

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 Kouten are the Respondents.. Respondents

FINAL REPLY BRIEF OF APPELLANT

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SC Court of Appeals

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I.
APPELLANT’S REPLY TO BRIEF OF RESPONDENT KOUTEN

South Carolina considers the plight of the Elderly a top priority as evidenced by the strong statutory protections set forth in the Omnibus Adult Protection Act, and this appeal again raises the question of who has standing to prosecute an action for an Elderly victim after their death, here Alice Shaw Baker ("Ms. Shaw Baker" or the "decedent")

The Brief of Respondent Peter Kouten essentially argues that Ms. Shaw Baker loses her right to bring her Complaint (R . 17), because this action was not brought by the personal representative Yet, this issue of whether Ms Shaw Baker’s estate should lose its opportunity to recoup its losses, when there is viable legal authority under the statutory authority in South Carolina Ann. Code § 15-5-90 for a “real representative” or the equitable principles governing “temporary representatives” of a Trust/ Estate, must be decided.¹

This action had to be brought by Appellant, in her capacity as Real Representative, or it would be have been lost by the bar of the statute of limitations. Appellant Betty Fisher , as Real Representative for Alice Shaw Baker ("Appellant")² contends that her action in bringing the underlying Complaint was the only way to safeguard Ms Shaw Baker's rights and to preserve the lawsuit.

¹ Respondent Peter Kouten failed to address these issues in his briefing, therefore Appellant contends that the legal principles in *First Union Nat Bank v FCVS Communications*, 321 S C 496, 469 S E 2d 429 (1996) apply. In *First Union*, the court held that if a Respondent fails to respond to an issue in the appellant's brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct. (See also 5 Am Jur 2d Appellate Review § 555, at 254 (1995))

² Appellant Betty Fisher is the daughter of Alice Shaw Baker’s older sister, i.e. Alice Shaw-Baker’s niece, Betty Fisher’s daughter, Counsel Lisa Fisher, is Alice Shaw Baker’s great niece.

As set forth herein, both procedurally and substantively, Respondent Peter Kouten has not in his reply brief, and can not based on the facts and law in this case, overcome the need for a third person, here Appellant, to preserve Alice Shaw Baker's causes of action against all Respondents

Moreover, as more fully developed, Respondents Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd have waived any objection to this appeal and have conceded to Appellant's arguments by failing to file any briefing in this matter.

Finally, the Brief of Respondent Kouten is fraught with erroneous legal conclusions, and factual statements, even to the point that the Brief itself identifies the wrong judge and wrong case number. Nor does it comply with Rule 267, SCACR, or even include Respondent's Bar no. as required by the court rules.³ For all of the reasons stated herein, Appellant requests that the court grant this appeal in its entirety.

J

II.
RESPONDENTS HUCKABEE, SLADE, AND BYRD'S FAILURE TO FILE THEIR OWN BRIEF AMOUNTS TO A CONFESSION THAT APPELLANT'S ARGUMENTS ARE CORRECT, THEREFORE THE APPEAL SHOULD BE AUTOMATICALLY GRANTED AS TO THESE RESPONDENTS

As set forth above, the *First Union Nat Bank* court held that a failure to respond to the issues in an Appellant's brief will be deemed a confession that the appellant's position is correct (See also 5 Am Jur 2d Appellate Review § 555, at 254 (1995).)

³ On the cover of the Appeal, Respondent Peter Kouten ("Respondent" or "Respondent Kouten") identifies the appeal as one from the Honorable Thomas L. Hughston, Jr, Circuit Court Judge. However, review of the record discloses that the judge who issued the orders was the Honorable J C Nicholson, Jr. The case number provided by Respondent Kouten is 2009-CP-10-3010, while this appeal relates to Circuit Court case no 2012-CP-10-1332

Here, Respondents Huckabee, Slade, and Byrd failed to file any brief addressing the issues raised by Appellant. They failed to adopt or join Respondent Kouten's brief pursuant to Rule 208(b)(6), SCACR.⁴ Respondent Kouten's argument in section 4 that the lower court determined that Appellant lacked standing is waived by these Respondents.

Appellant respectfully requests that this Court reverse the judgment as to these Respondents, Bessie Huckabee, Kay Passailague, and Sandra Byrd.

III.
RESPONDENT'S STATEMENT OF THE CASE IS "FACTUALLY
INACCURATE" AND INTENDS TO MISLEAD THIS COURT
AS EVIDENCED BY THE FAILURE TO REFERENCE THE RECORD
PURSUANT TO RULE 210 (C),
THEREFORE APPELLANT RESPECTFULLY REQUESTS THE COURT
STRIKE THE ENTIRETY OF THE "STATEMENT OF THE CASE".

Respondent Kouten continues to represent that he has the right to represent Respondents Huckabee, Slade and Byrd, and in so doing, he has set forth "factual

⁴ It cannot be disputed that the initial brief filed in this matter was on behalf of Respondent Peter Kouten only, his cover sheet specifically identifies Peter Kouten. There is no mention of any other respondent, nor could there be.

As set forth in the record, Respondent Peter Kouten obtained a consent order to withdraw from the case. While it is true that "Et al" is latin for "and others", there is nothing that supports the idea that it can be used for all other defendants without any information provided to the court. Therefore, even his contention that identification as "et al" is sufficient to advise this court that he was responding to the summary judgment motion (Respondent's brief, p. 11) cannot apply herein.

Appellant contends that failing to identify each individual defendant/respondent unfairly prejudices a party. These inconsistencies work mischief with the courts, as here, where a plaintiff can't determine who the moving parties are in Summary Judgment proceedings.

However, Rule 11(a), SCRCP, provides that an attorney sign not *his* paper, but a paper of a party. Therefore, implicitly it provides he must identify the party he is representing. Respondent Kouten failed to take this action, and it has caused a substantial hardship on Appellant.

statements” that are false, incomplete and misleading. (See South Carolina Rules of Professional Conduct, Rule 3.3) This was evident in the lower court as well, where he continued to represent Respondents even after the consent order substituting in new counsel (R. 13) Still he argued at the hearing and continues to appear on behalf of Respondents.

In the Statement of the Case, Respondent fails to reference the record and leaves important information out (e.g. Alice Shaw Baker revoked the Will that Respondents claim an interest in) Moreover, the information on p. 5 of the Brief of Respondent concerns disputed issues related to the Will Contest which have nothing to do with this Appeal.

Rule 208 (b) (4), SCACR, provides that there shall be references to the record in the parties briefs:

"The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210 (c)] to support the salient facts alleged."

In light of the fact that a Respondent is entitled to set forth its own "statement of the case" (Rule 208(b)(2), it must comply with the rules regarding the record. However, pursuant to Rule 210 (c), SCACR, "The Record shall not, however, include matter which was not presented to the lower court or tribunal "

Here, Respondent Kouten makes claims that are not correct, not in the record, not referenced in the brief, nor sought by way of designation of the record, therefore Appellant prays that the court strike Respondent’s Statement of the Case and that the court treat Respondent's brief, as if he did not include any statement of the case Therefore,

pursuant to Rule 208(b)(2), Respondent " shall be bound by the matters stated or alleged in appellant's statement of the case."⁵

IV.

THIRD PARTY STANDING UNDER THE OMNIBUS ADULT PROTECTION ACT, CASE LAW, AND STATUTORY LAW PROVIDES RELIEF FOR THIRD PARTY STANDING.

Respondent's reading of the Omnibus Adult Protection Act is too narrow and fails to follow the reasoning in the cases cited by Appellant.

In citing to the court's decision in *Amisub of South Carolina, Inc v Passmore*, 316 S.C. 112, 447 S.E 2d 207 (1994), Respondent's conclude that Appellant had to bring a report contemporaneously with the abuse. The code that the *Amisub* case dealt with has been repealed, but the case still stands for the proposition that a third party may sue on behalf of a victim.

Further, Respondent's conclusion concerning the decision in *Williams-Garrett v Murphy*, 106 F.Supp.2d 834 (2000) is without merit. There is nothing in the case, in the code, or in the analysis of the law that indicates that a "contemporaneous claim to report" is mandated, nor that the victim need be alive, to bring a civil action. Although Respondent claims specific and explicit procedures to make reports, the cases have no such holding or explicit requirement with regard to a private cause of action.

Appellant contends that the cause of action relates to *essentially* a negligence per se/reckless cause of action under South Carolina Ann. Code § 43-35-3. The statutes that apply in this instance are not limited, as set forth by Respondent Kouten. South Carolina

⁵ For clarity, Appellant's statement of case is divided into two parts: Statement of the Case and Statement of Facts.

Ann. Code 43-35-85 , specifically references the “death” of a victim. Even though South Carolina Ann. Code § 43-35-80, provides specifically that an attorney general may bring an action, it also includes language that

“Notwithstanding any regulatory or administrative penalty that may be assessed **and in addition to a private civil cause of action** that may be brought against a person or facility based on an action or failure to act that otherwise constitutes abuse, neglect, or exploitation under this chapter.” (Emphasis added)

Therefore, the legislature specifically anticipated that parties could bring civil actions. Under South Carolina Ann. Code §43-35-45 (g), an “interested person” has the ability to bring a motion to seek an investigation. Therefore, family involvement was anticipated, and Appellant contends there are no impediments to her bringing this cause of action on behalf of Alice Shaw Baker.

Respondent states that:

"Appellant has had five years to be heard regarding validity of [sic] 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." (Respondent's brief, p 9)

However, the trial court made **none** of these findings, and could not make these findings. Appellant filed a proper Complaint seeking the removal of Huckabee as personal representative, and all of the other relief in the Will contest action (R 17) This was done based on Respondent Huckabee’s improper activities and lack of statutory notice which led to her improper appointment as informal personal representative.

Information obtained after the initiation of the Complaint led to discovery that she is holding over \$16,000.00 of Ms. Shaw Baker's money without the bond ordered by the court⁶ and without informing the court (or any parties) in any court filings. (R. 132, prg. 50).

All of these issues will be resolved after trial, yet the important issues on appeal must be decided to ensure fairness and avoid prejudice. The underlying principles governing Due process under the South Carolina and United States Constitutions preclude any prejudicial determination that Appellant has lost her rights to proper findings, because she availed herself to appellate review! (See also, U S Const Amends. IV and XIV, § 1 and S C. Const. Art. I, § 3.)

Respondent argues that this case involves a "real party in interest" (Respondent's Brief, p 9), however Appellant is not bringing this in her name, **she is bringing it on behalf of Alice Shaw Baker.** There can be no doubt that Alice Shaw-Baker had a "right to relief" (See *Bardoon Properties v Eidolon Corporation*, 326 S C 166) So Respondent's argument fails. This action is to ensure that Ms. Shaw Baker's case is not subject to the statute of limitations. As outlined in the expert and lay affidavits filed in this case, Alice Shaw Baker was subject to harm during her life, including the harm caused by Respondent Kouten's unethical representation. (R. 88-135) Dismissal of this action would prejudice Alice Shaw Baker's estate.

Respondent does not even address the issue of the "real representative" or "temporary representative" raised in this appeal. Instead, he relies on South Carolina Code Ann Sections 62-3-711, 62-3-715, and 62-3-703(c) governing personal

⁶ See S.C Code Ann. § 62-3-605, S C Code Ann Section 8-3-60 [unlawful for individual to take public office without bond where required] (R 252)

representatives, which has nothing to do with third party standing. (See Respondent's Brief, § 2, p. 10)

Since Respondent fails to address the legal argument outlined in Brief of Appellant, pp. 20-29, the court should follow the legal authority in *First Union Nat Bank, supra*, and rule that Appellant's argument are deemed correct.

**V.
APPELLANT RAISED THE ISSUE OF RESPONDENT KOUTEN'S FAILURE TO
IDENTIFY HIMSELF THROUGHOUT THE HEARINGS AND PLEADINGS,
THUS CONTEMPLATING RESPONDENT'S WAIVER.**

Respondent contends that "Appellant did not raise the issues of named plaintiff [sic, should be "defendant"] and/or respondent or whether individual issues had been addressed during the hearing nor did she raise them during the reconsideration hearing." (Brief of Respondnet, p 11)

Contrary to Respondent's assertion, Appellant raised the issue at the beginning of her Return, footnote 3, (R 74)⁷ Respondent's Summary Judgment motion itself did not address the issues of legal malpractice, nor identify Respondent Kouten as one of the parties, so Reversal is mandated (R. 43) Also, as the case went forward, the original grounds for bringing the Motion for Summary Judgment changed, the issue of standing was not raised in the moving papers (R. 43) The issue of the appropriate parties continued to be an issue, as Respondent Kouten filed a Supplemental Memorandum Supporting the motion for Summary Judgment This document was filed individually by Peter Kouten as Defendant, not the other Respondents (R. 156)

⁷ See R 372

In Appellant's *Motion to Alter, Amend, Reconsider and Vacate Order of May 8, 2013*, (R. 162, 175, 176), Appellant specifically listed as grounds noticed that she was seeking "reconsideration" based on the trial court's failure to "rule on plaintiff's objections to Defendant's Motion," improper reliance on argument, and if waiver occurred due to defendants/respondents failure to set forth the parties' names in bringing said motions and lack of reference to causes of actions. Also, Appellant raised the issue of whether Respondent Kouten waived the issue of standing by failing to address the claims for Legal Malpractice and Breach of Fiduciary Duty. Since many of the pleadings were referenced in the "singular", Appellant contends *all* of the respondents waived the issue of standing. (R. 176)⁸ This issue was properly preserved.

The court in *Coward Hund Construction Co , Inc v Ball Corp.*, 336 S C. 1, 518 S E.2d 56, 58 (1999) explained

"Once the issue has been properly raised by a Rule 59 (e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised "

Additionally, James F. Flanagan explains in *South Carolina Civil Procedure* 475 (2nd ed. 1996):

"Lawyers cannot force a trial Judge to address a disputed issue "

Finally, as outlined in *Pye v. Estate of Fox*, 369 S C. 555, 563, 633 S.E. 2d 505, 509 (2006)

"The Supreme Court identifies two ways to preserve the issue: 'a ruling by the trial judge or a post trial motion.'"

⁸ The issue of representation and Respondent Kouten's appearance at the hearing on behalf of Huckabee, Slade and Byrd was also raised in *Objections and Opposition by Plaintiff Betty Fisher to Notice of Appearance filed by Counsel W Westbrook Wills on August 6, 2013* (R 216)

Therefore, the grant of Summary Judgment as to all Respondents must be reversed.

**VI.
RESPONDENT'S ARGUMENTS REGARDING HIS DUTY TO ALICE SHAW
BAKER AS COURT APPOINTED ATTORNEY/GUARDIAN AD LITEM ARE
INCORRECT, AND HIS CONTINUED REPRESENTATION VIOLATED
ACCEPTED ETHICAL STANDARDS.**

Respondent Kouten claims “substantial hardship” for the other Respondents if he was disqualified, but ignores the harm suffered by Alice Shaw Baker. Several ethical opinions have addressed similar issues related to a guardian ad litem for children, and the inappropriateness of dual or later representation. (See S C. Ethics Advisory Opinion 09-12 [lawyer who previously served as the guardian *ad litem* for three minor children in an abuse and neglect action should not represent the custodial parent/grandparent in a later action to enforce or modify child support]; See also Ethics Advisory Opinion 08-04 [guardian *ad litem* could not also represent the child; also, see Ethics Advisory Opinion 04-08 [guardian *ad litem* could not later represent a non- custodial parent in a child support reduction action]).

The rationale supporting these ethical considerations can not be limited to children. Alice Shaw Baker was in the most vulnerable position in her life when Respondent Kouten was appointed attorney/guardian ad litem, his continued representation of individuals who harmed Ms. Shaw Baker can not be defended

Contrary to Respondent Kouten’s claims, the court in *Townsend v Townsend*, 323 S C. 309, 474 S E 2d 424 (1996) recognized the importance of these principles. The *Townsend* court itself raised the issue relating to the conflict. Respondent Kouten states

that “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.” The *Townsend* court explained

“...to allow a guardian ad litem to represent a parent in a proceeding substantially related to the action for custody or visitation would **completely undermine the trust and confidence necessary to an informed recommendation by the guardian ad litem.**” (Emphasis added)

This same reasoning has to be applied in Alice Shaw-Baker’s case. The same duty that the court has to remove a guardian ad litem for a minor should apply to a vulnerable adult. Respondent Kouten claims that he never met with “Alice” privately on a one on one basis,⁹ however this is not controlling. The attorney client privilege may extend to information beyond the specific communication between lawyer and client. In *State v. Adams*, 277 S.C. 115, 283 S.E.2d 582 (1981), overruled on other grounds, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), the prosecution in a criminal case examined the defendant’s former counsel as to the lawyer’s opinion of whether a confession had been voluntarily given. The opinion was based in part upon the lawyer’s observation of the defendant during a confidential meeting. The court held that eliciting an opinion based upon the lawyer’s observation of the client during a confidential conversation was a violation of the attorney-client privilege. The court held.

“We believe that the spirit of this policy dictates that not only is the conversation protected but the entire setting of the confidential conference must be protected as well. **To lend privilege to the words spoken but to allow disclosure of professional impressions drawn from the**

⁹ For purposes of this appeal, Appellant repeats Respondent Kouten’s claims, however he failed to designate any part of the record and/or present any admissible evidence supporting this claim. Therefore, Appellant continues to object to his failure to reference admissible evidence.

manner of their delivery all but destroys the substance of the privilege " (*Adams*, at 586, emphasis added)

The courts have held that the attorney-client privilege extends beyond the death of the client (See *State v Doster*, 276 S C. 647, 284 S E.2d 218 (1981), *South Carolina State Highway Dept v Booker*, 260 S C. 245, 195 S E 2d 615 (1973).)

So under principles governing attorney client privilege, Respondent Kouten's claims that the communications were revealed to the court and third parties do not relieve him of his duties to preserve Alice Shaw Baker's confidences. Rather, they may even support Ms. Shaw Baker's legal malpractice cause of action against Respondent, and his failure to satisfy all the duties of appointed counsel.

Finally, it is well settled that the Sixth Amendment of the United States Constitution does not apply to civil actions (See *Turner v Rogers*, 387 S C. 142 (2011)), so Respondent Kouten's reliance on this authority has no place in this case. Respondent should not now, or ever have represented the other Respondents

VII. CONCLUSION

The real purpose of a case can sometimes be lost in cases, and real life can often bring the purpose into perspective. For example, Someone once asked, Why did you help that person? The reply was that they were once a baby, and someone loved them.

In law, the principles of third party standing may not be so simple, but that purpose is bolstered by the added commitment of Constitutional principles governing Equal Protection and Due Process (See U S. Const Amends. IV and XIV, § 1 and S C. Const Art I, § 3) We also have appellate review to correct errors in trial court decisions and orders Appellant should not be derided for seeking review on behalf of her Aunt, rather this case epitomizes the need for "real representatives" and "temporary representatives" to

seek recovery on behalf of their loved one when there are allegations, as here, of serious elder abuse, neglect, and breach of duty by those with access to the vulnerable.

While Alice Shaw Baker has died, this litigation necessarily continues. This appeal was filed to vindicate Alice Shaw Baker's rights, and in pursuit of that goal, Appellant respectfully prays that the court grant this appeal in its entirety.

RESPECTFULLY SUBMITTED,

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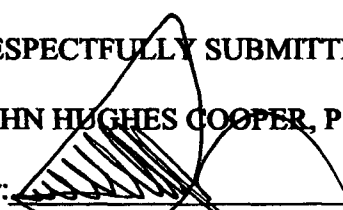
CERTIFICATE OF COUNSEL

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

October 17, 2014

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I certify that I have served the CERTIFICATE OF COUNSEL on the following counsel
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