THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas
Frank R. Addy, Jr., Circuit Court Judge
2016-002337

In the Matter of the Estate of Marion M. Kay

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

v.

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

Appellate Case No. 2016-002337

INITIAL PETITIONERS' BRIEF OF RESPONDENTS/PETITIONERS

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the Court of Appeals err in concluding that the heirs other than Respondents had interests so materially adverse to them that this barred a common fund attorney fee recovery?

2. Is the Court of Appeals's finding that there was no implied contract between counsel for Respondents and the other heirs contrary to this Court's precedent and unsupported by the evidence?

3. Did the Court of Appeals err in finding that Respondents' plea for their costs and attorney fees was abandoned?

4. Did the Court of Appeals utilize an improper standard of review contrary to this Court's precedent and the evidence?

5. Is the Court of Appeals's finding that the Personal Representative administered the Estate in good faith lacking evidentiary support and contrary to the record?

6. Is the Court of Appeals's conclusion that the Personal Representative is entitled to a fee equal to 10% of the Estate without evidentiary support and contrary to the law?

STATEMENT OF THE CASE

The Personal Representative (PR) in this case had secretly given himself 18.3% of a decedent's Estate ($ 93,775) as his fee prior to the probate hearing on his accounting and then had sought an additional $ 13,447.05, which would have brought his fee up to 21% of the Estate. The total he sought in commissions, fees for his law firm and expenses for an uncomplicated estate was $ 157,179 or 31% of the Estate, not counting his attorney fees and costs. The order below found he "had no method or formula for determining the amount for the four draws he gave himself other than by pulling figures out of the air" and he "failed to provide a legitimate basis for his fees." As a result of the efforts of Respondents/Petitioners' counsel, he was denied further compensation and his fee was cut by $ 42,475 to 10% of the Estate. This money was ordered to be returned to the Estate for its benefit, but Appellant has not done this. The circuit court affirmed on appeal.

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

Although this is an action for an accounting, the Court of Appeals originally found that the case was at Law and not in Equity and applied the legal standard of review. Later it substituted a new opinion correcting this. At oral argument both counsel had urged the application of the equitable Two Judge Rule. The Court of Appeals declined to do this.

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

ARGUMENT

I. The Court of Appeals's conclusion that the heirs other than Respondents had interests so materially adverse to them that this barred a common fund recovery is contrary to this Court's precedent and unsupported by the evidence.

> The common fund doctrine allows a court in its equitable jurisdiction to award reasonable attorney's fees to a party who, at his own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common fund or common property.... The justification for awarding attorney fees in this manner is based on the principle that 'One who protects or preserves a common fund works for others as well as for himself, and the others so benefitted should bear their just share of the expenses.' Layman v. State, 376 S.C.434, 452, 658 S.E.2d 320 (2008), quoting Petition of Crum. Johnson v. Williams, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941).

The Court of Appeals should have found that the PR's argument against a recovery of attorney fees by Respondents was abandoned, because it was just a brief series of unsupported statements. Having ignored the abandonment, the court's opinion on the meaning and scope of adverse interest in the context of a common fund recovery is contrary to precedent. The case of Bedford v. Citizens & S. Nat. Bank of SC, 203 S.C. 507, 28 S.E.2d 405 (1943), cited by the Court of Appeals, is instructive on the real meaning of adverse interest. The Court there stated the facts to be as follows:

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

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

services rendered there can be no allowance of fees from the common fund."

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

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

In granting the attorney there a fee this Court found, "The successful termination of that case, due solely to the efforts of [Attorney], resulted in the establishment of their rights to share in the fund. ... It is repugnant to fundamental principles of equity... that they should reap where they have not sown, free from any legal duty to compensate those who made the reaping possible." 14 S.E. at 24.

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

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

Here, two of the heirs may have been impatient to get their money, but beyond doubt all the heirs wanted as much money as they could get, and Respondents assisted them in that.

Though the Petitioner PR has professed tender concern for their wishes, it is his refusal to make a refund to the Estate- or even to deposit his excess fee with the Clerk- and his appeal which have delayed distribution for years.

The Court of Appeals's finding that heirs having 70% of the Estate wanted an immediate sale of the property before litigation began is without evidentiary support. As far as Lisbon Presbyterian Church and the Lisbon Cemetery Fund are concerned, that decision could have been made only by a congregational vote. (See Exhibit C-9, R. p. 630 and R. p. 471, ll. 17-19; R p. 198, ll. 15-18 and R. p. 472, ll.1-5.) Such a vote was not held until after probate litigation was nearly over and after Respondents had produced a new buyer for the property (R. p. 133, ll. 16-21), because the Petitioner PR had refused to provide the information requested by the Lisbon Church Session, including information about what he had paid himself (See R. pp. 262, ll. 4-6, 10-11; 633, 833, 865-71, 873.) This shows why the original probate hearing was necessary.

The alleged personal preference of Lisbon's pastor, who did not testify and under Presbyterian polity was not even a member of the church, is irrelevant; and his opinion of what the congregation supposedly would have voted for regarding the first buyer before litigation began is speculative. In fact, the PR admitted that "the church had indicated to me that they wanted me to accommodate everybody." (R. 79, ll.5-7) This means that only heirs with a 20% interest (See R. pp. 24-25.) can be said to have supported an immediate distribution. It should also be noted that Respondents owned 60% of the farm at issue (their half interest plus what the Will gave them) while the two impatient heirs owned a total of 8% of the farm.

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

The Court of Appeals has read the no adverse interest requirement, which was never argued by Respondent and is unpreserved, too broadly and contrary to precedent. It does not

require that all parties be in total lockstep; it merely requires that the parties from whom fee contribution is sought have received a material benefit from the labors of the attorney seeking the fee so that the unrepresented parties do not unjustly reap where they have not sown. The primary delay in the heirs' getting their inheritance resulted from the PR's insistence on appealing to get a bigger fee for himself, not the actions of Respondents.

II. The Court of Appeals's finding that there was no implied contract between counsel for Respondents and the other heirs is contrary to precedent and unsupported by the evidence.

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

The Petitioner PR has not appealed the findings of the probate judge that the work of Respondents' counsel was necessary and related to the merits of the matter and that he preserved and protected a common fund (Final Order, R. p. 12, # 4). These findings are therefore the law of the case. To the extent that the PR appealed the issue of the award of attorney fees to Respondents' counsel, his arguments should be deemed to be abandoned, because they are just a deficient series of unsupported opinions.

The Court of Appeals had no trouble finding that Respondents' counsel had caused to be created and preserved a common fund of the $ 42,275 (and prevented an additional payment of $ 13,447.05 to the PR plus payment of his costs and attorney fees) which the Personal Representative was ordered to return to the Estate and which all the heirs could potentially share. However, the Court of Appeals determined that there was no implied contract between the attorney and the other heirs and denied a fee on that basis, even though the Petitioner PR never argued this and it is unpreserved. An appellate court cannot consider issues on appeal which have not been preserved for appellate review. Ulmer v. Ulmer, 369 S.C. 486, 632 S.E.2d 858 (2006).

It is instructive to consult the Peppertree Resorts case cited by the Court of Appeals to understand what is required for an implied contract to exist. The Court there stated, "[W]hen a party who is unrepresented by counsel will benefit from a common fund and has acquiesced in

the actions of another party's attorney in creating this fund, the law will impose a contract on the former to pay for the services rendered." 315 S.C. at 41. The other parties here did not file any objection with the Probate Court or oppose Respondents' efforts to increase the value of the Estate. After the order of the Probate Court, they made no effort to dispute the resulting common fund. All that two of them (**not** the Lisbon Church and the Lisbon Cemetery Fund, which together had a 50% interest) did was to complain that they were not getting their money fast enough. This is an insufficient basis for them to avoid paying for the legal services which have benefitted an estate in which they are beneficiaries. As the Johnson case shows, the focus is on the benefit won for the heirs and how this affects the equities of the situation, not how close their relationship was with the counsel who benefitted them: "It is... essential that the services prove fruitful to the general class." Johnson v. Williams, 14 S.E.2d at 23.

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

If this Court reverses the Court of Appeals's denial of Respondents' entitlement to attorney fees for the probate trial work, it should also reconsider the denial of attorney fees and costs for the post-trial work and appeals, which were to preserve the common fund from the Appellant PR's attack, inasmuch as its denial of relief for appellate expenses was largely based upon its previous denial of relief under the common fund doctrine for the Probate Court work.

III. The Court of Appeals's finding that Respondents' arguments in favor of being paid their costs and attorney fees can be ignored as abandoned is contrary to this Court's precedent.

The undersigned is particularly aggrieved by the finding that the issue of Respondents' costs and attorney fees for the appeal was abandoned. Page 7 of the Respondents' Brief of Respondents/Petitioners filed below sets out the central arguments for requiring the PR to pay the costs associated with an appeal which was primarily for his personal benefit and not for the Estate. The arguments advanced are succinct but not mere conclusions, and they are supported by four case citations and three citations to the record. As a matter of law, this is not a conclusory

argument.

It is inconsistent that the Court of Appeals considered the merits of the Petitioner PR's exception to the award of an attorney fee to Respondents' counsel. (See pp. 40-41of the Brief of Appellant-Petitioner below.) His argument for that was barely longer than what the Court of Appeals found to be abandonment on Respondents' part, and it had only one case citation. That Court accepted none of his arguments yet ruled in his favor.

It was the finding of the Probate Court and the circuit court that the PR's litigation was for his personal benefit and not for the benefit of the Estate. (See R. p. 11, No. 19 and p. 12, No. 5.) The Court of Appeals then found, "We concur with the probate court's finding that Appellant's counsel's fees primarily stemmed from the contest between Appellant and Respondents over the amount of his compensation and, thus, were properly assessed against Appellant in his individual capacity." Joint Appendix at p. 31, paragraph 3. It must therefore follow that the PR's appeal to overturn the denial of the benefits he sought for himself is for his own benefit and not for the Estate. This is not a mere unmoored conclusion of counsel; it is a finding of two judges below upheld by the Court of Appeals. Requiring the Respondents to pay all the fees and costs associated with blocking the PR from taking more of the Estate from the heirs for himself in this appeal is extraordinarily unfair and contrary to precedent.

The Court of Appeals's citation of Bennet v. Investors Title Ins. Co., 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) for what constitutes abandonment does not support its conclusion; because that case correctly notes the requirement that abandonment of an issue requires **both** a conclusory argument **and** a lack of supporting citations. See also First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994). The undersigned's arguments, which were not mere conclusions, were amply supported by citations. These arguments were thus not abandoned as a matter of law.

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

IV. The Court of Appeals erred in applying an improper standard of review, contrary to this Court's precedent and the facts.

The purpose of the probate hearing which began this case was for the Personal Representative to give an accounting of his handling of Estate assets and his charges to the Estate in accordance with S.C. Code Section 62-3-1001(a)(3). See R. p. 122, ll. 23-24; p. 851 and p. 854(5)(A). This appeal has continued to examine that accounting. In its revised opinion the Court of Appeals recognized that this is a case in equity. "An action in accounting sounds in equity. " Morris v. Tidewater Land & Timber, Inc., 388 S.C. 317, 696 S.E.2d 599 (Ct. App. 2010). The ordinary appellate standard for a case in Equity is this Court's own view of the preponderance of the evidence. Williams v. Wilson, 349 S.C. 336, 563 S.E.2d 320 (2002).

Under the Two Judge Rule, because this is an equitable action and the findings of the probate judge were concurred in by the circuit court judge, those findings are not to be disturbed on appeal unless it is shown that they are without evidence to support them. Crown Central Corp. v. Elmwood Prop., 244 S.C. 588, 138 S.E.2d 38 (1964). There is abundant supporting evidence for their rulings in favor of Respondents, and the findings of the learned judges below in Respondents' favor are certainly not contrary to the clear preponderance of the evidence. See Final Order, R p. 11 , # 21; p. 12 # 4 and p. 13 (e).

"[A]n action at equity first tried by [the probate court] subsequently affirmed or concurred in by the circuit court will not be disturbed on appeal unless found to be without evidentiary support." Dean v. Kilgore, 313 S.C. 257, 259, 437 S.E.2d 154 (Ct. App. 1993). See also Matter of Will of Hall, 318 S.C. 188, 456 S.E.2d 439, 441 (Ct. App. 1995). There is strong evidentiary support for the holding that Respondents' counsel is entitled to a fee based upon his role in creating and preserving a common fund benefitting all the heirs, and the Court of Appeals did not find to the contrary. See Final Order, R. p. 4, # 14.

Application of the proper standard of review mandates that this Court uphold the findings of the Probate Court and the Court of Common Pleas below in Respondents' favor and therefore uphold the granting of an attorney fee and costs to Respondents' counsel for his role in creating and preserving a common fund benefitting all the heirs.

Precedent in this area is complicated by cases appearing to state a different standard of review, such as "whether there is any evidence which reasonably supports the circuit court's findings." Dean v. Kilgore, 313 S.C. 257, 260, 437 S.E.2d 154 (Ct. App. 1993); or whether the

findings below are "against the clear preponderance of the evidence." Nienow v. Nienow, 268 S.C. 161, 172, 232 S.E.2d 504 (1977). However, both those cases also cite the "without evidentiary support" standard. 313 S.C. at 259 and 268 S.C. at 170. This case provides an opportunity for this Court to clarify the proper standard..

The concurring and dissenting opinion, citing the Nienow case, found the Two Judge Rule to be meaningless because it does not alter the preponderance of evidence standard which otherwise routinely applies to civil appeals. This misapprehension illustrates the need for greater clarity of the law. There is strong evidentiary support in favor of the application of the Two Judge Rule, which both parties called on the Court of Appeals to apply in oral argument, to uphold the rulings of the probate and circuit courts in Respondents' favor. The Court of Appeals's interpretation of the Two Judge Rule is contrary to the precedent of this Court and lacks evidentiary support.

V. The Court of Appeals's finding that the Personal Representative administered the Estate in good faith lacks evidentiary support and is contrary to the record.

The undersigned incorporates by reference the preceding arguments and those made in Section VI, *infra*. In doing so, he by no means intends to abandon this argument and calls the Court's attention to R. pp. 875-80 and 1414-27, where the PR's manifold efforts to benefit himself at the expense of the Estate are more fully set out.

The probate judge found that the PR, who began charging even before the Testatrix had died and before he was appointed (Final Order, R. p. 8-9, # 5), unnecessarily complicated the Estate by changing the Will's provisions concerning an option (Final Order, R. p. 8, # 3). He found that the PR unnecessarily sold real estate in the Estate but noted that this generated proceeds for the PR's fee (Final Order, R. p. 8, # 4). He found that the PR unnecessarily complicated the Estate by filing a partition action, even though no heir was pushing for partition, instead of just issuing a deed of distribution as he should have (Final Order, R. p. 8, # 3). See S.C. Code Section 62-3-703 re the PR's duty to settle the Estate "expeditiously and efficiently".

Even if this Court were to accept that the PR acted in good faith in launching litigation to partition the Estate long after the Testatrix died, it must also judge the reasonableness of how he went about it. The probate judge said that this was a "fairly basic estate" (Final Order, R. p. 8, # 2 and p. 9, # 7), and it was located in Laurens County. The PR hired his Columbia law firm to

handle the partition. It wound up being paid a total of $ 25,806.38 (Final Order, R. pp. 10-11, # 17) without getting a partition order. A Laurens County lawyer could have achieved partition for a fraction of that. See also R. p. 206, ll. 6-7 where the PR testified that there was very little legal work to be done. In addition, more than $ 18,000 was paid for valuation of the non-taxable Estate's personal property, which served no purpose other than to further enrich the PR by increasing his fee. The circuit court judge (a former probate judge) characterized this as "a waste of money." See R.531, ll. 10-15. See also S.C. Code Section 62-3-719 concerning a PR's fee being based on the appraised value of the Estate.

The judges below found that the commissions claimed by the PR were "clearly excessive" (Final Order, R. p. 10, # 13), were without a legitimate basis and were the product of pulling a figure out of the air (Final Order, R. p. 9, # 8). The PR attempted to charge the Estate a total of $ 102,222 for his services (Final Order, p. 1, R. p. 7), and secretly (Final Order, R. p. 9, # 9 and R. 185, ll. 11-16) paid himself $ 93,775 before Respondents demanded a hearing to find out what he was up to. He failed to prove the existence and the necessity of the 468.6 hours he claimed to have worked (Final Order, para. 1 , R. p. 8). Like the Court of Appeals (Joint Appendix, p. 31, para. 3), the first two courts below found that the PR's actions in court were for his own personal benefit and not for the benefit of the Estate (Final Order, R p. 11, # 19 and R. p. 12, # 5; Order Disposing of Post-Trial Motions, R. pp. 16-18). This is not conduct which should be rewarded with a huge Personal Representative fee. See Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) and S.C. Code Section 62-3-703 concerning the fiduciary duty of a personal representative.

If this Court finds that the PR violated his fiduciary duty to the Estate for his own benefit and launched appeals primarily for his own benefit, it must inevitably conclude that he himself should pay for the costs and attorney fees of the litigation he caused in the probate court and the appeals which followed rather than the Estate. The post-judgment interest should also come from him instead of from the Estate.

VI. The Court of Appeals's conclusion that the Personal Representative was entitled to a fee equal to 10% of the Estate is without evidentiary support and contrary to law.

The evidence establishes that the Personal Representative's service was in bad faith and for his own enrichment. See R. pp. 875-80 and 1414-27 where the PR's self-enriching conduct is set out. However, even if this Court were to accept the Court of Appeals's unsupported finding that the actions of the Personal Representative were not in bad faith, the inquiry cannot end there. The payment to which he was entitled was also at issue. No court has made the essential finding of extraordinary services required by S.C. Code Section 62-3-719(a) to award a fee of more than 5%. (See the PR's admission of the necessity for this finding at R. 175, ll. 17-20.) The conclusion that the 10% awarded the PR was reasonable overlooks the fact that the PR caused this litigation by attempting to pay himself 21% of the Estate and to charge a total of 31% of the Estate for himself and his law firm (R.p.10, No. 12)- plus his personal attorney fees and costs- for what should have been an uncomplicated estate. This is much more than three courts have found to be remotely supported by the evidence.

One of the PR's charges to the Estate was over $ 18,000 in needless paralegal expenses (204.6 hours x $90/hr.). See R. pp. 4-5 and 750. There was absolutely no benefit to the non-taxable (R. 524, ll. 2-4) Estate here from this expenditure; it was solely for the purpose of boosting the PR's compensation by inflating the value of the Estate, and it achieved that purpose. The courts below rejected the PR's claims concerning the hours he worked (Final Order, R. p. 9, # 8) and found his commissions to be "clearly excessive" (Final Order, R. p. 10, # 13) and without a legitimate basis (Final Order, R. p. 9, # 8). This means that the judge who heard the PR's testimony found him (an attorney) not to be credible in his representations to the court, a conclusion amply supported by the record; and the circuit court judge likewise was skeptical of the PR's charges (R. 533, ll. 17- 534, l. 5). None of this supports a finding that 10% of the unjustly inflated value of the Estate is a reasonable fee for a self-enriching PR under the statute or under the Will, and that finding is without evidentiary support. The Testatrix's intent was to benefit her heirs, not to sue them and to enrich the PR at their expense.

The Court of Appeals upheld the Probate Court's finding that the PR "had no method or formula for determining the amount of the four draws he gave himself other than by pulling figures out of the air.", and he "failed to provide a legitimate basis for his fees." (Final Order, R. p. 9, # 8). By upholding the PR's fee, however, the Court of Appeals said that the litigation the PR caused by the extra $ 42,475 he wrongfully paid himself in commissions (and hid from the heirs) plus the additional $ 13,447.05 he demanded (a total of almost $56,000) is just a minor

diversion of no significance. This is unsupported by the evidence, and the PR provided no essential "extraordinary services" as required by statute.

The PR knew that the way to determine his fee if there was any doubt was to apply to the Probate Court to approve one (R. p. 204, ll. 16-18), but he chose instead to pay himself in secret (R. 185, ll. 11-16) what he alone decided he was worth (R. 174, ll. 21-24). He then asked the heirs to approve those fees without informing them of their amount until the Respondents forced him to do so. If a trustee had paid himself an extra $ 56,000 without telling the beneficiary, surely this Court would not have said that that was of no importance because he claimed he deserved it. The facts found do not support the conclusion stated by the Court of Appeals.

Although the Court of Appeals attempted to support its opinion by noting that the PR consulted with legal counsel (who did not testify and whose affidavit was not accepted into evidence), it fails to note that this was after he had paid himself what the first two judges below later found to be "clearly excessive" commissions without any legitimate basis and that the consultation was to support his inflated past and contemplated future payments to himself. The expert made no independent investigation and did not even see the PR's time sheets (R. p. 196, ll. 1-3, 11-13). He based his alleged opinion solely on what Appellant told him. This paid hearsay cannot be considered an independent and valid expert opinion, and it does not provide any evidentiary support for the Court of Appeals' conclusion.

It is inconsistent that the Court of Appeals found that there was no necessity for the Respondents to have filed a petition in the probate court to raise the issues but at the same time to find that Clean Hands was not an issue because it was not pled. This is an issue which permeates the record and was argued by consent. (See for example R. pp. 1414- 1429 and especially 1426(k).) Three courts' factual findings mandate a finding of unclean hands. There was no need to plead it, and it should at least be treated in the same manner as the unpled unjust enrichment argument made by Petitioner, which was considered on the merits by the Court of Appeals (Joint Appendix, p. 28).

It is this Court's duty to decide not what a personal representative can get away with but what is right conduct for a fiduciary. Here, ample evidence shows that the PR consistently put his own interests ahead of those of the Estate, and Justice and Equity require that he not be rewarded for that. Making him return more of his fee would mean that there would be less of a deduction from distributions to beneficiaries for Respondents/Petitioners' attorney fees and costs.

CONCLUSION

The Court of Appeals overlooked or misinterpreted important factual, equitable and legal elements of this case, and its findings against Respondents/Petitioners are without legal, equitable and evidentiary support. As a result, Respondents/Petitioners are entitled to the affirmation of the relief granted them below and to the granting of the relief they have sought in their appeal, including a reversal of the denial of a full award for attorney fees and costs for all their counsel's work, to include post-trial work and appeals. Because the PR's bad faith handling of his duties caused this litigation and because his appeal was for the primary purpose of benefitting himself and not the Estate, this Court should order that those attorney fees and costs plus the post-judgment interest should come from the funds of the PR and not from the Estate. The fee of the PR should be drastically reduced because of the deficiencies in his handling of the Estate and the lack of the required extraordinary services finding. On remand the Court below will also have to determine the significance of declarations by some heirs that they were waiving their right to further distributions. In being as succinct as possible in deference to the Court, Respondents/ Petitioners have not abandoned any of the issues raised here. The Court should affirm the relief granted to Respondents in the Probate Court for any ground appearing in the record in accordance with Rule 220 (c), SCACR.

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CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee at Cox Ferguson and Wham LLC and that on the 15 day of September, 2017 she served the Initial Petitioners' Brief of Respondents/Petitioners herein by depositing a copy of it in the United States Mail, postage prepaid and addressed to:

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