THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2013-CP-23-05389

Appellate Case No. 2014-001401

In the Matter of James Trippe, III Deceased

Gene D. Morin, Conservator for Katelin Trippe .....Respondent-Appellant

v.

James Trippe, Jr., individually and as Personal Representative
of the Estate of James A. Trippe, III .....Appellant-Respondent

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APPELLANT'S FINAL BRIEF OF RESPONDENT-APPELLANT

Jacqueline H. Patterson, I.D. # 12090
Nathaniel C. Farmer, I.D. #75976
PATTERSON & ASSOCIATES, P.A.
1088 N. Church Street
Greenville, SC 29601
(864) 329-0548

Attorneys for Respondent-Appellant, Gene D. Morin, Conservator for Katelin Trippe

May 4, 2015

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STATEMENT OF THE CASE

This matter arises from the administration of the probate estate of James A. Trippe, III ("Decedent"). Decedent died intestate on March 26, 2009. (R. p. 3). On or about April 16, 2009, Appellant-Respondent James A. Trippe, Jr. (Appellant-Respondent shall sometimes be referred to herein as the "PR") was appointed as Personal Representative of Decedent's Estate. (R. p. 4). The heirs of Decedent's Estate are his two children, James Trippe, IV ("James IV") and Katelin Trippe ("Katelin"). (*Id.*). Because Katelin is a minor child, Respondent-Appellant Gene D. Morin (Respondent-Appellant shall sometimes be referred to herein as "Conservator") was appointed by the Probate Court to act on Katelin's behalf. (*Id.*).

The original deadline for distributing Decedent's assets and closing the Estate was April 16, 2010. (R. p. 55, ¶ 14). On June 6, 2011, more than one year after such deadline, Conservator, acting on behalf of Katelin, filed a petition with the Probate Court to remove PR as personal representative on the grounds that PR had acted wrongfully, unreasonably and in bad faith in his dealings with Katelin by, among other things, failing to distribute the Estate in a timely manner and by proposing to distribute the Estate contrary to law[1] and in unequal shares with Katelin receiving less than her rightful inheritance. (R. pp. 56-57, ¶ 23 and R. pp. 59-60, ¶ 30).

At mediation, Conservator and PR reached an agreement as to the allegations set forth in the petition, the terms of such settlement were more fully set forth in a Mutual

[1] PR attempted to distribute approximately 1/3 of the Estate to Decedent's brother, Paul Trippe. (R. pp. 56-57, ¶ 23; R. pp. 358-359; R. p. 360).

Release and Settlement Agreement ("Settlement Agreement")[2] which was incorporated into the Order of the Probate Court dated April 27, 2012. (R. pp. 1-7).

The Decedent owned two lots located in the Bahamas (the "Lots"). (R. p. 5, ¶ 4). Pursuant to Paragraph 4 of the Settlement Agreement, PR agreed to convey the Lots to Conservator. Paragraph 4 of the Settlement Agreement states as follows:

> **Bahamas Lots.** Within **sixty (60) days following the execution of this Agreement**, Respondent PR shall transfer to Petitioner the two (2) lots located in the Bahamas (the "Lots") and identified on Schedule A.1. of the Second Supplemental Inventory and Appraisement dated December 9, 2011. The Lots shall be transferred free and clear of all liens, mortgages or other encumbrances. In connection herewith, **Respondent PR shall perform all acts and execute all documents required by the Greenville County Probate Court to transfer the Lots to Petitioner**. (Emphasis added) (*Id.*)

On May 1, 2012, Conservator filed a first contempt action against PR for failing to make a payment under the terms of the Settlement Agreement. (R. p. 8). After a hearing on the matter, PR was held in contempt of court for nonpayment. (R. p. 12). As part of the order, the Probate Court, understanding the difficulties of transferring foreign properties, extended the time for transferring the Lots by stating that such lots were to be "conveyed as soon as possible." (*Id.*).

In July 2012, PR executed a South Carolina "Deed of Distribution." (R. pp. 19-21; R. pp. 361-62). The "Deed of Distribution" did not contain a legal description of the Lots nor was the "Deed of Distribution" recorded in the Bahamas or any system for the recordation of real property located in the jurisdiction of the Bahamas. (*Id.*). However, PR took the position that he had sufficiently conveyed the Lots and complied with the Settlement Agreement through the execution of this South Carolina "Deed of

[2] Although not parties to the action, James IV and JAT, Inc. were signatories to the Settlement Agreement because they obtained certain rights and obligations under the Settlement Agreement. However, neither James IV nor JAT, Inc. have any rights or obligations relating to issues raised in this Appeal.

Distribution." (R. p. 121, line 14 - p. 126, line 15; R. pp. 258-272). The Probate Court and Bahamian counsel (retained by Conservator) disagreed, and they found that such "Deed of Distribution" was insufficient to transfer the property from the Decedent to Katelin, the minor child. (R. p. 19, ¶ 7-8; R. p. 258, lines 1-13; R. p. 363-364). After receipt of the "Deed of Distribution," the Probate Court continued to inform PR that copies of a **recorded** deed were needed. (R. p. 19, ¶ 7; R. p. 363; R. p. 364).

Despite having received the letters from the Probate Court, PR insisted that the "Deed of Distribution" was sufficient, and he refused or otherwise failed to take any further action with regard to transferring the Lots. As such, on October 4, 2012, Conservator filed a second contempt action, this time seeking to enforce Paragraph 4 of the Settlement Agreement (as altered by the June 15, 2012 Probate Order). (R. p. 17). The hearing for this petition was set for November 20, 2012.

On November 20, 2012, counsel for PR, Attorney Michael Coulter, failed to appear, but requested that Attorney O.W. Bannister (who was then-acting as counsel for James IV (Decedent's son) and had previously acted as counsel for Paul Trippe (PR's son and Decedent's brother)), represent PR at such hearing. (R. pp. 14-16). Mr. Bannister's representation of James IV (Decedent's son) had already been duly noted in the Probate Court's Order dated June 15, 2012 (R. p. 9) (and is subsequently noted in the Probate Court Orders dated (i) November 20, 2012 (R. p. 14), (ii) December 21, 2012 (R. pp. 17-18), (iii) June 25, 2013 (R. p. 24) and September 30, 2013 (R. p. 30)).

Conservator's counsel objected to Attorney Bannister's representation of PR on the grounds that Attorney Bannister had a conflict of interest. (R. p. 15). Specifically, by way of illustration and not of limitation, Conservator argued:

(1) Attorney Bannister represented Paul Trippe (PR's son), to whom the PR attempted to transfer Estate assets, contrary to law and to the exclusion of Katelin as an heir of the Estate. (R. pp. 56-57, ¶ 23; R. p. 302, lines 17-19; R. p. 309, line 9 – p. 312, line 18; R. pp. 361-62).

(2) Attorney Bannister represents James IV who took an adverse position to Katelin, the minor child, with regard to the disposition of Estate assets. (R. pp. 56-57, ¶ 23; R. pp. 1-7; R. p. 302, lines 17-19; R. p. 309, line 9 – p. 312, line 18).

(3) Attorney Bannister formerly represented Decedent in a divorce proceeding against the minor child's mother (R. p. 302, lines 17-19; R. p. 309, line 9 – p. 312, line 18).

As evidenced by the foregoing, Attorney Bannister represents parties and has taken positions which (i) are diametrically opposed to the interests of Katelin, the minor child, and (ii) would effectively reduce Katelin's inheritance. Such representations and positions are contrary to the role of the Estate attorney whose duty is to administer the Estate for the benefit of all the Estate's beneficiaries.

The Probate Court agreed with Conservator and issued the following statement in its Order dated November 20, 2012:

> It is obvious that Mr. Bannister has a conflict of interest having represented individuals with interests diametrically opposed to Katelin Trippe. Mr. Bannister cannot now use the knowledge he gained from that representation to affect or to appear to affect Katelin Trippe's distribution from this estate. As an heir, she has a right to a personal representative and an estate attorney (both of whom receive compensation from the estate) whose concern is only with the proper administration of the estate and meeting the fiduciary obligations thereto, see the SC Probate Code. (R. p. 15).

The hearing on Conservator's second contempt action came before the Probate Court on December 19, 2012. (R. p. 17). After hearing testimony in the matter, the Probate Court held PR in contempt of court for failing to transfer the Lots to Conservator as required by the Settlement Agreement and prior Court orders. (R. p. 21). The Probate Court found that PR and/or his counsel had received at least ten (10) different letters

stating that the Probate Court required copies of recorded deeds of distribution. (R. p. 19, ¶¶ 7-8). Two of these letters were issued after PR had executed the "Deed of Distribution," and, thus, the PR had notice from the Probate Court that his attempted transfer was not sufficient to transfer the Lots. (*Id.*). In its Order, the Probate Court did provide PR a grace period to transfer the Lots, such transfer having to be completed on or before February 1, 2013. (R. p. 22). The issue of attorney's fees was held in abeyance at that time. (*Id.*).

On February 7, 2013, Conservator filed a third contempt action against PR because PR had again failed to timely transfer the Lots as required by the Settlement Agreement and numerous Court Orders. (R. p. 23). At the hearing on April 24, 2013, PR presented no admissible evidence that he attempted to transfer the Lots prior to the February 1, 2013 deadline. (R. p. 28). At this hearing, PR attempted to present communications it had with Bahamian counsel, but the Probate Court refused to admit such evidence on the grounds that Attorney Bannister had failed to comply with Rule 45, SCRCP, in responding to a subpoena from Conservator's counsel relating to such documents. (R. p. 215, line 1 – p. 218, line 18). The Probate Court did allow Conservator the opportunity to proffer such evidence, but even the evidence which PR proffered showed that he did not retain Bahamian counsel until March 2013. (R. p. 223, line 6 – p. 224, line 23). Furthermore, at this hearing, Attorney Bannister questioned Conservator's counsel, Jacqueline H. Patterson, with regard to the attorney's fees sought to be recovered by Conservator. (R. pp. 250-287).

By Order dated June 25, 2013, the Probate Court found PR to be in contempt of court for failing to make legitimate efforts to transfer the Lots and granted Conservator

attorney's fees for work performed since July 2012. (R. pp. 28-29). The Court sentenced PR to ninety (90) days incarceration which could be suspended if PR transferred the Lots (or paid the equivalent value of the Lots) and paid Conservator's attorney's fees by July 12, 2013. (*Id.*).

On July 8, 2013, Attorney Bannister, again attempting to act on behalf of PR filed a Motion to Reconsider ("Motion") the Probate Court's Order dated June 25, 2013. (R. pp. 72-74). In the Motion, Attorney Bannister, in direct contravention of the Probate Court's Order dated November 20, 2012, labeled himself as the "Attorney for the Estate." (R. p. 74).

On August 21, 2013, a hearing was held on Attorney Bannister's Motion. (R. p. 30). The Probate Court denied Attorney Bannister's Motion on the grounds that (i) Attorney Bannister did not represent PR and (ii) the evidence in the record supported a finding of contempt. (R. pp. 31-33). Furthermore, the Probate Court, based upon the *Baron* factors, upheld the award of attorney's fees to Conservator in the amount of $12,920.53[3] and granted to Conservator additional attorney's fees in the amount of $6,159.18 in defending against the Motion. (*Id.*; R. pp. 378-380).

On October 4, 2013, PR served its Notice of Appeal on opposing counsel. PR filed his Grounds for Appeal (R. pp. 75-76) with the Probate Court on November 15, 2013.

On February 4, 2014, Conservator moved to dismiss the appeal on the grounds that the Notice of Appeal was not timely filed. (R. pp. 77-96). Conservator submitted argument that because Attorney Bannister could not represent PR as stated in the Probate

[3] One Thousand Five Hundred ($1,500.00) Dollars of this amount was reimbursement for attorney's fees paid to Bahamian counsel.

Court's November 20, 2012 Order, the Motion to Reconsider filed by Attorney Bannister was defective and insufficient to toll the statute of limitations. (R. pp. 81-84).

On February 18, 2014, oral arguments were presented before the Honorable D. Garrison Hill of the Greenville County Circuit Court. At the hearing, Conservator requested additional attorney's fees incurred in defending the appeal. The amount requested was $8,562.25. (R. pp. 381-83).The basis for such request was Paragraph 14 of the Settlement Agreement. (R. p. 6, ¶ 14).

On June 4, 2014, the Circuit Court issued an Order denying Conservator's Motion to Dismiss and partially reversing the Probate Court's finding of contempt. (R. pp. 37-44). The Circuit Court found that PR was not in contempt prior to December 21, 2012. (R. pp. 41-42). The Circuit Court also partially reversed the Probate Court's Orders by reducing the amount of attorney's fees to Four Thousand, Five Hundred ($4,500.00) Dollars. (R. p. 44).

On or about June 24, 2014, PR served a Notice of Appeal upon opposing counsel.

On June 19, 2014, Conservator filed a Motion to Alter or Amend Judgment with the Circuit Court. (R. pp. 105-108). On July 31, 2014, the Circuit Court issued an Amended Order, generally affirming the findings of fact and conclusions of law as found in its Order dated June 4, 2014 (R. pp. 45-52 - unless otherwise noted, the Circuit Court's Amended Order shall be referred to herein as the Circuit Court's "Order"). On August 21, 2014, Conservator served its Notice of Appeal on Attorneys Coulter and Bannister.

STANDARD OF REVIEW

This appeal involves the following questions: (i) whether the evidence presented by PR was sufficient to establish his defense for failing to comply with numerous orders of the Probate Court and (ii) whether Conservator is entitled to recover his full attorney's fees in seeking to enforce the Settlement Agreement and the Probate Court orders. For reasons more fully set forth below, Conservator would show the Circuit Court erred in reversing, in part, the orders of the Probate Court which found PR to be in contempt of court and granted Conservator the right to recover all of his attorney's fees.

"A decision on contempt rests within the sound discretion of the trial court. On appeal, a decision regarding contempt should be reversed only if it is without evidentiary support or the trial judge has abused his discretion." (citations omitted) *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (Ct.App. 2005).

A review of attorney's fees awarded is governed by an abuse of discretion standard. *Blumberg v. Nealco,* 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). An appellate court will not reverse an award unless it is based on an error of law or is without any evidentiary support. *Gooding v. St. Francis Xavier Hosp.,* 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997) ("An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support."). Where an attorney's services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by **any competent evidence**. *Baron Data Sys. v. Loter,* 297 S.C. 382, 384, 377 S.E.2d 296, 296 (1989) (emphasis added).

ARGUMENT

A. The Circuit Court erred by failing to award Respondent-Appellant the full amount of his attorney's fees.

In this case, the Probate Court awarded Conservator attorney's fees in the amount of $19,079.91 for work performed as a result of PR's failure to comply with a settlement agreement and three Orders of the Probate Court. (R. pp. 34-35). The Circuit Court reduced the award of attorney's fees to $4,500.00. (R. p. 52). For the reasons stated below, this Court should overrule the Circuit Court's reduction of the attorney's fees and should grant Conservator the attorney's fees incurred in the present appeal.

1. The Circuit Court erred in applying the proper standard of review for an award of attorney's fees.

The Circuit Court properly found that a review of attorney's fees award is governed by an abuse of discretion standard. *Blumberg,* 310 S.C. at 493. However, the Circuit Court erred in applying the standard of review to the facts of this case and instead undertook a de novo review of the record. An appellate court cannot reverse an award unless it is based on an error of law or is without any evidentiary support. *Id.; Gooding v. St. Francis Xavier Hosp.,* 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997) ("An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support."). Therefore, where an attorney's services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by **any competent evidence**." *Baron Data Sys. v. Loter,* 297 S.C. 382, 384, 377 S.E.2d 296, 296 (1989) (emphasis added).

In this case, the Probate Court did not abuse its discretion because competent evidence to support the Probate Court's full award of attorney's fees to Conservator was

provided. The Probate Court's award of these fees was based not only upon the fee affidavits of counsel but also upon the testimony of Conservator's counsel under oath. Below is an excerpt from the April 24, 2013 hearing:

> THE COURT: So do I have in my file the attorney's fees that you're asking for as a part of this proceeding today? Okay. That's what I need to know.
> MS. PATTERSON: I have done a supplemental that brings them all together for you. So it's a summary of all of the fees, Your Honor. (R. p. 249, lines 2-11).

At the hearing, Attorney Bannister, using the time sheets of Conservator's counsel (which he had obtained through subpoena), had the opportunity to examine Conservator's counsel. (R. pp. 250-287). As noted from the following excerpt from the April 24, 2013 hearing, it is clear that the Probate Court understood Attorney Bannister's argument but found it to be without merit:

> THE COURT: All of this is coming in solely for fees. So I assume he is trying to claim that you spent too much time on these issues, and some – and he's using the letters somehow to support that claim. I assume. Is that right, Mr. Bannister?
> MR. BANNISTER: It is, Your Honor. (R. p. 277, lines 1-9).

Additional fees were incurred due to the Motion to Reconsider filed by Attorney Bannister. At the August 21, 2013 hearing, the Court stated the following:

> Ms. Patterson has asked for fees for todays [sic] hearing. Im [sic] going to hold that in abeyance until I get her Affidavit fees, and Ill [sic] make a ruling on that when I get it. And, counsel, if you have any objection to her fees, send me something, and let me know why you object, and Ill [sic] make a ruling on that on the Pleadings. Okay. (R. p. 327, lines 12-21.)

Opposing counsel filed no objections in response to the fee affidavit.[4]

After reviewing the fee affidavits and hearing the testimony, the Probate Court found that $19,079.91 was a reasonable fee for work performed and costs paid to

[4] If an objection was filed, the same was not provided to Respondent's counsel.

Bahamian counsel from July 2012 through September 30, 2013. The Probate Court, recognizing the work performed in this matter and being in the best position to determine the difficulties of this case, made the following findings based upon the six factors set forth in *Baron*, 297 S.C. at 384-85:

(1) **The nature, extent, and difficulty of the legal services rendered** – "This is a very contentious case which has extended over several years and which involves unusual legal issues regarding foreign property." (R. p. 34).

(2) **The time and labor necessarily devoted to the case** – "Much time and labor has been devoted by Petitioner's counsel in enforcing the Settlement Agreement and the Orders of this Court and in defending against the positions taken by Attorneys Bannister and Coulter for Respondent's failure to act." (R. p. 34).

(3) **The professional standing of counsel** – "Patterson & Associates, P.A. is respected in this community and has litigated other cases in this Court." (R. p. 34).

(4) **The contingency of compensation** – "Contingency of compensation is not applicable." (R. p. 34).

(5) **The fee customarily charged in the locality for similar legal services** – "The rates charged by Petitioner's counsel are consistent with those charged by other attorneys practicing in this Court." (R. p. 34).

(6) **The beneficial results obtained** – "Petitioner's counsel has obtained the result for which they petitioned." (R. p. 34).

The Probate Court's decision to award attorney's fees to Conservator in the amount of $19,079.91 should be upheld because the Probate Court made specific findings on each of the six *Baron* factors and there is competent evidence to support the Probate Court's findings.

2. The Circuit Court erred in denying Respondent-Appellant attorney's fees prior to December 21, 2012 by failing to recognize the terms of the Settlement Agreement.

In its Order, the Circuit Court, citing *Cannon v. Georgia Attorney General's Office*, 397 S.C. 541, 548-550, 725 S.E.2d 698 (2012), held that Conservator was not entitled to attorney's fees prior to December 20, 2012 "[b]ecause there was no basis to find [PR] in willful contempt before the December 21, 2012 Order." (R. p. 52). However, as more fully set forth below, the Circuit Court erred because there was a basis to find PR in willful contempt prior to December 21, 2012 due to PR's failure to comply with the instructions of the Probate Court. Additionally, the Circuit Court erred by failing to consider the terms of the Settlement Agreement executed by PR which was incorporated into the April 27, 2012 Probate Court Order. Paragraph 14 of the Settlement Agreement provides:

> **Attorneys' Fees.** If an action is commenced to enforce any provision of this Settlement Agreement, the prevailing party as determined by a final court judgment shall be entitled to recover from the other party such reasonable attorneys' fees and costs incurred in the action as the court may award. (R. p. 6, ¶14)

In its December 21, 2012 Order, the Probate Court found PR to be in violation of the Settlement Agreement. (R. p. 21). As such, Conservator was the prevailing party and was entitled to recover its attorney's fee incurred prior to such date. To the extent that the Circuit Court overruled the Probate Court's December 21, 2012 Order, Conservator would show that, for reasons more fully set forth below, PR did not appeal the December 21, 2012 Order and, as such, the law of this case is that PR violated the Settlement Agreement prior to December 21, 2012 and was in contempt prior to such date.

For this reason, the Circuit Court's denial of Conservator's attorney's fees prior to December 21, 2012 is an error of law.

3. The Circuit Court's reduction of the attorney's fee to $4,500 is arbitrary and is an abuse of discretion.

In rendering its Order, the Circuit Court stated that "a reasonable award of fees and costs for [Conservator's] counsel is $4,500.00" for "work reasonably necessary to bring [PR] back to Court after the December 21, 2012 Order, and for defense of this appeal." (R. p. 52). The Circuit Court provided no basis for this reduction in fees nor does the Circuit Court state how it arrived at $4,500.00. Additionally, in making its determination, the Circuit Court fails to consider the factors set forth in *Baron*. The Circuit Court, acting in its appellate capacity, concludes that $4,500.00 is an adequate fee for the following work performed from December 21, 2012[5] through March 2014:

- Prepare and file an Order and Rule to Show Cause and a Verified Petition;
- Respond to subpoena from Attorney Bannister;
- Issuance and service of a subpoena to Attorney Bannister;
- Legal research and preparation for the April 24, 2013 hearing;
- April 24, 2014 hearing;
- Preparation of Order following April 24, 2013 hearing;
- Receipt and review of Motion to Reconsider filed by Attorney Bannister;
- Legal research and preparation of briefs and oral arguments for the August 21, 2013 hearing;
- August 21, 2013 hearing;
- Preparation of Order following August 21, 2013;
- Receipt and review of appellate filings by opposing counsel;
- Legal research regarding issues raised in appeal;
- Preparation of appellate Motion and Memo to Dismiss;
- Preparation of appellate brief;
- Preparation of oral arguments for appeal;
- Preparation of appellate order; and
- Correspondence with the client and counsel during this time.

[5] Respondent would show that it seeks recovery of attorney's fees for work performed prior to this date, but this Court did not consider such work in setting the $4,500.00 fee.

In *Johnson v. Johnson*, 296 S.C. 289, 303-04, 372 S.E.2d 107 (Ct.App. 1988), the Court of Appeals held that it was arbitrary and an abuse of discretion for a court to award attorney's fees in an amount less than that which was actually incurred when there was no basis for reducing the amount of attorney's fees. Specifically, the Court stated that a "decision lacking a discernible reason is arbitrary and constitutes an abuse of discretion." *Id.* In rendering its decision, the Court of Appeals found that the amount requested was not excessive and that counsel had not spent too many hours on the case in light of "the factual and legal complexity of the case, the vigorous manner in which [the opposing party] contested every issue, his lack of cooperation in discovery which forced [attorney's client] to obtain relevant evidence by other means, and the excellence of [the] attorney's work in briefing and presenting the case." *Id.* at 304. Thus, the Court of Appeals was not willing to second-guess the effort of an attorney to vigorously advocate for his or her client's position.

The same facts are present in this case. PR has failed to cooperate at every juncture of this Estate proceeding. (R. p. 302, line 8 – p. 303, line 24; R. p. 310, line 4-17; R. p. 319, line 19 – p. 320, line 10). During the administration of this Estate, PR has been granted at least seventeen (17) extensions and has missed at least twenty-one (21) deadlines. (R. p. 312, line 24 - p. 313, line 2). At least four Orders and Rules to Show Cause have been issued for failure to comply with the Settlement Agreement incorporated into an Order of the Probate Court. Two appeals have been filed, and PR has allowed the Estate's primary asset, JAT, Inc. (which was valued at approximately $600,000.00 at the time of Decedent's death) to now file bankruptcy. Additionally, PR's counsel and Attorney Bannister have failed to cooperate in this matter by, among other

things, failing to appear at a hearing (R. pp. 14-16), failing to respond to a subpoena (R. p. 214, line 20 – p. 215, line 13) and advocating legal positions despite clear conflicts of interest which were raised and ruled upon by the Probate Court (R. pp. 14-16).

It is important to note that the property giving rise to this contempt action still has not been transferred to Conservator nearly two (2) years after PR was ordered to do so. Conservator has had to continuously bring PR before the Probate Court because the only times PR has complied with the Probate Court Orders is when the Court threatens to incarcerate him. Each time, PR's counsel and Attorney Bannister raise a "new justification" as to why PR should not have to comply or did not comply with the Settlement Agreement or the Court's instructions. Therefore, Conservator's counsel has had to brief the relevant issues. These briefs have been successful in providing the Probate Court with the relevant legal issues, which, in turn, has resulted in findings in favor of Conservator. Conservator has been successful in **every** hearing before the Probate Court in this matter, including but not limited to the ones for which it seeks reimbursement of legal fees.

By altering the Probate Court's award of attorney's fees, the Circuit Court is second-guessing the work required by counsel and is attempting to become the trier of fact by determining the amount of work which was needed to accomplish the results obtained. Because the Probate Court was the trier of fact and the Probate Court was in the best position to determine the amount of work required, the Circuit Court, sitting in an appellate capacity, erred as a matter of law and abused its discretion by setting an arbitrary amount of fees when such amount does not comply with the factors set forth in *Baron*.

4. The Circuit Court erred in reducing Respondent-Appellant's attorney's fees because Appellant-Respondent did not properly preserve this issue for appellate review.

When an award of attorney's fees is based upon a finding of contempt and violation of a Settlement Agreement, both grounds must be appealed in order to preserve the issue for appellate review. *Anderson v. Short,* 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996); *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (Ct.App. 2005), *overturned on other grounds by 2008 S.C. Acts 211, § 1.* In this case, the Probate Court found that Conservator was entitled to attorney's fees because (i) PR violated the terms of the Settlement Agreement and (ii) PR was in contempt. PR clearly did not comply with the requirements found in *Anderson* and *Floyd* whereby he was required to appeal both issues. Instead, PR provided the following ground for appealing the award of attorney's fees:

> An award of attorney fees by the Probate Court was an abuse of discretion because the personal representative was pursuing the transfer of his deceased son's interest in the Bahamian lots with all due diligence and at his own expense and the time spent by the attorney pursuing the Rule to Show Cause was excessive, unnecessary, and mainly for the purpose of enhancing her own claim. (R. p. 76, ¶ h)

Here, PR does not specify as to which ground he is appealing. South Carolina law is clear that in order to preserve an issue for appellate review, specific grounds must be clearly stated. *Wilder Corp v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The above ground for appeal from PR does not clearly set forth the basis for appealing the attorney's fee award. As such, PR failed to preserve this issue for appellate review.

However, if we assume PR's ground for appeal sufficiently preserved one of the issues, because PR failed to appeal both grounds for awarding attorney's fees, the unappealed ground becomes the law of the case. *Floyd*, 365 S.C. at 72-73. ("because the

trial judge based his award of attorney's fees and costs on more than one ground, the unappealed ground becomes the law of the case"); *Anderson*, 323 S.C. at 525. As such, the award of attorney's fees must be affirmed. *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544 (S.C. 1970) (an unappealed ruling, "right or wrong, is the law of this case and requires affirmance.")

5. The Circuit Court's concerns regarding Respondent-Appellant's attorney's fees are without merit.

As noted in the Order, the Circuit Court had several concerns with the attorney's fee of Conservator. Each of the Court's concerns is addressed below, and none of which are meritorious in denying or reducing the attorney's fee owed to Conservator.

a. The Circuit Court erred in finding that the contempt hinged solely on who had the responsibility to record the deed because Appellant-Respondent, by and through his counsel and Attorney Bannister, took the position that the deed of distribution was sufficient under Bahamian law.

In its Order, the Circuit Court stated that the "contempt hinged on the discrete issue of who had the responsibility to record the deed in the Bahamas." (R. p. 51). The Court further questioned the time spent by Conservator's counsel in researching Bahamian law and the $1,500.00 fee paid to Bahamian counsel. The Circuit Court went on to state that "the hiring of Bahamas lawyer to advise as to a collateral matter benefitted neither the Estate nor Katelin." (R. p. 51).

The record in this case clearly reveals that the Circuit Court's statements are in error. Bahamian counsel was retained because PR and opposing counsel attempted to transfer the Lots contrary to Bahamian law. Because of PR's position, Bahamian counsel was retained to perform a title search on the lots and opine as to the procedures required

to transfer the Lots. This issue was relevant at the December 19, 2012 hearing[6] which led the Probate Court to state the following in its Order dated December 21, 2012:

> To effectively convey title of the Lots to Petitioner, **the Personal Representative must comply with Bahamian law**. (emphasis added) (R. p. 21)

If the only issue was who had the responsibility to record the deed in the Bahamas, then it would have been unnecessary for the Probate Court to instruct PR that he had to comply with Bahamian law.

Furthermore, the testimony of Ms. Patterson clearly shows that the retention of Bahamian counsel was necessary and that the issue was more than just who had the responsibility to record the deed. Below are excerpts from Ms. Patterson's testimony at the hearing dated April 24, 2013:

- R. p. 257, line 24 - p. 258, line 13: "We hired . . . in preparation for the original December 19th hearing, an attorney, which we had to pay, to obtain the procedure for transferring property. Because we received a letter, which I am glad to provide, from you, Bill, I believe advising us that the Deed of Distributions that you had given us were sufficient for recording in the Bahamas. So we provided those to the Bahamian attorney, who advised us that they we not sufficient. But we had to spend $1,500.00 to retain her."

- R. p. 265, line 9 - p. 266, line 1: "No, sir, because you have presented a case today at how difficult the transferring property is in the Bahamas, and what you had to go through. At the time prior to the hearing you were telling me, advising me that I didn't need anything but the Deeds of Distribution that you had already provided, and that I was good to go, and I should accept it. Because of that, because of the representations that you provided to me, in writing, I felt a need to prepare for the hearing, and know what had to be done in the Bahamas to transfer the lots. But not only that, to try to find the lots to even know if we owned them, which was a big problem."

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[6] Conservator attempted to obtain from the Probate Court a copy of the transcript of the December 19, 2012 hearing but was informed by the Probate Court that this transcript was not in the Probate Court's file. Conservator is informed and believes that (i) the Probate Court does not have a copy of this transcript because there was no appeal of the December 21, 2012 Order and (ii) the Circuit Court did not have a copy of this transcript when it reviewed the record.

- R. p. 268, line 22 - p. 269, line 1: "You chose not to use our lawyers in the Bahamas, although they were up on it. They knew exactly where the lots were, and what needed to be done. We had already paid $1,500.00."

- R. p. 269, lines 5-15: "Yes, at the [December 19, 2012] hearing, sir, which we all attended. We told the Court. We submitted our Affidavit. It has the fees in there. We told the Court. In fact I remember specifically . . . telling . . . Judge Faulkner that my lawyer charged $600.00 an hour, and I was going to move to the Bahamas." (in response to the question as to whether Conservator advised PR of the $1,500 fee from Bahamian counsel)

- R. p. 271, lines 15-23: "But sir, it was the benefit of my client in showing the Estate – or in preparation for the hearing to show The Court that a transfer had to occur in the Bahamas, which I believe we had to have the probate opened as well. Which prior to the hearing you were telling – advising that that did not have to happen.

It is well-settled in South Carolina that an appellate court is not in a position to second-guess the trier of fact with regard to the credibility of witnesses. *Frampton v. South Carolina Dept. of Transp.*, 406 S.C. 377, 391, 752 S.E.2d 269, 273 (Ct.App. 2013) ("The jury chose to believe and use Harnett's assessment of the damages, and this court may not second-guess determination of credibility by the trier of fact."); *State v. Clasby*, 385 S.C. 148, 155, 682 S.E.2d 892, 895 (Ct.App. 2009) ("The determination of a witness's credibility is left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity."); *Harmon v. Bank of Danville*, 287 S.C. 449, 452, 339 S.E.2d 150, 152 (Ct.App. 1985) ("Of course, the veracity and credibility of a witness can best be judged by the trial judge who heard the witness testify, and who was able to observe his demeanor. He is given broad discretion in this area.")

In this case, the Probate Court heard the testimony of Conservator's counsel and found that there was competent evidence to support Conservator's need to obtain Bahamian counsel because of the positions taken by the PR. As such, the Probate Court's award of the $1,500.00 fee paid to Bahamian counsel should be affirmed.

As an additional sustaining ground, Conservator would show that PR did not raise this issue in its Grounds for Appeal. (R. pp. 75-76).

b. The amount in controversy is irrelevant to the award of attorney's fees.

In the Order, the Circuit Court insinuates that the amount of the attorney's fee was excessive because the amount of the fee claim approached or exceeded the amount in controversy. In its Order, the Circuit Court stated the following:

> "[Conservator] thus seeks a total of $27,641.96 in attorneys fees and costs. This Court has not lost sight that this claimed amount exceeds the value of the very land that is the subject of this dispute." (R. p. 51)

It is well-settled under South Carolina law that the amount in controversy is irrelevant with regard to an award of attorney's fees. In *Taylor v. Medenica*, 331 S.C. 575, 582, 503 S.E.2d 458, 462 (2007), the South Carolina Supreme Court stated that "there is no requirement that attorney's fees be less than or comparable to a party's monetary judgment." In *Laser Supply and Services, Inc. v. Orchard Park Associates*, 382 S.C. 326, 343, 676 S.E.2d 139, 148 (Ct.App. 2009), the Court of Appeals found that "the amount of the fee award [$86,923.87] was reasonable in light of all of the *Baron* factors applied by the circuit court" even though judgment was only rendered in the amount of $24,195.00. The Court of Appeals further stated that the award of attorney's fee's "disparity with the damages award does not demonstrate an abuse of discretion on the part of the circuit court." *Id.*

Based upon the foregoing law, the Circuit Court erred in considering the value of the Lots in determining whether the award of attorney's fees to Conservator was reasonable.

6. The amount of Respondent-Appellant's attorney's fees is reasonable.

In discussing the reasonableness of the attorney's fee award, the Circuit Court further stated the following:

> "That the mushrooming fee was out of bounds became evident when Morin announced he was claiming $8,562.25 (to date) to defend this appeal, although the appeal had only been pending a few months. The combined length of the parties' appeal briefs[7] is less than 25 pages." (R. p. 51)

However, Conservator would show that the fees are very reasonable in light of the work required for this case.

a. The Probate Court's award.

First, in reviewing the award of attorney's fees, it is important to note that the fees incurred by Conservator are solely the result of PR's failure to do that which he agreed to and was required to do under the Settlement Agreement. Had PR complied with the Settlement Agreement, the contempt hearings would not have been necessary.

Second, the $17,579.91 ($19,079.91 less $1,500.00 to Bahamian counsel) claimed by Conservator's counsel was very reasonable for work required on a contested matter beginning July 2012 through October 2013. The work required included but was not limited to the following:

- Receipt, review and research regarding the defective Deed of Distribution;
- Correspondence with counsel regarding Deeds of Distribution and proper methods to transfer Bahamas lots;
- Correspondence to/from Probate Court regarding Estate closure;
- Correspondence with Bahamian counsel regarding Lots and transfer;
- Prepare and file Summons and Petition dated October 4, 2012;
- Service of Summons and Petition;
- Preparation for hearing dated December 19, 2012;
- December 19, 2012 hearing;

[7] The Order references the "**combined** length of the **parties'** appeal briefs." Respondent has not been provided an executed copy of Appellant-Respondent's brief.

- Preparation of Order following December 19, 2012 hearing;
- Prepare and file an Order and Rule to Show Cause and a Verified Petition on February 7, 2013;
- Respond to subpoena from Attorney Bannister;
- Issuance and service of a subpoena to Attorney Bannister;
- Legal research and preparation for the April 24, 2013 hearing;
- April 24, 2013 hearing;
- Preparation of Order following April 24, 2013 hearing;
- Receipt and review of Motion to Reconsider filed by Attorney Bannister;
- Legal research and preparation of briefs and oral arguments for the August 21, 2013 hearing;
- August 21, 2013 hearing;
- Preparation of Order following August 21, 2013; and
- Correspondence with the Court, the client and opposing counsel during this time relating to service of documents, scheduling, settlement offers, etc.

In light of the foregoing work, Conservator would show that the $19,079.91 awarded to Conservator is reasonable, and the Probate Court, in its review of the work performed, had competent evidence to rule that this amount was reasonable.

b. Amount requested on Appeal

Additionally, the amount of $8,562.25 requested on appeal included 37.8 hours of attorney and paralegal time as well as an additional 2.5 hours of estimated time in closing out the appeal. The work included the following:

- Receipt and review of appellate filings by opposing counsel;
- Review of the Probate Court's record, including but not limited to hearing transcripts;
- Legal research regarding issues raised in appeal;
- Preparation of appellate Motion and Memo to Dismiss;
- Preparation of appellate brief;
- Preparation of oral arguments for appeal;
- Appellate hearing;
- Preparation of appellate order; and
- Correspondence with the Court, the client and opposing counsel.

The Circuit Court states that the combined length of the parties' briefs was less than twenty-five (25) pages, but the only briefs filed were from Conservator: Motion and

Memorandum to Dismiss and an appellate brief. PR filed no briefs.[8] As such, Conservator prepared for all arguments which Attorneys Coulter and Bannister might raise.

Paragraph 14 of the Settlement Agreement (cited above) entitles Conservator to recover its attorney's fees in defending this Appeal which includes the $8,562.25, the additional costs incurred in seeking to alter or amend judgment and the costs in seeking reversal of the Circuit Court's Order.

B. The Circuit Court erred in making its factual findings contrary to the record on appeal.

For the reasons stated below, this Court should reverse the findings of facts found in the Circuit Court's Order.

1. The Circuit Court erred in finding that Appellant-Respondent was not in contempt prior to December 21, 2012.

a. The Circuit Court erred in reversing the findings of facts as found within the Probate Court's Order dated December 21, 2012 because an unappealed ruling is the law of the case.

It is well-settled law in South Carolina that an unappealed ruling becomes the law of the case. *Charleston Lumber Co. v. Miller Hous. Corp.*, 338 S.C. 171, 174-75, 525 S.E.2d 869, 871-72 (2000); *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (holding that appellant-respondent may not seek relief from a prior unappealed order of the circuit court because the ruling has become the law of the case); *In re Morrison*, 321 S.C. 370, 468 S.E.2d 651 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal);

[8] After receiving the Circuit Court's Order dated June 4, 2014, Conservator attempted to determine whether a brief had been submitted by PR because of the Court's use of the phrase, "combined length of the parties' briefs". Attorney Bannister provided Conservator an unsigned copy of a brief. Attorney Coulter did not respond to Conservator's request. In its Order, the Court denied receipt of a brief from PR.

Watkins v. Hodge, 232 S.C. 245, 247-48, 101 S.E.2d 657, 658 (1958) (refusing to consider jurisdictional matter of underlying case where issue had been ruled upon and not challenged on appeal). *Floyd*, 365 S.C. at 72-73 (the December 24 order which found Laurens in contempt and which was not appealed is the law of the case.).

A ruling cannot be altered even if the appellate court believes an unappealed ruling was in error. *Buckner,* 255 S.C. at 161 (an unappealed ruling, "right or wrong, is the law of this case and requires affirmance."); *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case).

In this case, the Circuit Court has effectively reversed the unappealed December 21, 2012 Probate Order which found PR to be in contempt of court prior to December 21, 2012. In its Order, the Circuit Court stated the following:

- "Before the fall of 2012, the Personal Representative had a good faith belief that his July 2012 delivery of the Deed of Distribution discharged his duties under the Settlement Agreement to transfer the Bahamas lots." (R. p. 49)

- "Because there was no basis to find [PR] in willful contempt before the December 20, 2012 Order, [Conservator] should not have received fees for efforts expended before this date." (R. p. 52)

Both of these findings are contrary to the December 21, 2012 Order which states the following:

- "Paragraph 4 of the Settlement Agreement required the Personal Representative to 'perform all acts and execute all documents required by the Greenville County Probate Court to transfer the Lots to Petitioner.' For this reason, I find that the Personal Representative has breached the terms of Paragraph 4 of the Settlement Agreement, and, consequently, has violated this Court's Order dated April 27, 2012." (R. p. 20, ¶11)

- "The Deed of Distribution signed by the Personal Representative on July 18, 2012 is not effective to transfer title of the Lots to Petitioner. The

> Personal Representative's failure to effectively transfer the Lots to Petitioner in proper form, free and clear of all liens and encumbrances, is a breach of his duties under Paragraph 4 of the Settlement Agreement, and is consequently a violation of this Court's Order." (R. p. 21)

- "To effectively convey title of the Lots to Petitioner, the Personal Representative must comply with Bahamian law." (*Id.*)

Because the PR did not appeal the December 21, 2012 Probate Order, it is an error of law for the Circuit Court to make findings contrary to such Probate Order.

b. The Circuit Court erred in interpreting the Settlement Agreement.

Additionally, the Circuit Court erred in its interpretation of Paragraph 4 of the Settlement Agreement. In its Order, the Circuit Court stated:

> To be sure, there are letters from the Clerk of the Probate Court stating that the Court required recorded deeds of distribution. But, before December 21, 2012, the controlling document arguably remained the Court Order that approved the Settlement Agreement which did not expressly require or even reference recording. (R. p. 49)

In making this statement, the Circuit Court did not consider the terms of the Settlement Agreement which provides: **"[PR] shall perform all acts and execute all documents required by the Greenville County Probate Court to transfer the Lots to Petitioner."** (Emphasis added). (R. p. 5, ¶ 4). This sentence effectively incorporates the instructions of the Probate Court into the Court Order approving the Settlement Agreement.

Prior to executing the Settlement Agreement, PR and/or his counsel had received eight (8) separate letters informing him that the Probate Court required a recorded copy of the deed transferring the Bahamas lots. (*See, e.g.,* R. p. 19, ¶ 7). As such, PR was on notice at the time that he signed the Settlement Agreement that he would have to record the deed of distribution.

Furthermore, following PR's execution of the defective deed of distribution in July 2012, the Probate Court sent him two additional letters stating that copies of the recorded deeds of distribution for the Lots must be filed with the Court prior to closing Decedent's Estate. (*See, e.g.,* R. p. 19, ¶ 8; R. pp. 363-364).

Because the Settlement Agreement clearly required PR to follow the requirements of the Probate Court with regard to the transfer of the Lots and such efforts were not made by the PR, the Probate Court properly found that PR did not make a good faith effort to transfer the Lots. Therefore, the Probate Court's finding of contempt prior to December 21, 2012 should be upheld.

c. Appellant-Respondent's mistake of law does not excuse his non-performance.

In *Brandt v. Gooding*, 368 S.C. 618, 628, 630 S.E.2d 259, 264 (2006), the South Carolina Supreme Court stated that "courts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice." As such, the court's power to find a party in contempt is one of the most unique of all equitable remedies.

In this case, the Circuit Court overruled the Probate Court by finding that PR made a good faith effort to transfer the Lots through the execution of a defective deed of distribution. The Circuit Court held that PR's mistake as to the legal effect of the deed of distribution excuses his contempt. This conclusion is contrary to law.

"A mistake of law occurs where a person is well acquainted with the existence or nonexistence of facts, but is ignorant of, or comes to an erroneous conclusion as to, their legal effect." *In re Estate of Holden*, 343 S.C. 267, 279, 539 S.E.2d 703, 710 (2000). Such was the case here. PR was fully aware of the facts but was allegedly not aware of

the legal ramifications of his failure to record the deed of distribution. In *Holden*, the Court stated:

> "[E]quitable relief is available where the parties acted under a mistake of fact going to the essence of the particular transaction, but not if the mistake was one of law." 27A Am.Jur.2d Equity § 7 (1996); Smothers v. U.S. Fidelity and Guar. Co., 322 S.C. 207, 470 S.E.2d 858 (Ct.App.1996) (a court of equity will not, in the absence of fraud or undue influence, grant relief from the consequence of a mistake of law). "**[R]elief will not be granted where the complaining party took measure to secure knowledge as to the state of the law and, being misinformed, placed himself in the prejudicial situation of which he later complains. Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests.**" Id., 322 S.C. at 210-211. (emphasis added)

Id. at 278-79. Because a "mistake of law" is no excuse for PR's failure to comply with Court Order approving the Settlement Agreement, the Probate Court's finding of contempt prior to December 21, 2012 should be upheld.

2. The Circuit Court erred in finding that Appellant-Respondent attempted to comply with the Settlement Agreement on January 30, 2013 because such finding of fact is based upon inadmissible evidence.

Although the Circuit Court found PR to be in contempt of the December 21, 2012 Order, the Circuit Court made a finding of fact that PR contacted Bahamian counsel on January 30, 2013. (R. pp. 49-50). This finding of fact, however, is not based upon the record but is instead based upon inadmissible evidence which Attorney Bannister proffered.

At the April 24, 2013 hearing, Attorney Bannister attempted to introduce communications he has had with Bahamian counsel. Conservator's counsel objected to the introduction of this evidence on the grounds that Attorney Bannister had failed to comply with Rule 45, SCRCP, in responding to a subpoena requiring him to produce these documents prior to hearing. Below is an excerpt from the April 24, 2013 hearing:

> THE COURT: Okay. So did you give her what the rule says about which ones of these were "protected by privilege"? So that she could then know what to expect or what to –
> MR. BANNISTER: I did not.
> THE COURT: Okay. All right. Then under the rules, if you did not do that, then I don't know if I have a choice other than to exclude it. I mean, if you didn't do that, she didn't know what was coming in. And all of this was for this hearing today?
> MS. PATTERSON: Yes, Your Honor.

(R. p. 214, line 20 - p. 215, line 9). The Probate Court further stated:

> THE COURT: Well, what I'm going to do is I'm going to exclude it under that rule. But I'm going to let him proffer it to make a record. But I'm not going to consider it for my ruling. But I'm going to let him make it in case he appeals. So I'm going to let him do a proffer. (R. p. 215, line 21-p. 216, line 4).

Exhibit Two of the proffered documents offered by Attorney Bannister was the letter dated January 30, 2013 to Arthur Seligman, an attorney in the Bahamas, whereby PR requested costs associated in transferring the lots.

Because the letter to Mr. Seligman was not admissible, the Circuit Court should not have considered it or cited it in its Order. "The purpose of a proffer is to adequately develop the record in order to allow the appellate court a chance to determine whether the appellant was prejudiced by the trial court's refusal to admit the evidence." (emphasis added) Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 77 (1999). Therefore, a proffer allows the party aggrieved an opportunity to appeal the lower court's denial of the evidence.

In this case, PR did not raise this issue (the denial of this evidence) on appeal (see R. pp. 75-76 and R. pp. 329-357). It is well-settled that "an issue which is not appealed is deemed abandoned." *Id.* at 86 citing *Dobyns v. South Carolina Dep't of Parks,*

Recreation, & Tourism, 325 S.C. 97, 480 S.E.2d 81 (1997). Furthermore, there is no finding that the Probate Court erred in excluding this evidence.

As such, the Circuit Court, sitting in an appellate capacity, erred in making findings of facts contrary to the record when the Circuit Court's sole function was to determine if there was any evidentiary support for the Probate Court's decision or if the trial judge abused its discretion. *Miller v. Miller*, 375 S.C. 443, 452, 652 S.E.2d 754, 759 ("An appellate court should reverse a decision regarding contempt 'only if it is without evidentiary support or the trial judge has abused his discretion.'").

C. The Circuit Court erred by failing to grant Respondent-Appellant's Motion to Dismiss.

1. The Circuit Court erred in understanding the role of Attorney Bannister.

In denying Conservator's Motion to Dismiss, the Circuit Court appears to misunderstand the role of Attorney Bannister. In the action in the Probate Court, Attorney Bannister **did not** represent PR. The Circuit Court's statements indicate a misunderstanding as to both Attorney Bannister's role in the Probate proceedings and his ability to represent PR as evidenced by the following statements:

- "The Motion to Reconsider was filed on behalf of a party, and the previous disqualification of **that party's attorney** does not render the filing of the Motion a nullity."
- "If that were so then anytime a Court disqualified a lawyer, the **client** would be placed in the untenable position of having to scramble to find new counsel in the short time available to move to reconsider or appeal."
- "And the lawyer – who may have been improperly disqualified by the Court's order – would in effect be prohibited from further protecting **his client's** interest at a crucial juncture in the litigation."

(R. p. 48). These above statements imply that Attorney Bannister represented PR during the Probate Court's proceedings. However, the record is clear that Attorney Bannister did

not represent PR but instead represented (i) James Trippe, **IV** who is a beneficiary of the Estate and (ii) Paul Trippe[9]. James Trippe, IV is PR's grandson and the brother to Katelin Trippe, the minor child.

The issue in this case is not whether a party's attorney can continue to serve. Instead, the issue is whether an attorney can change clients during the middle of a proceeding when Conservator raised a conflict of interest, and the Probate Court ruled that Attorney Bannister could not represent the Estate.

The Circuit Court's concern that a party's attorney could be disqualified at a "crucial juncture" simply does not apply to this case. First and foremost, it does not apply because Attorney Bannister did not represent PR. PR, at all times, continued to have representation from Attorney Coulter. He did not have to "scramble" to find new counsel. Second, the Circuit Court's concern is inapplicable because the disqualification of Attorney Bannister as stated in the November 20, 2012 Probate Order did not occur at a "crucial juncture" in the Probate proceedings. The disqualification occurred approximately eight (8) months prior to Attorney Bannister's filing of the Motion to Reconsider. Thus, at the time the Motion was filed, PR, Attorney Bannister and Attorney Coulter all had sufficient notice of the disqualification.

By holding that Attorney Bannister had the authority to file the Motion to Reconsider on behalf of PR, the Circuit Court has essentially nullified the November 20, 2012 Probate Court Order which states:

> It is obvious that Mr. Bannister has a conflict of interest having represented individuals with interests diametrically opposed to Katelin Trippe. Mr. Bannister cannot now use the knowledge he gained from that representation to affect or to appear to affect Katelin Trippe's distribution

[9] Paul Trippe is the PR's son and the Decedent's brother. Because Paul Trippe is not a beneficiary of this Estate, he has not been involved in most of the Probate proceedings.

from this estate. As an heir, she has a right to a personal representative and an estate attorney (both of whom receive compensation from the estate) whose concern is only with the proper administration of the estate and meeting the fiduciary obligations thereto, see the SC Probate Code. (R. p. 15).

2. The Circuit Court erred by disregarding the Probate Court's ruling that the Motion was improperly filed.

Additionally, in denying the Conservator's Motion to Dismiss, the Circuit Court completely disregarded the September 30, 2013 Probate Order. In its Order, the Circuit Court stated the following:

> The "Probate Court ruled on the merits of the Motion to Reconsider and **did not rule it was improperly filed.**" (Emphasis added) (R. p. 48)

This statement by the Circuit Court is completely contrary to the Probate Court's ruling. At the August 21, 2013 hearing, the Probate Court stated:

> "Well, the Motion to Reconsider is denied. **Its [sic] denied, first of all, because it wasnt [sic] filed by the estate attorney.**" (emphasis added) (R. p. 327, lines 5-8).

Additionally, in the September 30, 2013 Order, the Probate Court states, in pertinent part, the following:

> Based upon the evidence, testimony and records before this Court and the arguments presented by counsel, the Motion for Reconsideration filed by Mr. Bannister is hereby DENIED for the reasons set forth below.
>
> **A. Mr. Bannister does not represent [PR] and his Motion is improper.**
>
> The Motion was filed in this matter by attorney O. W. Bannister. Mr. Bannister represents James Trippe, IV, such representation being duly noted by the Orders of this Court dated (i) June 15, 2012, (ii) November 20, 2012, (iii) December 21, 2012 and (iv) June 25, 2013.

> Over the objection of Petitioner and his counsel, Mr. Bannister has on numerous occasions attempted to assume the role as attorney for the Personal Representative despite a clear conflict of interest. In November 2012, [PR's] attorney, Mr. Coulter, failed to appear for a hearing but requested that Mr. Bannister represent the Personal Representative at the hearing. In response thereto, this Court stated:
>
> > It is obvious that Mr. Bannister has a conflict of interest having represented individuals with interests diametrically opposed to Katelin Trippe. Mr. Bannister cannot now use the knowledge he gained from that representation to affect or to appear to affect Katelin Trippe's distribution from this estate. As an heir, she has a right to a personal representative and an estate attorney (both of whom receive compensation from the estate) whose concern is only with the proper administration of the estate and meeting the fiduciary obligations thereto, see the SC Probate Code.
>
> Mr. Bannister cannot now, in his Motion, represent to the Court that he is the attorney for the Personal Representative (see page 3 of the Motion) in contravention of the foregoing Order filed November 20, 2012. The conflict of interest for Mr. Bannister still exists, and Petitioner has not waived this conflict.

(R. pp. 31-32). In the September 30, 2013 Order, the Probate Court does provide additional sustaining grounds in upholding its June 25, 2013 ruling. However, the additional sustaining grounds do not negate the fact that the Motion to Reconsider was held to be improperly filed.

Although there is no case law directly on point stating that a motion filed by a disqualified attorney is a nullity, there is sufficient authority to show that an improper or defective post-trial motion does not toll the statute of limitations for filing a notice of appeal. *See, e.g., Collins Music Co., Inc. v. IGT*, 353 S.C. 559, 566, 579 S.E.2d 524, 527 (Ct. App. 2002); *Quality Trailer Products, Inc. v. CSL Equipment Co., Inc.*, 349 S.C. 216,

219, 562 S.E.2d 615, 617 (2002). The Probate Court ruled that the Motion to Reconsider was improper, and PR did not appeal this issue. Thus, the law of the case is that the Motion was improper. Because the Motion to Reconsider was improper, the Statute of Limitations was not tolled, and PR cannot appeal the June 25, 2013 Probate Order.

CONCLUSION

For the reasons stated herein, Conservator respectfully requests that this Court overrule the decision of the Circuit Court by upholding the findings of fact and conclusions of law of the Probate Court. Specifically, Conservator requests that this Court (i) uphold the findings of contempt against PR, and (ii) grant to Conservator the full amount of his attorney's fees, including the fees incurred on appeal.

Respectfully submitted,

Jacqueline H. Patterson, I.D. # 12090
Nathaniel C. Farmer, I.D. #75976
PATTERSON & ASSOCIATES, P.A.
1088 N. Church Street
Greenville, SC 29601
(864) 370-4159
Attorneys for Respondent-Appellant

May 4, 2015
Greenville, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2013-CP-23-05389

Appellate Case No. 2014-001401

In the Matter of James Trippe, III, Deceased

Gene D. Morin, Conservator for Katelin Trippe .....Respondent-Appellant

v.

James Trippe, Jr., individually and as Personal Representative
of the Estate of James A. Trippe, III .....Appellant-Respondent

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RESPONDENT-APPELLANT'S
RULE 211 CERTIFICATION

The undersigned counsel for Respondent-Appellant hereby certify that (i) Appellant's Final Brief of Respondent-Appellant and (ii) Respondent's Final Brief of Respondent-Appellant comply with Rule 211(b).

PATTERSON & ASSOCIATES, P.A.

Jacqueline H. Patterson, I.D. # 12090
Nathaniel C. Farmer, I.D. #75976
1088 N. Church Street
Greenville, SC 29601
(864) 329-0548
Attorneys for Respondent-Appellant, Gene D. Morin, Conservator for Katelin Trippe

May 4, 2014

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PROOF OF SERVICE

I certify that I have served (i) Appellant's Final Brief of Respondent-Appellant and (ii) Respondent's Final Brief of Respondent-Appellant on all counsel of record by depositing a copy of the same in the United States Mail, postage prepaid, on May 6, 2015, addressed as follows:

Michael T. Coulter
Clarkson, Walsh, Terrell & Coulter, PA
1164A Woodruff Rd.
Greenville, SC 29607

O. W. Bannister
Bannister & Wyatt, LLC
Post Office Box 10007
Greenville, SC 29603

Jacqueline H. Patterson, I.D. # 12090
Nathaniel C. Farmer, I.D. #75976
PATTERSON & ASSOCIATES, P.A.
1088 N. Church Street
Greenville, SC 29601
(864) 329-0548
Attorneys for Respondent-Appellant