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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

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

RECEIVED
AUG 29 2016
SC Court of Appeals

In the matter of the Estate of Alice Shaw Baker.

Betty Fisher and Lisa Fisher,Appellants

v.

Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd, and Henry McMaster, in his Capacity as Attorney General, Defendants,

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

APPELLANTS' MOTION FOR RECONSIDERATION

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 11
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE
Pro Hac Vice
c/o JOHN HUGHES COOPER, P.C.
1476 Ben Sawyer Blvd. Ste. 11
Mount Pleasant, SC 29464
843-883-9099; fax 843-883-9335

(Attorneys for Appellant)

COMES NOW Betty Fisher and Lisa Fisher, Appellants in the above appeal, brings this motion for reconsideration as follows

**I.
INTRODUCTION**

On August 19th, 2016, This court issued its ruling with regard to costs/attorney fees associated with the unpublished opinion number 2015-UP-359¹ filed on July 15th 2015. Despite legal precedent and public policy reasons disallowing attorney fees/costs in actions where there is a dismissal without prejudice, this Court awarded Respondents \$500 in costs pursuant to rule 222.²

Appellants contend that reconsideration of this award is necessary to maintain consistent law related to costs/attorneys fees, because without this consistency, an award of fees amounts to a sanction against Appellants for seeking redress for serious issues, as here disqualification. Moreover, without proper legal authority, an award of fees is contrary to American rule which holds that Attorney fees are not recoverable unless authorized by contract or statute. See *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993).

While Appellants realize that there are some cases where the procedural history of a case can obscure the important legal issues involved, a motion for reconsideration becomes a valuable

¹ For the court's convenience, attached as Exhibit A is the court's opinion filed July 15, 2016.

² Attached hereto is a true and correct copy of Respondent's motion marked as Exhibit B served on September 28, 2015. It is important to note that Respondent's counsel failed to seek attorney fees under Rule 222, despite the fact that the motion itself only sought costs under rule 222. (See *Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412 [prevailing party waived his right to attorney fees since her failed to file an itemized statement]) Here, Respondent's counsel prematurely filed for costs, and the court held his motion pending final resolution by the courts. Appellants question the reason the court would do this, however in so doing, Appellants contend the Court should hold him to the legal requirements and that includes seeking fees under the appropriate law.

The order granting fees is attached hereto as Exhibit C.

tool in returning focus on the legal issues and the public policy for awards of costs in the appellate arena. Appellants respectfully request that the court reconsider its order on the following issues:

- a) Legal precedent precludes the grant of costs/attorney fees in cases where the appeal is dismissed without prejudice, as here.
- b) Public policy precludes the grant of costs/attorney fees in cases where the appeal is dismissed without prejudice, as here.
- c) Constitutional principles of due process and equal protection preclude the grant of costs/attorney fees in cases where the appeal is dismissed without prejudice, as here, and serve to sanction Appellants for seeking redress for the legal and ethical violations by Respondent Peter Kouten.

II.

RECONSIDERATION OF THE GRANT OF COSTS/ATTORNEY FEES IS WARRANTED, IN LIGHT OF LACK OF LEGAL AUTHORITY FOR THE GRANT OF THESE FEES WHEN AN APPEAL IS DISMISSED WITHOUT PREJUDICE

A. *Legal Precedent and Public Policy Does not Support Award of Costs/Attorney Fees in Appeals based on Dismissal without Prejudice.*

United States Courts follow the American Rule with regard to awards of attorney fees. This rule is followed in South Carolina wherein Attorney fees are not granted unless authorized by contract or statute. (See *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993).)

Here, there was a dismissal without prejudice, so South Carolina common law does not provide a means for recovery of attorney fees, even when there is a successful litigant. (See *Collins v. Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961).) However, Dismissal without prejudice does not act as a determination of success on the merits. (E.g. *McEachern v. Black*, 329 S.C. 642, 496 S.E.2d 659 (Ct.App.1998) (concluding a dismissal without prejudice is not an adjudication upon the merits and does not have res judicata effect).)

Costs are permitted in appeals as set forth in Rule 222, SCACR, which provides in pertinent part:

"(a) To Whom Allowed. Unless otherwise ordered by the appellate court or agreed by the parties, costs shall be taxed against the appellant when the appeal is dismissed or judgment on appeal is affirmed. When a judgment is reversed, costs shall be taxed against the respondent unless the court orders otherwise. When an appeal is affirmed or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court.

(b) Costs Allowed. The party entitled to recover costs under this rule may, to the extent the party actually incurred these costs, recover the following: (1) the filing fee paid under Rule 203(d); (2) the cost of the court reporter's transcript; (3) premiums paid for costs of supersedeas bonds or other bonds obtained to preserve rights pending appeal; (4) the cost of printing the Record on Appeal under Rule 209; and (5) the cost of printing the party's final brief(s) under Rule 210. In addition, the party shall be entitled to recover an attorney's fee in an amount which shall be set by order of the Supreme Court.[1] The allowance of additional costs will generally not be allowed except in the most extraordinary of circumstances

(d) Motion for Costs. A party desiring costs to be taxed shall, within fifteen (15) days of the issuance of the remittitur, serve and file a motion requesting that costs be assessed under this Rule. The motion shall comply with Rule 240. If costs are being sought under (b) above, **the motion shall be accompanied by a sworn, itemized statement of costs incurred in the form prescribed in the Appendix to these rules.** Any return or reply to the motion shall be served and filed in the manner provided by Rule 240. The return may oppose the request for costs or seek a reduction of the amount of costs to be awarded. The remittitur shall not be stayed by the filing of a motion for costs."
(Emphasis added)

The order (Ex. C) granting fees is ambiguous. The court appears to have acknowledged that Respondent filed for costs under Rule 242(j), but ignores that the return by Respondent was essentially a copy of work filed by W. Westbrook Wills. Appellants can not determine the costs, other than it must be for attorney fees since it exceeds the amount requested by Respondent as to all other costs.

However, the procedural ambiguity of Respondent's motion is overcome by the clear policy precluding the grant of costs/attorneys fees when there is dismissal without prejudice. South Carolina's legal precedent has established policy mandates precluding the award of fees for "dismissals without prejudice." This public policy is eloquently addressed by the former Chief Justice Jean Hoefler Toal, and Shahin Vafai, and Robert A. Muckenfuss, in the book Appellate Practice in South Carolina (2002)("Appellate Practice"):

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"Case law makes clear that such dismissal must be with prejudice; where cases have been dismissed without prejudice, costs have not been allowed. See *Johnson v. Paraplane Corp*, 321 S.C. 3116, 468 S.E. 2d 620 (1996); *Peterkin v. Brigman*, 319 S.C. 367, 461 S.E. 2d 809 (1995); *Duncan v Government Employees Ins. Co*, 331 S.C. 484, 449, S.E. 2d 580 (1994); *McLendon v. South Carolina Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 443 S.E. 2d 539 (1994); *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E. 2d 379 (1994)." (See Appellate Practice, *supra*, Ch. 11, § IV(A)(1)(a), pp. 295-296)

Review of the cases which are set forth in the Appellate Practice all support Appellants' position that there are no grounds for the grant of costs/attorney fees. If the court permits the grant of attorney fees/costs, contrary to the American Rule, absent statutory authority and in violation of the State's accepted public policy deny these fees in dismissed appeals, then the award will act as an unwarranted sanction for seeking disqualification in this case.³

B. As Applied, Any Award of Fees Acts as a Sanction Against Appellants in Violation of Constitutional Principles of Due Process.

If there is no legal authority and/or as applied here, Appellants are treated differently than other Appellants, the \$500.00 Award of costs acts as a punitive sanction without an opportunity to be heard. This can be construed as a violation of due process.

³ Disqualification is an ethical issue, and not a procedural issue. (See *State of Arkansas v. Dean Foods Products Company, Inc*, 605 F.2d 380, 384 (8th circ. 1979) citing *American Can Company v Just Feed Company*, 436 F.2d 1125, 1127 (5th circ. 1971).

By the court's opinion, Ex. A, the issue of disqualification may again be raised in light of the dismissal without prejudice. Appellate jurisdiction under South Carolina Code §14 - 3 - 330 always permits an appeal of an order affecting substantial rights, disqualification affects these rights.

Adequate notice prior to imposition of sanctions is mandated by the due process clauses of the United States Constitutions. (U.S. Const., 14th Amendment; see also *Roadway Express, Inc. v. Piper* (1980) 447 U.S. 72, 767 [attorney's fees should not be assessed as a sanction without fair notice and an opportunity for a hearing.]) South Carolina also outlines that "[p]rocedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." (See *Moore v. Moore*, 376 S.C. 467 (2008).

Therefore, Appellants contend that if the order was for attorney fees, and if there is no legal authority for attorney fees, than Appellants are incurring a sanction without appropriate due process.

This motion for reconsideration more fully provides this Court with the legal authority against the order granting costs and fees, and as such will mandate reversal. Therefore, the issue of sanctions without due process will be cured.

III. CONCLUSION

Appellants can only rely on the law. One might say that the directions of the law does not become important until it's not followed, and the idea of justice is merely an idea until there is injustice.

Here, whether the court orders \$1.00 or \$500.00 for fees that are not supported by the law, incites serious consideration about the legal implications of the order and supports this motion for reconsideration. This court dismissed Appellants' appeal, without analysis of the important legal issues that were raised in another case on point, *Townsend v. Townsend*, 323 S.C. 309, 474 S.Ed. 2d 424 (1996). In so doing, the substantial rights related to disqualification may be raised again.

Appellants pray that this Court reconsider its order and instead follow the mandate of a "dismissal without prejudice" and which does not permit an award of costs/attorneys fees.

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By:

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

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Pro Hac Vice

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ATTORNEYS FOR PLAINTIFF

August 26, 2016

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

In the matter of the Estate of Alice Shaw Baker.

Betty Fisher and Lisa Fisher, Appellants,

v.

Bessie Huckabee, Kay Passailague Slade, Sandra Byrd,
and Henry McMaster, in his Capacity as Attorney
General of South Carolina, Defendants,

Of Whom Bessie Huckabee, Kay Passailague Slade, and
Sandra Byrd are the Respondents.

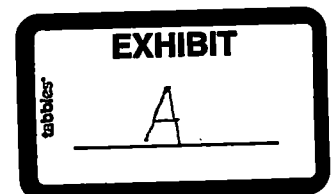
Appellate Case No. 2014-001267

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Unpublished Opinion No. 2015-UP-359
Submitted May 1, 2015 – Filed July 15, 2015

DISMISSED

John Hughes Cooper, of John Hughes Cooper, PC, of
Mount Pleasant, for Appellants.



Peter A. Kouten, of Kouten Law Firm, LLC, of Johns Island; and Warren W. Wills, III, of Law Office of W. Westbrook Wills III, of Folly Beach, for Respondents.

PER CURIAM: Betty and Lisa Fisher appeal circuit court orders denying their motion to disqualify attorney Peter Kouten and a consent order substituting counsel. Because the orders are not immediately appealable, we dismiss this appeal. *See EnerSys Delaware, Inc. v. Hopkins*, 401 S.C. 615, 619, 738 S.E.2d 478, 480 (2013) (holding an order denying a motion to disqualify an attorney is not immediately appealable).

DISMISSED.¹

SHORT, LOCKEMY, and McDONALD, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

KOUTEN LAW FIRM, LLC

8 Gillon Street
Charleston, South Carolina 29401
TEL: (843) 789-9614
FAX: (843) 559-3162

Mailing address:
PO Box 340
JOHNS ISLAND, SC 29457

EMAIL: pkouten@gmail.com
www.koutenlaw.com

September 25, 2015

South Carolina Court of Appeals
ATTN: V. Claire Allen
P.O. Box 11629
Columbia, SC 29211

Re: Appellate Case No. 2014-001267

In The Matter of the Estate of Alice Shaw-Baker

Betty Fisher and Lisa Fisher, Appellants,

v.

Bessie Huckabee, Kay Passailague Slade, Sandra Byrd, and Henry McMaster, in his
Capacity as Attorney General of South Carolina, Defendants.

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

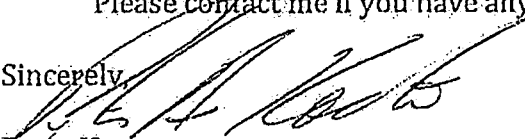
Dear Ms. Allen,

Please find enclosed original and six copies of Respondent's Motion for Costs.

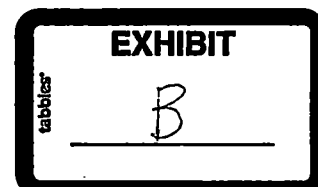
Also find enclosed Proof of Service, and check in the amount of \$25.00.

Please contact me if you have any questions regarding this filing.

Sincerely,


Peter Kouten
W/Enclosures

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



THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2014-001267

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Betty Fisher and Lisa Fisher, Appellants,

v.

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Capacity as Attorney General of South Carolina, Defendants.**

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

RESPONDENT'S MOTION FOR COSTS

PETER A. KOUTEN, ESQUIRE
PO Box 340
Johns Island, SC 29457
(843) 789-9614; fax (843) 559-3162
pkouten@gmail.com
(Attorney for Respondent as
Personal Representative for the
Estate of Alice Shaw Baker)


COMES NOW Bessie Huckabee, Respondent in the above Appeal, pursuant to Rule 222, SCACR, and moves for order for payment of Respondent's costs associated with the Rehearing in this matter.

This Court, on September 17, 2015, issued an Order ruling that the Appellant's Petition for Rehearing was DENIED. Respondent's counsel, upon service of Petition for Rehearing, reviewed the prior court's order and incurred costs researching the statutes and case law. Respondent also incurred costs of copying and postage.

Respondent has filed Itemized Statement of Costs as an exhibit to this motion.

WHEREFORE, Respondent prays that this Honorable Court Grant Respondent's Costs of Appeal Rehearing under Rule 222 SCACR and Order Appellant to pay Respondent's Costs.

Respectfully Submitted



Peter A. Kouten, Esquire

PO Box 340

Johns Island, SC 29457

pkouten@gmail.com

843-789-9614

Attorney For Respondent as Personal
Representative

September 25, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

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

Appellate Case No. 2014-001267

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v.

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

ITEMIZED STATEMENT OF COSTS

The Appellate Court is requested to tax the following costs against Betty Fisher and Lisa Fisher, Appellants

COSTS TAXABLE UNDER RULE 222, SCACR	NO. OF PAGES	RATE	REQUESTED	ALLOWED (For Court Use Only)
Cost of Printing or Copying Final Brief				
Cost of Printing or Copying Final Reply Brief				
Cost of Printing or Copying Record on Appeal				

Filing Fee Paid Under Rule 203(d), SCACR				
Cost of Court Reporter's Transcript				
Attorney's Fee Provided By Rule 222(b), SCACR				
Petition for Rehearing Copies of Petition	12	.50	6.00	
COSTS TAXABLE UNDER RULE 242(j), SCACR				
Cost of Printing or Copying Brief				
Cost of Printing or Copying Reply Brief	106		53.00	
Cost of Printing or Copying Appendix	7		3.50	
Filing fee paid under Rule 242(c), SCACR				
Attorney's fee provided by Rule 242(j)(2), SCACR	7 hrs	\$330/hr	\$1,000.00	
Other (specify and explain):				
		TOTAL	\$1,062.50	

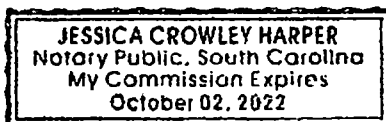
I, Peter A. Kouten, do swear or affirm that the foregoing costs are correct and were necessarily incurred in this action. A copy of this statement was (mailed to/served upon) opposing counsel.

Peter A. Kouten
Peter A. Kouten, Attorney for Respondent Bessie Huckabee as Personal Representative

Subscribed and sworn to before me this
20th day of September, 2015.

[Signature]
Notary Public for South Carolina

My Commission Expires: 10/2/2022



THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2014-001267

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v.

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Capacity as Attorney General of South Carolina, Defendants.

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

PROOF OF SERVICE

I certify that I have served the foregoing Respondent's Motion for Costs upon
counsel for Appellants and interested parties by depositing a copy of it in the United
States Mail, postage prepaid, on September 28th, 2015, addressed to the following:

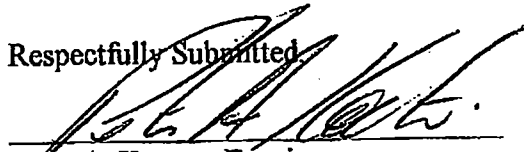
Counsel Served:

**John Hughes Cooper, Esquire
1476 Ben Sawyer Blvd., Ste. 7
Mt. Pleasant, SC 29464**

**W. Westbrook Wills, Esquire
P.O. Box 822
Folly Beach, SC 29439**

**Mary Frances Jowers, Esquire
PO Box 11549
Columbia, SC 29211**

Respectfully Submitted,



**Peter A. Kouten, Esquire
PO Box 340
Johns Island, SC 29457
pkouten@gmail.com
843-789-9614
Attorney For Respondent as Personal
Representative**

The South Carolina Court of Appeals

In the matter of the Estate of Alice Shaw Baker.

Betty Fisher and Lisa Fisher, Appellants,

v.

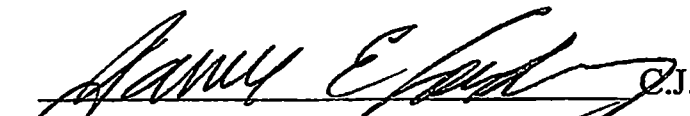
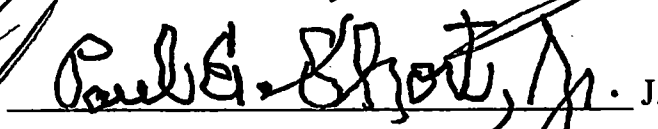
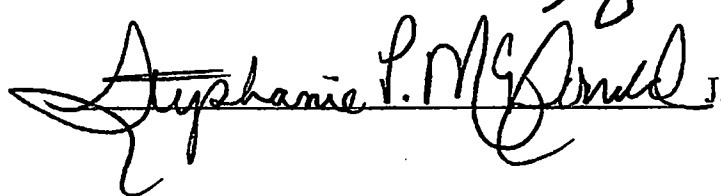
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Of Whom Bessie Huckabee, Kay Passailague Slade, and
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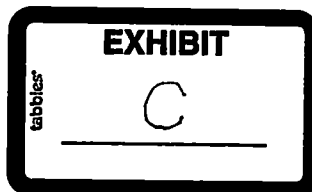
Appellate Case No. 2014-001267

ORDER

Pursuant to Rule 222 of the South Carolina Appellate Court Rules, the motion for costs filed by Respondents is granted in the amount of \$500.00 against Appellants. The lower court or tribunal is directed to add this award of costs to the remittitur.

Columbia, South Carolina



FILED

August 19, 2016 *EF*

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

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

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v.

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

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

PROOF OF SERVICE

I certify that I have served **Appellants' Motion for Reconsideration and Proof of Service** upon Respondents and upon the Attorney General by depositing a copy of it in the United States Mail, postage prepaid, on August 26, 2016, addressed as follows:

Hon. Mary Frances Jowers, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(By email)

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340
Johns Island, SC 29457

W. Westbrook Wills III, Esquire
P.O. Box 822
Folly Beach, SC 29439

August 26, 2016

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 
JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298
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State Bar of Georgia 185986
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ATTORNEYS FOR APPELLANTS

JOHN HUGHES COOPER PC

ADMIRALTY & MARITIME LAW & CIVIL LITIGATION



John Hughes Cooper
shiplaw@jhcooper.com

www.JHCOOPER.com

August 26, 2016

John Townsend Cooper
jtc@jhcooper.com

Hon. Jenny A. Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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AUG 29 2016

SC Court of Appeals

Re: Betty Fisher and Lisa Fisher, Appellants v. Bessie Huckabee, Kay Passailague Slade, Sandra Byrd, and Henry McMaster, in his capacity as Attorney General of South Carolina, Defendants, Of whom Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd are the Respondents, **Appellate Case No. 2014-001267**

Dear Ms. Kitchings:

Enclosed for filing please find an original and 6 copies of Appellants' Motion for Reconsideration, Proof of Service, and our check for the filing fee.

Also enclosed please find a copy of our filing for date stamping and return to us in the enclosed envelope.

Thank you for your assistance with this matter.

Best regards.

Very truly yours,

John Hughes Cooper

Enclosures: Original Appellants' Motion for Reconsideration
Proof of Service
6 copies Appellants' Motion for Reconsideration
Check for \$25.00
Copies for Date Stamping and Return
Return Envelope

Cc: W. Westbrook Wills III, Esquire
Peter A. Kouten, Esquire
Mary Frances Jowers, Asst. Attorney General (email)

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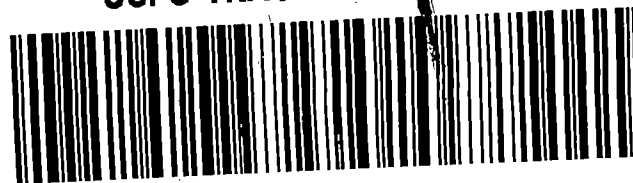
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Piedmont, SC 29673

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Jenny A. Kitchings, Clerk
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

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AUG 29 2016

SC Court of Appeals

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