

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

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Appellate Case No. 2016-000320
Circuit Case No. 2012-CP-10-1332

BETTY FISHER, as Real Representative
for Alice Shaw-Baker.....Petitioner

v.

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

Of whom Bessie Huckabee, Kay Passailague Slade, Sandra Byrd,
and Peter KoutenRespondents

**BRIEF ON THE MERITS
BY PETITIONER BETTY FISHER, REAL REPRESENTATIVE
REGARDING DECISION**

Fisher ex rel. Shaw Baker v. Huckabee, 415 S.C. 171, 781 S.E. 2d 156 (Ct. App. 2015)

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in failing to find that Respondents waived the issue of Petitioner Betty Fisher's standing to bring this action on behalf of her aunt Alice Shaw-Baker, when their initial papers did not raise the issue of standing?

2. Whether the Court of Appeals erred in determining that Petitioner Betty Fisher did not have standing to pursue actions on behalf of Alice Shaw-Baker, when the statutory and common law doctrines of equitable standing and public policy support pursuit of actions to vindicate the rights of the elderly?

3. Whether the Court of Appeals erred in finding that petitioner failed to preserve the issues of equitable standing and waiver by Respondents?

For judicial economy, Petitioner sets forth important portions of the Court's decision in *Fisher ex rel. Shaw Baker v. Huckabee*, 415 S.C. 171, 781 S.E. 2d 156 (Ct. App. 2015).

IMPORTANT PORTIONS OF OPINION

The Court ruled in its Opinion:

"[B]ased 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."

"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.

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.

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)." (App. 24-25)

I. INTRODUCTION

On December 7, 2016, the South Carolina Radio Network reported: "Of the 50 states and the District of Columbia, South Carolina has the worst elder-abuse protection programs, according to a new report from a commercial group that frequently compares state criteria."¹

Petitioner Betty Fisher, real representative, ("Petitioner") contends that this assessment fails to recognize the traditional, nuance, and flexible tools available to family members advocating for the rights of their Elder loved ones through the rightful application of the "survivability statute", Section 15-5-90 of the South Carolina Code (2005).

As a matter of public policy, the standing conferred on family members through the "survivability" statute, i.e. real representative, is duplicative of the long held function of equitable standing of a temporary representative, as described in *Bailes v. Southern Railway Co. Et al.*, 227 S.C. 176, 87 S.E. 2d 481 (1955) and Bogert, *The Law of Trust and Trustees*, § 869, ch. 41, "Beneficiary and Trustee—Remedies under Trusts", p. 118-119.

Standing serves as an important component in the fight against Elder Abuse and in stopping the errant fiduciary/executor from wholesale misappropriation of a vulnerable adult's estate--here the decedent, Alice Shaw Baker.

Despite South Carolina Radio Network's claims, the South Carolina Judiciary has been a progressive force in the defense of the Elderly. As part of this Court's commitment to the Elderly, Justice Jean Hoefler Toal established the *Task Force on State Courts and the Elderly*, on October 10, 2009.² This Task Force's efforts toward "advance planning" for the needs of the

¹ www.southcarolinaradionetwork.com/2016/12/07/new-report-says-south-carolina-lacks-elder-abuse-protections.

² In the order establishing the Taskforce, Order 2009-10-06-02, it was noted that "South Carolina ranked 29th in the nation with 485,333, or 12.6%, of its population 65 and over in 2000. U.S. Census Bureau projections indicate that this segment of our population will

elderly supplement and support the efforts of family members to promote justice for the wrongs suffered by their elderly family members.

Additionally, during the Conference on World Elder Abuse Awareness Day on June 11, 2014, the South Carolina Lieutenant Governor's Office recommended Elder Protection courts as derived from a California model to address victims' rights in the courts. It further discussed the role of Probate Courts in safeguarding the elderly and preventing exploitation from agents under power of attorneys and fiduciaries, and mandated a duty to have independent Guardian ad litem in the protection of the Elderly.³

This move toward active protection of the Elderly is consistent with Petitioner Betty Fisher's arguments in support of her standing on behalf of Alice Shaw Baker as supported by the provisions set forth in Section 15-5-90 of the South Carolina Code (2005). The Conference promoted the importance of an independent Guardian ad litem, instead of, as here, a Former Guardian ad litem, Attorney Peter Kouten, besieged by the conflict of interest created by his adverse position against Alice Shaw Baker vs. his improper representation of Bessie Huckabee.⁴

In Alice Shaw-Baker's case, her estate is meant to benefit animal charities, yet the ultimate disposition of *Fisher ex rel. Shaw Baker v. Huckabee*, 415 S.C. 171, 781 S.E. 2d 156 (Ct. App. 2015) ("Opinion" or "Decision"), will not merely allow abusers to escape justice by

increase to 1,134,459, or 22%, of our population by 2030. A significant percentage of these individuals will live in poverty and at least 50% of those over 85 will have reduced mental capacity. **The confluence of these facts presents a challenge for our court system that can only be met by advance planning.**" (<http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=586>, Emphasis added)

³ <http://aging.sc.gov/SiteCollectionDocuments/W/WEAAD%20The%20Courts%20Response%20to%20Elder%20Abuse.pdf>

⁴ His conduct was the subject of a cause of Legal Malpractice not considered by the circuit court or Court of Appeal in its analysis of the grant of summary judgment, and not answered by any of the respondents in their pleadings.

gaining the role of executor, but it will further allow them to elude liability based on the court's unwillingness to recognize a "real representative." The Opinion essentially becomes an instruction manual for Elder Abusers.

Reversal of the Court of Appeals' decision is the only means to protect the Elderly and Disabled, and it mirrors the strong public policy of South Carolina to protect its under represented and vulnerable citizens.

This briefing, as ordered by this court on January 13, 2017 and as required by Rule 242(I), SCACR, demonstrates the important statutory, equitable, and ultimately Constitutional protections that mandate reversal of the Court of Appeal's decision and confer standing on Petitioner.

STANDARD OF REVIEW

It is well settled that this court is free to decide questions of law with no particular deference to the lower court. *See* S.C. Const. art. V, §§ 5 and 9; S.C. Code Ann. §§ 14-3-320 and -330 (1976 & Supp.1999); S.C. Code Ann. § 14-8-200 (Supp.1999) (granting Supreme Court and Court of Appeals the jurisdiction to correct errors of law in both law and equity actions); *l'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).)

Rule 242, SCACR specifically addresses the types of cases that this Supreme Court will generally consider:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court."

This case meets this Court's requirement under Rule 242, SCACR for consideration. It can be considered a novel question of law, in that a decedent's rights will be forever lost without the ability of third parties to intervene and act on behalf of an elderly victim and recover on behalf of her estate. The public policy involved in securing the rights of the elderly will be undermined without having alternative ways to pursue, investigate, and recover for Elder Abuse. The United States Supreme Court has explained that where there is insufficient public policy on a subject, **it may be the function of the courts by their judgments to establish public policy where none on the subject exists...** (See *Page v. Winter*, 240 S.C. 516, 126 S.E. 2d 570 (1962), emphasis added.)

Moreover, the court in *Jade Street, LLC v. R. Design Const. Co.*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012) explained the importance of not allowing statutory interpretation to impede on reasonable interpretations, stating "...a statute is not to be construed in derogation of common law rights if another interpretation is reasonable." Equitable law regarding trust standing is complementary to the statute governing survival actions and its dual definition of a "personal representative" or "real representative."

Also, it is well settled that this court has jurisdiction to review matters where the rights of persons under a legal disability are at issue. (See *Galloway v. Galloway*, 249 S.C. 157, 153 S.E. 2d 326 (1967); *Stefan v. Stefan*, 320, S.C. 419, 495 S.E. 2d 734 [appellate court will consider issues not preserved when they involve the rights of minors]; *Joiner ex rel. Rivas v. Rivas*, 342 S. C. 102, 536 S.E., 2d 372 [procedural rights subservient to court's duty to zealously guard the rights of minors].)

The Court in *Williams v. Watkins*, 665 S.E. 2d 243, 379.S.C. 530 (2008) explained the purpose of the Omnibus Act, which is to "protect vulnerable adults from abuse, neglect, and exploitation." Although the statutory scheme involves actions that include criminal

punishment, a federal court explained that the structure of the legislation also established a private cause of action for abusing, neglecting, or exploiting vulnerable adults. (See *Williams Garrett*, 106 F. Supp.2d 834 (2000).) (R. 82)

Although this case involves issues that relate to a decedent, the underlying facts deal with a vulnerable adult, Alice Shaw Baker, who is alleged to have been exploited during her life time. It appears, based on the far reaching public policy seeking protection of vulnerable adults, as evidenced by the enactment of the Omnibus Adult Protection Act, South Carolina Code Ann. § 43-35-5 et seq, this is likely to be a recurring issue in South Carolina law. Other jurisdictions recognize expansive views of Elder abuse laws to pursue Elder Abuse / Dependent Adult Abuse causes of action. (See *Estate of Lowrie* (2004) 118 Cal.App.4th 220; 12 Cal.Rptr.3d 828; See also, *In re Estate of Wyttenbach*, 193 P.3d 814, 219 Ariz. 120 (2008) [holding the statute to preclude late-appointed personal representative from bringing elder abuse action violates spirit of Ariz. Adult Protective Services Act § 46-455.]; See Oregon Rev. Stat. § 124.100 [allows victim, guardian, conservator, personal representative, trustee or agent of fact to bring cause of action for elder abuse].)⁵

Moreover, this private right of action can not be available merely when the elder is alive. To effectuate its purposes, the Omnibus Act provides for a panoply of remedies, and by implication gives standing to third parties. Logically, if third parties do not have standing, then the scheme would be meaningless, because vulnerable adults would not be able to obtain necessary assistance while alive and the wrongdoer could avoid discovery by merely obtaining the nomination as an “executor/personal representative” in a Will.

⁵ See App. 380, ll. 12-14.

South Carolina has shaped an important legal framework allowing the next of kin/heir at law to pursue actions on behalf of the vulnerable to prevent widespread physical and financial abuse of the elderly.⁶ All of the alleged events occurred during the period of time where she met the criteria for a Vulnerable Adult pursuant to South Carolina Code § 43-35-10(11).

Therefore, this court may consider the rights of vulnerable adults ex mero motu. (*Galloway, supra.*)

Finally, this Court must consider the impermissible continued representation by Attorney Kouten of Respondents. (See *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996).) Respondent Kouten was prohibited from representing any parties with interests opposed to the best interests of his *ward*, Alice Shaw Baker. This basic principle is complicated by the financial gain that Respondent Kouten would gain by refusing to inform the probate court that Alice Shaw Baker intended her monies to go to animal charities—not Respondents.

Alice Shaw Baker’s condition prior to death precluded her from taking action against Respondents, and Petitioner, as real representative, is the only party willing to take action to preserve the causes of action on her behalf and seek recovery for the abuse. Here, one of the abusers was appointed personal representative without notice and hearing, and that the personal representative is not going to bring an action against herself.

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⁶ Petitioner is an heir at law, and she has a claim to an interest which can not be lost. (See *All Saints Parish, Waccamaw v. The Protestant Episcopal Church in the Diocese of South Carolina*, 358 S.C. 209, 222 (2004).) Nevertheless, Petitioner contends that all of Alice Shaw Baker’s assets were intended to go to animal charities.

STATEMENT OF THE CASE

A. Procedural History

Petitioner filed her Verified Complaint on February 24, 2012. (App. 28)

Respondents filed their Motion for Summary Judgment and Dismissal of Action on July 16, 2012. (App. 54)⁷ Their motion stated three claims for dismissal 1) Petitioner failed to seek review of companion case 2009-CP-10-3010; 2) Failed to state a claim for relief; 3) Failed to obtain a favorable determination that she has standing. This is different than what Respondents ultimately argued in later briefings, and none of the grounds were related to her standing of a "real representative", next of kin, or heir at law, as set forth in the Verified Complaint, (See App. 28, ¶3)

Thereafter, Petitioner filed her Motion as Real Representative for Alice Shaw-Baker, to Disqualify and Remove Opposing Counsel Peter Kouten due to Non Waiveable Conflict of Interest; Memorandum and Affidavit of Lisa Fisher on August 1, 2012. (App. 61)⁸

⁷ In said Motion, Respondents were identified as "respondents" not defendants. The motion was verified by Respondent Sandra Byrd, Bessie Huckabee, and Kay Passailague--not Kouten. The document was signed by Attorney Peter Kouten, merely as Attorney for Respondents. (App. 57) Yet, Attorney Kouten failed to cite to any legal authority for seeking the summary judgment. (See *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E. 2d 554, 558 (2011) [failure to provide any case law regarding a particular argument waives the issues].)

The court in *Valentine v. Davis*, 319 S.C. 169, 460 S.E. 2d 218 (1995) explained that individuals could not become parties by presumptuously adding their names to the captions and calling themselves plaintiffs. Although *Valentine* applies to plaintiffs, the same rationale applies to respondents.

⁸ In its decision, the Court declined to rule on the remaining issues. (App. 25) However, if this Court reverses the Court of Appeals' decision, Petitioner seeks a determination on the issue of Attorney Kouten's disqualification. *Hagood v. Sommerville* 362 S.C. 191, 607 S.E.2d 707 (1993) supports Petitioner's request for immediate ruling on this issue. Attorney Kouten has a non-waiveable conflict, which implicates due process and equal protection under the Constitution. As a ward subject to conservatorship should be protected from court appointed attorneys who use the appointment system, as a tool to gain business. .

Petitioner also filed her Return, Objection and Opposition as Real Representative for Alice Shaw-Baker to Motion for Summary Judgment, and Dismissal of Action; Memorandum of Law ; Affidavits in Support filed Concurrently on November 26, 2012. (App. 84, 99, 113, 122, 133). This Opposition included affidavits from Elder Abuse Expert David Kessler, Witness Candace Rickborn, Legal Malpractice expert Mark W. Hardee, and Attorney Lisa Fisher.

Thereafter, Defendant Peter A. Kouten filed his Memorandum Supporting Summary Judgment and Dismissal and Opposing Disqualification and Removal of counsel on November 28, 2012 (App.146) In said Memorandum he indicated that "Counsel for the Defendants in this matter has agreed to represent each Defendant and their interests in these matters are not adverse." (App. 146) This memorandum is the first to raise the issue of the real representative, without citation to authority and without any analysis as set forth by the Court of Appeals in its decision. In signing the Memorandum, Attorney Kouten again fails to reference who he is representing. (App. 155).

Additional briefing was filed as requested by the Court on December 7, 2012, entitled Supplemental Memorandum in Opposition by Plaintiff Betty Fisher, as Real Representative for Alice Shaw-Baker, to Motion for Summary Judgment and Dismissal of Action, as Requested by the Court. (App. 156).

Supplemental Memorandum supporting Motion for Summary Judgment and Dismissal of Action was filed by Petitioner *at the direct request of the court* on December 20, 2012. (App. 167). Petitioner included the statutory authority under the survivability code, South Carolina Code Ann. § 15-5-90 (1976) . It also raises the issues of family suing an attorney for misleading individuals relating to their estate inheritance (See *Hotz v. Minyard* , 304 S.C. 225, 403 S.E. 2d 634 (1991), and other cases were cited justifying the

authority of family to bring actions. (See *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 472 S.E.2d 612 (S.C. 07/01/1996); *Jenkins v. Wheeler*, 316 S.E. 2d 354 (N.C. Ct. App. 1984).)

In the Supplemental Memorandum Supporting Motion for Summary Judgement and Dismissal of Action, Respondents are mentioned in the first paragraph as seeking Motion for Summary Judgment. Thereafter, Peter Kouten is listed as Defendant. This is the first briefing where Respondents (or Defendant, if this court can determine who filed the brief) raises the issue of legal argument related to "real representative." The Supplemental Memorandum is signed by Peter A. Kouten and references only Defendant on the final page of the briefing. Respondents are not referenced at all. (App. 171). The Circuit Court issued its decision on May 8, 2013. (App. 6, 7).

To preserve her rights, Petitioner filed her Motion to Alter, Amend, Reconsider and Vacate Order of May 8, 2013 on May 28, 2013. (App. 172) This motion included appropriate affidavit and exhibits in support of the motion. (App. 190, 192, 197, 202, 211, 220.)

Respondent finally filed a Notice of Appearance by W. Westbrook Wills filed on August 6, 2013, (App. 225), to which petitioner filed her Objections and Opposition to Notice of Appearance filed by Counsel W. Westbrook Wills on August 6, 2013. (App. 227).

As necessary, petitioner filed her Supplemental Brief re: Motion by Plaintiff Betty Fisher to Alter, Amend, Reconsider and Vacate Order of May 8, 2013 on October 18, 2013. (App.237). In so doing, Petitioner more fully explained the underlying public policy arguments which mandated reversal. These authorities *support* Petitioner's position that she can bring an action to recover when a trustee has an adverse interest, and the

applicability where an executor has adverse relations with beneficiaries in a wrongful death context. (App. 238). It clarifies the distinction between survival actions where both a personal or real representative can prosecute an action.

Respondents filed Supplemental Memorandum Denying (sic) [in Opposition to] Plaintiff's Motion for Reconsidering Summary Judgment. (App. 269).

Petitioner also filed her Notice of Motion and Motion to Strike: 1) Defendants' Late Memorandum re: Summary Judgment; 2) Order Substituting Counsel; Affidavit of John Hughes Cooper filed on October 29, 2013. (App. 260).

On November 28, 2012, the parties appeared before the Honorable J.C. Nicholson for a hearing on the pending motions. (App. 456; Hearing tr.).

On October 8, 2013, the Circuit court heard the Motion to Reconsider.

On December 18, 2013, the Circuit Court affirmed the prior order granting the Summary Judgment. (App. 10).

Petitioner appealed the Orders granting Summary Judgment on January 22, 2014 (App. 288).

After briefing, the Court of Appeals had oral argument. (App. 290).

The Court of Appeals issued its decision on December 9, 2015 (App. 17-25) (Hereinafter "Opinion" or "Decision")

The Petitioner, Betty Fisher, filed her Petition for Rehearing on December 23, 2015. (App. 369-388)

The Court of Appeals denied the Petition for Rehearing by Order filed January 21, 2016. (App. 26-27)

On January 13, 2017, This court granted Petitioner's petition for writ of certiorari to review the court of appeals's published decision, *Fisher ex rel. Shaw Baker v. Huckabee*, 415 S.C. 171, 781 S.E. 2d 156 (Ct. App. 2015).

B. Factual History

Alice Shaw-Baker had long been an important member of South Carolina's community. She was a member in good standing of her church. She volunteered her time rescuing animals. She was an animal advocate who devoted her life to caring for animals and supporting animal charities. (App.32).

She was born August 14, 1929 in San Francisco, California. Ms. Shaw-Baker was enlisted in the United States Navy for four years and, during her enlistment, stationed in Charleston, South Carolina. (App. 19-33).

Thereafter, Petitioner alleges that Ms. Shaw-Baker worked for Charleston Memorial Hospital for approximately twenty years until her retirement. Petitioner contends that Respondents Huckabee, Slade, and Byrd worked for Ms. Shaw-Baker at Charleston Memorial Hospital, and used their working relationship with Ms. Shaw-Baker to gain information about her private life, her finances, and her estate plan. Furthermore, Respondents used this information to gain control over Ms. Shaw-Baker's mind and her will, and to interfere with the known estate plan that Ms. Shaw-Baker had established for the benefit and protection of animals. Also, Petitioner alleged that Respondents falsely claimed that Slade owned an animal rescue in their effort to further deceive Ms. Shaw-Baker. (App. 19-24)

When Ms. Shaw-Baker's mental abilities began to decline, these Respondents refused to assist Alice Shaw-Baker, or call her family to help. Instead, they reported her and

conservatorship /guardianship proceedings were initiated. When discovered Petitioner and her family rushed to Alice Shaw-Baker's side.

The probate court appointed Respondent Attorney Peter Kouten as Court Appointed Counsel, Guardian Ad litem, and visitor to Alice Shaw-Baker in the Conservatorship proceedings. However, Ms. Shaw-Baker agreed and the court granted the appointment of her great niece Lisa Fisher as conservator/guardian in October 2008. (App. 25-27) .

Nevertheless, Attorney Peter Kouten remained Court Appointed Attorney and Guardian ad litem with a duty to Alice Shaw-Baker , and while she was still alive. He began representing Respondents Slade, Huckabee, and Byrd, while he was still duty bound to Alice Shaw-Baker. He failed and refused to recuse himself.

Respondents seek to maintain Alice Shaw-Baker's estate for themselves. Prior to Alice Shaw-Baker's death, she revoked the Will when she learned of their intentions. Ms. Shaw-Baker intended that her monies be used for animal charities only. Then suddenly Alice Shaw-Baker died. Attorney Kouten actively continued to appear on behalf of Respondents, despite their adverse position against Alice Shaw-Baker's known desires.

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

The Court of Appeals' decision effectively defeats this important effort to vindicate the rights of Alice Shaw-Baker, and, long term, acts to defeat the rights of every family seeking help and justice for their loved one.

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II.

ARGUMENT

1.

THE SOUTH CAROLINA COURT OF APPEALS ERRED IN FAILING TO FIND THAT RESPONDENTS WAIVED THE ISSUE OF PETITIONER BETTY FISHER'S STANDING TO BRING THIS ACTION ON BEHALF OF ALICE SHAW-BAKER, WHEN THEIR INITIAL PAPERS DID NOT RAISE THE ISSUE OF STANDING OF A "REAL REPRESENTATIVE"

This Court reviews the case de novo regarding a question of law, (*Lambries v. Salida Ct. Council*, 409 S.C. 1, 7, 760 S.E. 2d 785, 788 (2014)), full consideration of all of the issues including waiver should also be considered.

Here that consideration includes acknowledgment that Respondents waived any issue related to standing. The lack of clarity in Respondents' filing of the Summary Judgment motion was present from the beginning. Respondent Kouten left the pleadings in a state of disarray--no clear issues, no law, no admissible evidence, and all, despite Petitioner's repeated opposition and objection.

The very first motion by Respondents failed to raise the issue of standing related to "real representative". In light of clear statutory language, Petitioner was not even required to set forth her capacity to sue or be sued, or her authority to sue or be sued in a representative capacity. (See Rule 9 (a), SCRPC). Instead it was Respondents who were required to raise the issue by way of "specific negative averment, which shall include such supporting particulars as are within the pleader's knowledge." (Id.) This failure means that ***Respondents*** waived the issue of standing, and the Court of Appeals erred by considering the arguments related to the "real representative" at all. Petitioner should not be required to

figure out the issues that a defendant/respondent is raising in its attack of a complaint by way of Summary Judgment.

Petitioner informed the court that Respondent/Defendant Kouten failed to set forth any admissible evidence in his pleadings, and for that reason alone his motion should have been denied. Once Respondents failed to raise the issue of standing in the original motion, they waived the issue with regard to any subsequent pleadings. (See *We Sav Financial Corp. v. Lingefelt*, 316 S.C. 442, 450 S.E.2d 580 (1994) [standing issue may be waived]; See also *Fabian v. Lindsey*, 410 S.C. 765 SE 2d 132 (2014) [standing found allowing third party beneficiaries' ability to bring legal malpractice action]).⁹

Respondents and their Counsel made specific choices to confuse the pleadings, and to impair the Court's ability to determine who was a party or not. If this were reverse, and a plaintiff did not clearly set forth the defendants, there is no question that default could not be entered or that parties could argue non-specificity as to allegations. But as to Petitioner, she was supposed to guess who was bringing the Motion for Summary Judgment, who was defendant, why a respondent was answering, and why pleadings were plural at some points, singular at others. Petitioner is not endorsing a grammatical exercise, instead, the law mandates clarity by attorneys in their role as professionals.

Other jurisdictions have found that "uncompromising behavior is not only inconsistent with general principles of professional conduct, but also undermines the truth-seeking function of our adversarial system." (See *Ahanchian v. Xenon Pictures, Inc.*, 624 F.

⁹ The Kentucky Supreme Court found that an appellate court cannot, sua sponte, resolve an appeal based on lack of standing, when it was not raised below. In this case, Petitioner's standing as "real representative" was not raised in the original papers by any party. Moreover, the parties failure to properly identify themselves raises questions about who filed the original papers at all. (See *Harrison v. Leach*, 323 S.W. 3d 702 (2010).)

3d 1253 (9th Cir. 2010).) While the *Ahancian* court was dealing with a case of unwillingness to stipulate to extensions, the same rationale can be applied in this instance, an attorney unwilling to clearly identify his clients and his status in the litigation, is interfering with the truth of the case. Therefore, holding Petitioner to this definition of standing but absolving respondents of their waiver is unfair and inconsistent with the law.

The doctrine of standing can not be used to undermine the truth seeking function of cases involving the elderly--as those perpetrators involved in fiduciary and elder abuse can tie the hands of loved ones by convincing an elderly person to name them as executors and beneficiaries of their Will or estate plan. Thereafter, attorneys can use standing to avoid personal liability of their clients by failing to identify the parties' status and ignoring specific allegations of misconduct. (*See Fabian, supra*. [estate planning attorneys may be liable for drafting errors].) Respondent Kouten knew that the intention of Alice Shaw Baker was to leave her property to animal charities, and instead of defending her rights, chose to represent the parties who took advantage of her. This is actionable, and actionable by Petitioner under a plain reading of the code and principles regarding temporary trustees.

The Court of Appeals erred in failing to find that the initial papers filed by Respondents constituted a waiver, therefore petitioner asks this Court to reverse and allow petitioner to proceed on behalf of Alice Shaw-Baker.

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2.

THE SOUTH CAROLINA COURT OF APPEALS ERRED IN DETERMINING THAT PETITIONER BETTY FISHER DID NOT HAVE STANDING TO PURSUE ACTIONS ON BEHALF OF ALICE SHAW-BAKER, BECAUSE THE STATUTORY MANDATES FOR SURVIVAL ACTIONS, COMMON LAW DOCTRINES OF EQUITABLE STANDING AND THE PUBLIC POLICY OF SOUTH CAROLINA SUPPORT THE PURSUIT OF ACTIONS TO VINDICATE THE RIGHTS OF THE ELDERLY

A. Interpretation of Standing Mandates Balancing Issues of Public Policy, Equity, Statutory Interpretation, and as the Facts Give Rise here, Prevention of Harm

In the article by notable Jurist Charles E. Clark, "The Handmaid of Justice," he quoted a 1907 case which used the lyrical imagery of "Procedure as the handmaid of justice" to reveal the inequity that can accompany strict interpretations of rules of practice, stating:

"Although I agree ...that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of a handmaid rather than mistress, and the **Court ought not be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.**" (Clark, Charles E., "The Handmaid of Justice," 23 Washington University Law Quarterly 297 (1938), emphasis added.)

This far-reaching view described by Judge Clark is evident in the case of Alice Shaw-Baker. It evokes both the beauty of justice and the brutality of rigid procedure when standing is denied and the court fails to consider the implications of preventing family from seeking redress for their family member's estate.

Here, the Court of Appeal's published Opinion ties the hands of the only people significantly concerned about the rights and desires of the decedent, and in so doing the

court interferes with vindication from the previous harm, and impairs the progressive efforts of the Court to create a framework for justice for those suffering from Elder Abuse.

B. "Statutory Standing" and "Equitable Standing": Either or Both Support Petitioner's Ability to Pursue the Case on Behalf of Alice Shaw Baker

The Court of Appeals refused to consider the equitable principles of standing claiming that it was an unpreserved issue. Instead, it relied on an antiquated view of the "statutory standing" language in the survival action code, S.C. Code Ann. § 15-5-90.¹⁰

By refusing to consider the issue of a "temporary representative" to preserve a case, when, as here, a purported executor will not pursue the actions, the case undermines South Carolina's long held policy favoring the disposition of issues on their merits rather than technicalities. (See *Balloon Plantation, Inc. v. Head Balloons, Inc.* 303 S.C. 152, 153, 399 S.E. 2d 439, 440 (Ct. App. 1990) [finding sanction dismissing counterclaim too severe.]

Petitioner's pleadings specifically raises the issue of equity in her discussion of Vulnerable Adults under the Omnibus Adult Protection Act, S.C Code Ann. Code § 43-35-5 et seq. ("Omnibus Act") which has the very purpose to protect the Vulnerable and Elderly.¹¹ The Omnibus Act contemplates "civil actions" and yet this code is rendered meaningless, if the individuals who take advantage of the elderly are made "personal

¹⁰ The court in *Brailsford v. Brailsford*, 380 S.C. 443, 669 S.E.2d 342 (2008) stated, "We note that the survivability statute was enacted in South Carolina to alleviate the "harshness and injustice of the common-law rule that a personal right of action dies with the person." So the premise of the "survivability statute" was meant to provide equitable relief, and also supports Petitioner's contention that it has an expansive view of standing.

¹¹ The verified Complaint specifically identified Petitioner as "Ms. Shaw-Baker's next of Kin, an heir at law, and [as] the real representative..." (App. 28, 29, prg 3)

representatives". Therefore, the framework for the "Omnibus Act", trust law, and the concept of "real representative" are complementary and not exclusive, instead they work together to support the need for a broad view of standing. To have a doctrine of standing, which is limited to a statutory definition of standing, without the ability to consider common law doctrines supporting equitable or third party standing creates a myopic view of justice--one which is not blind, but merely intransigent.

Other courts have discussed the importance of the general survivability statute, under S.C. Code Ann. § 15-5-90. The court in *Ferguson v. Charleston Lincoln Mercury*, 394 S.C. 558, 562 S.E. 2d 94 (2002) specifically explained in its discussion that , "When the statute's terms are clear and unambiguous, there is no room for construction and courts must apply them according to their literal meaning." (*Id. at* 563, citing *Tilley v. Pacesetter Corp.*, 333 SC. 33, 508 S.E. 2d 16 (1998).) The court went on to explain that "any cause of action that could have been brought by the deceased in his lifetime survives to his representative." (*Id.*, citing *Layne v. International Bhd. of Elec. Workers*, 271 S.C. 346, 247 S.E.2d 346 (1978).) While it appears that the plaintiff was a "personal representative", *Ferguson* stands for the proposition that the court must apply the literal meaning of a statute.

The term "real representative" still has meaning in today's world, by closely reviewing the definition of "statutory standing", one still must conclude that the real representative is an expansive definition under the code. Interpretation of S. C. Code Ann. § 15-5-90 does not permit the court to find that the "real representative" is limited to actions involving "injuries and trespasses to and upon real estate and any and all injuries," because that would also mean that the "personal representative" is limited to these same types of

actions. Nothing in the code or the legislative scheme supports such a reading, so standing is conferred upon Petitioner, as real representative.¹² (See App. 366-368, 369, 373-383.)

When the legislature changed the code to allow a personal representative to bring the causes of action, it could have changed the code (as it apparently did in the broad changes in Probate) to exclude a real representative from bringing the action. The legislature is presumed to know the law, and their decision not to exclude the term creates an explicit inference that they wanted a broad interpretation of standing.¹³ The changes in probate are not instructive in this case, these changes deal with the issues of the estate, not where there is a dispute concerning the harm suffered during the life of a vulnerable adult.

Therefore, by balancing the need to encourage protection of the elderly, denying those with unclean hands the benefit of protection by unintended immunization, and using

¹² Petitioner contends that summary judgment is also improper, because this area of law has not been developed (and may be construed as a “novel theory”. (See *Schmidt v. Courtney and Kemper Sports*, 357 S.C. 310, 324, 592 S.E.2d 326, 334-35 (2003) [error to grant summary judgment without an opportunity for full and fair discovery].)

¹³ See *Duvall v. South Carolina Budget and Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008)(“When the Legislature adopts an amendment to a statute, this Court recognizes a presumption that the Legislature intended to change the law.”)

a common sense reading of "real representative"¹⁴—the public importance supporting standing is obvious for the protection of the elderly.

C. The Court of Appeals' Analysis of Bennett v. Spartanburg and the Plain Language of the Code Governing Survival Actions do not Support a Finding that Petitioner Does not Have Standing.

The Opinion outlined all of the prior law regarding the archaic definition of "real representative," but the plain language of S.C. Code Ann. § 15-5-90 raises the most simple analysis of the issue of standing. It is settled that the statute has survived with little change since its enactment:

"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. (S.C. Code Ann. § 15-5-90 (1976) (emphasis added)."

¹⁴ When the statute's terms are clear and unambiguous, there is no room for an alternate construction, and courts must apply them according to their literal meaning. (*See Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (1998).)

The court in *Bailes v. Southern Railway Co. Et al.*, 227 S.C. 176, 87 S.E. 2d 481 (1955) explained that when a fiduciary, here disputed personal representative Huckabee, refuses to bring an action, **the courts have upheld the right of the beneficiary to begin such action.**" (Emphasis added; see also Bogert, *The Law of Trust and Trustees*, § 869, ch. 41, "Beneficiary and Trustee—Remedies under Trusts", p. 118-119)

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 to statute of limitations. Any problems with the complaint can be remedied by motions to amend, rather than dismissal. (*See Allen v. Oil Co.*, 59, S.C. 571 (1901).) Therefore, Petitioner contends that the "real representative" and the "personal representative" are on the same footing, based on the statute and the principles in trust law.

The Court's interpretation essentially finds that the plain language of the code about "real representatives" is without merit, but it is this language which supports Petitioner's reasoning that the causes of action related to real property and to injuries to the person or the personal property survive to both "personal" or "real representative" .

Since the survival action code , South Carolina Code Ann. § 15-5-90, specifically provides that survival actions “shall survive both to and against the personal *or real representative...of a deceased person,*” (Emphasis added), and Appellant is an heir at law under *Duke v. Postal Telegraph Cable Co.*, 71 S.C. 95 (SC 1905)[heirs at law are the real representatives],)¹⁵ she has standing under statutory law.

Further, contrary to Respondents' arguments, there is no doubt that the circuit court had concurrent jurisdiction to hear the matter, and resolution did not require the probate court's involvement.¹⁶ South Carolina Ann. Code § 62-1-302 (b) provides:

“The court’s jurisdiction over matters involving wrongful death or **actions under the survival statute is concurrent with that of the circuit court** and extends only to the approval of settlements as provided in Sections 15-51-41 and 15-51-42 and to the allocation of settlement proceeds among the parties involved in the estate.” (Emphasis added)

¹⁵ Petitioner Betty Fisher is the niece of Alice Shaw Baker, and therefore an “heir at law.” Additionally, Petitioner previously filed a Formal Petition for Appointment as Administrator, therefore if successful in the Will contest litigation, she will be the duly appointed administrator, *not Huckabee*.

¹⁶ Although the Circuit Court’s Order did not deal with the issue of concurrent jurisdiction, Petitioner brings the issue to this Court’s attention to ensure proper consideration of the legal authority presented to the court and arguments brought to the court’s attention at the November 28, 2012 hearing, including the fact that the issue was not raised in the moving papers. (R. 347, 348, ll. 6)

This “concurrent” jurisdiction is bolstered by the plain language of Section 62-3-804(2) of the South Carolina Code which allows a tort claimant to sue the personal representative of an estate in any court.

In the case of Alice Shaw Baker, she would have had at least 3 (three) viable causes of action against Respondents—1) Violation of the Omnibus Act; 2) Legal Malpractice; and Breach of Fiduciary Duty, if she were still alive. Therefore, Petitioner is duty bound to pursue these actions to preserve Ms. Shaw Baker’s rights and recover her losses for the estate.

Since the Omnibus Adult Protection Act is a cause of action, based on statute, it survives the death of a party . (See 1 CJS Abatement and Revival § 151, at 206 (1985); see also 1 Am Jur. 2d Abatement, Survival and Revival § 53 (1994).) Additionally, since violation of a statute constitutes negligence per se, Petitioner can use these violations to establish some evidence of recklessness and willfulness. (See *Id.* at 354, 683 S.E.2d at 823 [can establish punitive damages].)

The issue of standing was examined by the court in *Amisub of South Carolina, Inc. v Passmore*, 316 S.C. 112, 447 S.E.2d 207 (1994). The court explained that *third parties*, the hospital, had standing to assert the cause of action against a husband who refused to take financial responsibility for the care of his seriously ill wife. A close reading of the case demonstrates that the vulnerable person, the wife, died during the proceedings. Therefore, this also supports Omnibus Adult Protection Act as a remedial statutory scheme meant to afford victims and their estates with the means for recovery for harm suffered by a now deceased victim.

Therefore, whether the Court analyzes the code governing Survival actions or the Omnibus Act, the Circuit Court’s, and thereafter the Court of Appeals, fundamental error is

that it interpreted these codes according to Respondents' analysis of the code and definition of "real representative"-- finding that a real representative is limited to cases involving "injuries and trespasses to and upon *real estate*." (App. 12)

However, in well established rules governing statutory interpretation what a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. (See *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 122, 542 S.E.2d 736, 740 (2001).) Moreover, the words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. (*Durham v. United Cos. Fin. Corp.*, 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998); *Adkins v. Comcar Indus., Inc.*, 323 S.C. 409, 411, 475 S.E.2d 762, 763 (1996); *Worsley Cos. v. S.C. Dep't of Health & Envtl. Control*, 351 S.C. 97, 102, 567 S.E.2d 907, 910 (2002); see also *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. (See *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); *Bayle, supra*, 344 S.C. at 122, 542 S.E.2d at 739.)]

There is nothing in the statute which precludes the "real representative" from bringing the causes of action. When the legislature enacted the code, it could have changed it (as it apparently did in the broad changes in Probate) to exclude a "real representative" from bringing the action. The legislature is presumed to know the law and their decision not to

exclude the term creates an explicit inference that they wanted a broad interpretation of standing.¹⁷

Central to the Court of Appeals' decision was its analysis of *Bennett v. Spartanburg Ry. Gas & Elec. Co.* 97 S.C. 27, 29, 81S.E. 189, 189 (1914). The Court of Appeals states that a real representative has no standing, because "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....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." (See App. 22).

However, a closer reading of *Bennett* does not support this analysis and is silent on the role of a "real representative." The question presented to the *Bennett* court was: "Can ...two causes of action be joined in the same complaint?" It had nothing to do with standing. Instead, these causes of actions were essentially damages for the decedent's injuries and then damages for the benefit of her heirs. The court examined a prior Code of Civil

¹⁷ See *Duvall, supra*. Other courts have also looked at the basic tenets of statutory interpretation, including "When the terms of the Statute are clear, the court must apply those terms according to their literal meaning, without resort to subtle or forced construction to limit or expand the statute's operation. (See *Cooper v. Moore*, 351 S.C. 207, 569 S.E. 2d 330 (2002).) Also, In construing statutes the terms used therein must be taken in their ordinary and popular meaning; when such terms are clear and unambiguous there is no room for construction and courts are required to apply them according to their literal meaning. (See *Allstate Ins. Co. v. Estate of Hancock*, 345 S.C. 81, 545 S.E. 2d 845 (2001).)

Finally, It is never to be supposed that single word was inserted in state law without intention of thereby conveying some meaning. (See *Davenport v. City of Rock Hill*, 315 S.C. 114, 432 S.E.2d 451 (1993).)

Procedure [§ 218] which held that causes could be joined "where they arise out of the same transaction... and affect all the parties to the action." The court goes on to say:

"That the act requires the personal representative (administrator or executor) to sue, **need not trouble us**, the legislature could as well impose that duty on the sheriff or the coroner..."(Emphasis added)

The *Bennett* court did not care how the legislature set up the representative status, merely that they did not allow a representative to act in an improper, conflicted manner dealing with the rights of two separate estates. Petitioner contends that the *Bennett* court only determines that a personal representative could not sue on behalf of the wrongful death heirs. Petitioner is not seeking to obtain damages for her own harm, this is and always will be, an opportunity to obtain justice for Alice.

Petitioner further argues that this Court "need not [be] troubled" in allowing a real representative to file an action on behalf of a vulnerable decedent, because the plain language of the survivability code itself clearly provides that the cause of action for both real estate and personal injuries "survive **both** to and against the personal or real representative" (Section § 15-5-90 of the South Carolina Code (2005), emphasis added.)

Interestingly, the placement of the decisive words are not addressed respectively, i.e. real estate is mentioned first in the description of the cause of action, while *personal representative* is mentioned first in description of the "representative." Therefore, Petitioner contends that either "heirs at law" ("real representatives") or court appointed personal representatives can bring actions for personal or real property injuries, contrary to the Court of Appeals' analysis of the Code.

Also, in footnote 5 of the Opinion, the Court claims that because the causes of action include allegations of fraud and deceit, that Petitioner can not bring those causes of action. However, this was not the grounds for which the summary judgment was brought by Respondents, and the Court of Appeals is essentially assisting Respondent Kouten with its assessment of issues and facts--none of which he argued or even came up with in his motion.

The court's conclusion is not accurate, and if allowed to stand would prejudice the decedent's estate. The allegations can also raise negligence causes of action or actions for neglect under the elder abuse statutory scheme and breach of fiduciary duty, therefore, if the court found standing, Petitioner could pursue the action on those grounds.

3.

THE SOUTH CAROLINA COURT OF APPEALS ERRED IN FINDING THAT PETITIONER FAILED TO PRESERVE ISSUES OF EQUITABLE STANDING AND WAIVER BY RESPONDENTS

As indicated in Section II, subsection 1, once Respondents failed to raise the issue of Petitioner's standing as "real representative" in their initial pleading as a defense, the issue was waived. (See *We Sav Financial Corp. v. Lingefelt*, 316 S.C. 442, 450 S.E.2d 580 (1994) [standing issue may be waived].)

To ensure that this Court recognizes the raising of issues related to waiver and equitable standing, Petitioner references where she raised the issues brought before the Circuit Court:

- Petitioner referenced Respondent Kouten's failure to outline his capacity. (App. 85, fn. 3)
- Respondent Kouten and the other Respondents did not bring the motion for summary judgment based on standing. (App. 146)

- Petitioner raised the issue that Respondents cited no authority for the argument that Petitioner had no standing. Arguments are not evidence. (App. 184, citing *Trivelas v. S.C. Dept. of Transportation* , 348 S.C. 125, 141, 558 S.E. 2d 271, 279 (2001).)
- Petitioner argument that a third party can sue an attorney when he misleads individuals regarding their right to estate inheritance. (App. 162, see *Holz v. Mainyard*, 304 S.C. 225, 403 S.E. 2d 634 (1991) and *Jenkins v. Wheeler* 316 S.E. 2d 354, [estate heir allowed to sue attorney in tort when attorney failed to explain conflict of interest].) (App. 162)
- Petitioner continued to contend that the court ignored the motion to disqualify/ remove Kouten. (App. 164)
- Kouten did not bring up the issue of Petitioner's standing until his supplementary pleading filed on December 20, 2012. (App. 168) Therefore, Petitioner contends that he waived the issue of standing and in fact brought a different motion which the court should not have considered.
- Petitioner specifically raised the issue of Kouten's waiver to set forth the parties' names in bringing said motions and lack of reference to cause of actions in subsection 7. (App. 174)¹⁸
- Petitioner again brought up the issue of motion to remove in the motion to amend. (App. 181, fn. 5)
- Petitioner outlined that the circuit court failed to address the issues in the case. (App. 182)
- Petitioner notes that the circuit court failed to rule on her request re: Kouten and his failure to reference the causes of action for Legal Malpractice. (App. 186) Petitioner explained that it was necessary to determine whether any of the defendants waived the issue of standing.
- Petitioner further argued and cited to authority that a third party has authority to bring an action on behalf of a trust which has been described by treatises as "temporary representative of the trust" (see *Bailes v. Southern Railway Co.* 227 S.C. 176 (1955).) (App.238).

¹⁸ Petitioner compromises the *Order granting Summary Judgment* and deprives Appellant of Due Process/Equal Protection as a party is dismissed without seeking any relief from the court. (See also, U.S. Const. Amends. IV and XIV, § 1 and S.C. Const. Art. I, § 3.)

- Petitioner specifically requested that the court consider her motions and rule on the motions. (App. 242).
- Respondent Kouten stated that he was representing all defendants after the notice of association was filed. (App. 472-474).
- Petitioner questioned Kouten's involvement in the case from his first pleadings. (R. 472-474).

By raising these issues, Petitioner is entitled to have the court consider the issues, and acknowledge that the issues were preserved for the court's consideration.

If not reversed, the Court's Opinion will allow Attorney Kouten to stand as an ambiguous being, never responsible for his own actions and never culpable for his own wrongs. The Court's opinion identifies him as "pro se" on the cover sheet of the opinion, however he is the only person who filed pleadings on behalf of Respondents, the only person who argued at the hearings, and the only person who argued before the lower court.

This amounts to justice denied for Alice Shaw-Baker and directly bears on this erroneous decision, smacking a death blow to the families who seek justice for their loved ones.

CONCLUSION

Justice Earl Warren once stated that "It is the spirit and not the form of law that keeps justice alive. The beginning of Justice is the capacity to generalize and make objective one's private sense of wrong." (Warren, Earl, "The Law and the Future" in Fortune Magazine (November 1955).)

The concept of standing continues as a beacon of light worldwide and as eloquently described by Lord Diplock in his analysis of the law, in the United Kingdom decision,

Inland Revenue Commissioners Appellants v National Federation of Self-Employed and Small Businesses Ltd. Respondents (1982):

"[i]t would...be a grave danger to escape lacuna in our system of public law if a pressure group...or even a single public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law **and get the unlawful conduct stopped.**"
(Emphasis added).

Unlawful conduct toward the vulnerable and elderly can be stopped, by allowing family through the broad protections of statutory standing, S.C. Code Ann. Section 15-5-90, to seek to vindicate the wrongs they suffered.

Alice Shaw-Baker suffered, and she now deserves justice. She is loved. Betty Fisher, real representative, is being denied the opportunity to seek damages for her injuries, not because there is no evidence of wrongdoing, breach of fiduciary duty, legal malpractice, etc. by these Respondents (See App. 99--declarations of expert), but because the Court of Appeal's decision here fails to recognize the independent force of the "survivability statute" to allow Petitioner to act when a personal representative won't, nor as an extension of the concept of a temporary representatives to hold those in violation of a trust accountable. The protections guaranteed to the Elderly by the Constitution and the American Disabilities Act are undermined, as discrimination continues without the protection and force of the family. (See U.S. Const. Amends. IV and XIV, § 1 and S.C. Const. Art. I, § 3).

Reversal of the Court of Appeal's decision will allow justice to begin, stop the unlawful conduct of abusers who use estate planning as their criminal tools, and rehabilitate the misconception of South Carolina's commitment to its vulnerable and Elderly

population. By reenforcing families' rights to vindicate for their loved ones, standing will not be manipulated to defend the wrongdoers.

Petitioner respectfully prays that the Court reverse the Opinion of the Court of Appeals in its entirety.

RESPECTFULLY SUBMITTED,

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February 25, 2017

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-000320

Circuit Case No. 2012-CP-10-1332

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

PROOF OF SERVICE

I certify that on February 27, 2017, I served a copy of Brief of Petitioner on the
Respondents and interested parties by depositing same in the United States Mail, postage
prepaid, addressed as follows:

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