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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. 2014-000175
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 KoutenRespondents

**APPELLANT'S PETITION FOR REHEARING
REGARDING OPINION NO. 5371
HEARD OCTOBER 14, 2015 – FILED DECEMBER 9, 2015**

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INTRODUCTION

Pursuant to Rule 221(a) and Rule 240(I), SCACR,¹ Appellant Betty Fisher, As Real Representative for Alice Shaw Baker, Decedent (“Appellant”) respectfully petitions this Court for rehearing of Opinion No. 5371 (“Opinion”) filed on December 9, 2015

The policy for rehearing has been discussed by scholars in the past. One wrote, “The decision to rehear a case is an equitable decision with the goal of attaining justice for the particular litigants involved, which is precisely what a legal system is supposed to do.” (Wasserstrom, *Equity: The Case of an Equitable Decision Procedure* in *Readings in Philosophy of Law* 118 (1984).)

As set forth herein, by its Opinion, this Court has denied justice, not merely for Alice Shaw Baker, but for all family members justified to fight against the tyranny of those guilty of Elder Abuse. In so doing, this Court ignores issues that were properly briefed and made part of the record and which support the underlying principles supporting the interpretation of "real representative" or more importantly, "temporary trustee" standing to proceed with Alice Shaw Baker's cause of actions.²

¹ Rule 221(a) states in pertinent part:
“Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court. A petition for rehearing shall be in accordance with Rule 240, **and shall state with particularity the points supposed to have been overlooked or misapprehended by the court.**”

² Appellant specifically addresses the issue of objections and issues raised in the pleadings and in the motion to alter, amend requesting rulings on 1) equitable standing and 2) waiver of argument by Peter Kouten and 3) causes of action are that are more than mere fraud allegations, and contrary to the Court's Opinion can still be pursued. Further, she objects to the Court's characterization of Peter Kouten as "pro se". He is the only attorney who represented the other Respondents, by way of pleadings and appearances.

The Opinion affirming the circuit court's grant of summary judgment in favor of Respondents and holding that a "real representative does not have standing to bring personal actions on behalf of a decedent" (Opinion, p. 9) victimizes family members who in their attempt to vindicate the rights of their loved ones are subjected to the same shackles that imprisoned their beloved family members, here Alice Shaw Baker, the handcuffs of deceit which caused her to fall prey to these perpetrators, charlatans and betrayers. The Court's opinion now essentially holds them immune, because they were cunning enough to deprive family of standing by being named "personal representative"! Now, they have permission to use their positions to seduce wealthy women, like Alice to bestow on themselves their estates.

South Carolina's laws establish a far-reaching statutory framework to help the Elderly, but the Court's interpretation of the standing statutes lead to the disparate result of undermining this legislative intent which developed a private right of action for the vulnerable and Elderly.

This Court's decision does violence to these laws which will be undermined in all cases where the deceiver gains title as "personal representative." The law becomes of no effect, and this public Opinion instructs those individuals, so dastardly in their own right that they have no qualms about stealing from the Elderly, of the most convenient manner to interfere any family intervention and deny them a fair playing field in these Courts.

Appellant can not believe that this is this Court's intention to create such a vacuum in the law. Instead, Appellant uses this petition as an opportunity to demonstrate that the Court overlooked and misapprehended the law in its entirety, but most specifically in that:

- 1) The Court misapprehended or overlooked Appellant's legal analysis and interpretation of the questions which this case presented as to:
 - a) Statutory construction of the codes related to "real representative";
 - b) Complementary methods in the law which mandate a third party beneficiaries ability to act in the stead of the personal representative;

Appellant also addresses the issues in the Opinion that claim she failed to preserve the issues of equitable issues of trust law and Respondent Kouten's waiver. As will be shown, these issues were preserved and it appears that the court merely overlooked Appellant's reference in the record.

As set forth herein, Rehearing is proper and is the only way to ensure proper administration of the law.

IMPORTANT PORTIONS OF OPINION

The Court ruled in its Opinion:

"[B]ased on the legislative history of the survivability statute, we find the "real representative"—a decedent's intestate heir or devisee of his real property—is a remnant of the 1892 Act and only continued to have standing after the 1905 amendment in survival actions involving trespass or injury to the decedent's real estate. In addition to the legislative history of the survivability statute, we find the current version of the South Carolina Probate Code lends support to our conclusion that a real representative has no role in a survival suit for injuries to the decedent's person. In 1986, the General Assembly enacted a modified version of the Uniform Probate Code that modernized and made sweeping changes to the state's antiquated probate law on which the survivability statute was based. Act No. 539, 1986 S.C. Acts 3446 (codified as amended at S.C.Code Ann. §§ 62-1-100 through -7-1106 (Supp.2014)); see also generally S. Alan Merlin, Selected Substantive Provisions of the South Carolina Probate Code: A Comparison with Previous South Carolina Law, 38 S.C. L. REV. 611 (1987) (discussing the substantive changes

made to South Carolina probate law). Under the modern Probate Code, the personal representative is the central figure responsible for the orderly management of a decedent's estate."

"The real representative, on the other hand, is mentioned nowhere in the modern Probate Code. Nevertheless, in the instant case, Fisher argues specific language in Duke supports her contention that she may bring a survival action for any cause of action as Shaw–Baker's real representative.

As discussed above, although Fisher desires to bring personal causes of action on behalf of Shaw–Baker, we find these actions may only be properly pursued by the personal representative. See Bennett, 97 S.C. at 29, 81 S.E. at 189. Based on the foregoing, we hold the circuit court properly granted Respondents' motion for summary judgment because Fisher lacked standing to bring a survival action against them as Shaw–Baker's real representative.

II. Unreserved Issues

Fisher argues Kouten waived the issue of standing by failing to identify himself as a moving party in his motion for summary judgment. Fisher also asserts she has standing to bring the survival action under equitable principles of trust law. We find these issues are not preserved for appellate review because they were not properly raised to and ruled upon by the circuit court. See *Chastain v. Hiltabidle*, 381 S.C. 508, 514–15, 673 S.E.2d 826, 829 (Ct.App.2009) (“[A]n appellate court cannot address an issue unless it was raised to and ruled upon by the [circuit] court.”); *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating a party may not raise an issue for the first time in a motion to reconsider, alter, or amend a judgment that could have been presented prior to judgment).

III. Remaining Issues

Because our finding that Fisher lacked standing is dispositive in this case, we decline to address the remaining issues on appeal. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive)."

STANDARD OF REVIEW FOR REHEARING

Rehearing is warranted in cases where the Court has overlooked or misapprehended an argument. (See *Kennedy v. S.C. Retirement System*, 3349 S.C. 531, 564 S.E. 2d 322 (2001).)

Also, Appellant contends that if the Court fails to address some of the arguments raised in the appeal, "a *prima facie* case for rehearing has been made." (See *Covar v. Sallat*, 22 S.C. 265, 272 (1885).) A rehearing is also proper when a court has inadvertently overlooked exceptions. (See *Covar, supra*, at 272)

Finally, the principles behind the concept of rehearing were discussed in the broad constitutional context in the United States Supreme Court decision, in *Flynn v. United States*, 348 U.S. 956, 99 L.Ed. 1298, 1299 (1955) which provides: "The right to [a petition for rehearing] is not to be deemed an empty formality..."

Appellant respectfully pray that the Court grant this request for rehearing for the reason's more fully set forth herein:

I. THE COURT OVERLOOKED AND MISAPPREHENDED THE LAW GOVERNING REAL REPRESENTATIVES AND THE ARGUMENTS SUPPORTING COMPANION STANDING PRINCIPLES

The Court's Opinion has segregated the equitable principles of standing from the statutory standing issues, and while this is often appropriate because statutory standing is obvious and controlling, here, it undermines the principles sought by Appellant to allow her to bring this action on behalf of Alice Shaw-Baker. Appellant's pleadings specifically raises the issue of equity in her discussion of the Vulnerable Adults under the Omnibus Adult Protection Act, South Carolina Ann. Code § 43-35-5 et seq. ("Omnibus Act") which has the very purpose to protect the Vulnerable and Elderly. The Code contemplates "civil actions" and yet this code is rendered meaningless, if the individuals who take advantage of the elderly are made "personal representatives". This is further supported by the principles governing equitable standing supporting the

statutory scheme. Therefore, the framework for the "Omnibus Act", trust law, and the concept of "real representative" are complementary and not exclusive.³

A. *The Court's Opinion Undermines Public Policy Law Supporting Standing for Situations Involving Elder Abuse.*

Moreover, law governing standing also contemplates public policy issues that recognize standing. This Court has recognized that "standing is not inflexible." (*Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007).) In fact, the Court has ruled that "standing may be conferred upon a party when an issue is of such importance as to require its resolution for future guidance." (*Id.*) The court did explain that "[w]hether an issue of public importance exists **necessitates a cautious balancing of the competing interests involved.**" (*ATC S. Inc, v. Charleston Cty*, 380 S.C. 195, 198, 669 S.E. 2d at 341 (2008), emphasis added).

The Court went on to explain "[t]he key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of future guidance' that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance." *Id* at 199, 669 S.E. 2d at 341

Therefore, by balancing the need to encourage protection of the elderly, denying those with unclean hands the benefit of protection by unintended immunization, and

³ *Jade Street, LLC v. R. Design Const. Co.*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012)("Therefore, a statute is not to be construed in derogation of common law rights if another interpretation is reasonable.") Equitable law regarding trust standing is not undone by the definition of a "personal representative" or "real representative."

using a common sense reading of "real representative"⁴ –the public importance supporting standing is obvious for the protection of the elderly.

B. The Amendment to § 15-5-90 was not Limiting but a Liberal Construction Supporting Standing.

The Opinion outlined all of the prior law regarding the archaic definition of "real representative,"⁵ but the language amending § 15-5-90 raises the most simple analysis of the code. It is settled that the statute has survived with little change to the present day:

"Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding. (S.C. Code Ann. § 15-5-90 (1976) (emphasis added)."

The Court's interpretation essentially excludes the benefit of the amendment. The plain language supports Appellant's reasoning that either the causes of action for real property and injuries to the person or the personal property survive to both "personal" or "real representative". There is nothing in the statute which precludes the "real representative" from bringing the causes of action. When the legislature

⁴ When the statute's terms are clear and unambiguous, there is no room for an alternate construction, and courts must apply them according to their literal meaning. (*See Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (1998).) Generally, any cause of action which could have been brought by the deceased in his lifetime survives to his representative. (*Layne v. International Bhd. of Elec. Workers*, 271 S.C. 346, 247 S.E.2d 346 (1978).)

⁵ Appellant contends that summary judgment is also improper, because this area of law has not been developed (and may be construed as a "novel theory". (See *Schmidt v. Courtney and Kemper Sports*, 357 S.C. 310, 324, 592 S.E.2d 326, 334-35 (2003) [error to grant summary judgment without an opportunity for full and fair discovery].)

changed the code to allow a personal representative to bring the causes of action, it could have changed the code (as it apparently did in the broad changes in Probate) to exclude a real representative from bringing the action. The legislature is presumed to know the law, and their decision not to exclude the term creates an explicit inference that they wanted a broad interpretation of standing.⁶ Therefore, the changes in probate are not instructive in this case, these changes deal with the issues of the estate, not where there is a dispute concerning the harm suffered during the life of a vulnerable adult.

C. Equitable Law Governing Standing Complements Statute

The legal authority outlined in Appellant's briefing related to temporary trustees is controlling in that context. The court in *Bailes v. Southern Railway Co. Et al.*, 227 S.C. 176, 87 S.E. 2d 481 (1955) explained that when a fiduciary, here dispute personal representative Huckabee refuses to bring an action, **the courts have upheld the right of the beneficiary to begin such action.**" (Emphasis added; see also Bogert, *The Law of Trust and Trustees*, § 869, ch. 41, "Beneficiary and Trustee—Remedies under Trusts", p. 118-119) This is not a separate argument, it is merely support for the very arguments that Appellant raised, i.e. she was the only person to bring these causes of action to preserve Alice Shaw Baker's causes of action and to avoid any bar to statute of limitations. Any problems with the complaint can be remedied by motions to amend, rather than dismissal. (See *Allen v. Oil Co.*, 59, S.C. 571 (1901).)

⁶ See *Duvall v. South Carolina Budget and Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008)("When the Legislature adopts an amendment to a statute, this Court recognizes a presumption that the Legislature intended to change the law.")

D. Standing Was Not Raised by Respondent's Original Motion and Should have been Deemed Waived

There are several issues which the Court failed to recognize in Appellant's briefing and the Record. Since this Court reviews the case de novo regarding a question of law, (*Lambries v. Saluda Ct. Council*, 409 S.C. 1, 7, 760 S.E. 2d 785, 788 (2014)), full consideration of all of the issues including waiver should also be considered.

Appellant informed the court that Respondent Kouten failed to forth any admissible evidence in his pleadings, and for that reason his motion should have been denied. Appellant contends once he failed to raise the issue of standing in the original motion, he waived the issue with regard to any subsequent pleadings. (See *We Sav Financial Corp. v. Lingefelt*, 316 S.C. 442, 450 S.E.2d 580 (1994) [standing issue may be waived].)

This coupled with the fact that he used the singular and plural forms of Defendants/ Respondents in the pleadings means that Attorney Kouten was playing fast and loose with the representations to try and avoid waiver.⁷

Even had he raised the issue of standing, Appellant argues that the law supports her in that if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Appellant contends that

⁷ There wasn't even a reference to Respondents Passailague, Slade and Byrd in the pleadings. The prayer in the *Supplemental Memorandum* (R. 261) was also referenced in the singular . The documents did not raise any arguments opposing the Legal Malpractice cause of action against Respondent Kouten. (R. 43, 156, 258) (See *Valentine v. Davis*, 319 S.C. 169, 460 S.E. 2d 218 (1995) [can not add names to caption because it interferes with orderly administration of legal system])

this applies to standing as well, whether by statute, equitable law, or waiver. (See *Fabian v. Lindsey* 765 SE 2d 132 (2014) [standing found allowing third party beneficiaries ability to bring legal malpractice action]).⁸

For judicial economy, Appellant is referencing where she raised the issue of waiver and/or brought issues before the court.

- On page 74 of the Record, fn. 3, Appellant referenced Respondent Kouten's failure to outline his capacity.
- On p. 135 of the record, Respondent Kouten and the other Respondents did not bring the motion for summary judgment based on standing.
- He cited no authority for the argument that Appellant had no standing. Arguments are not evidence. (R. T. 174, citing *Trivelas v. S.C. Dept. of Transportation* , 348 S.C. 125, 141, 558 S.E. 2d 271, 279 (2001).)
- Appellant argument that a third party can sue an attorney when he misleads individuals regarding their right to estate inheritance. (R. 151, see *Holz v. Minyard*, 304 S.C. 225, 403 S.E. 2d 634 (1991) and *Jenkins v. Wheeler* 316 S.E. 2d 354, [estate heir allowed to sue attorney in tort when attorney failed to explain conflict of interest].) (R. 152)
- Appellant continued to contend that the court ignored the motion to remove Kouten. (R. 155)
- Kouten did not bring up the issue of Appellant's standing until his supplementary pleading filed on December 20, 2012. (R. 157)

⁸ The Kentucky Supreme Court found that an appellate court cannot, sua sponte, resolve an appeal based on lack of standing, when it was not raised below. Appellant contends standing was not raised in the original papers, was not raised by some of the parties as the disingenuous presentation of the pleadings went from singular to plural. (See *Harrison v. Leach*, 323 S.W. 3d 702 (2010).)

Therefore, Appellant contends that he waived the issue of standing and in fact brought a different motion which the court should not have considered.

- R. 163, Appellant specifically raised the issue of Kouten's waiver to set forth the parties names in bringing said motions and lack of reference to cause of actions in subsection 7. (R. 164)
- Appellant again brought up the issue of motion to remove in the motion to amend. (R. 170, fn. 5)
- Appellant outlined that the circuit court failed to address the issues in the case. (R. 171)
- Appellant notes that the circuit court failed to rule on her request re: Kouten and his failure to reference the causes of action for Legal Malpractice. (R. 176) Appellant explained that it was necessary to determine whether any of the defendants waived the issue of standing.
- Appellant further argued and cited to authority that a third party has authority to bring an action on behalf of a trust which has been described by treatises as "temporary representative of the trust" (see *Bailes v. Southern Railway Co.* 227 S.C. 176 (1955).)
- Appellant specifically requested that the court consider her motions and rule on the motions. (R. 231)
- Respondent Kouten stated that he was representing all defendants after the notice of association was filed. (R. 372)
- Appellant questioned Kouten's involvement in the case from his first pleadings. (R. 373)

By raising these issues, Appellant preserved it for the court's consideration. This coupled with the court's obligation to review the case de novo, Appellant requests rehearing on the matter. The Court's opinion will produce confusion as to the ability of family and beneficiaries to act on behalf of victims of Elder Abuse, leading to untoward consequences.

Additionally, the Court's opinion overlooks and misapprehends the other mandates for refusal, Peter Kouten's waiver and his continued representation of Respondents contrary to his ethical duties and his representation to the court.

The Court's opinion will allow Attorney Kouten to stand as an ambiguous being, never responsible for his own actions and never culpable for his own wrongs. The Court's opinion identifies him as "pro se" on the cover sheet of the opinion, however he is the only person who filed pleadings on behalf of Respondents, the only person who argued at the hearings, and the only person who argued before this court.

Yet, he never acted on his own behalf. Still, by this Court's opinion, he gained all of the benefits without requiring clarity for the record. The court will not allow a plaintiff to sue without fully disclosing the names of the litigants? However, Respondent can trade singular and plural identifications, never addressing any arguments in the court, and still this Court grants *him* relief.

This amounts to justice denied for Alice Shaw Baker and directly bears on this erroneous decision, smacking a death blow to the families who seek justice for their loved ones.

//

E. If the Court Finds Standing, Appellant Will be Able to Pursue the Causes of Action for Elder Abuse

Finally, in the Opinion the court stated:

"We note that some, if not all, of Fisher's causes of action include allegations of fraud and deceit, both of which are well-recognized common law exceptions to the survivability statute. *Ferguson*, 349 S.C. at 564, 564 S.E.2d at 97. Therefore, even if Fisher had standing, she could not bring these actions on Shaw-Baker's behalf under the statute"

The court's conclusion that Appellant would not be able to bring the actions because they were based on fraud and deceit is not accurate. The allegations can also raise negligence causes of action or actions for neglect under the elder abuse statutory scheme, therefore, if the court found standing, Appellant could pursue the action on those grounds.

CONCLUSION

Justice Earl Warren once stated that "It is the spirit and not the form of law that keeps justice alive. The beginning of Justice is the capacity to generalize and make objective one's private sense of wrong."

Alice Shaw-Baker deserves justice. She is loved. The only person willing to stand up for her, here Betty Fisher, is being denied the opportunity to seek damages for her injuries, not because there is no evidence of wrongdoing, breach of fiduciary duty, legal malpractice, etc. by these Respondents, but because Respondents hide behind perceived argument of standing. (See R. p. 111 -121 declaration of Expert Witnesses)

Moreover, the other issues raised in the pleadings, Respondent Kouten's waiver and equitable standing could not be waived as outlined above, because they

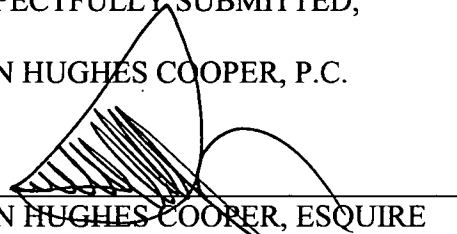
were raised in the lower court and brought to the court's attention in Appellant's motion to amend and briefing.

The wrong Alice Shaw Baker suffered is the wrong all of the elderly will suffer if the court views standing so narrowly that family can not assert their loved one's rights.

FOR ALL OF THESE REASONS, Appellants respectfully seek an Order granting rehearing and reverse all prior orders and allow Appellant to prosecute her Complaint as real representative on behalf of Alice Shaw Baker.

RESPECTFULLY SUBMITTED,

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December 22, 2015

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SANDRA BYRD, and PETER KOUTEN, and DOES 1 through 100, Defendants,

Of Whom BESSIE HUCKABEE, KAY PASSAILAGUE SLADE,
SANDRA BYRD, and PETER KOUTEN are.....Respondents

PROOF OF SERVICE

I certify that on December 23, 2015, I served a copy of **Appellant's Petition for**

Rehearing on the Respondents and interested parties by depositing same in the United States

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