

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

Honorable Thomas L. Hughston, Jr., Circuit Court Judge

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SEP 15 2014

SC Court of Appeals

Appellate Case No 2014-000175
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 Kouten are the
Respondents

FINAL BRIEF OF RESPONDENT
PETER KOUTEN

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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
- 3 WHETHER THE CIRCUIT COURT'S CONSIDERATION OF MOTION FOR SUMMARY JUDGMENT AS TO RESPONDENT PETER KOUTEN WHEN HE DID NOT IDENTIFY HIMSELF AS A PARTY IN THE PLEADING AND DID NOT ADDRESS ANY ARGUMENTS INDIVIDUALLY
- 4 WHETHER THE CIRCUIT COURT ERRED BY GRANTING SUMMARY JUDGMENT AS TO RESPONDENTS BESSIE HUCKABEE, KAY PASSAILAGUE SLADE, AND SANDRA BYRD REGARDING GENUINE ISSUES OF MATERIAL FACT
- 5 WHETHER THE CIRCUIT COURT ERRED BY ALLOWING PETER KOUTEN TO ACT AS COUNSEL FOR BESSIE HUCKABEE, KAY PASSAILAGUE SLADE, AND SANDRA BYRD WHEN HE WAS PREVIOUSLY COURT-APPOINTED ATTORNEY/GUARDIAN AD LITEM FOR THE DECEDENT

STATEMENT OF THE CASE

The initial action to which all ancillary matters attach is an action in the Probate Court of Charleston County In Re the Estate of Alice Shaw-Baker (hereinafter Alice), who died testate on February 25, 2009. Prior to her death, there were hearings to appoint guardian and conservator for Alice. Lisa Fisher, Esquire is a relative to Alice and sought appointment and was appointed guardian and conservator for Alice. The Appellant, Betty Fisher, is the mother of Lisa Fisher, both live in California. Alice was present at the final appointment hearing wherein the probate court sought to determine whether Alice had a last will. The prior temporary conservator indicated that she had a last will. The probate court ordered that it be delivered to the probate court and said last will was delivered and a certified copy is in the commitment division file. Upon Alice's death, Respondent Bessie Huckabee was appointed personal representative after Alice's last will, which nominated Bessie Huckabee, was presented to the probate court by John Hughes Cooper, Esquire, local counsel for Betty and Lisa Fisher and sponsor for Lisa Fisher's pro hac vice appointment for this and other filings¹. Appellant sought by petition to void appointment of the personal representative, contest the will, appoint an intestate heir as personal representative, and contest the beneficiary designations of additional non-probate assets. Appellant removed these actions to Charleston County Court of Common Pleas by statutory right.

¹ There are currently two appeals in the South Carolina Court of Appeals regarding this estate matter. The second appeal in this Court seeks appeal of the lower court's order denying motion to disqualify counsel, appeal of the lower court's order denying reconsideration, and appeal of a consent order wherein counsel was substituted. Additionally, there are three appeals pending in the lower court brought by the appellant and/or her daughter. The petition contesting last will has not been heard. The petition to remove personal representative has not been heard. They were filed in 2009.

The Appellant brought the action currently on appeal by way of verified complaint having four causes of action

- 1 Appellant sought to be recognized as a “real representative” of Alice in order to bring a survival action on behalf of Alice under the South Carolina Omnibus Adult Protection Act,
- 2 Breach of Fiduciary Duty against all Respondents,
- 3 Legal Malpractice against Respondent Kouten,
- 4 Attorney Costs and Fees

The Appellant in her Notice of Appeal appeals

- a Judgment dated May 7, 2013 and filed May 8, 2013
- b Judgment dated and filed September 3, 2013
- c Judgment dated December 12, 2013 and filed December 8, 2013
- d Order dated December 12, 2013 and filed December 18, 2013

The May 8, 2013 order indicated that “Plaintiff’s Motion for Summary Judgment is Granted” The aforementioned motion for summary judgment was filed by Respondents There was a scrivener’s error in the order as to the party bringing the motion More importantly, the order of May 8, 2013 indicated that the related case of 2009-CP-10-3010 “also ended ”

The September 3, 2013 order amended the scrivener’s error and indicated that “Defendant’s Motion for Summary Judgment is Granted” It indicated receipt of Plaintiff’s Motion to Amend and indicated a hearing date of said motion It did not make reference to the ending of case 2009-CP-10-3010

The Judgment dated December 12, 2013 and filed December 8, 2013 references the “attached order” for formal Order Affirming Prior Order Granting Summary Judgment in Favor of Defendants dated December 12, 2013 and filed December 18, 2013

The lower court ruled that any action against the person or personal property of Alice must be brought by the personal representative Although the Omnibus Adult

Protection Act allows for third party reporting, it also requires a report to be filed within two days of the allegations of abuse. Typically, the alleged victim is alive when a report is filed. The Appellant filed no report. Respondent supports the fact that Alice Shaw-Baker died on February 25, 2009 and that Bessie Huckabee was appointed the personal representative based on nomination of Alice in her Last Will and Testament.

Plaintiffs filed a will contest of the Last Will and Testament and sought removal of the Personal Representative in a complaint filed in April 27, 2009 and have yet to seek determination in those matters. Bessie Huckabee is the current and only serving personal representative for the estate of Alice Shaw Baker.

ARGUMENTS

1 WHETHER SOUTH CAROLINA'S PUBLIC POLICY REGARDING PROTECTION OF THE ELDERLY ESTABLISHES THIRD PARTY STANDING FOR APPELLANT

Under the South Carolina Omnibus Adult Protection Act enacted in 1993, any third party who has reason to believe that abuse, neglect, or exploitation is occurring regarding a vulnerable adult may report the incident South Carolina Code Section 43-35-25(B). The sole purpose of the Act is to identify vulnerable adults who are subject to abuse and, if found, immediately act to remove said vulnerable adult from the abusive situation. The requirement is immediate, while the alleged vulnerable adult is allegedly being abused, not *several years after her death*. (emphasis added) Appellant cites *Williams-Garrett v. Murphy*, wherein the plaintiff seeks redress under the act for actions by a defendant who is alleged to have conspired to take valuable coins from the alleged vulnerable adult 106 F. Supp 2d 834 (2000). The Appellant fails to indicate that the plaintiff in *Williams-Garrett* is Ms. Williams-Garrett herself, who alleges that she was vulnerable at the time of the coin transactions. She made a contemporaneous claim to report a specific event. Here, the Appellant has made no contemporaneous report.

Under the Act, the lower circuit court lacks jurisdiction as the family court is the proper trier of fact. The Act explicitly and procedurally requires a report to be filed within two days of the allegations of abuse, neglect, or exploitation and any actions, petitions and hearings to follow the report must proceed in the family court. The Plaintiffs in this action have filed no reports and have offered no specific instances of abuse, neglect, or exploitation of a vulnerable adult.

The Appellant argues that third party standing has been found proper in *Amisub of South Carolina, Inc v. Passmore*. In *Passmore*, Ms Passmore was alive, the action was brought by the hospital to recover fees for services, and it was not brought under the South Carolina Omnibus Adult Protection Act 316 S C 112 (1994). Here, the Appellant's action is brought solely under the Omnibus Adult Protection Act. Under the Act, with proper authentication of facts and a contemporaneous report of abuse, the Appellant would have every privilege under the laws of South Carolina to report any incident of alleged elder abuse. Appellant never provided any contemporaneous report of abuse. Further, the complaint at bar was filed three years after Alice died. The personal representative has been appointed for over five years at this point. Appellant has had five years to be heard regarding validity of last will and has sat on her right to hearing while attempting every other avenue. The lower court has determined that Appellant has sat on her right to be heard on the issue of appointment of personal representative. The lower court has determined that the South Carolina Probate Code regarding personal representatives is in place to ensure that a single authority is charged with the duties and responsibilities of a decedent's estate.

The purpose of a real party in interest provision is to assure that a defendant is required only to defend an action brought by a proper party and that such an action need be defended only once. 59 AmJur2d *Parties* § 35 (1987). The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, goes, in reality, to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it. 21 C J S *Courts* § 16 (1990). (See also *Bardoon Properties v. Eidolon Corporation, et al*, 326 S C 166 (1997).) Here, there is no third party standing for actions

in estates as the sole authority for said actions lies with the personal representative as codified under South Carolina Probate Code Sections 62-3-711 and 715 and therefore, Defendant's Grant of Summary Judgment should be upheld

2 WHETHER THE CIRCUIT COURT ERRED IN RULING THAT APPELLANT LACKED STANDING TO PURSUE DECEDENT'S SURVIVAL ACTIONS

The lower court did not err in its determination that Appellant lacks standing in any actions on behalf of Alice including survival actions. The personal representation is authorized to prosecute any causes of actions, arising, asserted, or brought under or by virtue of any statute or act of this State. South Carolina Code Ann. Section 62-3-715 Said actions survive to the personal representative on behalf of the decedent. A personal representative has the same standing to sue as her decedent had immediately prior to death. South Carolina Code Ann. Section 62-3-703(c) Here, the Appellant is not the court-appointed personal representative. Appellant does not have standing as a real representative and authority over estate actions brought on behalf of the decedent must be brought by the personal representative. Therefore, the lower court did not err in determining that Appellant lacks standing and therefore, Defendant's Grant of Summary Judgment should be upheld.

3 WHETHER THE CIRCUIT COURT'S CONSIDERATION OF MOTION FOR SUMMARY JUDGMENT AS TO RESPONDENT PETER KOUTEN WHEN HE DID NOT IDENTIFY HIMSELF AS A PARTY IN THE PLEADING AND DID NOT ADDRESS ANY ARGUMENTS INDIVIDUALLY

Rule 201, SCACR, states that an "appeal may be taken, as provided by law, from any final judgment, appealable order or decision." An issue cannot be raised for the first time on appeal, rather to be preserved for appellate review the issue must have been

raised to and ruled upon by the trial judge *S. C. Dep't of Trans v. First Carolina Corp of S. C.*, 641 S E 2d 903, 372 S C 295 (2007) Where the record does not reflect that a point has been raised before the trial court, that point cannot be considered on appeal *Murphy v Hagan*, 275 S C 334, 271 S E (2d) 311 (1980) Appellant did not raise the issues of named plaintiff and/or respondent or whether individual issues had been addressed during the hearing nor did she raise them during the reconsideration hearing These issues should not be considered on appeal and therefore, Defendant's Grant of Summary Judgment should be upheld

The lower court did not err in considering Motion for Summary Judgment based on Respondent's identification as a party and addressing plaintiffs arguments individually Et al is defined as "and other persons" and is an appropriate form when drafting a pleading which lists several parties Black's Law Dictionary (7th Ed., 1999) Here, Respondent listed the first party of plaintiff and first party of respondent followed by et al Additionally, Respondent has no requirement to address any and all arguments of a plaintiff These issues were,not brought up at hearing in the lower court and therefore, Defendant's Grant of Summary Judgment should be upheld

4 WHETHER THE CIRCUIT COURT ERRED BY GRANTING SUMMARY JUDGMENT AS TO RESPONDENTS BESSIE HUCKABEE, KAY PASSAILAGUE SLADE, AND SANDRA BYRD REGARDING GENUINE ISSUES OF MATERIAL FACT

The lower court did not err by granting summary judgment regarding genuine issues of material fact The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder *Bankers Trust of South Carolina v Benson*, 267 S C 152, 155, 226 S E 2d 703, 704 (1976) Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims

and defenses [that] have no factual basis " *Celotex Corp v Catrett*, 477 U S 317 (1986)

Here, the lower court determined that the Appellant lacked standing to bring the action and that any actions brought on behalf of a decedent must be brought by the court-appointed personal representative. In review of this threshold genuine issue of material fact, the lower court granted summary judgment, and therefore, Defendant's Grant of Summary Judgment should be upheld.

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

The lower court did not err on the issue of Respondents counsel as the lower court made determination that Appellant lacks standing in any actions on behalf of Alice. The lower court granted summary judgment based on Appellant's lack of standing, and therefore, Defendant's Grant of Summary Judgment should be upheld.

Expense and possible delay inherent in any disqualification of counsel, with additional reasons, qualify as "substantial hardship" precluding disqualification where attorney's disqualification creates the loss of extensive knowledge of a case based upon a long-term relationship between the clients and counsel and substantial discovery conducted in the actual litigation. S C Appellate Court Rule 407, Rules of Prof Conduct, Rule 3 7

The Sixth Amendment of the United States Constitution has been held to protect absolutely the right of a defendant to retain counsel of his choice and to be represented in the fullest measure by the person of his choice. Where the right to be assisted by counsel

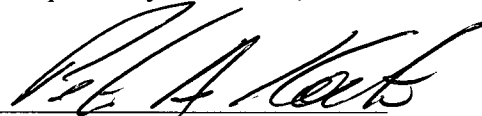
of one's choice is wrongly denied, a Sixth Amendment violation occurs regardless of whether the alternate counsel retained was effective, or whether the denial caused prejudice to the defendant. Further, because such a denial is not a trial error, meaning a constitutional error that occurs during presentation of a case to the jury, but a structural defect, in that the constitutional error affects the framework of the trial, the Supreme Court has held that the decision is not subject to a "harmless error" analysis.

Plaintiff cites the *Townsend v. Townsend* case as support for her claims. 323 S.C. 309 (1996). Although the *Townsend* case addresses issues regarding conflict of interest with a divorce lawyer representing a father and who had previously acted as guardian ad litem for the minor child. The court specifically indicates that this family court matter should be used "to clarify for the Bench and Bar some of the ethical and other responsibilities of attorney guardians ad litem in the context of *custody or support actions*" (emphasis added). The matter at issue is whether the prior representation did or could have revealed confidential information in the first representation that would be of significance in the second. Here, Respondent attorney never met with Alice privately on a one-on-one basis. Alice was under twenty-four hour care. There was no confidential information revealed to the attorney. There was no information revealed to attorney that was not provided to the probate court, there can be no conflict of interest along these grounds. Therefore, Defendant's Grant of Summary Judgment should be upheld.

CONCLUSION

For the reasons stated, this Court should uphold the judgment of the lower court and deny Appellant's appeal

Respectfully submitted,



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September 6th, 2014

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

Honorable Thomas L Hughston, Jr , Circuit Court Judge

Appellate Case No 2014-000175
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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 Kouten are the
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CERTIFICATE OF COUNSEL

SC Court of Appeals

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR

September 6, 2014



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