THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Circuit. Court Case No. 2009-CP-10-3010

S.C. Court of Appeals Case No. 2014-001267

In The Matter of the Estate of Alice Shaw-Baker

Betty Fisher and Lisa Fisher,

Appellants,

v.

Bessie Huckabee, Kay Passailague Slade, Sandra Byrd, and Henry McMaster, in his Capacity as Attorney General, Defendants,

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

Respondents.

RETURN OF RESPONDENTS TO PETITION FOR REHEARING

W. Westbrook Wills III
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

S.C. Code

S.C. Rules of Civil Procedure

S.C. Supreme Court

S.C. Court of Appeals

STATEMENT OF THE CASE

Alice Shaw-Baker (hereinafter Alice), died testate on February 25, 2009. Prior to her death, there were hearings to appoint a guardian and conservator for Alice. Appellant Lisa Fisher, Esq. ("Lisa"), a relative of Alice's, sought and was appointed guardian and conservator for Alice. Appellant Betty Fisher ("Betty") is Lisa's mother, both live in California. Upon Alice's death, Respondent Bessie Huckabee ("Huckabee") was appointed personal representative after Alice's Last Will and Testament nominating her was presented to the probate court by John Hughes Cooper, Esq., local counsel for the conservator Lisa Fisher, individually and Betty Fisher. Attorney Cooper is also sponsor for Lisa Fisher's pro hac vice appointment in this action and others pending in circuit court, including a will contest.[1] Appellants sought by petition to void the appointment of Huckabee as the personal representative, contest the will, appoint an intestate heir as personal representative, and contest the beneficiary designations of additional non-probate assets. Appellants removed these actions to Charleston County Court of Common Pleas by statutory right. The actions were filed in 2008, and have yet to be heard.

On August 1, 2012, Appellants moved the Court for an order disqualifying and removing opposing counsel. Then, on September 25, 2012, less than two months after filing motion for disqualification and removal, Appellants sought a consent scheduling order, which was executed by counsel for the Appellants, counsel for the Attorney General and counsel whose removal is sought. The consent scheduling order was signed

[1] The petition contesting last will has not been heard. The petition to remove personal representative has not been heard. Each was filed in 2009.

by the Ninth Judicial Circuit Judge on September 18, 2012 and is the law with regard to this case.

Respondents were introduced to W. Westbrook Wills, III, Esq. at which time Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd sought substitution of counsel in this matter. Attorney Wills filed signed Consent Order for Substitution of Counsel with the circuit court and the same was executed by the Ninth Judicial Circuit Judge on October 6, 2013. Although the Certificate of Service contains a captioned case other than the caption of the case at bar, all parties to case were properly served in accordance with Rule 5 and 11(b), South Carolina Rules of Civil Procedure.

On November 28, 2012, the Honorable Judge Nicholson, after hearing argument from the parties, dismissed Appellants' motion to disqualify and remove counsel. Thereafter, Appellants' motion for reconsideration was also denied, and Appellants appealed Judge Nicholson's dismissal. This Court dismissed Appellants' appeal, and Appellants have filed their petition for rehearing.

For reasons discussed further below, Appellants' petition for rehearing should be denied and the Order of Dismissal should be upheld.

ARGUMENT

I. THIS COURT CORRECTLY DISMISSED APPELLANTS' APPEAL BECAUSE THE CIRCUIT COURT'S ORDER WAS NOT IMMEDIATELY APPEALABLE.

An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed. Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E. 377, 379 (Ct. App. 2002). Whether an order issued prior to or during trial is

immediately appealable is governed primarily by section 14-3-330 of the South Carolina Code. Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005). Section 14-3-330 provides this Court with appellate jurisdiction over:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided,* that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

Accordingly, an order must fall within one of the enumerated subsections to be immediately appealable. State v. Wilson, 387 S.C. 597, 600, 693 S.E.2d 923, 924 (2010); see also Enersys Delaware, Inc. v. Hopkins, 401 S.C. 615, 617, 738 S.E.2d 478, 479 (2013).

In Hopkins, Ms. Hopkins retained counsel to defend her in an action brought by her former employer, EnerSys. Enersys sought to disqualify counsel for Ms. Hopkins because he had previously served as attorney of record for Enersys on several prior cases. The circuit court denied EnerSys's motion to disqualify finding insufficient grounds to disqualify him due to the dissimilarities of the previous representation and the suit at issue. EnerSys appealed. The Supreme Court reviewed the matter under the parameters

of §14-3-330 as to whether denying a motion to disqualify counsel affects the merits of the action. That court found it did not because the appealed order was not made in a special proceeding and did not relate to an injunction or appointment of a receiver, leaving only the matter of "whether the order denying the disqualification of an attorney affects a substantial right such that the order is immediately appealable under subsection (2)." Id. In its final determination, the Supreme Court found that the denial of a motion to disqualify an attorney is not immediately appealable because it does not affect a substantial right and does not prevent redress after trial. Importantly, the court further recognized that, based on the outcome of the trial, such an appeal may be unnecessary.

The order denying disqualification and removal of counsel is not a final order and therefore, is not immediately appealable. Appellants have recourse other than immediate appeal. Because the circuit court's denial of Appellants' motion to disqualify is not immediately appealable, this Court correctly dismissed Appellants' appeal of that order. Appellants' petition for rehearing should be denied for the same reasons.

II. THIS COURT CORRECTLY DISMISSED APPELLANTS' APPEAL BECAUSE THE ISSUE OF THE ORDER APPEALED FROM IS MOOT.

The Court only considers cases presenting a justiciable controversy. Byrd v. Irmo High School, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). A justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract. Id at 431, 865. A matter is moot where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. Mathis v. South Carolina State Highway Dep't., 260 S.C. 344, 345, 195 S.E.2d 713, 714 (1973). If there is no actual controversy, the

court will not decide moot or academic questions. Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) (citing Jones v. Dillon-Marion Human Res. Dev. Comm'n., 277 S.C. 533, 535 (1982)); see also Wallace v. City of York, 276 S.C. 693, 694 (1981).

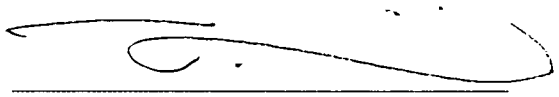
In Sloan, Sloan requested documents under the Freedom of Information Act (FOIA) from defendant, a nonprofit corporation dedicated to the recovery and conservation of the Confederate submarine, the H.L. Hunley. Defendant initially refused to provide the requested documents and Sloan filed a complaint seeking compliance with FOIA. Thereafter, defendant fully complied with Sloan's FOIA request, and moved for summary judgment with regard to Sloan's action. The circuit court granted defendant's motion for summary judgment finding the issue "moot because they [defendant] had fully complied with Sloan's FOIA request." Id.

Here, Appellants received a court order from the lower court which substitutes counsel for the Respondents. Counsel whose disqualification and removal are the subject of this appeal no longer represents the Respondents. The issues here are moot as no controversy currently exists in this case. Any judgment rendered by the Court will have no practical legal effect upon an existing controversy because, as in Mathis, an intervening event renders relief impossible. Therefore, this Court should deny Appellant's petition for rehearing for that additional reason.

CONCLUSION

For the reasons stated above, this Court should uphold its ruling and DENY Appellants' Petition for Rehearing.

Respectfully submitted,



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Attorney for Respondents

Dated this 10th day of August 2015

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

Circuit. Court Case No. 2009-CP-10-3010

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Capacity as Attorney General, Defendants,

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

Respondents.

PROOF OF SERVICE

I certify that I have served the enclosed Return of Respondents to Petition for Rehearing upon the Appellants, by depositing a copy in the United States Mail, postage prepaid, on April 16, 2015, addressed to Appellants' attorney of record, John Hughes Cooper, Esq., 1476 Ben Sawyer Blvd., Suite 7, Mount Pleasant, SC 29464. I have also served Mary Frances Jowers, Esq., PO Box 11549, Columbia, SC 29211.

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This 10th day of August, 2015

THE LAW OFFICE OF

W. WESTBROOK WILLS III

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Admitted in Georgia & South Carolina

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August 10, 2015

VIA US MAIL
South Carolina Court of Appeals
ATTN: V. Claire Allen
Post Office Box 11629
Columbia, South Carolina 29211

Re: Betty Fisher and Lisa Fisher v. Huckabee, et al.
Appellate Case NO.: 2014-001267

Dear Ms. Allen:

Please find enclosed the original and 6 copies of Respondents' Return of Respondents to Petition for Rehearing in the above-referenced case, along with a Proof of Service.

I have copied Peter Kouten, Esq., John Hughes Cooper, Esq., and Mary Frances Jowers, Esq. with copies this letter and its enclosures for service of the same upon those individuals and Appellants.

Thank you for your attention to this matter. If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

W. Westbrook Wills III

Enclosures (as stated)
cc: Peter Kouten, Esq. (w/ enclosures)
John Hughes Cooper, Esq. (w/enclosures)
Mary Frances Jowers, Esq. (w/enclosures)