THE STATE OF SOUTH CAROLINA

In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

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Appellate Case No. 2016-000320

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S.C. SUPREME COURT

Betty Fisher, on behalf of the estate of Alice Shaw Baker, .....Petitioner

v.

Bessie Huckabee, Kay Passailague Slade, Sandra Byrd, and Peter Kouten,
.....Respondents

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**PETITIONER'S PETITION FOR REHEARING
REGARDING OPINION NO. 27765
FILED FEBRUARY 28, 2018**

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## INTRODUCTION

"I do not think much of a man who is not wiser today than he was yesterday."

(Abraham Lincoln)

Pursuant to Rule 221(a), SCACR,[1] Petitioner Betty Fisher ("Petitioner") respectfully petitions this Court for rehearing of Opinion No. **2016-000320** ("Opinion") filed on February 28, 2018 which "Affirmed as Modified" the Court of Appeals decision on appeal.[2]

The Opinion brought much needed clarity regarding the law governing real parties in interest and survival actions, and although the information makes Petitioner "wiser today" than yesterday, it places all consequences on petitioner for a case of first impression. The Probate Code, referenced by this Court throughout the Opinion, went through major changes to clarify the Probate code in 2014, and it still did not change the "problem" language in § 15-5-90 regarding

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[1] Rule 221(a) states in pertinent part:

> "Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court. A petition for rehearing shall be in accordance with Rule 240, **and shall state with particularity the points supposed to have been overlooked or misapprehended by the court.**" (Emphasis added)

[2] The Appellate Case no. 2014-000175, Circuit Case no. 2012-CP-10-1332, regarding Opinon no. 5371 filed on December 9, 2015.

"survival actions" and "real representative".[3] Petitioner believes that rehearing will provide the appropriate vehicle for this court to reconsider the implications of the Opinion.

As such, Petitioner welcomes this opportunity to address issues that this Supreme Court may have overlooked or misapprehended in the law governing 1) the important public policy reasons for expanding and/or providing an exception for third party standing to secure the rights of the vulnerable and aged decedents; 2) the deprivation of due process as this Court provides Argument not in the record under Rule 220 ( c) and giving deference to Respondents which prejudice petitioner; 3) Due to the Status of the Will Contest, it was not foreseeable to request appointment of Special Administrator or seek to be substituted in as real party in interest.

This court's thorough and expert analysis of the issues in this case provide instruction and aid to future attorneys; nevertheless the analysis is markedly different than the arguments made by Respondents and as such affirmed the deprivation of Petitioner's right to be heard on the issue of Rule 17(a) and Rule 15.

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[3] The determination that "real representative" has no meaning is contrary to accepted views of statutory interpretation. In the case *Aakjer v. City of Myrtle Beach,* 388 S.C. 129, 135, 694 S.E. 2d 213, 216 (2010) states:

> "In general, repeal by implication is disfavored and it found only when two statutes are incapable of any reasonable reconcilement...When two statutes 'are incapable of reasonable reconcilement, the last statute passed will prevail, so as to impliedly repeal th earlier statute to the extent of the repugnancy."

Also, the Court in *Cain v. Daily,* 74 S.C. 480, 55 S.E. 110, 112 (1906) stated that "Courts should hesitate long to declare an act on our statute books obsolete through desuetude ... The better view is that a statute is in force until repealed by the proper authority, either expressly or by clear implication." Petitioner accepts that the court finds "real representative" is no longer useful, however petitioner believed that it had merit and was viable.

While Rule 220 ( c), SCRCP provides that:

> "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."

This Rule does not and cannot deprive Petitioner of her right to be heard on the issue not raised by Respondents in the lower court or in these proceedings. Here, as briefly set forth, the statutory and legal authority cited by the parties is not the grounds by which this Court reached its conclusion. Moreover, legal authority cited in this Court's opinion mandates reversal and remand, because Rule 56 motions are not appropriate for determining real party in interest issues. (*Patton v. Miller,* 420 S.C. 471, 487 (2017). This is part of the record under Rule 220( c), and as such the Court can grant petitioner the relief she raised in her opposition to the Court's rulings!

For the reasons stated herein, Petitioner respectfully requests that the court grant rehearing on this matter, and remand this case to provide Petitioner with an opportunity to seek appointment of a special administrator, seek substitution and joinder via Rule 17(a), SCRCP, and file an appropriate Motion to Amend via Rule 15. Such relief will not prejudice Respondents and will provide substantial justice and allow Alice Shaw Baker's estate relief. Without this relief, Alice Shaw Baker's estate will forever lose her rights as the statute of limitations is time barred.[4]

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[4] *See Thomas v. Grayson*, 318 S.C. 82, 84, 456 S.E. 2d 377 (1995); Also, *6 Cyclopedia, supra,* at § 21.11 which stated:
"When an action is brought by someone other than the real party in interest within the limitations period, and the real party in interest joins or ratifies the action after the limitations period has run, the amendment or ratification relates back to the time suit was originally filed and the action need not be dismissed as time barred."
Therefore, if this Court allows petitioner to raise the issue, Alice Shaw Baker's estate will not lose her right to seek redress. As the dissent in this matter acknowledged, the Court's Opinion "elevates form over substance and unnecessasrily deprives her of her right to have this

## LEGAL STANDARD FOR PETITIONS FOR REHEARING

It is well settled that a rehearing is warranted when the Court has overlooked or misapprehended an argument. (See *Kennedy v. S.C. Retirement System,* 349 S.C. 531, 564, S.E. 2d 322 (2001).)

Also, if the Court fails to address some of the arguments raised in the appeal, "a ***prima facie* case for rehearing has been made.**" (*Covar v. Sallat,* 22 S.C. 265, 272 (1885), emphasis added.)

The principles behind the concept of rehearing were discussed in the broad constitutional context in the United States Supreme Court decision, in *Flynn v. United States,* 348 U.S. 956, 99 L.Ed. 1298, 1299 (1955) which provides: " The right to [a petition for rehearing] is not to be deemed an empty formality..."

The Court's Opinion provides relief and overlooks fatal defects in Respondents' pleadings to Petitioner's unfair prejudice.

Finally, The Court's Opinion misapprehends the status of the case at the time of filing of Petitioner's return, which Petitioner contends interfered with normal procedures.

Due to the exceptional importance of the issues raised herein, Petitioner respectfully prays that the court grant this request for rehearing:

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matter heard on its merits.

## ARGUMENT

### I. THE OPINION OVERLOOKS AND MISAPPREHENDS PETITIONER'S ARGUMENTS REGARDING THE PUBLIC POLICY EXCEPTIONS AND VIABILITY OF ALLOWING THIRD PARTIES TO PURSUE SURVIVAL ACTIONS

The Court of Appeals' decision referenced the "real representative" matter, but this Court issued its Opinion based on arguments not raised by Respondents' in the lower courts. Petitioner's briefing sought relief from the stringent rules which limit victimized Elderly adults from having other assistance in pursuing the action.

As originally argued, depriving a third party of seeking review of an abuser's action, and forcing them to seek appointment as a Special Administrator, creates additional litigation and precludes judicial economy by resolving the issues succinctly.

Other states allow successors in interest or third parties to aid vulnerable adults and/or allow common law practice/trust strategies to protect the elderly and their estates. Petitioner raised the principle that "standing is not inflexible" (See *Davis v. Richland Cty Council*, 372 S.C. 497, 500, 642 S.E. 2d 740, 741 (2007).) Petitioner raised the issue of third party standing in *Bailes v. Southern Railway Co, Et al,* 227 S.C. 176, 87 S.E. 2d 481 (1955). [5]

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[5] Petitioner reminds the court that other cases have allowed third party standing. (See *Amisub of South Carolina Inc. v. Passmore*, 316 S.C. 112, 447 S.E. 2d 207 (1994) which allowed third parties to assert a cause of action against the husband who failed to take responsibility for his wife under the Omnibus Adult Protection Act; see also, *Hotz v. Minyard* 304 S.C. 225, 403 S.E. 2d 634 (1991) authorized an individual plaintiff to sue on behalf of herself and the shareholders of the family business. The Supreme Court found that the plaintiff had a "special confidence" in the defendant attorney and as such she could sue him regarding "breach of fiduciary" duty for failing to advise of the legal effects of her father's will.

To ensure that this Court realizes that Petitioner was not trying to avoid appointment, rather she was merely trying to preserve the estates' cause of action pending final determination of the Will contest, she directs the court to her *Petition for Writ of Certiorari* filed on February 23, 2016, wherein it is explained the rationale for seeking third party appointment:

> "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 by the statute of limitations. **Any problems with the complaint can be remedied by motions to amend rather than dismissal."**
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> (Petition, p. 19, fn. 6, emphasis added.)

Therefore, rehearing will allow this Court to reconsider the dissent's argument that the matter should be reversed and remanded is a viable one, now that this Court knows that Fisher "does" make this argument. Petitioner respectfully requests this relief.

## II. THE COURT IS REQUIRED TO GRANT THIS PETITION FOR REHEARING BECAUSE A COURT MAY NOT RENDER A DECISION BASED UPON AN ISSUE NOT RAISED OR BRIEFED BY ANY PARTY, WITHOUT FIRST AFFORDING THE PARTIES AN OPPORTUNITY TO PRESENT THEIR VIEWS ON THE MATTER.

It is clear that this Court has authority to affirm a decision based on any ground appearing in the record, as stated in Rule 220 ( c), SCRCP provides:

> "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."

Still, under the South Carolina Constitution and United States constitution, Due process requires notice and opportunity to be heard.

Here, Respondents did not raise the thoughtful, decisive argument related to Rule 17(a) or Rule 15 in their briefing, this Court did. In fact, Respondent Kouten did not even address any of the issues against him or properly include his name as party litigant.

In so doing, this Court provided the proper basis for use of the probate court and a special administrator, but failed to grant Petitioner relief or at least an opportunity to be heard on that important legal issue. Instead, this Court merely provided the proper law, to petitioner's detriment,

This issue has been raised in other jurisdictions. For instance, one court explained that it was error to "decide the case on an issue no one had raised, and about which the court had failed to inform he parties that it might consider." (See *California Casualty Ins. Co. v. Appellate Department,* 46 Cal.App.4th 1145, 1147). The court went on to state:

> "It was error to decide the case without warning the parties that the court was considering that ground and giving an opportunity to brief it."

Although a different jurisdiction, it provides persuasive authority that Petitioner is entitled to rehearing and reversal and remand.

Moreover, this Court's decision is interesting in its analysis, because to get to the conclusion that Betty Fisher did not have standing, the court had to give great deference to the pleadings of the Defendants. In effect, this Court found the proper legal authority to deal with the issues of the case. Petitioner raised the issue as to Defendant Kouten, in that the pleadings were so confusing, that it was unclear that Defendant Kouten ever answered any allegation on his own.

Yet, the Court holds petitioner to the premise that she should have known that her position was not tenable, and that the circuit court is not responsible for doing the plaintiff's work, but it

does not hold Defendants to the same standard even to present their argument on behalf of all defendants.

Plaintiff is not holding "form over substance", however she does ask this Court: Why in a case of first impression with law that supports (albeit unclear) that a family member can seek relief on behalf of a decedent, does this Court exclude a common law means of representation? Why does this Court also preclude accepted concepts of Trust law for suit? [6] Ultimately, wouldn't it be correct to state that it is not the "Supreme Court's responsibility for doing the respondent's work"?

Finally, this Court relied on Professor Flanagan's expertise in *Patton v. Miller,* 420 S.C. 471, 488-89, 804 S.E.2d 252, 261 (2017) to justify its analysis. However, in *Patton,* the court held that: "motions that do not go to the merits are not appropriately classified as summary judgment." James F. Flanagan, South Carolina Civil Procedure 445 (2d ed. 1996)." The *Patton* court's position that "the summary judgment procedure of Rule 56 is not appropriate for resolving a dispute over the identity of the real party in interest. If the court reviews the motion for summary judgment filed by Defendants (or Respondents as claimed in the pleading), the motion was for Summary Judgment under Rules of Civil Procedure Rule 56. (Rec. 54)

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[6] Petitioner cited to *Bailes v. Southern Railway Co. et al.,* 227 S.C. 176 (1955) For authority that the concept of temporary trusteeship could be used for wrongful death actions. The authority provides for the beneficiary to "bring the action"

The *Patton* court's analysis also supports the arguments raised in petitioner's return and pleadings in the lower court:

> As we will explain, the circuit court should have analyzed the issue under the Rule the **defendants invoked** when they claimed Patton as representative was the wrong party to bring the claim for Alexia's medical expenses—Rule 17(a) of the South Carolina Rules of Civil Procedure. See *Jaramillo v. Burkhart*, 999 F.2d 1241, 1246 (8th Cir. 1993) (holding in an indistinguishable scenario that partial summary judgment in favor of the defendants was improper and the issue should have been resolved pursuant to Rule 17(a))." (Emphasis added)

Essentially, *Patton* states that the lower court should have analyzed the issue raised by the defendants. Here, Respondents never raised the issue of Rule 17(a). Petitioner responded in the lower court to the issues raised, now that this Court has mandated a course of action, Petitioner respectfully requests an opportunity to comply, because she only brought this case to ensure that the statute did not run in this case and Alice Shaw Baker's rights were protected.

## III. THE COURT OVERLOOKED OR MISAPPREHENDED THE STATUS OF THE PLEADINGS AND THE REASONS THAT HAVING PROBATE COURT REVIEW WAS INAPPROPRIATE.

The underlying Will Contest was on appeal, so seeking relief from the probate court while the Court was reviewing previous orders *in the probate court* would not have been feasible.

The Complaint in this action was filed on February 24, 2012. Appeals regarding decisions in the probate court were filed in October and November 2011. During that period of time, the issues of stay, appropriate appointment of special fiduciary, and status of the case were essentially on hold.

On May 12, 2018, the Circuit Court began trial on the constructive trust portion of the will contest case. This Court also appointed a special Charleston county Judge, Beaufort County

Judge Kenneth Fulp to handle the estate and conservatorship actions in the Probate Court. As counsel Lisa Fisher explained to the lower court, the procedure described by the probate court for bringing the action was "incomplete."

However, as raised by the dissent, "While permitting the amendment would cause the defendants to face the merits of the amended claim, the defendants' opportunity to defend the claim was no different than it would have been if [Petitioner] had originally brought the claim in [the proper] capacity."

Petitioner contends based on all of the stated authority, rehearing is proper. Petitioner is willing to take all action under Rule 17. Of course, petitioner's counsel already acknowledged to the lower court that "a personal representative will be able to be substituted in after the will contest, that may be right." (Rec. 461)

Following proper procedure had always been petitioner's plan, however the complexity of the issues and the importance of the ensuring that the matter be heard on its merits, did not lead to immediately seeking relief that was only made clear by this Court's important decision.

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**WHEREFORE**, Petitioner respectfully seeks an Order granting rehearing and concluding that reversal and remand is the appropriate relief that should be afforded petitioner, to preserve Alice Shaw Baker's estate.

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: _____

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March 15, 2018

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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



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Appellate Case No. 2016-000320

Circuit Case No. 2012-CP-10-1332

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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

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**PROOF OF SERVICE**

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I certify that on March 15, 2018, I served a copy of **Petitioner's Petition for Rehearing Regarding Opinion No. 27765 Filed February 28, 2018** on the Respondents and interested parties by depositing same in the United States Mail, postage prepaid, addressed as follows:

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March 15, 2018

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