

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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AUG 21 2015
SC Court of Appeals

Appeal from Beaufort County
Roger M. Young, Circuit Court Judge

Case No. 2010-CP-07-4146

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

v

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

RESPONDENT’S REPLY TO APPELLANT’S PETITION FOR REHEARING

**The evidence in this case fully supports the jury’s verdict,
even if all the other alleged claims of error by the Appellant are deemed
to be sound, and even if those claims were properly raised and
preserved (which many were not).**

Respectfully, the Respondent suggests that this Court’s final point number six¹ in the
Orlosky v. Mullinax opinion is both sound and dispositive, and that the Appellant’s attempts
to undermine it in his Petition for Rehearing are truly misplaced and lack support in the

¹ Although this Reply focuses on the Court’s final point number six, merely for the record Respondent agrees with the Court’s overall opinion. Moreover, while we certainly disagree with much of Appellant’s Petition for Rehearing, we are content for sake of economy to focus on point six. Still, if the court should want our views on anything specifically in Appellant’s Petition for Rehearing, we would be more than happy to give the Court a Supplemental Reply if the Court asks us to do so.

record. As the Court noted, “Regardless of any alleged errors concerning the valuation of the Manor stock, we find evidence in the record to support the jury’s verdict.” (See Unpublished Opinion, p. 4, Point 6, First Sentence).

Everyone in this case, even the Appellant himself, agrees that Mr. Mullinax did not complete the tasks that he agreed to do. Indeed, even Mr. Mullinax concedes as much at Page 16 of his own Petition for Rehearing where he states, “Mullinax agrees with the Court that Mullinax did not complete the work specified in the contract.” (See Appellant’s Petition for Rehearing, p. 16, final paragraph).

It was deeply contested at trial, however, why the work was left uncompleted and the Estate never closed. In his own testimony, Mr. Mullinax has offered several different suggestions as to why his work was not completed and why the Estate remains still open.

For one example, the jury might have concluded that it was Mullinax’s own conduct that barred completion of the work for the Estate. After all, he did testify as follows:

Q. Would you agree with me, Mr. Mullinax, that you did not complete the job of administering the Estate?

A. **I did not complete it but it could not be closed** while a claim or litigation is pending. [emphasis added]

Q. You have a claim against the Estate?

A. Yes, I do.

Q. And as far as you know, nobody else has a claim?

A. I don’t have any idea.

Q. And, that’s as far as you know?

A. As far as I know.

(R. p. 169, lines 14-23)

Thus, if the jury found this particular testimony credible, it would certainly support the jury reaching the dual conclusions that (1) “I did not complete it” and (2) “it could not be closed” because of Mr. Mullinax’s very own conduct, by filing his own personal claim against the Estate, thereby deliberately preventing the Estate from being closed (the very thing he was hired to do).

Further, if the jury believed (as they had the right to do) that it was wrongful not to complete the tasks assigned to him under the contract, and that it was not appropriate for a lawyer to prevent an Estate from closing when he was hired to do the closing, then the jury verdict would be fully, and independently supported by evidence (coming ironically directly from the Appellant’s own testimony). Moreover, Mr. Mullinax also testified that although he did not keep detailed time and billing records he claimed an additional Twenty-one Thousand for the additional work he claimed to have done on the Manor stock sale. Under the fee agreement (as he would have you interpret it) he is due the outrageous sum of a Hundred Fifty-three Thousand for work he failed to complete. Of course, it was within the jury’s own prerogative, based upon Mullinax’s own testimony, and because he admitted that he failed to keep any detailed time or billing records, for the jury to also elect to reject, in whole or in part, his so-called additional claims.

Mr. Mullinax does not have an LLM in taxation, nor has our Supreme Court certified him as an expert or specialist in taxation. By distinct contrast, or so the jury may have found and believed, the lawyer who testified for the Respondent, Mr. Jordan, testified that he was certified by the South Carolina Supreme Court as an expert or specialist in taxation law. Specifically, in answering Mr. Bowen, Mr. Jordan testified as follows:

Q. And did you tell us you have been certified by the Supreme Court as an expert or specialist in taxation law?

A. Yes. [emphasis added]

(R. p. 87, line 6-8).

Mr. Jordan was further asked whether or not he had been selected to receive any awards or special recognitions in his tax specialty. And, he answered to this question as follows:

Q. Have you been selected for any awards or recognition in your profession?

A. I have been invited to attend as a member of both the American College of Trusts and Estate Counsel. These are invitation organizations, and I think you have to have a degree or recognition in order to get invited to attend.

I have also had numerous recognitions as Best Lawyer in South Carolina and that type of thing.

(R. p. 87, lines 9-16).

Obviously, if the jury believed Mr. Mullinax's testimony (no specialty recognition and no LLM in taxation and no certification from the South Carolina Supreme Court in taxation) and contrasted that testimony with Mr. Jordan's testimony (specialized, with recognitions from South Carolina Supreme Court, and the American College of Trusts and Estate Counsel) they were certainly free to believe, if they so desired, that one lawyer was a specialist and one was not, and that one was more knowledgeable about the IRS Code than the other.

Moreover, since Mr. Mullinax was squarely testifying in support of his own legal work and this lawsuit, and Mr. Jordan was not testifying to directly defend either his own prior legal work, or otherwise was not personally involved; the jury would be free to give this factor as much or as little or no weight as they deemed appropriate.

It is with these contrasting professional backgrounds that the jury could then decide whether or not to believe, in whole or in part, Mr. Jordan's further sworn testimony that when he took over the Estate Administration he discovered the following:

1. [The case was] "basically in the preliminary stage or dealing with the preliminary issues." (R. p. 89, lines 17-18).
2. "There had been some communication about the Manor Development Company stock with the folks in California **but in essence no real work had been done.**" [emphasis added] (R. p. 189, lines 23-25).
3. Mr. Jordan further believed and testified, that in his professional opinion, that there was no basis for any of Mr. Mullinax's additional charges.
4. Finally, Mr. Jordan was squarely asked whether or not Mr. Orlosky, the

Respondent in this case, was correct in his belief that he had been overcharged by the Appellant's Law Firm.

In telling language, he testified:

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

A. **For that work, probably Five to Ten Thousand dollars.**

[emphasis added]

(R. p. 95, lines 19-22).

If the jury accepted this testimony, from a certified specialist in the field of Estates and Estate taxation, the jury may have further concluded that Mr. Jordan was also accurate when he testified a little later in the record that there was no legitimate tax or other reason to value the estate at more than Two Point Eight Million Dollars.²

Then it obvious follows that it was surely within the Jury's prerogative to find that Mr. Mullinax had very substantially overcharged the Respondent when he used a much higher number without tax justification. Of course, the jury could also have rejected Mr. Jordan's analysis, and his opinions and concluded that he failed to consider a variety of factors, as Mr. Mullinax has repeatedly suggested. (See Appellant's Petition for Rehearing, p. 18, where the Appellant claims that the Respondent's new lawyer and his law firm failed to follow a large number of relevant tax considerations).

² Mr. Jordan and his law firm determined the value of the Estate to be \$2.8 million and therefore there was no requirement to file an Estate Tax Return. (R. p. 97, lines 1-12).

At all events, it is clear beyond argument that since there was a truly contested factual questions as to the value of the Estate,³ and since the jury's final verdict falls squarely within the evidence submitted in this trial by either one side or the other, under the most settled of S.C. principles, a jury verdict that squarely falls within the testimony of one side or the other is certainly properly within the province of the jury.⁴

As our Supreme Court has repeatedly held, a breach of contract action is an action at law. See Small v. Springs Industries, Inc., 292 S.C. 481, 357 S.E.2d 452 (1987). This Court's standard of review in an action at law is limited to correcting errors of law; and the Court will not reverse a **jury's factual findings** unless there is no evidence in the record which reasonably supports the jury's findings. See Townes Associates, Ltd. v. City of

³ If one is looking for possible clues to the pathway the jury might have taken to reach its final verdict, Mr. Jordan also testified in response to the question "I believe you just said that you estimated that maybe Mr. Mullinax had done twenty percent of the work? That "I think it's fair to say that." (R. p. 95, line 1-3). If the jury accepted this estimate, from the only true tax expert in this entire case, it is easy to see that at best only 20% of the \$100,000 that was paid had been earned and thus fully and totally explains the \$20,000 jury award to the Appellant with the remaining \$100,000 to be paid back and returned to the Respondent.

⁴ Mr. Mullinax uses some very strong words in his Petition for Rehearing. See, merely for some examples, "Orlosky may have fooled the jury" (See Appellant's Petition for Rehearing, p. 7); "these actions and inaction, which led to the deceit of the jury" (See Appellant's Petition for Rehearing, p. 6); "it was a sham" (See Appellant's Petition for Rehearing, p. 8). With all due respect, Respondent disagrees with these various characterizations. The jury was not fooled, but carefully considered all the evidence in this case. There was no "deceit" nor was anything in the case a "sham". Jury duty is difficult and this was unanimous verdict which did not do anything but carefully weigh all the evidence in the record. In short, this was a fair trial and the lawyers (for both Orlosky and Mullinax) did what lawyers are supposed to do, advocate for their clients.

Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).⁵

Even if one looks at Federal law, it is very clear that the question of the valuation of an Estate is quite often a **question of fact**. See, for merely one recent example, the case of Estate of Shirley G. Giouacchini, Deceased v. Commissioner of Internal Revenue, T.C. Memo 2013-27 (Docket No. 20122-05) where the Tax Court stated at pages 32 and 33, “Valuation is not an exact science and **each case necessarily turns on its own particular facts**”.⁶ [emphasis added]. See Estate of Spruill v. Commissioner, 88 T.C. 1197, 1228 (1987); See also, “**a valuation question is a question of fact**” Sammons v. Commissioner, 838 F.2 330, 333 (9th Cir. 1988), aff’g on this point, rev’g in part on another ground, T.C. Memo. 1986-318.

In Brief Summary Concerning Point No. 6

Respondent submits that this Court is on very firm and solid ground in holding that the jury verdict is sound. The verdict was not based on any error of law, but rather is based upon settled principles of South Carolina law. The jury had the right to consider the testimony of the only true tax expert in this case. The jury had the right to conclude, as they

⁵ See also for the same rule of law in Magnolia North Property Owners Association v. Heritage Communities, 725 S.E.2d 112 (S.C. App. 2012). (The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law. See Felder v. K-Mart Corp., 377 S.E.2d 332, 333 (1989). And a factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the finding).

⁶ The Ninth Circuit added that “it is the rule in this circuit that the Tax Court’s determination of the value of property is a finding of fact, which we will reverse only for clear error. Bryant v Commissioner, 790 F.2d 1463, 1465 (9th Cir. 1986); Ebben v Commissioner, 783 F.2d 906, 908-909 (9th Cir. 1986).

did, that 80% of the monies paid by the Respondent should be refunded to him. This was a simple case where a lawyer failed to do the work he had agreed to do and grossly overcharged his client for services the lawyer never rendered.

Very Respectfully Submitted,

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August 20, 2015
Hilton Head Island, South Carolina

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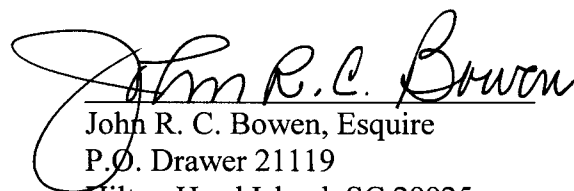
v

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

CERTIFICATE OF SERVICE

I, John Bowen, do hereby certify that I have this date served one (1) copy of the Respondent's Reply to Appellant's Petition for Rehearing upon the following counsel of record by causing said copy to be sent electronically by e-mail, by courier, and deposited with the United States Postal Service, first class postage prepaid and properly affixed thereto, and addressed as follows:

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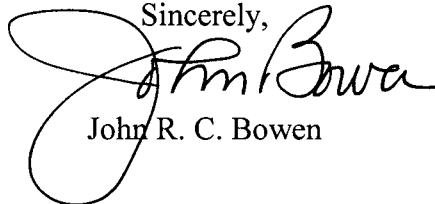
RE: Ron Orlosky v. The Law Office of Jay A. Mullinax, LLC
Appellate Case No.: 2012-212331

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Respondent's Reply to Appellant's Petition for Rehearing and Certificate of Service. We would appreciate it if you could please file the originals and return a clocked copies to us in the enclosed self-addressed stamped envelope.

Please do not hesitate to contact us should you have any questions. In the meantime, and with kind regards, I am

Sincerely,



John R. C. Bowen

JRCB/sv

cc: Mr. Ronald Orlosky
Mr. Jay A. Mullinax, Esquire