



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERSAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

April 17, 2018

The Honorable Julie J. Armstrong
100 Broad Street, Suite 106
Charleston, SC 29401-2210

REMITTITUR

Re: Betty Fisher v. Bessie Huckabee
Lower Court Case No. 2012-CP-10-01332
Appellate Case No. 2016-000320

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeal is enclosed.



Very truly yours,

CLERK

cc: Warren W. Wills, III, Esquire
Evan Adam Smith, Esquire
Ms. Betty Fisher

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

v.

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

Appellate Case No. 2016-000320

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27765
Heard October 19, 2017 – Filed February 28, 2018

AFFIRMED AS MODIFIED

John Hughes Cooper, of the John Hughes Cooper, P.C.,
of Mount Pleasant, Lisa Fisher, of the Law Offices of
Lisa Fisher, of Long Beach, California, *pro hac vice*,
both for Petitioner.

Evan Smith, of the Evan Smith Law Firm, LLC, of
Charleston, and Warren W. Wills III, of the Law Office
of W. Westbrook Wills III, of Folly Beach, both for
Respondents.

JUSTICE FEW: The question we address in this appeal is who may bring a civil action on behalf of the estate of a deceased person when the personal

representative of the estate is also a potential defendant in the action. The answer is found in section 62-3-614 of our Probate Code, which provides, "A special administrator may be appointed . . . in circumstances where a general personal representative cannot or should not act."

I. Facts and Procedural History

Alice Shaw-Baker lived in Charleston and had no immediate family. She allegedly reached an agreement with Bessie Huckabee, Kay Passailaigue Slade, and Sandra Byrd that if they would care for her in her final years, she would leave them the assets of her estate. In her last will—executed in 2001—she left her entire estate to Huckabee, Slade, and Byrd, and named Huckabee the personal representative. Shaw-Baker died in February 2009 at the age of seventy-nine.

Betty Fisher is Shaw-Baker's niece and closest living relative. Shortly after Shaw-Baker's death, Fisher filed an action in probate court challenging the 2001 will and the appointment of Huckabee as personal representative. Fisher removed the probate action to circuit court. On May 14, 2009, Fisher filed what she called a "Motion for Temporary Injunction" in the probate action in which she requested to remove Huckabee as the personal representative. Fisher specifically alleged in the motion "Shaw-Baker's estate has a survival action against Huckabee" as one of the reasons Huckabee should be removed. As an alternative to the removal of Huckabee, Fisher requested that attorney Frank Barnwell be appointed special administrator pursuant to section 62-3-614 of the South Carolina Code (Supp. 2017). Fisher made no suggestion, however, that the special administrator might bring a survival action.

On February 24, 2012, purporting to act as Shaw-Baker's "real representative," Fisher brought this action in circuit court against Huckabee, Slade, and Byrd, and against Peter Kouten—a lawyer who represented the first three. Her primary allegation in this action is that Huckabee, Slade, and Byrd breached their duty to take suitable care of Shaw-Baker, causing Shaw-Baker to incur damages during her lifetime. Fisher brought the action under the survival statute—section 15-5-90 of the South Carolina Code (2005).

The defendants moved for summary judgment under Rule 56 of the South Carolina Rules of Civil Procedure, claiming Fisher did not have standing to bring the survival action. The record indicates the Motion for Temporary Injunction Fisher filed almost three years earlier was still pending in the probate action at the time the summary judgment motion was filed. However, Fisher never asked the circuit

court—in the probate action or the survival action—to appoint a special administrator for the purpose of bringing the survival action. The circuit court dismissed the action. The court of appeals affirmed. *Fisher v. Huckabee*, 415 S.C. 171, 781 S.E.2d 156 (Ct. App. 2015). We granted Fisher's petition for a writ of certiorari to review the dismissal of the action.

II. Analysis

The question of who may bring a civil action arises under Rule 17(a) of the South Carolina Rules of Civil Procedure, which provides, "Every action shall be prosecuted in the name of the real party in interest." As the court of appeals has recognized, the real party in interest is "'the party who, by the substantive law, has the right sought to be enforced.'" It is ownership of the right sought to be enforced which qualifies one as a real party in interest." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013). The substantive law governing the estates of deceased persons is the South Carolina Probate Code. *See generally* S.C. Code Ann. § 62-1-100(b)(1) (Supp. 2017) (providing "the [Probate] Code applies to any estates of decedents"); § 62-1-301 (Supp. 2017) (providing "this Code applies to (1) the affairs and estates of decedents . . . [and] (4) survivorship").

Under ordinary circumstances, the Probate Code grants the personal representative the exclusive authority to bring civil actions—including a survival action—on behalf of an estate. *See* § 62-3-715(20) (Supp. 2017) (stating a personal representative may "prosecute or defend claims . . . for the protection of the estate"); § 62-3-703(c) (Supp. 2017) (providing "a personal representative . . . has the same standing to sue and be sued . . . as his decedent had immediately prior to death"); § 62-3-715(24) (Supp. 2017) (stating a personal representative may "compromise and settle . . . all claims and actions based on causes of actions surviving, to personal representatives"); *see also Carson v. CSX Transp., Inc.*, 400 S.C. 221, 242, 734 S.E.2d 148, 159 (2012) (explaining "a survival claim may only be filed by the personal representative of the decedent's estate").

However, the Probate Code contemplates there will be "circumstances where a general personal representative cannot or should not act," in which case the Probate Code provides, "A special administrator may be appointed" § 62-3-614. The Reporter's Comment to section 62-3-614 explains, "Appointment of a special administrator would enable the estate to participate in a transaction which the general personal representative could not, or should not, handle because of conflict of interest."

The defendants' motion for summary judgment sought dismissal of the survival action on the premise Fisher did not meet the real party in interest requirement of Rule 17(a). The premise of the motion was correct because Fisher was neither the personal representative nor a special administrator. However, Rule 17(a) provides:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

As the Reporter's Note to the rule states, this sentence "is intended to prevent forfeiture in those cases in which the determination of the proper party to sue is difficult or when there has been an honest mistake." *See also* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1541 (3d ed. 2010) (this sentence of Rule 17(a) was added "to provide that the failure to join the real party in interest at the commencement of the action does not require dismissal").

Therefore, Rule 17(a) provided Fisher an opportunity to cure her failure to meet the real party in interest requirement. If she had asked, the circuit court would have been required to allow time for "ratification, joinder, or substitution" of the proper party under Rule 17(a) instead of immediately dismissing the action. However, Fisher did not ask for such time, and specifically, she never asked the circuit court to consider whether a special administrator should be appointed under section 62-3-614, nor did she mention her pending motion in the probate action to appoint one. Under this circumstance, Rule 17(a) permitted the dismissal of the action. *Cf. Patton v. Miller*, 420 S.C. 471, 488-89, 804 S.E.2d 252, 261 (2017) (holding "the circuit court . . . erred by dismissing Patton's claims . . . [because] she did specifically ask to take advantage of . . . 'ratification, joinder, [or] substitution'").

This case was litigated in confusion from the beginning. Fisher filed her complaint in what she claimed was her capacity "as Real Representative for Alice Shaw-Baker." The term "real representative" is found in the survival statute, which provides, "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" § 15-5-90. The circuit court, and later the court of appeals, analyzed the issue as whether Fisher qualified as Shaw-Baker's real representative. Neither court considered Rule 17(a). Although the result the courts reached was not erroneous, the analysis was misplaced.

The confusion and misplaced analysis arose from the fact that our statutes contain terms that no longer have the same significance under modern law they had when they were originally used. For example, section 15-51-20 of the Wrongful Death Act provides, "Every [wrongful death] action shall be brought by or in the name of the executor or administrator of such person." S.C. Code Ann. § 15-51-20 (2005). Prior to the enactment of our Probate Code, the terms "executor" and "administrator" had specific meaning, and an "action for wrongful death . . . [could] be brought only by the executor or administrator of such deceased person." *Glenn v. E. I. DuPont De Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157 (1970). Under the Probate Code, however, the terms "executor" and "administrator" do not have separate meaning, but are included within the defined term "personal representative." See S.C. Code Ann. § 62-1-201(33) (Supp. 2017) (defining "Personal representative" as "includes executor, administrator, . . ."). Therefore, wrongful death actions must be brought by the personal representative, despite the language "shall be brought by . . . the executor or administrator" that still appears in section 15-51-20. Cf. *Rutland v. S.C. Dep't of Transp.*, 390 S.C. 78, 81, 700 S.E.2d 451, 453 (Ct. App. 2010) (explaining the personal representative brought the wrongful death action), *aff'd as modified*, 400 S.C. 209, 734 S.E.2d 142 (2012).

Similarly, the term "real representative"—whatever the term meant when the survival statute was enacted in 1892¹—is no longer a meaningful term. Rather, the substantive right to bring a survival action—like a wrongful death action—is determined by the Probate Code. As the court of appeals recognized, "The real representative . . . is mentioned nowhere in the modern Probate Code." 415 S.C. at 179, 781 S.E.2d at 160. Under the Probate Code, the right to bring a survival action belongs initially to the personal representative. *Carson*, 400 S.C. at 242, 734 S.E.2d at 159. However, "in circumstances where a general personal representative cannot or should not act," the right to bring a survival action belongs to a special administrator. § 62-3-614.

¹ See Act No. 15, 1892 S.C. Acts 18.

The dissent makes a tempting argument that we should reverse the circuit court and remand, so Fisher may now seek appointment as a special administrator for the purpose of bringing this action. Interestingly, Fisher does not make this argument. The argument, however, raises the valid question of who bears the responsibility of determining the identity of the real party in interest. To some extent, all participants in the litigation—including the trial court—share this responsibility. Here, the circuit court engaged Fisher in a discussion over who has the authority to bring the action, and suggested that Fisher turn to the probate court for guidance. Fisher declined. Ultimately, the circuit court is not responsible for doing the plaintiff's work, and the burden of compliance with Rule 17(a) and its real party in interest requirement falls to the plaintiff.

When the defendants' motion challenged whether Fisher complied with this requirement, she responded by continuing to maintain her legally flawed position. In other words, Fisher insisted that the validity of her claimed status be litigated, and she never contemplated changing her status to comply with Rule 17(a). Fisher chose the question for the court, and eventually, the court must rule on the question put before it. Fisher put to the circuit court, the court of appeals, and now this Court, the question of whether there is even such thing as a "real representative" under modern law. The Probate Code provides the answer to her question—"No."

In *Patton*, by contrast, the plaintiff responded to the defendants' motion by "specifically ask[ing]" to change her status through "'ratification, joinder, [and] substitution'" so she could address the defendants' claim she was not the real party in interest. 420 S.C. at 489, 804 S.E.2d at 261 (quoting Rule 17(a)). When the circuit court in that case refused to permit her to do so, the court committed legal error. 420 S.C. at 488, 804 S.E.2d at 261. Thus, the distinction between *Patton* and this case is that the plaintiff in *Patton* placed before the circuit court the Rule 17(a) question of whether she should be permitted to ratify, join, or substitute, while Fisher held firmly to her flawed position that she was right in the first place.

III. Conclusion

The Probate Code defines who may act on behalf of the estate of a deceased person. The Probate Code, therefore, is the substantive law by which the identity of the "real party in interest" is determined for all civil actions brought on behalf of the estate of a deceased person. When the personal representative of the estate cannot or should not bring the lawsuit, a "special administrator" should be appointed pursuant to section 62-3-614. After the defendants challenged Fisher's

status as the real party in interest, she did not ask for "a reasonable time . . . for ratification . . . or joinder or substitution." In that circumstance, Rule 17(a) provides for dismissal, and the circuit court did not err.

We **VACATE** that portion of the court of appeals' opinion discussing "real representative," and **AFFIRM** the court of appeals **AS MODIFIED**.

KITTREDGE and JAMES, JJ., concur. HEARN, J., dissenting in a separate opinion in which BEATTY, C.J., concurs.

JUSTICE HEARN: Respectfully, I dissent as I believe the proper approach is to reverse and remand to the circuit court for consideration of whether a special administrator should be appointed to bring this action. While I agree with the majority's legal analysis of the terms "real representative" and "special administrator," and that Petitioner should have filed a motion to have a special administrator appointed, I part company with the majority's ultimate conclusion that dismissal is warranted because Petitioner failed to specifically request this relief.

The majority rightfully highlights the confusion that has plagued this case from the beginning. The particular posture of the parties and the fact that the term "real representative" still exists throughout our statutory framework contributed to the confusion and may explain, at least in part, why Petitioner failed to bring this action in the name of the real party in interest. However, holding this misapprehension fatal to Petitioner's case is a harsh result that is not required by our rules. Instead, I would hold that Rule 17(a), SCRCP, specifically allows the proper party to assume prosecution of this case. Rule 17(a), SCRCP ("No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed...."); *Patton v. Miller*, 420 S.C. 471, 487, 804 S.E.2d 252, 260 (2017) ("Under the Rules of Civil Procedure, however, it is improper to immediately dismiss a lawsuit simply because it was not brought in the name of the real party in interest."). Moreover, remanding this case to permit Petitioner to seek an appointment of a special administrator is in keeping with our general rules of construction. *See Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) ("Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties."). Although Petitioner did not specifically ask the circuit court to appoint a special administrator, the continued use of the term "real representative" in the survival statute appears to make this request unnecessary. Only today, with this opinion, does this Court clarify that the term "real representative" is no longer legally viable in actions like this.

Furthermore, there can be no question that Petitioner was seeking to pursue a survival action, thus warranting the appointment of a special administrator because the real party in interest—the personal representative—was the defendant. *Patton*, 420 S.C. at 489, 804 S.E.2d at 261 ("[T]he Rules were never intended to trap a party simply for not using the proper words or rule number to describe the applicable legal principal."). Because a remand has no effect on the merits of the underlying claim, any prejudice to the defendants would be minimal. *Id.* at 492, 804 S.E.2d at 263 ("While permitting the amendment would cause the defendants

to face the merits of the amended claim, the defendants' opportunity to defend the claim on the merits was no different than it would have been if [Petitioner] had originally brought the claim in [the proper] capacity.").

I believe that the clear import of Rule 17(a), SCRCP, together with our jurisprudence favoring the resolution of suits on their merits, point to a different result than that reached by the majority. *Id.* at 488, 804 S.E.2d at 261 ("The purpose of [Rule 17(a), SCRCP] is to avoid precisely what occurred here—the unnecessary procedural dismissal of a lawsuit the court should resolve on the merits. As the Reporter's Note to the rule indicates, this sentence 'is intended to prevent forfeiture in those cases in which the determination of the proper party to sue is difficult or where there has been an honest mistake.'"). To deny Petitioner the relief she seeks here, where there is no suggestion that her failure to use the correct nomenclature was anything other than an honest mistake, elevates form over substance and unnecessarily deprives her of her right to have this matter heard on its merits. Therefore, I would reverse and remand for the circuit court to consider whether a special administrator should be appointed.

BEATTY, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

Bessie Huckabee, Kay Passailaigue Slade, Sandra Byrd, and Peter Kouten, and Does 1 through 100, Defendants,

Of whom Bessie Huckabee, Kay Passailaigue Slade, Sandra Byrd, and Peter Kouten are the Respondents.

Appellate Case No. 2014-000175

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

Opinion No. 5371
Heard October 14, 2015 – Filed December 9, 2015

AFFIRMED

John Hughes Cooper, of John Hughes Cooper, P.C., of Mount Pleasant; and Lisa Fisher, pro hac vice, for Appellant.

Peter A. Kouten, of Johns Island, pro se; and Warren W. Wills, III, of the Law Office of W. Westbrook Wills, III, of Folly Beach, for Respondents Bessie Huckabee, Kay Passailaigue, and Sandra Byrd.

WILLIAMS, J.: In this civil matter, Betty Fisher appeals the circuit court's grant of summary judgment in favor of Bessie Huckabee, Kay Passailague Slade, Sandra Byrd, and Peter Kouten (collectively "Respondents"). Fisher argues the court erred in (1) holding she lacked standing to bring a survival action against Respondents on behalf of her deceased aunt as a "real representative"; (2) failing to find Kouten waived the issue of standing; (3) failing to find she had standing based on equitable principles of trust law; (4) failing to find South Carolina public policy supports giving her third-party standing; (5) granting summary judgment when genuine issues of material fact existed as to her claims; (6) failing to rule upon the motion to disqualify Kouten as counsel for Huckabee, Slade, and Byrd; and (7) considering trial counsel's arguments as factual contentions. We affirm.

FACTS/PROCEDURAL HISTORY

Alice Shaw-Baker died testate in Charleston County, South Carolina, at the age of 79 on February 25, 2009. Originally from San Francisco, California, Shaw-Baker enlisted in the Navy and was subsequently stationed in Charleston. After her service, Shaw-Baker worked in accounting-related jobs for several employers in the Charleston area, including Charleston Memorial Hospital for over twenty years. Shaw-Baker married and divorced twice, and she had no children.

Shaw-Baker, a passionate advocate for animals, had executed prior wills that left the vast majority of her estate to animal welfare and rescue organizations. Her prior wills also included bequests to Huckabee and Slade, who were Shaw-Baker's friends and former colleagues at Charleston Memorial Hospital. In her last will and testament, executed on May 21, 2001, Shaw-Baker devised her entire estate to Huckabee, Slade, and another former colleague, Byrd. Shaw-Baker also named Slade the sole beneficiary of her state deferred compensation plan and a life insurance policy. Further, Shaw-Baker nominated Huckabee as personal representative. 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.

Shaw-Baker's closest living heir is her niece, Fisher, of Long Beach, California. On April 27, 2009, Fisher contested the will and sought removal of Huckabee as personal representative.¹ Fisher alleged Huckabee and Slade had unduly influenced Shaw-Baker by inducing her to execute the May 21, 2001 will naming

¹ The will contest is still pending in the probate court.

them the sole beneficiaries of the entire estate—with the exception of a \$4,000 bequest to Byrd—in exchange for the promise they would provide care for Shaw-Baker such that she could avoid being placed in an assisted living facility. Fisher alleged that, despite their promise, Huckabee and Slade failed to provide adequate care for Shaw-Baker, allowing her health and home to deteriorate to the point that her grand-niece was appointed as her guardian-conservator in her last year of life. Fisher also alleged Kouten, Shaw-Baker's court-appointed guardian ad litem and attorney, acted contrary to Shaw-Baker's interests and failed to exercise reasonable care in advising her on conservator and estate matters.

Based on these allegations, Fisher filed the instant lawsuit in circuit court on February 23, 2012, as Shaw-Baker's "real representative" under the survivability statute.² In her complaint, Fisher requested damages and attorney's fees, bringing causes of action against all Respondents for, *inter alia*, violation of the Omnibus Adult Protection Act³ and breach of fiduciary duty. Additionally, Fisher asserted a legal malpractice claim against Kouten.

Respondents filed a motion for summary judgment on December 17, 2012, claiming Fisher—as Shaw-Baker's real representative—lacked standing to bring this action. The circuit court granted Respondents' motion in a Form 4 order issued on May 8, 2013.⁴ Fisher filed a motion to alter or amend judgment on May 28, 2013.

In its December 12, 2013 order, the circuit court denied Fisher's motion to alter or amend and affirmed its prior order granting Respondents' motion for summary judgment. The court held a real representative could not sue on behalf of a decedent for injuries to his person or personal property 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. This appeal followed.

² See S.C. Code Ann. § 15-5-90 (2005).

³ S.C. Code Ann. §§ 43-35-5 through -595 (2015).

⁴ The circuit court made a scrivener's error in this order by granting summary judgment to Fisher. The court corrected this mistake in a September 3, 2013 order, in which it granted summary judgment to Respondents.

STANDARD OF REVIEW

"An appellate court reviews the grant of summary judgment using the same standard employed by the circuit court." *Columbia/CSA–HS Greater Columbia Healthcare Sys., LP v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 411 S.C. 557, 560, 769 S.E.2d 847, 848 (2015). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] 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 [the appellate court] reviews questions of law de novo." *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

LAW/ANALYSIS

I. Standing as "Real Representative"

Fisher contends the circuit court erred in finding she lacked standing to bring personal causes of action on behalf of Shaw-Baker as her "real representative" under the survivability statute. According to Fisher, because Huckabee—Shaw-Baker's personal representative—will not conceivably sue herself and the other Respondents, Fisher may bring this action as Shaw-Baker's real representative. We disagree.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly]." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "The [General Assembly]'s intent should be ascertained primarily from the plain language of the statute." *Ex parte Cannon*, 385 S.C. 643, 655, 685 S.E.2d 814, 821 (Ct. App. 2009) (quoting *Georgia-Carolina Bail Bonds, Inc. v. Cty. of Aiken*, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003)). "If, however, the language of the statute gives rise to doubt or uncertainty as to legislative intent, the construing court looks to the statute's language as a whole in light of its manifest purpose." *Id.* "The construing court may additionally look to the legislative history when determining the legislative intent." *Id.*

Section 15-5-90 of the South Carolina Code (2005) provides the following:

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

Because the language in section 15-5-90 is broad and does not explicitly state which causes of action survive to the personal or real representative, we look to the legislative intent behind this statute to resolve the question of whether Fisher may bring this action on behalf of Shaw-Baker. See *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002) (explaining "the [survivability] statute's language is broad and ostensibly appears to include almost every conceivable cause of action" with few exceptions).⁵

"At common law, a personal action *ex delicto* did not survive the death of either party." *Id.* at 564, 564 S.E.2d at 97. In 1859, the General Assembly passed a wrongful death statute, a version of Lord Campbell's Act in England, that provided a cause of action against a defendant who wrongfully killed a decedent for the benefit of certain family members. Act No. 4480, 1859 S.C. Acts 825–26; see also Robert L. Wynn, III, Note, *Death of the Head of the Family—Elements of Damages Under South Carolina's Lord Campbell's Act*, 19 S.C. L. REV. 220, 220–21 (1967) (providing a history of wrongful death and survival actions in South Carolina). The General Assembly also enacted the first survivability statute in 1892, stating that "causes of action for and in respect to any and all injuries and trespasses to and upon *real estate* shall survive both to and against the personal or real representative (as the case may be) of deceased persons." Act No. 15, 1892 S.C. Acts 18 (emphasis added). Our supreme court later held the wrongful death statute did not provide for the survival of a decedent's cause of action for personal injuries suffered prior to death for the benefit of his estate. *In re Estate of Mayo*, 60 S.C. 401, 413–14, 38 S.E. 634, 637–38 (1901). Therefore, in 1905, the General Assembly amended the survivability statute—which initially covered only real property—and inserted the words "and any and all injuries to the person or to personal property" after the words "real estate." Act No. 471, 1905 S.C. Acts 945; see also *Grainger v. Greenville, Spartanburg & Anderson Ry. Co.*, 101 S.C. 399,

⁵ We note that some, if not all, of Fisher's causes of action include allegations of fraud and deceit, both of which are well-recognized common law exceptions to the survivability statute. *Ferguson*, 349 S.C. at 564, 564 S.E.2d at 97. Therefore, even if Fisher had standing, she could not bring these actions on Shaw-Baker's behalf under the statute.

403, 85 S.E. 968, 969 (1915) (noting the legislative intent behind the amendment). The 1905 change is reflected in the current survivability statute. *See* § 15-5-90.

At common law, real and personal property were two distinct "species" during the administration of an estate. *Hull v. Hull*, 24 S.C. Eq. (3 Rich. Eq.) 65, 91 (1850). Title to a decedent's real property passed directly to his intestate heirs at law or devisees. *Id.* Thus, those individuals succeeding to the real property stood in the place of the decedent in regard to his affairs concerning the land and were sometimes called the "real representatives." 33 C.J.S. *Executors and Administrators* § 2 (2009).

Legal title to the decedent's personal property vested upon his death with his executor or administrator, otherwise referred to as the "personal representative." *Hull*, 24 S.C. Eq. at 91. A testator, however, could devise title to his real property to his personal representative and direct him to sell it to pay off estate debts or distribute the sale proceeds to his legatees. *See* S.C. Code of 1902 § 2600 (Civ. Code); *Hull*, 24 S.C. Eq. at 91. Therefore, a real or personal representative, but not both, could be vested with title in the decedent's real property. *See Hull*, 24 S.C. Eq. at 91 ("If [real property] is devised, unless devised to the executor, or power is given to him to dispose of it, [the executor] has no power to interfere with it, and the devisee takes it without his assent.").

The dichotomy between a personal and real representative is reflected in the 1892 Act. The General Assembly established the right to pursue survival actions involving a decedent's real estate to the "personal or real representative (as the case may be)." Act No. 15, 1892 S.C. Acts 18. The use of the words "as the case may be" demonstrates the General Assembly intended that either the personal or real representative could pursue a survival action, depending on how the title in real property vested upon the decedent's death. If the title vested to a testator's personal representative, then he would be the proper individual to bring a suit for injuries or trespass to the land as its legal owner. *See* Act No. 15, 1892 S.C. Acts 18. If, on the other hand, the title vested in an heir at law or devisee, then he could bring an action on behalf of the decedent as the real representative. *See* Act No. 15, 1892 S.C. Acts 18; *see also, e.g., Duke v. Postal Tel. Cable Co.*, 71 S.C. 95, 98–99, 50 S.E. 675, 676 (1905) (holding the decedent's intestate heirs are real representatives under the Act). After the 1905 amendment, the General Assembly expanded a personal representative's power in survival suits, allowing that person to also bring actions regarding injuries to the decedent's person or personal property, while a real representative remained constrained to actions related to injury or trespass to the decedent's real property. *See Bennett v. Spartanburg Ry., Gas & Elec. Co.*, 97

S.C. 27, 29, 81 S.E. 189, 189 (1914) (concluding 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" (emphasis added)); *id.* at 30, 81 S.E. at 189 (stating the recovery, if any, in a personal survival action goes to the decedent's personal representative to hold as assets of the estate). Therefore, 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 and only continued to have standing after the 1905 amendment in survival actions involving trespass or injury to the decedent's real estate.

In addition to the legislative history of the survivability statute, we find the current version of the South Carolina Probate Code lends support to our conclusion that a real representative has no role in a survival suit for injuries to the decedent's person. In 1986, the General Assembly enacted a modified version of the Uniform Probate Code that modernized and made sweeping changes to the state's antiquated probate law on which the survivability statute was based. Act No. 539, 1986 S.C. Acts 3446 (codified as amended at S.C. Code Ann. §§ 62-1-100 through -7-1106 (Supp. 2014)); *see also generally* S. Alan Medlin, *Selected Substantive Provisions of the South Carolina Probate Code: A Comparison with Previous South Carolina Law*, 38 S.C. L. REV. 611 (1987) (discussing the substantive changes made to South Carolina probate law). Under the modern Probate Code, the personal representative is the central figure responsible for the orderly management of a decedent's estate. *See* S.C. Code Ann. §§ 62-3-701 through -721 (Supp. 2014). The personal representative, for example, is afforded the same standing to sue that the decedent had immediately prior to death. S.C. Code Ann. § 62-3-703(c) (Supp. 2014). The personal representative also may prosecute and defend against claims for the protection of the estate. S.C. Code Ann. § 62-3-715(20) (Supp. 2014). Most importantly, for purposes of this case, the personal representative retains authority to compromise and settle suits for "pain and suffering[,] or both, and all claims and actions based on causes of actions surviving, to personal representatives, arising, asserted, or brought under or by virtue of any statute or act of this State." *Id.* § 62-3-715(24). The real representative, on the other hand, is mentioned nowhere in the modern Probate Code.

Nevertheless, in the instant case, Fisher argues specific language in *Duke* supports her contention that she may bring a survival action for any cause of action as Shaw-Baker's real representative. In *Duke*, the circuit court dismissed a landowner's action for damages against a telegraph company when it constructed a

telegraph line through his land without a permit in 1903. 71 S.C. at 96–97, 50 S.E. at 675. The landowner died intestate that same year, leaving his wife and children as heirs. *Id.* at 97, 50 S.E. at 675. His wife and children brought a subsequent action against the defendant telegraph company for the construction of the telegraph line, and a jury returned a verdict in their favor. *Id.* at 97–98, 50 S.E. at 675–76.

On appeal, the telegraph company argued the heirs had no standing to bring the action on behalf of the deceased landowner. *Id.* at 98, 50 S.E. at 676. Our supreme court disagreed and held the heirs had a right to sue under the survivability statute. *Id.* Specifically, the court noted the following:

[T]he right to sue is conferred by sec[ti]on 2859 of the Code of Laws [of 1902], which provides that "causes of action for and in respect to any and all injuries and trespasses, to and upon real estate, shall survive both to and against the personal or real representative (as the case may be) of deceased persons" *The heirs at law are the real representatives.*

Id. at 98–99, 50 S.E. at 676 (emphasis added).

Relying upon *Duke*, Fisher claims she is a real representative because she is Shaw-Baker's heir at law. In *Duke*, the decedent's intestate heirs succeeding to his real property brought the action for injury and trespass to his land under the 1892 Act.⁶ As heirs at law who succeeded to his real estate, the decedent's wife and children were the proper real representatives to bring a survival action on his behalf. See 33 C.J.S. *Executors and Administrators* § 2 (2009). In the present case, however, Shaw-Baker died testate, and the probate court appointed a personal representative to manage the estate. As discussed above, although Fisher desires to bring personal causes of action on behalf of Shaw-Baker, we find these actions may only be properly pursued by the personal representative. See *Bennett*, 97 S.C. at 29, 81 S.E. at 189.

Based on the foregoing, we hold the circuit court properly granted Respondents' motion for summary judgment because Fisher lacked standing to bring a survival action against them as Shaw-Baker's real representative.

⁶ The opinion in *Duke* was filed only seven days after the General Assembly passed the 1905 amendment.

II. Unpreserved Issues

Fisher argues Kouten waived the issue of standing by failing to identify himself as a moving party in his motion for summary judgment. Fisher also asserts she has standing to bring the survival action under equitable principles of trust law. We find these issues are not preserved for appellate review because they were not properly raised to and ruled upon by the circuit court. *See Chastain v. Hiltabidle*, 381 S.C. 508, 514–15, 673 S.E.2d 826, 829 (Ct. App. 2009) ("[A]n appellate court cannot address an issue unless it was raised to and ruled upon by the [circuit] court."); *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating a party may not raise an issue for the first time in a motion to reconsider, alter, or amend a judgment that could have been presented prior to judgment).

III. Remaining Issues

Because our finding that Fisher lacked standing is dispositive in this case, we decline to address the remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

CONCLUSION

Based on the foregoing, we hold a real representative does not have standing to bring personal actions on behalf of a decedent.⁷ Accordingly, the circuit court's grant of summary judgment in favor of Respondents is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

⁷ The instant case does not present the occasion for us to determine whether a real representative continues to have standing to pursue a survival action based on trespass or injury to a decedent's real property after the enactment of the South Carolina Probate Code.