

EXHIBIT D

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009-CP-10-3010

Betty Fisher, et al.,)
)
Plaintiffs,)
)
vs.)
)
Bessie Huckabee, et al.,)
)
Defendants,)
)
In the Matter of)
Alice Shaw-Baker.)
_____)

MOTION TO DISQUALIFY JUDGE HUGHSTON

FILED
2011 OCT 23 AM 8:38
JULIE J. ARMSTRONG
CLERK OF COURT

Plaintiffs filed this motion and the Rule 59 motion filed herewith at the request of the Court on 5 hours notice (see attached Exhibit) without statutory notices, as these motions involve substantial rights of Plaintiffs and are necessary to preserve Plaintiffs' rights and avoid waiver.

Plaintiffs want to prosecute this case, and they bring this motion in good faith to ensure that they are not prejudiced and that future appeals become unnecessary.

A. Judge Hughston must recuse himself or be disqualified as set forth herein.

The Code of Judicial Conduct provides:

1. (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
 - (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
 - (b) the judge served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
 - ***
 - (iii) is known by the judge to have a more than *de minimis* interest that could be substantially affected by the outcome of the proceeding;
 - (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Additionally, Judges should recuse themselves where questions of impartiality or impropriety are raised. *State v. Cheatham*, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002).

In this case, as stated above, Peter A. Kouten had *ex parte* communications with Judge Hughston. Peter A. Kouten is the primary witness for Defendants in this case. Peter A. Kouten is

now an Associate Judge of the Charleston County Probate Court. The Probate Court of Charleston has been disqualified from hearing the underlying probate case. Nevertheless, these prior communications with a witness who now is a judge in the same Court creates an actual ethical question. The underlying case was removed from the Probate Court, and Plaintiffs contend that the Supreme Court's decision to appoint a Special Judge from Beaufort County creates an inference that disqualification is necessary in this case. This coupled with the *ex parte* communication and standing as a judge mandates recusal, and/or disqualification in this case.

Submission of a proposed order without sending a copy to opposing counsel is an *ex parte* communication after the effective date of Rule 5(b)(3), SCRPC. *First Financial Ins. Co. V. Sea Island Sport Fishing Society, Inc.*, 327 S.C.12, 490 S.E. 2d 257 (1997). Peter A. Kouten's failure to serve plaintiffs with the *ex parte* proposed order violated Rule 5(b)(3), SCRPC, US Const. Amends V and XIV, § 1 (Due Process) and S.C. Const. Art I, § 3 (due process).

B. Statutory Stay of proceedings when matters are on appeal.

In this case, there is currently before the South Carolina Supreme Court a petition for writ of certiorari which implicates Bessie Huckabee, her powers and her standing (see Supreme Court, case *Fisher v. Huckabee*, Case no. 2017-000743).

The South Carolina Appellate Court rules set forth the general rules and procedures regarding automatic stays, exceptions to automatic stays, and motions to lift automatic stay. (See Rule 241, SCACR; see also *Piedmont Press Ass'n. v. Record Publ. Co.*, 156 S.C. 43, 12 S.E. 721(1930), staying appeal pending outcome of appeal in a related case).

The service of a notice of appeal in a civil case stays all matters decided in the appealed order, including the relief granted in the order.

As one case stated that a trial judge should grant a motion to stay when a failure to do so would put the moving party "between a rock and a hard place" at no fault of his own. (See *Talley v. John Mansville Sales Corp.*, 285 S.C. 117, 328 S.E.2d 621 (1985)).

Plaintiffs respectfully request that the court consider this issue so plaintiffs are not denied their rights and put in the dilemma of having a judge hear this matter who was already involved in the case in such a way as to unfairly prejudice plaintiffs.

As stated below, Judge Hughston must be disqualified due to issues raised in an earlier ruling. His knowledge and actions involving *ex parte* communications of the order restraining Bessie Huckabee signed on June 9, 2009 create prejudice, wherein plaintiffs' acceptance of him as a trial judge will act as waiver.

Additionally, in light of the underlying pending appeal, this matter is stayed, and as such the trial cannot go forward.

All of these issues involve substantial rights which may be immediately appealed. (See *Price v. Peachtree Elec. Services, Inc.*, 396 S.C. 403, 721 S.E. 2d 461 (S.C. App.2011).).

Finally, Plaintiffs contend that issues necessary for a determination of the Removal of Bessie

Huckabee are still before the S.C. Supreme Court, in *Fisher v. Huckabee*, Case No. 2017-000743. In that case, whether the appointment of a Special Fiduciary and the failure of Bessie Huckabee to obtain a Bond impact this case. It affects whether or not she has standing to appear in this case as personal representative, and may affect the orders that come down in this case.

These matters implicate the right and duty to file an immediate appeal under Section 14-3-330. (immediate appeals from orders granting, continuing, modifying, or refusing an injunction.)

For all of these reasons, this motion to disqualify Judge Hughston is required. Plaintiffs respectfully pray that the court grant the motion in its entirety, and respectfully disqualify Judge Hughston from hearing any further matter in this case.

C. Public Policy reasons mandating immediate appeal in this matter.

For public policy reasons, there are some instances where rulings must be appealed immediately or the right to appellate review of the ruling is lost. Historically, rulings must be appealed immediately or the right to appellate review of the ruling is lost. This rule has applied to two situations:

- (1) where the trial court's order deprives a party of a mode of trial to which the party is entitled as a matter of right; and
- (2) where the order disqualifies a party's trial counsel.

In this case, pursuant to S.C. Code Ann. § 14-3-330(2), when a trial court's order deprives a party of a mode of trial to which it is entitled to as a matter of right, such order is immediately appealable. *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81, Prod. Liab. Rep. (CCH) P 17994 (2008); *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533S.E.2d 331 (2000); see also *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 315 S.C. 17, 431 S.E.2d 587 (1993) ("Issues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable.").

The right is lost where a plaintiff fails to seek review. *Edwards v. Timmons*, 297 S.C. 314, 377 S.E. 2d 97 (1988) (where appellant did not appeal the order referring matter to master in equity, she could not complain after final order that she was deprived of her right to a trial by jury); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (where appellant failed to timely appeal an order referring dispute to master in equity, appellant could not later complain that he had been entitled to a trial by jury).

The purpose of immediate appeal of a right to a particular mode of trial is to preserve a party's constitutional right to trial by jury which would otherwise be lost. The questions of an actual trial is intrinsic. Therefore, this court's decision not to change venue, and allow the matter to be heard by a Judge with prior knowledge and who engaged in ex parte communications with the primary witness in this case would impair plaintiffs' constitutional rights.

Plaintiffs could not anticipate that Judge Hughston would be the trial judge in this matter. Plaintiffs contend that the rules governing judicial disqualification require some delicacy, however their rights cannot be prejudiced by having a judge hear the matter who had *ex parte* communications with the primary witness in the underlay case, Peter A. Kouten who is now an associate probate judge. This coupled with the fact that the issues raised in the underlying appeal

before the Supreme Court regarding Bessie Huckabee and her powers are implicated by this case.

WHEREFORE, for the above reasons and those stated in the Rule 59 Motion filed herewith, Plaintiffs pray that these motions be granted in their entirety.

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

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ATTORNEYS FOR PLAINTIFFS,

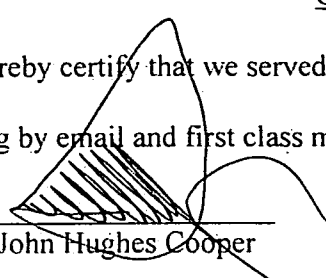
BETTY FISHER AND

LISA FISHER, AS CONSERVATOR FOR

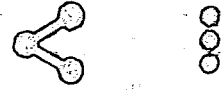
ALICE SHAW-BAKER

CERTIFICATE OF SERVICE

I hereby certify that we served counsel for all parties in this action with a copy of the forgoing by email and first class mail on October 20, 2017.


John Hughes Cooper

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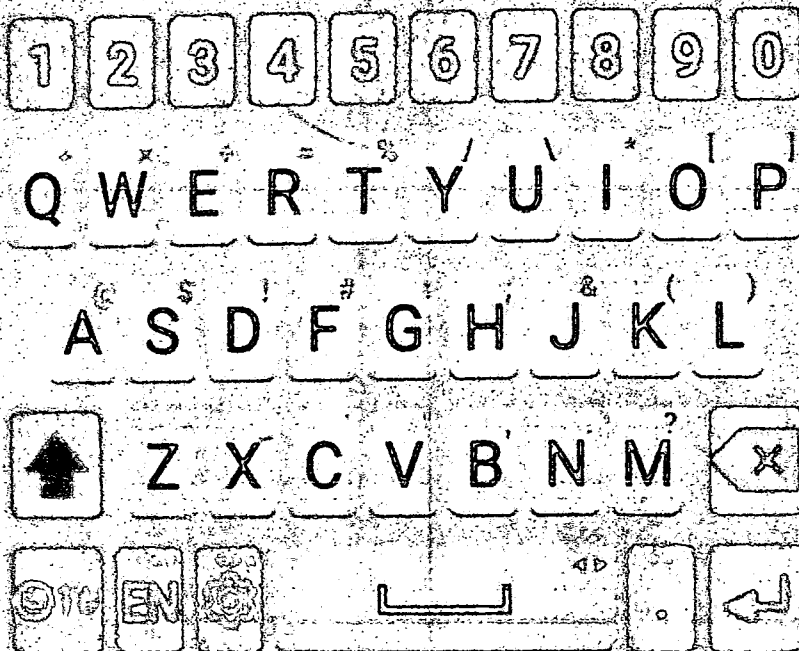
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Lfisher6736 joined.

W._Westbrook_Wills joined.

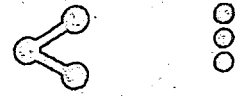
007940 joined.

BrianKern joined.





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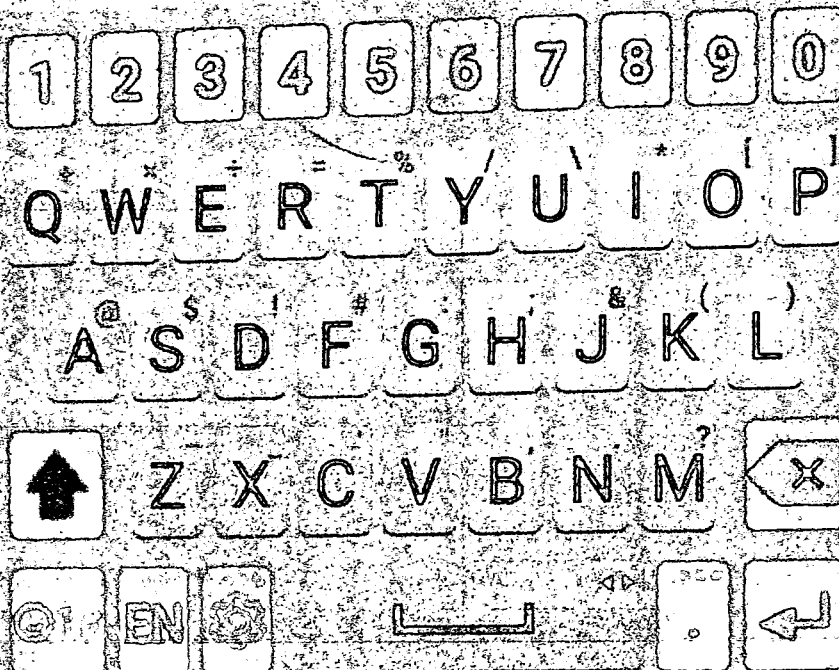


don: We will start the meeting in just a moment.

Manda joined.

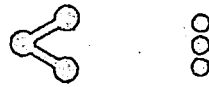
aandrews joined.

don: Judge Jefferson is about to take the bench so one more moment.



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don: Here we go

don: 09-3010 Baker v. Huckabee

Lfisher6736: This is Lisa Fisher. This is on the shaw Baker vs Huckabee matter. Trial in this case cannot proceed on Monday. It is imperative that we file a motion to alter/reconsider the motion to transfer venue. Also due to Drier



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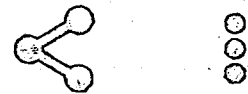


Monday. It is imperative that we file a motion to alter/reconsider the motion to transfer venue. Also due to Prior conduct in this case, we will file a motion to disqualify judge Hughston. If the Motions are not allowed to proceed, we will be filing an immediate notice of appeal due to the substantial prejudice and impairment of Rights in this case.

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W. Westbrook Wills: Brook Wills here for Defendnants

W. Westbrook Wills: Trial can go forward

W. Westbrook Wills: Defendants ready

101227: Jessica Crowley here for personal representative Bessie

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don: Judge Jefferson has said this is denied but you can file whatever you would like her to consider and the case will proceed forward on Monday. File your motions today and provide Judge Jefferson with a copy of the motion.

don: 1 for trial

W. Westbrook Wills: Defendants ready -

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don: 16-271 Reder v. Grimes

Lfisher6736: In that case, the the notice of appeal will be filed today.

Unfortunately the Court's decision not to hear the motion prior to trial impairs our rights.

007940: Justin McGee is for the Defendant in Reder v. Grimes

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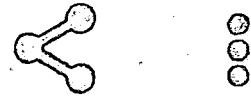
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don: Ms. Fisher, please file your motion today and serve a copy on Judge Jefferson. She will contact the parties today.

W. Westbrook Wills: Thanks Don

101227: Thank you

don: continued to allow for this to be

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Q W E R T V U I O P

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101227: Thank you

don: continued to allow for this to be reset.

W._Westbrook_Wills left.

don: 16-922 Sanchez v. Oberle

BrianKern: Defendant ready

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Q W E R T Y U I O P