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DEC 27 2018

S.C. SUPREME COURT

December 24, 2018

Via Fed Ex:

Honorable Daniel E. Shearouse, Clerk of Court
The South Carolina Supreme Court
1231 Gervais St.
Columbia, SC 29201

Re: Fisher v. Huckabee, et al.
Appellate Case No. 2018-000566

To the Honorable Daniel E. Shearouse:

Enclosed please find the following documents with the proper copies for filing and filing fee:

- 1) ORIGINAL 6 COPIES OF APPELLANT LISA FISHER'S PETITION FOR REHEARING; OR ALTERNATIVELY, MOTION TO VACATE, CLARIFY AND/OR TO MODIFY MEMORANDUM OPINION 2018-MO-039.

I am also serving counsel both by mail and by email.

Please conform the face pages of the document and return in the Self Addressed Stamped Envelope.

Thank you for your assistance. As set forth below, we are serving this letter on all parties.
My cell phone number is (562) 965-3267 if you have any questions.

Sincerely,

Lisa Fisher, Esq.

Enclosures

cc: Betty Fisher
(By personal service)

cc: Jessica Crowley
W. Westbrook Wills
(By email and mail)

Courtesy Copy via email per her request to:
Mary Frances Jowers

THE STATE OF SOUTH CAROLINA

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In the Supreme Court

DEC 27 2018

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Thomas L. Hughston, Jr., Circuit Court Judge

Circuit Court Case No. 2009-CP-10-3010
Appellate Court Case No. 2018-000566

Betty Fisher and Lisa Fisher,Appellants

v.

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

In the Matter of the Estate of Alice Shaw-Baker.

**APPELLANT LISA FISHER'S PETITION FOR REHEARING;
OR ALTERNATIVELY, MOTION TO VACATE, CLARIFY AND/OR TO MODIFY
MEMORANDUM OPINION 2018-MO-039**

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(Appellant)

INTRODUCTION

Pursuant to Rule 221(a), SCACR, Appellant Lisa Fisher (“Appellant”) respectfully petitions this Court for rehearing of Memorandum Opinion No. 2018-MO-039 (“Opinion”) filed on December 12, 2018 which “Affirmed in part, Reversed in part” the lower court’s decision. This is a per curiam decision.

This Court’s opinion mandates reversal as set forth herein. Alternatively, Appellant requests that this Court Vacate, clarify and/or modify the opinion as set forth herein.

LEGAL STANDARD FOR PETITIONS FOR REHEARING

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

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

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

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ARGUMENT

I. THIS COURT'S OPINION CONFLICTS WITH WELL-SETTLED PRECEDENT AND CONSTITUTIONAL PROTECTIONS REGARDING JURY INSTRUCTIONS, THE MODERN VIEW OF STANDING, AND THE STANDARD FOR IMPOSITION OF SANCTIONS.

Appellant has filed concurrently a petition for rehearing in the companion case.¹

A. *The Jury Charges were "Errors of Law" Mandating Reversal.*

This Court's decision with regard to the jury verdict directly conflicts with its own precedent concerning a conservatee's right to execute, and thus revoke a will. (See *Estate of Weeks*, 329 S.C. 251 (1997).)

Depriving Appellant of the right to a jury instruction that supports the right of Alice Shaw Baker to revoke the will deprives Appellant of a fair trial. The United States Supreme Court explained that once an "appeal is afforded, the state must not so structure it as to arbitrarily deny some persons the right or privilege available to others." (*Lindsey v. Normet*, 405 U.S. at 74-79 (1972).) In *Lindsey*, the court held that a double bond violated the Equal Protection Clause as it discriminates against tenants wishing to appeal from adverse decisions. Here, the trial court discriminated against Appellant in denying a proper jury instruction relating to Alice Shaw Baker's right to revoke her will. Alice Shaw Baker never had notice that she could not revoke her will, therefore instructing the jury that they had to abide by the order

¹ Appellant filed a petition for writ of certiorari in Case no. 2017-000743 ("writ case" or "companion case"). This matter was decided the same day in memorandum opinion no. 2018-M0-041. This is brought to the Court's attention, because the writ case deprives Appellant of reasonable compensation in her duties as Alice Shaw Baker's conservator and as such, it acts as a sanction against her. Therefore, this court has imposed dual sanctions. As set forth here, both cases should be reversed.

violated Appellant's right to collaterally attack an illegal ruling.² It is a violation of public policy to provide one elderly person the right to revoke, and not another elderly person said right, when they did not have an opportunity to object.

Moreover, in light of the bias of Judge Hughston, his interference on behalf of the Respondents was structural error mandates reversal. See *Caperton v. A.T. Massey Coal Co*, 566 S 868 (2009).

The *Caperton* court held that the test for actual bias is whether "under a realistic appraisal of psychological tendencies and human weakness," there is such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Other courts have also held that: "an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." (See *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1905 (2016).) As demonstrated, Judge Hughston's bias invaded the territory of the jury by the erroneous instructions, and provided him with the opportunity to both prosecute and manipulate the jury's decision. This deprived Alice Shaw Baker of the right to revoke her will, and provided Judge Hughston with the means to punish Appellant.

² Appellant reminds this Court that the probate court was limited to the following types of orders re Conservatorship, under Section 62-5-408. To the extent that order exceeded the court's jurisdiction, "A void judgment does not create any binding obligation." Federal decisions addressing void state court judgments include *Kalb v. Feuerstein* (1940) 308 US 433, 60 S Ct 343, 84 L ed 370; *Ex parte Rowland* (1882) 104 U.S. 604, 26 L.Ed. 861.

Other courts have found that an order that exceeds the jurisdiction of the court is void, and can be attacked in any proceeding in any court where the validity of the judgment comes into issue. (See *Rose v. Himely* (1808) 4 Cranch 241, 2 L ed 608; *Pennoyer v. Neff* (1877) 95 US 714, 24 L ed 565; *Thompson v. Whitman* (1873) 18 Wall 457, 21 L ed 897; *Windsor v. McVeigh* (1876) 93 US 274, 23 L ed 914; *McDonald v. Mabee* (1917) 243 US 90, 37 Sct 343, 61 L ed 608.)

Without public confidence in the court, the rule of law, itself is imperiled. (See *Liljeberg v. Health Services Acquisition Corp*, 486 US 847, 861 (1988).)

In a case such as Alice Shaw Baker, this Court has erroneously ruled Appellant has no standing. (See argument below). Therefore, this portion of the case mandates careful consideration of the rights of the conservatee. Revocation appears to have been the only issue where this court recognized Appellant's standing, therefore she was required to ensure that the jury was given the proper instruction. If there was no notice to Alice Shaw Baker in the pleadings, no notice served on Alice Shaw Baker of the potential loss of this liberty, and the instruction was erroneous, because precedent establishes that a conservatee does not lose her right to execute /revoke a will, then reversal is mandated.

By this Memorandum Opinion, this Court ignores the prejudicial effect of Judge Hughston's statement that Judge Curry's order was proper, and in so doing ignores the intent of Alice Shaw Baker. The Court cites to *York v. Conway Ford, Inc.*, 325 S.C.. 170, 147 (1997) for its contention that: "our scope of review extends merely to the correction of errors of law..." This case with regard to the revocation is based primarily on "errors of law."

The lower court told the jury how to rule, and this on its face is prejudicial.

While Appellant contends that Alice Shaw Baker wanted her monies to go to animal charities, there was more than one way to accomplish that goal, and that was to make sure that those who had lied to her were not the beneficiaries of her life's work. By the revocation, Alice Shaw Baker recognized this fact, and so should this Court. Reversal is mandated.

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B. This Court has Chosen to Ignore the Modern View of Standing, and in So Doing Misapprehended Appellant's Argument mandating Rehearing.

This court's decision with regard to the request for imposition of a constructive trust over the probate and non-probate assets in favor of animal charities has grave consequences to senior citizens, and most importantly to Appellant's loved one—Alice Shaw Baker.

Any citizen can be subjected to a fraud if a proponent fails to disclose their true "representative" capacity," and this court has now validated such actions. The Attorney General failed in their duty to protect Alice Shaw Baker, despite notice and a legal right to pursue said action. If someone walked into Alice Shaw Baker's home and stole all of the belongings, the police could be called by her family and the individuals prosecuted. However, Respondents' made claims to Alice Shaw Baker which she noted in her own writings and in conversations with independent people. These statements to Alice evidenced their "representative" capacity. This Court's ruling leaves the spoils to those engaging in trickery on a vulnerable person and who failed to disclose their true position of non-association with reputable dog charities. The Court did not have to believe Appellant, did not even have to believe the documentary evidence, it merely had to believe Kay Passailague Slade who admitted that Alice Shaw Baker wanted her monies to be used for animals and that she held herself out as a leader in the animal rescue community.

This Court has left a wrong without any recourse. However, the laws governing standing are changing. The recent case *Rowley v. City of New Bedford*, --- F.Supp.3d ----, 2018 WL 4600647 (D. Mass. Sept. 25, 2018) denied the City of New Bedford, Massachusetts' motion to dismiss plaintiff Rowley's (formerly plaintiff "Friends of Ruth & Emily, Inc.") citizen suit for injunction under the federal Endangered Species Act. Plaintiffs allege that two Asian Elephants, Ruth and Emily, were mistreated by the Buttonwood Park Zoo in New Bedford by chaining their

legs, housing them in inadequate facilities, failing to provide proper socialization, and failing to provide adequate veterinary care, which gives rise to their standing.

Although this case is not directly on point, it does demonstrate that standing does not solely require a litigant to suffer personal prejudice in an action. Appellant provided evidence that Alice Shaw Baker represented that her monies were to benefit animal charities. The court's decision and findings harm Appellant as she is forced to see her loved one's belongings used for an adverse purpose. However, this is an extension of the law which is also supported in other legal authority.

Appellant was the conservator, and had a duty to act as a fiduciary and is required to observe the standards of care applicable to trustees as described by Section 62-7-933. Trustees may represent and bind the beneficiaries of the trust with respect to questions or disputes involving the trust. Lisa Fisher was duty bound to deliver the funds to the proper person. South Carolina Code § 62-5-425(d) and § 62-7-707 (a) see also § 62-7-708 ("knows that there is a breach of fiduciary duty owed to the beneficiaries.")³

³ This issue has been discussed extensively in 2A Austin W. Scott & William F. Fratcher, The Law of Trusts § 185 at 562-80 (4th ed. 1987):

"Where the holder of the power holds it solely for his own benefit, the trustee can properly comply and is under a duty to comply with his directions, provided that the attempted exercise of the power does not violate the terms of the trust. But where the holder of the power holds it as a fiduciary, the trustee is not justified in complying with his directions if the trustee knows or ought to know that the holder of the power is violating his duty to the beneficiaries as fiduciary in giving the directions."

Therefore, Lisa Fisher has a stake in ensuring that the intentions of Alice Shaw Baker are honored, both to prevent violations to the beneficiaries and to prevent liability.

(See RESTATEMENT (SECOND) OF TRUSTS § 391 (limiting standing for the enforcement of charitable trusts to the attorney general, cotrustees, or individuals with "special interests"))

Since the Attorney General would not act on behalf of Alice Shaw Baker, Appellant had a legitimate argument. This Court's characterization of the argument as bordering on "frivolity" ignores the very basis for the case, to enforce accepted trust and probate principles of third party standing. The law provides for modification of wills to reflect the true intent of a testator, it would seem disingenuous to make these provisions hollow vessels to prevent any party from seeking relief on behalf of a testator.

The Attorney General is not going to enforce the charitable trust, the lack of specificity for a particular trust is not going to allow any entity to enforce the trust, and the only person with knowledge, acting as a fiduciary, with a duty to protect estate property is foreclosed the right by this decision.

In any event, this Court's own duty was compromised by failing to ensure that Alice Shaw Baker's property benefits animal charities, in light of evidence which specifically characterizes Kay Passailague Slade as "Custodian of pets and rescue **-governed by will**". (Emphasis added) This clearly identifies her in a "representative" capacity, and her receipt of these funds is no different than allowing a bank to release monies to an individual rather than an entity.

Furthermore, in this era of "see something, say something," this court creates a horrible precedent affecting this Appellant, both in her fiduciary capacity and her familial capacity, dictating that she bury her head in the sand for the sake of complacency and to avoid sanctions. This must not stand. Lisa Fisher would not have been justified under the law to follow the directions of Respondents to transfer the property to them. (See footnote 3)

Reversal is mandated, in light of this misapprehension of both the law and facts.

3. Sanctions against Lisa Fisher are in Violation of the Statutory Requirements under Rule 11 and FCPSA and Due Process and Equal Protection

As set forth above, Lisa Fisher presented legitimate arguments and at most asked for an extension of legal precedent to this particular case.

This Court's criticism that "Lisa Fisher has certainly engaged in abusive litigation tactics that amount to sanctionable conduct" is no more clear than Judge Hughston's orders which this court admits contained "addition and subtraction errors, double counting or certain portions of the award, a lack of evidence as to the other portions of the award, and a number of other errors, mathematical and otherwise."

The court affirmed a "sanction award of \$16,680.28 against Lisa Fisher, but only to that extent."

But to what extent? The original orders by Judge Hughston included referral to the Disciplinary committee and contempt charges against Lisa Fisher. The sanctions of this Court appear to be a "litigant" sanction, and not an attorney sanction, but the ambiguity of "that extent" creates confusion. ⁴

⁴ One author ruled that the place of a supreme court allows the court to bring "certainty out of doubt. This is really one of the silent unconsidered, yet most valuable functions of a supreme court." (See Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 Fordham L. Rev. 477 (1958), citing Lamar, A. "Unique and Unfamiliar Chapter in Our Legal History. 10 ABAJ 13, 515 (1924).)

The original order of Judge Hughston also mandated disclosure of financial documents, and more, yet this Court failed to not only mention nor rule on the statutory authority prohibiting such disclosure.

This Court appears to reduce the sanction award to Lisa Fisher, as a party, however in light of this court's decision in the writ action, Appellant Lisa Fisher is deprived of her right to know if this is a Rule 11 or an FCPSA sanction and why she is being deprived of compensation in the other actions (which is a duplicative sanction).

Most importantly, what was sanctionable? Asking this court to consider legitimate arguments? There is something unseemly in finding Lisa Fisher engaged in improper conduct, when Lisa Fisher was subjected to illegal and unethical conduct in this case to her personal and financial harm. Respondents:

- 1) Engaged in ex parte communications with the lower court in violation of lawyer's duty under Rule 402(3).
- 2) Had a secret meeting with the lower court in violation of all known laws governing ex parte communications.
- 3) Made false statements to this court about the state of the pleadings during Oral Argument.
- 4) Engaged in violations of Rule 3-310 and represented Respondents without any waiver of conflict of interest by Alice Shaw Baker.
- 5) Judge Hughston issued an order for the release of the property to Respondents before the statutory time limit for enforcement of the orders.
- 6) Judge engaged in an unlawful independent investigation.

And More.

Both Betty Fisher and Attorney John Hughes Cooper were properly determined *not* to have engaged in egregious, sanctionable conduct. However, this court is not required to disclose what Lisa Fisher is being charged with--this is certainly vague and ambiguous and fails to meet the statutory mandates under Rule 11 and FCPSA.

The State of South Carolina has deprived Lisa Fisher of Due Process and Equal Protection. Lisa Fisher did not have an opportunity to oppose these sanctions, and if these sanctions are against her as a lawyer, she will suffer further economic losses and prejudice as she must overcome charges administered by the Disciplinary Committee which may affect her law practice.

These types of sanctions are in violation of well established precedent. Appellant was entitled to procedural Due Process regarding any sanction award, and Due process requires:

“ 1) adequate notice; 2) adequate opportunity of a hearing; 3) the right to introduce evidence and the right to confront and cross examine witnesses.” (See *Moore v. Moore*, 376 S.C. 467, 657 S.E. 2d 743 (2008).)

While due process issues are not usually preserved if raised for the first time on appeal (see *Grant v. South Carolina Coastal Council*, 319 S.C. 348, 461 S.E. 2d 388 (1995)), Appellant could not raise this issue until this Court’s memorandum opinion, as she did not know that the Court would support a sanction award that did not set forth the purported wrongdoing. In *Runyon v. Wright*, 471 S.E. 2d 160 (1996), this Court held that an order must **describe the conduct determined to constitute a violation of Rule 11 and explain the basis for the sanction imposed.** (Emphasis added)

The United States Supreme Court in *Goodyear Tire & Rubber v. Haeger*, 581 US ____ (2017) explained, last year, that an appropriate sanction when imposed pursuant to civil procedures must be “compensatory” rather than punitive in nature....in other words, the fee award may go no further than to redress the wronged party ‘for losses sustained’; it may not

impose an additional amount as punishment for the sanctioned party's misbehavior...To level that kind of separate penalty, a court would need to provide procedural guarantees applicable in criminal cases, such as 'beyond a reasonable doubt' standard of proof.. When (as in this case) those criminal type protections are missing, a court's shifting of fees is limited to reimbursing the victim." ⁵

A court must observe due process "both in determining the requisite bad faith exists and in assessing fees." (See *Chambers v. Nasco, Inc*, 501 U.S. 32 (1991).) There is no evidence that Appellant's conduct caused any compensatory losses, nor that her conduct was unjustified, especially in seeking an extension of the law. Respondents made their own tactical decisions, and Appellant should not be required to compensate them for their own misdeeds and delay, especially in light of this court's ruling.

Therefore, this Court's failure to meet the statutory mandates under either Rule 11 or FCPSA mandates reversal, as it is illegal.

Finally, the sanctions award further undermine the purpose of this litigation, as this Court's decision ignores Alice Shaw Baker's intention which is contrary to well established law where " the overriding aspect of the administration of charitable trusts in modern American law has been deference to donor intent." (see RESTATEMENT (SECOND) OF TRUSTS § 381 (1959).) Alice Shaw Baker was a citizen of South Carolina, protecting her interests and desires should be the utmost concern for this court.⁶ If not this Court, an exception should be mandated

⁵ Rule 11 or discovery sanctions were not requested in this case, nor are they justified. While this Court does not call the loss of these monies sanctions, they have the effect of unjustly benefitting respondents.

⁶ S.C. Code § 62-2-601 which mandates that this Court reforms the will "even if unambiguous, to conform the terms to the testator's intention if it is proved by clear and convincing evidence that the

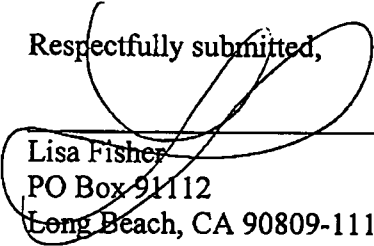
to allow those who truly care about their family to enforce the rights of the elderly, not create a means for this Court to sanction a party.

Appellant's arguments do not border on frivolity, as demonstrated by the longstanding historical authority committed to a testator's intent and the modern view of standing. Therefore, any award for sanctions must be reversed, whether as a litigant or an attorney.

WHEREFORE, Appellant respectfully seeks an Order granting rehearing, seeking reversal of the court's judgement, and finally, reversing all sanctions.

December 24, 2018

Respectfully submitted,



Lisa Fisher
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testator's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement." (Emphasis added) The evidence supported Alice Shaw Baker's intent and sanctioning Appellant for trying to enforce her rights undermines the intent of the statute.

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In the Supreme Court

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Betty Fisher and Lisa Fisher,Appellants

v.

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

In the Matter of the Estate of Alice Shaw-Baker.

PROOF OF SERVICE

I certify that I have served **APPELLANT LISA FISHER'S PETITION FOR REHEARING; OR ALTERNATIVELY, MOTION TO CLARIFY OPINION 2018-MO-039** postage prepaid, on December 24, 2018 (and via email) addressed as follows:

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December 24, 2018



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