

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

DEC 16 2016

S.C. SUPREME COURT

Appellate Case No. 2016-002337

In the Matter of the Estate of Marion M. Kay

Edward D. Sullivan, as Personal Representative
of the Estate of Marion M. Kay Petitioner/Respondent,

v.

Martha Brown and Mary Moses Respondents/Petitioners

JOINT APPENDIX

Daryl G. Hawkins
Law Office of Daryl G. Hawkins, LLC
1331 Elmwood Avenue, Suite 305
Columbia, SC 29201-2150
(803) 733-3531

John Ferguson
Cox, Ferguson & Wham, LLC
107 E. Laurens Street
Laurens, SC 29360
(864) 984-2126

Attorneys for Petitioner/Respondent

Attorneys for Respondents/Petitioners

INDEX TO JOINT APPENDIX

Court of Appeals Substitute Opinion dated November 2, 2106	1
Court of Appeals Order substituting Opinion dated November 2, 2016	19
Court of Appeals Opinion dated June 15, 2016	21
Petition for Rehearing of Respondents/Appellants	39
Appellant-Respondent's Petition for Rehearing	54
Brief of Appellant/Respondent	Filed Separately
Respondents' Final Brief of Cross Appellants/Respondents.....	Filed Separately
Reply Brief of Appellant Respondent	Filed Separately
Final Brief of Cross-Appellants/Respondents	Filed Separately
Respondent's Brief of Appellant/Respondent	Filed Separately
Cross-Appellants'/Respondents' Final Reply Brief.....	Filed Separately
Record on Appeal	Filed Separately

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Estate of Marion M. Kay

Edward D. Sullivan, as Personal Representative of the
Estate of Marion M. Kay, Appellant-Respondent,

v.

Martha Brown and Mary Moses, Respondents-
Appellants.

Appellate Case No. 2013-002319

Appeal From Laurens County
Donald B. Hocker, Probate Court Judge
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 5414
Heard June 3, 2015 – Filed June 15, 2016
Withdrawn, Substituted and Refiled November 2, 2016

**AFFIRMED IN PART, REVERSED IN PART, and
REMANDED**

Daryl G. Hawkins, of the Law Office of Daryl G.
Hawkins, LLC, of Columbia, for Appellant.

John R. Ferguson, of Cox, Ferguson, & Wham, LLC, of
Laurens, for Respondents.

WILLIAMS, J.: In this cross-appeal, Edward D. Sullivan (Appellant), the personal representative of Marion Milam Kay's estate (the Estate), contests the circuit court's decision to affirm the probate court's order¹ reducing Appellant's compensation as well as denying Appellant's request for reimbursement of certain fees and expenses in connection with the settlement of the Estate. Martha Milam Brown and Mary Leona Milam Moses (collectively "Respondents"), two beneficiaries of the Estate, cross-appeal, arguing the probate court improperly (1) awarded Appellant a fee equivalent to 10% of the Estate when Appellant acted in bad faith; (2) failed to require Appellant to pay all costs and attorney's fees associated with the settling of the Estate; (3) failed to rule on certain beneficiaries' prospective entitlement to additional proceeds from the Estate should Respondents prevail on appeal; (4) limited Respondents' counsel's request for attorney's fees; and (5) granted Appellant equitable relief when Appellant acted with unclean hands. We affirm in part, reverse in part, and remand.

FACTS

This appeal arises out of Appellant's administration of the Estate of Marion Milam Kay who passed away on May 3, 2007. In her last will and testament, Kay appointed Appellant to serve as her personal representative (PR). As PR for the Estate, Appellant was charged with the responsibility of distributing Kay's assets, and in turn, Kay's will granted Appellant "reasonable compensation for the services rendered and reimbursement for reasonable expenses." Pursuant to the terms of Kay's will, her assets were distributed as follows: Lisbon Presbyterian Church received 25%; the Lisbon Presbyterian Cemetery Fund received 25%; the Presbyterian Home of South Carolina received 10%; her two step-grandchildren, Bart and Martha Heard, each received 10%; and Respondents each received 10%. Kay's will also granted her neighbor, Charles Copeland, an eight-month option to purchase a one-half undivided interest in an adjoining 330-acre parcel (the Farm) at fair market value. The Estate, valued at \$513,491, consisted primarily of Kay's

¹ Pursuant to section 62-1-308(a) of the South Carolina Code (Supp. 2014), the probate court's order was appealed to the circuit court, which affirmed the probate court in a Form 4 order. *See* § 62-1-308(a) ("A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county, subject to the provisions of Section 62-1-303."). Because Appellant and Respondents essentially take issue with the rulings of the probate court, we frame their arguments accordingly, acknowledging the procedural posture of this case.

home (the Home) and the ten acres² on which the Home was situated, as well as the Farm.

Prior to Appellant submitting a petition for settlement to the probate court, several issues arose in the administration of the Estate. Appellant stated Respondents, who owned the other one-half interest in the 330-acre parcel, were "bitterly disappointed" upon learning they did not inherit Kay's entire one-half interest in the Farm. Respondents claimed Brown was entitled to an additional five acres—as promised prior to Kay's death—and Kay did not have the right to devise her interest to anyone other than the heirs of W.H. Milam.³ Respondents' claim to a portion of the Farm was at odds with the option to purchase afforded to Copeland in Kay's will. Further, Appellant discovered that the owners of the Farm granted to each other a "right of first refusal" in 1972, which created a potential conflict with Copeland's option to purchase the Farm.

Because Kay bequeathed the Estate to numerous entities with varying interests, Appellant stated he had to determine the most equitable means of accommodating each beneficiary. According to Appellant, three of the residual beneficiaries, whose interests totaled 70% of the Estate, desired to receive their share of the Estate in cash rather than an interest in real estate. In an effort to sort out the competing claims, Appellant hired a surveyor and an appraiser and met several times with Copeland about exercising his option to purchase.

On May 2, 2008, approximately one year after Kay's death, Appellant submitted a proposal to Respondents and Copeland, subject to the approval of all the beneficiaries and the probate court. In the proposal, Appellant recommended conveying five acres to Brown at no cost, conveying the 46.85 acres that adjoined Copeland's land to Copeland at its appraised value, and offering the remainder of the Farm to Respondents at the appraised value. Appellant testified neither Brown nor Moses ever responded to this proposal. After a meeting with all the beneficiaries later that summer, Appellant drafted a second proposal and presented it to Respondents. Appellant stated Respondents again failed to respond or offer a counter-proposal, and at that time, Respondents retained counsel.

² The Home and 6.238 acres are separated from the remaining 3.762 acres (the Lot) by a public roadway.

³ Brown and Moses were W.H. Milam's daughters.

After twenty months passed, and without a resolution of the Estate, Appellant filed a partition and declaratory judgment action in circuit court on January 1, 2009. Appellant stated the purpose of filing this action was to determine the rights of the parties—arising out of Copeland's option to purchase, the 1972 right of first refusal, and other claims made by Respondents—and to generally clear title to the property so the Estate could be settled. Appellant amended the complaint on March 4, 2009, at which time Respondents filed a counterclaim asserting a right to five acres. Litigation ensued, and the parties engaged in discovery. After fifteen months, the parties retained a mediator in an attempt to resolve the dispute.

Just prior to mediation, Appellant reached an agreement with Rowland Milam, a relative of Respondents, to purchase the Estate's one-half undivided interest in the Farm, the Home, and the Lot. The Estate was not responsible for any repairs or rollback taxes, and the property was sold using a quitclaim deed. The final purchase price was \$367,000, approximately 94% of the 2007–2008 appraised value. All parties consented to the sale of the property. Appellant then made the final distribution of Kay's personal effects and filed the proposal for distribution with the probate court on November 12, 2010.

Respondents requested a hearing, which took place on February 2, 2011, and February 21, 2011. At the hearings, the probate court received testimony and evidence from the parties but disallowed the introduction of an affidavit prepared by Appellant detailing his administration of the Estate and an affidavit from R. David Massey, Esquire, in support of Appellant's request for compensation.

The court subsequently issued an order, finding Appellant "unnecessarily complicated the Estate by insisting on filing a partition action." The court ruled Appellant should not have filed a partition/declaratory judgment action, but rather should have deeded out the Estate to the beneficiaries by a deed of distribution because it found "no necessity for a sale of the real estate." Further, the probate court stated Appellant "unnecessarily complicated the Estate by converting an eight-month option to purchase the Estate's one-half interest in its real estate into an indefinite right to purchase and by giving the option holder the right to buy only a portion of the property contrary to the Will."

The probate court then ruled on Appellant's entitlement to fees and commissions, finding Appellant's claims for commissions were not adequately documented because he "had no method or formula for determining the amount for the four draws he gave himself other than by pulling a figure out of the air." Appellant's total draws from the Estate on the date of the hearing amounted to \$93,775, or

18.3% of the Estate's value, which the court found to be far greater than the statutory presumption of 5%. As a result, the court held "the commissions sought by [Appellant] [we]re clearly excessive," particularly when Appellant offered no alternative for valuing his services. The court acknowledged Appellant "did an excellent job in securing the sales price for the real estate" and had "exemplary credentials and good standing in the Bar," but this alone did not automatically justify the relief requested. In addition, the probate court found Appellant did not act in bad faith.

The probate court approved a prior payment to Appellant's law firm, Collins & Lacy, P.C., for \$13,499.58 and found the firm was entitled to an additional \$12,306.80. However, the court questioned the necessity of 204.6 hours of paralegal work. The probate court disallowed Appellant's request for attorney's fees for Appellant's counsel, noting that—although counsel represented Appellant well—it did not believe the Estate should pay these attorney's fees. Further, the probate court denied Appellant's request for costs pertaining to the petition for settlement and Appellant's expert witness fees. The court did, however, award attorney's fees to Respondent's counsel in the amount of \$19,860, to be paid from the Estate.

Based on the probate court's findings, it concluded Appellant had a right to retain \$51,300, or approximately 10% of the Estate's value. As a result, Appellant was required to refund the Estate—within thirty days of the order—all additional commissions, totaling \$42,475.⁴ After the probate court denied Appellant's Rule 59(e), SCRCF, motion to reconsider, Appellant and Respondents appealed to the circuit court. Following a hearing on July 19, 2013, the circuit court issued a Form 4 order in which it affirmed the order of the probate court and required all parties to bear the costs of appeal to the circuit court. Appellant and Respondents then appealed to this court.

STANDARD OF REVIEW

On appeal from a final order of the probate court, the circuit court must apply the same standard of review that an appellate court would apply on appeal. *In re Howard*, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993). The standard of review applicable to cases originating in the probate court depends upon whether the

⁴ The probate court held if Appellant completed the winding up of the Estate, then he would be entitled to an additional compensation of \$2,500 that could be deducted from the amount owed to the Estate.

underlying cause of action is at law or in equity. *In re Estate of Hyman*, 362 S.C. 20, 25, 606 S.E.2d 205, 207 (Ct. App. 2004); *In re Thames*, 344 S.C. 564, 568, 544 S.E.2d 854, 856 (Ct. App. 2001).

This appeal stemmed from Appellant's petition for settlement of the Estate, including a determination of Appellant's entitlement to commissions, expenses, and costs; each party's entitlement to attorney's fees; and Respondents' motion to remove Appellant as PR of the Estate. Both parties concede—and we agree—that the affirmative relief sought by the parties lies in equity. *See Morris v. Tidewater Land & Timber, Inc.*, 388 S.C. 317, 324, 696 S.E.2d 599, 603 (Ct. App. 2010) ("An action for an accounting sounds in equity."); *Dean v. Kilgore*, 313 S.C. 257, 259, 437 S.E.2d 154, 155 (1993) (finding action to remove a personal representative of estate was an equitable action). If a matter is decided by the probate court and affirmed by the circuit court, this court applies the two-judge rule. *Dean*, 313 S.C. at 259–60, 437 S.E.2d at 155–56. When the circuit court concurs with the probate court in an equity case, the standard of review for this court is whether any evidence reasonably supports the findings of the court below. *Id.* at 260, 437 S.E.2d at 155–56.

LAW/ANALYSIS

I. Appellant's Appeal

Appellant raises the following issues on appeal, arguing the circuit court erred in affirming the probate court because the probate court improperly (1) required Appellant to refund a portion of his compensation when Appellant acted reasonably, his compensation was substantiated by the evidence, and a refund would unjustly enrich certain beneficiaries; (2) unjustly enriched one or more beneficiaries by returning Appellant's compensation; (3) denied Appellant his due process rights because Respondents did not properly request that the probate court review his compensation; (4) denied Appellant's request for fees and expenses in connection with the hearing to settle the Estate; (5) improperly awarded Respondents' counsel attorney's fees; and (6) denied Appellant's Rule 59(e), SCRCF, motion to reconsider. We agree in part.

A. Appellant's Fee

Appellant first claims the probate court improperly reduced his compensation for administering and settling the Estate because he acted reasonably and his actions were substantiated by the evidence. We disagree.

Pursuant to section 62-3-719(a) of the South Carolina Code (Supp. 2014),

Unless otherwise approved by the court for extraordinary services, a personal representative shall receive for his care in the execution of his duties a sum from the probate estate funds not to exceed five percent of the appraised value of the personal property of the probate estate plus the sales proceeds of real property of the probate estate received on sales directed or authorized by will or by proper court order, except upon sales to the personal representative as purchaser.

However, "[t]he provisions of this section do not apply in a case where there is a contract providing for the compensation to be paid for such services, or *where the will otherwise directs*, or where the personal representative qualified to act before June 28, 1984." S.C. Code Ann. § 62-3-719(c) (Supp. 2014) (emphasis added). Item V(3) of Kay's will addressed the PR fee schedule and stated, "For its services as personal representative, the individual personal representative shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses."

In Appellant's petition for settlement to the probate court, he requested \$93,775 for commissions already paid and \$13,447.05 for additional commissions yet to be paid. The probate court concluded compensating Appellant for the amounts requested would total 21% of the Estate's value, which was far beyond the statutorily mandated 5% pursuant to section 62-3-719(a). Because Appellant failed to provide a legitimate basis for his fees, the probate court concluded a reduction of \$42,475 was warranted, bringing Appellant's commission to 10% of the Estate's value.

On appeal, Appellant has included all of the invoices, time sheets, affidavits, and correspondence in support of his claim that he is entitled to the compensation he requested from the probate court. Appellant also cites to Item VII of Kay's will to support his administrative decisions underpinning his fees. Item VII authorizes the PR

to exercise all powers in the management of [the]
Estate . . . upon such terms and conditions as to [Kay's]
personal representative may seem best, and to execute
and deliver any and all instruments and to do all acts

which [her] personal representative may deem proper or necessary to carry out the purposes of this [] will.

We recognize that Appellant encountered difficulties in administering certain assets of the Estate and made efforts to rectify these interests. While we do not take issue with Appellant's belief that he acted reasonably and in the best interests of the Estate, we also do not believe the probate court's decision to decrease Appellant's compensation based on the value of the Estate and the court's view of the evidence is without support. Accordingly, we find the probate court acted properly in establishing a reasonable compensation for Appellant's services as PR and affirm the circuit court's decision to uphold the probate court's award of compensation to Appellant in the amount of \$51,300.

B. Unjust Enrichment

Next, Appellant argues the circuit court's decision to require him to return a portion of his compensation unjustly enriches certain beneficiaries who requested cash from the Estate and have benefitted from the services of Appellant. We disagree.

Appellant states "a majority in interest of the residuary beneficiaries (70%) desired that the PR liquidate the real estate so that they could receive a cash distribution rather than an undivided interest in real estate. Accordingly[,] the [p]robate [c]ourt's ruling unjustly enriches these beneficiaries." As discussed in Respondents' cross-appeal, we do not believe requiring Appellant to return a portion of his fees to the Estate would unjustly enrich these beneficiaries because these funds are properly part of the Estate's assets. *See Dema v. Tenet Physician Servs.—Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009) ("A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another."). Therefore, Appellant's theory of restitution is inapplicable to the case at hand. *See Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 12, 14–15 (Ct. App. 1988) ("Unjust enrichment is usually a prerequisite for enforcement of the doctrine of restitution; if there is no basis for unjust enrichment, there is no basis for restitution."). In addition, we find it would be inequitable to punish these beneficiaries under the doctrine of unjust enrichment based upon their desire to have cash—which they are rightfully entitled to and which Appellant consented to—as opposed to a share in the real estate. Consistent with Kay's will, a return of these monies would be divided among these beneficiaries in accordance with the distribution scheme provided in her will. Accordingly, we affirm the circuit court's ruling to affirm the probate court on this issue.

C. Due Process

Appellant contends the probate court erred in requiring him to return a portion of his compensation because Respondents failed to comply with the proper procedure for contesting Appellant's entitlement to his compensation, thereby depriving him of reasonable notice and an opportunity to be heard. We disagree.

Section 62-3-721(a) of the South Carolina Code (Supp. 2014) outlines the proper procedure for contesting a PR's compensation:

After notice to all interested persons, on petition of an interested person or on appropriate motion if administration is under Part 5 [sections 62-3-501 et seq.], . . . the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

Appellant contends Respondents failed to file a formal petition in violation of section 62-3-721. Although our review of the record uncovers no formal petition, we conclude the parties were aware of the issues that would be brought before the probate court at the petition for settlement, including Respondents' disagreement with Appellant's compensation. *See Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002) ("Procedural due process mandates that a litigant be placed on notice of the issues which the court is to consider."). The following dialogue between the probate court and the parties affirms our conclusion on this issue:

Court: Who's the moving party in this [case]?

Appellant's Counsel: As I understand it, Ms. Moses and Ms. Brown have requested the hearing, your Honor.

....

Court: Apparently closing documents were sent out and as per statutory right, interested parties have the right to demand [a] hearing concerning the closing of the Estate.

And evidently, [Respondents' counsel], that's what you've done?

Respondents' Counsel: Yes, sir.

....

Court: Okay . . . Let me ask you, [Appellant's counsel]. Were all of the beneficiaries under the will noticed of today's hearing?

Appellant's Counsel: Yes they were, your honor.

....

Court: [W]hen I've done these hearings when there's been a demand, it typically in most cases just makes a little more sense, and I think the process goes a little smoother, is if the -- because typically, it is a complaint about something the PR's done or not done. So typically it runs a little smoother if we start the case off as if you [Appellant] are the moving party. So, if there's not a big hang-up with that, that's how I would like to do it.

Based on the foregoing, we hold any purported defects in notice were waived at the hearing when the parties acknowledged the issues before the court and proceeded with the hearing. *See Strickland v. Consol. Energy Prods. Co.*, 274 S.C. 554, 555, 265 S.E.2d 682, 683 (1980) ("A general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process."); *Connell v. Connell*, 249 S.C. 162, 166–67, 153 S.E.2d 396, 398–99 (1967) (stating if a defendant, by his appearance, "asks any relief which can only be granted on the hypothesis that the court has jurisdiction of his person, then he has made a general appearance . . . and waives any defect in the jurisdiction arising either from the want of service on the defendant or from a defect therein"). Further, based on the length of the hearing, as well as the exhibits and documentation submitted to the probate court, we find Appellant had ample notice and an opportunity to be heard and, thus, affirm the circuit court's decision on this issue. *See Blanton*, 351 S.C. at 542, 570 S.E.2d at 569 ("Procedural due process contemplates notice, a reasonable opportunity to be heard, and a fair hearing before a legally constituted impartial tribunal.").

D. Appellant's Counsel's Attorney's Fees and Expenses

Appellant claims the circuit court erroneously denied his request for his counsel's attorney's fees, expert witness fees, and certain costs for time and preparation on the petition for settlement. We disagree.

In support of his claim for attorney's fees and expenses, Appellant cites section 62-3-720 of the South Carolina Code (Supp. 2014), which states, "If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred."

While we agree that section 62-3-720 affords a PR reimbursement for costs and attorney's fees in connection with the administration and protection of the Estate, we find the probate court properly determined which fees and costs would be borne by the Estate and which would be borne by Appellant. We concur with the probate court's finding that Appellant's counsel's fees primarily stemmed from the contest between Appellant and Respondents over the amount of his compensation and, thus, were properly assessed against Appellant in his individual capacity. Further, we conclude this statute was intended to cover attorney's fees and expenses in connection with prosecuting and defending claims against the Estate, as opposed to the situation before the probate court. *See* S.C. Code Ann. § 62-3-715(20) (Supp. 2014) (providing a PR, "acting reasonably for the benefit of the interested persons, may properly . . . prosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties").

To that end, we find the probate court properly approved the attorney's fees already paid to Collins and Lacy in the amount of \$13,499.58 and approved of an additional \$12,306.80 to Collins and Lacy for attorney's fees and costs that were incurred as part of Appellant's administration of the Estate. We agree with the probate court that those fees and costs were properly borne by the Estate and find that award reasonable given the circumstances and the overall value of the Estate. We also note that—unlike sections 62-3-715(20) and -720—section 62-3-721 makes no provision for the payment of a PR's attorney's fees or expenses connected with a proceeding to review the PR's compensation. *See* S.C. Code Ann. § 62-3-721(a) (Supp. 2014) ("After notice to all interested persons, . . . the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor, or other specialized agent or assistant, the

reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.").

We also find the probate court properly considered the nature of the testimony and the role of other witnesses in choosing which fees to assess against the Estate and against Appellant. The probate court denied Appellant's request for expert witness fees for an appraiser and consultant, both of whom testified at the hearing. While the probate court required Appellant to pay for the appraiser's and the forestry consultant's expert witness fees connected with the hearing, it also required the Estate to pay \$5,000 for the appraisal of Kay's property and \$750 for the forestry consultant's work valuing the timber on Kay's property. We agree the appraisal and consultant work were costs directly connected with the valuation of the Estate, and as such, were legitimate expenses properly paid out of the Estate's assets. We further concur with the probate court's decision to assess the expert fees against Appellant as their work product and valuations were not contested issues at the hearing. Based on the foregoing, we uphold the circuit court's decision to affirm the probate court on this issue.

E. Respondents' Counsel's Attorney's Fees

Appellant contests the probate court's decision to award Respondents' counsel attorney's fees based on the common fund doctrine. We agree.

"The common fund doctrine allows a court in its equitable jurisdiction to award reasonable attorney's fees to a party who, at his own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common fund or common property." *Layman v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329 (2008) (citing *Johnson v. Williams*, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941)). "Attorneys' fees awarded pursuant to the common fund doctrine come directly out of the common fund created or preserved." *Id.* (citation omitted). The rationale for awarding attorneys' fees in this manner is based on the principle that "one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses." *Id.* (citation omitted).

However, the allowance of attorney's fees out of a common fund is subject to abuse and is only permitted in exceptional cases when required to promote justice.

Johnson, 196 S.C. at 532, 14 S.E.2d at 23. Although the attorney's services might have benefitted all parties, fees cannot be awarded when the interests of the parties are adverse. *Bedford v. Citizens & S. Nat'l Bank of S.C.*, 203 S.C. 507, 515, 28 S.E.2d 405, 407 (1943). Before an attorney may be compensated out of a common fund, a contract of employment must exist, whether express or implied in law, between the attorney and all parties with an interest in the fund. *Johnson*, 196 S.C. at 532–33, 14 S.E.2d at 23.

Citing to the common fund doctrine, the probate court awarded Respondents attorney's fees and held, "Equity requires that all heirs pay for the work of Defendants' attorney[] because his work preserved and protected a common fund[] not just for the benefit of Defendants, but for all heirs." We find the probate court improperly applied this doctrine.

Respondents' decision to hire counsel was based upon their disagreement with the division of the Estate and the amount of Appellant's compensation. Because the common fund doctrine requires all interested parties to have the same interests, we do not believe the probate court should have required the Estate to pay for Respondents' attorney's fees. Several beneficiaries were in favor of selling the real estate as opposed to an in-kind distribution. Specifically, Penelope Arnold, the director of the Presbyterian Home of South Carolina's charitable foundation, testified "[the Presbyterian Home] do[es] not have the wherewithal financially to pay property taxes, to keep the land up, which we would be responsible for doing or paying someone to do that. And so the preference is always to sell real estate and receive the proceeds." Arnold further stated that, at a prior meeting with all the beneficiaries to resolve issues with the Estate's division, she and Reverend Hunter, of Lisbon Presbyterian Church, were not well-received by Respondents based on their preferences over the Estate's division. Lisbon Presbyterian Church also preferred to receive its 25% share of the Estate in cash.

In addition, neither of these beneficiaries took issue with Appellant's compensation as did Respondents. Furthermore, while Respondents' counsel's efforts resulted in monies being returned to the Estate, which arguably was for the benefit of all the beneficiaries, we find there was no "contract of employment, whether express or implied in law, between the attorney and all parties with an interest in the fund." *Peppertree Resorts, Ltd. v. Cabana Ltd. P'ship*, 315 S.C. 36, 41, 431 S.E.2d 598, 601 (Ct. App. 1993). If all the beneficiaries agreed on the distribution plan and took issue with Appellant's compensation, then the common fund doctrine would clearly apply. However, based on the foregoing evidence, we conclude Respondents—not the Estate—should have borne the cost of Respondents'

representation. As a result, we reverse the circuit court's decision to uphold the award of Respondents' counsel's attorney's fees pursuant to the common fund doctrine.

F. Rule 59(e) motion

Last, Appellant claims the circuit court erred in affirming the probate court's denial of Appellant's Rule 59(e), SCRCP, motion. We find this argument to be without merit.

In the circuit court's order, it did not rule on whether the probate court properly denied Appellant's post-trial Rule 59(e) motion. Rather, the circuit court—as the court of next review—properly addressed the issues that the parties raised to the probate court. As a result, we find Appellant's attempt to raise this as legal error to be misplaced and without merit. *See* S.C. Code Ann. § 14-8-250 (Supp. 2014) (noting "the [c]ourt need not address a point which is manifestly without merit"); Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit.").

II. Respondents' Cross-Appeal

Respondents raise the following issues on cross-appeal, claiming the circuit court erred in affirming the probate court because the probate court (1) improperly awarded Appellant a fee equivalent to 10% of the Estate when Appellant acted in bad faith; (2) failed to require Appellant to pay all costs and attorney's fees associated with the settling of the Estate; (3) failed to rule on certain beneficiaries' prospective entitlement to additional proceeds from the Estate should Respondents prevail on appeal; (4) limited Respondents' counsel's request for attorney's fees; and (5) granted Appellant equitable relief when Appellant acted with unclean hands. We disagree and address each argument in turn.

A. Appellant's Fee & Bad Faith

Respondents first claim the probate court erred in awarding Appellant a 10% commission because Appellant acted in bad faith. We disagree.

As stated above, we find the probate court properly considered the requisite factors and statutory considerations in its decision to award Appellant a fee equivalent to 10% of the Estate's value. While we recognize section 62-3-719(a) limits a PR's fee to 5% of the Estate, we believe the specific circumstances and competing interests that otherwise prolonged the settling of "a fairly basic" estate merited an

imposition of a higher fee. Further, we find a 10% fee was "reasonable compensation" for Appellant's services as stated in Kay's will.

Although Respondents contend Appellant acted in bad faith in the administration of the Estate, we find these allegations to be unsubstantiated and a mischaracterization by Respondents regarding Appellant's efforts as PR. Respondents claim Appellant acted in "violation of his fiduciary duty," "boost[ed] his commission," "bilk[ed] the Estate," "loot[ed] the Estate," and generally incurred "shocking charges . . . against the Estate." Although Appellant likely could have settled the Estate in a timelier and less costly manner, Appellant presented substantiated evidence that he worked diligently over a course of three years to accommodate all interested parties. Further, as noted by the probate court in its order and affirmed by the circuit court on appeal, Appellant has "exemplary credentials and good standing in the Bar." Respondents' contentions that Appellant acted in bad faith and violated his fiduciary duty to the Estate are not well-founded, particularly when Appellant submitted evidence he consulted with legal counsel on the proper courses of action in administering the Estate; Appellant attempted to meet with all the beneficiaries and create a compromise prior to filing a partition action; and Appellant "did an excellent job in securing the sales price for the real estate."

Based on the foregoing, we find Appellant did not improperly exercise his power in connection with the Estate and presented sufficient evidence to demonstrate he did not breach his duty to the Estate and its beneficiaries. *See* S.C. Code Ann. § 62-3-703(a) (Supp. 2014) (stating a PR has the "duty to settle and distribute the estate . . . as expeditiously and efficiently as is consistent with the best interests of the estate" and the "successors to the estate"). Accordingly, we affirm the circuit court's decision to uphold the probate court's findings on this issue.

B. PR's Court Costs, Attorney's Fees, and Post-Judgment Interest

Next, Respondents contend the probate court erred in failing to require Appellant to pay all costs associated with the proceedings before the probate court, including attorney's fees, court costs, and post-judgment interest. We find this argument unpreserved for our review.

Respondents' argument on this alleged ground of error is conclusory, only stating it would be "grossly unfair for the heirs to pay for the PR's attempts to increase his compensation and further obscure his wrongdoing," and "[i]f the PR chooses to violate his duties and maximize his own interests at the expense of the Estate by

filing an appeal, the heirs, who gain nothing by the appeal, should not suffer because of that." We find these two sentences are insufficient to assert legal error and decline to address Respondents' argument on this ground. *See Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (noting when an appellant fails to cite any supporting authority for a position and makes conclusory arguments, the appellant abandons the issue on appeal); Rule 208(b), SCACR (stating that, for appellate review of an issue to occur, the issue must be set forth in a statement of issues and argument).

C. Limitation of Recovery

Respondents argue the probate court erred in failing to rule on certain beneficiaries' prospective entitlement to additional proceeds from the Estate should Respondents prevail on appeal. We find this issue is not properly before this court.

Respondents did not raise this issue either to the probate court or to the circuit court. Accordingly, we find it is unpreserved for review on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review." (citation omitted)). Further, Respondents cite no legal authority to support their position, instead relying on a brief factual argument, which we find insufficient as a matter of law. *See Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593–94 (Ct. App. 2005) (finding party abandoned an issue on appeal by failing to cite any supporting authority and making only conclusory arguments).

D. Respondents' Attorney's Fees

Next, Respondents claim the probate court improperly limited their attorney's post-trial request for additional attorney's fees, citing to the common fund doctrine. Because we reverse the probate court's award of attorney's fees to Respondents' counsel, we decline to address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate courts need not address remaining issues when the resolution of a prior issue is dispositive).

E. Unclean Hands

Last, Respondents claim the probate court erred in granting Appellant equitable relief because Appellant acted with unclean hands. We find this argument is unpreserved for our review.

Neither the probate court nor the circuit court ruled on whether Appellant acted with unclean hands. Respondents' failure to raise this issue to either court precludes this court's review on appeal. See *Wilke*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review." (citation omitted)); *Rock Hill Nat'l Bank v. Honeycutt*, 289 S.C. 98, 104, 344 S.E.2d 875, 879 (Ct. App. 1986) (stating because the theory of unclean hands was not pled or raised to the trial judge, it could not be raised on appeal).

CONCLUSION

Accordingly, we **AFFIRM** the circuit court's decision upholding the probate court's order as to all issues except Respondent's counsel's attorney's fees. Because the common fund doctrine does not apply under these facts, we **REVERSE** the award of attorney's fees to Respondents' counsel. Based on our conclusion that Respondents—not the Estate—must pay for Respondent's counsel's attorney's fees, we **REMAND** the issue of each beneficiary's share of the Estate to the probate court for a determination consistent with this court's opinion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

HUFF, J., concurs.

FEW, A.J., concurring in part and dissenting in part: I concur with the result reached by the majority in all but two respects. First, I would reverse the decision to deny Sullivan's request for attorney's fees and expenses for the petition for settlement. In my view, the probate judge's denial of Sullivan's request for fees and expenses was driven by his disagreement with Sullivan's decision to file a partition action and ultimately sell the estate's interest in the real estate. Sullivan had the right to partition the land pursuant to Kay's will and the probate code and, thus, it was within his discretion to do so. Additionally, as the probate court found in its order and the majority explains in Part II. A of its opinion, Sullivan did not act in bad faith during his administration of the estate.

Moreover, the probate code required Sullivan to file a petition for settlement. See S.C. Code Ann. § 62-3-1001(a)(3) (Supp. 2015) (requiring a personal representative to file "an application for settlement of the estate to consider the final accounting or approve an accounting and distribution and adjudicate the final settlement and distribution of the estate"). Moses and Brown requested the hearing on Sullivan's petition for settlement, and at the hearing, Sullivan defended his

decision to seek a partition and sell the real estate. Because the probate code provides a personal representative who "defends or prosecutes any proceeding in good faith" is "entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred," S.C. Code Ann. § 62-3-720 (Supp. 2015), and Sullivan filed the petition for settlement and appeared at the hearing in good faith, I would find he is entitled to reasonable attorney's fees and expenses.

Second, I question whether the standard of review in an appeal from an equity case is any different simply because two judges have made the same factual determination. The first time the phrase "two-judge rule" was used in this State was in *Nienow v. Nienow*, 268 S.C. 161, 172, 232 S.E.2d 504, 510 (1977). Describing the substance of the rule, the *Nienow* Court stated "concurrent findings of fact by the trial judge and master are binding on this Court unless they are without evidentiary support or against the clear preponderance of the evidence." 268 S.C. at 170, 232 S.E.2d at 509. That description differs from the ordinary standard of reviewing equity cases only by the use of the word "clear." See *Lewis v. Lewis*, 392 S.C. 381, 390-91, 709 S.E.2d 650, 654-55 (2011) (explaining that in equity appeals there is "a burden on an appellant to satisfy the appellate court that the preponderance of the evidence is against the finding of the trial court"). The use of the word "clear" in *Nienow* does not distinguish the rule recited there from the rule applied in *Lewis*. As former Chief Justice Toal noted in her concurrence in *Lewis*, "our standard of review in a particular case depends on the nature of the underlying action and has little to do with the semantics concerning the method by which the case reaches the Court." 392 S.C. at 398, 709 S.E.2d at 658 (Toal, C.J., concurring). I would apply the standard of review from *Lewis*, and I would reach the same result as the majority on all issues except Sullivan's request for attorney's fees and expenses for the petition for settlement.

The South Carolina Court of Appeals

In the Matter of the Estate of Marion M. Kay

Edward D. Sullivan, as Personal Representative of the
Estate of Marion M. Kay, Appellant-Respondent,

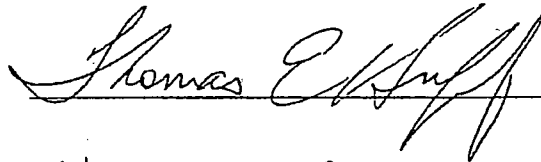
v.

Martha Brown and Mary Moses, Respondents-
Appellants.

Appellate Case No. 2013-002319

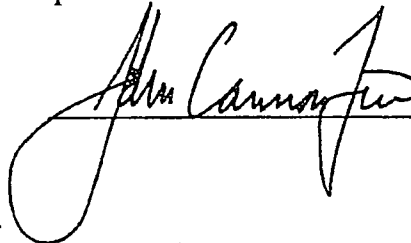
ORDER

After careful consideration of Appellant's and Respondents' petitions for rehearing, we deny both parties' petitions for rehearing. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.

 J.

 J.

Because of the substantive changes made to the majority opinion, I would grant rehearing and substitute the new opinions.

 A.J.

FILED
App.019
November 2, 2016 27

Columbia, South Carolina

cc:

Daryl G. Hawkins, Esquire

John R. Ferguson, Esquire

The Honorable Frank R. Addy, Jr.

The Honorable Donald B. Hocker

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

In the Matter of the Estate of Marion M. Kay

Edward D. Sullivan, as Personal Representative of the
Estate of Marion M. Kay, Appellant-Respondent,

v.

Martha Brown and Mary Moses, Respondents-
Appellants.

Appellate Case No. 2013-002319

Appeal From Laurens County
Donald B. Hocker, Probate Court Judge
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 5414
Heard June 3, 2015 – Filed June 15, 2016

**AFFIRMED IN PART, REVERSED IN PART, and
REMANDED**

Daryl G. Hawkins, of the Law Office of Daryl G.
Hawkins, LLC, of Columbia, for Appellant.

John R. Ferguson, of Cox, Ferguson, & Wham, LLC, of
Laurens, for Respondents.

WILLIAMS, J.: In this cross-appeal, Edward D. Sullivan (Appellant), the personal representative of Marion Milam Kay's estate (the Estate), contests the

circuit court's decision to affirm the probate court's order¹ reducing Appellant's compensation as well as denying Appellant's request for reimbursement of certain fees and expenses in connection with the settlement of the Estate. Martha Milam Brown and Mary Leona Milam Moses (collectively "Respondents"), Kay's sisters and two beneficiaries of the Estate, cross-appeal, arguing the probate court improperly (1) awarded Appellant a fee equivalent to 10% of the Estate when Appellant acted in bad faith; (2) failed to require Appellant to pay all costs and attorney's fees associated with the settling of the Estate; (3) failed to rule on certain beneficiaries' prospective entitlement to additional proceeds from the Estate should Respondents prevail on appeal; (4) limited Respondents' counsel's request for attorney's fees; and (5) granted Appellant equitable relief when Appellant acted with unclean hands. We affirm in part, reverse in part, and remand.

FACTS

This appeal arises out of Appellant's administration of the Estate of Marion Milam Kay who passed away on May 3, 2007. In her last will and testament, Kay appointed Appellant to serve as her personal representative (PR). As PR for the Estate, Appellant was charged with the responsibility of distributing Kay's assets, and in turn, Kay's will granted Appellant "reasonable compensation for the services rendered and reimbursement for reasonable expenses." Pursuant to the terms of Kay's will, her assets were distributed as follows: Lisbon Presbyterian Church received 25%; the Lisbon Presbyterian Cemetery Fund received 25%; the Presbyterian Home of South Carolina received 10%; her two step-grandchildren, Bart and Martha Heard, each received 10%; and Respondents each received 10%. Kay's will also granted her neighbor, Charles Copeland, an eight-month option to purchase a one-half undivided interest in an adjoining 330-acre parcel (the Farm) at fair market value. The Estate, valued at \$513,491, consisted primarily of Kay's

¹ Pursuant to section 62-1-308(a) of the South Carolina Code (Supp. 2014), the probate court's order was appealed to the circuit court, which affirmed the probate court in a Form 4 Order. *See* § 62-1-308(a) ("A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county, subject to the provisions of Section 62-1-303."). Because Appellant and Respondents essentially take issue with the rulings of the probate court, we frame their arguments accordingly, acknowledging the procedural posture of this case.

home (the Home) and the ten acres² on which the Home was situated, as well as the Farm.

Prior to Appellant submitting a petition for settlement to the probate court, several issues arose in the administration of the Estate. Appellant stated Respondents, who owned the other one-half interest in the 330-acre parcel, were "bitterly disappointed" upon learning they did not inherit Kay's entire one-half interest in the Farm. Respondents claimed Brown was entitled to an additional five acres—as promised prior to Kay's death—and Kay did not have the right to devise her interest to anyone other than the heirs of W.H. Milam.³ Respondents' claim to a portion of the Farm was at odds with the option to purchase afforded to Copeland in Kay's will. Further, Appellant discovered that the owners of the Farm granted to each other a "right of first refusal" in 1972, which created a potential conflict with Copeland's option to purchase the Farm.

Because Kay bequeathed the Estate to numerous entities with varying interests, Appellant stated he had to determine the most equitable means of accommodating each beneficiary. According to Appellant, three of the residual beneficiaries, whose interests totaled 70% of the Estate, desired to receive their share of the Estate in cash rather than an interest in real estate. In an effort to sort out the competing claims, Appellant hired a surveyor and an appraiser and met several times with Copeland about exercising his option to purchase.

On May 2, 2008, approximately one year after Kay's death, Appellant submitted a proposal to Respondents and Copeland, subject to the approval of all the beneficiaries and the probate court. In the proposal, Appellant recommended conveying five acres to Brown at no cost, conveying the 46.85 acres that adjoined Copeland's land to Copeland at its appraised value, and offering the remainder of the Farm to Respondents at the appraised value. Appellant testified neither Brown nor Moses ever responded to this proposal. After a meeting with all the beneficiaries later that summer, Appellant drafted a second proposal and presented it to Respondents. Appellant stated Respondents again failed to respond or offer a counter-proposal, and at that time, Respondents retained counsel.

² The Home and 6.238 acres are separated from the remaining 3.762 acres (the Lot) by a public roadway.

³ Kay, Brown, and Moses were W.H. Milam's daughters.

After twenty months passed, and without a resolution of the Estate, Appellant filed a partition and declaratory judgment action in circuit court on January 1, 2009. Appellant stated the purpose of filing this action was to determine the rights of the parties—arising out of Copeland's option to purchase, the 1972 right of first refusal, and other claims made by Respondents—and to generally clear title to the property so the Estate could be settled. Appellant amended the complaint on March 4, 2009, at which time Respondents filed a counterclaim asserting a right to five acres. Litigation ensued, and the parties engaged in discovery. After fifteen months, the parties retained a mediator in an attempt to resolve the dispute.

Just prior to mediation, Appellant reached an agreement with Rowland Milam, a relative of Respondents, to purchase the Estate's one-half undivided interest in the Farm, the Home, and the Lot. The Estate was not responsible for any repairs or rollback taxes, and the property was sold using a quitclaim deed. The final purchase price was \$367,000, approximately 94% of the 2007–2008 appraised value. All parties consented to the sale of the property. Appellant then made the final distribution of Kay's personal effects and filed the proposal for distribution with the probate court on November 12, 2010.

Respondents requested a hearing, which took place on February 2, 2011, and February 21, 2011. At the hearings, the probate court received testimony and evidence from the parties but disallowed the introduction of an affidavit prepared by Appellant detailing his administration of the Estate and an affidavit from R. David Massey, Esquire, in support of Appellant's request for compensation.

The court subsequently issued an order, finding Appellant "unnecessarily complicated the Estate by insisting on filing a partition action." The court ruled Appellant should not have filed a partition/declaratory judgment action, but rather should have deeded out the Estate to the beneficiaries by a deed of distribution because it found "no necessity for a sale of the real estate." Further, the probate court stated Appellant "unnecessarily complicated the Estate by converting an eight-month option to purchase the Estate's one-half interest in its real estate into an indefinite right to purchase and by giving the option holder the right to buy only a portion of the property contrary to the Will."

The probate court then ruled on Appellant's entitlement to fees and commissions, finding Appellant's claims for commissions were not adequately documented because he "had no method or formula for determining the amount for the four draws he gave himself other than by pulling a figure out of the air." Appellant's total draws from the Estate on the date of the hearing amounted to \$157,179, or 18.3% of the Estate's value, which the court found to be far greater than the

statutory presumption of 5%. As a result, the court held "the commissions sought by [Appellant] [we]re clearly excessive," particularly when Appellant offered no alternative for valuing his services. The court acknowledged Appellant "did an excellent job in securing the sales price for the real estate" and had "exemplary credentials and good standing in the Bar," but this alone did not automatically justify the relief requested. In addition, the probate court found Appellant did not act in bad faith.

The probate court approved a prior payment to Appellant's law firm, Collins & Lacy, P.C., for \$13,499.58 and found the firm was entitled to an additional \$12,306.80. However, the court questioned the necessity of 204.6 hours of paralegal work. The probate court disallowed Appellant's request for attorney's fees for Appellant's counsel, noting that—although counsel represented Appellant well—it did not believe the Estate should pay these attorney's fees. Further, the probate court denied Appellant's request for costs pertaining to the petition for settlement and Appellant's expert witness fees. The court did, however, award attorney's fees to Respondent's counsel in the amount of \$19,860, to be paid from the Estate.

Based on the probate court's findings, it concluded Appellant had a right to retain \$51,300, or approximately 10% of the Estate's value. As a result, Appellant was required to refund the Estate—within thirty days of the order—all additional commissions, totaling \$42,475.⁴ After the probate court denied Appellant's Rule 59(e), SCRCP, motion to reconsider, Appellant and Respondents appealed to the circuit court. Following a hearing on July 19, 2013, the circuit court issued a Form 4 order in which it affirmed the order of the probate court and required all parties to bear the costs of appeal to the circuit court. Appellant and Respondents then appealed to this court.

STANDARD OF REVIEW

On appeal from a final order of the probate court, the circuit court must apply the same standard of review that an appellate court would apply on appeal. *In re Howard*, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993). The standard of review applicable to cases originating in the probate court depends upon whether the underlying cause of action is at law or in equity. *In re Estate of Hyman*, 362 S.C.

⁴ The probate court held if Appellant completed the winding up of the Estate, then he would be entitled to an additional compensation of \$2,500 that could be deducted from the amount owed to the Estate.

20, 25, 606 S.E.2d 205, 207 (Ct. App. 2004) (citation omitted); *In re Thames*, 344 S.C. 564, 568, 544 S.E.2d 854, 856 (Ct. App. 2001) (citation omitted).

On appeal from an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses that no evidence supports them. *Neely v. Thomasson*, 365 S.C. 345, 349–50, 618 S.E.2d 884, 886 (2005). Questions of law may be decided by this court without deference to the lower court. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). The standard of review for an action at law is the same whether the facts are found by a jury or the judge sitting without a jury. *See Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 567–68, 211 S.E.2d 876, 877 (1975) (stating in an action at law, the judge's findings are equivalent to a jury's findings for purposes of appellate review). On the other hand, if the probate proceeding is equitable in nature, then the circuit court—on appeal—may make factual findings according to its own view of the preponderance of the evidence. *Howard*, 315 S.C. at 361–62, 434 S.E.2d 254, 257–58 (citation omitted).

The underlying nature of the matter before the probate court was the settlement of the Estate; Appellant's entitlement to commissions, expenses, and costs; and each party's entitlement to attorney's fees. On appeal to the circuit court and this court, Appellant and Respondents primarily contest the probate court's decisions regarding Appellant's commissions and expenses, as well as its ruling on attorney's fees. Because the proceeding in this case involved claims for money due, we find this is an action at law. *See id.* at 362, 434 S.E.2d at 258 (finding a claim for money owed to a creditor of an estate was triable at law with an attendant right to a trial by jury); *see also Weatherford v. Price*, 340 S.C. 572, 578, 532 S.E.2d 310, 313 (Ct. App. 2000) (stating a suit to recover attorney's fees is an action at law).

LAW/ANALYSIS

I. Appellant's Appeal

Appellant raises the following issues on appeal, arguing the circuit court erred in affirming the probate court because the probate court improperly (1) required Appellant to refund a portion of his compensation when Appellant acted reasonably, his compensation was substantiated by the evidence, and a refund would unjustly enrich certain beneficiaries; (2) unjustly enriched one or more beneficiaries by returning Appellant's compensation; (3) denied Appellant his due process rights because Respondents did not properly request that the probate court review his compensation; (4) denied Appellant's request for fees and expenses in connection with the hearing to settle the Estate; (5) improperly awarded

Respondents' counsel attorney's fees; and (6) denied Appellant's Rule 59(e), SCRCF, motion to reconsider. We agree in part.

A. Appellant's Fee

Appellant first claims the probate court improperly reduced his compensation for administering and settling the Estate because he acted reasonably and his actions were substantiated by the evidence. We disagree.

Pursuant to section 62-3-719(a) of the South Carolina Code (Supp. 2014),

Unless otherwise approved by the court for extraordinary services, a personal representative shall receive for his care in the execution of his duties a sum from the probate estate funds not to exceed five percent of the appraised value of the personal property of the probate estate plus the sales proceeds of real property of the probate estate received on sales directed or authorized by will or by proper court order, except upon sales to the personal representative as purchaser.

However, "[t]he provisions of this section do not apply in a case where there is a contract providing for the compensation to be paid for such services, or *where the will otherwise directs*, or where the personal representative qualified to act before June 28, 1984." S.C. Code Ann. § 62-3-719(c) (Supp. 2014) (emphasis added). Item V(3) of Kay's will addressed the PR fee schedule and stated, "For its services as personal representative, the individual personal representative shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses."

In Appellant's petition for settlement to the probate court, he requested \$93,775 for commissions already paid and \$13,447.05 for additional commissions yet to be paid. The probate court concluded compensating Appellant for the amounts requested would total 21% of the Estate's value, which was far beyond the statutorily mandated 5% pursuant to section 62-3-719(a). Because Appellant failed to provide a legitimate basis for his fees, the probate court concluded a reduction of \$42,475 was warranted, bringing Appellant's commission to 10% of the Estate's value.

On appeal, Appellant has included all of the invoices, time sheets, affidavits, and correspondence in support of his claim that he is entitled to the compensation he requested from the probate court. Appellant also cites to Item VII of Kay's will to

support his administrative decisions underpinning his fees. Item VII authorizes the PR

to exercise all powers in the management of [the] Estate . . . upon such terms and conditions as to [Kay's] personal representative may seem best, and to execute and deliver any and all instruments and to do all acts which [her] personal representative may deem proper or necessary to carry out the purposes of this [] will.

We recognize that Appellant encountered difficulties in administering certain assets of the Estate and made efforts to rectify these interests.⁵ While we do not take issue with Appellant's belief that he acted reasonably and in the best interests of the Estate, we also do not believe the probate court's decision to decrease Appellant's compensation based on the value of the Estate and the court's view of the evidence is without support. Accordingly, we find the probate court acted within its discretion in establishing a reasonable compensation for Appellant's services as PR and affirm the circuit court's decision to uphold the probate court's award of compensation to Appellant in the amount of \$51,300.

B. Unjust Enrichment

Next, Appellant argues the circuit court's decision to require him to return a portion of his compensation unjustly enriches certain beneficiaries who requested cash from the Estate and have benefitted from the services of Appellant. We disagree.

Appellant states "a majority in interest of the residuary beneficiaries (70%) desired that the PR liquidate the real estate so that they could receive a cash distribution rather than an undivided interest in real estate. Accordingly[,] the [p]robate [c]ourt's ruling unjustly enriches these beneficiaries." As discussed in

⁵ Appellant takes issue with the probate court's finding that he should have issued a deed of distribution to the beneficiaries for the real estate in lieu of filing a partition/declaratory judgment action and seeking to liquidate the real estate. Without ruling on the proper course of action, we are mindful of section 62-3-907(A) of the South Carolina Code (Supp. 2014), which states, "If distribution in kind is made, the personal representative *must* execute a deed of distribution with respect to real property" (emphasis added).

Respondents' cross-appeal, we do not believe requiring Appellant to return a portion of his fees to the Estate would unjustly enrich these beneficiaries because these funds are properly part of the Estate's assets. *See Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009) ("A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another."). Therefore, Appellant's theory of restitution is inapplicable to the case at hand. *See Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 12, 14–15 (Ct. App. 1988) ("Unjust enrichment is usually a prerequisite for enforcement of the doctrine of restitution; if there is no basis for unjust enrichment, there is no basis for restitution."). In addition, we find it would be inequitable to punish these beneficiaries under the doctrine of unjust enrichment based upon their desire to have cash—which they are rightfully entitled to and which Appellant consented to—as opposed to a share in the real estate. Consistent with Kay's will, a return of these monies would be divided among these beneficiaries in accordance with the distribution scheme provided in her will. Accordingly, we affirm the circuit court's ruling to affirm the probate court on this issue.

C. Due Process

Appellant contends the probate court erred in requiring him to return a portion of his compensation because Respondents failed to comply with the proper procedure for contesting Appellant's entitlement to his compensation, thereby depriving him of reasonable notice and an opportunity to be heard. We disagree.

Section 62-3-721(a) of the South Carolina Code (Supp. 2014) outlines the proper procedure for contesting a PR's compensation:

After notice to all interested persons, on petition of an interested person or on appropriate motion if administration is under Part 5 [sections 62-3-501 et seq.], . . . the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

Appellant contends Respondents failed to file a formal petition in violation of section 62-3-721. Although our review of the record uncovers no formal petition, we conclude the parties were aware of the issues that would be brought before the

probate court at the petition for settlement, including Respondents' disagreement with Appellant's compensation. See *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002) ("Procedural due process mandates that a litigant be placed on notice of the issues which the court is to consider." (citation omitted)). The following dialogue between the probate court and the parties affirms our conclusion on this issue:

Court: Who's the moving party in this [case]?

Appellant's Counsel: As I understand it, Ms. Moses and Ms. Brown have requested the hearing, your Honor.

....

Court: Apparently closing documents were sent out and as per statutory right, interested parties have the right to demand [a] hearing concerning the closing of the Estate. And evidently, [Respondents' counsel], that's what you've done?

Respondents' Counsel: Yes, sir.

....

Court: Okay . . . Let me ask you, [Appellant's counsel]. Were all of the beneficiaries under the will noticed of today's hearing?

Appellant's Counsel: Yes they were, your honor.

....

Court: [W]hen I've done these hearings when there's been a demand, it typically in most cases just makes a little more sense, and I think the process goes a little smoother, is if the -- because typically, it is a complaint about something the PR's done or not done. So typically it runs a little smoother if we start the case off as if you [Appellant] are the moving party. So, if there's not a big hang-up with that, that's how I would like to do it.

Based on the foregoing, we hold any purported defects in notice were waived at the hearing when the parties acknowledged the issues before the court and proceeded

with the hearing. *See Strickland v. Consol. Energy Prods. Co.*, 274 S.C. 554, 555, 265 S.E.2d 682, 683 (1980) ("A general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process."); *Connell v. Connell*, 249 S.C. 162, 166–67, 153 S.E.2d 396, 398–99 (1967) (stating if a defendant, by his appearance, "asks any relief which can only be granted on the hypothesis that the court has jurisdiction of his person, then he has made a general appearance . . . and waives any defect in the jurisdiction arising either from the want of service on the defendant or from a defect therein"). Further, based on the length of the hearing, as well as the exhibits and documentation submitted to the probate court, we find Appellant had ample notice and an opportunity to be heard and, thus, affirm the circuit court's decision on this issue. *See Blanton*, 351 S.C. at 542, 570 S.E.2d at 569 ("Procedural due process contemplates notice, a reasonable opportunity to be heard, and a fair hearing before a legally constituted impartial tribunal." (citation omitted)).

D. Appellant's Counsel's Attorney's Fees and Expenses

Appellant claims the circuit court erroneously denied his request for his counsel's attorney's fees, expert witness fees, and certain costs for time and preparation on the petition for settlement. We disagree.

In support of his claim for attorney's fees and expenses, Appellant cites section 62-3-720 of the South Carolina Code (Supp. 2014), which states, "If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred."

While we agree that section 62-3-720 affords a PR reimbursement for costs and attorney's fees in connection with the administration and protection of the Estate, we find the probate court properly exercised its discretion as to which fees and costs would be borne by the Estate and which would be borne by Appellant. We concur with the probate court's finding that Appellant's counsel's fees primarily stemmed from the contest between Appellant and Respondents over the amount of his compensation and, thus, were properly assessed against Appellant in his individual capacity. Further, we conclude this statute was intended to cover attorney's fees and expenses in connection with prosecuting and defending claims against the Estate, as opposed to the situation before the probate court. *See S.C. Code Ann. § 62-3-715(20)* (Supp. 2014) (providing a PR, "acting reasonably for the benefit of the interested persons, may properly . . . prosecute or defend claims,

or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties").

To that end, we find the probate court properly utilized its discretion when it approved of attorney's fees already paid to Collins and Lacy in the amount of \$13,499.58 and approved of an additional \$12,306.80 to Collins and Lacy for attorney's fees and costs that were incurred as part of Appellant's administration of the Estate. We agree with the probate court that those fees and costs were properly borne by the Estate and find that award reasonable given the circumstances and the overall value of the Estate. We also note that—unlike sections 62-3-715(20) and -720—section 62-3-721 makes no provision for the payment of a PR's attorney's fees or expenses connected with a proceeding to review the PR's compensation. *See* S.C. Code Ann. § 62-3-721(a) (Supp. 2014) ("After notice to all interested persons, . . . the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor, or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.").

We also find the probate court properly considered the nature of the testimony and the role of other witnesses in choosing which fees to assess against the Estate and against Appellant. The probate court denied Appellant's request for expert witness fees for an appraiser and consultant, both of whom testified at the hearing. While the probate court required Appellant to pay for the appraiser's and the forestry consultant's expert witness fees connected with the hearing, it also required the Estate to pay \$5,000 for the appraisal of Kay's property and \$750 for the forestry consultant's work valuing the timber on Kay's property. We agree the appraisal and consultant work were costs directly connected with the valuation of the Estate, and as such, were legitimate expenses properly paid out of the Estate's assets. We further concur with the probate court's decision to assess the expert fees against Appellant as their work product and valuations were not contested issues at the hearing. Based on the foregoing, we uphold the circuit court's decision to affirm the probate court on this issue.

E. Respondents' Counsel's Attorney's Fees

Appellant contests the probate court's decision to award Respondents' counsel attorney's fees based on the common fund doctrine. We agree.

"The common fund doctrine allows a court in its equitable jurisdiction to award reasonable attorney's fees to a party who, at his own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common fund or common property." *Layman v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329 (2008) (citing *Johnson v. Williams*, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941)). "Attorneys' fees awarded pursuant to the common fund doctrine come directly out of the common fund created or preserved." *Id.* (citation omitted). The rationale for awarding attorneys' fees in this manner is based on the principle that "one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses." *Id.* (citation omitted).

However, the allowance of attorney's fees out of a common fund is subject to abuse and is only permitted in exceptional cases when required to promote justice. *Johnson*, 196 S.C. at 532, 14 S.E.2d at 23. Although the attorney's services might have benefitted all parties, fees cannot be awarded when the interests of the parties are adverse. *Bedford v. Citizens & S. Nat'l Bank of S.C.*, 203 S.C. 507, 515, 28 S.E.2d 405, 407 (1943). Before an attorney may be compensated out of a common fund, a contract of employment must exist, whether express or implied in law, between the attorney and all parties with an interest in the fund. *Johnson*, 196 S.C. at 532-33, 14 S.E.2d at 23.

Citing to the common fund doctrine, the probate court awarded Respondents attorney's fees and held, "Equity requires that all heirs pay for the work of Defendants' attorney[] because his work preserved and protected a common fund[] not just for the benefit of Defendants, but for all heirs." We find the probate court improperly applied this doctrine.

Respondents' decision to hire counsel was based upon their disagreement with the division of the Estate and the amount of Appellant's compensation. Because the common fund doctrine requires all interested parties to have the same interests, we do not believe the probate court should have required the Estate to pay for Respondents' attorney's fees. Several beneficiaries were in favor of selling the real estate as opposed to an in-kind distribution. Specifically, Penelope Arnold, the director of the Presbyterian Home of South Carolina's charitable foundation, testified "[the Presbyterian Home] do[es] not have the wherewithal financially to pay property taxes, to keep the land up, which we would be responsible for doing or paying someone to do that. And so the preference is always to sell real estate and receive the proceeds." Arnold further stated that, at a prior meeting with all the beneficiaries to resolve issues with the Estate's division, she and Reverend Hunter, of Lisbon Presbyterian Church, were not well-received by Respondents

based on their preferences over the Estate's division. Lisbon Presbyterian Church also preferred to receive its 25% share of the Estate in cash.

In addition, neither of these beneficiaries took issue with Appellant's compensation as did Respondents. Furthermore, while Respondents' counsel's efforts resulted in monies being returned to the Estate, which arguably was for the benefit of all the beneficiaries, we find there was no "contract of employment, whether express or implied in law, between the attorney and all parties with an interest in the fund." *Peppertree Resorts, Ltd. v. Cabana Ltd. P'ship*, 315 S.C. 36, 41, 431 S.E.2d 598, 601 (Ct. App. 1993). If all the beneficiaries agreed on the distribution plan and took issue with Appellant's compensation, then the common fund doctrine would clearly apply. However, based on the foregoing evidence, we conclude Respondents—not the Estate—should have borne the cost of Respondents' representation. As a result, we reverse the circuit court's decision to uphold the award of Respondents' counsel's attorney's fees pursuant to the common fund doctrine.

F. Rule 59(e) motion

Last, Appellant claims the circuit court erred in affirming the probate court's denial of Appellant's Rule 59(e), SCRCR, motion. We find this argument to be without merit.

In the circuit court's order, it did not rule on whether the probate court properly denied Appellant's post-trial Rule 59(e) motion. Rather, the circuit court—as the court of next review—properly addressed the issues that the parties raised to the probate court. As a result, we find Appellant's attempt to raise this as legal error to be misplaced and without merit. *See* S.C. Code Ann. § 14-8-250 (Supp. 2014) (noting "the [c]ourt need not address a point which is manifestly without merit"); Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit.").

II. Respondents' Cross-Appeal

Respondents raise the following issues on cross-appeal, claiming the circuit court erred in affirming the probate court because the probate court (1) improperly awarded Appellant a fee equivalent to 10% of the Estate when Appellant acted in bad faith; (2) failed to require Appellant to pay all costs and attorney's fees associated with the settling of the Estate; (3) failed to rule on certain beneficiaries' prospective entitlement to additional proceeds from the Estate should Respondents prevail on appeal; (4) limited Respondents' counsel's request for attorney's fees;

and (5) granted Appellant equitable relief when Appellant acted with unclean hands. We disagree and address each argument in turn.

A. Appellant's Fee & Bad Faith

Respondents first claim the probate court erred in awarding Appellant a 10% commission because Appellant acted in bad faith. We disagree.

As stated above, we find the probate court properly considered the requisite factors and statutory considerations in its decision to award Appellant a fee equivalent to 10% of the Estate's value. While we recognize section 62-3-719(a) limits a PR's fee to 5% of the Estate, we believe the specific circumstances and competing interests that otherwise prolonged the settling of "a fairly basic" estate merited an imposition of a higher fee. Further, we find a 10% fee was "reasonable compensation" for Appellant's services as stated in Kay's will.

Although Respondents contend Appellant acted in bad faith in the administration of the Estate, we find these allegations to be unsubstantiated and a mischaracterization by Respondents regarding Appellant's efforts as PR. Respondents claim Appellant acted in "violation of his fiduciary duty," "boost[ed] his commission," "bilk[ed] the Estate," "loot[ed] the Estate," and generally incurred "shocking charges . . . against the Estate." Although Appellant likely could have settled the Estate in a timelier and less costly manner, Appellant presented substantiated evidence that he worked diligently over a course of three years to accommodate all interested parties. Further, as noted by the probate court in its order and affirmed by the circuit court on appeal, Appellant has "exemplary credentials and good standing in the Bar." Respondents' contentions that Appellant acted in bad faith and violated his fiduciary duty to the Estate are not well-founded, particularly when Appellant submitted evidence he consulted with legal counsel on the proper courses of action in administering the Estate; Appellant attempted to meet with all the beneficiaries and create a compromise prior to filing a partition action; and Appellant "did an excellent job in securing the sales price for the real estate."

Based on the foregoing, we find Appellant did not improperly exercise his power in connection with the Estate and presented sufficient evidence to demonstrate he did not breach his duty to the Estate and its beneficiaries. *See* S.C. Code Ann. § 62-3-703(a) (Supp. 2014) (stating a PR has the "duty to settle and distribute the estate . . . as expeditiously and efficiently as is consistent with the best interests of the estate" and the "successors to the estate"). Accordingly, we affirm the circuit court's decision to uphold the probate court's findings on this issue.

B. PR's Court Costs, Attorney's Fees, and Post-Judgment Interest

Next, Respondents contend the probate court erred in failing to require Appellant to pay all costs associated with the proceedings before the probate court, including attorney's fees, court costs, and post-judgment interest. We find this argument unpreserved for our review.

Respondents' argument on this alleged ground of error is conclusory, only stating it would be "grossly unfair for the heirs to pay for the PR's attempts to increase his compensation and further obscure his wrongdoing," and "[i]f the PR chooses to violate his duties and maximize his own interests at the expense of the Estate by filing an appeal, the heirs, who gain nothing by the appeal, should not suffer because of that." We find these two sentences are insufficient to assert legal error and decline to address Respondents' argument on this ground. See *Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (noting when an appellant fails to cite any supporting authority for a position and makes conclusory arguments, the appellant abandons the issue on appeal); Rule 208(b), SCACR (stating that, for appellate review of an issue to occur, the issue must be set forth in a statement of issues and argument).

C. Limitation of Recovery

Respondents argue the probate court erred in failing to rule on certain beneficiaries' prospective entitlement to additional proceeds from the Estate should Respondents prevail on appeal. We find this issue is not properly before this court.

Respondents did not raise this issue either to the probate court or to the circuit court. Accordingly, we find it is unpreserved for review on appeal. See *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review." (citation omitted)). Further, Respondents cite no legal authority to support their position, instead relying on a brief factual argument, which we find insufficient as a matter of law. See *Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding party abandoned an issue on appeal by failing to cite any supporting authority and making only conclusory arguments).

D. Respondents' Attorney's Fees

Next, Respondents claim the probate court improperly limited their attorney's post-trial request for additional attorney's fees, citing to the common fund doctrine. Because we reverse the probate court's award of attorney's fees to Respondents'

counsel, we decline to address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate courts need not address remaining issues when the resolution of a prior issue is dispositive).

E. Unclean Hands

Last, Respondents claim the probate court erred in granting Appellant equitable relief because Appellant acted with unclean hands. We find this argument is unpreserved for our review.

Neither the probate court nor the circuit court ruled on whether Appellant acted with unclean hands. Respondents' failure to raise this issue to either court precludes this court's review on appeal. *See Wilke*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review." (citation omitted)); *Rock Hill Nat'l Bank v. Honeycutt*, 289 S.C. 98, 104, 344 S.E.2d 875, 879 (Ct. App. 1986) (stating because the theory of unclean hands was not pled or raised to the trial judge, it could not be raised on appeal).

CONCLUSION

Accordingly, we **AFFIRM** the circuit court's decision upholding the probate court's order as to all issues except Respondent's counsel's attorney's fees. Because the common fund doctrine does not apply under these facts, we **REVERSE** the award of attorney's fees to Respondents' counsel. Based on our conclusion that Respondents—not the Estate—must pay for Respondent's counsel's attorney's fees, we **REMAND** the issue of each beneficiary's share of the Estate to the probate court for a determination consistent with this court's opinion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

HUFF, J., concurs.

FEW, A.J., concurring in part and dissenting in part: I concur with the majority in all but one respect—I would reverse the decision to deny Sullivan's request for attorney's fees and expenses for the petition for settlement. In my view, the probate judge's denial of Sullivan's request for fees and expenses was driven by his disagreement with Sullivan's decision to file a partition action and ultimately sell the estate's interest in the real estate. Sullivan had the right to partition the land pursuant to Kay's will and the probate code and, thus, it was within his discretion

to do so. Additionally, as the probate court found in its order and the majority explains in Part II. A of its opinion, Sullivan did not act in bad faith during his administration of the estate.

Moreover, the probate code required Sullivan to file a petition for settlement. *See* S.C. Code Ann. § 62-3-1001(a)(3) (Supp. 2015) (requiring a personal representative to file "an application for settlement of the estate to consider the final accounting or approve an accounting and distribution and adjudicate the final settlement and distribution of the estate"). Moses and Brown requested the hearing on Sullivan's petition for settlement, and at the hearing, Sullivan defended his decision to seek a partition and sell the real estate. Because the probate code provides a personal representative who "defends or prosecutes any proceeding in good faith" is "entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred," S.C. Code Ann. § 62-3-720 (Supp. 2015), and Sullivan filed the petition for settlement and appeared at the hearing in good faith, I would find he is entitled to reasonable attorney's fees and expenses.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM LAURENS COUNTY
Court of Common Pleas
Frank R. Addy, Jr., Circuit Court Judge
2013-002319

AUG 01 2016

SC Court of Appeals

In the Matter of the Estate of Marion M. Kay

Edward D. Sullivan, as Personal Representative
of the Estate of Marion M. Kay, ... Appellant/
Cross-Respondent

v.

Martha Brown and Mary Moses, ... Respondents/
Cross-Appellants

PETITION FOR REHEARING
OF RESPONDENTS/APPELLANTS

John R. Ferguson
S.C. Bar No. 1987
107 W. Laurens St. - PO Box 286
Laurens, SC 29360
(864) 984-212
Fax (864) 984-7372

COX, FERGUSON & WHAM, LLC
Attorneys for Respondents/Appellants

App.039

TABLE OF CONTENTS

Table of Authorities.	1
A Brief Summary of Relevant Facts	2
Argument.	2
The Court erred in concluding that the heirs other than Respondents/ Appellants had interests materially adverse to them.	3
The Court erred in finding that there was no implied contract between counsel for Respondents/Appellants and the other heirs.	5
The Court erred in stating that Respondents/Appellants' arguments in favor of being paid their costs and attorney fee can be ignored as abandoned. . .	7
The Court erred in applying the wrong standard of review.	8
The Court erred in finding that the Personal Representative was entitled to a fee equal to 10% of the Estate.	9
Conclusion.	11

TABLE OF AUTHORITIES

Cases

Bedford v. Citizens & S. Nat. Bank of SC, 203 S.C. 507, 28 S.E.2d 405 (1943).....	3
Bennett v. Investors Title Ins. Co., 370 S.C. 578, 635 S.E.2d 649 (Ct. App. 2006).....	8
Crown Central Corp. v. Elmwood Prop., 244 S.C. 588, 138 S.E.2d 38 (1964).....	8
Dean v. Kilgore, 313 S.C. 257, 437 S.E.2d 154 (1993).....	8
Johnson v. Williams, 196 S.C. 528, 14 S.E.2d 21 (1941).	3, 5, 6
Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008).	3
Matter of Will of Hall, 318 S.C. 188, 456 S.E.2d 439 (Ct. App. 1995).	9
Morris v. Tidewater Land & Timber, Inc., 388 S.C. 317, 696 S.E.2d 599 (Ct. App. 2010).	8
Peppertree Resorts v. Cabana Limited Partnership, 315 S.C. 36, 431 S.E.2d 598 (Ct. App. 1993).	4, 6
Sullivan v. Brown, Shearouse Adv. Sh. No. 24, p. 37, filed June 15, 2016. . .	7

Statutes

S.C. Code Section 62-3-1001(a)(3).	8
---	---

A BRIEF SUMMARY OF THE RELEVANT FACTS

The Personal Representative in this case had secretly given himself 18.3% of the Estate (\$ 93,775) as his fee prior to the probate hearing on his accounting and then had sought an additional \$ 13,447.05, which would have brought his fee up to 21% of the Estate. The total he sought in commissions, fees for his firm and expenses for an uncomplicated estate was \$ 157,179 or 31% of the Estate, not counting his attorney fees and costs. He "had no method or formula for determining the amount for the four draws he gave himself other than by pulling figures out of the air." and he "failed to provide a legitimate basis for his fees." As a result of the efforts of Respondents/Appellants' counsel, his fee was cut by \$ 42,475 to 10% of the Estate. This money is to be returned to the Estate for the benefit of all the heirs.

The Court has conceded the benefit to all the heirs, but it has reversed the two judges below who awarded Respondents/Appellants' counsel an attorney fee because the interests of some of the heirs were said to be adverse to those of Respondents/Appellants, and there was supposedly no express or implied contract of employment between their counsel and the other beneficiaries.

Though this is an action for an accounting, the Court found that the case was at Law and not in Equity and applied the legal standard of review.

Though the probate judge, the circuit court and this Court found that the Personal Representative's litigation (and therefore his appeal to reverse the denial of the relief he sought) was for his own personal benefit, this Court denied relief to Respondents/Appellants for their attorney fees and costs in fighting the PR's attempts to get nearly \$ 56,000 more from the Estate for himself plus costs and attorney fees through this appeal by finding that the arguments for that were abandoned. This Court also upheld the PR's fee of 10% of the Estate.

ARGUMENT

It is the position of Respondents/Appellants that the Court misapprehended or overlooked the following points which warrant rehearing:

I. The Court erred in concluding that the heirs other than Respondents/Appellants had interests materially adverse to them.

In order to understand what adverse interest means, it is useful to consult the relevant precedent. The case of *Bedford v. Citizens & S. Nat. Bank of SC*, 203 S.C. 507, 28 S.E.2d 405 (1943), cited by this Court, is instructive. The Court there stated the facts to be as follows:

A successfully sued B for recovery of the fund; C then sued A for recovery of the same fund and also succeeded; A's attorneys, successful in their original suit but failing in their efforts to retain the fund for their clients against C's claim (the latter represented by other attorneys), now seek to collect a fee from the fund over the opposition of C, who has his own attorneys to pay. 28 S.E.2d at 406.

It will readily be seen that in that case the other parties derived no benefit from the efforts of A's attorneys and had no reason to compensate them. That is not the case here where counsel's efforts resulted in an increase in the Estate of \$ 42,275, in which all the heirs will share, and in the defeat of the PR's demand for an additional \$ 13,447.05, a total benefit of almost \$ 56,000. As the Court said in *Johnson v. Williams* (also cited by this Court), 196 S.C. 528, 14 S.E.2d 21, 23 (1941), "It is... essential that the services prove fruitful to the general class. In other words, if no actual benefit accrues from the services rendered there can be no allowance of fees from the common fund."

This is because "the common fund doctrine is based on the equitable allocation of attorneys' fees among a benefitted group...." *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320, 330 (2008). The focus is thus on actual benefit to the heirs, not the existence of random squabbles. There can be no doubt that all the heirs here benefitted from the services of Respondents/Appellants' attorney.

The heirs in question in the *Johnson* case were, like the heirs here, unrepresented by counsel at the accounting hearing and did not argue their own interests. The Court observed, "It is true that in the contest by [Attorney] he acted primarily in the interest of [his clients] and did not profess to act on the theory of representation in behalf of [the other heirs], but they are all members of the same class." 14 S.E. at 23.

In granting the attorney there a fee the Court found, "The successful termination of that case, due solely to the efforts of [Attorney], resulted in the establishment of their rights to share in the fund. ... It is repugnant to fundamental principles of equity... that

they should reap where they have not sown, free from any legal duty to compensate those who made the reaping possible.” 14 S.E. at 24.

In its opinion this Court found an adversarial relationship, not because of the aim of Respondents/Appellants to increase the value of the estate by having the Personal Representative disgorge unearned commissions, but because two of the seven heirs wanted their money sooner rather than later. That is not a sufficiently substantive disagreement on which to found an adversarial relationship.

This is shown by Peppertree Resorts v. Cabana Limited Partnership, 315 S.C. 36, 431 S.E.2d 598 (Ct. App. 1993). There “although the relationship of Cabana and the respondents has been strictly adversarial since the appointment of the receiver, both prior to and subsequent to appointment of the receiver, the respondents... and Cabana had a mutual interest in the success of Cabana’s attorneys.” 315 S.C. at 41. The central question was thus whether there was a unity of interest in the ultimate aim of the attorney’s work, increasing the value of the Estate for the benefit of all the heirs, not whether any disagreements existed. The Court there went on to hold that Equity required that Cabana’s attorneys be paid from the common fund.

Here, two of the heirs may have been impatient to get their money, but beyond doubt all the heirs wanted as much money as they could get, and Respondents/Appellants assisted them in that. Though Appellant/Respondent professes tender concern for their wishes, it is his refusal to make a refund to the Estate or even to deposit his excess fee with the Clerk and his appeal which have delayed distribution for years. (But for his appeal, Respondents/Appellants would have waived their right to appeal.)

The Court erred factually in stating that heirs having 70% of the Estate wanted an immediate sale of the property. As far as Lisbon Presbyterian Church and the Lisbon Cemetery Fund were concerned, that decision could only have been made by a congregational vote (See Exhibit C-9, R. p. 630 and R. p. 471, ll. 17-19; R p. 198, ll. 15-18 and R. p. 472, ll.1-5.) Such a vote was not held until this case was well under way and after Respondents produced a buyer for the property (R. p. 133, ll. 16-21), because the Appellant PR refused to provide the information requested by the Lisbon Church Session, including information about what he had paid himself (See R. pp. 633, 833, 865-71, 873.)

The alleged personal preference of Lisbon's pastor, who did not testify, is irrelevant; and his opinion of what the congregation supposedly would have voted for is speculative. This means that only heirs with a 20% interest (See R. pp. 24-25.) can be said to have supported an immediate distribution. It should also be noted that Respondents owned 60% of the farm (their half interest plus what the Will gave them) while the two impatient heirs owned a total of 8% of the farm.

This Court was further in error in stating that Respondents opposed the sale of the farm property (R. pp. 311, l. 5- 313, l. 22) . While they did oppose the sale of a mere portion of the property to Mr. Copeland contrary to the Will and the PR's defective and unequal partition of the farm (R. pp. 311, ll. 5-7; 312, l.24- 314, l. 2), they did not oppose the sale of the farm to Roland Milam because that was reasonable for all the heirs. (See R. pp. 283, ll. 9-18 and 311, ll. 5-7, 9-18.) Partition alone would not have produced a buyer to purchase the farm, and a partial sale would not have accomplished the goal of Presbyterian Home. Even Appellant's counsel said he would not characterize Respondents' opposition to partition as wrongful or unreasonable (R. p. 493, ll. 18-22).

This Court has read the no adverse interest requirement (which was never argued by Appellant) too broadly. It does not require that all parties be in total lockstep; it merely requires that the parties from whom fee contribution is sought have received a material benefit from the labors of the attorney seeking the fee and that the unrepresented parties do not unjustly reap where they have not sown.

II. The Court erred in finding that there was no implied contract between counsel for Respondents/Appellants and the other heirs.

"The [common fund] rule is founded upon the just principle that one who preserves or protects a common fund works for others as well as for himself, and the others so benefitted should bear their just share of the expenses, including a reasonable attorney's fee...." Johnson v. Williams, 196 S.C. 528, 14 S.E.2d 21, 23 (1941). This is the basis for the implied contract.

Appellant/Respondent has not appealed the findings of the probate judge that the work of Respondents/Appellants' counsel was necessary and related to the merits of the matter and that he preserved and protected a common fund (R. p. 12, No. 4). These

findings are therefore the law of the case.

This Court had no trouble in finding that Respondents/Appellants' counsel had caused to be created and preserved a common fund of the \$ 42,275 (and prevented an additional payment of \$ 13,447.05 to the PR plus payment of his costs and attorney fees) which the Personal Representative was ordered to return to the Estate and which all the heirs were entitled to share. However, this Court determined that there was no implied contract between the attorney and the other heirs and denied a fee on that basis, even though Appellants never argued this.

It is instructive to consult the Peppertree Resorts case cited by the Court to understand what is required for an implied contract to exist. The Court there elucidated, "[W]hen a party who is unrepresented by counsel will benefit from a common fund and has acquiesced in the actions of another party's attorney in creating this fund, the law will impose a contract on the former to pay for the services rendered." 315 S.C. at 41. The other parties here did not file any objection with the Probate Court or hire counsel to oppose what Respondents/Appellants wanted to and did accomplish. After the order of the Probate Court, they made no effort to disclaim any interest in the common fund. All that two of them (not the Lisbon Church and the Lisbon Cemetery Fund, which together had a 50% interest) did was to complain that they were not getting their money fast enough. This is an insufficient basis for them to avoid paying for the legal services which have enriched them. As the Johnson case shows, the focus is on the benefit received by the heirs and how this affects the equities of the situation, not how close their relationship was with the counsel who benefitted them: "It is... essential that the services prove fruitful to the general class." *Johnson v. Williams*, 14 S.E.2d at 23.

By not actively opposing Ms. Brown and Ms. Moses (beyond two heirs stating their preference for when they would get paid) and by being willing to accept the benefits resulting from Ms. Brown's and Ms. Moses's litigation, the heirs have acquiesced in the actions of the attorney that benefitted them. By law this is a sufficient foundation for an implied contract, and Equity requires this Court to impose an implied contract to avoid unjust enrichment. (See R. p. 12, No. 4.)

If this Court changes its mind concerning Respondents/Appellants' entitlement to attorney fees for the Probate Court work, it should also reconsider its denial of attorney

fees and costs for this appeal, which was to preserve the common fund from Appellant's attack, inasmuch as its denial of relief for appellate expenses was partially based upon its previous denial of relief under the common fund doctrine for the Probate Court work.

III. The Court erred in finding that Respondents/Appellants' arguments in favor of being paid their costs and attorney fees for this appeal can be ignored as abandoned.

The undersigned is particularly aggrieved by a finding that the issue of Respondents/Appellants' costs and attorney fees for the appeal was abandoned. Page 7 of Respondents' Brief of Respondents/Appellants sets out the central arguments for requiring the PR to pay the costs associated with an appeal which was primarily for his personal benefit and not for the Estate. The arguments advanced are succinct but not mere conclusions, and they are supported by four case citations and three citations to the record plus arguments at pp. 6-7 of the Reply Brief of Respondents/Appellants and pp. 11-12 of the Brief of Appellants/Respondents.

The foundation of the exception was the finding of the Probate Court and the circuit court that the PR's litigation was for his personal benefit and not for the benefit of the Estate. (See R. p. 11, No. 19 and p. 12, No. 5.) As this Court found, "We concur with the probate court's finding that Appellant's counsel fees primarily stemmed from the contest between Appellant and Respondents over the amount of his compensation and, thus, were properly assessed against Appellant in his individual capacity." Shearouse Advance Sheet No. 24, filed June 15, 2016, p. 37 at p. 48, paragraph 3. It must therefore follow that the PR's appeal to overturn the denial of the benefits he sought for himself is for his own benefit and not for the Estate. This is not a mere unmoored conclusion of counsel; it is a finding of two judges upheld on appeal by this Court. To require the Respondents to pay all the fees and costs associated with blocking the PR from taking more of the Estate from the heirs for himself in this appeal is extraordinarily unfair.

It is inconsistent that this Court considered the merits of Appellant's exception to the award of an attorney fee to Respondents' counsel. His argument for that was barely longer than what this Court found to be abandonment on Respondents' part, and it had only one case citation. The Court accepted none of his arguments yet ruled in his favor.

The Court's citation of *Bennet v. Investors Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) for what constitutes abandonment does not support its conclusion; because that case correctly notes the requirement that abandonment of an issue requires **both** a conclusory argument **and** a lack of supporting citations. The undersigned's arguments, which were not mere conclusions, were amply supported by citations. The arguments were thus not abandoned as a matter of law.

Even assuming that this Court disagrees with Shakespeare that "Brevity is the soul of wit." and is not burdened by the verbosity of the Bar, until the Court's rules inform the Bar of some sort of minimum word requirement for arguments, it violates the Respondents/Appellants' right to due process for this Court to rest the disposition of an issue on a cursory review based on the length of an argument rather than its content.

IV. The Court erred in applying an improper standard of review.

The purpose of the probate hearing which began this case was for the Personal Representative to give an accounting of his handling of Estate assets and his charges to the Estate in accordance with S.C. Code Section 62-3-1001(a)(3). See R. p. 122, ll. 23-24; p. 851 and p. 854(5)(A). This appeal has continued to examine that accounting. As Appellant-Respondent's counsel correctly noted in his Respondent's Brief of Appellant-Respondent (p. 8), "An action in accounting sounds in equity. *Morris v. Tidewater Land & Timber, Inc.*, 388 S.C. 317, 696 S.E.2d 599 (Ct. App. 2010)." This Court's characterization of the case as one at law involving claims for money due is in error and not supported by the record.

Because this is fundamentally an equitable action and the findings of the probate judge were concurred in by the circuit court judge, those findings are not to be disturbed on appeal unless it is shown that they are without evidence to support them or against the clear preponderance of the evidence. *Crown Central Corp. v. Elmwood Prop.*, 244 S.C. 588, 138 S.E.2d 38 (1964). There is abundant supporting evidence for their rulings in favor of Respondents, and the findings of the learned judges below are not contrary to the clear preponderance of the evidence. See R p. 5(21), p. 6(4) and p. 7(e).

"[A]n action at equity first tried by [the probate court] subsequently affirmed or concurred in by the circuit court will not be disturbed on appeal unless found to be

without evidentiary support.” Dean v. Kilgore, 313 S.C. 257, 259, 437 S.E.2d 154 (1993). See also Matter of Will of Hall, 318 S.C. 188, 456 S.E.2d 439, 441 (Ct. App. 1995). There is strong evidentiary support for the holding that Respondents/Appellants’ counsel is entitled to a fee based upon his role in creating and preserving a common fund benefitting all the heirs.

Application of the proper standard of review mandates that this Court uphold the findings of the courts below and therefore uphold the granting of an attorney fee to Respondents/Appellants’ counsel for his role in creating and preserving a common fund benefitting all the heirs.

V. The Court erred in finding that the Personal Representative was entitled to a fee equal to 10% of the Estate.

While this Court found that the actions of the Personal Representative in bringing the Estate to a conclusion were not in bad faith, the inquiry cannot end there. The payment to which he was entitled was also at issue. This Court stated that the 10% awarded the PR was reasonable- although the statutorily required finding of extraordinary services was not made by the probate judge- but that overlooks the fact that the PR was attempting to pay himself 21% of the Estate and to charge a total of 31% of the Estate for himself and his law firm (R.p.10, No. 12)- including over \$ 18,000 in needless paralegal expenses (204.6 hours x \$90/hr.) for the purpose of valuing the personal property in the Estate to boost the PR’s commissions- plus his personal attorney fees and costs for what should have been an uncomplicated estate, much more than three courts have found to be supported by the evidence. The courts below rejected the PR’s claims concerning the hours he worked (R. p. 9, No. 8) and found his commissions to be “clearly excessive” (R. p. 10, No. 13) and without a legitimate basis (R. p. 9, No. 8). This means that the judge who heard the PR’s testimony found him not to be credible, which was amply supported by the record. None of this supports a finding that a 10% fee for the PR was reasonable under the statute or under the Will, and that finding is against the clear preponderance of the evidence. See R. pp. 1414-1429 where the PR’s pattern of conduct detrimental to the Estate is set out. The Testatrix’s intent was to benefit her heirs, not to sue them and to enrich the PR at their expense.

As this Court stated in its opinion, he “had no method or formula for determining the amount of the four draws he gave himself other than by pulling figures out of the air.”, and he “failed to provide a legitimate basis for his fees.” In essence this Court is now saying that the litigation the PR caused by the extra \$ 42,475 he wrongfully paid himself in commissions (and hid from the heirs) plus the additional \$ 13,447.05 he demanded (a total of almost \$56,000) is just a minor inadvertence of no significance.

The PR knew that the way to determine a fee if there was any doubt was to apply to the Probate Court to approve one (R. p. 204, ll. 16-18), but he chose instead to pay himself in secret what he alone decided he was worth. He then asked the heirs to approve those fees without informing them of their amount until Ms. Brown and Ms. Moses forced him to do so. If a trustee had paid himself an extra \$ 56,000 without telling the beneficiary, surely this Court would not have said that that was of no importance because he claimed he deserved it. The facts found do not support the conclusion stated.

Although the Court noted that the PR consulted with legal counsel (who did not testify and whose affidavit was not accepted into evidence), it fails to note that this was after he had paid himself what the two judges below later found to be “clearly excessive” commissions without any legitimate basis and that the consultation was to support his inflated past and contemplated future payments to himself. The expert made no independent investigation and did not even see the PR’s time sheets (R. p. 166, ll. 1-3). He based his opinion solely on what Appellant/Respondent told him. This cannot be considered an independent and valid expert opinion.

It is inconsistent that this Court has found that there was no necessity for the Respondents to have filed a petition in the probate court but at the same time to find that Clean Hands was not an issue because it was not pled. This is an issue which permeates the record and was argued by consent. (See for example R. pp. 1414- 1429 and especially 1426(k).) Three courts’ factual findings mandate a finding of unclean hands. There was no need to plead it, and it should at least be treated in the same manner as the unpled unjust enrichment argument made by Appellant, which was considered on the merits by this Court.

It is this Court’s duty to decide not merely what a personal representative can get away with but what is right conduct for a fiduciary. Here, the clear preponderance of the

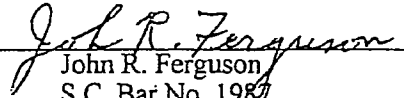
evidence shows that the PR consistently put his own interests ahead of those of the Estate, and Justice requires that he not be rewarded for that.

CONCLUSION

The Court has overlooked or misinterpreted important factual, equitable and legal elements of this case. As a result, Respondents/Appellants are entitled to the granting of their Petition for Rehearing and to the relief they have sought in their appeal. In being as succinct as possible in deference to the Court, the undersigned has not abandoned any of the issues raised here.

COX, FERGUSON & WHAM, LLC
Attorneys for the Respondents/Appellants

By: _____


John R. Ferguson
S.C. Bar No. 1987

107 E. Laurens St. - P.O. Box 286
Laurens, S.C. 29360
(864) 984-2126

July 28, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals.

APPEAL FROM LAURENS COUNTY
Court of Common Pleas
Frank R. Addy, Jr., Circuit Court Judge
2013-002319

RECEIVED

AUG 01 2016

SC Court of Appeals

In the Matter of the Estate of Marion M. Kay

Edward D. Sullivan, as Personal Representative
of the Estate of Marion M. Kay, ... Appellant/
Respondent

v.

Martha Brown and Mary Moses, ... Respondent/
Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee at Cox
Ferguson & Wham, LLC and that on the 28 day of July, 2016
she served the Petition for Rehearing of
Respondents/Appellants herein by depositing two copies of it
in the United States Mail, postage prepaid and addressed to:

Daryl G. Hawkins, Esq.
Attorney at Law
P.O. Box 11906
Columbia, SC 29211.

Duliorah Ball

July 28, 2016

COX, FERGUSON & WHAM

ATTORNEYS AT LAW
107 E. Laurens St.
P.O. Box 286
LAURENS, SOUTH CAROLINA 29360-0286

W. REID COX, JR.
JOHN R. FERGUSON
ALLEN M. WHAM

PHONE: (864) 984-2126
FAX: (864) 984-7372
E-MAIL: jferg@backroads.net

July 28, 2016

Office of the Clerk of Court
S.C. Court of Appeals
1015 Sumter St.
Columbia, SC 29201

RECEIVED

AUG 01 2016

SC Court of Appeals

Re: Sullivan v. Moses et al., 2013-002319

Dear Ladies:

With this letter I am enclosing an original and nine copies of the Petition for Rehearing of Respondents/Appellants in the above-referenced action. Please file the original and distribute the copies to the panel. I am also enclosing an original and a copy of a Certificate of Service on opposing counsel. Please file the original and return to me a clocked copy in the enclosed envelope. Thank you for your help.

Sincerely,

John R. Ferguson
John R. Ferguson

JRF/wp
Encl.

App.053

80462

RECEIVED

AUG 01 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Laurens County
Court of Common Pleas

Civil Action No. 2012-CP-30-258
The Honorable Donald B. Hocker, Probate Court Judge
The Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 5414
Heard June 3, 2016 – Filed June 15, 2016
Case Tracking No. 2013-2319

In the Matter of the Estate of Marion M. Kay

Edward D. Sullivan, as Personal Representative
of the Estate of Marion M. Kay Appellant-Respondent,

vs.

Martha Brown and Mary Moses Respondents-Appellants.

APPELLANT-RESPONDENT'S
PETITION FOR REHEARING

Daryl G. Hawkins
LAW OFFICE OF DARYL G. HAWKINS, LLC
Post Office Box 11906
Columbia, SC 29211-1906
803.733.3531 – Tel
803.744.1949 – Fax

*Attorneys for Appellant-Respondent
Edward D. Sullivan, PR of the
Estate of Marion M. Kay*

App.054

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS

Appellant-Respondent Edward D. Sullivan respectfully petitions this Court for rehearing in the instant case.

INTRODUCTION

In arriving at its decision in this case, the Court applied an "action at law" standard of review but should have applied an "action in equity" standard. It also considered the weight of the evidence not from the point of view as to whether or not "facts" were against the preponderance of the evidence, but by whether or not there was any evidence to support a finding. The Appellant – Respondent argues that the decision makes errors of law in interpreting the South Carolina Probate Code, and seemingly gives weight to probate code provisions that are not applicable to this case. Because the Court overlooked and misapprehended these points, the Appellant – Respondent respectfully requests the Court to grant rehearing and reconsider its opinion.

LAW/ANALYSIS

I. The Court Erred and Misapprehended the Standard of Review By Applying the Standard of Review for Reviewing Actions at Law, Rather Than the Applicable Standard for Review of Actions in Equity.

The case before the Court began with Appellant's filing of a Petition for Settlement for the Estate of Marion M. Kay on November 15, 2010 pursuant to SC Code Ann. Section 62-3-1001 (a)(3). R. p. 722. In the Petition, the Appellant-Respondent Edward D. Sullivan ("Appellant") requested that the probate court "consider and approve an accounting and proposal for Distribution; Approve previous distributions; and discharge the Appellant as Personal Representative" among other things. Counsel for Respondents-Appellants Martha Brown and Mary Moses ("Respondents") requested a hearing on the Appellant's Petition.

Respondents-Appellants filed no responsive pleadings outlining their contentions.

The Court ruled that this case is an action at law "[b]ecause the proceeding in this case involved claims for money due . . .", and that "the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses that no evidence supports them". However, "[a]n action for an accounting sounds in equity." Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009). Therefore, the reviewing court may review the record and make findings with its own view of the preponderance of the evidence. Id. (citing Lawson v. Rogers, 312 S.C. 492, 495, 435 S.E.2d 853, 855 (1993)).

In Lee v Lee, 251 S.C. 533, 536, 164, S.E.2d 308, 308 (1968), a ward challenged the actions of his general guardian and sought both an accounting and refund of commissions which he claimed the guardian was not entitled to. The Supreme Court held that the action was one in equity, in part because of numerous decisions of the court asserting that "equity has jurisdiction 'where a fiduciary relationship exists between the parties, and the duty rests upon the [fiduciary] to render an accounting.'" (citations omitted), at 536, 309.

The relationship of the Appellant as Personal Representative (PR) to each of the beneficiaries, including Respondents-Appellants, Brown and Moses, is a fiduciary one. See, SC Code Ann. Section 62-3-703(a) (2009) (stating "[a] personal representative is a fiduciary"). See also, Turpin v Lowther, 404 SC 581, 745 SE 2d 397, 400 (SC App. 2013). Accordingly, the case on appeal is one in equity.

As this Court notes, "the standard of review applicable to cases originating in the probate court depends upon whether the underlying cause of action is at law or in equity." Here, the underlying cause of action was the petition to approve the estate accounting – an equitable matter that would be decided by a judge and not a jury. The Respondents-Appellants successfully morphed the matter into an action seeking a refund of the Appellant's

compensation despite not filing the appropriate pleadings as required by the probate code. See S.C. Code Ann. § 62-3-721(a) (Supp. 2015). However, this does not change the original underlying nature of the proceedings nor change the standard of review pertaining to matters of equity. "[If the] alleged cause of action . . . is essentially equitable in nature, [a] prayer for the recovery of a specific sum of money does not change the action to one at law 'for the recovery of money only.'" Lee v. Lee, 251 S.C. 533, 536, 164, S.E.2d 308, 308 (1968).

The underlying proceeding on appeal was an action in equity and as such the proper standard of review allowed the circuit court to make factual findings according to its own view of the preponderance of the evidence. The circuit court did not find facts, nor analyze facts, but did hold the underlying action was an action in equity. (R. p. 21).

In the posture of this case, the Appellate Court may reverse the lower courts on errors of law or make findings of fact where facts relied upon below are without evidentiary support or against the clear preponderance of the evidence.

II. The Court Erred and Misapprehended or Overlooked that Basing a Personal Representative's Compensation Exclusively or Predominately on the Value of the Estate, pursuant to language in SC Code Section 62-3-319(a), is Error When the Will of the Decedent Otherwise Directs the Basis of Compensation

- A. The Court should establish factors for courts and Personal Representatives to consider when determining a Personal Representative's compensation where Section 62-3- 719(a) five percent cap does not apply.

This Court noted that the five per cent ceiling on compensation of the PR of SC Code Section 62-3-719 (a) does not apply to determining a reasonable compensation for a Personal Representative's (PR's) services "where the will otherwise directs", but then analyzed the percentage of compensation based on the value of the Estate without considering or establishing enumerated factors for either future courts or PR's to consider when determining

reasonable compensation. No guidance is provided on how to evaluate and determine "reasonable compensation."

This Court recognized that the probate court based its decision on the "value of the Estate" and exacerbated this error by applying the "action at law" standard of review by stating that it does not believe the utilization of an "Estate value " formula was "without [evidentiary] support." Appellant has argued above that the proper standard of review should be to reverse a finding if against a clear preponderance of the evidence, but more importantly, relying exclusively or predominately on the value of the Estate to establish reasonable compensation is an error of law. The will dictated the testatrix's intent that the compensation be "reasonable" and to that end an analysis of relevant factors should be considered and discussed.

Appellant does not argue that the value of the Estate has no relevance to the determination of reasonable compensation but does argue that value of the Estate and its assets should be considered as only one of many factors. These other factors should include the following:

1. Time and labor required,
2. Time limitations imposed by client and/or circumstances,
3. Novelty and/or difficulty of questions/issues presented,
4. Skill required to perform the service properly,
5. Results obtained,
6. Nature and value of the assets that are involved,
7. Complexity or simplicity of the estate involved,
8. Promptness, efficiency, and skill with which the administration was handled by the personal representative,
9. Benefits or detriments resulting to the estate or its beneficiaries from the PR's services,
10. Responsibilities assumed by and potential liabilities of the PR,
11. Experience, reputation, and ability of the PR performing the service,
12. If the PR is a member of the South Carolina Bar and has rendered legal services in connection with the administration of the estate,

13. Other professional education, experience, or accolades of the PR,
14. Likelihood that attorney's employment as PR will preclude other employment by the attorney,
15. Fees customarily charged in the locality for similar legal services by a personal representative with like skill, knowledge and experience,
16. Extraordinary services performed by the PR including, but not limited to sale of real or personal property, conduct of litigation on behalf of or against the estate, involvement in proceedings for the adjustment or payment of any taxes, carrying on of the decedent's business, any special services which may be necessary for the PR to perform,
17. Any delay in payment of the compensation after the services were furnished, and
18. Such other factors as a court may determine as reasonable to consider in a particular case.

See also Brief of Appellant-Respondent, pages 8 – 35; 37 – 40.

These factors should be considered in the determination of the amount of the Appellant's compensation as PR during the entire administration of the Estate, including his ongoing services since the initial filing of the Petition for Settlement.

- B. A clear preponderance of the evidence contradicts the lower court's findings of fact including that the Appellant unnecessarily complicated the the estate.

The lower court made a finding of fact that the Appellant "unnecessarily complicated the Estate by insisting on filing a partition action." (R. p. 8, para 2). To the contrary, a preponderance of the evidence, if not all of the evidence, supports that, as noted in this Court's opinion, the Appellant worked for 20 months with the various interested parties, made proposals, which garnered no response, and offered compromises to secure a resolution. Only when no progress was made or even responses received did the Appellant file the partition action – which included an action to declare the rights of the parties. There is no evidence that Appellant complicated the administration of the Estate. He sought to carry out

the intention of Ms. Kay to liquidate the Estate, to provide funds to the beneficiaries, including the cemetery fund, and to allow Charles Copeland to exercise the option granted by the will.

- C. A clear preponderance of the evidence contradicts the lower court's finding of fact that a deed of distribution would have been in conformity with Ms. Kay's will.

The lower court made a finding of fact that "[t]his was a fairly basic estate which could have been easily, quickly and cheaply settled by a deed of distribution. This would also have been in conformity with the Testatrix's Will." (R. p. 8, para 2). This is plain error. Ms. Kay intended for the real estate to be liquidated and the proceeds disbursed to the beneficiaries rather than simply giving them an undivided interest in real estate. For example, the will provides that interest on the cemetery fund's share of the proceeds be used to upkeep the Kay plot. There would be no interest without a liquidation of the real estate to create a cash fund to then accrue interest. Likewise, the Appellant could not have issued a deed of distribution to the beneficiary cemetery fund as "funds" of this nature are not legal entities and cannot hold title to real property. Furthermore, Ms. Kay granted an option to Charles Copeland. In liquidating the estate and resolving the issues created by the various competing interests, the preponderance of the evidence supports that Appellant carried out Ms. Kay's testamentary intent, his primary duty. See S.C. Code Ann. § 62-1-102(b)(2) and (3) (Supp. 2015) stating that underlying purposes and policies of this Code include making effective the intent of the decedent in the distribution of her property and promoting a speedy and efficient system for liquidating the estate and making distributions to [her] successors. (emphasis added).

III. The Lower Court's Ruling Regarding the Appellant's Compensation and Legal Fees and Costs is Contradicted Both by a Clear Preponderance of the Evidence and is Without Evidentiary Support Requiring Rehearing

Assuming arguendo that the Court applied the correct standard of review, "an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S. E. 2d 773, 775 (1976) (emphasis added). "The rule is the same whether the judge's findings are made with or without a reference." Id. "The judge's findings are equivalent to a jury's findings in a law action." Id.

1. The lower court's finding that Appellant failed to provide a legitimate basis for his compensation is without evidentiary support

The lower court found that "the [Appellant] failed to provide any legitimate basis for the fees he claimed and instead testified that he had no method or formula for determining the amount for the four draws he gave himself other than by pulling a figure out of the air. Although the [Appellant] in Memorandum argued that he had 468.6 hours of time as PR, the proof he provided failed to support this." (R. p. 9, para 8). This is not correct.

The record reflects that the Appellant testified he used various factors in determining the amount of the compensation, including time (468.6 hours), effort, novelty of issues, and the result. (R. p. 174, Line 19 – p. 175, Line 3). Because the will called for "reasonable compensation" and there is no specific standard or formula set in South Carolina, Appellant was forced to determine what would be considered "reasonable compensation". Appellant determined his fees based on several factors, including the Model Rules of Professional Conduct (although he was not charging as an attorney, he is still bound by the rules) and the

well-established formulas found in Florida and Colorado. (R. p. 174, Line 12 – p. 176, line 9) Appellant also consulted with Alan Medlin, a well-known expert in the field, and another attorney to determine reasonableness. (R. p. 175, Line 23, - p. 176, Line 9; R. p. 181, Line 21 – p. 182, Line 7). As this Court notes, Appellant has provided invoices, time sheets, and affidavits. Contrary to the lower court's finding, the Appellant simply did not "pull a number out of the air" and did in fact provide a method that was used to determine "reasonable compensation".

The lower court itself offers no support of its finding that a fee of \$51,300 is reasonable compensation other than it is about 10% of the Estate. There is no other justification or support by the lower court for reducing the Appellant's compensation other than (1) the value of the estate, (2) an inference that his ruling is based on his disagreement with the Appellant's handling of the estate and (3) a "compromise [that] takes into account that not all of the heirs opposed the PR's final accounting . . . ". (R. 10, Para 14). In fact, there were more witnesses that testified in favor of the Appellant's management of the Estate and compensation and expenses (Penelope Arnold and Bart Heard) than opposed (Martha Brown). Furthermore, Ms. Arnold's duties at the Presbyterian home included working with estates and personal representatives. In fact, Ms. Brown conceded that Ms. Arnold would be in a better position than her to evaluate the Appellant's services. (R. p. 364, Line 11 – p. 365, Line 9). Because the Court overlooked this point, the Court should allow re-hearing of the case.

2. The lower court's finding that Appellant complicated the Estate and should have simply filed a deed of distribution is without evidentiary support

There is no credible evidence that the Appellant complicated the Estate by "insisting" on filing a partition action.(R. p. 8, Para 2). In fact, Appellant did not insist, but worked with the

parties for 20 months and offered several proposals, to which there was no response. Without citing to any law, the lower court determined that the Appellant should have issued a deed of distribution to the beneficiaries in lieu of seeking to liquidate the real estate. (R. p. 8, Para 2). However, not only did Ms. Kay intend for the real property to be divided and sold, a super majority of the heirs had the same desire. The lower court's ruling would negate in its entirety SC Code Section 62-3-911 that provides for a partition action by the PR or one or more of the interested heir or devisees. This is error. Because the Court overlooked this point, the Court should grant rehearing.

IV. The Court Seemingly Relies on a Misapprehension of SC Code 62-3-907 (A)

Though this Court does not rule on the proper course of action, it implies in its footnote 5 that section 62-3-907(A) of the South Carolina Code (Supp. 2014)¹ may provide the answer because it provides, "[i]f a distribution in kind is made, the personal representative must execute a deed of distribution with respect to the real property." "In-kind" is defined as "goods or services rather than money." *In Kind*, Black's Law Dictionary (9th ed. 2009). As a result, this statute does not apply because Ms. Kay did not bequeath or devise, (i.e. distribute), the real estate in kind to any of the heirs, and there was no distribution made in kind. Nor did Appellant make a distribution of real property. Second, the purpose of this probate code provision is to provide for a mechanism that evidences the conveyance of title to distributees. See S.C. Code Ann. § 62-3-907 Reporter Comment (Supp. 2015). If a beneficiary inherits a particular property by the will, the provision requires the personal representative to provide an "instrument or deed of distribution" as evidence of the transfer of title. Id. at § 62-3-907(A). (Also see subsequent provision SC Code 62-3-908 "Distribution; right or title of distributees" in

¹ This Section of the South Carolina Probate Code was amended in 2013 after the partition action was

further explanation of the statutory scheme relating to conclusive evidence of title). The statute does not, however, override the intent of the testator as to how the property is left or impede the powers granted to the personal representative in effecting the testator's intent. Accordingly, this section does not support the contention in any way that seeking to divide the property, filing a partition action and subsequently selling the property was improper and therefore serving as a basis to reduce Appellant's compensation. Appellant acted in accordance with the powers granted by the will and by statute to effect the intent of the testator, and absent evidence of abuse of discretion in exercising these powers, should not be penalized by this substantial reduction in his compensation. In fact, the lower court made a specific finding that Appellant did not act in bad faith (R. p. 10, para 16), and the record is replete with evidence with the efforts made by Appellant to carry out the intent of the testator, to reach a compromise among the beneficiaries, and to accommodate the desires of those beneficiaries to initiate a partition action – their statutory right pursuant to SC Code Section 62-3-911 as well as the powers granted by the will. See S.C. Code Ann. § 62-1-102 (Supp. 2015). Therefore, section 62-3-907(A) simply does not apply.

The lower court's ruling is marred by its disagreement with the Appellants' efforts to ascertain and carry out the intent of Ms. Kay, the decedent, that resulted in the partition action. As such, the ruling is both without evidentiary support and contradicted by a clear preponderance of the evidence, and its order requiring a refund of fees and denial of additional compensation, legal fees and costs and expert fees should be reversed. This Court apparently misapprehends SC Code Section 62-3-907 as well as 62-3-911, and the express powers of Ms. Kay's will. Accordingly, the Court should grant rehearing and reconsider its opinion.

V. The Appellant Should be Awarded Legal Fees and Costs

The Respondents-Appellants' demand for a hearing on the Appellant's Petition for Settlement necessitated that he try to prepare for all possible issues, especially when the trial court ruled he must present his evidence as if he was the moving party.

The majority of the Court holds that the Appellant is not entitled to legal fees and costs related to the hearing. The majority cites SC Code Section 62-3-720, which states "If any personal representative or person nominated as personal representative defends or prosecutes a proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements, including reasonable attorneys' fees incurred." Despite its plain language, the majority concludes that the statute was intended to cover those fees and expenses in connection with prosecuting and defending claims exclusively against the estate. Respectfully, the majority overlooks that Respondent Brown used the hearing that she requested to pursue a claim against the Estate for five (5) acres of land (or apparently the equivalent value). (R. p. 100, Line 23 – p. 104, Line 18). She renewed this request at the Rule 59 Hearing. Appellant successfully defended her ongoing claims. (See Order Disposing of Post-Trial Motions, R. p. 18, 1st paragraph). Accordingly, the Appellant did in fact defend a claim against the Estate (successfully) and is entitled to reimbursement—even given the majority's view. Further, as the dissent notes, the probate code required Appellant to file a petition for settlement and he both prosecuted and defended in good faith his decisions to support his claims for compensation and to conclude the Estate at the requested hearing. See S.C. Code Ann. § 62-3-1001(a)(3) (Supp. 2015). The Appellant successfully defended Respondent Brown's claim against the Estate, appeared in good faith, and is entitled to be reimbursed for reasonable attorney's fees and costs as provided by the

statute (and will provisions) for his fees and costs. A rehearing should be granted.

The Court affirms the lower court's decision to assess expert fees for those testifying at the hearing against the Appellant individually because their work product and valuations were not contested issues at the hearing. Because the Respondents-Appellants filed no written pleading on any positions they intended to take, all issues had to be addressed. Everything the Appellant did as personal representative, including what the amount of his compensation was subject to review by the Court. These experts appeared and testified not just about the work they had previously performed for the estate but to provide testimony as to the extraordinary result achieved by the Appellant in selling the real estate and as additional justification for the compensation. These issues were absolutely contested. In fact, the Court, based on this testimony, found that the Appellant "did an excellent job in securing the sales price for the real estate." Respectfully, the value of the Appellant's services, as supported by the outstanding result achieved, was in fact an issue – if not the issue – and bitterly contested by the Respondents making the use of legal counsel and experts reasonably necessary. Accordingly, Appellant is statutorily entitled to reimbursement of these fees and costs. The failure to award reasonable attorney's fees and expert's fees is an error of law. The Court should grant rehearing.

CONCLUSION

The Court's opinion affirming the lower court's decision relating to determination of reasonable compensation in the face of the overwhelming evidence, facts and circumstances of this case as well as this Court's interpretation of SC Code Section 62-3-720 pertaining to recovery of legal fees and costs will have a chilling effect on those that are asked to serve as personal representatives and undertake that enormous responsibility. For the foregoing reasons, Appellant- Respondent respectfully requests this Court grant rehearing in this Case.

LAW OFFICE OF DARYL G. HAWKINS, LLC

By: 
Daryl G. Hawkins

1331 Elmwood Avenue, Suite 305 (29201)
Post Office Box 11906
Columbia, South Carolina 29211
803.733.3531 Tel
803.744.1949 Fax

*Attorneys for Appellant-Respondent
Edward D. Sullivan, PR of the
Estate of Marion M. Kay*

August 1, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
COURT OF COMMON PLEAS

Civil Action No. 2012-CP-30-258
The Honorable Donald B. Hocker, Probate Court Judge
The Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 5414
Heard June 3, 2016 - Filed June 15, 2016-08-01
Case Tracking No. 2013-2319

RECEIVED
AUG 01 2016
SC Court of Appeals

In the Matter of the Estate of Marion M. Kay

Edward D. Sullivan, as Personal Representative
of the Estate of Marion M. Kay Appellant-Respondent,

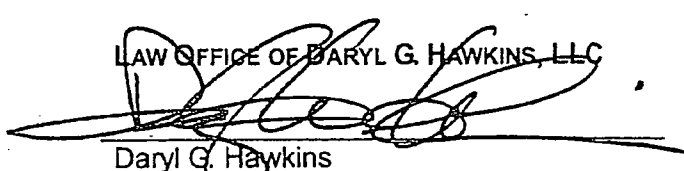
vs.

Martha Brown and Mary Moses Respondents-Appellants.

PROOF OF SERVICE

I certify that I served Appellant-Respondent's Petition for Rehearing upon Respondents-Appellants Martha Brown and Mary Moses by mailing one (1A) copy to counsel of record, John R. Ferguson, PO Box 286, Laurens, SC 29360-on August 1, 2016.

LAW OFFICE OF DARYL G. HAWKINS, LLC


Daryl G. Hawkins
1331 Elmwood Avenue, Suite 305 (29201)
PO Box 11906
Columbia, South Carolina 29211
803.733.3531 Tel
803.744.1949 Fax

*Attorneys for Appellant -Respondent
Edward D. Sullivan, PR of the
Estate of Marion M. Kay*

August 1, 2016

App.068

TELEPHONE
(803) 733-3531

LAW OFFICE OF
DARYL G. HAWKINS, LLC
1331 Elmwood Avenue • Suite 305 (29201)
Post Office Box 11906
Columbia, South Carolina 29211

FACSIMILE
(803) 744-1949

August 1, 2016

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RECEIVED

AUG 01 2016

SC Court of Appeals

RE: *In the Matter of the Estate of Marion M. Kay*
Edward D. Sullivan, as Personal Representative of
the Estate of Marion M. Kay, Appellant-Respondent v.
Martha Brown and Mary Moses, Respondents-Appellants
Laurens Co Circuit Court Appeals File No. 2012-CP-30-258
Laurens Co Probate Court File No. 2007-ES-30-208
SC Court of Appeals Tracking No. 2013-002319

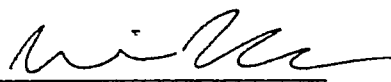
Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of the Appellant/Respondent's Petition for Rehearing in the above-referenced matter. I am also enclosing a check in the amount of \$25.00 for the required filing fee.

Please return a clocked-copy with our courier.

If you have any questions, please do not hesitate to call.

Very truly yours,


Legal Assistant

Enclosures
Cc: John R. Ferguson .

App.069

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appellate Case No. 2016-002337

RECEIVED

DEC 16 2016

S.C. SUPREME COURT

In the Matter of the Estate of Marion M. Kay

Edward D. Sullivan, as Personal Representative
of the Estate of Marion M. Kay.....Petitioner/Respondent,

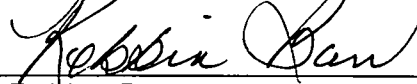
v.

Martha Brown and Mary Moses.....Respondents/Petitioners

PROOF OF SERVICE

I certify that I served the Joint Appendix upon Martha Brown and Mary Moses by mailing one (1) copy to counsel of record, John R. Ferguson, PO Box 286, Laurens, SC 29360, on December 16, 2016.

LAW OFFICE OF DARYL G. HAWKINS, LLC



Robbin Barr

1331 Elmwood Avenue, Suite 305 (29201)

PO Box 11906

Columbia, South Carolina 29211

803.733.3531 Tel

803.744.1949 Fax

*Attorneys for Petitioner/Respondent
Edward D. Sullivan, PR of the
Estate of Marion M. Kay*

December 16, 2016

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

DEC 16 2016

Appellate Case No. 2016-002337

S.C. SUPREME COURT

In the Matter of the Estate of Marion M. Kay

Edward D. Sullivan, as Personal Representative
of the Estate of Marion M. Kay.....Petitioner/Respondent,

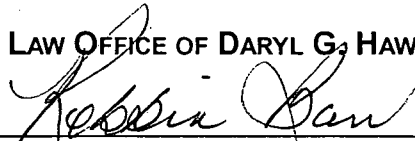
v.

Martha Brown and Mary Moses.....Respondents/Petitioners

PROOF OF SERVICE

I certify that I served the Joint Appendix upon Martha Brown and Mary Moses by mailing one (1) copy to counsel of record, John R. Ferguson, PO Box 286, Laurens, SC 29360, on December 16, 2016.

LAW OFFICE OF DARYL G. HAWKINS, LLC



Robbin Barr
1331 Elmwood Avenue, Suite 305 (29201)
PO Box 11906
Columbia, South Carolina 29211
803.733.3531 Tel
803.744.1949 Fax

*Attorneys for Petitioner/Respondent
Edward D. Sullivan, PR of the
Estate of Marion M. Kay*

December 16, 2016