ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2012-212331

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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR WHEN IT DENIED THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT BASED ON ESTOPPEL?

2. DID THE COURT ERR WHEN IT ALLOWED THE PLAINTIFF TO TESTIFY EXTENSIVELY ABOUT ALLEGED COMMUNICATIONS WITH THE DECEDENT THAT IMPACTED HIS INTEREST IN VIOLATION OF THE DEAD MAN'S STATUTE (S.C. CODE OF LAWS §19-11-20)?

3. DID THE COURT ERR WHEN IT FAILED TO REASONABLY CHARGE THE JURY WITH CLARITY ON THE LAW AND ISSUES IN THE CASE, THEREBY PREDJUDICING THE DEFENDANT?

4. DID THE DEFENDANT SHOW BY A PREPONDERANCE OF EVIDENCE THAT IT PROVIDED REQUESTED SERVICES TO THE PLAINTIFF BEYOND THE SCOPE OF THE WRITTEN CONTRACT WHICH RESULTED IN A PECUNIARY BENEFIT TO THE PLAINTIFF, FOR WHICH THE PLAINTIFF PAID THE DEFENDANT NOTHING?

5. DID THE CIRCUIT COURT ERR WHEN IT ALLOWED A BREACH OF CONTRACT CLAIM BASED ON THE PLATINIFF'S INTERPRETATIONS OF THE CONTRACT, THAT IF FOLLOWED, WOULD VIOLATE STATUTORY LAW AND PUBLIC POLICY?

STATEMENT OF THE CASE

On June 23, 2009 Ron Orlosky (hereinafter "Ron") signed a written engagement letter with the Law Office of Jay A. Mullinax, LLC (hereinafter "Law Office") and hired

attorney, Jay A. Mullinax (hereinafter "Mullinax") to administer the estate and trust of his late wife, Debora L. Orlosky (hereinafter "Debora" or "decedent"). Ron terminated Mullinax's services on or about March 19, 2010 and retained Michael Jordan (hereinafter "Jordan") at the McNair Firm for estate and trust administration matters relating to Debora's estate. When Ron terminated Mullinax, Ron had an outstanding balance with Mullinax in the amount of $32,101.20 plus interest

On July 29, 2010, Law Office filed a creditor's claim in the Beaufort County Probate Court for the outstanding balance Ron owed Law office, $32,101.20, plus a statutory 8.75% interest rate for services rendered. On August 20, 2010, three weeks after Law Office filed the creditor's claim against the estate of Debora L. Orlosky, Ron Orlosky (Spouse, Personal Representative and Trustee for the Debora L. Orlosky estate and trust) filed suit in the Beaufort County Circuit Court against Law Office for breach of contract seeking damages of $29,751.68 (plus interest) and $89,253.00 (treble damages) for unfair trade practices.

Law Office's creditor's claim against Ron that was filed on July 29, 2010 was subsequently removed to the circuit court and Law Office's claim and Ron's suit were essentially merged.

On April 18 - 20, 2012, the case was tried by a jury which found in favor for Ron, the Plaintiff, and awarded him $80,000.00 for breach of contract. On June 12, 2012, the circuit court's amended judgment awarded Ron $89,354.26 to include interest.

On June 18, 2012, Law Office served Notice of Appeal on Ron.

FACTS

On April 1, 2009, Ron (Respondent) and his wife, Debora, retained the Law Office of Jay A. Mullinax, LLC (Appellant) for estate planning matters and signed a written engagement letter for the preparation of specific documents at a specific fee range and any additional work on an hourly basis. (R. pp. 306-312).

When Ron and Debora engaged Law Office for estate planning matters, they provided Law Office with a completed Estate Planning Questionnaire dated March 26, 2009 (R. pp. 314-321) and their financial statement dated March 26, 2009 (R. pp. 313), representing the couple's combined estate net value of $6,171,300.00, which included Debora's shares in the Manor Development Company, (hereinafter "Manor") valued at $2,600,000.00. Ron and Debora subsequently executed their estate planning documents on May 20, 2009. Debora died on June 17, 2009.

On June 23, 2009, Ron (as Personal Representative and Trustee for the Debora Orlosky estate and trust) retained Law Office and signed a written engagement letter (R. pp. 255-258) exclusively for services "necessary and appropriate" to administer the estate and agreed to pay Law Office based on the time devoted to the matters or a minimum of 2.5% of the value of the estate. Based on the financial statement that Ron and Debora provided to Law Office just three months prior, Law Office estimated the value of Debora's estate to be approximately $4.4 million. Ron and Debora valued the Manor stock at $2.6 million on their financial statement (R. p. 313), which comprised a large portion of Debora's estate value, but the stock produced extremely low income.

Although Debora's Trust (R. pp. 197-237), expressed that it was her preference

for the Trustee (Ron) not to sell her interest in her family's business, Manor Development Company, Although the sale of the stock was not necessary, Ron insisted shortly after Debora's death that Law Office negotiate for the sale of the stock. Negotiations for the sale of the Manor stock took place between Law Office and Manor's attorney, David Bjornstrom, (hereinafter "Bjornstrom") from October 2009 through February 2010. Law Office negotiated for the purchaser to offer Ron approximately $156,000.00 above the purchaser's initial offered price.

Between June 23, 2009 and March 19, 2010, Ron paid Law Office approximately $100,000.00 for Law Office's services. Ron terminated Law Office's services on or about March 19, 2010 (R. p. 286) and retained Jordan at the McNair Firm for estate and trust administration matters relating to Debora's estate. When Ron terminated Law Office, Ron had an outstanding balance with Law Office in the amount of $32,101.20 plus interest ($11,103.70 fee for necessary estate administration services (R. p. 285) under the written contract, and $20,997.50 for the additionally requested services of negotiating the sale of Manor stock). Law Office communicated with McNair Law Firm about the outstanding balance for services rendered without resolution. (R. pp. 296-299).

On July 29, 2010, Law Office filed a creditor's claim (R. pp. 304-305) in the Beaufort County Probate Court for the outstanding balance Ron owed Law Office, which was $32,101.20, plus a statutory 8.75% interest rate for services rendered. On August 20, 2010, three weeks after Law Office filed the creditor's claim against the estate of Debora L. Orlosky, Ron (Spouse, Personal Representative and Trustee for the Debora L. Orlosky estate and trust) filed suit in the Beaufort County Circuit Court

against Law Office for breach of contract seeking damages of $29,751.68 (plus interest) and $89,253.00 (treble damages) for unfair trade practices. Law Office filed a counterclaim for Breach of Contract on the Plaintiff and Unjust Enrichment/Quantum Meruit. (R. pp. 18-20).

Law Office's creditor's claim against Estate of Debora L. Orlosky filed on July 29, 2010 was subsequently removed to the circuit court and Law Office's claim and Ron's suit were essentially merged. Discovery began on or about October 19, 2010 and the parties did not reach a settlement. The case went to trial and upon motion by the Defendant, the Court dismissed the claim of unfair trade practices by granting a summary judgment on April 18, 2012.

On April 18 - 20, 2012, the case was tried by a jury which found in favor for Ron and awarded him $80,000.00 for breach of contract. On June 12, 2012, the circuit court's amended judgment awarded Ron $89,354.26 to include interest.

ARGUMENTS

I. THE COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON EQUITABLE ESTOPPEL.

Law Office made multiple motions for a directed verdict based on equitable estoppel. (R. p. 117, line 24- p. 120, line 16; R. p. 174, line 16- p. 177, line 23). Essentially, the motions assert that Ron was estopped from alleging a different estate value than the one he asserted at the formation of the contract -- when Ron's original value was used to entice Law Office to enter the contract.

Equitable estoppel operates to deny a party the right to prove an otherwise important fact. *Maher v. Tietex Corp.*, 500 S.E.2d 204, 331 S.C. 371 (S.C.App. 1998). The doctrine of estoppel applies if a person, by his or her actions, conduct, words, or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his or her prejudice or injury. *Rushing v. McKinney*, 633 S.E.2d 917, 370 S.C. 280 (S.C.App. 2006).

With regard to the party estopped, the elements of equitable estoppel are: (1) conduct amounting to a false representation or concealment of material facts, "or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party [370 S.C. 294] subsequently attempts to assert;" (2) the intention or expectation that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. *Southern Dev. Land & Golf Co., v. South Carolina Pub. Serv. Auth.,* 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993). "As related to the party claiming the estoppel, the essential elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position." *Id.*

Law Office and Ron entered into a contract wherein Ron was to pay Law Office based on a percentage of the value of Debora's estate. (R. pp. 255-258). Shortly before Law Office and Ron entered into the contract, Ron and Debora represented to Law Office that Debora's estate was valued at approximately $4,400,000.00. (R. p. 313). This value was bolstered by additional documents, collected by Law Office. (R. pp. 327-329). Based on Ron's agreement to pay for the services covered in the contract, Law

Office completed much of the work, and Ron subsequently asserted that the estate value was much less than what he and Debora had earlier asserted. (R. p. 69, lines 18-25).

Ron agreed to pay for the services with the intention or expectation that his agreement would be acted upon by Law Office to do the work. Ron's latent and unsubstantiated claim that the value of the estate is less than previously thought, does not hold water. Regardless, Ron's intentions are inconsequential with regard to the claimed value. With regard to equitable estoppel, an intentional misrepresentation by the defendant is not necessary. *Dillon County Sch. Dist. Number Two v. Lewis Sheet Metal Works, Inc.,* 286 S.C. 207, 332 S.E.2d 555 (Ct.App.1985). An aggrieved party's reasonable reliance on the words or conduct of the party being estopped is sufficient. Id. Bad faith is not always necessary to equitable estoppel. *Ellis v. Metropolitan Cas. Ins. Co. of New York*, 197 S.E. 510, 187 S.C. 162 (S.C. 1938).

Leading up to the signing of the written contract, Ron and Debora did not provide Law Office with any documentation or evidence that contradicted their assertion that Debora's estate was valued at approximately $4,400,000.00. Therefore, Law Office lacked knowledge of and means of knowledge of the assertions Ron made at trial to devalue the estate. As a result of Ron and Debora's representations as to the value of Debora's estate, Law Office relied on the conduct of Ron and Debora, and Law Office took a prejudicial change in position by agreeing to a fee based on the Plaintiff's unilateral representations about Debora's estate value. Now, after Law Office provided services, Ron wants to change his earlier asserted estate value which was used to entice Law Office into the contract.

The Law Office asserted equitable estoppel on more than one occasion during the trial. (R. p. 117, line 24- p. 120, line 16; R. p. 174, line 16- p. 177, line 23). The Court should reverse the lower Court's ruling and grant Law Office's motion for a directed verdict.

II. THE COURT ERRED WHEN IT ALLOWED THE PLAINTIFF TO TESTIFY EXTENSIVELY ABOUT ALLEGED COMMUNICATIONS WITH THE DECEDENT THAT IMPACTED HIS INTEREST IN VIOLATION OF THE DEAD MAN'S STATUTE (S.C. Code Ann. § 19-11-20 (1985).

In reviewing the admission or exclusion of evidence, the trial court's ruling will not be disturbed on appeal absent a clear abuse of discretion. *Hofer v. St. Clair*, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *Conner v. City of Forest Acres*, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." *Hanahan v. Simpson,* 326 S.C. 140, 156, 485 S.E.2d 903, 911 (1997).

The South Carolina Dead Man's Statute, S.C. Code Ann. § 19-11-20 (1985) provides, in pertinent part:

"[N]o party to an action or proceeding, no person who *has a legal or equitable interest which may be affected by the event of the action or proceeding*, no person who, previous

to such examination, has had such an interest, however the same may have been transferred or come to the party to the action or proceeding, and *no assignor of anything in controversy in the action shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased*, insane or lunatic as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person or as assignee or committee of such insane person or lunatic, when such examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness or the interest previously owned or represented by him . . . ." (emphasis added).

Essentially, the rule prohibits any interested person from testifying concerning conversations or transactions with the decedent if the testimony could affect his or her interest. See *Long v. Conroy,* 246 S.C. 225, 143 S.E.2d 459 (1965). It is undisputed that Ron was a lifetime beneficiary to Debora's estate and trust. As such, Ron had a present and vested pecuniary interest in the outcome of the case.

The rule is founded on the principle that it is against public policy to allow a witness thus interested to testify as to such matters when such testimony, if untrue, cannot be contradicted. *Trimmier v. Thomson,* 41 S.C. 125, 19 S.E. 291 (1894); *Harris v. Berry,* 231 S.C. 201, 98 S.E.2d 251 (1957). Because this statute is an exception to the general rule of witness competency, it requires a restrictive reading on which the party requesting its muzzling effect bears the burden. See *Havird v. Schissell,* 252 S.C. 404,

166 S.E.2d 801 (1969); James F. Dreher and W.M. Von Zharen, A Guide to Evidence Law in South Carolina, 21-22 (2nd Ed.1987).

Law Office's attorney, Tom Taylor (hereinafter "Taylor"), objected to Ron's testimony under the Dead Man's Statute when Ron began to testify about alleged communications with the decedent. (R. p. 58, lines 8-14). Ron's trial attorney, John R. C. Bowen (hereinafter "Bowen"), alleged that Ron "was testifying about a conversation that he had with his wife during her life, and I believe that he can testify as to what he understood her wishes to be." (R. p. 58, lines 16-19). Taylor objected on the grounds, inter alia, that Ron was prohibited under the Dead Man's Statute from testifying about something that a deceased person told him that could benefit him under the terms of the will, which is exactly what Ron proposed to do. (R. p. 58, line 24–p. 59, line 6).

Taylor also objected under the Dead Man's Statute to Ron's proposed testimony about communications with the decedent that directly contradicted what the decedent expressed in her estate documents, which were signed by the decedent twenty-eight (28) days before her death. (R. p. 59, lines 4-6; R. pp. 227-228). Taylor further objected under the Dead Man's Statute and provided the Court with a copy of *Hanahan v. Simpson*, 326 S.C. 140, 151, 485 S.E.2d 903, 909 (1997), which stands for the principle that the Dead Man's Statute "prohibits any interested person from testifying concerning conversations or transactions with the decedent if the testimony could affect his or her interest." (R. p. 59, lines 13-14). Taylor also refers to the case standing for the principle that it is against public policy to allow a witness thus interested to testify

as to such matters when such testimony, if untrue, cannot be contradicted. (R. p. 59, lines 17-21).

The Court asked Ron's trial attorney, Bowen, what testimony he planned to introduce and Bowen replied that he was unsure but that he believed his client was going to testify that "ultimately since the decedent's two daughters had no active interest, no participatory role, that ultimately the plan was for him to take over the whole property." (R. p. 60, lines 4-11). This proposed testimony, which was eventually allowed by the Court over Taylor's objection, contradicts the decedent's own documents and handwritten notes which expressly prohibits Ron from ownership of the Manor stock, which according to the decedent's documents, was intended to be for her daughters. (R. p. 316, questions 13 and 17). The handwritten notes on the Estate Planning Questionnaire, under "prenuptial agreement", expressly mentions that "Ron is excluded from stock ownership in Manor Development." (R. p. 316, question 17).

Taylor further objected, under the Dead Man's Statute, to Ron's potential testimony about the appropriateness of the sale of the Manor stock. It is claimed that such testimony could benefit Ron if he were to try to convince the jury that the decedent desired to sell the stock despite the fact that the decedent's Trust document, which she signed 28 days before she passed away, expressly states that "I prefer that the Trustees not sell shares of stock or other interests in Manor Company because I believe that the best interests of the beneficiaries will be served by retention of those interests in the trust's portfolio." (R. pp. 227-228). Taylor objected that it could benefit

Ron to use alleged conversations with the decedent (that are unable to be contradicted) to convince the jury that the sale of the stock, under the circumstances Ron advances, were appropriate. (R. p. 60, line 20- p. 61, line 2). The alleged statements of the decedent's desires could cloud the definition of "necessary and appropriate" which are defined under the terms of the written contract. The jury could confuse "what is necessary in order to administer the estate" and what is "necessary in order to fulfill the decedent's wishes".

Due to the restrictive reading of the statute, courts have recognized many exceptions the rule. The Dead Man's Statute is inapplicable in testimony where the witness's present or previous interest will not be affected by the event of trial; *See Hanahan,* 326 S.C. at 152-53, 485 S.E.2d at 909-10. If the statute is not applicable to the current case, then it is hard to imagine the statute has any meaning left at all. (Quoting Chief Justice Jean Toal in *Brooks v. Kay,* 530 S.E.2d 120, 339 S.C. 479 (S.C. 2000).

The Court overruled Taylor's objection stating that the focuses of Ron's predicted testimony "are not going to be something that will be decided by this jury" (R. p. 61, lines 11-18). Taylor stood by his position that Ron's testimony would be to try to convince the jury that it was appropriate to try to value the stock for One Point Five Million Dollars. Taylor further stated that the testimony has a direct benefit to Ron because of "Mr. Mullinax's Counterclaim that he deserved more money because the stock in the estate should have been valued at Two Point Six Million Dollars. If Mr.

Orlosky could convince the jury it was appropriate to sell that stock at One Point Five Eight, that would benefit him." (R. p. 61, line 19- p. 62, line 3).

Testimony concerning conversations between Ron and the decedent, Debora should have been deemed inadmissible under the Dead Man's Statute because any alleged conversation would not be able to be contradicted. Everything in the record overwhelmingly points to the fact that the decedent did not want Ron to sell the stock, however, each conversation that Ron testified about between himself and the decedent contradicts the decedent's trust (R. pp. 227-228), and, handwritten notes (R. p. 316, questions 13 and 17). Furthermore, Ron had a present and vested pecuniary interest in the outcome of the case, therefore, the Court's exception to the Dead Man's rule is not a valid reason to overrule Taylor's objections.

Where testimony in violation of the Dead Man's Statute is cumulative to other properly admitted testimony, the admission of the improper testimony may be held to be harmless. See *McBeth v. Bishop,* 278 S.C. 443, 298 S.E.2d 441 (1982). Ron's testimony does not fall under a harmless error analysis and does not avoid the application of the statute because Ron's testimony was not cumulative to any properly admitted evidence.

No one offered evidence or testimony in evidence that suggests that prior to Law Office's discharge, that Office failed to accomplish anything that was "necessary and appropriate" under the written contract. Ron's own attorney, Jordan's, testimony

bolsters the position that Office accomplished everything that was required under the terms of the written contract, up until the time of the discharge.

Ron's testimony alleging communication with the decedent was not cumulative to any other evidence. It was directly contradictory to all other written evidence, including sworn documents and unsworn documents from the decedent, some as recent as 28 days before her death. (R. p. 316, questions 13 and 17; R. pp. 227-228). Such testimony, which should have been prohibited under the Dead Man's Statute, is not cumulative. As such, the portions of Ron's testimony, as it relates to the aforementioned matter, which were erroneously admitted in violation of the Dead Man's Statute were not cumulative to other testimony so as to render its admission harmless error. *Brooks v. Kay,* 530 S.E.2d 120, 339 S.C. 479 (S.C. 2000).

The contract between Ron and Law Office expressly circumscribed that Ron was to pay Law Office "based on the time devoted to the estate or a minimum of two and a half percent (2.5%) of the value of the estate" for the "services that are necessary and appropriate to administer the estate under the laws of South Carolina". (R. p. 255, ¶ numbered 1; R. p. 257, ¶ numbered 2).

At the time that Ron and Law Office signed the contract, the following documents were available to both parties concerning the Manor stock: Ron and Debora's Financial Statement dated March 26, 2009 (R. p. 313) and Ron and Debora's Estate Planning Questionnaire dated March 26, 2009 (R. pp. 314-321). In the Financial Statement (R. p. 313), Ron and Debora listed Debora's estate to include her interest in Manor stock, valued by Ron and Debora at $2,600,000.00.

Additional documents related to the value of Debora's interest in Manor stock, dated prior to Debora's death, also valued Debora's interest in Manor stock at $2,600,000.00. (R. pp. 326-327).

By using the information on the documents provided by Ron and Debora at the time the parties signed the written contract, the subject stock was valued at $2,600,000.00, resulting in an approximate estate value of $4,446,148.03 (R. pp. 354-355).

Over the objections of Taylor, Ron testified about communications with the decedent, wherein, he alleged that on several occasions, the decedent, Debora, stated her intention was for Ron to sell the Manor Stock. (R. p. 58, line 8; R. p. 62, lines 9-15). Selling the stock required that the stock be sold under the terms of a shareholder buy-sell agreement. (R. pp. 238-254). Ron testified liberally about his communications with the decedent about the shareholder's alleged process of updating (i.e. modifying) the terms of the buy-sell agreement. (R. p. 62, line 25 – p. 63, line 15). Taylor objected to this testimony under the Dead Man's Statute. (R. p. 63, lines 16-22). Although Ron failed to sell the Manor stock under the required provisions of the buy-sell agreement, a sale's price was allegedly calculated using a provision listed in the buy-sell agreement. The provision used to calculate the sale's price of the stock was not one that was allowed under the circumstances, but Ron agreed to sell the stock at the offered price of $1,585,076.00 even though all of the decedent's documentation leading up to her death, (R. pp. 326-329) refers to the value of her Manor stock as $2,600,000.00. The fact that Ron opted to sell stock valued at $2,600,000.00, for $1,585,076.00, does not change the stock's value, nor does it change the definition of "fair market value" as

defined by the Department of the Treasury; and it does not change the fact that the fair market value of the stock was $2,600,000.00. (R. p. 313; R. pp. 326-327; and R. pp. 328-329). Ron expressly wrote to Law Office to express that "Regardless of where we end up on the price, I want to sell." (R. p. 339; R. p. 161, line 5- p. 162, line 7). Clearly, Ron's selling price had nothing to do with the stock's value.

Ron's testimony about communications with the decedent suggested that the decedent wanted to sell the Manor stock that modifications were being made to the Manor stock buy-sell agreement (R. pp. 238-254), and, that the Manor buy sell agreement dictated not only an optional "sale's price, but the value of the stock as well. Ron's trial attorney, Bowen, opened Ron's case by stating to the jury that "the *'chief dispute'* between Ron and Mr. Mullinax was as to the 'value' of his wife's [Debora's] or his late wife's [Debora's] interest in a family company [Manor] that she and her brother and sister owned in California." (R. p. 57, lines 17-20). Under the terms of the contract between Ron and Mullinax, the "value" of the estate was determinative of what Ron owed to Mullinax under the contract. (R. p. 257, ¶ numbered 2).

In pursuit of Ron's endeavor to sell the stock, Duke Lang (hereinafter "Duke"), the managing shareholder (de facto "purchaser") of Manor, hired a Certified Public Accountant (CPA) firm to determine the sale price of the stock. The Certified Public Accountant firm replied to Duke in a letter dated November 15, 2009. (R. pp. 322-325).

The Certified Public Accountant letter states, inter alia, "we have reviewed the Manor Development Co. Shareholder Agreement... for the purpose of determining the appropriate redemption price for the shares held by the Estate of Debora L. Orlosky..."

(R. pp. 322-325). The Certified Public Accountant firm continues by stating, "We have not performed any valuation procedures and do not purport to represent that the findings herein are a representation of fair market value. Fair market value being defined as the amount at which property would change hands between a hypothetical willing seller and a hypothetical willing buyer when neither is action under compulsion and when both have reasonable knowledge of the relevant facts." (R. p. 322, ¶ 2). In other words, Ron's bases the value of his wife's stock on a "value" that the Certified Public Accountant firm expressly states it is unwilling to purport as "a representation of fair market value". The Certified Public Accountant made a point to express this fact by stating it in writing in a letter addressed to Duke.

Additionally, the CPA's calculations were made on November 15, 2009, approximately 150 days after the decedent died. However, the CPA based its calculations stated in their letter (R. p. 322, ¶ 3), "...Article 4 (Section 4.2) less appropriate discounts for lack of marketability and lack of control (Section 4.5)" of the shareholder agreement. The Shareholder agreement does provide a sale price provision for the sale of the Manor stock upon the death of a shareholder. (R. pp. 239-240, Section 2.4). Although the Shareholder Agreement does not dictate the value for estate tax purposes, it does speak to the sale price, and it specifically requires that for Article 2.4 (Transfer upon Death) to apply, the sale must take place within 180 days. (R. pp. 239-240, Section 2.4). Ron did not sell the Manor stock until 2010, more than 180 days after the decedent's death which occurred on June 17th, 2009. Therefore, Article 2.4 of the agreement cannot be used in order to dictate the sale price.

Law Office put into evidence a document titled "Annual Shareholder Meeting of Manor Development Co.", wherein all three shareholders voted and resolved on March 6, 2006 that "the valuation of the Corporation Stock as referred to in the Buy-sell Agreement [a/k/a Shareholder Agreement] from this date until changed will be $74,404.66 per share." (R. pp. 328-329). Using Manor's declared value for the buy sell agreement, the decedent's shares, representing one-third of the company, would have been valued at approximately $2,500,000.00 million dollars. This value is consistent with the decedent's documents where she values her own shares to be worth $2,600,000.00 in March 2009, three months before her death. (R. p. 313). This value is also consistent with "Summary – Buy Sell Agreement Stock Value" document, signed by the decedent, providing the buy sell stock value of $72,239.38 per share. (R. p. 327).

The value of an asset for federal estate tax purposes according to the Department of Treasury Regulations, the definition of Fair Market Value is "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." Treas. Reg. § 20.2031-1(b).

The taxing authorities are well aware that owners of closely held companies may be tempted to set an artificially low price in the buy-sell agreement in an attempt to reduce the federal estate tax of a deceased owner, especially when the owners are related. Internal Revenue Code § 2703 was established to preclude related parties from depressing the value of and interest in a family-controlled entity through buy-sell agreements. (I.R.C. § 2703).

There are problems with using an artificially low price to reduce the estate tax value of the interest. The buy-sell agreement may not qualify as a bona fide business arrangement or fail to satisfy the comparability test under § 2703, if the agreement is subject to that section, although, if a regulatory exception applies, the agreement will be deemed to be a bona fide business arrangement and not a testamentary device.

The general rule under § 2703 is that, for purposes of estate, gift, and generation-skipping transfer taxes, the value of any property is determined without regard to any right or restriction relating to the property. A right or restriction means any option, agreement or other right to acquire or use the property at a price less that the fair market value (determined without regard to the option, agreement, or right) or any restriction on the right to sell or use such property. A right or restriction may be contained in a partnership agreement, articles of incorporation, corporate bylaws, a shareholders' agreement, or any other agreement or may be implicit in the capital structure of the entity.

Under I.R.C. § 2703(b), a right or restriction will not be disregarded if it satisfies the following three requirements: the right or restriction is a bona fide business arrangement; (Treas. Regs. § 25.2703-1(a)(3)); the right or restriction is not a device to transfer the property to members of the decedent's family for less than full and adequate consideration in money or money's worth; and the terms of the right or restriction are comparable to similar arrangements entered into by persons in an arm's length transaction.

I.R.C. § 2703 applies to any right or restriction created or substantially modified after October 8, 1990. The regulations provide some guidance as to what will be considered a substantial modification. For example, a substantial modification is any discretionary modification of a right or restriction, whether or not authorized by the terms of the agreement which results in a more than de minims change to the quality, value, or timing of the rights of any party with respect to property subject to the right or restriction. (Revenue Reconciliation Act of 1990, P.L. 101-508, § 11602(e)(1)(A)(ii); Treas. Regs. § 25.2703-2; Treas. Regs. § 25.2703-1(c)(1)).

The Plaintiff's estate attorney, Jordan, committed fraud upon the Court when he testified about the value of the estate and the only possible reason for the Defendant's conclusion of the estate value. Specifically, the Plaintiff's estate attorney, Jordan, testified that the only possible reason for the Defendant to value the estate at a higher value than the amount proffered by Jordan was for the Defendant to inflate the amount of the fee owed by the Plaintiff to the Defendant under the contract. (R. p. 98, lines 7-19).

The value of the estate is determinative of the necessity to file a Federal Estate Tax Return (IRS Form 706). Both Jordan and Mullinax testified as to being authorized to practice before the Internal Revenue Service and it was not contested. Treasury Department Circular No. 230 (Treas. Regs. Subtitle A, Part 10) provides the Regulations Governing Practice before the Internal Revenue Service, Title 31 Code of Federal Regulations, Subtitle A, Part 10, updated (June 3, 2011).

Treasury Department Circular No. 230 requires compliance with, in part, the following sections from those practicing before the Internal Revenue Service: §10.21 Knowledge of client's omissions, §10.22 Diligence as to accuracy, §10.34 Standards with respect to tax returns and documents, affidavits and other papers, §10.37 Requirements for other written advice, §10.51 Incompetence and disreputable conduct and §10.52 Violations subject to sanction.

The applicable portions of Treasury Department Circular No. 230 mandated that Mullinax comply with the law, which included adhering to the law as it applied to having Ron file an Estate Tax Return.

Both Mullinax and Jordan, practicing before the Internal Revenue Service, were charged with duties concerning the valuing of the estate and the proper application of the law. Jordan's testimony shows that he is in direct violation of his requirements under the Treasury Department Circular No. 230 as someone who practices before the Internal Revenue Service. Jordan testified that neither he nor his firm did any independent analysis or independent research concerning the value of the estate, the figures provided to them by the client, or the application of law necessary to appropriately determine whether an estate tax return was due to the Internal Revenue Service. (R. p. 99, line 23 - p. 100, line 15; R. p. 103, line 25 – p. 104, line 9; R. p. 104, line 24 - p. 105, line 5). Without conducting independent research of the figures provided to Jordan, he advised his client that no estate tax return was due. (R. p. 97 lines 3-12).

Although Jordan could not cite a specific provision in the Shareholder Agreement that would allow a sale at the price he used, Jordan claimed that the value he used for the Manor stock is the number signed by Debora in the shareholder's agreement (R. p. 100, line 9- p. 101, line 1). Jordan testified that he did not feel the need to question the CPA's calculation regarding the sale's price, of the Manor Stock, which Jordan used as its value. (R. p. 103, lines 12- 19). Jordan used the sale price as the value in spite of the fact that the CPA firm wrote that "we have not performed any valuation procedures and do not purport to represent that the findings herein are a representation of fair market value. (R. p. 322-325). Jordan testifies that he used the number that the CPA provided as the value of the Manor Stock, even though the CPA firm clearly states that the number should not be used to "represent the fair market value." As a result of Jordan's decision to represent the sale's price as the "fair market value", Jordan advised Ron that no estate tax return was due. (R. p. 97, lines 3-12).

Jordan's testimony shows that he is in direct violation of his requirements under the Treasury Department Circular No. 230 as someone who practices before the Internal Revenue Service. Jordan testified that he based his information solely on information from the client and did not evaluate the operation of the Shareholder's Agreement's which was according to him, determinative of the value of the stock value. Jordan stated that his client, Ron, was "comfortable" with the [alleged] number in the shareholder's agreement and that he did not feel the need to do anymore work because it would be unnecessary. (R. p. 100, line 16- p. 101, line 1).

Mullinax testified that the Shareholder's Agreement was not determinative of the fair market value of the stock. Mullinax specifically referred to Chapter 14 of the Internal Revenue Code and the companion Treasury Regulations which directly disregard the sale's price in a Shareholder Agreement if the Shareholder's Agreement or the Shareholders do not follow the requirements of Internal Revenue Code Chapter 14 and the companion regulations. (R. p. 103, line 1- p. 104, line 13).

All testimony and corresponding documentation from Ron and Law Office exclusively show that the Shareholder Agreement was not followed in consummating a sale. Jordan could not even cite the provision used to lead to the CPA's calculated sales price. Even still, the Shareholder Agreement plainly shows that the provision that Ron allegedly used to determine a sale's price does not allow a sale under the circumstances in this case. The provision used required a sale within 180 days of the decedent's death, yet the sale happened long after the 180 day deadline. This strict provision directly impacts the respect that the Internal Revenue Service shows to a Shareholder Agreement and its impact on value.

Under the provisions of the Shareholder Agreement, because the sale did not take place within 180 days, the next available option required the purchase to occur at a formula price approximately $500,000.00 higher than the 180 day provision. (R. p. 243, Article 3.12).

Under Internal Revenue Code Chapter 14 and the companion regulations, the parties' disregard of the terms of the Shareholder Agreement excludes the Shareholder

Agreement from consideration in valuing the stock when there is more than a de *minimis* change to the quality, value, or timing of the rights of any party with respect to property that is subject to the right or restriction is a substantial modification. Specifically, Treasury Regs. §25.2703-1(c)(1) disregards "any discretionary modification of a right or restriction, whether or not authorized by the terms of the agreement, that results in other than a *de minimis* change to the quality, value, or timing of the rights of any party with respect to property that is subject to the right or restriction is a substantial modification." When the parties disregarded the terms (requiring a sale within 180 days of decedent's death), resulting in a $500,000.00 change in required sales price, that was more than a de minimus change to the "quality, value, or timing of the rights of any party" under the Shareholder Agreement. Thus, even if the Shareholder's Agreement had met the other criteria as a factor proscribing value, which it did not, here, it does not meet the most basic standards which require compliance with its own terms.

The omission of this fact is fraudulent upon the Court by Jordan, who did not even mention Internal Revenue Code Chapter 14 or its companion Treasury Regulations. It should be noted that under Treasury Department Circular No. 230, incompetence is no excuse in determining the value of an estate or its assets. Jordan testified he was not familiar with Treasury Department Circular No. 230 and, therefore, was not aware of the information it contained, or the fact that he was disregarding its provisions. (R. p. 107, lines 4-15).

In consideration of the fact that the Plaintiff's estate attorney, Jordan, committed fraud upon the Court by (1) testifying that the Defendant was fired by the Plaintiff at the "beginning" of the estate administration (R. p. 89, lines 14 – 18); (2) by testifying that the estate value was only increased by the Defendant to increase his fee (R. p. 98, lines 7-19); (3) by fraudulently testifying as to the application of the law to the facts, and fraudulently omitting settled laws, codes, and regulations in his testimony, such testimony should be struck in its entirety. It should be considered that Jordan, was the only witness who testified in the case other than the parties. Jordan testified to the fact that he is prohibited ethically under South Carolina from testifying against his client, Ron and that Ron is paying him $350 an hour to be giving testimony in the trial. (R. p. 104, lines 1-10).

III. DID THE COURT ERR WHEN IT FAILED TO REASONABLY CHARGE THE JURY WITH CLARITY ON THE LAW AND ISSUES IN THE CASE, THEREBY PREDJUDICING THE DEFENDANT?

A trial court must charge the current and correct law. *Welch v. Epstein,* 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000); *see also Brown v. Smalls,* 325 S.C. 547, 481 S.E.2d 444 (Ct.App.1997) (trial judge is required to charge current and correct law applicable to issues presented). A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. *Keaton ex rel. Foster v. Greenville Hosp. System,* 514 S.E.2d 570, 334 S.C. 488 (S.C. 1999). "When instructing the jury, the trial court is required to charge only principles of law that apply to the

issues raised in the pleadings and developed by the evidence in support of those issues." *Clark v. Cantrell,* 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). The substance of the law is what must be instructed to the jury, not any particular verbiage. *Keaton ex rel. Foster v. Greenville Hosp. System,* 514 S.E.2d 570, 574, 334 S.C. 488, 496 (S.C. 1999). A jury charge which is substantially correct and covers the law does not require reversal. *Id.* To entitle an appellant to reversal, the trial court's instructions must be not only erroneous, but also prejudicial. *Arkwright Mills v. Clearwater Mfg. Co.,* 217 S.C. 530, 61 S.E.2d 165 (1950).

"When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues." *Tucker v. Reynolds,* 268 S.C. 330, 335, 233 S.E.2d 402, 404 (1977).

In this case the Defendant, Law Office, made two counterclaims against the Plaintiff, Ron, one for breach of contract and another for Quantum Meruit (R. pp. 18-20; R. p. 116, lines 14 – 23). Law Office's claim against Ron for breach of contract was based on the party's written contract. (R. pp. 255-258; R. p. 178, line 21 – p. 179, line 4). Law Office's second claim against Ron for quantum meruit was based on an implied contract. "[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." *QHG of Lake City, Inc. v. McCutcheon,* 360 S.C. 196, 202, 600 S.E.2d 105, 108 (Ct. App. 2004) (internal quotation marks omitted). Unfortunately, when the Court dismissed Law Office's claim for quantum meruit, the Court made it clear that it was unfamiliar with the synonymous meanings between

"quantum meruit", "quasi-contract", and "implied by law contract." (R. p. 117, line 9). Although Ron's claim for quantum meruit was dismissed (R. p. 117, line 13), Law Office's claim for quantum meruit survived. Ron had one claim against Law Office.

At the conclusion of the testimony, the Court instructed the jury that it would hear each party's closing argument and then the Court would charge on the law. Before the closing arguments, the Court instructed the jury that "Under the procedural rules, since the Plaintiff has the burden of proving his case, he will have the first argument and he may also have a right to close" (R. p. 179, lines 22-24). The Court failed to mention either of the Defendant's (Law Office) two counterclaims to the jury or the Defendant's burden of proof regarding either counterclaim. As a result, the closing of the trial was reminiscent of the beginning, when in the Court's opening instructions it makes only a vague reference to one of the Defendant's two counterclaims. (R. p. 56, lines 13-18).

The Court reminded the jury of the Ron's claim before the closing arguments, but the Court failed to remind the jury about the Law Office's counterclaims. As a result of the Court's instructions focusing exclusively on the Ron's claim, the Court overtly impressed the jury to focus on the Ron's claim and disregard Law Office's counterclaims. Law Office was left to hope that the jury would recall the Court's vague reference to one of the Defendant's (Law Office) two counterclaims, made at the beginning of the trial. (R. p. 56, lines 13-18). The primary focus of the Court's opening instructions to the jury were on the Plaintiff's claim against the Defendant, thereby prejudicing the Defendant (Law Office). (R. p. 54, line 25 – p. 56, line 23).

In the Court's opening charge to the jury, it proclaimed, "but the Plaintiff does have the burden of proving this case. The Defendant does not have to prove anything or disprove what the Plaintiff says." (R. p. 56, lines 9-12). The Court continues by making a vague reference to one of the Defendant's two counterclaims. (R. p. 56, lines 13-18). Unfortunately, it is impossible to decipher from the Court's instructions to which of the Defendant's (Law Office) counterclaims it is referring. (R. p. 56, lines 13-18). Nevertheless, it is the Court's only reference to either of the Defendant's counterclaims during the Court's opening instructions.

Prior to the closing arguments, the Court completely omitted reference to the Defendant's counterclaims, thereby failing to task the jury with considering the Defendant's evidence against the Plaintiff. Because the Court instructed the jury specifically on the Plaintiff's claim before the closing argument, but did not even mention the Defendant's counterclaims to the jury, the instructions were prejudicial.

At the conclusion of the closing statements, the Court instructed the jury that "Now, in a civil case – we talked about the burden of proof. The Plaintiff has the burden of proof in the case." (R. p. 185, lines 15-17). The Court again implies that the Plaintiff is the only one with a claim in this case and that the Plaintiff has the only burden of proof.

The Court's implication mirrors its statements when it failed to address either of the Defendant's counterclaims at the beginning of the charge. (R. p. 179, lines 22-24). The Court does attempt to correct its oversight later in the charge by stating "We have

a claim and a counterclaim, so the Plaintiff has the burden of proof in proving his claim...The Defendant has denied this claim, and on his counterclaim the defendant has the burden of proving his counter claim..." (R. p. 185, line 17 – p. 186, line 1). The Court once again refers to only one of the Defendant's two counterclaims. The jury is left to wonder which counterclaim, and whether one of the Defendant's counterclaims is simply unimportant or dismissed by the Court.

The Court repeatedly refers to the Plaintiff's (Ron) claim against the Defendant (Law Office) throughout its charge and refers to it as a breach of contract or the Defendant's breach of the contract. (R. p. 55, lines 13 – 22; R. p. 56, lines 8 – 12; R. p. 56, lines 19-20). However, the Court only mentions one of the Defendant's two counterclaims and it does not even identify the nature of the Defendant's claim. In fact, throughout the trial, from the opening until the jury verdict, the Court never once specifically refers to the Defendant's claim of quantum meruit/unjust enrichment.

The Court eventually refers to one of the Defendant's counterclaims in its closing charge, but just like in its opening charge, the Court repeatedly refers to the Plaintiff's claim and rarely refers to either of the Defendant's counterclaims. It is reasonable to believe that because the Court frequently mentioned the Plaintiff's claim against the Defendant, but rarely mentions either of the Defendant's claims against the Plaintiff, the jury focused more on the Plaintiff's claim and considered it paramount. On the other hand, it is reasonable to believe that because the Court rarely mentioned either of the Defendant's counterclaims, the jury was likely to give the counterclaims less

weight. After all, the Court gave the Defendant's counterclaims less weight in its charge and instructions to the jury.

The Defendant's (Law Office) counterclaims were for the Plaintiff's breach of the written contract (R. pp. 255-258), for necessary services and the Plaintiff's breach of the implied contract (Quantum Meruit/Unjust Enrichment) for additional requested services that were unnecessary. (R. pp. 18-20). A large portion of the case centers around the fact that the Plaintiff, Ron, and the Defendant, Law Office, entered into an implied agreement for the Defendant to negotiate the sale of the estate's Manor Stock. Law Office's negotiations for the sale of the Manor stock was an unnecessary service for the administration of the estate. Services that were unnecessary for the administration of the estate fell outside scope of the written contract. However, Ron requested that the Law Office provide these services.

The Defendant had the burden to prove that the parties entered into an implied contract for the services beyond the scope of the written contract. Unfortunately, in the Court's closing charge, it states that "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." (R. p. 187, lines 10-12). The Court's reference is to a single contract. The basic premise of the Defendant's claim of quantum meruit is to show a contract implied at law. *Myrtle Beach Hosp. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000).

The Defendant's counterclaim of quantum meruit alleges that the parties entered into an implied contract. The Defendant had the burden to prove the implied

contract to the jury. In its charging order, the Court simply states that the parties have admitted there was "a contract". (R. p. 187, lines 10-12). The Court does not distinguish between the written contract and the implied contract, both of which were at issue in the case. The jury was left to infer that the Court only wants it to consider one contract, and not consider the Defendant's implied contract (for quantum meruit).

When defining the word 'contract' to the jury, the Court frequently uses the word "written" when explaining a contract. (R. p. 188, lines 1, 21, and 24). The Court fails to give an explanation of how to infer the formation of an implied contract, and how an implied contract may have been breached by the Plaintiff, Ron.

Generally, an alleged error in a portion of a charge must be considered in light of the whole charge, and must be prejudicial to the appellant to warrant a new trial. *Priest v. Scott,* 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976). The entirety of the Court's closing charge and opening instructions were erroneous and prejudicial to the Defendant.

The Court's overwhelming focus on the Plaintiff's (Ron) claim and the Court's failure to adequately address the Defendant's (Law Office) counterclaims with clarity in both the closing charge and opening instructions was prejudicial to the Defendant. In light of the whole charge, the Defendant's counterclaims take a back seat to the Plaintiff's claim both in the eyes of the Court and by instruction, in the eyes of the jury. The Court failed to adequately charge the jury with the task of determining whether or not the Defendant proved that the Plaintiff breached the implied contract, and the

Court only refers to a "written" contract in the closing charge. Together, the opening and closing charges are prejudicial to the Defendant because the Court frequently tasks the jury with determining whether or not the Plaintiff had proven the burden of proof against the Defendant. The Court fails to provide similar attention or adequacy to the Defendant's counterclaims against the Plaintiff. The charges are prejudicial to the Defendants because the Court fails to mention the implied contract between and Plaintiff and the Defendant and fails to define an implied contract to the jury.

IV. DID THE DEFENDANT SHOW BY A PREPONDERANCE OF EVIDENCE THAT IT PROVIDED REQUESTED SERVICES TO THE PLAINTIFF BEYOND THE SCOPE OF THE WRITTEN CONTRACT WHICH RESULTED IN A PECUNIARY BENEFIT TO THE PLAINTIFF, FOR WHICH THE PLAINTIFF PAID THE DEFENDANT NOTHING?

"[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." *QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 202, 600 S.E.2d 105, 108 (Ct. App. 2004) (internal quotation marks omitted). As such, an action based on a theory of quantum meruit sounds in equity. *Columbia Wholesale Co. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). When reviewing an action in equity, an appellate court reviews the evidence to determine facts in accordance with its own view of the preponderance of the evidence. *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010).

The elements of a quantum meruit claim are as follows: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value. *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 617-18, 703 S.E.2d 221, 225 (2010).

The Defendant made a quantum meruit claim against the Plaintiff. However, in this case, the Court failed to charge the jury or even mention the Defendant's claim of quantum meruit against the Plaintiff. Nevertheless, the claim was made and the Defendant's evidence supports that claim.

Here, Ron and Mullinax agree that they entered into a written contract for Law Office to preform "services that are necessary and appropriate to administer the estate under the laws of South Carolina and rules of court having jurisdiction of the estate". (R. pp. 255 – 256, ¶ numbered 1). Ron was to pay Law Office a minimum of 2.5% of the estate value for "necessary services" under the terms of the written contract.

With regard to the administration of estates, actual and necessary services are more fully described in Treas. Regs. §20.2053-3(a), wherein it recognizes these activities are those for the collection of assets, payment of debts, and distribution of property to the persons entitled to it. Treas. Regs. §20.2053-3(a) expressly excludes from necessary activities those that are "not essential to the proper settlement of the estate, but incurred for the individual benefit of the heirs, legatees, or devisees…". In fact, Treas. Regs. §20.2053-3(d)(2) expressly excludes the sale of property as necessary unless the sale is necessary in order to pay the decedent's debts, expenses of administration, or taxes, to preserve the estate or effect distribution. Mullinax alludes

to these facts in his testimony. (R. p. 143, lines 6-23; R. p. 144, lines 9-21; R. p. 149, lines 7-21).

Sometime after the signing of the original contract, Ron wanted Law Office to perform additional unnecessary services. Specifically, Ron requested that Law Office negotiate for the sale of the decedent's stock in Manor Development. (R. p. 296). At trial, no one claimed that the sale of the Manor stock was necessary.

Ron's attorney, Jordan, testified that Law Office's efforts resulted in Ron receiving an amount of $261,000.00 above the original offer. (R. p. 103, lines 17-24). Ron also testified that Law Office's negotiations resulted in a higher sale price for the Manor stock. (R. p. 83, line 13- p. 84, line 13). Mullinax testified that Ron received an additional $156,000.00 above the original offer. (R. p. 155, lines 9-25). Ron eventually sold the stock for $1,585,000.00 (R. p. 78, lines 7-17), (approximately $185,000.00 above the original offer) as a result of Law Office's negotiations.

After Ron requested that Law Office perform the unnecessary services of negotiating for the sale of the Manor stock, the parties did not prepare or sign another written contract. However, based on previous dealings with Ron, Law Office billed Ron for the additional, services regarding negotiations for the sale of the Manor Stock at standard hourly rates for the firm, an amount of $20,997.50. Law Office stated in his correspondence attached to the invoice that "these charges were for the additional services rendered that were not necessary in order to administer the estate or trusts under the laws of South Carolina, and therefore not included in our charges for those necessary administration expenses. (R. pp. 296-299). Ron was familiar with Law Office's billing practices, because Ron and Debora signed an earlier Engagement Letter

for Estate Planning Services (R. pp. 359-360), with Law Office on April 1, 2009, which included the following provisions:

> ***How I Charge for Services Rendered***
>
> I usually bill for estate planning work in two ways: a fixed amount (which may be expressed in a range), and an amount based on my time billed at standard hourly rates. I will bill you for my time at my standard hourly rates, unless you and I agree on a fixed amount.
>
> ***Fixed Fee Arrangements***
>
> If I agree on a fixed amount, my fees will not be limited to that amount if you do not accurately disclose information that I request and need for your work, *or if you materially change the terms, conditions, scope, or nature of the work after we agreed on the fixed amount. If this happens, you agree to pay me for my time billed at my standard hourly rates, unless we agree on a revised fixed amount.* (emphasis added)

Although there was no separate written agreement circumscribing the unnecessary services requested by Ron during the estate administration, Ron was familiar with the terms of engagement for services with Law Office. Law Office's efforts netted an extra approximate amount of between $156,000.00 and $261,000.00 to the estate and trust. Law Office's negotiations benefited Ron, however, he never paid Law Office anything for negotiating the additional windfall to the estate and trust. Law Office subsequently filed a claim in the Probate Court for the unpaid legal services, which included these related fees for unnecessary services. Thereafter, Ron filed a

claim in Circuit Court and all of the matters, including Law Office's initial claim, were merged in the Circuit Court case.

The evidence shows by a preponderance of the evidence that Law Office's services, which were not covered by the June 23, 2009 written contract (R. pp. 255-258), conferred a pecuniary benefit on Ron, that Ron realized that benefit when he sold the stock for the increased sale price negotiated by Law Office, and Ron retained the full amount of that benefit under conditions that make it unjust for Ron to retain it without paying its value. Therefore, the Court should award Law Office an amount equal to its value. The evidence shows that Law Office's hourly charges for these unnecessary charges amounts to $20,997.50. However, in consideration of Ron's eventual sale of the Manor Stock with the additional benefit of $185,000.00 thanks to Law Office's negotiations, the Court may determine that Ron should pay a higher amount to Law Office for these services.

V. THE COURT ERRED WHEN IT ALLOWED A BREACH OF CONTRACT CLAIM BASED ON THE PLATINIFF'S INTERPRETATIONS OF THE CONTRACT, THAT IF FOLLOWED, WOULD VIOLATE STATUTORY LAW AND PUBLIC POLICY.

The definition of a breach of contract is a failure to person a contractual promise without legal excuse. Ralph King Anderson, Jr. South Carolina Requests to Charge – *Civil §* 19-2 (2002). The action is one at law. *Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc.*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004), predicated

on the existence of a contract. *Tidewater Supply Co., Inc. v. Industrial Electric Co.,* 253 S.C. 483, 171 S.E.2d 607 (1969).

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of this [c]ourt extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Townes Assocs., Ltd. v. City of Greenville,* 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

If an error raises a question of law, the analysis for the standard of review stops, and the de novo standard applies. *N. Am. Rescue Prods., Inc. v. Richardson,* 720 S.E.2d 53, 58 (S.C. Ct. App. 2001). Here, there is a question of law, and the de novo standard should be applied.

In order to recover for a breach of contract the party must allege and prove: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage suffered by the plaintiff as direct and proximate results of the breach. *Fuller v. Eastern Fire & Casualty Insurance Co.,* 240 S.C. 75, 124 S.E.2d 602, 610 (1962).

Ron and Law Office agree that they entered into a written contract for Law Office to perform "services that are necessary and appropriate to administer the estate under the laws of South Carolina and rules of court having jurisdiction of the estate" (R. pp. 255-256, ¶ numbered 1). Ron and Law Office also agreed that Ron was to pay Law Office a minimum of 2.5% of the estate value for "necessary services" under the

terms of the written contract (R. p. 257, ¶ numbered 2). The Engagement Letter summarized the necessary services that may be performed under the contract.

For administration of estates, actual and necessary services are more fully described in Treasury Regs. §20.2053-3(a), wherein it recognizes these activities are those for the collection of assets, payment of debts, and distribution of property to the persons entitled to it. Treasury Regs. §20.2053-3(a) expressly excludes from necessary activities those that are "not essential to the proper settlement of the estate, but incurred for the individual benefit of the heirs, legatees, or devisees...". In fact, Treasury Regs. §20.2053-3(d)(2) expressly excludes the sale of property as necessary unless the sale is necessary in order to pay the decedent's debts, expenses of administration, or taxes, to preserve the estate or effect distribution. Mullinax alludes to these facts in his testimony. (R. p. 143, lines 6-23; R. p. 144, lines 9-21; R. p. 149, lines 7-21).

A large portion of the value of Debora's estate included stock in one private corporation, Manor Development ("Manor"). As Personal Representative of Debora's estate and Trustee of Debora's trust, Ron requested that Law Office negotiate the sale of the Manor stock against the stated testamentary preference of Debora. The sale of the stock (e.g. property) was not required in order to pay the decedent's debts, expenses of administration, or taxes, to preserve the estate or effect distribution. Treasury Regs. §20.2053-3(d)(2). Because the sale of the Manor stock was unnecessary, Law Office's negotiations for the sale of the Manor stock was not covered by the written contract, which limited its scope to necessary services (R. pp. 255-256, ¶ numbered 1).

At the time the parties entered into the written contract, Ron and Law Office did not contemplate that negotiations for the sale of the Manor stock would be "necessary and appropriate" under the terms of the written contract. Except for Ron's testimony that should have been disallowed under the Dead Man's Statute, all of the evidence suggest that the sale of the estate's Manor stock was disfavored by the decedent and her documents, and the sale was unnecessary for the administration of the estate.

At no time has there been any allegation that the sale of the Manor stock was necessary to administer the estate under the terms of the written contract. In fact, the evidence shows that the sale of the stock was expressly discouraged by the decedent, Debora, including in her own sworn trust, signed 28 days prior to her death. (R. pp. 227-228, Article 21.3).

Although the sale of the Manor stock was unnecessary, Ron requested that Mullinax preform those additional services and subsequently claimed that the services for the sale of the stock should be included in the original fees for necessary services. (R. p. 64, line 19–p. 65, line 13). Under Ron's theory of the written contract, unlimited services would be considered "necessary" and would be required by Mullinax under a buffet of unlimited legal services at a set fee. (R. p. 64, line 19–p. 65, line 13).

Ron's own attorney, Jordan, testified about those things that were "necessary" for the administration of the estate. (R. p. 106, lines 5-17). According to the list provided in testimony by Ron's own attorney (Jordan), Law Office preformed all actions that were "necessary and appropriate" for the estate administration – at least until Ron discharged Law Office of its responsibilities.

When asked what is "necessary and appropriate" for the administration of the estate, Ron's attorney, Jordan, testified about what was "necessary and appropriate" that would have to be done to open up and proceed to take on and take through an estate such as Debora's. Taking Jordan's descriptive list in turn, the evidence shows that Law Office achieved each action that was deemed "necessary and appropriate", under the terms of the contract, as listed by Ron's own attorney.

First, Ron's attorney, Jordan, testified that to do what is "necessary and appropriate" for the estate administration, "the first question you have to ask the surviving spouse or the personal representative is what are the assets that are there, and then comes identifying what the those assets are." (R. p. 106, lines 9-17). Law Office had accomplished these steps by gathering estate asset information through the firm's questionnaires and communications with Ron and Debora prior to and after her death. (R. p. 313; R. pp. 314-321). Since Ron and Debora visited Law Office and requested preparation of their estate planning documents less than 4 months before Debora passed away, it was appropriate to use the previously gathered questionnaire and list of asset information as a starting point for gathering date of death asset values.

Secondly, Jordan testified that "necessary and appropriate" actions would include, that "you take those assets and determine the value of the estate at the date of death." (R. p. 106, lines 12-13). Law Office took the asset information the firm gathered and determined the date of death value by communicating with the various entities about the real estate, bank accounts and insurance policies (R. p. 336-337; R. p. 341; R.

p. 158, line 21-p. 159, line 14; R. p. 130, line 1–p. 131, line 19). Law Office gathered all the estate asset date of death values and prepared an itemized asset spread sheet (R. pp. 354-355, "fair market value (706) column"), to use in preparing a Federal Estate Tax Return (Form 706) draft for the estate. Law Office also used the information to prepare and file the Probate Court Inventory and Appraisement. (R. pp. 270-274).

Thirdly, Ron's attorney, Jordan, testified that in order to do what is "necessary and appropriate", you then "determine any debts or obligations that need to be satisfied…". Law Office determined whether or not the estate had debts or obligations (R. p. 320), and, determined how the estate was going to pay the debts. (R. p. 132, lines 7- 20). Throughout the process of gathering information regarding the assets and debts of the estate, Law Office dealt with the Probate Court by filing various required probate documents in accordance with the South Carolina Probate Code. (R. pp. 331-335; R. p. 338; R. p. 340). In response to questioning concerning the list of potential services on the firm engagement letter, Mullinax testified that his firm had completed each required task in a timely manner, up until the time of discharge. (R. p. 126, line 7 – p. 143, line 5). Law Office's engagement letter and Jordan's testimony describing "necessary and appropriate" estate administration tasks are fairly identical in substance.

There was no testimony or documents in evidence that suggests that prior to Law Office's discharge, that Law Office failed to accomplish anything that was "necessary and appropriate" under the written contract. The testimony from Ron's own

attorney, Jordan, bolsters the position that Law Office accomplished everything that was required under the terms of the written contract, up to the time of discharge. A contract may give a right to demand performance, but no cause of action arises until a party refuses or neglects to perform some duty required by the terms of the contract. *Tillinghast v. Boston & Port Royal Lumber Co.,* 39 S.C. 484, 18 S.E. 120 (1983)(mere fact one enters into contract gives no cause of action; action does not arise until there is some breach) *overruled on other grounds in Hendrix v. Hendrix,* 296 S.C. 200, 371 S.E.2d 528, 530 (1988). No allegation was made that Law Office refused to complete its duties under the terms of the contract. A complaint which alleges no breach of contractual duty fails to state a cause of action. *Seebaldt v. First Federal Savings & Loan Ass'n,* 269 S.C. 691, 239 S.E.2d 726, 727 (1977).

Under the terms of the written contract, the Summary of Services to be Performed for the Estate section states that the firm would provide services that are necessary and appropriate to administer the estate, including to "Prepare, assist, or coordinate for the preparation of all tax returns for the estate, including federal estate tax and generation-skipping tax returns..." (R. p. 256, ¶ (e)).

Law Office gathered the estate assets and values and determined that the estate value was $4,446,148.03. (R. pp. 354-355). The estate value, under the law, required that Law Office transcribe the collected values to an Estate Tax Return and that Ron file it with the Internal Revenue Service. (I.R.C. §2010(c)).

The gathering of the asset information and preparation of the Federal Estate Tax Return was "necessary" for the administration of the estate and was included in Law Office's set fee in the written contract. Although the law required Ron to file an

Estate Tax Return with the Internal Revenue Service, no estate "tax" was owed because of the way Law Office had drafted the estate planning documents. (R. pp. 197-237).

Ron alleged that the estate value was below $3,500,000.00 and thus, a 706 was never signed. Law Office insisted that the estate was valued at $4,446,148.03 and that Ron must file an Estate Tax Return. Although Law Office had collected much of the information to complete a Federal Estate Tax Return, because Ron and Law Office disagreed on the fair market value of assets in the estate, Law Office could not complete a Federal Estate Tax Return (Form 706) for Ron to sign. (R. p. 132, line 21- p. 133, line 15).

This provided Law Office with a dilemma. Mullinax testified that he was authorized to practice before the Internal Revenue Service and it was not contested. Under the provisions of Treasury Department Circular No. 230 (Treas. Regs. Subtitle A, Part 10), as an attorney practicing before the Internal Revenue Service, Law Office was charged with duties concerning the valuing of the estate and the proper application of the law.

Treasury Department Circular No. 230, provides the Regulations Governing Practice before the Internal Revenue Service, Title 31 Code of Federal Regulations, Subtitle A, Part 10. Treasury Department Circular No. 230 requires compliance with, in part, the following sections from those practicing before the Internal Revenue Service: Treasury Regs. §10.21 Knowledge of client's omissions, Treasury Regs. §10.22 Diligence as to accuracy, Treasury Regs. §10.34 Standards with respect to tax returns

and documents, affidavits and other papers, Treasury Regs. §10.37 Requirements for other written advice, Treasury Regs. §10.51 Incompetence and disreputable conduct and Treasury Regs. §10.52 Violations subject to sanction.

The applicable portions of Treasury Department Circular No. 230 mandated that Law Office comply with the law, which included adhering to the law as it applied to having Ron file an Estate Tax Return. For Law Office to disregard the rule of law and assist Ron in avoiding what was required under the law would be an egregious matter. Law Office did not go along with Ron's scheme but encouraged Ron's compliance with the law, by insisting that he file the Federal Estate Tax Return.

If Law Office had followed Ron's wishes and assisted Ron in failing to properly file an Estate Tax Return, it would mean that Law Office would have violated the law and it would be against all applicable legal and ethical standards. Furthermore, it would result in Law Office being sanctioned and potential loss of Law Office's livelihood as a practitioner practicing before the Internal Revenue Service. Law Office had no intention of assisting in this plan.

Courts will not enforce a contract which violates public policy, statutory law, or constitutional provisions. *Berkebile v. Outen*, 426 S.E.2d 760, 311 S.C. 50 (S.C. 1993). Thus, a contract which contravenes public policy is void and cannot be the basis of an action for breach. A contract which contravenes public policy is void, and an action cannot be maintained for either [313 S.C. 278] its breach or for inducing its breach. *Jackson v. Bi-Lo Stores*, Inc., 437 S.E.2d 168, 313 S.C. 272 (S.C.App.1993).

Any damage to Ron, was as a direct and proximate cause of Ron discharging Law Office and preventing Law Office from completing his duties under the written contract.

To recover for a breach of contract the plaintiff must allege and prove damage suffered by the plaintiff as direct and proximate results of the breach. *Fuller v. Eastern Fire & Casualty Insurance Co.,* 240 S.C. 75, 124 S.E.2d 602, 610 (1962). Although Law Office did not breach the written contract, if Law Office had breached the written contract, Ron suffered no damage as a result of the transaction. In fact, the overall actions of Law Office directly and proximately resulted in a negotiated gain for the estate in the amount of between $156,000.00 and $261,000.00. Mullinax's, Ron's and Jordan's testimony all agree that Law Office's actions resulted in a gain for the estate (R. p. 155, lines 9 - 25; R. p. 102, line 11- p. 103, line 24; R. p. 83, line 13-p. 84, line 13). Ron alleges that he paid Mullinax $100,000.00 in all toward all services (R. p. 69, lines 9-13), and, that Mullinax's direct and sole efforts resulted in an unexpected windfall for the estate in the amount of between $156,000.00 and $261,000.00.

The plaintiff bears the burden of proving damages resulting from the breach. *Fuller v. Eastern Fire & Casualty Insurance Co.,* 240 S.C. 75, 124 S.E.2d 602 (1962).

Although Ron admitted that he discharged Law Office from its duties under the written contract, Ron failed to prove that he suffered any damaged caused by Law Office.

Law Office did show its damages from Ron's breach of the written contract. Specifically, Ron was to pay Law Office a minimum of 2.5% of the estate value for "necessary services" under the terms of the written contract dated June 23, 2009 (R.

pp. 255-258). The estate value information provided by Ron and Debora in their estate planning questionnaire (R. pp. 314-321) and financial statement (R. p. 313) which contained information from the questionnaire, was available at the time the contract was executed. Debora's portion of the estate value was approximately $4,400,000.00. Under the written contract, with a $4,400,000.00 estate, Ron would owe Law Office approximately $110,000.00 (2.5% x $4,400,000.00) for the necessary estate administration services.

Because the estate value information provided by Ron and Debora in their estate planning questionnaire (R. pp. 314-321) and financial statement (R. p. 313), were unverified, Law Office initially billed Ron a partial amount of $25,000.00, and "attempted to ask for less fee than what the two point five percent might be, because I wanted to make sure that the values given to me were roughly accurate" (R. p. 124, line 17 – p. 125, line 4).

According to Ron and Debora's own documentation that they provided to Law Office, 2.5% of the estate value is equal to $110,000.00 (approximately 2.5% of $4,400,000.00). After collecting the date of death values of the estate's assets, Law Office prepared a spreadsheet containing the updated information (R. pp. 354-355), Law Office concluded that the estate was in fact worth approximately $4,400,000.00 and billed Ron accordingly to the written contract. (R. p. 257; R. p. 145, line 20-p. 148, line 15). Once Mullinax completed most of the work, Ron unjustifiably discharged Mullinax and failed to pay what Ron owed to Mullinax under the terms of the contract.

Damages in a breach of contract action are to place the nonbreaching party in the position he or she would have been had there been no breach and the contract was

performed. *Minter v. GOCT, Inc.,* 322 S.C. 525, 473 S.E.2d 67 (Ct.App. 1996). The proper measure of compensation is the loss actually incurred as the result of the breach. *Minter v. GOCT, Inc.,* 322 S.C. 525, 473 S.E.2d 67 (Ct.App. 1996).

Ron presented no evidence that he was damaged by the transactions with Law Office. Therefore, the Court should overturn the lower court ruling and Ron should receive no funds from Law Office since Law Office did not breach the contract.

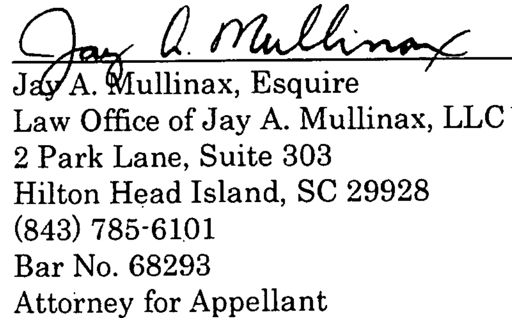
Ron did breach the written contract by unjustifiably discharging Law Office and Law Office is therefore due a remedy. There must be a "certain standard or fixed method by which the loss may be estimated with a fair degree of accuracy." *South Carolina Federal Savings Bank v. Thorton-Crosby Development, Co*, 303 S.C. 74, 399 S.E.2d 8, 11 (Ct. App. 1990), aff'd, 310 S.C. 232, 423 S.E.2d 114 (1992). The damages for Ron's breach of contract are specific. Ron owed Law Office 2.5% of the value of the estate for the necessary estate administration services. This amounted to approximately $110,000.00 (2.5% of $4,400,000.00), less the amount already paid.

CONCLUSION

For the foregoing reasons, Appellant respectfully prays that the Court reverse the judgment of the Circuit Court and award Appellant the amount of its claim for its breach of contract claim in the amount of $111,153.70 plus interest and for its claim for quantum meruit/unjust enrichment in the amount of $20,997.50 plus interest or additional relief that the Court deems equitable.

Respectfully submitted,

June 12, 2014



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2012-212331

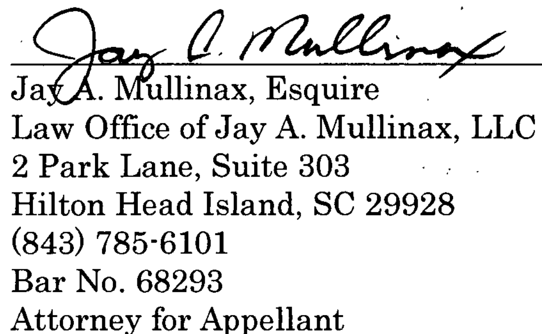
Ron Orlosky in his capacity as Personal Representative of The Estate of Debora L. Orlosky, and in his capacity as trustee of the Debora Laura Orlosky Revocable Trust,	Respondent,

v.

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

CERTIFICATE OF COUNSEL

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



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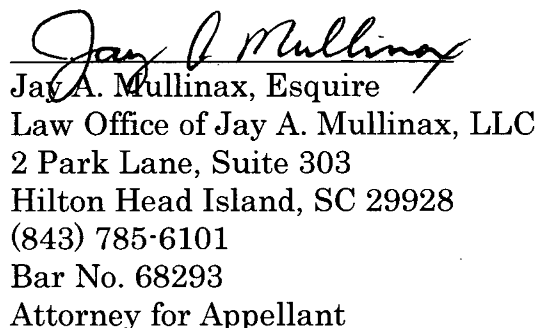
v.

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

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant and Certificate of Counsel on Mr. Ron Orlosky, by depositing a copy of it in the United States Mail, postage prepaid on June 12, 2014, addressed to his attorney of record, Mr. John R.C. Bowen, P.O. Drawer 21119, Hilton Head Island, South Carolina 29925-1119.

June 12, 2014



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