorandum Denying [Appellant's] Motion reconsidering summary judgement filed on October 22, 2013. (R. ____)

Another briefing was filed by Appellant regarding the Late Filed Memorandum of Respondent Kouten and Substitution of Counsel on October 29, 2013. (R. ____)

On December 18, 2013, the circuit court issued its Form 4 Judgment in a Civil Case and Order Affirming Prior Order Granting Summary Judgment in favor of Defendant dated December 18, 2013. (R. ____)

The timely filed Notice of Appeal was filed and served on January 22, 2014. (R. ____)

⁷ For judicial economy, as part of the record, Appellant files only one set of the original exhibits.

c. Final Ruling and Order

"Plaintiff's Motion to Reconsider filed on May 28, 2013 came before the Court on October 8, 2013. Plaintiff was represented by Lisa Fisher and John Hughes Cooper. Defendant was represented by Peter A. Kouten. Plaintiff asked the Court to reconsider its order of May 8, 2013, in which it granted summary judgment in favor of Defendants. Upon further review of the matter, Plaintiff's Motion to Reconsider is DENIED and the Court's order of May 8, 2013, is REINSTATED and Defendant's motion for summary judgment in GRANTED in favor of the Defendants.

FINDINGS OF FACT

1. Alice Shaw Baker ("decedent") died on February 25, 2013.
2. An estate was opened in the Charleston County Probate Court within thirty days of her date of death.
3. Plaintiffs delivered the Last Will and Testament to the Charleston County Probate Court and the personal representative was nominated pursuant to the Last Will and Testament and appointed.⁸
4. Plaintiffs filed a will contest of the Last Will and Testament and sought removal of the Personal Representative in a complaint filed on April 27, 2009.
5. Plaintiff filed the current action on February 24, 2012, under the Charleston County Circuit Court file number 2012-CP-10-1332.

CONCLUSIONS OF LAW

"Summary judgment is only appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. The evidence and inferences drawn therefrom should be viewed in the light most favorable to the non-moving party." *Southern Contracting, Inc. v. H.C. Brown Construction Co, Inc.*, 317 S.C. 95, 450 S.E. 2d 601(Ct. App. 1994)

[¶]The Court's prior order granted summary judgement on the basis that Plaintiff lacked standing to sue on behalf of the decedent in the current action. Plaintiff argues that as a beneficiary of the decedent's estate, she is a "real representative" pursuant to South Carolina Code Annotated Section 15-5-90, which states:

⁸ Appellant contests the facts as set forth in the Order. She further contends that the informal appointment of Respondent Huckabee was based on a "revoked" Will and without proper notice in violation of Due Process and Equal Protection. Further, the Will contest seeks removal of Respondent Huckabee. Moreover, Appellant objected at the hearing to the rendition of "facts", which was merely argument by counsel which will not support this order. (See *Gilmore v. Ivy*, 290 S.C. 53, 348 S.E.2d 180 (1986) .)

[¶] Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.

[¶] Furthermore, the Plaintiff argues that she is deemed a "real representative" based on her interpretation of a 1905 South Carolina Supreme Court case which states "causes of action for and in respect to any and all injuries and trespasses, to and upon real estate, shall survive both to and against the personal or real representative (as the case may be) of deceased persons, ' etc. The heirs at law are the real representatives." *Duke, et al. v. Postal Telegraph Cable Co.*, 71 S.C. 95, 50 S.E. 675, 676 (1905).

[¶] Plaintiff argues that she is able to bring an action under Section 15-5-90 against the Defendants because she is a real representative of the decedent's estate, rather than a personal representative, because she is a beneficiary of the decedent's estate. The Court disagrees with Plaintiff's interpretation of a real representative. Historically, a real representative was able to bring actions "in respect to injuries and trespasses to and upon *real estate*." *Duke*, 50 S.E. at 676 (emphasis added). The Court finds that a real representative is unable to bring an action on behalf of the decedent for injuries to the person or to personal property; rather, such action must be taken through the personal representative of the estate. Though the Court is sympathetic to Plaintiff because it understands that a personal representative will not sue itself, the Plaintiff's proper remedy is through the probate court and through the removal of the personal representative. Therefore, the Court reaffirms its prior decision and finds that Plaintiff lacks standing to bring the asserted causes of action."

[¶] Therefore, the Court's order of May 8, 2013, is in REINSTATED and Defendant's motion for summary judgment is GRANTED."(R. ____)

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ARGUMENT

IV.

THE ORDER GRANTING RESPONDENTS' SUMMARY JUDGMENT MUST BE REVERSED, TO ALLOW APPELLANT THE OPPORTUNITY TO PRESERVE THE SURVIVAL ACTIONS ON BEHALF OF DECEDENT ALICE SHAW BAKER

A. Standard of Review

It is well settled that in an action in equity, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. (See *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E. 2d 773 (1976).) Inasmuch as this case involves equitable issues relating to trusts and vulnerable persons, Appellant contends that this court may make its own findings.

However, even in the plain legal context, Summary judgment is not appropriate when there is a genuine issues of material fact. (See *Café Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 406 S.E. 2d 162 (1991).)

Further, if further inquiry into the facts of the case is required to clarify the application of the law, summary judgment is not proper. (*Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison*, 320 S.C. 470, 465 S.E. 2d 765 (1995).)

Summary Judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusions to be drawn therefrom. (*MacFarlane v. Manly*, 274 S.C. 392, 264 S.E. 2d 838 (1980).)

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As the Supreme Court of South Carolina has held:

“Since it is a drastic remedy, summary judgment “should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues”[...] (“an extreme remedy to be cautiously invoked”). This means among other things, that summary judgement must not be granted until the opposing party has had a full and fair opportunity to complete discovery. (See *Baughman v. American Telephone and Telegraph Co.*, 306 S.C. 101, 112, 410 S.E. 2d 537, 543).

Finally, in the *Estate of Cantrell*, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (1990), the court explained:

"On appeal from summary judgment, the reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party. The judgment may be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

In this case, the main issue is Appellant’s standing to prosecute the case. Since the circuit court used standing as its sole basis for granting summary judgment, issues related to disqualification of Respondent Kouten and expert testimony related to wrongdoing by all of Respondents were never ruled upon. The circuit court did not allow discovery in this matter. Appellant contends that this prevented the court from critical factual issues which would have led to an evidentiary dispute as to why Betty Fisher, and Betty Fisher alone, is the person to prosecute these actions, as allegations concerning the competency of Respondent Huckabee to act in light of the alleged adverse interests should have been considered as set forth herein.

B. This Court has Authority to Safeguard Rights for Persons Under A Disability, and the Public Policy of the State of South Carolina Supports Third Party Standing

It is well settled that this court has jurisdiction to review matters where the rights of persons under a legal disability are at issue. (See *Galloway v. Galloway*, 249 S.C. 157, 153 S.E. 2d 326 (1967); *Stefan v. Stefan*, 320, S.C. 419, 495 S.E. 2d 734 [appellate court will consider issues not preserved when they involve the rights of minors]; *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 536 S.E. 2d 372 [procedural rights subservient to court's duty to zealously guard the rights of minors].)

The Court in *Williams v. Watkins*, 665 S.E. 2d 243, 379 S.C. 530 (2008) explained the purpose of the Omnibus Act, which is to “protect vulnerable adults from abuse, neglect, and exploitation.” Although the statutory scheme involves actions that include criminal punishment, a federal court explained that the structure of the legislation also established a private cause of action for abusing, neglecting, or exploiting vulnerable adults. (See *Williams Garrett*, 106 F. Supp.2d 834 (2000).) (R. ____)

Although this case involves issues that relate to a decedent, the underlying facts deal with a vulnerable adult, Alice Shaw Baker, who is alleged to have been exploited during her life time. It appears, based on the far reaching public policy seeking protection of vulnerable adults, as evidenced by the enactment of the Omnibus Adult Protection Act, South Carolina Code Ann. § 43-35-5 et seq, this is likely to be a recurring issue in South Carolina law. Other jurisdictions recognize expansive views of Elder abuse laws to pursue Elder Abuse /Dependent Adult Abuse causes of action. (See *Estate of Lowrie* (2004) 118 Cal.App.4th 220; 12 Cal.Rptr.3d 828; See also, *In re Estate of Wyttenbach*, 193 P.3d 814, 219 Ariz. 120 (2008) [allowing the statute to preclude late-appointed personal representative from bring elder abuse action violates spirit of Ariz. Adult Protective

Services Act § 46-455.]; See Oregon Rev. Stat. § 124.100 [allows victim, guardian, conservator, personal representative, trustee or agent of fact to bring cause of action for elder abuse].)⁹

Moreover, this private right of action can not be available merely when the elder is alive. To effectuate its purposes, the Omnibus Act provides for a panoply of remedies, and by implication gives standing to third parties. Logically, if third parties do not have standing, then the scheme would be meaningless, because vulnerable adults would not be able to obtain necessary assistance while alive and the wrongdoer could avoid discovery by merely obtaining the nomination as an “executor/personal representative” in a Will.

South Carolina has shaped an important legal framework which supports the important tool of allowing the next of kin/heir at law to pursue actions on behalf of the vulnerable to prevent widespread physical and financial abuse of the elderly.¹⁰ All of the alleged events occurred during the period of time where she met the criteria for a Vulnerable Adult pursuant to South Carolina Code § 43-35-10(11). Therefore, this court may consider the rights of vulnerable adults ex mero motu. (*Galloway, supra.*) Alice Shaw Baker’s condition prior to death precluded her from taking action against Respondents.

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⁹ See *November 28, 2012* transcript, R._____, p. 24, ll. 12-14.

¹⁰ Appellant is an heir at law, and she has a claim to an interest which can not be lost. (See *All Saints Parish, Waccamaw v. The Protestant Episcopal Church in the Diocese of South Carolina*, 358 S.C. 209, 222 (2004).) Nevertheless, Appellant contends that all of Alice Shaw Baker’s assets were intended to go to animal charities.

C. Appellant has Standing to Pursue Alice Shaw Baker's Survival Action, Based on Respondent's Actions and Equitable Principles in Trust Law

In Justice Harlan's dissent in the United States Supreme Court decision of *Flast v. Cohen*, 392 U.S. 83, 129 (1968), the standing doctrine was described as "a word game played by secret rules".¹¹ While this can seem true, Appellant believes that third party standing in matters relating to elder abuse, trusts, probate, and/or fiduciary duties brings clarity and reveals safeguards in these equitable cases.

It is well settled that the court in *Williams-Garrett v. Murphy*, 106 F. Supp.2d 834 (2000), the court found a private right of action existed for violation of the Omnibus Act. Therefore, Appellant contends it is subject to a survival action, and to the equitable and legal grounds necessitating third party standing be granted to Appellant.

In Appellant's case, the circuit court's decision granted summary judgment to Respondents who failed to address the third party doctrine in their pleadings. Third party standing is a well accepted concept in many cases. Specifically, the case *Amisub of South Carolina, Inc. V. Passmore*, 316 S.C. 112, 447 S.E.2d 207 (1994) permitted standing to a hospital to pursue a cause of action for violation of the Omnibus Action. (See below, § IV (c).)

In *Hotz v. Minyard*, 304 S.C. 225, 403 S.E.2d 634 (1991), the court reversed summary judgment where an attorney misled a daughter concerning the effect of her

¹¹ Even the Honorable court acknowledged at the hearing on November 28, 2012 that the issue of standing in this case "may be accepted practice but its's not the routine practice." The "novelty" of the question provides additional grounds for this court to consider the issues and deny summary judgment. (See *Schmidt v. Courtney and Kemper Sports*, 357 S.C. 310, 324, 592 S.E.2d 326, 334-35 (2003) [error to grant summary judgment without an opportunity for full and fair discovery in relation to "novel theory."])

father's will. This fiduciary relationship between the attorney and the daughter was significant in the court's rationale. The court held that a lawyer may not actively misrepresent the status of a Will/Estate plan to the beneficiaries. Here, Appellant has asserted that Respondent Kouten actively represented the other Respondents *before* Alice Shaw Baker's death. This constituted a non-waiveable conflict of interest. Further, Appellant claims that Respondents knew that Alice Shaw Baker's sole intent in drafting the (now revoked) will was to benefit animal charities. Respondent Kouten's interest in misrepresenting the intent of said Will was for his own self interest, contrary to both ethical and legal standards. If Respondent Kouten took the correct position, he would not gain employment from Respondents, this alone is a genuine issue of material fact that precludes summary judgment .

Moreover, the equitable third party standing doctrine explains why Appellant is not required to obtain a final adjudication of her *Petition to Remove Respondent Bessie Huckabee* as the named personal representative in the informal probate, ¹² *before* safeguarding Alice Shaw Baker's Survival causes of action and pursuing these causes of action.

The circuit court recognized the import of its decision, when it found that Respondent Huckabee as personal representative would "not sue itself", and by implication, would not sue the other Respondents. (R. ___) However, the circuit court's Order *does not* take into account the exceptions permitting a beneficiary to sue when an

¹² Appellant does not concede or admit the validity of the informal probate. The issues and facts surrounding the grant of the informal probate are disputed and the subject of the Probate litigation. Appellant is seeking to vacate that order and/or remove Huckabee as personal representative in the Probate action.

adverse interest exists– but it is these exceptions (coupled with the statutory scheme, discussed below) which mandate reversal.

The court in *Bailes v. Southern Railway Co. Et al.*, 227 S.C. 176, 87 S.E. 2d 481 (1955) held specifically that:

“If a trustee refuse, after demand, to bring action in behalf of the trust estate or the beneficiaries thereof, or if he has an adverse interest or has conspired to defeat the trust, the beneficiary may himself bring the action against the third person, joining the trustee as a defendant. **In so doing, the beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust.**”(Emphasis added)

The South Carolina Supreme Court went on to say that:

“ The rule, which is frequently cited in other instances of trusteeship, is no less applicable where the trust relationship is that between an executor or administrator and the beneficiaries of a cause of action for wrongful death. Its applicability to such actions is discussed in the annotation following *Cudney v. United Power & Light Corp.*, 1935, 142 Kan. 613, 51 P.2d 28, in 101 A.L.R. 835, at pages 840 *et seq.*, with the comment that **"in the few cases discovered where, upon the failure of an executor or administrator to perform his duty as the only proper party to bring or prosecute an action under the death statute, the beneficiary has started suit to recover damages for the death, the courts have upheld the right of the beneficiary to begin such action."** (Emphasis added)

Further analysis of this principle is more fully explained in the treatise, Bogert, *The Law of Trust and Trustees*, § 869, ch. 41, “Beneficiary and Trustee–Remedies under Trusts”, p. 118-119:

“If the trustee cannot or will not enforce the cause of action running to him for the benefit of the beneficiary, a practical difficulty arises which compels the courts to vary their usual rules as to parties. **There is danger that the cause of action may be barred by laches or the operation of the**

Statute of Limitations, if the beneficiary is obliged to wait for the trustee to act, or is forced to sue the trustee to compel action, or to bring a proceeding for the removal of the trustee and the appointment of a successor. In addition the financial condition of the third party may change so that all relief will be shut off. In such an emergency the court permits a suit in equity by the beneficiary to enforce the cause of action running to the trustee, in which case the third party and the trustee should be made parties defendant. The beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust in order to effect a recovery which will go to the trustee or his successor for the benefit of the beneficiary.” (R. ____, emphasis added).

Here, Appellant acts as temporary representative of the Estate of Alice Shaw Baker. The same harm, outlined in Bogert, applies in this case:

- ! Appellant was forced to file this action to prevent a bar by the Statute of Limitations;
- ! Respondents will not sue each other for their collusion and/or the alleged wrong that Alice Shaw Baker suffered.
- ! Appellant has filed an action seeking to remove Respondent Huckabee, however the procedural delays in this case do not justify losses of Alice Shaw Baker’s causes of action.

Therefore, the impact of *Bailes* and the analysis in Bogert can not be overstated. It provides for third party standing in survival actions, and it even can apply *in wrongful*

death cases.¹³ Currently, under South Carolina Ann. Code § 15-51-20, wrongful death actions are to “...be brought by or in the name of the executor or administrator,” and there is no exception stated in the statute for a “real representative”. As set forth below, the Survival cause of action is not limited to preclude third party standing.

These principles demonstrate that Appellant may pursue the claims on behalf of Alice Shaw Baker’s estate for the benefit of the rightful beneficiaries, and granting Summary Judgement based on lack of standing was error.

D. Appellant has Standing to Pursue Alice Shaw Baker’s Survival Action, Based on Statutory Authority under South Carolina Code § 15-5-90

The above section discusses the equitable arguments for allowing third party standing in matters relating to trusts. This argument works in conjunction with the statutory authority compelling reversal in this matter.

South Carolina Ann. Code § 15-5-90 provides:

“Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or **real representative**, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.” (Emphasis added)

¹³ This case is not a wrongful death action, it is a survival action, however at the hearing on November 28, 2012, it was clear that Respondents were presenting the case as a “joint issue” requiring filing in the probate court. (*November 28, 2012*, R.____, p. 26, ll. 5-8)

This specificity of the code, and provision for a “real representative” supports Appellant’s position that she can bring Alice Shaw-Baker’s causes of actions in the circuit court.¹⁴

Since the survival action code, South Carolina Code Ann. § 15-5-90, specifically provides that survival actions “shall survive both to and against the personal *or real representative...of a deceased person,*” (Emphasis added), and Appellant is an heir at law under *Duke v. Postal Telegraph Cable Co.*, 71 S.C. 95 (SC 1905)[heirs at law are the real representatives],¹⁵ she has standing under statutory law.

Further, contrary to Respondents’ arguments, there is no doubt that the circuit court had concurrent jurisdiction to hear the matter, and resolution did not require the probate court’s involvement.¹⁶ South Carolina Ann. Code § 62-1-302 (b) provides:

“The court’s jurisdiction over matters involving wrongful death or **actions under the survival statute is concurrent with that of the circuit court** and extends only to the approval of settlements as provided in Sections 15-51-41 and 15-51-42 and to the allocation of settlement proceeds among the parties involved in the estate.” (Emphasis added)

¹⁴ See *November 28, 2012* transcript, R_____, p. 18, ll 2-5; p. 19

¹⁵ Appellant Betty Fisher is the niece of Alice Shaw Baker, and therefore an “heir at law.” Additionally, Appellant previously filed a Formal Petition for Appointment as Administrator, therefore if successful in the Will contest litigation, she will be the duly appointed administrator, *not Huckabee*.

¹⁶ Although the circuit court’s Order did not deal with the issue of concurrent jurisdiction, Appellant brings the issue to this Court’s attention to ensure proper consideration of the legal authority presented to the court and arguments brought to the court’s attention at the November 28, 2012 hearing, including the fact that the issue was not raised in the moving papers. (*November 28, 2012* transcript, R. _____p. 8, p. 15, ll. 6)

This “concurrent” jurisdiction is bolstered by the plain language of Section 62-3-804(2) of the South Carolina Code which allows a tort claimant to sue the personal representative of an estate in any court.

In the case of Alice Shaw Baker, she would have had at least 3 (three) viable causes of action against Respondents—1) Violation of the Omnibus Act; 2) Legal Malpractice; and Breach of Fiduciary Duty, if she were still alive. Therefore, Appellant is duty bound to pursue these actions to preserve Ms. Shaw Baker’s rights and recover her losses for the estate.

Since the Omnibus Adult Protection Act is a cause of action, based on statute, it survives the death of a party . (See 1 CJS Abatement and Revival § 151, at 206 (1985); see also 1 Am Jur. 2d Abatement, Survival and Revival § 53 (1994).) Additionally, since violation of a statute constitutes negligence per se, Appellant can use these violations to establish some evidence of recklessness and willfulness. (See *Id.* at 354, 683 S.E.2d at 823 [can establish punitive damages].)

As briefly referenced above, the issue of standing was examined by the court in *Amisub of South Carolina, Inc. v. Passmore*, supra. The court explained that **third parties**, the hospital, have standing to assert the cause of action against a husband who refused to take financial responsibility for the care of his seriously ill wife. A close reading of the case demonstrates that the vulnerable person, the wife, died during the proceedings. Therefore, this also supports Omnibus Adult Protection Act as a remedial statutory scheme meant to afford victims and their estates with the means for recovery for harm suffered by a now deceased victim.

Therefore, whether the Court analyzes the code governing Survival actions or the Omnibus Act, the circuit court’s fundamental error is that it interpreted these codes

according to Respondents' analysis of the code and definition of "real representative" finding that a real representative is limited to cases involving "injuries and trespasses to and upon *real estate*." (R. ____)

However, in well established rules governing statutory interpretation what a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. (See *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 122, 542 S.E.2d 736, 740 (2001).) Moreover, the words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. (*Durham v. United Cos. Fin. Corp.*, 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998); *Adkins v. Comcar Indus., Inc.*, 323 S.C. 409, 411, 475 S.E.2d 762, 763 (1996); *Worsley Cos. v. S.C. Dep't of Health & Env'tl. Control*, 351 S.C. 97, 102, 567 S.E.2d 907, 910 (2002); see also *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. (See *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); *Bayle*, 344 S.C. at 122, 542 S.E.2d at 739.)

With these clarifying principles, interpretation of S. C. Code Ann. § 15-5-90 does not permit the court to find that the "real representative" is limited to actions involving "injuries and trespasses to and upon real estate and any and all injuries", because that would also mean that the "personal representative" is limited to these same types of

actions. Nothing in the code or the legislative scheme supports such a reading, so standing is conferred upon Appellant, as real representative.¹⁷ (See *October 8, 2013 transcript*, R. _____, p. 6-8, 12, 17-27.)

E. Respondent Kouten Waived the Issue of Standing as to all Causes of Action, Therefore Summary Judgment must be Reversed

The circuit court also granted Summary Judgment in favor of Respondent Peter Kouten. However, Appellant has continued to object to Respondent Kouten's failure to file a responsive pleading or join the original motion.¹⁸ This refusal to join constitutes waiver.

The subject motion that led to Summary Judgment was based on "verifications" signed by Respondents Huckabee, Slade, and Byrd.¹⁹ Respondent Kouten signed documents based on his status as attorney of record, not in his own capacity. Moreover, none of Respondents' documents even raised arguments opposing the legal malpractice cause of action against Respondent Kouten. (R. ____)

This cause of action was based on the fact that Respondent Kouten was Alice

¹⁷ Appellant contends that summary judgment is also improper, because this area of law has not been developed (and may be construed as a "novel theory". (See *Schmidt v. Courtney and Kemper Sports*, 357 S.C. 310, 324, 592 S.E.2d 326, 334-35 (2003) [error to grant summary judgment without an opportunity for full and fair discovery])

¹⁸ Through the motion and supplemental pleadings, "Defendant" is used singularly. There isn't even a reference to Respondents Passailague, Slade and Byrd. The prayer in the Supplemental Memorandum (R. ____) is also referenced in the singular.

¹⁹ A motion to dismiss under Rule 12(b)(6) is not converted into a Rule 56 motion by affidavits of some defendants served after the motion and not referred to in the memoranda. Here, there was no mention of any factual reference in the memoranda, because there were no affidavits.

Shaw Baker's court appointed attorney in the conservatorship action.²⁰ The allegations are that while Alice Shaw Baker was still alive, Respondent Kouten began representing Respondents Huckabee, Slade, and Byrd. This conflict of interest is impermissible as explained in *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996). Respondent Kouten was prohibited from representing any parties with interests opposed to the best interests of his *ward*, Alice Shaw Baker. This basic principle is complicated by the financial gain that Respondent Kouten would gain by refusing to inform the probate court that Alice Shaw Baker intended her monies to go to animal charities—not Respondents.

While the conflict of interest should have immediately led to Respondent Kouten's disqualification, he continues to this day to represent the adverse interests of Respondents.

The court in *Valentine v. Davis*, 319 S.C. 169, 460 S.E. 2d 218 (1995) explained that individuals could not become parties by presumptuously adding their names to the caption and calling themselves plaintiffs. The court stated:

"We are unwilling to torture the rules in such a way to correct possible mistakes in the filing of motions or misjudgments in strategic procedural decisions. **To do so would jeopardize the continuity and uniformity that is essential to the orderly administration of the legal system.**"
(Emphasis added)

Although *Valentine* dealt with a plaintiff, the same rationale applies here. Respondent Kouten made a "strategic" decision to avoid responding to the Complaint, intentionally failed to address the legal malpractice cause of action, and refused to name

²⁰ Respondent Kouten was also appointed by the court as her guardian ad litem and visitor in the conservatorship action. Hereafter, Appellant will reference as "court appointed counsel for all purposes.

himself as a party—this compromises the Order granting Summary Judgment and deprives Appellant of due process/equal protection as a party is dismissed without seeking any relief from the court. (See also, U.S. Const. Amends. IV and XIV, § 1 and S.C. Const. Art. I, § 3.)

In light of the fact that Respondent Kouten did not raise the issue of standing on his own behalf, Appellant contends it has been waived as to Respondent Kouten. (See *Bardoon Properties, NV v. Eidolon Corp*, 326 S.C. 166, 485 S.E.2d 371 (S.C. 05/12/1997); see also *We Sav Financial Corp. v. Lingefelt*, 316 S.C. 442, 450 S.E.2d 580 (1994) [standing issue may be waived].)

Therefore, Summary Judgment as to Respondent Kouten must be reversed.

F. Summary Judgment was Improper as to Respondents Huckabee, Slade, and Byrd, as Genuine Issues of Material Fact are Demonstrated by Expert Witness Declarations and Lay Declarations.

Although the issue of standing was used by the circuit court as the grounds for granting the summary judgment, Appellant does not waive the issue that her opposition to the motion and the support for her Motion to Alter, Amend, Reconsider and Vacate Order was supported by significant evidence supporting the causes of action alleged on behalf of Alice Shaw Baker. Appellant filed lay and expert witness affidavits which demonstrated genuine issues of material fact.

It is well settled that any relief obtained by plaintiff's Omnibus/Legal Malpractice action/Breach of Fiduciary Duty would be to recover for the damage incurred personally for Ms. Shaw Baker--thus, it is a survival action for her benefit. It is well settled that the test of a survival action in South Carolina is whether the *decedent* suffered conscious pain

and suffering. (See *Camp v. Petroleum Carrier Corp.*, 204 S.C. 133, 139, 28 S.E.2d 683, 685 (1944) (emphasis added).)

With regard to the Omnibus Act, *Williams Garrett, supra*, outlines that the Act is "to provide civil and criminal penalties for abuse, neglect, and exploitation," of the disabled (S.C.Code Ann. § 43-35-5(9).) It also allows action by the Attorney General against persons or facilities for the failure to exercise reasonable care. (See § 43-45-80.)

By this dual application, and the further definition of neglect under S.C. Code § 43-35-10, survival actions were contemplated:

“Neglect may be repeated
conduct or a single incident
which has produced or can be
proven to result in serious
physical or psychological
harm or **substantial risk of
death.**” (Emphasis added)

Common sense dictates that the ability to enforce the law must continue after death to ensure that wrongdoers will be either prosecuted or suffer some liability. (See also, S.C. Code § 43-35-35 which outlines the manner to report deaths where abuse or neglect are suspected.) (See also *Amisub of South Carolina, Inc. V. Passmore*, 316 S.C. 112, 447 S.E.2d 207 (1994)).

Issues of Breach of Fiduciary duty are raised in cases where individuals suffer wrongdoing by those with fiduciary relationships. (See *Osprey, Inc. v. Cabana Limited Partnership*, 340 S.C. 367, 340 S.C. 367 (2000) [cause of action for Breach of Fiduciary abuse allowed to proceed].) These actions have also been permitted when an attorney misleads individuals concerning their estate inheritance. (See *Hotz v. Minyard*, 304 S.C. 225, 403 S.E.2d 634 (1991); see also, *Williams-Garrett v. Murphy, supra* [for exploitation

of a 90 year old vulnerable adult].)

As to Respondent Kouten alone, the courts have long recognized that "The relationship of an attorney with his or her client is 'highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith.'" (See *Weatherford v. Park*, 340 S.C. 572, 532 S.E.2d 310 (2000) .)

The affidavits establish a genuine issue of material fact which precluded the grant of summary judgment. The unusual circumstance of not having an acting personal representative does not prevent Appellant from protecting the cause of action so that the statute of limitations does not run.²¹ For these reasons, Appellant requests that the court reverse the order in its entirety, and allow Appellant to prosecute the action on behalf of Alice Shaw Baker as real representative.

G. *The Court Erred by Failing to Rule on Appellant's Motion to Disqualify Respondent Kouten Who Acted as Counsel for Respondents when he was Alice Shaw Baker's Court Appointed Attorney*

At the hearing on November 28, 2012, the court considered the arguments relating to Appellant's motion for disqualification. (*November 28, 2012 transcript*, R ____, pp. 34-45)

The circuit court reasoned that only Bessie Huckabee could complain about the

²¹ Appellant presented evidence that Respondent Huckabee is subject to removal, and her removal is mandated in part due to her failure to give notice to family, her failure to obtain a bond as ordered by this Court on June 9, 2009, her concealment of estate assets in the inventory filed wherein she excluded the receipt of IRA funds belonging to Alice Shaw Baker in excess of \$16,000.00 and all the other grounds that Appellant asserted in her complaint. (R. ____) However, this merely raises genuine issues of material fact to defeat the summary judgment motion, it does not require Appellant to obtain rulings prior to preserving Alice Shaw Baker's causes of action by the filing of this matter.

conflict of interest that may have been raised by Respondent Kouten's dual representation.

However, this rationale failed to recognize the duty owed to Alice Shaw Baker. She was Respondent Kouten's "ward" as court appointed counsel in the conservatorship proceedings. It is well settled that a ward will be considered a client for the purposes of the rules relating to attorney conflicts of interest. (*Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996).)

Under the rules relating to attorney conflicts of interest, a lawyer owes a duty of loyalty to former clients. (*In re Johnson*, 386 S.C. 550, 689 S.E.2d 623 (2010), Rule 407, SCACR, Rule 1.9.)

In evaluating a lawyer guardian ad litem's potential conflict of interest in subsequent relations, matters are "substantially related" when the guardian ad litem reasonably could have gained information in the first matter that would be relevant to the second matter. (See *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996).)

Respondent Kouten, conducted an investigation pursuant to S.C. Code Ann. § and regularly visited with Ms. Shaw Baker in October and November 2008. (R. ___) It is well settled that concurrent conflicts of interest can arise from a lawyer's responsibilities to a former client. (See Rule 407, SCACR, Rule 1.7, Comment 1.)

Moreover, the court in *Townsend, supra*, explained that a ward of an attorney guardian ad litem should not have to encounter that person in subsequent litigation in which the former guardian ad litem is representing anyone whose interests are potentially or actually adverse to the ward's. (See *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996).)

As argued, Respondent Kouten had a duty of advocating Alice Shaw Baker's true interests regarding the disposition of her estate. Appellant has argued that

Respondent Kouten is not to determine the veracity of the conflicting allegations regarding the validity of Decedent's May 21, 2001 will nor the veracity of the conflicting allegations regarding Respondents' neglect of Alice Shaw Baker as a vulnerable adult.

Since a lawyer shall not represent a client if representation is adverse to another client's interests unless both clients consent, (*In re Johnson*, 386 S.C. 550, 689 S.E.2d 623 (2010); Rule 407, SCACR, Rule 1.7) and here Alice Shaw Baker can not consent, Respondent Kouten must withdraw from the representation.

Finally, the Court has ample authority, and, in fact, a duty to remove Respondent Kouten from representation of Respondents, because the Court must ensure the integrity of the proceedings before it. (*Townsend*, *supra*.)

Here, the Court did not rule on Appellant's *Motion for Disqualification*, so he continues to act on behalf of Bessie Huckabee. While Respondent Kouten filed ineffective *Notice of Appearance* by W. Westbrook Wills²² and later obtained a Consent order substituting Counsel without notice to Appellants, this does not cure the defect in Respondent Kouten's continued representation of the other Respondents, because Alice Shaw Baker's interests have not been protected. Her death does not absolve the court of its duty in protecting her rights.

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²² Its important to note that at the hearing on *October 8, 2013*, Appellant's counsel raised the issue of the proper representation by Attorney Wills and the Notice of Association. (*See October 8, 2013 transcript*, R. _____, pp. 13, 15-17) Respondent Kouten made it clear that he was arguing on behalf of all Respondents, despite Attorney Will's filing of the Notice of Appearance.

H. The Court Erred in Considering the “Factual Contentions” of Respondent Kouten at the Hearings.

Appellant objected to Respondent Kouten’s assertion of fact in the pleadings and at the hearings. (R. ___) By implication, it appears that the circuit court considered some of the factual assertions of Respondent in making its Order.

As the court in *Gilmore v. Ivy*, 290 S.C. 53, 348 S.E.2d 180 (1986) explained, a party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment "even though his adversary does not come forward with opposing materials."... While statements of fact can constitute an "admission[] on file"...and thus be entitled to consideration by the court in determining whether a genuine issue of material fact exists, *factual statements of counsel, whether made during oral argument or in written briefs or memoranda, ordinarily may not be so considered.*” (*Id.*, *emphasis added.*)

Also, South Carolina Rules of Civil Procedure, Rule 56(e) have a personal knowledge requirement for purpose of said motion

Rule 7(b)(1), requires a motion to state with "particularity the grounds" for relief. Moreover, the allegations do not accurately reflect the facts and events leading to this case. Therefore, it was error for the court to consider Respondent Kouten’s argument as alleged “facts”.

CONCLUSION

Appellant Betty Fisher comes to this Court, with a heart full of love yet gripped in sorrow, for her aunt, Alice Shaw Baker. Without this respect for the Law and desire to preserve her aunt’s estate for animal charities, Alice Shaw Baker’s Survival actions

will be forever lost.

The circuit court's sympathy for the procedural conundrum that the case is in will not rectify the harm suffered by Alice Shaw Baker and her estate. (See *October 8, 2013 transcript*, R. _____, p. 28-29.) However, as set forth in this brief, the Law does provide relief. It provides relief by the Policies of South Carolina on behalf of the Elderly, the statutory authority under South Carolina Ann. Code § 15-5-90 and under the well accepted policies which enable a third party to effectuate standing in matters involving trusts and breach of trust, and support Appellant's position.

For all of the reasons stated herein, Appellant respectfully requests that the Court reverse:

- a. The Form 4 Judgment in a Civil Case and Order case related to case 2009-3010 and this case is ended filed on May 8, 2013;
- b. The order granting summary judgment filed on May 8, 2013;
- c. Form 4 Judgment in a Civil Case and Order Affirming Prior Order Granting Summary Judgment in favor of Defendant dated December 18, 2013.
- d. Order case related to case 2009-3010 and this case is ended filed on May 8, 2013;

e. The order finding Appellant lacks standing.

Further, Appellant prays that the court allow her to prosecute her Complaint as real representative on behalf of Alice Shaw Baker.

RESPECTFULLY SUBMITTED,

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