THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
The Honorable John C. Hayes, III

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SC Court of Appeals

Case 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 & Felder, LLC and Chad McGowan,............................... Respondents.

FINAL BRIEF OF RESPONDENTS McGOWAN, HOOD & FELDER, LLC AND CHAD McGOWAN

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TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL. 1

STATEMENT OF THE CASE. 1

STATEMENT OF THE FACTS. 2

ARGUMENT. 13

I. Strong was not required to be adjudicated Davis' common law husband in order to recover for loss of consortium in the Wrongful Death Litigation 13

II. Because Bell failed to prove Strong was not Davis' common law husband, he failed to prove he should have received the settlement funds from the Wrongful Death Litigation that were distributed to Strong, and the circuit court therefore properly directed a verdict on damages in favor of McGowan under the "case within a case" doctrine. 19

III. Alternatively, directed verdict should have been granted under *Douglass*, because the "Estate of Mrs. Davis" is not a legal entity that could contract away the strict privity rule of § 109 as to extend McGowan's duty beyond Gilmore to Bell. 26

IV. Bell cannot invoke issue preclusion to vest the probate court with jurisdiction to rule on anything beyond the issue of standing. 38

V. Bell cannot manufacture conflicts of interest where none exist in order to impose liability on McGowan. 40

VI. Bell cannot invoke the equitable remedy of disgorgement to strip McGowan of his duly earned fee for the Wrongful Death Litigation. 42

CONCLUSION 43

PROOF OF SERVICE. 46

TABLE OF AUTHORITIES

Cases

Andrews v. Cent. Sur. Ins. Co., 295 F. Supp. 1223 (D.S.C. 1969) 43

Argoe v. Three Rivers Behavioral Center & Psychiatric Solutions, 388 S.C. 394, 697 S.E.2d 551 (2010) 26

Argoe v. Three Rivers Behavioral Center, 2008 WL 8185836 (S.C. C.P. Lexington, July 3, 2008) 30

Bankers Trust of S.C. v. Bruce, 283 S.C. 408, 323 S.E.2d 523 (1984) 40

Belk v. Harris, Civil Action No. 08-CP-43-0347 (Oct. 25, 2008) 42

Bennett v. Spartanburg, 97 S.C. 27, 81 S.E. 189 (1914) 40

Betz v. Blatt, 116 A.D.3d 813, 984 N.Y.S.2d 378 (N.Y. App. 2014) 37

Bornhorst v. Lee, 2011 WL 8106439 (S.C. C.P. Charleston Cnty. April 19, 2011) 15

Brazell Bros. Contractors v. Hill, 245 S.C. 69, 138 S.E.2d 835 (1964) 38

Brown v. Butcher, 2011 WL 1256595 (S.C. C.P. Kershaw Cnty. Nov. 8, 2011) 23

Brown v. Coe, 365 S.C. 137, 616 S.E.2d 705 (2005) 31

Burns v. State Farm Mutual Auto. Ins. Co., 297 S.C. 520, 377 S.E. 2d 569 (1989) 36

Burroughs v. Worsham, 352 S.C. 382, 574 S.E. 2d 215 (Ct. App. 2002) 24

Butler v. Kidder, 87 N.Y. 98 (1881) 34

Estate of Cabatit v. Canders, 105 A.3d 439 (Me. 2014) 37

Carter v. Wroten, 187 S.C. 432, 198 S.E. 13 (1932) 32

Dickey v. Clarke Nursing Home, 2007 WL 8325995 (S.C. Ct. App. Feb. 23, 2007) 30, 31, 32

Doe v. Howe, 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005) 19, 23

Douglass v. Boyce, 344 S.C. 5, 542 S.E.2d 715 (2001) 1, 26, 27, 28, 29, 30, 38

In re Ducane Gas Grills, Inc., 320 B.R. 312 (D.S.C. 2004) 37

In re Estate of Duffy, 392 S.C. 41, 707 S.E.2d 447 (Ct. App. 2011) 21

Ecclesiastes Prod. Ministries v. Outparcel Assoc., LLC,
374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007) 44

In re Eldridge, 348 B.R. 834 (S.D. Ala. 2006) 32

Eriks v. Denver, 118 Wash.2d 451, 824 P.2d 1207 (1992) 43

Fabian v. Lindsay, 410 S.C. 475, 765 S.E.2d 132 (2014) 35, 36, 38

Flexon v. PHC-Jasper, Inc., 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015) 39

Fouche v. Royal Indem. Co. of N.Y., 217 S.C. 147, 60 S.E. 2d 73 (1950) 13

Gaar v. N. Myrtle Beach Realty Co., Inc.,
287 S.C. 525, 339 S.E.2d 887 (Ct. App. 1986) 26

Giffey v. Columbia/Colleton Reg'l Hosp., Inc., 364 S.C. 158, 612 S.E.2d 695 (2005) 20

Gordon v. Busbee, 2003 WL 26131496 (S.C. C.P. Aiken Cnty. Jan. 5, 2003) 33

Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002) 20

Harris Teeter, Inc. v. Moore & Van Allen, PLLC,
390 S.C. 275, 701 S.E.2d 742 (2010) 21, 35

Holmes v. Haynsworth, Sinkler & Boyd, P.A.,
408 S.C. 620, 760 S.E.2d 399 (2014) 19, 20, 22

Holmes v. McClendon, 349 Ark. 162, 76 S.W.3d 836 (2002) 41

In re Estate of Hover, 407 S.C. 194, 754 S.E.2d 875 (2014) 39

ITC Comm. Funding, LLC v. Crerar, 393 S.C. 487, 713 S.E.2d 337 (Ct. App. 2011) 41

Jeffrey v. Pounds, 67 Cal.App.3d 6, 136 Cal.Rptr. 373 (3rd Dist. 1977) 43

Jensen v. Crandell, 1997 WL 34981765 (Me. Super. Mar. 4, 1997) 37

Jones v. Lott, 379 S.C. 285, 665 S.E.2d 642 (Ct. App. 2008) 44

L.F.S. Corp. v. Kennedy, 287 S.C. 162, 337 S.E.2d 209 (1985) 16, 37

Lemons v. The McNair Law Firm, P.A.,
2012 WL 10646748 (S.C. C.P. Horry Cnty. Sept. 4, 2012) 25, 38

Lennon v. S.C. Coastal Council, 330 S.C. 414, 498 S.E.2d 906 (Ct. App. 1998) 39

Lester v. McFaddon, 415 F.2d 1101 (4th Cir. 1969) 40

Limehouse v. Hulsey, 404 S.C. 93, 744 S.E.2d 566 (2013) 39

In re Estate of Livingston, 404 S.C. 137, 744 S.E.2d 203 (Ct. App. 2013) 33

In re Estate of McCool, 131 N.H. 340, 553 A.2d 761 (1988) 43

Moss v. Shelly, 287 S.C. 310, 338 S.E.2d 327 (1985) 40

Neely v. Thomasson, 365 S.C. 345, 618 S.E.2d 884 (2005) 16

Parker v. Parker, 313 S.C. 482, 443 S.E.2d 388 (1994) 13, 14, 15, 16, 19, 25

Peppertree Resorts Ltd. v. Cabana Ltd. Partnership,
315 S.C. 36, 431 S.E.2d 598 (Ct. App. 1993) 40, 43

Pessoni v. Rabkin, 220 A.D.2d 732, 633 N.Y.S.2d 338 (1995) 43

Petition of Crum, 196 S.C. 528, 14 S.E.2d 21 (1941) 42

Pope v. Heritage Communities, Inc., 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011) 23

Rice v. Perl, 320 N.W.2d 407 (Minn. 1982)...43

Richland Horizontal Prop. Regime Homeowners Ass'n., Inc. v. Sky Green Holding, Inc.,
392 S.C. 194, 708 S.E.2d 225 (Ct. App. 2011) 34

Ross v. Med. Univ. of S.C., 328 S.C. 51, 492 S.E.2d 62 (1997) 39

Ross v. Richland, 270 S.C. 100, 240 S.E.2d 649 (1978) 39

Rydde v. Morris, 381 S.C. 643, 675 S.E.2d 431 (2009) 36

Singleton v. Cromartie,
2005 WL 5712347 (S.C. C.P. Richland Cnty. Dec. 20, 2005)...................................29, 30

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

Southeastern Housing Found. v. Smith,
2006 WL 6318130 (S.C. C.P. Richland Cnty. Nov. 20, 2006)..38

State v. Eli Lilly & Company,
2009 WL 6058384 (S.C. C.P. Spartanburg Cnty. Sept. 22, 2009). 29

State v. Sawyer, 409 S.C. 475, 763 S.E.2d 183 (2014)..30

Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995) 27

Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 787 S.E.2d 485 (2016)..........19

Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997)...20

In re Swanner, 408 S.C. 191, 758 S.E.2d 711 (2014) 42

Thomas & Howard Co., Inc. v. T.W. Graham & Co., 318 S.C. 286, 457 S.E.2d 340 (1995)..38

Thomas v. 5 Star Transportation, 412 S.C. 1, 770 S.E.2d 183 (Ct. App. 2015).........15, 16

In re Trexler, 327 S.C. 315, 491 S.E.2d 257 (1997)..41

Tuomey v. Nexsen Pruet, LLC, 2017 WL 119081 (D.S.C. Mar. 31, 2017)......................19

Walker v. Gov't Employees Ins. Co., 12 Va. Cir. 436 (Va. Cir. 1974) 37

Wellin v. Wellin, 2016 WL 8653023 (D.S.C. Nov. 14, 2016)...................................31, 32

Wellin v., Wellin, 2017 WL 1247918 (D.S.C. Mar. 31, 2017) 31

White v. Roundtree Transport, Inc., 386 So.2d 1287 (Fla. App. 3rd Dist. 1980)..............43

White v. U.S., 907 F.Supp.2d 703 (D.S.C. 2012) 24

Winters v. Fiddie, 394 S.C. 629, 716 S.E.2d 316 (Ct. App. 2011)...................................25

Statutes

S.C. Code Ann. § 15-75-20 (1969)..5

S.C. Code Ann. § 62-1-109 (1999)...1, 26, 28, 29, 38, 44

S.C. Code Ann. § 62-2-109 (1987)...13, 16

S.C. Code Ann. § 62-2-802(b)(4) (1990) 13, 16

S.C. Code Ann. § 62-3-301(a)(6) (1987)...36

S.C. Code Ann. § 62-3-714 (1986) 6, 36

S.C. Code Ann. §§ 15-5-90 and 15-51-10 (1962) 5

STATEMENT OF ISSUES ON APPEAL

I. Andrew Strong was not required to be adjudicated the common law husband of Emma Davis in order to recover for loss of consortium in the case of *Tanisha Gilmore, as the Personal Representative of the Estate of Emma Davis, and Andrew Strong v. Amisub of SC, Inc. d/b/a Piedmont Medical Center, et al.*, Case No. 10-CP-3899, Court of Common Pleas for York County, Sixteenth Judicial Circuit Court, South Carolina ("Wrongful Death Litigation").

II. Because Willie Bell failed to prove Strong was not Davis' common law husband, he failed to prove he should have received settlement funds from the Wrongful Death Litigation that were distributed to Strong, and the circuit court therefore properly directed a verdict on damages in favor of McGowan, Hood & Felder, L.L.C. and Chad McGowan (collectively "McGowan") under the "case within a case" doctrine.

III. Alternatively, directed verdict should have been granted under *Douglass v. Boyce*, 344 S.C. 5, 542 S.E.2d 715 (2001), because the "Estate of Mrs. Davis" is not a legal entity that could contract away the strict privity rule of S.C. Code Ann. § 62-1-109 (1999) as to extend McGowan's duty beyond Tanisha Gilmore, the Personal Representative of the Estate of Emma Davis ("Estate"), to Bell.

IV. Bell cannot invoke issue preclusion to vest the probate court with jurisdiction to rule on anything beyond the issue of standing.

V. Bell cannot manufacture conflicts of interest where none exist in order to impose liability on McGowan.

VI. Bell cannot invoke the equitable remedy of disgorgement to strip McGowan of his duly earned fee for the Wrongful Death Litigation.

STATEMENT OF THE CASE

On September 11, 2014, Bell, individually and as the Successor Personal Representative of the Estate, filed suit against McGowan, alleging claims for legal malpractice, fraudulent misrepresentation, negligent misrepresentation, violation of the South Carolina Unfair Trade Practice Act ("SCUTPA"), and breach of contract with fraudulent intent. Bell's claims arise from McGowan's alleged failure to protect Bell's interests in the Wrongful Death Litigation ("Wrongful Death Litigation"). (R. pp. 3-28, Compl., Sept. 11, 2014; R. pp. 46-63, Am. Compl., Sept. 15, 2015.)

McGowan denied Bell's allegations because: McGowan was not in privity with Bell either individually or as the Successor Personal Representative of the Estate and therefore had no duty to Bell; McGowan had no conflicts of interest; there was no evidence to support Bell's claims for fraudulent misrepresentation, negligent misrepresentation, breach of contract with fraudulent intent, or punitive damages; and, McGowan did not violate SCUTPA. (R. pp. 29-36, Ans., Feb. 9, 2015; R. pp. 37-45, Am. Ans., Mar. 6, 2015; R. pp 64-74, Ans. to Am. Compl., Oct. 7, 2015.)

Bell's claims against McGowan were tried from July 18, 2016 to July 20, 2016. (R. pp. 273-1152, Trial Tr., July 18, 2016-July 20, 2016.) At the conclusion of Bell's case-in-chief, McGowan moved for a directed verdict, which was granted as to all causes of action except legal malpractice. (R. p. 572, lines 8-20, Trial Tr. 300:8-20, July 19, 2016; R. pp. 267-272, Mot. Directed Verdict, July 20, 2016.) Because Bell failed to prove the case within his case, the circuit court also directed a verdict as to certain damages in favor of McGowan. (R. p. 598, lines 6-25, Trial Tr. 12:6-25; R. p. 599, lines 5-23, Trial Tr. 13:5-23; R. p. 611, lines 19-25, Trial Tr. 25:19-25; R. p. 612, lines 13-17, Trial Tr. 26:13-17, July 20, 2016.) As a result of the directed verdict, after set-off Bell had no recoverable damages (R. p. 612, lines 18-22, Trial Tr. 26:18-22, July 20, 2016), and therefore abandoned his legal malpractice claims as to allow the circuit court's ruling on McGowan's Motion for Directed Verdict to become a final order for purposes of the present appeal. (R. p. 613, lines 2-8, Trial Tr. 27:2-8, July 20, 2016.)

STATEMENT OF FACTS

On February 11, 2010, Davis died at Piedmont Medical Center during implantation of a pacemaker. (R. p. 361, line 19, Trial Tr. 89:19, July 18, 2016; R. p. 622, Bell Trial Ex.

3.) Sometime after Davis' death, an anonymous caller telephoned McGowan and asked McGowan to contact Davis' family because her death may have been caused by medical malpractice. (R. pp. 728-729, Bell Trial Ex. 14(I).) McGowan explained to the unknown caller that ethics precluded him from contacting Davis' family, but he would be happy to speak with the family if they chose to call him. (*Id.*)

On February 15, 2010, the day before Davis' funeral, an anonymous caller telephoned Davis' home, spoke to members of Davis' family, and told them he was in the operating room during Davis' procedure and her death may have been caused by medical malpractice. (R. pp. 367, line 20 – 368, line 2, Trial Tr. 95:20-96:1-2, July 18, 2016; R. pp. 728-729, Bell Trial Ex. 14(I); R. p. 982, lines 20-25, McGowan Trial Ex. 33, 26:20-25.) Bell was at Davis' home that evening and was provided with details of the call by his family, but he never inquired further as to the circumstances of Davis' death. (R. p. 368, lines 3-7, Trial Tr. 96:3-7; R. p. 391, lines 14-18, Trial Tr. 119:14-18, July 18, 2016.)

On February 17, 2010, the day after Davis' funeral, McGowan met with seven of Davis' family members to discuss the circumstances of Davis' death: Rosa Hall and Atlean Jordan, Davis' sisters; Brenda Foster, Linda Gilmore, and Robin McClurkin, Davis' nieces; and, Debbie and Gennette Strong, Strong's sisters. (R. pp. 482, line 3 – 483, line 17, Trial Tr. 210:3-211:17; R. pp. 496, lines 4-14, Trial Tr. 224:4-14, July 19, 2016; R. pp. 709-722, Bell Trial Ex. 14C; R. pp. 707, 728-730, Bell Trial Ex. 14I-J.) McGowan took notes during the meeting; writing that Davis was "survived by Willie Bell (maybe) – son" and "Andrew Strong – potential common law husband – 30 yrs lived together". (*Id.*) The family explained that Strong was Davis' common law husband of thirty years; and Davis took Bell in when he was very young and raised him as if he were her own son, but Bell was never

formally adopted by Davis or Strong. (R. pp. 487, line 10 - 490, line 22, Trial Tr. 215:10-218:22, July 19, 2016; R. pp. 709-722, Bell Trial Ex. 14C; R. pp. 707, 728-730, Bell Trial Ex. 14I-J.) At the conclusion of the meeting, McGowan explained to the family that they had to go to probate court, obtain an order appointing a personal representative of the Estate, and return with the appointment so that McGowan could represent the personal representative in bringing claims for Davis' wrongful death as a result of medical malpractice. (R. pp. 728-729, Bell Trial Ex. 14I.) McGowan believed the family would select Strong to serve as the personal representative of the Estate, as everyone at the meeting had identified him as Davis' common law husband. (*Id.*)

The next day, February 18, 2010, McGowan prepared a memorandum of his meeting with the family.[1] (R pp. 485, line 5 – 486, line 17, Tr. 213:5-214:17, July 19, 2016; R. pp. 728-729, Bell Trial Ex. 14I.) That same day, the family went to probate court to have a personal representative appointed for the Estate. (R. p. 447, lines 7-9, Trial Tr. 175:7-9, July 19, 2016.) The family met with the Honorable Lois H. Roddey of the probate court, and explained Davis' relationship with Strong and Bell. (R. p. 447, lines 1-2, Trial Tr. 175:1-2, July 19, 2016.) Judge Roddey advised that because Strong was Davis' common law husband, he could not serve as personal representative of the Estate, and the family therefore would have to select someone else. (R. pp. 444, line 21 – 445, line 4,Trial Tr. 172:21-173:4, July 19, 2016.) As Hall and Jordan, Davis' sisters, did not want to be involved, the family selected Gilmore to serve as personal representative of the Estate. (R. p. 474, lines 10-19, Trial Tr. 202:10-19, July 19, 2016.) In turn, on February 19, 2010,

[1] The memorandum bears a date of April 14, 2014, as the date automatically updated when the memorandum was printed. (R. pp. 485, line 5 – 486, line 17, Tr. 213:5-214:17; R. pp. 728-729, Bell Trial Ex. 14I.)

Gilmore filed an Informal Application for Appointment as Personal Representative of the Estate (R. pp. 773-778, McGowan Trial Ex. 15); Hall and Jordan filed waivers of any priority they may have had to be appointed personal representative (R, pp. 778-780, McGowan Trial Ex. 16-17); and, the probate court, with the family's assurance that Davis had raised but never adopted Bell, appointed Gilmore to serve as Personal Representative of the Estate (R. p. 281, McGowan Trial Ex. 18).

On February 24, 2010, Gilmore, Strong, Hall, and Foster met with McGowan, who gave Gilmore a Retainer Agreement and a release of medical records to be executed and returned. (R. p. 474, lines 6-9, Trial Tr. 202:6-9, July 19, 2016; R. p. 1124, McGowan Trial Ex. 92.) Gilmore executed the release during the meeting, and returned by mail the executed Retainer Agreement, along with Davis' death certificate. (R. p. 473, lines 16-22, Trial Tr. 201:16-22, R. p. 495, lines 10-14, Trial Tr. 223:10-14, July 19, 2016; R. pp. 633-635, Bell Trial Ex. 7.)

On March 15, 2010, Gilmore filed an Inventory and Appraisement with the probate court, identifying Strong as the beneficiary of two insurance policies issued by Liberty National Life Insurance Company ("Liberty"). (R. pp. 782-787, McGowan Trial Ex. 19.)

On September 15, 2010, McGowan filed Gilmore and Strong's Complaint against Amisub of SC, Inc. d/b/a Piedmont Medical Center, Carolina Cardiology, Vasant Patel, M.D., Ellenora Issac, R.N., and Gary Miller, R.N. (collectively "Piedmont") in the Wrongful Death Litigation. Gilmore, as personal representative of the Estate, sought to recover for survival and wrongful death under S.C. Code Ann. §§ 15-5-90 and 15-51-10 (1962), and Strong sought to recover for loss of consortium under S.C. Code Ann. § 15-

75-20 (1969). (R. pp. 793-801, McGowan Trial Ex. 25; R. pp. 639-654, McGowan Tr. Ex. 90.)

On February 21, 2011, the probate court, without notice, *sua sponte* issued an Order closing the Estate and terminating Gilmore as personal representative. (R. p. 751, Bell Trial Ex. 22.) The Order does not show notice to Gilmore. (*Id.*) Nor was McGowan made aware that it had issued. (R. p. 505, lines 2-21, Trial Tr. 233:2-21, July 19, 2016.) Thus, in accordance with S.C. Code Ann. § 62-3-714 (1986)[2], the Order was not effective to place Gilmore or McGowan on notice that Gilmore had been terminated as personal representative of the Estate.

On May 9, 2012, the circuit court granted Piedmont's Motion for Summary Judgment on the Estate's survivorship claim, finding there was no evidence Davis experienced pain and suffering prior to her death. (R. p. 640, McGowan Trial Ex..91 at 2.) The circuit court denied Piedmont's Motion for Summary Judgment on Strong's claim for loss of consortium, but observed that if the case proceeded to trial, Strong and Gilmore would have to elect the cause of action under which they were seeking to recover:

> With respect to the loss of consortium claim, [Piedmont] argues that recovery by [Strong] on both the wrongful death and loss of consortium claims would constitute a double recovery, as he is the sole beneficiary in the death action. It is clear that both causes of action present the same elements of recovery, namely, loss of companionship, society, services, counsel and good offices.
>
> ***Since, in theory, as the sole statutory beneficiary, [Strong] could maintain either cause of action without the other***, it is not proper to grant [Piedmont's] present motion with respect to the consortium claim. At some later point in the litigation, it may be that [Piedmont] will move to require [Strong and Gilmore] to elect the cause of action upon which they will go to trial, or upon which cause of

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[2] The 2014 amendments to Section 62-3-714 do not materially alter the statute.

> action they will recover any damages that may be subsequently awarded. That issue is not now presented, and need not be decided at this time.

(*Id.* (***emphasis*** added).)

On September 12, 2012, Strong, against McGowan's advice, entered into an agreement with McGowan's father-in-law, Michael Maloney ("Maloney"), by which Maloney advanced $10,000[3] to Strong against his possible recovery in the Wrongful Death Litigation, with $20,000 being due to Maloney if and when Strong recovered in the Wrongful Death Litigation. (R. p. 517, lines 3-18, Trial Tr. 245:3-18, July 19, 2016.) The advance was memorialized by an "Acknowledgment and Agreement" executed by Strong that explained the amount advanced and the amount to be repaid; that McGowan recommended against the advances; that McGowan would not receive any benefit in connection with the advances; that Strong was encouraged to seek the advice of separate counsel; and, advised that if Strong did not recover in the Wrongful Death Litigation he would not have to repay the advances.[4] (R. p. 517, lines 3-18, Trial Tr. 245:3-18, July 19, 2016; R. p. 752, Bell Trial Ex. 23.)

Depositions in the Wrongful Death Litigation disclosed that Bell was at the hospital during Davis' procedure, and was a party to conversations with her treating physicians as to her cause of death. (R. p. 407, lines 1-9, Trial Tr. 135:1-9; R. p. 499, lines 17-22, 227:17-22, July 19, 2016; R. p. 977, lines 5-18, McGowan Trial Ex. 33, 21:5-18.) As a result of

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[3] Maloney gave Strong two additional cash advances on the same terms: (1) $1,500 on November 19, 2012 and (2) $4,000 on April 17, 2013. (R. p. 752, R. p. 804, McGowan Tr. Ex. 27-28.)

[4] There is no evidence that McGowan ever made "assurances [to Maloney] that he would obtain a favorable outcome of the case". (Bell's Brief at 10.)

these disclosures, Piedmont asked McGowan for Bell's deposition. (R. p. 407, lines 10-12, Trial Tr. 135:10-12, July 19, 2016.) McGowan asked Gilmore to contact Bell to arrange for his deposition. (R. p. 407, lines 13-17, Trial Tr. 135:13-17; R. pp. 409, line 1 – 410, line 2, Trial Tr. 137:1-138:2, July 19, 2016.) Bell, who has a significant criminal record[5], refused "to come within 20 miles of the courthouse" and did not want anything to do with the case. (R. p. 409, lines 16-20, Trial Tr. 137:16-20, July 19, 2016.)

Shortly thereafter, McGowan negotiated a $2,300,000 settlement of the Wrongful Death Litigation. (R. p. 411, lines 2-23, Trial Tr. 139:2-23, July 19, 2016; R. pp. 1001-1021, McGowan Trial Ex. 34-39.) As a result of the settlement, Bell was never deposed. (R. p. 411, lines 2-23, Trial Tr. 139:2-23, July 19, 2016.) The Petition for Approval of Settlement was prepared by Piedmont, attested to by Gilmore and Strong, and proceeded to hearing before the Honorable John C. Hayes, III on July 24, 2013 with both Gilmore and Strong present. (R. pp. 430, line 21 – 431, line 13, Trial Tr. 158:21-159:13, R. pp. 510, line 3 – 511, line 3, 238:3-239:3, July 19, 2016; R. pp. 739-743, Bell Tr. Ex. 17.) On August 1, 2013, the settlement was approved and the Wrongful Death Litigation was dismissed with prejudice. (R. p. 431, lines 10-13, Trial Tr. 159:10-13, July 19, 2016; R. pp. 744-747, Bell Tr. Ex. 18.)

McGowan received $1,026,172.03 for fees and expenses out of the settlement, with Strong receiving the balance of $1,273,827.97 as he was believed to be the common law husband and sole beneficiary of Davis. (R. p. 439, lines 4-5, Trial Tr. 167:4-5; R. pp. 515,

[5] Bell has been convicted of multiple felonies, including three convictions for shoplifting, two convictions for forgery, four convictions for passing fraudulent checks, and one conviction for receiving stolen property. (R. p. 352, lines 12-19; Trial Tr. 80:12-19, July 18, 2016; R. pp. 169-176, Notice of Intent to Utilize Plaintiff's Criminal Record.)

line 15 – 516, line 2, Trial Tr. 243:15:244:2, July 19, 2016; R. p. 749, Bell Tr. Ex. 20.) In turn, Strong gave $420,000 of the settlement proceeds to members of Davis' extended family, including $100,000 to Bell, by way of checks issued by McGowan from his trust account and made payable to Strong and to the recipient of the check so that Strong could retain control over the funds up to the time the checks were negotiated. (R. p. 389, lines 20-21, Trial Tr. 117:20-21; R. p. 408, lines 10-25, Trial Tr. 136:10-25; R. p. 475, lines 8-14, Trial Tr. 203:8-14; R. p. 475, lines 11-14, Trial Tr. 203:11-14; R. pp. 492, line 25 – 493, line 1, Trial Tr. 220:25-221:1; R. p. 514, lines 8-16, Trial Tr. 242:8-16, July 19, 2016; R. p. 748, Bell Trial Ex. 19; R. p. 1033, McGowan Trial Ex. 43; R. p. 1051, McGowan Tr. Ex. 59, ¶ 15.)

Shortly after receiving the $100,000 from Strong, Bell announced for the first time that he was the adopted son of Davis and therefore was entitled to the entire settlement. (R. pp. 385, line 23 – 386, line 2, Trial Tr. 113:23-114:2, July 18, 2016.) Bell quickly retained Strom Law Firm L.L.C. as his counsel, and with their assistance obtained a copy of his birth certificate on September 18, 2013. (R. pp. 373, line 6 – 374, line 8, Trial Tr. 101:6-102:8, July 18, 2016; R. p. 435, lines 11-17, Trial Tr. 163:11:-17, July 19, 2016; R. p. 621, McGowan Trial Ex. 58; R. p. 1118, McGowan Trial Ex. 84; R. pp. 617-620, McGowan Ex. 85.) On November 11, 2013, Bell filed a Motion to Intervene in the Wrongful Death Litigation for purposes of filing a Motion to Vacate the Settlement (R. pp. 1061-1069, McGowan Trial Ex. 60); filed a separate complaint against Gilmore and Strong in the case captioned *Willie Bell v. Tanisha Gilmore and Andrew Strong,* Case No. 2013-CP-46-3482, Court of Common Pleas for York County, Sixteenth Judicial Circuit, South Carolina ("Gilmore Litigation"), alleging causes of action for conversion, constructive trust,

injunction and, as to Gilmore only, breach of fiduciary duty (R. pp. 1070-1078, McGowan Trial Ex. 61); and, filed a Motion for Temporary Restraining Order (R. pp. 1079-1084, McGowan Trial Ex. 62), which was granted (R. pp. 1087-1093, McGowan Trial Ex. 71-72), thereby enjoining Strong and Gilmore from alienating any of the settlement funds.

Bell thereafter ratified settlement of the Wrongful Death Litigation through his counsel, John Alphin, who confirmed that Bell only took issue with the distribution of the settlement proceeds, not the $2,300,000 settlement itself (R. pp. 1085-1086, McGowan Trial. Ex. 63), and resolved his claims against Gilmore and Strong for the sum of $250,000 (R. pp. 1094-1112, McGowan Trial Ex. 73-79). Bell next appointed himself Successor Personal Representative of the Estate (R. pp. 376, line 3 – 377, line 7; Trial Tr. 104:3-105:7, July 18, 2016; R. pp. 629-632, Bell Trial Ex. 6; R. pp. 629-631, McGowan Trial Ex. 81; R. p. 1114, McGowan Trial Ex. 82) and filed suit against McGowan in the present matter, seeking to recover individually and as successor personal representative for McGowan's alleged failure to protect Bell's interests as Davis' adopted son and "sole legitimate heir" in the Wrongful Death Litigation ("Malpractice Litigation") (R. pp. 3-28, Compl., Sept. 11, 2014; R. p. 46-63, Am. Compl., Sept. 15, 2015; R. p. 377, lines 10-12, Trial Tr. 105:10-12, July 18, 2016).

Bell did not sue McGowan over the handling of the Wrongful Death Litigation. (R. p. 563, lines 14-23, Trial Tr. 291:14-23, July 19, 2016.) He sued McGowan over the distribution of the settlement funds from the Wrongful Death Litigation, asserting that:

(1) He was the adopted son of Davis (R. p. 356, lines 22-24, Trial Tr. 84:22-24, July 18, 2016);

(2) Strong was ***not*** Davis' common law husband (R. p. 375, lines 16-22, Trial Tr. 103:16-22, July 18, 2016);

(3) Since Strong was ***not*** Davis' common law husband he could not receive any of the settlement funds under the Consortium Act (R. p. 476, lines 9-20, Trial Tr. 204:9-20, July 19, 2016);

(4) Since Strong was ***not*** Davis' common law husband he could not receive any of the settlement funds under the Wrongful Death Act (R. p. 511, lines 15-17, Trial Tr. 239:15-17, July 19, 2016);

(5) Since Strong was ***not*** Davis' common law husband and could not receive any of the settlement funds under the Consortium Act or the Wrongful Death Act, all of the settlement funds should have been distributed to the statutory beneficiaries under the Wrongful Death Act (R. p. 550, lines 16-20, Trial Tr. 278:16-20, July 19, 2016); and

(6) As Davis' adopted son, Bell was the sole statutory beneficiary under the Wrongful Death Act and should have received all of the settlement funds (R. p. 375, lines 5-11, Trial Tr. 103:5-11, July 18, 2016).

Thus, in order to recover in legal malpractice, Bell had to prove *inter alia* that Strong was ***not*** Davis' common law husband, such that Bell would have received all of the settlement funds. (R. p. 598, lines 1-8, Trial Tr. 12:1-8; R. p. 600, lines 9-15, Trial Tr. 14:9-15, July 20, 2016.) Accordingly, whether Strong was Davis' common law husband was the case that Bell had to prove within his case for legal malpractice against McGowan, *i.e.*, "a case within a case." (*Id.*)

Bell proceeded to trial against McGowan on July 18, 2016, and rested his case on July 20, 2016. McGowan moved for directed verdict which the circuit court granted in part and denied in part.

The circuit court found that Bell failed to prove that Strong was ***not*** Davis' common law husband, *i.e.*, he failed to prove the case within his case, which meant he failed to prove that the damages awarded to Strong as Davis' common law husband should have gone to him as Davis' adopted son. (R. pp. 598, line 6 – 599, line 7, Trial Tr. 12:6-13:7, July 20, 2016.)

In this regard, after fees and expenses, $1,200,000 was left for distribution in accordance with the circuit court's order approving settlement, half of which was allocated to Strong's claims under the Consortium Act and half of which was allocated to Gilmore's claims as personal representative under the Wrongful Death Act. (R. p. 439, lines 4-5, Trial Tr. 167:4-5; R. pp. 515, line 15 – 516, line 2, 243:15-244-2, July 19, 2016; R. pp. 602, line 22 – 603, line 3, Trial Tr. 16:22-17:3, July 20, 2016; R. p. 749, Bell Tr. Ex. 20.) Because Bell failed to prove Strong was ***not*** Davis' common law husband, *i.e.*, failed to prove the case within his case, the circuit court directed a verdict in favor of McGowan as to the $600,000 of settlement funds that were allocated to Strong's claims under the Consortium Act. (R. p. 608, line 14, Trial Tr. 22:14, July 20, 2016.)

Further, because Bell failed to prove Strong was ***not*** Davis' common law husband, *i.e.*, failed to prove the case within his case, the circuit court directed a verdict in favor of McGowan as to the $300,000 that Strong, as Davis' common law husband, would have received as his share of the $600,000 of settlement funds that were allocated to the wrongful death claims. (R. p. 608, lines 9-19, Trial Tr. 22:9-19, July 20, 2016.)

The circuit court denied McGowan's Motion for Directed Verdict as to the rest of the settlement funds, *i.e.*, $300,000, that were allocated to settlement of the wrongful death claims, holding that questions of fact remained *inter alia* as to McGowan's alleged malpractice and whether Bell should have received those funds as Davis' adopted son. (R. p. 602, lines 1-7, Trial Tr. 16:1-7; R. p. 608, lines 16-22, Trial Tr. 22:16-22, July 20, 2016.)

As Bell was not entitled to disgorgement (R. pp. 611, line 19 – 612, line 4, Trial Tr. 25:19-26:4, July 20, 2016) and had already received $350,000 from Strong and Gilmore in connection with settlement of the Wrongful Death Litigation and the Gilmore Litigation

(R. p. 389, lines 20-21, Trial Tr. 117:20-21; R. pp. 1103-1112, McGowan Trial Ex. 78-79), which was more than he could have recovered by proceeding to verdict on his claims for legal malpractice, Bell abandoned his legal malpractice claims and allowed the circuit court's ruling on McGowan's Motion for Directed Verdict to become a final order for purposes of the present appeal. (R. p. 612, lines 18-22, Trial Tr. 26:18-22, R. p. 613, lines 2-8, 27:2-8, Trial Tr. July 20, 2016; R. pp. 1-2, Order, July 21, 2016.)

ARGUMENT

I. Strong was not required to be adjudicated Davis' common law husband in order to recover for loss of consortium in the Wrongful Death Litigation.

Parker v. Parker, 313 S.C. 482, 485-486, 443 S.E.2d 388, 390 (1994), is virtually on point with this case and with the circuit court's directed verdict in favor of McGowan.

In *Parker*, the Supreme Court of South Carolina considered whether adjudication of paternity under S.C. Code Ann. § 62-2-109 (1987), which mirrors the language of S.C. Code Ann. § 62-2-802(b)(4) (1990)[6], is the exclusive means and methods by which an illegitimate child, Virginia Ann Martin, could take as the heir of her deceased father, James Franklin Parker, Sr. The Supreme Court rejected arguments that § 62-2-109 was not only exclusive but also mandatory, and held that: unless paternity was in dispute, there was no need for Ms. Martin to defend her parentage by adjudication; where the personal representative of Mr. Parker's estate acknowledged Ms. Martin's parentage from the outset there was no dispute requiring adjudication; anyone having a dispute with Ms. Martin's parentage was required to raise this dispute within the statutory time limits; and, the burden

[6] Both statutes require "adjudication 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."

to timely raise the issue of paternity did not fall upon Ms. Martin, but rather upon those taking issue with her parentage:

> The circuit court reasoned, and we agree, that if paternity is questioned by either the personal representative or other interested party, which would include Virginia Ann Martin and the Appellants, then such action must be brought within the statutory time frame of six months after the death of the father.
>
> On the present facts, it is quite apparent that no such dispute arose within the statutory time limit. The personal representative actually filed the Application/Petition for Informal Probate with Virginia Ann Martin listed as a daughter. The petition, standing alone, is compelling evidence that the personal representative did not dispute Virginia Ann Martin's parentage, and therefore, that Virginia Ann Martin was not required to defend her parentage. Moreover, this petition was not disputed within six months of the death of James Parker, Sr., and throughout the protracted proceedings related to the estate, no party sought to contest Virginia Ann Martin's parentage until almost four years later.
>
> Appellants argue that this logic improperly places a burden on the other heirs to dispute parentage. The plain meaning of the statute does not delineate which party must raise parentage as an issue; however, obviously the burden must rest with any party with an actual dispute about the parentage. Commonly, the illegitimate heir must raise the issue to be included in the intestate succession of the father, but in the present instance, there was no need since the estate, through the personal representative, acknowledged at the outset Virginia Ann Martin's parentage.
>
> In our opinion, both the probate court and circuit court correctly decided this issue since the Appellants failed to raise Virginia Ann Martin's parentage within the statutory time limit.

Id. at 486, 443 S.E. at 390.

Here, like in *Parker*, there was no dispute as to Strong's common law marriage with Davis until it came time to distribute the settlement from the Wrongful Death Litigation years after her death. Thus, there was no need for Strong to defend his common law marriage with Davis by way of adjudication. Also like in *Parker*, Strong was

acknowledged as Davis' common law husband from the outset not only by Gilmore, the Estate's personal representative[7], but also by Davis' extended family. (R. p. 215, lines 10-11, Trial Tr. 215:10-11; R. p. 489, lines 13-25, Trial Tr. 217:13-25, July 19, 2016; R. pp. 709-722, Bell Trial Ex. 14C; R. pp. 707, 728-730, Bell Trial Exs. 14I-J; R. p. 834, lines 15-25, McGowan Trial Ex. 30, at 29:15-25; R. p. 967, lines 21-25, McGowan Trial Ex. 33, at 11:21-25.) Again, there was no need for Strong to defend his common law marriage with Davis by way of adjudication. Lastly, and again like *Parker*, Bell had the burden of taking issue with Strong's common law marriage to Davis within eight months of her death or six months after Gilmore's appointment as personal representative. Bell failed to do so, and cannot avoid this burden by shifting it to McGowan in the present proceeding. *Parker* is on point and compels affirmance of the circuit court's directed verdict in favor of McGowan.

Equally compelling is this Court's decision in *Thomas v. 5 Star Transportation*, 412 S.C. 1, 770 S.E.2d 183 (Ct. App. 2015), which held that 5 Star Transportation ("5 Star") had failed to adduce sufficient evidence to overcome Emily Thomas' good faith belief that she had entered into a valid common law marriage with George Thomas, as to allow 5 Star to deny Mrs. Thomas workers' compensation benefits as his surviving spouse:

> Here, the only evidence as to whether George knew of an impediment to his marriage with Emily was Emily's testimony he said he was divorced from Cynthia. He was served with a summons and complaint for divorce from Cynthia more than two months prior to the marriage ceremony with Emily. Much like *Bowlin,* 5 Star presented no evidence George did not know he could not marry

[7] McGowan had no duty to ensure that Gilmore was properly appointed as Personal Representative for the Estate and was entitled to presume that what should have been done by the probate court in appointing Gilmore was, in fact, done and done properly. *E.g., Bornhorst v. Lee,* 2011 WL 8106439 (S.C. C.P. Charleston Cnty. April 19, 2011); *Fouche v. Royal Indem. Co. of N.Y.*, 217 S.C. 147, 154-155, 60 S.E. 2d 73, 75-76 (1950).

> when he and Emily had their marriage ceremony. Additionally, George and Emily continued to act as husband and wife after the impediment was removed. Accordingly, we find Emily was George's surviving spouse because she and George married in good faith.

Id. 16-18, 770 S.E.2d at 191-192.

Here, like in *5 Star*, the circuit court recognized that adjudication under § 62-2-802(b)(4) is not the exclusive means and methods of proving common law marriage: "I think it's clear that you can have a common-law [spouse other than pursuant to § 802]. We've got Worker's Comp cases, it comes up all the time as whether or not somebody's a common-law husband or not." (R. p. 580, lines 7-11, Trial Tr. 308:7-11, July 19, 2016.) Thus, the circuit court's directed verdict in favor of McGowan is in accord with the teaching of *5 Star*, and pursuant to these teachings should be affirmed.

Parker also sets forth a compelling alternate ground for affirming the circuit court's directed verdict: Bell is estopped by his silence from challenging the common law marriage of Strong and Davis. *E.g., Parker*, 313 S.C. 482 at 487, 443 S.E.2d at 390; *Neely v. Thomasson*, 365 S.C. 345, 352, 355, 618 S.E.2d 884, 888-889 (2005); *L.F.S. Corp. v. Kennedy*, 287 S.C. 162, 163-164, 337 S.E.2d 209, 210 (1985). As held by the Supreme Court in *Parker*:

> Further, the inaction of the Appellants gave Virginia Ann Martin absolutely no notice and lulled her into a position where she could no longer defend her parentage under § 62-2-109. The prejudice to Virginia Ann Martin is apparent and is more than sufficient to establish her defense of equitable estoppel.

Here, Bell is attempting long after the fact to collaterally attack that which he did not contest during the Wrongful Death Litigation; the common law marriage of Strong and Davis. Nor did he attack their marriage during the time that he sought to intervene in the

Wrongful Death Litigation in an effort to undue the settlement that had been negotiated; efforts that he subsequently abandoned in favor of ratifying the settlement so that Strong and Gilmore would be able to fund his $250,000 settlement of the Gilmore Litigation. (R. pp. 1085-1086, McGowan Tr. Ex. 63; R. pp. 1094-1112, McGowan Tr. Ex. 73-79.) In fact, the first time that Bell took issue with Strong and Davis' common law marriage occurred when it was to his advantage to do so in the Malpractice Litigation, even though he knew all along that Davis had designated Strong as the beneficiary of her life insurance policies, knew that her death had been caused by medical malpractice, and knew that Gilmore and Strong were pursuing the Wrongful Death Litigation:

> Q. Did you ever talk to any attorneys to get that insurance?
>
> A. No, sir.
>
> * * *
>
> Q. * * *. When your mama died, did you ever call a lawyer to say, "We got this phone call and something's wrong and I want you to look into this"?
>
> A. No, I didn't do that.
>
> * * *
>
> Q. Okay. So from February 11, 2010 until August 7, 2013, when you saw that article, even though in Chester everyone knows everything, you never heard a word about this lawsuit or on the streets or anything?
>
> A. Yes, I heard a guy -- a friend of the family told me that Andrew was seeing a lawyer.
>
> Q. And when was that?
>
> * * *

A. While -- it was after about a year -- about a year after [Davis' death].

Q. Okay. And did you ever go to Andrew and say, "Why are you seeing a lawyer?"

A. No.

Q. Did you ever call a lawyer and say, "Hey something's going on here. Andrew's got a lawyer"?

A. No, sir.

* * *

Q. From the time your mama died until you heard about the money, did you do anything at all?

A. I didn't know I could do something about it.

Q. You didn't know you could call a lawyer for that?

A. No, because I didn't know the hospital had killed her.

Q. But you knew the phone call had come in saying that the hospital killed her, right?

A. Yes.

Q. And you didn't do anything.

A. No, sir. I didn't do nothing.

(R. p. 385, lines 14-17, Trial Tr. 113:14-17; R. p. 387, lines 4-6, Trial Tr. 115:4-6; R. pp. 387, line 21 – 388, line 13, Trial Tr. 115:21-116:13, July 18, 2016.)

Bell simply cannot stand in silence, allow years to pass while he lived with Strong,[8] did not give notice to Strong, Gilmore, or McGowan that he took issue with Strong's common law marriage to Davis, and then ambush them with his Motion to Intervene in the

[8] (R. p. 388, lines 20-23, Trial Tr. 116:20-23, July 18, 2016.)

Wrongful Death Litigation, Motion for Temporary Restraining Order, the Gilmore Litigation, and the Malpractice Litigation. (R. pp. 1061-1084, McGowan Trial Ex. 60-62.) The prejudice to McGowan is manifest, for if Bell had simply spoken up early on, McGowan could have arranged for waivers of conflicts, separate counsel, or withdrawn from representation of Gilmore and Strong in the Wrongful Death Litigation altogether, which is precisely what he did when Bell finally broke his silence. (R p. 412, lines 10-18, Trial Tr. 140:10-18, July 19, 2016; R. p. 452, lines 3-14, Trial Tr. 180:3-14, July 19, 2016.) *Parker* is on point in providing a compelling alternate ground for affirming the circuit court's directed verdict in favor of McGowan: Bell is estopped by his own silence from proceeding against McGowan in the Malpractice Litigation.

II. **Because Bell failed to prove Strong was not Davis' common law husband, he failed to prove he should have received the settlement funds from the Wrongful Death Litigation that were distributed to Strong, and the circuit court therefore properly directed a verdict on damages in favor of McGowan under the "case within a case" doctrine.**

Bell argues that McGowan had to prove Strong was Davis' common law husband in order to prevail by way of directed verdict. (Bell Brief at 17-19.) Bell is wrong. Bell had the burden of proving Strong was not the common law husband of Davis as he would have had to do in the probate court or circuit court in order to show that he, not Strong, should have received all of the settlement funds from the Wrongful Death Litigation. *Parker*, 313 S.C. at 386, 443 S.E. 2d at 390; *accord Tuomey v. Nexsen Pruet, LLC*, 2017 WL 119081, *3 (D.S.C. Mar. 31, 2017), *quoting Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 525, 787 S.E.2d 485, 489 (2016); *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 631, 760 S.E.2d 399, 407 (2014), *abrogated on other grounds by*, *Stokes-Craven Holding Corp.*, 416 S.C. at 534-535, 787 S.E.2d at 494-495; *Doe v. Howe*, 367 S.C. 432,

442, 626 S.E.2d 25, 30 (Ct. App. 2005), *quoting Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997); *Hall v. Fedor*, 349 S.C. 169, 174-175, 561 S.E.2d 654, 657 (Ct. App. 2002).

Bell failed to adduce any evidence to carry this burden. (R. p. 598, lines 9-15, Trial Tr. 12:9-15, July 20, 2016.) In contrast, Davis' declarations in her life insurance applications are uncontroverted in attesting to her common law marriage to Strong. (*Id.*; R. pp. 766-768, McGowan Trial Ex. 9-10.) The circuit court found Davis' declarations to be the only competent, credible, and admissible evidence on this issue and rightly directed a verdict on damages in favor of McGowan, with Bell thereafter abandoning the rest of his claims. (R. pp. 608, line 9 – 609, line 23, Trial Tr. 22:9-23:3, July 20, 2016; R. pp. 612, lines 18 – 613, line 7, Trial Tr. 26:18-27:7, July 20, 2016.) *E.g., Giffey v. Columbia/Colleton Reg'l Hosp., Inc.*, 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005); *Holmes*, 408 S.C. at 636, 760 S.E.2d at 407 (whether the plaintiff has proved the case within his case is a question of law).

Davis' declarations that Strong was her common law husband are consistent with other evidence adduced in the Wrongful Death Litigation. Before the Wrongful Death Litigation was filed, nine members of Davis' family described to McGowan the 30 year relationship Davis had with Strong, including Jordan and Hall, Davis' sisters, who were at the first meeting with McGowan and who would have been Davis' beneficiaries, but for her marriage to Strong. (R. pp. 482, line 3 – 483, line 17, Trial Tr. 210:3-211:17; R. p. 496, lines 4-14, Trial Tr. 224:4-14, July 19, 2016; R. pp. 709-722, Bell Trial Ex. 14C, R. pp. 707, 728-730, Bell Trial Exs. 14I-J.) Not only did Jordan and Hall tell McGowan that Davis and Strong were married, they also consented to Gilmore's appointment as personal

representative and relinquished any interest they had in the Estate in order to increase the chances of success for the Wrongful Death Litigation. (R p. 474, lines 10-19, Trial Tr. 202:10-19, July 19, 2016; R. pp. 773-780, McGowan Trial Ex. 15-17.) There was no dispute among the family as to whether Strong and Davis were married, and therefore no reason for McGowan not to believe what the family had told him. *E.g., Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 292-293, 701 S.E.2d 742, 750-751 (2010).

Additionally, many of Davis' family members were deposed in the Wrongful Death Litigation with each testifying that Davis raised Bell like a son, but did not adopt him; and that Strong was her common law husband. (R. p. 452, lines 15-25, Trial Tr. 180:15-25, July 19, 2016; R. p. 834, lines 15-25, McGowan Trial Ex. 30, at 29:15-25; R. p. 967, lines 21-25, R. p. 977, lines 5-18, McGowan Trial Ex. 33, at 11:21-25, 21:5-18.) Even the defendants in the Wrongful Death Litigation, despite the fact that it would have benefited their interests, never argued that Strong was not Davis' common law husband. In fact, they were the ones that valued Strong's claim for consortium as being worth $2,300,000, as that is what they paid to settle the Wrongful Death Litigation, all the while believing Strong to be Davis' common law husband and the sole beneficiary of the Estate. (R. p. 512, lines 22-25, Trial Tr. 240:22-25, July 19, 2016; R. pp. 1001-1020, R. pp. 739-743, McGowan Trial Ex. 34-39.)

In re Estate of Duffy, 392 S.C. 41, 707 S.E.2d 447 (Ct. App. 2011), which Bell relies on in his Brief, supports the circuit court's ruling that Bell failed to adduce evidence sufficient to overcome Davis' declaration that Strong was her common law husband. In *Duffy*, Robert Davitt ("Robert") and Helen Duffy ("Helen") cohabitated, exchanged cards and letters referring to each other as "spouse", and held themselves out in the community

as man and wife. Bell says that this evidence was overcome by "contrary evidence", without ever disclosing what the evidence was that negated the existence of a common law marriage. The contrary evidence was "Helen's last will and testament and her second amendment and restatement of trust that declared she was 'living with, but not married to, Robert M. Davitt,' which the court concluded was a clear expression of her state of mind regarding her relationship with Robert". *Id.* at 46, 707 S.E.2d at 450. Like Helen's will, Davis' sworn declarations in her insurance applications that Strong was her common law husband are a "clear expression of her state of mind" regarding their relationship that Bell did not in any way overcome.

When Davis' own words and other evidence from the Wrongful Death Litigation are contrasted with the hearsay evidence offered by Bell - Davis' obituary, two pages from her medical records, and her death certificate - there is no question that Bell failed to prove that the outcome of the Wrongful Death Litigation would have been different had he challenged Strong's status as Davis' common law husband. (R. p. 598, lines 9-18, Trial Tr. 12:9-18, R. p. 600, lines 9-18, 14:16-25, July 20, 2016; R. pp. 622-624, R. pp. 705-706, Bell Trial Ex. 3-4, 12-13.)

Nor did Bell offer any expert testimony to establish that any breach of duty by McGowan was the proximate cause of any damage to Bell. Professor Freeman was Bell's sole expert, and he did not testify that Bell would have been successful had he challenged Strong's status as Davis' common law husband, or that without Strong the Wrongful Death Litigation would have still been settled for $2,300,000. *See, e.g., Holmes*, 408 S.C. at 636, 760 S.E.2d at 407 ("a claimant must establish through expert testimony" damages and

proximate cause of the damages by the breach of duty by the attorney); *Doe,* 367 S.C. at 445-446, 626 S.E.2d at 31-32.

In fact, Bell offered no evidence of what the value of the wrongful death claim would have been had Bell been the sole beneficiary of the Estate. Bell assumes that the defendants would have still paid $2,300,000 to settle the Wrongful Death Litigation, but that assumption does not suffice for purposes of challenging the circuit court's directed verdict. *Brown v. Butcher*, 2011 WL 1256595 (S.C. C.P. Kershaw Cnty. Nov. 8, 2011) ("Plaintiff has the burden of providing expert testimony to establish what a reasonable [fact finder] who was aware of all the facts would have most probably awarded had the case gone to trial. Without setting forth this evidence, a plaintiff fails to satisfy her burden of proving causation and damages"); *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 432, 717 S.E.2d 765, 780 (Ct. App. 2011) (the court is not authorized to submit "speculative, theoretical, and hypothetical views to the jury").

While Bell argues that consortium claims have only a "nominal value" (Bell Brief at 16 n.12); he presented no evidence that the $2,300,000 settlement of the Wrongful Death Litigation was based on anything other than Strong's consortium claim, who was believed by all to be the sole heir and beneficiary. (R. p. 439, lines 4-5, Trial Tr. 167:4-5; R. pp. 515, line 15 – 516, line 2, Trial Tr. 243:15-244:2, July 19, 2016; R. p. 749, Bell Tr. Ex. 20.) As the circuit court recognized in granting summary judgment as to the survival claim brought by Gilmore and in denying summary judgment as to Strong's loss of consortium claim, Strong's damages for loss of consortium were the same, whether under the Wrongful Death Act or the Consortium Act, such that he would have to elect his remedy when the case was tried:

> With respect to the loss of consortium claim, [Piedmont] argues that recovery by [Strong] on both the wrongful death and loss of consortium claims would constitute a double recovery, as he is the sole beneficiary in the death action. It is clear that both causes of action present the same elements of recovery, namely, loss of companionship, society, services, counsel and good offices.
>
> Since, in theory, as the sole statutory beneficiary, [Strong] could maintain either cause of action without the other, it is not proper to grant [Piedmont's] present motion with respect to the consortium claim. At some later point in the litigation, it may be that [Piedmont] will move to require [Strong and Gilmore] to elect the cause of action upon which they will go to trial, or upon which cause of action they will recover any damages that may subsequently be awarded. That issue is not now presented, and need not be decided at this time.

(R. p. 1121, McGowan Trial Ex. 91 at 2.)

Had the Wrongful Death Litigation gone to trial, Strong would have elected to proceed solely under the Consortium Act, and would have proven at trial that he was Davis' common law husband. (R. p. 478, lines 7-24, Trial Tr. 206:7-24, July 19, 2016.) *E.g., Burroughs v. Worsham*, 352 S.C. 382, 406-407, 574 S.E. 2d 215, 227 (Ct. App. 2002); *accord White v. U.S.*, 907 F.Supp.2d 703, 708-709 (D.S.C. 2012). This never became an issue though, as shortly after the summary judgment ruling the Wrongful Death Litigation was settled for $2,300,000, with the defendants allocating the settlement equally to the wrongful death claim and the consortium claim to ensure that they had adequate consideration to support a complete release of both causes of action. (R. pp. 430, line 21 – 431, line 13, Trial Tr. 158:21-159:13; R. pp. 510, line 3 – 511, line 3, Trial Tr. 238:3-239:3, July 19, 2016; R. pp. 739-743, Bell Trial. Ex. 17; R. pp. 1001-1020, R. p. 739, McGowan Trial Ex. 34-39.)

Noticeably absent from Bell's Brief is any reference to his Motion to Intervene in the Wrongful Death Litigation by which he sought to have the Order approving the

settlement vacated or modified. (R. pp. 1061-1069, McGowan Trial Ex. 60.) Bell is silent on this because he abandoned this Motion, choosing not to contest the issues in the case in which they were presented and choosing not to appeal the circuit court's approval of the settlement. Having made those choices, Bell cannot now collaterally attack settlement of the Wrongful Death Litigation by suing McGowan, as he cannot do indirectly that which he elected not to do directly. *E.g., Parker v. Parker*, 313 S.C. 482, 485-486, 443 S.E.2d 388, 390 (1994); *Lemons v. The McNair Law Firm, P.A.*, 2012 WL 10646748 (S.C. C.P. Horry Cnty. Sept. 4, 2012) (plaintiff was precluded from rearguing in legal malpractice an issue that was determined in the underlying litigation which plaintiff did not appeal).

Contrary to Bell's assertions, the reason the circuit court disregarded his evidence is far from "inexplicable." (Bell Brief at 18.) Judge Hayes, who was intimately familiar with the Wrongful Death Litigation from having heard and approved the Petition for Settlement, and equally familiar with the Malpractice Litigation having ruled upon McGowan's Motions for Summary Judgment, recognized that Bell's only evidence consisted of inadmissible hearsay that did not prove in any way that the outcome of the Wrongful Death Litigation would have been any different if Bell had challenged Strong's status as Davis' common law husband at that time (R. p. 598, lines 13-15, Trial Tr. 12:13-15, July 20, 2016); especially in light of Davis' own words declaring Strong to be her common law husband (R. pp. 766-768, McGowan Trial Ex. 9-10). *Winters v. Fiddie*, 394 S.C. 629, 646, 716 S.E.2d 316, 325 (Ct. App. 2011) (motions for directed verdict are given a deferential standard of review). Said another way, Bell presented no evidence at trial to show that Strong would not have been held by either the probate court or the circuit court

to be anything other than Davis' common law husband, and therefore the circuit court's directed verdict should be affirmed.

III. Alternatively, directed verdict should have been granted under *Douglass*, because the "Estate of Mrs. Davis" is not a legal entity that could contract away the strict privity rule of § 109 as to extend McGowan's duty beyond Gilmore to Bell.

Bell concedes that he had no direct attorney-client relationship with McGowan. (R. p. 378, lines 7-25, Trial Tr. 106:7-25, July 18, 2016; Bell Brief at 24-26.) Thus, but for the circuit court's ruling that the Estate is a legal entity that could enter into contracts (R. pp. 422, line 8 – 423, line 16, Trial Tr. 150:8-151:16, July 19, 2016), the "strict privity" rule of S.C. Code Ann. § 62-1-109 (1999) would limit McGowan's duties or obligations solely to Gilmore, as the personal representative of the Estate:

> **§ 62-1-109. Duties and obligations of lawyer arising out of relationship between lawyer and person serving as a fiduciary.**
>
> 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.

E.g., *Argoe v. Three Rivers Behavioral Center & Psychiatric Solutions*, 388 S.C. 394, 402-403, 697 S.E.2d 551, 554 (2010); *Gaar v. N. Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986) ("an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf

of and with the knowledge of his client"); *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995).

Bell never addresses § 109, looking instead to the decisions of New Mexico to extend McGowan's duty beyond Gilmore to Bell. (Bell Brief at 28.) New Mexico, however, does not have a statute similar to § 109, and its decisions are therefore inapplicable. More importantly, the law of South Carolina, and specifically § 109, govern this case. In this regard, § 109 is a codification of the "strict privity" rule of the common law, pursuant to which attorneys retained by the personal representative of an estate, whether for administration pursuant to § 62-3-715 (19) or for litigation pursuant to § 62-3-715 (20), have no duties or obligations to others having an interest in the estate, unless such duties are expressly provided for by way of the written agreement between the attorney and the personal representative. *E.g., Douglass v. Boyce*, 344 S.C. 5, 542 S.E.2d 715 (2001). As succinctly explained by the Reporter's Comments to § 109:

> This section was enacted and intended to clarify to whom an attorney representing a fiduciary owes a duty: unless a written employment agreement expressly provides otherwise, the attorney for a fiduciary owes a duty only to the fiduciary and not to any other person. Thus, this section confirms that an attorney for the fiduciary does not owe any duty or obligation to a beneficiary of the estate for which the fiduciary serves; there is no direct or vicarious duty owed by the attorney to a beneficiary without an express written agreement to the contrary. Moreover, the attorney for the fiduciary owes no duty to the fiduciary estate or property. The attorney effectively represents the fiduciary and not the fiduciary estate. The rule of this section applies even if the fiduciary pays the attorney from the estate for which the fiduciary serves. The section is expressly declarative of the common law and applies to attorney-client relationships existing before and after the enactment of this section.

The Supreme Court of South Carolina's holding in *Douglass* is factually and legally on point with this matter. In *Douglass*, Christopher Boyce ("Christopher") was killed in an

automobile accident. His parents, Daniel and Yvonne Boyce, were appointed personal representatives of his estate. They retained Brown & Givens to pursue a wrongful death action which was settled. The Boyces received the entire proceeds of the settlement as the sole beneficiaries of Christopher's estate.

William David Douglass ("William") commenced an action against the Boyces alleging they had breached their fiduciary duty to him by failing to include him as a statutory beneficiary in the wrongful death action. William alleged that he was Christopher's son by way of Christopher's liaison with Melodye Shampine, who was married to Robert Douglass at the time. Mr. Douglass was listed on William's birth certificate as his father. William amended his complaint to add Brown & Givens as a party defendant seeking to recover in connection with their representation of the Boyces in the wrongful death action.

The Supreme Court held that Brown & Givens owed no duty to William as a matter of law; using an overlay applying the Supreme Court's holding to the present case evidences that McGowan, like Brown & Givens, owed no duty to Bell as a matter of law:

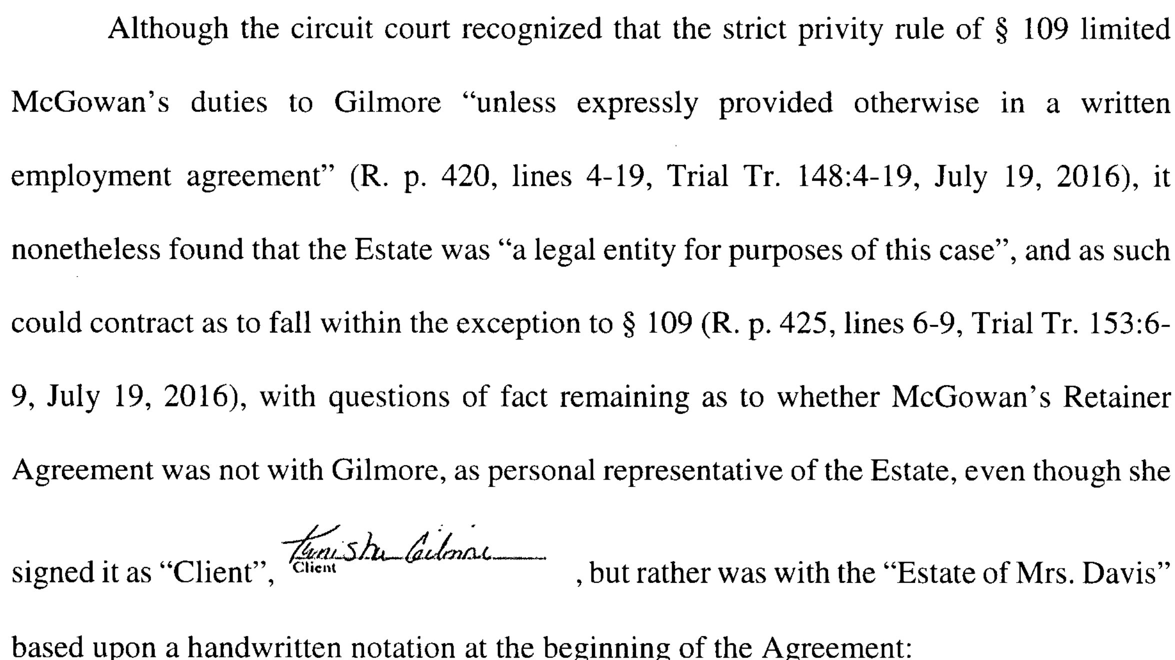
> As noted by both the trial judge and the Court of Appeals, an attorney is immune from liability to third persons arising from the attorney's professional activities on behalf and with the knowledge of the client, absent an independent duty to the third party . . . Accordingly, in this case, the question is whether an attorney **[McGowan]** representing the personal representative **[Gilmore]** in a wrongful death action has an independent duty to the statutory beneficiaries **[Bell]**.
>
> Under our Probate Code, S.C.Code Ann. §62-1-109 (Supp.1999), the legislature has provided the following:
>
>> 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.
>
> This statute expressly negates any duty to persons interested in . . . the proceeds of a wrongful death action **[Bell]** since such an action is brought by a fiduciary **[Gilmore]**.
>
> * * *
>
> We hold under §62-1-109 the Court of Appeals properly affirmed the dismissal of the causes of action against [Brown & Givens] **[McGowan]** because they owed [William] **[Bell]** no duty in connection with their representation of the Boyces **[Gilmore]** as personal representatives of Christopher's estate **[Davis' Estate]**.

344 S.C. at 10, 542 S.E.2d at 717 (**overlay** added); *accord Singleton v. Cromartie*, 2005 WL 5712347 (S.C. C.P. Richland Cnty. Dec. 20, 2005) ("the attorney-client relationship involved is between the lawyer [McGowan] and person serving as the fiduciary [Gilmore] and does not extend to "other persons interested in the estate, trust estate, or fiduciary property" like Plaintiff Barry Naylor, II [Bell], an heir or beneficiary of these Estates").

Because South Carolina has expressly seen fit to codify the strict privity rule of the common law by way of § 109, there is no basis to look to New Mexico law as there is no doubt that the attorney client relationship between McGowan and Gilmore, the personal representative, does not impose upon McGowan any duties or obligations to others, such as Bell. *See State v. Eli Lilly & Company*, 2009 WL 6058384 (S.C. C.P. Spartanburg Cnty. Sept. 22, 2009) (the legislature can enact statutes that are in accord with or at variance with common law concepts such as privity). Section 109 is clear on its face, as is evidenced by the Reporter's Comment, the holding of *Douglass*, the Legislature when it further

considered § 109 after *Douglass*, but chose not to revise it, and the decisions in *Singleton* and *Argoe v. Three Rivers Behavioral Center*, 2008 WL 8185836 (S.C. C.P. Lexington, July 3, 2008), *aff'd*, 388 S.C. 394, 687 S.C. 551 (2010), both of which follow *Douglass* in holding that an attorney for a personal representative has no duty to other persons having an interest in the estate where such duty has not been expressly provided for in the attorney's written employment agreement with the personal representative. *E.g., State v. Sawyer*, 409 S.C. 475, 481, 763 S.E.2d 183, 186 (2014).

Although the circuit court recognized that the strict privity rule of § 109 limited McGowan's duties to Gilmore "unless expressly provided otherwise in a written employment agreement" (R. p. 420, lines 4-19, Trial Tr. 148:4-19, July 19, 2016), it nonetheless found that the Estate was "a legal entity for purposes of this case", and as such could contract as to fall within the exception to § 109 (R. p. 425, lines 6-9, Trial Tr. 153:6-9, July 19, 2016), with questions of fact remaining as to whether McGowan's Retainer Agreement was not with Gilmore, as personal representative of the Estate, even though she signed it as "Client",  Client, but rather was with the "Estate of Mrs. Davis" based upon a handwritten notation at the beginning of the Agreement:

This is an agreement between McGowan, Hood & Felder, LLC (hereinafter "attorneys") and [handwritten notation] (hereinafter "client").

(R. p. 425, lines 12-23, Trial Tr. 153:12-23, July 19, 2016.)

In reaching this decision, the circuit court relied on *dicta* in *Dickey v. Clarke Nursing Home*, 2007 WL 8325995 (S.C. Ct. App. Feb. 23, 2007), which is not only unpublished as to be without precedential value and not to be cited, but is also distinguishable. James Dickey ("Dickey"), then a licensed attorney in South Carolina filed

suit, in his individual capacity and as personal representative of his mother's estate, against Clarke Nursing Home for, *inter alia*, wrongful death. *Id.* at *1. During the course of the litigation, the South Carolina Bar placed Dickey on interim suspension. *Id.* After his suspension was in effect, Dickey filed a motion to reconsider the ruling on Clarke Nursing Home's motion for summary judgment. *Id.* The trial court relying on *Brown v. Coe*, 365 S.C. 137, 143, 616 S.E.2d 705, 708 (2005), held that Dickey's attempt to file the motion without counsel for the personal representative was "tantamount to the unauthorized practice of law", and thus, denied the motion after limiting it to Dickey in his individual capacity. *Id.*

Dickey, in his individual capacity, appealed the ruling. *Id.* Because only counsel for the personal representative of the estate could pursue a wrongful death action, this Court rejected Dickey's arguments and affirmed the trial court's dismissal of the wrongful death claim. *Id.* at *3. *Dickey* did not address the ability of an estate to contract or to enter into an attorney client relationship based on the actions of its personal representative, did not address the Probate Code, and *Brown*, on which *Dickey* was based, was held by the circuit court to be inapplicable to the Malpractice Litigation.

As succinctly explained by the United States District Court for the District of South Carolina ("District Court") in *Wellin v. Wellin*, 2016 WL 8653023 (D.S.C. Nov. 14, 2016),[9] the Estate is not a legal entity capable of retaining counsel. In *Wellin*, the children of Keith S. Wellin sought to take the 30(b)(6) deposition of the "Estate of Keith S. Wellin" as they anticipated that Wendy Wellin, special administrator of the estate, would disclaim

[9] The Special Master's Report and Recommendation was adopted by the District Court. *Wellin v., Wellin*, 2017 WL 1247918 (D.S.C. Mar. 31, 2017).

knowledge of the facts, such that they would then have to take depositions of those with knowledge of the facts, *e.g.*, an attorney or accountant, but who would not be able to bind the estate with their testimony.

The District Court distinguished *Brown*, upon which *Dickey* was based, finding that "South Carolina has long recognized that an estate of a deceased person is composed of the decedent's property" and thus, is inanimate, "lacking any ability to act except through its appointed representative." *Id.* at *4, *citing Carter v. Wroten*, 187 S.C. 432, 198 S.E. 13 (1932) ("The estate of a deceased person, as commonly understood, consists of real and personal property, choses in action, debts, etc. An estate as such cannot hold legal title to lands, because it is neither a person nor a legal entity."). The District Court quashed the deposition notice because "separate and apart from its representative, the inanimate property making up an estate has no ability to comply with a Rule 30(b)(6) deposition notice", as it lacks the ability to do anything other than exist. *Id.* at *5-6, *citing In re Eldridge*, 348 B.R. 834, 845 (S.D. Ala. 2006).

The rationale of *Wellin* is in accord with Title 62 of the Probate Code. Under § 62-1-201(11), "[e]state includes the property of the decedent . . . as originally constituted and as it exists from time to time during administration." Upon Davis' death, her "estate" devolved to Gilmore, as the duly appointed personal representative under § 62-3-101, who took possession of the Estate pursuant to § 62-3-709 for purposes of administration, which included the pursuit of civil actions for survival, the recovery for which becomes an asset of the Estate to be distributed by Gilmore, as personal representative, in accordance with the Probate Code, and for wrongful death, the recovery for which is to be distributed by Gilmore, as personal representative, to Davis' statutory beneficiaries in accordance with

the Wrongful Death Act; both of which actions were required to be brought in Gilmore's name as personal representative of the Estate.

In order to pursue such actions, Gilmore, as personal representative of the Estate, was authorized to retain counsel pursuant to § 62-3-715(20), with the costs of such counsel to be borne by the Estate in accordance with § 62-3-720. Gilmore's authority to enter into such a retainer on behalf of the Estate is exclusive and plenary, usurping the rights of any and all heirs or statutory beneficiaries, including Bell, who might otherwise have an interest in the retention of counsel and the pursuit of such actions. *In re Estate of Livingston*, 404 S.C. 137, 145, 744 S.E.2d 203, 208 (Ct. App. 2013).

As explained in *Gordon v. Busbee*, 2003 WL 26131496 (S.C. C.P. Aiken Cnty. Jan. 5, 2003), an attorney cannot be said to represent an estate or to have duties to an estate as an estate is simply the whole of the property owned by a decedent at the time of death that is subject to administration until distributed, but is not a legal entity which can sue, be sued or be represented by counsel. This conclusion is reinforced by the views of the Ethics Advisory Committee of the South Carolina Bar, which recognized that reference to the "attorney for the estate" means the attorney retained by the personal representative for the estate. Ethics Advisory Committee, Op. 93-341 (1993).

Gilmore, as personal representative of the Estate, was the only person who was legally authorized to enter into the Retainer Agreement with McGowan, which she did on March 15, 2010, signing the Agreement on the last page in the space designated for "Client". (R. pp. 633-635, Bell Trial Ex. 7.) While the first line of the Agreement bears a handwritten notation that the client is the "Estate of Mrs. Davis", this notation refers to nothing more than property that is subject to administration by Gilmore or Bell, and cannot

be used to circumvent § 109. *See, e.g., Richland Horizontal Prop. Regime Homeowners Ass'n., Inc. v. Sky Green Holding, Inc.*, 392 S.C. 194, 197-198, 708 S.E.2d 225, 226 (Ct. App. 2011) (parties to a contract may not circumvent a statute by redefining its plain and unambiguous terms). Nor can this notation be construed as having "expressly provided" for the imposition upon McGowan of duties or obligations to those who may have an interest in the Estate, like Bell, as there is no evidence of Gilmore and McGowan's mutual intent to impose such duties and obligations within the meaning of the exception to § 109. *Butler v. Kidder*, 87 N.Y. 98 (1881) ("'unless otherwise expressly provided by written agreement' applies only if it appears from the face of the document at issue, or other writing, that the parties had in mind the contingency mentioned . . . and inserted clear and unambiguous provisions in their agreement evidencing their intent to invoke the exception").

Contrary to Bell's selective quotation of the trial transcript, McGowan did not admit that he represented the Estate. Rather, following the circuit court's ruling that the Estate could be a legal entity for purposes of this case, McGowan explained:

> Q. [W]e know that you say you represent the estate of Emma Davis and the PR of Emma Davis; is that correct?
>
> A. To me, they're the same thing, so the -- the "and" is -- is not accurate because to me, I was hired to pursue the med mal case for the PR of the estate, and that's what I set out to do.
>
> * * *
>
> Q. Is the estate your client?
>
> A. My client is the PR on behalf of the estate.

(R. p. 431, lines 19-23, Trial Tr. 159:19-23; R. p. 432, lines 1-5, Trial Tr. 160:1-5, July 19, 2016.) Bell's reference to the "estate of Ms. Davis" in McGowan's letter of February 24,

2010 to Piedmont Medical Center is similarly misplaced (Bell Brief at 25) as Bell conspicuously leaves out the sentence of the letter that states, "I enclose a copy of the PR paperwork and the records authorization" which was signed by Gilmore, the Personal Representative. (R. p. 636, Bell Trial Ex. 8.) Thus, when viewed in its totality, McGowan was not conveying that he represented the Estate. *E.g., Harris Teeter,* 390 S.C. at 292-293, 701 S.E.2d at 750-751.

Nor is *Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014), applicable to this matter. Here, the only evidence that Davis intended to provide for *anyone* upon her death is her life insurance policy in which she designated Strong, her common law husband, as the beneficiary. (R. pp. 766-768, McGowan Tr. Ex. 9-10.) Davis did not hire McGowan. Rather, Gilmore hired McGowan to sue those who had tortiously caused the death of Davis, without any regard as to who would be entitled to take by way of intestate succession, which governs distribution of proceeds allocated to a wrongful death claim that pass outside of probate directly to the statutory beneficiaries. McGowan's Retainer Agreement with Gilmore does not reflect any intent to provide for Bell, does not identify Bell in any way, does not refer to Bell by status, and does not distribute Davis' property. (R. pp. 633-635, Bell Trial Ex. 7.) Moreover, and unlike Lindsay, McGowan did not err in handling the Wrongful Death Litigation, which Bell admits, and McGowan therefore did not breach any duty that would defeat an intent of Davis to provide for Bell. (R. p. 563, lines 14-23, Trial Tr. 291:14-23, July 19, 2016.)

Bell's reliance on a blog post by Tiffany Provence, an expert for McGowan who did not testify at trial as verdict was directed in McGowan's favor at the close of Bell's case, is equally misplaced. (Bell Brief at 26.) The extract of the blog quoted by Bell is not

a part of the record nor is it available at the website provided by Bell. Moreover, the post was addressing "the additional complications that are brought about during the administration of estates in Probate Court", which are not at issue here as McGowan, by the express terms of his Retainer Agreement, was not involved in the Estate's administration in probate court. (R. pp. 633-635, Bell Trial Ex. 7.)

Recognizing the Estate as a legal entity that can be represented by counsel will not only eviscerate the protections afforded under § 109, but also the immunity provided by § 62-3-714, which protects persons who in good faith deal with a personal representative. Indeed, such a holding would in essence be rewriting the entire Probate Code. *Burns v. State Farm Mutual Auto. Ins. Co.*, 297 S.C. 520, 523, 377 S.E. 2d 569, 570 (1989) (courts have no power to legislate). Moreover, extension of *Fabian* in this manner would wreak havoc with counsel's ethical duties to personal representatives, heirs, and statutory beneficiaries, as well as prospective heirs and statutory beneficiaries, of the estates at issue, and place impossible burdens on counsel to identify and track down any one who could have an interest in the funds to be recovered lest they be faced with a claim by someone who emerges after the litigation is concluded and the funds are dispersed, like Bell did here. *Rydde v. Morris*, 381 S.C. 643, 650, 675 S.E.2d 431, 435 (2009).

At trial, Bell attempted to "stand in the shoes" of Gilmore, as Successor Personal Representative, even though he argues that her appointment was invalid[10], in order to

[10] If Gilmore's appointment was invalid, then so too is Bell's as Successor Personal Representative. S.C. Code Ann. § 62-3-301(a)(6) provides that "an application for appointment of a personal representative to succeed a personal representative . . . shall adopt the statements in the application . . . which led to the appointment of the person being succeeded."

establish standing to pursue his claim for legal malpractice against McGowan. (R. p. 592, lines 6-7, Trial Tr. 6:6-7, July 20, 2017.) However, while Bell may have the same powers and duties as Gilmore, he is not a party to her contract with McGowan, has no privity with McGowan, and therefore has no standing upon which to sue McGowan. *E.g., In re Ducane Gas Grills, Inc.*, 320 B.R. 312, 321 (D.S.C. 2004); *Estate of Cabatit v. Canders*, 105 A.3d 439, 443-445 n.6 (Me. 2014); *Betz v. Blatt*, 116 A.D.3d 813, 816, 984 N.Y.S.2d 378, 382 (N.Y. App. 2014). Indeed, to extend privity as advocated by Bell would give Bell the functional equivalent of an assignment of any legal malpractice claim that Gilmore may have against McGowan; but any such assignment, direct or indirect, is against the public policy of South Carolina. *E.g., Skipper v. ACE Prop. & Casualty Ins. Co.*, 413 S.C. 33, 36-37, 775 S.E.2d 37, 38-39 (2015).

In fact, should Bell step into the shoes of Gilmore, then his remedy against McGowan is limited to those remedies that Gilmore might have against McGowan. *See Walker v. Gov't Employees Ins. Co.*, 12 Va. Cir. 436, *2 (Va. Cir. 1974). Here, Bell settled with Strong and Gilmore for $250,000, allocated equally between them, which means that Gilmore's remedy, if any, against McGowan is limited to $125,000. (R. pp. 1103-1110, McGowan Trial Ex. 78.) This is the amount that Gilmore paid to resolve Bell's claims against her, as personal representative, for breach of fiduciary duty, and is the amount that she could pursue McGowan for had she chosen to do so. *Jensen v. Crandell*, 1997 WL 34981765, *4 (Me. Super. Mar. 4, 1997).

Even this remedy is lost to Bell, however, because Gilmore chose not to sue McGowan, and Bell ratified the underlying settlement so he has no claim against McGowan as a matter of law. (R. pp. 1085-1086, McGowan Trial Ex. 63.) *L.F.S. Corp. v.*

Kennedy, 287 S.C. 162, 163-164, 337 S.E.2d 209, 210 (1985) (acceptance of financial benefits and advantages of order are clear, unequivocal acts of ratification of order); *accord Lemons*, 2012 WL at *7-8, *citing Brazell Bros. Contractors v. Hill*, 245 S.C. 69, 74, 138 S.E.2d 835, 837 (1964) ("Ratification . . . is the adoption by one of a bargain struck by another under circumstances that he would not have been bound but for his subsequent assent"); *accord Southeastern Housing Found. v. Smith*, 2006 WL 6318130 (S.C. C.P. Richland Cnty. Nov. 20, 2006) (can ratify pending legal actions *nunc pro tunc*).

Bell's remedy was against Gilmore. He could and did sue Gilmore as the personal representative of the Estate to recover for breach of fiduciary duty. Unlike Lindsay in *Fabian*, McGowan is not immunized from suit as his client, Gilmore, the personal representative of the Estate, could sue him for legal malpractice; an action Gilmore chose not to pursue even after she settled with Bell.

McGowan respectfully submits that the circuit court erred as a matter of law in holding that the Estate was a legal entity, has the capacity to contract, and could be designated in the Retainer Agreement as a separate entity capable of being represented by McGowan. The circuit court did, however, direct a verdict in favor of McGowan, which should be affirmed under § 62-1-109 and *Douglass*.

IV. Bell cannot invoke issue preclusion to vest the probate court with jurisdiction to rule on anything beyond the issue of standing.

Bell cannot use the Probate Order to prove or disprove any issue or claim in this matter. Once the probate court ruled on standing it divested itself of jurisdiction. Any rulings made in addition to standing were made without jurisdiction and are void and without legal effect. *See Thomas & Howard Co., Inc. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995) (if a court acts without subject matter jurisdiction,

its judgments are void from inception and are a complete nullity, without any legal effect); *Ross v. Richland*, 270 S.C. 100, 101-102, 240 S.E.2d 649, 650 (1978) ("a court without jurisdiction only has authority to dismiss the action").

Standing is a necessary component of subject matter jurisdiction. "Jurisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) the court's power to render the particular judgment requested." *In re Estate of Hover*, 407 S.C. 194, 207, 754 S.E.2d 875, 882 (2014), *citing Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013). Without standing, the probate court could not do anything other than dismiss McGowan's Petition. *Lennon v. S.C. Coastal Council,* 330 S.C. 414, 415-416, 498 S.E.2d 906, 906 (Ct. App. 1998) (the issue of standing is a component of subject matter jurisdiction that goes to determine justiciability); *Limehouse*, 404 S.C. at 104, 744 S.E.2d at 572 (absent jurisdiction a court cannot proceed at all other than to announce the lack of jurisdiction and dismiss the case).

Moreover, the law of the case doctrine is inapplicable. The "doctrine of the law of the case prohibits issues that have been decided in a prior appeal from being relitigated in the trial court ***in the same case***. [***Emphasis*** added.]" *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571-573, 776 S.E.2d 397, 403-404 (Ct. App. 2015), *quoting Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997). Here, the Probate Order was rendered in a completely separate case, by a court that lacked jurisdiction, well after the underlying Wrongful Death Litigation had been concluded, and issued on Bell's Motion to Dismiss McGowan's Petition to Remove Bell as the Successor Personal Representative of the Estate. Bell cannot retroactively apply this decision, which his lawyers drafted, to McGowan's handling of the Wrongful Death Litigation. Nor can Bell extend the probate

court's decision to the Malpractice Litigation in order to overcome his failure to prove his cases within his case, and thus, as the circuit court did, the Probate Order should be wholly disregarded by this Court.

V. <u>Bell cannot manufacture conflicts of interest where none exist in order to impose liability on McGowan.</u>

Bell's arguments as to conflicts of interest are a red herring that were properly rejected by the circuit court as they are based solely on Bell's speculation and belief that Strong's loss of consortium claim "would reduce the amount of money that would go into the Estate". (Bell Brief at 32.) Bell, however, has failed to present any evidence to prove that had he come forward earlier and challenged Strong's status as Davis common law husband, his challenge would have been successful as to change the outcome of the Wrongful Death Litigation. Bell also is incorrect that the settlement of the wrongful death claim would "go into the Estate." The damages in a wrongful death claim are distributed by the personal representative directly to the statutory beneficiaries. *Bennett v. Spartanburg*, 97 S.C. 27, 81 S.E. 189, 189-190 (1914); *accord Lester v. McFaddon*, 415 F.2d 1101, 1103-1104 (4th Cir. 1969); *Moss v. Shelly*, 287 S.C. 310, 311, 338 S.E.2d 327, 328 (1985).

Moreover, there was no conflict of interest up to the point of settlement, as evidenced by Bell's concession that the settlement was reasonable and his failure to prove that the settlement would have been any different had it been known earlier that he had been formally adopted by Davis. *E.g., Bankers Trust of S.C. v. Bruce*, 283 S.C. 408, 421, 323 S.E.2d 523, 531 (1984) ("In order to recover for an attorney's alleged conflict of interest, the client bears the burden of proving the alleged conflict affected the result of the prosecution or defense of the action in question."); *Peppertree Resorts Ltd. v. Cabana Ltd.*

Partnership, 315 S.C. 36, 41-42, 431 S.E.2d 598, 601 (Ct. App. 1993) (consent is implied where there is a mutual interest in the success of the case). In fact, Bell's admission that the settlement was "reasonable" *ipso facto* destroys any allegations of conflict, as it confirms his acceptance of McGowan's strategy to present a united front to maximize recovery in the Wrongful Death Litigation. *In re Trexler*, 327 S.C. 315, 318, 491 S.E.2d 257, 259-260 (1997); *ITC Comm. Funding, LLC v. Crerar*, 393 S.C. 487, 492, 713 S.E.2d 335, 337-338 (Ct. App. 2011).

Nor is there any conflict of interest with respect to distribution of the settlement funds, for as soon as Bell emerged and made claim on the settlement, McGowan immediately recognized the potential conflict and referred Gilmore and Strong to separate counsel, who handled their defense and settlement of the Gilmore Litigation. (R. p. 412, lines 10-19, Trial Tr. 140:10-19, July 19, 2016.) *E.g., Holmes v. McClendon*, 349 Ark. 162, 172-174, 76 S.W.3d 836, 842-844 (2002).

Lastly, other than Freeman's testimony as to a "potential" conflict of interest (R. p. 545, lines 9-12, Trial Tr. 273:9-12, July 19, 2016), Bell offers neither fact nor law to support his position that the advances made by Maloney to Strong "created an additional conflict of interest." (Bell Brief at 30-33.) Bell ignores the fact that each advance made by Maloney to Strong was memorialized by an "Acknowledgment and Agreement", duly executed by Strong that explained the amount advanced and the amount to be repaid; that McGowan advised against the advance; that McGowan did not receive any benefit in connection with the advances; that Strong was encouraged to seek the advice of separate counsel; and, was advised that if he did not recover in the Wrongful Death Litigation he would not have to repay the advances. Strong gave his informed consent to the potential

conflict of interest presented by the advances, and repaid Maloney out of the settlement funds he received from the Wrongful Death Litigation. (R. p. 545, lines 9-12, Trial Tr. 273: 9-12, July19, 2016; R. p. 749, Bell Trial Ex. 20.) *See In re Swanner*, 408 S.C. 191, 195, 758 S.E.2d 711, 713 (2014).

The circuit court properly rejected Bell's attempts to manufacture non-existent conflicts of interest, its directed verdict should therefore be affirmed.

VI. Bell cannot invoke the equitable remedy of disgorgement to strip McGowan of his duly earned fee for the Wrongful Death Litigation.

The circuit court correctly rejected Bell's attempts to seek disgorgement of McGowan's fees, recognizing that even under a preponderance of the evidence standard there was no evidence that supported forfeiture. (R. p. 608, lines 20-25, Trial Tr. 22:20-23; R. p. 611, lines 17-19, Trial Tr. 25:17-19, July 20, 2016.) "It is repugnant to fundamental principles of equity . . . that [Bell] should reap where they have not sown, free from any legal duty to compensate those who made the reaping possible." *Petition of Crum*, 196 S.C. 528, 533, 14 S.E.2d 21, 24 (1941). Particularly since Bell has failed to pursue, and therefore waived any right to "claw back" distributions of the settlement proceeds pursuant to § 62-3-909, and has similarly failed to pursue, and therefore waived, review of McGowan's fees under § 62-3-721. As Bell admits, McGowan's fees were well within the standard of the profession, totally justified considering the complexity of and result in the Wrongful Death Litigation, and are not subject to disgorgement. (R. p. 563, lines 14-23, Trial Tr. 291:14-23, July 19, 2016.) *Belk v. Harris*, Civil Action No. 08-CP-43-0347 (Oct. 25, 2008) ("If mere receipt of attorney fees were sufficient to cause a lawyer to lose his immunity, the lawyer would never have immunity unless the services were rendered without a fee being charged.").

The out of state cases cited by Bell are all distinguishable and inapplicable as each case involved a blatant, known conflict of interest that was ignored by the lawyer, such as agreeing to directly represent clients with adverse interests, *Pessoni v. Rabkin*, 220 A.D.2d 732, 732, 633 N.Y.S.2d 338, 338 (1995), *Eriks v. Denver*, 118 Wash.2d 451, 460-461, 824 P.2d 1207, 1212 (1992), *In re Estate of McCool*, 131 N.H. 340, 351, 553 A.2d 761, 769 (1988), *Jeffrey v. Pounds*, 67 Cal.App.3d 6, 8-9, 136 Cal.Rptr. 373 (3rd Dist. 1977), *White v. Roundtree Transport, Inc.*, 386 So.2d 1287, 1299-1289 (Fla. App. 3rd Dist. 1980); and negotiating a settlement for a client with an adjustor that was also a part-time consultant for the attorney, *Rice v. Perl*, 32N.W.2d 407, 408-409 (Minn. 1982). Further, as the circuit court noted, there is no South Carolina authority applying the equitable remedy of disgorgement in the manner advocated by Bell.

At the very least, as a number of the cases cited by Bell recognize, McGowan is entitled to his fees based upon *quantum meruit*: the reasonable value of the services rendered. *E.g., Peppertree Resorts, Ltd. v. Cabana Ltd. Partnership*, 315 S.C. 36, 43, 431 S.E. 2d 598, 602 (Ct. App. 1993); *accord Andrews v. Cent. Sur. Ins. Co.*, 295 F. Supp. 1223 (D.S.C. 1969). Bell cannot strip McGowan of his fee based on unsubstantiated "potential conflicts". (R. p. 545, lines 9-12, Trial Tr. 273:9-12, July 19, 2016.) The circuit court correctly held that Bell was not entitled to disgorgement, especially as Bell takes no issue with McGowan's services in obtaining the $2,300,000 settlement in the Wrongful Death Litigation, and its ruling should be affirmed.

CONCLUSION

In an appeal from a directed verdict ruling, the Court "will reverse only where there is no evidence to support the trial judge's ruling, or where the ruling was controlled by an

error of law." *Ecclesiastes Prod. Ministries v. Outparcel Assoc., LLC*, 374 S.C. 483, 490-491, 649 S.E.2d 494, 497-498 (Ct. App. 2007). As it was not "reasonably conceivable to have a verdict for [Bell] under the facts as liberally construed in [his] favor", McGowan respectfully submits that the circuit court's directed verdict on Bell's failure to prove the case within his case, conflicts of interest, and entitlement to disgorgement is correct; eliminated all possible damages Bell could seek to recover; ended the case in McGowan's favor; and should be affirmed. Alternatively, directed verdict should have been granted based upon estoppel by silence and because the "Estate of Mrs. Davis" is not a legal entity that could contract away the strict privity rule of § 62-1-109 as to extend McGowan's duties and obligations beyond Gilmore to Bell.

Additionally, other than in his Statement of the Case and Statement of Facts, Bell never addresses his claims for fraudulent and negligent misrepresentation, and not once in his Brief does he even refer to his claim for breach of contract with fraudulent intent. Bell has therefore abandoned these claims. *Jones v. Lott*, 379 S.C. 285, 289–291, 665 S.E.2d 642, 644–645 (Ct. App. 2008), *aff'd*, 387 S.C. 339, 692 S.E.2d 900 (2010).

Lastly, throughout his Brief, Bell continues his campaign of vilifying and disparaging McGowan. As Bell's vilification and disparagement do not bear on the merits of issues before the Court, McGowan has not responded in kind, and instead prefers to close on the merits by respectfully submitting, for the reasons set forth, that the directed verdict entered below should be affirmed.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
The Honorable John C. Hayes, III

RECEIVED
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SC Court of Appeals

Case 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 & Felder, LLC and Chad McGowan,.............................. Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that Respondents McGowan Hood & Felder, LLC and Chad McGowan's Final Brief complies with Rule 211(b), SCACR.

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