IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY

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

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

Appellate Case No. 2016-001558

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

Appellant,

v.

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

Respondents.

BRIEF OF APPELLANT WILLIE BELL

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the lower court erred in ruling as a matter of law that a formal adjudication of Andrew Strong as a common law spouse, under S.C. 62-802 was not required in order for Strong to recover under the wrongful death statute and for a claim of loss of consortium?

II. Even if no adjudication is required, did the lower court err as a matter of law by shifting the burden of proof onto the Appellant to demonstrate that Andrew Strong was not a common law spouse?

III. Where the Probate Court ruled that Andrew Strong was not a surviving spouse because he failed to timely adjudicate his status as common a law spouse, was the lower court barred by the doctrines of issue preclusion and law of the case from disregarding the Probate Court order?

IV. Did the lower court err in ruling that Respondents did not have irreconcilable conflicts of interest where its clients, and Respondents' own father-in-law, all held competing claims on the same pool of settlement proceeds?

V. Did the lower court err in failing to find that disgorgement is the proper where the lawyer has irreconcilable conflicts of interests?

STATEMENT OF THE CASE

This case was initiated by the Appellant Willie Bell's filing of a Complaint against attorney Chad McGowan and his law firm, McGowan, Hood, and Felder, LLC, on September 11, 2014. R.p. 3. In his Complaint, Appellant asserted claims for malpractice, fraudulent misrepresentation, negligent misrepresentation, and unfair trade practices in Respondents' handling of a medical malpractice/wrongful death action that arose from the death of Appellant Willie Bell's mother Emma Davis. R.p. 46-63. Following extensive discovery, the matter was ready for trial, which took place before a jury on July 18-20, 2016. R.p. 273, 587. The Honorable John C. Hayes, III presided.

After Appellant Willie Bell presented his case, Respondents moved for a directed verdict. R.p. 590: 15-20. The lower court denied the directed verdict with regard to the legal malpractice case. R.p. 1. However, the lower court found that Appellant Willie Bell had the burden of proving that a non-adjudicated putative common law spouse was not actually a common-law spouse. The lower court further held that Appellant had failed to meet this burden. *Id.* The lower court granted Respondents' motion for directed verdict as to the unfair trade practices claim. (*Id.*). Finally, the lower court declined to impose disgorgement of attorney's fees due to conflicts of interest. (*Id.*). Appellant Willie Bell then timely appealed. Respondents cross-appealed on August 19, 2016.

STATEMENT OF THE FACTS

INTRODUCTION

This case involves claims against an attorney, Chad McGowan, and his law firm (collectively "Respondents") for malpractice, fraudulent misrepresentation, negligent misrepresentation, and unfair trade practices in their handling of a medical malpractice/wrongful death action that arose from the death of Appellant Willie Bell's mother Emma Davis. Respondents had irreconcilable conflicts of interest in their concurrent representation of the Estate of Emma Davis and other clients; they turned a blind eye to the true facts; and they ignored the law, in their self-centered pursuit of a large attorney's fee, all to the detriment of Appellant Willie Bell—the sole legal heir to Emma Davis.

Appellant Willie Bell is Ms. Davis's adopted son[1] and the only legal heir to Ms. Davis, who died intestate. Appellant Willie Bell was not informed of the medical malpractice action brought on behalf of his mother's. Instead, from the inception of suit against Ms. Davis's doctors, Respondents acted in concert with the Estate's Personal Representative and the decedent's boyfriend to deny Appellant Willie Bell the settlement proceeds from the underlying medical malpractice suit, and to obtain large sums of money for themselves, the Personal Representative, Ms. Davis's boyfriend, and others. As a result, Appellant Willie Bell has been cheated out of hundreds of thousands of dollars to which he was legally entitled.

In addition to representing the Estate of Emma Davis, Respondents also represented Andrews Strong (hereinafter "Strong"), a non-adjudicated putative common-law spouse, and Tanisha Gilmore the Personal Representative of Emma Davis's Estate. Respondents also arranged

[1] The adoption decree shows that Appellant Willie Bell was adopted in 1985. R.p. 617.

for one of Respondents' family members to lend money to Strong during the medical malpractice litigation, the repayment of which was tied to the eventual proceeds of the lawsuit. These conflicting interests limited Respondents' motivation to find the proper beneficiary of the Estate of Emma Davis, Appellant Willie Bell.

FACTS

Emma M. Davis died on February 11, 2010, from complications that occurred while undergoing a medical procedure for a pacemaker at the Piedmont Medical Center in Rock Hill, South Carolina. R.p. 622, 634. At the time of her death, Ms. Davis was not married and had one adopted son, Appellant Willie Bell. *Id.* Ms. Davis died intestate and thus, her estate should have passed to her adopted son, Appellant Willie Bell, pursuant to S.C. Code § 62-2-103, which governs intestate distribution, stating that if there is no surviving spouse, the estate passes to "the issue of the decedent."

Shortly after her death, one of Ms. Davis's relatives received an anonymous call from a man who allegedly worked at Piedmont Medical Center, who stated that Piedmont Medical had done something wrong in the operating room, causing Ms. Davis's death. R.p. 367:19 – 368:2, R.p. 728. Thereafter, some of Ms. Davis's relatives contacted Respondents and a meeting was arranged for a few days later to discuss the potential case. R.p. 401:23 – 402:1, R.p. 728. Although Ms. Davis's relatives knew where Appellant Willie Bell lived and how to contact him, Appellant Willie Bell was not asked to go the meeting. R.p. 368:10-17.

Initial Consultation & Existence of Willie Bell

According to Respondents' notes from that initial meeting, two of Ms. Davis's sisters, three of Ms. Davis's nieces, and two sisters of Andrew Strong (Ms. Davis's boyfriend at the time of her death), attended the initial consultation.[2] R.p. 711. During the meeting, at least one attendee raised the issue of Ms. Davis having an adopted son, which is reflected in Respondents' Client Questionnaire where Respondents wrote the following:

surviving Willie Bell (maybe)- son.

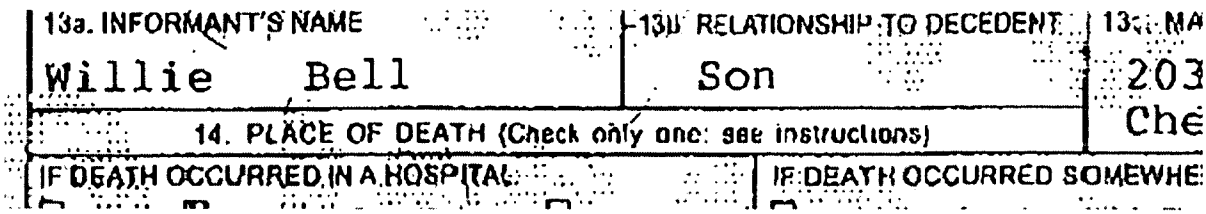
R.p. 709. In the typed Memo to File summarizing the initial meeting, Respondents wrote the name "Willie Bell" and referred to him as the "surviving son":

There is a surviving son, Willie Bell who may or may not have been formally adopted.

R.p. 728.

Additionally, Appellant Willie Bell was listed as Ms. Davis's son in her Obituary (R.p. 623) and on her Death Certificate (R.p. 622), both of which Respondents had in their possession in order to bring the lawsuit for wrongful death. The Death Certificate reflected the following:

[2] At the end of the medical malpractice case, Respondents wrote checks to those who attended the initial meeting in the following manner: two of Ms. Davis's sisters received $5,000 each; two of Mr. Strong's sisters received $5,000 each (and 1 sister who did not attend received $5,000). One niece of Ms. Davis received $100,000 and the other -- Tanisha Gilmore, the PR -- received $200,000. R.p. 748.


13a. INFORMANT'S NAME
Willie Bell
13b. RELATIONSHIP TO DECEDENT
Son
13c. MA
203
Che
14. PLACE OF DEATH (Check only one: see instructions)
IF DEATH OCCURRED IN A HOSPITAL
IF DEATH OCCURRED SOMEWHE

R.p. 622. The obituary clearly identified Appellant Willie Bell as Emma Davis's son, and Strong merely as her companion:

Survivors include a son, Willie Bell and his wife, Claudene, of Chester; her companion, Andrew Strong of the home; two brothers, Monroe Davis Jr. of Chester and Michael Young and his wife,

R.p. 623. Respondents knew where Appellant Willie Bell lived and had his home address. R.p. 410:15-17.[3]

Despite the numerous references to Appellant Willie Bell's existence, and the family's familiarity with his location, and status, Respondents made no attempt to call Appellant Willie Bell, even while knowing that he could be the one true beneficiary of the Estate of Emma Davis if Appellant Willie Bell had in fact been formally adopted.[4] R.p. 406:7-9. Respondents decided that

[3] After the medical malpractice case was settled, Ms. Gilmore contacted Appellant Willie Bell and told him not to believe what he read in the newspaper about the settlement and told him he would receive $100,000 from the settlement. R.p. 370:5 - 371:5. Appellant Willie Bell later received a check for that amount from Respondents.

[4] In fact, Chad McGowan would not ever mention the name "Willie Bell" again throughout the medical malpractice litigation until after the case had been settled, notably leaving his name off of all discovery responses and court filings. R.p. 410:15 – 411:11. Appellant Willie Bell was never interviewed or deposed during the medical malpractice case.. When it became apparent that Willie Bell was indeed a fact witness in the medical malpractice case and would have to be deposed, the case was quickly settled before the true facts came to light.

Appellant Willie Bell had not been adopted, rather than contacting Appellant Willie Bell directly or performing any other investigation. R.p. 402:8-24.[5]

Initial Consultation & Andrew Strong

Also during the initial consultation with Respondents, in addition to discussing Appellant Willie Bell, the attendees also discussed Andrew Strong, who Respondents referred to in their Questionnaire as being the "potential common (law) husband." R.p. 709. Notably, Strong was not listed as Ms. Davis's common law spouse in her Obituary, and instead was merely labeled a "companion." R.p. 623. Similarly, he was not mentioned on her Death Certificate and was only referenced in the medical records as Ms. Davis's "friend." R.p. 623, 706.

Importantly, Strong was never adjudicated to be Ms. Davis's common law spouse by the Probate or Family Court as required by South Carolina Code Section 62-2-802 to claim this legal status.[6] R.p. 449:6-23. In particular, Section 62-2-802(b)(4) states that a "surviving spouse" does not include:

> [A]n individual claiming to be a common law spouse who has not been established to be a common law spouse by an adjudication commenced before the death of the decedent or within the later of eight months after the death of the decedent or six months after the initial appointment of a personal representative; if the action is

[5] After the medical malpractice case was resolved, Appellant Willie Bell received a $100,000 check from Respondents. At the very least, at the time of this payment, Respondents were on notice that Willie Bell was a beneficiary.

[6] In his deposition in the medical malpractice case, Strong testified that he had been adjudicated a common-law spouse. R.p. 694:11-21. Even though Chad McGowan was present and knew the statement was false, he took no action to correct the misstatement or convey the falsity of the misstatement to the doctor/hospital lawyers. R.p. 445:10 – 448:24. Rule 3.3(a)(3) of the Rules of Professional Conduct states that if a "lawyer's client...has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal," which includes a deposition. *Id.*; Rule 1.5(c), Rules of Professional Conduct.

> commenced after the death of the decedent, proof must be by clear and convincing evidence.

S.C. Code § 62-2-802(b)(4). In the medical malpractice case, Strong testified that that Ms. Davis never used his name and they had no paperwork evidencing a common law marriage. R.p. 666:16 – 667:4. In the face of these facts, however, Respondents took it upon themselves to declare Strong to be Ms. Davis's common law husband.

Retention Agreement

Respondents entered into a formal retainer agreement for representation for the Estate of Emma Davis, the first sentence of this contract specifically states that Respondents' client was to be "the Estate of Mrs. Davis," and was signed by Tanisha Gilmore ("Gilmore"), a niece of Emma Davis. R.p. 633. During trial, Respondent argued that this phrase means nothing because an estate is not a legal entity. However, the lower court ruled that an estate is a separate "legal entity." R.p. 425:6-9; 423:13-15. *Dickey v. Clarke Nursing Home*, No. 2007-UP-098, 2007 WL 8325995, at *1 (S.C. Ct. App. Feb. 23, 2007) (an estate "is a separate legal entity from the individual named as PR[.]"), citing *Brown v. Coe*, 365 S.C. 137, 142, 616 S.E.2d 705, 708 (2005). Furthermore, as Respondents have acknowledged, the heirs are the beneficial owners of an estate. R.p. 438:18-20. Of course, as Ms. Davis's only surviving son, Appellant Willie Bell is the sole heir and beneficiary of the Estate of Emma Davis.

Respondents' Concurrent Representation of Andrew Strong

Respondents agreed to represent Strong concurrent with their representation of the Estate and PR despite entering into a formal fee agreement with only the Estate, and despite the fact that Strong's interest in the proceeds of the medical malpractice lawsuit directly conflicted with the Estate's interest.

Following the initial consultation, Respondents eventually filed a complaint for wrongful death, survival, and loss of consortium, asserting that Strong was the surviving common law spouse of Ms. Davis and the sole heir and beneficiary of the Estate. Later, Respondents also filed a Petition for Approval of Settlement with the Circuit Court under the same guise. R.p. 639, 739, 744. Of course, since there had been no adjudication by any court that Strong was a common-law spouse, and Strong was described by Ms. Davis as a "friend," he was not an intestate heir, a statutory wrongful death beneficiary, or a spouse for the purposes of loss of consortium.

Despite the fact that Strong was not a beneficiary to the Estate of Ms. Davis and that his interests directly conflicted with those of the sole legal beneficiary of the Estate, Respondents took no measures to inform the Probate Court or their other clients, the Estate and the PR, of the same. Rather, Chad McGowan continued to litigate the lawsuit brought on Strong's behalf, even though Strong's interests directly conflicted with those of the Estate and PR.

Estate Prematurely Closed in Probate Court

Without any action by the Respondents, the Probate Court discharged Gilmore as Personal Representative during the course of the medical malpractice litigation and closed the Estate of Emma Davis on February 21, 2011:

This is to certify that
the personal representative(s)
in the above estate
appear(s) to have completed the administration, and this
Court has closed this estate
by order dated FEB. 21, 2011

R.p. 751. The Estate was closed even though Respondents had not taken any of required steps to make a determination as to the legitimate heirs of the Estate. Later, after the medical

malpractice/wrongful death case was settled, Respondents represented in the Petition for Approval of Settlement that Tanisha Gilmore was "the duly appointed personal representative" even though the Estate had been closed and the PR discharged. R.p. 739.

Respondents Arrange Private Loans for Strong

During the medical malpractice litigation, Respondents also arranged for private loans totaling $15,500 to be made to Strong by Mr. McGowan's own father-in-law, Mr. Maloney. R.p. 517:3-11, R.p. 749. Respondents drafted the loan documents in which Strong borrowed $15,500 from Mr. Maloney. R.p. 752. Under the terms of the loan from Mr. McGowan's father-in-law, Strong was required to pay 100% interest on the loan. R.p. 517:15-24. These loans were secured and guaranteed against the expected proceeds of the claims against the hospital and made pursuant to Respondents' assurances that he would obtain a favorable outcome of the case. In other words, repayment to Respondents' father-in-law hinged upon a successful outcome of the case.

At this stage of the litigation, Respondents were now representing the competing interests of Strong, the Estate, the PR, and Mr. Maloney. Despite the existence of directly conflicting interests of multiple clients, which should have required a withdrawal from being counsel, Respondents now added an additional layer of conflict because they now had a personal interest to ensure loan repayment to Mr. Maloney by continuing to represent Strong.

Settlement of Wrongful Death / Loss of Consortium Action & Distribution

Ultimately, Respondents obtained a settlement for the wrongful death/loss of consortium case in the amount of Two Million Two Hundred Thousand Dollars ($2,200,000.00).[7] R.p. 739,

[7] As noted previously, if Strong is not a common-law husband, he should not get the proceeds from either a wrongful death or loss of consortium claim. However, Strong received half of the

744. Respondents filed a Joint Petition for Approval of Settlement in the Court of Common Pleas in York County asserting that Gilmore "is the duly appointed personal representative" even though the Estate had been dismissed and Gilmore discharged. *Id.* In the same Joint Petition, Respondents also asserted that Strong was the "sole heir and beneficiary of the Estate of Emma Davis," even though no determination of heirs had been made by the Probate Court. *Id.* That determination was made illegally and ***solely*** by Respondents.

Following the wrongful death settlement hearing, Respondents distributed to Strong, the improper heir, the sum of Eight Hundred Thirty Three Thousand Three Hundred Twenty Seven Dollars and Ninety-Seven Cents ($833,327.97); Respondents distributed to the former PR Gilmore Two Hundred Thousand Dollars ($200,000.00), even though she had only been awarded a Twenty Five Thousand Dollar ($25,000.00) fee by the Probate Court and was not an heir of the Estate.[8] R.p. 749, 750. Respondents received Nine Hundred Twenty Thousand Dollars ($920,000.00) in attorneys' fees and One Hundred Six Thousand One Hundred Seventy Two Dollars and Three Cents ($106,172.03) in reimbursed costs. R.p. 749.

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settlement amount allocated to wrongful death and all of the settlement amount allocated to loss of consortium, amounting to three-fourths of the entire settlement.

[8] Respondents also wrote checks to both Strong's sisters and Davis's sisters, who had attended the initial consultation with Respondents. R.p. 748, R.p. 514:7-16. Of course, this was not Strong's money in the first place and should not have been distributed to other non-heirs. Respondents also wrote a check against Strong's recovery from the lawsuit to Mr. McGowan's father-in-law, who advanced money to Strong, as arranged by Respondents. R.p. 517:5-19.

Appellant Willie Bell Learns of Emma Davis Suite and Settlement

Rather than ever being contacted by Respondents, Appellant Willie Bell, the son and sole true beneficiary of the Estate of Emma Davis, learned of the settlement from an article in the newspaper. R.p. 370:5 - 371:2.[9]

After learning that he had been deprived of his right to the settlement proceeds as the only son and beneficiary, and discovering that the Estate had been closed, Appellant Willie Bell sought to be appointed as subsequent successor personal representative of his mother's Estate. R.p. 632. Respondents attempted to block this appointment by filing a Petition to Restrain and Remove Successor Personal Representative. R.p. 1147. The Probate Court denied Respondents' Petition. *Id.* Upon proper appointment by the Probate Court, Appellant Willie Bell filed suit, both in his individual capacity and as successor personal representative, against Respondents in the Circuit Court for Richland County, alleging causes of action for legal malpractice, fraudulent and negligent misrepresentation, breach of contract with fraudulent intent, and violations of the South Carolina Unfair Trade Practices Act. R.p. 3, 46.

At the jury trial in July 2016, Appellant Willie Bell presented his case. After the close of his case, Respondents sought a directed verdict as to all causes of action. R.p. 590:15-20. The lower court denied "Defendant's Motion for directed verdict on the legal malpractice case." R.p. 1. However, the lower court held that Appellant Willie Bell had "failed to prove that Strong was not a common law husband." This ruling improperly shifted the burden to Appellant Willie Bell, instead of correctly assigning the burden to Respondents to prove that Strong was a common law

[9] Appellant Willie Bell hired an attorney to obtain some of the monies to which he was entitled. That matter was settled for $250,000.00 (and he had received $100,000 from Respondents initially). R.p. 602:8-12.

spouse. *Id.*; R.p. 598:6 – 599:20. Based on this ruling, the Court granted the motion for directed verdict as to the unfair trade practices claim, finding it was premised on Strong's status as a common-law spouse. R. p. 1; R.p. 599:9-12. Finally, the Court held that Respondents had not engaged in conflicts of interest that would require a disgorgement of attorney's fees. R.p. 1; R.p. 611:19 – 612:1; R.p. 612:7-17z. This appeal then followed.

ARGUMENT

I. The lower court erred in ruling as a matter of law that formal adjudication of Andrew Strong as a common law spouse, under S.C. Code § 62-2-802 was not required in order for Strong to recover under the wrongful death statute and for a claim of loss of consortium.

A loss of consortium action due death has limits. In order for Andrew Strong to have standing to pursue a loss of consortium cause of action, Strong must have been adjudicated to be the common law spouse of Emma Davis within 8 months of her death, pursuant to S.C. Code § 62-2-802. Similarly, only an estate beneficiary can recover from legal proceeds derived from a wrongful death cause of action. In order to qualify as an estate beneficiary, Strong was required to be adjudicated as a common law spouse within the eight month time period, which he never was. Accordingly, the lower court erred in ruling that Appellant Willie Bell was required to prove that Strong was *not* a common law husband; rather than placing the burden on Respondents to prove that Strong was legally entitled to recover from the wrongful death and loss of consortium causes of action.

South Carolina has long recognized that the issue of common law marriage is a matter of law for the court to determine. *In re Estate of Duffy*, 392 S.C. 41, 707 S.E.2d 447 (Ct.App. 2011), citing *Tarnowski v. Lieberman*, 348 S.C. 616, 619, 560 S.E.2d 438, 440 (Ct.App. 2002). Moreover, "[t]he party seeking to establish the existence of a common law marriage carries the burden of

proof." *Id.* at 46, 707 S.E.2d at 450. *See Ex Parte Blizzard*, 185 S.C. 131, 133, 193 S.E. 633, 644 (1937). A party who seeks to demonstrate that a common law marriage existed following a death must do so exclusively pursuant to S.C. Code Ann. § 62-2-802(b)(4), which provides the mechanism by which one claiming the status of a common law spouse can be considered a surviving spouse.[10]

Specifically, S.C. Code Ann. § 62-2-802(b)(4) states that a surviving spouse shall not include:

> [A] person claiming to be a common law spouse who has not been established to be a common law spouse by an adjudication commenced before the death of the decedent or within the later of 8 months after the death of the decedent or 6 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.[11]

In *Duffy*, the appellant, Robert Davitt, was the former live-in companion of the decedent, Helen Duffy. Davitt moved before the probate court for an adjudication as to his status as the surviving spouse entitled to a statutory elective share of Ms. Duffy's estate. *Duffy*, 392 S.C. at 43-44, 707 S.E.2d at 449. During a trial before the probate court, Mr. Davitt presented evidence that

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[10] S.C. Code Ann. § 62-2-101 provides that "[a]ny part of the estate of a decedent not effectively disposed of by [her] will passes to [her] heirs as prescribed in the following sections of this Code. S.C. Code Ann. § 62-2-102 then clarifies the division of an intestate estate. As it relates to spouses, only one considered a "surviving spouse" may inherit through an intestate estate.

[11] As the Court of Appeals noted in *Duffy*, "[c]lear and convincing evidence is that 'degree of proof which will produce in the [fact-finder] a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt . . . .'" *Estate of Duffy*, 392 S.C. at 46, 707 S.E.2d at 450 (quoting *Satcher v. Satcher*, 351 S.C. 477, 483, 570 S.E.2d 535, 538 (Ct. App. 2002). Regardless of the standard to which Strong should have adhered, it is undisputed that no formal adjudication by the probate court, or any court with concurrent jurisdiction, was made within the confines of the statute.

he and the decedent lived together prior to her death, that they held themselves out in the community as man and wife, and that he and the decedent exchanged cards and letters referring to one another as spouses. *Id.* The probate court ruled against Mr. Davitt, finding that he failed to establish himself as the surviving spouse by clear and convincing evidence. Mr. Davitt then appealed. *Id.*

The Court of Appeals upheld the lower court finding that the probate court duly considered the evidence appellant presented in support of his petition under S.C. Code Ann. § 62-2-802(b)(4), including: (1) numerous celebration cards from the decedent to the appellant with notations indicating a marital relationship; (2) photographs depicting the decedent wearing a ring on her ring finger; and (3) testimony from twelve witnesses in the couple's community testifying that the parties lived together continuously and held themselves out as husband and wife. *Id.* at 46-47, 707 S.E.2d at 450. Nevertheless, the Court of Appeals found that the probate court did not err in assigning more weight to contrary evidence negating the existence of a common law marriage. *Id.*

In the instant case, Respondents admitted during the trial that he understood Andrew Strong was never formally adjudicated pursuant to S.C. Code § 62-2-802(b)(4) as a surviving spouse of Ms. Davis. R.p. 446-448. Moreover, Respondents testified that during the course and scope of his representation, he did not formally seek an adjudication for Strong as the common law surviving spouse of Ms. Davis. R.p. 440:20 – 441:12. Respondents testified that he believed no such adjudication was required unless a contest arose as to Strong's identity as a surviving spouse. R.p. 440:24-25; 441:1-9, 442:1-14. This remained Respondents' position throughout the trial despite his understanding that proper identification of statutory beneficiaries was a mandatory component of a wrongful death settlement. R.p. 460:14 – 461:21.

To further support his argument that no adjudication was necessary under S.C. Code Ann. § 62-2-802, Respondents attempted to distinguish between the wrongful death cause of action and the consortium claim he alleged in the second amended complaint, stating that the two causes of action were entirely distinct. Specifically, Respondents asserted that S.C. Code Ann. § 15-75-20, allowed Respondents to maintain a cause of action for loss of companionship of a spouse, without the formal constraints required in determining that Strong was, in fact, a spouse.[12] R.p. 581:16 – 582:10. However, Respondents admitted that it was his responsibility to demonstrate to the court who the heirs and beneficiaries were, pursuant to the wrongful death statute. R.p. 430:2-17.

While the lower court did not specifically address the statutory mandates of S.C. Code § 62-2-802, the lower court nevertheless adopted Respondents' argument in ruling that Appellant Willie Bell was only entitled to half of the proceeds associated with the wrongful death claim, and that Strong, was entitled to the entirety of the allocation attributed to consortium and half of the proceeds from the wrongful death claim. R.p. 606:21 – 607:19. This holding is predicated on a finding of Strong as a surviving spouse, despite the absence of a formal adjudication, and the shifting of the burden to Appellant. The lower court affirmation the allocation of the settlement proceeds was based upon an understanding that Andrew Strong was a surviving spouse absent

[12] S.C. Code Ann. § 15-75-20 provides that "[a]ny person may maintain an action for damages arising from an intentional or tortious violation of the right to the companionship aid, society and services of his or her *spouse*." (Emphasis added.) Moreover, South Carolina courts have traditionally assigned a nominal value to consortium. In the instant matter, one half of the proceeds of the settlement procured by Respondents were allocated to consortium, which all but gutted the portion of the settlement allocated to wrongful death. Strong received all of the consortium proceeds and half of the wrongful death proceeds, or ¾ of the settlement, while Appellant Willie Bell received only ¼ of the proceeds.

formal adjudication. This ruling was based upon an error of law, and must be vacated, and the matter must be returned to the lower court.

II. Even if no adjudication is required, the lower court erred as a matter of law by shifting the burden of proof onto the Appellant to demonstrate that Andrew Strong was not a common law spouse.

The burden of proving the existence of a common law marriage rests on the party asserting it, in this case Andrew Strong. The lower court erred in ruling that it was Appellant Willie Bell's burned to prove that Andrew Strong was *not* the common law spouse of Emma Davis, and that Bell had failed to carry this burden. Accordingly, the lower's court ruling should be reversed.

As noted previously, the existence of a common law marriage is a question of law. *In re Duffy*, 392 S.C. at 46, 707 S.E.2d at 450. *See Bell v. Progressive Direct Insurance, Co.*, 407 S.C 565, 757 S.E.2d 399 (2014) (citing *Campbell v. Christian*, 235 S.C. 102, 104, 110 S.E.2d 1, 2 (1959)). While both parties are living, "The party asserting the marriage bears the burden of proving the common law marriage by a preponderance of the evidence." *Progressive* at 581, 757 S.E.2d at 407. Of course, if the party asserting the common-law marriage seeks to prove the marriage after the death of the alleged spouse, the standard of proof is clear and convincing evidence, rather than preponderance of the evidence. S.C. Code § 62-2-802.

Progressive involved a dispute over the proceeds of a UIM policy, following a motor vehicle accident. *Id.* Importantly, in *Progressive*, both parties purporting to be common law spouses were alive, and thus S.C. Code Ann. § 62-2-802 did not apply. However, despite the efforts of the parties, who lived together, and shared a child in common, the Court still determined that the parties failed to demonstrate a common law marriage existed. *Id.*

In the instant matter, the lower court held first that Appellant Willie Bell, and not Mr. Strong, bore the burden of proof. R.p. 598:1-8. The lower court then found that Appellant Willie Bell failed to prove that Mr. Strong did not qualify as a common law husband. *Id.* The lower court further found that the only competent evidence presented regarding Mr. Strong's status was an application of insurance purportedly completed by Ms. Davis listing Mr. Strong as a common law husband. R.p. 598:9-18. No eye witness testimony was presented at trial regarding the circumstances or execution of this document. Inexplicably, the lower court disregarded the evidence presented by the Appellant Willie Bell, including Ms. Davis' obituary, her medical records, and her death certificate. *Id.* ll. 1-18.

The lower court did not rule that Strong was a common a law spouse, but rather, ruled merely that Plaintiff, having been assigned the burden of proof by the court, failed to meet that burden. R.p. 598:19-20; 610:14-22.

Appellant Willie Bell maintains that, in an action initiated after death, S.C. Code Ann. § 62-2-802 remains the only way a party can demonstrate that they are a surviving spouse for purposes of any legal action.[13] However, even if the Court disagrees, the lower court clearly erred in shifting the burden of proof to the Appellant Willie Bell to demonstrate the existence of a common-law marriage between Mr. Strong and Ms. Davis. The lower court's order stated "...it was found that Plaintiff failed to prove Mr. Strong was not a common law husband." R.p. 1. Moreover, the lower court misapplied the law to the extent the court made no determination as to

[13] Furthermore, if an adjudication to determine common law spouse is initiated after the death of the decedent, "proof must be by clear and convincing evidence" -- rather that the mere preponderance of the evidence standard that applies before death. S. C. Code § 62-2-802(b)(4); *In re Estate of Duffy, supra.*

common law status prior to shifting the burden of proof. Therefore, the lower court erred as a matter of law, and this ruling must be reversed.

III. Where the Probate Court ruled that Andrew Strong was not a surviving spouse because he failed to timely adjudicate his status, the lower court is barred by the doctrines of issue preclusion and law of the case from disregarding the Probate Court.

After learning from the newspaper of the existence and settlement of his mother's wrongful death lawsuit, Appellant Willie Bell took steps to become the successor personal representative of his mother's estate. During this process, Respondents challenged Appellant Willie Bell's appointment and as successor personal representative. In rejecting Respondents' challenge, the Probate Court found that Bell was the "sole surviving heir" and that Andrew Strong had failed to have his status as common law spouse adjudicated within the statutory time limits and thus, was not a "surviving spouse." R.p. 1147. This ruling precluded the lower court from finding in this case that Strong was Davis's common law husband. Reversal of the lower court's order is warranted on this basis.

The law-of-the-case doctrine precludes parties from relitigating, after an appeal or opportunity for appeal, those issues that have been previously decided in the same case. *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015). S*ee also, In Re Grossinger's Assocs.*, 184 B.R. 429 (Bankr. S.D.N.Y. 1995) ("The doctrine applies to all issues decided expressly or by necessary implication."). The policy of the law of the case is based upon the interest in promoting "the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Flexon* at 573, 776 S.E.2d at 404, citing *Christianson v. Colt Industries Operating, Corp.*, 486 U.S. 800, 816 108 S.Ct. 2166 (1988). The law of the case doctrine operates

with equal finality upon unappealed rulings. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013).

Similar to the law-of-the-case doctrine, the doctrines of claim and issue preclusion bar a litigant from raising any issues which were adjudicated in a former suit, or any issues which might have been raised. *Plum Creek Dvlpmt. Co., Inc. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999); *see Hilton Head Center of S.C., Inc. v. Public Service Comm'n.*, 294 S.C. 9, 362 S.E.2d 176 (1987). Where a party demonstrates that the matter involves the same parties, and subject matter, and has been adjudicated previously, the parties are precluded from relitigating an issue on which the parties have had a full and fair opportunity to be heard. *Plum Creek* at 35, 512 S.E.2d at 109.

In the instant matter, Respondents filed a Petition in the probate court to remove Appellant Willie Bell as a successor personal representative in the underlying matter. In an order denying Respondents' petition, the probate court found:

> [Respondent] does not dispute that Bell has priority of Appointment under S.C. Code § 62-3-203 as the sole surviving heir. It is undisputed that Andrew Strong, who [Respondent] contends is a common law husband, failed to have his status as Ms. Davis' husband adjudicated within the time limits provided under S.C. Code § 62-2-208(b)(4) and therefore is not to be considered a surviving spouse under the probate code.

R.p. 1148-1149.

The probate court then denied Respondents' petition based upon Respondents' lack of standing. *Id.* The probate court very clearly stated that the order was based upon the hearing held before the court on April 21, 2015, along with the entire record. Thus it is clear that the parties, all of whom are the same parties as set forth herein, were provided a full and fair opportunity to argue these issues before a court of competent jurisdiction. Following the issuance of the probate court's

order, Respondents never requested reconsideration, nor filed an appeal despite the fact that the order effectively ended Respondents' petition.

At the instant trial, Appellant Willie Bell argued that Respondents' failure to appeal or challenge the ruling of the lower court rendered this opinion the law of the case with regard to the issue of Mr. Strong's status as a surviving spouse, and precluded Respondents from arguing a position contrary to that order. R.p. 328:17 – 329:4. Respondents disagreed, arguing that the probate court's ruling adjudicating that Mr. Strong could not qualify as a surviving spouse was mere dicta, because the probate court also determined that Respondents lacked standing to challenge Appellant Willie Bell as a successor personal representative.[14] R.p. 329:14-20. Respondents further argued that the order of the probate court was not an actual order issued by the court, as it was drafted by the prevailing party, ignoring the probate court's ratification of the order via signature. *Id.*

Despite the clear language of the written order of the probate court, which was based upon a full and fair opportunity to argue the issues, the lower court ruled that the order did not constitute the law of the case. R.p. 333:17 – 334:7. In declining to adopt the probate court order as the law

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[14] During the underlying trial, Respondents argued that the probate court lacked jurisdiction over the Respondents' petition to remove Appellant as successor PR, because the probate court determined that Respondents was without standing to bring the petition. This interpretation confuses two different legal concepts. The petition to remove a personal representative is very much within the original jurisdiction of the probate court. S.C. Code Ann. § 62-3-611. However, standing refers to a moving party's fundamental right to the relief requested. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In the order denying Respondents' petition, the probate court very carefully addressed the elements of standing with regard to who had a right to seek the removal of a personal representative, and thus determined that Respondent was not a "person interested in the estate," as defined by S.C. Code Ann. § 62-1-201(23). R.p. 1149-1150. Moreover, the Probate Court not only ruled on Respondents' standing, but also ruled that Strong was not a surviving spouse. R.p. 1149.

of the case, and in allowing the Respondents to relitigate an issue previously adjudicated by the probate court, the lower court erred as a matter of law and the ruling must be reversed.

IV. The lower court erred in ruling that Respondents did not have irreconcilable conflicts, where its clients and Respondents' own father-in-law all held competing claims on the same pool of settlement proceeds.

The lower court erred in ruling that Appellant Willie Bell had "not proven sufficiently to the Court's satisfaction of conflict, which would require a forfeiture [or] the disgorgement." R.p. 612:12-17. The irreconcilable conflicts of interest were apparent from the trial testimony and exhibits, and the lower court's ruling constitutes an error of law. By representing, *inter alia*, an Estate, a PR, a non-adjudicated putative common-law spouse, and the only true beneficiary, the Respondents had irreconcilable conflicts of interest. The appropriate remedy for such actions is disgorgement of attorney's fees.

One of a lawyer's most important ethical duties is to avoid conflicts of interest. *In re Conduct of Knappenberger*, 108 P.3d 1161, 1170 (Or. 2005). Conflicts of interest can arise when a lawyer represents more than one person in a case. Rules 1.7 and 2.2 of the South Carolina Rules of Professional Conduct (RPC), Rule 407, SCACR. Rule 1.7 addresses conflicts of interest and provides:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> > (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; **and**
> >
> > (2) Each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

> (1) The lawyer reasonably believes the representation will not be adversely affected; **and**
>
> (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

McNair v. Rainsford, 330 S.C. 332, 344, 499 S.E.2d 488, 494 (Ct. App. 1998) (emphasis added).

It is undisputed here that there was no consultation or consent by any of the conflicting parties.[15]

A. The Estate of Emma Davis is a legal entity that was represented by Respondents.

Respondents initially claimed that they represented the PR of the Estate and that "[t]here is no legal entity known as the 'the estate of Mrs. Davis,' there's only the PR that can act for anything." R.p. 404:21 – 405:3. However, Respondents later admitted that they did represent the Estate:

> Q. ...we know now that you say you represent the estate of Emma Davis and the PR of Emma Davis; is that right?
>
> A. To me, they're the same thing....

R.p. 431:19-23.

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[15] Moreover, some conflicts cannot be waived by consent. Rule 1.7(b) allows a lawyer to represent a client despite a conflict of interest only if certain conditions are met, one of which is that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." Comment 12 to Rule 1.7 of the South Carolina Rules of Professional Conduct states: "Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b) some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client." Comment 27 states "In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails."

The fact that Respondents undertook representation of the "Estate of Mrs. Davis" is apparent from the face of the retainer agreement. R.p. 633. Our courts have clearly held that an estate "is a separate legal entity from the individual named as PR[.]" *Dickey v. Clarke Nursing Home*, No. 2007-UP-098, 2007 WL 8325995, at *1 (S.C. Ct. App. Feb. 23, 2007), citing *Brown v. Coe*, 365 S.C. 137, 142, 616 S.E.2d 705, 708 (2005). The lower court considered the *Dickey* case and properly ruled that the Estate was a separate legal entity:

> So twice in this opinion, the Court treats an estate as a legal entity. And so I so find that the estate is a legal entity....

R.p. 423:13-15. The lower court further ruled "the estate can be and is--can be a legal entity--and for the purposes of this case." R.p. 425:6-9.

Plaintiff's expert, John Freeman testified that under South Carolina statutory law, a lawyer owes "a duty to the personal representative and you owe a duty to anybody else that you designate in writing in your retainer agreement. And here, the Estate itself was designated, in writing, in the retainer agreement, as a client." R.p. 546:15-23. Mr. Freeman was referencing S.C. Code § 62-1-109,[16] which states:

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

[16] Respondents attempted throughout this litigation to rely on S.C. Code § 62-2-109, claiming that they only represented the PR and had no duties to anyone else.

(emphasis added). As Mr. Freeman explained in his testimony, the retainer agreement here expressly provided that the client was the Estate. R.p. 633. Since the heirs are a beneficial owner of any estate (as Respondents admitted[17]), a lawyer representing an estate would have obligations extending to the heirs -- here, Appellant Willie Bell.

In addition, in a letter to the hospital in which Ms. Davis was treated, Respondents held themselves out as counsel to the Estate, stating:

> I hope this finds you well. Please be advised that I represent the estate of Mrs. Davis, who died during a procedure at PMC on February 11, 2010.

R.p. 636.

As counsel for the Estate or PR, Respondents' duty extended to Appellant Willie Bell, the adopted son of Ms. Davis, the sole heir under the intestate statute, and the sole statutory beneficiary to the proceeds of a wrongful death action under S.C. Code §15-51-20. See, *Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132, (2014). In fact, one of Respondents' expert witnesses published an article explaining this duty:

> An attorney representing the Personal Representative individually is not the attorney for the estate.... And so frequently, we find ourselves being hired by the Personal Representative to act as the attorney for the Estate. In this relationship, the Personal Representative is still the client but we owe a duty to all of the heirs or beneficiaries of this estate.

Provence, Tiffany, "But Aren't You MY Attorney?" http://provencemesservey.com/SCProbateLawyer, (March 5, 2013).

In *Fabian*, the South Carolina Supreme Court extended the duty that a will-drafting lawyer has to his client to others, including the intended or third party beneficiaries of an estate:

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[17] When asked "The estate's for the benefit of all heirs, isn't it?" Respondents answered "Yes." R.p. 438:18-24.

> We affirmatively recognize a cause of action, in both tort and contract, by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent.

Fabian v. Lindsay, 410 S.C. at 491, 765 S.E.2d at 141. The Court explained the duty should be extended"because the beneficiaries were supposed to be the beneficial owners of estate assets, [and] only the beneficiaries suffer directly due to the lawyer's negligence." *Fabian*, 410 S.C. at 483, 765 S.E.2d at 137. "In these circumstances, retaining strict privity in a legal malpractice action for negligence committed in preparing will or estate documents would serve to improperly immunize this particular subset of attorneys from liability for their professional negligence." *Fabian,* 410 S.C. at 490, 765 S.E.2d at 140.

The ruling and logic of *Fabian* are clearly applicable to this case. Here, Appellant Willie Bell is the only heir of Ms. Davis, and thus is "beneficial owner" of the Estate's assets. In fact, Respondents acknowledged that an estate is for the benefit of the heirs, (R.p. 438:18-22), which would include Appellant Willie Bell, a fact that Respondents should have determined by conducting the proper inquiry into Appellant Willie Bell's adoption. Appellant Willie Bell is the one that suffered due to Respondents' failure to recognize that he was the only true and proper heir. Respondents should not be immunized from their wrongdoing on the basis that there is no strict privity between them and Appellant Willie Bell.

B. Respondents represented the Personal Representative who brought the wrongful death action, and therefore, Respondents owed a duty to Appellant Willie Bell as a statutory beneficiary.

Respondents testified at trial, that in addition to representing the Estate, they also represented Tanisha Gilmore, the Personal Representative:

Q. And you say that you also represent the PR.

A. Yes....

R.p. 429:6-7.

Assuming Ms. Gilmore was an appropriate PR (which Appellant disputes) and could bring a wrongful death suit pursuant to S.C. Code § 15-51-20, Respondents still have a duty to the wrongful death beneficiaries to act with reasonable care:

> Although a statutory beneficiary is not in an attorney/client relationship with the attorney of the personal representative, the statutory beneficiary is an intended beneficiary of the attorney/client relationship that exists between the personal representative and his or her attorney. Because a statutory beneficiary is an intended beneficiary of this attorney/client relationship, both the attorney and the personal representative owe a duty to act with reasonable care regarding the interests of the statutory beneficiary.

Spoon v. Mata, 338 P.3d 113, 116–17 (N.M. App. 2014) (internal references omitted).[18]

More specifically, Respondents have a duty to ensure that Appellant Willie Bell, as a statutory beneficiary receives the benefits of the wrongful death action. *Leyba v. Whitley*, 907 P.2d 172, 182 (N.M. 1995) ("... attorneys have a duty to exercise reasonable care to ensure that the statutory beneficiaries actually receive the proceeds of any wrongful death claim."); s*ee*, e.g., *Home Ins. Co. v. Wynn*, 493 S.E.2d 622 (Ga. App. 1997) (attorney representing surviving spouse in wrongful death action also had attorney–client relationship with decedent's sons from former marriage). Respondents admitted representing the Estate and Personal Representative Tanisha Gilmore. Thus, in the wrongful death lawsuit brought by Ms. Gilmore, Respondents had a duty to ensure that the estate beneficiaries, in this case Appellant Willie Bell, received the proceeds of the settlement. As Plaintiff's expert testified:

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[18] Spoon involved a wrongful death case brought by a widow/personal representative and the decedent's out-of-wedlock child, who was a statutory beneficiary under the wrongful death statute.

> Part of the requirement for wrapping up a wrongful death case for a lawyer charged with that responsibility is to file a petition, in court, listing the heirs. In my estimation, no reasonable lawyer, particularly in a case involving millions of dollars, would just rely upon family members, who have no legal skills to determine who the heirs are--which is a legal determination-- where you may have issues such as common-law spouse or is somebody or --are they not adopted. That's a legal question. And that, as -- a lawyer's supposed to step up and handle that.

R.p. 544:15-24.

C. Respondents' representation of a non-adjudicated putative common law spouse conflicted with their representation of the Estate and PR.

In addition to representing the Estate and PR Gilmore, Respondents also undertook the representation of Strong, as demonstrated by the lawsuit filed by Respondents styled as "Tanisha Gilmore, as Personal Representative of the Estate of Emma Davis, and Andrew Strong." At trial, Respondents admitted that he represented Strong:

> Q: Well, you keep saying who you represent. Who did you represent?
>
> A: Tanisha Gilmore, as PR of the Estate and Andrew Strong.

R.p. 413:1-4.[19]

After the case was settled and Appellant Willie Bell learned he had been excluded from the case, despite being the son and only heir or beneficiary, Appellant hired an attorney. In a letter to that attorney, Respondents wrote:

> Pete, Ms. Gilmore will be getting counsel for this matter. I believe that since I represented the estate as a whole and not any individual heir, it would be wrong for me to try and represent one heir or heirs against another.

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[19] Even though McGowan represented Strong and received a contingency fee from the settlement, he did not have a fee agreement with Strong as required by the ethical rules. R.p. 546:6-11; Rule 1.5, Rules of Professional Conduct. There was no fee agreement with the PR either, only the retainer agreement for "the estate of Mrs. Davis." R.p. 633.

Pl. Ex. 9. Yet, Respondents did represent an individual heir, Strong, a fact that was admitted at trial:

> Q. All right. Let's go back to that first sentence that says you represented the estate as a whole and not the individual heir. Is that what is say?
>
> A. Yes.
>
> Q. But you did represent and individual heir, didn't you?
>
> A.. I represented Mr. Strong for his loss of consortium claim.
>
> Q. And he was an individual heir, too; wasn't he?
>
> A. As far as I know, he was both an individual heir and he was entitled to a loss of consortium claim.

R.p. 437:16-25; R.p. 637.

Respondents even admitted that Appellant Willie Bell and Mr. Strong had competing interests:

> Q. If Willie Bell's son, an adopted son, he's the heir; is that not right?
>
> A. He's an heir.
>
> Q. And Mr. Strong is a competing heir.
>
> A. Potentially.

R.p. 412:3-9. In other words, Respondents had competing obligations to the Estate (and by extension Appellant Willie Bell), Gilmore, and Strong.

D. Respondents' arranging a loan to their client, the non-adjudicated putative common law spouse, from a family member of Respondents created an additional conflict of interest.

Respondents added one final obligation while the medical malpractice litigation was pending, when they arranged for Mr. McGowan's father-in-law, Mike Maloney, to lend money to

Andrew Strong. R.p. 517:3-11; R.p. 752. Respondents drafted the loan documents in which Strong borrowed $15,500 from Mr. Maloney. R.p. 517:6-9 – 518:2-4. Mr. Maloney was to receive double that amount upon resolution of the case. R.p. 752. At this point, the Estate, Gilmore, Strong, and Maloney were all seeking monies from the proceeds of the case.

Plaintiff's expert testified as to the duties a lawyer has and in particular, the duty to avoid conflicts of interest:

> And then one duty is to avoid conflict interest or deal with improperly. And to the extent that there's a pie slicing dispute between Willie and Mr. Strong and other people, that raises conflict issues where you are expected to make full disclosure to people, get things out in the open, to have a written understanding as to how its' going to happen --how it's going to be resolved. I didn't see any sign of that.

R.p. 543:13-20.

Moreover, Strong was never adjudicated to be the common law spouse by the Probate or Family Court as required by the South Carolina Code Section 62-2-802, and it is well documented that he would not have qualified as the common law husband.[20] Respondents' unsupported determination that Strong was the common law spouse and their representation of Strong in the lawsuit was absolutely adverse to the interests of the Estate and PR as explained by Appellant Willie Bell's expert:

> Q. What as the--is there-- explain the possible conflict between the PR and the son and the common-law husband. Is there conflict there?
>
> A. There certainly is a potential conflict for this reason: You're talking about one pie.

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[20] The lower court improperly rejected the evidence showing that Strong was not the common law husband, and disregarded the ruling of the Probate Court in which the court held that Strong was not a "surviving spouse." R.p. 1149; R.p. 462:22 – 463:16. The lower court also discarded the importance of the medical records of Ms. Davis, in which she categorized Strong as a "friend" or companion (and identified her marital status as "single"), holding they were "hearsay evidence" R.p. 598:13-15. The lower court focused on the fact that "[n]one of those were signed by Emma Davis." R.p. 600.

> It's a big pie. It's a multimillion dollar pie. It's a multimillion-dollar-plus pie even if you take $900,000 in fees out of it. Who get what size piece? And my-- Mr. Strong thinks he's entitled to more than Willie or the PR thinks something else. Any time you're talking about pie slicing you talking about the potential for conflict, and -- that's-- that's really at the heart of this.

R.p. 545:6-17.

For every dollar recovered in the lawsuit, Strong-- assuming he had been determined to be common law husband -- would receive 75% of the proceeds and Appellant Willie Bell, as the son, would receive 25 percent. In other words, if Strong had been adjudicated the common law spouse, then he had a valid loss of consortium claim, which would reduce the amount of money that would go into the Estate. Thus from the very beginning of the case, the Estate's interest (in effect the interests of Appellant as the only legal heir) and Strong's interest were in direct conflict.

Finally, Respondents' arranging the loans from Mr. McGowan's father-in-law, Mr. Maloney, to Strong during the course of the litigation created an even more adverse relationship. At that point, having assured his father-in-law of the success of the claim and the ability to double his money, Respondents were now representing the interests of at least three parties who would take from the same pot of money. Respondents failed to make their clients aware of the competing interests they represented and/or to obtain written consent allowing them to continue to represent those adverse interests in the litigation.

In summary, Respondents had clear and direct conflicts of interest in this case and the lower court erred in ruling to the contrary. Respondents represented the entity of the Estate of Emma Davis (R.p. 633), thus extending their duties to Appellant Willie Bell as the only heir and as a statutory beneficiary under the wrongful death statute. Respondents also represented Andrew Strong in the same litigation. Anything Strong would receive from the lawsuit (if proven to be a

common law spouse) would be taken away from the Estate and the rightful heir to the same. That fact alone creates an impermissible conflict of interest. When considering Respondents' action taken together, , it is clear that the law of disgorgement should have been applied, requiring Respondents to return the $970,000 attorney's fee to the Estate, to be distributed to the only legal heir. The lower court's finding that Appellant Willie Bell had "not proven sufficiently to the Court's satisfaction of conflict" should be reversed as an error of law.

V. The lower court erred in failing to find that disgorgement is the proper remedy here where the lawyer has irreconcilable conflicts of interests.

The lower court found that Appellant Willie Bell had not proven a conflict of interest (a ruling which Appellant Willie Bell disputes in Section IV above. However, it appears that the lower court recognized the fee forfeiture or disgorgement was an appropriate remedy where there is a conflict of interest:

> I find it that it not--by a lesser standard of greater weight or preponderance of the evidence, not proven sufficiently to the Court's satisfaction of conflict, **which would require a forfeiture [or] the disgorgement.**

R.p. 612:13-17 (emphasis added). Even though the lower court indicated disgorgement is required in some cases, an analysis of disgorgement and why it should be ordered in this case, is necessary.

Disgorgement is an equitable remedy to deprive a wrongdoer of ill-gotten gains or unjust enrichment. *United States v. Philip Morris, Inc.*, 273 F. Supp. 2d 3, 8 (D.D.C. 2002).[21] "Courts throughout the country have ordered the disgorgement of fees paid or the forfeiture of fees owed to attorneys who have breached their fiduciary duties to their clients by engaging in impermissible

[21] While monetary damages are generally considered legal relief, "monetary relief has been characterized as equitable where it is (1) restitutionary; or (2) incidental to or intertwined with injunctive relief." *Id.* Disgorgement is akin to restitution.

conflicts of interests" *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz,* 602 A.2d 1277 (Pa. 1992). For example, courts held that disgorgement or forfeiture was appropriate in the following cases:

1. In *Pessoni v. Rabkin,* 220 A.D.2d 732, 633 N.Y.S.2d 338 (1995), the court found that in an auto accident case, an attorney's representation of the husband/driver, wife/passenger, and children/passengers created conflicts of interest because the lawyer knew a cross claim would be interposed against the husband by the other driver. The court found that the lawyer should have declined to represent the wife and children and held that he was not entitled to legal fees for any services rendered.

2. In *Eriks v. Denver,* 824 P.2d 1207 (Wash. 1992), an attorney represented investors and promoters of a tax shelter scheme in a tax audit. The attorney knew that the investors had a potential civil claim against promoters, but only advised the promoters of this conflict of interest and not the investors. The court found that the lawyer's inability to properly advise his clients of the potential civil claim (and failure to disclose conflicts of interest) violated the duty of loyalty and required disgorgement of fees.

3. In *In re Estate of McCool,* 553 A.2d 761 (N.H. 1988), a lawyer was appointed the PR of the estate of a father who died in a plane crash for which he was the pilot; the lawyer's law firm was retained as the estate's lawyers. The lawyer's firm also represented the estates of the pilot's girlfriend and their two children, who all died in the crash. It was then discovered that the pilot's negligence caused the crash, and that estates of the girlfriend and children had wrongful death claims. The court found the attorney could not receive attorney's fees amid these multiple conflicts of interest.

4. In *Rice v. Perl,* 320 N.W.2d 407 (Minn.1982), the plaintiff's lawyer negotiated a settlement with an adjustor for the defendant with regard to plaintiff's tort claim. The plaintiff's lawyer failed to disclose that the adjustor was also a part-time consultant for the law firm and had been paid significant amounts of money over the years. The court held that the lawyer violated his duty to disclose any material matter bearing upon the lawyer's duty to represent the client with undivided loyalty and held that the lawyer forfeited fees.

5. In *Jeffry v. Pounds,* 67 Cal.App.3d 6, 136 Cal.Rptr. 373 (1977), a lawyer in the firm was representing a client in an accident case when the lawyer's partner began representing the client's wife in a divorce action -- a direct conflict of interest. Client hired new counsel and refused to pay old firm any proceeds from the settlement of the accident case. The court found that the law firm was only entitled to fees for services furnished prior to the conflict of interest.

6. In *White v. Roundtree Transport, Inc.,* 386 So.2d 1287 (Fla.App.1980), a widow hired one lawyer to pursue a worker's compensation claim and another to for a wrongful death action for her husband. The lawyer filed a wrongful death suit seeking damages for the widow and the decedent's two minor children from a previous marriage. The mother of the minor children hired an attorney to pursue a workers compensation claim and intervened in the wrongful death action. In a later proceeding regarding the allocation of attorney's fees, the court held that the widow's lawyers "conceded that there was a conflict in the positions of [widow] and the children concerning the division of the worker's compensation award and that a similar conflict became apparent in the wrongful death action as it progressed. There was also evidence that the [widow's lawyers] knew or should have known of this conflict from the commencement of the wrongful death action." The court held that the widow's lawyers were not entitled to any portion of the fee earned by the settlement on behalf of the children.

The remedy is premised on the idea that disgorgement of fees is "a reasonable way to discipline an attorney's specific breaches of professional responsibility and to deter future misconduct." *Behnke v. Ahrens*, 172 Wash. App. 281, 294 P.3d 729 (2012). Whether a lawyer's conflict of interest proximately caused any damages is not a consideration, because the courts have held that once a conflict of interest or other ethical violation has been established, the attorney is prohibited from collecting fees for his or her services. *Eriks v. Denver,* 824 P.2d 1207 (Wash. 1992) (court found causation and damages must only be shown to establish legal malpractice but that disgorgement of fees for breaches of ethics, without showing causation, was a well-recognized principle to deter future misconduct); *Burrow v. Arce*, 997 S.W.2d 229 (Tx.1999) (a party "need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty...."); *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 212 (Minn. 1984)(If lawyer breaches the duty of loyalty, the client is deemed injured even if no actual loss results and attorney's fees are forfeited).

Here, the lower court made an error of law in ruling that there was no conflict of interest requiring disgorgement. As set forth in detail in Section IV, Respondents represented multiple conflicting interests which adversely affected the representation of Respondents' client, the Estate of Emma Davis, of which Appellant Willie Bell was the sole heir. These conflicting interests as to who was to receive the money from the settlement proximately caused Appellant Willie Bell's damages (even though causation is not needed for disgorgement) because as the sole legitimate heir and beneficiary, Appellant Willie Bell was entitled to the entire settlement amount. As a result, this Court should reverse the lower court's order that found insufficient conflicts of interest and Respondents should be required to disgorge the $920,000.00 fee they received.[22]

CONCLUSION

The instant case should be remanded for a new trial with instructions to follow the ruling and directions of this Court. This Court also has the power to decide, as a matter of law, all issues of damages, restitution and disgorgement. As to liability, as a matter of law, the Respondents did not follow the proper procedure to have Mr. Strong adjudicated a common-law spouse after the death of Emma Davis, under S.C. Code § 62-2-802 and this was malpractice: without an adjudication under Section 62-2-802, Mr. Strong did not qualify as spouse in order to bring a wrongful death or loss of consortium action. Thus, as a matter of law, Appellant Willie Bell should have received all of the settlement monies. As a matter of law, Respondents had conflicts of interest requiring disgorgement of the 920,000.00 fee they received. Therefore, as a matter of law, Appellant Willie Bell, as the only heir and beneficiary was entitled to a sum certain of

[22] Respondents also received $106,172.03 for costs that Appellant Willie Bell did not seek to disgorge.

$2,1938,27.97, which is comprised of the $2.3 million settlement, minus Respondents' costs of $106,172.03. The sum of $350,000, which Appellant Willie Bell has already received, would be set off against that amount. Appellant Willie Bell is therefore entitled to judgment in the amount of a sum certain of $1,843,827.97, plus prejudgment interest.

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July 17, 2017.

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY

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

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

Appellate Case No. 2016-001558

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

Appellant,

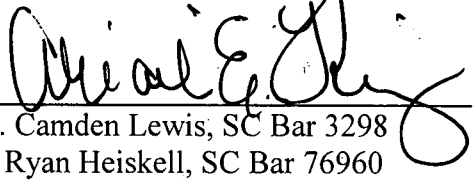
v.

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

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Appellant complies with Rule 211, SCACR(b).



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