THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas

The Honorable Lawton McIntosh

Appellate Case No. 2019-000905

J. Morgan Kearse, Personal Representative of the Estate of G.H. Kearse,……………..…. Appellant,

v.

The Kearse Family Education Trust, William Gordon Kearse, Elizabeth Kearse Gooding, Julia Kearse Sharp, Rachael Kearse Best, Joseph Weber Kearse, and John Morgan Kearse, of which all are named individually and as Trustees of the Kearse Family Education Trust U/A/D Nov. 05, 1992……………………………………………………………………………………Respondents.

FINAL BRIEF OF RESPONDENT ELIZABETH KEARSE GOODING, INDIVIDUALLY AND AS TRUSTEE OF THE KEARSE FAMILY EDUCATION TRUST U/A/D NOV. 05, 1992

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COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the Circuit Court correctly dismissed the appeal because Appellant is not the personal representative of the Estate and lacks standing to appeal as personal representative?

II. Whether the Circuit Court correctly held the probate court's order appointing a successor personal representative is the unappealed law of the case?

III. Whether a source of authority other than that as personal representative confers standing to Appellant to act on behalf of the estate?

IV. Whether there is a real-party-in-interest issue when all of the real parties in interest are named in the action and whether any such issue is untimely when Appellant raised it only after litigating his status to appeal?

V. Whether the probate court correctly held the parties reached a binding settlement?

VI. Whether the Court should affirm on an additional sustaining ground because Appellant did not bring the action in good faith?

STATEMENT OF THE CASE

This is an appeal brought by someone as personal representative of an estate when that person is not the personal representative. The issue properly before the Court is Appellant's standing. While the case involves a lengthy underlying procedural history in probate and circuit court to understand how the parties arrived before this Court, the real dispute is payment of attorney's fees ordered by the probate court and not anything related to interpretation of a will, trust, or estate documents.

The parties' father, G.H. Kearse ("Mr. Kearse") died on June 10, 2013. Almost three years later, on April 8, 2016, Appellant J. Morgan Kearse ("Morgan"), acting as then-personal representative of Mr. Kearse's Estate, filed a Petition for Instructions in the Allendale County Probate Court and named all six siblings, including himself, as individual respondents. (R. 295). On June 16, 2013, still acting as then-PR, Morgan filed an Amended Petition naming the siblings individually and in their capacities as trustees of a family trust. (R. p. 338).

On December 7, 2016, Respondent Elizabeth Kearse Gooding filed a petition to remove Morgan as PR and a motion for summary judgment as to the petition. (R. pp. 355-66). On December 13, 2016, Morgan filed a motion to voluntarily dismiss his petition. (R. pp. 367-68). On January 20, 2017, Elizabeth filed a motion for a restraining order against Morgan as PR. (R. pp. 373-74). On February 1, 2017, Elizabeth filed a memorandum in support of her motion for summary judgment. (R. pp. 376-87).

On February 1, 2017, Morgan's counsel emailed the probate court a letter stating the parties reached a settlement and counsel would read it at the hearing scheduled for the following day. (R. p. 522). On February 2, 2017, Morgan's counsel appeared at the hearing and said that Morgan no longer agreed to the settlement. Counsel also said he submitted Morgan's irrevocable resignation as PR. The probate court found a settlement existed and entered it into the record. On February 27, 2017, the probate court filed an order accepting Morgan's resignation as PR and finding a valid settlement, including that Morgan individually pay Julia, Elizabeth, and the Estate's legal fees and costs related to the petition but he may ask the Estate to reimburse him for Elizabeth and his legal fees. (R. pp. 275-76).

On March 20, 2017, the probate court appointed a Successor PR. (R. p. 278). The same day Morgan filed a motion to reconsider. (R. p. 388). On July 27, 2017, Morgan filed a motion to dismiss the petition, confirm his resignation as PR, and direct the Estate to pay his counsel's fees and costs. (R. p. 401). On August 15, 2017, Elizabeth filed memoranda in opposition to Morgan's motions. (R. pp. 408-21). On August 17, 2017, the probate court held a hearing on the motions and denied them in an order filed on September 18, 2017. (R. pp. 495, 280-86).

On September 27, 2017, Morgan filed a notice of appeal to the circuit court. (R. p. 426). After briefing, the circuit court held argument on October 8, 2018. (R. p. 662). On October 29,

2018, the circuit court issued a Form 4 Order dismissing the appeal and asking counsel to prepare a formal order. (R. p. 29). On November 8, 2018, Morgan filed a motion to reconsider or for ratification, joinder, or substitution of a real party in interest. (R. p. 257). On December 13, 2018, the court filed a formal order dismissing the appeal. (R. pp. 32-36). On December 27, 2018, Morgan filed another motion to reconsider or for ratification, joinder, or substitution of a real party in interest. (R. p. 551). On April 4, 2019, the court held a hearing on the motion and, on April 8, 2019, denied it in a Form 4 Order. (R. p. 37). On May 14, 2019, the circuit court filed a formal order denying the motion to reconsider. On May 29, 2019, Morgan filed this appeal.

FACTS

Mr. Kearse died testate on June 10, 2013, with six living children. (R. p. 295). All six children are parties to the underlying action, and three are parties to this appeal. A provision in Mr. Kearse's will led to the underlying action, and a history of it will help the Court to understand how the parties arrived at this juncture and show that a majority of the issues are not preserved.

I. Mr. Kearse's Will Provision to Build a Home on Land he did Not Own

In 1992, Mr. Kearse created an irrevocable trust known as The Kearse Family Education Trust ("the Trust"), naming his six children as Trustees. (R. pp. 309-26). He transferred a family farm and other real property to the Trust. (R. pp. 309, 325-26, 376-77, 381-82). The Trust's purpose is to keep ownership of the property in the family and to use the money generated by the timber, rents, etc. to pay for his grandchildren's education. (R. p. 309). In May 2011, almost twenty years after transferring the property to the Trust, Mr. Kearse wrote a will with a provision telling his children to build a house on the family farm. (R. p. 303). After his death, the siblings disputed whether they could or should build the house given that the Trust, not Mr. Kearse, owned the property and there is no money provided to pay for the house. (R. pp. 296, 327-28). This dispute led to Morgan filing the underlying action in probate court.

Mr. Kearse named his six children as co-personal representatives of his estate. (R. pp. 295, 304). The siblings are W. Gordon Kearse ("Gordon"), Respondent Elizabeth Kearse Gooding ("Elizabeth"), Respondent Julia Kearse Sharp ("Julia"), Rachael Kearse Best ("Rachael"), Appellant J. Morgan Kearse ("Morgan"), and Joseph W. Kearse ("Joseph").[1] In October 2013, Morgan's five siblings renounced their rights as PR, and the probate court appointed Morgan as the PR of his father's estate. (R. p. 295).

II. <u>The Probate Court Accepted Morgan's Resignation as PR, Ordered Morgan Individually to Pay Attorney's Fees, and Appointed a Successor PR</u>

On April 8, 2016, Morgan, acting as then-PR of Mr. Kearse's estate, filed a Petition for Instructions in the probate court. (R. p. 295). The petition is captioned as "J. Morgan Kearse, Personal Representative of the Estate of G.H. Kearse" versus the individual siblings. *Id.* The petition sought an order directing the PR to build the home referenced in Mr. Kearse's will and that money from his Estate *and* the Trust pay for it. (R. pp. 297-98, 300). Four siblings—Respondents Elizabeth and Julia, and Joseph and Gordon—submitted filings in response to the petition.[2] (R. pp. 327-33). Elizabeth asked the probate court to find that it cannot order the Estate to build a home on property the Estate does not own and to award costs and attorneys' fees in opposing the petition. (R. p. 330). In June 2016, in response to a motion to dismiss filed by Julia, Morgan filed an Amended Petition naming the siblings individually and as Trustees. (R. p. 338). At this point, Morgan as PR was suing himself individually and as trustee of a Trust. (R. pp. 338,

[1] First names are used for clarity.

[2] Joseph is *pro se* and submitted a letter stating he supported exploring building a house if financially possible and he wanted to close the Estate as soon as possible. (R. p. 335). Gordon is *pro se* and submitted a letter stating he opposed building the house and wanted the estate closed as soon as possible. (R. p. 520). Neither one submitted any other filing.

344). Respondents Elizabeth and Julia filed answers to the Amended Petition, asking the probate court to deny it and award them attorneys' fees and costs. (R. pp. 344-53).

On September 7, 2016, the parties took Morgan's deposition. (R. pp. 381-82). He admitted that he knew before filing the petition that the Trust owned the property and an attorney provided him an opinion that Mr. Kearse could not direct the construction of a home on land he did not own. *Id.* On December 7, 2016, Elizabeth filed a petition to remove Morgan as PR and a motion for summary judgment as to the petition. (R. pp. 356, 364). In her affidavit attached to the removal petition, Elizabeth gave a timeline of events leading up to Morgan filing the petition, the legal bases for why the Estate cannot build a house on property it does not own, and the deficiencies and mismanagement as PR. (R. pp. 357-63). Elizabeth asked the Court to remove Morgan as PR and order him to pay the Estate and her legal fees incurred in the action. (R. p. 362 ¶ 18). In response, Morgan filed a motion "in his capacity as Personal Representative of the Estate of G.H. Kearse" to voluntarily dismiss his petition and close the Estate. (R. pp. 367-68). The probate court scheduled a hearing for February 2, 2017, to hear all outstanding motions.

Prior to the hearing, the parties entered a settlement. Morgan's counsel communicated his agreement to counsel for Elizabeth and Julia and the fact of the settlement to the court. On January 31, 2017, Mr. Speights, counsel for Julia, emailed Mr. Wingate, counsel for Morgan, and Mr. Slotchiver, counsel for Elizabeth, a settlement term sheet to which Julia agreed. (R. pp. 466-68). Mr. Slotchiver responded that Elizabeth also agreed to the term sheet. (R. p. 470).

On February 1, 2017, Mr. Wingate responded to "confirm[] that Morgan also agrees to the terms set forth in the Settlement Offer." (R. p. 473). He promised to send a letter to the probate judge "notifying her that we have reached an agreement" and said he would not attend the hearing and Mr. Speights would read the agreement into the record. *Id.* Mr. Speights asked him to "[p]lease

include in your letter that all the other siblings have agreed to the settlement." (R. p. 477). Mr. Wingate said he notified the clerk of court "that we have reached a settlement" and asked permission to not attend the hearing. *Id.* Mr. Slotchiver responded that he "would prefer that all interested parties, including John Morgan and each of his siblings be present to place on the record their consent to this Agreement" but he is "not dead set on it in light of the fact that I understand [Mr. Wingate]'s letter to the Court will confirm that he has personally spoken with Joseph, Gordon, and Rachael to confirm their consent to the Agreement." (R. p. 476). Mr. Wingate wrote that he was "in the process of obtaining signatures from Gordon, Rachael and Joseph to indicate their consent", and he did not want "all the siblings" attending the hearing based on prior interactions. (R. p. 475). Mr. Wingate later confirmed "Joseph, Gordon and Rachael are each signing the agreement this afternoon, and I'll have copies of their signatures with me at the hearing" and stated "Morgan, Joseph, Gordon and Rachael will NOT attend" the hearing. *Id.*

Mr. Wingate emailed a letter to the probate judge stating the hearing "will not be necessary" because the "parties have reached a global settlement in this matter, including the siblings who are pro se parties", and asked to be excused from attending the hearing since Mr. Speights will "read the agreement into the record." (R. p. 522). The settlement agreement is two pages that contains six paragraphs. The two paragraphs relevant to this appeal state:

> Morgan shall immediately pay Julie's legal fees and expenses incurred in connection with the defense of Morgan's Petition for Instructions. Julie does not want the Estate to pay any of these fees or expenses.
>
> Morgan shall be responsible for the payment of your [Mr. Wingate's] legal fees and [Eliza]beth's legal fees. Morgan may seek to have the Estate pay all or some portion of these legal fees. In such event, if the majority of the other siblings (Gordon, [Eliza]beth, Rachael, Joseph, and Julie) do not object to the Estate paying such fees, Julie will honor the decision of the majority.

(R. pp. 480-81, 444 lns. 14-15). The other paragraphs required Morgan to resign as PR, allowed him to keep a $25,000.00 PR commission, agreed for the Trust to purchase their mother's home,

and allowed Morgan to use Mr. Kearse's old law office rent free without objection from Julia because the Estate does not own the office. (R. pp. 480-81, 358-59).

On February 2, 2017, Mr. Wingate, Mr. Slotchiver, Mr. Speights, Elizabeth, and Julia attended the hearing. (R. p. 273). Morgan, Rachael, and Joseph chose not to attend despite proper notice. (R. pp. 287-91). Mr. Wingate began by explaining "I represent Morgan Kearse in his capacity as Personal Representative of the Estate." (R. p. 436 lns. 20-21). He then told the court that he did not have Joseph and Rachael's signatures on the settlement and Morgan "does not consent to the settlement." (R. p. 437, 439). He also stated Morgan "would like to take a unilateral step and submit . . . a pleading announcing his resignation as Personal Representative." (R. pp. 437-38). He described the resignation as submitted "irrevocably" and stated

> that ***all*** of [Morgan]'s authority is terminated or is frozen. He has no power to write checks. He has no power to file documents. ***He has no power to take action***. He can do nothing but sit on the sidelines and wait for Your Honor to appoint a successor fiduciary or fiduciaries, whatever you decide to do, for this estate.

(R. pp. 438-39) (emphasis added). He recognized "Your honor will hear arguments today that once I have represented to the Court yesterday in writing that we have a settlement that my party would be – my client would be bound to that. That very well may be what you decide." (R. p. 439).

Julia and Elizabeth asked the court to enforce the settlement. They submitted the attorneys' emails to the court, along with copies of the settlement signed by Julia, Elizabeth, and Gordon. (R. pp. 443, 463-85). The probate court enforced the settlement, explaining

> . . . [t]he court is left in a conundrum because I have nothing further from Mr. Kearse what all of a sudden he doesn't agree to specifically in the agreement, and having found – this particular time with nothing further on that except that he just is going to resign and doesn't agree . . . the Court finds no other way at this point to move forward other than to, A, accept the agreement into the court record, and, B, accept the appointment of resignation of Mr. Kearse.

(R. pp. 452-53). Morgan's counsel did not make any argument in opposition to the settlement other than to say Morgan did not consent and Joseph and Rachael did not sign it.

On February 27, 2017, the probate court filed an order entering the settlement. (R. pp. 272-76). It found "Rachael and Joseph advised the Petitioner that they agreed to the settlement before Mr. Wingate represented to the Court that a settlement had been reached, but they chose not to attend the hearing to dispute the settlement." (R. p. 275). The order required "Morgan"[3] to pay Julia, Elizabeth, and Mr. Wingate's legal fees and expenses within 7 days of the date of the order. (R. pp. 275-76). He could then "seek to have the Estate reimburse him for all or some portion of these legal fees and expenses" paid to Elizabeth and Mr. Wingate. *Id.* The court accepted Morgan's resignation as PR. "Effective February 2, 2017, Petitioner's authority is terminated. The Petitioner has no power to take any action." (R. p. 275).

On March 20, 2017, the probate court appointed Harley Ruff as the successor PR. (R. p. 278). "In late March" Morgan mailed Mr. Ruff the estate checking account. (R. p. 814). In June 2017, Morgan delivered the remaining estate assets to Mr. Ruff's office. *Id.* On July 11, 2017, Mr. Ruff sent the beneficiaries a memorandum on the consolidation of estate assets. *Id.* In November 2017 and October 2018, Mr. Ruff executed and filed deeds of distribution for various real properties owned by the Estate. (R. pp. 816-28).

After the probate court's February 27, 2017 order, Morgan raised new arguments in every filing. On March 20, 2017, Morgan filed a motion to alter or amend the February 27, 2017 order and raised new issues. (R. p. 388). He filed it "in his capacity as Personal Representative of the Estate of G.H. Kearse", even though he no longer served as PR. (R. pp. 388, 814). Morgan argued

[3] The probate court used "Petitioner" when referring to Morgan as PR and "Morgan" when referring to him as an individual. (R. pp. 275-76).

for the first time that the settlement did not meet alleged statutory and procedural requirements, the terms of the settlement were not properly before the probate court, and, alternatively, asked for an evidentiary hearing. (R. pp. 391-95, 397-98). The motion did not contest the probate court's removal of Morgan as PR. (R. p. 275). Rather, it states he "would not contest any order that accepted his resignation" as PR even if it was not properly before the court or did not follow statutory procedure. (R. p. 297).

Morgan also filed an affidavit, presented for the first time with his motion. (R. pp. 396, 399-400). He tried to get Joseph, Rachael, and Gordon to sign a second agreement (unbeknownst to Julia and Elizabeth) stating they agreed to allow the Estate to pay for Elizabeth and Mr. Wingate's attorney's fees. (R. pp. 399-400). When Gordon refused to sign it, Morgan no longer wanted to agree to the settlement, which was not conditioned on a separate, second agreement. (R. pp. 396, 399).

In July 2017, during the pendency of his motion to alter or amend, Morgan filed another motion also purportedly "in his capacity as" PR. (R. p. 401). He asked the probate court to dismiss his original petition for instruction, confirm his resignation as PR and Mr. Ruff's appointment, and order the Estate to pay his legal fees. (R. pp. 401-06). The probate court already decided those matters. The February 27, 2017 order states "[t]he Petition for Instructions is dismissed with prejudice" and "[t]he Court accepts Petitioner's Resignation as the Personal Representative." (R. p. 275). The March 20, 2017 order appointed Mr. Ruff as the successor PR. (R. p. 278). Morgan did not challenge those rulings in his motion to alter or amend.

Elizabeth filed memoranda in opposition to the motions. (R. pp. 408-21). She argued the motions improperly raised new issues and presented new evidence, are legally incorrect, and the motion to dismiss is an improper attempt to alter the probate court's order. Elizabeth also argued

that the separate, second agreement Morgan asked the *pro se* siblings to sign is not part of the settlement agreement because, if it were, the settlement agreement would simply say the Estate is to pay the fees rather than saying Morgan shall pay and may, in the future, seek reimbursement from the Estate. (R. p. 420).

On August 17, 2017, the probate court held a hearing on the motions and denied them. (R. pp. 495-96). Elizabeth argued that Morgan (as PR) is the only party who filed a motion to alter or amend and he "is no longer the personal representative." (R. pp. 490, 493). This argument directly raised the issue that Morgan was no longer PR and could not take any action as PR. In response, Morgan did nothing to substitute a party or challenge the probate court's orders in a proper capacity.

On September 18, 2017, the probate court filed an order denying the motions. (R. pp. 280-86). It noted that no respondent, including Morgan individually, joined in the motions and no party objected to Mr. Ruff's appointment as successor PR. (R. pp. 281-82). The court held (1) Morgan did not object to the presentation of the settlement at the February 2, 2017 hearing and did not ask for a continuance to present any counter-evidence; (2) Morgan did not provide any testimony or evidence at the February 2, 2017 hearing and neither a *pro se* party nor Morgan individually filed an objection to the court's prior decision; and (3) Morgan is not the PR. (R. pp. 284-85).

III. **The Circuit Court Dismissed the Appeal Because Morgan is not the PR and Cannot Take Any Action on Behalf of the Estate**

On September 27, 2017, Morgan, purportedly acting as PR, filed a notice of intention to appeal to the circuit court, listing the probate court's February 27, 2017 and September 15, 2017 orders as those on appeal. (R. p. 426). He did not list the order appointing Mr. Ruff as the successor PR in the notice of appeal. *Id.* He listed four issues for appeal—whether the probate court erred

in (1) denying the motion to reconsider, (2) finding a binding settlement, (3) ordering payment of attorney's fees, and (4) accepting his resignation as PR and appointing a successor PR. (R. p. 431).

The parties filed briefs in the circuit court. The majority of Morgan's brief argues there is no binding settlement agreement. (R. pp. 201-10). He made two other arguments—the settlement agreement was not properly before the probate court and he remains the PR. (R. pp. 210-13). Elizabeth and Julia filed a joint Respondents' brief with three arguments—(1) Morgan is not the PR and cannot appeal or take any action as PR; (2) the probate court correctly enforced the settlement because Morgan acknowledged it in writing to the court; and (3) as an additional sustaining ground, the Court should order Morgan to pay their fees and costs because he did not bring the petition for instructions in good faith. (R. pp. 228-37).

The Honorable R. Lawton McIntosh held oral argument on October 8, 2018. Counsel for Morgan, Elizabeth, and Julia appeared but no *pro se* party appeared. (R. p. 32). Morgan argued principally that there is no settlement agreement. (R. pp. 664-72). Respondents argued that the Court should dismiss the appeal because Morgan is not the PR and did not have standing to take any action on the Estate's behalf, and did not appeal the order appointing Mr. Ruff as PR. (R. pp. 673-74). Respondents also argued Morgan raised many issues too late. (R. p. 674). He argued for the first time in a motion to reconsider in the probate court that the settlement did not comply with alleged statutory requirements, case law, and Rule 43(k), SCRCP. *Id.* He argued for the first time in his reply brief on appeal that he remains the PR. *Id.*

On October 29, 2018, the circuit court issued a Form 4 Order dismissing the appeal "based on Mr. Kearse's resignation as personal representative as evidenced by probate court order filed March 23, 2017. Personal representative did not appeal that order and is not subject for a motion

for reconsideration. Probate court judgment is affirmed. Mr. Hewitt [counsel for Elizabeth] to prepare formal order." (R. p. 29).

On November 8, 2018, before the entry of a formal order, Morgan filed a motion to reconsider or for ratification, joinder, or substitution of a real party in interest. (R. p. 527). The motion raised dozens of arguments for the first time and asked for the first time to substitute as the appellant either Morgan individually or as co-trustee or Mr. Ruff as PR. The motion also incorrectly stated that Mr. Ruff did not accept the appointment as PR and Morgan did not deliver the Estate assets to him. (R. pp. 542-44).

On November 28, 2018, in response to the premature motion to reconsider or substitute, Elizabeth submitted an affidavit and attachments to the circuit court showing that Morgan began transferring Estate assets to Mr. Ruff in late March 2017 and knew that Mr. Ruff accepted the PR appointment and is administering the Estate, including transferring bank accounts and real property. (R. pp. 812-28).

On December 13, 2018, the circuit court filed a formal order dismissing the appeal as a nullity "because Morgan is not the personal representative and can therefore not purport to appeal the probate court's decision as personal representative." (R. p. 34). "[T]he March 20, 2017 order appointing Harley Ruff as personal representative" is "the law of the case" because the "motion to reconsider did not mention Morgan's resignation—a resignation his lawyer said was irrevocable" and the order appointing Mr. Ruff is not mentioned in the notice of appeal. *Id.* The circuit court "expresse[d] no opinion" on any other issue. (R. p. 35).

On December 27, 2018, Morgan filed another motion to reconsider or for ratification, joinder, or substitution of a real party in interest. (R. p. 551). This motion included more arguments raised for the first time. In sum, Morgan argued the court should substitute a proper party or,

alternatively, that he has standing even if he is not PR or that he remains the PR. (R. pp. 552-53). The motion included Mr. Ruff's affidavit presented for the first time on appeal. Mr. Ruff believes the "appeal is necessary to resolve legal disputes that prevent the full administration of the Estate of G.H. Kearse, and anticipate[s] that a dismissal of the appeal would not provide a final resolution of those issues." (R. p. 577 ¶ 2). Mr. Ruff specified "I do not take any position, and I remain neutral regarding the substance of such appeal." (R. p. 577 ¶ 3). He stated "I do not wish to be directly joined or substituted as a party because Morgan Kearse already has legal counsel that is well versed in the factual and legal issues involved, and so that I may remain neutral." (R. p. 577 ¶ 4). Morgan's motion does not explain how this resolves the standing issue, how he can appeal an action in a legal capacity that he does not possess, or how he can take legal positions on behalf of an Estate when the PR expressly does not take a position.

On April 4, 2019, Judge McIntosh held a hearing on the motion to reconsider. Respondents explained that the probate court's order requires Morgan individually to pay the legal fees and only affects the Estate if a majority of the siblings agree the Estate will pay the fees for Elizabeth and Morgan's counsel. (R. pp. 708, 715). However, Morgan did not appear or appeal individually, a capacity in which he was a party to the action. *Id.*

On April 8, 2019, the circuit court entered a Form 4 Order denying the motion and asking counsel to prepare a formal order. (R. p. 37). On May 14, 2019, the court filed a formal order denying the motion. It held Morgan's arguments that the probate court did not validly remove him as PR and erred in accepting his resignation are not preserved. (R. p. 43). It listed numerous times that Morgan could have disputed the order appointing Mr. Ruff as PR, including at least: (1) the February 2, 2017 hearing when the probate court accepted his resignation, (2) the motion for reconsideration in the probate court, (3) after the order appointing Mr. Ruff as PR, and (4) the

hearing on the motion to reconsider in probate court when Respondents' counsel stated Morgan was not PR. (R. pp. 42-43). The court maintained its prior ruling that Morgan is not the PR and the time to challenge his resignation or removal is passed; therefore, he cannot appeal as PR. (R. pp. 43-44). On May 29, 2019, Morgan filed this appeal.

STANDARD

"[O]n appeal from the final order of the probate court in this matter, the circuit court ought to have applied the same standard of review that this Court would apply on appeal." *In re Howard*, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993). "The standard of review applicable to cases originating in the probate court is controlled by whether the underlying cause of action is at law or in equity." *Paradeses v. Paradeses (In re Estate of Paradeses)*, 426 S.C. 388, 391, 826 S.E.2d 871, 873 (Ct. App. 2019). "If the proceeding in the probate court is in the nature of an action at law, the circuit court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." *Id.* at 361, 434 S.E.2d at 257. "[I]f the probate proceeding is equitable in nature, the circuit court, on appeal, may make factual findings according to its own view of the preponderance of the evidence." *Id.* at 361-62, 434 S.E.2d at 258.

The issue is whether Morgan has standing to appeal. The probate code governs standing of a personal representative. S.C. Code Ann. § 62-3-703(c). However, the issue in this case is not whether a PR has standing for a particular matter but, whether a particular individual is a PR. This is also controlled by the probate code and is a question of law. S.C. Code Ann. §§ 62-3-610, -613. While removal of a PR is an equitable action, the issue on appeal is not removal on the merits of a PR's conduct. The issue is the effect of various legal actions including court orders and a resignation and appointment of a PR.

Morgan represented to the probate court that the parties reached a settlement and Respondents asked the probate court to enforce the settlement agreement. Any issue the Court

reaches as to the enforceability of the settlement agreement is an action at law subject to the any evidence standard of review. "In South Carolina jurisprudence, settlement agreements are viewed as contracts" and enforcing the terms of a settlement agreement is a matter of contract law. *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009).

ARGUMENT

To put this case as plainly as possible, Morgan does not have standing as PR of the Estate because he is not the PR. Even if he somehow remained PR, the order he challenges affects him as an individual and does not affect the Estate. A reason for this confusion is that Morgan as PR sued himself as an individual and trustee. He then agreed as an individual to pay Respondents' and his legal fees. When the probate court entered that agreement, Morgan challenged it as PR rather than as an individual. Those legal errors are the law of the case.

When Respondents argued that Morgan is not the PR and he did not individually challenge the order (R. pp. 490, 493), Morgan did not ask to substitute a real party in interest. He argued his authority to litigate as PR. It is too late to ask for substitution or ratification after Morgan lost the issue of his authority to litigate. Regardless, substitution or ratification does not solve the problem that the Estate is not aggrieved by the probate court's order. The Court should affirm the circuit court and dismiss the appeal.[4]

Many of Appellant's arguments are unpreserved. The probate and circuit courts held he raised new arguments in motions to reconsider and refused to consider them. (R. pp. 285-86, 43-44). Morgan does not argue on appeal that either court erred in finding his arguments unpreserved. These holdings are the law of the case. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires

[4] Respondent briefs the issues in a different order than Appellant but addresses all of his arguments.

affirmance."). The sequence of events demonstrates the lack of issue preservation. At the February 2, 2017 hearing in probate court, Morgan resigned and argued he did not consent to the settlement and Rachael and Joseph did not sign it. Any other arguments in Morgan's brief on this issue are unpreserved as either made for the first time in a motion to reconsider or on appeal. *See Kan Enters. v. S.C. Dep't of Revenue*, 420 S.C. 596, 608, 803 S.E.2d 882, 888 (Ct. App. 2017) (stating a party may not raise an issue for the first time in a motion to reconsider, alter, or amend a judgment that could have been presented prior to judgment). At the hearing in probate court on the motion to reconsider, Respondents argued Morgan was not the PR, and the probate court held no one challenged Mr. Ruff's appointment as successor PR. (R. pp. 490, 493, 282, 285). Despite this, Morgan did not appeal Mr. Ruff's appointment and cannot now challenge it. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Respondent addresses all of Appellant's arguments but the only preserved issue is standing as PR to appeal.

I. <u>The Circuit Court Correctly Dismissed the Appeal because Morgan is Not the Personal Representative and Lacks Standing to Appeal as Personal Representative</u>

Morgan filed "irrevocably" a resignation as PR and the probate court accepted it on the record and in two orders, issued an order terminating his authority as PR, and appointed a successor PR to whom Morgan turned over the Estate assets. (R. pp. 278, 276, 438, 814). It is plain that Morgan is not the PR.

Morgan individually is without standing or authority to pursue an action on behalf of the Estate. He continued to submit filings as PR and, therefore, it is his burden to ensure the proper legal capacity and status. *See Fisher v. Huckabee*, 422 S.C. 234, 241, 811 S.E.2d 739, 742 (2018) ("[T]he burden of compliance with Rule 17(a) and its real party in interest requirement falls to the

plaintiff."). Morgan individually was a party to the petition but chose not to file responsive pleadings or challenge the orders requiring him to pay attorney's fees.[5]

In the event the Court reaches Morgan's technical arguments that he somehow remains PR, a response is provided. The starting point is Morgan's status at the February 2, 2017 hearing. Prior to the hearing Elizabeth filed motions to remove him as PR and to restrain him from acting on behalf of the Estate. (R. pp. 356-63, 373-74). After service of a removal petition, a "personal representative shall not act except to account, to correct maladministration, or preserve the estate." S.C. Code Ann. § 62-3-611(a). Therefore, at the time of the hearing, Morgan had extremely limited authority as PR. He submitted a written resignation at the hearing. (R. p. 278). The statute addressing PR resignation states:

> A personal representative may resign his position by filing a written statement of resignation with the court and providing twenty days' written notice to the persons known to be interested in the estate. If no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment ***and in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to him***. When the resignation is effective, the personal representative's attorney of record shall be relieved of any further duties to the court.

S.C. Code Ann. § 62-3-610(b) (emphasis added). In accordance with 62-3-610(b), the resignation Morgan signed and filed states "I realize that this resignation is effective only upon the appointment and qualification of a Successor Personal Representative and delivery of the assets to that person." (R. p. 278).

[5] Morgan could have initially sought appointment of a special administrator rather than bring an action as PR and name himself as a defendant individually and as a trustee. *See Fisher*, 422 S.C. at 236, 811 S.E.2d at 740 (stating the issue "is who may bring a civil action on behalf of the estate of a deceased person when the personal representative of the estate is also a potential defendant in the action" and the "answer is" S.C. Code Ann. § "62-3-614 of our Probate Code, which provides, 'A special administrator may be appointed . . . in circumstances where a general representative cannot or should not act.'").

On February 27, 2017, the probate court filed an order stating it "accepts Petitioner's resignation as the Personal Representative. Effective February 2, 2017, Petitioner's authority is terminated. The Petitioner has ***no power to take any action***." (R. p. 275) (emphasis added).

On March 20, 2017, the probate court appointed Harley Ruff "as Successor Personal Representative in this Estate." (R. p. 278). In late March and June 2017, Morgan transferred the Estate checking account and remaining Estate assets to Mr. Ruff. (R. p. 814). March 20, 2017, is the latest possible date on which Morgan's already limited authority as PR terminated, although Respondent's position is that he lost all authority on February 2, 2017. His attorney's ability to file on behalf of the Estate terminated. "When the resignation is effective, the personal representative's attorney shall be relieved of any further duties to the court." S.C. Code Ann. § 62-3-610(b). All filings and actions taken after that date are a nullity—filed by a person and an attorney with no authority to act on behalf of the Estate.

Every angle Morgan argues leads to the same conclusion—his authority as PR was limited in December 2016 and terminated completely by March 20, 2017, at the latest. The circuit court correctly dismissed the appeal because Morgan as PR lacked standing. This Court should affirm on this basis alone.

II. The Probate Court's Order Appointing a Successor PR is the Unappealed Law of the Case

On March 20, 2017, the probate court appointed Mr. Ruff as the successor PR and held Morgan's "resignation is hereby effective." (R. p. 278). Morgan never appealed that order. It is not listed on the notice of appeal to the circuit court. (R. p. 426). In March and June 2017, Morgan transferred Estate assets to Mr. Ruff. (R. p. 814). The circuit court correctly held the order appointing Mr. Ruff is the law of the case and requires affirmance. (R. p. 34).

Despite his failure to appeal the order and compliance with it by turning over the Estate assets, Morgan now argues the circuit court erred in applying the law of the case because it is "not an independent 'order'" and was not effective as an order. (Br. of App. pp. 25-33). Both arguments are incorrect for the reasons stated below.

"An unappealed ruling is the law of the case and requires affirmance." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). "A person interested in a final ***order, sentence, or decree*** of a probate court may appeal to the circuit court . . . ." S.C. Code Ann. § 62-1-308(a) (emphasis added). Mr. Ruff's appointment is labeled as "ORDER", states it appoints him as successor PR, makes Morgan's resignation effective, and terminates Morgan's appointment upon accounting for and delivering the assets to Mr. Ruff. (R. p. 278). This is plainly an order of the probate court that is appealable to the circuit court. Morgan's argument that it is merely an "attempt" to appoint Mr. Ruff pursuant to a prior order or "a ministerial component of the Probate Court's own Order dated February 2, 2017" is not convincing. (Br. of App. pp. 25-26). The February 27, 2017 order stated the probate court accepted Morgan's resignation and terminated his authority as PR. (R. p. 275). The court stated it "will appoint a neutral non-family member to serve as the Special Administrator." (R. p. 276). The March 20, 2017 order was necessary to confer authority on an actual person to serve as PR. It is an independent order and the only order that appoints a new PR to act on behalf of the Estate.

The March 20, 2017 order is also effective as an independent order because it complied with S.C. Code Ann. § 62-3-610(b) to appoint a successor PR. The order is an "appointment and qualification of a successor representative" made after 20 days "written notice" of the prior PR's resignation. Morgan cites to the process to appoint a special administrator. (Br. of App. p. 30) (citing S.C. Code Ann. § 62-3-614). The probate court did not appoint a special administrator. It

appointed a successor PR.[6] (R. p. 278). Appointment of a successor PR rather than a special administrator made sense because Morgan resigned "irrevocably" and Elizabeth had a pending motion to remove him as PR for mismanagement. (R. pp. 438-39, 356-63). The order complies with the requirements for appointment of a successor PR.

Contrary to Morgan's argument, the probate court did not lose "jurisdiction" to appoint a successor PR. (Br. of App. p. 30). The probate court always retains jurisdiction to appoint a PR. The statute Morgan cites refers to whether the statement of resignation of a PR is "ineffective." S.C. Code Ann. § 62-3-610(b). Jurisdiction and the effectiveness of a statement of resignation are completely different matters. The statute provides that "[1] If no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment and [2] in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to him." S.C. Code Ann. § 62-3-610(b). As to the first clause regarding an application or petition for appointment, it states only that after twenty days the resignation is ineffective "as a termination of appointment", *i.e.*, it does not independently terminate the appointment. The probate court sought a successor PR during the time between the February 2, 2017 hearing and the March 20, 2017 order as evident from the reference to Algernon Gibson Solomons, Jr., in the order and the court's appointment of someone else. (R. p. 276). As to the second clause, "in any event" the court appointed a successor and Morgan delivered the assets to him. The order is a final,

[6] That the February order referred to a special administrator and the March order appointed a Successor PR is irrelevant. The probate court appointed a "Successor Personal Representative" and no one challenged the appointment. Regardless, it supports Respondent's argument that Morgan was required to appeal the March 20, 2017 order if it was, as he now argues, "inconsistent with the Order" issued in February. (Br. of App. p. 26).

appealable order. If Morgan wanted to retain authority as PR, he should have challenged the order granting that authority to Mr. Ruff. Morgan did not appeal it, and it is the law of the case.

Appellant's final list of arguments that the March 20, 2017 order is not effective are unpreserved but also confusing and contrary to reality. (Br. of App. pp. 31-33). It is undisputed that the following occurred: (1) on February 2, 2017, Morgan submitted an irrevocable resignation as PR; (2) on February 27, 2017, the probate court formally accepted the resignation, terminated his authority as PR retroactive to February 2, 2017, and stated its intention to appoint a special administrator; (3) on March 20, 2017, the probate court appointed Mr. Ruff as successor PR; (4) Morgan filed and argued a motion to reconsider and never challenged the appointment of Mr. Ruff or the termination of his appointment; and (5) Morgan transferred the Estate assets to Mr. Ruff, who is administering the Estate without objection. Neither the probate court nor Respondents erred in any respect in these events. Morgan simply continued to pursue an action in a capacity he no longer held. There is no framing of these events that can change them, and the inescapable result that Morgan is not the PR. Finally, Appellant incorrectly states he did not deliver the Estate Assets and Mr. Ruff did not accept the appointment as PR. (Br. of App. p. 32). Morgan and his counsel know Morgan turned over the Estate assets to Mr. Ruff and that Mr. Ruff has, since his appointment, acted as PR without objection.

The circuit court correctly held the order appointing Mr. Ruff is the law of the case and this Court may affirm for this reason alone.

III. Morgan Does Not Possess Standing to Appeal

Morgan makes nine arguments that he could possess standing to appeal as PR of Estate when he is not the PR. (Br. of App. pp. 33-41). The arguments are unpreserved and incorrect.

PR standing is conferred by statute. "[A] personal representative of a decedent domiciled in this State at his death has the same standing to sue and be sued . . . as his decedent had immediately prior to death." S.C. Code Ann. § 62-3-703(c). "[A] personal representative, acting reasonably for the benefit of the interested persons, may properly: . . . prosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties." S.C. Code Ann. § 62-3-715(20). Morgan could only appeal as PR of Mr. Kearse's Estate and otherwise has no standing.

As to Morgan's first and second arguments, standing was promptly raised and is properly preserved. Respondent is not responsible for issue preservation but nonetheless responds to these arguments. (Br. of App. pp. 33-35). "[T]o preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court." *Holy Loch Distribs. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000). The probate court appointed Mr. Ruff as successor PR on March 20, 2017. (R. p. 278). On August 15, 2017, in a memorandum in opposition to Morgan's motion to dismiss and confirm his resignation, Elizabeth argued that "No party appealed this [March 20, 2017] Order and it is the law of the case and unappealable." (R. p. 410). Respondents argued at the hearing on the motion to reconsider that Morgan is not the PR, and the probate court ruled that Morgan is not the PR. (R. pp. 490, 493, 285). It is self-evident that one who is not PR cannot act as PR. Elizabeth promptly raised the issue. She argued standing in her brief to the circuit court, which ruled that Morgan is not the PR and does not have standing to appeal as PR. (R. pp. 229-31, 29, 32, 34, 43-44). The issue was timely raised to and ruled on by the probate and circuit courts.

As to Morgan's third argument, the March 20, 2017 order is appealable. If he wanted to continue as PR, he needed to appeal Mr. Ruff's appointment. (Br. of App. pp. 36-37). Morgan's

argument that the order appointing Mr. Ruff is not appealable does not support his argument that he "retains standing even if the" order is effective. (Br. of App. pp. 33, 36). Regardless, an order terminating his authority and conferring all authority to Mr. Ruff is a final, appealable order. *See* S.C. Code Ann. § 62-1-308(a) ("A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court . . . ."). The order finally determined Morgan's rights as PR. (R. p. 278). As a seemingly alternative position, Morgan argues the order is not final because he "had already filed a Motion to Alter or Amend the same, and there remained further action by the Probate Court to determine the same." (Br. of App. p. 36). This is inaccurate. His motion to reconsider did not challenge Mr. Ruff's appointment. (R. pp 388-98). In fact, his motion states he "remains willing to resign as personal representative, and would ***not contest*** any order that accepted his resignation." (R. p. 397) (emphasis added). Finally, he incorrectly characterizes the order as adding Mr. Ruff as a party. (Br. of App. p. 37). The order does not add Mr. Ruff as a party to any action. It appoints him as the PR of an Estate.

As to Morgan's fourth argument, S.C. Code Ann. § 62-1-308(h) does not apply to the order appointing Mr. Ruff as Successor PR because the order was entered on March 20, 2017, prior to Morgan's notice of appeal filed on September 27, 2017. (R. pp. 278, 426). The argument is also made for the first time in this appeal.

As to Morgan's fifth argument, he could have appealed as an individual. The dispute is about an order that Morgan *individually* pay attorney's fees. His motion to reconsider in probate court stated he took no issue with the order except for the legal fees. (R. pp. 395, 397). The proceedings below included all of the real parties in interest. Morgan brought an action as PR and then named himself individually and as trustee as an opposing party. The issue is the capacity in which he appealed. He appealed as PR rather than as an individual when the challenged order

requires him individually to pay legal fees. *See, e.g.*, Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal.").

As to Morgan's sixth argument, the probate court had no independent obligation to realign parties in an action it dismissed. Morgan never asked the probate court to realign the parties. "[T]he burden of compliance with Rule 17(a) and its real party in interest requirement falls to the plaintiff." *Fisher v. Huckabee*, 422 S.C. 234, 241, 811 S.E.2d 739, 742 (2018). That realignment did not occur does not allow Morgan to appeal as PR. Elizabeth suffered and continues to suffer prejudice by incurring legal fees to oppose Morgan's appeal of an action as PR of her father's Estate when that authority lies solely with Mr. Ruff.

As to Morgan's seventh argument, he does not retain statutory authority to appeal, and this argument is unpreserved. He argues that S.C. Code Ann. § 62-3-702 allows him to "continue to act" as PR if another appointment "was in error." (Br. of App. p. 40). Section 62-3-702 does not address the continuation of someone to act as PR. It states:

> A person to whom general letters are issued first has exclusive authority under the letters until his appointment is terminated or modified. If, through error, general letters are afterwards issued to another, the first appointed representative may recover any property of the estate in the hands of the representative subsequently appointed, but the acts of the latter done in good faith before notice of the first letters are not void for want of validity of appointment.

§ 62-3-702. It provides a PR with "general letters" authority until his appointment is terminated. If "general letters" are incorrectly issued to someone else, the prior PR can recover estate property from the second PR. The statute says nothing about continuing to act as PR after termination and appointment of a successor PR, and does not confer standing to Morgan. He is also not saved by S.C. Code Ann. § 62-3-608, which says termination ends a PR's power "except that" a PR "until restrained or enjoined by court order, may perform acts necessary to protect the estate." His power terminated, restrained, and enjoined at the latest on March 20, 2017. At that time, he could not

take any acts he deemed necessary to protect the Estate, including an appeal. The appeal is not necessary to protect the Estate because the probate court's order does not direct the Estate to pay any money. It simply says Morgan may ask the Estate to reimburse him. (R. p. 276). Morgan also stated his reason for appealing, and it is not to benefit the Estate but to ensure the Estate pays the legal fees he incurred in pursuing this matter. His brief to the circuit court states "it is important for the record to accurately reflect that Morgan Kearse is pursuing this appeal as Personal Representative so that he has a firmer basis for recovering his legal fees and costs for the same." (R. p. 213). Continuing an action purportedly as PR to strengthen the chances of recovering legal fees from the Estate is not necessary to protect the Estate.

As to Morgan's eighth argument, he argues for the first time that he has general standing. (Br. of App. pp. 40-41). He cannot have general standing "as Personal Representative" that is separate and apart from the standing of the actual PR. Even if legally possible, Morgan still fails to meet the requirements for general standing. "When no statute confers standing, the elements of constitutional standing must be met." *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). The elements of constitutional standing are (1) injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision. *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (internal quotation marks omitted). Morgan suffered no injury as PR. The probate court accepted his voluntary resignation and ordered him individually to pay fees for which he may ask the Estate to reimburse him. (R. pp. 275-76). Neither the Estate nor Morgan as PR suffered an injury in fact from the order. It follows that with no injury, there is also no causal connection and nothing a favorable decision may redress. Morgan does not have general standing as PR to appeal.

For these numerous, independent reasons, Morgan is without standing to pursue this appeal, and the Court should affirm the circuit court by dismissing it.

IV. <u>There is No Real Party in Interest Issue; Substitution, Ratification, and Joinder are Untimely and Improper Under These Circumstances</u>

If the Court finds Morgan does not have standing as PR to appeal, he asks the Court to allow ratification, joinder, or substitution of a real party in interest. (Br. of App. p. 43). The Court should reject this argument for numerous, independent reasons.

First, there is no real party in interest issue in this case. All of the real parties in interest were a part of the proceedings below.[7] Morgan brought an action as PR and then named himself individually and as Trustee as an opposing party. His own conflict of interest and continued attempts to exercise authority he does not have caused the standing problem. The issue is the capacity in which Morgan appealed. He chose to appeal as PR instead of as an individual when the settlement agreement requires him individually to pay legal fees.

Morgan does not ask the Court to substitute a particular person because there is no one proper to substitute. Mr. Ruff is the PR but does not agree to substitution on behalf of the Estate. (R. p. 577 Aff. ¶ 4). Morgan's choice to pursue this as the Estate (to recover his legal fees from the Estate) rather than as an individual caused the standing problem, and it is not remedied by

[7] Morgan named all six siblings individually and as Trustees. The Trust was properly represented, and the co-trustees properly acted on its behalf. *See, e.g.*, S.C. Code Ann. §§ 62-7-816(2), -816(14), -816(24) (stating "a trustee may: . . . (2) acquire or sell property, for case or on credit, at public or private sale; . . . (14) pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust; . . . (24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property . . . ."). Regardless, Morgan filed the pleadings. He never raised the Trust's representation below and cannot complain about it on appeal. *Erickson v. Jones St. Publrs., LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) ("[A] party may not complain on appeal of error or object to a trial procedure which his own conduct has induced.").

substitution. (R. p. 213). Morgan as an individual (on one side of the "v") cannot be substituted for Morgan as PR (on the other side of the "v").

Second, even if a person for substitution did exist, Morgan failed to seek substitution within a reasonable time. Rule 17, SCRCP, states the real party in interest requirement. "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification or commencement of the action by, or joinder or substitution of, the real party in interest." Rule 17(a), SCRCP. *Fisher v. Huckabee*, 422 S.C. 234, 811 S.E.2d 739 (2018) is the Supreme Court's most recent opinion addressing the real party in interest requirement. In *Fisher*, a decedent wrote a will leaving her assets to three non-relatives that cared for her. 422 S.C. at 236, 811 S.E.2d at 740. Her niece, Mrs. Fisher, filed an action after her death to challenge the will and the appointment of one of the caretakers, Mrs. Huckabee, as the PR. *Id.* at 236-37, 811 S.E.2d at 740. Fisher also filed an action in circuit court, purportedly acting as the decedent's "real representative", for survival damages against the caretakers. *Id.* at 237, 811 S.E.2d at 740. The defendants filed a motion for summary judgment arguing Fisher lacked standing, and the Supreme Court agreed. *Id.* at 237-38, 811 S.E.2d at 740-41. The Court held that Fisher should have sought appointment of a special administrator to bring the survival claim. *Id.* at 238-39, 811 S.E.2d at 741. The Court noted that "Rule 17(a) provided Fisher an opportunity to cure her failure to meet the real party in interest requirement" but found "Fisher did not ask for such time." *Id.* at 239, 811 S.E.2d at 741. "Under this circumstance, Rule 17(a) permitted the dismissal of the action." *Id.*

The *Fisher* Court held "the burden of compliance with Rule 17(a) and its real party in interest requirement falls to the plaintiff."[8] *Id.* at 241, 811 S.E.2d at 742. "When the defendants' motion challenged whether Fisher complied with this requirement, she responded by continuing to maintain her legally flawed position. In other words, Fisher insisted that the validity of her claimed status be litigated, and she never contemplated changing her status to comply with Rule 17(a)." *Id.* at 241, 811 S.E.2d at 742; *cf. Patton v. Miller*, 420 S.C. 471, 488-89, 804 S.E.2d 252, 261 (2017) (holding the circuit court erred in dismissing plaintiff's claims because "she did specifically ask to take advantage of . . . 'ratification, joinder, [or] substitution.'").

Morgan acted as Mrs. Fisher by maintaining the legally flawed position that he is the PR. "In other words, [Morgan] insisted that the validity of [his] claimed status be litigated" and belatedly asked for substitution, ratification, or joinder after losing this argument. Respondents raised the issue that Morgan is not the PR at the hearing on the motion to reconsider in the probate court. (R. pp. 490, 493). The probate court stated at the hearing and in its order denying the motion that Morgan is not the PR. Despite this obvious challenge to his authority, Morgan argued in his briefs to the circuit court that he remained the PR. (R. pp. 212-13, 244-51). Even after Respondents asked the circuit court to dismiss the appeal because Morgan is not the PR (R. pp. 228-30), he continued to argue that he remained PR. (R. pp. 244-51). After the circuit court entered a Form 4 Order dismissing the appeal and asking counsel to draft a formal order, Morgan filed a motion to reconsider with numerous arguments that he remained PR and was the proper party to litigate. (R. pp. 529-46). He alternatively asked for ratification, joinder, or substitution suggesting either himself individually or as co-trustee or Mr. Ruff. (R. p. 547). This request is too late. Morgan

[8] Morgan argues that Respondents failed to seek substitution. It is plainly not Respondents' burden or obligation to ensure Morgan pursues an action in the proper capacity.

cannot choose to litigate his capacity to bring the claim and then, after losing the argument, ask for substitution. This is not a proper situation for substitution under Rule 17(a), SCRCP, and the Court should deny the belated request for it.

Third, Respondents would suffer prejudice from a belated substitution. Respondents directly raised Morgan's authority and capacity in the probate court and asked the circuit court to dismiss the case on the same basis. Morgan continued to maintain the validity of his status to litigate. Respondents incurred legal fees and costs in challenging him. It would be inequitable to allow substitution after he lost the merits of the issue and caused Respondents to incur legal fees.

Morgan's final two arguments on this point are equally unavailing. (Br. of App. 44-45). First, Rule 25(c), SCRCP, does not apply to the facts of this case. (Br. of App. p. 44). There is no "transfer of interest" that occurred to invoke Rule 25(c). This case involves termination of authority. The probate court terminated Morgan's authority as PR and granted the authority exclusively to Mr. Ruff. Rule 25(c) does not let Morgan continue an action in a legal capacity he no longer holds. Second, that Morgan or any other party may later attempt to challenge the probate court's order is not a basis to let him appeal in an unauthorized capacity. (Br. of App. p. 45). The proper way to get a ruling on the merits of the order was to appeal in the proper capacity in a timely manner. If the Court affirms the dismissal of this appeal, the probate court's order is the law of the case and cannot be challenged by any of the siblings. *See Bone v. United States Food Serv.*, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) ("The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so."). Any

party could have challenged the probate court's order but they all chose not to do so. A future failure to comply with it is contempt of court.[9]

Finally, the request that the Court "accept Mr. Ruff's ratification of Appellant's appeal under Rule 17(a), SCRCP" (Br. of App. p. 44) is unpreserved because Morgan did not raise it until the second motion to reconsider in the circuit court. (R. p. 554). The argument and Mr. Ruff's affidavit also do not provide a basis for ratification. Mr. Ruff stated only that he ratified the "pursuit of the above referenced appeal so that it may be resolved on the merits." (R. p. 577 ¶ 3). He does "not take any position, and I remain neutral, regarding the substance of such appeal." *Id.* That is not ratification. This litigation is not neutral and Morgan takes numerous positions on disputed matters between the parties. "[A] successor personal representative ***may*** be substituted in all actions and proceedings to which the former personal representative was a party", but Mr. Ruff has not sought to do so and there is no statute providing that a former PR and his attorney may continue acting on behalf of the Estate. S.C. Code Ann. § 62-3-613 (emphasis added). That Mr. Ruff supports the resolution of these issues does not give Morgan authority to act on behalf of the Estate and take positions as to the issues.

V. The Probate Court Correctly Held the Parties Reached a Binding Settlement

Morgan does not have standing to pursue this issue and it is not preserved because the circuit court did not rule on it. In the event the Court reaches this issue, Respondent addresses the

[9] Morgan threatens that, if the Court dismisses the appeal because he lacks standing, either himself or a *pro se* party will choose not to comply with the settlement agreement as a way to challenge it. (Br. of App. p. 45; R. pp. 558, 251, 717-18). "Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). Noncompliance as a means to challenge the agreement is procedurally improper and also contempt of court because the agreement is in a court order.

merits. The probate court correctly held the parties reached a binding settlement and Morgan tried to back out of it without valid legal cause. (R. pp. 283-85).

Morgan told the probate court that the "parties have reached a global settlement in this matter, including the siblings who are pro se parties." (R. pp. 522). His counsel was so sure of it that he did not plan to attend the hearing. (R. pp. 477-78, 522). Counsel then attended the hearing to try to withdraw Morgan's agreement to the settlement without explanation. (R. p. 439). Respondents presented emails between counsel that unequivocally show Morgan agreed to the settlement. (R. pp. 466-79). Morgan's affidavit states "I also informed my counsel that I was willing to assent to the Final Term Sheet" but withdrew his consent only after Gordon would not sign the second, secret agreement. (R. p. 399). All parties agreed to the settlement. Morgan (as PR) is the only party contesting it.

As to Morgan's first argument, the parties reached a meeting of the minds. The terms of the agreement are not in dispute. He argues only that three siblings did not sign it. (Br. of App. p. 16). The absence of signatures from Morgan, Rachael, and Joseph does not mean the parties did not reach a meeting of the minds. Morgan's counsel expressly stated they agreed to the settlement and none of them individually or as trustee challenged the probate court's order enforcing the settlement. (R. pp. 522, 272-77). Morgan cannot state to Respondents' counsel and the probate court that the parties reached a settlement and then argue that there was no meeting of the minds. As to the Trust argument, all six siblings are listed individually and as trustees, and all acted in these capacities in agreeing to the settlement and choosing not to challenge the probate court's order.

As to Morgan's second argument, he cites to probate code sections that are inapplicable to this case. (Br. of App. pp. 17-20). Morgan and his counsel agreed to effectuate the settlement

agreement based on written stipulation of counsel. (R. p. 522). Morgan argued these code sections after the probate court enforced the agreement to try to invalidate it. Section 62-3-912 of the South Carolina Code applies when "successors . . . agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent." S.C. Code Ann. § 62-3-912. The settlement agreement in this case does not alter any successor's interest under Mr. Kearse's will. *See In re Estate of Brown*, 427 S.C. 138, 142, 828 S.E.2d 789, 791 (Ct. App. 2019) ("We hold the settlements here are not governed by § 62-3-912 because they do not alter the interests, shares or amounts to which the successors are entitled under Brown's Will."). Morgan argues that the settlement alters someone's share by putting "conditions upon his use of [Mr. Kearse]'s law office, setting his Personal Representative fee, requiring him to pay Respondent Sharp's legal fees, and possibly paying Respondent Gooding's legal fees and individually paying his own legal fees as Personal Representative." (Br. of App. p. 17). None of these alter an interest under § 62-3-912. Morgan's individual payment of fees and payment as PR are not addressed in Mr. Kearse's will. (R. pp. 301-05). As to the law office, the Estate does not own it and Morgan never contested that provision of the settlement agreement. (R. pp. 358-59). Regardless, that provision does not alter an interest under the will because it still allows Morgan "the use and contents of the office for the duration of his [legal] practice." (R. pp. 302, 464). The settlement does not fall within § 62-3-912.

Section 62-3-1102 of the South Carolina Code also does not apply to the settlement. (Br. of App. 99 18-20). It states the "procedure for securing court approval of a compromise" and "is designed to require court approval of the settlement of estate controversies when the settlement (1) will impact persons holding beneficial interests in the estate and (2) is sought to be binding on non-parties." *In re Estate of Brown*, 427 S.C. at 143, 828 S.E.2d at 791. To "trigger § 62-3-1102", a "successor" must have a "beneficial interest" that is "affected by the compromise." *Id.* at 143,

828 S.E.2d at 791. The analysis begins with the relevant terms of Mr. Kearse's will, which (1) allows Morgan to use his old law office for the "duration of his practice" as a lawyer and then, to any other family member who practices law or to the family Trust, and (2) all other property to the Trust. (R. pp. 301-05). The settlement at issue does not fall within § 62-3-1102 because it does not impact a person holding a beneficial interest and is not binding on a non-party. It binds only the parties to the petition and does not impact anyone's beneficial interest because it allows Morgan's continued use of the law office (which the Estate did not even own) and requires him *personally* to pay legal fees. (R. pp. 358-59). As in *In re Estate of Brown*, the agreement "does not affect [a] beneficial interest: he will receive precisely the same thing under the Will and Trust that he would have received had" the parties not entered into the settlement. *Id.* at 143, 828 S.E.2d at 791.

As to Morgan's third argument, the settlement agreement satisfies Rule 43(k), SCRCP. (Br. of App. pp. 21-22).

> No agreement between counsel affecting the proceedings in an action shall be binding unless [1] *reduced to the form of a* consent order or *written stipulation signed by counsel and entered in the record*, or [2] unless made in open court and noted upon the record, or [3] reduced to writing and signed by the parties and their counsel.

Rule 43(k), SCRCP (emphasis added). The agreement satisfies the first condition. It was reduced to a written stipulation when Morgan's counsel sent the probate court a letter stating the "parties have reached a global settlement in this matter" and describing the terms. (R. p. 522). This is an agreement reduced to the form of a written stipulation signed by counsel and entered into the Court record. Rule 43(k) references "entered into the record" and "made in open court." These are different methods of satisfying Rule 43(k). Once Morgan's counsel sent the probate court a letter acknowledging and communicating the settlement, it became part of the record.

This situation is distinguishable from *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 627 S.E.2d 724 (2006), cited by Morgan. In *Farnsworth*, plaintiff's counsel communicated a settlement offer that defendant's counsel accepted by signing the offer letter. *Id.* at 636, 627 S.E.2d at 725. Before the parties made the settlement part of the court record, *i.e.*, before they communicated it to the court, the plaintiff rescinded the agreement. *Id.* Here, Morgan's counsel agreed in writing to the settlement and then notified the probate court in writing of the settlement, satisfying the first condition of Rule 43(k). At that point, he was not "entitled to withdraw h[is] assent" because "one of the three conditions listed" in Rule 43(k) was met. *Farnsworth*, 367 S.C. at 637, 627 S.E.2d at 725. The probate court correctly enforced the settlement.

VI. <u>The Court May Affirm as an Additional Sustaining Ground because the Petition for Instructions was Not Brought in Good Faith</u>

The Court may affirm for any ground appearing in the record. Rule 220(c), SCACR. The record shows that Morgan did not bring the petition for instructions in good faith, and the Court may affirm the order requiring him to pay his, Elizabeth, and Julia's legal fees on that basis.

The probate court may order a party or the estate to pay another party's fees and costs "as justice and equity may require." S.C. Code Ann. § 62-1-111. Elizabeth presented evidence that Morgan should never have filed the petition. ***Prior*** to filing the petition, he (1) had an attorney's opinion stating that Mr. Kearse could not order the construction of a home on land he did not own, (2) knew the Trust owned the land, (3) did not know the size of the proposed house, the cost of building it, or the amount of carrying costs such as taxes and insurance. (R. pp. 376-87, 234-37). Morgan's explanation for filing the petition is that a sibling threatened litigation to build the house. This does not negate the fact that there is no legal basis for the action. The Court should order Morgan to pay Elizabeth's legal fees and costs in defending this entire action.

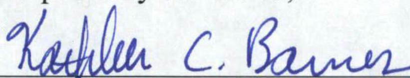
The estate may pay the PR's legal fees when he "defends or prosecutes any proceeding in good faith, whether successful or not." S.C. Code Ann. § 62-3-720. This statute allows the Court to deny payment by the estate of a PR's legal fees when a proceeding is not brought in good faith. As noted in the prior paragraph, the Petition was not brought in good faith because it lacked any legal basis and the appeals are not pursued in good faith where Morgan is not the PR and the appeals are unnecessary to preserve the estate. *See* S.C. Code Ann. § 62-3-611(a) (stating after a petition for removal of PR is served, the PR "shall not act except to account, to correct maladministration, or preserve the estate"). The Court should affirm the order that Morgan pay his own legal fees and costs in bringing the Petition and pursuing appeals.

CONCLUSION

For any of the independent reasons discussed above, the Court should affirm the dismissal of this action and remand to probate court for compliance with the terms of the settlement agreement.

Respectfully submitted,

May 7, 2020



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas

RECEIVED
MAY 14 2020
SC Court of Appeals

The Honorable Lawton McIntosh

Appellate Case No. 2019-000905

J. Morgan Kearse, Personal Representative of the Estate of G.H. Kearse,…………..…. Appellant,

v.

The Kearse Family Education Trust, William Gordon Kearse, Elizabeth Kearse Gooding, Julia Kearse Sharp, Rachael Kearse Best, Joseph Weber Kearse, and John Morgan Kearse, of which all are named individually and as Trustees of the Kearse Family Education Trust U/A/D Nov. 05, 1992……………………………………………………………………………Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

Respectfully submitted,

May 7, 2020

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