

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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SC SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Published Opinion No. 5371
Heard October 14, 2015 -- Filed December 9, 2015

Appellate Case No. 2014-000175
Circuit Case No. 2012-CP-10-1332

BETTY FISHER, as Real Representative
for Alice Shaw-Baker.....Petitioner

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

**PETITION FOR WRIT OF CERTIORARI
REGARDING OPINION NO. 5371
Heard October 14, 2015 – Filed December 9, 2015.**

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CERTIFICATION BY COUNSEL

The Court of Appeals issued its decision on December 9, 2015 (App. 17-25) (Hereinafter "Opinion" or "Decision") The Petitioner, Betty Fisher, filed her Petition for Rehearing on December 23, 2015. (App. 369-388) The Court of Appeals denied the Petition for Rehearing by Order filed January 21, 2016. (App. 26-27)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in failing to find that Respondents waived the issue of Petitioner Betty Fisher's standing to bring this action on behalf of Alice Shaw-Baker, when their initial papers did not raise the issue of standing?

2. Whether the Court of Appeals erred in determining that Petitioner Betty Fisher did not have standing to pursue actions on behalf of Alice Shaw-Baker, when the statutory and common law doctrines of equitable standing and public policy support pursuit of actions to vindicate the rights of the elderly?

3. Whether the Court of Appeals erred in finding that petitioner failed to preserve the issues of equitable standing and waiver by Respondents?

I. INTRODUCTION

In the article by notable Jurist Charles E. Clark, "The Handmaid of Justice," he quoted a 1907 case which used the lyrical imagery of "Procedure as the handmaid of justice" to reveal the inequity that can accompany strict interpretations of rules of practice, stating:

"Although I agree ...that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of a handmaid rather than mistress, and the **Court ought not be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.**" (Clark, Charles E., "The Handmaid of Justice," 23 Washington University Law Quarterly 297 (1938), emphasis added emphasis added.)

This far-reaching view described by Judge Clark is evident in the case of Alice Shaw-Baker, where third party standing on behalf of a decedent embodies the only litigation vehicle to achieve restitution for the harm she suffered . It evokes both the beauty of justice and the brutality of rigid procedure when a decedent's estate is not permitted to pursue litigation against an errant purported Executor and a court appointed attorney for the wrongs suffered by a victimized Elderly adult, merely because the Court of Appeals errs in its definition of the scope of power of a "real representative" and its perceived procedural limitation, contrary to the plain language of the code governing survival actions.

As will be set forth herein, Petitioner asserts that the Court erred in its *Opinion No. 5371*, Heard October 14, 2015 --Filed December 9, 2015, and she will demonstrate that:

- a. Respondents¹ waived the issue of standing by failing to raise the issue of Petitioner Betty Fisher's role as "real representative" or "heir at law" in its initial pleading, i.e. Motion for Summary Judgment;
- b. The statutory definition of standing under S.C. Code Ann. Section 15-5-90 supports Petitioner's pursuit of a survival action for the benefit of Alice Shaw- Baker to recover for her harm, and caused by Respondents for Elder Abuse, Breach of Fiduciary Duty, and Legal Malpractice;
- c. Petitioner raised and sought ruling on the issue of waiver and described the principles of equitable standing as complementary to the concept of a "real representative" which was the foundation of Petitioner's verified complaint and all pleadings related to her causes of action in the Verified Complaint.

Allowing the Court of Appeals' decision in this case, *Fisher v. Huckabee*, *Opinion 5371*, to go unchallenged would do a grave disservice to the vulnerable elderly and disabled in South Carolina. In Alice Shaw-Baker's case, her estate is meant to benefit animal charities, yet the ultimate disposition of *Fisher v. Huckabee* will allow abusers to escape justice by merely gaining the role of executor and eluding liability based on the court's unwillingness to recognize a "real representative." The Opinion essentially becomes an instruction manual for Elder Abusers.

Reversal of the Court of Appeals' decision is the only means to protect the Elderly and Disabled, and it mirrors the strong public policy of South Carolina to protect its under represented and vulnerable citizens.

¹ During the conservatorship /guardianship proceedings, the probate court appointed Respondent Attorney Peter Kouten as Court Appointed Counsel, Guardian Ad litem, and visitor to Alice Shaw Baker in the Conservatorship proceedings. Ms. Shaw Baker agreed to the appointment of her great niece Lisa Fisher as conservator/guardian in October 2008. (App. 25-27) Despite his appointment for Alice Shaw-Baker, Respondent Attorney Peter Kouten began to represent Respondents Kay Passailague Slade, Bessie Huckabee, and Sandra Byrd while Alice Shaw-Baker was still alive. This case references all respondents, because they were named in the Verified Complaint in this case, however Petitioner disputes that they ever properly appeared in the Circuit Court cases or in these Appellate proceedings.

Petitioner prays that this Court reverse the Court of Appeals' decision , *Opinion No. 5371*, Heard October 14, 2015 --Filed December 9, 2015, and the Circuit Court's Orders Granting Summary Judgment in favor of Respondents. (App, 17, 6, 7, 9, and 10, respectively).

STANDARD OF REVIEW

It is well settled that this court is free to decide questions of law with no particular deference to the lower court. *See* S.C. Const. art. V, §§ 5 and 9; S.C. Code Ann. §§ 14-3-320 and -330 (1976 & Supp.1999); S.C. Code Ann. § 14-8-200 (Supp.1999) (granting Supreme Court and Court of Appeals the jurisdiction to correct errors of law in both law and equity actions); *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).)

Rule 242, SCACR specifically addresses the types of cases that this Supreme Court will generally consider:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court."

This case meets this Court's requirement under Rule 242, SCACR for consideration. It can be considered a novel question of law, in that a decedent's rights will be forever lost without the ability of third parties to intervene and act on behalf of an elderly victim and recover on behalf of her estate. The public policy involved in securing the rights of the elderly will be undermined without having alternative ways to pursue, investigate, and recover for Elder Abuse. The United States Supreme Court has explained

that where there is insufficient public policy on a subject, **it may be the function of the courts by their judgments to establish public policy where none on the subject exists...**"

(See *Page v. Winter*, 240 S.C. 516, 126 S.E. 2d 570 (1962), emphasis added.)

Moreover, the court in *Jade Street, LLC v. R. Design Const. Co.*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012) explained the importance of not allowing statutory interpretation to impede on reasonable interpretations, stating "...a statute is not to be construed in derogation of common law rights if another interpretation is reasonable." Equitable law regarding trust standing is complementary to the statute governing survival actions and its dual definition of a "personal representative" or "real representative."

Therefore, whether this court deems it appropriate to grant certiorari based on the novel aspects of the case, the Constitutional importance of the case, or the conflict that such a narrow definition would create, Petitioner implores this Court consider these important issues.

STATEMENT OF THE CASE

A. Procedural History

Petitioner filed her Verified Complaint on February 24, 2012. (App. 28)

Respondents filed their Motion for Summary Judgment and Dismissal of Action on July 16, 2012. (App. 54)² There motion stated three claims for dismissal 1) Petitioner

² In said Motion, Respondents were identified as "respondents" not defendants. The motion was verified by Respondent Sandra Byrd, Bessie Huckabee, and Kay Passailague--not Kouten. The document was signed by Attorney Peter Kouten, merely as Attorney for Respondents. (App. 57) Yet, Attorney Kouten failed to cite to any legal authority for seeking the summary judgment. (See *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E. 2d 554, 558 (2011) [failure to provide any case law regarding a particular argument waives the issues].)

failed to seek review of companion case 2009-CP-10-3010; 2) Failed to state a claim for relief; 3) Failed to obtain a favorable determination that she has standing. This is different than what Respondents ultimately argued in later briefings, and none of the grounds were related to her standing of a "real representative", next of kin, or heir at law, as set forth in the Verified Complaint, (See App. 28, ¶3)

Thereafter, Petitioner filed her Motion as Real Representative for Alice Shaw-Baker, to Disqualify and Remove Opposing Counsel Peter Kouten due to Non Waiveable Conflict of Interest; Memorandum and Affidavit of Lisa Fisher on August 1, 2012. (App. 61)³

Petitioner also filed her Return, Objection and Opposition as Real Representative for Alice Shaw-Baker to Motion for Summary Judgment, and Dismissal of Action; Memorandum of Law ; Affidavits in Support filed Concurrently on November 26, 2012. (App. 84, 99, 113, 122, 133). This Opposition included affidavits from Elder Abuse Expert David Kessler, Witness Candace Rickborn, and Legal Malpractice expert Mark W. Hardee, and Attorney Lisa Fisher.

Thereafter, Defendant Peter A. Kouten filed his Memorandum Supporting Summary Judgment and Dismissal and Opposing Disqualification and Removal of counsel on November 28, 2012 (App.146) In said Memorandum he indicated that "Counsel for the Defendants in this matter has agreed to represent each Defendant and their interests in these

³ In its decision, the Court declined to rule on the remaining issues. (App. 25) However, if this Court reverses the Court of Appeals' decision, Petitioner seeks a determination on the issue of Attorney Kouten's disqualification. *Hagood v. Sommerville* 362 S.C. 191, 607 S.E.2d 707 (1993) supports Petitioner's request for immediate ruling on this issue. Attorney Kouten has a non-waiveable conflict, which implicates due process and equal protection under the Constitution. As a ward subject to conservatorship should be protected from court appointed attorneys who use the appointment system, as a tool to gain business. .

matters are not adverse." (App. 146) This memorandum is the first to raise the issue of the real representative, without citation to authority and without any analysis as set forth by the Court of Appeals in its decision. In signing the Memorandum, Attorney Kouten again fails to reference who he is representing. (App. 155).

Additional briefing was filed as requested by the Court on December 7, 2012, entitled Supplemental Memorandum in Opposition by Plaintiff Betty Fisher, as Real Representative for Alice Shaw-Baker, to Motion for Summary Judgment and Dismissal of Action, as Requested by the Court. (App. 156).

Supplemental Memorandum supporting Motion for Summary Judgment and Dismissal of Action was filed by Petitioner *at the direct request of the court* on December 20, 2012. (App. 167). Petitioner included the statutory authority under the survivability code, South Carolina Code Ann. § 15-5-90 (1976). It also raises the issues of family suing an attorney for misleading individuals relating to their estate inheritance (See *Hotz v. Minyard*, 304 S.C. 225, 403 S.E. 2d 634 (1991), and other cases were cited justifying the authority of family to bring actions. (See *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 472 S.E.2d 612 (S.C. 07/01/1996); *Jenkins v. Wheeler*, 316 S.E. 2d 354 (N.C. Ct. App. 1984).)

In the Supplemental Memorandum Supporting Motion for Summary Judgment and Dismissal of Action, Respondents are mentioned in the first paragraph as seeking Motion for Summary Judgment. Thereafter, Peter Kouten is listed as Defendant. This is the first briefing where Respondents (or Defendant, if this court can determine who filed the brief) raises the issue of legal argument related to "real representative." The Supplemental Memorandum is signed by Peter A. Kouten and references only Defendant on the final page

of the briefing. Respondents are not referenced at all. (App. 171). The Circuit Court issued its decision on May 8, 2013. (App. 6, 7).

To preserve her rights, Petitioner filed her Motion to Alter, Amend, Reconsider and Vacate Order of May 8, 2013 on May 28, 2013. (App. 172) This motion included appropriate affidavit and exhibits in support of the motion. (App. 190, 192, 197, 202, 211, 220.)

Respondent finally filed a Notice of Appearance by W. Westbrook Wills filed on August 6, 2013, (App. 225), to which petitioner filed her Objections and Opposition to Notice of Appearance filed by Counsel W. Westbrook Wills on August 6, 2013. (App. 227).

As necessary, petitioner filed her Supplemental Brief re: Motion by Plaintiff Betty Fisher to Alter, Amend, Reconsider and Vacate Order of May 8, 2013 on October 18, 2013. (App.237). In so doing, Petitioner more fully explained the underlying public policy arguments which mandated reversal. These authorities *support* Petitioner's position that she can bring an action to recover when a trustee has an adverse interest, and the applicability where an executor has adverse relations with beneficiaries in a wrongful death context. (App. 238). It clarifies the distinction between survival actions where both a personal or real representative can prosecute an action.

Respondents filed Supplemental Memorandum Denying (sic) [in Opposition to] Plaintiff's Motion for Reconsidering Summary Judgment. (App. 269).

Petitioner also filed her Notice of Motion and Motion to Strike: 1) Defendants' Late Memorandum re: Summary Judgment; 2) Order Substituting Counsel; Affidavit of John Hughes Cooper filed on October 29, 2013. (App. 260).

On November 28, 2012, the parties appeared before the Honorable J.C. Nicholson for a hearing on the pending motions. (App. 456; Hearing tr.).

On October 8, 2013, the Circuit court heard the Motion to Reconsider.

On December 18, 2013, the Circuit Court affirmed the prior order granting the Summary Judgment . (App. 10).

Petitioner appealed the Orders granting Summary Judgment on January 22, 2014 (App. 288).

After briefing, the Court of Appeals had oral argument. (App. 290). Thereafter, the Court of Appeals issued its Opinion affirming the Circuit Court's actions granting Summary Judgment in its Opinion no. 5371, basing it, in part, on lack of standing by Petitioner. (App. 20).

Petitioner filed her Petition for Rehearing on December 23, 2015. (App. 369) By Order filed on January 21, 2016, the Court of Appeals denied the Petition for Rehearing. (App. 26). This petition for writ of certiorari follows.

B. Factual History

Alice Shaw-Baker had long been an important member of South Carolina's community. She was a member in good standing of her church. She volunteered her time rescuing animals. She was an animal advocate who devoted her life to caring for animals and supporting animal charities. (App.32).

She was born August 14, 1929 in San Francisco, California. Ms. Shaw-Baker was enlisted in the United States Navy for four years and, during her enlistment, stationed in Charleston, South Carolina. (App. 19-33).

Thereafter, Petitioners allege that Ms. Shaw-Baker worked for Charleston Memorial Hospital for approximately twenty years until her retirement. Petitioners contend that Respondents Huckabee, Slade, and Byrd worked for Ms. Shaw-Baker at Charleston Memorial Hospital, and used their working relationship with Ms. Shaw-Baker to gain information about her private life, her finances, and her estate plan. Furthermore, Respondents used this information to gain control over Ms. Shaw-Baker's mind and her will, and to interfere with the known estate plan that Ms. Shaw-Baker had established for the benefit and protection of animals. Also, Petitioners alleged that Respondents falsely claimed that Slade owned an animal rescue in their effort to further deceive Ms. Shaw-Baker. (App. 19-24)

When Ms. Shaw-Baker's mental abilities began to decline, these Respondents refused to assist Alice Shaw-Baker, or call her family to help. Instead, they reported her and conservatorship /guardianship proceedings were initiated. When discovered Petitioner and her family rushed to Alice Shaw-Baker's side.

The probate court appointed Respondent Attorney Peter Kouten as Court Appointed Counsel, Guardian Ad litem, and visitor to Alice Shaw-Baker in the Conservatorship proceedings. However, Ms. Shaw-Baker agreed to the appointment of her great niece Lisa Fisher as conservator/guardian in October 2008. (App. 25-27) .

Nevertheless, Attorney Peter Kouten remained Court Appointed Attorney and Guardian ad litem with a duty to Alice Shaw-Baker. But he began representing Respondents Slade, Huckabee, and Byrd, while he still represented Alice Shaw-Baker. He failed to recuse himself.

Respondents seek to maintain Alice Shaw-Baker's estate for themselves. Prior to Alice Shaw-Baker's death, she revoked the Will when she learned of their intentions. Ms.

Shaw-Baker intended that her monies be used for animal charities only. Then Alice Shaw-Baker died. Attorney Kouten actively continued to appear on behalf of Respondents, despite their adverse position against Alice Shaw-Baker's known desires.

Petitioner filed this Elder Abuse litigation to preserve the rights to recover for Respondents' wrongdoing to her aunt. This petition raises important issues to ensure that third party family members can fight for their loved ones, against those who take advantage of them.

The Court of Appeals' decision effectively defeats this important effort to vindicate the rights of Alice Shaw-Baker, and, long term, acts to defeat the rights of every family seeking justice for their loved one.

ARGUMENT

II.

THE SOUTH CAROLINA COURT OF APPEALS ERRED IN FAILING TO FIND THAT RESPONDENTS WAIVED THE ISSUE OF PETITIONER BETTY FISHER'S STANDING TO BRING THIS ACTION ON BEHALF OF ALICE SHAW-BAKER, WHEN THEIR INITIAL PAPERS DID NOT RAISE THE ISSUE OF STANDING OF A "REAL REPRESENTATIVE"

This Court reviews the case de novo regarding a question of law, (*Lambries v. Salida 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.

Here that consideration includes acknowledgment that Respondents waived any issue related to standing. The lack of clarity in Respondents' filing of the Summary Judgment motion was present from the beginning. Respondent Kouten left the pleadings in a state of disarray--no clear issues, no law, no admissible evidence, and all, despite Petitioner's repeated opposition and objection.

The very first motion by Respondents failed to raise the issue of standing related to "real representative". In light of clear statutory language, Petitioner was not even required to set forth her capacity to sue or be sued, or her authority to sue or be sued in a representative capacity. (See Rule 9 (a), SCRCF). Instead it was Respondents who were required to raise the issue by way of "specific negative averment, which shall include such supporting particulars as are within the pleader's knowledge." (Id.) This failure means that ***Respondents*** waived the issue of standing, and the Court of Appeals erred by considering the arguments related to the "real representative" at all. Petitioner should not be required to figure out the issues that a defendant/respondent is raising in its attack of a complaint by way of Summary Judgment.

Petitioner informed the court that Respondent/Defendant Kouten failed to set forth any admissible evidence in his pleadings, and for that reason alone his motion should have been denied. Once Respondents failed to raise the issue of standing in the original motion, they 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]; See also *Fabian v. Lindsey* 765 SE 2d 132 (2014) [standing found allowing third party beneficiaries' ability to bring legal malpractice action]).⁴

Respondents and their Counsel made specific choices to confuse the pleadings, and to impair the Court's ability to determine who was a party or not. If this were reverse, and a plaintiff did not clearly set forth the defendants, there is no question that default could

⁴ 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. In this case, Petitioner's standing as "real representative" was not raised in the original papers by any party. Moreover, the parties failure to properly identify themselves raises questions about who filed the original papers at all. (See *Harrison v. Leach*, 323 S.W. 3d 702 (2010).)

not be entered or that parties could argue non-specificity as to allegations. But as to Petitioner, she was supposed to guess who was bringing the Motion for Summary Judgment, who was defendant, why a respondent was answering, and why pleadings were plural at some points, singular at others. Petitioner is not endorsing a grammatical exercise, instead, the law mandates clarity by attorneys in their role as professionals. Other jurisdictions have found that "uncompromising behavior is not only inconsistent with general principles of professional conduct, but also undermines the truth-seeking function of our adversarial system." (See *Ahanchian v. Xenon Pictures, Inc.*, 624 F. 3d 1253 (9th Cir. 2010).) While the *Ahanchian* court was dealing with a case of unwillingness to stipulate to extensions, the same rationale can be applied in this instance, an attorney unwilling to clearly identify his clients and his status in the litigation, is interfering with the truth of the case. Therefore, holding Petitioner to this definition of of standing but absolving defendants of their waiver is unfair and inconsistent with the law.

The doctrine of standing can not be used to undermine the truth seeking function of cases involving the elderly--as those perpetrators involved in fiduciary and elder abuse can tie the hands of loved ones by convincing an elderly person to name them as executors and beneficiaries of their Will or estate plan. Thereafter, attorneys can use standing to avoid personal liability of their clients by failing to identify the parties' status?!

The Court of Appeals erred in failing to find that the initial papers filed by Respondents constituted a waiver, therefore petitioner asks this Court to reverse and allow petitioner to proceed on behalf of Alice Shaw-Baker.

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III.
THE SOUTH CAROLINA COURT OF APPEALS ERRED IN DETERMINING THAT PETITIONER BETTY FISHER DID NOT HAVE STANDING TO PURSUE ACTIONS ON BEHALF OF ALICE SHAW-BAKER, BECAUSE THE STATUTORY MANDATES FOR SURVIVAL ACTIONS, COMMON LAW DOCTRINES OF EQUITABLE STANDING AND THE PUBLIC POLICY OF SOUTH CAROLINA SUPPORT THE PURSUIT OF ACTIONS TO VINDICATE THE RIGHTS OF THE ELDERLY

A. *Interpretation of Standing Mandates Balancing Issues of Public Policy, Equity, Statutory Interpretation, and as the Facts Give Rise here, Prevention of Harm*

The Court's Opinion denying Petitioner standing has failed to consider the implications of preventing a family from seeking redress for their family member's estate. The Opinion ties the hands of the only people significantly concerned about the rights and desires of the decedent, and in so doing the court interferes with vindication from the previous harm, and sets dangerous policies allowing for future harm of the Elderly.

Additionally, the court segregated the equitable principles of standing from the statutory standing language in the survival action code, S.C. Code Ann. § 15-5-90 (1976), which undermines South Carolina's long held policy favoring the disposition of issues on their merits rather than technicalities. (See *Balloon Plantation, Inc. v. Head Balloons, Inc.* 303 S.C. 152, 153, 399 S.E. 2d 439, 440 (Ct. App. 1990) [finding sanction dismissing counterclaim too severe.]

Petitioner's pleadings specifically raises the issue of equity in her discussion of Vulnerable Adults under the Omnibus Adult Protection Act, S.C Code Ann. Code § 43-35-5 et seq. ("Omnibus Act") which has the very purpose to protect the Vulnerable and Elderly.⁵ The Omnibus Act contemplates "civil actions" and yet this code is rendered

⁵ The Verified Complaint specifically identified Petitioner as "Ms. Shaw-Baker's next of Kin, an heir at law, and [as] the real representative..." (App. 28, 29, prg 3)

meaningless, if the individuals who take advantage of the elderly are made "personal representatives". Therefore, the framework for the "Omnibus Act", trust law, and the concept of "real representative" are complementary and not exclusive, instead they work together to support the need for a broad view of standing. To have a doctrine of standing, which is limited to a statutory definition of standing, without the ability to consider common law doctrines supporting equitable or third party standing creates a myopic view of justice--one which is not blind, but merely intransigent.

Yet, 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.**" (*ATCS, 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 using

a common sense reading of "real representative"⁶—the public importance supporting standing is obvious for the protection of the elderly.

B. The Court of Appeals Analysis of Bennett v. Spartanburg and the Plain Language of the Code Governing Survival Actions do not Support a Finding that Petitioner Does not Have Standing.

The Opinion outlined all of the prior law regarding the archaic definition of "real representative," but the plain language of S.C. Code Ann. § 15-5-90 raises the most simple analysis of the issue of standing. It is settled that the statute has survived with little change since its enactment:

"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)."

6

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).)

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 disputed 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 Petitioner 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).) Therefore, Petitioner contends that the "real representative" and the "personal representative" are on the same footing, based on the statute and the principles in trust law.

The Court's interpretation essentially finds that the plain language of the code about "real representatives" is merited, but it is this language which supports Petitioner's reasoning that the causes of action related to real property and to 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 enacted the code, it could have changed it (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.⁷

Central to the Court of Appeals' decision was its analysis of *Bennett v. Spartanburg Ry. Gas & Elec. Co.* 97 S.C. 27, 29, 81 S.E. 189, 189 (1914). The Court of Appeals states that a real representative has no standing, because "the 1905 amendment ' provides among other things, that causes of action for and in respect to any and all injuries to the person shall survive to the personal representative of the deceased....stating the recovery , if any in a personal survival action goes to the decedent's personal representative

⁷ 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.")

Other courts have also looked at the basic tenets of statutory interpretation, including "When the terms of the Statute are clear, the court must apply those terms according to their literal meaning, without resort to subtle or forced construction to limit or expand the statute's operation. (See *Cooper v. Moore*, 351 S.C. 207, 569 S.E. 2d 330 (2002).) Also, In construing statutes the terms used therein must be taken in their ordinary and popular meaning; when such terms are clear and unambiguous there is no room for construction and courts are required to apply them according to their literal meaning. (See *Allstate Ins. Co. v. Estate of Hancock*, 345 S.C. 81, 545 S.E. 2d 845 (2001).)

Finally, It is never to be supposed that single word was inserted in state law without intention of thereby conveying some meaning. (See *Davenport v. City of Rock Hill*, 315 S.C. 114, 432 S.E.2d 451 (1993).)

to hold as assets of the estate....Therefore, based 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." (See App. 22).

However, a closer reading of *Bennett* does not support this analysis and is silent on the role of a "real representative." The question presented to the *Bennett* court was: "Can ...two causes of action be joined in the same complaint?" It had nothing to do with standing. Instead, these causes of actions were essentially damages for the decedent's injuries and then damages for the benefit of her heirs. The court examined a prior Code of Civil Procedure [§ 218] which held that causes could be joined "where they arise out of the same transaction... and affect all the parties to the action." The court goes on to say:

"That the act requires the personal representative (administrator or executor) to sue, **need not trouble us**, the legislature could as well impose that duty on the sheriff or the coroner..."(Emphasis added)

The *Bennett* court did not care how the legislature set up the representative status, merely that they did not allow a representative to act in an improper, conflicted manner dealing with the rights of two separate estates. Petitioner contends that the *Bennett* court only determines that a personal representative could not sue on behalf of the wrongful death heirs. Petitioner is not seeking to obtain damages for her own harm, this is and always will be, an opportunity to obtain justice for Alice.

Petitioner further argues that this Court "need not [be] troubled" in allowing a real representative to file an action on behalf of a vulnerable decedent, because the plain language of the survivability code itself clearly provides that the cause of action for both

real estate and personal injuries "survive both to and against the personal or real representative" (Section § 15-5-90 of the South Carolina Code (2005), emphasis added.)

Interestingly, the placement of the decisive words are not addressed respectively, i.e. real estate is mentioned first in the description of the cause of action, while *personal representative* is mentioned first in description of the "representative." Therefore, Petitioner contends that either "heirs at law" ("real representatives") or court appointed personal representatives can bring actions for personal or real property injuries, contrary to the Court of Appeals' analysis of the Code.

Also, in footnote 5, the Court claims that because the causes of action include allegations of fraud and deceit, that Petitioner can not bring those causes of action. However, this was not the grounds for which the summary judgment was brought by Respondents, and the Court of Appeals is essentially assisting Respondent Kouten with its assessment of issues and facts--none of which he argued or even came up with in his motion. Moreover, Petitioner contends that the court's conclusion 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, Petitioner could pursue the action on those grounds.

**IV.
THE SOUTH CAROLINA COURT OF APPEALS ERRED IN FINDING THAT
PETITIONER FAILED TO PRESERVE ISSUES OF EQUITABLE STANDING
AND WAIVER BY RESPONDENTS**

As indicated in Section II, once Respondents failed to specifically identify standing as "real representative" in their initial pleading, the issue was waived. (See *We*

Sav Financial Corp. v. Lingefelt, 316 S.C. 442, 450 S.E.2d 580 (1994) [standing issue may be waived].

To ensure that this Court recognizes the raising of issues related to waiver and equitable standing, Petitioner references where she raised the issues brought before the Circuit Court:

- Petitioner referenced Respondent Kouten's failure to outline his capacity. (App. 85, fn. 3)
- Respondent Kouten and the other Respondents did not bring the motion for summary judgment based on standing. (App. 146)
- Petitioner raised the issue that Respondents cited no authority for the argument that Petitioner had no standing. Arguments are not evidence. (App. 184, citing *Trivelas v. S.C. Dept. of Transportation* , 348 S.C. 125, 141, 558 S.E. 2d 271, 279 (2001).)
- Petitioner argument that a third party can sue an attorney when he misleads individuals regarding their right to estate inheritance. (App. 162, see *Holz v. Mainyard*, 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].) (App. 162)
- Petitioner continued to contend that the court ignored the motion to disqualify/remove Kouten. (App. 164)
- Kouten did not bring up the issue of Petitioner's standing until his supplementary pleading filed on December 20, 2012. (App. 168) Therefore, Petitioner contends that he waived the issue of standing and in fact brought a different motion which the court should not have considered.
- Petitioner 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. (App. 174)
- Petitioner again brought up the issue of motion to remove in the motion to amend. (App. 181, fn. 5)
- Petitioner outlined that the circuit court failed to address the issues in the case. (App. 182)
- Petitioner 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. (App. 186)

Petitioner explained that it was necessary to determine whether any of the defendants waived the issue of standing.

- Petitioner 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).) (App.238).
- Petitioner specifically requested that the court consider her motions and rule on the motions. (App. 242).
- Respondent Kouten stated that he was representing all defendants after the notice of association was filed. (App. 472-474).
- Petitioner questioned Kouten's involvement in the case from his first pleadings. (R. 472-474).

By raising these issues, Petitioner is entitled to have the court consider the issues, and acknowledge that the issues were preserved for the court's consideration.

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.

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.

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." (Warren, Earl, "The Law and the Future" in *Fortune Magazine* (November 1955).)

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 the Court of Appeal's view of standing is so narrow that Petitioner is denied standing. (See App. 99--declarations of expert).

The injustice of denying standing to those who care about their Elderly family members undermines South Carolina's commitment to its vulnerable population, and impairs families from vindicating their family's rights, a result so wrong that it demands reversal.

Petitioner respectfully requests that the Court grant this writ of certiorari, reverse the Opinion of the Court of Appeals, and address the remaining issues without remand to the Court of Appeals. Petitioner will brief any remaining issues as directed by the Court.

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By:


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February 22, 2016

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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SC SUPREME COURT

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 KOUTEN are.....Respondents

PROOF OF SERVICE

I certify that on February 22, 2016, I served a copy of **Petition for Writ of Certiorari** on the Respondents and interested parties by depositing same in the United States Mail, postage prepaid, addressed as follows:

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February, 22, 2016

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