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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1180904

**Margaret Stockham, as personal representative of
the Estate of Herbert Stockham, deceased**

v.

**George Ladd, Virginia Ladd Tucker, and Constance Ladd
Moore,
as cotrustees of the Virginia C. Stockham Trust**

**Appeal from Jefferson Circuit Court
(CV-12-902305)**

WISE, Justice.

Margaret Stockham, as personal representative of the estate of Herbert Stockham, deceased ("Stockham"), appeals from a judgment of the

1180904

Jefferson Circuit Court, on remand from this Court, denying her motion for reimbursement of costs and attorney fees. We reverse and remand.

Background

This underlying action has been before this Court previously. Ladd v. Stockham, 209 So. 3d 457 (Ala. 2016). In that opinion, we summarized the factual background as follows:

"[Virginia] Ladd [was] a beneficiary of three trusts that each held preferred and common stock in SVI Corporation ('SVI'): the Kate F. Stockham Trust, the Herbert C. Stockham Trust, and the Virginia C. Stockham Trust (hereinafter referred to collectively as 'the trusts'). Ladd served as an individual cotrustee of the Kate F. Stockham Trust; Herbert Stockham ('Herbert') served as an individual cotrustee of both the Herbert C. Stockham Trust and the Virginia C. Stockham Trust. At all times relevant to these appeals, one or more predecessors of Wells Fargo Bank, N.A. ('Wells Fargo'), served as the corporate cotrustee of each of the trusts. At all times relevant to these appeals, Herbert served either on the board of directors or as an officer of SVI.

"In 1997, SVI's board of directors, on which Herbert then served, agreed to sell nearly all of SVI's assets to Crane Co. ('Crane') for \$60 million. The one asset Crane did not want to purchase was SVI's Birmingham plant and foundry facility because of potential environmental-contamination concerns. As a condition to the proposed sale, SVI agreed to manufacture an order of valves for Crane to be completed by May 1998. Before the sale between SVI and Crane could become final, SVI's shareholders had to pass a resolution approving of the

sale of substantially all of SVI's assets. Accordingly, SVI's board of directors notified SVI's shareholders that a meeting to consider such a resolution would be held on December 1, 1997.

"On December 1, 1997, SVI's board of directors held a meeting for SVI's shareholders to consider the resolution to sell substantially all of SVI's assets to Crane. Ladd attended that meeting. At the meeting, SVI's board of directors thoroughly explained the proposed sale. SVI's board of directors explained that, should the proposed sale be approved by the shareholders and following the completion of the manufacture of the valves Crane requested, SVI's board of directors would begin the process of dissolving SVI. An attorney hired by SVI's board of directors, Jim Hughey, stated at the meeting that proceeds from the proposed sale would allow SVI to redeem SVI's preferred stock 'in full' with 'something left over for the common shareholders.' An accountant hired by SVI's board of directors, Ron Travis, stated at the meeting that SVI would make the 'final liquidating distribution' 'three years down the road.'

"At the conclusion of the December 1, 1997, meeting, SVI's shareholders voted in favor of authorizing SVI's board of directors to sell substantially all of SVI's assets to Crane. Ladd, in her capacity as cotrustee of the Kate F. Stockham Trust, which held SVI stock, was entitled to vote on the sale issue; Ladd voted against the sale. On December 9, 1997, SVI and Crane entered into an agreement for the sale of SVI's assets.

"On April 30, 1998, SVI completed the manufacture of the valves Crane had ordered as part of the sale. Once the manufacturing of the valves was completed, SVI ceased operations and began to wind up its affairs. As part of winding

up its affairs, SVI had to remedy the environmental-contamination concerns with its Birmingham facility and dispose of that property. SVI also had to satisfy all outstanding liabilities, which included workers' compensation obligations, asbestos-exposure lawsuits, and product-liability lawsuits.

"SVI continued the winding up of its affairs until 2006, when it filed articles of dissolution. During that time, SVI continued to pay dividends on the preferred shares of SVI stock until September 2004, at which time the payment of dividends was suspended based on SVI's declining financial position. SVI never redeemed any of its stock as it had promised to do at the December 1, 1997, meeting. Throughout this period, the SVI board of directors informed its shareholders regularly of SVI's declining financial condition. For instance, in November 2004, SVI's board of directors informed SVI's shareholders that the suspension of the payment of dividends begun in September 2004 would remain in effect until SVI's liquidation. Also, in July 2007 SVI's board of directors informed SVI's shareholders that there would probably not be any funds to distribute to SVI's shareholders after SVI satisfied all of its outstanding obligations.

"Herbert resigned as cotrustee of the Virginia C. Stockham Trust on November 18, 2008, and he resigned as cotrustee of the Herbert C. Stockham Trust on November 25, 2008.

"On July 21, 2010, in an unrelated proceeding, the Herbert C. Stockham Trust, the Kate F. Stockham Trust, and the portion of the Virginia C. Stockham Trust that held SVI stock were terminated by an order of the Jefferson County Probate Court.

"On July 21, 2012, Ladd sued Herbert[, whose estate was subsequently substituted as a party], Wells Fargo, and other individual directors of SVI. Ladd alleged that Herbert had breached his fiduciary duties as cotrustee of the Herbert C. Stockham Trust and of the Virginia C. Stockham Trust and that Wells Fargo had breached its fiduciary duty as cotrustee of the trusts. Specifically, concerning Ladd's claim against Herbert, Ladd alleged that Herbert 'breached these fiduciary duties by managing SVI in such a way that the value of [the Herbert C. Stockham Trust and the Virginia C. Stockham Trust] was completely destroyed'; Ladd did not allege that Herbert, in his capacity as cotrustee of the Herbert C. Stockham Trust and the Virginia C. Stockham Trust, acted fraudulently. Ladd also asserted shareholder-derivative claims against Herbert and the other individual directors of SVI. Subsequently, Ladd amended her complaint several times. Ultimately, Ladd asserted nine claims against the defendants. The first two of Ladd's claims -- one against Herbert and one against Wells Fargo -- were characterized as 'direct claims'; the remaining seven claims were characterized as derivative claims against Herbert, Wells Fargo, and the other individual directors of SVI.

"On September 26, 2012, the defendants filed a motion to dismiss all of Ladd's claims against them. On June 18, 2013, the circuit court denied the defendants' motion to dismiss. The defendants were ordered to file answers to Ladd's complaint, which they did.

"On March 7, 2014, having conducted some discovery, Stockham and the individual directors of SVI filed a motion to dismiss as untimely all of Ladd's derivative claims asserted against them in their capacities as former directors of SVI. On May 8, 2014, the circuit court granted the motion and dismissed all the derivative claims against Stockham and the

individual directors of SVI; this order adjudicated all of Ladd's claims against the individual directors of SVI, leaving Stockham, Wells Fargo, and SVI as remaining defendants. On May 28, 2014, the circuit court certified its May 8, 2014, order as final pursuant to Rule 54(b), Ala. R. Civ. P. Ladd did not appeal the May 8, 2014, order dismissing her derivative claims against Stockham and the individual directors of SVI.

"After further discovery, Ladd, Stockham, and Wells Fargo filed motions for a summary judgment on Ladd's remaining claims. In her summary-judgment motion, Ladd argued that Herbert would have had knowledge of SVI's financial situation by virtue of his position on the board of directors and that, as cotrustee of the Herbert C. Stockham Trust and the Virginia C. Stockham Trust, he breached his fiduciary duty to Ladd by failing to inform Ladd of SVI's financial situation and 'by failing to take any action or demand that SVI redeem the preferred shares [of SVI stock held by the trusts] as [SVI] said it would at the time it said it would.' Stockham and Wells Fargo argued in their joint motion for a summary judgment that Ladd's claims were barred by the applicable statute of limitations and by the doctrine of laches. In addition to their joint motion, Stockham and Wells Fargo also filed individual motions for a summary judgment related to the claims asserted against them.

"On September 18, 2014, the circuit court entered a summary judgment in favor of Stockham and against Ladd

"....

"On October 20, 2014, Stockham filed a motion for 'reimbursement of fees and expenses.' In her motion, Stockham argued that, pursuant to Rule 54(d), Ala. R. Civ. P., §§ 19-3B-708 and -709, Ala. Code 1975, and § 34-3-60, Ala.

1180904

Code 1975, she is entitled to reimbursement for costs and attorney fees in defending Ladd's action against Herbert as cotrustee of the Herbert C. Stockham Trust and of the Virginia C. Stockham Trust. On January 14, 2015, the circuit court denied Stockham's motion. On January 23, 2015, Stockham cross-appealed from the circuit court's denial of her motion for costs and attorney fees."

209 So. 3d at 458-62 (footnotes omitted).

On appeal to this Court, Virginia Ladd¹ argued that the circuit court had erroneously found that her claim against Stockham was barred by the two-year statute of limitations. We determined that Ladd had not demonstrated that the circuit court had erred in entering a summary judgment for Stockham, and we affirmed the circuit court's judgment. We also stated: "This conclusion on the statute-of-limitations issue renders moot all of Ladd's remaining arguments concerning the separate and independent reasons the circuit court entered a summary judgment in favor of Stockham." 209 So. 3d at 469.

¹Virginia Ladd died on June 2, 2017. Afterward, George Ladd, Virginia Ladd Tucker, and Constance Ladd Moore, as personal representatives of her estate, were substituted as plaintiffs for Ladd in the underlying action. For the sake of consistency, we continue to refer to the plaintiffs as "Ladd" in this opinion.

In her cross-appeal, Stockham argued that the circuit court had erred in denying her motion seeking reimbursement of costs and attorney fees. This Court agreed with Stockham, stating, in relevant part:

"Stockham argues that the circuit court erred in denying her request for expenses and attorney fees under §§ 19-3B-708, 19-3B-709, and 34-3-60[, Ala. Code 1975]. Sections 19-3B-709 and 34-3-60 both allow for attorney fees to be assessed in cases concerning the 'administration' of a trust. Section 19-3B-709 provides, in pertinent part:

" '(a) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate for:

" '(1) expenses that were properly incurred in the administration of the trust, including the defense or prosecution of any action, whether successful or not, unless the trustee is determined to have willfully or wantonly committed a material breach of the trust.'

"Section 34-3-60 provides, in pertinent part:

" 'In all actions and proceedings in the probate courts and circuit courts and other courts of like jurisdiction, where there is involved the administration of a trust ... the court having jurisdiction of such action or proceeding may ascertain a reasonable attorney's fee, to be paid to the attorneys or solicitors representing the trust ...

and is authorized to tax as a part of the costs in such action or proceeding such reasonable attorney's fee....'

"The circuit court determined that Stockham was not entitled to attorney fees under those statutes for two reasons. First, the circuit court concluded that Herbert was not involved with the administration of the Herbert C. Stockham Trust and the Virginia C. Stockham Trust. The circuit court stated that '[t]his case did not involve the management and distribution of property held in a trust; rather, Ladd's action against Stockham alleged claims of breach of fiduciary duty for [Herbert's] failure to protect the Trusts' property as a former co-trustee and director of SVI.' Second, the circuit court concluded that Stockham was not entitled to attorney fees because Herbert was sued after he had resigned as cotrustee of the Herbert C. Stockham Trust and of the Virginia C. Stockham Trust.

"....

"... Ladd's breach-of-fiduciary-duty claim against Herbert is, in essence, that, while he was cotrustee of the Herbert C. Stockham Trust and of the Virginia C. Stockham Trust, Herbert should have taken actions to ensure that SVI would redeem the preferred shares of SVI stock held by the Herbert C. Stockham Trust and the Virginia C. Stockham Trust. According to Ladd, Herbert failed to take those actions while he was cotrustee, and that is the basis of Ladd's claim against Herbert. The circuit court's suggestion in its January 14, 2015, order that Ladd's breach-of-fiduciary-duty claim against Herbert was based on actions Herbert allegedly failed to take after he resigned as cotrustee is not consistent with its earlier order.

"Therefore, we conclude that the circuit court's holding that Stockham is not entitled to reimbursement for attorney fees and costs under §§ 19–3B–708, 19–3B–709, and 34–3–60 for the successful defense of Ladd's claim against Stockham is in error. Ladd's breach-of-fiduciary-duty claim against Herbert was based on actions Herbert took while acting as cotrustee of the Herbert C. Stockham Trust and of the Virginia C. Stockham Trust, and his actions concerned the assets of those trusts; Herbert was certainly involved in the administration of those trusts and was sued for decisions he made concerning assets held by those trusts. Under Regions [Bank v. Lowrey], 101 So. 3d 210 (Ala. 2012),] and Regions [Bank v. Lowrey], 154 So. 3d 101 (Ala. 2014),] a trustee is entitled to reimbursement of attorney fees and costs for the successful defense of a breach-of-fiduciary-duty claim against the trustee.

"Stockham also argues that the circuit court's holding that Stockham cannot recover attorney fees for the defense of Ladd's claim against Stockham because Herbert is no longer the cotrustee of the Herbert C. Stockham Trust and of the Virginia C. Stockham Trust is in error. ...

"....

"As in Morrison [v. Watkins], 20 Kan. App. 2d 411, 889 P. 2d 140 (1995),] Herbert was sued for actions taken -- or, more accurately stated, not taken -- while he was acting as the cotrustee of the Herbert C. Stockham Trust and of the Virginia C. Stockham Trust. As explained by the Morrison court, the mere fact that Herbert is no longer the cotrustee of the Herbert C. Stockham Trust and of the Virginia C. Stockham Trust is not a reason to deny Stockham reimbursement of costs or attorney fees. To hold otherwise would prevent trustees from defending themselves against even unjustifiable assaults,

1180904

which would ultimately frustrate the settlor's purpose in establishing the trust."

Ladd, 209 So. 3d at 470-74.

This Court then stated:

"Stockham has demonstrated that the circuit court exceeded its discretion in denying Stockham's request for reimbursement of costs and attorney fees under §§ 19–3B–708, 19–3B–709, and 34–3–60. Ladd's breach-of-fiduciary-duty claim against Herbert was based on Herbert's actions while he was cotrustee of the Herbert C. Stockham Trust and of the Virginia C. Stockham Trust. Herbert was certainly involved with the administration of the Herbert C. Stockham Trust and of the Virginia C. Stockham Trust; it is not relevant that Herbert was not serving as the cotrustee of those trusts at the time he was sued. Accordingly, we reverse the circuit court's judgment denying Stockham costs and attorney fees and remand the matter to the circuit court for it to reconsider Stockham's motion."

Ladd, 209 So. 3d at 474 (emphasis added).

On Remand to the Circuit Court

On remand to the circuit court, Ladd again filed an objection to Stockham's motion for costs and reimbursement of attorney fees and expenses. However, in that motion, she made more extensive allegations and arguments than she had made in her previous objection. One of the arguments Ladd raised for the first time was that Stockham was not

1180904

entitled to fees under § 19-3B-709, Ala. Code 1975, because Herbert Stockham had "committed a willful or wanton material breach of the trust." In response, Stockham argued that this Court's remand order did not open the door for the circuit court to revisit whether Herbert had committed a breach of trust.

On June 30, 2017, the circuit court entered an order that provided, in part:

"After careful consideration of the written submissions of the parties and extensive oral argument by counsel, the Court concludes that it is not bound by the prior ruling of [the previous circuit judge] regarding the conduct of Herbert Stockham with respect to its effect, if any, on his estate's request for attorneys' fees.

"Therefore, a hearing is set on August 17, 2017, at 9:30 A.M. to hear evidence and argument regarding the conduct of Herbert Stockham and what effect, if any, his conduct in handling the Stockham trust may have on his estate's request for attorneys' fees."

The circuit court conducted several hearings on remand. Thereafter, on July 31, 2019, the circuit court entered an order denying Stockham's motion for attorney fees and expenses based on its finding that Herbert

1180904

Stockham "did indeed commit material, willful breaches of trust in at least three independent ways...." This appeal followed.

Discussion

Stockham argues that Ladd waived any challenge to the estate's right to reimbursement by failing to assert -- at the summary-judgment stage, in opposition to the estate's motion for reimbursement, or in the previous appeal -- that Herbert Stockham "willfully or wantonly committed a material breach of trust." She also argues that the circuit court exceeded the scope of this Court's remand order by allowing Ladd to raise such an argument on remand.

In Scrushy v. Tucker, 70 So. 3d 289 (Ala. 2011), Richard Scrushy, a former director and former chief executive officer of HealthSouth Corporation ("HealthSouth"), a Delaware corporation, appealed from a judgment against him in a shareholder-derivative action that had been filed by Wade Tucker on behalf of nominal defendant HealthSouth. This Court set forth the relevant background of the case as follows:

"Certain aspects of this case have already come before us during this long and intricate litigation. See Scrushy v. Tucker, 955 So. 2d 988 (Ala. 2006) ('Scrushy,' sometimes

referred to herein as 'the bonus case'); and Ernst & Young, LLP v. Tucker, 940 So. 2d 269 (Ala. 2006) ('Tucker'). It was the first of a number of derivative actions to be commenced by various HealthSouth shareholders against Scrushy and other former HealthSouth officials and related parties in various forums including (1) the Jefferson Circuit Court, (2) the United States District Court for the Northern District of Alabama ('the Federal derivative actions'), and (3) the New Castle Chancery Court in Delaware, Biondi v. Scrushy, 820 A.2d 1148 (Del. Ch. 2003), restyled and resolved, In re HealthSouth Shareholders Litig., 845 A.2d 1096 (Del. Ch. 2003), aff'd, 847 A.2d 1121 (Del. 2004) (table) ('the Delaware derivative actions').

"....

"All HealthSouth derivative actions pending in the Jefferson Circuit Court were consolidated with Tucker's case no. CV-02-5212 or abated in its favor. ...

"In case no. CV-02-5212, the first claim to be presented for resolution was 'Scrushy's alleged breach of duty in accepting bonuses that HealthSouth was not legally obligated to pay,' Scrushy, 955 So. 2d at 998, because HealthSouth's earnings, which had formed the bases for the bonuses, were 'inflated,' along with Tucker's request for disgorgement of those bonuses. That issue initially arose on December 15, 2003, when Tucker moved for a partial summary judgment, seeking a return of incentive bonuses HealthSouth had paid Scrushy from 1996 through 2002. On September 21, 2005, Scrushy filed a cross-motion, seeking a partial summary judgment 'ordering that [he was] legally entitled to retain all bonus compensation received by him from HealthSouth, with the exception of annual bonuses received in 2001 and 2002, for which genuine issues of fact remain[ed].' In his brief in support

of that motion, Scrusy also challenged Tucker's standing 'to complain of alleged wrongdoing for the period prior to his stock purchase [i.e., August 18, 1998].' (Emphasis added.)

"On October 12, 2005, Tucker filed a document styled 'joinder of plaintiff' in which he joined the Wendell J. Cook, Sr., Testamentary Trust, John P. Cook, trustee ('Cook'), as a derivative plaintiff pursuant to Rule 20(a), Ala. R. Civ. P. The document was verified by an affidavit stating that Cook had owned shares of HealthSouth stock continuously since 1993.

"On January 3, 2006, the trial court denied Scrusy's motion in its entirety, but it granted, in part, Tucker's motion. With regard to the incentive bonuses paid to Scrusy in 1997 through 2002, the court held that 'HealthSouth [had] incurred actual losses and no bonus pool existed out of which the bonuses for [those] years could properly have been paid' and, consequently, that 'Scrusy [had been] unjustly enriched by [those] payments.' The court ordered Scrusy to return '\$47,828,106, representing the bonuses paid for the years 1997–2002, plus prejudgment interest.' Scrusy, 955 So. 2d at 995. In so doing, the trial court rejected Scrusy's challenge to standing. In that connection, it stated, in part:

" 'Another shareholder, [Cook], which held its HealthSouth shares continuously since 1993, joined as plaintiff herein under [Ala. R. Civ. P.] Rule 20(a) on October 12, 2005, and adopted Tucker's complaint in its entirety. No party objected. [Cook] is represented by the identical legal team that represents Tucker. For all purposes [Cook's] shareholding relates back to the original Tucker complaint. In re MAXXAM, Inc./Federated Development, 698 A.2d 949 (Del. Ch. 1996)(holding new shareholder plaintiff may be added even at a

late stage to cure shareholding defect of earlier plaintiff)....'

"The rest of the case proceeded to a trial without a jury, the parties having stipulated that resolution of the case turned on equitable claims to which the right to a trial by a jury did not apply and that the remedies were, likewise, equitable remedies. Indeed, resolution of the case was bolstered by a number of important stipulations. In particular, the parties stipulated that '[b]etween 1996 and March 18, 2003, certain executive, financial, and accounting managers at HealthSouth engaged in a conspiracy and fraud to overstate the financial health of HealthSouth in HealthSouth's financial statements.' It was stipulated that '[t]he public financial reports issued for HealthSouth after July 1, 1996, and before March 18, 2003, were false and unreliable, and materially overstated HealthSouth's net income and the net assets on HealthSouth's balance sheet.' The parties further stipulated that 'the crucial issue in the case, overshadowing all others, is whether or not Scrushy knew of the fraud or intentionally disregarded his responsibilities to HealthSouth.'

"On June 18, 2009, the trial court entered a final judgment 'in favor of Derivative Plaintiffs, Wade C. Tucker and the Wendell J. Cook, Sr., Testamentary Trust, John P. Cook, Trustee, for and on behalf of HealthSouth Corporation, and against Richard M. Scrushy,' for \$2,876,103,000. In connection with its findings of fact, the trial court stated its 'firm and confident conclusion that Scrushy knew of and participated in the fraud from and after the summer of 1996' but that, in any event, 'Scrushy [had] clearly breached his fiduciary duty of loyalty by consciously disregarding his responsibilities to HealthSouth.' (Emphasis added.)

"For purposes of this appeal, three portions of the trial court's award are particularly pertinent. First, the court found that Scrushy had breached three of his employment contracts with HealthSouth, namely, (1) a 1986 employment agreement, (2) a 1998 employment agreement, and (3) a 2002 employment agreement, 'by engaging in massive fraud and by consciously disregarding his responsibilities to HealthSouth.' The trial court held those three employment contracts to be 'rescinded on [that] ground,' and it ordered the forfeiture of \$26,725,000, plus prejudgment interest, which represented all compensation Scrushy had received for his services to HealthSouth under those contracts. Second, the court awarded \$147,450,000, plus prejudgment interest, which represented 'the total net profit Scrushy received from ... two stock sales' Scrushy made on the basis of 'inside information,' in violation of principles set forth in Brophy v. Cities Service Co., 70 A.2d 5 (Del. Ch. 1949). Third, the court awarded \$206,383,000, plus prejudgment interest, based on Scrushy's participation in projects involving HealthSouth, namely, (1) sale and lease-back transactions with First Cambridge, 'a real estate investment trust' started by 'members of HealthSouth's management team'; and (2) the uncompleted construction of a facility known as the Digital Hospital, which was begun, but soon abandoned, by HealthSouth. The trial court certified its judgment as final, pursuant to Rule 54(b), Ala. R. Civ. P."

Scrushy, 70 So. 3d at 293-98 (footnote omitted).

Scrushy challenged the judgment on several grounds, including that the derivative claims were barred by the doctrine of res judicata. This Court rejected Scrushy's argument, reasoning:

"Scrushy ... insists that 'Tucker's claims are barred by the doctrine of res judicata in that his claims and/or causes of action were brought, and some causes of action[, i.e., the "Buyback" claims,] were actually litigated to a final judgment, in [In re HealthSouth Shareholders Litig., 845 A.2d 1096 (Del. Ch. 2003), aff'd, 847 A.2d 1121 (Del. 2004) (table)].' Scrushy's brief, at 59 (emphasis added).

"Tucker and Cook contend that consideration of [this] defense[] is precluded by the doctrine of the law of the case. That is so, because, they say, Scrushy failed to assert them when this Court resolved the bonuses issue presented in Tucker, supra, where, in affirming the partial summary judgment against Scrushy for restitution of the amount paid to him in bonuses, '[w]e conclude[d] that, under the law of either Delaware or Alabama, Scrushy was unjustly enriched by the payment of the bonuses, which were the result of the vast accounting fraud perpetrated upon HealthSouth and its shareholders.' 955 So. 2d at 1012. Tucker and Cook contend that both defenses should have been asserted in that first appeal of this case.

"According to Scrushy, the doctrine of the law of the case 'turns on whether the Court addressed the issue between the parties' and does not apply because the defenses were not asserted in the first appeal. Reply brief, at 19–20. Scrushy's understanding of the law-of-the-case doctrine is inaccurate: it is not essential to the application of the doctrine that the issue be asserted in the first appeal. It is enough that the issue should have been raised in the first appeal. 'Under the law of the case doctrine, "[a] party cannot on a second appeal relitigate issues which were resolved by the Court in the first appeal or which would have been resolved had they been properly presented in the first appeal." ' Kortum v. Johnson, 786 N.W.2d 702, 705 (N.D. 2010)(quoting State ex rel. North

Dakota Dep't of Labor v. Riemers, 779 N.W.2d 649 (N.D. 2010)(emphasis added)); see also Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ('Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court. C.J.S. Appeal & Error § 991 (2008)....').

"The doctrine is the same in Alabama. '[I]n a second appeal, ... a matter that had occurred before the first appeal, but that was not raised in the first appeal, [is] the law of the case.' Life Ins. Co. of Georgia v. Smith, 719 So. 2d 797, 801 (Ala. 1998) (summarizing the holding in Sellers v. Dickert, 194 Ala. 661, 69 So. 604 (1915)).³ The doctrine in this form was applied in Bankruptcy Authorities, Inc. v. State, 620 So. 2d 626 (Ala. 1993), which was the second of two appeals in that case. There, this Court held that the failure of the appellant to raise an issue in its first appeal regarding the sufficiency of the evidence to support the judgment precluded review of that issue in the second appeal.⁴

"Procedurally, Scrusy had ample opportunity to assert ... the doctrine of res judicata as [a] defense[] to the partial summary judgment in the bonus case. The judgment in In re HealthSouth Shareholders Litigation, on which Scrusy relies for his res judicata defense, was affirmed by the Delaware Supreme Court on April 14, 2004. Scrusy did not file his cross-motion for a partial summary judgment in the bonus case until September 21, 2005, and the partial summary judgment was entered on January 3, 2006.

"Indeed, on May 27, 2004, Scrusy actually raised in the trial court the statute-of-limitations defense in his motion to dismiss the third and fourth amended complaints. In particular, he argued that 'any claim for unjust enrichment or

innocent misrepresentation that seeks the return of [salary, bonuses, options and incentive compensation] paid to Mr. Scrusby more than two years prior to [August 28, 2002,] [was] barred by [the statute of limitations].'³ (Emphasis added.) However, he did not raise that defense again until after this Court had affirmed the partial summary judgment in the bonus case. Thus, because [this] defense[was] not presented to this Court in the bonus case, we will not consider [it] here.

"

³The law-of-the case doctrine is procedural. Halliburton Energy Servs., Inc. v. NL Indus., 553 F. Supp. 2d 733, 778 (S.D. Tex. 2008); State v. Kiles, 222 Ariz. 25, 36, 213 P.3d 174, 185 (2009).

⁴Although the Court referred to the appellant's failure to raise the issue as a 'waiver,' it is just as properly referred to as a basis for the application of the law-of-the-case doctrine."

70 So. 3d at 303-04.

Also, in Wehle v. Bradley, 195 So. 3d 928 (Ala. 2015), this Court addressed an issue following remand concerning interest on payments that had been made without prior court approval. We explained:

"Section § 43-2-844(7), Ala. Code 1975, provides that '[u]nless expressly authorized by the will, a personal representative, only after prior approval of court, may ... [p]ay compensation of the personal representative.' It is undisputed that the personal representatives paid themselves compensation before obtaining court approval for that compensation. The daughters contend that the circuit court

erred by denying their claim seeking interest from the personal representatives from the date of the compensation payments through the date those payments were approved by the circuit court.

"The daughters first note that, in contradiction of the decision in Wehle I [Wehle v. Bradley, 49 So. 3d 1203 (Ala. 2010)], the circuit court concluded in its final order that Robert G. Wehle's will 'expressly allowed advanced payments to be made to the Personal Representatives.' According to the circuit court, because the will authorized the payments and because the payments were made in good faith and upon the advice of counsel, there was no basis for imposing an interest charge against the personal representatives. The circuit court quoted several provisions of the will that it concluded 'expressly give[] the Personal Representatives the right to advance themselves money.'

"In Wehle I, this Court noted several provisions of Robert G. Wehle's will upon which the personal representatives sought to rely as justification for making compensation payments to themselves without first obtaining court approval. We concluded that those provisions did '"not satisfy the requirement in [§ 43-2-844] that there be an 'express provision' " authorizing the payment of such fees without court approval.' 49 So. 3d at 1209 (quoting Green v. Estate of Nance, 971 So. 2d 38, 42 (Ala. Civ. App. 2007)).

"As the daughters correctly observe, the circuit court's conclusion on remand that no prior court approval was necessary violates the doctrine of the law of the case.

"'"Under the doctrine of the 'law of the case,' whatever is once established between the same parties in the same case continues to be the law of

that case, whether or not correct on general principles, so long as the facts on which the decision was predicated continue to be the facts of the case." Blumberg v. Touche Ross & Co., 514 So. 2d 922, 924 (Ala. 1987). See also Titan Indem. Co. v. Riley, 679 So. 2d 701 (Ala. 1996). "It is well established that on remand the issues decided by an appellate court become the 'law of the case,' and that the trial court must comply with the appellate court's mandate." Gray v. Reynolds, 553 So. 2d 79, 81 (Ala. 1989).'

"Southern United Fire Ins. Co. v. Purma, 792 So. 2d 1092, 1094 (Ala. 2001). It does not matter that the circuit court in some instances in its order quoted provisions of the will this Court did not quote in Wehle I. The personal representatives could have cited those provisions as authority for the premature payments in their appeal in Wehle I; they did not do so. Moreover, whether they did so or not, the issue at hand -- whether the will contained 'express provisions' authorizing the payment of fees to personal representatives without prior court approval -- was before this Court and was decided by this Court in Wehle I.

"'"Under the law of the case doctrine, '[a] party cannot on a second appeal relitigate issues which were resolved by the Court in the first appeal or which would have been resolved had they been properly presented in the first appeal.'" Kortum v. Johnson, 786 N.W.2d 702, 705 (N.D. 2010) (quoting State ex rel. North Dakota Dep't of Labor v. Riemers, 779 N.W.2d 649 (N.D. 2010) ...); see also Judy v. Martin, 381 S.C. 455, 458, 674 S.E. 2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an

1180904

appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court. C.J.S. Appeal & Error § 991 (2008)...".'

"Scrushy v. Tucker, 70 So. 3d 289, 303–04 (Ala. 2011)(emphasis omitted); see also Schramm v. Spottswood, 109 So. 3d 154, 162 (Ala. 2012) (applying the law-of-the-case doctrine where a party attempted to 'advance a new argument in order to revisit an issue already decided by the trial court' and affirmed in a previous appeal)."

195 So. 3d at 937-38 (emphasis added).

Similarly, in this case, after the circuit court entered a summary judgment in favor of Stockham, Stockham filed a motion requesting reimbursement of attorney fees and expenses pursuant to § 19–3B–709, Ala. Code 1975, as well as other statutes. Although Ladd filed a response in opposition to Stockham's motion and quoted § 19-3B-709 and argued that Stockham was not entitled to reimbursement under that statute, she never argued that Stockham was not entitled to reimbursement because Herbert willfully or wantonly had committed a material breach of the trusts. Likewise, Ladd did not raise such an argument in opposition to the motion for reimbursement in her brief on appeal to this Court in Ladd v. Stockham. Clearly, Ladd could have raised an argument that Herbert

1180904

had willfully or wantonly committed a material breach of the trusts at any of those times. Therefore, because Ladd first raised her argument in the circuit court following remand by this Court, it was not properly before the circuit court and could not serve as a basis for denying Stockham's request for reimbursement of costs and attorney fees.

Conclusion

For the above-stated reasons, the circuit court erred in denying Stockham's motion for reimbursement of costs and attorney fees based on Ladd's newly raised argument that Herbert had willfully and wantonly committed material breaches of the trusts. Accordingly, we reverse the circuit court's judgment and remand this case for the circuit court to reconsider Stockham's motion for reimbursement without consideration of Ladd's newly raised arguments.

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Shaw, Bryan, and Stewart, JJ., concur.

Mendheim, J., concurs in the result.

Mitchell, J., recuses himself.