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AUG 18 2015

SC Court of Appeals

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. 2014-001267
Circuit Case No. 2009-CP-10-3010

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

**APPELLANTS' REPLY TO DUAL RETURNS OF RESPONDENTS TO
PETITION FOR REHEARING**

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I. INTRODUCTION

"The lady doth protest too much, methinks."

Hamlet Act 3, scene 2, 222–230

William Shakespeare's comment on deception in his famous speech between Hamlet and his mother bears light on Respondents' efforts to oppose Appellants Betty Fisher and Lisa Fisher's ("Appellants") *Petition for Rehearing*.¹ Appellants might wish this were mere drama, fiction, fantasy--or even a bad nightmare, rather than undergo the reality of the loss of their warm, beloved Aunt and Great-aunt, Alice Shaw Baker.² She is the subject of these appeals, and the harm caused by Attorney Kouten, and Attorney Wills continued representation of Respondents Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd ("Respondents").³

It is interesting to note that neither Counsel Peter Kouten or W. Westbrook Wills III filed any briefing at all in the underlying appeal opposing Appellant's Final Brief.⁴ However, the return filed by Attorney Wills in opposition to Appellants Petition for rehearing is almost verbatim to the return filed by Attorney Kouten--there is not even an attempt to screen their involvement.⁵

¹ Appellants file one brief to oppose the two returns filed in this case. For purposes of judicial economy, one brief is appropriate. The briefing by Attorneys Kouten and Attorney Wills are almost verbatim.

² As more fully set forth in the underlying Appeal, Appellants Betty Fisher and Lisa Fisher, niece and grandniece, went to South Carolina to help her due to the problems she was suffering by the underlying conservatorship. Alice Shaw Baker never had children of her own, and Appellants loved and cared about Alice as evidenced by these appeals.

³ Attorney Wills admits that he was "introduced" to Respondents, however he fails to identify the encounter or file appropriate evidence to justify reference to these purported factual events. Moreover, Attorney Wills connection to Kouten was sealed by his filing of *Respondents' Return of Respondents to Petition for Rehearing*. [sic] (See Correspondence to court dated August 10, 2015, and accompanying return.) This return was filed 4 days after, Attorney Kouten's return. This return continues to make it abundantly clear that Attorney Kouten is leading the litigation, and that Attorney Wills is acting to mask Respondents true conduct.

⁴ On October 31, 2014, this Court sent correspondence directing Appellants to file their final brief. Said Final Brief and Record was filed on November 20, 2014.

In the circuit court, when Appellants filed their Motion to Disqualify ("Motion"), only Attorney Kouten filed a *Memorandum Opposing Disqualification* in the Circuit Court on November 12, 2012 (R. 68).

At the hearing on the *Motion for Disqualification*, heard on November 28, 2012, when asked by the Judge who was present for the Defendants, Attorney Kouten stated:

"Judge, Peter Kouten for the defendants."

(R. 176, ll. 12-13, emphasis added)

In an attempt to interfere with a proper ruling from the court, Attorney Wills filed a *Notice of Appearance* on August 6, 2013 which was an improper attempt to gain substitution. (R. 102) (See Rule 11, SCRCP; see also *Collins Entertainment Corp. v. Columbia "20" Truck Stop, Inc.*, 343 S.C. 257, 539 S.E. 2d 699(S.C. 2000) [changes to counsel must be made by application to court]). Appellants objected to said notice. (R. 104)

Thereafter, again prior to the ruling on the motion to disqualify, Attorneys Kouten and Wills attempted to undermine the Motion by obtaining an ex parte consent order. This order was

⁵ While it does not appear that there is any South Carolina rule which permits the screening of disqualified lawyers to avoid imputed disqualification, a screen may be relevant to obtaining a client's consent to or waiver of a conflict of interest. See S.C. Bar Ethics Adv. Op. # 92-23. Here, Alice Shaw Baker could not even give her consent or waive any conflict. Therefore, even with a screen, Attorneys Kouten and Wills can not escape the adverse position that they have taken to her interests.

The South Carolina Bar has commented that the embodiment of a private law firm" may include sharing arrangements. (also S.C. Bar Ethics Adv. Op. # 91-37 [sharing arrangements may have relevance in application of disqualified lawyers]) The comment to Rule 1.10 notes that "[a] group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other."

Here you have two attorneys, whom the evidence will show were from the same law school and class, who are acting in concert. Attorney Wills made a conscious choice to not merely follow Attorney Kouten's lead, but mirror his every word and argument. This has to be unacceptable, and certainly raises the issue of conflict sufficient to govern disqualification (See Rule 1.7, SCRPC) and justify rehearing.

not served on Appellants-- until it was signed by the court. The consent order was not signed by their alleged clients. Appellants contend the law does not support this type of ex parte issuance of an order, or meet the statutory requirements for changing counsel. Despite the plain language of the Consent Order that Attorney Wills was now counsel, the correspondence informed the court:

"Peter Kouten will remain as counsel for the Estate of Alice Shaw Baker."

(R., 107, emphasis added)

Appellants continued to object based in part to the fatal procedural defects, and the improper attempt to avoid a decision by the Court. The Circuit Court finally rendered its decision on February 4, 2014 denying the Motion, (R. 8) and this appeal followed.

Now, this court has dismissed Appellant's appeal based on the alleged interlocutory nature of the appeal, but Appellants contend in part in their rehearing, that the substantive mandate of a court to prevent Court Appointed Counsel from this type of conduct was an exception to the rule precluding immediate Appeal. *Townsend V. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996) will be rendered meaningless. This continuing conduct Attorney Kouten and Attorney Wills demonstrates the reason that *Townsend* is necessary.

Their returns use ambiguity to mislead this court as to their role as counsel. No where in Attorney Kouten's correspondence to the court dated August 6, 2014 [sic] or the return dated August 6, 2015, is there any statement as to who he represents. While Attorney Wills does claim to represent "Respondents", none specifically identified, the question arises, why is he allowing Attorney Kouten to draft the substance of his pleadings if they are not acting in unison? Appellant contends and the returns demonstrate that Attorney Wills is merely a beard for Kouten, as they attempt to avoid the necessary finding by a court of non-waiveable conflict of interests

and actions adverse to Alice Shaw Baker. This is in direct conflict with Rule 3.3 (a), SCRPC, which provides:

" A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or **fail to correct a false statement of material fact** or law previously made to the tribunal by the lawyer."

(Rule 3.3(a), SCRPC, Emphasis added)

First, Attorney Kouten claims that he is representing counsel for Respondents;

Next, Attorneys Kouten and Wills try and hedge their bets by claiming that Kouten represents the estate (i.e. Bessie Huckabee, as purported executor);

Now, Attorneys Kouten files briefing without claiming representation of any client, while Attorney Wills acts as a surrogate for "Respondents" and relying on the language and argument in Kouten's return. At some point, ambiguity is merely a way of failing to correct a false statement of material fact, i.e. Kouten still represents Respondents and cannot avoid disqualification.

Appellants pray that the court issue an order granting rehearing and concluding that Attorney Kouten must be disqualified. Moreover, based on the lack of notice and ex parte communication with the court that Attorney Wills also be precluded from acting as counsel. In support of this request, Appellants briefly address the arguments set forth in the return:

II.

REHEARING IS PROPER IN THIS MATTER, AS THE EXCEPTIONS PROVIDE FOR IMMEDIATE APPEAL WHEN IT AFFECTS A SUBSTANTIVE RIGHT AND /OR INVOLVES AN INTERLOCUTORY ORDER

While the Supreme Court's decision in *Energys Delaware, Inc. v. Hopkins*, 401 S.C. 615, 617, 738 S.E.2d 478, 479 (2013) appears to support the concept that an order denying a motion to disqualify is not immediately appealable, a closer reading of the case and the conflicting opinion of *Townsend, supra*, demonstrates that the matter must be determined on a case by case analysis.

Also, the Supreme Court did not analyze the conflict in terms of a court appointed attorney's duty and role in the judicial system. If *Townsend* establishes a duty on the court to sua sponte disqualify a court appointed attorney, this implicitly supports a finding that the matter involves a substantial right. Moreover, the Motion for Disqualification acts to prevent Kouten from continuing to represent Respondents. As seen in the filing of the dual returns, an injunction is necessary to prevent Attorney Kouten's involvement. For that reason alone, it fulfills the mandate of Section 14-3-330(4).

Respondents' reliance on *Tatnall v. Gardner*, 350 S.C. 135, 138, 564 S.E. 377, 379 (Ct. App. 2002) is misplaced. *Tatnall, supra*, dealt with a motion to amend pleadings.

Reference to *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E. 2d 707, 708 (2005) outlines the important substantial rights which mandate immediate appeal when the court grants a motion for disqualification. The underlying legal analysis actually supports Appellant's contentions for immediate appeal, because by placing a defendant's substantial rights above a plaintiffs, when the case involves the important role of a court appointed counsel, visitor, and guardian ad litem. Attorney Kouten's role was not merely of an attorney dealing with a client—he took on a fiduciary role which mandates a court's sua sponte actions. The factual background in *Hagood* is distinguished, and as such, when the cases are read together, the legal principles support rehearing in this case.

As the court in *Eldridge v. City of Greenwood*, 300 S.C. 369, 388 S.E. 2d 247, explain "where conflicting decisions appear to have been made by inadvertence or otherwise, and the position of the court is thereby rendered uncertain, the rule of stare decisis does not necessarily apply, and it is the duty of this court to follow the decision which it conceives is based upon the sounder reasoning, although, generally, the last expression of the court is controlling against prior opinions." While the last expression of the court may be controlling, as here, due to the additional

duty imposed on both a court for sua sponte removal and the implication of a fiduciary duty being implicated upon a court appointed attorney, the sounder reasoning is disqualification. If it wasn't clear, prior to the filing of the dueling returns, the chance for a fair trial without disqualification seems bleak.

III.
**REHEARING IS PROPER IN THIS MATTER, BECAUSE THE ISSUES RAISED IN THE
APPEAL AND PETITION FOR REHEARING ARE NOT MOOT AS EVIDENCED BY
THE RETURNS FILED BY ATTORNEYS KOUTEN AND WILLS**

Respondent's assertion that this matter is moot is incorrect. The court in *Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, explained the exceptions to the concept of mootness:

"First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction. *Second*, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Application of the public interest exception requires the question at issue to be (1) of public importance, and (2) of imperative and manifest urgency. Third, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case. The utilization of an exception under the mootness doctrine is flexible and discretionary pursuant to South Carolina jurisprudence, not a mechanical rule that is automatically invoked." (*Id.*, see also *In re Darlene C.*, 278 S.C. 664, 301 S.E.2d 136 (1983))

The court in *Sloan, supra*, set forth exceptions which the facts in this case support. With regard to court appointed attorneys, the matter is subject to repetition and a particularly vulnerable part of the community--the elderly, will be affected. This is a matter of public importance and urgency.

Finally, with the filing of the dual returns, it is clear that Attorney Kouten's misconduct will continue, and with Attorney Wills tumbling thereafter.

For these reasons, the matter is not moot, and is necessary for the courts review to ensure that Attorney Kouten and Wills due not to continue to act in concert.

IV. CONCLUSION

Research into the role of a court appointed attorney is sparse in South Carolina opinions. The *Townsend, supra*, decision is markedly direct in outlining the duty of the court in dealing with a subsequent representation by a court appointed attorney.

A report by the Alabama Bar demonstrates the high standards many states hold court appointed to, stating:

"First, an attorney for a disabled client will be held to a higher standard of responsibility: "As the difficulty of the situation increases, so too does the lawyer's responsibility. 'For every degree that [the lawyer] by his testimony and evidence proved a less than normal mental and functional capacity on the part of his client...he raised by an equivalent degree the standard of conduct which the Court must require of him in his dealings with the client," citing *In re Witte*, 615 SW2d 421, 422 (Mo. 1981).

Alabama Ethics Opinion RO-95-03.

Based on the clear, unambiguous dictates of *Townsend, supra*, there is no reason to believe that South Carolina would not hold, and does not hold, an attorney like Kouten, to these same standards.

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Appellants respectfully request that the court grant their Petition for Rehearing, based on the factual , legal and policy reasons set forth herein. Alice Shaw Baker deserves the protections that only this court can provide in its rulings and that the nightmare can only be ended by this court's justice.

RESPECTFULLY SUBMITTED,

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By: _____

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August 17, 2015

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v.

BESSIE HUCKABEE, KAY PASSAILAGUE SLADE, SANDRA BYRD, and HENRY
MCMASTER, in his Capacity as Attorney General of South Carolina, Defendants

Of whom BESSIE HUCKABEE, KAY PASSAILAGUE SLADE, and SANDRA BYRD are
the.....Respondents

PROOF OF SERVICE

I certify that I have served the **Appellants' Reply to Dual Returns of Respondents to
Petition for Rehearing** upon Respondents and upon the Attorney General by depositing a copy
of it in the United States Mail, postage prepaid, on August 17, 2015, addressed as follows:

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August 17, 2015

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