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THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
Honorable J.C. Nicholson, Jr., Circuit Court Judge

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Appellate Case No. 2014-001267  
Ct. Court Case No. 2009-CP-10-3010

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RECEIVED  
AUG 10 2015  
SC Court of Appeals

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.

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RETURN

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## STATEMENT OF THE CASE

Alice Shaw-Baker (hereinafter Alice), 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 conservator and Betty Fisher, mother of conservator, both live in California. Upon Alice's death, Respondent Bessie Huckabee was appointed personal representative after Alice's Last Will and Testament, which nominated Bessie Huckabee, was presented to the probate court by John Hughes Cooper, Esquire, local counsel for the conservator, Lisa Fisher, individually, and Betty Fisher. Attorney Cooper is sponsor for Lisa Fisher's pro hac vice appointment for this action and others pending in circuit court, to include a will contest.<sup>1</sup> 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. The actions were filed in 2008 and have yet to be heard.

Appellants filed for disqualification and removal of opposing counsel on August 1, 2012. On September 25, 2012, less than two months after filing motion for disqualification and removal, the 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 by the Ninth Judicial Circuit Judge on September 18, 2012 and is the law with regard to this case.

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<sup>1</sup> The petition contesting last will has not been heard. The petition to remove personal representative has not been heard. They were filed in 2009.

Respondents were introduced to W. Westbrook Wills, III, Esquire 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 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.

Appellants were heard by the Ninth Judicial Circuit Judge on November 28, 2012 and were denied disqualification of counsel. Appellant's sought reconsideration and were again denied disqualification and removal of counsel. This Court dismissed Appellant's appeal.

For the above reasons, Appellants issue regarding rehearing should be dismissed and the Order of Dismissal should be upheld.

#### **ARGUMENT**

##### **I. APPELLANTS SHOULD BE DENIED REHEARING AS THE ORDER IN THIS MATTER IS INTERLOCUTORY.**

Appellants should be denied rehearing in this matter. 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 (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, 194 (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 (2010). See also *Energys Delaware, Inc. V. Hopkins* 401 S.C. 615, 617 (2013)

In *Hopkins*, Ms. Hopkins was fired from Energys and she retained counsel to pursue an action against Energys. Counsel for Ms. Hopkins previously worked with Energys in developing litigation strategy. Energys sought disqualification of counsel in his representation of Hopkins. The court reviewed, under the parameters of Section 14-3-330, whether denying disqualification of counsel affects the merits of the action and found it did not. The court further found that the order was not made in a special proceeding and did not relate to an injunction or appointment of a receiver, leaving only the determination 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 the final determination, the court found that denial of disqualification does not affect a substantial right because the denial of disqualification does not refuse a new trial to Appellants, and, as the court reasoned, the unappealable matter “can be redressed equally as well after trial as through an immediate appeal.” *Id.* at 619 The court found that an order denying a motion to disqualify an attorney is not immediately appealable and further reasoned that an appeal may be unnecessary based on the outcome of the trial.

The order denying disqualification and removal of counsel is not a final order and therefore, is not immediately appealable. The Appellants have recourse other than immediate appeal. Therefore, The Appellants should be denied rehearing on their Petition and the Order of Dismissal should be upheld.

## **II. APPELLANTS SHOULD BE DENIED REHEARING AS THE ORDER IN THIS MATTER IS MOOT.**

The Court only considers cases presenting a justiciable controversy. *Byrd v. Irmo High School*, 321 S.C. 426, 430 (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. A moot case exists 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, 346 (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 (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).

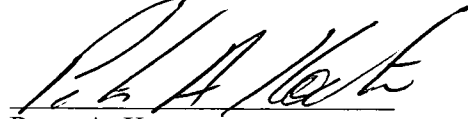
In *Sloan v. Friends of the Hunley, Inc. (Friends)*, documents were requested by Sloan under the Freedom of Information Act (FOIA). *Friends* is a nonprofit corporation dedicated to the recovery and conservation of the Confederate submarine, the *H.L. Hunley*. *Friends* initially refused to provide the requested documents, at which time, Sloan filed a complaint seeking compliance with FOIA. Thereafter, having complied with the request, *Friends* sought and was granted summary judgment finding the issues “moot because they 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. The 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, The Appellants should be denied rehearing on their Petition.

CONCLUSION

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

Respectfully submitted,



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*Accepted for*  
July 6, 2015

THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

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APPEAL FROM CHARLESTON COUNTY  
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Honorable J.C. Nicholson, Jr., Circuit Court Judge

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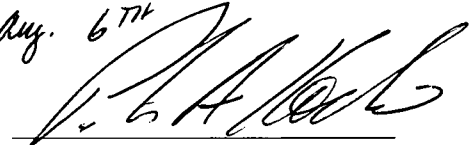
Of whom Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd,  
Respondents.

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PROOF OF SERVICE

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I certify that I have served Return to Petition for Rehearing upon counsel for  
Appellants and counsel for Respondents by U.S. Mail, on July ~~6~~<sup>6<sup>th</sup></sup>, 2015, addressed  
to the parties as listed below.

*Aug. 6<sup>th</sup>*  


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August 6<sup>th</sup>, 2015

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August 6, 2014

The South Carolina Court of Appeals  
ATTN: V. Claire Allen  
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**RECEIVED**  
AUG 10 2015  
SC Court of Appeals

**Re:** Betty Fisher v. Bessie Huckabee  
Appellate Case #2014-001267

Dear Ms. Allen:

Please find enclosed Original Return and Proof of Service with six copies in the above referenced matter.

I have also enclosed additional copy to be clocked and returned in the envelope provided for my records. Please contact me if you have any questions regarding this filing.

Sincerely,

  
Peter A. Kouten

CC: John Hughes Cooper, Esquire  
W. Westbrook Wills, Esquire  
Mary Frances Jowers, Esquire