IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY

Court of Common Pleas
The Honorable John C. Hayes, III

C/A No. 15-CP-46-1827

Appellate Case No. 2016-001558

Willie Bell, individually and on behalf of the Estate of Emma M. Davis as its duly appointed Personal Representative,

Appellant,

v.

McGowan, Hood, and Felder, LLC and Chad McGowan,

Respondents.

INITIAL REPLY BRIEF OF APPELLANT WILLIE BELL

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Table of Contents

Table of Authorities iii

Argument 1

I. In order to recover for wrongful death or loss of consortium, Andrew Strong was required to be timely adjudicated as the common law spouse of Emma Davis..... 1

II. While Appellant does not have the burden to prove Strong was not the common-law spouse, the evidence in the record shows that Davis and Strong did not hold themselves out to be married..... 7

III. An estate is an entity separate from the Personal Representative and Respondents, by the language of their own retainer agreement, undertook to represent the Estate. 10

IV. As the court with exclusive original jurisdiction to determine matters arising out of the probate of an estate, the probate court's order was binding as to all parties in this matter and the doctrines of res judicata and law of the case preclude relitigating the probate court's determinations and those issues which were admitted by all parties..... 15

V. The conflicts between Respondents' representation of the unadjudicated putative common law spouse and the Estate and/or Personal Representative where there is a sole child of the decedent is an actual, not manufactured, conflict of interest..... 20

VI. Appellant Willie Bell is not challenging the amount of the fee Respondents received, but instead asserts that Respondents' conflicts of interest render the entire fee subject to disgorgement..... 22

Conclusion 23

Table of Authorities

Cases

Argoe v. Three Rivers Behavioral Health, LLC, 2017 WL 1293986 20

Bell v. Progressive Direct Insurance, Co., 407 S.C 565, 757 S.E.2d 399 (2014) 7

Borissoff v. Taylor & Faust, 33 Cal. 4th 523, 531, 93 P.3d 337, 341 (2004) 14

Brown v. Coe, 365 S.C. 137, 616 S.E.2d 705(2005) 12

Byers v. Mount Vernon Mills, Inc., 268 S.C. 68, 71, 231 S.E.2d 699, 700 (1977) 5

Caratan v. C.I.R., 14 T.C. 934, 942 (1950) 13

Dickey v. Clarke Nursing Home, No. 2007-UP-098, 2007 WL 8325995 (S.C. Ct. App. Feb. 23, 2007) 12

In re Estate of Duffy, 392 S.C. 41, 707 S.E.2d 447 (Ct.App. 2011) 7, 8

Fabian v. Lindsay, 410 S.C. 475, 765 S.E.2d 132 (2014) 14

Flexon v. PHC-Jasper, Inc., 413 S.C. 561, 776 S.E.2d 397 (Ct.App. 2015) 19

Gordon v. Busbee, 2003 WL 26131496 (S.C. Com. Pl. Aiken Cnty, Jan. 5, 2003) 13

Gosnell v. Dorchester Sch. Dist. No. 2, 301 S.C. 21, 389 S.E.2d 865 (1990) 1-2

In Re Estate of Hover, 407 S.C. 194, 754 S.E.2d 875 (2014) 15, 16, 17

Laughton v. O'Braitis, 360 S.C. 520, 602 S.E.2d 108 (Ct.App. 2004) 17, 18

In re Estate of McCool, 553 A.2d 761 (N.H. 1988) 23

Parker v. Parker, 313 S.C. 482, 443 S.E.2d 388 (1994) 2, 3 5

Pessoni v. Rabkin, 220 A.D.2d 732, 633 N.Y.S.2d 338 (1995) 23

Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct.App.1989) 2

Skipper v. ACE Prop. & Cas. Ins. Co., 413 S.C. 33, 775 S.E.2d 37 (2015) 14

State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct.App.1991) 5

Thomas v. 5 Star Transportation, 412 S.C. 1, 770 S.E.2d 183 (Ct. App. 2015) 4, 5

Wellin v. Wellin, No. 2:13-CV-1831-DCN, 2016 WL 8653023(D.S.C. Nov. 14, 2016) 13

Statutes

S.C. Code Ann. § 14-3-330.....1

S.C. Code Ann. § 62-1-109.....10, 13

S.C. Code Ann. § 62-2-109.....2, 3

S.C. Code Ann. § 62-2-802.....1, 2, 3, 20

S.C. Code Ann. § 62-3-721.....22

Other authority

West's Encyclopedia of American Law 2nd Ed. (2008) 13

INTRODUCTION

In their Brief, Respondents attempt to re-cast Appellants' arguments, mischaracterize the facts; and rely on case law that has no application. Respondents also discount the evidence and testimony submitted at trial.[1] It beguiles logic when all of Respondents' arguments fail to recognize that an attorney cannot represent an unadjudicated common law spouse and a Personal Representative or Estate where there is a potential (and later verified) son. It is clear that the lower court erred in granting Respondents motion for a directed verdict.[2]

I. In order to recover for wrongful death or loss of consortium, Andrew Strong was required to be timely adjudicated as the common law spouse of Emma Davis.

Respondents contend that Strong did not have to be adjudicated Emma Davis's common law husband for the purposes of the medical malpractice litigation, despite the express language of S.C. Code Ann. § 62-2-802(b)(4), which requires a person claiming to be a common law spouse to be adjudicated as such within a certain time after the death of the decedent.[3] In

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[1] In several places in their Brief, Respondents claim that Appellant "abandoned" his claims for fraudulent or negligent misrepresentation. This is incorrect. Because the lower court's ruling eliminated damages, it effectively ended the case. Thus, the lower court's ruling was rendered appropriate for an interlocutory appeal based S.C. Code § 14-3-330 because it involved the merits. Moreover, the lower court did not rule on negligent or fraudulent misrepresentation (see the Form 4 Order), and Appellant cannot appeal a non-ruling.

[2] Throughout their brief, Respondents cite to "McGowan" Exhibits supposedly admitted at trial. After Judge Hayes had ruled on the directed verdict motion, Respondent's Counsel asked, "[j]ust as a matter of housekeeping" that Defendant's Exhibits be "admitted for the record[.]" Tr. of July 20, 27:11-16. These exhibits (other than those that are duplicates of Plaintiff's exhibits) were not before the judge prior to this.

[3] Respondents apparently concede the adjudication is needed for a wrongful death claim but argue adjudication is not required for loss of consortium. See, Heading I, Resp. Brief, p. 11. However, that claim is not supported by logic or case law. A loss of consortium can only be asserted by a spouse (not a friend or significant other) for damages for "the value of the injured spouse's services, society, and companionship in an action for loss of consortium as well as

support of this argument, Respondents wrongfully rely on *Parker v. Parker*, 313 S.C. 482, 443 S.E.2d 388 (1994), claiming it is "on point." However, both the law and the facts of that case are completely different than this case.

Parker involved an illegitimate child as a potential heir. Respondents claim that since the Supreme Court in *Parker* rejected the argument that S.C. Code § 62-2-109 was the only way to determine parentage, the court here must also reject that S.C. Code S.C. Code Ann. § 62-2-802(b)(4) is required to determine a common law spouse. Respondents ignore critical differences in the language of the two statutes.

Section 62-2-109, by its own terms, indicates that a legal determination may only be needed if there is a challenge to paternity, as indicated by the use of the word "if":

> **If**, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, though, or from a person:
> (2) In cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father if:
> ii) the paternity is established by an adjudication commenced before the death of the father or within the later of eight months after the death of the father or six months after the initial appointment of a personal representative of his estate and, if after his death, by clear and convincing proof....

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medical expenses incurred on behalf of the injured spouse." *Gosnell v. Dorchester Sch. Dist. No. 2*, 301 S.C. 21, 23–24, 389 S.E.2d 865, 866 (1990). Those damages are similar to those in a wrongful death case, which include "(1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries." *Self v. Goodrich,* 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct.App.1989). Respondents have provided no support as to why adjudication is not required under both claims. To hold otherwise would simply allow non-married couples to claim a common-law marriage in order to recover under consortium when they would not qualify to recover under wrongful death.

In other words, if an illegitimate child's status as heir is questioned, then an adjudication is required. In contrast, the statute governing common law spouses does not anticipate a challenge, but instead mandates who can be considered a surviving spouse and heir:

> For purposes of Parts 1, 2, 3, and 4 of Article 2 [Sections 62-2-101 et seq., 62-2-201 et seq., 62-2-301 et seq., and 62-2-401 et seq.] and of Section 62-3-203, a surviving spouse **does not** include:
>
> 4) an individual claiming to be a common law spouse **who has not been established to be a common law spouse by an adjudication commenced before the death of the decedent or within the later of eight months after the death of the decedent or six months after the initial appointment of a personal representative**; if the action is commenced after the death of the decedent, proof must be by clear and convincing evidence.

S.C. Code Ann. § 62-2-802(b)(4) (emphasis added). In other words, a putative common law spouse cannot be a surviving spouse *unless and until* a timely adjudication has been made--regardless of whether there is or might be a challenge by an interested party.

Moreover, the factual differences between *Parker* and the case at bar render *Parker* in applicable. In *Parker*, the decedent's wife was appointed personal representative and in the petition for informal probate, she listed herself and four children as the heirs, including an illegitimate child of decedent, Virginia Ann Martin ("Martin"). During the probate process, the legitimate children challenged the appointment of the personal representative though ultimately, a settlement was reached that allowed PR to continue. Martin was a part of this settlement agreement. Almost a year after the death of decedent, another person came forward asserting he was a child and heir. While his claim was rejected as untimely, the probate court's orders acknowledged Martin's continued presence and participation in each proceeding regarding the claim. Almost four years after the death of the decedent, the legitimate children, for the first time, sought to exclude Martin under Section 62-2-109. The court found that an adjudication of

paternity was required only where an interested party questioned paternity and that the challenge must be brought within the statutory time limit. Since the legitimate children had notice of Martin's claim and allowed her to participate in proceedings for four years before challenging paternity, the court rejected the children's request.

However, unlike the case here, all of the heirs in *Parker* were listed in the initial probate filing and thus, had notice that Martin claimed to be a child and heir. The legitimate children could have challenged Martin's parentage but chose not to. In contrast, here, Appellant Willie Bell was not included in the Petition for Appointment filed by Tanisha Gilmore (Def. Ex. 15),[4] even though he was the only child of Emma Davis, nor was he contacted regarding the institution of legal proceedings for medical malpractice in his mother's name.[5] Moreover, Strong was not listed in the Petition filed by Ms. Gilmore (Def. Ex. 15) as a common law spouse. [6] Thus, there was no way for Bell or any interested party to even challenge Strong's status as none had been asserted by Strong or the Personal Representative.

The other case on which Respondents primarily rely, *Thomas v. 5 Star Transportation*, 412 S.C. 1, 770 S.E.2d 183 (Ct. App. 2015), also has no application here. In *Thomas*, the issue before the court was whether Emily Thomas was a surviving spouse under workers compensation law, not for the purposes of a wrongful death or loss of consortium action.

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[4] It should be noted that here is no evidence in the record that the probate court appointed Gilmore (a great-niece of Ms. Davis) as PR due to "the family's assurances that Davis had raised but never adopted Bell" as Respondents claim. Resp. Brief, p. 4.

[5] Respondents knew of Willie Bell's existence as a "surviving son" who may have been adopted, but failed to determine his status and include him in the proceedings. Pl. Ex. 14i.

[6] The only people Gilmore included as intestate heirs were Rosa Hall and Atlean D. Johnson, Ms. Davis's sisters.

Moreover, that case involved the validity of a marriage where two people had engaged in a marriage ceremony, but one participant's divorce had not been made final. Respondents incorrectly claim that Emily entered into a "common law marriage" with George. The Court of Appeals actually *rejected* the Workers Compensation Panel's determination that Emily and George were common law spouses and did not even use the phrase "common law" in holding that Emily was a surviving spouse. Instead, the court focused on the fact that Emily had a marriage ceremony with George, and apparently neither knew that his divorce was not final. The divorce was final approximately 6 months later. The Court of Appeals stated:

> Although the Appellate Panel erred in determining Emily was George's common law or putative spouse, we affirm that Emily was George's surviving spouse because they entered into marriage with a good faith belief that they could marry and continued to act as husband and wife once the impediment was removed.

Id. at 18, 192.[7] The court did not address whether adjudication of a common law spouse under S.C. Code Ann. § 62-2-802(b)(4) was required in order to bring a wrongful death or loss of consortium claim because that issue was not before court. See, *State v. Austin,* 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct.App.1991). ("[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.")

Finally, Respondents claim that Bell is estopped from challenging Strong's status by Bell's silence during the medical malpractice litigation, again relying on *Parker*. As discussed above, in *Parker*, the legitimate children were included in all probate proceedings and knew that

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[7] In other words, the Thomas case simply followed "well settled" workers compensation case law which has held that "the removal of an impediment to a marriage contract (the divorce in this case) does not convert an illegal bigamous marriage into a common law legal marriage." *Byers v. Mount Vernon Mills, Inc.*, 268 S.C. 68, 71, 231 S.E.2d 699, 700 (1977). Thus, *Thomas* provides no support for Respondents' arguments.

Martin claimed to be a child of the decedent. The children had the opportunity to challenge paternity but failed to do so for four years, thus providing the basis for estoppel when they finally made a challenge four years later. Here, Bell was not listed as an intestate heir in the probate proceedings (Def. Ex. 15) and as he testified, was never informed of any legal proceedings:

Q. Did anybody ask you to go with them to talk to an attorney?

A. No, sir.

Q. Do you know what a personal representative is or did you at that time?

A. No, sir.

Q. Did anybody ask you to go to the probate court and be a personal representative?

A. No, sir.

Q. Just no one talked to you about it?

A. No, sir.

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Q. Did [Gilmore] every mention anything to you about being a personal representative or a lawsuit or anything?

A. No, sir.

Q. Did anybody talk to you--the lawsuit?

A. No, sir.

Tr. of July 18-19, 96:15-97:13. Having no notice of any of the legal proceedings, Bell did not have the opportunity to challenge Strong's status, and there is no basis for estoppel.

II. While Appellant does not have the burden to prove Strong was not the common-law spouse, the evidence in the record shows that Davis and Strong did not hold themselves out to be married.

Respondents claim that because Appellant Willie Bell failed to prove Strong was not the common law husband, Bell failed to prove Bell was entitled to all of the settlement funds as the wrongful death beneficiary. Contrary to Respondents' claims, Respondents have the burden of proof to show that Andrew Strong was the common-law husband and therefore was entitled to recover for wrongful death and loss of consortium. See, *In re Estate of Duffy*, 392 S.C. 41, 707 S.E.2d 447 (Ct.App. 2011)("[t]he party seeking to establish the existence of a common law marriage carries the burden of proof." However, the evidence in the record is sufficient to demonstrate that Strong was not the common-law husband of Emma Davis, despite Respondents' over-reaching claims that all of the evidence indicated Davis and Strong were married.

While Strong and Davis lived together, cohabitation alone is not sufficient. *Baker v. Baker,* 330 S.C. 361, 367, 499 S.E.2d 503, 507 (Ct.App.1998) (common law marriage requires cohabitation accompanied by a present intent to be husband and wife); *Bell v. Progressive Direct Ins. Co.*, No. 2011-UP-242, 2011 WL 11734353, at *2 (S.C. Ct. App. June 23, 2011), aff'd, 407 S.C. 565, 757 S.E.2d 399 (2014) (cohabitation alone is insufficient to create a common law marriage). The evidence shows that despite their cohabitation, Davis did not consider herself married to Strong. In the medical malpractice litigation, Strong testified that that Ms. Davis never used his name and they had no paperwork evidencing a common law marriage. Pl. Ex. 11,

p. 12:16-13:4.[8] Ms. Davis never took his last name. (Def. Ex. 29, p. 12). The trailer in which Davis and Strong lived was in her name, as was the electricity. (Def. Ex. 29, p. 15; 39). Contrary to Respondents' claim, not all family members represented that Davis and Strong were married. In fact, they were described by one relative (sister Rosa Hall) as boyfriend and girlfriend (Def. Ex. 32, p. 18) and another one (niece Linda Gilmore) conceded they "lived together but not married." (Def. Ex. 31, p. 22). Ms. Davis held herself out to others as unmarried, as demonstrated in the medical records, which stated "The patient is single." Pl. Ex. 12. Ms. Davis described Andrew Strong as a "friend" in another medical record. Pl. Ex. 13.[9]

The sole basis for Respondents' claim that Strong was the common law spouse is an application of insurance purportedly completed by Ms. Davis listing Mr. Strong as a common law husband.[10] Of course, there was no testimony was presented at trial regarding the circumstances or execution of this document. Our courts have rejected claims of common law marriage where there was more evidence than this lone writing. See, *In re Estate of Duffy*, 392 S.C. 41, 707 S.E.2d 447 (Ct.App. 2011), (multiple cards with notations indicating a marital

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[8] Respondents try to use the fact that the defendants in the medical malpractice case did not challenge Strong's status as common law spouse as additional proof that Strong actually was the common law spouse. Of course, Respondents ignore the fact that in the medical malpractice action, Strong testified that he had been adjudicated a common-law spouse and even though Mr. McGowan knew that not to be true, he took no action to correct the misstatement. Pl. Ex.11, p. 40:11-21.Tr. of July 18-19, p. 173:10-176:24. The defendants in the medical malpractice case had no reason to challenge Strong's testimony.

[9] In their brief, Respondents argue that the medical records and other evidence indicating Davis's status as single (and Bell as her son) is "hearsay." However, Respondents did not object to any of these exhibits at trial.

[10] Respondents claim that the life insurance policy is "uncontroverted" evidence of a common law marriage, but as set forth herein, there was testimony from the medical malpractice case and other evidence that did contradict a claim of common law marriage.

relationship; wearing of a wedding ring; and testimony from witnesses was insufficient to prove common law marriage.) The life insurance application alone is insufficient to declare Strong a common law spouse.

Respondents also claim that he had no way of knowing that Appellant Willie Bell was adopted and thus could not have known that Bell was entitled to proceeds under a wrongful death action. Respondents argue that the family members all testified that Willie Bell was not adopted.[11] However, Respondents' own notes indicated that at least someone at the initial meeting indicated that Willie Bell had been adopted, as a there is a memo to file stating: "There is a surviving son, who may or may not have been adopted." Pl. Ex. 14c. Respondents simply failed to make any investigation or true determination as to Willie Bell's status, relying on statements by some family members that Bell had not been adopted. As Mr. Freeman testified:

> As a lawyer you don't necessarily let your client to you investigation. Sometimes they don't have the skills to do it. Sometimes they don't know where to look for what's important. That's why you went to law school and got a degree, to learn how to do that. And so to say, "Well, I relied on the family," I don't care if you're relying on 4 people, 6 people, or 100 people, if they're not lawyers, when you're relying on them for a legal judgment, you making a mistake in my opinion. And that was a failure and it was a blunder; it was an error.

Tr. of July 20, p. 270:6-16.

Finally, Respondents claim that Appellant Willie Bell has failed to establish proximate cause because there was no evidence that Bell would have received the entire $2.3 million fund as the wrongful death settlement. While Bell did not challenge the settlement amount, he did assert that but for Respondents' professional negligence, he would have been entitled to the

[11] Of course these relatives were also ones that received payments from Strong and clearly had a vested interest in keeping quiet.

entire amount as the sole heir and statutory beneficiary of Ms. Davis. In other words, all Appellant Willie Bell had to prove was that he was the son and statutory beneficiary and that Respondents failed to have Strong adjudicated a common law spouse as required by law. The adoption decree (Pl. Ex. 1) and the probate court ruling (Ct. Ex. 5) establish Bell's status as the only son and Respondents did not dispute that they failed to have Strong adjudicated as common law spouse.

III. An estate is an entity separate from the Personal Representative and Respondents, by the language of their own retainer agreement, undertook to represent the Estate.

Respondents argue that the directed verdict should have been granted on the basis that the "Estate of Mrs. Davis" was not an entity that could enter into a contract and thus, Respondents' duty was limited to Gilmore under S.C. Code § 62-1-109. Respondents are trying to avoid the express language of the retainer agreement, as well as the applicable code section and case law.

As noted in Appellant's opening brief, Section 62-1-109 states:

> **Unless expressly provided otherwise in a written employment agreement**, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.

(emphasis added). Of course, here, <u>there is an express provision in a written employment agreement</u> that creates/extends Respondents' duty to the "Estate of Mrs. Davis." Pl. Ex. 7.[12]

[12] Respondents wrongfully assert that Appellant Willie Bell has failed to address this section, but on p. 25 of his opening brief, Bell noted the exception in S.C. Code § 62-1-109 and referenced the testimony by John Freeman in which Mr. Freeman stated that Respondents had a duty to the personal representative as well as the Estate of Mrs. Davis since the Estate had been designated as the client in the Retainer Agreement. Tr. of July 18-19, 274:15-23.

Trying to run from their own written agreement, Respondents argue that *Douglass ex rel. Louthian v. Boyce*, 344 S.C. 5, 542 S.E.2d 715 (2001) supports their argument that they had no duty to anyone other than the personal representative, claiming the case is "factually and legally on point with this matter." However, that case is neither. In that case, seventeen-year-old Christopher Boyce was killed in a car accident and his parents were appointed personal representatives of his estate. The Boyces pursued a wrongful death action which eventually settled. Douglass, who claimed to be the biological son of the decedent, commenced an action against the Boyces claiming they breached their fiduciary duty to him by failing to include him in the wrongful death action. Douglass was born less than a year before Christopher's death, to a woman who was married to someone else.

The *Douglass* case has nothing to do with the case at bar. Douglass involved a paternity question and the presumption that a child was born of the marriage, not to Boyce. The lawyer was not expected to look past that legal presumption. The clear distinction between *Douglass* and the instant case is that the attorney in that case did not know about the existence of the child during the wrongful death litigation and, even if the evidence was available to him, all evidence pointed to the child being fathered by someone other than Christopher. Here, the facts are quite the opposite. Respondents knew from the initial meeting that Appellant Willie Bell was potentially the son of Emma Davis as his notes indicate. (Pl. Ex. 14c, 14i). Respondents had additional evidence of Willie Bell's existence from the death certificate and the obituary. (Pl. Ex. 3, 4). Yet Respondent ignored the existence of Appellant Willie Bell as the adopted son and sole true heir to Emma Davis and failed to make any investigation as to Bell's status.

Furthermore, even the *Douglass* case acknowledges that the duty of a personal representative's attorney can be extended to third parties (including statutory beneficiaries) by providing for such in written employment agreement. *Douglass*, 344 S.C. at 10, 542 S.E.2d at 717, citing S.C. Code § 62-1-109 ("an attorney is immune from liability to third persons arising from the attorney's professional activities on behalf and with the knowledge of the client, absent an *independent* duty to the third party"). Of course, here, the retainer agreement clearly identifies the client:

RETAINER AGREEMENT

This is an agreement between McGowan, Hood & Felder, LLC (hereinafter "attorneys") and [illegible] (hereinafter "client"). This agreement covers legal service for claims relating to injuries suffered by client. This agreement covers any claim that client may have against any potentially liable party for injuries, resulting damages and any liabilit[illegible]

Pl. Ex. 7. In addition, Respondents admitted representing the estate. In an email to a lawyer for Appellant Willie Bell, Mr. McGowan wrote "I believe since I represented the estate as a whole, and not any individual heir, it would be wrong for me to represent one heir or heirs against another." Pl. Ex. 9.

Respondents claim that the lower court erred in finding the estate was an entity and assert that the case cited, *Dickey v. Clarke Nursing Home*, No. 2007-UP-098, 2007 WL 8325995, at *1 (S.C. Ct. App. Feb. 23, 2007), did not address the ability of an estate to enter a contract. While it is correct that *Dickey* did not involve an estate's contract, the court clearly held that an estate "is a separate legal entity from the individual named as PR." See also, *Brown v. Coe*, 365 S.C. 137,

142, 616 S.E.2d 705, 708, *order clarified*, 365 S.C. 664, 620 S.E.2d 323 (2005)("The estate is a separate legal entity [from its administrator] with interests other than [the administrator's] alone."). Moreover, West's Encyclopedia of American Law 2nd Ed. (2008) defines an "entity" as follows:

> A real being: existence. An organization or being that *possesses separate existence for tax purposes*. Examples would be corporations, partnerships, *estates*, and trusts.

(emphasis added). Of course, federal tax courts have long recognized that "the estate of a deceased person [is] a taxable entity during the period of administration[.]" *Caratan v. C.I.R.*, 14 T.C. 934, 942 (1950). The law is clear-- an estate is an entity apart from the PR and under S.C. Code § 62-1-109, an attorney-client relationship with the estate was created as it was "**expressly provided [for] in a written employment agreement....**" See Pl. Ex. 7.[13]

Respondents, relying on *Gordon v. Busbee*, 2003 WL 26131496 (S.C. Com. Pl. Aiken Cnty, Jan. 5, 2003), claim that an attorney cannot represent an estate or have duties to an estate. First, it should be noted that this circuit court order, available on Westlaw, has significant omissions. For example, there is a notation that "Pages 4-8 illegible in original document."

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[13] *Wellin v. Wellin*, the case upon which Respondents rely, does not apply here. In that case, the court actually recognized that South Carolina law such as *Brown v. Coe* held that an estate is an entity, but found that an estate could not be subject to a deposition notice under Rule 30(b)(6), FRCP. The *Wellin* court noted that Rule 30(b)(6) was entitled "Notice or Subpoena Directed to an Organization" and stated "it seems clear Rule 30(b)(6) is intended to apply to organizations formed for a particular purpose or for the purpose of achieving a series of goals." *Wellin v. Wellin*, No. 2:13-CV-1831-DCN, 2016 WL 8653023, at *6 (D.S.C. Nov. 14, 2016). A probate estate, the court concluded, was "not an organization subject to the Rule. It is not made up of two or more persons, nor is it formed for a particular purpose or formed to achieve a series of goals." Id. The fact that an estate was not an organization subject to Rule 30(b)(6) does not negate the case law holding that an estate and personal representative are separate entities.

Thus, there may be significant facts or law in those omitted pages. Moreover, *Gordon* was prior to *Fabian v. Lindsay,* 410 S.C. 475, 765 S.E.2d 132 (2014), which extended the duty a will-drafting lawyer had to heirs, explaining that the duty should be extended "because the beneficiaries were supposed to be the beneficial owners of estate assets, [and] only the beneficiaries suffer directly due to the lawyer's negligence." *Fabian*, 410 S.C. at 483, 765 S.E.2d at 137. Of course, here, the "beneficial owner of estate assets" was Appellant Willie Bell. Respondents, as attorneys for the Estate, have duties that extend to the beneficial owner of that Estate.

Respondents argue that recognizing an estate as entity and extending *Fabian* to that estate would "wreak havoc" with a counsel's ethical duties to statutory or prospective heirs and place impossible burdens on counsel to identify or track down such heirs. This argument is a red herring. Respondents had direct knowledge that Emma Bell had a son from conversations with family members, notations in medical records, and on the death certificate. Despite that knowledge, Respondents took no action to determine whether Appellant Willie Bell had been adopted. The "impossible burden" to track down Appellant Willie Bell would have been to call Willie Bell at the house he lived in with his mother and Strong.

Finally, even if the Estate and Tanisha Gilmore as Personal Representative are one and the same, Respondents still had conflicts of interest in representing Strong.[14] Gilmore did not

[14] Respondents also have a somewhat confusing argument that Bell, as successor PR cannot sue Respondents for legal malpractice because Gilmore, the original PR did not sue. However, as one court noted "a successor fiduciary must have standing to sue the predecessor's attorney if there is to be an effective remedy for legal malpractice that harms estates and trusts administered by successor fiduciaries."*Borissoff v. Taylor & Faust*, 33 Cal. 4th 523, 531, 93 P.3d 337, 341 (2004). Respondents also assert that allowing Bell to proceed is an assignment of a legal malpractice claim prohibited by *Skipper v. ACE Prop. & Cas. Ins. Co.*, 413 S.C. 33, 35, 775

include Strong in probate filings as an intestate heir/common law spouse; thus, anything Strong recovered would reduce the recovery obtained by Gilmore as Personal Representative.

IV. As the court with exclusive original jurisdiction to determine matters arising out of the probate of an estate, the probate court's order was binding as to all parties in this matter and the doctrines of res judicata and law of the case preclude relitigating the probate court's determinations and those issues which were admitted by all parties.

In their initial brief, Respondents argue that the probate court divested itself of subject matter jurisdiction when it ruled that Respondent McGowan lacked standing as an interested party to seek removal of Petitioner as the successor personal representative of the estate of Emma Davis. However, South Carolina law does not support Respondent's position. Instead, the probate court remains the court with original jurisdiction to determine statutory beneficiaries under the probate code.

As the South Carolina Supreme Court noted in *In re Estate of Hover*, 407 S.C. 194, 754 S.E.2d 875 (2014), every reference to "jurisdiction" does not implicate "subject matter jurisdiction." *Id.* at 207, 754 S.E.2d 882. Instead, courts generally define jurisdiction to mean "the power to declare law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* citing *Limehouse v. Hulsey*, 404 S.C. 93, 104 S.E.2d 556, 552 (2013).

While the facts in *Hover* are complicated and involve, a mortgage, foreclosure and deficiency judgment, the Supreme Court ultimately certified the limited question of whether the claim of a creditor bank against an estate was enforceable under the probate code when the bank

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S.E.2d 37, 55 (2015). That case involved defendants confessing to a multimillion- dollar judgment and then assigning the plaintiffs their malpractice claim against the defendants' attorneys. Citing the heightened risk for collusion, the court refused to allow an adversary assign such a malpractice claim.

failed to file the claim within the statutorily prescribed time. *Id.* at 202, 754 S.E.2d at 879. Initially, the Supreme Court determined that the entirety of the issue before the court arose under the probate code, and was therefore statutory in nature. *Id.* The Court then found that, under the strict rules of statutory construction, the Bank's deficiency judgment did not operate as an allowance under the probate court to extend the time in which to file a claim and thus, the Bank had failed to timely file a claim. *Id.* at 206-207, 754 S.E.2d at 881-882. The Supreme Court stated unequivocally that this failure of Respondent Bank to timely file a claim, **did not divest the probate court of subject matter jurisdiction with respect to issues arising out of the probate of an estate**. *Id.* at 208, 754 S.E.2d at 882. *See* S.C. Code Ann. § 62-1-302(a)(1) (Recognizing that the probate court has exclusive jurisdiction over all subject matter related to the estates of a decedent.)(emphasis added). "Instead, noncompliance eliminates a claimant's right of action against a decedent's estate and in turn, deprives the court of power to adjudicate the claim." *Id.*

In the instant matter, Respondents moved before the probate court for removal of Appellant Willie Bell as successor personal representative after Bell initiated suit in circuit court against Respondents. At the hearing, the probate court, in its original jurisdiction, determined that Appellant Willie Bell was the "sole surviving heir" of Emma Davis, and thus entitled to highest priority of appointment under the probate code. *See* Ct. Ex. 5, p. 1. The probate court also found that it was "undisputed that Andrew Strong... failed to have himself adjudicated" as the common law husband of Emma Davis, within the statutorily prescribed time period set forth under S.C. Code Ann. § 62-2-208(b)(4), and thus could not be considered a surviving spouse. *See* Ct. Ex. 5, pp. 1-2 . *See also In re Hover*, 407 S.C. 194, 207, 754 S.E.2d 875, 882 (discussing the preclusive effect of a nonclaim statute against claims arising outside of the statutory timeframe.)

The probate court then determined that Respondents were not an "interested party" within the meaning of the statute and lacked standing to enable the court to provide the relief requested. Ct. Ex. 5, p. 2-3. Significantly, the order of the probate court expressly provides that "[Respondent] McGowan does not dispute that [Petitioner] Bell has priority of appointment under S.C. Code § 62-3-203 as the sole surviving heir. It is undisputed that Andrew Strong, who [Respondent] McGowan contends is a common law husband, failed to have his status as Ms. Davis's husband adjudicated within the time limits provided under S.C. Code § 62-2-804(b)(4) and therefore is not to be considered a surviving spouse under the Probate Code." Id. at p. 1-2

The probate court's finding that Respondents lacked standing, did not divest the probate court of subject matter jurisdiction to determine estate issues such as priority of appointment. Rather, the Court found that, given the arguments made by counsel, insufficient evidence existed to remove Appellant Willie Bell as personal representative. Moreover, the probate court, by determining that Respondents lacked standing, determined that it was without the ability to grant Respondents' requested relief of removal, regardless of whether the probate court retained the power to determine priority of appointment.

After the probate court issued its order, Respondents could have sought reconsideration, or filed notice of appeal as to the probate court's decision. However, Respondents failed to act. In the absence of any affirmative action by Respondents, the final decision of the probate court, including the court's affirmation that certain factual and legal issues were agreed upon by the parties, became binding.

"Under the doctrine of issue preclusion, if an issue of fact or law was actually litigated and determined and necessary to a valid and final judgment, the determination is conclusive in a

subsequent action on that claim or a different claim." *Laughton v. O'Braitis*, 360 S.C. 520, 602 S.E.2d 108 (Ct.App. 2004) (Cert. denied 2006), citing *Carman v. S.C. Alcoholic Beverage Control Comm'n*, 317 S.C.1, 6, 451 S.E.2d 383, 386 (1994).

In *Laughton*, following the probate court's dismissal with prejudice of an action for accounting and termination of the appointment of her sister as personal representative of their father's estate, Laughton brought an action for partition and accounting in circuit court. *Id.* at 524, 602 S.E.2d at 110. The Court of Appeals determined that Laughton's action for partition was barred by the doctrine of issue preclusion because the subsequent action initiated in circuit court by Petitioner involved the same subject matter as the action initiated in probate court, and therefore the probate court's dismissal precluded Laughton from raising the same issues, regardless of which court was asked to determine those issues. *Id.*

The Court of Appeals was not convinced by the Laughton's efforts to distinguish the two actions:

> It is a fundamental principle of jurisprudence that material facts or questions which are directly in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment entered therein, and that such facts or questions became *res judicata* and may not be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action.
>
> The rule will also apply even though the subsequent action is upon a different cause of action, and involves a different subject matter, claim, or demand, then the earlier action. In such cases, it is likewise immaterial that the two actions have a different scope, or are based on different grounds, or are tried on different theories, or are instituted for different purposes, and seek different relief.

Id. at 527, 620 S.E.2d at 112, quoting 46 Am.Jur.2d Judgments § 539 (1994).

In the instant matter, Respondents moved before the probate court for an order to remove Appellant Willie Bell as successor personal representative of the estate of Emma Davis. The probate court thereafter determined that Bell had the highest priority of appointment as the sole surviving heir of Ms. Davis. The probate court also determined that Andrew Strong failed to avail himself of the statutory requirements to be adjudicated a common law spouse and therefore was barred from consideration as a surviving spouse under the South Carolina probate code.

Respondents thereafter brought these same issues before the trial court, despite the probate court's binding adjudication. Respondents are barred under the doctrine of claim preclusion from relitigating these issues and in disregarding the conclusion of the probate court.

Similar to issue preclusion, the law of the case operates to bar a party from relitigating after an appeal, or opportunity for appeal, those issues previously decided with regard to the same claims and factual issues. *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 776 S.E.2d 397 (Ct.App. 2017) *See Argoe v. Three Rivers Behavioral Health, LLC*, 2017 WL 1293986. In *Argoe*, the Court of Appeals was asked to determine whether the appellant could maintain a cause of action for medical malpractice, which was premised on the same factual scenario (appellant's involuntary commitment by order of the probate court. *Id.* at *2-3. The Court of Appeals affirmed the circuit court's grant of summary judgment to the defendants because the probate court's order of commitment was never contested and was therefore proper. *Id.* at *3. The Court of Appeals held that that the probate court's unappealed order became the law of the case and binding on all subsequent court actions alleging the same factual issues. *Id.* at *5.

In the instant case, in their initial brief, Respondents encourage the Court to adopt a very narrow interpretation of law of the case, applying the doctrine only in circumstances involving the

"exact same case." Initial Brief of Respondent, p. 34-35. However, as the Court of Appeals made clear in *Argoe*, law of the case does not simply preclude relitigating matters in the exact case. *Id.* at *5. Rather, law of the case precludes relitigating the same factual or legal issues in a subsequent action, even where the action is presented under the guise of a different form. *Argoe* at *5, citing *Ackerman v. McMillan*, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct.App. 1996).

Here, the litigation before the probate court involved the same material parties and factual disputes as the matter initiated by Appellant Willie Bell in circuit court, including a determination of statutory beneficiaries, and whether Andrew Strong was barred pursuant to the probate code from classification as a surviving spouse. After the probate court made its determination, Respondents did not seek reconsideration or file an appeal. Instead, Respondent disregarded the order of the probate court, and presented the same issues before the circuit court for determination. As the court made clear in *Argoe*, an unappealed ruling involving the same material issues and parties becomes the law of the case, and cannot be challenged even under a new heading. The circuit court therefore erred in failing to rule that Respondents were precluded from relitigating these same issues, and in disregarding the order of the probate court, and must be reversed.

V. The conflicts between Respondents' representation of the unadjudicated putative common law spouse and the Estate and/or Personal Representative where there is a sole child of the decedent is an actual, not manufactured, conflict of interest.

Respondents claim that Appellant Willie Bell "manufactured" conflicts of interest but assert that there are no such conflicts. Respondents argue that Bell failed present evidence that Strong's status as common law spouse could have successfully been challenged. The issue of Strong's status -- including the requirements of S.C. Code Ann. § 62-2-802(b)(4) and the evidence indicating the Strong and Davis were <u>not</u> common law spouses-- has already been set

forth in Appellant's opening brief and in Section II above. Appellant's expert, John Freeman, clearly testified as the conflict between Strong and the PR and/or Estate (which consists of Bell as the only intestate heir and statutory beneficiary) and Bell:

> You're talking about one pie. It's a big pie. It's a multi-million dollar pie. It's am million-dollar-plus pie even if you take 900,000 in fees out of it. Who gets what size piece? And Mr. Strong thinks that he's entitled to more than Willie or the PR thinks something else.

Tr. of July 18-19, 273:9-15.

Moreover, Respondents' claim that there was no conflict at distribution of the settlement because Respondents referred Gilmore and Strong to separate counsel is disingenuous. The only reason Respondents referred the matter to other counsel was because Appellant Willie Bell learned that he, as the one, true heir and beneficiary, had been excluded from the legal proceedings and would receive nothing from his mother's Estate, causing Bell to take took legal action against Gilmore and Strong. Respondents did not come to the realization themselves that there was a conflict of interest between the Estate and Strong.

Respondents also assert that there was no evidence of a conflict of interest due to Mr. Malone's loans to Strong because Respondents advised Strong against the transaction and encouraged him to seek separate counsel, and that they, Respondents, did not receive any benefit in connection with the loans. However, Mr. Maloney is the father-in-law of Mr. McGowan and his repayment hinged on a successful outcome of the case. Thus, Respondents had a vested, personal interest and a personal benefit in ensuring that Strong recover substantial funds so that Respondents' father-in-law would recoup not only loan, but twice that amount.

VI. Appellant Willie Bell is not challenging the amount of the fee Respondents received, but instead asserts that Respondents' conflicts of interest render the entire fee subject to disgorgement.

Respondents claim that since Appellant Willie Bell did not seek to undo the entire settlement, he has waived review of Respondents' fees under S.C. Code § 62-3-721. However, that code section only applies to a challenge to the reasonableness of a professional's (attorney, auditor, etc.) fee. This case is not a fee dispute, but a one involving malpractice, fraudulent misrepresentation, negligent misrepresentation, unfair trade practices, and conflict of interest. Thus, Appellant Willie Bell is entitled to a panoply of remedies and is not limited to a "refund" of part of the fee under S.C. Code 62-3-721.[15]

Respondents also attempt to distance themselves from the significant body of case law that requires disgorgement where there are conflicts of interest, claiming that those cases involve "blatant, known conflict of interest." Of course, Respondents did have a blatant, known conflict of interest; Respondents knew that Emma Davis had a son who was potentially adopted and that his interests and Strong's, as a putative common-law spouse diverged, but Respondents exercised willful blindness to ignore this conflict. In addition, Respondents conceded there is a conflict in their Brief, when Respondents indicate that if they knew Strong might not be the common law spouse, "McGowan could have arranged for waivers of conflicts, separate counsel, or withdrawn from representation of Gilmore and Strong in the Wrongful Death Litigation altogether[.]"[16]

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[15] Furthermore, that code section does not indicate it is an exclusive remedy, nor could it exclude damages for torts committed by the attorney.

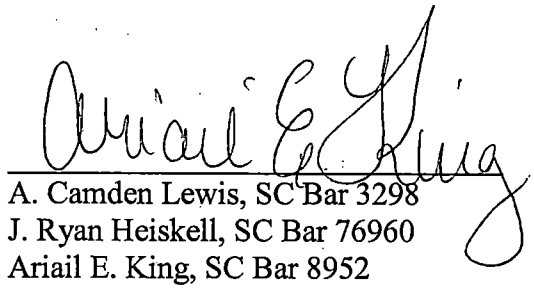
[16] Respondents try to blame Appellant Willie Bell for failing to "speak up" as to Strong's status, but as noted previously, Appellant Willie Bell was not included in the wrongful death litigation or the probate filings (and Strong was not designated as common law spouse in those filings), so he had no way to know that Respondents were asserting Strong was the common law spouse.

Resp. Brief, p. 16. Thus, it is quite appropriate for Respondents' attorney's fees to be disgorged. See, e.g., *Pessoni v. Rabkin,* 220 A.D.2d 732, 633 N.Y.S.2d 338 (1995)(an attorney's representation of the husband/driver, wife/passenger, and children/passengers created conflicts of interest that rendered him unable to collect attorney's fees); *In re Estate of McCool,* 553 A.2d 761 (N.H. 1988) (a lawyer could not receive attorney's fees amid multiple conflicts of interest stemming from representation of pilot and passengers in airplane crash).

CONCLUSION

In this case, the lower court made up law, ignored conflicts of interest and generally ignored precedence. Appellant Willie Bell, as the son, and sole heir and beneficiary, should have received all of the settlement monies and Respondents should be disgorged of the attorney's fee collected. Therefore, Appellant Willie Bell is entitled to a sum certain of $2,1938,27.97, which is comprised of the $2.3 million settlement, minus Respondents' costs of $106,172.03. The lower court should be reversed and judgment entered in Appellant's favor.

Additionally, Respondents wrongfully claim that Appellant Willie Bell never took issue with Strong as common law spouse until this malpractice case was filed, but Bell actually raised the issue at his first opportunity -- when he filed a Motion to Intervene in the medical malpractice case after Strong attempted to pay him off for much less than Bell, the only statutory beneficiary, should receive. Def. Ex. 60.



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May 26, 2017

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY

Court of Common Pleas
The Honorable John C. Hayes, III

C/A No. 15-CP-46-1827

Appellate Case No. 2016-001558

Willie Bell, individually and on behalf of the Estate of Emma M. Davis as duly appointed Personal Representative,

Appellant,

v.

McGowan, Hood, and Felder, LLC and Chad McGowan,

Respondents.

PROOF OF SERVICE

I, Kathy A. Collins, Legal Assistant with the law firm of Lewis Babcock L.L.P., do hereby certify that I served the foregoing Initial Reply Brief of Appellant Willie Bell by mailing a copy of same, first-class postage prepaid, to opposing counsel to the following address:

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May 26, 2017

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk, S. C. Court of Appeals
1120 Senate Street
Columbia, SC 29201

Re: **Willie Bell, individually and on behalf of the Estate of Emma M. Davis as its duly appointed Personal Representative v. McGowan, Hood and Felder, LLC and Chad McGowan**
Appellate Case No.: 2016-001558

Dear Ms. Kitchings:

Enclosed for filing, please find one original and two copies of the Initial Reply Brief of Appellant Willie Bell. Please returned a stamped with our courier.

By copy of this letter, I am serving the same on opposing counsel.

Sincerely yours,

Kathy A. Collins
Legal Assistant to Ariail E. King

cc w/ enc.: Steven G. Janik, Esq.
Lovic A. Brooks, III, Esq.

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