

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge and Master-In-Equity

---

Case No. 2013-CP-07-01491  
Appellate Case No. 2014-002249

---

**RECEIVED**

JUL 09 2015

Nicholls & Crampton, P.A.,

Appellant **SC Court of Appeals**

v.

Estate of Valerie D'Agostino,

Respondent.

---

REPLY BRIEF OF APPELLANT

---

Jay A. Mullinax, Esquire  
Law Office of Jay A. Mullinax, LLC  
2 Park Lane, Suite 303  
Hilton Head Island, SC 29928  
(843) 785-6101  
Attorney for Appellant

**TABLE OF CONTENTS**

Table of Authorities.....Pg. iii

Adoption of Statements.....Pg. 1

**Arguments**

I. THE LOWER COURT’S ORDER SHOULD BE REVERSED BECAUSE NICHOLLS APPEALED THE LOWER COURT’S ESTOPPEL RULING AND NICHOLLS ARGUMENTS WERE PERSUASIVE.....Pg. 1

II. NICHOLLS REFERENCE TO N.C. CODE §28A-26-6, A STATUTE WHICH PROHIBITED RICHARD D’AGOSTINO FROM TAKING LEGAL ACTION AS PERSONAL REPRESENTATIVE IN NORTH CAROLINA (PRIOR TO HIS APPOINTMENT IN NORTH CAROLINA) IS NOT AN ISSUE BEFORE THE COURT FOR REVIEW, NOR IS IT GERMANE TO APPELLANT’S ARGUMENTS OR A REVERSAL IN THIS CASE.....Pg. 5

III. NICHOLLS ARGUMENT THAT NORTH CAROLINA LAW SHOULD BE APPLIED IN THIS CASE IS PRESERVED FOR REVIEW BECAUSE IT WAS RAISED TO AND RULED UPON BY THE LOWER COURT, AND IS PERSUASIVE.....Pg. 8

IV. NORTH CAROLINA LAW RETROACTIVELY CONSTRUED THE CONTRACT TO MEAN THAT THE ESTATE OF VALERIE D’AGOSTINO WAS ALSO

	LIABLE FOR NICHOLLS’ FEES, THUS NULLIFYING ANY LEGAL IMPACT OF AN AMBIGUITY IN THE CONTRACT.....Pg. 9
V.	NORTH CAROLINA’S LAW, RETROACTIVELY CONSTRUING THE CONTRACT TO IMPUTE LIABILITY TO VALERIE D’AGOSTINO’S ESTATE, NULLIFIED ANY LEGAL IMPACT OF AN AMBIGUITY IN THE CONTRACT.....Pg. 10
VI.	THE COURT SHOULD APPLY THE “RELATION BACK” DOCTRINE BECAUSE THE NORTH CAROLINA COURT’S APPOINTMENT OF RICHARD D’AGOSTINO ON JULY 12, 2010 AS FOREIGN PERSONAL REPRESENTATIVE RELATES BACK TO HIS SIGNING OF THE CONTRACT ON JUNE 10, 2010.....Pg. 13
VII.	THE APPELLANT SPECIFICALLY RAISED THE ISSUE OF RICHARD’S ACTS BENEFICIAL TO THE ESTATE, PRESERVING THE ISSUE FOR APPEAL.....Pg. 13
	Conclusion.....Pg. 15

## TABLE OF AUTHORITIES

### CASES

<u>Associated Spring Corp. v. Roy F. Wilson &amp; Avnet, Inc.</u> , 410 F. Supp. 967 (D.S.C., 1976).....	Pg. 7
<u>Holland v. State</u> , 470 S.E.2d 378, 379 (S.C. 1996).....	Pg. 2, 5
<u>In re Dawson Est.</u> , 689 N.E.2d 1008, 1012, 117 Ohio App. 3d 51, 57-8 (Ohio Ct. App. 1996).....	.....Pg. 11
<u>Livingston v. Atlantic Coast Line R. Co.</u> , 176 S.C. 385, 180 S.E. 343 (1935).....	Pg. 7
<u>Murphy v. Equitable Life Assurance Society</u> , 197 S.C. 393, 15 S.E.2d 646 (1941).....	Pg. 7

### STATUTES

N.C. Code §28A-13-1.....	Pg. 2, 3, 4, 6, 7, 8, 10, 13, 14
N.C. Code §28A-26-6.....	Pg. 5, 6, 7
S.C. Code Ann. §62-3-803(c)(3) (2012).....	Pg. 12
S.C. Code Ann. §62-3-808(c).....	Pg. 4

### OTHER AUTHORITIES

Restatement (Second) of Conflict of Laws §187 (1971).....	Pg. 7
---	-------

**ADOPTION OF STATEMENT OF ISSUES ON APPEAL, STATEMENT OF THE CASE,  
AND STATEMENT OF FACTS**

Appellant [Plaintiff], Nicholls & Crampton, P.A., by and through its attorney, submits this Reply Brief. By reference, Appellant adopts the Statement of Issues, Statement of the Case, and the Statement of Facts presented in its Initial Brief of Appellant.

**ARGUMENTS**

**I. THE LOWER COURT’S ORDER SHOULD BE REVERSED BECAUSE NICHOLLS APPEALED THE LOWER COURT’S ESTOPPEL RULING AND NICHOLLS ARGUMENTS WERE PERSUASIVE.**

Respondent [Defendant] alleges that the Appellant [Plaintiff] failed to appeal the Lower Court’s estoppel ruling and as a result, the Lower Court’s Order should be affirmed. The Respondent refers to the Lower Court’s Order Conclusion of Law #6, which reads, “I conclude that the Petitioner is estopped and/or barred from now taking the position that Richard D’Agostino contracted with it in his representative capacity because that position is directly at odds and inconsistent with Petitioner’s position in the Estate of Richard D’Agostino and its email of January 30, 2012.” (Lower Court Order dated 9/16/14)

In direct appeal of the Lower Court’s ruling on estoppel, the Appellant argued in its Initial Brief that “Both the Plaintiff and the Defendant agree that at the time the contract was signed, Richard, in his individual capacity, contracted with the Petitioner Nicholls.” (Appellant’s Initial Brief Pg. 10, Pg. 12)

The entire record contains “no evidence” that the Appellant ever took the position that Richard D’Agostino [originally] contracted in his representative capacity, nor does the Appellant presently take such a position. The Respondent cannot provide a scintilla of evidence the Appellant ever took the position that Richard D’Agostino originally contracted in his representative capacity with Appellant. When there is “no evidence,” an appellate court will reverse. (Holland v. State, 470 S.E.2d 378, 379 (S.C. 1996)).

The Appellant has consistently maintained that the Richard D’Agostino originally contracted in his individual capacity with Nichols on June 10, 2010, but that the North Carolina Court’s appointment of Richard D’Agostino as Foreign Personal Representative on July 12, 2010 means that powers of the personal representative “relate back” to the personal representative’s acts prior to his appointment. (See N.C. Code §28A-13-1)

The Appellant’s acceptance of North Carolina law’s retroactive recognition of an act by an individual later appointed as Foreign Personal Representative in no way suggests that the Appellant ever took a position that Richard D’Agostino originally signed the contract as Personal Representative.

At the hearing, in response to the Court’s mention of estoppel on this issue (Tr. Pg. 23, lines 20-21; Tr. Pg. 34, line 16; Pg. 43, line 7), Appellant specifically expressed to the Court that “Mr. Richard D’Agostino was not the [Foreign] Personal Representative [in North Carolina] when he signed the engagement letter” (Plaintiff’s Exhibit 2(b), Part 1(A)) on June 10, 2010. (Tr. Pg. 24, lines 3-6; Also see Tr. Pg. 25, lines 15-16; Tr. Pg. 26, lines 1-2, lines 7-9; Tr. Pg. 34, lines 23-24) Appellant continued by explaining to the Court that the North Carolina Court had already appointed [March 10, 2010] a relative of Valerie D’Agostino as Personal Representative in North Carolina. (Tr. Pg. 24, lines 12-13) The Appellant’s Initial Brief emphasizes these foundational points in direct

appeal against the Lower Court's ruling on estoppel. (Appellant's Initial Brief, Pgs. 3 – 6; Pgs. 10 - 12; Pg. 15; Pg. 20)

Appellant further explained to the Court the basis for the Appellant's claim, being, inter alia, that when the North Carolina Court appointed Richard as Foreign Personal Representative of the Valerie's Estate on July 12, 2010, his powers as the Foreign Personal Representative "relate back" to his acts prior to his appointment, thus ratifying his prior act of contracting individually with Nicholls on June 10, 2010 for services related to Valerie's Estate. (Tr. Pg. 24, lines 20-24; Tr. Pg. 34, line 23 - Pg. 35, line 20) The Appellant expressly reiterated this contention with specificity in its May 22, 2014, May 30, 2014, and June 27, 2014 correspondences to the Lower Court, as requested by the Lower Court (Letters dated 5/22/14, 5/30/14, 6/27/14) The Lower Court's failure to properly apply North Carolina law (N.C. Code §28A-13-1) in this case, as argued in the Appellant's correspondences to the Lower Court and in the Appellant's Initial Brief, resulted in the incorrect ruling that the Appellant should be estopped from asserting its claim against the Estate of Valerie D'Agostino.

The Appellant, consistent with its unchanging position that Richard D'Agostino had originally contracted in his individual capacity, made a claim (Plaintiff's Exhibit 2, Part 1(D)) dated December 27, 2011 against Richard D'Agostino's estate. That claim states that its basis was for "Legal services rendered in the Estate of Valerie D'Agostino for decedent Richard D'Agostino pursuant to engagement letter [contract] attached; decedent [Richard D'Agostino] agreed to be personally liable for said fees in the event fees were not paid by the Estate of Valerie D'Agostino." (Plaintiff's Exhibit 2, Part 1(D))

Following the Appellant's receipt of a Disallowance of Claim (Plaintiff's Exhibit 2, Part 1(e)) from Richard D'Agostino's estate, Appellant filed a Petition for Allowance of Claim (Defendant's

Deposition Exhibit 20) against Richard D'Agostino's estate, wherein the Appellant states that "Richard D'Agostino personally, and not in a representative capacity, contracted on June 8, 2010 with Petitioner for the performance of legal services in North Carolina in connecti[o]n with the administration of the Estate of Valerie D'Agostino." As noted in the Appellant's claim and petition against Richard D'Agostino's estate, the Appellant maintained that Richard D'Agostino contracted with the Appellant in his personal capacity while still recognizing the dual liability of Valerie D'Agostino's estate. When the North Carolina Court appointed Richard D'Agostino as Foreign Personal Representative, the liability of Valerie D'Agostino's estate was solidified as well as retroactively ratified under North Carolina law. (See N.C. Code §28A-13-1)

The retroactive recognition of Richard D'Agostino's act, "as if the North Carolina Court had appointed him as Foreign Personal Representative prior to signing the contract", did not negate Richard D'Agostino's individual liability under the contract that he signed personally. Thus, the Appellant's earlier claim (Defendant's Deposition Exhibit 20) against Richard D'Agostino's estate was proper and legally justifiable under South Carolina claims law, which recognizing dual liability and contract claims against a personal representative, "whether or not the personal representative is individually liable therefore." (See S.C. Code Ann. §62-3-808(c)) The Appellant specifically raised this issue in its Initial Brief (Appellant's Initial Brief, Pg. 11) by quoting S.C. Code Ann. §62-3-808(c). (Note typographical citation error in Appellant's Initial Brief Pg. 11 to S.C. Code Ann. §62-3-808(d)). At the hearing, the attorney for the Appellant adamantly argued that the North Carolina Court's recognition of Valerie D'Agostino's estate liability, after its appointment of Richard D'Agostino as Foreign Personal Representative, did not "negate" Richard D'Agostino's individual liability. (Tr. Pg. 34, lines 6 - Pg. 44, line 10) (It is worth noting here that under conflict of laws principles the North Carolina contract is to be interpreted under North Carolina law, but each party

has properly followed South Carolina procedural laws for the claims in South Carolina.)

The Appellant directly appealed the Lower Court's ruling on estoppel by attacking the estoppel's underpinnings. Contrary to the Lower Court's ruling on estoppel, the entire record contains "no evidence" that the Appellant ever took the position that Richard D'Agostino [originally] contracted in his representative capacity. In light of the fact that the Respondent did not produce a scintilla of evidence the Appellant ever took the position that Richard D'Agostino originally contracted in his representative capacity with Appellant, this Court should reverse the Lower Court's ruling on estoppel. When there is "no evidence," an appellate court will reverse. (Holland v. State, 470 S.E.2d 378, 379 (S.C. 1996))

**II. NICHOLLS REFERENCE TO N.C. CODE §28A-26-6, A STATUTE WHICH PROHIBITED RICHARD D'AGOSTINO FROM TAKING LEGAL ACTION AS PERSONAL REPRESENTATIVE IN NORTH CAROLINA (PRIOR TO HIS APPOINTMENT IN NORTH CAROLINA) IS NOT AN ISSUE BEFORE THE COURT FOR REVIEW, NOR IS IT GERMANE TO APPELLANT'S ARGUMENTS OR A REVERSAL IN THIS CASE.**

The Respondent suggests that Appellant's Initial Brief's reference to N.C. Code §28A-26-6 is not before this Court "for review", because it was never raised to and ruled upon by the Lower Court. The Appellant agrees that the particular statute is not before this Court for review. However, the Appellant asserts its right to submit legal authority, case law and statutory, in support of issues raised in the Lower Court. The Respondent contends that the Appellant is prohibited from citing legal authority (case law or statutory) in a legal brief during the appeal process. This contention is without merit.

The Appellant's use of N.C. Code §28A-26-6 in its Initial Brief simply bolsters the Appellant's contention that Appellant never took the position that Richard D'Agostino [originally] contracted in his representative capacity and that the Lower Court failed to apply North Carolina law to a North Carolina contract.

Appellant has consistently maintained that Richard D' Agostino originally contracted with it in his individual capacity and N.C. Code §28A-26-6 simply supports that position by noting that Richard D'Agostino was prohibited from taking legal action in his representative capacity, in North Carolina (prior to his appointment in North Carolina), under North Carolina law. The entire purpose of the contract was for Richard to take action in the North Carolina Courts. If Richard had signed the contract, as South Carolina [Domiciliary] Personal Representative, for the purpose of taking legal action in the North Carolina Courts, the contract would be void *ab initio* as against public policy.

The Appellant specifically raised the issue of N.C. Code §28A-13-1 with the Lower Court. (Letters dated 5/22/14, 5/30/14, 6/27/14) The Lower Court improperly interpreted the Appellant's use of N.C. Code §28A-13-1 ("relation back" statute) when it failed to apply North Carolina law. (N.C. Code §28A-26-6) Part of the Court's failure to properly interpret the North Carolina law included its failure to recognize that N.C. Code §28A-26-6 prohibited Richard D'Agostino from taking legal action in North Carolina, prior to his appointment in North Carolina. This Court Order specifically states that "There is no reason why Richard D'Agostino could not have entered into the contract as issue in his capacity as Personal Representative of his wife's South Carolina [Domiciliary] estate..." (Lower Court Order Pg. 9)

All parties agree that the contract was for the purpose of Appellant assisting Richard D'Agostino in filing actions in a North Carolina Court. Richard D'Agostino had to initiate the

actions in an individual capacity, because North Carolina law prohibited him from filing the actions in his representative capacity. (N.C. Code §28A-26-6) North Carolina “relation back” statute (N.C. Code §28A-13-1), however, retroactively disregards N.C. Code §28A-26-6 once the North Carolina Court appointed Richard as Foreign Personal Representative. This allowed Richard’s prior acts to be recognized as if the North Carolina Court had appointed him earlier.

As noted in the Lower Court’s Order, the Appellant argued before the Lower Court that N.C. Code §28A-13-1 should be applied in this case. The Court should have used North Carolina law to interpret this North Carolina statute. As noted in Livingston v. Atlantic Coast Line R. Co., 176 S.C. 385, 180 S.E. 343 (1935), the court stated “...a contract as to its validity and interpretation is governed by the law of the place where it is made, the *lex loci contractus*; or more accurately, that contracts are to be governed as to their nature, validity and interpretation by the law of the place where they are made, unless the contracting parties clearly appear to have had some other place in view.’ 13 C.J. 248 This view is widely-held and is generally in conformity with that of the Restatement (Second) of Conflict of Laws §187 (1971), as cited in Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc., 410 F. Supp. 967 - Dist. Court, D. South Carolina 1976.”

Here, the Lower Court’s order expressly indicates that it relies exclusively on “South Carolina law” to interpret the “North Carolina contract”. The failure of the lower Court to use North Carolina law to interpret a North Carolina contract is in direct conflict with South Carolina conflict of laws principles, which requires that the contract be interpreted with the law of the state where it is signed and performed. (See Murphy v. Equitable Life Assurance Society, 197 S.C. 393, 15 S.E.2d 646 (1941)) Because the Lower Court failed to use North Carolina law to interpret a North Carolina contract, the Lower Court’s Order should be reversed.

**III. NICHOLLS ARGUMENT THAT NORTH CAROLINA LAW SHOULD BE APPLIED IN THIS CASE IS PRESERVED FOR REVIEW BECAUSE IT WAS RAISED TO AND RULED UPON BY THE LOWER COURT, AND IS PERSUASIVE.**

Respondent argues that North Carolina law should not be applied in this case because it was allegedly not raised to and ruled upon by the lower court, and if preserved, is allegedly without merit. However, Respondent's Initial Brief specifically cites three separate occasions where Appellant explicitly encouraged the Lower Court to apply North Carolina law in this case. (Respondent's Initial Brief Pg. 10; Letters dated 5/22/14, 5/30/14, 6/27/14) In each instance, the Appellant specifically cites the decisive N.C. Code §28A-13-1 "relation back" statute.

Additionally, the Lower Court's Order expressly addressed and ruled on the application of North Carolina law, specifically referring to the pivotal and foundational N.C. Code §28A-13-1 "relation back" statute. (Lower Court Order dated 9/16/14 Pg. 9; Pg. 13 Conclusions of Law #8) The Lower Court Order specifically states that the "...Petitioner cites "relation back" statutes of...the North Carolina Probate Code (N.C. Code §28A-13-1) in support of its claim." (Lower Court Order dated 9/16/14, Pg. 9)

As noted, the Respondent betrays his contention that the Appellant never raised the issue of the application of North Carolina law when Respondent specifically cites the instances where the Appellant raised the issue to the Lower Court. (Respondent's Initial Brief Pg. 10) Also, the Lower Court's Order specifically shows that it ruled on the application of North Carolina law in this case. (Lower Court Order dated 9/16/14 Pg. 9; Pg. 13 Conclusions of Law #8) The Respondent's argument that (1) the Appellant never raised the issue of the application of North Carolina law and (2) that the Lower Court never ruled on the issue, are both without merit. Therefore, the Court should apply North Carolina law to the North Carolina contract and reverse the Lower Court's Order.

**IV. NORTH CAROLINA LAW RETROACTIVELY CONSTRUED THE CONTRACT TO MEAN THAT THE ESTATE OF VALERIE D'AGOSTINO WAS ALSO LIABLE FOR NICHOLLS' FEES, THUS NULLIFYING ANY LEGAL IMPACT OF AN AMBIGUITY IN THE CONTRACT.**

The Appellant has consistently maintained that at the time Richard D'Agostino signed the contract, he did so in his individual capacity, accepting personal liability. The Respondent suggests that the contract was ambiguous, but the Respondent, the Appellant, and the Court all construed the contract to mean that Richard D'Agostino signed it in his individual capacity. The Appellant has never alleged that when Richard D'Agostino signed the contract that he was somehow prospectively assigning liability to Valerie D'Agostino's estate. Richard had no power to do so. In fact, at the hearing, the Appellant specifically advised the Lower Court that "at the time that he [Richard D'Agostino] signed the contract he was not [Foreign] Personal Representative [in North Carolina]." (Tr. Pg. 26, lines 7-9) Therefore, he could not prospectively charge the estate until he was appointed [in North Carolina] and then retroactively he was, in fact, valid in charging the estate for whatever reimbursements or anything else he needed to do." (Tr. Pg. 34, line 23 – Pg. 35, line 3)

Under the N.C. Code §28A-13-1 "relation back" statute, the North Carolina Court's appointment of Richard D'Agostino on July 12, 2010, "**a month after**" he signed the contract, solidified the latent liability of Valerie D'Agostino's estate that previously lay dormant in the contract. The Lower Court failed to apply this North Carolina law in this case, although the Appellant specifically argued the issue. Thus, Court should reverse the Lower Court Order.

**V. NORTH CAROLINA'S LAW, RETROACTIVELY CONSTRUING THE CONTRACT TO IMPUTE LIABILITY TO VALERIE D'AGOSTINO'S ESTATE, NULLIFIED ANY LEGAL IMPACT OF AN AMBIGUITY IN THE CONTRACT.**

The Appellant has consistently maintained that at the time Richard D'Agostino signed the contract, he did so in his individual capacity, accepting personal liability. At the time Richard signed the engagement letter [contract] on June 10, 2010, he had no authority to prospectively assign liability to Valerie D'Agostino's estate. However, when the North Carolina Court appointed Richard as Foreign Personal Representative of the Valerie's Estate on July 12, 2010, his powers as the Foreign Personal Representative "relate back" to his acts prior to his appointment, thus ratifying his prior act of contracting individually with Nicholls on June 10, 2010 for services related to Valerie's Estate. (Tr. Pg. 24, lines 20-24; Tr. Pg. 34, line 23 - Pg. 35, line 20; See N.C. Code §28A-13-1)

Respondent argues that Richard D'Agostino's acts prior to his appointment as Foreign Personal Representative in North Carolina have no bearing on the liability of Valerie D'Agostino's estate. The Respondent is effectively asking the Court to disregard North Carolina law which specifically provides that "...The powers of a personal representative relate back to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter...." (N.C. Code §28A-13-1)

The Respondent also implies that Richard D'Agostino's acts, in furtherance of the estate administration, were somehow for Richard D'Agostino's personal benefit. Ironically, although Richard D'Agostino personally advanced funds in the furtherance of the estate administration, he never made a claim against the estate, he was never compensated for his role as Personal Representative in South Carolina or North Carolina, and he even renounced all spousal benefit he would have received under the intestacy laws of both South Carolina and North Carolina.

Respondent suggests that Richard D'Agostino's pre-appointment acts were for his personal benefit. However, each of Richard's pre-appointment acts were in direct advancement of the estate administration and identical to acts required and expected of Personal Representatives. Richard's attorneys appropriately analyzed the various intestate distribution schemes under both North Carolina and South Carolina law. This analysis included consideration of Richard's potential for an administrator's fee and spousal share. (Defendant's Hearing Exhibit 8) Every personal representative has a basic obligation to determine various distribution schemes under applicable laws, even if the analysis includes the personal representative as a beneficiary. "The mere fact that a fiduciary may also have an interest in the estate as a beneficiary does not, without more, support a finding that the actions of the fiduciary are taken solely for her benefit as beneficiary." (In re Dawson Est., 689 N.E.2d 1008, 1012, 117 Ohio App. 3d 51, 57-8 (Ohio Ct. App. 1996))

Respondent also points to Richard's act of filing sanctions against Huther (Defendant's Hearing Exhibit 8), filed contemporaneously with removal of Huther as Personal Representative (Order on Petition for Resignation of Administrator dated 7/12/10) so the North Carolina Court could properly appoint Richard as Foreign Personal Representative. Although sanctions against Huther (and his attorney) sought and gained an \$8,000.00 reimbursement for Richard's legal fees (Plaintiff's Hearing Exhibit 2(B), Part 4) that he advanced in furtherance of his appointment as Foreign Personal Representative in North Carolina, nothing suggests that he sought the "reimbursement" for personal gain. If Richard's recoupment of \$8,000.00 legal fees from Huther and his attorney had been unsuccessful, Valerie's estate would have been liable for those unrecovered fees advanced by Richard.

Respondent additionally suggests that legal representation of Richard in negotiating a resolution of the "North Carolina matters" somehow was for Richard personally. These "North

Carolina matters” related directly to Richard’s petition and appointment as Foreign Personal Representative, the resignation of Ronald Huther as Personal Representative, and the sanctions filed against Huther in support of these actions. Richard initiated all of these acts in support of the estate administration. No evidence suggests that he sought or received any benefit for undertaking these actions.

The Respondent correctly states that in an email dated January 30, 2012, Nicholls’ attorney wrote to co-counsel and stated that he “did not file a claim in [Valerie D’Agostino’s] estate as we were never advised to do so by her estate and our claim has always been against [Richard D’Agostino] personally.” (Defendant’s Deposition Exhibit 19) As of January 30, 2012, the time of the email, Nicholls had presented a claim against Richard D’Agostino’s estate dated December 27, 2011 (Plaintiff’s Hearing Exhibit 2(D)), but had not yet presented a claim against Valerie D’Agostino’s estate. Richard subsequently presented a claim against Valerie D’Agostino’s estate dated September 26, 2012 (Plaintiff’s Hearing Exhibit 2(B), Part 1(F)), nine months after the subject email.

In fact, in the subject email of January 30, 2012, Nicholls’ co-counsel from South Carolina suggest that “There’s no need to [presently] file a claim in her [Valerie’s] estate, because direct attorney’s fees/adm expenses are not subject to the normal “creditor” claim rules. (Defendant’s Exhibit 19) This presumably refers to the South Carolina’s presentation of claims procedures which disregards general statute of limitation rules on the presentation of claims for “collection of ...reimbursement for expense advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.” (S.C. Code Ann. §62-3-803(c)(3) (2012)) Nicholl’s co-counsel also mentions in the email that he has a “pending Motion for attorney fees against her [Valerie’s] estate, and I included your [Nicholls] fees (along with copies of your

engagement letter and billing) – so we should be covered in her [Valerie’s] estate... [If not] ... we should be able to recover from his [Richard’s] estate.” (Defendant’s Exhibit 19)

Nicholls clearly contemplated the potential that under the relation back doctrine, practiced in numerous jurisdictions, that his claim against Richard’s estate in no way impeded his potential claim against Valerie’s estate. (Defendant’s Exhibit 19) Thus, the Court should reverse the Lower Court’s ruling construing that an inferred ambiguity in the contract disallowed Nicholls claim.

**VI. THE COURT SHOULD APPLY THE “RELATION BACK” DOCTRINE BECAUSE THE NORTH CAROLINA COURT’S APPOINTMENT OF RICHARD D’AGOSTINO ON JULY 12, 2010 AS FOREIGN PERSONAL REPRESENTATIVE RELATES BACK TO HIS SIGNING OF THE CONTRACT ON JUNE 10, 2010.**

The powers of a personal representative relate back to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter....” (N.C. Code §28A-13-1) Richard signed the contract on June 10, 2010 and the North Carolina Court appointed him on July 12, 2010, thus ratifying his act of signing the contract. The Appellant fully addresses these issues with particularity in its Initial Brief, Argument III.

**VII. THE APPELLANT SPECIFICALLY RAISED THE ISSUE OF RICHARD’S ACTS BENEFICIAL TO THE ESTATE, PRESERVING THE ISSUE FOR APPEAL.**

The Respondent argues that the Appellant never raised the issue of what acts Richard took that were beneficial to the estate. The Appellant’s principal argument throughout this case rests on N.C. Code §28A-13-1, which reads, in part, “The powers of a personal representative relate back to

give acts by the person appointed which are ‘**beneficial to the estate**’ occurring prior to appointment the same effect as those occurring thereafter....”

Appellant filled its Lower Court argument with references to the acts that were beneficial to the estate under N.C. Code §28A-13-1. (Tr. Pg. 41, lines 12-15, line 20; Tr. Pg. 42, lines 4-9, 21-23) The hearing included an extensive and exclusive discussion on the subject of Richard’s acts benefiting the estate. (Tr. Pg. 41, line 11 – Pg. 61, line 22) Appellant specifically listed several acts that benefited Valerie’s estate, including Richard’s Court filings that led to the resignation of Huther as Personal Representative in North Carolina, Richard’s appointment as Foreign Personal Representative in North Carolina, and the other things listed on the invoice. (Tr. Pg. 42, line 4-9, lines 21-23; See Plaintiff’s Hearing Exhibit 2(B) and 2(C)) During the discussion on the subject of Richard’s acts benefiting the estate, the Appellant referred to the benefits to the estate about 20 times. (Tr. Pg. 41, line 11 – Pg. 61, line 22)

When referring to Richard’s acts that benefited the estate, the Appellant specifically referenced those things that “advance the cause of administration” and for “estate administration”. (Tr. Pg. 41, lines 12-15, line 20; Tr. Pg. 42, lines 4-9, 21-23) A review of the various actions taken by Richard that advanced the estate administration, it is difficult to conclude that Richard’s appointment as Foreign Personal Representative in North Carolina and his successful closure of the North Carolina estate administration, was anything other than “**beneficial to the estate.**”

Richard’s actions closed the North Carolina estate administration, an unnecessary estate expense. This act benefited the estate. The North Carolina estate administration should have never been opened by anyone, let alone, by Ronald Huther who later resigned as Personal Representative when the Court found out he was appointed under false pretense. (Defendant’s Hearing Exhibit 8) Huther’s fraudulent filings with the North Carolina Court and the improper opening of the North

Carolina estate administration led directly to the additional years of litigation, not Richard's acts of undoing the wrong that had been done by Huther. The record reflects that the Appellant raised the issue of Richard's acts, prior to appointment in North Carolina, as being "**beneficial to the estate.**" (Tr. Pg. 41, line 11 – Pg. 61, line 22)

In addition to the Respondent's contention that Appellant did not raise this issue, the Respondent also contends that the Lower Court did not rule on the issue. In the Respondent's Initial Brief, the Respondent specifically refers to the Lower Court's Order, wherein the Lower Court stated that "it was far from clear" that Richard's actions... were '**beneficial to the estate**' and found that Nicholls "has not shown that the work he performed was '**beneficial to the Estate**' of Valerie D'Agostino." (Respondent's Initial Brief Pg. 18; See Lower Court Order dated 9/16/14, Pg. 10, Pg.11 Findings of Fact #8) Neither the Lower Court nor the Respondent provide any legal analysis or legal authority for the unsupported finding that Richard's actions were unbeneficial to the estate. Conversely, the Appellant provides legal analysis and extensive authority for the interpretation of what is "beneficial to the estate" in Appellant's Initial Brief, Argument III, Pages 25-26. Thus, the Court should reverse the Lower Court's ruling and find that Richard's acts benefited the estate.

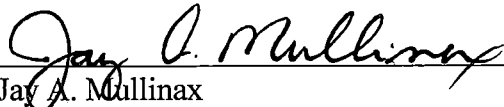
### **CONCLUSION**

For the foregoing reasons, Appellant respectfully prays that the Court reverse the judgment of the Circuit Court and award Appellant Nicholls the amount of its claim plus interest and additional

relief that the Court deems equitable.

Respectfully submitted,

July 6, 2015

  
Jay A. Mullinax  
Law Office of Jay A. Mullinax, LLC  
2 Park Lane, Suite 303  
Hilton Head Island, SC 29928  
(843) 785-6101  
Bar No. 68293  
Attorney for Appellant

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**

JUL 09 2015

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

SC Court of Appeals

Marvin H. Dukes, III, Circuit Court Judge and Master-In-Equity

Appellate Case No. 2014-002249

Nicholls & Crampton, P.A.,

Appellant,

v.

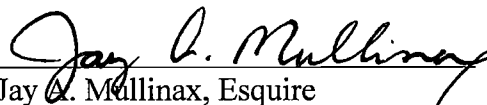
Estate of Valerie D'Agostino,

Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant and Additional Designation of Matter on the Estate of Valerie D'Agostino by depositing a copy of it in the United States Mail, postage prepaid on July 6, 2015, addressed to its attorney of record, Mr. J. Ashley Twombly, Esquire, Twenge + Twombly Law Firm, LLC, 311 Carteret Street, Beaufort, South Carolina 29902.

July 6, 2015

  
Jay A. Mullinax, Esquire  
Law Office of Jay A. Mullinax, LLC  
2 Park Lane, Suite 303  
Hilton Head Island, SC 29928  
(843) 785-6101  
Bar No. 68293  
Attorney for Appellant



July 6, 2015

**VIA U.S. POSTAL SERVICE**

Jenny Abbott Kitchings, Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

**RECEIVED**

JUL 09 2015

SC Court of Appeals

Re: Estate of Valerie D'Agostino  
Case No. 2013-CP-07-01491  
Appellate Case No. 2014-002249

Dear Ms. Kitchings:

Enclosed please find one (1) original and one (1) copy of Appellant's Initial Reply Brief, Additional Designation of Matter, and Proof of Service. If you have questions, please don't hesitate to contact our office. Thank you for your time and attention to this matter.

Very truly yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

/Enclosures  
JAM:lnk

\\JAYAMULLINAX-PC\Mullinax Shared\Firm\Clients\PROBATE  
CLIENTS\Claimant\Nicholls & Crampton, P.A\Appeal\Reply Brief\NICHOLLS Letter to Court  
of Appeals Enclosing Reply Brief.docx

*Chart your course.  
Build your legacy.  
There's still time.*



2 Park Lane, Suite 303  
Hilton Head Island, SC 29928

Jenny Abbott Kitchings, Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

RECEIVED

JUL 09 2015

SC Court of Appeals