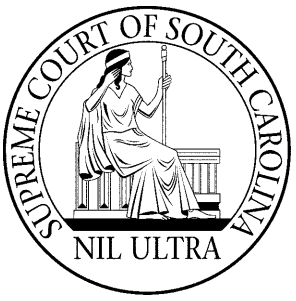

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 24
June 15, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Matthew S. Medley, Appellant.

Appellate Case No. 2014-001499

Appeal From Cherokee County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 5412
Heard April 19, 2016 – Filed June 15, 2016

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Susannah R. Cole, both of Columbia; and Solicitor Barry Joe Barnette, of Spartanburg, for Respondent.

WILLIAMS, J.: Matthew S. Medley appeals his conviction for driving under the influence (DUI), second offense, arguing the circuit court erred in admitting incriminating statements he made while in custody regarding his alcohol consumption. We affirm.

FACTS/PROCEDURAL HISTORY

On the evening of April 20, 2013, officers with the Cherokee County Sheriff's Office were working a traffic checkpoint on Highway 150 North in Cherokee County, South Carolina. At approximately 12:45 A.M. on April 21, 2013, officers witnessed Medley run a stop sign and speed away from the checkpoint on his motorcycle. Two of the officers, Lieutenant Steven Bright and Lieutenant Brian Mullinax, subsequently gave chase in separate vehicles.

Both officers captured the ensuing high-speed chase on dashboard video cameras in their patrol cars. Medley reached a top speed of 109 miles per hour on his motorcycle during the chase. Lt. Mullinax's camera captured Medley running through stop signs and crossing over the yellow center line on several occasions. At one point during the chase, a can of beer flew back from Medley's motorcycle toward the police cars.

The chase ended at Medley's parents' home. After Medley stopped his motorcycle and ran to the front porch, Lt. Mullinax apprehended him and "put him on the ground." Lt. Mullinax asked Medley whether he had a license and how much he had been drinking. Medley responded that he did not have a license and "[t]oo much." Officers subsequently read Medley his *Miranda*[1] rights. Thereafter, officers ordered Medley off the ground and brought him to the front of the patrol car, where they placed him under arrest and read him his *Miranda* rights again. Officers then searched the saddlebags on Medley's motorcycle and discovered approximately eighteen full cans of beer.

Lt. Mullinax transported Medley to the Cherokee County Detention Center while Bright arranged for his motorcycle to be towed. Medley initiated conversation with Lt. Mullinax during the car ride, apologizing and asking to make a phone call. Medley also asked if he could drop off keys at his girlfriend's house on the way to the detention center. After telling Lt. Mullinax to "take a right" when they approached a stop sign, Medley volunteered that he does not drink much anymore. Lt. Mullinax asked Medley how much he had to drink that day, and Medley stated he "didn't keep count." Lt. Mullinax told him to estimate, and Medley responded, "I couldn't tell you." When asked if he had more than ten drinks, Medley answered, "No, sir." Lt. Mullinax then asked if he had more than five, and Medley

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

replied, "About four." Lt. Mullinax, however, stated he believed Medley had consumed more than that.

When they reached the detention center, Lt. Mullinax printed Medley's advisement of implied consent form, the breath alcohol analysis report with Medley's biographical data, and the South Carolina Department of Motor Vehicles notice of suspension. Medley signed all of the documents. Following the required twenty-minute waiting period, all of which was videotaped, Medley refused to submit to a breathalyzer test.

On August 8, 2013, a Cherokee County grand jury indicted Medley for failure to stop for a blue light and second-offense DUI. The case was called for a jury trial on June 10, 2014. Prior to trial, Medley objected to the admission of statements he made to Lt. Mullinax regarding his alcohol consumption on the night of the arrest, and the circuit court held a *Jackson*[2] hearing. At the hearing, both parties informed the court that no dispute existed as to what was said and pointed out the portions of the videos that were relevant to the motion. After hearing arguments and reviewing the videotapes, the court denied Medley's motion and found his statements were admissible. Medley later raised a contemporaneous objection when the State sought to admit the statements at trial.

At the conclusion of the two-day trial, the jury found Medley guilty of second-offense DUI and failure to stop for a blue light. The circuit court sentenced Medley to five years' imprisonment, suspended upon the service of twenty-seven months, and five years' probation for the DUI charge. On the failure to stop for a blue light charge, the court sentenced Medley to a consecutive term of three years' imprisonment, suspended upon the service of three months, and probation. The court also revoked Medley's probation on another charge and sentenced him to a consecutive term of one year in prison. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Jenkins*, 412 S.C. 643, 650, 773 S.E.2d 906, 909 (2015). The decision of whether to admit or exclude evidence is within the sound discretion of the circuit court. *State v. Jackson*, 384 S.C. 29, 34, 681 S.E.2d 17, 19 (Ct. App. 2009). This court will not disturb the circuit court's admissibility determinations absent a prejudicial

[2] *Jackson v. Denno*, 378 U.S. 368 (1964).

abuse of discretion. *State v. Adkins*, 353 S.C. 312, 326, 577 S.E.2d 460, 468 (Ct. App. 2003). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001).

LAW/ANALYSIS

Medley argues the circuit court erred in admitting incriminating statements regarding his alcohol consumption. According to Medley, the court should have excluded his answer to the initial question Lt. Mullinax asked him prior to reading his *Miranda* warnings. Medley further contends the court should have excluded his answers to Lt. Mullinax's post-*Miranda* questions pursuant to the rules set forth in *Missouri v. Seibert*[3] and *State v. Navy*.[4] Although we agree the circuit court abused its discretion in admitting Medley's incriminating statements, we find any error in their admission was harmless beyond a reasonable doubt.

I. Admissibility of Incriminating Statements

The purpose of *Miranda* warnings is to apprise a defendant of the constitutional privilege not to incriminate oneself while in the custody of law enforcement. *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003). "A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights." *State v. Miller*, 375 S.C. 370, 379, 652 S.E.2d 444, 449 (Ct. App. 2007).

> In both *Seibert* and *Navy*, the courts emphasized that *Miranda*'s warnings requirement cannot be skirted by interrogative tactics that undermine the very purpose of *Miranda*, i.e., unless and until such warnings and waiver are given, no evidence obtained as a result of interrogation can be used against a defendant at trial.

State v. White, 410 S.C. 56, 57, 762 S.E.2d 726, 727 (Ct. App. 2014) (emphasis omitted).

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[3] 542 U.S. 600 (2004).

[4] 386 S.C. 294, 688 S.E.2d 838 (2010).

"*Miranda* warnings are required for official interrogations only when a suspect 'has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *State v. Kennedy*, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996) (quoting *Miranda*, 384 U.S. at 444), *aff'd as modified*, 333 S.C. 426, 510 S.E.2d 714 (1998).

> The special procedural safeguards outlined in *Miranda* are not required if a suspect is simply taken into custody, but only if a suspect in custody is subjected to interrogation. Interrogation is either express questioning or its functional equivalent. It includes words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.

Id.

"Whether a suspect is in custody is determined by an examination of the totality of the circumstances, such as the location, purpose, and length of interrogation, and whether the suspect was free to leave the place of questioning." *Navy*, 386 S.C. at 301, 688 S.E.2d at 841. "The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody." *Evans*, 354 S.C. at 583, 582 S.E.2d at 410. On appeal, this court will uphold the circuit court's findings as to custody when they are supported by the record. *Navy*, 386 S.C. at 301, 688 S.E.2d at 841.

Examining the totality of the circumstances, we find the circuit court's custody determination is not supported by the record. Although Medley was in his parents' front yard, not the typical scene of an interrogation, Lt. Mullinax had him handcuffed and pinned to the ground while asking the question that elicited the objectionable response. In our view, a reasonable person would have undoubtedly concluded he was in custody because Medley was restrained and, thus, deprived of his freedom of action. *See Evans*, 354 S.C. at 583, 582 S.E.2d at 410 (providing "[t]he custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody"); *Kennedy*, 325 S.C. at 303, 479 S.E.2d at 842 (stating "*Miranda* warnings are required for official interrogations only when a suspect 'has been taken into custody or otherwise deprived of his freedom of action in any significant way'" (quoting *Miranda*, 384 U.S. at 444)); *Navy*, 386 S.C. at 301, 688 S.E.2d at 841 (noting

"whether the suspect was free to leave the place of questioning" is part of the totality of the circumstances analysis for purposes of determining custody).

Further, given that the most important factual question in any DUI case is how much alcohol the suspect consumed prior to getting behind the wheel, we find Lt. Mullinax should have known his question was reasonably likely to elicit an incriminating response from Medley. *See Kennedy*, 325 S.C. at 303, 479 S.E.2d at 842 (stating interrogation "includes words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response"). Therefore, we find his question clearly constituted interrogation. *See State v. Easler*, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997) (concluding police subjected a suspect to interrogation when, after determining he had been involved in an accident, police "continued to question him as to why he had left the accident and when he had last had a beer" because they "knew these questions were likely to elicit incriminating responses").

Based on the foregoing, we find Medley was subject to custodial interrogation at the time he made the initial incriminating statement regarding his alcohol consumption. Because Medley was subject to custodial interrogation at this point of the encounter with police, *Miranda* warnings were required. *See id.* ("*Miranda* warnings are required for official interrogations only when a suspect 'has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" (quoting *Miranda*, 384 U.S. at 444)). Accordingly, we hold the circuit court erred in failing to suppress Medley's response to the initial question regarding how much he had to drink that day.[5] *See Miller*, 375 S.C. at 379, 652 S.E.2d at 449 ("A

[5] We reject the State's contention that Lt. Mullinax's question falls within the public safety exception to *Miranda* because this argument is without merit. *See New York v. Quarles*, 467 U.S. 649, 655, 657 (1984) (carving out a public safety exception to the *Miranda* rule and stating "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination"). Asking Medley how much he had to drink, although perhaps relevant to his own health and safety, was simply irrelevant to the public's safety. The only purpose for asking such a question was to obtain evidence for his DUI case. While Medley led police on a lengthy high-speed chase, he was handcuffed and pinned to the ground in his parents' front yard at the relevant time in question and, thus, posed no threat to public safety. Therefore, to the extent the circuit court

statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights.").

Having found the circuit court erred in admitting Medley's initial response, we must next determine whether the subsequent statements he made in the patrol car on the way to the detention center were taken in violation of *Seibert* and *Navy*.

As our supreme court noted, "[i]n *Seibert*, the [U.S. Supreme] Court dealt with the police practice of questioning a suspect until incriminating information is elicited, then administering *Miranda* warnings. Following the warnings, the suspect is again questioned and the incriminating information re-elicited. The post-warning statement is then sought to be admitted." *Navy*, 386 S.C. at 302, 688 S.E.2d at 841. To determine whether a constitutional violation occurred in this setting, a court must analyze the following factors: (1) "the completeness and detail of the question and answers in the first round of interrogation," (2) "the timing and setting of the first questioning and the second," (3) "the continuity of police personnel," and (4) the degree to which the interrogator's questions treated the second round as continuous with the first." *Id.* at 302, 688 S.E.2d at 841–42.

Applying the factors to the instant case, we find no constitutional violation occurred in this setting. Regarding the first factor, the question and answers in the first round of interrogation were not detailed or complete. Indeed, Lt. Mullinax asked only one objectionable question prior to reading Medley his *Miranda* rights—i.e., how much Medley had to drink that day—and Medley offered a two-word response: "Too much." Although this was arguably a rather damning statement, Lt. Mullinax did not continue questioning Medley regarding his alcohol consumption at that point in time. Lt. Mullinax did not, for example, ask Medley how many drinks he consumed or how long he had been drinking that day.

Turning to the second factor, we find the timing and setting of the first and second questionings were vastly different in this case. The first round, as outlined above, was brief and took place in Medley's parents' front yard immediately after he was detained for leading officers on a lengthy high-speed chase. Lt. Mullinax, in the heat of the moment, asked the initial question regarding Medley's alcohol consumption in conjunction with a standard inquiry as to whether he had a driver's license. The second round, on the other hand, took place in Lt. Mullinax's patrol

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relied upon the public safety exception in its ruling at the pre-trial hearing, we find this was error because the exception is inapplicable to this case.

car while he was transporting Medley to the detention center. Although Medley was clearly in custody at this point, he received *Miranda* warnings twice before entering the patrol car. Further, Medley's statements in the patrol car were elicited nearly twenty-two minutes after the initial questioning. Our review of the video reveals Medley initiated the conversation with Lt. Mullinax in the patrol car by stating he does not drink much anymore.

We do, however, acknowledge the third *Seibert* factor goes against upholding the admission of Medley's statements because Lt. Mullinax administered both the first and second questionings and, thus, the continuity of personnel was present in this case. As to the fourth factor, though, we find Lt. Mullinax's questions did not treat the second round as continuous with the first. As noted above, nearly twenty-two minutes transpired between Medley's statement during his initial detention and those made while he was in the patrol car. While Medley's alcohol consumption was a common subject in both conversations, Lt. Mullinax did not initiate the second conversation. Rather, Lt. Mullinax responded to Medley's statement that he was not drinking much anymore, and the ensuing post-*Miranda* conversation led to statements regarding Medley's alcohol consumption on the day in question.

Upon a thorough review of the record, we find Medley's incriminating statements were not a direct product of the impermissible tactic of "question first, give *Miranda* rights later" that was expressly forbidden by the U.S. Supreme Court in *Seibert* and our supreme court in *Navy*. Accordingly, the circuit court did not abuse its discretion in admitting Medley's post-*Miranda* statements at trial.

II. Harmless Error

Even if the circuit court abused its discretion in admitting Medley's incriminating statements at trial, we find any error in their admission was harmless.

"The failure to suppress evidence for possible *Miranda* violations is harmless if the record contains sufficient evidence to prove guilt beyond a reasonable doubt." *State v. Lynch*, 375 S.C. 628, 636, 654 S.E.2d 292, 296 (Ct. App. 2007). "Harmless error rules, even in dealing with constitutional errors, 'serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.'" *White*, 410 S.C. at 59, 762 S.E.2d at 728 (quoting *Chapman v. California*, 386 U.S. 18, 22 (1967)).

Based upon our review of the record, we find the overwhelming evidence of Medley's guilt renders any error in the admission of his incriminating statements harmless beyond a reasonable doubt. The videos from the officers' dashboard cameras showed Medley recklessly operating his motorcycle. Indeed, Medley drove all over the road during the high-speed chase—crossing the yellow line and running through stop signs multiple times—and reached a top speed of 109 miles per hour. Both officers on the scene testified that Medley appeared intoxicated based upon his slurred speech, glassy eyes, and overall demeanor. The officers further testified that he smelled of alcohol that evening. Medley also exhibited strange behavior, asking to use his cell phone while he was on the ground surrounded by officers and asking to drop his keys off at his girlfriend's house on the way to the detention center. The saddlebags on Medley's motorcycle contained approximately eighteen unopened beer cans, and another beer can flew off the back of his motorcycle during the pursuit. Finally, the videotape of the twenty-minute waiting period prior to Medley's refusal to submit to a breathalyzer test shows Medley sitting with his head slumped over the entire time.

Accordingly, notwithstanding the erroneous admission of Medley's statements regarding his alcohol consumption, we find the record contained ample evidence from which a jury could have concluded Medley was guilty, beyond a reasonable doubt, of second-offense DUI. Thus, to the extent the court erred in admitting such statements, we find the error, if any, was harmless beyond a reasonable doubt. *See Lynch*, 375 S.C. at 636, 654 S.E.2d at 296 ("The failure to suppress evidence for possible *Miranda* violations is harmless if the record contains sufficient evidence to prove guilt beyond a reasonable doubt."); *White*, 410 S.C. at 59, 762 S.E.2d at 728 (noting our harmless error rules '"block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial'" (quoting *Chapman*, 386 U.S. at 22)).

CONCLUSION

Based on the foregoing analysis, Medley's conviction for second-offense DUI is

AFFIRMED.

LOCKEMY, C.J., and MCDONALD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

West Anderson Water District, Appellant,

v.

City of Anderson, South Carolina, Respondent.

Appellate Case No. 2014-002488

Appeal From Anderson County
R. Keith Kelly, Circuit Court Judge

Opinion No. 5413
Heard March 16, 2016 – Filed June 15, 2016

AFFIRMED

Sarah Patrick Spruill and Boyd Benjamin Nicholson Jr., both of Haynsworth Sinkler Boyd, PA, of Greenville, for Appellant.

Frank H. Gibbes, III, of Gibbes Burton, LLC, of Spartanburg, and J. Franklin McClain, of Anderson, for Respondent.

GEATHERS, J.: In this declaratory judgment action, Appellant West Anderson Water District (the District) seeks review of the circuit court's order interpreting a contract between the District and Respondent City of Anderson, South Carolina (the City) that allowed the City to provide water service to a certain site within the District's boundaries. The District argues the individuals serving on the District's governing board at the time the contract was executed did not have authority to bind successor boards. The District also argues the circuit court's interpretation of

the disputed contractual provision substantially compromised the District's central, primary function, i.e., the provision of water and sewer service. We affirm.

FACTS/PROCEDURAL HISTORY

Prior to February 2002, Duke Energy Corporation (Duke) owned and operated a water system serving wholesale and retail water customers throughout various parts of Anderson County. On February 20, 2002, Duke sold the system's retail component to the City and its wholesale component to the members of the Anderson County Joint Municipal Water System (the Joint System).[1] The Joint System was created pursuant to the Joint Municipal Water Systems Act,[2] S.C. Code Ann. §§ 6-25-5 to -170 (2004), which allows two or more municipalities to form a joint municipal water system to meet the needs of their service areas or to create a finance pool. S.C. Code Ann. § 6-25-30 (2004).[3] The Joint System's members include the District; the City; the municipalities of Clemson, Pendleton, and Williamston; Starr-Iva Water and Sewer District; Sandy Springs Water District; Powdersville Water District; Hammond Water District; Homeland Park Water District; Broadway Water and Sewerage District; and Big Creek Water and Sewerage District.

On March 21, 2002, the Joint System entered into an agreement to sell water to its members (the Water Sale and Purchase Agreement).[4] Included in this agreement was a provision in which the District consented to the City providing water service to a facility owned by Michelin North America, Inc. (Michelin) and at least partially located within the District's historical service area. The agreement also included a provision referencing an attached territorial map designating the respective new service areas for each party. The attached territorial map designated the property on which the Michelin facility was located as included within the City's new service area.

In 2012, the District learned Michelin was building a second facility on the property it occupied. Subsequently, the District received a letter from the City

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[1] Currently named, "Anderson Regional Joint Water System."

[2] In 2007, the legislature changed the name of this Act to the "Joint Authority Water and Sewer Systems Act." 2007 Act No. 59, § 1 (effective June 6, 2007).

[3] This provision was amended in 2007.

[4] The Water Sale and Purchase Agreement was later amended. However, the parties have not indicated that any amendments are pertinent to the issues in this case.

stating the City would be providing water service to the second facility and requesting the District to "cease contact with Michelin regarding water service to the site." The District later filed a summons and complaint seeking a declaratory judgment that the City may not provide water service to Michelin's second facility and an injunction against the City's provision of water service to the second facility. The City answered and filed a counterclaim seeking a declaration that it was entitled to provide water service to Michelin's second facility pursuant to the Water Sale and Purchase Agreement.

The circuit court conducted a bench trial and subsequently issued an order declaring that the Water Sale and Purchase Agreement authorized the City to provide water service to Michelin's second facility. In its order, the circuit court concluded the District's enabling legislation authorized the District to bind members of future boards to the terms of the Water Sale and Purchase Agreement. The circuit court also concluded the District's delegation of power to the City to provide water service to the Michelin property did not substantially compromise the District's central, primary function. The circuit court denied the District's motion to amend its order pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in finding the Water Sale and Purchase Agreement allowed the City to provide water service to the entire Michelin site?

2. Did the circuit court err in concluding the District's board could bind successor boards to the Water Sale and Purchase Agreement?

3. Did the circuit court err in concluding the District's delegation of its power to the City would not substantially compromise the District's primary function?

STANDARD OF REVIEW

"Declaratory judgments in and of themselves are neither legal nor equitable. The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue." *Kinard v. Richardson*, 407 S.C. 247, 256, 754 S.E.2d 888, 893 (Ct. App. 2014) (citation omitted) (quoting *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003)). "An action to construe a contract is an action at law reviewable under an 'any evidence'

standard." *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). "In an action at law, tried, without a jury, the appellate court's standard of review extends only to the correction of errors of law." *Sherlock Holmes Pub, Inc. v. City of Columbia*, 389 S.C. 77, 81, 697 S.E.2d 619, 621 (Ct. App. 2010) (quoting *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006)).

LAW/ANALYSIS

I. Construction of the Water Sale and Purchase Agreement

The District contends the circuit court erred in finding the Water Sale and Purchase Agreement allows the City to provide water service to the entire Michelin site. The District argues the Water Sale and Purchase Agreement allows the City to provide service to only those customers existing when the agreement was executed and Michelin's second facility, a new "customer," did not exist when the agreement was executed. We disagree.

"When interpreting a contract, a court must ascertain and give effect to the intention of the parties." *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 334, 676 S.E.2d 139, 143 (Ct. App. 2009). "To determine the intention of the parties, the court 'must first look at the language of the contract . . . .'" *Id.* (quoting *C.A.N. Enters. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988)).

When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court. *See Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) ("The construction of a clear and unambiguous contract is a question of law for the court."). Whether an ambiguity exists in the language of a contract is also a question of law. *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C 617, 623, 550 S.E.2d 299, 302-03 (2001). "A contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation." *Id.* at 623, 550 S.E.2d at 302. "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties." *Id.* at 623, 550 S.E.2d at 303. "The determination of the parties' intent is then a question of fact." *Id.*

Here, the circuit court concluded the Water Sale and Purchase Agreement was ambiguous due to the conflict between the "prefatory clause" in the "Background

and Findings" section of the agreement and section 6.02 of the agreement, which discusses territorial boundaries.[5] The prefatory clause states,

> It is presently intended by the parties hereto that the City of Anderson will serve (1) two industries; BASF and Owens-Corning, located within the boundaries of Starr-Iva Water and Sewer District; and (2) the *industrial facilities* of Michelin, which are located within the boundaries of West Anderson Water District. Both Starr-Iva Water and Sewer District and West Anderson Water District consent to the City of Anderson's providing such services to these industries. However, such consent is *strictly limited to* the provision of service to these *named industrial customers* and no further provision of service by the City of Anderson shall be made to any customer located within the boundaries of Starr-Iva Water and Sewer District or within West Anderson Water District without the written consent of such Purchaser.

(emphases added). On the other hand, section 6.02 of the agreement states,

> In order to successfully plan and finance additions to each Purchaser's System, and to avoid future disputes, the parties have agreed upon a Territorial Map of the territories of the parties to this Agreement in order to set out the areas each intends to serve. The Territorial Map is attached hereto as Exhibit D.

These two provisions, considered together, render the contract reasonably susceptible to at least two interpretations, e.g., (1) the District's consent was limited to the customer named in the prefatory clause, Michelin or (2) the District's consent covered water service to *any* customer occupying the Michelin site during the contract's thirty-year term. Therefore, we agree with the circuit court that the contract is ambiguous. *See McClellanville*, 345 S.C at 623, 550 S.E.2d at 302 ("A

[5] While the circuit court referenced the original Water Sale and Purchase Agreement, we reference the "Restated and Amended" version of the agreement. There are no material differences between the two versions of the provisions discussed here.

contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation."). Further, the circuit court properly considered extrinsic evidence to determine the parties' intent. *See id.* at 623, 550 S.E.2d at 303 ("Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties.").

Moreover, the evidence supports the circuit court's conclusion that the parties intended to authorize the City to provide water service to the entire Michelin site. Steven Wilson, the District's general manager, admitted under cross-examination that the orange-coded area on the territorial map attached to the Water Sale and Purchase Agreement was intended to show the City's service area and the yellow-coded area was intended to show the District's service area.[6] Wilson also admitted that when negotiations for this agreement began, "everybody was concerned about having a map of their service area so everybody would know where each entity was going to serve under" the agreement.

William McCoy, the Co-Project Manager for the Anderson County Water Association (later designated as the Joint System), also testified that the color-coded territorial map accurately portrayed the service areas each member intended to serve at the time they executed the Water Sale and Purchase Agreement. McCoy further stated the City's service area included "both the big part that's in orange[] and the three parcels that are shown jutting out at the bottom, one of which is the Michelin property." While the fifth draft of the agreement omitted the reference to the attached territorial map, this reference was added back into all of the remaining drafts at the City's insistence.

Based on the foregoing, the evidence supports the circuit court's finding that the Water Sale and Purchase Agreement allows the City to provide water service to the entire Michelin site. Therefore, we affirm the circuit court's construction of this agreement. *See Pruitt*, 343 S.C. at 339, 540 S.E.2d at 845 ("An action to construe a contract is an action at law reviewable under an 'any evidence' standard.").

[6] The legend on the territorial map indicates that the City's territory is actually coded as pinkish-orange and the pure orange-coded area is the territory of Hammond Water District.

II. Binding Successor Boards

The District maintains the circuit court erred in concluding the District's board could bind successor boards to the Water Sale and Purchase Agreement. We disagree.

In *Cunningham v. Anderson County*, this court discussed the test for determining the validity of long-term governmental contracts:

> If the term of the contract in question extends beyond the term of the governing members of the municipality entering into the contract, the validity of the contract is dependent on the subject matter of the contract. The general rule is that, if the contract involves the exercise of the municipal corporation's business or proprietary powers, the contract may extend beyond the term of the contracting body and is binding on successor bodies if, at the time the contract was entered into, it was fair and reasonable and necessary or advantageous to the municipality. However, *if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils*.

402 S.C. 434, 443, 741 S.E.2d 545, 550 (Ct. App. 2013) (emphasis added by *Cunningham*) (quoting *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 132, 459 S.E.2d 876, 880 (Ct. App. 1995) (*Cowart I*), *aff'd*, 324 S.C. 239, 478 S.E.2d 836 (1996) (*Cowart II*)), *aff'd in part, rev'd in part on other grounds*, 414 S.C. 298, 778 S.E.2d 884 (2015). This court also highlighted the additional holding in *Cowart I* that the law governing municipal corporations applies to determining the scope of a special purpose district's power to enter into contracts. *Id.* at 442, 741 S.E.2d at 549. The court further held:

> [W]here the contract involved relates to governmental or legislative functions of the council, or involves a matter of discretion to be exercised by the council[,] *unless the statute conferring power to contract clearly authorizes the council to make a contract extending beyond its own term*, no power of the council to do so exists, *since the power conferred upon municipal councils to exercise*

> *legislative or governmental functions is conferred to be exercised as often as may be found needful or politic*, and the council presently holding such powers is vested with no discretion to circumscribe or limit or diminish their efficiency, but must transmit them unimpaired to their successors.

Id. at 443-44, 741 S.E.2d at 550 (emphasis added by *Cunningham*) (quoting *Cowart I*, 319 S.C. at 132, 459 S.E.2d at 880-81). In determining whether a local governing body is exercising a governmental, versus proprietary, function, "'the true test is whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired.'" *Id.* at 444, 741 S.E.2d at 550 (emphasis omitted) (quoting *Cowart I*, 319 S.C. at 132-33, 459 S.E.2d at 881). Further, "South Carolina's courts have repeatedly held that a municipality's provision of water service to residents and non-residents is a governmental function." *City of Beaufort v. Beaufort-Jasper Cty. Water & Sewer Auth.*, 325 S.C. 174, 179, 480 S.E.2d 728, 731 (1997).

As noted in *Cunningham*, there is an exception to the rule that contracts involving a governmental function may not bind successor boards "when 'enabling legislation *clearly authorizes* the local governing body to make a contract extending beyond its members' own terms.'" *Id.* at 445, 741 S.E.2d at 551 (emphasis added in *Cunningham*) (quoting *Cowart II*, 324 S.C. at 241, 478 S.E.2d at 838).

A. Enabling Legislation

The District's enabling legislation is Act No. 78 of 2001, which is codified at sections 33-36-1310 to -1370 of the South Carolina Code (2006). For a complete understanding of the issue, we set forth Section 1 of Act No. 78, which states,

> Act 1030 of 1964 was enacted to take advantage of federal funding available through the Farmer's Home Administration Act to provide for the growing need for utility and other services, especially in rural areas. Since that time, the availability of the funding has diminished, and federal and state funding are more often provided from additional sources. The General Assembly finds, under certain conditions, that the not-for-profit corporations organized under Act 1030 of 1964, for the purposes of providing water services, should be granted

> the right to elect to become public bodies politic and corporate for reasons including, but not limited to, the following:
>
> (1) the opportunity to receive funding, loans, and grants from other sources such as the State Revolving Fund will be increased or enhanced;
>
> (2) *the right to participate in a joint municipal water system as authorized under Chapter 25, Title 6 of the 1976 Code will be afforded*; and
>
> (3) the cost of borrowing money for infrastructure construction and expansion will be lower and growth demands more economically met.

(emphasis added). Section 2 of this act added sections 33-36-1310 to -1370 to the South Carolina Code. Notably, section 33-36-1310(A) states, in pertinent part,

> *For the exclusive purpose[] of participating in a joint municipal water system as authorized under Chapter 25, Title 6*, a nonprofit corporation incorporated for the purposes of providing water or water and sewer services, pursuant to the provisions of this chapter may elect, by resolution, to become a public service district, a public body politic and corporate.

(emphasis added).

Here, the circuit court concluded that Act No. 78 clearly authorized the District to enter into the Water Sale and Purchase Agreement by granting public service districts the power to "enter into contracts of short or long duration" and to "make contracts of all kinds and execute all instruments or documents necessary or convenient to carry out the business of the district." *See* S.C. Code Ann. § 33-36-1360(A)(9) & (11) (2006).[7] The circuit court also referenced the amendment by

[7] Section 33-36-1360(A) states, in pertinent part,

> The newly converted district has all rights and powers of a public body politic and corporate of this State

Act No. 78 to the Joint Municipal Water Systems Act, Act No. 82 of 1983, S.C. Code Ann. § 6-25-5 to -170 (2004), to allow newly converted public service districts to become members of a joint water system.[8] Section 1 of the Joint Municipal Water Systems Act states,

> The General Assembly of this State finds and determines:
>
> (a) That the present availability of water and even more so in the years to come is very crucial to the welfare and needs of the people of the State of South Carolina, and is a matter of great public concern; that no longer is the impounding, treatment, production, transmission, distribution, sale, and service of water peculiar to the needs and welfare of a particular municipality, but such is of great importance to the people of this State as a whole.

> including, without limitations, all the rights and powers necessary or convenient to carry out and effectuate its purposes including, but not limited to, the following rights and powers to . . . (9) enter into contracts of short or *long duration*; [and] . . . (11) make contracts of all kinds and execute all instruments or documents necessary or convenient to carry out the business of the district . . . .

(emphasis added).

[8] *See* S.C. Code Ann. § 6-25-20(h) (2004) (defining "Member of a joint system" as "those municipalities whose governing bodies have agreed (1) to create a joint municipal water system to undertake the impounding, acquisition, treatment, production, transmission, distribution, service, and sale of water to a municipality which is a member of the system and other municipalities, and persons which are not members when approved by the governing body of each member or (2) to create a joint municipal water system for the purpose of creating a financing pool. A joint municipal water system created for the purpose of creating a financing pool may have as nonvoting members nonprofit corporations created pursuant to Chapter 36 of Title 33; however, a nonprofit corporation which has become a public service district pursuant to Article 8 of Chapter 36 of Title 33 is a voting member.").

> (b) That the development of the State and its maintenance and growth depends in large measure on the availability of adequate and safe water supplies and water sources; and that the impounding, production, treatment, transmission, distribution, sale, and service of water by the municipalities of this State *through joint action of certain municipalities* who choose to do so is of great importance to the people of the State and to the areas of the State where such facilities are present.
>
> (c) *The creation of joint municipal water systems* to provide and sell water to its members and to other municipalities who are not members, but who sell and serve water when approved by the governing body of each member; and *to provide for the joint planning, financing, development, ownership, operation, and the issuance of revenue bonds* by such joint municipal water systems is for a public use and for a public purpose.

1983 S.C. Acts 138 (emphases added).

In discussing the Joint Municipal Water Systems Act, the circuit court highlighted section 6-25-128, which states that contracts concerning the sale of

> capacity and output from a project may extend for a period *not exceeding fifty years* from the date of the contract and may be renewable and extended upon terms as the parties may agree for not exceeding an additional fifty years; and the execution and effectiveness is not subject to any authorizations or approvals by the State or any agency, commission, or instrumentality or political subdivision of them.

(emphasis added).

B. Authorization for the Water Sale and Purchase Agreement

As previously stated, section 33-36-1360(A)(9), part of the District's enabling legislation (Act No. 78 of 2001), grants public service districts the power to "enter into contracts of short or long duration." Further, one of the express purposes of

Act No. 78, of which section 33-36-1360(A)(9) is a part, is to afford nonprofit corporations converting to public service districts the right to participate in a joint municipal water system as authorized under the Joint Municipal Water Systems Act, of which section 6-25-128 is a part. Section 6-25-128 allows contracts concerning the sale of capacity and output from a project to extend for a period not exceeding fifty years from the date of the contract. We find it necessary and reasonable to consider both Act No. 78, specifically section 33-36-1360(A)(9), and the Joint Municipal Water Systems Act, specifically section 6-25-128, together in determining whether the District's enabling legislation "*clearly authorizes* the [District] to make a contract extending beyond its [board] members' own terms." *Cunningham*, 402 S.C. at 445, 741 S.E.2d at 551.

When we consider these interrelated legislative acts together, it is clear that authorizing a joint water system to enter into a fifty-year contract for the sale of capacity requires the same authorization for those public service districts participating in the joint system. Therefore, the circuit court correctly reasoned that if a joint water system is authorized by section 6-25-128 to enter into a contract for a term extending beyond its board members' own terms, the members of the joint water system, such as the District, "must be able to do the same."

III. Delegation of Power

The District asserts the circuit court erred in concluding the delegation of power given to the City to serve the Michelin site did not substantially compromise the District's central, primary function. We disagree.

In *Beaufort*, our supreme court examined a contract between the Beaufort-Jasper County Water and Sewer Authority (the Authority) and the City of Beaufort, as well as a similar contract between the Authority and the Town of Port Royal (the Town), for the Authority's sale of water to the City of Beaufort and the Town. 325 S.C. at 177, 480 S.E.2d at 730. These contracts included a provision prohibiting the Authority from selling

> water to be used by persons, private corporations or other municipalities . . . in Beaufort *County*, without the consent of Beaufort and the Town of Port Royal . . . unless said City and/or Town refuse or neglect to render such service to such persons, private corporations or other municipalities within a reasonable time after the same has been demanded.

Id. (emphasis added). Referencing this provision in each contract as the "Contested Clauses," the court stated that this right of first refusal for all of Beaufort County "hamper[ed] [the] Authority's discretion." *Id.* at 182, 480 S.E.2d at 732. The court affirmed the circuit court's ruling that the Contested Clauses constituted an unlawful delegation of governmental power "both because the Contested Clauses bind future governing boards *and*, more importantly, because they give away too much power in themselves." *Id.* at 182, 480 S.E.2d at 732-33 (emphasis added).

We infer from this language an additional hurdle for the proponent of a long-term governmental contract—the proponent must show not only that enabling legislation clearly authorized the contract to bind successor boards but also that any delegation of authority in the contract does not relinquish too much power. As to what constitutes too much power, footnote 4 in the *Beaufort* opinion is instructive: "We do not speak to more minor delegations of power, but simply find that where the *central, primary* function of a special purpose district is *substantially compromised* by a contract, the delegation of power may be invalid or unlawful." *Id.* at 180 n.4, 480 S.E.2d at 732 n.4 (second emphasis added).

Here, the circuit court distinguished *Beaufort* from the present case by characterizing the scope of the District's consent to the City's provision of water to the Michelin site as "circumscribed." The circuit court correctly noted the territorial map attached to the Water Sale and Purchase Agreement demonstrated that the Michelin site comprised "only a small part of the District's service area." Based on this analysis, the circuit court concluded the District's consent was a "minor delegation of governmental authority" and did not "'substantially compromise' its discretion or ability to function." *Id.* at 180 n.4, 480 S.E.2d at 732 n.4. We agree.

The City also distinguishes *Beaufort* from the present case. The City argues that in *Beaufort*, the supreme court was concerned with the Authority's delegation to the City and the Town of the *power to decide* when the Authority was allowed to "provide water to anyone in its own service area." *Id.* at 182, 480 S.E.2d at 732. The City contends that in the present case, the District's discretion was not impaired because the District exercised its power to decide who would provide water to the Michelin site for the limited term of the Water Sale and Purchase Agreement by consenting to the City's service to the site. We agree.

The District compares the disputed contractual provision in the present case to a contract provision invalidated by the circuit court in *G. Curtis Martin Investment Trust v. Clay*, 274 S.C. 608, 266 S.E.2d 82 (1980). In *Clay*, our supreme court upheld the circuit court's invalidation of a provision granting a private individual the right to approve "large uses" of a sewer system that had been previously sold by that individual to the North Charleston Sewer District. *Id.* at 610-13, 266 S.E.2d at 83-85. This veto power was to last "until such time as the District connect[ed] the system with the District's main line." *Id.* at 610, 266 S.E.2d at 84. The court stated the district commissioners' "abdication . . . of their statutory and constitutional responsibility to act for the public welfare to a private party who ha[d] no duty to give the public welfare any deliberation was improper." *Id.* at 612, 266 S.E.2d at 84-85. The court further stated, "The police power of a corporate political entity cannot be exercised for private purposes or for the benefit of particular individuals or classes." *Id.* at 612, 266 S.E.2d at 85.

The *Clay* court held the commissioners themselves were required to act on applications for connection to their system rather than allowing the private individual to do so:

> Act 1768 creating the District, though it does authorize discretionary contracting, does not allow the District to delegate away those powers and responsibilities which give life to it as a body politic. A municipal corporation or other corporate political entity created by state law, to which police power has been delegated, may not divest itself of such power by contract or otherwise.

Id. *Clay* is distinguishable from the present case because here, the District has not delegated its decision-making authority to a private person or entity, or even another public entity, but rather it has delegated the function of providing water and sewer *service* to the Michelin site to the City for a limited period of time.

Based on the foregoing, we affirm the circuit court's conclusion that the District's consent did not substantially compromise its discretion or ability to function.

CONCLUSION

Accordingly, the circuit court's order is

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Estate of Marion M. Kay

Edward D. Sullivan, as Personal Representative of the Estate of Marion M. Kay, Appellant-Respondent,

v.

Martha Brown and Mary Moses, Respondents-Appellants.

Appellate Case No. 2013-002319

Appeal From Laurens County
Donald B. Hocker, Probate Court Judge
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 5414
Heard June 3, 2015 – Filed June 15, 2016

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Daryl G. Hawkins, of the Law Office of Daryl G. Hawkins, LLC, of Columbia, for Appellant.

John R. Ferguson, of Cox, Ferguson, & Wham, LLC, of Laurens, for Respondents.

WILLIAMS, J.: In this cross-appeal, Edward D. Sullivan (Appellant), the personal representative of Marion Milam Kay's estate (the Estate), contests the circuit court's decision to affirm the probate court's order[1] reducing Appellant's compensation as well as denying Appellant's request for reimbursement of certain fees and expenses in connection with the settlement of the Estate. Martha Milam Brown and Mary Leona Milam Moses (collectively "Respondents"), Kay's sisters and two beneficiaries of the Estate, cross-appeal, arguing the probate court improperly (1) awarded Appellant a fee equivalent to 10% of the Estate when Appellant acted in bad faith; (2) failed to require Appellant to pay all costs and attorney's fees associated with the settling of the Estate; (3) failed to rule on certain beneficiaries' prospective entitlement to additional proceeds from the Estate should Respondents prevail on appeal; (4) limited Respondents' counsel's request for attorney's fees; and (5) granted Appellant equitable relief when Appellant acted with unclean hands. We affirm in part, reverse in part, and remand.

FACTS

This appeal arises out of Appellant's administration of the Estate of Marion Milam Kay who passed away on May 3, 2007. In her last will and testament, Kay appointed Appellant to serve as her personal representative (PR). As PR for the Estate, Appellant was charged with the responsibility of distributing Kay's assets, and in turn, Kay's will granted Appellant "reasonable compensation for the services rendered and reimbursement for reasonable expenses." Pursuant to the terms of Kay's will, her assets were distributed as follows: Lisbon Presbyterian Church received 25%; the Lisbon Presbyterian Cemetery Fund received 25%; the Presbyterian Home of South Carolina received 10%; her two step-grandchildren, Bart and Martha Heard, each received 10%; and Respondents each received 10%. Kay's will also granted her neighbor, Charles Copeland, an eight-month option to purchase a one-half undivided interest in an adjoining 330-acre parcel (the Farm)

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[1] Pursuant to section 62-1-308(a) of the South Carolina Code (Supp. 2014), the probate court's order was appealed to the circuit court, which affirmed the probate court in a Form 4 Order. *See* § 62-1-308(a) ("A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county, subject to the provisions of Section 62-1-303."). Because Appellant and Respondents essentially take issue with the rulings of the probate court, we frame their arguments accordingly, acknowledging the procedural posture of this case.

at fair market value. The Estate, valued at $513,491, consisted primarily of Kay's home (the Home) and the ten acres[2] on which the Home was situated, as well as the Farm.

Prior to Appellant submitting a petition for settlement to the probate court, several issues arose in the administration of the Estate. Appellant stated Respondents, who owned the other one-half interest in the 330-acre parcel, were "bitterly disappointed" upon learning they did not inherit Kay's entire one-half interest in the Farm. Respondents claimed Brown was entitled to an additional five acres—as promised prior to Kay's death—and Kay did not have the right to devise her interest to anyone other than the heirs of W.H. Milam.[3] Respondents' claim to a portion of the Farm was at odds with the option to purchase afforded to Copeland in Kay's will. Further, Appellant discovered that the owners of the Farm granted to each other a "right of first refusal" in 1972, which created a potential conflict with Copeland's option to purchase the Farm.

Because Kay bequeathed the Estate to numerous entities with varying interests, Appellant stated he had to determine the most equitable means of accommodating each beneficiary. According to Appellant, three of the residual beneficiaries, whose interests totaled 70% of the Estate, desired to receive their share of the Estate in cash rather than an interest in real estate. In an effort to sort out the competing claims, Appellant hired a surveyor and an appraiser and met several times with Copeland about exercising his option to purchase.

On May 2, 2008, approximately one year after Kay's death, Appellant submitted a proposal to Respondents and Copeland, subject to the approval of all the beneficiaries and the probate court. In the proposal, Appellant recommended conveying five acres to Brown at no cost, conveying the 46.85 acres that adjoined Copeland's land to Copeland at its appraised value, and offering the remainder of the Farm to Respondents at the appraised value. Appellant testified neither Brown nor Moses ever responded to this proposal. After a meeting with all the beneficiaries later that summer, Appellant drafted a second proposal and presented

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[2] The Home and 6.238 acres are separated from the remaining 3.762 acres (the Lot) by a public roadway.

[3] Kay, Brown, and Moses were W.H. Milam's daughters.

it to Respondents. Appellant stated Respondents again failed to respond or offer a counter-proposal, and at that time, Respondents retained counsel.

After twenty months passed, and without a resolution of the Estate, Appellant filed a partition and declaratory judgment action in circuit court on January 1, 2009. Appellant stated the purpose of filing this action was to determine the rights of the parties—arising out of Copeland's option to purchase, the 1972 right of first refusal, and other claims made by Respondents—and to generally clear title to the property so the Estate could be settled. Appellant amended the complaint on March 4, 2009, at which time Respondents filed a counterclaim asserting a right to five acres. Litigation ensued, and the parties engaged in discovery. After fifteen months, the parties retained a mediator in an attempt to resolve the dispute.

Just prior to mediation, Appellant reached an agreement with Rowland Milam, a relative of Respondents, to purchase the Estate's one-half undivided interest in the Farm, the Home, and the Lot. The Estate was not responsible for any repairs or rollback taxes, and the property was sold using a quitclaim deed. The final purchase price was $367,000, approximately 94% of the 2007–2008 appraised value. All parties consented to the sale of the property. Appellant then made the final distribution of Kay's personal effects and filed the proposal for distribution with the probate court on November 12, 2010.

Respondents requested a hearing, which took place on February 2, 2011, and February 21, 2011. At the hearings, the probate court received testimony and evidence from the parties but disallowed the introduction of an affidavit prepared by Appellant detailing his administration of the Estate and an affidavit from R. David Massey, Esquire, in support of Appellant's request for compensation.

The court subsequently issued an order, finding Appellant "unnecessarily complicated the Estate by insisting on filing a partition action." The court ruled Appellant should not have filed a partition/declaratory judgment action, but rather should have deeded out the Estate to the beneficiaries by a deed of distribution because it found "no necessity for a sale of the real estate." Further, the probate court stated Appellant "unnecessarily complicated the Estate by converting an eight-month option to purchase the Estate's one-half interest in its real estate into an indefinite right to purchase and by giving the option holder the right to buy only a portion of the property contrary to the Will."

The probate court then ruled on Appellant's entitlement to fees and commissions, finding Appellant's claims for commissions were not adequately documented because he "had no method or formula for determining the amount for the four draws he gave himself other than by pulling a figure out of the air." Appellant's total draws from the Estate on the date of the hearing amounted to $157,179, or 18.3% of the Estate's value, which the court found to be far greater than the statutory presumption of 5%. As a result, the court held "the commissions sought by [Appellant] [we]re clearly excessive," particularly when Appellant offered no alternative for valuing his services. The court acknowledged Appellant "did an excellent job in securing the sales price for the real estate" and had "exemplary credentials and good standing in the Bar," but this alone did not automatically justify the relief requested. In addition, the probate court found Appellant did not act in bad faith.

The probate court approved a prior payment to Appellant's law firm, Collins & Lacy, P.C., for $13,499.58 and found the firm was entitled to an additional $12,306.80. However, the court questioned the necessity of 204.6 hours of paralegal work. The probate court disallowed Appellant's request for attorney's fees for Appellant's counsel, noting that—although counsel represented Appellant well—it did not believe the Estate should pay these attorney's fees. Further, the probate court denied Appellant's request for costs pertaining to the petition for settlement and Appellant's expert witness fees. The court did, however, award attorney's fees to Respondent's counsel in the amount of $19,860, to be paid from the Estate.

Based on the probate court's findings, it concluded Appellant had a right to retain $51,300, or approximately 10% of the Estate's value. As a result, Appellant was required to refund the Estate—within thirty days of the order—all additional commissions, totaling $42,475.[4] After the probate court denied Appellant's Rule 59(e), SCRCP, motion to reconsider, Appellant and Respondents appealed to the circuit court. Following a hearing on July 19, 2013, the circuit court issued a Form 4 order in which it affirmed the order of the probate court and required all parties to bear the costs of appeal to the circuit court. Appellant and Respondents then appealed to this court.

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[4] The probate court held if Appellant completed the winding up of the Estate, then he would be entitled to an additional compensation of $2,500 that could be deducted from the amount owed to the Estate.

STANDARD OF REVIEW

On appeal from a final order of the probate court, the circuit court must apply the same standard of review that an appellate 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 depends upon whether the underlying cause of action is at law or in equity. *In re Estate of Hyman*, 362 S.C. 20, 25, 606 S.E.2d 205, 207 (Ct. App. 2004) (citation omitted); *In re Thames*, 344 S.C. 564, 568, 544 S.E.2d 854, 856 (Ct. App. 2001) (citation omitted).

On appeal from an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses that no evidence supports them. *Neely v. Thomasson*, 365 S.C. 345, 349–50, 618 S.E.2d 884, 886 (2005). Questions of law may be decided by this court without deference to the lower court. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). The standard of review for an action at law is the same whether the facts are found by a jury or the judge sitting without a jury. *See Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 567–68, 211 S.E.2d 876, 877 (1975) (stating in an action at law, the judge's findings are equivalent to a jury's findings for purposes of appellate review). On the other hand, if the probate proceeding is equitable in nature, then the circuit court—on appeal—may make factual findings according to its own view of the preponderance of the evidence. *Howard*, 315 S.C. at 361–62, 434 S.E.2d 254, 257–58 (citation omitted).

The underlying nature of the matter before the probate court was the settlement of the Estate; Appellant's entitlement to commissions, expenses, and costs; and each party's entitlement to attorney's fees. On appeal to the circuit court and this court, Appellant and Respondents primarily contest the probate court's decisions regarding Appellant's commissions and expenses, as well as its ruling on attorney's fees. Because the proceeding in this case involved claims for money due, we find this is an action at law. *See id*. at 362, 434 S.E.2d at 258 (finding a claim for money owed to a creditor of an estate was triable at law with an attendant right to a trial by jury); *see also Weatherford v. Price*, 340 S.C. 572, 578, 532 S.E.2d 310, 313 (Ct. App. 2000) (stating a suit to recover attorney's fees is an action at law).

LAW/ANALYSIS

I. Appellant's Appeal

Appellant raises the following issues on appeal, arguing the circuit court erred in affirming the probate court because the probate court improperly (1) required Appellant to refund a portion of his compensation when Appellant acted reasonably, his compensation was substantiated by the evidence, and a refund would unjustly enrich certain beneficiaries; (2) unjustly enriched one or more beneficiaries by returning Appellant's compensation; (3) denied Appellant his due process rights because Respondents did not properly request that the probate court review his compensation; (4) denied Appellant's request for fees and expenses in connection with the hearing to settle the Estate; (5) improperly awarded Respondents' counsel attorney's fees; and (6) denied Appellant's Rule 59(e), SCRCP, motion to reconsider. We agree in part.

A. Appellant's Fee

Appellant first claims the probate court improperly reduced his compensation for administering and settling the Estate because he acted reasonably and his actions were substantiated by the evidence. We disagree.

Pursuant to section 62-3-719(a) of the South Carolina Code (Supp. 2014),

> Unless otherwise approved by the court for extraordinary services, a personal representative shall receive for his care in the execution of his duties a sum from the probate estate funds not to exceed five percent of the appraised value of the personal property of the probate estate plus the sales proceeds of real property of the probate estate received on sales directed or authorized by will or by proper court order, except upon sales to the personal representative as purchaser.

However, "[t]he provisions of this section do not apply in a case where there is a contract providing for the compensation to be paid for such services, or *where the will otherwise directs*, or where the personal representative qualified to act before June 28, 1984." S.C. Code Ann. § 62-3-719(c) (Supp. 2014) (emphasis added). Item V(3) of Kay's will addressed the PR fee schedule and stated, "For its services as personal representative, the individual personal representative shall receive

reasonable compensation for the services rendered and reimbursement for reasonable expenses."

In Appellant's petition for settlement to the probate court, he requested $93,775 for commissions already paid and $13,447.05 for additional commissions yet to be paid. The probate court concluded compensating Appellant for the amounts requested would total 21% of the Estate's value, which was far beyond the statutorily mandated 5% pursuant to section 62-3-719(a). Because Appellant failed to provide a legitimate basis for his fees, the probate court concluded a reduction of $42,475 was warranted, bringing Appellant's commission to 10% of the Estate's value.

On appeal, Appellant has included all of the invoices, time sheets, affidavits, and correspondence in support of his claim that he is entitled to the compensation he requested from the probate court. Appellant also cites to Item VII of Kay's will to support his administrative decisions underpinning his fees. Item VII authorizes the PR

> to exercise all powers in the management of [the] Estate . . . upon such terms and conditions as to [Kay's] personal representative may seem best, and to execute and deliver any and all instruments and to do all acts which [her] personal representative may deem proper or necessary to carry out the purposes of this [] will.

We recognize that Appellant encountered difficulties in administering certain assets of the Estate and made efforts to rectify these interests.[5] While we do not take issue with Appellant's belief that he acted reasonably and in the best interests

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[5] Appellant takes issue with the probate court's finding that he should have issued a deed of distribution to the beneficiaries for the real estate in lieu of filing a partition/declaratory judgment action and seeking to liquidate the real estate. Without ruling on the proper course of action, we are mindful of section 62-3-907(A) of the South Carolina Code (Supp. 2014), which states, "If distribution in kind is made, the personal representative *must* execute a deed of distribution with respect to real property . . . ." (emphasis added).

of the Estate, we also do not believe the probate court's decision to decrease Appellant's compensation based on the value of the Estate and the court's view of the evidence is without support. Accordingly, we find the probate court acted within its discretion in establishing a reasonable compensation for Appellant's services as PR and affirm the circuit court's decision to uphold the probate court's award of compensation to Appellant in the amount of $51,300.

B. Unjust Enrichment

Next, Appellant argues the circuit court's decision to require him to return a portion of his compensation unjustly enriches certain beneficiaries who requested cash from the Estate and have benefitted from the services of Appellant. We disagree.

Appellant states "a majority in interest of the residuary beneficiaries (70%) desired that the PR liquidate the real estate so that they could receive a cash distribution rather than an undivided interest in real estate. Accordingly[,] the [p]robate [c]ourt's ruling unjustly enriches these beneficiaries." As discussed in Respondents' cross-appeal, we do not believe requiring Appellant to return a portion of his fees to the Estate would unjustly enrich these beneficiaries because these funds are properly part of the Estate's assets. *See Dema v. Tenet Physician Servs.–Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009) ("A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another."). Therefore, Appellant's theory of restitution is inapplicable to the case at hand. *See Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 12, 14–15 (Ct. App. 1988) ("Unjust enrichment is usually a prerequisite for enforcement of the doctrine of restitution; if there is no basis for unjust enrichment, there is no basis for restitution."). In addition, we find it would be inequitable to punish these beneficiaries under the doctrine of unjust enrichment based upon their desire to have cash—which they are rightfully entitled to and which Appellant consented to—as opposed to a share in the real estate. Consistent with Kay's will, a return of these monies would be divided among these beneficiaries in accordance with the distribution scheme provided in her will. Accordingly, we affirm the circuit court's ruling to affirm the probate court on this issue.

C. Due Process

Appellant contends the probate court erred in requiring him to return a portion of his compensation because Respondents failed to comply with the proper procedure

for contesting Appellant's entitlement to his compensation, thereby depriving him of reasonable notice and an opportunity to be heard. We disagree.

Section 62-3-721(a) of the South Carolina Code (Supp. 2014) outlines the proper procedure for contesting a PR's compensation:

> After notice to all interested persons, on petition of an interested person or on appropriate motion if administration is under Part 5 [sections 62-3-501 et seq.], . . . the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

Appellant contends Respondents failed to file a formal petition in violation of section 62-3-721. Although our review of the record uncovers no formal petition, we conclude the parties were aware of the issues that would be brought before the probate court at the petition for settlement, including Respondents' disagreement with Appellant's compensation. *See Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002) ("Procedural due process mandates that a litigant be placed on notice of the issues which the court is to consider." (citation omitted)). The following dialogue between the probate court and the parties affirms our conclusion on this issue:

> Court: Who's the moving party in this [case]?
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> Appellant's Counsel: As I understand it, Ms. Moses and Ms. Brown have requested the hearing, your Honor.
>
> . . . .
>
> Court: Apparently closing documents were sent out and as per statutory right, interested parties have the right to demand [a] hearing concerning the closing of the Estate. And evidently, [Respondents' counsel], that's what you've done?
>
> Respondents' Counsel: Yes, sir.

. . . .

> Court: Okay . . . Let me ask you, [Appellant's counsel]. Were all of the beneficiaries under the will noticed of today's hearing?
>
> Appellant's Counsel: Yes they were, your honor.
>
> . . . .
>
> Court: [W]hen I've done these hearings when there's been a demand, it typically in most cases just makes a little more sense, and I think the process goes a little smoother, is if the -- because typically, it is a complaint about something the PR's done or not done. So typically it runs a little smoother if we start the case off as if you [Appellant] are the moving party. So, if there's not a big hang-up with that, that's how I would like to do it.

Based on the foregoing, we hold any purported defects in notice were waived at the hearing when the parties acknowledged the issues before the court and proceeded with the hearing. *See Strickland v. Consol. Energy Prods. Co.*, 274 S.C. 554, 555, 265 S.E.2d 682, 683 (1980) ("A general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process."); *Connell v. Connell*, 249 S.C. 162, 166–67, 153 S.E.2d 396, 398–99 (1967) (stating if a defendant, by his appearance, "asks any relief which can only be granted on the hypothesis that the court has jurisdiction of his person, then he has made a general appearance . . . and waives any defect in the jurisdiction arising either from the want of service on the defendant or from a defect therein"). Further, based on the length of the hearing, as well as the exhibits and documentation submitted to the probate court, we find Appellant had ample notice and an opportunity to be heard and, thus, affirm the circuit court's decision on this issue. *See Blanton*, 351 S.C. at 542, 570 S.E.2d at 569 ("Procedural due process contemplates notice, a reasonable opportunity to be heard, and a fair hearing before a legally constituted impartial tribunal." (citation omitted)).

D. Appellant's Counsel's Attorney's Fees and Expenses

Appellant claims the circuit court erroneously denied his request for his counsel's attorney's fees, expert witness fees, and certain costs for time and preparation on the petition for settlement. We disagree.

In support of his claim for attorney's fees and expenses, Appellant cites section 62-3-720 of the South Carolina Code (Supp. 2014), which states, "If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred."

While we agree that section 62-3-720 affords a PR reimbursement for costs and attorney's fees in connection with the administration and protection of the Estate, we find the probate court properly exercised its discretion as to which fees and costs would be borne by the Estate and which would be borne by Appellant. We concur with the probate court's finding that Appellant's counsel's fees primarily stemmed from the contest between Appellant and Respondents over the amount of his compensation and, thus, were properly assessed against Appellant in his individual capacity. Further, we conclude this statute was intended to cover attorney's fees and expenses in connection with prosecuting and defending claims against the Estate, as opposed to the situation before the probate court. *See* S.C. Code Ann. § 62-3-715(20) (Supp. 2014) (providing a PR, "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").

To that end, we find the probate court properly utilized its discretion when it approved of attorney's fees already paid to Collins and Lacy in the amount of $13,499.58 and approved of an additional $12,306.80 to Collins and Lacy for attorney's fees and costs that were incurred as part of Appellant's administration of the Estate. We agree with the probate court that those fees and costs were properly borne by the Estate and find that award reasonable given the circumstances and the overall value of the Estate. We also note that—unlike sections 62-3-715(20) and -720—section 62-3-721 makes no provision for the payment of a PR's attorney's fees or expenses connected with a proceeding to review the PR's compensation.

See S.C. Code Ann. § 62-3-721(a) (Supp. 2014) ("After notice to all interested persons, . . . the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor, or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.").

We also find the probate court properly considered the nature of the testimony and the role of other witnesses in choosing which fees to assess against the Estate and against Appellant. The probate court denied Appellant's request for expert witness fees for an appraiser and consultant, both of whom testified at the hearing. While the probate court required Appellant to pay for the appraiser's and the forestry consultant's expert witness fees connected with the hearing, it also required the Estate to pay $5,000 for the appraisal of Kay's property and $750 for the forestry consultant's work valuing the timber on Kay's property. We agree the appraisal and consultant work were costs directly connected with the valuation of the Estate, and as such, were legitimate expenses properly paid out of the Estate's assets. We further concur with the probate court's decision to assess the expert fees against Appellant as their work product and valuations were not contested issues at the hearing. Based on the foregoing, we uphold the circuit court's decision to affirm the probate court on this issue.

E. Respondents' Counsel's Attorney's Fees

Appellant contests the probate court's decision to award Respondents' counsel attorney's fees based on the common fund doctrine. We agree.

"The common fund doctrine allows a court in its equitable jurisdiction to award reasonable attorney's fees to a party who, at his own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common fund or common property." *Layman v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329 (2008) (citing *Johnson v. Williams*, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941)). "Attorneys' fees awarded pursuant to the common fund doctrine come directly out of the common fund created or preserved." *Id.* (citation omitted). The rationale for awarding attorneys' fees in this manner is based on the principle that "one who preserves or protects a common fund works for others as well as for

himself, and the others so benefited should bear their just share of the expenses." *Id.* (citation omitted).

However, the allowance of attorney's fees out of a common fund is subject to abuse and is only permitted in exceptional cases when required to promote justice. *Johnson*, 196 S.C. at 532, 14 S.E.2d at 23. Although the attorney's services might have benefitted all parties, fees cannot be awarded when the interests of the parties are adverse. *Bedford v. Citizens & S. Nat'l Bank of S.C.*, 203 S.C. 507, 515, 28 S.E.2d 405, 407 (1943). Before an attorney may be compensated out of a common fund, a contract of employment must exist, whether express or implied in law, between the attorney and all parties with an interest in the fund. *Johnson*, 196 S.C. at 532–33, 14 S.E.2d at 23.

Citing to the common fund doctrine, the probate court awarded Respondents attorney's fees and held, "Equity requires that all heirs pay for the work of Defendants' attorney[] because his work preserved and protected a common fund[] not just for the benefit of Defendants, but for all heirs." We find the probate court improperly applied this doctrine.

Respondents' decision to hire counsel was based upon their disagreement with the division of the Estate and the amount of Appellant's compensation. Because the common fund doctrine requires all interested parties to have the same interests, we do not believe the probate court should have required the Estate to pay for Respondents' attorney's fees. Several beneficiaries were in favor of selling the real estate as opposed to an in-kind distribution. Specifically, Penelope Arnold, the director of the Presbyterian Home of South Carolina's charitable foundation, testified "[the Presbyterian Home] do[es] not have the wherewithal financially to pay property taxes, to keep the land up, which we would be responsible for doing or paying someone to do that. And so the preference is always to sell real estate and receive the proceeds." Arnold further stated that, at a prior meeting with all the beneficiaries to resolve issues with the Estate's division, she and Reverend Hunter, of Lisbon Presbyterian Church, were not well-received by Respondents based on their preferences over the Estate's division. Lisbon Presbyterian Church also preferred to receive its 25% share of the Estate in cash.

In addition, neither of these beneficiaries took issue with Appellant's compensation as did Respondents. Furthermore, while Respondents' counsel's efforts resulted in monies being returned to the Estate, which arguably was for the benefit of all the beneficiaries, we find there was no "contract of employment, whether express or

implied in law, between the attorney and all parties with an interest in the fund." *Peppertree Resorts, Ltd. v. Cabana Ltd. P'ship*, 315 S.C. 36, 41, 431 S.E.2d 598, 601 (Ct. App. 1993). If all the beneficiaries agreed on the distribution plan and took issue with Appellant's compensation, then the common fund doctrine would clearly apply. However, based on the foregoing evidence, we conclude Respondents—not the Estate—should have borne the cost of Respondents' representation. As a result, we reverse the circuit court's decision to uphold the award of Respondents' counsel's attorney's fees pursuant to the common fund doctrine.

F. Rule 59(e) motion

Last, Appellant claims the circuit court erred in affirming the probate court's denial of Appellant's Rule 59(e), SCRCP, motion. We find this argument to be without merit.

In the circuit court's order, it did not rule on whether the probate court properly denied Appellant's post-trial Rule 59(e) motion. Rather, the circuit court—as the court of next review—properly addressed the issues that the parties raised to the probate court. As a result, we find Appellant's attempt to raise this as legal error to be misplaced and without merit. *See* S.C. Code Ann. § 14-8-250 (Supp. 2014) (noting "the [c]ourt need not address a point which is manifestly without merit"); Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit.").

II. Respondents' Cross-Appeal

Respondents raise the following issues on cross-appeal, claiming the circuit court erred in affirming the probate court because the probate court (1) improperly awarded Appellant a fee equivalent to 10% of the Estate when Appellant acted in bad faith; (2) failed to require Appellant to pay all costs and attorney's fees associated with the settling of the Estate; (3) failed to rule on certain beneficiaries' prospective entitlement to additional proceeds from the Estate should Respondents prevail on appeal; (4) limited Respondents' counsel's request for attorney's fees; and (5) granted Appellant equitable relief when Appellant acted with unclean hands. We disagree and address each argument in turn.

A. Appellant's Fee & Bad Faith

Respondents first claim the probate court erred in awarding Appellant a 10% commission because Appellant acted in bad faith. We disagree.

As stated above, we find the probate court properly considered the requisite factors and statutory considerations in its decision to award Appellant a fee equivalent to 10% of the Estate's value. While we recognize section 62-3-719(a) limits a PR's fee to 5% of the Estate, we believe the specific circumstances and competing interests that otherwise prolonged the settling of "a fairly basic" estate merited an imposition of a higher fee. Further, we find a 10% fee was "reasonable compensation" for Appellant's services as stated in Kay's will.

Although Respondents contend Appellant acted in bad faith in the administration of the Estate, we find these allegations to be unsubstantiated and a mischaracterization by Respondents regarding Appellant's efforts as PR. Respondents claim Appellant acted in "violation of his fiduciary duty," "boost[ed] his commission," "bilk[ed] the Estate," "loot[ed] the Estate," and generally incurred "shocking charges . . . against the Estate." Although Appellant likely could have settled the Estate in a timelier and less costly manner, Appellant presented substantiated evidence that he worked diligently over a course of three years to accommodate all interested parties. Further, as noted by the probate court in its order and affirmed by the circuit court on appeal, Appellant has "exemplary credentials and good standing in the Bar." Respondents' contentions that Appellant acted in bad faith and violated his fiduciary duty to the Estate are not well-founded, particularly when Appellant submitted evidence he consulted with legal counsel on the proper courses of action in administering the Estate; Appellant attempted to meet with all the beneficiaries and create a compromise prior to filing a partition action; and Appellant "did an excellent job in securing the sales price for the real estate."

Based on the foregoing, we find Appellant did not improperly exercise his power in connection with the Estate and presented sufficient evidence to demonstrate he did not breach his duty to the Estate and its beneficiaries. *See* S.C. Code Ann. § 62-3-703(a) (Supp. 2014) (stating a PR has the "duty to settle and distribute the estate . . . as expeditiously and efficiently as is consistent with the best interests

of the estate" and the "successors to the estate"). Accordingly, we affirm the circuit court's decision to uphold the probate court's findings on this issue.

B. PR's Court Costs, Attorney's Fees, and Post-Judgment Interest

Next, Respondents contend the probate court erred in failing to require Appellant to pay all costs associated with the proceedings before the probate court, including attorney's fees, court costs, and post-judgment interest. We find this argument unpreserved for our review.

Respondents' argument on this alleged ground of error is conclusory, only stating it would be "grossly unfair for the heirs to pay for the PR's attempts to increase his compensation and further obscure his wrongdoing," and "[i]f the PR chooses to violate his duties and maximize his own interests at the expense of the Estate by filing an appeal, the heirs, who gain nothing by the appeal, should not suffer because of that." We find these two sentences are insufficient to assert legal error and decline to address Respondents' argument on this ground. *See Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (noting when an appellant fails to cite any supporting authority for a position and makes conclusory arguments, the appellant abandons the issue on appeal); Rule 208(b), SCACR (stating that, for appellate review of an issue to occur, the issue must be set forth in a statement of issues and argument).

C. Limitation of Recovery

Respondents argue the probate court erred in failing to rule on certain beneficiaries' prospective entitlement to additional proceeds from the Estate should Respondents prevail on appeal. We find this issue is not properly before this court.

Respondents did not raise this issue either to the probate court or to the circuit court. Accordingly, we find it is unpreserved for review on appeal. *See 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 [circuit court] to be preserved for appellate review." (citation omitted)). Further, Respondents cite no legal authority to support their position, instead relying on a brief factual argument, which we find insufficient as a matter of law. *See Mulherin–Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593–94 (Ct. App. 2005) (finding party abandoned an issue on appeal by failing to cite any supporting authority and making only conclusory arguments).

D. Respondents' Attorney's Fees

Next, Respondents claim the probate court improperly limited their attorney's post-trial request for additional attorney's fees, citing to the common fund doctrine. Because we reverse the probate court's award of attorney's fees to Respondents' counsel, we decline to address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate courts need not address remaining issues when the resolution of a prior issue is dispositive).

E. Unclean Hands

Last, Respondents claim the probate court erred in granting Appellant equitable relief because Appellant acted with unclean hands. We find this argument is unpreserved for our review.

Neither the probate court nor the circuit court ruled on whether Appellant acted with unclean hands. Respondents' failure to raise this issue to either court precludes this court's review on appeal. *See Wilke*, 330 S.C. at 76, 497 S.E.2d at 733 ("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 [circuit court] to be preserved for appellate review." (citation omitted)); *Rock Hill Nat'l Bank v. Honeycutt*, 289 S.C. 98, 104, 344 S.E.2d 875, 879 (Ct. App. 1986) (stating because the theory of unclean hands was not pled or raised to the trial judge, it could not be raised on appeal).

CONCLUSION

Accordingly, we **AFFIRM** the circuit court's decision upholding the probate court's order as to all issues except Respondent's counsel's attorney's fees. Because the common fund doctrine does not apply under these facts, we **REVERSE** the award of attorney's fees to Respondents' counsel. Based on our conclusion that Respondents—not the Estate—must pay for Respondent's counsel's attorney's fees, we **REMAND** the issue of each beneficiary's share of the Estate to the probate court for a determination consistent with this court's opinion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

HUFF, J., concurs.

FEW, A.J., concurring in part and dissenting in part: I concur with the majority in all but one respect—I would reverse the decision to deny Sullivan's request for attorney's fees and expenses for the petition for settlement. In my view, the probate judge's denial of Sullivan's request for fees and expenses was driven by his disagreement with Sullivan's decision to file a partition action and ultimately sell the estate's interest in the real estate. Sullivan had the right to partition the land pursuant to Kay's will and the probate code and, thus, it was within his discretion to do so. Additionally, as the probate court found in its order and the majority explains in Part II. A of its opinion, Sullivan did not act in bad faith during his administration of the estate.

Moreover, the probate code required Sullivan to file a petition for settlement. *See* S.C. Code Ann. § 62-3-1001(a)(3) (Supp. 2015) (requiring a personal representative to file "an application for settlement of the estate to consider the final accounting or approve an accounting and distribution and adjudicate the final settlement and distribution of the estate"). Moses and Brown requested the hearing on Sullivan's petition for settlement, and at the hearing, Sullivan defended his decision to seek a partition and sell the real estate. Because the probate code provides a personal representative who "defends or prosecutes any proceeding in good faith" is "entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred," S.C. Code Ann. § 62-3-720 (Supp. 2015), and Sullivan filed the petition for settlement and appeared at the hearing in good faith, I would find he is entitled to reasonable attorney's fees and expenses.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Timothy McMahan, Appellant/Respondent,

v.

S.C. Department of Education-Transportation, Employer, and State Accident Fund, Carrier, Respondents/Appellants.

Appellate Case No. 2014-002294

Appeal From The Workers' Compensation Commission

Opinion No. 5415
Heard March 15, 2016 – Filed June 15, 2016

REVERSED

Kevin B. Smith, of Hoffman Law Firm, of North Charleston, for Appellant/Respondent.

J. Gabriel Coggiola and George Trask Miars, Jr., both of Willson, Jones, Carter, & Baxley, P.A., of Columbia, for Respondents/Appellants.

WILLIAMS, J.: In this cross-appeal arising from a workers' compensation action, the estate of Appellant/Respondent Timothy McMahan (the Estate) appeals the Appellate Panel of the Workers' Compensation Commission's (the Appellate Panel) decision to deny the Estate permanent total disability benefits based upon its conclusion that McMahan had not attained maximum medical improvement (MMI)

prior to his death. Respondents/Appellants South Carolina Department of Education and the State Accident Fund (collectively "SCDOE") cross-appeal, arguing the Appellate Panel erred in omitting a finding that McMahan was barred from receiving posthumous permanent disability benefits pursuant to section 42-9-280 of the South Carolina Code (2015). In the alternative, SCDOE claims that, even if the Estate could recover benefits after his death, McMahan's paraplegia would cause his disability award to abate pursuant to subsection 42-9-10(C) of the South Carolina Code (2015). SCDOE also argues the Appellate Panel should have included in its order a finding that the award of disability benefits violated SCDOE's due process rights. We reverse.

FACTS/PROCEDURAL HISTORY

On June 15, 2011, McMahan was working for SCDOE as a bus mechanic when a bus he was repairing fell on top of him, crushing his spine. McMahan suffered a T-12 compression fracture and underwent two back surgeries at the Medical University of South Carolina (MUSC) on June 16, 2011, and October 10, 2011. Dr. Raymond Turner, a neurosurgeon at MUSC, performed both surgeries.[1] During McMahan's last visit at MUSC, he indicated he would be moving to Tennessee and requested a transfer of care and sufficient pain medication to last through his transfer.

McMahan subsequently moved to Tennessee with his wife to care for his elderly parents. McMahan's medical records indicated he saw Dr. Patrick Bolt, the physician SCDOE authorized to treat McMahan, on April 23, 2012. McMahan again visited Dr. Bolt's practice on May 11, 2012, at which time McMahan was evaluated by Dr. Bolt's physician's assistant, who discussed his evaluation and physical examination with Dr. Bolt that same day.

At McMahan's initial visit, Dr. Bolt noted McMahan's chief complaint was low back pain, particularly in his left lower extremity. Dr. Bolt's records indicated McMahan "walk[ed] with a markedly pitched forward gait . . . . He [wa]s only

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[1] Specifically, McMahan underwent a T-12 corpectomy and fusion on June 16. Due to hardware failure from the initial surgery, Dr. Turner performed a second surgery on October 10, at which time McMahan received a T-11, T-12, and L-1 laminectomy and bilateral foraminotomies—with placements of pedicle screws at his T-10 and L-2 vertebrae—and a corrective T-12 corpectomy and fusion from his T-10 to L-2 vertebrae.

able to straighten to neutral, he [wa]s able to flex to 80% of normal. . . . His quadriceps [we]re 3/10 on the left, hip flexors [we]re 3/10 on the left, otherwise full strength in the lower extremities." In the "discussion/plan" portion of Dr. Bolt's notes, he stated the following:

> I have declined to take over [McMahan's] pain management as this was a stipulation to my seeing the patient[;] [I] was [to see him] only for a surgical opinion. I have recommended that the patient be placed in pain management in the Knoxville area. . . . I will see the patient back after the imaging studies are obtained. We will see if there is anything that may be recommended further from a surgical standpoint. Apparently, the patient is already at maximum medical improvement but, again, I have no records to confirm this. There is no change in restrictions at this time.

Dr. Bolt performed X-rays during the initial visit and ordered an updated MRI, a CT scan, and a duplex scan on that date. After a review of those scans and McMahan's return visit on May 11, 2012, Dr. Bolt noted McMahan's symptoms were "exactly the same" as those from his prior visit. Dr. Bolt did not observe any new neural pinches on the MRI but ordered an EMG to rule out any radiculopathies.

McMahan died from an unrelated heart condition on October 6, 2012. On February 27, 2013, Dr. Bolt, as the authorized treating physician, completed a Form 14B for the Workers' Compensation Commission, indicating the date of McMahan's MMI was April 23, 2012. In addition, Dr. Bolt explained his conclusion regarding McMahan's impairment, stating "he had thought [McMahan] was previously at [MMI], [but] apparently that was not the case." According to Dr. Bolt, McMahan was at MMI when he saw McMahan on April 23, 2012. Dr. Bolt believed McMahan was totally disabled given his limited ability to walk and his need for a wheelchair. Based upon McMahan's spinal cord injury and a review of the American Medical Association (AMA) guidelines, Dr. Bolt concluded McMahan sustained a 54% impairment to his whole person.

The Estate subsequently filed a Form 50 on May 23, 2013, alleging McMahan sustained injuries to his head, brain, back, internal organs, teeth, legs, mouth, and ribs in the course and scope of his employment. SCDOE filed a Form 51 on June

13, 2013, admitting injury to McMahan's back and denying all other claims. The single commissioner held a hearing on August 15, 2013, and found McMahan reached MMI prior to his death. Further, the single commissioner concluded the Estate was entitled to total disability benefits under section 42-9-30(21) of the South Carolina Code (2015) based upon a 50% or greater loss of use to McMahan's back. Because McMahan was entitled to compensation pursuant to section 42-9-30, the single commissioner concluded the claim did not abate under the statute and, therefore, the Estate was entitled to the unpaid balance of McMahan's permanent and total disability benefits as prescribed by section 42-9-280.

SCDOE timely appealed to the Appellate Panel, and a review hearing was held on July 22, 2014. By order dated September 30, 2014, the Appellate Panel reversed the single commissioner's decision, finding McMahan was not at MMI prior to his death and, therefore, he was not entitled to permanent total disability benefits. This cross-appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act (APA) establishes the standard for judicial review of workers' compensation decisions. *Pierre v. Seaside Farms, Inc.,* 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). Under the APA, this court can reverse or modify the decision of the Appellate Panel when the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence considering the record as a whole. *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010).

LAW/ANALYSIS

I. The Estate's Appeal

The Estate appeals the Appellate Panel's decision to reverse the award of permanent total disability benefits in its favor, arguing the only medical evidence in the record established McMahan attained MMI prior to his death. We agree.

Section 42-9-280 addresses situations like the instant case in which an injured claimant later dies from a cause unrelated to the workplace injury. Specifically, section 42-9-280 provides the following:

> When an employee receives or is entitled to compensation under this title for an injury covered by the second paragraph of [s]ection 42-9-10[2] or 42-9-30 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived. But if the death is due to a cause that is compensable under this title and the dependents of such employee are awarded compensation therefor, all right to unpaid compensation provided by this section shall cease and determine.

Because McMahan sustained an admitted injury to his back, for the Estate to be entitled to compensation pursuant to section 42-9-280, his injury must be covered under section 42-9-30.

Subsection 42-9-30(21) states, in relevant part,

> The compensation for partial loss of use of the back shall be such proportions of the periods of payment herein provided for total loss as such partial loss bears to total loss, except that in cases where there is fifty percent or more loss of use of the back the injured employee shall be presumed to have suffered total and permanent disability and compensated under [s]ection 42-9-10(B). The presumption set forth in this item is rebuttable . . . .

As an initial matter, we disagree that the dispositive question for purposes of the Estate's entitlement to compensation under section 42-9-280 is whether McMahan was at MMI prior to his death. Although the parties, the single commissioner, and the Appellate Panel focus on MMI as the lynchpin in the Estate's ability to recover

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[2] Subsection 42-9-10(B) of the South Carolina Code (2015) states that "[t]he loss of both hands, arms, shoulders, feet, legs, hips, or vision in both eyes, or any two thereof, constitutes total and permanent disability to be compensated according to the provisions of this section." Because McMahan's injury was to his back, this subsection is inapplicable.

benefits pursuant to section 42-9-280, we find this focus is misplaced. Based upon our review of case law and a plain reading of the applicable statutes, so long as McMahan sustained an injury covered by the second paragraph of section 42-9-10 or 42-9-30 and died from a cause unrelated to the injury, the Estate is entitled to recover the unpaid balance of McMahan's compensation. *See* § 42-9-280 (stating "[w]hen an employee receives or is entitled to compensation under this title for an injury covered by the second paragraph of [s]ection 42-9-10 or 42-9-30 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support").

Our conclusion is buttressed by *Dodge v. Bruccoli, Clark, Layman, Inc.*, in which we stated that MMI and disability are not always inextricably intertwined. 334 S.C. 574, 581, 514 S.E.2d 593, 596 (Ct. App. 1999) ("'Maximum medical improvement' is a distinctly different concept from 'disability.'"). Although a finding of MMI often coincides with an award of permanent disability benefits, *see Smith v. S.C. Dep't of Mental Health*, 335 S.C. 396, 399, 517 S.E.2d 694, 695–96 (1999) (holding it was appropriate to terminate temporary benefits in favor of permanent benefits upon a finding of MMI), an individual can also be permanently disabled and still have yet to achieve MMI.[3] Even if McMahan had not attained

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[3] We find the Appellate Panel misstated the law in its final order when it found "[i]t is well settled in South Carolina that the award of disability benefits is premature prior to the claimant reaching MMI." The Appellate Panel supported this statement by citing to *Smith* and stating our supreme court "not[ed] that the degree of permanent disability cannot be determined prior to MMI." The issue in *Smith*, however, was whether an employer could cease payment of temporary benefits if an employee had achieved MMI. 335 S.C. at 398, 517 S.E.2d at 695. Although our supreme court concluded it was appropriate to terminate temporary benefits in favor of permanent benefits upon a finding of MMI, the court never held an individual was precluded from a permanent disability award without a finding of MMI. *Id.* at 399–400, 517 S.E.2d at 695–96. We believe the correct interpretation of the law was aptly stated in *Bass v. Kenco Group*, wherein this court held as follows:

> A declaration of [MMI] is irrelevant to the award of permanent partial disability in this case. "[MMI]" is a distinctly different concept from "disability." . . . It is true that when a claimant receiving temporary benefits

MMI by the time of his death, we hold he could still be permanently and totally disabled for purposes of sections 42-9-30 and 42-9-280.

To that end, the only medical evidence in the record regarding the extent of McMahan's injury and ensuing disability is that of SCDOE's authorized treating physician, Dr. Bolt. After Dr. Bolt examined McMahan, ordered X-rays, an MRI, a CT scan, a duplex scan, and an EMG, and reviewed all of these scans—with the exception of the EMG, which was not administered before McMahan passed away—he concluded McMahan was totally disabled and assigned a 54% impairment rating to his whole person pursuant to the AMA guidelines. Considering the severity of McMahan's accident, his two back surgeries, and his general prognosis, we agree with Dr. Bolt's conclusion that McMahan was totally and permanently disabled. Further, Dr. Bolt was the treating physician approved by SCDOE, and if SCDOE was dissatisfied with Dr. Bolt's assessment and evaluation, then it should have ensured Dr. Bolt had all the relevant medical records it now claims precluded him from making an accurate diagnosis prior to transferring McMahan's care from Dr. Turner to Dr. Bolt. Because we find Dr. Bolt properly concluded McMahan had sustained a 54% impairment to his whole person, we likewise agree with the single commissioner's finding that McMahan was permanently and totally disabled pursuant to section 42-9-30(21).[4] As a result,

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> reaches [MMI] and is still disabled, temporary benefits are terminated and the claimant is awarded permanent benefits. . . . It does not follow, however, that a claimant who has not reached [MMI] is precluded from an award of permanent benefits.

366 S.C. 450, 466–67, 622 S.E.2d 577, 585–86 (Ct. App. 2005) (internal citations omitted).

[4] We are aware that a 54% impairment rating to the whole person does not necessarily equate to a 54% loss of use to the back under section 42-9-30. *See Sanders v. MeadWestvaco Corp.*, 371 S.C. 284, 292, 638 S.E.2d 66, 70 (Ct. App. 2006) (acknowledging that the commission is not bound by the opinion of medical experts and "may find a degree of disability different from that suggested by expert testimony"). However, because Dr. Bolt also concluded McMahan was totally disabled, and no medical evidence was submitted to the contrary, we find this is substantial evidence of McMahan's condition and support for the single commissioner's finding on this issue.

we find the Appellate Panel erred in denying the Estate's claim for compensation pursuant to section 42-9-280.

Furthermore, even if the Estate's entitlement to McMahan's benefits hinged on MMI, we nevertheless hold the Appellate Panel committed legal error in reversing the single commissioner and denying the Estate's claim for compensation. The *only* medical evidence in the record regarding MMI came from Dr. Bolt, and he stated on two separate occasions that he believed McMahan was at MMI. Although Dr. Bolt did not possess all of McMahan's medical records when he initially stated he was of the impression McMahan was at MMI, we find his evaluations and diagnostic testing were thorough and his conclusions were well-founded. We also disagree with SCDOE's argument that a recommendation for further pain management necessarily negated Dr. Bolt's MMI statement. *See Dodge*, 334 S.C. at 581, 514 S.E.2d at 596 (stating the fact a claimant has reached MMI does not preclude a finding the claimant still may require additional medical care or treatment); *Scruggs v. Tuscarora Yarns, Inc.*, 294 S.C. 47, 50, 362 S.E.2d 319, 321 (Ct. App. 1987) (holding substantial evidence supported a finding of MMI despite the claimant continuing to receive physical therapy). Rather, due to the nature and severity of McMahan's back injury, we find it very likely that McMahan would continue to need pain management for the remainder of his life, irrespective of an MMI diagnosis. Accordingly, we reverse the Appellate Panel's order and find permanent total disability benefits were warranted pursuant to section 42-9-280.

II. SCDOE's Cross-Appeal

SCDOE cross-appeals, arguing the Appellate Panel improperly omitted a finding that McMahan was barred from receiving posthumous permanent disability benefits because section 42-9-280 prohibits such an award after a claimant has died. Further, SCDOE claims a posthumous award of permanent disability would violate its right to due process because SCDOE was precluded from introducing evidence and cross-examining witnesses. Alternatively, SCDOE contends if this court finds a posthumous award is appropriate pursuant to section 42-9-280, then McMahan's award would abate because he was a paraplegic as defined by subsection 42-9-10(C). We address each argument in turn.

A. Posthumous Permanent Disability Determination

SCDOE first claims section 42-9-280 does not provide for a posthumous adjudication of a claimant's permanent disability. We disagree.

Section 42-9-280 plainly affords dependent survivors all benefits due to an injured claimant who suffered a physical loss when the claimant later dies from a cause unrelated to the workplace injury. *See* § 42-9-280; *see also Stone v. Roadway Express*, 367 S.C. 575, 578, 627 S.E.2d 695, 696 (2006) (finding section 42-9-280 clearly affords dependent survivors all benefits due to an injured worker who suffers a physical loss under sections 42-9-10 or 42-9-30 when the worker dies from an unrelated cause). Although SCDOE argues a prior award of disability benefits is necessary for section 42-9-280 to apply, the plain language of the statute states otherwise. Specifically, section 42-9-280 provides, in part, the following:

> When an employee receives or *is entitled to* compensation under this title for an injury covered by the second paragraph of [s]ection 42-9-10 or 42-9-30 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived.

(emphasis added). In the instant case, as stated in Part I, *supra*, McMahan was entitled to compensation for his work-related injury pursuant to section 42-9-30(21). Further, SCDOE accepted McMahan's claim and admitted he suffered a work-related injury to his back prior to his death. We find it would be absurd to preclude McMahan's widow from receiving compensation to which she is otherwise entitled solely because McMahan happened to die before the parties adjudicated McMahan's workers' compensation claim with finality. In our view, this is why the General Assembly specifically chose the language "receives or is entitled to compensation" when it drafted this statute, and we hold any different conclusion would run afoul of legislative intent. *See Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."); *see also Peay v. U.S. Silica Co.*, 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) ("[W]orkers' compensation statutes are construed

liberally in favor of coverage. It follows that any exception to workers' compensation coverage must be narrowly construed." (internal citation omitted)).

B. Due Process

In the alternative, SCDOE contends that, even if the Appellate Panel properly adjudicated McMahan's claim after his death, a posthumous award violated SCDOE's due process rights to conduct full discovery, to present and cross-examine witnesses, and to introduce evidence. We disagree.

The South Carolina Constitution provides that, in proceedings before administrative agencies, "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard." S.C. Const. art. I, § 22. Our supreme court has explained as follows:

> Procedural due process requirements are not technical; no particular form of procedure is necessary. The United States Supreme Court has held, however, that at a minimum certain elements must be present. These include (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses.

In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003) (internal citation omitted).

After reviewing the record, we find SCDOE never deposed or examined the witnesses who would have knowledge of McMahan's condition and treatment. The only witness SCDOE was unable to depose or require to testify prior to the hearing before the single commissioner was McMahan. Even if McMahan was living when the parties litigated his entitlement to benefits, McMahan's testimony would not be dispositive on the contested medical issues presented to the single commissioner. To the extent McMahan's untimely death prevented SCDOE from deposing him regarding issues like his work history, education, and transferable skills, we note that McMahan's widow testified at the hearing before the single commissioner on these topics. Despite her presence and testimony before the single commissioner, SCDOE chose not to cross-examine her.

Furthermore, SCDOE never scheduled Dr. Turner's deposition nor requested that he testify before the single commissioner, despite Dr. Turner performing McMahan's back surgeries and providing post-operative treatment at MUSC. SCDOE now claims on appeal that Dr. Turner's silence in his medical notes regarding MMI meant McMahan had not attained MMI when Dr. Turner transferred McMahan to Dr. Bolt's care. We find this argument unpersuasive. The *only* doctor who evaluated McMahan prior to his death, requested and reviewed certain testing, and submitted medical opinions regarding MMI, disability, and impairment was Dr. Bolt. Despite Dr. Bolt's involvement in McMahan's treatment immediately preceding McMahan's death, SCDOE chose not to proceed with his deposition even after noticing it for August 21, 2013. Had SCDOE taken Dr. Bolt's deposition, we believe some of the evidentiary issues of which it now complains could have been addressed.

In sum, we find SCDOE had the opportunity to present evidence and to examine and cross-examine the necessary witnesses but chose not to prior to the hearing before the single commissioner. As a result, we decline to find a posthumous award of benefits pursuant to section 42-9-280 violated SCDOE's due process rights. To the contrary, we believe the posthumous award of benefits satisfied procedural due process requirements. *See In re Vora*, 354 S.C. at 595, 582 S.E.2d at 416 (stating "[p]rocedural due process requirements are not technical" and "no particular form of procedure is necessary").

C. Paraplegia and Abatement

Last, SCDOE contends that, even if the Appellate Panel was permitted to adjudicate McMahan's entitlement to benefits after his death, the award would abate pursuant to subsection 42-9-10(C) as a result of McMahan's paraplegia. We disagree.

Subsection 42-9-10(C) states that "any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage . . . shall receive the benefits for life." Section 42-9-280 does not include awards made according to subsection 42-9-10(C) among those that survive a claimant's death from an unrelated cause. *See* § 42-9-280 (stating "[w]hen an employee receives or is entitled to compensation under this title for an injury covered by *the second paragraph of [s]ection 42-9-10* or 42-9-30 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance

of compensation shall be made to his next of kin dependent upon him for support" (emphasis added)).

SCDOE claims McMahan clearly suffered from paraplegia as a result of his accident. SCDOE highlights the emergency room doctor's discharge notes the day after McMahan's accident, in which the doctor stated, "[McMahan] was found to be paraplegic. CT scan obtained showed of T12 compression fracture with retropulsion." In response, the Estate argues this statement was not a diagnosis and paraplegia was not mentioned in the section of the discharge notes entitled "Diagnosis" and "Secondary Diagnosis." We agree with the Estate that this single statement is not dispositive on the issue of McMahan's paraplegia.

In addition, neither Dr. Turner nor Dr. Bolt diagnosed McMahan with paraplegia. Instead, the Estate references Dr. Turner's medical notes after McMahan's surgery in which Dr. Turned noted, "Patient is mobilizing well with a walker, given the initial spinal cord injury." Dr. Bolt's notes acknowledged McMahan's prior back surgery and his usage of a wheelchair. Dr. Bolt's records also indicated McMahan "walk[ed] with a markedly pitched forward gait . . . . He [wa]s only able to straighten to neutral, he [wa]s able to flex to 80% of normal. . . . His quadriceps [we]re 3/10 on the left, hip flexors [we]re 3/10 on the left, otherwise full strength in the lower extremities."

SCDOE urges this court to consider the case of *Reed-Richards v. Clemson University*, in which this court upheld a lifetime benefits award and found the term *paraplegic* included a diagnosis of incomplete paraplegia. 371 S.C. 304, 309, 638 S.E.2d 77, 80 (Ct. App. 2006). SCDOE argues the claimant's physical limitations in *Reed-Richards* are almost identical to McMahan's, noting Reed-Richards' need for a walker and her incontinence issues after her accident. *See id*., 638 S.E.2d at 78. We agree with SCDOE that Reed-Richards and McMahan suffered from several of the same problems after their accidents. However, unlike the claimant in *Reed-Richards*, McMahan was never diagnosed by either of his treating physicians with incomplete or total paraplegia. We are concerned with finding McMahan suffered from paraplegia when neither Dr. Turner nor Dr. Bolt affirmatively diagnosed him with this condition, despite McMahan's spinal cord injury and their ability to observe his progress post-accident. Further, we note SCDOE denied McMahan's claim for injury to his legs as a result of the accident, instead taking the position that McMahan's legs were not affected and not compensable injuries.

Given the foregoing, we find it would be illogical to permit SCDOE to deny McMahan's injuries to his legs at the outset for treatment purposes but then argue his legs were affected for purposes of establishing paraplegia under section 42-9-10(C) so as to preclude the Estate from receiving his benefits pursuant to section 42-9-280. Accordingly, we reject SCDOE's argument and find McMahan's award does not abate pursuant to section 42-9-10(C).

CONCLUSION

Based on the foregoing, the Appellate Panel's decision is

REVERSED.

LOCKEMY, C.J, and MCDONALD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Co., Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated, Appellants,

v.

Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Homes Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund, Respondents.

Appellate Case No. 2014-000963

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5416
Submitted December 1, 2015 – Filed June 15, 2016

AFFIRMED

James Edward Bradley and S. Jahue Moore, both of Moore Taylor Law Firm, P.A., of West Columbia, for Appellants.

William W. Wilkins and Burl F. Williams, of Nexsen Pruet, LLC, of Greenville, for Respondents; James Lynn Werner and Lawrence M. Hershon, of Parker Poe Adams & Bernstein LLP, of Columbia, for Respondent South Carolina Home Builders Self Insurers Fund and Respondents Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund; and Pope D. Johnson, III, of Johnson & Barnette, LLP, of Columbia, for Respondents Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund.

WILLIAMS, J: In this civil matter, Allen Patterson and several others[1] (collectively "Appellants") appeal the circuit court's grant of the South Carolina Home Builders Self Insurers Fund (the Fund) and its trustees' (collectively "Respondents") Rule 12(b)(6), SCRCP, motion to dismiss. Appellants argue the court erred in (1) finding the Fund was not a trust; (2) ruling the action involved derivative claims subject to the pleading requirements of Rule 23(b)(1), SCRCP; and (3) holding Appellants' complaint did not comply with such requirements. We affirm.

FACTS/PROCEDURAL HISTORY

Home Builders Association of South Carolina, Inc. (HBASC) is a nonprofit corporation organized under the laws of South Carolina. HBASC's membership is comprised of individual and corporate homebuilders throughout the state. On September 27, 1995, HBASC created the Fund in a document titled "Agreement and Declaration of Trust" (the Agreement). Pursuant to the Agreement with

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[1] The other named appellants in this matter are Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC.

HBASC, as the "Settlor," the contemporaneously formed "Board of Trustees" (the Board) was to direct the affairs of the Fund. According to the Agreement, the Fund's purpose was to meet and fulfill HBASC members' obligations and liabilities under the South Carolina Workers' Compensation Act[2] (the Act).

The Fund is regulated and controlled by the South Carolina Workers' Compensation Commission (the Commission) and is not an insurance company. To become a member of the Fund and satisfy workers' compensation obligations under the Act, a homebuilder must first submit an application to the Commission. If the Commission approves the application, then the homebuilder receives a certificate confirming membership in the Fund. Five weeks following approval, the Fund begins to bill the new member for the premium relating to its business. Each Fund member pays a predetermined rate for protection from workers' compensation claims of its employees. Additionally, each member is jointly and severally liable for the obligations of the Fund.

Appellants are members of the Fund. On February 16, 2012, Appellants filed a complaint (First Complaint) against Respondents, bringing causes of action for, *inter alia*, breach of fiduciary duty, breach of trust, and breach of contract. Appellants alleged the Board breached its fiduciary duties by voting to remove approximately $5 million from the Fund to establish a separate member-owned insurance company that Appellants argue would not provide any benefit to existing Fund members.[3]

After Appellants amended the First Complaint, Respondents moved to dismiss under Rule 12(b)(6), SCRCP, arguing Appellants failed to meet the pleading requirements for derivative suits under Rule 23(b)(1), SCRCP. Respondents alternatively asserted the suit involved the internal affairs of a trust and, thus, was under the exclusive jurisdiction of the probate court pursuant to section 62-7-201 of the South Carolina Code (Supp. 2015).

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[2] S.C. Code Ann. §§ 42-1-10 through -19-50 (2015 & Supp. 2015).

[3] The $5 million transfer to a new mutual insurance company was ratified by 96.5% of Fund members and approved by the Commission. Respondents returned the $5 million to the Fund after failing to reach an agreement with HBASC on the formation of the company.

On March 4, 2013, the circuit court accepted Respondents' alternative argument and dismissed the action without prejudice, holding it lacked subject matter jurisdiction to hear the case. The court ruled Appellants must initially file the action in probate court, but could subsequently remove it to circuit court under section 62-1-302(d)(4) of the South Carolina Code (Supp. 2015).

Appellants filed another complaint (Second Complaint) on April 9, 2013, in probate court and moved to remove the case to circuit court. On April 22, 2013, the probate court granted Appellants' motion to remove. In the circuit court, Respondents again filed a motion to dismiss the Second Complaint, arguing the lawsuit was a shareholder derivative action and Appellants failed to comply with the pleading requirements of Rule 23(b)(1). On November 8, 2013, the circuit court denied Respondents' motion to dismiss, holding the Fund was a trust and, as such, was not subject to the pleading requirements of Rule 23(b)(1).

Respondents subsequently filed a Rule 59(e), SCRCP, motion to alter or amend judgment. The circuit court granted Respondents' motion on February 11, 2014, and dismissed Appellants' Second Complaint.[4] In reaching its decision, the court found the Fund was not a trust, but instead resembled an unincorporated association. The court further explained the "gravamen of the [Appellants' c]omplaint alleges that the [F]und has been injured, not that the members have been injured." Thus, the court found the claims were typical of derivative claims subject to the pleading requirements of Rule 23(b)(1), requiring particularized allegations that Appellants first made a demand on the Board to obtain the relief they sought. The court found Appellants' complaint did not include sufficient allegations of such a demand and, therefore, did not comply with Rule 23(b)(1).

The circuit court, however, recognized Respondents had agreed to accept a January 20, 2013 letter from Appellants as a demand under Rule 23. After giving Respondents sixty days to respond to the letter, the court ruled Appellants "may

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[4] Upon our review of the record on appeal, we cannot determine whether the Agreement was attached to the Second Complaint. Nevertheless, given that no party raised an issue on appeal regarding the circuit court's review of the Agreement under a Rule 12(b)(6) motion, we find it is the law of the case. *See Trans. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance.").

pursue whatever legal action they determine is appropriate." On March 3, 2014, Appellants filed a motion to alter or amend the order of dismissal, which the circuit court denied. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in finding the Fund was not a trust?

II. Did the circuit court err in ruling the action involved derivative claims subject to Rule 23(b)(1), SCRCP?

III. Did the circuit court err in holding Appellants' complaint did not comply with the pleading requirements of Rule 23(b)(1), SCRCP?

STANDARD OF REVIEW

The appellate court applies the same standard of review as the circuit court in reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case." *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003). "The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 149, 714 S.E.2d 537, 539 (2011).

LAW/ANALYSIS

I. Unincorporated Association or Trust

A. Judicial Estoppel

As a preliminary matter, Appellants contend Respondents are judicially estopped from arguing the Fund is not a trust because Respondents previously took an inconsistent position in their first motion to dismiss Appellants' First Complaint. We disagree.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). "The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary." *Id.* To prevail on a judicial estoppel claim, a party must prove the following:

> (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Id. at 215–16, 592 S.E.2d at 632. In South Carolina, the doctrine of judicial estoppel applies only to matters of fact, not conclusions of law. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997).

In its motion to dismiss Appellant's First Complaint, Respondents argued Appellants failed to meet the pleading requirements for derivative suits under Rule 23(b)(1). Respondents alternatively asserted the suit involved the internal affairs of a trust and, thus, was under the exclusive jurisdiction of the probate court. The circuit court accepted Respondents' alternative argument when it dismissed the case for lack of subject matter jurisdiction. After Appellants filed their Second Complaint in probate court and removed the case to circuit court, Respondents filed another motion to dismiss, contending the Fund was not a trust.

Here, Respondents have not misrepresented facts or changed their version of events to gain an advantage in the instant litigation. *See Bailey*, 327 S.C. at 252, 489 S.E.2d at 477 ("When a party has formally asserted a certain version of the *facts* in litigation, he cannot later change those facts when the initial version no longer suits him." (emphasis added)). Rather, Respondents argued alternative legal theories concerning the essence of the Fund. *See id.* at 251, 489 S.E.2d at 477 (stating the doctrine of judicial estoppel "does not apply to conclusions of law or

assertions of legal theories"). Therefore, we find the doctrine of judicial estoppel is inapplicable to this case.

B. Merits

As to the merits of this issue, Appellants argue the circuit court erred in finding the Fund was not a trust. We disagree.

"A trust is an 'arrangement whereby property is transferred with intention that it be administered by [a] trustee for another's benefit.'" *State v. Parris*, 363 S.C. 477, 482, 611 S.E.2d 501, 503 (2005) (quoting *State v. Jackson*, 338 S.C. 565, 570, 527 S.E.2d 367, 370 (Ct. App. 2000)). To prove the existence of a trust, one must show (1) a declaration creating the trust, (2) a trust *res*, and (3) designated beneficiaries. *Whetstone v. Whetstone*, 309 S.C. 227, 231, 420 S.E.2d 877, 879 (Ct. App. 1992).

"An unincorporated association is a body of individual persons organized without a charter for the prosecution of some common enterprise." *Graham v. Lloyd's of London*, 296 S.C. 249, 255, 371 S.E.2d 801, 804 (Ct. App. 1988). An unincorporated association is not a legal entity separate from its members. *Id.* Moreover, the liability of its members is joint and several. *Elliott v. Greer Presbyterian Church*, 181 S.C. 84, 96, 186 S.E 651, 658 (1936); *see also* S.C. Code Ann. § 15-35-170 (2005) ("On judgment being obtained against an unincorporated association[,] . . . the individual property of any copartner or member thereof found in the State shall be liable to judgment and execution for satisfaction of any such judgment.").

We acknowledge that, at first glance, the Agreement contains language that could be indicative of the Fund being a trust. The Agreement refers to HBASC as the "Settlor." Further, the Agreement grants the Board all powers conferred by the South Carolina Uniform Trustee's Powers Act[5] and authorizes it to invest assets of the Fund. *Cf.* S.C. Code Ann. § 62-7-933 (Supp. 2015) (providing the prudent investor rule for trustees). Additionally, the Agreement mentions the Fund's

[5] The South Carolina Uniform Trustee's Powers Act was repealed by the South Carolina Uniform Trust Code in 2005. *See* Act No. 66, 2005 S.C. Acts 280–518 (codified as amended at S.C. Code Ann. §§ 62-7-101 through -1106 (Supp. 2015)).

compliance with the rule against perpetuities and states the situs of the Fund is the State of South Carolina.

The Agreement, however, also contains provisions usually associated with business corporations. The Board, for example, is elected by the Fund's members. *Cf.* S.C. Code Ann. § 33-8-103(d) (2006) (providing for the election of board of directors by the shareholders). In addition, the Agreement provides notice requirements for regular and special meetings of the Board. *Cf.* S.C. Code Ann. § 33-8-220 (2006) (stating the notice requirements for meetings of the board of directors). Likewise, the Agreement requires that the Board establish an office to house the Fund's books and records. *Cf.* S.C. Code Ann. § 33-16-101 (2006) (requiring corporations to maintain a principal office for corporate records). Under the Agreement, the Fund must indemnify the Board for negligence in all actions made in good faith. *Cf.* S.C. Code Ann. § 33-8-510 (2006) (granting authority to corporations to indemnify board of directors for actions made in good faith). Moreover, the Agreement authorizes the Board to obtain liability insurance at the expense of the Fund for all actions, except those made in bad faith or in gross negligence. *Cf.* S.C. Code Ann. § 33-8-570 (2006) (allowing corporations to purchase and maintain liability insurance for their board of directors).

Based upon our review of the Agreement and applicable law, we find the circuit court correctly held the Fund was not a trust. *See* 1 S. ALAN MEDLIN, ESTATE PLANNING IN SOUTH CAROLINA: THE LAW OF WILLS AND TRUSTS § 501.1 (2002) (stating "a settlor may fail to create a trust despite using the word trust"). While the Agreement—arguably a declaration—most likely satisfies the first element for creating a trust, Appellants cannot prove the remaining elements. *See Whetstone*, 309 S.C. at 231, 420 S.E.2d at 879. First, HBASC did not transfer any money or property to the Board to hold in trust for the Fund's members. *See* S.C. Code Ann. § 62-7-401 (Supp. 2015) (stating a trust may be created by a "transfer of property to another person as trustee"); *Whetstone*, 309 S.C. at 231, 420 S.E.2d at 879 (holding one must show a trust *res* to prove the existence of a trust); MEDLIN, *supra*, § 501.1 (noting "[a] settlor cannot create a trust in property not currently owned"). After the Fund was created, its members began to contribute membership dues and premiums into the Fund in exchange for protection for its workers' compensation obligations.

Second, the Agreement contains no provision for "beneficiaries." *See* S.C. Code Ann. § 62-7-402(a)(3) (Supp. 2015) (requiring a trust to have definite

beneficiaries); § 62-7-402(c) ("A beneficiary is definite if the beneficiary can be ascertained now or in the future . . . ."). Homebuilders must apply to become Fund members. Further, a third party—the Commission—must approve Fund members. Thus, even assuming the Agreement is a declaration of trust, potential Fund members are not ascertainable from the Agreement.

Moreover, we agree with the circuit court that the Fund resembles an unincorporated association. *See Graham*, 296 S.C. at 255, 371 S.E.2d at 804 (holding an unincorporated association is a "body of individual persons organized without a charter for the prosecution of some common enterprise"). The Fund is a common enterprise of homebuilders who have voluntarily joined together to form a fund to provide workers' compensation coverage for their businesses. Additionally, the Fund's members are joint and severally liable for any shortfall in Fund assets. *See Elliott*, 181 S.C. at 96, 186 S.E. at 658 (stating the liability of an unincorporated association's members is joint and several).

Therefore, we find the circuit court properly concluded the Fund was an unincorporated association and not a trust.

II. Direct or Derivative Claims

Appellants next argue their claims are not derivative and, thus, do not need to comply with the pleading requirements of Rule 23(b)(1), SCRCP. We disagree.

At the outset, because Rule 23(b)(1) covers derivative suits for both corporations and unincorporated associations, we find that principles of South Carolina law concerning derivative suits for corporations apply in this case. *See* Rule 23(b)(1), SCRCP (outlining the requirements for "derivative action[s] brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association").

"In South Carolina, the authority to direct the business and affairs of a corporation is delegated to a board of directors, not the shareholders." *Carolina First Corp. v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2000). Individual shareholders may not directly sue corporate directors for losses suffered by the corporation. *Babb v. Rothrock*, 303 S.C. 462, 464, 401 S.E.2d 418, 419 (1991). "An action seeking to remedy a loss to the corporation is generally a derivative one." *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001)

(quoting *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995)).

"A derivative action is, in essence, a challenge to a board's managerial authority." *Whittle*, 343 S.C. at 408, 539 S.E.2d at 187. "[A] shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder." *Brown*, 348 S.C. at 49, 557 S.E.2d at 684 (quoting *Hite*, 305 S.C. at 361, 409 S.E.2d at 342).

Nevertheless, the general rule that a shareholder cannot bring a direct suit for injuries to a corporation has two exceptions: (1) when the shareholder suffers an injury separate and distinct from that suffered by other shareholders, and (2) when the alleged wrongdoer owes a fiduciary relationship to the shareholder and full relief cannot be accomplished through recovery by the corporation. *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 308, 728 S.E.2d 61, 65 (Ct. App. 2012) (quoting *Brown*, 348 S.C. at 49, 50, 557 S.E.2d at 684, 685).

In the instant case, Appellants allege the Board's decision to remove $5 million from the Fund harmed the Fund's ability to adequately cover its risks. Thus, the action is premised on the alleged harm to the overall Fund, not to individual members. Accordingly, we find the circuit court correctly held Appellants' claims were derivative and subject to the pleading requirements of Rule 23(b)(1). *See* Rule 23(b)(1), SCRCP (noting the rule applies to members bringing a derivative action to enforce a right of an unincorporated association); *Brown*, 348 S.C. at 49, 557 S.E.2d at 684 (stating "a shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder").

Appellants also argue their action falls under the fiduciary relationship exception to the general rule for derivative suits because the Board owed a special fiduciary duty to the Fund's members to protect the Fund's assets. *See Rice-Marko*, 398 S.C. at 308–09, 728 S.E.2d at 65–66. The circuit court did not rule on the special duty argument, and it is nowhere mentioned by Appellants in their complaints, the transcript of the motions hearing, or their Rule 59(e) motion to alter or amend judgment. Because Appellants raise this argument for the first time on appeal, we find the issue is not preserved for appellate review and decline to address it. *See Chastain v. Hiltabidle*, 381 S.C. 508, 514–15, 673 S.E.2d 826, 829 (Ct. App. 2009)

("[A]n appellate court cannot address an issue unless it was raised to and ruled upon by the [circuit] court.").

Therefore, we find the circuit court properly concluded Appellants' claims were derivative and, thus, subject to the requirements of Rule 23(b)(1).

III. Compliance with Rule 23(b)(1)

Finally, Appellants assert that, even if their claims are derivative, they properly complied with Rule 23(b)(1) by alleging a demand on the Board. We disagree.

In pursuing a derivative suit, shareholders must first make a demand on the board of directors to take the action they desire or allege that such demand would be futile. *Whittle*, 343 S.C. at 188, 539 S.E.2d at 409 (quoting *Allison ex rel. Gen. Motors Corp. v. Gen. Motors Corp.*, 604 F. Supp. 1106, 1112 (D. Del. 1985)). The purpose of the demand requirement is to ensure compliance with the most fundamental principle of corporate governance: directors are answerable to the shareholders and responsible for managing all aspects of corporate affairs. *Id.* (quoting *Gen. Motors Corp.*, 604 F. Supp. at 1117). "A demand alerts the board so that it may take the corrective action, if any, which it deems necessary." *Id.*

Rule 23(b)(1) governs the manner in which a shareholder must bring a derivative action and provides as follows:

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the

> reasons for his failure to obtain the action or for not making the effort. . . .

"The demand requirement of Rule 23 balances a shareholder's right to assert a derivative claim against a board's duty to decide whether to invest the resources of the corporation in pursuit of the shareholder's claim of a corporate wrong." *Whittle*, 343 S.C. at 187, 539 S.E.2d at 408 (quoting *Blasband v. Rales*, 971 F.2d 1034, 1048 (3d Cir. 1992)).

The heightened and particularized pleading requirements of Rule 23(b)(1) are intended to allow the court to perform a gatekeeping function to prevent the unrestrained use of derivative actions. *Id.* at 185, 539 S.E.2d at 408 (quoting 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 23.1.02[4] (3d ed. 2000)). "A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRCP, is properly dismissed pursuant to Rule 12(b)(6)." *Clearwater Tr. v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006).

This court has previously upheld the dismissal of a derivative suit when the shareholders' complaint failed to comply with Rule 23(b)(1). *See Whittle*, 343 S.C. at 184–91, 539 S.E.2d 406–10. In *Whittle*, a group of shareholders brought a derivative suit against a bank's parent corporation, seeking rescission of bonuses paid to various bank officers in the form of stock in another company. 343 S.C. at 181, 539 S.E.2d at 405. The shareholders alleged the bonuses were devised as a method of self-dealing to the detriment of the bank and its parent corporation. *Id.* at 182, 539 S.E.2d at 406. The circuit court granted the bank and other defendants' motion to dismiss the action, finding the shareholders failed to allege particularized facts showing they complied with the demand requirements of Rule 23(b)(1) and the demand thereafter was wrongfully refused. *Id.* at 183, 539 S.E.2d at 406. In their complaint, the shareholders only alleged they demanded "certain information" and "certain actions" and made a "supplemental demand." *Id.* at 189, 539 S.E.2d at 409. Because the complaint did not contain allegations regarding what the shareholders demanded and what the bank's board of directors rejected, this court held the shareholders failed to comply with the demand requirements of Rule 23(b)(1) and affirmed the circuit court's dismissal of the action. *Id.*

In the instant case, Appellants assert they complied with Rule 23(b)(1), pointing to paragraph eight of their complaint:

> 8. To the extent required by South Carolina Rule of Civil Procedure 23, the [Appellants] allege:
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> > a. The [Appellants] were beneficiaries of the trust at all times relevant including when the transactions complained of were made.
> >
> > b. The [Appellants], their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to Counsel for the [Respondents], meetings with counsel for the [Respondents], correspondence to the Trust and a previous lawsuit to no avail.

Contrary to Appellants' contention, we find they failed to allege sufficient particularized facts in their complaint to demonstrate they made a demand on the Board. We first note Appellants' allegations concerning their demand are vague and similar to those made in *Whittle*. 343 S.C. at 189, 539 S.E.2d at 406 (noting the shareholders only alleged in their complaint that they demanded "certain information" and "certain actions" and made a "supplemental demand"). In paragraph 41 of their complaint, Appellants requested that the circuit court (1) remove the entire Board for their breach of fiduciary duties, (2) provide for the election of a new Board, (3) order that all assets be returned to the Fund, (3) order all damages incurred and money taken from the Fund be awarded, (4) enjoin future violations of fiduciary duties, and (5) award Appellants actual and punitive damages.

In paragraph eight of the complaint, however, Appellants provided no guidance on exactly what recourse they sought from the Board prior to this suit. Therefore, the circuit court could not discern whether Appellants simply requested the $5 million be returned to the Fund or whether they, among other things, demanded that members of the Board resign or called for a new election. As a result, the circuit court was not in a position to determine whether the Board's refusal of the demand was wrongful and decide whether to allow the lawsuit to proceed. *See Whittle*, 343 S.C. at 189, 539 S.E.2d at 409 (holding shareholders did not comply with Rule 23(b)(1) because their complaint did not contain allegations regarding what they demanded and what the board of directors rejected).

Appellants nevertheless counter that their January 20, 2013 letter—a proper demand on the Board—was incorporated by reference in their Second Complaint.[6] We find Appellants did not specifically incorporate the letter by reference in merely stating they sent "correspondence" to Respondents. Moreover, Appellants conceded the letter was not attached to the complaint, but rather was only included with their memorandum in opposition to Respondents' motion to dismiss. *See* Rule 10(c), SCRCP ("A copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading."); *McCormick v. England*, 328 S.C. 627, 632–33, 494 S.E.2d 431, 433 (Ct. App. 1997) ("A ruling on a motion to dismiss a claim must be based solely on the allegations set forth on the face of the complaint.").

Therefore, we find the circuit court properly concluded that Appellants failed to comply with the requirements of Rule 23(b)(1).

CONCLUSION

Based on the foregoing, we hold the circuit court properly concluded the Fund was not a trust, Appellants' claims were derivative, and Appellants failed to comply with the pleading requirements of Rule 23(b)(1). Accordingly, the circuit court's grant of Respondents' motion to dismiss is

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[6] After Respondents alerted Appellants to the Rule 23(b)(1) requirements by moving to dismiss the First Complaint for failure to comply with the rule, Appellants sent the January 20, 2013 demand letter. Respondents replied, stating they were withholding a substantive response until the circuit court ruled on their motion to dismiss. The circuit court dismissed the First Complaint for lack of subject matter jurisdiction on March 5, 2013. Respondents contend that, before they were able to provide a substantive reply, Appellants filed the Second Complaint in probate court on April 9, 2013, and removed the matter to circuit court. The circuit court then dismissed the Second Complaint and gave Respondents sixty days to respond to the demand letter, allowing Appellants to file another complaint that complied with Rule 23(b)(1). Appellants, however, instead chose to appeal the circuit court's dismissal.

AFFIRMED.[7]

HUFF and THOMAS, JJ., concur.

[7] We decide this case without oral argument pursuant to Rule 215, SCACR.