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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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.

APPELLANTS' FINAL BRIEF; JOINDER BY BETTY FISHER

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A.
Introduction

There is no doubt that Alice Shaw Baker's devotion to animals was known to all--maybe too well. While Appellants Lisa Fisher and Betty Fisher ("Appellants") have at all times acted in good faith in an effort to honor Alice Shaw Baker's wishes and ensure her assets were used for charitable purposes. Nevertheless, these legal proceedings have been met with disdain by the lower court and unwarranted sanctions.

As set forth herein, Appellants seek to overturn the judgment, sanctions, and terrible findings that attack both the character and professionalism of Appellants, Alice Shaw Baker's family.

These principles to restore estate assets for charitable purposes are not "unreasonable". They don't even require an extension of the law, because they are increasingly promoted through legal and scholarly writings. Third party standing is not prohibited in "probate" matters. Appellant Lisa Fisher wrote extensively about the premise in her *Return to Respondents' Motion for Summary Judgment* on February 26, 2018 (R. 575) Therefore, when the lower court denied Summary Judgment, Appellants believed the issues of standing, dismissal, and accusations of wrong legal theories were behind them.

Commentary in the Restatement even finds that "a court may act on its own motion if it becomes aware of a possible breach of trust by a trustee." (See *Restatement (Second) of Trusts* sct. 200 cmt. H (1959) see also Unif. Trust Code sct. 706 (a).) In this case, there is ample evidence that Alice Shaw Baker had an expectation that her monies were to be used for charitable purposes for animals. Therefore, Appellants suggest that the court should have

recognized that Kay Passailague Slade's standing in the animal rescue community created a duty to disclose to Alice Shaw Baker that she was not using the monies for the "rescue" that she worked at. [1]

South Carolina relies on this modern view of law governing wills and trusts–as demonstrated by the statutory authority in S.C. Code § 62-2-601 which mandates reformation of a will "even if unambiguous, to conform the **terms to the testator's intention** if it is proved by clear and convincing evidence that the 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)

and

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[1] This duty to disclose is not a new concept. Justice Benjamin Cardozo wrote, "A trustee is held to something stricter than the morals of the market palace. Not honesty alone, but he punctilio of an honor the most sensitive." (See *Reinhard v. Salmon,* 164 S.E. 545 (1928).)

Respondent Slade knew she was required to take care of Alice Shaw Baker's dogs. The evidence supports a finding that Alice Shaw Baker was led to believe that based on her reputation in the community, and Alice Shaw Baker's understanding, the monies were to go to the charity.

In New York case *Mandarin Trading Ltd v. Wiledenstein,* 16 N.Y. 3D 173, 178 (2011), the court held that a special relationship where the defendant owes fiduciary duties to the plaintiff required the defendant to disclose information.

There is also the "special facts" doctrine where one party has superior knowledge. *In PT Bank Central Asia v. ABN AMRO Bank N.V.* 301 A.D. 2d 373 (2003), the court held that a defendant had information not readily available to plaintiff. Therefore, under the Special Facts doctrine, there was a duty to disclose.

Everyone is just ignoring the extrinsic evidence as if it doesn't exist. Even if the Court were to find that there were no "intentional statements" leading Alice Shaw Baker to believe that the monies were going to dog charities, there certainly would be a mistake that this Court can correct. Although fraud does not survive a person's death in South Carolina, there is no doubt that "silence may constitute fraud" and it certainly can be viewed as extrinsic evidence to outline a testator's true intent. (See *Dye v. Gainey,* 320 S.C. 65, 68 [Fraud is an essential element to constructive trusts, although it need not be actual fraud.].)

South Carolina Code § 62-7-407 (2016) provides in pertinent part: "...a trust need not be evidenced by a trust instrument. The creation of an oral trust and its terms may be established only by clear and convincing evidence."[2]

One must question what impact these laws have if no one has standing to pursue them. Moreover, the danger that a conservator/trustee/fiduciary would not be able to restore the estate to the rightful owner when she has personal knowledge, as here, that the decedent's estate had either been revoked or a new will executed, leaves them open to liability.

The public policy reasons for allowing third party /special interest standing is essential to protecting the viability of a decedent's wishes. In the scholarly article by author Edward C. Halbach entitled *Standing to Enforce Trusts: Renewing and Expanding Professor Gaubatz's 1984 Discussion of Settlor Enforcement,* Univ. Of Miami Law Review, Vol. 62:713, the modern [view is:]

> "...A recognition of Special Interest Standing reflects society's interest not only in enhancing the enforcement of charitable trusts but also in honoring the reasonable expectations of settlors and the donor public." (See *Halbach,* See p. 718)

Appellants contend that their efforts to restore the monies to Alice Shaw Baker's charitable intent, either through a direct will contest or constructive trust/equitable

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[2] Additionally, the due process concerns Appellants raised in this case concerning Peter Kouten's conflict has recently been through new legislation, which changes the procedure and duties of appointment of court appointed attorneys and guardian ad litem based on the Constitutional issues, inherent conflict between the roles of GAL and attorneys, and protections necessary to protect the elderly or vulnerable adults. (See S.C. Code § 62-5-403(b) and 62-5-101). Said changes to go into effect in 2019.

Appellants recognition of these issues through this litigation should not be viewed as problems, instead they demonstrated foresight in the protections of the elderly, such as Alice's case.

deviation/reformation action, should not have created such discord in the court.

Respondents made tactical decisions through this case to point the finger of accusation at Lisa Fisher. Yet, Lisa Fisher's only duty was to Alice Shaw Baker. The record shows some of Respondents and their counsels' deception in this case, but Appellants merely want justice for Alice Shaw Baker. Instead, a judgment over $250,000.00 in sanctions and attorney fees were levied against Betty Fisher and Lisa Fisher. There is a judgment against their former attorney. They now must appear pro se, because of the conflict created by the judgments in case. **They have been punished for taking a stand for Alice Shaw Baker** , and the punishment was baseless.

Appellants ask this Honorable Court to look at what has happened, both with the lower court's conduct and the errors in law. Reversal is the only way to ensure that a grave miscarriage of justice is not allowed to continue. Most important, It is also the only way to ensure that the expectations and intentions of Alice Shaw Baker are honored.

B.
Statement of Issues on Appeal

1) WHETHER APPELLANTS HAVE STANDING TO PROSECUTE BOTH THE WILL CONTEST MATTER AND THE EQUITABLE CAUSES OF ACTIONS, THEREBY MANDATING REVERSAL OF THE COURTS ORDERS.

2) WHETHER APPELLANTS WERE DEPRIVED OF A FAIR TRIAL, BASED ON THE TRIAL COURT'S INDEPENDENT INVESTIGATION, SECRET MEETING, EX PARTE COMMUNICATIONS WITH RESPONDENTS' COUNSEL, TRIAL RULINGS (INCLUDING DEMAND FOR PRIVATE FINANCIAL RECORDS), AND BIAS MANDATE REVERSAL.

3) WHETHER THE TRIAL COURTS' JURY INSTRUCTIONS PREJUDICED APPELLANTS AND INTERFERED WITH ALICE SHAW BAKER'S CONSTITUTIONAL AND STATUTORY RIGHT TO REVOKE HER WILL MANDATING REVERSAL.

4) WHETHER SANCTIONS AGAINST APPELLANTS WERE WARRANTED WHEN THE LITIGATION WAS REASONABLY SUPPORTED BY THE FACTS AND LAW.

5) WHETHER JUDGE HUGHSTON'S RECUSAL AND DISQUALIFICATION IS MANDATED, IF THE COURT REVERSES THE ORDERS IN THIS CASE.

C.
Statement of the Case

Alice Shaw-Baker died on February 25, 2009. She was a wonderful woman who led a life devoted to animals and animal charities. She had been placed under a conservatorship and guardianship without notice to her family. Once they learned about the conservatorship, [Appellant] Lisa Fisher traveled to South Carolina. She assisted in fixing her house up, getting her to a beauty parlor, obtaining caregivers, and helping her great aunt Alice Shaw Baker from being institutionalized.

It was her family who stood with and by Alice.

Her court appointed attorney, Guardian ad litem, and visitor was attorney Peter Kouten.

Appellant Lisa Fisher was appointed as Alice Shaw Baker's guardian and conservator on November 19, 2008. (R. p. 10) She acted at all times to make sure that she was happy and healthy, including bringing in a hair dresser to fix her hair at her home, taking her shopping, and to the movies.

Alice Shaw Baker appreciated Lisa Fisher's help, because as she put it, "My best friend [Bessie Huckabee] betrayed me." There was a power of attorney and advanced healthcare directive naming Bessie Huckabee, who refused to assist Alice.

During the conservatorship trial, the court put in the order that Alice Shaw Baker could not change her will. This was done without notice to Alice or [Appellants] and is contrary to

South Carolina Law. Also, this was done, despite findings by the court that it was a limited conservatorship and that the court made findings that she had capacity to nominate Lisa Fisher.

Alice Shaw Baker was sent to the hospital on or about February 14, 2009 for changes to her medication. On February 25, 2009, Alice Shaw Baker died, the very day Lisa Fisher had flown out to pick her up (by medical ambulance/plane), as required by the doctor, to bring her to California to try and get her some additional medical help. It was devastating for Alice's family, Appellants herein.

Bessie Huckabee filed an informal petition for probate without notice to Betty Fisher. Appellants objected to and filed a formal will contest on April 27, 2009. [Respondents] filed their answer which did not seek attorney fees or any costs whatsoever. (R. p. 171)

On May 13, 2009, the Will contest/constructive trust litigation was formally removed from the probate court to the Circuit Court. The matter was bifurcated. Respondents' first Motion for Summary Judgment was denied on October 23, 2017. The trial judge denied the [Respondents']' motion for directed verdict.

Appellants asked for numerous jury instructions which the court did not provide to the jury. In fact, the trial court made strenuous statements to the jury which Appellants believe prejudiced their case. (R. p. 1210, ll. 3-16; pp. 1223-1224)[3]

During the Jury Trial, Judge Hughston also arranged for the Clerk to attend trial, and he

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[3] The court charged the jury as follows: "you will have [Judge Curry's order] and you can look at it and see when it was. You can see what she said in that order, and you can presume that she had good reason to say that. She had good reason to do what she did when she put it in writing and filed in the probate court. You can presume that, that she was not able to make a will at that time." (R. p. 1210, ll. 3-16)

Not only do Appellants contend that this is a wrong instruction, but it is a dictate to the jury that Alice Shaw Baker could not change/revoke her will.

inquired into the legal validity of the will, not Respondents' counsel. (R. pp. 991-992) All of these actions on behalf of Respondents were improper.

During the Bench Trial, various versions of Alice Shaw Baker's wills were presented. Other Evidence of Alice Shaw Baker's stated intentions, extrinsic evidence was filed.

After the bench trial, the Judge actively assisted Respondents, by assisting them with "collection" of monies, without notice to Appellant.

During the litigation, Appellants objected to and asserted the rights for Alice Shaw Baker that Attorney Peter Kouten had an actual conflict in representing Respondents. They alleged that he represented Respondents at the same time as Alice Shaw Baker, while she was alive. This is a viable and proper argument.

This was appealed, as were other erroneous orders, which delayed the trial of this case. Nevertheless, Appellants at all times believed that their legal claims were warranted under existing law or that there was a good faith and reasonable argument existing for the extension, modification, or reversal of, delay, existing law. [4]

Moreover, the pleadings were not filed to harass or injure any party, to delay, or properly adjudicate the case. Appellants sought only to ensure that Alice Shaw Baker's testamentary

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[4] [REPEATED ARGUMENT, ABOVE. APOLOGIES TO THE COURT: ~~During the litigation, Appellants objected to and asserted the rights for Alice Shaw Baker that Attorney Peter Kouten had an actual conflict in representing Respondents. They alleged that he represented Defendants at the same time as Alice Shaw Baker, while she was alive. This is a viable and proper argument. This was appealed, as were other erroneous orders, which delayed the trial of this case. Nevertheless, Plaintiffs at all times believed that their legal claims were warranted under existing law or that there was a good faith and reasonable argument existing for the extension, modification, or reversal of, delay, existing law. Moreover, the pleadings were not filed to harass or injure any party, to delay, or properly adjudicate the case. Plaintiffs sought only to ensure that Alice Shaw Baker's testamentary wishes were followed.~~]

wishes were followed.

This appears to have angered and interfered with the court's consideration of the case and the duties of this Court. Appellant Betty Fisher relied on the advise of her counsel and is now being subjected to the same fate as her daughter, a judgment in excess of $250,000.00 dollars, not demanded by [Respondents] in any pleading or motion,[5] but contrived without notice and

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[5] Although Respondents filed post trial motions for attorney fees pursuant to S.C. Code § 15-36-10, said motion did not request fees, costs, or damages amounting to the sanctions imposed herein. Their motion filed on or about November 6, 2017 asked for $111,842.42. The motion was not based on Rule 11, and the motion was not based on any affidavits regarding alleged wrongdoing. The allegations in the motion were different than raised by the court. See *PDHC v. Estate of Thompson*, 418 S.C. 557 (2016) which provides:

> "The main purpose of Rule 11, however, is to deter future litigation abuse, not compensate the opposing party. By waiting until the case has been fully litigated and decided by the appellate courts on the merits, the Estate failed to challenge or prevent any litigation abuse from occurring in this case. Instead, the Estate made the tactical decision of waiting until the conclusion of the case to recover attorney's fees for all of the abuses that took place over a three-year period. In our view, the Estate's delay in bringing the motion for sanctions failed to serve the deterrence and efficiency purposes of Rule 11 and, therefore, was unreasonable."

Appellants contend the *Thompson* case precluded the [lower] court from granting all of the attorney fees and costs, due to the delay of [Respondents].. Appellants objected to the billings and time in the fee estimation. The bills of W. Westbrook Wills III absolutely supports [Appellants] position that he was not substituted in 2013 and in fact, Peter Kouten's billing includes duplicative charges and appearances before the Supreme Court. Review of those billings show that Peter Kouten knew that Bessie Huckabee could not be bonded since July of 2009. [Appellant] Lisa Fisher's concerns over the protection of the trust were justified. Respondents allowed [Appellant] to pay for the protection of the property, knowing that statutory protections precluded her from acting as personal representative.

Appellant had no notice of the extent of damages and/or attorneys fees that the [lower] court would impose. The American rule still applies in litigation, when there isn't frivolous or bad faith arguments made by the litigants. Lisa Fisher is the only person accused of wrongdoing, where their billing records show that counsel and Respondent Huckabee could not be bonded, and as such could not pay for the maintenance of the property. Unjust enrichment for their benefit as the property increased in value is ignored for the sake of Respondents, when the

contrary to the other courts' jurisdiction.

Appellants Lisa Fisher and Betty Fisher believe that based on the pleadings, evidence, orders, and judgment in this case, the only result that can be made is reversal of the Judgment of the bifurcated trials.

Appellant Lisa Fisher protected these assets during the pendency of these proceedings, based on her duty under S.C. Code § 62-5-425 (d) and § 62-7-707. Due to her actions, the house has nearly doubled in value, the monies in the investment have doubled in value,[6] and no other attorneys and/or Special Administrators have incurred additional fees which would have diminished the value of the property.

D.
Standard of Review

"An appeal from the probate court to the circuit court regarding the validity of a will is a matter of law." *Golini v. Bolton*, 326 S.C. 333, 338, 482 S.E. 2d 784, 784 (1997).

On appeal, this Court will examine the record to see if there is any evidence t o reasonably support the factual findings of the probate court. " (*Dean v. Kigore,* 313 S. C. 25, 259 (1993)). An action to declare a constructive trust is in equity and a reviewing cut may find facts

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[lower] court's own feelings of remorse for the benefit of Respondents and his rage over Appellant Lisa Fisher's conduct in seeking redress, blinded the principles guiding temperance for justice. The court in *Wannaker v. Wannamaker, 395 S.C. 592, 719 S. E.2d 261* (Ct. App.2011), held that a family court may not sua sponte modify an order not requested by the moving party. There is no reason for a difference in sua sponte orders in the [lower] Court.

[6] The initial orders by Judge Hughston, some which have been vacated, created interference with the jurisdiction of the courts and raised havoc in this case, as the [lower] court made decisions about Appellants' fees and duties and made decisions about prior orders of Judge Curry regarding John Hughes Cooper's previously granted attorney fees. None of which was part of this case.

in accordance with its own view of the evidence." (*Lollis v. Lollis,* 291 S.C. 525, 530 (1987).)

South Carolina Frivolous Civil Proceedings Sanctions Act S.C. Code Ann. § §15-36-10 (Supp. 2012) (the "FCPSA") is reviewed *de novo*.

The same standard of review applies to a trial judge's findings under Rule 11, SCRPC. (See. *Site Prep, L.L.C. v. Atl. Coast Builders & Contractors, L.L.C.,* 394 S.C. 97, 104, 713 S.E.2d 650, 653 (Ct. App. 2011) ["The determination of whether attorney's fees should be awarded under Rule 11 or under the [FCPSA] is treated as one in equity."])

E.
Relevant Orders[7]

All of Judge Hughston's orders are damaging to Appellant's reputation, however the March 21, 2018 order is the most inimical and hostile toward Lisa Fisher. The court states with regard to Lisa Fisher's testimony:

> "The only reason that I do not call it perjury is that Alice Shaw Baker is now deceased and unavailable, and I am aware of the standard of proof in a criminal action." (R. p. 68)

This Court's March 21, 2018 order also states:

> "Since I am confident there will be an immediate appeal of my decisions, consistent with the prior acts of the Plaintiffs and their attorneys, I decline to write about the tortuous history and undisputed facts. **I leave that to the Justices of the Supreme Court of South Carolina. They can find the facts in this equity case."** (R. p. 63, emphasis added.)

Then at the conclusion of the order, the court states: "The real purpose undoubtedly was

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[7] Appellants are not listing all of the orders herein, however they do not waive any defects therein. They are merely setting forth some of the orders which demonstrate the prejudice in this case.

to have her die in California, ultimately avoid the jurisdiction of South Carlina control the Estate, defeat the Will and benefit her mother and herself." Talk about making a bad impression! Fortunately, Judge Hughston's conclusions were wrong, they were not based on any evidence, they were mere rank speculation! However, it is hard to believe that type of allegation will not impact Appellant's reputation, due to the public nature of these filings.

Rule 52 (a), SCRCP states that: "In all actions tried upon the facts without a jury..., the court **shall** find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58." (Emphasis added) While there are findings, Appellants contend that the findings are not based on equity and not on point with regard to the issues in the case. Moreover, the vagueness in the findings and the lack of information regarding evidence reviewed by Judge Hughston mandates reversal.

Appellants contend that the lower Court had no discretion to fail to provide findings of fact on the equitable issues in this case.

In the June 29, 2018 judgment, Judge Hughston made the following conclusions

> "Plaintiffs had practically no contacts with Alice Shaw-Baker prior to this. Lisa Fisher **successfully maneuvered the professional elder care Co-Conservator/Guardian**,[8] Jane Orenstein out, and her actions as sole Conservator/Guardian begin and continue to this day, according to her. It is important to read Judge Curry's November 19, 2008 Order for it is

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[8] This order substantially demonstrates the inherent contempt Judge Hughston has for Appellant Lisa Fisher. There is no evidence presented by Respondents, nor known by Appellant Lisa Fisher that supports the conclusion that Lisa Fisher "maneuvered" Jane Orenstein out. There was no petition for Jane Orenstein's appointment.

Lisa Fisher spent her time and money to help Alice. Respondents did not, despite the fact that Respondent Huckabee indicated that she would act as Alice's agent under the power of attorney. When Lisa Fisher asked her to act as co-conservator, Bessie Huckabee wouldn't even do that! (R. p. 1456-1457)

> dispositive of Plaintiffs' contention that Alice Shaw-Baker revoked her Will. She was an "Incapacitated Person". Section 62-5-101 (1) S.C. Code of Laws. Among other things, Judge Curry Ordered, "neither Alice Shaw-Baker nor anyone on her behalf may revise or revoke her Will or execute a new Will, unless specifically ordered by this Court." No one sought to change this Order. This alone should have told Plaintiffs not to claim the Will was revoked under extremely suspicious and questionable circumstances shown in the record and recited in my prior Order. This Order is in addition to the settled law that a mentally incompetent person lacks capacity to revoke a Will. **Without question, Alice Shaw-Baker lacked capacity to revoke her Will**.
>
> ***
>
> However, **it is finally established** clearly by the memorandum of a call from her to her insurance company: "I have received your letter dated **March 6, 1996** and the beneficiary forms naming the John Ancrum Society for the Prevention of Cruelty to Animals and have discussed this with my attorney. We have decided not to change the beneficiary and name my estate as beneficiary. Ok. I will order the file to make sure your estate is named as beneficiary and if it isn't, I will prepare beneficiary forms accordingly." (R. pp. 110-112)

It is unclear why Judge Hughston felt this was memorandum "finally established" anything. Appellants know that the monies were not going to John Ancrum. If the court were to give this memorandum any credence, it should have been that the money was going to "her estate" which is consistent with Appellants' position.

F.
Evidence that Alice Shaw Baker Intended Animal Charities To Inherit her Entire Probate Estate and Non-Probate Assets

Alice Shaw Baker's own writing and words demonstrated her intentions, not merely for as beneficiaries of the life insurance and deferred compensation, but also to her probate assets where she described [Respondent] Slade:

> " ...custodian of pets and rescue–governed by will...." (R. 1614)

And

> "...Current bene[ficiary] works on A dog rescue and $ to go to the dog rescue...." (R. 1608)

And

> "Upon death my estate is all going to charity." (R. 1611)

Respondent Slade stated that she worked at a dog rescue, and admitted at the Motion for New Trial that she was "known" for working with rescues. There was another judicial admission of Respondent Slade who testified:

> THE WITNESS: We talked about the Charleston Animal Society and they did not want to agree to her wishes and how that really upset her.
> Other than that, because I work with some rescue, she one time told me that as far as she was concerned, I could sell her house and buy land and
> that way I could bring in -- have all the dogs I wanted.
> BY MR. COOPER:
> Q. Next question: Did she ever express to you or talk to you about what you -- what - anything she left to you, what that will be used for?
> A. Well, like I said, she told me she would hope that I would get land and that way I could have all the dogs I wanted. She could only have three dogs where she lived, but she did know
> that I would take in dogs and have surgery or whatever needed to be done and find them homes and
> keep them, yes, sir." (R.. p. 1133-, ll. 13-125, p. 1134, ll. 1-8)

However, on further inquiry, Kay Slade admitted that she did not tell Alice Shaw Baker that was what she was going to do, but that Slade said she did not want to think about that because that would mean that she lost her [Alice]. (R. p. 1362, ll. 1-8)

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This too is significant because a reasonable trier of fact could find this was deceptive and that Alice was Duped. Respondent Slade never told Alice that she had **no** intention of using Alice's money to buy land, therefore her silence, when she had a duty to disclose to Alice her true intentions, would justify the equitable relief of constructive trusts, etc. based on South Carolina law regarding latent ambiguities.

Further inquiry led to Respondent Slade saying how do you know I won't, wherein the trial court laughed and said "GOOD ANSWER!" (R. p. 1359, l. 9) Kay Passailague Slade testified that she was known to "do a lot with animal charities. I do a lot of fostering and that sort of thing." (R. p. 1468) Her answer admitted that she held a role of "trust and confidence." (R. 171)

This testimony is important, because Kay Passailague Slade held herself out as a person in the community who was engaged in dog charities. Appellants contend that this is an important factor. If Alice Shaw Baker left her money to an employee of the Humane Society, however her intent was that it went to the charity, Would Appellants' contentions about the misconduct of Respondents be without merit? The questions asked by Appellants are proper in a case where Alice Shaw Baker's documents clearly state that Kay Passailague was "the custodian of pets **and rescue–governed by will**" and other documents referenced that the monies were to go to the dog rescue that [Kay Passailague Slade] works on." (R. 1608)

Then in May of 2018, Respondent Slade stated:

> "A. I can't tell you. We were not the kind of people that went to each other's house.
> Q. You didn't visit her regularly at her --
> A. No. She didn't visit me regularly. We talked on the phone every day."
> (R. p. 1473, ll. 20-25)

Finally, admitting that she did not see Alice Shaw Baker on a regular Basis, "... Alice would not let us come into her house. **We were not those kind of friends**. (R. 1480, ll. 1-6) She further acknowledged that they were not "best friends." (R.. 1472, ll. 13-17; R. p. 1450, ll. 22-25)

Respondents were the kind of friends willing to take all of Alice's monies, but not friends that visit, reach out to her family, or help her in her time of need. It's interesting to note that Respondents testified that Alice would not let her in the home for years, however they did not turn her in to Elizabeth Spencer, until the last dog died. No longer would Respondent Slade even have to take care of Alice's dogs! How unwilling they were to help her at all.

As set forth herein, Reversal is the only way to undo the wrongs suffered by Appellants in these trials, and to undo the wrong suffered by Alice.

ARGUMENT

I.

APPELLANTS HAVE STANDING TO PROSECUTE BOTH THE WILL CONTEST MATTER AND THE EQUITABLE CAUSES OF ACTION TO BENEFIT ANIMAL CHARITIES, THEREFORE THE JUDGMENT MUST BE REVERSED.

South Carolina Code Ann. § 62-2-101 (1987) provides that:"Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed [by the sections concerning intestate succession]."

This provision provides Betty Fisher with standing to seek a determination of the rights over the property.

It is well settled in South Carolina that "the paramount consideration in constructing terms used in a will is to ascertain and effectuate the intention of the testator, unless that

intention contravenes some well settled rule of law or public policy." (See *McGirt v. Nelson,* 599 S.E.2d 620 (S.C. Ct. App. 2004); *Bob Jones University v. Strandell,* 344 S.C. 224, 543 S.E. 2d 251 (Ct. App. 2001); see also *Matter of Clark*, 308 S.C. 328, 417 S.E.2d 856 (1992).)

In construing the language of a will, the reviewing tribunal must give the words contained in the document their ordinary and plain meaning unless it is clear the testator intended a different sense or such meaning would lead to an inconsistency with the testator's declared intention. (See *In re Estate of Fabian*, 326 S.C. 349, 483 S.E.2d 474 (Ct.App.1997).)

The same procedure for determining intent in wills is used in trusts and non-probate assets.

In South Carolina, the seminal case of *Shelley v. Shelley*, 244 S.C. 598, 602, 137 S.E.2d 851, 853 (1964) explains that "When a latent ambiguity exists, the lower court must resolve the ambiguity by ascertaining the decedent's intent. To do this, "A will must be so construed as to carry out the real intention of the testator as gathered from all attendant circumstances." (*Id.*)

Equitable deviation permits deviation from a term of the trust if, owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purposes of the trust. Under these circumstances a court may direct or permit a trustee to accomplish acts that are unauthorized or even forbidden by the terms of the trust. "The Court of Equity has the power upon a proper showing, to permit a deviation from the strict terms of a trust if necessary or advisable to carry out the purposes thereof." (*South Carolina Natl. Bank v. Bonds*, 260 S.C. 327, 195 S.E.2d 835 (1973); see also S.C. Code sct. 62-7-413)

Moreover, Lisa Fisher sought to amend the complaint to establish Reformation of the

Will in light of the trial court's refusal to allow testimony. (See S.C. § 62-7-415; See R. p. 352)

Lisa Fisher as a former conservator in possession under S.C. Code § 62-5-417 acts 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) provides the requirements that she is to "deliver" the property to the proper person.

Appellant Lisa Fisher protected the property and pursuant to statute "has the duties of a trustee and the powers necessary to protect the trust property." (See § 62-7-707; see also § 62-7-708 ("knows that there is a breach of fiduciary duty owed to the beneficiaries.")[9]

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[9] 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."**
>
> (Emphasis added)

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.

II.
REVERSAL IS MANDATED, BECAUSE APPELLANTS WERE DEPRIVED OF A FAIR TRIAL, AS THE TRIAL COURT'S ACTIONS DURING BOTH TRIALS AND IN POST TRIAL PROCEEDINGS AMOUNTED TO CONSTITUTIONAL AND STATUTORY VIOLATIONS.

A. *Over Appellants' Objections, The Trial Court Conducted an Independent Investigation concerning the Underlying Case without Notice of the Documents Considered, Without any Request for Judicial Notice, Without any Ability to Contest or Clarify the Documents Considered, and Without the Ability to Argue any Defenses.*

On December 8, 2017, the American Bar Association issued its Formal Opinion 478 concerning Independent Factual Research by Judges Via the Internet. This Opinion is instructive with regard to Judge Hughston's independent investigation in this case, although Appellant Lisa Fisher understands that South Carolina adheres to the rules set forth in Canon 1 for its discipline of Judges.

Appellants do not raise this issue as to whether discipline is appropriate, rather this issue is crucial in evaluating Appellants' claims and violation of their rights. It further demonstrates prejudice by the trial court.

The opinion states:

> "Independent investigation of adjudicative facts generally is prohibited unless the information is properly subject to judicial notice. The restriction on independent investigation includes individuals subject to the judge's direction and control."

Moreover, the opinion cites to Model Rule 2.9 (c) states: "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed."

The underlying principles for these types of rules are that: "The United States legal

system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society." This system requires that judges' decisions be based upon evidence presented on the record or in open court, and available to all parties. Except for evidence properly subject to judicial notice, a defining feature of the judge's role in an adversarial system is that the judge will **"consider only the evidence presented by the parties."** Judges must be careful not to undermine this hallmark principle of judicial impartiality, or substitute for the time-honored role of the neutral and detached magistrate someone who combines the roles of advocate, witness, and judge." (*Id.*, Emphasis added)

The [lower] court's orders requiring Appellants to produce all discovery, review all of the cases files without giving parties judicial notice, and not informing the parties of what was being admitted caused Appellants' harm.

Parties are entitled to believe that the proceedings are not the subject to a secret inquiry. Appellants had a right to object and /or at least explain the reasons for pleadings and legal rationale.

It is well settled that Pre-judging the issues deprives the proceeding of impartiality and denies due process. (See *Marshall v. Jerrico,* 446 U.S. 238, 242, 200 S. Ct. 1610, 64 L.3d 2d 182 (1980).)

Appellants contend that this was a violation of Due Process, Equal protection, and the statutory and evidentiary codes. As set forth in Appellants' Pre Trial Brief, Appellants objected formally and informally at trial. (R. 607)

B. ***Judge Hughston's Secret Meeting and Ex Parte Phone Calls with Respondents' counsel Deprived Appellants of a Fair Trial.***

It is well settled under Canon 3, Section 7 (a), that a judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding.

There are certain circumstances where courts have affirmed orders despite ex parte communications, however in this case, no such affirmance should be allowed. The court in *Burgess v. Stern,* 428 S.E.2d 880 (1993) cited to the case *In re: Wisconsin Steel*, 48 B.R. 753 (D.Ill.1985). The Court in Wisconsin Steel noted:

> "It is rarely possible to prove to the satisfaction of the party excluded from the communication that nothing prejudicial occurred. The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declaration. This is why the prohibition is not against 'prejudicial' ex parte communications, but against ex parte communications."

Here, the orders of April 3, 2018 (R. 96) were clearly prejudicial, and established a pattern of misconduct wherein Attorney Wills was speaking directly to the court again on April 12, 2018.[10]

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[10] The trial court acknowledged these communications at the hearing:

> **"So in order to carry out the terms of what I had decided in regard to it, I did another order without anybody's input...**
> ***
> ...it's my recollection in regard to that the deputy sheriff called me about it and asked me, you know, should they go ahead and do anything. Or maybe Mr. Wills called, I don't remember, but you were out there where they were too, and all. And I didn't know anything about the Supreme Court action at that point in time.
> ***
> THE COURT: And I said, go ahead and do what you're supposed to do as far as securing the property and turning it over to the personal representative. And then

Judge Hughston enjoined Appellant from filing any motion in the circuit court. This order was held without an opportunity to be heard by Appellants during a meeting at the court house, which the court acknowledged at the hearing on the motion for new trial on May 21, 2018. (R. p. 1406-1408)[11]

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within a few minutes of my telling them to do that, the secretary who does my clerical work for me said, wait a minute. There's something that just come in on the machine and everything from the Supreme Court apparently. And she printed it out, and I saw it. And I called back out there immediately when I read what the Supreme Court said and told them to stop, leave, don't do anything more. That's what happened as far as that was concerned." (Emphasis added)

Appellant outlined the actions which she observed in her affidavit in support of her motion. (R.. p. 664)

It is important that Judge Hughston acknowledged he initiated the action. He essentially acted to assist in collections, sua sponte, for the benefit of Respondents. Respondents had counsel. Appellants were entitled to a neutral tribunal.

[11] In lieu of examining Mr. Wills at the hearing on the motion for new trial, the court set forth all of the people present at the hearing and his statement concerning what happened:

"The clerk of court, who you were supposed to deliver things to and who was going to turn over the money that had been held -- and it belonged to Ms. Huckabee --arranged to have deputies come, and for me to come and for her to come, and her lawyers to come to turn over that to her, and to make arrangements about going out to get the property, the real estate property, that belongs to the estate, no question about that, turned over to the personal representative of the estate. So that's how all that came about. And that's all that was done. Mr. -- I can't remember his name.

***

Mr. Wills was there, Ms. Crowley was there, Ms. Huckabee was there, the clerk of court was there, her chief -- whatever he's called -- deputy clerk was there. And my recollection is, there were two deputy sheriffs there to coordinate in regard to waiting a proper amount of time and going out to secure the real estate. And that's what was done. The money was turned over, and arrangements were made between them and the deputies to go out there and see about getting the real estate into the hand of the personal representative of the estate. And all of that was done after I thought I was done with the case." (R. pp. 1406-1408)

It appears that everyone was there-- save Appellants. Appellants were entitled to notice.

At the same hearing, the court recalled the other ex parte communication it had with the Deputy Sheriffs, Attorneys Wills and Crowley. These conversations were with counsel after Appellant Lisa Fisher had filed a petition for stay with this Court. This too was a disturbing action by the court. While the Court indicates that these things were done after he was done with the case,[12] that creates its own problem, as the court took special action for the benefit of the Respondents.

On June 29, 2018, the trial court ruled as follows:

> "**I have condensed the history of this case** as follows: Over the past nine years, in this and other related cases, Plaintiffs have appealed and asked for reconsideration of almost every decision of every Court. They have filed nine appeals, four Writs of Certiorari, three petitions for rehearing, and seven motions for reconsideration. To date, they have not prevailed on any substantive matters with the exception of one remand on the issue of conservator fees. It should be noted that Plaintiffs' first appeal was from what was essentially a mutual restraining Order. Imagine that! As I have previously written, I deeply regret signing that Order." (Emphasis added)

The court's apologetic tone towards Respondents, coupled with the complete review of

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12 The court has also made mention of the fact that he believed that the order was after the appropriate 10 days. But he hadn't waited the 10 days, and he was in fact assisting Respondents' counsel with collection without their filing of motions, judgment, collections, or relief from the court. Appellant contends that allegations in the federal court case of *Stanfield v. Charleston County Court,* 2:15-CV-7756-PMD-MGB noted that another pro se litigant complained that motion hearings were decided "IN THE ABSENCE of Plaintiff."

Certainly, Appellant does not assert that the facts are the same in the courts, and the *Stanfield* court was dismissed under *Rooker-Feldman* doctrine. However, the case does shine a light on the problem with these hearings without proper notice and an opportunity to be heard.

Appellants were not pro se, and probably would not be pro se now, had Judge Hughston not imposed sanctions against their counsel. He has separately appealed the sanctions award against him in *Ex Parte Cooper*, Case no. 2018-000662.

the file, discovery, probate file, etc., demonstrates a pro-active stance of the court. Respondents did not have to do anything, because the trial court acted on their behalf

This is why there is a policy against investigations and ex parte communications. It is not merely the appearance of impropriety, it is actual impropriety.[13]

C. *Errors During the Will Contest Deprived both Appellants of a Fair Trial, and as Such the Judgment must be Reversed.*

The jury trial was affected by the erroneous rulings of Judge Hughston. These issues were raised clearly in the Motion for New Trial filed on or about November 2, 2017. (R. 357) The court denied the motion on or about March 21, 2018. (R. 62) Appellants filed their notice of appeal on said denial on or about April 5, 2018. (R /753)

As set forth herein, Appellants raise the issues for purposes of issue preservation, and under the legal authority that the Court's Order and the jury verdict is against the weight of the evidence, and was based on the improper exclusion of evidence, consideration of improper evidence, including the 2009 probate order and improper and incomplete jury charges.

It is well settled that the trial judge is never permitted to second-guess the jury in their fact finding responsibilities unless compelling reasons justify invading the jury's province. (See *Watson v Ford Motor Co,* 389 S.C. 434, 699 S.E. 2d 169 (2010).)

In this case, the trial court precluded evidence which would have assisted [Appellants] in

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[13] As cited in *Segars-Andrews v. Judicial Merit Selection Commission,* 387 S.C. 109 (2010) in fn. 1 which queried the commissions findings concerning when a judge creates: "...an atmosphere of distrust that made [plaintiff] construe both her ruling and the system that authorized and sanctioned it as corruptible and capable of manipulation by persons with connections to a judge..." it causes the appearance of impropriety and led the litigant "not only to question [the judge's] ability to render a fair and impartial decision, but also to lose faith in the integrity of this state's judicial system."

establishing the intent of Alice Shaw Baker, including but not limited to:

(1) **The court's failure to allow the introduction of [Appellant's] testimony regarding Alice Shaw Baker's statements before and while defacing and tearing copy of will based on the Dead Man's Statute, when the testimony should have been admissible as to capacity, state of mind, and intent (which is a statutory element) and the fact that Lisa Fisher was appearing in a representative capacity;**

Other legal authority further supports Appellants' reading that Lisa Fisher's testimony was wrongfully excluded with regard to Alice Shaw Baker's communication. Although some evidence may be excluded by operation of the Dead Man's Statute, it may not only be relevant to the issues, but crucial. It may be the only evidence that would permit a fair determination of the case." (Sanders, Alex. *Trial Handbook for South Carolina Lawyers*, § 22.4)

The court in *McBeth v. Bishop,* 278 S.C. 443, 298 S.E.2d 441 (1982) held that testimony incompetent under Dead Man's Statute is admissible if no objection is made on that ground. Moreover, if testimony which is incompetent under the Dead Man's Statute is given without objection, it is error to later strike it upon motion of counsel. (See *Stark v. Hopson,* 22 S.C. 42 (1884); *U.S. Fire Ins. Co. v. Macloskie*, 320 S.C. 459, 465 S.E. 2d 759 (Ct. App. 1995)

Additionally, the witness' interest is not affected when he or she has no interest other than in a representative capacity and that interest is not subject to change by the outcome. *(See Havird v. Schissell*, 252 S.C. 404, 166 S.E. 2d 801 (1969)*; Ex Parte Newton,* 183 S.C. 379, 191S.E. 59 (1937), emphasis added.)

(2) **Exclusion of expected testimony of Dr. Waid due to unavailability at trial due to his vacation in Europe, and trailing the case to allow him to testify on Monday, October 30, 2017;** (See Rule 803 and 804)

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(3) **Exclusion of evidence of Alice Shaw Baker's intent to benefit animal charities (Carol Linville, deposition testimony of John David Smoak, III, ING records, PEBA testimony and records).**

The court refused a short continuance to ensure that Betty Fisher was able to appear at the trial in violation of the ADA. All of these legal failures mandate reversal.

D. ***The Trial Court Demonstrated its Bias Against Appellants which Permeated the Court Proceedings.***

Judge Hughston threatened Lisa Fisher during the Will contest proceedings to a sanction order, based on her argument. Appellant can not locate it in the record.

During the Bifurcated Constructive trust/Equitable Deviation trial, prior to the conclusion of the trial, Judge Hughston requested financial records.

The Order of Judgment stated:

> "I cannot conclude without saying that I have sympathies for Lisa Fisher. It is painful for me to see and hear her put herself and others through this. She is well educated with a law degree and other degrees. She can do much that is worthwhile and of benefit to her clients and herself. Something has happened to throw her off track, and to, I can only conclude, become obsessed with this and other situations. This is indeed unfortunate, and I can only hope that something will happen to help her move on and away from this. She needs help—legal and perhaps otherwise. I hope she gets it." (R. 138)

These statements are disturbing. Certainly, they were unnecessary for purposes of any judgment, even one as tainted as issued herein. Nevertheless, they show an extremely hostile view of Appellant Lisa Fisher, whether couched in unwanted sympathies or draped in blatant attacks of fraud and perjury. These conclusions are wrong, and they warp the system, by

claiming that someone who follows judicial procedures and seeks review is subject to false characterizations implying she is "unbalanced." Appellant wonders if this type of conclusion would be appropriate in any situation. Just because a judge doesn't like your legal analysis, he gets to claim you are somehow unfit. It is this same judicial hardness that found that Alice was incompetent.

Dr. Waid's testimony at the bench trial indicated several medical factors which may have interfered with her ability to take care of herself. Dr. Waid did find that "basically, she understood the purpose of the will and the objects of her affections that she would be leaving her sources of income or money or things to people she desired." (Transcript March 12, 2018, p. 181)

The standard for revocation of a will is the same as the standard for executing a will, and it is a low standard under South Carolina law. (See *In re Estate of Weeks*, 329 S.C. 251 (1997), 495 S.E. 2d 454.)

There are at least 7 orders after trial in this case. It would seem that this confusion and modifications by the Court demonstrate that it was a hotly contested case with important legal issues. Judge Hughston claims, after 2 trials, that he should have granted Summary Judgment, so how are Appellants liable for all of these increased attorneys fees based on Judge Hughston's "error."

Appellants contend that as set forth herein, the trial court got it wrong, and in the process used stereotypes and bias to justify the courts' reasoning. Other jurisdictions have concluded that the general rule that an appellate court will not consider points not raised at trial does not apply to: "a matter involving the public interest or the due administration of justice." (See 9 Witkin,

Cal.Procedure (3d ed 1985) Appeal sct. 315, p. 326) In the case of *Catchpole v. Brannon*, 36 Cal.App.4th 237 (1995),[14] the court concluded that the issue of judicial gender bias involved both a public interest and the due administration of justice. It stated that "the presence of judicial partiality is, of course, most pernicious where–as claimed here-it bears directly on the matter to be decided."

Here, judicial partiality on behalf of Respondents was present throughout the case as stated herein, however the court's statements about Alice's condition and Appellant's need for help, all create the presence of "judicial partiality" and to the extent it has not been raised, Appellant's pray the court consider the implications and actual harm suffered by the proceedings.

E. *While Trial was Still Proceeding, The Trial Court Ordered Appellants to Produce their Financial Records, in Violation their Constitutional Rights, the Statutory Provisions regarding Financial Records in Punitive Damages Case, and Admittedly without any Statutory or Legal Authority.*

In the middle of the bench Trial, Judge Hughston asked Appellants and their Counsel to produce their financial records, wherein the following conversation took place:

> "During the I'm not sure that it's appropriate to ask prior to the end of trial. In any event, Your Honor, if you can tell me what statutory authority --
> THE COURT: **There's no statutory authority. It's within the discretion of the Court; I'm telling you that and you ought to know that.**
> MS. FISHER: I know that -- I don't believe that's correct. I mean no disrespect to you –
> THE COURT: You can take it up or do whatever you want to do afterward. **If you don't get that to me within a reasonable**

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[14] *Catchpole* is cited for its authority concerning "public interest" and "due administration of justice", not the facts of the case.

period of time, you're going to face further sanctions.
MS. FISHER: Okay. Well, just for clarity, Your Honor, I did look to try and find what statutory authority you might have, and now you're telling there is none. So I did look under the Internal Revenue Codes -- the Revenue and Treasury Code 1425119542, which indicates that income taxes are privileged. Also, under –
THE COURT: Okay. We can go at it several ways. I want the figures I told you, your net taxable income. You don't have to show me your tax return. You give it to me under oath that's your net taxable income and that would be sufficient.
MS. FISHER: And, Your Honor, with regard to that issue, I still believe that's under the code -- under the Constitution, financial --
THE COURT: I don't believe so. I will bear whatever responsibility comes from that.
MS. FISHER: Well, I understand. And I will bear whatever responsibility it takes, but I will look further into that. If the Court requires briefing, I certainly will give that to you, but I don't think whatever amount of money I made, or may not have, has any -- has any limits to what you can do. My hope is that based on the law regarding sanctions, that of course sanctions will not be imposed and attorney's fees will not be imposed.
THE COURT: I can understand that.
MS. FISHER: I respectfully am not attempting to disobey your order, but I do believe that I need to interpose that objection." (R. 1372-1377)

Appellants were forced to immediately [appeal], because the Court threatened contempt. Appellant filed her motion to Vacate said order, which the court denied. (R. 613) This issue is still relevant as the court has issued contempt order without proper proceedings, [nor] an opportunity to be heard. [15]

The Frivolous Civil Proceedings Sanctions Act states explicitly that factors can be considered for sanctions: "At the conclusion of a trial." The United States Supreme Court

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[15] At one point, the court did set a hearing on the contempt, however this matter was taken off calendar and no hearing has ever been conducted. (R. 708). Nevertheless, Judge Hughston orders include contempt which has been stayed. (R. 138)

explained in *Shelton v. Tucker*, 364 UW 479, 488) (1960) that a compelling state purpose cannot be pursued by means that broadly stifle fundamental personal liberties.

Also the court in *Sultan v. Health South Corp,* 400 S.C. 412 (2012) explained that there is a prejudicial effect of [disclosure] is self evident.

These principles combined with the Constitutional Right to privacy demonstrate error by the court in making these orders. Moreover, the court in *Ex Pate Capital U Drive It, Inc.* 369 S.C. 1, 630 S.E. 2d 464 (2006) found the matter immediately appealable.

Under both the State and Federal Constitution, Appellants should not be compelled to waive their right to privacy.

Appellant respectfully requests that the court reverse any order [for disclosure of financial records or contempt] related to this order is the July 23, 2018 order which has held Appellants in contempt, although stayed.

III.
LEGAL PRECEDENT AND STATUTORY AUTHORITY SUPPORTS THE CONCLUSION THAT ALICE SHAW BAKER COULD REVOKE HER WILL, THEREFORE THE TRIAL COURT'S INSTRUCTIONS TO THE JURY WERE ERROR AND PREJUDICED APPELLANTS.

Appellants contend that the trial in the bifurcated Will Contest was fraught with legal errors which prejudiced them and deprived them of a fair trial.

It is well settled that "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." (*See State v. Martinson,* 388 S.C. 469, 478,697S.E. 2d 578, 583 (2010)[internal citations omitted]) The law to be charged must be determined from the evidence presented at trial." (See *State v. Cole,* 338 S.C. 97, 101, 525 S.E. 2d 511, 512.)

South Carolina Courts further hold that:"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." (See *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011), 709 S.E.2d at 611 [citation and internal quotation marks omitted].") An erroneous jury instruction will not result in reversal unless it causes prejudice to the appealing party." Id.

As set forth herein, the actions of Judge Hughston both during the will contest and equitable case prejudiced Appellants and were based on errors at law.

A. *A Citizen of South Carolina, even when under a Probate Conservatorship, has a Statutory Right to Execute or Revoke a Will, therefore the Trial Court's Jury Instructions[16] were Erroneous and Mandate Reversal.*

Judge Hughston's comments at trial and instructions prejudiced Appellants. Further, the orders continue to assert that Alice Shaw Baker was incompetent and could not execute or revoke her will after the conservatorship was granted. Alice Shaw Baker was entitled to revoke her will, and that the order of Judge Curry was void on its face.

Appellants reiterate that the probate court was limited to the following types of orders re Conservatorship, under Section 62-5-408. To the extent that the 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.

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[16] Appellants note the term "jury instruction" is also called "jury charge" in South Carolina. For purposes of this appeal, both terms are used interchangeably.

In this case, the evidence shows that Alice Shaw Baker was never given notice that her rights to revoke her will were being sought in the conservatorship papers. This was not an issue that should have been considered by the court, and certainly not one for any order to issue

The conservatorship order found that Alice Shaw Baker had capacity to nominate Lisa Fisher, ordered further testing regarding her capacity, allowed her to remain in her home, and **issued a limited conservatorship.**

Incomplete sentence, removed for clarity: ~~[Had the Court not interfered with the jury, provided a proper instruction as requested by]~~

As such, reversal is mandated regarding the following jury charges, which include the:

(1) Failure to charge the jury with regard to the ability of a conservatee to make a will/revoke a will;[17]

(2) Failure to charge jury that a Prior adjudication of an individual's incompetence does not conclusively bind the trial court in another action where the person's competency is directly at issue. (*Church v. Trotter*, 278 S.C. 504, 506, 299 S.E.2d 332, 333 (1983).)

(3) Improper charge to the jury over [Appellants'] objections based on mental capacity–refusal to charge lesser capacity needed to make or revoke a will;

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[17] One of the Charges requested by plaintiffs:
"A person is not incompetent to make a will because he has been adjudicated to be of unsound mind, or insane, or has been confined in an institution for the insane. This is true where a person has been adjudicated to be incapable of managing his property, or handling his affairs, whether the adjudication of incompetency precedes or follows the execution of the will. It is also true where a guardian or conservator of one's person or estate has been appointed, in the absence of a controlling statute, and unless the order appointing the guardian is based on an express finding of some mental defect. (*In re Estate of Weeks*, 329 S.C. 251 (1997), 495 S.E. 2d 454.)

(4) Improper charge to the jury over Plaintiffs' objections based on mental capacity– refusal to charge lesser capacity needed to make or revoke a will, as compared with capacity to contract;

(5) Improper Jury Charge without allocating time to object, commenting upon failure to call Dr. Waid.

IV.
SANCTIONS AGAINST APPELLANTS ARE NOT WARRANTED, BECAUSE THE LITIGATION WAS REASONABLY SUPPORTED BY THE FACTS AND WAS WARRANTED UNDER EXISTING LAW.

A. *Sanctions were Not Warranted.*

In the June 29, 2018 order, Judge Hughston stated his ultimate conclusion as to why Appellants were subject to sanctions:

> "Frivolous determinations are governed by a reasonable attorney standard. Here, two questions arise. One, would a reasonable attorney bring and maintain a suit now in its ninth year claiming that **an undoubtedly incompetent person had revoked her otherwise valid will by tearing it on January 1, 2009**, following Judge Curry's Order of November 19, 2008, when only that attorney supposedly witnessed the tearing and no proof of such an act exist other than that attorneys say so, and that attorney's mother is an heir if the Will was revoked along with some other heirs who are not parties, or notified of this suit, and whose existence was just revealed?[18] The answer is an unqualified "No", Two, would a reasonable attorney bring and maintain a suit now in its ninth year claiming an equitable constructive trust over the entire Estate given all the **clear facts and circumstances in the record contrary to such a claim**? Again, the answer is an unqualified "No".

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[18] The judge's conclusion re: notice is not true. Lisa Fisher testified that the family had been given notice. Moreover, at the time of the revocation, Lisa Fisher was not acting as counsel, the record shows that she was only guardian and conservator. The conclusion also fails to acknowledge that if the estate was deemed "intestate", family would have to be given formal notice for distribution. Therefore, the implied claims that Appellant Lisa Fisher was bringing this action to gain a benefit is not true, and shows a preference for Respondents despite their own misdeeds.

For instance, the trial court decided in its judgment that the appropriate grounds for sanctions were actions taken by Lisa Fisher in her role as conservator. Lisa Fisher had no notice that her accounting was going to be a basis for sanction. Respondents did not ask for damages by way of their answer or any cross complaint. The calculations by the court are in fact wrong, and subject to an accounting in the Beaufort Probate Court.[19] Moreover, even if it were appropriate to use an accounting which has not yet been approved, it is unclear how Betty Fisher would be liable for the actions of Lisa Fisher during her tenure as conservator.

Based on the legal authority cited by Judge Hughston, Appellants contend that sanctions were not warranted under Rule 11, SCRCP or the South Carolina Frivolous Civil Proceedings Sanctions Act (FCPSA).

While a trial judge may impose sanctions under both Rule 11 and the FCPSA. There are certain findings that must be made to support it.

In this case, the court did not make any findings that Appellants did not have "good ground to support it" or that it was "interposed for delay". It did not make any of the findings necessary under S.C. Code §15-36-10.

It also states that the section "shall not apply where an attorney...establishes a basis to proceed with litigation or to assert or controvert an issue therein, that is not frivolous."

The FCPSA specifically states that "(2) Unless the court finds by a preponderance of the

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[19] Appellant Lisa Fisher informs the court that the issue of the accounting is going forward in Beaufort at this time. Lisa Fisher asks the court to take judicial notice of the judgment with the handwritten note sent to Judge Fulp of the Beaufort court. This note is not part of the formal judgment and demonstrates ex parte communication by Judge Hughston with Judge Fulp. Appellants contend that Judge Hughston had copied Judge Fulp throughout the trial. This further demonstrates an intent to influence the probate court.

evidence that an attorney, party, or pro se litigant engaged in advancing a frivolous claim or defense, the attorney, party, or pro se litigant shall not be sanctioned."

Judge Hughston made general allegations. Although he did reference the revocation claim and the temporary restraining order claim, these were non-frivolous and there were facts to support each claim. Appellants contend that there was sufficient basis for each of these actions, as well: Lisa Fisher testified about the revocation. Other documents set forth Alice Shaw Baker's true intent which supported the revocation. (R. pp. 1608, 1611, 1614) Mental evaluations by both doctors, Dr. Honney (R. pp. 1574-1575) and Dr. Waid (R. pp. 1379-1390; pp. 1663-1664), and Candace Rickborn's testimony. (R. pp. 1001-1014)

The law supports a conservatee's right to execute and revoke a will even after conserved. Respondents claims about their relationship, the issue of buying land as requested by Alice Shaw Baker, and the multiple writings, would have led an attorney or a party to believe that there was a reasonable basis for the filings and continuance of the litigation.

Moreover, while the judge changed his mind and granted summary judgment, there is legal authority which overturned sanctions award under the FCPSA where motion for summary judgment was denied. (See *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E. 2d 903 (1997); but see *Holmes v. E. Cooper Cnty. Hosp. Inc.* 408 .C. 138, 758 S.E.2d 483 [sanctions award may still be granted after summary judgment denied]). Appellants contend that the repeated rulings on summary judgment and directed verdict still are a basis for the court's consideration that the sanctions award is improper.

In *Ex Parte Gregory,* 378 S.C. 430, 438 (2008), the Supreme Court found that a "court imposing sanctions under Rule 11 should, in its order, describe the conduct determined to

constitute a violation of the Rule and explain the basis for the sanction imposed."

The statements made by the judge in his March 21, 2018 order is not supported by the record. This is not a proper basis for imposition of sanctions, and as such it was an abuse of discretion.

B. The Post Trial Motions for Increase in Attorney Fees and Sanctions Did Not Have Proper Notice, and Included Improper and Duplicative Fee Requests.

After Appellants filed their Rule 59 motion by Order of this Supreme Court, Judge Hughston modified his order which reduced some of the attorneys fees. Respondents filed a Joint Motion for Reconsideration twice, once on July 9, 2018 and again on July 19, 2018 which included a coversheet requesting oral argument (R. p. 787 and p. 810, respectively) .[20]

Once Appellant Lisa Fisher received the motions, she intended to oppose due the factual inaccuracies and inflated bills. The first motion was sent to the wrong address. Both motions requested 30 minutes and a court reporter. On July 23, 2018, the court amended its order which was provided to Appellants via email. Appellant Lisa Fisher informed the court by email that said motion was sent to the wrong address, and she did not have an opportunity to respond to the motion. The judgment increased the sanctions award against Appellants, and incorporated the previous findings. (R. 138)\

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[20] Respondents sent an email to Judge Hughston informing him that they were filing a new motion to increase attorney fees. (R. p. 843) Judge Hughston asked them to file the motion, because he intended to rule without a hearing. (R. p. 843) The motion was served twice on Appellants, once to PO Box 9112 instead of PO Box 91112. Appellants intended to oppose, however Judge Hughston's order of July 9, 2018 was issued without hearing or request for opposition. This order increased the judgment against Appellants as follows: Peter A. Kouten increased from $35,315.00 to $78,872.43 and Jessica Crowley from $25,512.50 to $78,872.43.

The court did not comment or provide an opportunity to respond.

Appellants contend that they should have been given an opportunity to be heard prior to any increase in judgment. Said increase in judgment was a violation of Due Process and the statutory procedure for motions in South Carolina.

V.
IF REVERSED, DISQUALIFICATION AND RECUSAL OF JUDGE HUGHSTON IS MANDATED

For all the reasons set forth herein, Appellants contend that if this case is remanded for a new trial an order recusing and/or disqualifying the Honorable Thomas L. Hughston is mandated.

Appellants have been completed prejudiced by his rulings, his actions, his analysis–all supporting the factors set forth in *Segers-Andrews, supra.*

VI.
REMEDY SOUGHT

The irony of this case certainly does not escape Appellants Lisa Fisher and Betty Fisher.

Alice Shaw Baker's death was the catalyst for these proceedings. She lived a simple frugal life–with a focus on animals and animal protection.

Her Death left heartbreak and sadness for Appellants, who loved and heartfully cared for her, but it is her life that spurs this case to a proper resolution. This selfless woman made an impact on the countless lives of animals through her good works and now her memory and her image has led to consideration of these very important issues by the highest court in South Carolina.

//

Her case stands as an example of the need to right the wrongs for all cases, not merely cases that are acceptable to the trial court. Appellants believe that based on the law and facts of her case, her case will lead to precedent which will:

1) protect the unprotected wards and conservatees;
2) maintain due process rights of conservatees to revoke or execute a will;
3) provide guidance to fiduciaries who have knowledge that proposed personal representatives were subject to overreaching;
4) establish firm precedent preventing independent investigation by trial courts;
5) provide legal authority to litigants ordered to turn over their financial records;
6) prevent improper sanctions in complex legal matter.

But most importantly, it can stand to detract those willing to live off the assets of the hard working Senior Citizens who have charitable intentions.

Appellants respectfully request that this Court reverse all orders, and allow them to have a new trial on these both the will contest and the constructive trust/deviation/reform.

Finally, if this Court does reverse this matter, Appellants respectfully pray that the Court transfer the case to a neutral judge to ensure that they suffer no further harm or prejudice.

October 11, 2018

RESPECTFULLY SUBMITTED,

By:_____

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THE STATE OF SOUTH CAROLINA

In the Supreme Court

RECEIVED

OCT 16 2018

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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.

JOINDER BY BETTY FISHER IN APPELLANTS' FINAL BRIEF

I BETTY FISHER do hereby join in Lisa Fisher's Final Brief. I have requested that this joinder be part of the record and agree and supports the Brief filed herein.

RESPECTFULLY SUBMITTED,

Betty Fisher

BETTY FISHER *(Pro Se)*
P.O. Box 91112
Long Beach, CA 90809-1112

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S.C. SUPREME COURT

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CERTIFICATE UNDER RULE 211, SCACR

The undersigned certified that this Final Brief complies with Rule 211 (b), SCACR.

October 11, 2018

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PROOF OF SERVICE

I certify that I have served **APPELLANTS' FINAL BRIEF; JOINDER BY BETTY FISHER;** postage prepaid, on October 11, 2018 (and via email) addressed as follows:

Jessica L. Crowley, Esquire
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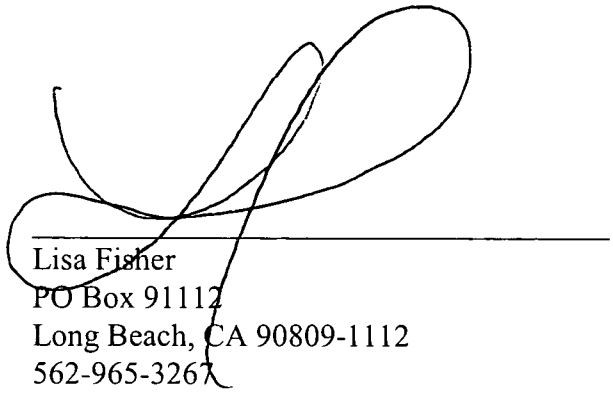
Courtesy Copy via email to:

Hon. Mary France Jowers, Esquire
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

October 11, 2018



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