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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEALS FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Tamara Curry, Probate Court Judge

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Appellate Case No. 2014-002034
Circuit Case No. 2011-CP-10-8657

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LISA FISHER.....Appellant

v.

BESSIE HUCKABEE.....Respondent

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# FINAL REPLY BRIEF OF APPELLANT

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# I.
# INTRODUCTION

In Oliver Wendall Holmes' diseent in *Frank v. Mangum,* 237 U.S. 309 (1915), he simplified the most fundamental purpose of Constitutional protections, specifically due process:

> "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' **there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.**" (*Id.,* Emphasis added)

Statutory provisions, legal precedent, and Constitutional provisions (including due process, equal protection, and reference to the takings claus) all play an important role in determining whether the probate court erred in denying Appellant Lisa Fisher ("Appellant") compensation for her role as conservator and guardian of Alice Shaw Baker.

However, in the brief submitted by Respondent Bessie Huckabee ("Respondent"), she fails to address most of Appellant's arguments and precedent, instead she presents law by conjecture, speculation, and manipulation of the facts. Moreover, her brief fails to comply with Rules 208(b)(4) and 210( h), SCACR with appropriate reference to the record in her briefing.[1] The lack of reference to the record presents a challenge to Appellant who must show Respondent's manipulation and speculation without the benefit of Respondent's references. Appellant is prejudiced by false statements, like "The Appellant continues to expend estate assets

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[1] The court in *Henning v. Kaye*, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992), provides: "Except as provided by Rule 212 and Rule 208(b)(1) ( c) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR. Only matters the parties deem not to be relevant to the appeal are properly excluded from the record. See *Former v. Butler*, 319 S.C. 275, 277 n.1, 460 S.E.2d 425, 427 n.1 (Ct. App. 1995). "[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review." Appellant contends that these rules do not merely require the record, but require appropriate "reference to the record" so that the party and this Court can accurately determine where the alleged facts are located. (See Rule 210(h), SCACR).

without court authority and is unapologetic." (Respondent's Brief, p. 4) There are no facts which support this statement, and it is in fact a misstatement.[2] These types of misstatements coupled with the errors of the probate court, if allowed to stand, prejudice Appellant.[3] Respondent has obtained a favorable order in the wrong court, without testimony, without evidence, without any hearing whatsoever–this can not, and was not, justified by Respondent. Further, Respondent's attempts to use improper material, documentation, and argument not provided to the probate court and not briefed to the Circuit Court mandates the filing of a *Motion to Strike,* filed concurrently.

Appellant replies briefly to Respondent's contentions:

## ARGUMENT

### 1. The Circuit Court Abused its Discretion and Deprived Appellant of Due Process by Failing to Review the Statement of Grounds Prior to the Hearing

Respondent's conclusion, that the circuit court did not abuse it s discretion nor deprive Appellant of due process, is not a surprise. However, reliance on *Townes Associates, Ltd v. City of Greenville,* 266 S.C. 81 (1976) is misplaced. The court in *Townes, supra*, had evidence at the lower court, and the appellate court determined that it was bound to determine whether there is any evidence which reasonably supports the factual findings of the judge.

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[2] Rule 407, Rule 3.3, provides, "CANDOR TOWARD THE TRIBUNAL.(a) 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." Here, Respondent's counsel makes a statement that he knows to be false. The court froze the conservatorship account, as evidenced by the appeal.

[3] By making this statement in the present, there is an assertion that Appellant is using the conservatorship estate' monies. Nothing could be further from the truth, as the facts will establish, that pending resolution on appeal, Appellant has been forced to pay for all expenses to protect the property. This is obvious and appropriate for the court to consider, in light of the fact that the conservatorship bank account is frozen and subject to this Appeal! ®. 59, order freezing account)

Here, there was no hearing with regard to the Motion for Fees. Reference by the probate court to the hearing on the Special Fiduciary did not provide grounds for depriving Appellant of her fees, providing her with an opportunity to testify, and/or present evidence. The hearing on the Special Fiduciary failed to reference any evidence, and specifically precluded Appellant from testifying. [4] No factual findings were or could be made. Moreover, The circuit court, sitting as an appellate court, made the following judgment "...this court ....affirms the probate court's order of November 9, 2011, denying the Appellant's motion to amend the court's order denying the approval of fees and expenses of guardian and conservator." ( R. 69, Form 4 dated 8/14/14)

It is well settled that Appellate courts are bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law." (*State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993).) Appellant does not argue that the mere decision to uphold the probate court's order deprived her of due process. Instead, she argues that the court's failure to read the statement of grounds prior to hearing prevented Appellant from meaningfully arguing the merits of the case. She could surmise what the court might question, however that did not permit the court to seriously consider the appeal.

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[4] The motion for Special Fiduciary was heard nearly a month before the filing of the Renewed motion for fees ( R. 360). At that hearing the court denied Appellant's request to testify:

> "MR. COOPER: ...Ms. Fisher, who is an attorney in California, who has been admitted by the Court here to be involved in the estate action, since she has been handling these, can she speak to the Court?
> THE COURT: No, this is a motion, and this is really between the attorneys, and I just want to know what your position is, legal position, as to what her legal authority is to still disburse moneys when in fact the conservatorship has when she has been discharged, and the only thing the Court has been looking for are the annual accountings. ®. 553, Transcript, p. 16, ll. 1-14)

Finally, Appellant's *Brief* outlines the legal precedent and factual authority justifying the grant of Appellant's fees, and the probate court's order denying her fees demonstrates manifest prejudice against Appellant and is erroneous as a matter of law. The "error of law" mandates reversal.

### 2. Respondent's Argument is Unintelligible and Ignores Facts and Law Demonstrating that Appellant was Deprived of Reasonable Compensation Under Probate Code S.C. Code Ann § 62-5-312(b) and S.C. Code Ann. § 62-5-414

Appellant contends that Respondent's argument is unintelligible regarding this issue, stating: " Appellant raises the issue of compensation for the guardian from the conservator, by agreement, in furtherance of South Carolina Probate Code Section 62-5-312(b). This issue was never raised at the lower court and has not been preserved. For this reasons, the issue at bar on appeal should be dismissed." (Respondent's brief, p. 6-7)

Appellant raised these issues in her *Motion to Alter* re: fees, and cites the code on p. 5 of her moving papers ( R. 364). She continues to argue for appropriate compensation. The issue of "room and board" as set forth in Section 62-5-312(b) is secondary to the provision that guardian's and conservator's are entitled to compensation, it has nothing to do with a contract for rent.

Respondent cites no authority for the conclusion that: "The lower court has determined that based on Appellant's disregard for the authority of the lower court as it pertains to holding assets intrust, the lower court has a right to protect remaining conservatorship assets and deny Appellant's request for fees." (Respondent's brief, p. 7)[5] Respondent fails to cite to the record,

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[5] Georgia courts have discussed the problems with allowing facts outside the record evan in argument. *McConnell v. Akins*, 586 S.E.2d 688 (2003) stating: "The law forbids introduction into case, by way of argument, facts which are not in the record and are calculated to prejudice party and render trial unfair." Although not a trial, it is well established by the rules of the court, Rules 208 and 212, SCACR, that this court is not to consider any alleged fact not cited in the record. Here, there is nothing in the record to allow the court to jump to this conclusion, and Appellant respectfully requests that the court ignore these improper conclusions. (See Concurrently Filed Motion to Strike)

because there was no such finding. Additionally, there is nothing in the law which provides for this inequitable treatment, for a conservator/guardian who spent in excess of 400 hours caring and ensuring the well being of her loved one, to be the only person who was *not* compensated .

Even more disturbing is the false statement that Appellant disregarded the lower court. Appellant's legal position is not a violation of court orders, she has a tenable legal argument and is entitled to have appropriate judicial review. Commentary to South Carolina Rule 3.1 explains that does not preclude "a good faith argument for an extension, modification or reversal of existing law." The comment to Rule 3.1 also clarifies that a matter is "not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery," nor is a matter automatically deemed frivolous merely because the lawyer did not believe the client ultimately would prevail. Rule 3.1, cmt. For example, a lawyer properly may commence an action based upon a good faith argument that existing law ought to be reversed, even though the lawyer may not expect the argument to be adopted. See id. (See ABA/BNA Lawyers' Manual on Professional Conduct, "Trial Conduct: Meritorious Claims," pp. 61:101).

Appellant is entitled to appropriate compensation, therefore the orders must be reversed.

### 3. The Probate Court's Decision to Deny Compensation to Appellant for work in excess of 465 hours is on its Face Prejudicial and Amounts to a Deprivation Under the Takings Clause

In the case of *Ex Parte Brown* 393 S.C. 214 (2011), the court cited to a Supreme Court case in Kansas, which talked about the obligations of Attorneys, while it is true that Appellant was not acting as an attorney, on behalf of Alice Shaw Baker, the reasoning of the court applies:

> "Attorneys make their living through their services. Their services are the means of their livelihood. We do not expect architects to design public buildings, engineers to design highways, dikes, and bridges, or physicians to treat the indigent without compensation.

> When attorneys' services are conscripted for the public good, such a taking is akin to the taking of food or clothing from a merchant or the taking of services from any other professional for the public good. And certainly when attorneys are required to donate funds out-of-pocket to subsidize a defense for an indigent defendant, the attorneys are deprived of property in the form of money. We conclude that attorneys' services are property, and are thus subject to Fifth Amendment protection" (See *State v. Smith*, 242 Kan. 336, 747 P.2d 816, 842 (1987).)

Here, Appellant is an attorney, acting in the capacity of trustee, formerly acting as conservator and guardian. If the court fails to reverse the order, Appellant most certainly is being forced to bear the public burden for the care of a person in need of protective proceedings--Alice Shaw Baker. While Appellant loved Alice Shaw Baker, and her assistance was not based on any desire for compensation, the facts disclosed before and after her death support compensation. Appellant travelled from California, expended in excess of 465.85 hours and incurred costs in excess of $11,912.50. ( R. 249, p. 251, motion for fees). These hours were spent so that the conservatee, *Alice,* could remain in her home, help her retain independence, and preserve her assets. At the time of the initial conservatorship proceeding, the plan was to place Alice in a nursing/assisted living facility contrary to her desires.

Appellant wishes Alice Shaw Baker had lived to a great old age, where all her monies had been expended for her care. At that time, Appellant would have gladly waived her fees. But the Law does not require Appellant to work hard, pass on personal opportunities, and grieve over the struggles of her beloved Great -Aunt, as Respondent and her associates seek a windfall from the life work of Alice Shaw Baker. It would be grossly unfair to have her take on the job of conservator and guardian, act in Alice Shaw Baker's best interest, and do so without compensation. Every other person involved in Alice Shaw Baker's case–everyone, received their compensation without any hearings and/or review of their performance. ( R. 22, 24, 27, 42, 38,

44, 46, 48, 50, 51, orders approving compensation) Respondent had no standing to object to the attorneys', guardian ad litem, visitor,[6] doctor fees during Alice Shaw Baker's life.

Now, Respondent makes claims about Appellant that are untrue, and which do not even address the statutory or legal basis for the grant of fees. She does so, regarding the periods of time when Lisa Fisher stepped up to help Alice, despite Respondent's broken promises to help Alice . ( R. 329)

Respondent claims: "the lower court reviewed the request for fees and denied the request based on evidence that money in the conservatorship when the Appellant was discharged in no longer where it was held for safe keeping. The Appellant has spent conservatorship funds without authority"--this claim is blatantly false–and false on its face. As set forth in Section 5. and 61, Appellant also seeks reversal of the order freezing the conservatorship accounts. Respondent's acknowledgment of this order, in this very appeal, demonstrates that not only is she not spending any monies, but that she can't. Thus, there is no risk to the Estate--no immediate and irreparable harm. All of Alice Shaw Baker's money was safeguarded. Appellant has a bond. She had a good faith, legally tenable position that any such monies are to be provided to the "duly appointed personal representative." (See South Carolina Probate Code Section 62-5-425 (d).) [7]

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[6] This is even more disturbing *and telling*, because Respondent's counsel Peter Kouten was Alice Shaw Baker's court appointed attorney in the conservatorship. He received payment as attorney, guardian ad litem, and visitor. He received his payment without any "determination by the court", other than the signing of the order. Yet, here the argument is that only Appellant is to be burdened with this care

[7] Respondent's brief fails to address all arguments raised by Appellant. (See *First Union National Bank v. FCVS Communications,* 321 S.C. 496, 469 S.E. 2d 613 (1996)[if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that appellant's position is correct), reversed and remanded on other grounds, 328 S.C. 290, 494 S.E. 2d 67 (1997). The arguments Respondent does address, also references improper matter from its designation and speculative, conclusionary, and false facts.

As indicated more fully in her brief, without Appellant's protection of the assets-- taxes, insurance, maintenance would not have been completed, without more fees and costs incurred. She has maintained her bond, and protected the property, now doing so with her own funds pending resolution of these appeals--All for the benefit of Alice Shaw Baker's estate and her ultimate beneficiaries–animal charities. The order denying Appellant's fees must be reversed.

### 4. Appellant was deprived of Compensation in violation of Equal Protection and established legal precedent

Respondent repeats her argument with regard to section 3 above, the Takings Clause. However, Appellant contends the Constitutional questions are different. The facts of Appellant's devotion to Alice Shaw Baker, in her time of trouble are the same, and Appellant is the only person who did not receive compensation for taking care of her great aunt. As stated in her brief, This mandates reversal.

### 5. *Grosshuesch* Does not Support the Freezing of Appellant's Assets, as here when No Admissible Evidence or Testimony was Presented

Appellant contends that the standards for injunctions require notice and a hearing under Rule 65(a), (b), and well established precedent. Respondent claims that the orders issued by the probate court, somehow constitute evidence. In review of the record, it is clear that there was no affidavit supporting the *Motion for Special Fiduciary,* no admissible evidence was presented, no testimony taken–only argument. Moreover, in light of Appellant's bond, there was no evidence of immediate and irreparable harm. These provisions could not be clearer. Any argument by Respondent that the probate court's unsupported conclusions supports the injunction is completely misplaced. The court in *Grosshuesch v. Cramer,* 367 S.C. 1, 623 S.C. 833, 834

(2005) had evidence that there were real estate property transfers and checks for cash deposited into the accounts of the alleged wrongdoers. Here, Appellant protected the status quo, so that the property would not be harmed–taxes paid, insurance paid, maintenance paid. There was no wrongdoing alleged, or could be alleged. The probate court denied the right to be heard by Appellant, even informally, at the hearing on the *Motion for Special Fiduciary.* It is questionable why Respondent's counsel went to the Conservator court , he knew that jurisdiction for the estate property was in the Circuit Court. He further knew that after the death of Alice Shaw-Baker, the assets were estate property and by statute, Appellant was duty bound to protect the assets pending proper appointment. (See South Carolina Probate Code Section 62-5-425 (d).) This is a classic case of forum shopping–wherein Respondent's counsel attempts to undermine the statutory protections obtained by Betty Fisher in seeking removal of the Estate case to the Circuit Court. Respondent was to get a bond which she failed to get, therefore the law is clear that had evidence been submitted to the court, Appellant would have been required to "balance the equities of the opposing parties on the particular facts of the case to determine which side is more entitled to relief. (See *Levine v. Spartanburg Regional Services District, Inc.,* 367 S.C. 458, 464 (2005).) Thereafter, analyzed the statutory requirement that Appellant hold the monies for the proper personal representative. (See South Carolina Probate Code Section 62-5-425 (d).) The conclusion that the court had authority, even to freeze Alice Shaw Baker's accounts, are untenable.

Justice demands reversal, when counsel plays fast and loose with procedures to prejudice Appellant.

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**6. Respondent's Arguments relating to the Freezing of Conservatorship Accounts in Violation of Constitutional and Legal Protections are Flawed, and Contrary to the Best Interests of Alice Shaw Baker's Estate and the Facts of this case.**

In her Brief, Respondent again mischaracterizes Appellant's action and the evidence in this case, by claiming that Appellant "withdrew monies from the Conservatorship account without having the legal fiduciary authority. In making this argument, Respondent invokes the "exclusive jurisdiction" of the probate court, without acknowledging the responsibility of the probate court over decedent's estate, and even more surprising (*or telling*) ignoring that the decedent's estate had been removed to the circuit court.

It is well settled that an order freezing the accounts is in the nature of an injunction. (See *Grosshuesch v. Cramer*, 367 S.C. at 5, 623 S.E.2d 833, 835 (2005) (interpreting order freezing assets as an injunction). Moreover, under the South Carolina Code, injunctions are immediately appealable. S.C. Code Ann. § 14-3-330(4).

Alice Shaw Baker's guardianship expired upon her death. S.C. Code Ann. § 62-5-306 (1987) (terminating the authority of a guardian upon the death of the ward). All claims related to the conservatorship may have to be decided by the probate court. Therefore, upon filing of the *Motion for Special Fiduciary*, the matter necessarily was an issue for the Circuit Court, subject to removal and subject to the stay on appeal. Here, Appellant reminds this court that no party requested any orders freezing Ms. Shaw Baker's assets.

So when all is said and done, Respondent's arguments are nothing more than mere smoke and mirrors, as it relies on conjecture, speculation, and prejudicial manipulation of the facts in this case. Respondent got out of the Circuit Court and created new and more brutal legal issues,

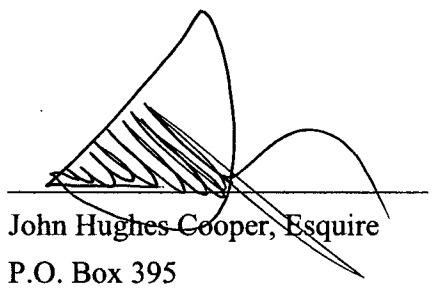
where Appellant has to protect Alice Shaw Baker's property pending final resolution of the Appeal. The orders must be reversed.

## V.
## CONCLUSION

Appellant contends that all Orders are erroneous as a mater of law, and mandate reversal The inunction ("freezing order") should be lifted from Alice Shaw Baker's property pending final resolution, with orders to account in the Probate Court. The issue of compensation for Appellant should be reversed and remanded for hearing in the Probate Court, upon delivery of assets to the proper personal representative.

Appellant respectfully prays that this Honorable Court reverse the Orders in this matter.

December 8, 2015



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**CERTIFICATE OF COUNSEL**

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

December 8, 2015

RESPECTFULLY SUBMITTED,

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