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.

PETITION FOR REHEARING

Jay A. Mullinax, LL.M. (Estate Planning)
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

Pursuant to Rule 221 SCACR, Appellant, Law Office of Jay A. Mullinax, LLC, hereby petitions this Court for a rehearing of 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, Appellate Case No. 2012-212331.

MEMORANDUM IN SUPPORT

On December 8, 2014, an oral argument was held between Respondent's Counsel of Record, Mr. Stephen A. Spitz and Appellant's attorney, Mr. Jay A. Mullinax. The Unpublished Opinion was filed on July 29, 2015.

I. Equitable Estoppel

The Court's Order states that the trial court did not err when it denied Mullinax's motion for a directed verdict on equitable estoppel. The Court based its decision on two propositions. Firstly, that "The Manor Development Company Shareholder's Agreement, which Orlosky provided to Mullinax (at an unknown date after the contract was signed), "clearly contained a provision setting forth 'the formula' for calculating the 'sales price' of the shares." Secondly, the Court surmised that notwithstanding the multiple documents supporting the estate's value of $4,444,148.03, that because Mullinax purportedly did not bill based on the $4,444,148.03 valuation until December 11, 2009, the Court inferred that Mullinax had knowledge of the Orlosky's "alleged estate value" of $3,000,000.00.

Orlosky did not follow the Manor Development Company's Shareholder Agreement in determining the 2010 "sales price" of the stock and the sales price was irrelevant to the 2009 date

of death value of the stock, and thus, irrelevant to calculating the fee owed to Mullinax under the contract.

The following, from **Estate of Bernard Curry v. United States of America** (706 F.2d 1424 (1983), gives a summation of one reason why the post death "sales price" has no relevance to the "date of death" "fair market value" of the estate:

> "Section 2001 of the Internal Revenue Code of 1954, 26 U.S.C. § 2031(a) provides that the value of the gross estate of the decedent is determined by including "all property" therein. The corresponding Treasury Regulations provide that the value of includible property is its "fair market value" at the time of decedent's death. Section 20.2031-1(b), Treasury Regulations on Estate Tax (1954 Code). That regulation states further that the "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 the relevant facts." *Id.* The first question for our purposes thus becomes whether the property of which the fair market value is to be assessed should be viewed as it exists in the hands of the estate, or as it may exist if fortuitously balkanized through a chain of post-death transactions.
>
> We believe that the first perspective comports more fully with the nature of the estate tax. As the Supreme Court has explained, the estate tax was not conceived as "a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the

interest which ceased by reason of the death." *YMCA v. Davis*, 264 U.S. 47, 50, 44 S.Ct. 291, 292, 68 L.Ed. 558 (1924). Other courts have emphasized that the resultant "valuation is determined by *the interest that passes,* and the value of the interest before or after death is pertinent only as it serves to indicate the value *at* death." *United States v. Land*, 303 F.2d 170 (5th Cir.1962) (emphasis in original); *see also Estate of Bright v. United States*, 658 F.2d 999 (5th Cir.1981)."

All parties agreed that under the terms of the contract that the "fair market value" of the estate was determinative of the legal fees owed under the contract formula. Clearly, the Orlosky did not think the sales price had anything to do with fair market value. Orlosky 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).

The Orlosky even admitted that the "value" of the stock had nothing to do with its "sale price" under the buy-sell agreement. (Initial Br. of Orlosky, p. 25, n. 8). Specifically, Orlosky testified that under the optional sale, no matter if the value was "Three Million [or] Four Million", Orlosky would not have received more [than $1.5 Million] "regardless of the value". (R. p. 70, lines 1-7; p. 70, line 14-p. 71, line 1; Initial Br. of Orlosky, p. 25, n. 8). To conclude that the stock's "sales price" had something to do with its value is to deny Orlosky's own testimony and argument in its Initial Brief.

The Certified Public Accountant letter used by Orlosky to allege a "fair market value" 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 goes out of its way and 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).

The contract required Orlosky to pay Mullinax a minimum fee based on a percentage of the date of death estate value. (R. p. 257) That fact has never been in dispute. The Court of Appeals implies in its order that a "sales price" in the Shareholder Agreement is equivalent to [fair market] value. It is not. The record clearly shows throughout that references to the estate "value" are referring to the "fair market value" as defined by Treasury Regulations §20.2031-1(b), as required for federal estate tax purposes and South Carolina Probate Code §§62-3-706 and §62-3-708.

Orlosky's own attorney testified that the alleged $1.58 million dollar sales price in the Shareholder Agreement "might not have been an actual fair market value", but he [attorney] just wanted it to be recognized by the IRS. (R. p. 104, lines 10-13) When Orlosky's attorney was asked if he independently evaluated the value of the stock, he admitted that he simply accepted the fact that the decedent had signed the Shareholder Agreement and Orlosky confirmed it. (R. p. 100, lines 9-15)

Orlosky's attorney was handed the Shareholder Agreement at trial and asked if he had done anything to evaluate whether or not the $1.58 million was the appropriate amount of money the estate was entitled to for the decedent's stock. (R. 100, lines16-20) Orlosky's attorney slyly avoided the question and simply replied that "...my client said that he was comfortable with that number...and there was no need to do make-work or unnecessary work...". (R. p. 100, lines 21-25) When asked where in the Shareholder Agreement the amount of $1.58 million dollars was

derived, Orlosky's attorney could not even identify it (R. p. 102, line 11-20), instead, he referred to a calculation by the purchaser's accounting firm as the source of the $1.58 million dollar figure. (R. p. 102, line 17-20) Orlosky's attorney eventually admitted that he had not ever looked at the CPA's calculations on which he had relied. ((R. p. 104, line 24- p. 105, line 1) These actions and inactions, which led to the deceit of the jury, are in direct violation of Treasury Circular 230 requirements and Orlosky's attorney's obligations under those guidelines. (See Mullinax's Final Initial Brief p. 20-24 and 43-44)

As noted, any alleged "sales price" in the Manor Development Company's was irrelevant to the value of the stock in this case. The Treasury Regulations provide for a "willing buyer, willing seller..." standard in order to reach a "fair market value" for estate purposes. (Treas. Reg. § 20.2031-1(b)) (Mullinax's Initial Brief, p. 18) The Internal Revenue Chapter 14 §§2701-2704 were specifically created and designed to be particularly restrictive with family agreements attempting to set a sales price intended to depress fair market value for estate purposes. (See Mullinax's Initial Brief, pp.s 18-24)

The Treasury Regulations are rather specific when they say that "The fair market value of a particular item of property includible in the decedent's gross estate is not to be determined by a forced sale price." (Treas. Reg. § 20.2031-1(b)) The calculations done by the purchaser's CPA firm and relied on by the Orlosky to determine a "sales price" were made under a "force sale" standard, deducting a forced sale "hypothetical 40% tax liability" from the value of the stock. (R. p. 324) As a general rule, in situations where it is unlikely that a corporation would be liquidated and no disposition of the corporation's appreciated assets is expected to occur in the near future, the present value of the potential tax liability at a far off future date may be de minimis. (TAM

9150001) There is no evidence in the record that Manor Company intended to liquidate, in fact, the company was reclaiming its own shares, it certainly was not liquidating.

The Court should take note that Mullinax's own calculations of the estate's fair market value of $4,446,148.03, included significant discounts in valuing the stock at $2,672,378.20. (R. p. 354 amount listed as 1/3 division of all Manor Stock) It is clear that Mullinax's calculations included legitimate discounts of 20% for a lack of marketability (R. p. 354 showing $2,672,378.20 discount) and 25% for lack of control (R. p. 354 showing $2,672,378.20 discount). Mullinax included these discounts in the calculations of the stock's legitimately recognized fair market value under Internal Revenue Code and Treasury Regulations. (R. P. 354) Mullinax's calculations resulted in an specific discount of $1,781,585.47 to the decedent's Manor Stock ($1,781,585.47 is 1/3rd of the aforementioned discounts of the whole Manor Company, of which decedent owned one-third). Although Orlosky did not follow the Shareholder Agreement, Mullinax used the aforementioned discounts of 20% and 25% (identical to Shareholder's Agreement discounts in Article 4.5) because they were in keeping with Internal Revenue Standards and Treasury Regulations.

Even if all of the discounts claimed by Orlosky were allowed in determining a "sales price", and the sales price had some relationship to the "fair market value", it is clear from the record that Orlosky's "sales price" did not come from the Shareholder Agreement. Orlosky did not follow the Shareholder Agreement, and thus any sales price under it cannot be used as a factor in determining a "fair market value". (See Mullinax's Initial Brief, pp.s 18-24) Although Orlosky may have fooled the jury into believing that he followed the Shareholder Agreement, a simple reading of the Shareholder Agreement shows otherwise. The Court of Appeals may not as easily be fooled.

The Shareholder Agreement provides that "'**For one hundred and eighty days**' following the death of a Transferor Shareholder (Decedent) may sell Shares as determined under Article 4.." (R. p. 239) Orlosky sold the stock more than one hundred and eighty days following the death of the Transferor Shareholder, thus, the alleged "sales price" is irrelevant to the "fair market value", for two reasons.

The Internal Revenue Code and Treasury Regulations expressly disregard any restriction in these family arrangements (e.g. Shareholder Agreements) that modify the restriction in a way that results in more than a de minimis change in value. (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)) (See Mullinax's Initial Brief pp.s 18-24) Under the Shareholder Agreement, Article 2.4 could only be used to set a sales price to occur within 180 days. Thereafter, Orlosky was limited to sell the shares under the higher price of Article 2.7, where a discount to the sales price under Article 4.5(b) is not allowed. After one hundred and eighty days, the sales price discount of $1,428,284.00 (R. p. 325 "discount for lack of control") was no longer a part of any sales price formula available to Orlosky under the Shareholder Agreement.

Additionally, the Shareholder Agreement expressly indicates that the fair market value of the real property "shall be determined by appraisal" in accordance with provisions of this Section 4.4. (R. p. 245) Orlosky conducted no appraisals for the company's real property in accordance with the Shareholder Agreement. Even though the "sales price" occurring almost a year after the decedent's death had nothing to do with the "date of death fair market value", it was a sham to say that Orlosky followed the Shareholder Agreement or any pathway to a Shareholder Agreement sales price.

The Court surmised that notwithstanding the multiple documents supporting the estate's value of $4,444,148.03 that because Mullinax did not expressly bill based on the $4,444,148.03 valuation until December 11, 2009, the Court inferred that Mullinax had knowledge of the Orlosky's alleged estate value of $3,000,000.00.

The Court's inference comes from Mullinax's invoice dated December 11, 2009. In that invoice, Mullinax bills Orlosky for $36,103.70 (an adjustment to the earlier cumulative bills of a June 2009 $25,000.00 retainer, June 2009 $25,000.00 first payment, October 2009 $25,000.00 second payment, for a total of $111,000.00) to adjust to the then verified estate value of $4,444,148.03 (2.5% of $4,444,148.03 = $111,000). (R. pp.s 258, 265-266, 267-268, 275-276 – bills for June 2009, October 2009, December 2009)

All charges and invoices leading to Mullinax's December 11, 2009 invoice were on schedule to have Orlosky pay Mullinax $100,000.00. As of the December 11, 2009 invoice, in accordance with the contract, Mullinax had collected a $25,000.00 retainer (as required under the contract), a first payment of $25,000.00 (from a June 30, 2009 invoice), and billed Orlosky an additional $25,000.00 for his second payment on October 2, 2009, for a total of $75,000. Under the contract, Orlosky owed Mullinax a third payment.

Using the Court's own analysis, if Mullinax's December 11, 2009 invoice had only billed Orlosky for $25,000.00 (representing an alleged amount based on an estate valuation of $3,000,000.00), Mullinax would have collected a cumulative $100,000.00 (represented by a $25,000.00 retainer, $25,000.00 first payment, $25,000.00 second payment, $25,000.00 third payment). In other words, if Mullinax had not adjusted for value in the December 11, 2009 bill, Mullinax would still have collected $100,000.00. It's no accident that $100,000.00 happens to represent exactly 2.5% of an estate value of $4,000,000.00. Mullinax's first collection of

$25,000.00 in June of 2009 put Mullinax on course to collect $100,000.00, without any adjustment for estate value.

It's also worth noting that even after Mullinax received confirmation of his $4,444,148.03 estate value, he invoiced Orlosky for the adjusted balance on December 11, 2009, but only asked that Orlosky pay $25,000.00 toward that balance. (Invoice dated December 11, 2009)

II. Dead Man Statute

The Court's decision may have overlooked or misapprehended portions of the Dead Man statute (S.C. Code §19-11-20 (1985), particularly when it omitted critical portions of the statute and certain facts it in its interpretation. In particular, the Court's decision may have overlooked Orlosky's multiple roles during testimony. Orlosky was "sole life-time beneficiary of any proceeds gained from the litigation" in additioin to being "personal representative of the estate" and "trustee of the trust". Under the Court's interpretation of the dead man's statute, Orlosky should have been allowed to testify for his personal pecuniary benefit as sole lifetime beneficiary of the litigation proceeds – because he also happened to be serving as "personal representative of the estate" and "trustee of the trust". We believe that this interpretation accepts a portion of the statute while disregarding other portions. The statute should be read

The Court should reconsider such an interpretation in light of the fact that fiduciaries (e.g. Personal Representatives, Trustees) are frequently parties to actions where they have a specific pecuniary interest. Based on the Court's interpretation, a fiduciary, as in this instance, can testify for his or her own personal pecuniary benefit, but a defendant (non-fiduciary) (Mullinax, here) does not have the same right to testify about conversations

with the decedent. Such an interpretation is not in keeping with the intention or spirit of the statute.

As noted in Mullinax's briefs, essentially, the dead man's statute prohibits any interest 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). (Mullinax's Initial Brief p. 9) Mullinax outlines the statutory implications in Appellant's Initial Brief. (Initial Br. of Appellant p. 8-10). The statute is plain and unambiguous. Under the statute, Orlosky should not and does not have the right to testify for his own pecuniary benefit in the litigation just because he happens to serve as a fiduciary in the same litigation.

The statute reads, in full:

> "[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 interest 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). The Appellant outlines the statutory implications in Appellant's Initial Brief. (Initial Br. of Appellant p. 8-10). The statute is plain and unambiguous.

III. Charging Orders (Quantum Meriut)

The Court Order indicates that Mullinax did not preserve its argument concerning error in the trial court's jury charges. The Court based its decision on two premises. The Court indicates that the record does not contain any proposed charges from Mullinax. Secondly, the Court suggest that Mullinax never raised the arguments to the trial court either before or after it charge the jury.

The Court correctly states that the record does not contain any proposed charging orders from Mullinax. Unfortunately, in addition to the Court's loss of the court reporter and her hearing transcript for an extended period of time, the Court also lost the charging orders presented to the Court by Mullinax.

The record specifically shows that Mullinax presented charging orders to the Court (R. p. 116, lines 17-19), that the Court received them (R. p. 116, lines 20), that there was discussion on them, and that the Court refused to use them. While it is correct to say that the record does not contain any proposed charges from Mullinax, it was the Court that lost them, and thus they were unavailable to Mullinax for the record. Of course, as this Court is aware, Mullinax chose to move

forward with an incomplete and inaccurate record, as an alternative to moving forward without a record. Mullinax made this choice in response to the ultimatum by the Court of Appeals.

The matters contained in the balance of the Court of Appeals decision on this matter are more fully addressed in the Mullinax's Final Reply Brief, pp.s 14-18. In particular, the Brief contains a summation of the issues drafted and articulated best by South Carolina Supreme Court Chief Justice Jean Toal.

The Court of Appeals has the authority to correct this error of law an inequitable injustice. The Appellant respectfully requests that it do so.

IV. Quantum Meruit is not properly before the Court because it was not submitted to the jury. (e.g. no charging order by the lower Court, jury never received it)

The Court indicates that the issue of quantum meruit is not properly before the Court because the issue was not submitted to the jury by the trial court. The Court correctly states that the trial court did not charge the jury on quantum meruit. The trial court chose not to do so, although Mullinax clearly supplied the trial Court with the appropriate charging orders. (R. p. 116, lines 17-19) Afterward, the trial Court lost Mullinax's charging orders and thus, the charging orders were unavailable for the record. In practice and in this case, the trial court's general duty to charge the jury with the current and correct law is without meaning or effect. Under the application of the Court rules, it is the Appellant's responsibility to supply the Appellate Court with an adequate record, even if the trial court and the court reporter lose parts of the record.

As the record indicates and the Court of Appeals recognizes, neither a court nor a jury has reviewed or ruled on Mullinax's claim of quantum meruit. Mullinax certainly made the

quantum meruit argument in its pleadings and to the jury. (R. pp.s 19-20, 44) (R. references in Mullinax's Final Initial Brief p. 32-36 and Mullinax's Final Reply Brief p. 18-21) It was the Court, not Mullinax that failed to present the matter to the jury.

As noted in Fields v. Regional Medical Center Orangeburg, (354 S.C. 445, 581 S.E.2d 489 (Ct. App. 2003):

> When evidence is erroneously excluded by the trial court, the appellate court usually engages in the following analysis to determine whether prejudice has occurred. First, the court considers, inter alia, whether the error may be deemed harmless because equivalent or cumulative evidence or testimony was offered; the aggrieved party still managed to accomplish his primary objective, such as eliciting testimony about an issue or effectively cross-examining a witness; the jury's verdict or a proper court ruling rendered the wrongly excluded evidence moot because it was relevant to an issue that did not have to be reached; the aggrieved party failed to establish a claim or defense even when both the admitted and excluded evidence are considered; or the wrongly excluded evidence involved a generally known fact.
>
> Second, the appellate court considers whether, viewing a case as a whole, the wrongly excluded evidence or testimony was so crucial and important in proving the aggrieved party's claim or defense that its exclusion constitutes prejudicial error, i.e., the aggrieved party demonstrates there is a reasonable probability the jury's verdict was influenced by the lack of the challenged evidence. Fields v. Regional Medical Center Orangeburg, 354 S.C. 445, 581 S.E.2d 489 (Ct. App. 2003)

The Court of Appeals has the authority and ability to review this matter for a justiciable result. The Appellant respectfully requests that it do so.

V. Public Policy Issue

Mullinax argued that the trial court erred when it allowed a breach of contract claim based on the plaintiff's interpretations of the contract, that if followed, would violate statutory law and public policy. The Court of Appeals ruled that Mullinax did not raise the issue of a violation of public policy or statutory law when moving for a directed verdict. In support of its conclusion, the Court referred to the fact that only issues raised in a directed verdict motion can properly be raised in a JNOV motion.

Mullinax specifically raised the aforementioned issue to the lower court and did so expressly in a Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict (JNOV). (ROA, p. 372, para. #5.) Mullinax also outlined this issue in its Motion for Relief from Judgment. (ROA, p. 396, para. #5)

At trial, Mullinax's case in chief centered around Mullinax's obligation to abide by the statutory law and public policy that required the filing of an Estate Tax Return (706), as required under law and public policy. In fact, Mullinax testified that "I can mention now or later my obligations under the Internal Revenue Code". (ROA, p. 136, lines 7-9) Mullinax continued that "I can lose my law license and my ability to practice before the Internal Revenue Service by not filing tax returns that should be filed..." (ROA, p. 136, lines 10-13) Mullinax further testified that the basis of this contention was "it was my obligation – and I can refer to [Department of Treasury] Circular 230 which governs all people who practice before the Internal Revenue Service. (ROA, p. 136, lines 1-13) Mullinax further emphasized "I can lose my license or be

disbarred from the practice of law if my clients avoid a tax return." (ROA, p. 137, lines 1-3) Mullinax added that "...I was not going to assist in the avoidance by my client of filing a tax return, nor would I have done that with Mr. Orlosky." (ROA, p. 137, lines 11-13)

Ironically, Mr. Orlosky's private act of personally filing an "Estate Tax Return extension" impeaches his contention that he didn't believe an Estate Tax Return was lawfully due. (ROA, p. 136, lines 2-5). The record is littered with Mullinax's references to its obligations under the Internal Revenue Code, [Department of Treasury] Circular 230, and the South Carolina Probate Code.

In light of the fact that Mullinax did raise the issue to the lower court in a motion for a directed verdict, and that the motion appears in the record, the Appellant respectfully requests that the Court reconsider this issue.

VI. Two-issue rule

The Court suggests that it should not overturn the jury verdict based on the "two issue" rule. In particular, it points to the quantum meruit issue as an issue that should not be disturbed on appeal. Ironically, neither the jury nor the court ever ruled on the matter of quantum meruit. Thus, for the Court of Appeals to now consider the trial court' failure to charge the jury (prejudicial error) and the trial court's failure to rule on the matter, well, it would not be overturning a verdict, it would merely be providing one – in the first instance.

Mullinax agrees with the Court that Mullinax did not complete the work specified in the contract. In order for Mullinax to legally complete the work specified in the contract while abiding by the law and ethical obligations to the Court, Orlosky was required to sign an accurate

Inventory and Appraisement for the Probate Court and sign an Estate Tax Return for the Internal Revenue Service. Orlosky refused to agree to sign an accurate Inventory and Appraisement for the Probate Court or an accurate Estate Tax Return for the Internal Revenue Service. (R. p. 140, lines 18-25) Orlosky's refusal to sign these required documents made it impossible for Mullinax to legally complete the work under the contract. (R. p. 140, lines 18-25) As noted in Mullinax's briefs, the law didn't require Mullinax's to complete work under a contract when it was against public policy. 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).

Not only did the law prevent Mullinax from completing the contract under Orlosky's interpretation, but the law does not hold Mullinax liable for failure to complete a contract when the Orlosky's actions prevented Mullinax from doing so lawfully.

The Court apparently relies on the testimony of Orlosky's attorney in reaching its decision. It is correct to say that Orlosky did pay Mullinax's competitor to testify against Mullinax for $350.00 per hour, and over $30,000.00 in compensation (as of time of testimony), in defense of Mullinax's claim of approximately $32,000.00. Yes, although the competitor attorney provided no evidence that he knew what volume of work or time Mullinax provided to Orlosky, the competitor miraculously concluded that he could have done the Mullinax's work for less compensation. The competitor's testimony reveals that he did not review the Shareholder

Agreement or become familiar with it, that he did not review the CPA calculations, that he ignored the CPA's view that its calculations were not the stock's fair market value, that he ignored and could not even cite the foundational Internal Revenue Codes, Treasury Regulations, Treasury Circular 230, and well established case law on these matters. Certainly. Any payment for his services should be less than those of Mullinax, after all, Mullinax provided all of the aforementioned The Court suggests that evidence in the record supports the jury's finding that Mullinax was entitled to $20,000.00. Although the Court does not specify the evidence on which it relies, the inference is that the $20,000.00 figure derives from the invoice exclusively for services beyond the necessary estate administration requirements. (R. p. 296-299) As the Court is aware, these are the matters for which Mullinax claimed "quantum meriut", for which Orlosky paid Mullinax nothing, and Court failed to charge the jury.

The Appellant respectfully requests that this Honorable Court reconsider its decision in light of the aforementioned reasons in keeping with the spirit of Benjamin Franklin, who said:

> "For having lived long, I have experienced many instances of being obliged, by better information or fuller consideration, to change opinions, even on important subjects, which I once thought right, but found to be otherwise."
>
> Benjamin Franklin, Date: September 17, 1787

August 12, 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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
AUG 13 2015
SC 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 SERVICE

I certify that I have served the Petition for Rehearing on Mr. Ron Orlosky, by depositing a copy of it in the United States Mail, postage prepaid on August 12, 2015, addressed to his attorney of record, Mr. John R.C. Bowen, P.O. Drawer 21119, Hilton Head Island, South Carolina 29925-1119.

August 12, 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