IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young., Circuit Court Judge

Case No. 2010-CP-07-4146

Ron Orlosky in his capacity as Personal Representative of The Estate of Debora L. Orlosky, and in his capacity as trustee of the Debora Laura Orlosky Revocable Trust . — Respondent

v.

The Law Office of Jay A. Mullinax, LLC, — Appellant

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

In Response To Appellant's First Issue

1. In a case at law, dealing with a claimed lawyer's fee on one side, and a breach of contract on the other side, was it error to take contested facts in a legal case and permit a jury to resolve them?

2. Even assuming, purely for sake of argument, that it might have been a possible error, hasn't the Defendant - Appellant waived his equitable estoppel argument, by permitting the Judge below to charge the jury, without objection, the factual questions found in the so-called equitable estoppel argument?

3. Did the Lower Court commit an error of law when it denied Appellant's Motion for Directed Verdict on equitable estoppel, when several necessary elements for equitable estoppel, were never proven?

4. On policy grounds, should a lawyer be permitted to use equitable estoppel against a client when the client merely desires to ask reasonable questions about the lawyer's attorney fees and the progress of his own case?

In Response To Appellant's Second Issue

5. Has the Dead Man's Statute actually been violated on this record?

6. Assuming a technical violation exists, doesn't at least one exception to the Statute exist on this record?

7. Even assuming, for purely academic argument only, a technical violation existed, without a valid exception, are there truly sufficient grounds of prejudice to actually

reverse the trial judge's discretionary decision to admit the testimony in question in this case?

In Response To Appellant's Third Issue

8. Can the Defendant - Appellant now argue on appeal about jury charges that he never objected to at trial?

9. At all events, did the Circuit Court prejudicially err in giving jury charges that both sides below accepted as fair?

In Response To the Appellant's Fourth Issue

10. Even beyond the written fee agreement, was the defendant's argument for even more money, submitted but squarely rejected, by the jury below?

In Response To The Appellant's Fifth Issue

11. Is a verdict to pay the defendant the actual worth of his professional services, as determined by a jury, against public policy or in violation of a Statute?

12. Even assuming a technical violation, hasn't that error clearly been waived, and not preserved on appeal, by not objecting to jury charges actually given by trial judge?

STATEMENT OF THE CASE

The case was commenced by Ron Orlosky ("Orlosky") on August 20, 2010 by the filing of a Summons and Complaint, Notice of Motion and Motion to Remove to the Circuit Court, and proposed Order with the Beaufort County Probate Court. These pleadings, served upon The Law Office of Jay A. Mullinax, LLC and Jay A. Mullinax (herein collectively "Mullinax") on that same date, asserted causes of action for Breach of Contract and for Violations of the South Carolina UTPA both in connection with Mullinax's handling of the Estate of Debra Orlosky, the plaintiff's late wife. On August 23, 2010, the Beaufort County Probate Court entered its Order granting Orlosky's motion, and removing the case to the Court of Common Pleas for Beaufort County. Mullinax's Answer, filed October 19, 2010, included a general denial, affirmative defenses, and included counterclaims against Orlosky for Breach of Contract, or in the alternative for Unjust Enrichment. Orlosky replied to the Counterclaim by general denial of the material allegations on October 25, 2010, and Mullinax then filed an Amended Answer and Counterclaim dated October 29, 2010 to which was added an additional affirmative defense. Again, by Reply filed November 11, 2010, Orlosky denied the material allegations of the Amended Answer and Counterclaim.

On December 1, 2010, Orlosky served an Offer of Judgment on Mullinax in which he offered to take judgment against Mullinax for the Total sum of $29,751.68. This offer was not accepted by Mullinax who, on February 1, 2011, served an Offer of Judgment offering to take judgment on the Counterclaim in the amount of $32,101.20. On April 9, 2012, plaintiff amended his complaint to seek additional damages, and to add a third cause of Action for Quantum Meruit. Mullinax answered on April 16, 2012 asserting the same

counterclaims as before, but omitting the additional affirmative defense. The case was tried before the Honorable Roger M. Young and a jury between April 18, 2012 and April 20, 2012. On April 20, 2012, the jury returned a verdict in favor of Orlosky in the amount of $80,000.00, and also found for Orlosky on Mullinax's counterclaim.

Appellant's post trial motions for a Directed Verdict and for Judgment NOV, for A New Trial, for Relief from Judgment, and To Alter or Amend dated April 26, 2012 were denied by order dated May 17, 2012. In that same Order, the Honorable Roger M. Young granted Orlosky's Motion to Tax Costs and Award Interest filed April 25, 2012, and directed entry of Judgment for Orlosky in the total sum of $89,354.26. Appellant then served notice of intention to appeal the verdict and the Order of May 17, 2012, and this appeal follows.

FACTS

Although the parties do agree on some significant facts, there are also very substantial differences between the parties on many other facts that are very much in dispute. Sadly, everyone can agree that Debora Orlosky passed away on June 17, 2009.[1] A few days following her death, on June 23, 2009, her husband Ron Orlosky ("Orlosky"), the named Personal Representative of his late wife's Estate and Trustee of her Trust, retained The Law Office of Jay A. Mullinax, LLC ("Mullinax"). Mullinax agreed to provide the services necessary for the administration of the Estate[2] and the Trust. The Mullinax engagement letter stated "We agree to represent you as Personal Representative and Trustee under the terms of this agreement. At the conclusion of your role in one capacity, this agreement will continue to control our relationship as to your remaining roles." (Transcript, Plaintiff's Exhibit 5).

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[1] Nonetheless, even on this seemingly simple fact, Lawyer Mullinax did at least suggest he might use a different date in a formal document. To use his own words:

Q: "So, you are saying that you might put a different date than the date she really died?"

A: "It's possible, yes"

(Transcript, Page 313, Lines 7-8).

[2] At the time of her death her estate essentially consisted of a one-third (1/3) interest in two pieces of real estate in California, bank and brokerage accounts, personal items, and a 1/3 interest in a closely held family company which was a part of her trust. The company, Manor Development, was a California real estate management company owned by Mrs. Orlosky, her brother, and her sister. The value and disposition of the stakeholder's interest was subject to a binding shareholder's agreement which had been executed several months before her death, and by which each of the family member's spouses had also agreed to be bound. This agreement provided a formula for valuation if the shareholder wished to sell, and a different formula for valuation should the company seek to force a sale. (Transcript, Plaintiff's Exhibit 2).

On or about June 23, 2009, Orlosky paid the requested retainer of $25,000.00. On June 30, 2009, a mere seven days later, Mullinax sent an invoice for a second $25,000.00 to which he claimed to be entitled for having filed the Petition for the appointment of Orlosky as Personal Representative of the Estate and Trustee of the Trust. (Transcript, Plaintiff's Exhibits 6 and 7). On October 2, 2009, Mullinax again invoiced Orlosky for an additional $25,000.00, bringing the total billed and paid in the four months since his late wife's death to $75,000. (Transcript, Plaintiff's Exhibit 8). Significantly, during the four month period, the only document which Mullinax had completed and filed with the Probate Court, apart from the Petition for Informal Appointment, was a Motion for an Extension of Time to file the Inventory. (Transcript, Plaintiff's Exhibit 9). On October 19, 2009, Mullinax filed an Inventory (Transcript, Plaintiff's Exhibit 10) which was largely incomplete. On December 11, 2009, Mullinax invoiced Orlosky for an additional $25,000.00. (Transcript, Plaintiff's Exhibit 11). He further informed Orlosky that he would be required to pay additional sums totaling $36,103.70 of which $25,000 should be paid at that time. This sum, Mullinax contended, was to "make up the new minimum." Orlosky then made additional payments totaling $25,000.00 bringing to $100,000.00 the total paid to Mullinax over the six month period.

During the period from December, 2009 to March, 2010, Orlosky became increasingly dissatisfied with Mullinax's services. Typical was an exchange of letters and emails concerning Plaintiff's Exhibit 16. The Plaintiff was attempting to get the details of why he had been billed an additional $15,000 in extra charges, and he wanted to discuss the sale of the stock and the stage of completion of the work. (Transcript, Page 71, Lines 21-25;

Page 72, Line 1). In response, Orlosky testified that prior to scheduling an appointment with him, Mullinax demanded payment of an additional "$11,100". (Transcript, Page 72, Lines 2-5).

The dissatisfaction, in part, was as a result of what Orlosky felt to be a sort of "bait and switch" resulting from Mr. Mullinax's unilateral decision to change the minimum payment required and to bill as additional services for matters which Orlosky believed were included as part of the agreement. Additionally, as a result of discussions with his brother-in-law in California, he discovered that Mullinax was not following his instructions with respect to the sale of the Manor Development stock, and had not been sending him copies of relevant documents and correspondence which were contrary to his instructions. (Transcript, Page 72, Line 24 to Page 74, Line 24; Court's Exhibit 1, Deposition of Boyd Lang, Page 12, Line 13 to Page 13, Line 5 and Page 21, Line 20 to Page 23, Line 21). Orlosky communicated with Mullinax about these concerns, and requested that Mullinax follow his wishes/instructions, and that he receive copies of all documents. (Transcript, Plaintiff's Exhibit 20). Also, he began to question the amounts being charged inasmuch as little appeared to have actually been done in the Estate or the Trust.

Orlosky specifically requested that Mullinax provide a detailed "summary of the hours worked and expenses incurred" in order that he could understand what he was being billed for, (Transcript, Page 72, Lines 16-25 and Plaintiff's Exhibit 17), however Mullinax

did not comply with the request. [3]

Rather, Mullinax wrote to Orlosky informing him that if he failed to promptly pay his bills, he would cease working on the file, that he would not meet until Orlosky paid an additional $11,103.70, and he further claimed entitlement to receive $26,103.70 for "extra work." (Transcript, Plaintiff's Exhibit 16). In that same letter, Mullinax acknowledged that there was "significant" work remaining to be done on the estate file. On March 4, 2010, Orlosky requested that Mullinax provide him with the following information by March 15, 2010:

- Status of the Estate - please provide a listing of the activities that have been accomplished to date.
- Remaining Activities - please provide a listing of the activities that remain to be done to complete all required estate tasks up to and including the estate closing process.
- Expenses - please provide a detailed accounting of all expenses related to the handling of the estate from day one until today. This accounting should include the date, time spent, description of activity, and who performed the task (attorney or paralegal).
- Expected Future Costs - Please provide me with your best estimate of the expenses involved to complete all remaining activities and close the estate.

(Transcript, Plaintiff's Exhibit 17). Mullinax again did not respond, and on March 19, 2010,

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[3] Ultimately, the Plaintiff was forced to send his requests for information from his own lawyer in a certified letter dated March 4, 2010 to the Mullinax Law Firm. He never received any written signature that the certified letter was received. When the Post Office investigated, at the request of the Plaintiff, he was told that they attempted to deliver on March 6th and March 7th. The letter was never picked up. (Transcript, Page 76, Lines 1-10). In essence, the letter had been refused. "Confused about it" (Transcript, Page 76, Line 7), the Plaintiff then elected to personally go to the Mullinax Law Firm and give the letter to the receptionist. Even then, Plaintiff was never given answers to the questions he had.

Orlosky terminated the contract with Mullinax, in a letter which reads in part as follows:

> Effective today, March 19,2010, I am terminating your engagement as the attorney for the Estate of Debora Laura Orlosky.
>
> I expect your full cooperation with new counsel during the transition process.
>
> Considering that a final complete inventory, the IRS 706 form, the Manor stock sale, any estate closing documents, as well as other estate-related documents have not been finalized or filed, the estate work is very much incomplete. Therefore, I again ask for you to please provide me with a detailed summary of the hours worked and expenses incurred prior to March 19, 2010, so that the financial matters may be settled. You have already received $100,000 and I suspect that I will be entitled to a refund.

(Transcript, Plaintiff's Exhibit 19).

Mullinax never did directly address any of the Plaintiff's questions. Instead, he only responded by sending additional invoices. He also never produced any detailed time or expense records for the purported work done, prior to the date of his termination, because he candidly admitted at the trial that he did not actually keep such time records to begin with[4]. Further, Mullinax provided very few documents to Mr. Orlosky's new counsel who,

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[4] Mullinax testified at trial that he did not maintain any detailed time and billing records. He testified as follows in response to the following question:

Q: Do you have any time records for any of the times indicated to do the things that were necessary to administer the Estate?

A. No, I don't.

(Transcript, Page 317, Lines 16-19).

In fact, in response to a further question, he testified again that:

Q. You don't have any time records so you couldn't tell us anyway?

A. I don't have any time records from which to find that out.

(Transcript, Page. 318, Lines 7-10).

in essence, had to start from the beginning on the matter. Nonetheless, Mullinax continued to insist that he was due additional monies, and filed a Creditors Claim against the Estate of Debora Orlosky in the amount of $32,101.20.

The agreement between the parties (which was drafted solely and exclusively by Mullinax himself) provided as follows with respect to Mullinax's compensation if the agreement were terminated by the client:

> 4. Termination of Engagement
>
> (a) The Personal Representative/Trustee, once determined, may terminate this engagement at any time by notice in writing to me. Upon receipt of such notice, subject to such court approval, as may be necessary in the context of the situation, I will promptly cease providing any services to the estate or trust as allowed by law. **The estate or trust will be responsible for paying for my services rendered up to the time I receive such notice** and for such reasonable services that I provide thereafter in connection with the transfer of responsibility for the matters I am providing to new counsel. . . [emphasis added]

(Transcript, Plaintiff's Exhibit 5). Notwithstanding these provisions, Mullinax failed and refused to provide any detailed time and billing records for the work done on the Estate prior to the termination, and continued to insist he was due additional sums for work on the Estate and for "extra work" which he claimed was not covered by the engagement agreement[5]. Finally, in June, 2010, he provided an itemized invoice for the "extras" which

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[5] Ultimately, the Plaintiff would discover that the Mullinax Law Firm only filed a single, very incomplete document, with the Probate Court. (Transcript, Page 63, Lines 19-25). In the meantime, more and more billing statements were being sent to the Plaintiff. (Transcript, Page 64, Line 24 to Page 65, Line 2; Page 68, Line 25 to Page 69, Line 14; Plaintiff's Exhibit 11, 12, and 13.)

included matters dating as far back as July 15, 2009; however in his own sworn testimony he stated that no detailed time and billing records for the matters which he claims were part of his engagement exist.

Mr. Michael Jordan of the McNair Law Firm, a certified specialist in Taxation, Estate Planning, and Probate with 39 years of experience, testified at trial. Mr. Jordan expressed the formal legal opinion that the work done by Mullinax represented "just the start of the administration process," and that if his firm had done the same work they would have billed between "$5,000 and $10,000" for the work done by Mr. Mullinax prior to the termination. (Transcript, Page 144, Lines 19-22; Page 145, Lines 2-12). It was also his opinion that Mullinax had inflated the value of the estate from its true value of $2,384,307.56 to $4,444,148.03 for the purpose of charging additional fees to the estate, and further that Mullinax improperly imposed "additional charges" for work which was already included in the scope of work under the agreement. (Transcript, Page 139, Lines 5-19; Page 140, Lines 3-22; Page 146, Line 20 to Page 147, Line 22; Plaintiff's Exhibit 31).

At no time during the representation was Plaintiff ever given answers to the basic questions he had asked, including what was left to be done on the Estate, and an itemized list of the endless charges he was asked to repeatedly pay. In fact, as the relations between the Client and the Lawyer deteriorate, perhaps the ultimate surprise was that even after Mr. Mullinax was terminated, and after $100,000 had been paid in attorney fees, the Plaintiff was to receive yet another claim filed in the Probate Court by Mullinax claiming that he is

still due $32,101.20, and preventing him from being able, to this day, to close his late wife's

estate.

ARGUMENT

I.

Defendant Has No Valid Equitable Estoppel Argument For Several Independent Reasons

A. The Lower Court Made No Error Of Law By Concluding That The Question of What Attorney Fee Was Rightfully Earned, Was A Highly Contested Fact, Not Suitable For Equitable Estoppel, And Properly Left To A Jury.

The Lower Court properly left the question of the amount of the Appellant's Attorney's fee to a jury as it was a heavily contested issue of conflicting facts in a case of law.[6]

The Appellant was paid $100,000 by the Respondent. If the jury decision stands, $80,000, will be returned to the Respondent. Thus, the lawyer will be paid $20,000 for his time and efforts in this case. If this does happen, and the verdicts below on the counterclaim and claim are affirmed, neither side will receive what they hoped for. Respondent accepts the jury verdict and does not seek any modification on appeal. He can accept the jury's determination.

Moreover, this case includes far more than merely the overcharging of attorney's fees, it is also claimed in this record, and the jury heard evidence, that the lawyer

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[6] A fee dispute between a lawyer and a client is an action at law. See Lester v. Dawson, 372 S.C. 263, 491 S.E.2d 240 (1997). Even a suit to recover attorneys' fees, when based on an implied contract asserting a quantum meruit measure of recovery, is an action at law. See Weatherford v. Price, 340 S.C. 572, 532 S.E.2d 310 (S.C. App. 2000).

mishandled the case, breached his own contract, repeatedly refused to properly communicate with his own client, and deliberately ignored certified mail sent to him by the client asking for clarification.[7] The Lower Court's jury charge clearly discussed that it was for the jury to decide who, if anyone, had unjustifiably breached the contract.

> Now, the parties have admitted that there was a binding contract, so I will not instruct you that you are to determine if there was a contract. In this case both parties agree that there was a contract, but there is a claim that both have breached the contract that existed between the parties.
>
> In a breach of contract a party is only entitled to recover if you find that it has been proven by the preponderance of the evidence or the greater weight of the evidence that the other party **unjustifiably breached** the contract. [emphasis added]

(Transcript, page 412, Lines 10-20).

* * * *

> You can believe one witness over another or many against one. You can accept all of a witness' statements, or you can reject it in its entirety. You can accept it or reject it. You can accept a part of a witness' testimony, you can reject a part of it.

(Transcript, Page 410, Lines 10-14). In short, the very fact questions (and others) that the Defendant now seeks to invoke as an Equitable Estoppel defense, were submitted without objection to the Jury, as part of sharply conflicting factual testimony. Accordingly, this

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[7] Any and all of those issues might be part of the jury's verdict for $80,000. It is further submitted that the jury could have found that he breached his contract for any or all of these reasons. To suggest just one, consider the role of Rule 1.4, S.C.R.P.C.

Court can simply determine that the question of estoppel has been deliberately waived by not properly preserving objections to the jury charge in this case.

It has long been S.C. jurisprudence that failure to object or otherwise challenge a jury charge precludes issues from being raised on appeal. See Munn v. Asseff, 226 S.C. S4, 83S.E.2d 642, 643-44 (1954). See also S.C. Jurisprudence, Appeal and Error, Section 81, Pg. 155 ("failure to object to a charge makes the charge the law of the case."). It certainly bears repeating that the jury did not find the Defendant was entitled to nothing. To the contrary, they awarded the Defendant thousands and thousands of dollars that he does not have to remit or refund. ($20,000 in total). Having partially won, but also having partially lost, the Defendant now claims his LLC is entitled to a full second bite at the apple, and he asserts that even in a highly contested factual and legal dispute, he is actually entitled to equitable estoppel of his own Client from even questioning his fees. Did the Defendant breach his agreement by over-charging the Estate? Did the Plaintiff really take advantage of the Defendant and demand vast legal work but refuse to pay for its real value and worth? Was the fee agreement breached by the Lawyer? Was it breached by the Client? All of these contested factual questions were submitted to the jury, without objection, for its due deliberation. As is so often the case, neither side wholly agrees with the jury. So what?

Furthermore, the jury verdict reflects "real justice" in this case. Indeed, the jury awarded Defendant more money than perhaps he was entitled to in the first place. Michael Jordan concluded the legal fees that Mullinax should have charged, if he had completed all

the work, should have been around $30,000 total, for all his legal work, both inside and outside the fee agreement. Without objection, the jury heard him say under oath:

> [S]o, if I were looking at the total thing I would say the bill for the work he did on this Estate – we probably would have had a bill of somewhere around Thirty Thousand Dollars.
>
> That would be okay and be reasonable.

(Transcript, Page 170, Lines 3-7). Michael Jordan also testified:

> Q. And was it reasonable for Mr. Mullinex to want to be paid a Hundred or a Hundred and Thirty-Two Thousand Dollars based on the work that had been done?
>
> A. **I don't think it was reasonable.** [emphasis added]

(Transcript, Page 170, Lines 8-11).

So, if this unobjected testimony was considered by the jury, and clearly it may have been, the verdict is very sound, and their conclusions are faithful to the law. In short, they reached a fair and just verdict, one that did not give either side precisely what they either hoped or desired. The Defendant claims he is entitled to Equity. But a basic equitable maxim is that "Equity follows the Law" not that Equity overrules Legal Juries in contested legal cases of fact. On this ground as well, it is clear the Lawyer's first argument is in error.

B. Several Necessary Elements of Estoppel Were Never Proven

1. There Was a Failure of Proof That An Attorney Can "Reasonably Rely" Upon A Lay Client's Innocent Estimate Of The Ultimate Value of An Estate, When That Question Turns On Complex Questions of Law, That Require Independent Legal Research.

In the Appellant's Brief, Appellant argues that he is entitled to equitable estoppel. Even if for academic purposes only, that might otherwise be accurate, it is still clear as a matter of law that the Appellant had to prove a number of elements necessary for an equitable estoppel to exist, including his "reasonable reliance" on the words or conduct of the Plaintiff in this case. See Appellant's Initial Brief, Pg. 7, where he acknowledges this is an element he must prove to the Judge's satisfaction on his Motion for a Directed Verdict.

Specifically, he had to prove to the jury and/or Judge's satisfaction (He never asked the Court to make an independent determination of this question, merely to rule upon a directed verdict motion) that he "reasonably relied" upon an initial estimate, by an innocent client, of what his wife's estate might be worth. Even assuming for a moment, without certainly conceding this fact, that the Plaintiff's innocent initial estimate of the estate might have been mistaken, it is clear that no estoppel exists as a matter of law.

First, it is the lawyer, not the client, who is an expert in probate court and the valuation process of an estate. It is the lawyer, not the client, who has ethical and fiduciary

duties not the other way around. It is the lawyer who is an expert in the law, not the client. The matter of estate valuation and administration is sufficiently complex, strange, and difficult for a client to understand, that it is extraordinarily odd for Appellant to argue that he "reasonable relied" on a lay, innocent client's understanding as to how the law might value a particular estate that has one very substantial asset, Manor Development Corporate stock, that is governed by a valid Buy-Sell Agreement.

It is extremely noteworthy that the Appellant, in his brief at page 7 in the final paragraph, does not cite a single South Carolina case in support of his novel legal position that it is the client, and not the lawyer, that has a duty to undertake independent legal research as to whether or not the Estate should be valued by a valid Buy-Sell Agreement concerning corporate stock, or whether it should be valued by a different manner.

And, it is equally telling that none of the five cases the Appellant cites in his brief on Pages 6 and 7, concerning equitable estoppel, deals in any way with a lawyer attempting to use equitably estoppel against an innocent lay client concerning a complex point of law. In short, the Appellant on this appeal asks this Court to adopt an utterly novel use of equitable estoppel and cites no precedent at all in support of the novel position that clients, not lawyers, have the duty to determine a legal question, the proper evaluation on an estate. On this ground alone, the Lower Court was surely on solid legal ground in rejecting the Appellant's claim for a directed verdict. (See Transcript, Page 190 Line 2 to Page 191 Line 16.)

2. Appellant Also Failed To Prove On This Record That He Lacked Knowledge Or Means Of Acquiring the Knowledge About The Value of This Stock

To show both why it is so utterly unreasonable for a lawyer to **reasonably** rely upon an innocent client's initial estimate of what an estate might have been worth, and to also show that the Appellant - Lawyer certainly had it within his own ability to determine this legal question, one need only compare what the other estate expert, Michael Jordan of the McNair Law Firm, who also testified in this case, did in distinct contrast to the Appellant.

Unlike the Appellant, Mr. Jordan knew he could not ask his client to determine this legal question and he testified that he undertook independent legal research and wrote a memorandum of law on the complex legal question of whether or not the IRS would recognize the legitimacy of a shareholders' agreement in terms of Buy-Sell Agreement.

By contrast, Mr. Mullinax not only failed to produce a memorandum of law, he actually refused to answer any questions at all about how he determined the valuation of the stock. (See Respondents Statement of Facts, earlier in this brief, which is obviously directly contrary to the Appellant's Statement of Facts and which the Jury clearly accepted in light of the verdicts on both the Plaintiff's Claim and the Defendant's Counterclaim). On this additional ground as well, it is clear on the record that Mr. Mullinax did not prove to either the satisfaction of the Trial Judge (who turned down the directed verdict motion) or the Jury

(who ruled against him on his counterclaims and for the Plaintiff on the claim of being overcharged) that he was entitled to a verdict in his favor.

In fact, with regard to "means of knowledge" Mr. Mullinax merely asserts, without discussion of the independent legal research he could have done, as Mr. Jordan did, and without citation to any case authority, that his "Law Office lacked knowledge of and means of knowledge of the assertions" made by the Plaintiff in this case. Appellant's Brief, Pg. 7 (near the bottom of the page). But, this conclusion is in error, or so a Jury and a Judge could determine, by merely comparing what another Estate Attorney did.

3. The Directed Verdict Motion Was Also Denied On At Least One Further Ground The Reasonable Attorney Fee To Be Charged In This Case Was Highly Contested Throughout The Trial

Estoppel implies a single statement. But, the statements about what the attorney fee was going to be, and how it was going to be computed, was very much contested in this case. For example, when the question first came up, in the form of a Motion for Directed Verdict, Counsel for the Respondent argued to the Lower Court the following:

> Mr. Bowen: He kind of ignores the fact also that their position is not all based on valuation and should have been based on hourly. It looks like Mr. Mullinax was charging valuation and hourly. It was kind of like the maximum that no one should have charged.

(Transcript, Page 190, Lines 24 to Page 191 Line 3).

C. Even Assuming All The Elements of Equitable Estoppel Had Been Proven, There Still Remains A Fundamental Policy Flaw in Appellant's Estoppel Argument.

Moreover, equitable estoppel is inapplicable on this record for a further fundamental flaw in the Lawyer's argument. An excellent policy argument exists that estoppel is not applicable (at all) in lawyer-client fee disputes on grounds of public policy. In the famous case, DeStefano v. City of Charleston, 403 S.E.2d 648 (S.C. 1991), the South Carolina Supreme Court held that no estoppel should ever exist when public officers of limited authority made mere mistakes or errors in telling the public something about official municipal policies. The reason for this rule is plain: The general public can not be estopped about the law itself, because to do so would cause a much greater harm to the public than the value of correcting a mere mis-statement.

Even assuming, without agreeing, that the Plaintiff may have made a simple mistake in some preliminary financial information given to the Defendant, he was merely expressing an opinion, not a fact, and to hold all Clients to their initial opinions, and estopped then, would do great harm to the attorney - client relationship.

It is the lawyer who has the special expertise, it is the Lawyer who has the special knowledge, it is the Lawyer and the legal profession that the Courts regulates to make sure that all professional fee agreements (and, for that matter, all other professional agreements between Clients and Lawyers) are appropriate and reasonable and fair and ethical. When there is a dispute between a Client and a Lawyer, what possible policy justification exists

to bar the Client from even being permitted to make a legal argument that the Lawyer failed to earn his fee because he breached his own fee agreement? There is virtually no valid reason, and absolutely no policy justification or prior case law to bar a Client from at least putting his or her point of view in front of a jury about the reasonableness or unfairness of a professional fee. Estoppel should really play little or no role in that decision between Clients and Lawyers as it is enormously disruptive to an already fragile attorney - client relationship. (See also Wagner v. Graham, 370 S.E.2d 95 (S.C. App. 1998) where the Court of Appeals squarely held that estoppel had no role to play at all where an unlicensed contractor sought to sue for his own work. The statute requiring that fee be based upon a professional license simply because the statute was enacted to protect the public and therefore could not be the subject of an estoppel.)

Respectfully, this very same logic fully applies to the many regulations, restrictions, and safeguards that surround a lawyer's fee agreement, which are quite often in dispute. In short, if the Court sees fit to look into the merits of this matter, and not simply decide that jury charge, without objection, failed to preserve this argument, then on the merits the Lawyer in at least this case (and perhaps other lawyers as well) should not easily be permitted to argue that everyone in the world is truly "estopped" to question their own fees.

Finally, even assuming that an equitable estoppel could conceivably exist in some highly limited Lawyer - Client fee context, that rule certainly has no application here, the Plaintiff - Respondent submits, where here the Client repeatedly paid the Lawyer's demand

for more and more and more fees, adding up to at least $100,000 in around nine months, but when the lawyer refused to even respond to legitimate questions by the Client as to what additional amounts of legal work needed to be done, what it would cost and so on. (See the subsequent further testimony of Mr. Jordan, from the McNair Firm, that the Mullinax Law Firm did not properly perform its agreement to do various legal work for the Estate, because its protests about selling this particular stock, in Mr. Jordan's professional opinion, was not prudent) Mr. Jordan's testimony:

> This was a prudent number, and I think it would be imprudent for a trustee to retain such a concentration of assets without diversification. I think that would scare me if I were the Trustee.
>
> Q. So from what you just told me, not only did you believe it was prudent for him to sell the stock, but it would have been imprudent not do so?
>
> A. That's what I said.
>
> Mr. Bowen: I don't believe I have any further questions for Mr. Jordan.

(Transcript, Page 171, Line 19 to Page 172, Line 3).

Naturally, this was a contested fact flatly denied by the Defendant. The Trial Judge, instead of using equitable estoppel in the middle of a highly contested factual case, properly left these issues for a jury.

In Brief Summary

Not only were the jury charges unobjected to, in this case, and not only do they fully include the very facts that Appellant insists should now be held as fully established by an equitable estoppel, they were highly contested facts in a legal case and were very rightfully submitted to the Jury. Further, as at least one true expert testified, the Defendant's fee was not reasonable and it is always open for a Client to question a Lawyer's fee arrangement, and no matter what the Lawyer may say or not say, as a matter of social policy, the Court should deny any request to use equitable estoppel to bar a Client from asserting the Lawyer has not been fair and reasonable in charging a professional fee.

Respectfully, for the good of the public, and the legal profession itself, please categorically reject the Defendant's argument as it asks this Court to do nothing less than to fundamentally change the lawyer - client relationship.

II.
There is No Dead Man Statute Problem On the Record for Several Reasons

A. The Jury was never asked to decide what the Respondent's late Wife said or did not say.

Disappointed in the jury verdict, the Appellant - Lawyer attributes the disappointing result to his assertion that "Dead Man's Statute" has been violated. With all due respect, this assertion is off target.

The dead man statute is an exception to the general rule of witness competency. Even the Appellant recognizes this fact in his own brief when he notes the statute calls for a "restrictive reading." See Appellant's Initial Brief, Pg. 10. The Statute itself is found in S.C. Code Ann. at Section 19-11-20 (1985). Moreover, since this is a rule of evidence, it follows the general rule that " the admission of evidence is a matter left to the direction of the trial judge and absent a clear abuse, will not be disturbed on appeal". See Carlyle v. Tuomey Hospital , 305 S.C. 187, 193, 404 S.E.2d 630, 663 (1991).

When the question of the Dead Man's Statute, first came up in the trial, it was in the context of some testimony by the Plaintiff about the advisability of selling the closed company stock held by the estate. Concerning the claim this testimony should be excluded, the trial judge correctly noted that this was a fee dispute case, and not a case about the sale or no sale of stock, and the jury was not going to be asked to decide whether or not the stock

should, or should not, be sold or what the Respondent's wife said or didn't say on this subject.

Since this was not an issue for the jury to even decide, it is enormously difficult to understand how the testimony about selling or not selling could possibly effect their decision (indeed, they were going to independently hear from several witnesses without objection about the sale of the stock, including the Plaintiff's own trial expert). Because it was a question that it need not decide, the lower court was on solid ground when Judge Young told both counsel in the Trial:

> The Court: As far as this matter goes, it is not whether he had the right to do it, to sell the stock or not sell the stock, to get the cash or not get the cash. That is not going to be an issue for the jury to decide.
>
> So he can testify about it because it is not an issue prohibited by the Deadman's Statute, because his interests you are talking about right now are not going to be something that will be decided by the jury.

(Transcript, Page 47, Line 11-22).

The Plaintiff - Respondent submits this is sound and it would provide countless problems to future trial judges in South Carolina if questions, not to be actually decided by the jury, could suddenly fall under the Dead Man's Statute. This is especially true because the Dead Man Statute calls for a "restrictive reading," not the very broad liberal interpretation of the Dead Man's Statute asked for by the Defendant - Appellant on this appeal. The Court should also review the testimony by Plaintiff - Orlosky that the legal fee he believed he

should have been charged was utterly irrelevant to the value of the stock to begin with, whether or not it was or was not sold, due to a valid Buy-Sell Agreement that was binding upon the Estate and the Plaintiff.[8] That testimony is quoted below in the footnote and it remains uncontradicted on this record. In short, for two utterly independent reasons, both because the jury was not going to decide the question to being with, and because -- with or without an actual sale – the question of the stock value itself, dealing with the Estate, was

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[8] See the Transcript, Page 67, Lines 1-7; Page 67, Line 14 to Page 68, Line 1 where the Plaintiff testified:

Q. Did Mr. Mullinax tell you at that time or at any time previous to that that you shouldn't sell the Manor Development stock . . . .
A. No.
Q. Did he advise you at any time not to sell?
A. No.
Q. If the value of the company had been as Mr. Mullinax thought it ought to be, under the [buy-sell] agreement could you or the estate have received any more?
A. No, I was bound by what the agreement said, the buy and sell agreement, and that was what was required to be done.
Q. So did it matter if the value was Three Million, Two Million, Four Million?
A. No.
Q. Would you have gotten any more regardless of the value?
A. No.
Q. Would there have been more to the estate or proceeds going into the trust from the sale?
A. No.

already fixed by a valid Buy-Sell Agreement,[9] there was no violation of the Dead Man's Statute when the Plaintiff briefly testified about the sale of the stock in the Estate.

Moreover, there are "many" exceptions to the Dead Man's Statute that have always been recognized, and at least one of these exceptions quite clearly fit the facts here.

B. At All Events, There Is A Recognized Exception To The Dead Man Statute Present In This Case

Assuming for Academic Purposes Only, a Dead Man Statute Issue Exists, (and candidly Plaintiff does not see it) it is clear that at least one exception to the Statute also exist in this case. Michael Jordan, Esquire, Plaintiff's Expert at Trial, independently testified (totally without regard to anything the Plaintiff may have said to his Wife, prior to her death, and totally independently of whatever she said or did not say to him) that he personally held the professional opinion that the stock should be sold. Normally, Mr. Jordan testified, "a

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[9] Hanahan v. Simpson, 485 S.E.2d 903 (S.C. 1997) is a key case. There, the South Carolina Supreme Court noted that Dead Man's Statute has been "sharply criticized" in recent years Id. at 484 S.E.2d 909. and that as a result a number of exceptions now exist to the statute.

For example, the Court noted in Hanahan that a witness is prohibited from testifying under the Dead Man's statute only if his or present or previous interest will be affected by the events of trial. But, long prior to the trial, the status of a sale had long been fixed and determined by a valid Buy-Sell Agreement that had nothing to do with the Plaintiff. Moreover, under the Will, all the proceeds from the sale were also prearranged and fixed, and again this had nothing to do with the Plaintiff as all the stock sale proceeds were to flow solely to the deceased's own two daughters.

In short, with the price settled, with the beneficiaries predetermined, the Plaintiff, quite literally, was not "an interested person" as that term has come to be defined, with regard to the sale of the stock. The money was not going to him nor was the price to be determined by him. As the trial focused on the contested question of attorney fees, and overcharging, and not the stock, the Lower Court's conclusions on the Statute's irrelevancy can be squarely affirmed under the Hanahan v. Simpson.

trust should not be heavily invested in one stock"..."It is prudent to diversify." (See Transcript, Page 173, Lines 3-10).

In light of this professional, independent, cumulative testimony, which is clearly cumulative to the Plaintiff himself testifying that he thought the stock should be sold, even if the Plaintiff was referring to a prior conversation with his own wife, and even though he would not benefit directly either from holding the stock or selling it (as the ultimate beneficiary was going to be his wife's two daughters) it was - at worse - mere harmless error as the cases in South Carolina have again and again held in applying the Dead Man's Statute, when the same thought was testified to by others in the trial independently and without objection. In short, there certainly should not be an outright reversal if the same evidence was independently introduced by someone else. See, for examples, Harris v. Campbell, 358 S.E.719 (S.C. App. 1987) (reversal is not warranted where evidence is erroneously admitted so long as it is merely cumulative); Mcbeth v. Bishop, 298 S.E.2d 441, 442 (S.C. 1982) (Consequently, admission of testimony, although technically in violation of the statute, affords no grounds upon which to reverse the verdict, because it was merely cumulative to other testimony).

In Brief Summary

The trial court, in its sound discretion, makes the first and most important call about the Dead Man's Statute. In this case, given that the Statute is not favored, and given that the Jury was not going to be called upon to decide any of the issues to begin with, specifically

whether or not the stock should or should not be sold, it only makes logical sense to affirm what the sound Circuit Court Judge ruled. But, if for some reason, this Court wants to probe further into a truly lower court discretionary decision (and the bright line test, when the question is not even going to arise in the jury room, no dead man statute issue is present). This is especially true when it is shown, as here, it is cumulative testimony from a true expert in this field to do exactly what the Plaintiff wanted to do and what he said his late wife talked to him about (which was a very brief part of the overall trial). In short, there is no reversible error here.

III.

The Judge Below Made No Inappropriate Charges To the Jury. But Even Assuming That He Had, Because the Appellant Failed to Object To Charges That Were Made, Appellant Has Clearly Waived His Rights to Object To Jury Charges Given, And Has Failed to Properly Preserve This Alleged Error on Appeal.

In the Defendant - Appellant's Claimed Third Error Below (See his Initial Brief, Page. 25 -32) the Defendant complains about the jury charges given to the jury. Starting at Page 409 of the trial transcript, the Court instructed the Jury. As is certainly the better practice, the Judge very carefully ended his charge with the following statement:

> Now, before you begin to deliberate on your verdict I must give the attorneys an opportunity to tell me if I have left something out of my charge or stated something incorrectly.

(Transcript, Page 417, Lines 16-19).

Neither the Appellant nor the Respondent suggested any changes or had any objections. (See Transcript, Page 418 Lines 2-8). **(Nothing from the Plaintiff and Nothing from the Defendant)**.

In light of these uncontested facts, it is a little surprising that Appellant now takes Pages 25-32 to complain about something that he voluntarily accepted, without exception, reservation, or complaint, at trial. Of course, a timely objection could have been immediately corrected below, thus saving potentially years of time and much additional expenses.

It is a settled rule of appellate practice that objections never voiced or heard or ruled upon below concerning the jury charge means as a matter of law that those objections are not

properly preserved for argument on appeal. See, for example, Floyd v. Floyd, 615 S.E.2d 465 (S.C. App. 2005) (an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon the trial judge to be properly preserved for appellate review); Wilder v. Wilder, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal but must be raised and ruled by the trial judge to be preserved for possible appellate review). In short, this argument fails as a matter of law[10].

In Brief Summary

The Appellant failed to raise this argument below. He has waived it. Merely for academic purposes, it does merit adding that Judge's charge to the jury appears to be fair and just to both sides, and even his own Attorney at the time had no objections, complaints or additions.

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10 Merely for the record, even if this issue had been properly preserved, Respondent also submits that the jury charges were fair and impartial for both sides. It is well settled that jury charges have to be considered as a whole, and a mere isolated portion which might even be misleading, is still not enough to constitute a reversible error. See Keaton ex rel. Foster v. Greenville Medical System, 514 S.E.2d 570 (S.C. 1999)

IV.

The Jury Verdict That Appellant Take Nothing Under His Counterclaim Is Fully Supported By Evidence On the Record.

The main contested factual issue in this three day trial was just how much Mr. Mullinax's law firm was entitled to, if anything, under the contested facts and circumstances of this case. Both sides acknowledged a contract existed. Both sides also claimed that the other side breached that contract. The issue of how much was owed, and if one or the other of the parties breached the contract, was sharply contested.

The Appellant now argues in his own personal view, that the "preponderance of the evidence" supports his additional claim of another $20,997 (even beyond the over $100,000 he was previously paid by the Plaintiff). But, Respondent submits that the Appellant's counterclaim for additional funds was sharply contested and was appropriately left to the Jury to be decide as a contested factual issue. The Jury elected, as was their role and right, to award zero dollars on the Appellant's counterclaim and there is substantial evidence in the record to uphold this determination. Appellant is not entitled to second-guess this decision on appeal.

The Trial Judge, the Honorable Roger Young, personally and carefully explained the Appellant's counterclaim on the jury verdict form to the Jury. (Transcript, Page 416, Line 24 to Page 417, Line 11). Neither side had any objection whatsoever to his comments to the

jury, and neither side objected in his submitting this contested question to the jury at the end of the trial.

Concerning the Appellant's claim for additional funds, even the Appellant admits there is no writing that reflects an actual agreement about these charges. See Appellant's Brief on Appeal, Pg. 35 (at the bottom of the page, where he openly acknowledges "although there was no separate written agreement . . . ."). Concerning this hotly contested issue, the jury elected not to see the matter the way the Appellant hoped. Appellant truly cites no law on pages 32 to 37 of Appellant's Initial Brief to remotely justify overturning their verdict on this point.

Indeed, the Respondent respectfully suggests to this Honorable Court that there any number of reasons **right on the record** to support the jury's verdict that the Defendant never proved his counterclaim. To mention merely two obvious arguments that jury may well have adopted: The jury could have simply decided that Respondent's trial counsel was right when he argued in its closing argument that Mullinax Law Firm simply failed as a matter of evidence to prove his claims of additional funds. Further, the jury could have also decided that Mr. Mullinax's Law Firm breached his own retainer agreement, and never closed the Estate, and therefore was never entitled to anywhere near the funds he thought he was entitled to – much less additional claims for even more legal fees, based upon a contested implied agreement not reduced to a writing.

The record reflects that Trial Counsel for the Plaintiff argued to the Jury in his closing argument:

> Mr. Mullinax tells you as he sits here today that he can't tell you the time he spent on the case. He can't tell you the dates he did anything. He can't tell you much he billed for anything because he did not keep any time records for the things he said were necessary and appropriate for administering the Estate. Yet he claims that it is worth Hundred and Eleven Thousand Dollars, or that it's worth some higher number.

(Transcript, Page 389, Line 22 to Page 390, Line 4).

Obviously, this was a jury issue to be decided by the jury, in the jury room, and the mere fact that the jury came to a very different conclusion that Mr. Mullinax personally hoped is hardly grounds to overturn the jury verdict. Of course, it has long been established that in this state every reasonable presumption exists in favor of a general jury verdict for one side or the other. See Goldkist, Inc. v. C&S National Bank, 333 S.E.2d 67,73 (S.C.App. 1985). In fact, even Mr. Mullinax's own trial counsel, agreed in his closing statement that this question was factual, and contested, and recognized that this was a genuine jury question. Specifically, Mullinax's trial lawyer told the jury:

> "When you look at the credibility of witnesses, I ask that you really judge them . . . . "

(Transcript, Page 398, Lines 19-20).

Apparently, the jury did just that and concluded that Mullinax Law Firm was entitled to zero on its counterclaim. It is extraordinarily hard to see how Appellant can complain on

appeal, about something Mullinax never objected to, and where the jury only did what Mullinax's own trial lawyer asked them to do at trial, determine his credibility.

In short, in the eyes of the jury, there simply was no merit in Appellant's claim for additional funds, particularly when he refused to explain to his own client the basis for most of his <u>written</u> claims he had made, much less his unwritten claim for even more fees.

V.
Neither Statutes Nor Public Policy Bar The Plaintiff From The Recovery the Jury Awarded Him Based Upon The Appellant's Overcharges

Appellant also argues on appeal, even if he did breach the agreement, and overcharge the Respondent, it would be against "public policy" and various "statutes" to uphold the jury verdict for the Respondent for $80,000. **But this is hardly what he argued to the jury.** At trial, Appellant's trial lawyer, recognizing that this was a contested factual question, and asked the jury the following key question in Mullinax's own closing argument:

> You will have the contract that they made, and the question you have to decide is who breached the contract. Did Mr. Mullinax breach it or was he doing everything he could in a reasonable manner in his professional capacity?

(Transcript, Page 403, Lines 12-15)

Appellant now argues in his Initial Brief something very different to this Court. He argues that finding him in breach of the contract would be contrary to statutory law and in violation of public policy. This argument, of course, is premised if, but only if, one agrees and accepts completely Mullinax's very strained version of the applicable facts in this matter.

In fact, there were (and are) two sides – in this dispute, and it certainly was the jury's prerogative not to agree with Mullinax's version of the facts and instead side with the Plaintiff. Looking at the jury's verdict, it is clear that they did side (in part) with Plaintiff - Respondent and partially rejected Mullinax's version of the underlying facts in this case.

Specifically, Mullinax Law Firm totally overlooks and fails to discuss why Michael Jordan, Esq., a genuine specialist in both taxation and estate planning in the McNair Law Firm, who dramatically disagreed with his " legal position" about how this Estate should be handled, and what the proper method of determining its value should be, should not have been considered by the jury in this case. To say the least, Michael Jordan was a very impressive witness, or so the jury certainly could have decided.

First, Mr. Michael Jordan has vast legal experience, as he testified that he has practiced law for 39 years, in the field of estates and estate administration. (Transcript, Page 131, Line 11).

Second, his practice is virtually **exclusively** in estate planning, and probate and trust. (Transcript, Page 131, Lines 21-22). He holds two specialty certifications from the South Carolina Supreme Court, (1) in estate planning and probate law and the (2) in taxation law. (Transcript, Page 132, Lines 7-10).

Third, he has received special professional awards and outstanding professional public recognition in both of these two fields, including being invited to join the American College of Trusts & Estates Counsel and labeled in this field, Best Lawyer in South Carolina, in his speciality. (Transcript, Page 133, Lines 11-16). **Thus, his opinions might well have carried special weight with the jury.**

It is therefore particularly significant that Michael Jordan first squarely testified that the Estate was in a very "preliminary stage" (Transcript, Page 135, Lines 14-25)**, with most**

of the legal work yet to be done, when he was initially engaged to administer the estate. Specifically, Michael Jordan undertook significant legal research to determine whether or not a tax return should be filed by the Estate, and he also did significant legal research as to how the Estate should be valued. (See Plaintiff's Exhibit 26).

Quoting him directly:

> So, the principal asset of this Estate being the stock in the Manor Development Company, one of the questions that I had to determine in my own mind was whether for estate tax reporting purposes it was appropriate to take the value in the buy sell agreement [for $1,500,000] as to the value of the stock . . . .
>
> I did research that led me to the professional conclusion that if the IRS were presented the issue that they would recognize the legitimacy of the shareholders' agreement; . . . .
>
> This memo is a summary of the research.

(Transcript, Page 137, Line 16 to Page 138, Line 3).

In sharp contrast, Mr. Mullinax did no research at all. It is also highly relevant that Michael Jordan was being paid by the hour. Mr. Jordan's decision, or a jury could have decided, about how to value this estate, had absolutely nothing whatsoever to do with the fee that he was charging the Plaintiff to administer the Estate. (See Transcript, Page 134, Lines 1-6; Page 134, Lines 14-16). Again by distinct contrast, the Appellant, the Mullinax Law Firm, based its principal fee upon a percentage of the value of the Estate itself. So, instead of a modest fee, if the Estate was not that large, the Mullinax Law Firm would receive a much larger, and much more substantial fee, if the value of the stock was not governed by

the buy-sell agreement, with its $1,500,000 value, but a much higher fee based upon a very different, and higher, valuation of that stock.

Again, it bears reiterating, Michael Jordan did substantial impartial legal research and came to the legal conclusion that Estate simply had far less than the value that Mullinax claimed it had. From this central dispute of fact, between lawyers, much of the rest of the case can easily be explained. Mullinax, during his time working at that time, did no legal research at all on this question.

When Jordan took over the legal administration of the estate from Mullinax, it was his professional opinion that no more than 20 to 25% of the estate work had been completed (See Transcript, Page 144, Lines 1-5), and that even if all the work had been done, and completed by Mullinax Law Firm, Mr. Jordan further testified that on the basis of the actual value of the work, actually completed by Mr. Mullinax before he was discharged, the McNair Law Firm would have only billed Five to Ten Thousand Dollars. (Transcript, Page 144, Lines 19-22).[11]

However, because only 1/4 of the work was completed (at most) and because Mr. Jordan firmly believed after his research memo (Plaintiff's Exhibit 26) there could be no

[11] This testimony is significant and is quoted in full in context:

Q. Let me ask you, had you performed the work that Mr. Mullinax did prior to the time you took over, do you know or have an idea of what your firm would have charged?

A. For that work, probably Five to Ten Thousand Dollars.

(Transcript, Page 144, Lines 19-22).

greater value for estate purposes than the buy-sell agreement for the stock, Mr. Jordan was asked the ultimate question as an expert, as to the reasonableness of Mullinax's own interpretation of the value of the Estate, and the professional value work he had accomplished prior to be discharged. Quoting directly from Jordan's testimony:

> Q. Was it reasonable for Mr. Mullinax to want to be paid a Hundred or a Hundred Thirty - Two Thousand Dollars based upon the work that had been done?
>
> A. I don't think it was reasonable[12].

(Trial Transcript, Page 170, Lines 8-11)

Thus, the jury had ample evidence to support its apparent conclusion that Mullinax did not properly perform his contract with the Estate, that he did in fact grossly overcharge the Estate, and that it was certainly within the bounds of the evidence submitted at trial that Mullinax had breach its contract with the Plaintiff.

Of course, it is a settled rule of law and of civil procedure that issues of fact in an action for the recovery of money are tried by a jury, unless a jury trial be waived. S.C.R.C.P. 38(a). And, it is equally settled that an action for breach of contract seeking monetary damages is an action at law. See S.C. Fed. Savings Bank v. Thorton - Crosby Development Co., 423 S.E.2d 114 (1992).

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[12] In fact, the jury could if it so desired – compare the McNair Law Firm for two full years of work on the Estate (which was approximately $30,000) with Mullinax Law Firm fee of $132,000 with most of the work still left to do. (See Transcript, Page 144, Lines 8-11).

So, in essence, like so many contract disputes, this case comes down to a rather simple factual dispute: the jury was required to determine, whether or not Mullinax's charges were proper or not, and whether or not Mullinax's fees were unfair and beyond what they should have been. If they found, as Michael Jordan stated, and as the Plaintiff himself testified (see the Plaintiff's subsequent testimony discussed in this Section of the Respondent's Initial Brief), then his charges were not reasonable, and the jury really could and did very properly determine that he overcharged the Plaintiff. In short, the jury had evidence, if they believed, that the contract had been breached, and the Plaintiff - Respondent suffered very real damages.

On the other hand, if the jury could have also found that Mullinax had properly charged for his services in a reasonable manner, and if they made that factual determination they could have found that his contract was fair and appropriate, and there was no breach of contract. In short, this was a true contested fact and it very properly was decided in the jury room by an impartial jury. Proof that at trial, this central question, **as even Mullinax's own trial lawyer recognized below,** in his own closing argument to the jury, was for the jury to

be decide in the jury room.[13]

Mullinax makes one final argument in his brief that should be addressed. He asserts that "Ron (referring to the Plaintiff) presented no evidence that he was damaged by the transactions with the [Mullinax] Law Office." (Appellant's Initial Brief, Pg. 47).

Contrary to Mullinax's argument of "no damages", there is very strong evidence, again if believed by the jury, that there were significant damages to the Plaintiff. As discussed above, Michael Jordan testified that the Mullinax bills were not reasonable. Further, the Plaintiff himself at the trial directly testified to damages the breach of contract created. The Court's attention is directed to the following testimony:

> Q. Do you believe that you have been treated fairly by Mullinax or the Estate?
> A. Obviously the Estate has not been treated fairly
> Q. Do you believe that he has been overpaid?
> A. Certainly. I think he has been overpaid.
> Q. If you believe you have overpaid him, how much would you ask the jury to refund?
> A. Based upon my analysis as I said before, I would say Eighty to Eighty-five Thousand Dollars.

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[13] Not only did Mullinax's own lawyer argue this to the Jury in his closing argument, "the question you have to decide is who breached the contract. Did Mr. Mullinax breach it or was he doing everything he could in a reasonable manner in his professional capacity? (See Transcript, Page 403, Lines 12-15).

The Judge charged the jury this very question in his own charge when he charged the jury it was up to them to decide whether or not Mullinax had "overcharged" the Plaintiff under his agreement. (See Transcript, Page 410, Lines 17-21).

It also merits noting that this charge was given with no objections of any kind by either Plaintiff's or Defendant's counsel. (Transcript, Page 418, Lines 2-9).

(Transcript, Page 96, Line 23 to Page 97, Line 6).[14] Further, in response to the question "Do you have an opinion as to what the value of Mr. Mullinax's work..." he replied "maybe in the Fifteen to Twenty Thousand Dollar range." (Transcript, Page 94, Line 23 to Page 96, Line 2).

In brief summary, the jury could have accepted, if they found this credible, the Plaintiff was overcharged by $80,000 - $85,000. They could also accepted Mr. Jordan's testimony that actual work performed by lawyer Mullinax was very "incomplete" and Mr. Jordan had to almost start over from scratch. (Transcript, Page 95, Lines 11-23). On either basis, there was evidence on the record of real damages for Mr. Mullinax's failure to do what he should have done.

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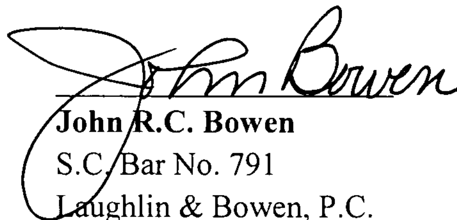
[14] Plaintiff - Respondent submits that it is hardly an accident that the jury, apparently finding him to be credible, awarded damages at $80,000.

CONCLUSION

This was a fair trial. It dealt with a question of breach of contract and it raised factual issues very much in dispute during the trial itself. The Judges charges were never objected to, the issues of contested fact were properly joined and very properly submitted to a jury for their exclusive determination, and the case should be affirmed.



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