

THE STATE OF SOUTH CAROLINA

In the Supreme Court

Published Opinion No. 5371

Appellate Case No. ~~2017-000743~~ ²⁰¹⁶⁻⁰⁰⁰³²⁰
Circuit Case No. 2012-CP-10-1332

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S.C. SUPREME COURT

Betty Fisher , as Real Representative for Alice Shaw-Baker, Petitioner,

v.

Bessie Huckabee, Kay Passailague Slade, Sandra Bird, and Peter Kouten and Does 1-100,
Defendants,

Of Whom Bessie Huckabee, Kay Passailague Slade, Sandra Bird, and Peter Kouten are the
Respondents.

RESPONDENT'S ~~INITIAL~~ BRIEF

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

Table of Contents

Table of Contents	2
Cases	2
Statement of Issues on Appeal.....	6
Statement of the Case.....	7
Argument.....	9
Conclusion.....	24

Table of Authorities

Cases

<i>Ahanchian v. Xenon Pictures, Inc.</i> , 624 F. 3d 1253 (9 th Cir. 2010)	14
<i>Anchor Point Inc. v. Shoals Sewer Co.</i> , 308 S.C. 422 (1992)	11
<i>Asbury v. S.C. National Bank</i> , 268 S.C. 40 (1977)	17
<i>ATC South, Inc. v. Charleston Cnty.</i> , 380 S.C. 191 (2008)	11
<i>Bailes v. Southern Ry. Co.</i> 227 S.C. 176 (1955)	21
<i>Bardoon Properties v. Eidolon Corporation, etal</i> , 326 S.C. 166 (1997)	20
<i>Bennett v. Spartanburg Ry., Gas & Elec. Co.</i> , 97 S.C. 27 (1914).....	21
<i>Byrd v. Irmo High Sch.</i> , 321 S.C. 426 (1996)	9
<i>Duke v. Postal Tel. Cable Co.</i> , 71 S.C. 95 (1905)	22
<i>Ex parte Morris</i> , 367 S.C. 56 (2006)	10

Fabian v. Lindsey, 410 S.C. 475 (1977)13, 14

Fisher Ex Rel. Shaw-Baker v. Huckabee, 415 S.C. 171 (Ct App. 2015)22

Freemantle v. Preston, 398 S.C. 186 (2012)10

FW/PBS, Inc. v. Dallas, 493 U. S. 215 (Sup.Ct. 1990)12

Guy v. Liederbach, 501 Pa. 47, 459 A.2d 744 (1983)13

Jackson v. State, 331 S.C. 486 (1997)9

Lanham v. Blue Cross & Blue Shield of S.C., Inc. 349 S.C. 356 (2002)9

Lujan v. Defenders of Wildlife, 504 U.S. 555 (Sup.Ct. 1992)10, 11

Michael P. v. Greenville County Dep't of Soc. Servs., 385 S.C. 407 (Ct.App. 2009)9

Murphy v. Hagan, 275 S.C. 334 (1980)16, 23

Park v. Safeco Ins. Co., 251 S.C. 410 (1968)14

Parker v. Parker, 313 S.C. 482 (1994)12

Perry v. Bullock, 409 S.C. 137 (2014)17

Roche v. Young Bros., Inc., of Florence, 332 S.C. 75 (1998)17

Sea Pines Ass'n for the Protection of Wildlife, Inc. v.
South Carolina Dep't of Natural Res., 345 S.C. 594 (2001)10

S. C. Dep't of Trans. v. First Carolina Corp. of S. C., 372 S.C. 295 (2007)15, 23

S.C. Prop. & Cas. Ins. Co. Guar. Ass'n v. Brock, 410 S.C. 361 (2014)17

Smiley v. South Carolina Dep't of Health & Env't'l Control, 374 S.C. 326 (2007)10

<i>Steel Co. v. Citizens for a Better Env't</i> , 523 U.S. 83 (Sup.Ct. 1998)	11
<i>Strickland v. Strickland</i> , 375 S.C. 76 (2007)	12
<i>Town of Summerville v. City of N Charleston</i> , 378 S.C. 107 (2008).....	9
<i>United States v. Hays et al.</i> 515 U.S. 737 (Sup.Ct.1995)	12
<i>WeSav Financial Corp. v. Lingefelt</i> 316 S.C. 442 (1994)	13
<i>Youngblood v. S. C. Dep't of Soc. Svs.</i> , 402 S.C. 311 (2013)	11

Codes:

Land Transfer Act of 1875.....	19
Land Transfer Act of 1892.....	22
Land Transfer Act of 1897.....	19, 22
S.C. Code Ann § 15-5-90 (2005)	16
S.C. Code Ann. Section 43-35-25 (2015)	18
S.C. Code Ann. Section 43-35-40 (2015)	18
S.C. Code Ann §§ 43-35-5 through -595 (2015).....	18
S.C. Code Ann §§ 62-3-711 and 715 (Supp.2014)	20
S.C. Code Ann. § 62-3-703(c) (Supp. 2014).....	17,20
S.C. Code Ann. § 62-3- 715(20) (Supp. 2014)	17,20
S.C. Code of 1902 § 2600 (Civ. Code).....	21
S.C. Civil Code Section 2859 of 1902	21

Rules:

Rule 56(c), SCRCF9
Rule 201, S.C. Appellate Court Rules15

Reference/Law Review/ Articles

1A C.J.S. *Actions* § 101 (2005).9
21 C.J.S. *Courts* § 16 (1990)20
59 AmJur2d *Parties* § 35 (1987)20
Black’s Law Dictionary, 2nd Edition, 1910 pg 1020-1021.....19
Real Representative Law, 1897, being part I. of the *Land Transfer Act, 1897*,
and a discussion on administration thereunder (1898),
W. Clowes and Sons, London 1898.
<http://archive.org/stream/realrepresentati00tyss#page/n5/mode/2up>)19
Real Representative Law, published in 1898.19

Statement of Issues on Appeal

1. Did the Court of Appeals err in failing to find that Respondents waived the issue of Petitioner's standing to bring this action if Respondent's initial papers did not raise the issue of standing?

2. Did the Court of Appeals err in determining that Petitioner did not have standing to pursue actions on behalf of Alice Shaw-Baker?

3. Did the Court of Appeals err in finding that Petitioner failed to preserve the issues of equitable standing and waiver by Respondents?

Statement of the Case

Alice Shaw-Baker (hereafter "Alice") died testate in Charleston County on February 25, 2009. She retired from Charleston Memorial Hospital after more than twenty years of service in the accounting department. Alice was divorced and had no children. Alice had cultivated relationships with co-workers after her retirement and several were close friends. She named three of her friends as beneficiaries of her last will.

Prior to her death, Alice was deemed incapacitated and daughter of the Petitioner was appointed guardian and conservator for Alice. The Petitioner and her agents had access to Alice's files including her Last Will and Testament. Although Alice had executed prior wills leaving her estate to animal welfare, her prior wills also included bequests to her friends Bessie Huckabee and Kay Slade. In her Last Will and Testament, executed on May 21, 2001, Alice devised her entire estate to friends Bessie Huckabee, Kay Slade, and Sandra Byrd. Alice also named Slade the sole beneficiary of her state deferred compensation plan and life insurance. Further, Alice nominated Huckabee as personal representative. The Petitioner's attorney turned over Alice's original Last Will and Testament to the Charleston County Probate Court after Alice's death, a copy of which was previously provided to the probate court after the guardianship hearing on request of the probate judge. Huckabee petitioned the probate court for informal probate of the will on March 11, 2009. The probate court admitted the will and appointed Huckabee as personal representative.

Alice's closest living intestate heir is the Petitioner Betty Fisher, of Long Beach, California. On April 27, 2009, Fisher contested the will, sought removal of Huckabee as personal representative and alleged Huckabee and Slade had unduly influenced Alice by

inducing her to execute the May 21, 2001 Will.¹ Fisher filed the instant case in circuit court on February 23, 2012, as Alice's "real representative" under the survivability statute.

The Petitioner alleges violation of the Omnibus Adult Protection Act, breach of fiduciary duty and a legal malpractice claim against Attorney Kouten. Respondents filed a Motion for Summary Judgment on December 17, 2012, claiming Fisher lacked standing to bring this action. The circuit court granted Respondents' motion in a Form 4 order issued on May 8, 2013. Petitioner filed a motion to alter or amend judgment on May 28, 2013.

In its December 12, 2013 order, the circuit court denied Petitioner's motion to alter or amend and affirmed its prior order granting Respondents' motion for summary judgment. The circuit court held a real representative could not sue on behalf of a decedent under the survivability statute. Noting a real representative historically was only able to bring actions related to the decedent's real estate, the court found only a personal representative could bring those actions. Accordingly, the court concluded Fisher's only remedy was to seek removal of Huckabee as personal representative in probate court which she had ample opportunity and time to do. The Petitioner appealed and the lower court's ruling was upheld by the Court of Appeal.

¹ The Will Contest has not been heard.

ARGUMENT

STANDARD OF REVIEW

An appellate court reviews the grant of summary judgment using the same standard employed by the circuit court. *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002) Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)

- 1. The Court of Appeals did not err in finding that Petitioner did not preserve her defense that Respondents waived standing.**

Standing

"Before any action can be maintained, there must exist a justiciable controversy." *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996) Standing is that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims. 1A C.J.S. *Actions* § 101 (2005) It concerns an individual's "sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court." *Id.* Justiciability encompasses several doctrines, including ripeness, mootness, and standing. *Jackson v. State*, 331 S.C. 486, 491 n. 2, 489 S.E.2d 915, 917 n. 2 (1997) (citation omitted) "Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Michael P. v. Greenville County Dep't of Soc. Servs.*, 385 S.C. 407, 415, 684 S.E.2d 211, 215

(Ct.App.2009) "Generally, to have standing, a litigant must have a personal stake in the subject matter of the litigation." *Id.* at 415-16, 684 S.E.2d at 215.

Standing is comprised of three elements: First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Smiley v. South Carolina Dep't of Health & Envt'l Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (alteration in original)) "The party seeking to establish standing carries the burden of demonstrating each of the three elements." *Sea Pines Ass'n for the Protection of Wildlife, Inc. v. South Carolina Dep't of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001)

"One must be a real party in interest, *i.e.*, a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Ex parte Morris*, 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006)

Standing is a fundamental prerequisite to instituting any action. It may exist by statute, through the principles of constitutional standing, or through the public importance exception. *Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012) Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation. *See id.* at 194-95, 728 S.E.2d at

44-45; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n. 2, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (stating the issue of statutory standing as "whether this plaintiff has a cause of action under the statute"). When no statute confers standing, the elements of constitutional standing must be met. To possess constitutional standing, first, a party must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Second, a causal connection must exist between the injury and the challenged conduct. *Id.* Finally, it must be likely that a favorable decision will redress the injury. *Id.* See also *Youngblood v. S. C. Dep't of Soc. Svs.*, 402 S.C. 311 (2013) *Anchor Point Inc. v. Shoals Sewer Co.*, 308 S.C. 422, 418 S.E.2d 546 (1992).

In the case at bar, any recovery of damages to the actions filed would be of benefit to the estate. Further, the Petitioner is not a named beneficiary to the estate and therefore is not one for whom any recovery would benefit. Finally, she has no interest in the estate nor would she have any real, material, or substantial interest in recovery.

Waiver of Standing

The South Carolina Court of Appeals did not err in failing to find that Respondents waived the issue of Petitioner's standing to bring this action on behalf of Alice Shaw-Baker. Contrary to Petitioner's claim, Respondents initial papers did raise the issue that Petitioner lacked standing. The Respondents filed timely Motion for Summary Judgment. The initial filing of the Respondents indicates as follows:

"COMES NOW the Respondents in the above action, seeking Motion for Summary Judgment and Motion to Dismiss. The Respondents respectfully

requests this Honorable Court grant these motions..... Betty Fisher has yet to obtain a favorable determination that she has standing in any matter.”

Respondents filed two subsequent pleadings prior to hearing. The first was Memorandum Supporting Motion for Summary Judgment And Dismissal and Opposing Disqualification and Removal of Counsel wherein Respondents again contested standing of Petitioner to bring action and, as to the issue brought under the Omnibus Adult Protection Act, argued that the circuit court lacked jurisdiction. The second subsequent pleading was Supplemental Memorandum Supporting Motion for Summary Judgment And Dismissal of Action. Again, the Respondents contest the Petitioner’s standing and the circuit court’s jurisdiction.

“Waiver is a voluntary and intentional abandonment or relinquishment of a known right.” *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). Stated differently, waiver requires a party to have known of a right and known he was abandoning that right. *Strickland v. Strickland*, 375 S.C. 76 at 85, 650 S.E.2d at 471.

The United States Supreme Court has held that the question of standing is not subject to waiver. In *FW/PBS, Inc. v. Dallas*, the Court stated “[W]e are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing `is perhaps the most important of [the jurisdictional] doctrines.’ ” 493 U. S. 215, 230-231 (1990) (citing *United States v. Hays et al.* 515 U.S. 737 (1995) holding that a party may never waive standing) Here, there was no agreement of waiver of standing nor was there a finding by the lower court that any Respondent waived the standing defense.

The Petitioner cites *WeSav Financial Corp. v. Lingefelt* as a decision which bolsters her position that standing may be waived. 450 S.E.2d 580 (1994) Although *WeSav* does discuss real parties of interest, it does not discuss waiver of standing. In a closer review of *WeSav*, this Court looks at standing based on actual authority to defend an action. This Court indicated that the receiver (RTC) of *WeSav's* parent company does not own the capital stock it has "received" thus overruling the lower court's decision. "The RTC's status as a shareholder does not make it the real party in interest." Id at 582. The Petitioner in *WeSav* did not waive standing nor did this Court hold that standing was waived. Here, the Petitioner is not a shareholder or a beneficiary. She is not a real party of interest.

In *Fabian v. Lindsey*, as cited by the Petitioner, estate planning documents which were defective as to carrying out the final wishes of a testator gave rise to an action wherein the "left out" beneficiaries sought to hold the attorney responsible for the defects. This Court found that, although there was no privity of contract between the drafting attorney and the "left out" beneficiaries, "the grant of standing to a narrow class of third-party beneficiaries was appropriate ... 'where the intent to benefit the plaintiff is clear and the promisee (testator) is unable to enforce the contract,' as named legatees would otherwise have no recourse for failed legacies that resulted from attorney malpractice." 410 S.C. 765 (citing *Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744, 746 (1983))

The Court in *Fabian* states that "of the three possible plaintiffs, only the beneficiaries have the motivation and sufficient damages to bring a malpractice claim. The client is deceased and the estate lacks a cause of action or damages or both." What is important to note is that the Petitioner in the case at bar alleges that the estate of Alice Shaw-Baker has a cause of action and damages and that, although there is a personal representative, she, the Petitioner, should have the

same authority to bring an action on behalf of the decedent's estate as a real representative. Here, the Petitioner is not a beneficiary. The Petitioner is a "would-be" heir to the estate of Alice in the event the last will of the decedent is found invalid. The *Fabian* Court recognized three categories of plaintiffs. It did not recognize any other possible plaintiff and therefore it did not recognize the authority of a third party identifying herself as a real representative. *Fabian* does not stand for the proposition that standing can be waived nor does it confer standing on a real representative. See also *Park v. Safeco Ins. Co.*, 251 S.C. 410, 414, 162 S.E.2d 709, 711 (1968) ("The courts generally decline to pronounce a declaration in a suit wherein the rights of the plaintiff are contingent upon the happening of some event which cannot be forecast and which may never take place.")

The Petitioner insists that this Court take into consideration the "truth seeking function" of the system by citing *Ahanchian v. Xenon Pictures, Inc.*, 624 F. 3d 1253, 1255 (9th Cir. 2010). She is asking this Court to grant her "wide latitude of discretion" with "procedural rules" to her benefit. She is not citing *Xenon* as a case supporting her specific claim that the issue of standing was waived as she alleges. She is asking this Court to go against proper procedure and allow her to proceed where she has no right. In *Xenon*, the court states that the reason for wide latitude with procedure is "to secure the just, speedy, and inexpensive determination of every action and proceeding." *Id.* Here, the Petitioner filed in the probate court, inter alia, a contest of last will, removal of personal representative, and restraint of personal representative in 2009. She has sat on her right to hearing on these issues. It has been eight years and none of these issues have been heard. There have been five appeals of lower court decisions regarding Alice and her estate brought by Petitioner and her daughter as conservator. None have been related to the validity of the last will of Alice. Alice did not name dog charities as her final beneficiaries. She named

Bessie Huckabee, Kay Slade and Sandra Bird. The standing that Petitioner so desperately seeks here comes upon adjudication of the validity of the last will in her favor. That has not occurred. The Petitioner has sat on her right to hearing regarding the will contest, where she is thinly tethered with standing as an intestate heir. In the event the probate court determines the last will is valid, the Petitioner's standing with any and all matters affecting the estate will be extinguished. Alice was over eighteen at the time of execution, she was of sound mind, she understood her family and her assets, and the will was signed by her and witnessed by two disinterested witnesses at an attorney's office. The Petitioner is asking this Court to confer standing upon her when she is not a beneficiary of the Last Will. Her actions, or more properly stated, her inaction, after eight years, shows that she is not looking for a "just, speedy and inexpensive determination" as discussed in *Xenon*. She is looking for standing where none exists. She is alleging waiver of standing when the lower court's decision for summary judgment was based on Petitioner's lack of standing.

The Respondents did not confuse the lower court's ability to determine who was a party. Petitioner's claim does not consider the Respondent's First Memorandum wherein the Introduction it was stated "Counsel for the Defendants in this matter has agreed to represent each Defendant and their interests in these matters are not adverse." She is incorrect in her assertions that the Respondents attempted to confuse the lower court.

Waiver of standing, statutory, equitable, or otherwise, was never raised by the Petitioner in the lower court. Rule 201, SCACR, states that an "appeal may be taken, as provided by law, from any final judgment, appealable order or decision." An issue cannot be raised for the first time on appeal, rather to be preserved for appellate review the issue must have been raised to and ruled upon by the trial judge. *S. C. Dep't of Trans. v. First Carolina Corp. of S. C.*, 641 S.E.2d

903, 372 S.C. 295 (2007). Where the record does not reflect that a point has been raised before the trial court, that point cannot be considered on appeal. *Murphy v. Hagan*, 275 S.C. 334, 271 S.E. (2d) 311 (1980). The Petitioner did not raise the issue of waiver of standing at the trial nor did she raise this issue during the reconsideration hearing. The issue of waiver of standing should not be considered on appeal and therefore, the Court of Appeals affirmation of Defendant's Grant of Summary Judgment should be upheld.

The Respondents pled that Petitioner lacks standing and provided memoranda of law to the lower courts pleading Petitioner's lack of standing. The lower court issued summary judgment based on lack of standing, and the prevailing law is that standing is the most important of jurisdictional doctrines. The lower court found that the Petitioner lacks standing and the Court of Appeals affirmed the lower court's decision. This Court should uphold the lower court orders and concur that the Petitioner lacks standing in this matter.

2. The Court of Appeals did not err in determining that Petitioner did not have standing to pursue actions on behalf of Alice Shaw-Baker.

In review of the survival of right of action statute, SC Code Ann 15-5-90, it states: "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." The pertinent part of the above is pared down in the instant case to "Causes of action for and in respect to any and all injuries to the person shall survive both to and against the personal or real representative, as the case may be, of a deceased person..."

"All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *S.C. Prop. & Cas. Ins. Co. Guar. Ass'n v. Brock*, 410 S.C. 361, 367, 764 S.E.2d 920, 922 (2014) "The plain language of a statute is considered the best evidence of the legislature's intent." *Perry v. Bullock*, 409 S.C. at 140, 761 S.E.2d at 253. Further, "[i]n construing a statute, this Court is constrained to avoid an absurd result." *Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998)

The personal representative is authorized to prosecute any causes of actions, arising, asserted, or brought under or by virtue of any statute or act of this State. South Carolina Code Ann. Section 62-3-715 Said actions survive to the personal representative on behalf of the decedent. A personal representative has the same standing to sue as the decedent had immediately prior to death. South Carolina Code Ann. Section 62-3-703(c)

This Court, in *Asbury v. S.C. National Bank*, held that even assuming that an action would not abate upon death, "neither appellant nor anyone else had been appointed as executor of [the] estate," and therefore, the Court could not address the action 231 SE 2d 306 SC 1977 This holding is a direct confirmation that survival actions in South Carolina must be brought by the personal representative. Here, the Petitioner is not the court-appointed personal representative. Petitioner does not have standing as a real representative and authority over estate actions brought on behalf of the decedent must be brought by the personal representative. Therefore, the lower court did not err in determining that Petitioner lacks standing. Respondent's Grant of Summary Judgment and affirmation by the Court of Appeals should be upheld.

The Omnibus Adult Protection Act

The Omnibus Adult Protection Act (hereafter "The Act"), enacted in 1993, requires that any person with knowledge of abuse, neglect, or exploitation of a vulnerable adult shall report the incident within twenty-four hours of the alleged incident. South Carolina Code Ann. Section 43-35-25 The report must be made to Department of Social Services Adult Protective Services. These reporting requirements are mandatory. *Id.* If DSS has reasonable suspicion of criminal conduct, the report and investigation must be forwarded to local law enforcement or the South Carolina Law Enforcement Division (SLED) within one working day of completing the review. South Carolina Code Ann. Section 43-35-40

The *family court* (emphasis added) has exclusive jurisdiction to seek protection of the alleged vulnerable adult under The Act. A hearing must be held within forty days of the petition being filed in the *family court* (emphasis added) and Adult Protective Services must conduct a comprehensive evaluation of the vulnerable adult prior to hearing. *Id.* Sections 43-35-50 and 80 of The Act address the possibility of civil or criminal actions which may result after hearing.

The Petitioner's alleged survival action is brought under the Omnibus Adult Protection Act. The circuit court lacks jurisdiction as the Omnibus Adult Protection Act explicitly and procedurally requires, upon evidence that elder abuse, neglect, or exploitation has occurred, that petitions and hearings must proceed in the family court.

The Petitioner did not create a contemporaneous trail of reports, etc. under the Act which would make any matter under the Act ripe for hearing. She did not meet the burden of establishing that the lower court has jurisdiction to hear actions allegedly brought under the Act.

Real Representative

In Black's Law Dictionary published 1910, a real representative is defined as follows:

He who represents or stands in the place of another with respect to his real property is so termed, in contradistinction, to him who stands in place of another, with regard to his personal property, and who is termed the personal representative.

“An heir is a representative of his ancestor and the executor is the representative of the testator, the heir standing in the place of his deceased ancestor with respect to his realty, the executor standing in the place of his deceased testator with respect to his personalty...”

Black's Law Dictionary, 2nd Edition, 1910 pg 1020-1021

Further definition of a real representative can be found in the publication, *The Real Representative Law*, published in 1898. This publication discusses the prior difference between authority over both personal property of decedent and real property of decedent.

The Land Transfer Act of 1875, originally enacted in England and Wales, and amended with the Land Transfer Act of 1897, introduced an important amendment to the general law which separated the real and personal property by making real estate vest in the personal representative. Prior to this act and its predecessors, creditors “under seal” as mortgagors were able to claim an interest in the decedent's real property so encumbered. These creditors faced difficulty seeking repayment as the real property vested in the heirs at death. Further, those creditors who were not considered under seal, those not having a security interest in the real property, did not have legal recourse to seek payment of their claim from the decedent's real property. *The Real Representative Law, 1897*, being part I. of the *Land Transfer Act, 1897*, and a discussion on administration thereunder (1898), W. Clowes and Sons, London 1898. (See publication online at <http://archive.org/stream/realrepresentati00tyss#page/n5/mode/2up>)

The Land Transfer Acts ceased the automatic transfer of real property to the testate devisee or intestate heir at law and allowed the personal representative the authority to access the real property for the payment of all proper debts of the estate. As the personal representative under current code has authority over all property of the decedent, real and personal, the personal representative and real representative, as appears in the survival statute, are one in the same and, if there be a modern day distinction between the two, it is a distinction without a difference.

Additionally, The South Carolina Probate Code specifically designates and places upon the personal representative of a decedent's estate standing to sue on behalf of the decedent. South Carolina Probate Code Ann. Section 62-3-703 Further, a personal representative is granted the authority to prosecute estate claims. South Carolina Probate Code Section 62-3-715(20) The South Carolina Probate Code grants standing to sue on behalf of a decedent to the court-appointed personal representative. The purpose of a real party in interest provision is to assure that a defendant is required only to defend an action brought by a proper party and that such an action need be defended only once. 59 AmJur2d *Parties* § 35 (1987) The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, goes, in reality, to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it. 21 C.J.S. *Courts* § 16 (1990) (See also *Bardoon Properties v. Eidolon Corporation, etal*, 326 S.C. 166 (1997) Here, there is no third party standing for actions in estates as the sole authority for said actions lies with the personal representative codified at South Carolina Probate Code Sections 62-3-711 and 715. These statutes provide certainty to all who deal with the estate that authority is centralized, without question, in the appointed representative.

In review of the law of real representatives with historical background, including a definition of real representative, it would appear that reference to the real representative in the

survival statute of the South Carolina Civil Code Section 2859 of 1902 had the original intent to address "causes of action for injuries and trespass to real estate" by the real representative. With the current probate code, the personal representative controls all decedent's property, real and personal. Respondents have provided statutory reference and case law which grants authority to sue and each includes the personal representative or co-personal representatives. Finally, if there be any spark of life still vested in what is termed "real representative" it would not extend beyond questions or issues with real property. The Petitioner's actions are not grounded in real property and thus, are not actions which were intended to be authorized by a real representative, if such distinction today exists.

The Petitioner cites *Bailes v. Southern Ry. Co.* wherein this Court states that "It is contemplated that the administrator, properly appointed, will enforce any action which will discharge or carry out his trust responsibility" and "if an administrator fails, or tries to defeat the trust, the beneficiary can enforce his own cause of action acting as temporary representative of the trust." 227 S.C. 176, 87 S.E.2d 481 (1955) In *Bailes*, a creditor qualified as personal representative when the beneficiary could not qualify. The creditor sought only what was due him, as creditor, in settlement of a wrongful death action. The issue distinguishing *Bailes* from this case is that, here, the Petitioner is not a beneficiary of Alice. The beneficiaries are Bessie Huckabee, Kay Slade, and Sandra Byrd. Further, in *Bennett v. Spartanburg Ry, Gas & Elect. Co.*, 97 S.C. 27, 29, 81 S.E. 189, 189 (1914) this Court concluded 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" *Id.* at 30, 81 S.E. at 189 Stating also, the recovery, if any, in a personal survival action goes to the decedent's personal representative to hold as assets of the estate. *Id.* Finally, the Court of Appeals in affirming the

lower court stated that “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.” *Fisher Ex Rel. Shaw-Baker v. Huckabee*, 781 SE 2d 156 Ct App (SC 2015)

Based on the foregoing, it appears that to complete authority in the personal representative, *Duke v. Postal Telegraph Cable Co.*, as cited by the Petitioner and the Court of Appeals, should be overturned as a remnant of the past separation of authority for real and personal property and, the South Carolina Probate Code and *Bennett v. Spartanburg* should hereafter control as the law with regard to standing to file suit under the survival statute and otherwise. Based on the forgoing, this Court should uphold the lower court’s decision and the affirmation by the Court of Appeals and uphold Summary Judgment for Petitioner’s lack of standing.

3. The Court of Appeals did not err in finding that Petitioner failed to preserve the issues of equitable standing and waiver by Respondents.

The Respondents herein filed Motion for Summary Judgment of this action in the lower court citing Grounds for Dismissal being “Plaintiff Betty Fisher has yet to obtain a favorable determination that she has standing in any matter.” The Respondents filed a Memorandum of Law furthering the defense of lack of standing by stating “Betty Fisher, although she indicates in her pleading captions, ‘real representative for Alice Shaw-Baker’ has never been granted such status and, therefore, lacks standing and authority to file this action.” In Supplemental Memorandum Respondents again addressed the issue of lack of standing by stating “Defendant has provided statutory reference and case law to those persons with authority to sue and each includes the personal representative.”

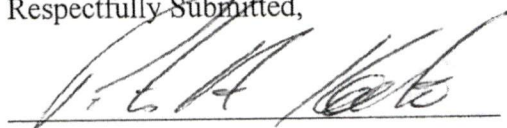
There should be no confusion as to whether the Respondents preserved the defense of lack of standing, statutorily, equitable or otherwise. The Petitioner has provided no statutory evidence or case law which would support a conclusion that standing can be or has been waived. Here, there has been no waiver of standing by any Respondent. Based on the forgoing, this Court should uphold the lower court's decision and the affirmation by the Court of Appeals and uphold Summary Judgment for Petitioner's lack of standing.

Waiver of standing, statutory, equitable, or otherwise, was never raised by the Petitioner in the lower court. Rule 201, SCACR, states that an "appeal may be taken, as provided by law, from any final judgment, appealable order or decision." An issue cannot be raised for the first time on appeal, rather to be preserved for appellate review the issue must have been raised to and ruled upon by the trial judge. *S. C. Dep't of Trans. v. First Carolina Corp. of S. C.*, 641 S.E.2d 903, 372 S.C. 295 (2007). Where the record does not reflect that a point has been raised before the trial court, that point cannot be considered on appeal. *Murphy v. Hagan*, 275 S.C. 334, 271 S.E. (2d) 311 (1980). The Petitioner did not raise the issue of waiver of standing at the trial nor did she raise this issue during the reconsideration hearing. The issue of waiver of standing should not be considered on appeal and therefore, the Court of Appeals affirmation of Defendant's Grant of Summary Judgment should be upheld.

CONCLUSION

For the reasons stated, this Honorable Court should uphold the Grant of Summary Judgment of the lower court and the Court of Appeals affirmation of the lower court's ruling.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Peter A. Kouten", is written over a horizontal line.

Peter A. Kouten, Esquire
PO Box 340
Johns Island, SC 29457
pkouten@gmail.com
843-789-9614

March 31, 2017
Charleston, South Carolina

Respectfully Submitted,



W. Westbrook Wills III. Esquire
P.O. Box 822
Folly Beach, SC 29439
Tel. (843) 805-6300
Attorney for Respondents Bessie Huckabee and Kay Slade
and Sandra Byrd.

March 31, 2017
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA

In the Supreme Court

Published Opinion No. 5371

Appellate Case No. 2017-000743
Circuit Case No. 2012-CP-10-1332

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S.C. SUPREME COURT

Betty Fisher , as Real Representative for Alice Shaw-Baker, Petitioner,

v.

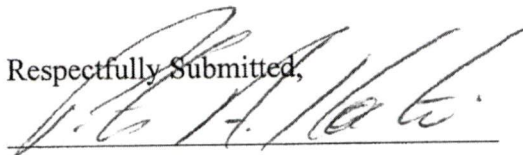
Bessie Huckabee, Kay Passailague Slade, Sandra Bird, and Peter Kouten and Does 1-100,
Defendants,

Of Whom Bessie Huckabee, Kay Passailague Slade, Sandra Bird, and Peter Kouten are the
Respondents.

PROOF OF SERVICE

I certify that I have served the foregoing Respondent Motion to Strike upon counsel for
Petitioner and Respondents by depositing a copy of same in the United States Mail, postage prepaid, on
April 1, 2017, addressed as noted below.

Respectfully Submitted,



Peter A. Kouten, Esquire
PO Box 340
Johns Island, SC 29457
pkouten@gmail.com
843-789-961

Counsel Served:

John Hughes Cooper, Esquire
1476 Ben Sawyer Blvd., Ste. 11
Mt. Pleasant, SC 29464

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