

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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APR 10 2017

S.C. SUPREME COURT

Appellate Case No. 2016-000320
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

**RETURN BY PETITIONER BETTY FISHER,
AS REAL REPRESENTATIVE OF ALICE SHAW-BAKER TO
RESPONDENTS' MOTION TO STRIKE**

JOHN HUGHES COOPER, ESQUIRE
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and

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(Attorneys for Petitioner)

COMES NOW Petitioner Betty Fisher, as Real Representative for Alice Shaw Baker, ("Petitioner"), and opposes Respondents Bessie Huckabee and Peter Kouten's Motion to Strike¹ dated March 27, 2017.

Said motion references non-existent Rule 224, SCACR, for authority to bring this motion. The motion seeks to strike portions of Petitioner's Brief on the Merits, claiming that it does not adhere to Rule 208, SCACR.

I.
**PETITIONER PRAYS THE COURT DENY THIS MOTION IN ITS ENTIRETY,
BECAUSE HER BRIEF SUBSTANTIALLY COMPLIES
WITH THE MANDATES OF RULES 242, SCACR AND 208, SCACR .**

In Summary, Petitioner responds specifically to the portions of the brief that Respondents seek to strike:

1. pp. 2 and 3, referencing: Important Portions of Opinion

In an effort to summarize the portions of the opinion that included the ruling of the Court of Appeals, Petitioner set forth a shortened version of the Opinion.

Petitioner did not waive any argument set forth in the actual opinion, however there were some specific portions of the Opinion that dealt specifically with standing, waiver, and other issues raised by Petitioner. This is the Opinion so it is not contested. Petitioner contends that the introduction and important portions of the Opinion are merely stylistic differences, and in fact comply with Rule 208.

Respondents Bessie Huckabee and Peter Kouten ("Respondents") cite no authority for the proposition that the summary or portions of opinion set forth in Petitioner's brief does not comply with the court rules and are not "within the confines of the Rules."

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¹ The heading for the Motion to Strike also spells the name of "Sandra Bird" differently than all previous pleadings, wherein it was spelled "Byrd". Petitioner makes note of this so that this Court understands the variance in her headings.

2. pp. 4 through 9, except for p. 6 of lines 12-16 referencing the Standard of Review.

There is nothing in the rules that preclude Petitioner from including an explanation or summary of her argument at the beginning of the briefing. From p. 4 through p. 9, Petitioner sets forth not only the arguments, but the implications of the arguments.

Pursuant to Rule 242, SCACR, Petitioner had an obligation to outline the policy issues, the conflict, the novel questions of law, and the constitutional law that necessitate this court's review.

This is not a form brief, it is a brief which outlines the importance of the Elder Abuse causes of actions which mandate explanation of the "novel" questions of law and constitutional issues, etc.

Petitioner submits that, contrary to the representations by Respondents, there is nothing that requires Petitioner to follow a format.

If this Court believes that the formatting should be different, at this Court's direction, Petitioner respectfully requests that this Court allow her to amend.

3. Respondents object to Petitioner's brief as containing contested matters, and thereafter states that:

"The Petitioner filed a will contest in 2009 and has yet to have the matter heard. The will left the entire estate to Respondents Bessie Huckabee, Kay Passailague Slade, and Sandra Bird. Alice Shaw-Baker also left substantial non-probate assets for the benefit of the Respondents Bessie Huckabee, Kay Passailague Slade, and Sandra Bird." (Motion p. 2)

Petitioner certainly objects to the accuracy of the above statement by Attorney Kouten, and contends that the statement is included in the motion, without any reference to what he wants stricken. Petitioner respectfully requests that this Court reject his vague and irrelevant request.

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4. Additionally, Respondents seek to strike "Factual History," at p. 14, paragraph three of the brief stating:

"...at the third paragraph 'Petitioner alleges...' The Petitioner proceeds to list unsubstantiated allegations, indicating initially that they are merely allegations."

This petition relates to a Complaint against Respondents. In said Petition, petitioner set forth allegations that are set forth in the Complaint with appropriate references to the record. This should not be stricken, because it is not merely a "statement of the case" under Rule 208, SCACR, rather it is a reference to the statement of facts.

Here under Rule 242 (I), the "briefs shall, to the extent possible comply with the requirements of Rule 208(b)." Rule 208(b)(1)(D) indicates that a party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and summarize the party's contentions."

If the Court feels the placement of this statement of facts (herein designated as "factual history") would be better served in a separate portion of the brief, designated as "statement of the facts", Petitioner respectfully requests that this Court grant her leave to amend her Brief on the Merits.

5. Respondents further seek to strike page 15 paragraph 3:

Respondents do not reference the specific allegations set forth in this paragraph, which deals with the allegations that Respondent Kouten was Guardian ad litem with a duty to Alice Shaw Baker, etc.

This allegation is central to the allegations of Elder Abuse, and Legal Malpractice, which are at the core of this Petition. Petitioner respectfully requests that the Court deny the request to strike these allegations.

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6. And page 15, paragraph four, sentence two:

It is difficult to accurately determine the facts that Respondents want stricken, however Petitioner believes that Respondents want this Court to strike the allegations that "Ms. Shaw Baker intended that her monies be used for Animal Charities only."

This paragraph is part of the argument, is a contested fact, and part of the allegations of wrongdoing by the parties and what constitutes Elder abuse. It also explains the importance of a family member seeking justice for their loved one and in standing up for the known desires of a decedent. This is standing, which the Court of Appeals denied, and is the subject of this Petition for Writ of Certiorari.

Petitioner respectfully requests that the court deny Respondents' request.

7. And page 15, paragraph five:

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

This is argument, and as referenced above, Rule 208(b)(1)(D) indicates that a party may also include "a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and summarize the party's contentions."

For this reason, Petitioner respectfully requests that this Court deny the motion to strike.

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II.

REMEDY SOUGHT

Petitioner respectfully requests that this Court deny Respondents' Motion to Strike in its entirety. Petitioner's counsel believes that the briefing complies in fact and in substance with Rule 208, SCACR. If this court feels that the stylistic framework requires adjustment, Petitioner requests that the Court permit counsel to amend.

The court in *Henning v. Kaye* (1992) 415 S.E.2d 794 considered the appropriate treatment of a party who failed to comply with formatting. The *Henning* court held that:

"...dismissal of an appeal was not mandatory where the brief filed by the appellant failed to comply with Rule in that it was not correctly organized and labeled, the issues were not distinctively headed, the table of authorities was not alphabetized or referenced to the body of the brief, the statement of the case contained contested matter and omitted required information, and the arguments contained no citations to the record or to the cases listed in the table of authorities; however these rules are not mere technicalities and the appellant would be required to amend his brief."

While Petitioner does not believe her brief fails in the way that the *Henning* court describes, she notes for the court that amending the brief is proper, if the court feels that it was not correctly organized.

Finally, Petitioner notes the wisdom of the 7th circuit in analyzing motions to strike, in *Custom Vehicle Inc. v. Forest River, Inc.*, 464 F. 3d 725 (7th cir. 2006). The court explained that some motions to strike "do nothing but squander" the court's time and disserve the interest of judicial economy."

Petitioner believes that the logic of the *Custom Vehicle* court supports her position that her brief conforms in substance to the dictates of Rule 208, and that this case deals with standing and allegations in a complaint, which are inherently contested. Also, the language of Rule 242, SCACR is not as rigid as Respondents assert, rather it states that the "briefs shall, **to the extent possible**, comply with the requirements of Rule 208(b)." (Emphasis added)

Therefore, this Court has discretion to find that Petitioner's Brief on the Merits substantially complies with the rule.

WHEREFORE, Petitioner Prays that the Court deny Respondents' Motion in its entirety.

April 6, 2017

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: _____

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PROOF OF SERVICE

I certify that I have served the **RETURN BY PETITIONER BETTY FISHER,
AS REAL REPRESENTATIVE OF ALICE SHAW-BAKER TO RESPONDENTS'
MOTION TO STRIKE** on the following counsel and parties by depositing a copy of it in
the United States Mail, postage prepaid, on April 6, 2017, addressed as follows:

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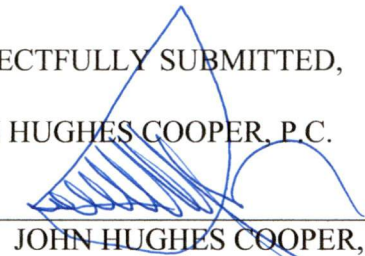
(Attorney Pro Se and for Bessie Huckabee, as Personal Representative)

April 6, 2017

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

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