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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

____

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley Price, Circuit Court Judge

____

Case No.: 2018-CP-10-05710
Appellate Tracking No.: 2021-000141

Estate of Patricia A. Brunson ………………………………………………Intervenor/Appellant,

In re:

Elaine Mincey as Personal Representative for the Estate of
William Alexander Brunson, Jr.,……………………………………………Plaintiff/Respondent,

vs.

David Scott Wich and C. J. Wingerter Company, L.L.C., ……………………………Defendants.

____

AMDENDED INITIAL BRIEF

____

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STATEMENT OF ISSUES ON APPEAL

Since there is no transcript of record of an appearance before the Court deciding the Estate's Petition to approve settlement, should the motion to intervene have been heard by the judge who approved the allocation of settlement proceeds?

Did Judge Price have jurisdiction to review an Order entered by Judge Hughston?

Did the learned trial judge err in dismissing the appellant's application to intervene?

Did the learned trial judge err in entering an order on the merits of the collateral issue of removing the Personal Representative after denying the appellant's right to intervene?

STATEMENT OF THE CASE

On February 14, 2020, the Appellant, the surviving spouse of the Decedent, William Brunson, filed a Petition to intervene in the Estate's application, filed in circuit court on December 3, 2018, to allocate a division of settlement proceeds between wrongful death and survival benefits. The Estate negotiated a settlement of its claim for damages arising out of an automobile wreck on November 11, 2017, when a speeding driver struck an Appellant's automobile in which her husband was a passenger. Because liability was clear, the Estate negotiated a settlement without filing suit, and after the at-fault insurance company tendered its policy limits of $500,000.00 to the Estate for wrongful death and pain and suffering (plus an additional $50,000.00 under U.I.M.) The value of the claim was in large part based on the fact that the Appellant and Decedent were married for almost 50 years. Therefore, the Estate filed a Petition in the circuit court on December 3, 2018, asking the Court to approve the settlement and to allow the P.R. to allocate the money to wrongful death and survival as follows: $400,000.00 to survival and $150,000.00 to wrongful death. Even though the value of the claim was based on Brunson's long marriage, and even though the Personal

Representative, Appellant's step-daughter, knew Appellant was represented by counsel and already involved in adversary proceedings, the Estate never informed the surviving spouse that it had settled the claim, filed the Petition, scheduled a hearing, or secured a court Order until December 18, 2018 when the Estate e-mailed a copy of the unfiled Order to counsel: "Per our conversation, please find attached a copy of the Order approving Settlement we received from Yarborough Applegate and which is currently being filed with the Probate Court." (R.O.A. page __[Province December 18, 2018, e-mail]) This e-mail makes a proposal for settlement to which appellant's counsel responded. At this juncture in the record, the appellant cannot say much more about this e-mail exchange because appellant no longer has e-mails from 2018, and Respondent has blacked out most of the e-mail communication on which it relies. (On July 27, 2021, the Estate's lawyer promised to forward unredacted copies, which has not occurred yet.) It is clear from that small amount of material that is unredacted that the appellant thought the Order had not been filed and that the funds were being held in trust, which is exactly what Respondent's counsel told the Court on December 7, 2020: "that money is sitting in trust." (R.O.A. page ___[tr. page 16, line 20]) On March 15, 2019, the Estate mailed the appellant a check dated December 14, 2018, in the amount of $49,052.39. (R.O.A. pages ____, _____, _____ and ______[Petition, Order, March 15, 2019 letter and check])

Eleven months after receiving the March 15, 2019 transmission of the check, and unable to get the P.R. to respond to her, Appellant filed a motion to intervene, seeking leave of court to be heard on the Estate's proposed allocation of benefits between the wrongful death and the survival recoveries. In her Petition to intervene, the surviving spouse alleges that the Personal Representative breached her fiduciary duty to the Appellant in a number of ways, one of which is her proposed allocation of benefits. (R.O.A. page ___[petition]) After the Clerk of Court notified

the parties that Appellant's Petition to intervene would be heard on Monday, December 7, 2020, on Friday, December 4, 2020, the Respondent filed a memorandum of law objecting to intervention on two grounds: (1) that the case was already settled, and (2) that the Petition to intervene came too late to set aside a judgement for fraud under Rule 60(b). R.O.A. page ____. On Sunday, December 6, 2020, the Appellant filed a Reply memorandum, and on Monday, December 7, 2020, the matter came before the Honorable Bentley Price, who denied the petition to intervene by form Order the following day, Tuesday, December 8, 2020. (R.O.A. pages ___-___ for transcript and page ___ for the form Order.) On December 16, 2020, the Appellant filed a Motion for Reconsideration. (R.O.A. page ____) Thereafter, the Court inquired of the parties whether they wanted the reconsideration issue decided on briefs or on oral argument. (R.O.A. page ____[inquiry from Court] Appellant's counsel replied on December 31, 2020, that Appellant elected to submit reconsideration on briefs, provided she could include the transcript of record. (R.O.A. page ____: "I do not mind submitting it on briefs, but if we're going to do that, I'd like to ask for enough time to get the transcript, which I've already ordered.." In response, on January 7, 2021, the Court's clerk informed the parties that it did not matter how the case was presented because the Court would not reconsider the decision. (R.O.A. pages ___-___ "Good afternoon all, I spoke with Judge Price and he has indicated you all are welcome to submit briefs. However, he will not change his ruling.") The same day, Respondent's counsel submitted an unsolicited proposed Order that the Court signed on January 7, 2021,. (R.O.A. page ____) This appeal followed on February 4, 2021. (R.O.A. page ____)

STATEMENT OF FACTS

Patricia and William Brunson married on September 3, 1968. It was a second marriage for

each. At the time they married, William, who was 45, had six children, and Patricia, who was 33, had one. The two never had a child together. From the time of their marriage in 1968, they operated a number of businesses together, including a feed store, a seafood store, a liquor store, and most successfully, a well sales and installation business. They both worked hard, lived modestly, and over the years made generous gifts to their children.

William was a World War II Naval veteran who spent his war service in combat in the Pacific. As a result of his military service, he and Patricia considered Veteran's Day to be an important holiday, and over the years, they developed a Veteran's Day routine. On Veteran's Day in 2017, November 11, as usual, they drove to visit family and friends and went out to eat. Due to his advanced age—he was 94 in 2017—William let Patricia drive, and he occupied the front passenger seat in which he sat unbelted because of a shoulder injury. As they neared their home off Main Road on Johns Island, Patricia made a left turn from U.S. Highway 17 South on to Main Road, and a speeding pick-up truck struck them on the passenger side. William Brunson succumbed to his injuries a few hours after the collision, and Patricia was grievously injured. Although she made a remarkable recovery from her injuries, Patricia passed away on October 27, 2020, at the age of 85.

Following William's death in 2017, while Patricia was recuperating from her injuries, some of William Brunson's children produced for probate a homemade Will dated July 10, 2010, drafted by his oldest son, Billy, which William Brunson allegedly executed when he was 87 years old. Even though Billy is not a lawyer, and drafting a Will without a license constitutes a crime in South Carolina under § 40-5-310, S. C. Code, the decedent's oldest son, Billy, drew this 2010 putative Will to disadvantage his stepmother and increase his and his siblings' inheritances, leaving Patricia

the sum of $100.00 after a 49-year marriage. (Patricia owned a ½ interest in the marital home in her own name.) In addition to drafting the Will, Billy also controlled its execution by transporting his Father to Billy's church, Cavalry Lutheran Church, and located two witnesses to watch the Decedent sign the alleged Will. The Decedent had no connection to the church, and Patricia challenged the validity of this Will as well as filed a demand for elective share. At the time the Personal Representative filed her December 3, 2018, Petition for allocation without notice to the surviving spouse, all of these legal issues were in dispute and in litigation, so the P.R. knew her stepmother was represented by counsel.

As a result of the challenge to the Will and the Estate's aggressive challenge to Patricia's demand for elective share, the relationship between Patricia and her step-children deteriorated, which has spawned multiple actions, including the present dispute over the allocation of wrongful death and survival proceeds. Importantly, there were (and are) other adversarial legal actions pending at the time the Personal Representative scheduled and conducted a settlement hearing without notice to Patricia Brunson.

As litigation between the surviving spouse and her step-children escalated, Respondent's counsel visited Appellant's counsel and urged Appellant to deescalate the hostility and work together to maximize the recovery against the at-fault driver. Appellant's counsel understood that by working together and providing a unified front, the parties could maximize the recovery for the benefit of all sides. Appellant agreed and pledged to cooperate in bringing a coordinated claim against the at-fault driver. That visit was the first and last time Appellant heard from counsel or anyone else regarding the tort claim against the at-fault driver.

Shortly after March 15, 2019, the Appellant received a letter and a check dated December

14, 2018, from the Personal Representative's lawyer, Tiffany Provence. (R.O.A. page ____[Exhibit 1] In the multiplicity of pending actions, William Applegate was handling the tort claims against the at fault driver, and Tiffany Provence, Virginia Spencer, and Seth Levy were handling the Will Contest case, the challenge to Patricia's elective share, the partition action case, and a suit to remove the Personal Representative. This March 15, 2019 correspondence was the first notice to Appellant that the Estate was attempting to distribute proceeds from the tort claims the appellant thought were being held in trust. To this day, the Appellant does not know if the settlement proceeds are being held in trust or have been disbursed. The Personal Representative's December 3, 2018, Petition for Settlement Approval states the proceeds are in trust:

12. . . . These survival net proceeds are to be deposited in an Estate account or in the trust account of the attorney for the Estate until such time as the Estate is closed. (R.O.A. page ___[Petition at ¶12]

Consistent with this pleading, the Estate's attorney informed the Court on December 7, 2020 at the appearance before Judge Price that the proceeds **are** being held in escrow and have not been disbursed:

MR. APPLEGATE: Your Honor, I am sorry to do this, but the confusion and this sort of misrepresentation and confusion of the facts are overwhelming. You know, everything that Mr. Goldstein says is really just incorrect, but the bottom line is, we filed a case and, yes, we settled a case on behalf of Mr. Brunson. Okay.

And what he's suggesting here is these facts, there was $150,000 that was allocated to the wrongful death case, and there was $400,000 allocated to the survival case. There are a lot of reasons why this was the case. Because the survival claims merited the payment. He suffered sort of a terrible death.

He was 96-years-old. The wrongful death claim didn't have a lot of value. So it was separated according to the law, the appropriate allocation of damages. Okay.

The only proceeds that have been distributed are the proceeds that were distributed according to the statutory beneficiaries. So she received the lion's share[1] of those, his client did, because that was what was available.

The other proceeds are still sitting in a trust. No one has received them because they

[1] 9% of the total recovery

are still arguing about the validity of the Will and if she had a different Will. That's, again, kind of beyond my involvement. It's not notice.

R.O.A. page ____[transcript page 22, line 2—page 23, line 15] (emphasis added)

If the above statement were true, this entire action would be unnecessary. However, following the above statement to the Court, the appellant followed up with several inquiries as to whether the proceeds are being held in "trust" pending a final outcome of Probate Court litigation consistent with the representations made in writing an orally. Notwithstanding the representations to the Court in this case through the pleadings and the oral statements made by counsel, the appellant still lacks a clear or definitive answer about the status of the settlement proceeds. (In a companion case to remove the P.R., the Estate has responded to discovery requests representing that it has disbursed the proceeds.) The fact that the appellant cannot obtain a clear answer validates her motivation and justification for intervention because she remains in the dark as to her interests in the management of her husband's Estate. The record demonstrates that the only notice provided to the surviving spouse about the Estate's proposal for distribution of benefits is the check mailed to appellant on March 15, 2019. (R.O.A. page ___[letter, check])

After receiving the March 15, 2019 letter, appellant eventually discovered on her own that the Personal Representative filed on December 3, 2018, a petition to approve settlement and arranged it to to come before the Honorable Thomas L. Hughston on December 4, 2018. (The December 18th e-mail [R.O.A. page ___] said only that the Order was being forwarded to Probate Court but said nothing about the proposal for distribution. It did not include a settlement statement. The Personal Representative furnished no notice of either the filing of the Petition to Approve Settlement or the scheduling of a hearing before Judge Hughtson. Once Appellant learned that the Estate was attempting to disburse, she made inquiries through Court Administration and verified

that the settlement hearing took place without a court reporter, and it is undisputed that neither the law firm handling the tort claim, nor the law firms representing the Estate provided notice of either the filing of the petition or the scheduling of a hearing to approve settlement. Likewise, the Clerk of Court provided no notice because without an affidavit or acceptance of service, the Clerk's office had no idea who should be notified, and when the parties came before the Court without the surviving spouse on December 4th, the presiding judge relied on counsel to provide notice to all interested parties. After appellant tried unsuccessfully to resolve the matter, on February 14, 2020, she filed a petition to intervene in the tort case, seeking leave of Court to intervene in order to ascertain the exact status of the claim and learn how or whether the proceeds have been allocated, and if so, to whom and by what formula.

STANDARD OF REVIEW

Even though the Estate did not file a motion to dismiss Appellant's Petition to Intervene, seeking relief as required by Rule 7 of the *South Carolina Rules of Civil Procedure*, the circuit court, relying on nothing more than the Estate's memorandum of law, dismissed the Appellant's petition to intervene, also denying, without reaching, the Appellant's request that the Personal Representative be removed from handling the allocation and distribution of death benefits. (There is also a separately pending action to remove the P.R.) The Estate identified a single ground to deny intervention in its memorandum of law; to wit, the application to intervene in the allocation of death benefits came more than a year after Judge Hughston's Order and is, therefore, barred under Rule 60(b). Motions to Intervene are governed by Rule 24, not Rule 60. If a memorandum of law is sufficient to obtain the relief of dismissal on an affirmative defense, then the standard of review on such motions to dismiss requires the reviewing court to construe all the facts and inferences in the

light most favorable to the party whose claim is being dismissed without a hearing on the merits. In *Williams v. National Union Fire Ins. Co.*, 94 F. Supp.3d 719 (2015), the United States District Court (District of South Carolina) took up a motion to dismiss when the defendant, as here, alleged the statute of limitations elapsed:

The dismissal of a complaint on statute of limitations grounds is itself a rare occurrence because "[a] statute of limitations defense must `clearly appear on the face of the complaint.'" *Groves v. Daffin,* No. CIV.A. 8:13-00019-JM, 2014 WL 897346, at *2 (D.S.C. Mar. 6, 2014) (quoting *Richmond, Fredericksburg & Potomac R. Co. v. Forst,* 4 F.3d 244, 250 (4th Cir.1993)); *see also Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir.2007) (noting that a statute of limitations defense "may be reached by a motion to dismiss filed under Rule 12(b)(6)" only "in the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint"). Under South Carolina's "discovery" rule, "the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." *Epstein v. Brown,* 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005).

Here, Respondent alleges that the Appellant's Petition to Intervene came too late because it was more than 12 months after Judge Hughtston entered his Order even though the Estate concedes it never provided notice of either the filing, the hearing and never provided a filed copy of Judge Hughston's Order to Appellant; the December 18th e-mail says it is being sent for filing. Thus, the application of the statute of limitations not only does not "clearly appear on the face of the [petition]" but also the applicability of a statute of limitations to a Petition to Intervene is clearly disputed in the pleadings See paragraphs 13-17 of the Petition to Intervene, R.O.A. page ___, which allegations are set forth here for the Court's convenience:

13. The Personal Representative furnished no notice to the moving party/intervenor that she had filed suit and/or settled a claim against the at-fault driver, that the case or claim had been settled, or that funds were collected and available for distribution.

14. The Personal Representative concealed these facts from the surviving spouse and intentionally withheld the pleadings from the surviving spouse that would have put her on notice of a pending settlement. The Personal representative's intentional acts, including her failure to give notice to a statutory beneficiary, deprived the Court of jurisdiction because a necessary and

indispensable party, who the Personal Representative knew was represented by separate counsel, was intentionally excluded from the proceedings and thereby prevented from an opportunity to be heard.

15. The moving/intervening party learned that there may have been a settlement when Personal Representative's Counsel mailed a letter on March 15, 2019, enclosing check #3534, in the amount of $49,052.39 with no explanation other than: "Please find enclosed a check for Patricia Brunson for her share of the proceeds in the wrongful death claim in the above matter."

16. The Personal Representative never provided a copy of the pleadings, the amount received or any information about the putative settlement.

17. The Personal Representative never provided notice that she scheduled a Settlement Conference on a pending wrongful death/survival action.

R.O.A. page ____

It is a disputed fact as to whether the December 18th e-mail provided sufficient notice to the appellant or even whether a one-year time deadline applies to a Petition to Intervene. More importantly, the appellant never knew that a proposal for distribution existed until receipt of the March 15, 2019 letter transmitting a check. An unfiled Order is not final "[u]ntil the paper has been delivered by the judge to the clerk of court, to be filed by him as an order in the case, it is subject to the control of the judge, and may be withdrawn at any time before such delivery. *Christy v. Christy*, 354 S.C. 203, 580 S.E.2d 444 (2003) Therefore the trial court erred in refusing the appellant an opportunity to be heard and, assuming *arguendo* that the Estate's memorandum of law sufficiently pled affirmative relief, failed to construe the facts and the inferences reasonably deducible from them in the light most favorable to the surviving spouse as the party resisting a motion to dismiss. Appellant's request to intervene is not subject to being peremptorily dismissed because, as discussed more fully below, the Estate files a memorandum asserting the statute of limitations because that is an affirmative defense that must be pled and proved and is subject to being rejected on legal grounds such as estoppel. Moreover, an application to intervene is not subject to being dismissed by way of summary dismissal on an unfiled claim of alleged untimeliness.

ARGUMENTS

Argument 1

Because the question of the allocation of settlement proceeds involves a modification of a circuit court Order and because there was no court reporter present for the hearing on the Personal Representative's Petition to Approve Settlement, the matter should have been set before the judge who entered the Order, and the disposition of the Appellant's claim without her participation deprived her of due process.

A.

A circuit court judge cannot review another circuit court judge's Order unless permitted by Rule 63.

The Estate scheduled its Petition to Approve Settlement before the Honorable Thomas L. Hughston on December 4, 2018. It is undisputed that the Estate withheld notice to the appellant of not only the filing of the Petition to approve settlement, but also the scheduling of the hearing and foreclosed any opportunity for the appellant to be heard. It is also undisputed that as of December 4, 2018, the Personal Representative and the Appellant were already involved in highly contested, adversarial litigation in Probate Court, and the Personal Representative was aware that: (1) Appellant had separate counsel, and (2) Appellant alleged the Personal Representative was not acting in the Appellant's best interest. As a result of the Personal Representative's concealment of notice, the surviving spouse had no idea that the wrongful death case was being settled or that Personal Representative had filed and scheduled a petition to approve settlement before the Court. As discussed more fully below, the first indication to the surviving spouse that the wrongful death proceeds might be disbursed occurred when she received a letter dated March 15, 2019 (R.O.A. page ____[Exhibit 1]) enclosing a check in the amount of $49,052.39 with no explanation. The letter states in its entirety:

Please find enclosed a check for Patricia Brunson for her share of the proceeds in the wrongful death claim in the above matter. Tiffany meant to give it to you at the conclusion of Patricia's

deposition last week but you left before she was able to do so. (R.O.A. page ____) (Since the Respondent conducted Patricia Brunson's deposition in her home due to her injuries, the Appellant has no idea how Patricia's lawyer left before opposing counsel.)

Following receipt of the above correspondence, appellant inquired of the Estate for information about the status of the proceeds from the tort case, and after receiving none, she set out to ascertain the status of the wrongful death claim by checking the Clerk of Court records where she found the pleadings. Initially, Appellant was not overly concerned about the matter because the pleadings filed with the Court stated that the proceeds would be held in trust pending a resolution of the pending Estate litigation, a representation repeated by counsel in open court before Judge Price (quoted above on page 9, R.O.A. page ____[tr. pages 22-23]). However, as time went on, after the Estate refused to confirm information about the status of the wrongful death case, she filed a Petition to Intervene on February 14, 2020, asking the Court for leave to intervene because it was becoming obvious the Personal Representative was accelerating her efforts to harm appellant's interests. Because the legal issue involves a review of an Order approving settlement and the facts presented to the Court to obtain the Order, without a transcript, only Judge Hughston knows what facts the Estate persuaded him to adopt an inequitable division. (Appellant has since learned that the Estate settled the tort case by misleading the carrier into believing the Estate also represented the appellant. These are facts that can only be developed if appellant is permitted to intervene.) Since Judge Hughston is not disabled, the rules require that he must hear the case. Only if he is disabled is a substitute judge authorized to act in his behalf under Rule 63, *South Carolina Rules of Civil Procedure*. When the parties appeared before Judge Price on December 7, 2020, appellant's counsel informed the Court that the matter must be heard by Judge Hughston unless he were disabled and pointed out to the Court that if he were not, then the matter should be assigned to him.

See Record on Appeal page ____[transcript of hearing page 6, line 24-page 8, line 8] where Appellant pointed out to the Court that the case must go to Judge Hughston unless he were disabled:

MR. GOLDSTEIN: . . . The second housekeeping matter is this is, as opposing counsel has correctly identified, a motion brought under Rule 60. And when I filed the motion, I tried to get a copy to Judge Hughston, who heard the original petition for settlement. And I was informed that Judge Hughtston had followed in my footsteps and was—had undergone a cardiac procedure, and I am not aware of his current availability to hear the matter.

So I don't know if Rule 63 is implicated in this matter or not. I don't know if it has to go back before him or if—if your Honor can hear it. That's just the nature of the –

THE COURT: Well, he's slated to hold a term of court coming up in two weeks so –

MR. GOLDSTEIN: Okay. Well, then he's obviously back, so –

THE COURT: I assume so. I have not personally spoken to him in several weeks, so I'm not sure what his current status is. Yes, he did have a procedure of which was complicated, but he apparently made a full recovery and I have seen him in the building.

MR. GOLDSTEIN: Okay.

THE COURT: So, I don't know.

MR. GOLDSTEIN: All right. Well, I think as a – I'm not trying to judge shop, I don't want to create a false impression, but I think the rules are pretty clear that this is in the nature of asking a circuit court judge to amend an order, and I think it would be required to go back before him, but I'll let you make the call on that.

I'm just putting that out there as that's my understanding of the rules.

Under the *Rules of Civil Procedure*, unless Judge Hughston were disabled under Rule 63, then a substitute judge has no power to alter a previous judge's ruling:

The threshold issue in this case is what discretion a successor judge has under Rule 63. There is a long-standing rule in this State that one judge of the same court cannot overrule another. *Tisdale v. Amer. Life Ins. Co.*, 216 S.C. 10, 56 S.E.2d 580 (1950); *Dinkins v. Robbins*, 203 S.C. 199, 26 S.E.2d 689 (1943). Accordingly, we hold a successor judge may not substitute his own judgment for that of the trial judge; nor may he grant a new trial under Rule 63 unless he articulates a valid reason to grant post-trial relief based on the record before him.

Charleston County Social Services v. Father, 317 S.C. 283, 454 S.E.2d 307 (1995)

Here, the facts present a more serious defect in procedure than in *Charleston County Social*

Services raised because here, there is no transcript of record as to what representations the Personal Representative made to the presiding judge to induce him to approve an allocation calculated to disadvantage the surviving spouse and benefit the P.R. and her siblings. More importantly, the parties here never got as far as the parties in *Charleston County Social Services* because here, the surviving spouse was only asking for leave to intervene, a motion the Court was required to grant under Rule 24 before it could reach the merits of Appellant's claim under Rule 60(b). As this record makes clear, it is beyond dispute that the Personal Representative took actions to enrich herself at the expense of the surviving spouse in breach of a P.R.'s fiduciary duty. However, in placing before the Court nothing more than a request to be heard, the circuit court denied her that opportunity initially for unknown reasons because the Form Order dated December 8, 2020 found in the Record on Appeal at page ___ does not give reasons. Appellant assumed the reason was that the Court found the application to be untimely under Rule 60(b) because that is the only bar advanced in the Estate's memorandum of law. Thus the circuit court never addressed the Rule 63 issue, and it is a fundamental one. Likewise, when the Appellant pointed out in her Motion for Reconsideration that the Court failed to provide an explanation, the circuit court compounded its error by declining to address it a second time. See Motion for Reconsideration at R.O.A. page _____.

As discussed above, the Estate's memorandum of law rested upon a single bar to intervention: that it was not timely having been filed more than one year from the date of Judge Hughtson's Order. (As discussed more fully below, the Estate never filed a motion to dismiss, so the Court granted a preemptory dismissal without an application ever being filed. Even in the ancient Code Pleading days, the Court could not issue a demurrer unless and until a party asked for one.) However, the Form Order is silent, and after the surviving spouse pointed out this omission in her

December 16, 2020, Motion for Reconsideration (R.O.A. page ___), the Court informed the parties that it was not going to change its mind even before the Appellant briefed the issues or filed the transcript, which the Court specifically said it would allow prior to making a decision. Instead, the Court adopted Respondent's unsolicited proposed Order without allowing the Appellant to brief the issues, file the transcript, or even comment on the proposed Order. (R.O.A. pages ___-____ and _____[December 29—January 7 e-mail exchange and Form 4 Order]) The lack of participation by the surviving spouse is troubling in light of the record of legal decisions being adjudicated without her participation and the Court's offer to the parties of either an in-person hearing or a briefing. (See the e-mail exchange in the Record on Appeal at pages ___-___.) As the pleadings and the December 7th transcript of the hearing verify, the Respondent's sole objection to the surviving spouse's motion to intervene was that it was not timely. (See Record on Appeal pages ____-_____ for the complete transcript of the Estate's statement.) Appellant pointed out that her application was timely—or at least a disputed fact—because the Respondent improperly calculated a one-year time limit under Rule 60—not Rule 24—to include the months during which the Respondent fraudulently concealed from the surviving spouse the Estate's application to the Court, the scheduling of a hearing, and even any filing of the Court's decision. The Estate also misled the appellant into believing the settlement proceeds were in trust, a statement amplified by counsel on December 7, 2020. The first opportunity the appellant had to discover the Estate's concealment was when she received the March 15, 2019, correspondence enclosing a proposed distribution, and when the Estate continued to refuse to answer the appellant about the proceeds, she then, less than 12 months after discovering the fraud, filed her Petition to Intervene. The lower court concluded her time ran during the period of concealment, which is like holding a party in default for failing to

answer a complaint never served. As discussed in Argument 2 below, a limitation on bringing an action does not begin to run until a party discovers the fraudulent concealment or, with due diligence, could have discovered it, and it is at least a question of fact as to whether the time began on December 18th or March 15th. It is also a highly disputed question of law as to whether the Rule 60 time limit applies to a Rule 24 application to intervene. As discussed more fully below, there is no 1-year time limit on a motion to intervene under Rule 24; the only requirement is that it be "timely," and in light of the Personal Representative's representation to the Court (R.O.A. page ___[tr. page 23 and Memorandum]) that the proceeds are in trust, there can be no question that the application is "timely" because if the proceeds are in trust, then the issue does not arise until the Estate proposes to distribute the funds. The Estate's representation to the Court that the proceeds are in trust, evaporates any claim of untimeliness and invokes the principle of judicial estoppel, a concept that inures to the Court to protect the integrity of proceedings before it and not to parties. Judicial estoppel prevents the Estate from asserting mutually exclusive positions to the Court on one hand—the proceeds are in trust—and the opposite to the Appellant—we have distributed the proceeds by court Order and this is what you get. See *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004):

Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. See *Colleton Reg. Hosp. v. MRS Med. Rev. Systs*., 866 F.Supp. 896, 900 (D.S.C. 1994) The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary. See *Hawkins v. Bruno Yacht Sales*, 353 S.C. 31, 42, 577 S.E.2d 202, 208 (2003)

In *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997) we formally adopted the doctrine of judicial estoppel as it relates to matters of fact, not law.

The threshold legal issue here is whether Judge Price possessed the authority to review a decision reached by another circuit court judge's decision, and neither the caselaw nor the Rules

permit this. However, the record here is unnecessarily complicated because the Court does not reach any of these legal issues until the appellant is permitted to intervene. As the Orders under review demonstrate, the circuit court never took up this important issue and decide the case on what amounted to an inchoate motion to dismiss, allowing the case to go forward before a second circuit judge without comment. Such prohibition against one judge taking up another judge's decision is especially important here because there is no record of the hearing held before Judge Hughston so there is no way of knowing what information the Personal Representative presented or withheld from the Court in asking for an Order designed to disadvantage her stepmother with whom she was in litigation and for whom the Personal Representative knew had separate counsel.

B.

The disposition of the Appellant's Motion for Reconsideration without her participation deprived her of fundamental due process.

After the Court entered a Form Order on December 8, 2020, appellant filed a motion for reconsideration on December 16, 2020, identifying three broad areas the Court overlooked: (1) the Court did not disclose a reason for the dismissal, (2) the Court never determined it had jurisdiction, and (3) after dismissing the appellant's application to intervene, the Court went further and reached the merits of Appellant's claim seeking removal of the P.R. after refusing her the right to intervene. R.O.A. page ____[motion for reconsideration]). However, the court never afforded the surviving spouse an opportunity to be heard after the form Order even though the Court was entering a dispositive decision on grounds equivalent to a motion to dismiss. (The judicial standard for a peremptory dismissal is discussed more fully in Arguments 2 and 3 below. The Estate's failure to file a Motion to Dismiss is discussed in Argument 2(B)(1) below.) In fact, as the record demonstrates, the presiding Judge gave appellant an option of either being heard in open court or

submitting the issue on briefs. The Appellant elected to brief the issues, provided she could submit the transcript she had already ordered. However, despite providing the appellant the option of briefing, and prior to the appellant filing a memorandum, the Court informed the parties that no matter what appellant submitted, the Court was not going to revisit the decision. (See R.O.A. at pages ___-____ for the December 29th – January 8th email communications between the Court and the parties.) The procedure took a stranger turn when the Estate submitted an unsolicited proposed Order denying Reconsideration without affording the appellant even an opportunity to be heard or comment on the unsolicited proposed Order. See Record on Appeal page ____. On January 7, 2021, at 5:02 p.m., the respondent sent to the Court a proposed Order, stating:

. . . While it appears Judge Price may simply want to file a Form 4, I am attaching a proposed order that had already been prepared for his review and use if convenient.

The next day at 10:25 a.m., the Court wrote back:

Judge Price has reviewed the order and would like you to please e-file the order. Please also have the clerk direct the filing to his queue for signature. (R.O.A. page ____)

The run up to the unsolicited Order being submitted and filed in 17 hours is unusual, and it prejudiced the appellant, not once, but twice. First, the Form 4 Order morphed into a fuller Order on reconsideration reaching issues on the merits that the Court cannot possibly decide unless the Court permits the appellant the right to intervene and be heard. In addition to that prejudice, the procedure also prevents appellant from having any opportunity to make a record, something that is especially critical when one judge is reviewing another judge's Order without any supporting record. See *Christy v. Christy*, 354 S.C. 203, 580 S.E.2d 444 (2003) where the Supreme Court affirmed the Court of Appeals' decision (on different grounds) that a successor judge cannot sign an

Order for a disabled judge even when there is a full trial record: "We also agree with the Court of Appeals' suggestion that the parties **may consent** to have all or some of the issues determined by the family court judge upon the existing record." (emphasis added) Because the original appearance before Judge Hughston occurred without a court reporter, Judge Hughston is the only person in a position to know what the Personal Representative's representations were to the Court to induce the Court to grant approval of a settlement specifically designed by a demonstrably adversarial party to disadvantage the surviving spouse. It is probable that when the application to allocate proceeds came before Judge Hughston, the P.R. made no mention that the Decedent left behind a wife of nearly 50 years or that the P.R. and her siblings were trying to force the Appellant to accept $100.00 as her share of the Estate. The P.R.'s animosity for her stepmother makes the unusual exchange between counsel and the Court establishing and then revoking the procedure for the Court to consider appellant's motion for reconsideration a bitter pill. The entire exchange is in the Record on Appeal at pages ___-____ summarized here for the Court's convenience:

On Tuesday, December 29, 2020, the Court, speaking through its law clerk, asked appellant via email if she wanted the reconsideration decided on a hearing or on briefs. (R.O.A. page ____)

On Thursday, December 31, 2020, appellant's counsel replied to the Court: "I do not mind submitting it on briefs, but if we're going to do that, I'd like to ask for enough time to get the transcript, which I've already ordered." (R.O.A. page ____) This transcript was, and is, critically important to this case because Respondent's counsel informed the Court, consistent with its pleadings, that the settlement proceeds are being held in "trust" pending resolution of Will contest case, a statement that turns out to be an accidental mistake at best a material misrepresentation at worst. The unsettled status of the wrongful death proceeds emphasizes the critical importance of

the surviving spouse's efforts to intervene. If the Estate's representations are accurate, then the Estate cannot complain that a beneficiary wants to participate in the discussion of how to allocate proceeds. On the other hand, if the statement is false, then it is further evidence of the lengths the Personal Representative will go to defraud her stepmother and emphasizes the lower court's error in not allowing the surviving spouse to intervene. (Remember: the respondent's sole basis for resisting intervention is that the surviving spouse's application to intervene is not "timely," which is discussed fully below.) The point here is that the Estate's lack of clarity highlights the need for the surviving spouse to be granted intervention so she can be heard and develop a full record.

On Thursday, January 7, 2020, the Court, again speaking through its law clerk, informed the parties that the presiding judge was not going to revisit his ruling: "I spoke with Judge Price and he has indicated you all are welcome to submit briefs. However, he will not change his ruling." (R.O.A. page ____[email January 7, 2021])

The same day, at 5:02 p.m., Respondent's counsel submitted a proposed Order without direction from the Court: "While it appears Judge Price may simply want to file a Form 4, I am attaching a proposed order that had already been prepared for his review and use if convenient. Please disregard otherwise." (R.O.A. page _____[email January 7, 2021])

The next morning at 10:25, the Court, again speaking through the Clerk, notified the parties that "Judge Price has reviewed the order and would like you to please e-file the order. Please also have the clerk direct the filing to his queue for signature." (R.O.A. page ____[email January 8, 2021])

In short, the entire process occurred not only without the participation of the appellant, but also after the Court granted appellant's request for briefing and filing of the December 7th transcript.

(R.O.A. pages ___-____) Instead, the Estate submitted an unsolicited Order, which the Court adopted. This is a profound deprivation of fundamental due process because it prevented the appellant from making a full record, accepted an unsolicited proposed Order, and afforded the appellant no opportunity even to comment on an unsolicited proposed Order. Due process means the right to be heard in a **meaningful** manner.

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified." [citations omitted] It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." [citations omitted]
> *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972)

The *South Carolina Rules of Civil Procedure* do not set out specific rules governing the submission of unsolicited, proposed Orders other than they must be provided to counsel in the same manner as provided to the Court. The closest the Rules get to the issue raised here is in Rule 5(b), which is amplified by the Supreme Court's Order on e-filing. Rule 5(b) says:

(b)(3) Service of Proposed Orders and Other Papers. Any party providing a proposed order, proposed findings of fact or conclusions of law, or proposed judgment or other paper to the court for its consideration in any pending matter shall serve the same on all counsel of record at the same time and by the same means.

This Rule is silent on the permissibility of providing unsolicited Orders, but the 1994 Note to the Amendment shines some light on the purpose of the Rule:

Note to 1994 Amendment:
Rule 5(b)(3) clarifies the intent of Rule 5(a) and requires that proposed orders, findings of fact and conclusions of law and other materials provided to the court are to be served on all counsel of record. The material is to be provided to all other counsel at the same time and by the same means as they are provided to the court. **Thus opposing counsel will have the opportunity to review and comment on the proposed order before it is signed.** The rule does not require the court to delay entering any proposed order. (emphasis added)

The Supreme Court's Order on e-filing make clear that unsolicited Orders are not permitted:

8. Attachments and Exhibits

(c) Proposed Orders. Proposed orders must be prepared in Microsoft Word (*.doc or *.docx) format, unless the proposed order is a consent order signed by a party who is not an Authorized E-filer, in which case the signed proposed order should be scanned to PDF. Proposed orders should be submitted in one of two ways:

(1) Proposed **orders prepared by a party upon a judge's instructions** may not be E-Filed, but should instead be submitted by email to the requesting judge.

(2) Proposed orders prepared as part of a motion or as proposed consent orders should be E-Filed as attachments to the motion or other submitting document, such as a motion/order cover sheet.
(emphasis added)

As set forth above, the trial judge never announced an oral ruling at the conclusion of the hearing on December 7, 2020 (R.O.A. page ___[tr. Page 25]) nor provided any written instructions on what should be included in a proposed Order:

THE COURT: I'm going to take it under advisement and I will give you my decision by the end of the day.

Thereafter, the Court entered a Form Order filed December 9, 2020, and this document gives no indication as to why the surviving spouse was not permitted to intervene or how the Court reached the merits of removing the Personal Representative after denying the right to intervene. The Form Order did not address the legal issues, but it is clear from the record (transcript of hearing at pages ___-____ of the R.O.A.) that the only ground asserted by the Personal Representative to deny intervention was that the application came more than 12 months after the date of Judge Hughston's December 14, 2018, Order approving settlement. (As discussed fully below, the Estate never filed a motion to dismiss under Rules 7 or 12; instead, it filed on Friday before a Monday morning hearing, a memorandum of law, citing Rule 60(b).) The Court did not address any of the appellant's legal arguments: (1) that statute of limitations is an affirmative defense that must be plead and proved or (2) that the Court cannot calculate the limitation time as running during the period the Personal Representative willfully concealed the evidence that she intended to disburse on

the case despite informing appellant the proceeds were in trust or applied to the Court for disbursement. Even though the check the Personal Representative allegedly wrote out of the wrongful death proceeds is dated December 14, 2018, it is undisputed that she did not send it to her stepmother until March 15, 2019, and whatever date the appellant received that correspondence is the date that started a one-year countdown under Rule 60 if Rule 60 were implicated. See *Christy v. Christy, op. cit*. (This is discussed more fully below in Argument 2.) It is undisputed that the Personal Representative never gave the surviving spouse notice of the filing, the hearing, or the Order, which is a willful suppression of both pleadings and a filed Order by a Personal Representative who is a fiduciary to the appellant. (See Rule 5(a) *South Carolina Rules of Civil Procedure* requiring service of all pleadings and Orders on all "parties of record.") Therefore, when the trial court accepted an unsolicited proposed Order from Respondent with no opportunity for appellant even to comment on it, it not only violated the spirit and the letter of the Rules cited above, but also, and more importantly, it compounded the improper treatment of the appellant throughout the administration of her husband's Estate. It also constituted a denial of fundamental due process by depriving the Appellant of an opportunity to make a record. Moreover, as discussed more fully below in Argument 4, the Orders reach decisions on the merits of the Personal Representative continuing to serve which the Court cannot possibly reach without admitting the appellant to the case as an intervenor. Otherwise, the Court is deciding the merits of her claim in her absence, a procedure so fatally flawed that it became the model of lampoonery as "double secret probation" in the film, *Animal House*. As set forth above in the Standard of Review, the Court cannot simultaneously dismiss an action and then after dismissing the case, reach the merits of the issue that would have been before the Court had intervention been granted. The two are mutually

exclusive. For these reasons, because appellant informed the Court at the call of the case that the matter should be heard by Judge Hughston (R.O.A. page ___[tr. page 6, l. 24—page 8, l. 8]), the Orders should be vacated, and the matter should be remanded back to Judge Hughston who is the judge who heard the petition to approve settlement, because as set forth above, one circuit court judge lacks the authority to modify another circuit court judge's decision absent a finding of disability under Rule 63.

Argument 2

The appellant's right to intervene is a matter of right, and her application to intervene was timely. The allegation that an application is barred by a statute of limitations is an affirmative defense that must be pled and proved, and the time does not run until a party has an opportunity to discover she has a claim.

A. The right to intervene is a matter of right.

When the Court initially denied the appellant's application to intervene, it did so without explanation or examination of the factors regulating intervention. See R.O.A. page ___[form 4 Order]. As discussed more fully in Argument B(1) below, the Estate never filed a Motion to Dismiss, relying instead on a memorandum of law saying that Judge Hughston's Order approving settlement cannot be modified because appellant moved to intervene more than a year after the date of the Order. Following the Form Order, appellant filed a motion for reconsideration, identifying three broad grounds the Court overlooked. When the Court reached out to the parties to set a hearing date, as set forth above, appellant's counsel accepted the Court's offer to submit reconsideration on briefs without oral argument, provided she could have time to file the transcript of the hearing. The entire exchange is contained in the Record on Appeal at pages ____-_____, but because these communications are so important and brief, the appellant cites them here *verbatim* for the Court's convenience:

On December 21, 2020, the presiding judge's law clerk asked the Clerk's office to put Appellant's Motion for Reconsideration on Judge Price's "next Charleston CP week." (R.O.A. page ___) The Clerk wrote back the same day and informed the parties: "Judge Price is not currently scheduled for a motions term in Charleston for the first 6 months of the year." On December 29, 2020, the Judge's Clerk inquired of appellant: "Mr. Goldstein, is a hearing requested or would you prefer Judge Price rule on the briefs? Please copy opposing counsel on your reply email." On December 31, 2020, appellant's counsel responded to the Court's inquiry: "I do not mind submitting it on briefs, but if we're going to do that, I'd like to ask for enough time to get the transcript, which I've already ordered." (R.OA. page ____). The law clerk responded the same day: "I will wait to hear from opposing counsel." The same day, Respondent's counsel wrote to the Court:

> . . . I agree to have the motion ruled on by the briefs since we have already appeared and argued. I will submit a proposed order for your review consistent with my original motion response . . . (R.O.A. page ___)

Of critical importance is the undisputed fact that the respondent's December 4, 2020, memorandum cited two grounds for respondent's objection. The first was that the Estate's incorrect assertion that appellant was trying to set aside the settlement, which demonstrates that the respondent either never grasped the purpose of appellant's seeking intervention or misconstrued it for a perceived advantage. As the transcript of the hearing on December 7, 2020, demonstrates, appellant **never** challenged the settlement, only the allocation of proceeds between wrongful death and survival. Appellant's desire to intervene is only to protect her interest in the Estate **after** respondent settled the case! As this record (and the multiplicity of lawsuits generated by this Estate) demonstrates, it is a genuine issue as to whether the Personal Representative is fulfilling her

fiduciary duties to the surviving spouse, and it is impossible for the Personal Representative to authorize a distribution when the appellant's interest in the Estate has not been determined. The Estate's refusal to give a straight answer on the disposition of the settlement proceeds emphasizes the validity of appellant's concerns.

In the January 13, 2021, Order denying Reconsideration, **the circuit court never mentions or discusses either intervention or Rule 24**! Of course, this omission is no criticism of the circuit court because the Estate never filed a motion seeking dismissal, which would have triggered a discussion of Rule 24. Instead, it conceded intervention and filed a memorandum raising an issue of affirmative defense that the Court cannot reach until the appellant is permitted to intervene. The Estate argued—and the Court accepted—that appellant's application is barred by the one-year limitation imposed by Rule 60(b) even though the Court cannot reach this issue until after it grants intervention. The Order denying reconsideration never takes up, applies, or analyzes the Rule governing timeliness under intervention, which is different from Rule 60(b) but turns appellant away because it found that the 366th day after Judge Hughston entered his Order brought the curtain down on Appellant's application to be heard even though the Estate never notified her that it filed pleadings, scheduled a hearing, or secured an Order until after it had been signed, but not filed. This single, undisputable fact requires that the case be reversed under Rule 60(b) or under Rule 24.

In addition, the circuit court commits legal error on page 3 where it erroneously concludes that it lacks subject matter jurisdiction to entertain an application to remove a P.R. on the ground that only the Probate Court can entertain such motion: "The Court of Common Pleas does not have jurisdiction to do that. Only the Probate Court does." (R.O.A. page ___[Order at page 3]) This conclusion is not only erroneous, but also *dicta* because the question posed to the Court was: Can

the appellant intervene to protect her rights or does Rule 60(b) foreclose her? Leaving aside the issue of removing the P.R. momentarily, the Estate concedes that the circuit court has jurisdiction to address that issue because it decided the issue in the Estate's favor.

The Estate did not object to appellant's Petition because the Court lacked jurisdiction, but rather it objected to the surviving spouse's efforts to intervene on the sole ground that her application was not timely under Rule 60(b), which is a ground only Judge Hughston can decide. More importantly, the lower court's statement is erroneous. The Probate Court and the Circuit Court have concurrent jurisdiction over wrongful death settlement approvals, and it was the Personal Representative, not the surviving spouse, who invoked the circuit court's jurisdiction under §62-1-302(b), S. C. Code, Ann, the Probate Code, which says:

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

Moreover subsection (d) of the same statute provides that any matter involving the right to jury trial or a controversy in excess of $5,000.00 can be removed to circuit court on the motion of either party. Thus the insertion of a gratuitous and erroneous finding in an Order Denying Reconsideration sheds no light on any of the important legal questions raised in this case—whether appellant's request to intervene is timely under Rule 24. The Estate never claimed the circuit court lacked jurisdiction—it claimed the application came too late under Rule 60(b). Certainly, subject matter jurisdiction can be raised at any time, but the Personal Representative invoked the concurrent jurisdiction of the circuit court to oversee the allocation of death benefits, and she cannot be heard to complain about subject matter jurisdiction at this juncture because the statute specifically bestows concurrent jurisdiction on the circuit and probate courts, and that includes overseeing the manner in

which the death benefits are paid. The appellant's request to remove the P.R. over the allocation of wrongful death proceeds relates only to the limited subject before the Court in Case No.: 2018-CP-10-05710. In fact, the parties are involved in a companion case, 2020-CP-10-00965, but the fact of Appellant's pending companion case is just as much *dicta* as the jurisdictional finding quoted above. However, what might be relevant is the fact that no one has challenged the jurisdictional right of the surviving spouse to maintain an independent action pending at Case Number 2020-CP-10-00965 to remove the Personal Representative from the entire Estate. Under § 62-1-302(d), any controversy in Probate Court demanding a jury trial or involving a dispute more than $5,000.00 is automatically removed to circuit court upon the request of any party. Thus the appellant's pleadings in case number 2020-CP-10-00965 might control the outcome of the case now before the Court if, and only if, the parties agree to consolidate the cases, or the Court consolidates them, but even if they were consolidated, consolidation would not solve the prohibition that one circuit court judge cannot modify the order of another circuit court judge set forth in Argument 1.

As set forth above, the only basis asserted by the respondent as a bar to intervention is the Estate's memorandum of law asserting intervention must come within 1-year of the date of Judge Hughston's Order. See R.O.A. page ___[December 4, 2020 Memo]. And, as discussed throughout this Brief, the December 8, 2020 Form Order shed no light on the Court's reason for denying intervention, and the Order Denying Reconsideration never mentions or analyzes Rule 24 or how a memorandum of law serves as the required motion to dismiss under Rule 7. To be fair to the circuit court, the Estate never raised the application of Rule 24 as a bar, choosing, instead, to rely upon a single line of attack; to wit, that because appellant seeks to modify Judge Hughston's Order, Rule 60(b) imposes a strict one-year time limit on Appellant's application, which began to run at the day

after Judge Hughston signed an Order approving settlement . (At the risk of needless repetition, the appellant points out that if the proceeds are held in trust, as the Estate represents, then the entire controversy is unnecessary because the appellant's portion of the Estate is undecided. All this could have been addressed if the Court had permitted her to intervene.)

On January 6, 2021, the Court, speaking through the law clerk about appellant's Motion for Reconsideration, advised the parties as follows: "Not a problem. I will let Judge Price know and forward your proposed order on for his review when received. Thank you both." (R.O.A. page ____) The same day, the Judge's Clerk added: "I spoke with Judge Price and he has indicated you all are welcome to submit briefs. However, he will not change his ruling." (R.O.A. page ___) The next day, January 7th, Respondent's counsel wrote: "Thanks for your e-mail While it appears Judge Price may simply want to file a Form 4, I am attaching a proposed order that had already been prepared for his review and use if convenient. Please disregard otherwise." (R.O.A. page ___) The next day at 10:25 a.m. came the final communication from the Court: "Judge Price has reviewed the order and would like you to please e-file the order. Please also have the clerk direct the filing to his queue for signature." (R.O.A. page ____)

As the above facts demonstrate, the disposition of Appellant's motion for reconsideration was at best irregular. Not only did appellant have no opportunity to comment on an unsolicited proposed Order, but also was denied the right to provide the transcript of the hearing or submit a brief as the Court said it would allow. When the trial court adopted an unsolicited proposed Order without affording appellant an opportunity to participate, this decision prevented the appellant from pointing out that the Estate's Petition for Approval of Settlement (R.O.A. page ___) informed Judge Hughtson that the proceeds were being placed in trust or that counsel emphasized this decision at

oral argument before Judge Price. However, because the Court did not allow the appellant to intervene, it foreclosed her of an opportunity to demonstrate that these assertions might be inaccurate and prevented her an opportunity to adjust Estate disbursements to compel the Estate to conform to South Carolina law. Not to put too fine a point on it, but by keeping the appellant out of the case, the Court cloaked the Personal Representative's delicts in immunity. As a result, neither Judge Hughston nor Judge Price were afforded an opportunity to hear about how the funds might not be in "trust" as represented to the Court in both pleadings and oral statements or how the Personal Representative has offered for Probate a document the Appellant contends is unlawful (Will drawn by Decedent's oldest son, leaving surviving spouse $100 or that her step-mother has claimed an elective share which the Personal Representative is resisting). Obviously, these acts are ongoing, and the ongoing nature of the Personal Representative's delicts eviscerates any Estate claim that the Appellant's application to intervene is not timely.

Most troubling is the Court's statement that no matter what the parties submitted, the Court was not going to amend its Order because the Court obviously misapplied the 1-year time bar under Rule 60(b) to a Rule 24 motion and never addressed the issue that South Carolina law does not start the clock on a party who is unaware of the existence of a claim—especially where, as here, the Estate intentionally created the delay by willfully withholding the pleadings and notice from the appellant. All of this makes it beyond dispute that the Court, at a minimum, should have afforded the appellant an opportunity to intervene and be heard and, at the least, make her record. Instead the Court dismissed her application on what amounts to an unfiled Motion to Dismiss.

At no time in this case, either at the original hearing on December 7, 2018, in the form Order of December 9, 2018, or the Order Denying Reconsideration of January 13, 2019, does the

Court even address the intervention Rule under which Appellant filed her Petition. Rule 24, *South Carolina Rules of Civil Procedure* says in applicable part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers unconditional right to intervene,; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Clearly the appellant has an undisputed interest in the property or transaction, and this limited record makes clear the hostility the Personal Representative has for her stepmother. "Generally, the rules of intervention should be liberally construed where judicial economy will be promoted by declaring the rights of all affected parties." *Stoney v. Stoney*, 417 S.C. 345, 790 S.E.2d 31 (Ct. App. 2016) (Brother of litigant permitted to intervene in Family Court action to protect his interest in a marital property.) The Supreme Court reversed this decision in 2018, but only because the Court of Appeals failed to consider the case *de novo* instead of an abuse of discretion standard. Thus, not only is the law cited in *Stoney* good law, but also it illuminates the standard of review to be applied here since the lower court dismissed the Appellant's petition peremptorily.

In order to intervene in a case, a party seeking to enter the case must demonstrate:

(1) A timely application.

(2) An interest in the subject of the action.

(3) Without intervention, a right is being impaired or impeded.

(4) The intervenor's interest is not being adequately protected.

In Re Horry County State Bank, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004)

If the Court had permitted the surviving spouse to intervene, she could take the necessary steps to make sure the allocation of death benefits occurred in accordance with state law rather than

being manipulated to disadvantage her, and she could determine if they are being held in trust or if they have been disbursed.

The Court must also take into consideration that law requires courts to construe liberally motions to intervene. Parties are allowed to intervene as a matter of right so long as they meet the four criteria set out above. Here, appellant demonstrated:

1. Her application was timely, coming less than 12 months after she discovered the P.R. was attempting to make a distribution under a court Order;

2. Even the Estate concedes that the appellant has a statutory interest in the subject;

3. The appellant has demonstrated that the P.R. will take extraordinary effort to disadvantage her; and

4. The P.R. is not only not adequately protecting her interests, but also taking affirmative steps to prevent the Appellant from having any meaningful participation in the Estate of her husband of nearly 50 years, demonstrating a level of cruelty not routinely seen.

In re: Horry County State Bank, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004)

Here, no one disputes the appellant is the surviving spouse of the Decedent in a nearly 50-year marriage or that she is a statutory beneficiary of the Estate. It is a tautology that her interests are not being adequately protected because the Personal Representative is attempting to keep her out of her husband's Estate, and out of this case on the ground that her application is untimely while simultaneously concealing the settlement of the tort case from her stepmother in order to prevent her participating in the allocation of proceeds. In the Estate case, the Personal Representative, and her legal team, even asserted that the surviving spouse waived her claim to a statutory elective share because she did not mention it in the *ad damnum* clause, even though her pleading is captioned:

"Vacate Will/Demand for Elective Share" and cites the statute by name and number. (The *ad damnum* clause says: D. "Invalidating the Will because it fails to provide for the surviving spouse, who possesses at a minimum an elective share under § 62-2-201.")

Thus, it is self-evident that the surviving spouse's interests are not being adequately protected without intervention, and the Estate has not identified a *scintilla* of prejudice or delay if the surviving spouse is granted intervention other than it will have to quit suppressing pleadings and keeping her in the dark. However, the circuit court heard none of this because it peremptorily dismissed her without giving her an opportunity to be heard. The pleadings and the record demonstrate that the Estate raised only Element 1, timeliness under Rule 60(b), to the Court, and this is the only issue material to the question now before the Court. As set forth in her Petition, her presentation to the Court, and throughout this brief, the surviving spouse made an application to intervene less than one year of discovering the proposed distribution of the settlement of the wrongful death case. (This discussion assumes that there is a 1-year time limit for a motion to intervene. In fact Rule 24, establishes no bright line test.) The Estate's representation to the Court is that the settlement proceeds are being held in "trust" and have not been disbursed, see Record on Appeal page ____[tr. Page 22, l. 25], reinforces the appellant's application for intervention is timely. The timeline of undisputed events shines a powerful light on the Personal Representative's misconduct:

December 3, 2018—Personal Representative files petition to approve settlement. She provides no notice to her stepmother. (R.O.A. page _____)

December 7, 2018—Personal Representative schedules hearing on petition to approve settlement. She provides no notice to her stepmother.

December 18, 2018—Estate Counsel e-mails a copy of the Order and says it is being sent to Probate Court for filing.

March 15, 2019—Personal Representative mails a distribution check to surviving spouse.

February 14, 2020—Surviving Spouse files a motion to intervene to allow her to be heard on the allocation of benefits, which is the money the Estate says it is holding in trust.

Even if Rule 24 had a one-year bright line test like Rule 60(b), it is an undisputed fact that the appellant filed her motion to intervene 11 months after she discovered the Personal Representative's actions in settling the case without her and proposing to distribute the proceeds without affording her an opportunity to be heard. (It is important to recall that the respondent mischaracterizes the appellant's efforts as an effort to upset the settlement. As should be clear now, the appellant sought only to be heard on the Estate's proposal for distribution of the proceeds it says it is holding in trust.)

This record makes clear that the Personal Representative's sole objection to the surviving spouse's petition to intervene is the Estate's assertion that the application was not "timely" under Rule 60(b). The Respondent asserted—and the Court accepted—the allegation that Appellant's application came more than one year after Judge Hughston entered his Order, and therefore her avenue for relief is cut off under Rule 60(b). At no time did the lower court consider whether the one-year time bar of Rule 60(b) applies in a Rule 24 motion or whether the discovery rule computes the time bar beginning at the Appellant's first opportunity to know the P.R. had the settlement proceeds in hand.

First, the time limitation of Rule 60(b) does not control applications under Rule 24, and second, as discussed more fully below, the Respondent cannot fraudulently suppress notice of court

proceedings and include that period of suppression as time against the appellant. If that were the case, the Estate would be drafting the Court as an accessory to fraud.

The *Federal Rules of Civil Procedure* have a nearly identical intervention rule to the South Carolina Rule, and therefore a discussion of "timeliness" under the Federal Rule is applicable to the South Carolina Rule. §1916 of the Wright & Miller treatise on *Federal Practice and Procedure* collects and digests the cases on timeliness under Rule 24 as follows:

§1916 Timeliness of Motion

Both Rule 24(a) and 24(b) require that a motion to intervene be "timely." According to the requirement of timeliness applies whether intervention is sought as a matter of right or as a matter of discretion. As the Fifth Circuit pointed out:

> "Timeliness" is not a word of exactitude or of precisely measurable dimensions. The requirement of timeliness must have accommodating flexibility toward both the court and the litigants if it is to be successfully employed to regulate intervention in the interests of justice.

Since the requirement of timeliness is a flexible one, much must necessarily be left to the sound discretion of the court and the trial judge's decision on the question will be reviewed only for an abuse of discretion.

Even though the timeliness requirement applies to both intervention of right and permissive intervention, a different standard is used, depending on the type of intervention sought, in determining what is timely. Since in situations in which intervention is of right the would-be intervenor may be seriously harmed if intervention is denied, courts should be reluctant to dismiss such a request for invention as untimely, even though they might deny the request if the invention was merely permissive.

In exercising its discretion, the court necessarily will consider the time element itself but this should not be judged in a vacuum. The timeliness requirement is not intended as a punishment for the dilatory and the mere lapse of time by itself does not make an application untimely. The court must weigh the lapse of time in the light of all the circumstances of the case.

. . .

The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case. If prejudice is found, the motion will be denied as untimely. Conversely, the absence of prejudice

supports finding the motion to be timely.

Here, the Respondent argued, and the trial court accepted, that there is a bright line 1-year deadline that ran from the moment Judge Hughston signed an Order without notice to the appellant. No one except the Personal Representative knew about the petition for settlement, the date and time of the hearing, or even the filing of an Order. The P.R. provided none of this information to the surviving spouse even though she knew her step-mother was represented by counsel. As to the propriety of the surviving spouse intervening, the respondent never argued or even identified any alleged prejudice resulting from the surviving spouse's desire to be included in her Husband's Estate. The only argument respondent identified for excluding the appellant was the time to intervene expired on the 1-year anniversary of an Order obtained at a hearing without appellant's participation. This is an obvious and palpable error of law.

The fundamental question is: can the Court peremptorily dismiss an application to intervene under these facts without affording the appellant the right to be heard? Neither statements from the Bench nor the Form Order filed December 8, 2020, identify the basis for the dismissal, but the Order on Reconsideration makes a finding that the surviving spouse's application to intervene was untimely, the time having elapsed on the one year anniversary date of Judge Hughtson's Order approving settlement. (Statute of limitations defenses are discussed more fully in the next section.) At the time of the application for settlement, the Personal Representative was in litigation with her stepmother and aware that her stepmother had separate counsel. Yet, despite knowing this, the Personal Representative scheduled a hearing before Judge Hughtston on December 8, 2018, and never provided a copy of the petition to the appellant, her counsel, or in any way alerted her step-mother either that she had settled the tort case or that she was proposing to allocate the proceeds in a

manner calculated to provide the minimum recovery to the surviving spouse and increase the recovery to herself and her family. During this period of time, the surviving spouse thought they had an agreement to negotiate jointly to maximize recovery as that was the announced purpose of respondent's counsel's visit to appellant's counsel's office.

In summary, whether the appellant's motion to intervene was or was not timely, is not something that the circuit court could decide simply upon the statements of counsel without affording the appellant the right to be heard. As a result, the orders below should be vacated, and the matter should be remanded back to Judge Hughston to decide whether the allocation of benefits is proper.

B. If appellant's motion were untimely (which appellant denies), the burden is on the respondent to plead it and prove it as an affirmative defense.

1. The statute of limitations is an affirmative defense that must be plead and proved, and Rule 7 *South Carolina Rules of Civil Procedure* requires that the Estate file an application for relief to bring the matter before the Court.

2. The statute does not begin to run against a party whose right to an action is fraudulently concealed—the Discovery Rule.

The sole ground the Estate raised in its memorandum to deny the appellant the right to intervene was that the appellant's motion to intervene came too late, more than one year after Judge Hughtson entered his Order. The Estate never filed a motion to dismiss or any kind of affirmative pleading seeking dismissal, only mentioning the 60(b) time bar in its memorandum, an issue the Court cannot reach until the appellant intervenes. The Court's conclusion is error of law for two reasons.

First, an alleged statute of limitations defense is not something that can be decided because a party mentions it in a memorandum of law. If the appellant missed a filing deadline, which she

denies, such an allegation is an affirmative defense that must be both pled and proved by a preponderance of the evidence. See Rule 8(c) of the *South Carolina Rules of Civil Procedure*, which lists the affirmative defenses, including statute of limitations, "and any other matter constituting an avoidance or affirmative defense." Not only must the defense be affirmatively plead and proved, *Linda Mc Company, Inc. v. Shore*, 375 S.C. 432, 653 S.E.2d 279 (Ct. App. 2007), affirmed as modified, 390 S.C. 543, 703 S.E.2d 499 (2010), but also, because it is an affirmative defense, it can be waived if not specifically plead. *Mende v. Conway Hosp., Inc.* 304 S.C. 313, 404 S.E2d 33 (1991). (Hospital agreed to voluntary non-suit instead of continuance during which limitation expired, and that act deemed to be a waiver of the defense.) Here, the facts are not only much stronger, but also involve facts that cannot be resolved on a peremptory motion to dismiss, or in this case a denial of the appellant's right to intervene in order to be heard.

As discussed throughout this brief, and as established by the record, the Personal Representative filed and scheduled her Petition to Approve Settlement without notice to the surviving spouse. See Rule 5(a) Service: When required, *South Carolina Rules of Civil Procedure*: "Unless otherwise ordered by the court because of numerous defendants or other reasons, all (1) written orders . . . shall be served upon each of the parties of record." The Personal Representative and her step-mother were adversarial parties in several pending matters in 2018. As stated above, despite several requests, the Personal Representative still refuses to disclose pertinent information to the surviving spouse (now her Estate). The Personal Representative kept the appellant in the dark as to all her activity, and now seeks to elevate her concealment as cover to run out the clock on the appellant. However, despite calling the P.R.'s fraudulent concealment to the trial court's attention in the pleading to intervene (see R.O.A. page ____[¶¶ 13-15 of February 14, 2020 Petition], as

required by Rule 24, the court imposed a strict 1-year deadline by including the time of willful concealment as part of the period of limitation. South Carolina law does not permit this, and the Court cannot reach this affirmative defense until the appellant is given leave to intervene. Moreover, the trial court refused to apply the well-settled law that a dispute over the statute of limitations cannot be decided as a matter of peremptory dismissal, and thus the trial court erred by calculating the time period to include the period of fraudulent concealment. This is an error of law.

2. The time period does begin to run against a party who is unable to discover the fraud because the wrongful conduct is concealed—the Discovery Rule.

Assuming *arguendo* that the Rule 60 1-year time limit applies to a Rule 24 motion to intervene, the question then becomes: when did the 1-year deadline begin to run? In South Carolina, when a wrongdoer intentionally conceals her wrongful conduct from an innocent party, the time to take action does not begin to run until the innocent party either discovers the concealment, or, has a reasonable opportunity to discover the willful nondisclosure. This is known as the "Discovery Rule," and it is universally applied in American jurisprudence. Our Supreme Court made this clear in *Moriarty v. Garden Sanctuary Church of God*:

IV. Statute of Limitations

McConnell argues the trial court erred in finding his claims were barred by the statute of limitations. We agree.

McConnell's claims are governed by the three-year statute of limitations. S.C. Code Ann. § 15-3-530(5) (2005). Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. S.C. Code Ann. § 15-3-535 (2005); *Dean v. Ruscon Corp*., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996).

The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.

The statute of limitations is triggered not just by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another. *Id.* at 329, 534 S.E.2d at 676. The determination of when the statute of limitations began to run is a question of fact for the jury when the parties present conflicting evidence.
Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 328-29, 534 S.E.2d 672, 676 (2000)

In a case similar to the one now before the Court, an elderly father sued his daughter and her husband for fraudulently conveying his home and for other misuse of his money. The defendants asserted the statute of limitations, which the Master-in-Equity refused to apply on the ground that the plaintiff brought his action within three years of discovering the fraud. The Court of Appeals affirmed, holding:

The Bensons argue the master erred in denying their motion to dismiss based on the statute of limitations. We disagree.

This action is governed by a three-year statute of limitations period. S.C.Code Ann. § 15-3-530 (2005); see *Mazloom v. Mazloom*, 382 S.C. 307, 323, 675 S.E.2d 746, 755 (Ct. App. 2009) (citing three-year statute of limitations in breach of fiduciary duty action); *Turner v. Milliman*, 381 S.C. 101, 109-10, 671 S.E.2d 636, 640 (Ct. App. 2009) (applying three-year statute of limitations in fraud action).

The discovery rule applies to this action. *See* S.C.Code Ann. § 15-3-535 (2005) (applying the discovery rule to causes of action arising under section 15-3-530(5)); *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004) (stating "[i]n determining when a cause of action arose under section 15-3-530, we apply the `discovery rule'"). According to the discovery rule, the statute of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence that a cause of action might exist. *Abba Equip., Inc. v. Thomason*, 335 S.C. 477, 485, 517 S.E.2d 235, 29 (Ct. App. 1999). The date on which discovery of the cause of action should have been made is an objective question. *Joubert v. S. C. Dep't. of Soc. Servs*., 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000). In *Young v. South Carolina Department of Corrections,* this court stated:

In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist. 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999).

The property transfer in this case was made on March 9, 2001. The action was not filed until October 2006. Moore testified he first became aware that something was amiss on December 25,

2005. When he was riding with the Bensons to Christmas dinner at his son Robert's house, Thomas asked who had permitted someone to park a truck on the subject property. Moore testified he had concern about why Thomas was asking about his property.

Moore's son, James Luther Moore, Jr., testified Moore rode home with him from the Christmas dinner and Moore stated he heard Jeannette tell Thomas to "be quiet" when Thomas asked about the vehicle parked on the property. Moore allegedly explained to James that Thomas and Jeannette acted like the property belonged to them. According to James, Moore was also concerned that Thomas was picking up bottles and cans on the property and Moore wanted James's son, Marcus, to check on it.

Marcus testified Moore and his father asked him to look into Moore's affairs a week or so after Christmas 2005. He found the property was titled to the Bensons. He later took Moore to the bank and received the bank records from 2000 to at least 2005. He explained the withdrawal of retirement funds to Moore, who denied withdrawing any money. Marcus also took Moore to Heckman's office to get copies of the closing documents on the property.

In this case, we look to when a person of common knowledge and experience under the circumstances of the case would have known that he sold his property to the Bensons. In light of the evidence that Jeannette handled Moore's personal affairs, we affirm the master's finding that the statute of limitations did not begin to run until Moore first had suspicions that something was amiss in December 2005.

Moore v. Benson, 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010)

Here, the facts are worse. Here, not only is the Personal Representative the appellant's fiduciary, but also there is a history of the P.R. taking acts to disadvantage her stepmother and benefit herself and her siblings! (There is a companion action to remove the Personal Representative pending at Case Number 2020 CP 10 00965, filed February 21, 2020, that has not been heard.) Prior to the particular fraud being discussed here upon receipt of the March 15, 2019, letter (R.O.A. page ___), the Personal Representative has taken other steps hostile to her stepmother, and the parties have been involved in highly contentious litigation since 2017. This fact explains the Personal Representative's motive to keep her step-mother in the dark while she was manipulating the death benefits to disadvantage the appellant and increase the recovery to the Personal Representative and her family. Regarding the tort suit against an at fault driver, the Personal Representative not only withheld any notice from the appellant about the settlement or

the allocation of proceeds, but also misled appellant into a false sense of cooperation when she dispatched her lawyer to appellant's counsel's office to propose working together on the tort case, which appellant agreed to do. Under these facts, it is impossible for a court to dismiss appellant's application to intervene under the tests established under the caselaw and Rule 24. Even the Respondent concedes that that the first opportunity for the appellant to know what the Personal Representative was doing was when the Personal Representative mailed appellant a check on March 15, 2019. Even as late as the hearing before the Court on December 7, 2020, the Estate says the proceeds are in trust. If there is a 1-year time limit on a Rule 24 motion to intervene, the clock began ticking upon receipt of that letter because that was the first notice that the Order had been filed and the P.R. was planning on making disbursements. Prior to the receipt of that letter, the P.R. misled appellant into thinking they were working together on the tort claim against the at-fault driver (and even misrepresented to the claims adjuster that the Estate's counsel represented Petitioner). No matter what one's view of these facts are, it is beyond dispute that the Court erred in making a decision on the merits of an affirmative defense of statute of limitations at a summary proceeding on a motion to dismiss based on nothing more than a memorandum of law filed a few days before the hearing.

In this case, the Personal Representative, who is a fiduciary duty to the surviving spouse but who has a competing claim to benefits, deliberately withheld notice from her that she had scheduled a settlement hearing on the tort case in which the surviving spouse had an interest and that she had made an allocation of benefits that disadvantaged the surviving spouse in favor of her stepchildren, including the P.R. See § 62-3-703: "A personal representative is a fiduciary who shall observe the standards of care described in § 62-7-804," and it is, at least, a question of

fact whether she adhered to that standard in concealing notice from a beneficiary. That question cannot be decided on an inferred motion to dismiss as to whether the P.R. breached her fiduciary duty to inform the surviving spouse of a pending application to approve settlement of a death case.

In a case with a much lower standard of care than fiduciary, both the Court of Appeals and the Supreme Court reversed a circuit court decision to dismiss a claim for willful nondisclosure in a 2005 case called *Slack v. James*. There, the Court of Appeals reversed the summary decision to dismiss counterclaims, and the Supreme Court affirmed, holding:

> We note that when ruling on a motion to dismiss a counterclaim, the question is whether, in the light most favorable to the complainant, and with every doubt resolved in his behalf, the counterclaim states any valid claim for relief. *Cf. Touissaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987) (ruling on 12(b)(6) motion to dismiss must be based solely upon allegations set forth on the face of complaint and motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case). The counterclaim should not be dismissed merely because the court doubts the complainant will prevail in the action. *Cf. Toussaint v. Ham, supra* (question is whether in light most favorable to plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief).
>
> The Court of Appeals properly found a question of fact exists as to whether Buyers' reliance on the misrepresentation was reasonable although the falsity of the alleged misrepresentation could have been ascertained by examining the public records. See *Unlimited Servs., Inc. v. Macklen Enters., Inc*., 303 S.C. 384, 401 S.E.2d 153 (1991) (general rule is that questions concerning reliance and its reasonableness are factual questions for the jury); *Florentine Corp. v. PEDA I, Inc*., 287 S.C. 382, 339 S.E.2d 112 (1985) (right to rely must be determined in light of representee's duty to use reasonable prudence and diligence under the circumstances; determination of what constitutes reasonable diligence and prudence must be made on case by case basis).

Slack v. James, 364 S.C. 609, 614 S.E.2d 636 (2005) (Appellate courts reversed the trial court’s decision to strike counterclaims on the ground that the buyers could have discovered the existence of an easement through due diligence.)

Here, the circuit court never explained initially why it was denying the surviving spouse's application to intervene, dismissing her application on a Form 4 Order without explanation. While the circuit court ultimately accepted an unsolicited proposed Order from the Estate, it did so after it announced it was not changing its mind or permitting the appellant to be heard on the proposed Order. (See Record on Appeal page ____ for January 7, 2021 statement from the Court, quoted above on pages 6 and 22 and page ____ for Order denying reconsideration.) If the Supreme Court in *Slack v. James* determined it was error to strike counterclaims alleging failure to disclose a 4-inch sewer easement by the seller of real property, it is a much more serious error to deny a surviving spouse of a right to be heard when a fiduciary withholds notice from her beneficiary there is a petition pending touching on her rights to receive benefits under South Carolina law.

For these reasons, the circuit court erred in dismissing the appellant's motion to intervene, and the matter should be remanded back to the circuit court, specifically Judge Hughston, because it is his Order that the Appellant seeks to have reviewed.

Argument 3

Even if the circuit court properly denied the Appellant's motion to intervene, once it dismissed the application to intervene, it could not reach the merits of the relief requested by the Appellant.

After the circuit court entered its Form 4 Order denying the application to intervene, the Appellant filed a motion for reconsideration as the law requires. A party aggrieved by such lack of finding is obligated to file a motion to alter or amend to correct the deficiency or otherwise she waives her right to judicial review. *Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016). This is especially important in this case because the Petitioner's application to intervene involves several

important questions of law, none of which the Court reaches unless it authorizes intervention. In other words, if a Court denies a party's application to intervene, the decision prevents the Court from reaching the merits and adjudicating the intervenor's claims, because she is not in the case.

Yet, here, the lower court dismissed appellant's application to intervene and then went further and denied the relief she was requesting even though she is not in the case. In the January 13, 2021, Order denying reconsideration, the circuit court misapprehended appellant's entire premise, calling the matter a "hearing," which, according to the Order under review does not require any findings. (R.O.A. page **___**[Order page 1]) The obvious error is that the Court was ending the appellant's entire claim by preventing her from entering the case, and such a dispositive decision is the equivalent of granting a Motion to Dismiss, and this requires findings. See Rule 52(a): "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion **except as provided under Rule 41(b)**." (emphasis added) A preemptory dismissal requires more than a Form Order, unless, of course, consistent with the settled law cited below in the *Spence* case, the Court dismisses without prejudice to allow a party the right to refile to cure any deficiencies. (Of course, even a dismissal without prejudice requires a Court to identify the deficiencies warranting dismissal.) If the Court denies her Petition to be admitted as a party to challenge the allocation of death proceeds, then it cannot dismiss her claim alleging the Personal Representative should be removed on its merits without affording the Petitioner an opportunity to be admitted as a party and to be heard on the merits. The law is clear that a court cannot end a claim with finality without affording a party an opportunity to refile to cure a pleading deficiency:

Dismissal of a complaint does not bar a subsequent action brought before expiration of the statute of limitations if the dismissal is based merely on the insufficiency of the complaint. *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986); *Hennegan v. Atlantic Coast Line R. Co.*, 211 S.C. 357, 45 S.E.2d 331 (1947). Dismissal of a case precludes relitigation only on matters

actually decided in the dismissal. *Sealy,* 289 S.C. at 544, 347 S.E.2d at 505 (dismissal for improper joinder and lack of capacity to sue precluded only those issues).

When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The plaintiff in most cases should be given an opportunity to file and serve an amended complaint. See *Foman v. Davis*, 371 U.S. 178, 182 (1962) (rules of civil procedure should be liberally construed to do substantial justice and lower court erred in denying motion to amend complaint where amendment would have stated alternative theory of recovery); *Small v. Mungo*, 254 S.C. 438, 442-44, 175 S.E.2d 802, 804 (1970) (affirming dismissal of complaint for failure to proceed, but finding it should have been dismissed without prejudice); *Dockside Assn., Inc. v. Deytens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907, (Ct. App. 1988) (citing Rule 15(a), SCRCP, that plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal under provisions of Rule 12(b)); *Davis v. Lunceford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983) (trial court properly dismissed action in which plaintiff served summons but failed to timely serve complaint, but dismissal with prejudice was improper because such a dismissal is in nature of discontinuance of action and is not an adjudication on the merits; action should have been dismissed without prejudice); accord *Arkansas Dept. of Environ. Quality v. Brighton*, 102 S.W.3d 458, 468 (Ark. 2003) (complaint dismissed for failure to state facts upon which relief can be granted should be dismissed without prejudice in order for plaintiff to decide whether to serve amended complaint or appeal); *Thacker v. Bartlett*, 785 N.E.2d 621, 624 (Ind. App. 2003) (dismissal for failure to state a claim is without prejudice because the complaining party may either file an amended complaint or stand upon complaint and appeal); *Giuliani v. Chuck*, 620 P.2d 733, 737 (Haw. App. 1980) (complaint is not subject to dismissal with prejudice unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations); James F. Flanagan*, South Carolina Civil Procedure* 95 (2d ed. 1996) (party who loses a motion to dismiss normally is given the right to amend the complaint to cure the defect).

When a complaint is dismissed without prejudice and the plaintiff is given the opportunity to file and serve an amended complaint, but instead chooses to appeal, the plaintiff ordinarily waives the right to amend his complaint. The appellate court may affirm the dismissal with prejudice if it determines the lower court properly dismissed the complaint. *Brighton*, 102 S.W.3d at 468; *Swink v. Ernst & Young*, 908 S.W.2d 660, 663 (Ark. 1995) (when trial court dismisses complaint pursuant to Rule 12(b)(6) for failure to state facts upon which relief can be granted, dismissal is without prejudice; plaintiff then has the election to plead further or appeal).

When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice. When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint. An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted. *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 708 A.2d

283, 286-87 (Me. 1998) (trial court acted within its discretion in dismissing case with prejudice pursuant to Rule 12(b)(6) where plaintiff was unable to show how he would cure defects in his complaint if granted leave to amend it); *Barkley v. Good Will Home Assn*., 495 A.2d 1238 (Me. 1985) (in absence of bad or dilatory motives on the part of plaintiff or undue prejudice to defendant, the trial court abused its discretion by denying the plaintiff an opportunity to amend her complaint after it was dismissed pursuant to Rule 12(b)(6)); *Baker v. Town of Middlebury*, 753 N.E.2d 67, 74 (Ind. App. 2001) (dismissal of complaint pursuant to Rule 12(b)(6) with prejudice was harmless error because plaintiff failed to show how he would have amended his complaint to avoid dismissal). *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006)

Here, the Court's Order denies the Petitioner's application to enter the case as a party intervenor and then goes further and adjudicates one her claims that the Court should remove the P.R.. Unless the court allows the intervenor in the case, the court never acquires the jurisdiction to reach the merits of the Petition. By reaching the merits of the surviving spouse's claim without her participation, such a decision represents an abdication of fundamental due process, which requires at a minimum the surviving spouse's right to be heard in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972): "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.' [citations omitted] It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" No court cannot decide an individual's legal rights if she is not a party before the Court, and for this reason the Orders under review should be reversed and the matter remanded to Judge Hughston for disposition.

CONCLUSION

For the reasons set forth, the Appellant prays that the matter be remanded to the circuit court to Judge Hughston to allow the appellant an opportunity to be heard on the merits of how the proceeds being held in trust should be allocated between wrongful death and survival, taking into

consideration the appellant's pending claims whether the allocation of benefits from the wrongful death case should be reallocated and for an opportunity to demonstrate that the Personal Representative should not continue to serve in this matter because of her breach of fiduciary duty to the surviving spouse.

Respectfully submitted,

August 6, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley Price, Circuit Court Judge

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Case No.: 2018-CP-10-05710
Appellate Tracking No.: 2021-000141

Estate of Patricia A. Brunson ……………………………………………….Intervenor/Appellant,

In re:

Elaine Mincey as Personal Representative for the Estate of
William Alexander Brunson, Jr.,…………………………………………….Plaintiff/Respondent,

vs.

David Scott Wich and C. J. Wingerter Company, L.L.C., ……………………………Defendants.

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PROOF OF SERVICE

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I certify that I have served the Initial Brief and Designation of Contents of Record on Appeal on the Respondent, Estate of Brunson, by depositing a copy of it in the United States mail, postage prepaid on August 6, 2021, addressed to the Estate's attorney of record, William E. Applegate, IV, 291 East Bay Street, Suite 2, Charleston, S. C. 29401 and also by providing a copy by electronic means.

/s/ Thomas R. Goldstein________________
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