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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

AUG 21 2015

SC Court of Appeals

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

Appellate Case No. 2014-002249

IN-RE: Estate of Valerie D'Agostino

Nicholls & Crampton, P.A.,

v.

Appellant,

Estate of Valerie D'Agostino,

Respondent.

RECORD ON APPEAL

VOLUME 1 OF 2

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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-07-01491

NICHOLLS & CRAMPTON P.A., ET AL.

2014 SEP 16 PM 4:52

ESTATE OF VALERIE D'AGOSTINO, ET AL.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

3069
Judge Code

9/16/2014
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

JAY A. MULLINAX

J. ASHLEY TWOMBLEY

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: N/A

2013 SEP 16 PM 1:52
IN THE CIRCUIT COURT
CASE NO: 2013-CP-07-01491

Petitioner,

V.

FINAL MERITS HEARING ORDER

ESTATE OF VALERIE D'AGOSTINO,
Respondent.

This matter is before me for a hearing on Petitioner's Motion for Summary Judgment and a Final Merits Hearing. The hearing was held on May 19, 2014, and present for the hearing were Jay A. Mullinax, Esq., for Petitioner and J. Ashley Twombly, Esq., for Respondent. Regarding the Final Merits Hearing, the parties previously stipulated that this matter would be tried before the undersigned in a summary fashion, that the court would consider deposition transcripts as opposed to live witness testimony, and that the undersigned would issue a final order with findings of fact and conclusions of law.

After hearing and considering arguments from both counsel at the hearing and reviewing all of the information provided by the parties, including but not limited to the depositions of Frederick Timothy Nicholls and Ronald Huther and the exhibits thereto, the contract between Petitioner and Richard D'Agostino, and the post-hearing letters submitted by counsel, I now make the following findings of fact and conclusions of law and issue this final Order.

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Procedural Background

Petitioner filed a claim against the Estate of Valerie D'Agostino in Beaufort County Probate Court, seeking payment of attorney fees for legal services provided to Richard D'Agostino. In its Statement of Creditor's Claim, dated September 26, 2012, Petitioner stated that the basis of the claim was for "Legal Services provided to Richard D'Agostino as Personal Representative of the Estate of Valerie D'Agostino," and therefore, the Estate of Valerie D'Agostino was responsible for the unpaid fees. Petitioner also sought interest and attorney's fees.

Respondent timely filed a Notice of Disallowance of Petitioner's Claim, alleging that Richard D'Agostino contracted with Petitioner personally and not in his representative capacity, that the amount of the claim was unreasonable in light of the service provided, and that Respondent was not responsible for paying any attorney fees Petitioner incurred pursuing this claim. Petitioner then filed a Summons and Petition for Allowance of Claim, and Respondent filed an Answer, once again denying the claim. This case was removed from the Beaufort County Probate Court to the Beaufort County Circuit Court and was referred to me via an order dated March 18, 2014. ✓

The deciding question in this case is whether Richard D'Agostino contracted with Petitioner personally or in his capacity as Personal Representative of the Estate of Valerie D'Agostino. For the reasons contained herein, I find and conclude (1) that the contract entered into between Petitioner and Richard D'Agostino is ambiguous as to the resolution of the deciding question, (2) that construing the contract against the drafter leads to the conclusion that Richard D'Agostino contracted with Petitioner personally, (3) that the evidence submitted to the Court leads to the conclusion that the parties intended for the contract to be between Petitioner and Richard D 'Agostino personally and (4) that the Estate of Valerie D'Agostino has no

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liability or responsibility to pay Petitioner's claim.

Factual Background

Valerie D'Agostino died on October 17, 2009. On January 8, 2010, Richard D'Agostino was appointed as Personal Representative of the estate by the Beaufort County Probate Court.

In addition to the Beaufort County estate opened by Richard D'Agostino, an estate for Valerie D'Agostino was subsequently opened in Wake County North Carolina by Ronald Huther, Valerie D'Agostino's son. According to Mr. Huther, relying upon the advice of a North Carolina attorney and the North Carolina attorney's interpretation of a waiver that had been previously executed by Richard D'Agostino, Mr. Huther requested that he be appointed as the Fiduciary for the North Carolina estate stating that he was the person "entitled to apply for letters or am applying after all persons having prior right have renounced." On or about March 5, 2010, the Wake County North Carolina Court appointed Huther as Personal Representative of the North Carolina estate.

On June 10, 2010, Richard D'Agostino signed a contract retaining Petitioner. The scope of representation, as provided in the contract, states "[y]ou have requested that we provide legal services on your behalf in connection with the administration of your deceased wife's estate in Wake County, NC (the 'Matter')." The re line of the contract states "Estate of Valerie V. D'Agostino." Richard D'Agostino's signature block states "Rich D'Agostino." (Contract dated June 8, 2010). The contract does not specify whether Richard D'Agostino signed individually or in his capacity as personal representative, but the words "personal representative" do not appear in the contract. The retainer called for under the contract was paid by Richard D'Agostion's personally.

On or about July 2, 2010, Petitioner filed Motions for Sanctions on behalf of Richard D'Agostino against Mr. Huther and Mr. Huther's North Carolina counsel alleging that

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misrepresentations were made to the North Carolina Court in Mr. Huther's application to be appointed as personal representative. Subsequently, Mr. Huther voluntarily resigned as personal representative of the North Carolina estate and retained new counsel. The Wake County, North Carolina estate was ultimately closed, and the Estate of Valerie D'Agostino was probated in Beaufort County.

Initially, Petitioner contended that Richard D'Agostino entered into the contract personally and not in his capacity as personal representative of the Estate of Valerie D'Agostino. Specifically, Petitioner filed a claim against the Estate of Richard D'Agostino, and the claim was denied by his estate. Petitioner then filed a Petition for Allowance against the Estate of Richard D'Agostino. In the Petition for Allowance, Petitioner made the following statement: "Richard J. 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 connection with the administration of the Estate of Valerie D'Agostino." (Nicholls Dep. Def. Exh. 20). Mr. Nicholls also stated in an email dated January 30, 2012, that Petitioner had not filed a claim against the Estate of Valerie D'Agostino because "our claim has always been against him personally." (Nicholls Dep.p. 41, line 10-p.43, line 1; Nicholls Dep. Def. Exh. 19). Petitioner's claim against the Estate of Richard D'Agostino was ultimately dismissed with prejudice by the Beaufort County Probate Court pursuant to an order dated March 6, 2013. That order was never appealed or otherwise challenged.

Petitioner now argues that Richard D'Agostino retained Petitioner in his capacity "as Personal Representative of the Estate of Valerie D'Agostino," (Statement of Creditor's Claim, dated September 26, 2012) and therefore, the Estate of Valerie D'Agstino is responsible for the remaining balance owed under the contract. Petitioner also claims interest due under the contract, as well as attorney's fees.

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Analysis

The threshold question before the Court is whether Richard D'Agostino a) contracted with Petitioner in his individual capacity, b) contracted in his capacity as Personal Representative of the Estate of Valerie D'Agostino, or c) whether the contract is ambiguous on this point. A contract is ambiguous when it may fairly and reasonably be understood in more ways than one. Jordan v. Security Group, Inc., 311 S.C. 227, 428 S.E.2d 705 (1993). The question of whether or not a contract is susceptible of more than one interpretation is a question of law for the court. Liberty Mut. Ins. Co. v. Westport Ins. Corp., 664 F. Supp. 2d 587 (D.S.C. 2009).

After reviewing and considering all of the evidence, I find that the contract at issue is ambiguous on this issue for the following reasons:

1. The language used in the contract is simply not clear as to whether Richard D'Agostino hired Petitioner in his individual capacity as a beneficiary of the estate or in his capacity as Personal Representative of the Estate of Valerie D'Agostino. While the re line of the contract states "Estate of Valerie V. D'Agostino," the scope of representation is "in connection with the administration of your deceased wife's estate." Richard D'Agostino was a beneficiary of Valerie's estate as well as the personal representative. Therefore, he had multiple interests in the estate. The contract does not specify or otherwise address which interests Petitioner was retained to pursue.
2. Petitioner initially argued during the hearing that Richard D'Agostino did not enter into the contract as personal representative of Valerie D'Agostino's estate because he had not been appointed as personal representative of her estate at the time to contract was entered into. However, Respondent correctly pointed out that Richard D'Agostino

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was appointed by the Beaufort County Probate Court as Personal Representative for the Estate of Valerie D'Agostino on January 8, 2010, almost six months before he signed Petitioner's contract. There is no reason why Richard D'Agostino could not have entered into the contract as personal representative of Valerie D'Agostino's estate had he chosen to do so. Moreover, there is no reason why Petitioner could not have drafted the contract to specify that the Estate of Valerie D'Agostino was responsible for the fees. Again, the words "personal representative" do not appear anywhere in the contract.

3. The contract does not mention that Valerie D'Agostino's estate will be responsible for the fees incurred and not does mention that Richard D'Agostino would be liable if her estate did not pay.
4. Frederick Timothy Nicholls, Petitioner's 30(b)(6) deponent, testified that the contract was "not clear" as to whether Mr. D'Agostino was individually responsible for Petitioner's fees or if the Estate of Valerie D'Agostino was responsible for Petitioner's fees. When Nicholls was asked "my question to you is the [contract] does not specify whether or not Richard D'Agostino is individually responsible for the fees or if the estate is responsible for the fees, isn't that right," Petitioner responded "[y]eah, I don't think it is clear, yes." (Nicholls Dep.p.21, lines 14-21).
5. Based upon all of the above, at best the contract can be fairly and reasonably understood either way, and is therefore ambiguous.

South Carolina law is clear that "any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the ambiguous language." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 205, 687 S.E.2d 714, 718 (Ct. App. 2009). Petitioner's representative testified that he

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drafted the contract. (Nicholls Dep.p.8, lines 11-15). Therefore, the contract must be construed "liberally and most strongly in favor of the party who did not write or prepare the contract." Myrtle Beach Lumber Co. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981). A reasonable construction of the contract, much less a liberal one, is that Richard D'Agostino was individually responsible for fees incurred pursuant to the contract.

Such a finding is supported by other testimony offered by Petitioner's representative as well as the documentation submitted to the Court for consideration. For example, when asked about the motions for sanctions that were filed by Petitioner on behalf of Richard D'Agostino, Petitioner conceded they were filed on behalf of Richard D'Agostino individually:

Q: I understand, but this motion to seek sanctions and to try to have sanctions imposed . . . that was done on behalf of Richard D'Agostino individually, correct?

A: Yes, I think it was. It appears to be, yeah

(Nicholls Dep.p. 20, lines 12-17.) In addition, there were numerous documents filed on behalf of "Richard D'Agostino" by Petitioner without any reference to proceeding as personal representative of an estate. In addition, Petitioner concedes in his deposition that at least some of the work performed by Petitioner was analyzing whether or not Richard D'Agostino would individually receive more money if Valerie D'Agostino's estate was probated in North or South Carolina. (Nicholls Dep.p.12, lines 15-25 -p.14, line 03; p. 19 line 21 -p.20 line 4 and p. 25 line 6 -p.26, line 7).

During his deposition, Petitioner's representative acknowledged that he sent an email to his co-counsel wherein he stated 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.**" In response to questions about the email, the following exchange took place:

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Q: Isn't it true, though, that you stated that you didn't file a claim against the wife's estate because you were never advised to do so and your client has always been against Mr. D'Agostino personally?

MR. MULLINAX: Object to the form.

A: That is what it says, yes.

Q: And that was true when you wrote it, right?

A: Yeah.

(Nicholls Dep.p. 42-43).

In addition, prior to filing a claim against the Estate of Valerie D'Agostino, Petitioner filed a claim the Estate of Richard D'Agostino after he passed away. In that claim, Petitioner took the position that "Richard J. D'Agostino personally, and not in a representative capacity, contracted" with Petitioner. (Nicholls Dep. Def. Exh. 20) (underline added). The factual position previously taken by Petitioner is directly at odds with the factual position Petitioner attempts to take in this case. The Court finds that Petitioner is barred by estoppel, waiver and the doctrine against inconsistent positions from taking such a contrary position here. 28 Am. Jur. 2d Estoppel and Waiver § 65 ("Generally, a party will not be permitted to maintain inconsistent positions or to take a positions in regards to a matter that is directly contrary to, or inconsistent with, one previously assumed by him or her, at least whenever he or she had, or was chargeable with, full knowledge of the facts.").

Finally, Richard D'Agostino paid the initial retainer fee required under the contract with his personal funds using a check from his personal banking account. (Nicholls Dep. Def. Exh. 2). The Estate of Valerie D'Agostino never paid for any of the work performed under the contract, and there is no evidence that payment was ever sought from her estate in the normal course by Petitioner until this claim was filed.

Here, the testimony of Petitioner's own 30(b)(6) deponent and review of the contract

itself establishes (1) that Petitioner drafted the contract, (2) that the contract is admittedly not clear and is ambiguous as to whether Richard D'Agostino signed in his personal or representative capacity, and (3) the evidence presented to the Court suggests that it was the intent of both Petitioner and Richard D'Agostino that "Richard J. D'Agostino personally, and not in a representative capacity, contracted" with Petitioner.

Arguments of Petitioner

Petitioner advances several arguments in support of the claim. First, Petitioner cites "relation back" statutes of the South Carolina Probate Code (S.C. Code Ann. § 62-3-701) and the North Carolina Probate Code (N.C. Code § 28A-13-1) in support of its claim. These "relation back" statutes provide that the powers of a personal representative relate back to give acts by the person appointed as personal representative which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Petitioner argues the "relation back" statutes apply in this matter because Richard D'Agostino had not been appointed as Personal Representative in the North Carolina Estate at the time he entered into the contract, and when he later was appointed as Personal Representative of that Estate, his appointment related back to acts taken by him prior to his appointment.

This argument ignores the fact that Richard D'Agostino was appointed by the Beaufort County Probate Court as Personal Representative for the Estate of Valerie D'Agostino on January 8, 2010, almost six months before he signed Petitioner's contract. (Fiduciary Letters dated January 8, 2010). 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 estate, or why language could not have been inserted into the contract to hold Valerie D'Agostino's estate liable for fees incurred, which is the entity Petitioner now seeks to hold responsible under the contract. Accordingly, the "relation back" statutes do not help Petitioner.

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In addition, it is far from clear that the actions of Richard D'Agostino and Petitioner were "beneficial" to the estate of Valerie D'Agostino. Petitioner appears to have been hired to stop the North Carolina probate proceeding and assist Richard D'Agostino in negotiating and drafting a settlement agreement that would fully resolve issues related to the same. While a settlement agreement was ultimately entered into, it was later rescinded by Richard D'Agostino (Ppetitioner's client) which resulted in two additional years of litigation. Therefore, Petitioner has not shown that his work was necessarily beneficial to the Valerie D'Agostino's estate.

Second, Petitioner also argues that as part of a Settlement Agreement and General Release (Settlement Agreement) resolving previous litigation that the Estate of Valerie D'Agostino agreed to pay Petitioner's claim. Petitioner was not a party to this Settlement Agreement. Nevertheless, this argument is not supported by the language of the Settlement Agreement. The Settlement Agreement provides that some moneies would be held in escrow pending final resolution of "any and all claims of Nicholls & Crampton, P.A. ("Nicholls") against the Estate of Richard D'Agostino." (Settlement Agreement ¶ 4) (underline added). The Settlement Agreement then states how the money will be distributed if Petitioner's claim against the Estate of Richard D'Agostino were upheld and how the money will be distributed if Petitioner's claim against the Estate of Richard D'Agostino were denied. (Settlement Agreement ¶ 4). Ultimately, Petitioner's claim against the Estate of Richard D'Agostino was dismissed, with prejudice. The Settlement Agreement Petitioner referenced does not appear to even contemplate a creditor's claim against the Estate of Valerie D'Agostino. According, I find that the Settlement Agreement does not require the Estate of Valerie D'Agostino to pay Petitioner's claim.

Third, Petitioner argues both Richard D'Agostino and the Estate of Valerie D'Agostino had dual liability under the contract. A review of the contract reveals that there is no language to

support the dual liability argument. Such an interpretation stretches the language of the contract, and construes the ambiguity liberally in favor of Petitioner and strongly against Respondent, which is at odds with South Carolina law. Moreover, the dual liability argument is not supported by the previous claim Petitioner filed with the Probate Court wherein Petitioner stated that "Richard J. D'Agostino personally, and not in a representative capacity, contracted" with Petitioner.

Accordingly, I find that Petitioner's arguments are without merit. Based on the evidence presented and after considering the arguments of the parties, I make the following:

FINDINGS OF FACT

1. I find that Richard D'Agostino was appointed by the Beaufort County Probate Court as the Personal Representative of the Estate of Valerie D'Agostino on January 8, 2010.
2. I find that on June 10, 2010, Richard D'Agostino signed a contract retaining Petitioner.
3. I find that Richard D'Agostino paid the initial retainer from his personal funds.
4. I find that Petitioner drafted the contract.
5. I find that F. Timothy Nicholls, Petitioner's 30(b)(6) deponent, testified that the contract is not clear as to whether Richard D'Agostino was individually responsible for Petitioner's fees.
6. I find that the contract drafted by Petitioner is ambiguous as to whether Richard D'Agostino hired Petitioner in his individual or representative capacity.
7. I find Richard D'Agostino was both a beneficiary and the Personal Representative of the Estate of Valerie D'Agostino and thus had multiple interests in the Estate of Valerie D'Agostino.
8. I find, based on Mr. Nicholls' deposition testimony, that the work performed by Petitioner included an analysis of whether Richard D'Agostino personally would receive

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more money under South Carolina or North Carolina probate law and the filing of a motions on behalf of Richard D'Agostino personally. I also find that Petitioner has not shown that the work he performed was beneficial to the Estate of Valerie D'Agostino.

9. I find that prior to making a claim against Respondent, Petitioner took the position that its claim was against Richard D'Agostino personally in an email to co-counsel dated January 30, 2012.
10. I find that it was the parties' intent for Richard D'Agostino to enter the contract personally and not in a representative capacity.
11. I find that after Richard D'Agostino died, Petitioner made a claim against his Estate for attorneys' fees alleged owed.
12. I find that in making its claim against the Estate of Richard D'Agostino, Petitioner stated in its Petition for Allowance that Richard D'Agostino "personally and not in a representative capacity" contacted Petitioner to provide legal services in North Carolina.
13. I find that Richard D'Agostino individually contracted with Petitioner.
14. I find that the Settlement Agreement and General Release references Petitioner's claim against the Estate of Richard D'Agostino in no way requires the Estate of Valerie D'Agostino to pay Petitioner's claim.
15. I find that there is no evidence to support Petitioner's dual liability argument.
16. I find that Respondent properly disallowed Petitioner's claim.

CONCLUSIONS OF LAW

1. Under South Carolina law, a contract is ambiguous when it may fairly and reasonably be understood in more than one way. E.g., Jordan, 311 S.C. at 227, 428 S.E.2d at 705.
2. I conclude as a matter of law that the contract drafted by Petitioner is susceptible of more

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than one interpretation regarding whether Richard D'Agostino hired Petitioner individually or in his representative capacity and who is responsible for Petitioner's fees.

3. South Carolina law is clear that ambiguities, doubts or uncertainties as to a contract's meanings are resolved against the drafting party and must be construed strongly in favor of the non-drafting party. E.g., Plantation A.D., LLC, 386 S.C. at 205, 687 S.E.2d at 718; Myrtle Beach Lumber Co., 276 S.C. at 8, 274 S.E.2d at 426.
4. I conclude that the contract signed by Richard D'Agostino must be construed against Petitioner and in favor of Respondent and that a reasonable construction of the contract is that the Estate of Valerie D'Agostino is not responsible for fees incurred under the contract.
5. I conclude that Petitioner performed work on behalf of Richard D'Agostino personally.
6. I conclude that 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.
7. I conclude that Richard D'Agostino individually contracted with Petitioner.
8. I conclude that the "relation back" statutes of South Carolina and North Carolina do not help Petitioner because Richard D'Agostino was appointed as Personal Representative of the Estate of Valerie D'Agostino prior to signing Petitioner's contract and that Petitioner's arguments based on the "relation back" statutes are misplaced.
9. I conclude that Petitioner's dual liability argument is contrary to South Carolina case law that requires courts to construe ambiguous language in a contract liberally and most strongly in favor of the party who did not draft the contract. Myrtle Beach Lumber Co., 276 S.C. at 8, 274 S.E.2d at 426.
10. I conclude that since Richard D'Agostino individually contracted with Petitioner,

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Respondent has no liability or responsibility to pay Petitioner's claim.

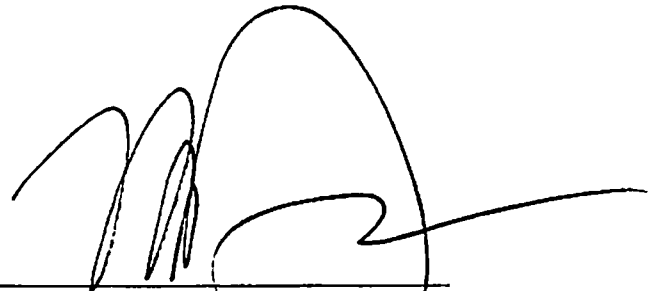
11. I conclude that Respondent properly disallowed Petitioner's claim.

Therefore, I find as a matter of fact and conclude as a matter of law that Petitioner's claim against Respondent is due to be denied and was properly denied and disallowed by Respondent.

Motion for Summary Judgment

Finally, on April 22, 2014, Petitioner filed a Motion for Summary Judgment, and that Motion for Summary Judgment was heard before Final Merits Hearing. The Court took the motion under advisement. Since the Final Merits Hearing has now been held, Petitioner's Motion for Summary Judgment is now moot. Even if it were not moot, I find that there were genuine issues of material fact that prevented summary judgment.

IT IS SO ORDERED!



MARVIN H. DUKES, III
Master In Equity and Special Judge for the
Fourteenth Judicial Circuit, Beaufort County

Beaufort, South Carolina

July 2014
9/16/14

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 Law Office of Jay A. Mullinax, LLC
2 PARK LANE, SUITE 303
HILTON HEAD ISLAND, SC 29928

May 8, 2013

VIA HAND DELIVERY

Ms. Kaye Pinckney, Clerk
Beaufort County Probate Court
P.O. Box 1083
Beaufort, SC 29901-1083

**Re: Estate of Valerie D'Agostino
Case No. 2009ES0700889**

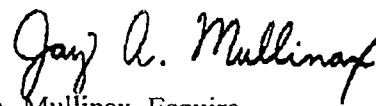
Dear Ms. Pinckney:

Enclosed please find an original and (1) one copy of a Summons and Certificate of Service to accompany the previously filed Petition for Allowance of Claim in regard to the above referenced estate. Please file the original and return a clocked copy to me in the enclosed self-addressed, stamped envelope.

If you have questions, please don't hesitate to contact our office.

Very truly yours,

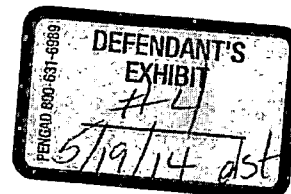
LAW OFFICE OF JAY A. MULLINAX, LLC


Jay A. Mullinax, Esquire

/Enclosure

JAM:kem

Cc: VIA US POSTAL SERVICE
J. Ashley Twombly, Esquire (w/encl.)
Sean M. Bolchoz, Esquire (w/encl.)



STATE OF SOUTH CAROLINA,

COUNTY OF BEAUFORT

NICHOLLS & CRAMPTON, P.A.

Petitioner,

vs.

ESTATE OF VALERIE D'AGOSTINO

Respondent(s).

IN THE PROBATE COURT

SUMMONS

CASE NO. 2009ES0700889

TO THE RESPONDENT(S) ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Petition herein, a copy of which was served upon you, and to serve a copy of your Answer to this Petition upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Petition, judgment by default will be rendered against you for the relief demanded in the Petition.

Hilton Head Island, South Carolina


Petitioner/Attorney for Petitioner

Dated: May 8, 2013

Address: 2 Park Lane, Suite 303
Hilton Head Island, SC 29928
(843)785-6101

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

PROBATE COURT

IN THE MATTER OF THE ESTATE OF VALERIE D'AGOSTINO, DECEASED
CASE NUMBER: 2009ES0700889

PROOF OF DELIVERY

On the 8th day of May, 2013, I mailed or delivered a copy of
the Summons for the Petition for Allowance of Claim.

- ☒ [X] A copy of which is attached hereto and incorporated herein, or
[] The original is on file with the court and incorporated herein.

Delivery was accomplished by the following method (check appropriate box):

- [] Personal delivery ☒ [X] Ordinary First Class Mail
[] Certified Mail with Return Receipt requested [] Registered Mail

to each of the following persons at the addresses shown:

Sean Michael Bolchoz, Esquire

Bolchoz Law Firm, PA
6 Buckingham Plantation Drive, Suite B
Post Office Box 828
Bluffton, SC 29910

J. Ashley Twombly, Esquire

Twenge & Twombly Law Firm, LLC
311 Carteret Street
Beaufort, SC 29902

LAW OFFICE OF JAY A. MULLINAX, LLC

By: Jay A. Mullinax
Jay A. Mullinax, Esquire
2 Park Lane, Suite 303
Hilton Head Island, SC, 29928
843-785-6101
Attorney for the Petitioner

SWORN to before me this 8th day
of May, 2013.

Betty C
Notary Public for South Carolina
My Commission Expires: 2013

Form #120PC (2/2004)
SCPC 1-401, 3-1003, general

STATE OF SOUTH CAROLINA)
)
COUNTY OF: BEAUFORT)
)
IN THE MATTER OF ESTATE OF)
VALERIE D'AGOSTINO:

IN THE PROBATE COURT
PETITION FOR ALLOWANCE OF CLAIM

NICHOLLS & CRAMPTON, P.A.

Petitioner

) CASE NUMBER: 2009ES0700889

vs.

Estate of Valerie D'Agostino

Respondent(s) (if applicable)

The undersigned petitions the Court to allow the following claims against the estate in the amounts set forth below:

Creditor Name and Address	Amount of Claim
Nicholls & Crampton, P.A.	\$6,013.00
3700 Glenwood Avenue, Suite 500	(Includes
Raleigh, NC 27612	interest)

In support of this Petition, Petitioner states that each claim is valid, was presented within the period for the presentation of claims as provided by law, and has not been paid, and, as to those claims which were presented to the Personal Representative and not filed with the Court, that a copy of the statement of each such claim is attached to this Petition and made a part hereof.

(Other:)

1. Memorandum in Support of Petition for Allowance of Claim
 - a. Exhibit A: Signed Engagment Letter
 - b. Exhibit B: Invoice dated 06/08/10-09/23/10
 - c. Exhibit C: Invoice dated 11/30/11
 - d. Exhibit D: Statement of Creditor's Claim (Estate of Richard D'Agostino)
 - e. Exhibit E: Notice of Disallowance of Claim from Rebecca H. Hale
 - f. Exhibit F: Statement of Creditor's Claim (Estate of Valerie D'Agostino)
 - g. Exhibit G: Notice of Disallowance of Claim from J. Ashley Twombly

Executed this 7 day of May, 2013.

Signature:

Name: Jay A. Mullinax, Esquire
Attorney for the Petitioners

Address: _____
Telephone(O): _____
(H): _____
Attorney: Jay A. Mullinax, Esquire
Address: 2 Park Lane, Suite 303
Hilton Head Island, SC 29928
Telephone: (843)-785-6101

ORDER FOR ALLOWANCE OF CLAIM

On the basis of the within Petition and upon hearing for allowance of claims, IT IS HEREBY ORDERED that the following claims against the estate be ☐ ALLOWED ☐ DISALLOWED in the amounts set forth below:

Creditor Name and Address

Amount of Claim

Executed this day of , 20 .

, Probate Court Judge

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
IN THE MATTER OF ESTATE OF)
VALERIE D'AGOSTINO:)
)
NICHOLLS & CRAMPTON, P.A.,)
)
Petitioner,)
v.)
)
ESTATE OF VALERIE D' AGOSTINO,)
)
Respondent.)
_____)

IN THE PROBATE COURT

CASE NUMBER: 2009ES0700889

**MEMORANDUM IN SUPPORT OF
PETITION FOR ALLOWANCE OF CLAIM**

1. Valerie D' Agostino died on October 17, 2009, domiciled in Beaufort County, South Carolina. She was survived by her husband, Richard D' Agostino, Ronald Huther (son) and Heidi Pallesen (daughter). The Beaufort County Probate Court subsequently appointed Mr. Richard D'Agostino as Personal Representative of his wife's estate.
2. On June 10, 2010, Richard D'Agostino, Personal Representative for the Estate of Valerie D'Agostino, consented to, approved, and signed an Engagement Letter with Nicholls & Crampton, P.A., regarding professional legal service fees, costs, disbursements, and payment policy relating to the Engagement Letter's subject: "Estate of Valerie D'Agostino". (A copy of the signed Engagement Letter is attached as **Exhibit A.**)
3. The payment policy in the Nicholls & Crampton, P.A. Engagement Letter approved and signed by Richard D' Agostino on June 10, 2010 states "We will send you detailed, itemized monthly bills reflecting our charges. All statements sent to you are payable within thirty (30) days. Any charges not paid within said thirty days will accrue interest from the due date at the rate of one and one-half (1 ½) percent per month until paid".
4. Legal Services rendered for Mr. D'Agostino relating to actions taken related to his responsibility as Personal Representative of the Estate of Valerie D'Agostino are dated

June 8, 2010 through September 23, 2010 resulting in fees of \$13,289.75; Nicholls & Crampton, P.A. received three checks from Mr. D'Agostino in payment for its services:

- i. 7/16/10 – Payment- Check # 13894 for \$1,500.00
- ii. 9/23/10 – Payment - Check # 1803 for \$1,200.00
- iii. 9/23/10 – Payment - Check #14006 for \$6,800.00

Total =\$9,500.00

(A copy of this invoice is attached as **Exhibit B.**)

5. Therefore, Mr. D'Agostino paid \$9,500.00 towards his charges of \$13,289.75, leaving a remaining balance of \$3,789.75.
6. Richard D' Agostino ("Decedent") died on April 11, 2011.
7. Christopher D'Agostino subsequently petitioned the Probate Court for the State of South Carolina, County of Beaufort, to open the Estate of Richard D'Agostino.
8. The Court, thereafter, appointed Mr. Christopher D' Agostino, as the Personal Representative of his father's estate.
9. Nicholls & Crampton, P.A., made demands upon Mr. Richard D' Agostino prior to his death, and on Christopher D' Agostino, as Personal Representative of Estate of Richard J. D'Agostino, for payment of an outstanding balance for services provided to Mr. D'Agostino that were related to the Estate of Valerie D'Agostino.
10. Despite Nicholls & Crampton P.A. demands, Richard D'Agostino and Christopher D' Agostino, as Personal Representative of Estate of Richard J. D'Agostino failed and refused to pay the outstanding balance for services provided by or expenses paid and incurred by Petitioner.
11. As of November 30, 2011, Mr. D'Agostino's invoice had a remaining principle of \$3,789.75, plus an accumulated interest charge of \$753.19 resulting in a total balance of \$4,542.94. (A copy of this invoice is attached as **Exhibit C.**)

12. Nicholls & Crampton, P.A. filed a Statement of Creditor's Claim against the Estate of Richard D'Agostino on December 27, 2011 for \$4,542.94 for legal services (including interest) rendered to Richard D'Agostino. (A copy of Creditor's Claim is attached as **Exhibit D.**)

13. On January 10, 2012, a Notice for Disallowance of Claim was executed by Rebecca H. Hale of Hale & Bolchoz, L.L.C., and signed by Christopher D' Agostino disallowing the claim against the Estate of Richard D'Agostino for \$4,542.94. The Notice of Disallowance of Claim included the following statement:

This claim represents fees due from the Estate of Valerie D' Agostino, 2009ES07889, whereby decedent was serving as Personal Representative. These fees are due from that estate rather than the decedent's estate. The engagement letter signed by decedent did not in anyway make him personally liable for such fees, and therefore his estate is not liable for such payment either. Furthermore based on information and belief there is enough money in the Estate of Valerie D' Agostino to pay such fees.

(A copy of the Disallowance of Claim and Proof of Delivery is attached as **Exhibit E.**)

14. The Beaufort County Probate Court subsequently dismissed the Petitioner's claim against the Estate of Richard D'Agostino.

15. On September 26, 2013, Petitioner filed a Statement of Creditor's Claim against the Estate of Valerie D'Agostino in the amount of \$3,789.75, plus interest and attorney fees, for "legal services provided to Richard J. D'Agostino as Personal Representative of the Estate of Valerie D' Agostino." (A copy of Statement of Creditor's Claim is attached as **Exhibit F.**)

16. On April 8, 2013, Respondent's counsel, J. Ashley Twombly of Twenge & Twombly Law Firm mailed to Petitioner, Nicholls & Crampton, P.A., and its counsel a Notice of Disallowance of Petitioner's claim in its entirety. The Notice of Disallowance included the following statement:

Richard D' Agostino was contracted with Nicholls & Crampton, P.A. personally and not in his representative capacity as the Personal Representative of the Estate of Valerie D' Agostino. Because the services you provided were provided to Richard D' Agostino personally, the Estate of Valerie D' Agostino is not responsible for paying the fees associated with that representation.

(A copy of the Disallowance of Claim and Proof of Delivery is attached as **Exhibit G.**)

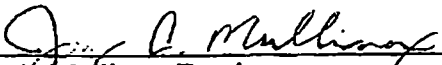
17. The Respondent provides no evidence of his allegations.
18. Conversely, the Petitioner has provided the Court with the following prima facie evidence of its claim: An engagement letter (with the subject matter: Estate of Valerie D'Agostino and details of the services and charges) signed by the Respondent and Petitioner; detailed invoices with time entries and subject matter exclusively related to the administration of the Estate of Valerie D'Agostino; a Court filing by an attorney (Rebecca Hales) representing Richard D' Agostino which alleges that the Estate of Valerie D'Agostino owes the claim.
19. The remaining principle balance of \$3,789.75 has accrued interest since Sept, 23, 2010 at the rate of one and one-half (1½) percent per month, in accordance with the referenced engagement letter and its terms (as proscribed in South Carolina Code of Laws §62-3-806(d)), resulting in the principal and interest total amount of \$6,013.00 (through May 1, 2013, representing 31 months of interest)
20. Decedent, Mr. Richard J. D'Agostino, Personal Representative of the Estate of Valerie D'Agostino, knowingly accepted the benefits of the services provided by and expenses incurred by Petitioner.
21. The services provided by the Petitioner, Nicholls & Crampton, P.A., resulted in the following benefits to the estate: Dismissal of unnecessary and improper venue of estate administration in North Carolina (with anticipated ancillary estate administration in South Carolina); proper efficient venue for estate; reduction in administrative costs of dual

estate administrations; recovering of attorney fees from another law firm for improper venue proceedings in North Carolina.

22. The hourly rates and interest are in accordance with the engagement letter and the services provided by the Petitioner, Nicholls & Crampton, P.A., as outlined and described in the invoice entries, are reasonably worth \$3,789.75, plus interest of \$2,223.25, resulting in the total amount of \$6,013.00. The Respondent has provided no evidence to the contrary.
23. The Petitioner made every reasonable effort to negotiate a settlement with the Respondent, even though the Petitioner was excluded from all negotiations with other parties during several months of a negotiated "global settlement" to settle all matters related to this case. In fact, the Petitioner provided a specific number in settlement and welcomed the Respondent to provide a counter offer. The Respondent provided no counter offer.
24. The Petitioner withdraws its claim regarding attorney fees related to this action. Although the contract was made with a North Carolina law firm, related to a matter initiated in a North Carolina court, and North Carolina courts have awarded attorney fees with similar criteria, the effort to prosecute the claim outweighs the prospect for equity to be achieved. Likewise, the effort to prosecute a companion claim under South Carolina law, which specifically proscribes the allowance of attorney fees, outweighs the prospect for equity to be achieved for the Petitioner. It should be noted that the Respondent never produced, cited, or directed Petitioner to any support for Respondent's position in regard to this matter.
25. The Petitioner respectfully prays that this Court, consider the foregoing and grant the Petitioner's claim based on the evidence presented.

Respectfully submitted,

LAW OFFICE OF JAY A. MULLINAX, LLC


Jay A. Mullinax, Esquire
2 Park Lane, Suite 303
Hilton Head Island, SC 29928
Tel: (843) 785-6101
Fax: (843) 785-6104
Attorney for the Petitioner

Dated: May 7, 2013
Hilton Head Island, South Carolina

NICHOLLS & CRAMPTON, P. A.

ATTORNEYS AT LAW

3700 Glenwood Avenue
Suite 500
Raleigh, North Carolina 27612PO Box 18237
Raleigh, North Carolina 27619

Telephone: (919) 781-1311

Facsimile: (919) 782-0465

June 8, 2010

Mr. Rich D'Agostino
c/o Anthony E. Griffis, Esq.
322 Moss Creek Village Drive
Hilton Head Island, SC 29926via: giffis@hargray.com

Re: Estate of Valeric V. D'Agostino

Dear Mr. D'Agostino

1. Scope of Representation. You have requested that we provide legal services on your behalf in connection with the administration of your deceased wife's estate in Wake County, NC (the "Matter").
2. Professional Service. Our services in the Matter will be provided at our existing hourly rates for the lawyers and paralegals who will be working on the Matter as follows:

Senior Attorneys	\$275 per hour
Associate Attorneys	\$200 per hour
Certified Paralegals	\$135 per hour
Legal Assistants	\$ 80 per hour

Our services shall include, without limitation, our time to review and draft of documents, legal research, depositions, mediation, settlement discussions, court appearances, appearances before the Clerk, conferences, and any other tasks necessary to represent you in the Matter.

3. Retainer. In consideration of the services performed, or to be performed, you shall wire transfer to us the sum of One Thousand Five Hundred Dollars (\$1,500) as a retainer. This amount will be credited, from time to time, as a payment on account of our services and expenses incurred. This retainer is not an estimate of anticipated fees in this matter. In the event that the hours expended in the Matter are less than the total retainer, we will refund the balance to you.

4. Costs and Disbursements. You are also responsible for all necessary and reasonable costs and expenses incurred or paid out in the performance of our services. We will bill you, or ask you to pay directly, for out-of-pocket costs. These costs and expenses shall include, but not be limited to: expert witness

charges, travel expenses, duplication expenses, transmittal charges, long distance charges, courier charges, and any other necessary expenses. If we advance any costs or expenses, you shall reimburse us upon our furnishing you information as to the amount unless said amount can be charged against any available retainer remaining in your account.

5. Payment Policy. We will send you detailed, itemized monthly bills reflecting our charges. All statements sent to you are payable within thirty (30) days. Any charges not paid within said thirty days will accrue interest from the due date at the rate of one and one-half (1 1/2) percent per month until paid.

6. Discharge or Withdrawal. You have the right to discharge us for any reason at any time. We reserve the right to withdraw from representing you at any time. Upon termination, for any reason, we will promptly turn over your file to you upon request, however, you will remain responsible for all fees and costs incurred through the date of termination, but payment of our final statement shall not be a precondition to the release of your file.

7. Disclaimer. In representing you in this matter, we cannot and do not warrant or predict results or final developments. Be assured that it is our desire to afford you conscientious, faithful, and diligent service, seeking at all times to achieve solutions that are just and reasonable to you.

If the foregoing meets with approval, kindly signify consent and approval by having the agreement signed in the space provided below, insert the date, and return the original of this letter to us, along with the retainer fee.

Sincerely,

NICHOLLS & CRAMPTON, P. A.

/s/ Tim Nicholls

CONSENTED TO AND APPROVED


Rich D'Agostino
June 2, 2010

In Account With

NICHOLLS & CRAMPTON, P.A.
ATTORNEYS AT LAW3700 Glenwood Avenue - Suite 500
Post Office Box 18237
Raleigh, North Carolina 27612
Telephone: 919/781-1311 Fax: 919/782-0465Federal ID #
56-1201204Rich D'Agostino
c/o Anthony E. Griffin, Esq.
322 Moss Creek Village Drive
Hilton Head Island, SC 29926Invoice Date: September 23, 2010
Invoice No. 108938
Client/Matter ID: 102245.001

RE: FTM - VALERIE D'AGOSTINO ESTATE

Amount Paid: _____

For legal services rendered, including but not limited to

Date	Initials	Description	Hours	Amount
06/08/2010	NIC	Telephone conference with Mr. Griffis re: estate; draft engagement letter.	0.80	220.00
06/09/2010	PAR	Obtain documents from Estates Division.	1.20	162.00
06/10/2010	NIC	Review guardianship and estate filings; e-mail Mr. Griffis.	0.70	192.50
06/11/2010	NIC	Conference with associate re: procedural matters; review intestacy law.	0.70	192.50
	NIC	Telephone conference with Mr. Griffis; telephone call with Mr. Alexander; call Mr. Belcher.	1.20	330.00
06/14/2010	NIC	Review and respond to Mr. Garri's e-mail.	0.20	55.00
06/21/2010	NIC	Telephone conference with Mr. Griffis; telephone conference with Assistant Clerk of Court; conference with Mr. Dombalis; review Hearing Notice; e-mail Mr. Belcher.	1.10	302.50
	DOM	Conference with Mr. Nicholls re: strategy; review memo to Charlotte attorney.	0.70	192.50
06/22/2010	NIC	Revise and finalize e-mail to Charlotte attorney; e-mail to Mr. Griffis; conference with Intern re: domicile.	1.10	302.50
06/24/2010	NIC	Draft fax to Mr. Alexander; e-mail to Mr. Griffis.	0.80	220.00
07/01/2010	NIC	Telephone conference with Mr. D'Agostino; review letter from D. Alexander.	0.50	137.50
07/02/2010	DOM	Draft Motion for Sanctions.	0.70	192.50
	NIC	Conference with Mr. Dombalis; review and file Motion for Sanctions.	0.70	192.50

A finance charge is computed on account balances unpaid 30 days
after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%)

Rich D'Agostino
RE: FTN - VALERIE D'AGOSTINO ESTATE

Invoice Date: 09/23/2010
Invoice No. 108938
Client/Matter ID. 102245.001

			Hours	
	DOM	Conference with Mr. Nicholls.	0.30	82.50
07/07/2010	NIC	Review e-mails from Mr. Garris; conference with Mr. Domballs re: strategy; telephone conference with Mr. Garris; telephone conference with Mr. D'Agostino; research.	1.20	330.00
	DOM	Conference with Mr. Nicholls; telephone conference with South Carolina counsel and Mr. Nicholls.	0.50	137.50
07/08/2010	NIC	Review file in preparation for hearing; telephone conference with Messrs. Domballs and Garris; telephone conference with Mr. Glass; telephone conference with Mr. D'Agostino; research jurisdiction and other matters for hearing.	7.50	2,062.50
	DOM	Telephone conference with Mr. Nicholls and South Carolina counsel.	1.30	357.50
07/09/2010	PAR	Preparation of all Qualification Documents; meeting with Mr. Nicholls re: estate administration.	1.80	243.00
	PAR	Draft application, Oath, etc. for Mr. D'Agostino.	1.80	243.00
	NIC	Conference with Mr. Domballs; telephone conference with Mr. Griffiths; telephone conference with Mr. D'Agostino; review application, etc.	1.40	385.00
	DOM	Conference with Mr. Nicholls.	0.20	55.00
07/12/2010	NIC	Review Petition and Exhibits; telephone conferences with Messrs. D'Agostino, Griffiths and Glass; prepare for hearing before Clerk.	2.10	577.50
	NIC	Hearing before Clerk; e-mail Mr. Garris; telephone conference with Mr. D'Agostino.	1.80	495.00
07/13/2010	NIC	Draft amendment to Motion for Sanctions; telephone conference with Mr. D'Agostino.	0.60	165.00
07/14/2010	DOM	Review and comment on amendment to motion.	0.30	82.50
	NIC	Various e-mails to Messrs. Griffiths and Glass; telephone conference with Mr. Alexander; draft Notice of Hearing.	1.30	357.50
07/16/2010	NIC	Conference with paralegal.	0.50	137.50
	PAR	Conference with Mr. Nicholls re: filing Application for letters.	0.50	67.50
	NIC	Telephone conference with Mr. Griffiths and Mr. Glass; review Alexander e-mail.	0.50	137.50
	PAR	Meeting with Mr. Nicholls re: qualification documents.	0.60	81.00
07/17/2010	NIC	Prepare for hearing.	1.00	275.00
07/18/2010	NIC	Prepare for hearing.	1.60	440.00

A finance charge is computed on account balances unpaid 30 days
after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%)

Rich D'Agostino
RE: FTN - VALERIE D'AGOSTINO ESTATE

Invoice Date: 09/23/2010
Invoice No. 108938
Client/Matter ID. 102245.001

			Hours	
07/19/2010	NIC	Prepare for hearing; various telephone conferences with Messrs. Griffis and Alexander; conference with Mr. Dombalis; revise motion for sanctions.	3.00	825.00
	DOM	Various conferences with Mr. Nicholls re: sanctions.	1.00	275.00
	DOM	Review sanction case law; conference with Mr. Nicholls re: same.	0.05	13.75
07/22/2010	NIC	Various telephone conferences with Messrs. Glass, Alexander and Griffis re: settlement; draft e-mail re: settlement.	2.30	632.50
07/23/2010	NIC	Various e-mails re: continuance of hearing.	0.40	110.00
07/27/2010	NIC	Respond to Mr. Griffis.	0.20	55.00
07/29/2010	NIC	Review and revise Settlement Agreement; e-mail Mr. Griffis; telephone conference with Mr. Griffis; revise Agreement and e-mails; various e-mails; telephone conference with Assistant Clerk.	2.30	632.50
08/02/2010	NIC	Revise Agreement; respond to Mr. Alexander's e-mail re: changes.	0.20	55.00
08/09/2010	NIC	Review and reply to various e-mails.	0.70	192.50
08/12/2010	NIC	Review and respond to Mr. Glass e-mail and Mr. Griffis e-mail.	0.40	110.00
08/13/2010	NIC	Conference with Messrs. Griffis and Glass re: changes to Settlement Agreement; review revised Agreement.	0.80	220.00
09/01/2010	NIC	Review and respond to various e-mails re: settlement.	0.30	82.50
09/10/2010	NIC	Various e-mail communications re: settlement.	0.80	220.00
09/17/2010	NIC	Review various emails.	0.30	82.50
09/20/2010	NIC	Review and respond to various emails.	0.40	110.00
09/23/2010	NIC	Prepare and file withdrawal of motion; various emails.	0.70	192.50
		FEES BILLED	51.05	13,212.75

FEE SUMMARY

<u>Timekeeper</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
F T Nicholls	40.10	\$275.00	\$11,027.50
N J Dombalis	5.05	275.00	1,388.75
L C Connolly	5.90	135.00	796.50

A finance charge is computed on account balances unpaid 30 days
after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%)

Rich D'Agostino
RE: FTN - VALERIE D'AGOSTINO ESTATE

Invoice Date: 09/23/2010
Invoice No. 108938
Client/Matter ID. 102245.001

DISBURSEMENTS

	Copies, Parking	30.00
	Federal Express charges	22.00
	Delivery charge	25.00
	TOTAL DISBURSEMENTS through 07/09/2010	77.00
	TOTAL FEES AND DISBURSEMENTS THIS INVOICE	13,289.75
07/16/2010	Payment-Check # 13894	-1,500.00
09/23/2010	Payment-Check # 1803	-1,200.00
09/23/2010	Payment-Check # 14006	-6,800.00
	Total Payments	-9,500.00
	BALANCE DUE	<u>\$3,789.75</u>

A finance charge is computed on account balances unpaid 30 days
after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%)

EXHIBIT" C "

In Account With
NICHOLLS & CRAMPTON, P.A.
ATTORNEYS AT LAW

3700 Glenwood Avenue - Suite 500
Post Office Box 18237
Raleigh, North Carolina 27612
Telephone: 919/781-1311 Fax: 919/782-0465

Federal ID #
56-1201204

Rich D'Agostino
c/o Anthony E. Griffin, Esq.
322 Moss Creek Village Drive
Hilton Head Island, SC 29926

Invoice Date: November 30, 2011
Invoice No. 117498
Client/Matter ID: 102245.001

RE: FTM - VALERIE D'AGOSTINO ESTATE

Amount Paid: _____

=====

For legal services rendered, including but not limited to

PREVIOUS BALANCE	\$4,488.74
Finance Charge	54.20
BALANCE DUE	<u>\$4,542.94</u>

A finance charge is computed on account balances unpaid 30 days
after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%)

EXHIBIT" D "

STATE OF SOUTH CAROLINA)

COUNTY OF: BEAUFORT)

IN THE MATTER OF: RICHARD J. D'AGOSTINO)

IN THE PROBATE COURT

STATEMENT OF CREDITOR'S CLAIM

CASE NUMBER: 2011ES0700406

Decedent's Date of Death (if known): 04/11/2011

Decedent's Last Mailing Address: 15 Sebring Drive, Bluffton, SC 29909

Creditor: Nicholls & Crampton, P. A.

Address: 3700 Glenwood Avenue, Suite 500

Raleigh, NC 27612

Telephone: 919-781-1311

Basis of claim:

Legal services rendered in the Estate of Valerie D'Agostino for decedent Richard D'Agostino pursuant to engagement letter attached; decedent agreed to be personally liable for said fees in the event fees were not paid by the Estate of Valerie D'Agostino

Amount of claim \$ 4,542.94

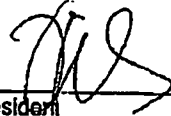
Date claim will become due (if not already due): Claim due as of 9/23/, 2010 when last services rendered.

Nature of uncertainty as to amount of claim and due date, if any:

N/A

Description of any security as to claim:

None

Signature: 

Title: President

Date: December 27, 2011

INSTRUCTIONS: Claims must be filed with the Probate Court of this county and delivered or mailed to the Personal Representative appointed to administer the estate (see section 62-3-803, 62-3-804, and 62-3-806 on next page.)

EXHIBIT" E "

STATE OF SOUTH CAROLINA)

COUNTY OF: BEAUFORT)

IN THE MATTER OF: Estate of Richard J. D'Agostino)

IN THE PROBATE COURT

NOTICE OF DISALLOWANCE OF CLAIM

) CASE NUMBER: 2011ES0700406

TO:

Name: F. Timothy Nicholls, Esquire

Address: PO Box 18237

Raleigh, NC 27610

The undersigned, as the Personal Representative(s)/Conservator(s) appointed to administer this estate, disallows \$ 4,542.94 of your claim for \$4,542.94 presented on 1/2/12.

Your claim was disallowed for the following reason(s):

This claim represents fees due from the Estate of Valerie D'Agostino, 2009ES07889, whereby decedent was serving as Personal Representative. These fees are due from that estate rather than the decedent's estate. The engagement letter signed by decedent did not in anyway make him personally liable for such fees, and therefore his estate is not liable for such payment either. Furthermore based on information and belief there is enough money in the Estate of Valerie D'Agostino to pay such fees..

Failure to protest this disallowance of your claim, (that is, failing to file your petition for its allowance (form #373PC) in the Probate Court and failing to commence a proceeding on the claim within thirty days after the mailing of this Notice of Disallowance of Claim), shall result in your claim or the disallowed portion of your claim being forever barred.

Executed this 10th day of Jan, 2012

Signature: 

Name: Christopher d'Agostino

Address: 13710 Trinity Leaf Place
Riverview, FL 33579

E-mail:

Telephone (O): 813 393-4576

(H): 813 677-0284

STATE OF SOUTH CAROLINA

COUNTY OF: BEAUFORT

IN THE MATTER OF: ESTATE OF RICHARD J.
D'AGOSTINO

IN THE PROBATE COURT

PROOF OF DELIVERY

) CASE NUMBER: 2011ES070406

On the 7th day of June, 2011, I mailed or delivered the following document, Notice of Dissallowance of Claim of Anthony E. Griffis, and Notice of Dissallowance of Claim of F. Timothy Nicholls, Esquire

- ☐ A copy of which is attached hereto and incorporated herein, or
☒ The original of which is on file with the court and incorporated herein,

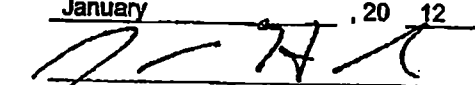
Delivery was accomplished by the following method (check appropriate box):

- ☐ personal delivery ☒ ordinary first class mail
☐ certified mail ☐ registered mail

to each of the following persons at the address shown:

NAME	ADDRESS
J. Ashley Twombly, Esquire	311 Carteret Street, Beaufort, SC 29902
Anthony E. Griffis, Esquire	355 Park Avenue, SW, Aiken, SC 29801
F. Timothy Nicholls, Esquire	3700 Glenwood Avenue, Suite 500, Raleigh, NC 27612

SWORN to before me this 12 day of
January, 2012


Notary Public for South Carolina

My Commission Expires: 12/12/16

Signature: Rebecca H. Hale

Name: Rebecca H. Hale, Esquire

Address: PO Box 22561

Hilton Head Island, SC 29925

Telephone (O): (843) 837-3000

(H):

E-mail: rhalehaleandbolchoz.com

Signature: _____

Name: _____

Address: _____

Telephone (O): _____

(H): _____

E-mail: _____

EXHIBIT" F "

STATE OF SOUTH CAROLINA)

COUNTY OF: BEAUFORT)

IN THE MATTER OF: The Estate of Valerie D'Agostino)

IN THE PROBATE COURT

STATEMENT OF CREDITOR'S CLAIM

CASE NUMBER: 2009ES0700889

Decedent's Date of Death (if known): October 17, 2009

Decedent's Last Mailing Address: 15 Sebring Drive, Bluffton, SC 29909

Creditor: Nicholls & Crampton, P.A.

Address: c/o Law Office of Jay A. Mullinax, LLC

2 Park Lane, Suite 303

Hilton Head Island, SC 29928

Telephone: (843) 785-6101

Basis of claim:

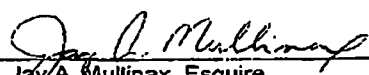
Legal services provided to Richard J. D'Agostino as Personal Representative of the Estate of Valerie D'Agostino.

Amount of claim \$ \$3,789.75 plus interest and attorney fees

Date claim will become due (if not already due): , 20

Nature of uncertainty as to amount of claim and due date, if any:

Description of any security as to claim:

Signature: 

Title: Jay A. Mullinax, Esquire

Date: September 26, 2012

INSTRUCTIONS: Claims must be filed with the Probate Court of this county and delivered or mailed to the Personal Representative appointed to administer the estate (see section 62-3-803, 62-3-804, and 62-3-806 on next page.)

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

PROBATE COURT

IN THE MATTER OF THE ESTATE OF VALERIE D'AGOSTINO, DECEASED
CASE NUMBER: 2009ES0700889

PROOF OF DELIVERY

On the 26 day of September, 2012, I mailed or delivered a copy of the Statement of Creditor's Claim.

- ☒ A copy of which is attached hereto and incorporated herein, or
☐ The original is on file with the court and incorporated herein.

Delivery was accomplished by the following method (check appropriate box):

- ☐ Personal delivery ☒ Ordinary First Class Mail
☐ Certified Mail with Return Receipt requested ☐ Registered Mail

to each of the following persons at the addresses shown:

J. Ashley Twombly, Esquire Twenge & Twombly, LLC
311 Carteret Street
Beaufort, SC 29902

LAW OFFICE OF JAY A. MULLINAX, L.L.C.

By: Jay A. Mullinax
Jay A. Mullinax, Esquire
2 Park Lane, Suite 303
Hilton Head Island, SC. 29928
843-785-6101
Attorney for the Estate

SWORN to before me this 26 day
of September, 2012.

[Signature]
Notary Public for South Carolina
My Commission Expires: 10/14/19

STATE OF SOUTH CAROLINA)
COUNTY OF: BEAUFORT)
IN THE MATTER OF: ESTATE OF)
VALERIE D'AGOSTINO)

IN THE PROBATE COURT
NOTICE OF DISALLOWANCE OF CLAIM

) CASE NUMBER: 2009ES0700889

TO:

Name: Nicholls & Crampton, P.A.
Address: c/o Law Office of Jay A. Mullinax, LLC
2 Park Lane, Suite 303
Hilton Head, SC 29928

The undersigned, as the Personal Representative(s)/Conservator(s) appointed to administer this estate, disallows \$ 3,789.75 plus claimed interest and claimed attorney fees of your claim for \$3,789.75 plus interest and attorney fees presented on September 26, 2012.

Your claim was disallowed for the following reason(s):

Richard D'Agostino contracted with Nicholls & Crampton, P.A. personally and not in his representative capacity as the Personal Representative of the Estate of Valerie D'Agostino. Because the services you provided were provided to Richard D'Agostino personally, the Estate of Valerie D'Agostino is not responsible for paying the fees associated with that representation.

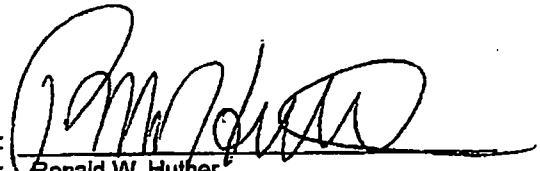
In addition, the amount of the claim is unreasonable in light of the service that was provided.

Finally, under no circumstances would anyone be responsible for paying the attorney's fees Claimant's lawyer (Jay A. Mullinax) incurred in attempting to pursue this claim. Significantly, Claimant and his attorney have repeatedly been asked to identify any case, statute or other legal principal that would allow Claimant to recover attorney's fees incurred in filing and pursuing a probate creditor's claim. Despite numerous requests, Claimant has been unable to produce, cite, direct or otherwise reference any authority to support Claimant's claim for attorney's fees on top of the face amount of his creditor's claim. Claimant has been warned in writing numerous times, pursuant to South Carolina Rules of Civil Procedure 11 and other relevant law, that he must have a legitimate basis in law and fact to advance his claim for attorney's fees.

Failure to protest this disallowance of your claim, (that is, failing to file your petition for its allowance (form #373PC) in the Probate Court and failing to commence a proceeding on the claim within thirty days after the mailing of this Notice of Disallowance of Claim), shall result in your claim or the disallowed portion of your claim being forever barred.

Executed this

day of March , 2013.

Signature: 

Name: Ronald W. Huther

Address: 3402 Tennessee Drive
Alexandria, VA 22303

E-mail: _____

Telephone (O): (240) 486-1703

(H): _____

STATE OF SOUTH CAROLINA
COUNTY OF: BEAUFORT
IN THE MATTER OF: ESTATE OF
VALERIE D'AGOSTINO

IN THE PROBATE COURT
PROOF OF DELIVERY

CASE NUMBER: 2009ES0700889

On the 8th day of April, 2013, I mailed or delivered the following document, Notice of Disallowance of Claim

- ☒ A copy of which is attached hereto and incorporated herein, or
☐ The original of which is on file with the court and incorporated herein,

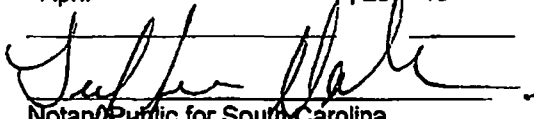
Delivery was accomplished by the following method (check appropriate box):

- ☐ personal delivery
☐ certified mail
☒ ordinary first class mail
☐ registered mail

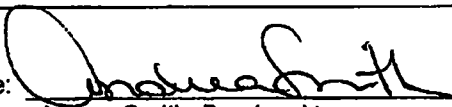
to each of the following persons at the address shown:

NAME	ADDRESS
Jay A. Mullinax, Esquire	2 Park Lane, Ste 303, Hilton Head, SC 29910
Anthony E. Griffis, Esquire	10 Fording Island Road Extension, Hilton Head, SC 29926
Sean M. Bolchoz, Esquire	P.O. Box 828, Bluffton, SC 29910

SWORN to before me this 8th day of
April, 2013


Notary Public for South Carolina
My Commission Expires: _____



Signature: 
Name: Andrea Smith, Paralegal to
Twenge + Twombly Law Firm
Address: 311 Carteret Street
Beaufort, SC 29902
Telephone (O): _____
(H): (843) 982-0100
E-mail: andrea@twlawfirm.com

Signature: _____
Name: _____
Address: _____
Telephone (O): _____
(H): _____
E-mail: _____

D'3

FILED

2013 JUN -3 AM 10:51

PROBATE COURT
BEAUFORT COUNTY, SC

STATE OF SOUTH CAROLINA

) IN THE PROBATE COURT

COUNTY OF BEAUFORT

) CASE NO. 2009-ES-07-889

IN RE:

ESTATE OF VALERIE D'AGOSTINO

NICHOLLS & CRAMPTON, P.A.,

Petitioner,

v.

ANSWER

ESTATE OF VALERIE D'AGOSTINO,

Respondent.

TO: JAY A. MULLINAX, ESQUIRE, ATTORNEY FOR THE PETITIONER:

Estate of Valerie D'Agostino, hereinafter "Respondent," answering the Petition for Allowance of Claim filed by Nicholls & Crampton, P.A. hereinafter "Petitioner," would allege and state as follows:

Respondent denies each and every allegation not specifically admitted hereinafter.

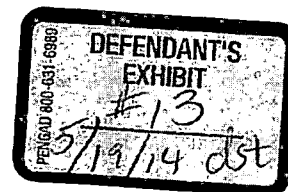
FOR A FIRST DEFENSE

1. Respondent denies each and every allegation contained in Petitioner's Petition for Allowance of Claim and demands strict proof thereof.

FOR A SECOND DEFENSE

2. Respondent re-alleges all of the preceding paragraphs above and incorporates the same herein by reference as if repeated verbatim.

3. Petitioner's claims are barred, in whole or in part, by the doctrine of estoppel.



FOR A THIRD DEFENSE

4. Respondent re-alleges all of the preceding paragraphs above and incorporates the same herein by reference as if repeated verbatim.
5. Petitioner's claims are barred by the doctrine of res judicata.

PRAYER FOR RELIEF

WHEREFORE, Respondent having fully answered Petitioner's Petition for Allowance of Claim prays that this action be dismissed with costs to Petitioner.

By: _____

TWENGE + TWOMBLEY LAW FIRM

J. ASHLEY TWOMBLEY

311 Carteret Street

Beaufort, SC 29902

Attorney for Respondent

Telephone: (843) 982-0100

Facsimile: (843) 982-0103

www.twlawfirm.com

Beaufort, South Carolina

May 31, 2013

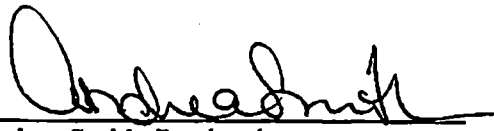
CERTIFICATE OF SERVICE

The undersigned, Andrea Smith, hereby avers that she is the Paralegal to TWENGE + TWOMBLEY LAW FIRM, Attorneys for Respondent, and that on the 31st day of May 2013 a true and accurate copy of the attached was placed in an envelope with first class postage thereon prepaid through the United States Postal Service, and mailed to the following:

Jay A. Mullinax, Esquire
Law Office of Jay A. Mullinax, LLC
2 Park Lane, Suite 303
Hilton Head Island, SC 29928
Telephone: (843) 785-6101
Facsimile: (843) 785-6104
Attorney for Nicholls & Crampton, P.A

Anthony E. Griffis, Esquire
Griffis Law Office
10 Fording Island Road Extension
Hilton Head Island, SC 29926

BY:


Andrea Smith, Paralegal to
TWENGE + TWOMBLEY LAW FIRM

1 State of South Carolina) Court of Common Pleas
2 County of Beaufort) 14th Judicial Circuit
3) No.: 2013-CP-07-1491

4 Nicholls & Crampton,)
5 P.A.,)

6 Plaintiff,)

7 vs.)

8 Estate of Valerie)
9 D'Agostino,)

10 Defendant.)

HEARING

May 19, 2014

11
12 Hearing reported by Deborah S. Thomas,
13 Certified Verbatim Reporter and Notary Public in and
14 for the State of South Carolina; said hearing held
15 before the Honorable Marvin H. Dukes, III, Beaufort
16 County Master in Equity and Special Circuit Court
17 Judge in accordance with the South Carolina Rules of
18 Civil Procedure, at the Beaufort County Courthouse,
19 102 Ribaut Road, Room 212, Beaufort, South Carolina,
20 on May 19, 2014, at the hour of 1:36 p.m.

21
22 ABACTIS REPORTING SERVICES
23 15 Pineapple Drive
24 Bluffton, South Carolina 29909
25 (803) 206-7390

Appearances

Representing the Plaintiff:

JAY A. MULLINAX, ESQUIRE
Law Office of Jay A. Mullinax, LLC
2 Park Lane, Suite 303
Hilton Head, South Carolina 29928
Jay@sc-estate planning.com

Representing the Defendant:

J. ASHLEY TWOMBLEY, ESQUIRE
Twenge & Twombley, LLC
311 Carteret Street
Beaufort, South Carolina 29902
twombley@twlawfirm.com

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CONTENTS

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* * * * *

EXHIBIT INDEX

Exhibits: Marked at Page

(All exhibits retained by
the Clerk of Court.)

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* * * * *

1 This hearing is taken in accordance
2 with the South Carolina Rules of Civil Procedure.

3 JUDGE DUKES: Good afternoon then.
4 We are here on Case 13-CP-07-1491. This is in the
5 matter of the Estate of Agostino -- Nicholls &
6 Crampton versus the Estate of D'Agostino. And we
7 have a full trial scheduled today, but first we have
8 a motion for summary judgment by the Plaintiff. So
9 I'm happy to hear from you, sir.

10 MR. MULLINAX: Your Honor, you have
11 the Motion for Summary Judgment. And hopefully
12 you've had an opportunity to look it over. I'll try
13 to summarize it as best I can for the court's
14 benefit for the report, but we do believe that this
15 is a case to summary judgment. We don't believe
16 there is any genuine issue as to any material fact.
17 And that as a matter of law we are due judgment.

18 The petition for allowance of claim was
19 the original thing that started this whole case. It
20 was filed on May the 8th, 2013. That is in the
21 record. As stated in our summary judgment, the
22 Defendants -- it is Defendant who is the Estate of
23 Richard D'Agostino. Mr. D'Agostino signed an
24 engagement letter with the Plaintiff Nicholls &
25 Crampton, a law firm in North Carolina, to assist

1 him in his service as personal representative for
2 his late wife's estate, Valerie D'Agostino.

3 And we are unaware of anything that
4 questions the validity of the contract at this
5 point. With regard to the engagement letter
6 particularly, just to summarize it, expresses the
7 way that the law firm in North Carolina, Nicholls &
8 Crampton, bill the client.

9 It goes over the fact that there will be
10 monthly bills that would be sent to the client. And
11 that it would accrue interest at one and a half
12 percent per month per the engagement letter.

13 The subject matter on the engagement
14 letter itself signed by Richard D'Agostino is, and I
15 put this in quotes, but Estate of Valerie D'Agostino
16 which is the subject matter of the contract between
17 the Plaintiff and the Defendant.

18 The Plaintiff apparently was paid in part,
19 and I think that is in the record, but I won't go
20 over those parts at this point, but there was an
21 outstanding invoice that was sent to the Defendant
22 in September of 2010, which is almost four years ago
23 at this point.

24 And the invoice, of course, recites the
25 activities of the law firm. It itemizes those

1 activities, all relating to the Estate of Valerie
2 D'Agostino for which the law firm was hired to
3 assist Mr. D'Agostino with that estate.

4 The Defendant to this point at least has
5 not provided any evidence whatsoever, and the
6 depositions should prove that out, as to any
7 questions as to any particular validity of the
8 charges on the invoice. And of course it has been
9 accumulating interest since.

10 The only evidence that the Plaintiff is
11 aware of at this point has been presented by the
12 Defendant was a witness by the name of Ronald
13 Huther, excuse me, who is the personal
14 representative at this point of Valerie D'Agostino's
15 estate. And he testified, which is cited in the
16 summary judgment motion that he had no personal
17 knowledge of the activities listed in the invoice
18 that is the subject of the matter before the court
19 today.

20 When asked about the invoice and asked
21 about the activities of the law firm and whether he
22 had any personal knowledge Mr. Huther testified, I
23 don't have any. I just recognize a couple of the
24 names on here.

25 He further testified, which is in the

1 record, that, I have no knowledge of any of this
2 stuff, referring to the invoice. So at this point
3 the Plaintiff is unaware of any evidence whatsoever
4 that contradicts the activities of the law firm for
5 which the Defendant was billed and has still not
6 paid in almost four years.

7 Mr. Huther's attorney, Ashley Twombly,
8 did file a disallowance of claim on the claim that
9 was filed by the Plaintiff. And in that
10 disallowance of claim the following statement is
11 included. It says the amount of the claim is
12 unreasonable and in light of the services that were
13 provided. That is at the top of Page 4 of the
14 summary judgment, Your Honor, if you are looking for
15 that.

16 But up at the top it says according to
17 Mr. Twombly's disallowance of claim the reason for
18 the disallowance of claim was that the claim was
19 unreasonable in light of the services that was
20 provided. But, however, during depositions,
21 Mr. Twombly, the same attorney on behalf of the
22 Defendant who filed the disallowance of claim,
23 stipulated, and this is midway down Page 4, Mr.
24 Twombly then interrupted Mr. Huther's testimony to
25 state on the record, we will stipulate that all of

1 those fees are reasonable referring to the invoice
2 that was previously cited.

3 So in the disallowance of claim, Mr.
4 Twombly on behalf of his client indicates that the
5 claim is unreasonable in light of the services that
6 were provided. But yet in deposition, Mr. Twombly
7 stated on the record that he stipulated that all the
8 fees are reasonable. And that is cited there on
9 Page 4 and cites to the transcript during the
10 deposition. And it's on the record.

11 And then he later stated the same thing
12 again that all of those fees are reasonable
13 according to Hutter. That is deposition Page 46,
14 Page 8 and 9 (sic).

15 For that reason the Plaintiff believes
16 that there is no issue as to the reasonableness of
17 the fees. They've already stipulated that they are
18 reasonable. The Defendant has provided no evidence
19 or testimony of any sort contradicting the
20 activities of the law firm. And we don't anticipate
21 that coming today.

22 As a result, that is the reason for our
23 summary judgment motion. For further evidence on
24 the summary judgment motion, we have submitted to
25 the court something that was already in the record

1 from the Attorney Rebecca Hale of the former law
2 firm known as Hale & Bolchez. And Ms. Hale stated
3 in the disallowance of claim that she filed to the
4 court that this claim -- referring to the invoice
5 previously referred to. That this claim represents
6 fees due from the Estate of Valerie D'Agostino. So
7 Rebecca Hale, of Hale & Bolchez, an attorney
8 licensed to practice in South Carolina, has also
9 given sworn testimony to the court in this case
10 saying that the fees are due from the Estate of
11 Valerie D'Agostino. And she goes on with more
12 information there. That is on Page 5, midway down.

13 Turning to Page 6 of Paragraph 10 of the
14 summary judgment, let it be known to the court --
15 and this is in the record, but the Defendant in this
16 case has received from the Estate of Richard
17 D'Agostino \$4,929.08 specifically.

18 And those funds, according to documents
19 that are in the record, have been provided for the
20 purpose of settling this case. At this point the
21 Plaintiff has received none of those funds, but
22 those came from the Estate of Richard D'Agostino to
23 the estate of the Defendant today, Valerie
24 D'Agostino. And those funds have not been
25 forthcoming to the Plaintiff at this point.

1 During testimony the Defendant,
2 Mr. Huther, as personal representative for the
3 Estate of Valerie D'Agostino, testified -- and this
4 is in Paragraph 10 of the summary judgment motion,
5 he testified that the \$4,900 was to be the amount
6 that we, the Defendant, were going to pay
7 Mr. Nicholls, the Plaintiff, plus any additional
8 interest that might have popped up between the time
9 it was going to take to sort all of this stuff --
10 out all of this stuff.

11 And that is referred to in transcript --
12 the Huther deposition, Page 50, 22 it looks like,
13 through 51, Line 2. So the Plaintiff -- or excuse
14 me. The Defendant at this point has in his
15 possession \$4,900 from Richard D'Agostino's estate
16 specifically for the purpose of settling this
17 estate -- this matter at this point, and they
18 haven't -- they haven't presented any of those funds
19 to the Plaintiff.

20 In closing, Your Honor, Page 7, we
21 indicate on Paragraph 12 that according to the
22 Defendant's attorney, which is in Exhibit 8, he has
23 expressed to the court directly with cc copies to
24 us, that the Defendant wants to get this case
25 resolved, and at this point I really do not care who

1 resolves it or how they resolve it, end quote.

2 So it's clear to us that at least in text
3 that the Defendant wants to settle this case.
4 However, at this point that certainly hasn't
5 occurred. And I do want to speak just for a minute
6 with regard to settlement offers.

7 To the Plaintiff's knowledge there has
8 been one single solitary offer in this case to date
9 by the Defendant. And that was made on the Friday
10 before depositions on Monday for \$2,000. That is
11 the sole offer ever made in this case by the
12 Defendant to the Plaintiff. However, the Plaintiff
13 has made offers earlier on that were -- they were a
14 higher number to settle this case, but unfortunately
15 that has not occurred.

16 At this point, Your Honor, we can see no
17 defense to the engagement letter of contract. We
18 see no defense to the charges because they have no
19 testimony or other evidence that has been presented
20 to the court at this point to defend against the
21 claim. And, in fact, the Defendant himself
22 testifies to the fact that he has no knowledge of
23 the activities of the law firm of Nicholls &
24 Crampton in North Carolina.

25 And I do want to remind the court at this

1 point that the estate was administered here in
2 Beaufort County, South Carolina, but there were some
3 activities in North Carolina. And actually there
4 was an effort to open the estate there. And that
5 was settled between Mr. D'Agostino's estate, I
6 think, and Mrs. D'Agostino -- or excuse me.
7 Mr. D'Agostino and Mrs. D'Agostino's relatives which
8 is separate and apart from the case today, but I do
9 want you to know the background on that.

10 The reason the law firm in North Carolina
11 had to be hired was in part because I think there
12 were some properties and some interests there that
13 had to be an ancillary issue to what was being dealt
14 with here in Beaufort County.

15 I don't think there is any debate as to
16 jurisdiction or proper venue at this point. I just
17 want to make that clear to the court.

18 So we have asked the court at this point
19 for a summary judgment. I'm not going to speak to
20 this at length at this point, but we do think that
21 attorney fees may be appropriate given the fact that
22 we've gone through this for four years at this point
23 and it's been a long arduous process. And we think
24 that it could have been easily settled early on for
25 a reasonable cost which was just the principal and

1 the interest. Unfortunately that never occurred.
2 And unfortunately Nicholls & Crampton, the law firm
3 trying to do good work in North Carolina for a South
4 Carolina resident, has been fighting for a long time
5 to get this settled and was unsuccessful.

6 I will mention that the claim before the
7 court today was only filed in May of last year in
8 large part because there were purported settlement
9 negotiations going on between all the parties. And
10 there was an effort to try to settle it without
11 having to file this claim, but unfortunately it came
12 to that last May, I believe. Thank you, Your Honor.

13 JUDGE DUKES: All right. Thank you
14 very much. Happy to hear from you, sir.

15 MR. TWOMBLEY: Thanks, Judge Dukes.
16 This is in essence, it's a breach of contract case.
17 The exhibit that you are looking at is the contract
18 at issue.

19 JUDGE DUKES: That would be A to the
20 Plaintiff's motion?

21 MR. TWOMBLEY: Right. And before,
22 just so the record is clear, Jay said a lot of
23 things that I'm not going to respond to because I
24 don't think they are relevant or genuine to the
25 summary judgment issue. And I just want to make

1 sure that my silence or failure to address them --

2 JUDGE DUKES: I'm not going to
3 consider the settlement numbers and all of that. I
4 mean, I think that would probably be inappropriate.

5 MR. TWOMBLEY: There were a lot of
6 other things, too, but anyway, this is the contract.
7 And if you read the contract, you will see that it
8 is not between Mr. D'Agostino as personal
9 representative of the estate. It is between
10 Mr. D'Agostino individually and the law firm of
11 Nicholls & Crampton. Okay?

12 So, in other words, it's not signed by
13 Mr. D'Agostino as personal representative of the
14 estate. It's not addressed to Mr. D'Agostino as
15 personal representative of the estate.
16 Interestingly, the words personal representative of
17 the estate aren't in here.

18 And so the question is is this a contract
19 between Mr. D'Agostino individually or -- and
20 Nicholls & Crampton or is it a contract between
21 Mr. D'Agostino as personal representative of the
22 Estate of Valerie D'Agostino. Are you following me?

23 JUDGE DUKES: I am. And I guess I
24 have a question that I assume is somewhere within
25 the exhibit that are going to be offered today. And

1 that is was there another law firm providing
2 services to Mr. D'Agostino as personal
3 representative of the Estate of Valerie D'Agostino.

4 MR. TWOMBLEY: Yes, there was. It
5 was Tony Griffis from Hilton Head.

6 JUDGE DUKES: Okay. All right. And
7 I don't know if that is an undisputed fact.

8 MR. MULLINAX: I wasn't involved with
9 it at that point, Your Honor. I can't confirm it or
10 deny it at this point.

11 JUDGE DUKES: Okay. But somewhere
12 within the documents that are being offered today is
13 that fact --

14 MR. TWOMBLEY: Yes.

15 JUDGE DUKES: -- that is apparently
16 not a disputed fact, I guess. All right. Go ahead.
17 I'm sorry. I didn't mean to interrupt.

18 MR. TWOMBLEY: And so you will note
19 that it says that you have requested that we provide
20 legal services on your behalf in connection with the
21 administration of your deceased wife's estate. And
22 then it says you, you. We will send you detailed
23 invoices. You have the right, you know, et cetera
24 and so on.

25 So the words personal representative don't

1 appear anywhere in this contract. Okay? So the
2 question then is, by looking at nothing else other
3 than the contract, who is it between. Okay?

4 Now, as Your Honor is aware -- you've got
5 Mr. Nicholls' deposition. We deposed Mr. Nicholls
6 in this. And the first thing I asked him about was
7 who drafted this contract. And I said -- asked the
8 question. Is this a copy of the letter that you
9 sent Mr. D'Agostino? Yes, it appears to be.

10 And is this his signature at the end of
11 it? I'm assuming it is, yes. And was this the --
12 the purpose of this to outline the terms of
13 representation? Correct. Did you draft this
14 letter? This is Mr. Nicholls on behalf of Nicholls
15 & Crampton. Yes.

16 Did Mr. D'Agostino make any changes to it
17 after it was drafted? I don't recall that he did,
18 no. Okay. So we have this contract. The issue is
19 is it -- who is responsible for these fees? Who is
20 it between? Is it between Mr. D'Agostino as
21 personal representative of his wife's estate or is
22 it between Mr. D'Agostino individually?

23 Now, I asked Mr. Nicholls on Page 20, Line
24 6, now back to Defendant's Exhibit 6. This
25 motion -- and I was referring to a motion that Mr.

1 Nicholls brought in North Carolina, wasn't brought
2 on behalf of Mr. D'Agostino as personal
3 representative of his wife's estate. He said, no,
4 but as you can see the caption is the Estate of
5 Valerie D'Agostino.

6 Question, I understand, but this motion to
7 seek sanctions is to try to have sanctions imposed
8 against Mr. Huther, that was done on behalf of
9 Richard D'Agostino individually, correct? Answer,
10 yes, I think it was. It appears to be.

11 Now, if you will go down to the bottom, I
12 asked him the next question. Let me ask you this.
13 The engagement letter. Would you agree with me that
14 it is not clear whether or not Richard D'Agostino is
15 individually responsible for these fees? Or in the
16 alternative, whether or not the estate is
17 responsible for the fees?

18 His answer, I mean, I know what -- it was
19 clear to me and I think it was clear to him, and
20 that is that we were representing him I connection
21 with the administration of his wife's estate in
22 North Carolina.

23 But my question to you is the letter does
24 not specify whether or not Mr. D'Agostino is
25 individually responsible for these fees or if the

1 estate is responsible for the fees; isn't that
2 right? Yes, I don't think it's clear. Yes.

3 Okay. So now we've got this contract.
4 It's beyond dispute that Mr. Nicholls of Nicholls &
5 Crampton drafted the contract. That Mr. D'Agostino
6 did not make any changes to the contract. And Mr.
7 Nicholls himself has conceded under oath that it is
8 not clear. Okay?

9 Now, we are all familiar with the law in
10 South Carolina with respect to ambiguities in
11 contracts. Under South Carolina law whether a
12 contract's language is ambiguous is a question of
13 law. It's a question for you to decide. Well, in
14 this instance Mr. Nicholls himself testified under
15 oath that it wasn't clear.

16 Now, Mr. Nicholls also testified that he
17 drafted it. And we know in South Carolina that
18 ambiguities or conflicts in documents constituting a
19 contract must be construed against the party who
20 prepared the contract. They must be construed that
21 way.

22 So here is what we have, Judge Dukes, the
23 person who drafted the contract testifies under oath
24 that it's not clear whether or not Mr. D'Agostino
25 was responsible for the fees individually or whether

1 or not the Estate of Valerie D'Agostino was
2 responsible for the fees. The contract is
3 ambiguous.

4 South Carolina law provides that a court
5 will construe any doubts and ambiguities in an
6 agreement against the drafter of the agreement.
7 Okay? Now, if there were any question as to what
8 Mr. Nicholls thought as far as who was responsible
9 for the fees and something that Jay conveniently
10 left out of his presentation in support of summary
11 judgment is that this is not Mr. Nicholls' first
12 effort to try to collect these fees. Okay?

13 And I know this gets a little bit
14 confusing and if you are not -- if you have a
15 question, let me know, but when Mrs. D'Agostino
16 died, and while her estate was being probated, Mr.
17 D'Agostino died. So then we had two estates. Okay?

18 And so Mr. Nicholls has to decide, well,
19 whose estate am I going to try to get this money
20 from? Am I going to go after Mr. D'Agostino's
21 estate or am I going to go after Valerie
22 D'Agostino's estate? And that would depend on,
23 well, who was he doing the work for.

24 I mean, if he was doing the work for Mr.
25 D'Agostino individually, then there would be no need

1 to file a claim against Mrs. D'Agostino's estate.
2 Of course, if he was doing the work for Mr.
3 D'Agostino as personal representative of
4 Mrs. D'Agostino's estate, then the estate would be
5 responsible for those fees.

6 So he has to make a choice as to which
7 estate. Well, let me show you what he did. He
8 filed a claim against Mr. D'Agostino's estate. And
9 read at the bottom what it says. Richard
10 D'Agostino, personally and not in a representative
11 capacity, contracted on June the 8th, 2010, with the
12 petitioner. Signed by Mr. Nicholls on behalf of
13 Nicholls & Crampton.

14 So he's filed this document in court
15 saying that Richard D'Agostino personally, and not
16 in a representative capacity, contracted on June 8th
17 with petitioner for the performance of legal
18 services in North Carolina.

19 So if there was any question about who is
20 responsible for these fees -- and I don't think the
21 contract is ambiguous. I think it's perfectly clear
22 that this is something Mr. D'Agostino was doing
23 himself. This was not something he was doing on
24 behalf of his wife's estate.

25 And it's obvious that Mr. Nicholls thought

1 the same thing because four years ago he filed a
2 claim and said, yeah, I wasn't doing this. I didn't
3 enter into an agreement with you in a representative
4 capacity as personal representative of your wife's
5 estate. I agreed with you individually, personally.

6 So as far as summary judgment is
7 concerned, you've got the drafter's testimony under
8 oath that it's not clear. He testified under oath
9 that he drafted, you know, the contract and that
10 nobody made any changes. And I would respectfully
11 submit that that is -- you know, defeats a summary
12 judgment motion.

13 Now, if that weren't enough, this claim
14 that was filed against -- against Mr. D'Agostino's
15 case, it was thrown out with prejudice. Everything
16 was so organized before I started going through it.
17 In March of last year Judge Faulk considered that
18 claim, the one that is in front of you. He
19 dismissed it. And he dismissed it on a number of
20 grounds, but what is important, it says because
21 petitioner failed to timely file or serve a summons
22 with this petition for allowance of claim and
23 failure to require a filing fee the petitioner's
24 claim is barred.

25 If you look on Page 6, because -- it's

1 paragraph numbered 1. Because Petitioner's claim
2 against the decedent's estate is barred under South
3 Carolina Code 62-3-806, petitioner's petition for
4 allowance of claim is hereby dismissed with
5 prejudice. It's over.

6 This order was never appealed. It was
7 never challenged. And the time to do so is over.
8 And that will conclude our presentation or if you
9 have any questions I'll be happy to answer them.

10 JUDGE DUKES: All right. Of course,
11 this order affects the case against Richard
12 D'Agostino. And this particular Plaintiff is
13 looking for money from the Estate of Valerie
14 D'Agostino.

15 MR. TWOMBLEY: Well, when the claim
16 is dismissed with prejudice that is on the merits.

17 MR. MULLINAX: That is against
18 Richard D'Agostino's estate, Your Honor. I don't
19 think there is any debate about that.

20 JUDGE DUKES: I've got to wonder
21 about the estoppel portion of this.

22 MR. MULLINAX: Well, I have some
23 things to address, Your Honor, as soon as you are
24 ready to hear them.

25 JUDGE DUKES: Okay. Let me make

1 sure -- Ashley, anything else on -- okay. Happy to
2 hear from you.

3 MR. MULLINAX: Okay. Let's start
4 with the contract, Your Honor. Mr. Richard
5 D'Agostino was not the personal representative when
6 he signed the engagement letter. The reason he was
7 not the personal representative is because -- and I
8 was not involved with the case at that time. This
9 is all in court records. And if Mr. Twombly wants
10 to dispute any of these, these are all in court
11 records already.

12 But I believe it was a relative of
13 Ms. D'Agostino, I think it was her daughter --

14 JUDGE DUKES: Wait. I have a
15 question then. How could he possibly have
16 contracted on behalf of the estate of Valerie --

17 MR. MULLINAX: Because the probate
18 code allows that, Your Honor.

19 JUDGE DUKES: Okay.

20 MR. MULLINAX: If a personal
21 representative had to be appointed before they could
22 hire an attorney to help administer the estate, we
23 would have a huge problem. Everything relates back.
24 Once the court appoints a personal representative,
25 any action that they took prior to under South

1 Carolina Probate Code relates back --

2 JUDGE DUKES: You've got a copy of
3 that or a citation or something?

4 MR. MULLINAX: I can -- it's in the
5 probate -- it's in 62-3 -- it's a relation back
6 doctrine because in order to open the estate,
7 clients have to hire attorneys frequently. And so
8 what happens is once the court appoints the
9 attorney, everything that they did previous is
10 sanctioned and blessed by the probate court
11 retroactively.

12 So almost all engagement letters that I'm
13 familiar with by prospective personal
14 representatives are signed prior to their
15 appointment. And Richard was not a personal
16 representative. And, in fact, the daughter of
17 the -- Valerie had opened an estate in North
18 Carolina. And part of what Mr. Nicholls' law firm
19 did for Mr. Richard D'Agostino, and the invoice is
20 clear on this, was assisting him in getting the
21 estate -- or getting the removal of the daughter as
22 personal representative in North Carolina so that he
23 could open the estate in South Carolina because he
24 was the proper by default, by statute, the proper
25 person to open an estate on his late wife's estate.

1 So with regard to him signing the contract
2 personally, this is in the transcript, but Mr.
3 Nicholls testified to the fact that Mr. D'Agostino
4 agreed to pay the charges personally if the estate
5 didn't pay. And that is borne out in everything
6 that has already been filed with the court to date.

7 Nevertheless, Mr. Richard D'Agostino, when
8 he signed the contract, was not yet the personal
9 representative, but because he signed the contract,
10 and the subject right there on the engagement letter
11 is for the Estate of Valerie D'Agostino. And to the
12 interpretation of contract, I don't dispute the rule
13 of law that Mr. Twombly has cited to, but there is
14 also another rule of law that affectively says and
15 essentially says that we don't strain to reach --
16 strain to read contracts that are more or less plain
17 in the context of the situation.

18 If you look at the invoice which Mr.
19 Twombly conveniently left out of his discussions,
20 but if you look at the invoice which is attached to
21 the claim dated September the 23rd, 2010, and I
22 think there may be two in there actually. If you
23 look through there the entire invoice from start to
24 finish is referring to the responsibilities of a
25 personal representative, Mr. D'Agostino in this

1 case, and how Mr. Nicholls' law firm assisted him in
2 the administration of his late wife's estate. First
3 by getting a personal representative removed in
4 North Carolina. Then by getting -- which was done
5 by agreement by the way as far as I recall. And I
6 think that is in the record in the settlement
7 between Mr. Twombly and Mr. Bolchez's office, but
8 nevertheless that personal representative stepped
9 down and Mr. Richard D'Agostino was appointed as the
10 personal representative.

11 And I said per the South Carolina Probate
12 Code. Everything retroactive that he took on
13 actions on behalf of the estate were sanctioned by
14 the court when he got appointed. And I can provide
15 the court the particular code section, but it's a
16 long-standing code. It's not anything new. But if
17 you look through the invoice, you are not going to
18 find anything that is for Mr. Richard D'Agostino's
19 personal benefit that is not already a
20 responsibility of the personal representative.

21 And so I would submit to the court that it
22 would be a farce to believe that the contract with
23 the subject line of Valerie D'Agostino, which
24 clearly enunciates in it that it's dealing with the
25 estate administration and then the invoices that

1 accompany that on this matter dealing with the
2 estate administration, I think it would be quite a
3 strain to think that this has anything to do with
4 Mr. D'Agostino personally and not just the estate of
5 his late wife.

6 With regard to the dismissal of the
7 earlier claim, again which I was not involved with
8 at that point, but the Estate of Richard D'Agostino,
9 the reason that the court -- and they enunciated in
10 their order that has been provided to the court at
11 this point, the reason that that was dismissed,
12 Judge Faulk -- I believe it was Judge Faulk ruled,
13 correctly so, that under the new rule, and I believe
14 it was 2010 when it came -- it may have been 2011,
15 Your Honor may remember it, but there was a change
16 in the probate code that changed claims once a
17 disallowance was made to require a summons and
18 petition.

19 My client, Nicholls & Crampton before they
20 were my client, did in fact as Judge Faulk correctly
21 stated, failed to file a summons and petition and
22 filing fee within the timeframe under that new law.
23 And, again, I wasn't involved with it at that time.
24 And as I've mentioned previously, and this is in the
25 record, there were efforts made to try to negotiate

1 a settlement between all the parties without having
2 to file this one against Valerie D'Agostino's
3 estate.

4 But, nevertheless, that was dismissed and
5 then the claim -- and I'm not sure of these dates,
6 but they are in the record, but the claim was filed
7 against Valerie's estate. At that point Richard's
8 estate was no longer a party.

9 And the reason they were not a party was
10 it was on a technicality that Richard's estate would
11 not have been jointly and severely liable
12 potentially for the claim in this matter. And so
13 they were no longer a party to the matter.

14 With regard to the -- so there was no
15 merit -- I want to mention that the court, Judge
16 Faulk, didn't mention anything on the merits with
17 regard to the claim against Richard's estate. He
18 merely said, hey, you didn't file a summons and
19 petition in a timely fashion and pay the fee,
20 therefore it's dismissed with prejudice, but that
21 was against Richard's. That has nothing at all
22 whatsoever to do with the fact of Valerie's. And
23 something that Your Honor sees all the time, I would
24 suppose, is individuals that are jointly and
25 severally liable on mortgages. Just because one

1 happens to get a dismissal under some technicality,
2 doesn't mean that the other person is any less
3 jointly and severely liable on the same case. And
4 it's really a different case number and everything
5 so it's a whole different claim at this point.

6 And I would refer to the invoices in
7 particular, Your Honor, because it would take quite
8 a strain to think that any of that is for the
9 benefit of Mr. Richard D'Agostino and not just for
10 the Estate of Valerie D'Agostino except for what he
11 would have to do as personal representative who
12 might be a beneficiary anyway.

13 I'd be happy to answer any other
14 questions, Your Honor.

15 JUDGE DUKES: Well, I mean -- and the
16 part that I guess confuses me or concerns me about
17 the other case is this. That the contract, which is
18 Exhibit A, the letter dated June 8, 2010, because
19 actually in your presentation you sort of mention
20 there might be two contracts. You said maybe after
21 the fact Mr. D'Agostino verbally assured that he
22 would pay personally. And I would think that would
23 have been something taken care of in the other case
24 because, of course, if he's going to take on the
25 responsibility of personally paying for something, I

1 wouldn't think that would be part of the claim
2 against the estate of Valerie D'Agostino, but there
3 is the assertion in the claim in the Richard
4 D'Agostino case that is filed in probate court.

5 And let me go back to the contract a
6 second. The contract means one of two things. I
7 think you all agree. It either means when it refers
8 to your behalf in the first sentence in scope of
9 representation, it either means your behalf as
10 personal representative of the estate of Valerie
11 D'Agostino or it means your behalf personally,
12 Mr. Richard D'Agostino. I think you all probably
13 agree on that and just -- maybe you don't.

14 But in the claim that was filed in the
15 Estate of Richard D'Agostino I think the Plaintiff,
16 you all correct me if I'm wrong, but takes the
17 position that this contract means that Richard
18 D'Agostino personally entered into this contract and
19 not as the administrator of the estate.

20 MR. MULLINAX: He was not the
21 personal representative at the time that he signed
22 the contract, Your Honor. And his liability at that
23 point -- it would be correct to say that a personal
24 representative that is not subsequently appointed as
25 personal representative and retroactively sanctioned

1 their actions by that appointment, it would be
2 correct to say that they would be personally liable
3 for that contract because the reason that Richard is
4 able to move forward with that as the -- as the
5 assumed personal representative, if the court
6 determines later that he is not appropriately named
7 as personal representative or for whatever reason
8 he's disqualified, they would not sanction his role
9 retroactively as personal representative. And
10 therefore he would be personally liable under that
11 situation, but that does not negate the fact that
12 two people can be -- two entities can be liable
13 under the same contract.

14 And because he was retroactively
15 sanctioned by the court, and I will try to find that
16 code section for Your Honor, but because that was by
17 appointment later on, then he was de facto due as
18 personal representative, which the code allows,
19 reimbursements for any payments and any advancements
20 made by him. And at that point the estate is fully
21 liable for the contract.

22 JUDGE DUKES: Then why would they sue
23 him personally -- no, I'm sorry. Why did they bring
24 the claim in the Estate of Richard D'Agostino?

25 MR. MULLINAX: Well, because there

1 was a -- which is in testimony, and this has been
2 stated before, but there was a presentation that
3 Richard D'Agostino would in fact agree to pay if
4 Valerie's estate would not pay. And I believe --
5 and, Your Honor, I apologize, I don't know where,
6 but I know it's in the record where that is cited
7 to. Mr. Nicholls testified to it. And I don't
8 think I presented it with my stuff, but he testified
9 in deposition, and I can provide -- I don't mind
10 providing the whole deposition to the court, but he
11 provided testimony to say that, in fact, that if
12 Valerie's estate did not pay, then Richard would, in
13 fact, pay. Richard subsequently passed away and the
14 claim was made against his estate.

15 JUDGE DUKES: So the claim in
16 Richard's estate was not made on Exhibit A at all.
17 It was made on his verbal assurance?

18 MR. MULLINAX: It's my understanding
19 from my client's testimony, and it's in the record,
20 that it was by verbal assurance that Richard
21 D'Agostino assured my client that, in fact, he would
22 pay if Valerie's estate did not pay, but at that
23 point -- I want to remind the court that at that
24 point Mr. Richard D'Agostino, of course, was living.
25 I'm stating the obvious, but he was living. I don't

1 know what his health situation was, but it appears
2 from just on its face that maybe he was in bad
3 health towards the end of his life. And when he
4 passed away, then a claim was made against Richard's
5 estate as a result.

6 JUDGE DUKES: And the reason I ask,
7 and you all lived through this. I mean, I've heard
8 little parts of it hear and there, but it would seem
9 to me that if the Plaintiff made the claim against
10 the Estate of Richard D'Agostino and made that claim
11 on the basis of the letter of July 8th, 2010, then
12 they have chosen, you know, heads or tails, they
13 have chosen heads that this particular contract,
14 this written contract, means your behalf refers to
15 him personally. I would think that that is -- and
16 they may be estopped to assert otherwise, but I
17 don't know. I mean, if you are saying it's on a
18 verbal assertion and has nothing to do with this
19 letter, maybe that's the case.

20 MR. MULLINAX: I'm not saying -- let
21 me clarify that, Your Honor. I'm not saying it has
22 nothing to do with the letter because, as I stated
23 before, at the time that he signed the contract he
24 was not personal representative. So he could not
25 prospectively charge the estate until he was

1 appointed and then retroactively he was, in, fact,
2 valid in charging the estate for whatever
3 reimbursements or anything else he needed to do.

4 JUDGE DUKES: But you are saying that
5 did happen?

6 MR. MULLINAX: I'm sorry?

7 JUDGE DUKES: You are saying that did
8 happen under 62-3- I know you are still looking for
9 the code section, but it all went to -- the clock
10 was turned back.

11 MR. MULLINAX: It was sanctioned.

12 JUDGE DUKES: Which, as I understand
13 you are telling me on the probate code means that
14 this June 8th letter would be taken in as though it
15 were signed by someone who was the administrator of
16 the estate?

17 MR. MULLINAX: It was any actions by
18 the personal representative, once they are appointed
19 are made sanctioned by the court retroactively to
20 get them to that point.

21 JUDGE DUKES: Wouldn't that then
22 remove him from personal liability if in fact that
23 is the case?

24 MR. TWOMBLEY: Why would you file a
25 claim against --

1 MR. MULLINAX: Well, I don't -- I
2 don't know -- it makes the estate -- it makes the
3 estate liable at that point. I'm not so sure that
4 it negates anything else. Now, in a suit he could
5 claim, no, it's not me. And he did, Your Honor.
6 It's in the claim against Richard D'Agostino at that
7 point he had been named as personal representative.
8 And his estate said, it's not us. It's Valerie's
9 estate that owes the money, legitimately so.

10 And Sean Bolchez says -- and that is in my
11 summary judgment motion. Sean Bolchez has provided
12 testimony to the court to that effect. Rebecca Hale
13 has provided sworn testimony to that effect, that
14 it's Valerie's estate that owes because Richard was,
15 in fact, named as personal representative and
16 appointed by the court and retroactively now is due
17 by Valerie's estate, not by Richard anymore.

18 So that is -- we have two attorneys that
19 have sworn statements before the court today.
20 Forget about the witnesses that have a personal
21 interest in this.

22 MR. TWOMBLEY: Well, where are those
23 sworn statements from Rebecca Hale and Sean Bolchez?

24 MR. MULLINAX: Well, they are in my
25 summary judgment motion.

1 MR. TWOMBLEY: Which --

2 JUDGE DUKES: Will you all do me a
3 favor and just try to talk one at a time because I
4 know Deborah is trying to catch up all the exhibits.

5 MR. TWOMBLEY: Sure.

6 MR. MULLINAX: Well, again --

7 MR. TWOMBLEY: Well, I would like
8 a --

9 MR. MULLINAX: Do you have a copy of
10 the summary judgment?

11 MR. TWOMBLEY: Yeah.

12 MR. MULLINAX: Okay.

13 JUDGE DUKES: All right.

14 MR. MULLINAX: All right. Let's look
15 at Exhibit E. Take a look at Exhibit E. And take a
16 look at --

17 JUDGE DUKES: My E is a notice of
18 disallowance of claim. Is that what yours is?

19 MR. MULLINAX: Yes.

20 JUDGE DUKES: Okay.

21 MR. MULLINAX: And that is where
22 Rebecca Hale signed off indicating that the claim
23 represent fees due from the Estate of Valerie
24 D'Agostino.

25 MR. TWOMBLEY: That is not sworn

1 testimony though.

2 MR. MULLINAX: I believe -- I believe
3 it is. On the disallowance claim, Your Honor, is
4 that -- well, it's signed by an attorney. It's
5 filed with the court.

6 JUDGE DUKES: It says sworn,
7 actually. It's a notarized statement here, the
8 proof of --

9 MR. MULLINAX: Thank you, Your Honor.

10 JUDGE DUKES: Oh, wait. I'm looking
11 at proof of delivery. I'm sorry. I'm looking at
12 the wrong thing. E. Now, that is signed by -- I
13 can't tell. Is it Chris D'Agostino signed that. Am
14 I looking at the wrong E?

15 MR. MULLINAX: I apologize, Your
16 Honor. I may have misspoke. I need to look at my
17 own Exhibit, but it was filed by Rebecca Hale.

18 MR. TWOMBLEY: And then there was the
19 one from Sean Bolchez, the sworn testimony from him.

20 JUDGE DUKES: Yeah. In a minute
21 maybe we ought to just make a stack of everything
22 that is appropriate for -- and just mark it all.

23 MR. MULLINAX: Yes, Your Honor, it
24 was -- I misspoke. It was signed -- the proof of
25 delivery is signed by Rebecca Hale who was

1 representing the signature inventory on that,
2 Christopher D'Agostino. And in the disallowance of
3 claim that is where it cites that the Estate of
4 Valerie D'Agostino was, in fact, where the fee
5 should come from which is born out in the testimony
6 that I provided in the summary judgment motion
7 because Mr. Twombley's own client, as I mentioned in
8 my recitation of the summary judgment, own client
9 cites that the \$4,900 was to be taken and used from
10 the Estate of Richard D'Agostino's estate to pay
11 this claim.

12 MR. TWOMBLEY: Show us where it says
13 that?

14 MR. MULLINAX: What I just referred
15 to?

16 MR. TWOMBLEY: Well, the \$4,900 --
17 well, actually I misspoke. I shouldn't have --

18 MR. MULLINAX: Sure. It's in
19 Paragraph 10 of my summary judgment motion. And you
20 can find it on Huther's deposition at Page 50, Line
21 22 through 51, Line 2 where the Defendant testified
22 about the \$4,900. And it said the 49 -- I'm
23 quoting. The \$4,900 was to be the amount we, the
24 Defendant, were going to pay Mr. Nicholls, the
25 Plaintiff, plus any additional interest that might

1 have popped up between the time it was going to take
2 to sort all of this out -- out all of this stuff.
3 And that is Huther Page 50, Line 22 through 51, Line
4 2.

5 So monies were given. With regard to
6 liability, Your Honor, of Richard's estate,
7 Richard's estate has already thrown in \$5,000 in
8 this case.

9 JUDGE DUKES: Here is the part I
10 guess I'm having trouble with. And hindsight is
11 always 20-20 in these things. You described a
12 situation a minute ago where maybe it's not even
13 unusual for an individual who believes they are
14 going to be the administrator to go ahead and hire
15 counsel, but there are situations where maybe they
16 are not going to be the administrator, maybe they
17 are thrown out and that kind of thing.

18 And that is a known risk, I guess, when
19 they contract with the attorney. And the attorney
20 would know that, I assume, if they operate in this
21 world. And so I just don't get why the contract,
22 the letter, doesn't anticipate that somewhere since
23 it's a known risk and apparently a fairly common
24 thing maybe, and say you are signing this both
25 personally and as the administrator under Section 62

1 whatever. If you are the administrator you are
2 being hired as the -- hiring us as the
3 administrator, however in the event you are not you
4 are personally responsible. I mean, it would have
5 been so easy to throw that paragraph in here. I
6 don't know.

7 MR. MULLINAX: I'll admit, Your
8 Honor, that it's not a very sophisticated engagement
9 letter for estate administration. I don't think
10 that negates too much. I will mention though that
11 if the actions taken by the law firm on behalf of an
12 individual, and this is kind of circumstance, if it
13 advances the cause of the estate administration
14 there is still a right for that law firm or entity
15 to make a claim against the estate.

16 And the reason is this. We want estates
17 to be administered. We want them to be administered
18 properly so attorneys get involved frequently. As a
19 result if the court recognizes that there was an
20 advancement of the estate administration, regardless
21 if the person pays personally or they don't, there
22 is still the potential for a claim against the
23 estate because it was -- otherwise it would be
24 quantum meruit that the estate got a benefit that,
25 in fact, was not paid back to the person assisting.

1 So that is just a known thing.

2 So if Mr. Nicholls' law firm in this case,
3 and he did, was not paid personally by Richard or
4 his estate, he still has a right because he advanced
5 the cause. He got a personal representative removed
6 in North Carolina. He got the estate open in South
7 Carolina. He got his client appointed as personal
8 representative. And the invoice indicates some
9 other things that were done.

10 So as a result he would be due for
11 services rendered that benefited the estate
12 regardless of what personal debt Richard D'Agostino
13 took on or he didn't.

14 JUDGE DUKES: But, I mean, that is
15 not really what today is about, right? I mean, what
16 you all are moving for is full payment under what
17 you assert is the contract?

18 MR. MULLINAX: We are, Your Honor.
19 We are. We are also saying that there was still the
20 ability to file against the claim under duplicate
21 circumstances including the fact that the invoice
22 reflects the advances made in the estate
23 administration that benefited the estate. And at
24 this point it was Valerie's estate that benefited
25 from these services.

1 There has been no indication, no testimony
2 given, certainly not by Mr. Bolchez or Ms. Hale or
3 her clients at that point that any benefit ever came
4 to Richard D'Agostino's estate. It all went to
5 Valerie's estate.

6 JUDGE DUKES: All right. And I'm
7 still concerned a little about the estoppel issue.
8 Maybe I'm patently wrong on that, but it seems --

9 MR. MULLINAX: Your Honor, I don't
10 see the merit -- the judge did not rule on the
11 merits of that case.

12 JUDGE DUKES: I wasn't thinking it
13 was a res judicata thing. I was just taking sort
14 of -- taking a position in court as to what this
15 contract means. You've taken a legal position. And
16 now you seek to take a different legal position.

17 MR. MULLINAX: Well, you were, I
18 would say it would be an addition. I would say that
19 the fact that he agreed to be personally liable to
20 that contract doesn't negate the fact that the
21 estate is also liable. As again I say something you
22 deal with frequently, joint and several liability on
23 a mortgage, a little bit different, but still two
24 parties can be liable at the same time under the
25 same contract. And just because one is dismissed

1 under a technicality for not doing the summons and
2 petition, which is in fact what happened in this
3 case, not on the merits of the case, there is no
4 reason that the other party should not be liable
5 under the same contract.

6 And that is what our position is today,
7 that Valerie's estate, which is the one that
8 benefited from all the activities of my client is
9 the one that is in fact due or owed the money or
10 owes the money to the Plaintiff in this case.

11 And, in fact, Richard's estate already
12 chipped in \$5,000 toward the final settlement of
13 this case which is in the record as well. So
14 Richard has handed Mr. Twombly's client \$5,000 said
15 here is my piece of it. And for the rest of it you
16 just go settle it with Nicholls' law firm. There is
17 5,000 -- and this is in the deposition that
18 Mr. Huther testified and I think Mr. Twombly will
19 confirm that he's got \$4,900 sitting in his trust
20 account that is supposed to settle this matter that
21 came from Mr. Richard D'Agostino's estate.

22 So even though it was dismissed on a
23 technicality, they still gave Mr. Twombly \$5,000 in
24 assisting to settle this matter.

25 JUDGE DUKES: Of course, I don't know

1 if I can -- in fact, I'm pretty certain I cannot
2 consider that in deciding today's issue.

3 MR. MULLINAX: Well, that is in the
4 record, Your Honor.

5 JUDGE DUKES: No, I don't have a
6 problem --

7 MR. MULLINAX: And he said it in the
8 deposition.

9 JUDGE DUKES: I believe you. I
10 believe it happened, but as far as settlement
11 negotiations and what somebody put in an escrow
12 account to settle something and that kind of thing,
13 I mean, I think I'm sort of specifically precluded
14 from considering that unless it's a relevant matter.
15 And I don't know how it would be relevant to this,
16 the fact that they put aside some money to settle
17 it.

18 MR. MULLINAX: We would say, Your
19 Honor, and I apologize to the court if this is not
20 on target, but we think it's evidence of the fact
21 that they know that the fees are owed. Mr.
22 Twombly's client testified that the fees were
23 reasonable. We think that he testified -- we know
24 he testified and it's in the record today and in the
25 transcript that he testified that he in fact got

1 \$5,000 from another estate in order to settle this
2 case. That is in the record.

3 And we think that is indicative of the
4 fact that in fact the fees were reasonable.
5 Mr. Huther testified to the fact they were
6 reasonable. Mr. Twombly stipulated that the fees
7 were reasonable. And the invoices, Your Honor,
8 clearly indicate that this was done on behalf of the
9 estate, not on the behalf of Richard D'Agostino.

10 And Mr. Twombly has yet to point to
11 anything in the invoices or in the charges that were
12 specifically benefiting Richard D'Agostino that
13 weren't otherwise his duty as personal
14 representative to administer this estate.

15 JUDGE DUKES: Well, let me figure out
16 for a second what is undisputed because most of what
17 you all are saying is undisputed and you agree on.
18 I think what is undisputed is the contract that I
19 need to deal with, the entire contract between the
20 parties, is within the four corners of the June 8th,
21 2010 letter. Is that --

22 MR. MULLINAX: I can't deny that,
23 Your Honor.

24 MR. TWOMBLY: That is accurate.

25 JUDGE DUKES: Okay. The second issue

1 that is undisputed is no one contests the
2 reasonableness of the fees. Is that right?

3 MR. TWOMBLEY: That is incorrect.

4 JUDGE DUKES: That is incorrect.

5 MR. TWOMBLEY: That is incorrect.

6 JUDGE DUKES: All right.

7 MR. TWOMBLEY: What Jay only read a
8 portion of what I said in the deposition. And at
9 that juncture we were discussing the rates that Mr.
10 Nicholls were charging. Jay was asking my client,
11 you know, would it surprise you if a lawyer in North
12 Carolina charged, you know, 250 an hour for his
13 time. And my client said no. And then he said,
14 well, would it surprise you if a parallel charged,
15 you know, \$100 an hour. My client said no.

16 And at that point in time I said, Jay, we
17 will stipulate that all of that is reasonable with
18 respect to the rates. I don't know exactly what I
19 said, but I'm sure Jay can pull it up and read it to
20 you, but I specifically said as to the rates.

21 And so I don't think that the fees are
22 reasonable. I don't think the court has to get into
23 that at all to resolve --

24 JUDGE DUKES: Probably not. I was
25 just trying to figure out --

1 MR. TWOMBLEY: And I can find that --

2 MR. MULLINAX: I would like to speak
3 to that, Your Honor, because I do have a different
4 opinion on what was just spoken to, but in my
5 summary judgment motion --

6 JUDGE DUKES: I think you had pointed
7 out a transcript page.

8 MR. MULLINAX: I did. And I'll pull
9 it back up. The entire conversation was about the
10 invoice that is before the court today. It in
11 Paragraph 6 of the summary judgment motion. And I
12 pointed to the fact that Mr. Twombley -- this is
13 midway down Page 4. When Mr. Huther is being asked
14 for -- and I don't deny the fact that when we were
15 talking about rates, we were referring to the rates
16 that were on the invoices before the court today.
17 But Mr. Twombley interrupted the questioning of
18 Mr. Huther about the fees on the particular invoices
19 in this case, not some fiction. Not some imaginary
20 invoice, but this particular invoice.

21 Mr. Twombley interrupted Mr. Huther's
22 testimony to state on the record, we will stipulate
23 that all those fees are reasonable referring to the
24 invoice fees that Mr. Nicholls' firm provided to the
25 Estate of Valerie D'Agostino.

1 MR. TWOMBLEY: What page is this --

2 MR. MULLINAX: And they went on to
3 say in the transcript it's Page 46, Line -- well,
4 I'm not -- it's Page 46. It looks like 3 through 7
5 and then it goes on. Where the Defendant stipulates
6 that those fees are reasonable. Huther deposition
7 Page 46, 8 through 9.

8 MR. TWOMBLEY: Can I read it to you,
9 Judge Dukes?

10 JUDGE DUKES: Let me make sure I need
11 any more on that, but I'll --

12 MR. MULLINAX: But we were
13 referring -- if the court goes -- if the court wants
14 to take that into account, I would certainly be
15 willing to provide the entire transcript to the
16 court, but the context of the entire questioning of
17 Mr. Huther was to question whether the fees on the
18 particular invoice in this case were, in fact,
19 reasonable.

20 And we were asking Mr. Huther who had
21 filed a disallowance of claim and had claimed that
22 they were unreasonable and talking about the
23 invoice. And Mr. Huther's attorney interrupted him
24 to say, we will stipulate that all of those fees are
25 reasonable. So we ceased the questioning on that

1 matter after we got stipulation that, in fact, the
2 fees on the invoice that we were talking about were,
3 in fact, reasonable.

4 JUDGE DUKES: All right. Well, let
5 me -- I think Ashley wanted to read it and then
6 maybe --

7 MR. TWOMBLEY: You can just read it.
8 I'll just highlight it.

9 JUDGE DUKES: I'm handed the
10 transcript here. I'm looking at Page 40. And for
11 the record this is the transcript of the deposition
12 of Ronald W. Huther, H-u-t-h-e-r. and this was taken
13 the 9th of December, 2013. Referring to Page 45.

14 MR. MULLINAX: It's on Page 40, Your
15 Honor. I want to clarify.

16 JUDGE DUKES: Starting on 40?

17 MR. MULLINAX: I'm asking you what
18 page you are referring to.

19 JUDGE DUKES: Oh, I was on 45.

20 MR. MULLINAX: Oh, okay.

21 JUDGE DUKES: Forty-five which on
22 line 23 and I believe, Mr. Mullinax, it was your
23 question. Yeah, this is --

24 MR. TWOMBLEY: Actually it's Page 46.

25 JUDGE DUKES: Forty-six. Okay. I

1 was looking at --

2 MR. TWOMBLEY: Oh, yeah. I'm sorry.

3 JUDGE DUKES: You had highlighted
4 something. Maybe it didn't matter.

5 MR. TWOMBLEY: I got you.

6 JUDGE DUKES: That's all right. Now
7 moving to 46. All right. And I guess what Mr.
8 Twombley is pointing to is 46, Line 8, where Mr.
9 Twombley says, we will stipulate that all of those
10 fees are reasonable. I mean, if you want us to do
11 that or you can ask him about it, I mean as far as
12 the rates and all of that stuff. Okay. So --

13 MR. TWOMBLEY: And if you would -- on
14 45, he had just asked, would it surprise you if I
15 told you an attorney might charge 275 an hour?
16 Would it surprise you if some attorneys charge \$400
17 an hour? The next question was paralegals at 135.
18 And at that point in time I said, we will stipulate
19 that all of those fees are reasonable, I mean if you
20 want us to do that, or you just can ask him about
21 it, I mean, as far as the rates and all of that
22 stuff.

23 And I was clearly saying -- because I am
24 familiar with what attorneys charge. And I know
25 that those rates were, in fact, reasonable, but

1 again --

2 JUDGE DUKES: Well, let me do this.
3 Really what I was trying to do, and I should have
4 made this clear, is figure out where you -- everyone
5 agrees you don't have a dispute rather than go into
6 the dispute itself. And that is my fault for not
7 making that clear, but so far what I've got is that
8 everybody agrees that the letter of June 8th, 2010,
9 is the complete contract between the parties so far
10 as it relates to this dispute.

11 The second thing I think I was about to
12 get into, if I hadn't gotten into it yet is I think
13 we agree that Mr. D'Agostino was not the
14 administrator of the estate at the time he executed
15 the letter.

16 MR. MULLINAX: That's right.

17 JUDGE DUKES: But he eventually
18 became the administrator of the estate.

19 MR. TWOMBLEY: I disagree. He was
20 appointed on January the 8th of 2010.

21 JUDGE DUKES: Okay. Well, I guess we
22 don't agree --

23 MR. MULLINAX: Your Honor, I think we
24 need to stop there. I would like to review what he
25 has because I have different information. Now,

1 there may have been an issue, and again I wasn't
2 involved at that point, but there may have been an
3 issue of a dual appointment, an action that had
4 started in North Carolina. And he may have started
5 one in South Carolina inadvertently without knowing
6 the one had been filed in North Carolina.

7 And if that is what he's referring to, of
8 course, that wouldn't be --

9 JUDGE DUKES: Does it get the same
10 case number?

11 MR. MULLINAX: I don't know, Your
12 Honor. It may be attached just by probate internal
13 rule, but --

14 MR. TWOMBLEY: What does -- the issue
15 is was he the personal representative of Ms.
16 D'Agostino's estate on June the 8th of 2010. That
17 is what your entire presentation was built on was
18 that he was not the personal administrator on
19 June 8th, 2010, and therefore that resolves all of
20 the ambiguity in the legal fees contract.

21 The point of fact is that on January the
22 8th of 2010, Judge Francis Simon, the Beaufort
23 County probate judge, issued fiduciary letters
24 appointing Richard D'Agostino as the personal
25 representative of the Estate of Valerie D'Agostino.

1 So when he entered into that agreement he
2 was the personal representative. And, in fact, you
3 remember earlier, Judge Dukes, you asked, did he
4 have a lawyer in South Carolina. He did. His
5 lawyer was Tony Griffis. And Tony Griffis is the
6 one who found Nicholls & Crampton.

7 JUDGE DUKES: Well, let me let -- do
8 you have a copy of that for Jay?

9 MR. TWOMBLEY: I don't, but I will --
10 I can have it here. I did not know that that fact
11 was going to be --

12 JUDGE DUKES: Can you make that fancy
13 thing print on our print letter or is that --

14 MR. TWOMBLEY: I can forward it to
15 you and --

16 JUDGE DUKES: Forward it to -- no.
17 Wait. Heather is not -- let's see. How do we do
18 that. Forward it -- let's go off the record for a
19 second.

20 (Discussion off the record.)

21 JUDGE DUKES: Okay. In the break I
22 printed out a copy of the -- what appears to be and
23 I'm sure is the probate court fiduciary letter,
24 personal representative, in the matter of Valerie
25 D'Agostino. And that was case 09-ES-07-889. That

1 is the same one pretty much, but it shows on the
2 face of this showing apparently on January 8th,
3 2010, where Judge Simon of the probate court made
4 Richard D'Agostino the personal representative in
5 this case.

6 MR. TWOMBLEY: Or the personal
7 representative of the Estate of Valerie D'Agostino.

8 JUDGE DUKES: I'm sorry. You are
9 right. This isn't -- the case referenced on the
10 form. I apologize. That's correct. All right.

11 MR. MULLINAX: Your Honor, I would
12 like to address a couple of things that have come
13 up, including the one you just brought up.

14 JUDGE DUKES: Sure.

15 MR. MULLINAX: That actually bolsters
16 our case just a little bit. I'm going to refer to
17 Probate Code Section 62-3-714 which is one of the
18 things that I've been referring to previously in
19 general which is that a person who deals in good
20 faith with a personal representative has a right to
21 do those actions as a business as Mr. Nicholls' law
22 firm did.

23 And is due as a result of doing those.
24 So -- and he has no duty to look into his
25 employment, et cetera, but now that we have the

1 appointment, clearly Mr. Richard D'Agostino had the
2 right after his appointment to hire Mr. Nicholls'
3 law firm and he did.

4 So I would refer the court -- I just ask
5 that the court take it under judicial advisement of
6 Section 62-3-714. It is specifically to protect
7 places like Mr. Nicholls' law firm in dealing in
8 good faith with the personal representative of an
9 estate, assisting with the estate administration and
10 then effectively not getting paid for the services
11 they provide.

12 And so I would refer the court to that.

13 JUDGE DUKES: And just -- I'm sure
14 I'll read the statute at some point, but does it
15 provide a lien on the estate or personal judgment
16 against the person that made the representation or
17 what does it cover?

18 MR. MULLINAX: Well, it says -- and
19 let me see if I can skim it to give you the
20 highlights. I'll read the first sentence at least.
21 A person who in good faith either assists a personal
22 representative or deals with him for value is
23 protected as if the personal representative properly
24 exercised his power.

25 And it just -- again, it's specifically

1 for the protection of entities that deal with
2 someone who is the personal representative. And
3 they don't even have to inquire into certain things
4 such as the assets of the estate or the power, et
5 cetera.

6 I'll also refer the court to Section
7 62-3-701, which I referred to earlier. Again the
8 probate code. Section 62-3-701. And this is the
9 section that refers to duties and powers of the
10 personal representative that commence upon his
11 appointment, but this is the relation -- what we
12 call the relation back doctrine where it says the
13 powers of the personal representative relate back in
14 time to get acts by the person appointed which are
15 beneficial to the estate occurring prior to
16 appointment the same effect as those occurring
17 thereafter.

18 Prior to appointment a person named as
19 personal representative in a will may protect
20 property from the decedent's estate or protect
21 property of the decedent's estate and carry out
22 written instructions of the decedent relating to
23 body, funeral, burial arrangements. The personal
24 representative may ratify and accept acts on behalf
25 of the estate done by others where the acts would

1 have been proper for a personal representative.

2 So again, it's referring to beneficial
3 work for the estate administration which Mr. Richard
4 D'Agostino was doing. And, again, the protection of
5 the entities that deal with personal representatives
6 in good faith. And that is what 714 calls to mind.

7 JUDGE DUKES: All right. Anything
8 else anybody on any of this? I'm not sure what else
9 you all would present, I mean, where we went from
10 here.

11 MR. TWOMBLEY: There are a couple
12 things. I don't question the statute that Jay read,
13 but that doesn't resolve the question. The question
14 is when Mr. D'Agostino was dealing with Nicholls &
15 Crampton, was he doing so in his power as personal
16 representative or was he doing so individually?
17 That is the question.

18 Our argument is that it's just not
19 clear -- actually that is not our position. That is
20 Mr. Nicholls' position. He testified under oath
21 that it wasn't clear. South Carolina law is clear
22 that all ambiguities have to be construed against
23 the person who prepared the contract -- the contract.
24 It's construed strongly in favor of the person who
25 didn't.

1 And if he was the personal representative
2 at that point in time, certainly Mr. Nicholls could
3 have said, you are the personal representative. And
4 you are hiring me to do work for you as the personal
5 representative. He was charged with speaking
6 clearly as to the relationship and who was
7 responsible for what. He didn't do it.

8 And then he filed a claim against Mr.
9 D'Agostino's estate and said that it was expressly
10 not in a representative capacity.

11 MR. MULLINAX: I'm going to object to
12 that. It doesn't say that at all. It says that he
13 happens to be personally liable as well in addition
14 to the estate being liable which the code clearly
15 says that if it's for the benefit of the estate, the
16 estate is liable.

17 It doesn't negate the liability of anybody
18 else, but the estate is ultimately liable.
19 Otherwise, we can shut down any estate
20 administration for anybody until the court takes it
21 over because no one is going to want to deal with a
22 personal representative, God help us if my personal
23 representative tries to deal with that on this and
24 not be able to contract and deal with the property
25 of the estate which is the entire reason for the

1 code section that I cited to the court a minute ago
2 is to protect the entities and individuals that deal
3 in good faith with the personal representative of
4 the estate or as I cited in 704 which is the
5 relation -- or 701 which relates back to previous
6 actions on people that are named as personal
7 representative, but may not have been appointed at
8 that point.

9 But, Your Honor, I -- and actually you can
10 maybe help me out because I wasn't involved back
11 then, but I do have notes at least. And I know
12 these are in the circuit court's record at this
13 point, but one of the actions taken by Mr. Nicholls,
14 which is in the invoice, is the removal of a
15 personal representative in North Carolina in order
16 to have the estate administered here in South
17 Carolina.

18 That is clearly for the estate
19 administration. So I'm a little perplexed by this,
20 I'll admit. I wasn't familiar with this. And I
21 apologize to the court for that, but clearly there
22 was another personal representative named in the
23 estate at the same time all of these things were
24 going on in South Carolina. And Mr. Nicholls went
25 to great lengths to have that individual removed.

1 And then Mr. Richard D'Agostino as the
2 sole personal representative here in South Carolina
3 and the estate administered here. And, in fact,
4 there were sanctions that were filed against, I
5 think, an attorney in North Carolina in regard to
6 allowing the daughter of the decedent to file when
7 they knew good and well that Richard D'Agostino
8 should have been the only personal representative in
9 the estate.

10 And Mr. D'Agostino -- or excuse me.
11 Nicholl's law firm, and this is in the record, got
12 from that attorney sanctions and put money back into
13 the estate of Valerie D'Agostino -- or excuse me.
14 Anyway, he got sanctions back in that event. And
15 the monies I believe came back into the estate as a
16 result of his actions.

17 But, Your Honor, I would really encourage
18 the court to look at the invoice that is the basis
19 for the entire claim because Mr. Twombly still has
20 not pointed to anything on the invoice that relates
21 to anything other than benefit of the estate
22 administration in this case.

23 And to say that it happens to be for the
24 benefit of Richard when there is nothing on the
25 invoice that implies as much is just a farce.

1 JUDGE DUKES: Let me ask you all how
2 you all want to proceed at this point. We've
3 probably gone well beyond the typical summary
4 judgment. We had this scheduled as a summary
5 judgment and then a trial. Of course we have no
6 witnesses. We simply have a lot of documents here.
7 So perhaps one way we could do this would be simply
8 to call it the final hearing and see what documents
9 we wanted to mark as Plaintiff's and Defendant's
10 documents or exhibits including, perhaps, the
11 affidavits and whatnot and put those in if you all
12 can agree on those.

13 MR. TWOMBLEY: That was my --
14 somebody from my office was bringing that. As far
15 as, you know, however Your Honor would like us to --
16 I don't have too much more to -- I do have some
17 things to put in --

18 JUDGE DUKES: Oh, no. I wasn't going
19 to stop you. I was just thinking about as we move
20 ahead and try to make a clean record and that kind
21 of thing. All right. Let's do this then. Let me
22 hear whatever Mr. Twombley has.

23 MR. TWOMBLEY: No, well, I meant
24 that -- and that is all I have for summary judgment
25 purposes, but for, you know, the final hearing

1 so-to-speak, I've said almost everything I have to
2 say. I have a few more documents to show you and
3 put on the record, but I'll proceed however Jay
4 would like.

5 JUDGE DUKES: Let me do this. I
6 don't know if I'm necessarily prepared to Rule one
7 way or the other on summary judgment at this very
8 moment. So I would think we might -- since we are
9 gathered here and have scheduled this, and I'm sure
10 both of you all want to end this matter as
11 expeditiously as possible. Let's just hear the rest
12 of it. And then we'll make a stack of those things
13 that need to be marked, put those in, put whatever
14 objections there might be, if any, to those
15 documents. And I'll have a whole record that I can
16 consider.

17 Either it will just be no material issue
18 of fact, and I'll rule one way or the other on
19 summary judgment, or I'll rule on everything that I
20 have in the record. So why don't we do that then.
21 So what -- basically, Mr. Twombly, you've had a
22 couple more things and then --

23 MR. TWOMBLEY: Well, I think it's
24 Jay's case. Do you have something else?

25 MR. MULLINAX: Your Honor, I think

1 you have already in the record everything with
2 regard to the petition and all the exhibits with the
3 petition. And that is part of this case that we are
4 talking about right now. In addition to the summary
5 judgment motion, and, of course, you've got excerpts
6 from the transcript itself.

7 So we don't have anything I don't think
8 documentation-wise to add with regard to the case in
9 chief. I would ask I guess two things. One is that
10 points of law that have been referred to in this --
11 well, up to this point, I would request that the
12 court give us maybe 10 days or something to provide
13 a memorandum to lay that out for the court's benefit
14 even though they've been cited in general terms, I
15 think there have been a few points of law that need
16 to be provided to the court in summary with
17 citations that we weren't able to necessarily
18 provide today.

19 The second thing I would say -- and maybe
20 I'll change my mind at the end of the hearing would
21 be I would respectfully request that the court give
22 us a period after the hearing for any post-trial
23 motions as well.

24 JUDGE DUKES: Let me think about that
25 at the end of it.

1 MR. MULLINAX: Yes, Your Honor.

2 JUDGE DUKES: I might not feel like I
3 need anything.

4 MR. MULLINAX: Sure.

5 JUDGE DUKES: But I'll thank you for
6 the offer.

7 MR. MULLINAX: But I don't think we
8 needed to anything else with regard to the specifics
9 of the case except for I would remind the court that
10 there is a hefty bit of documentation, transcripts,
11 agreements, contracts that relate to this case. And
12 I apologize in advance for saying what I'm going to,
13 but I would ask that the court take judicial notice
14 of things that have already been filed with the
15 circuit court on behalf of the Estate of Valerie
16 D'Agostino dealing with many of the matters that
17 we've discussed today.

18 We tried to condense -- as the Plaintiff,
19 we tried to condense this to the most pertinent
20 things to try to shorten the hearing and deal with
21 it expeditiously. But that said, we are concerned
22 that if there is any contradictory positions taken
23 today, that there may be something in the file that
24 we can point the court to at least to take judicial
25 notice of, but it's certainly filed in the court

1 already.

2 But I don't think there is anything else
3 we need to add at this point, Your Honor, other than
4 a response after Mr. Twombly speaks.

5 JUDGE DUKES: All right. Okay.
6 Thank you very much. Mr. Twombly, anything else or
7 whatever else you want to tell me?

8 MR. TWOMBLY: Yeah, I have a few
9 things. I think first I would object to the court
10 taking judicial notice of everything that has
11 happened prior to today in court. I have no idea
12 what Jay is referring to.

13 Number 1, we would at this point make a
14 motion for a directed verdict. When the -- Rule 50
15 of the Rules of Civil Procedure provide that when
16 upon a trial of the case presents only questions of
17 law, that that judge may direct the verdict.

18 In the two handouts that I gave you
19 whether or not a contract is ambiguous is a question
20 of law for the court. And if it is ambiguous which
21 Mr. Nicholls himself testified that it was not clear
22 who was responsible for the payment of the fees,
23 then those ambiguities must be construed in our
24 favor. We didn't draft the contract. Mr. Nicholls
25 did.

1 And based on that we think that the case
2 can be resolved very simply and on extremely strong
3 grounds. And those grounds are that when you
4 consider Mr. Nicholls' testimony that the contract
5 is not clear, when you consider the previous claim
6 that he filed where he took the position in court
7 that Mr. D'Agostino agreed to pay those fees
8 individually and not in a representative capacity,
9 that document is ambiguous. It must be construed
10 against them. That is a question of law for the
11 court. And it has to be construed in our favor.
12 And that is the position we take at this time.

13 JUDGE DUKES: Let me make sure I've
14 got a complete record of that which everyone agrees
15 should be in this record. And I think that would be
16 the motion for summary judgment and attachments,
17 which maybe we need to mark if there is an extra
18 copy, if not we can use this one.

19 MR. MULLINAX: I think I have an
20 extra copy, maybe. Let me check.

21 JUDGE DUKES: You are looking for an
22 extra copy?

23 MR. MULLINAX: I'm still looking
24 because she's got me --

25 JUDGE DUKES: That's all right. We

1 can use this one.

2 MR. TWOMBLEY: We can make a list.

3 MR. MULLINAX: Here we go.

4 JUDGE DUKES: Why don't we mark that
5 entire -- is that the same package as that?

6 MR. MULLINAX: Yes, it is.

7 JUDGE DUKES: Why don't we mark that
8 as Plaintiff's 1.

9 MR. MULLINAX: Let me make sure I
10 have two copies of this position. Give me just one
11 second to confirm I've got the same thing sitting
12 here in another package. Here we go. That is what
13 I was looking for. I don't know if I do have a
14 second copy of it.

15 JUDGE DUKES: That's all right. I've
16 got this copy. Just for the record, Heather has
17 written the time and the date of the hearing on the
18 top in red ink, but other than that it's just as I
19 received it. Next -- that would be Plaintiff's 1.
20 I'll give Deborah a second to mark.

21 (MARKED PLAINTIFF'S EXHIBIT NO. 1.)

22 JUDGE DUKES: All right. And then in
23 no particular order what I have been given and have
24 in front of me are -- and have been referred to are
25 the deposition of Nicholls. Is this the entire

1 deposition?

2 MR. TWOMBLEY: No, but I've got the
3 entire one.

4 JUDGE DUKES: Okay. Well, I don't
5 know if I need the entire one unless --

6 MR. TWOMBLEY: I'm going to put it in
7 in my case, so --

8 JUDGE DUKES: Okay. You are?

9 MR. TWOMBLEY: Yeah.

10 JUDGE DUKES: Okay. Well, I'll --

11 MR. TWOMBLEY: And Huther's.

12 JUDGE DUKES: All right. Well, then
13 I won't do that then. Then I've got a copy of this
14 document appointing Mr. D'Agostino as personal
15 representative of the Estate of Valerie D'Agostino.
16 Why don't we make that Defendant's 2 if you could
17 slide --

18 COURT REPORTER: Defendant's 2 or --

19 JUDGE DUKES: Wouldn't that be
20 Defendant's 2?

21 COURT REPORTER: Plaintiff's 1. I've
22 only had --

23 JUDGE DUKES: You have Plaintiff's 1.
24 Yeah, I know. There aren't any more Plaintiff's
25 exhibits, right?

1 COURT REPORTER: I haven't marked a
2 Defendant's 1 yet.

3 JUDGE DUKES: You haven't marked --

4 MR. MULLINAX: You are saying
5 Defendant 2 on that, but she doesn't have --

6 JUDGE DUKES: Oh, I said 2? I'm
7 sorry. Don't listen to me. Just mark it whatever
8 you think.

9 COURT REPORTER: You are trying to
10 fool me.

11 MR. TWOMBLEY: Defendant's 1 just for
12 the record.

13 JUDGE DUKES: Yeah, Defendant's 1.
14 Sorry. Just ignore my mumblings.

15 COURT REPORTER: I thought I missed
16 one.

17 JUDGE DUKES: All right. So if you
18 could -- if you would slide that one down actually
19 to her. I'm not going to worry about the
20 depositions.

21 (MARKED DEFENDANT'S EXHIBIT NO. 1.)

22 MR. MULLINAX: Do you have a package
23 like this?

24 JUDGE DUKES: Do I?

25 MR. MULLINAX: Well, you should.

1 That is the petition -- that is the whole petition
2 along with the exhibits.

3 JUDGE DUKES: That is attached to the
4 summary judgment?

5 MR. MULLINAX: No, Your Honor. This
6 is the original petition and the whole package has
7 previously been sent to the court with exhibits?

8 MR. TWOMBLEY: That is basically his
9 complaint and all of the exhibits attached to it.

10 MR. MULLINAX: It's been filed with
11 the court.

12 JUDGE DUKES: Are the relevant
13 exhibits also attached to the summary judgment.
14 Half of that looks like it's stuff that is
15 reattached.

16 MR. MULLINAX: I don't think that
17 they are mirror images. Let me check though. It's
18 possible that it's in the summary judgment, but I
19 want to understand it stands alone.

20 JUDGE DUKES: Because everything you
21 referred to today I think I was able to find in
22 there. The rest of it you all can probably
23 stipulate as to dates and the fact that things were
24 filed and refused and that sort of thing.

25 MR. MULLINAX: You know what, Your

1 Honor, I think it is all in here. Let me just go
2 back to the back to make sure. These are not
3 identical, Your Honor, but this was -- this was
4 already -- this is my entire complaint pretty much
5 that we've previously filed with the court. I mean,
6 I think I've got an extra copy of it.

7 JUDGE DUKES: Well, let me ask you
8 this. Is there anything in there that is not
9 something that you all sort of stipulated to or
10 isn't referred to in the other one?

11 MR. MULLINAX: Take a look at that
12 list there, Ashley, if you would.

13 JUDGE DUKES: I mean, I think the
14 circumstances and the history of it are the subject
15 of stipulation it seems like, but I'll let you all
16 look at it.

17 MR. MULLINAX: Let me confirm here
18 that --

19 JUDGE DUKES: I mean, I know the
20 claim was filed. It was disallowed.

21 MR. TWOMBLEY: Number 2 references a
22 settlement agreement and a correspondence from
23 Bolchez. I don't stipulate to that settlement
24 agreement.

25 JUDGE DUKES: Yeah, the settlement

1 agreement stuff probably needs to --

2 MR. TWOMBLEY: Number 3 is an interim
3 accounting that was never mentioned. Number 4 is a
4 family settlement agreement that was never
5 mentioned.

6 MR. MULLINAX: It's in the -- it's in
7 the depositions, Your Honor. I mean, it was --

8 JUDGE DUKES: No, I understand. But
9 I probably need to disregard anything with regard to
10 settlement. I mean, again, I encourage settlements.
11 Love everybody who settles, but as far as what the
12 terms were, I think it has a chilling effect on
13 future settlements if the word gets out that the
14 judge is going to consider --

15 MR. MULLINAX: I want to clarify,
16 Your Honor, that that is not a settlement between my
17 client and Twombley's client. That is settlement
18 between others. So I just want to clarify that
19 is -- it's not our settlement negotiations or
20 construction. It has to do with other -- it has to
21 do with Mr. Twombley and another client. It does
22 relate to our claim in part, not in total, but we
23 weren't involved with it. So it is not a settlement
24 between those two parties.

25 JUDGE DUKES: Okay. But, I mean, if

1 he's going to object to it, how does it come in in
2 the trial?

3 MR. MULLINAX: Well, it came in -- it
4 was presented and is part of the deposition
5 transcript and the exhibits presented. And he's
6 going to turn in, which I'm in support of, the
7 entire Nicholl's transcript and the entire Huther
8 transcript. So it's already been -- it's already
9 been submitted to the court through the deposition.
10 All the exhibits referred to in the deposition, it's
11 part of it.

12 JUDGE DUKES: Are there exhibits to
13 the deposition?

14 MR. MULLINAX: Yes, Your Honor.

15 MR. TWOMBLEY: Honestly it doesn't
16 really doesn't matter to me if he wants to bring it
17 in.

18 JUDGE DUKES: Well, if it's an
19 exhibit to the deposition and you are putting the
20 whole deposition in it probably does come in.

21 MR. TWOMBLEY: And then Number 5 says
22 probate law. And then there is nothing behind 6.

23 MR. MULLINAX: I can remove that
24 portion.

25 MR. TWOMBLEY: All right. What is

1 number --

2 MR. MULLINAX: I'm not sure why --

3 MR. TWOMBLEY: Number 5 is --

4 MR. MULLINAX: Let me see if it's in
5 this copy. I think that is just referring to the --
6 we can remove that, 5 and 6.

7 MR. TWOMBLEY: It's 62-1-111,
8 authority to award costs and expenses.

9 MR. MULLINAX: Right.

10 MR. TWOMBLEY: That is your request
11 for attorneys fees?

12 MR. MULLINAX: Well, that was in the
13 most recent filing -- well, it's in the summary
14 judgment actually, Your Honor. The summary judgment
15 requests attorneys fees and costs. And we provided
16 the court with the authority for that.

17 JUDGE DUKES: Is it a statute or
18 something?

19 MR. MULLINAX: It is a statute
20 because apparently some people were confused about
21 whether attorneys fees and costs were supposed to be
22 awarded in probate cases. So the legislature
23 decided to do something about that. And it says to
24 clarify the law. In 162-1-101.

25 JUDGE DUKES: This isn't a probate

1 case?

2 MR. MULLINAX: It is a probate case,
3 Your Honor. The original claim was filed in probate
4 court. And it was removed by Mr. Twombly to the
5 circuit court.

6 JUDGE DUKES: All right.

7 MR. TWOMBLEY: What this says, Judge
8 Dukes, it says in a formal proceeding.

9 MR. MULLINAX: It's a formal
10 proceeding.

11 JUDGE DUKES: Well, why don't we do
12 this. For what it's worth I'll look at the statute.
13 That is just a copy of the statute?

14 MR. MULLINAX: It is a copy of the
15 statute.

16 JUDGE DUKES: Okay. I mean, I don't
17 know if it needs to be an exhibit, but I'll --

18 MR. TWOMBLEY: I just want to clarify
19 for the record that Mr. Mullinax and his client are
20 continuing to seek attorneys fees in this case from
21 my client as they have all along.

22 JUDGE DUKES: It sounds like it since
23 he's got the case.

24 MR. TWOMBLEY: And now we have new
25 evidence of the same, so --

1 MR. MULLINAX: Well, to correct the
2 record, we acquiesced on the attorney fees earlier,
3 but we brought that back up at this point, Your
4 Honor.

5 JUDGE DUKES: Well, to the extent
6 there is something in the code -- I tell you what,
7 if you could separate that because I wouldn't --
8 that doesn't really need to be an exhibit. I'll
9 attach it here to the front of the file, a copy of
10 the code.

11 MR. MULLINAX: It's an exhibit in the
12 summary judgment already motion, I believe.

13 JUDGE DUKES: Well, if it's already
14 in here -- well, I don't want you to take everything
15 apart.

16 MR. MULLINAX: Okay. All right.

17 JUDGE DUKES: It's the kind of thing
18 that is usually more of just an attachment.

19 MR. MULLINAX: Okay.

20 JUDGE DUKES: All right. Also I have
21 or had -- here it is. Whatever Defendant's next
22 exhibit was, there was the -- 2. Thank you.
23 Petition for allowance of claim. And 3 would be the
24 order dismissing claim. Are these the other two
25 things that I have because I understand you all are

1 going to take the depositions separately. So let
2 me -- if you could pass those down to Deborah.

3 COURT REPORTER: Are these in order?
4 Petition first, order second?

5 MR. TWOMBLEY: Yes, ma'am.

6 JUDGE DUKES: That makes sense, yes.

7 COURT REPORTER: I mean second and
8 third, but --

9 JUDGE DUKES: Second and third, yeah.

10 COURT REPORTER: But the order.

11 (MARKED DEFENDANT'S EXHIBIT NO. 2.)

12 (MARKED DEFENDANT'S EXHIBIT NO. 3.)

13 JUDGE DUKES: All set? All right.

14 So we have those in as exhibits. What else, Mr.
15 Twombley?

16 MR. TWOMBLEY: Well, just to clarify,
17 Judge Dukes, this is a breach of contract case.
18 That is what is asserted in the complaint. The
19 contract is there. I think the first question the
20 court has got to ask is, you know, is the contract
21 clear as to who is responsible for those fees?

22 JUDGE DUKES: Let me ask you this.
23 As I understand the testimony that you brought up of
24 the Plaintiff himself, I mean the individual
25 Plaintiff Mr. Nicholls, I guess, his testimony

1 appeared to be that it wasn't clear. Does a lack of
2 clarity always equate to ambiguity?

3 MR. TWOMBLEY: Well, I think if
4 something is ambiguous it is capable of more than
5 one reasonable interpretation. And I think that is
6 what an ambiguous contract is. And, in fact, a
7 contract is ambiguous when it may fairly and
8 reasonably be understood in more than one way. When
9 it is obscure in meaning through indefiniteness of
10 expression or containing words that have double
11 meanings. So if there were any question whether or
12 not it was really ambiguous or not -- I mean, I
13 think Mr. Nicholls certainly clarified that when he
14 filed a claim in the probate court that said Richard
15 D'Agostino agreed individually and not in a
16 representative capacity that he was going to pay
17 these legal fees.

18 JUDGE DUKES: Well, and I don't know
19 if that affects the four corners of whether or not
20 it's ambiguous or not. I mean, I think that gets
21 into an estoppel after the fact issue, but I can
22 understand what you are saying.

23 MR. TWOMBLEY: Well, you know what, I
24 think that if the contract said, you know, Dear Mr.
25 D'Agostino, you've been appointed the personal

1 representative of the estate or earlier when they
2 took the position that he hadn't been appointed and
3 we expect that you are going to be appointed in the
4 future. And, you know, this letter is to clarify
5 that these fees will be a part of the estate and
6 will be billed to the estate. However, in the event
7 that, you know, we are not paid or whatever else,
8 you know, then you will be individually responsible
9 for them. I think if it said something like that
10 then it would be clear. We would know, you know,
11 under what circumstances who was supposed to pay and
12 when and where.

13 And so -- I mean, to me this is a textbook
14 example of something -- a contract that can be read
15 two different ways. I mean, one person could say,
16 well, you know, it does relate to the estate. I
17 mean, Mr. D'Agostino was a beneficiary of that
18 estate. So, you know, he had a personal financial
19 motive in hiring a lawyer in North Carolina and
20 having the lawyer do the work.

21 On the other hand, I think I'm
22 perfectly -- and Mr. Nicholls said it in his
23 deposition, he said it's not clear who is
24 responsible for the fees. I mean, I don't know. I
25 think that is -- I mean, this is sworn testimony

1 from the Plaintiff himself that says, I drafted the
2 contract. And, oh, by the way, it's not clear to me
3 who is responsible for the fees.

4 I mean, if that is not ambiguous, then I
5 mean do you think it's clear?

6 MR. MULLINAX: Your Honor, I would
7 like to respond when you are ready.

8 JUDGE DUKES: I'll answer that when I
9 give the order.

10 MR. TWOMBLEY: I understand that you
11 will, but --

12 JUDGE DUKES: I think we can all
13 agree that if Mr. Nicholls could redraft it today it
14 would not be the same letter. Let me say that. I
15 think that we wouldn't be sitting here and he would
16 have drafted a different letter if he had a time
17 machine, but anyway, anything else, sir?

18 MR. TWOMBLEY: Well, I mean -- but I
19 think you are on the right track. But I think you
20 have to look at the four corners of the document,
21 and then I think you have to look at Mr. Nicholls'
22 testimony. We would respectfully submit that it's
23 not clear. In fact, it's spawned this very
24 litigation as to who is responsible for it. And
25 based on that we just think it's a very simple, very

1 clean, and a very -- you know, I just don't think
2 that -- I just think the case could be resolved that
3 way which is consistent with the Plaintiff's own
4 testimony. And as far as our motion goes, that is
5 it.

6 JUDGE DUKES: Thanks.

7 MR. MULLINAX: Your Honor, I would
8 like to respond and maybe help the court out a
9 little bit with some clarity from the actual probate
10 code. I would appreciate it -- and I apologize for
11 not having copies of these things today for the
12 court, but I very much encourage the court to look
13 back at these code sections that I'm citing and
14 review them.

15 I'm referring now to probate code section
16 62-3-808. That is 62-3-808. It speaks very
17 succinctly to the issue before us. I apologize to
18 the court in advance for reading this to the court,
19 but I think it's so important to the crux of what
20 Mr. Twombly's argument has been.

21 The title, which as the court knows is not
22 terribly material to the actual code section is
23 individual liability of the personal representative.
24 The code reads starting in Subparagraph A, unless
25 otherwise provided in the contract, the personal

1 representative is not individually liable and the
2 contract properly entered into in his fiduciary
3 capacity in the course of administration of the
4 estate unless he fails to reveal his representative
5 capacity or identify the estate in the contract.

6 Mr. Richard D'Agostino identified the
7 estate in the contract. It's the only subject in
8 the reference line. It goes on to say in that same
9 code section that a personal representative is
10 individually liable for obligations arising from
11 ownership or control of the estate or for torts
12 committed in the course of administration of the
13 estate only if he is personally at fault.

14 Mr. Richard D'Agostino, which the record
15 reflects, had not paid his bill at the time of his
16 death. So he was at fault by not paying the bills
17 in his representative capacity. And therefore we
18 had a right to file a claim against his estate.

19 C says claims based on contracts entered
20 into by a personal representative, and Mr. Twombly
21 has submitted to the court today that Mr. Richard
22 D'Agostino was in fact the personal representative
23 on the date that he signed the contract. It says
24 claims based on contracts entered into by the
25 personal representative in his fiduciary capacity on

1 obligations arising from ownership or control of the
2 estate or on torts committed in the course of estate
3 administration may be asserted against the estate by
4 proceeding against the personal representative in
5 his fiduciary capacity whether or not the personal
6 representative is individually liable therefore.

7 It's saying right there in Section C that
8 someone can be personally liable as personal
9 representative. And they additionally can go after
10 the estate for a claim such as what we have before
11 us today.

12 The issue of liability between the estate
13 and the personal representative individually may be
14 determined in a proceeding for accounting, surcharge
15 or indemnification or other appropriate proceeding.
16 We are in that appropriate proceeding today, but I
17 would encourage the court to read 62-3-808 of the
18 probate code which speaks directly to the issues
19 clearly enunciating personal representatives for the
20 estate can be personally liable, at the same time
21 the estate can be jointly and severally liable for
22 the same actions. So --

23 JUDGE DUKES: This is a contract that
24 just refers to one client. I mean, I can see how
25 you could have a contract that would refer to both

1 the -- the one we discussed maybe in a perfect
2 world. And it would have been the estate is going
3 to be reasonable, but if they don't pay then this
4 individual is going to be responsible.

5 I mean, you know, again, I haven't read
6 that code section so I just heard it for the first
7 time, but it sounds more like it's referring to that
8 because the first code section you read said
9 basically the administrator acting in his capacity
10 as administrator has no personal liability.

11 So it would seem like the only way those
12 two code sections could go together would be a
13 different kind of contract that would make the
14 personal representative personally liable.

15 MR. MULLINAX: Well, again, if -- in
16 this case it's clear from the record that
17 Mr. Richard D'Agostino didn't pay the bill on behalf
18 of the estate. And he could, in fact, be personally
19 liable as a result of not paying the bill which is
20 what Section B says.

21 So we are saying that both can be liable
22 at the same time and one being dismissed on a
23 technicality doesn't dismiss the liability of the
24 other which is what we have here today.

25 I do want to make mention of the fact,

1 Your Honor, that I don't want the court to be
2 confused when you look at the specifics of it
3 because it's I'll admit from sitting on the
4 committee for four years it is a little confusing,
5 but the code section came into effect January 1st of
6 this year. However, if you read the preface to the
7 entire probate code, it's retroactive to any estate
8 proceedings that were already going on unless the
9 court find one of two different findings there.

10 So I just want to make mention of that
11 with regard to --

12 JUDGE DUKES: Could you send to me,
13 please, the -- and copy Ashley, but the code
14 sections that you have referenced --

15 MR. MULLINAX: Absolutely.

16 JUDGE DUKES: -- which so far I've
17 got are 62-3-701, 714, 808, and which one was the
18 attorney fees one? I don't know if I caught the
19 number on that one.

20 MR. MULLINAX: 1-101, I believe.
21 I'll double check that real quick. 62-1-101.

22 JUDGE DUKES: Okay.

23 MR. MULLINAX: Yes, that's right.

24 JUDGE DUKES: And if you don't
25 mind --

1 MR. MULLINAX: Absolutely.

2 JUDGE DUKES: -- in P.D.F. or however
3 you want to do it.

4 MR. MULLINAX: Absolutely.

5 JUDGE DUKES: Okay.

6 MR. TWOMBLEY: And just to respond
7 very briefly to that, I mean, I think if this
8 contract said that it was between Mr. D'Agostino as
9 personal representative then these code sections
10 would apply, but, I mean, that is not what it says.
11 That is the whole issue is that it's ambiguous.
12 It's not clear.

13 And I was just reading back at this juris
14 prudence that Florida and -- you know, it says any
15 ambiguity in a contract, doubt or uncertainty. So
16 it's not just a, quote, ambiguity. It's any
17 ambiguity in a contract, doubt, uncertainty as to
18 its meaning should be resolved against the party who
19 prepared the contract or is responsible for the
20 ambiguous language.

21 Ambiguous language in a contract should be
22 construed liberally and most strongly in favor of
23 the party who did not write or prepare the contract.
24 So it's any ambiguity in a contract, doubt, or
25 uncertainty.

1 And Mr. Nicholls testified in his
2 deposition that it's not clear. That is doubt.
3 That is uncertainty. That is ambiguity in my
4 opinion.

5 JUDGE DUKES: Let me ask you all
6 this. When the documents that you all have
7 referenced or maybe it's even an exhibit, one of the
8 documents that was executed by an attorney, and I
9 think it was the other estate, which set of
10 attorneys were executing the documents in the
11 Valerie D'Agostino estate? Is that a part of this?

12 MR. TWOMBLEY: This gets incredibly
13 complicated because --

14 JUDGE DUKES: Oh, I figured it
15 probably was.

16 MR. TWOMBLEY: -- Mr. D'Agostino was
17 at one point in time the personal representative of
18 Ms. D'Agostino's estate. Then Mr. D'Agostino died
19 which brings in another D'Agostino name, Christopher
20 D'Agostino. During all of this there were several
21 different lawyers involved, one of which was Jim
22 Hale who had a long battle with cancer and then
23 passed away. And then Becky Hale and then Sean
24 Bolchez. Before that it was Tony Griffis. And so
25 I'm happy to go into all the detail you need.

1 JUDGE DUKES: During his life --
2 during Richard D'Agostino's life from the time he
3 was appointed personal representative to the time of
4 his death, because I assume that is when his
5 representation ended.

6 MR. TWOMBLEY: Right.

7 JUDGE DUKES: I don't know if it's a
8 part of this record or if there are documents in
9 here or not, who are the -- to the extent an
10 attorney for the estate needed to execute a form or
11 something, was that Nicholls & Crampton or was it --

12 MR. MULLINAX: Only with regard to
13 North Carolina.

14 MR. TWOMBLEY: It was Tony Griffis
15 who is now retired.

16 JUDGE DUKES: Okay. All right. That
17 is an undisputed fact. I mean, is that just in the
18 records?

19 MR. MULLINAX: I can't dispute it,
20 Your Honor. I don't have personal knowledge of it.
21 I wasn't involved with it at that point. I will say
22 to the court I'm not certain out of ignorance
23 whether Tony Griffis would testify that he was, in
24 fact, an attorney for the Estate of Valerie
25 D'Agostino -- or am I misspeaking here? Of Richard

1 D'Agostino or for Richard -- excuse me. For Richard
2 at that point. I don't know. He may have thrown
3 his hat in the ring. I just don't know.

4 JUDGE DUKES: But I mean if we were
5 to pull the probate file --

6 MR. TWOMBLEY: You will see it's Tony
7 Griffis.

8 MR. MULLINAX: I can't dispute it,
9 Your Honor.

10 JUDGE DUKES: Okay.

11 MR. MULLINAX: I don't question
12 his -- what he's saying.

13 JUDGE DUKES: And, of course, within
14 the contract itself I noticed of course the address
15 for Richard D'Agostino is through Tony Griffis's
16 office. So they obviously clear on the face of it
17 had a connection to this situation right from the
18 outset. All right. Anything else at all?

19 MR. TWOMBLEY: Not on the motion, no.

20 JUDGE DUKES: All right.

21 MR. MULLINAX: I don't have anything,
22 Your Honor.

23 JUDGE DUKES: All right. Well, again
24 I'll take the motion you were advisement and then
25 we've sort of mixed the two together a little bit,

1 but let's just move on to whatever in addition to
2 the motion which we will incorporate in the case
3 depending on how the motion comes out. And what
4 else do you have for the record for me to consider?

5 MR. TWOMBLEY: I think that Jay
6 already put this in, but just out of an abundance of
7 caution the summons and the complaint that they
8 essentially filed, that is in the probate court.
9 When you don't pay a claim you have to file a
10 petition on it accompanied by a summons. That is
11 essentially your summons and complaint.

12 And there were six or seven exhibits
13 attached to that. And I'm going to make that a part
14 of the record. Again, I think Jay already has. So
15 we will just call this one, Madam Court Reporter,
16 Defendant's Number 4. Is that what I have? Is that
17 right?

18 COURT REPORTER: Yes. There is one
19 thing. I have this table of contents here. What
20 does this go to because we didn't --

21 JUDGE DUKES: Well, I thought we
22 decided -- what did we --

23 MR. MULLINAX: It has some additional
24 documentation, Your Honor, in that that was not
25 party to the summary judgment.

1 JUDGE DUKES: All right. Do we want
2 to pull those documents out or --

3 MR. MULLINAX: All of these things
4 should be in the -- they are already in the
5 pleadings, Your Honor.

6 JUDGE DUKES: And I believe you, but
7 for purposes of this I need to make them exhibits.

8 MR. MULLINAX: Sure.

9 JUDGE DUKES: So I thought we --

10 COURT REPORTER: Two. We didn't --

11 MR. MULLINAX: Plaintiff's Exhibit 1.

12 COURT REPORTER: Okay. This is
13 Plaintiff's Exhibit 1. So are you going to make
14 this part of 1 or do you want this to be 2?

15 JUDGE DUKES: See, I thought there
16 was a whole lot of duplication in there. We were
17 going to remove the settlement negotiation stuff out
18 of that one.

19 MR. MULLINAX: But then we went back,
20 Your Honor, and because the --

21 JUDGE DUKES: That's right, right.

22 MR. MULLINAX: -- the total
23 depositions is part of that?

24 JUDGE DUKES: Okay. Well, let me ask
25 Mr. Twombly then. Anything in that document that

1 would give you pause not to make it Plaintiff's 2?
2 The things you had concern about before the
3 settlement issues which it turns out are exhibits to
4 the deposition that you are going to make an
5 exhibit.

6 MR. TWOMBLEY: No, I don't have any
7 issue with that.

8 JUDGE DUKES: All right. Let's just
9 make it Plaintiff's 2 then just in total. And I
10 understand there is some duplication.

11 (MARKED PLAINTIFF'S EXHIBIT NO. 2.)

12 COURT REPORTER: And the next thing
13 was Defendant's 4.

14 JUDGE DUKES: Jay, any problem with
15 Defendant's 4?

16 MR. MULLINAX: Can I see what
17 Defendant's 4 is? I don't have a copy. No, I don't
18 I have objection to this.

19 JUDGE DUKES: Let's make that
20 Defendant's 4.

21 MR. MULLINAX: Have you got a copy
22 for me, Ashley?

23 (MARKED DEFENDANT'S EXHIBIT NO. 4.)

24 MR. MULLINAX: And, Ashley, did I
25 give you a copy of this? This is Plaintiff's 2, I

1 believe.

2 MR. TWOMBLEY: Just to make sure I've
3 got all of my stuff straight if you will give me one
4 second, Judge Dukes.

5 JUDGE DUKES: I never have all of my
6 stuff straight. So if you can -- off the record.

7 (Discussion off the record.)

8 MR. TWOMBLEY: I'm then going to put
9 in the deposition of Mr. Huther and the deposition
10 of Mr. Nicholls.

11 JUDGE DUKES: All right. Do those
12 have the attachments also?

13 MR. TWOMBLEY: I do not have the
14 attachments to them.

15 JUDGE DUKES: All right. What was
16 the -- do you want -- there was an exhibit that you
17 wanted to make an attachment to the deposition, Jay.
18 I can't remember what it was -- one of the -- no, I
19 think it's already in there because it attached to
20 Plaintiff's 2 because you didn't remove it.

21 MR. MULLINAX: Well, Ashley, you
22 don't have a copy with all the exhibits?

23 MR. TWOMBLEY: No.

24 JUDGE DUKES: What exhibits, other
25 than the one that you've got attached to Plaintiff's

1 2 did you have an interest in? Because they are
2 just extra, correct?

3 MR. MULLINAX: Well, the -- well, I
4 included family settlement and agreement. Your
5 Honor, I'm not sure. Whatever direction you want to
6 give me on this. I mean, I would be fearful of
7 taking this out of -- the deposition out of context
8 without the exhibits. That said, I'll admit I don't
9 see anything, you know, striking me right up side
10 the head that says it needs to be in the -- to the
11 court. I don't want to overwhelm the court.

12 MR. TWOMBLEY: The exhibits that I
13 want to make a part of the record, now I've got
14 them. Those are the ones that we talked about
15 previously. And the ones I'm about to talk about,
16 but it doesn't matter to me. Put them all in, none
17 of them, whatever.

18 MR. MULLINAX: But you don't have
19 copies to put in if you wanted to of the exhibits?

20 JUDGE DUKES: All right. But you've
21 got the one that you've got as Plaintiffs 2 which is
22 in?

23 MR. MULLINAX: Right.

24 JUDGE DUKES: Okay. Is there
25 anything else?

1 MR. MULLINAX: I would only ask that
2 if -- well, maybe you can agree, Ashley, that if the
3 court has any questions as to anything in the
4 deposition with regard to an exhibit that they don't
5 have a copy of, then maybe we can just agree by
6 stipulation that we will provide it to the court.

7 MR. TWOMBLEY: What I think we ought
8 to do is bring you a proper copy of the deposition
9 with all the exhibits that can be made?

10 MR. MULLINAX: We can do that.

11 JUDGE DUKES: And substitute whatever
12 you are about to put in?

13 MR. TWOMBLEY: Right.

14 JUDGE DUKES: That will work. And
15 then it's all in there.

16 MR. MULLINAX: Okay.

17 JUDGE DUKES: All right. So that
18 would be Plaintiff's 5. And I don't even need to
19 substitute it. You all just bring me one and we
20 will put it in. Deborah, you tell me how you want
21 to do that.

22 MR. TWOMBLEY: Well, that was 3 and
23 4, right?

24 COURT REPORTER: Okay. Wait a
25 second. He pushed this one down here. This would

1 be Defendant's?

2 MR. TWOMBLEY: Yes. I wrote. I
3 apologize. I'm making that --

4 JUDGE DUKES: You are so used to
5 being the plaintiff.

6 COURT REPORTER: 5 and 6.
7 Defendant's 5 and 6.

8 JUDGE DUKES: Okay. And those are to
9 be substituted with the full depositions and
10 exhibits; is that correct?

11 MR. TWOMBLEY: Yeah.

12 JUDGE DUKES: On both of them or just
13 the one?

14 MR. TWOMBLEY: Both of them.

15 JUDGE DUKES: Okay. All right.
16 Whose got those? Who is going to do the
17 substitution?

18 MR. TWOMBLEY: I'll be happy to do
19 it. We'll print it off and bring it up here. These
20 documents, we don't have to make them -- well, we
21 will make them exhibits. So we are now at
22 Defendant's what, Madam Court Reporter?

23 COURT REPORTER: All right. I'm
24 marking 5 and 6 right now.

25 JUDGE DUKES: Yeah. That's right.

1 We need to give her a quick break to catch up.

2 (MARKED DEFENDANT'S EXHIBIT NO. 5.)

3 (MARKED DEFENDANT'S EXHIBIT NO. 6.)

4 COURT REPORTER: Okay. And they are
5 to be substituted.

6 MR. TWOMBLEY: Thank you for keeping
7 it straight. Defendant's Number 7 is a check that
8 shows that when Mr. D'Agostino paid the retainer fee
9 that was called for on the June 10th he paid for it
10 out of his personal checking account, not out of an
11 estate bank account. And, remember, he had been
12 appointed personal representative in January, you
13 know, six months before.

14 JUDGE DUKES: All right. So that
15 would be -- you already have that one? So this is
16 my copy?

17 MR. TWOMBLEY: That is your copy.

18 (MARKED DEFENDANT'S EXHIBIT NO. 7.)

19 MR. TWOMBLEY: Defendant's Number 8
20 is one of the motions that Mr. Nicholls filed on
21 behalf of Mr. D'Agostino. And as you can see, it
22 says, comes now Richard D'Agostino. It doesn't say,
23 you know, as personal representative of the Estate
24 of Valerie D'Agostino.

25 MR. MULLINAX: What is the date of

1 this, Ashley? I can't see the date up there at the
2 top.

3 JUDGE DUKES: It's July -- the one --

4 MR. MULLINAX: July 2010?

5 JUDGE DUKES: Yeah. It looks like
6 the 2nd. Is that what yours says? Under the S.

7 MR. MULLINAX: Oh, I see it on the
8 sign -- on the signature anyway.

9 MR. TWOMBLEY: Yeah.

10 JUDGE DUKES: Is that the 2nd?

11 MR. MULLINAX: Is there any filing
12 documentation with this, Ashley, or is it -- you are
13 just going to submit this to the court?

14 MR. TWOMBLEY: I'm just going to
15 submit it like that.

16 MR. MULLINAX: All right.

17 (MARKED DEFENDANT'S EXHIBIT NO. 8.)

18 MR. TWOMBLEY: Defendant's Number 9
19 is an amendment to that motion for sanctions. And
20 as you can see again, comes now Richard D'Agostino.
21 In both of those documents you can see Mr. Nicholls,
22 it says he's attorney for Richard D'Agostino. It
23 doesn't say he's the attorney for the estate or as
24 personal representative of the estate.

25 (MARKED DEFENDANT'S EXHIBIT NO. 9.)

1 MR. TWOMBLEY: We are at 10?
2 Defendant's Number 10 is another amendment to the
3 motion for sanctions. And again filed by -- comes
4 now Mr. D'Agostino, not as personal representative
5 of the estate. And it's signed by Mr. Nicholls as
6 attorney for Richard D'Agostino.

7 (MARKED DEFENDANT'S EXHIBIT NO. 10.)

8 MR. TWOMBLEY: The next one is
9 Defendant's 11 which is a notice of hearing. Well,
10 again it's brought by Mr. D'Agostino individually
11 and signed by his attorney Mr. Nicholls. It shows
12 that he's the attorney for Mr. D'Agostino.

13 MR. MULLINAX: I'm sorry. Are we
14 looking at -- okay.

15 JUDGE DUKES: That was a notice of
16 hearing was the last one.

17 MR. MULLINAX: Okay.

18 (MARKED DEFENDANT'S EXHIBIT NO. 11.)

19 MR. TWOMBLEY: The next one is
20 Defendant's 12 which is a withdrawal of the motion
21 for sanctions again brought by Mr. D'Agostino,
22 signed by -- was that 12?

23 COURT REPORTER: Uh-huh.

24 (MARKED DEFENDANT'S EXHIBIT NO. 12.)

25 MR. TWOMBLEY: Defendant's 13 is a

1 copy of the answer that we filed in -- the third
2 defense is res judicata. And you know, we believe
3 that the order from the prior -- from Judge Faulk
4 that was not challenged, appealed. It says that the
5 claim is dismissed with prejudice. So we think that
6 that is res judicata. We have to plead that in our
7 answer. And we've done that.

8 (MARKED DEFENDANT'S EXHIBIT NO. 13.)

9 JUDGE DUKES: Anything else?

10 MR. TWOMBLEY: Yeah, I'm --

11 JUDGE DUKES: Oh, Deborah is still
12 writing. I'm sorry.

13 MR. TWOMBLEY: Okay. The next one is
14 Defendant's 14 which is an e-mail from Tim
15 Griffis -- I'm sorry. Tony -- from Tim Nicholls to
16 Tony Griffis. And one of the --

17 MR. MULLINAX: Can I see that, a copy
18 of that?

19 MR. TWOMBLEY: Yes.

20 MR. MULLINAX: Because I don't know
21 if I -- I may object to this.

22 MR. TWOMBLEY: Well, it was made an
23 exhibit to the deposition, so --

24 MR. MULLINAX: Okay. If it was in a
25 deposition then I remove my objection. Go ahead.

1 (MARKED DEFENDANT'S EXHIBIT NO. 14.)

2 MR. TWOMBLEY: One of the things that
3 the two are researching and working on has to do
4 with whose law would be more financial favorable to
5 Mr. D'Agostino. In other words, from a standpoint
6 of a beneficiary of an estate, you know, would Mr.
7 D'Agostino get more if the estate were in North
8 Carolina or if it were in South Carolina. This is
9 part of the work that Mr. Nicholls did that they
10 claim was for the estate. And figuring out whose
11 law is more favorable -- financially favorable to
12 Mr. D'Agostino is not something that would be done
13 by the estate. I think that that would not be
14 something that would be a proper administration
15 expense of the estate.

16 MR. MULLINAX: I -- well, go ahead.

17 MR. TWOMBLEY: That is our opinion.
18 Maybe that is what other beneficiaries of an estate
19 should pay for is to figure out which ones -- you
20 know, how they can get the least amount of money.
21 We would say not. I just want to -- if you will
22 give me one second I wanted to pull up --

23 MR. MULLINAX: I'll note for the
24 court that that is not in our claim by the way, any
25 services rendered -- let me check that. That is not

1 part of the claim, Your Honor, by the way, July the
2 6th, 2010. You can refer to the invoices, but it's
3 not part of the claim.

4 JUDGE DUKES: Of course, I guess the
5 defense is you've got to represent one or the other,
6 particularly if they are adverse interests, right?

7 MR. MULLINAX: Well, as administrator
8 certainly he had a duty to figure out the
9 administration of the estate and the venue and the
10 appropriate place to bring it. It just so happens
11 maybe he's a beneficiary as well, but every personal
12 representative practically has to do that with very
13 few exceptions. It's part of his job as personal
14 administrator to find out what the breakdown would
15 be.

16 JUDGE DUKES: You still looking,
17 Ashley?

18 MR. TWOMBLEY: Yeah.

19 MR. MULLINAX: And I'll draw the
20 court's attention on that exhibit, Plaintiff's 14.
21 In the middle of that where it says from Mr.
22 Nicholls to Mr. Griffis, I'll remind Rich that he
23 will owe us both for our fees whether the clerk
24 awards any from the estate or not, again referring
25 to the joint liability of the estate and Richard

1 there.

2 MR. TWOMBLEY: I apologize. I just
3 want to make sure I get everything in the record.
4 That is all I've got, Judge Dukes.

5 JUDGE DUKES: All right. Anything
6 else from you, Jay?

7 MR. MULLINAX: I don't think I have
8 anything, Your Honor.

9 JUDGE DUKES: All right. So let's
10 see. I have pending then the Plaintiff's summary
11 judgment motion, the Defendant's directed verdict
12 motion?

13 MR. TWOMBLEY: Which we renew.

14 JUDGE DUKES: Okay. And failing both
15 of those, the case in chief which consists of
16 basically an assemblage of documents and
17 stipulations which we have on the record. Is that a
18 fair assessment?

19 MR. MULLINAX: Yes, it is.

20 MR. TWOMBLEY: And a couple of
21 depositions.

22 JUDGE DUKES: A couple of
23 depositions? Okay. All right. And you've sought
24 attorneys fees. My usual practice is if I found
25 that first of all you won, and then second of

1 all attorneys fees are appropriate, and you are
2 going to send me those statutes, right, on those --

3 MR. MULLINAX: Yes, Your Honor. I've
4 got that in my list to send you. I wanted to revert
5 back to my earlier question though for the court is
6 that if you issue a ruling on the case in chief
7 exclusive of the attorney fees, and I can file a
8 motion -- a post-trial motion for attorneys fees
9 unless you want me to file that today. I've got it
10 with me, but --

11 JUDGE DUKES: Well, what I was going
12 to say is ordinarily in any non-jury trial, which of
13 course is what I do, if attorneys fees are to be
14 awarded usually once I've said attorneys fees are to
15 be awarded then unless there is some objection ask
16 for at that point either an affidavit to be prepared
17 and submitted to the other side. If everybody
18 agrees those are the attorneys fees, great. If not,
19 we will have a quick hearing on attorneys fees.

20 MR. MULLINAX: Okay, Your Honor.

21 JUDGE DUKES: Again, assuming we get
22 to that point, but that is my usual practice just
23 because ordinarily it's hard to figure it all up on
24 the fly. And we have the luxury of not worrying
25 about a jury.

1 MR. TWOMBLEY: And if I could just
2 say one thing with respect to attorneys fees. In
3 the Plaintiff's complaint they withdrew their claim
4 for attorneys fees. And I object to them reraising
5 it now in their motion for summary judgment. The
6 complaint is part of the record. You can read it.
7 It says the Plaintiff is withdrawing his claim for
8 attorneys fees. And so I just point that out to
9 you.

10 MR. MULLINAX: I want to speak to
11 that, Your Honor, when he's done.

12 JUDGE DUKES: Okay.

13 MR. MULLINAX: It clearly enunciates
14 that we acquiesced and dropped the attorney fees in
15 hopeful settlement in the matter. However, it also
16 expresses in that withdrawal that the reasoning was
17 at the time it wasn't worth fighting that battle
18 because we wanted to deal with the case in chief.

19 We are resurrecting it now because part of
20 the issue at that point was the legislature had not
21 created a statute that cleared up the fact that in
22 probate cases you would be awarded attorneys fees.
23 Well, as of January the 1st it's now in black and
24 white to clarify, is what the reporter's comments
25 say. To clarify the law.

1 Well, now we have something really easy
2 for everybody to read and understand so that we
3 don't have to deal with case law and research and
4 legal memorandum, et cetera. It's clear on its
5 face. So we did drop it. And it's clear from our
6 dropping it that we dropped it because we didn't
7 want to fight that battle. We didn't want to fight
8 all the case law stuff. Now it's in the statute and
9 it's clear as a bell.

10 JUDGE DUKES: But it's not in the
11 pleadings as we sit here today?

12 MR. MULLINAX: It is in the summary
13 judgment motion.

14 JUDGE DUKES: But the summary
15 judgment motion is limited to what was requested in
16 the pleadings, I think.

17 MR. MULLINAX: Right, Your Honor. I
18 would ask leave of the court to amend the complaint
19 if -- I was expecting the summary motion prior to.
20 And I apologize, but nevertheless I would ask leave
21 of the court if you -- under your normal policy if
22 you are going -- if you rule in our favor, then we
23 would raise it as a post-trial motion which is not
24 unheard of.

25 JUDGE DUKES: Well, let's do this. I

1 guess what I wanted to say is to the extent that
2 those hurdles are reached, I would get back with you
3 all and then we will talk about whether or not you
4 can agree to a number. And if you can't, we will
5 keep the record open for that purpose.

6 MR. MULLINAX: Thank you, Your Honor.

7 JUDGE DUKES: All right. So what
8 else other than -- let's see. So I'm going to wait
9 on the probate code sections. You are going to copy
10 Ashley and send to me. I'll only ask for any kind
11 of post-trial briefs if I need them. No need to
12 work on those. I've got those documents. Ashley is
13 going to submit copies of the two depositions with
14 exhibits; is that right?

15 MR. TWOMBLEY: The depositions, yeah.
16 Okay.

17 JUDGE DUKES: And what is a
18 reasonable -- how many days do you think just so I
19 can --

20 MR. TWOMBLEY: I'll bring them up
21 here this afternoon or tomorrow morning.

22 JUDGE DUKES: All right. That's
23 fine. And I guess it is just Monday. It seems like
24 Wednesday already. And all right. I think that --
25 is there anything else then for this record?

1 MR. MULLINAX: Not from me, Your
2 Honor.

3 JUDGE DUKES: All right. That will
4 conclude the record then except to the extent I'm
5 leaving it open for attorneys fees.

6 (Whereupon, the hearing was concluded
7 at 3:54 p.m.)
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Certificate of Reporter

I, Deborah S. Thomas, Certified Verbatim Reporter and Notary Public in and for the State of South Carolina, do hereby certify that I reported the hearing of Nicholls & Crampton vs. D'Agostino, on the 19th day of May, 2014: and that the foregoing 109 pages constitute a true and correct transcription of the said hearing.

I further certify that I am neither attorney nor counsel for, nor related to or employed by, any of the parties connected with this action, nor am I financially interested in said cause.

I further certify that the original of said transcript shall be hereafter delivered to JAY A. MULLINAX, ESQUIRE, Law Office of Jay A. Mullinax, LLC, 2 Park Lane, Suite 303, Hilton Head, South Carolina 29928.

In witness whereof I set my hand and seal this 20th day of February, 2015.

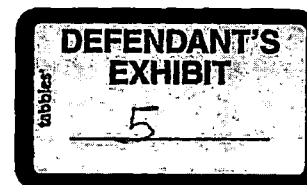
My Commission
expires 1/4/18

Deborah S. Thomas, CVRM
and Notary Public for the
State of South Carolina

1
2 IN THE COURT OF COMMON PLEAS
3 STATE OF SOUTH CAROLINA
4
5 COUNTY OF BEAUFORT

6 IN RE:
7 ESTATE OF VALERIE D'AGOSTINO,
8
9
10
11 NICHOLLS & CRAMPTON, P.A.

Plaintiff,



12 vs. CIVIL ACTION NUMBER
13 2013-CP-07-01491
14

15 ESTATE OF VALERIE D'AGOSTINO,
16 Defendant.

17 -----/

18 The deposition of FREDERICK TIMOTHY
19 NICHOLLS, a witness in the above-entitled cause,
20 taken pursuant to Notice and agreement, before
21 Ceil Weser, Certified Court Reporter and Notary
22 Public, at the Offices of Twenge & Twombly, 311
23 Carteret Street, Beaufort, South Carolina, on
24 the 9th day of December, 2013, commencing at or
25 about the hour of 10:46 a.m.

1
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3

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14 ALSO PRESENT:

15 Ronald Huther

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1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 FREDERICK TIMOTHY NICHOLLS,
3 having been produced and first duly sworn as a
4 witness, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. TWOMBLEY:

7 Q Mr. Nicholls, could you please identify
8 yourself for the record, please.

9 A Frederick Timothy Nicholls, Raleigh,
10 North Carolina.

11 Q And Mr. Nicholls, have you ever given a
12 deposition before?

13 A No.

14 Q You are a practicing lawyer, though?

15 A Yes.

16 Q Do you take depositions?

17 A Yes.

18 Q Just so the record is clear, you have
19 obviously sworn to tell the are truth and the
20 court reporter is going to take down my
21 questions and your answers so we have a record
22 of things, do you understand?

23 A I do.

24 Q Any time you don't understand my
25 questions the rules require you to direct those

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 questions to me rather than to your lawyer.

3 Once the deposition gets started it is just you

4 and I, is that fair?

5 A Yes.

6 Q Now, Mr. Nicholls, I understand that in

7 approximately June of 2008 that you were

8 retained by Richard D'Agostino to do some legal

9 work for him, is that correct?

10 A That is correct.

11 Q And what was the nature of the work you

12 were going to do for him?

13 A The nature of that work was to see what

14 could be done to modify the administration of

15 his wife's estate that had been filed, I think

16 by Mr. Huther in Raleigh in Wake County. Modify

17 it to the extent of advising the Court that the

18 administration was probably not proper in Wake

19 County.

20 (Whereupon, Defendant's Exhibit

21 Number 1 was marked

22 for identification.)

23 BY MR. TWOMBLEY:

24 Q And I am going to hand you what I have

25 as Defendant's Exhibit 1.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Is this a copy of the letter that you
3 sent Mr. D'Agostino?

4 A Yes, it appears to be.

5 Q And is this his signature at the end of
6 it?

7 A I am assuming it is, yes.

8 Q And was this the purpose of this to
9 outline the terms of the representation?

10 A Correct.

11 Q Did you draft this letter?

12 A Yes.

13 Q Did Mr. D'Agostino make any changes to
14 it after it was drafted?

15 A I don't recall that he did, no.

16 (Whereupon, Defendant's Exhibit
17 Number 2 was marked
18 for identification.)

19 Q I will show you what I next marked as
20 Plaintiff's Exhibit 2, and this appears to be a
21 check that was written by Mr. D'Agostino to your
22 law firm?

23 MR. MULLINAX: Excuse me, did you
24 mean Defendant's Exhibit 2?

25 MR. TWOMBLEY: Yes, Defendant's.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 THE WITNESS: Was that a question?

3 BY MR. TWOMBLEY:

4 Q Yes.

5 A Yes, it is.

6 Q And was this for the payment of a \$1500
7 retainer?

8 A Yes.

9 Q And this was paid to you out of an
10 account in the name of Richard J. D'Agostino is
11 that right?

12 A That is what appears on the check.

13 Q Do you have any reason to believe that
14 this was not an account in his personal
15 individual name?

16 A No.

17 (Whereupon, Defendant's Exhibit
18 Number 3 was marked
19 for identification.)

20 BY MR. TWOMBLEY:

21 Q Next I will show a document that is
22 marked as Defendant's Exhibit 3.

23 Who is Nick Dombalis?

24 A Dombalis, he is a partner of mine.

25 Q Was he assisting you in your work for

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Mr. D'Agostino?

3 A On some -- yeah, to an extent, yes.

4 Q And read this E-mail for me and
5 familiarize yourself with it and tell me if you
6 can what was going on at this point in time in
7 the representation?

8 A Well, the letter to Mr. Belcher or the
9 note to Mr. Belcher was an attorney in Charlotte
10 that I had been advised was representing
11 Mr. Huther. And so I had contacted him. There
12 was an attorney in Durham named David Alexander
13 who originally represented Mr. Huther I think on
14 the administration when the application for
15 letters and such were on file with the court.

16 Subsequent to that time there was some
17 issues about the validity of the application
18 itself, and Mr. Alexander advised me that
19 Belcher was representing them. So I contacted
20 Belcher.

21 Q Okay.

22 Now, as part of the work that you were
23 doing for Mr. D'Agostino, did you undertake to
24 advise him as to whose intestate laws would be
25 more favorable for his individual financial

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 benefit?

3 A That certainly came up in discussions,
4 yes. I dealt with -- my contact down here with
5 Mr. D'Agostino was through an attorney named
6 Tony Griffis, who I think has since retired from
7 practice.

8 Q And did you research the intestacy laws
9 in South Carolina and North Carolina?

10 A No.

11 Q Did you advise Mr. D'Agostino as to
12 which intestacy laws would financially benefit
13 him more favorably --

14 A Griffis would have advised me what is
15 in South Carolina.

16 I told Griffis what was available in
17 North Carolina.

18 Q If you let me finish the question
19 before you start the answer so we are not
20 talking at the same time there during the end.

21 Let me show you what I marked as
22 Defendant's Exhibit 4.

23 (Whereupon, Defendant's Exhibit

24 Number 4 was marked for

25 identification.)

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 BY MR. TWOMBLEY:

3 Q How many pages are there?

4 A Two.

5 Q May I see that back, please, I
6 apologize.

7 I think I got that straight now, I
8 apologize.

9 I will show you what we marked as
10 Defendant's Exhibit 4.

11 Is this an E-mail from you to Mr.
12 Griffis on the first page?

13 A On the first page? Yeah, at the top,
14 right.

15 Q And did you advise Mr. Griffis in this
16 E-mail that in looking at his analysis and yours
17 that you would try to keep the estate in North
18 Carolina since North Carolina's intestacy laws
19 were more favorable to Richard?

20 A I don't see that referenced in this
21 first E-mail.

22 Q At the end it says: Per your analysis
23 we will try to keep the estate in North
24 Carolina.

25 A Okay, yeah. That would have been the

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 analysis of Griffis.

3 Q And based on what he had told you about
4 South Carolina law and based on what you knew
5 about North Carolina law, it was decided it
6 might be more favorable to keep the estate in
7 North Carolina for Mr. Griffis -- I mean for
8 Mr. D'Agostino?

9 A Yes, I think from a dollar standpoint
10 that was Griffis' determination.

11 Q And you agreed with that determination?

12 A Well, based on what he told me that
13 here is what -- and I don't remember the
14 numbers -- but it certainly was evident that
15 based on South Carolina intestacy law that the
16 amount in South Carolina would be greater -- or
17 I'm sorry, would be less than the amount per
18 intestacy laws in North Carolina. North
19 Carolina would be greater than South Carolina.

20 Q So that was an issue that you all
21 looked at during the representation?

22 A He asked about that, Griffis did, yeah.

23 Q And that came up and you all discussed
24 it and addressed it?

25 A Yeah, yeah, sure.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 And I assume he was advising Richard on
3 that.

4 (Whereupon, Defendant's Exhibit
5 Number 5 was marked for
6 identification.)

7 BY MR. TWOMBLEY:

8 Q The next document I want to show you --
9 somehow my copy has gotten messed up a little
10 bit but -- the next document I marked as
11 Defendant's Exhibit 5, and I would ask if you
12 recognize that document?

13 A Yes.

14 Q And this is a letter that you wrote to
15 David Alexander?

16 A Yes.

17 Q And this letter was addressing who was
18 going to pay for the legal fees that had been
19 incurred by Mr. D'Agostino, correct? That is
20 one of the things that is being addressed in
21 this letter?

22 MR. MULLINAX: Object to the form.

23 You can answer the question.

24 BY MR. TWOMBLEY:

25 Q You can answer.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 A Yeah, but repeat the question.

3 Q One of the issues that is being
4 addressed is Mr. D'Agostino's contention as to
5 who would be responsible for the legal fees that
6 he had incurred.

7 MR. MULLINAX: Object to the form.

8 BY MR. TWOMBLEY:

9 Q It says at the bottom that you were
10 going to move for sanctions and that the
11 sanctions would include your client's payment,
12 that would be Mr. Huther's payment from his
13 personal funds or share of the estate of all
14 legal fees incurred by Mr. D'Agostino in this
15 matter, right?

16 A Yeah, we are talking about if the court
17 imposed sanctions for what Mr. Alexander
18 primarily had advised Mr. Huther about, that the
19 court would have the power to sanction Alexander
20 and Mr. Huther for legal fees incurred in filing
21 the original application.

22 Q Correct.

23 (Whereupon, Defendant's Exhibit
24 Number 6 was marked for
25 identification.)

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 BY MR. TWOMBLEY:

3 Q I will show you what has been marked as
4 Defendant's Exhibit 6.

5 . Is this a copy of the first page of
6 the motion for sanctions that was filed?

7 A It appears to be.

8 Q And this -- the beginning of it, it
9 says: Now comes Richard D'Agostino by and
10 through counsel and moves the court to impose
11 sanctions?

12 A Yes.

13 Q Let me just ask you to go back for a
14 moment.

15 You would agree with me that
16 Defendant's Exhibit 1, a fee agreement, it does
17 not mention the fact that Mr. D'Agostino is
18 proceeding as personal representative of his
19 wife's estate?

20 MR. MULLINAX: Object to the form.

21 BY MR. TWOMBLEY:

22 Q Or would you agree with me on that?

23 A That he is proceeding on that basis?
24 Well, he wasn't the administrator the of the
25 estate at that time, so he didn't have that

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 authority.

3 Q He wasn't the administrator?

4 A At that point in time.

5 The whole purpose of this was -- he
6 wanted to be the administrator of his wife's
7 estate in North Carolina. He had the right by
8 law in North Carolina to do it.

9 The original application was filed
10 falsely, because it said that -- he wasn't even
11 mentioned as one, as the rightful person to
12 administer the estate; and two, he wasn't
13 mentioned as a beneficiary of the estate. That
14 is what drove all of this.

15 He had prior to that time filed through
16 Mr. Griffis proceedings in the probate court
17 here in South Carolina, which was known and made
18 known according to Mr. Griffis to Mr. Huther and
19 I believe Mr. Alexander as well. And
20 notwithstanding that fact, they went ahead and
21 proceeded to probate or administer the estate in
22 North Carolina.

23 So he engaged me to deal with that
24 matter, the administration of his wife's estate
25 in North Carolina.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q My question is from reviewing the
3 engagement letter between you and
4 Mr. D'Agostino, the words "personal
5 representative" don't even appear in the letter,
6 isn't that right?

7 MR. MULLINAX: Object to the form.

8 THE WITNESS: I don't think they
9 do, but I -- I don't recall they do,
10 but you have looked at it. You say
11 they don't, they don't.

12 But again he was not the personal
13 representative of the estate at that
14 time.

15 BY MR. TWOMBLEY:

16 Q And with respect to Defendant's Exhibit
17 2, the first check for legal fees for the
18 retainer that was provided to you, that was
19 written out of Mr. D'Agostino's personal
20 account, correct?

21 A Again it appears to be. I don't know
22 what arrangements he had with an estate in South
23 Carolina where he was the personal
24 representative. He may have been reimbursed, I
25 don't know.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q My only question is that this check was
3 written out of his personal account?

4 MR. MULLINAX: Object to the form.

5 THE WITNESS: I can't disagree
6 with that. It appears to be.

7 BY MR. TWOMBLEY:

8 Q In Defendant's Exhibit 4 in this E-mail
9 one of the things you are addressing is
10 Mr. D'Agostino's beneficial or financial
11 interest in his wife's estate, correct?

12 A The beneficial interest of all the
13 beneficiaries, Mr. Huther included, would have
14 been addressed from time to time with my
15 conversations with Mr. Griffis. I don't know
16 what he talked to Mr. D'Agostino about, but
17 certainly we talked about what interest all of
18 the beneficiaries, Mr. Huther, his sister, and
19 Mr. D'Agostino, would have had in the estate in
20 North Carolina.

21 Q But in this E-mail one of the things
22 you are discussing is -- is Mr. D'Agostino is
23 how much money? Will he get more money or less
24 money himself individually depending on whether
25 the estate is in North Carolina or South

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Carolina?

3 MR. MULLINAX: Object to the form.

4 THE WITNESS: Sure.

5 BY MR. TWOMBLEY:

6 Q Now back to Defendant's Exhibit 6, this
7 motion wasn't brought on behalf of Richard D
8 D'Agostino as personal representative of his
9 wife's estate, was it?

10 A No, but as you can see the caption is
11 the matter of the estate of Valerie D'Agostino.

12 Q I understand, but this motion to seek
13 sanctions and to try to have sanctions imposed
14 against Mr. Huther, that was done on behalf
15 of Richard D'Agostino individually, correct?

16 A Yes, I think it was. It appears to be,
17 yeah.

18 I don't see the rest of the motion, so
19 I don't know what the other statement of facts
20 are.

21 And the reason I say that, I can't
22 remember time-wise whether he had been appointed
23 at that time.

24 Q Let me ask you, the engagement letter
25 would you agree with me that it is not clear

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 whether or not Richard D'Agostino is
3 individually responsible for these fees, or in
4 the alternative whether or not an estate is
5 responsible for the fees?

6 MR. MULLINAX: Object to the form.

7 THE WITNESS: I mean I know
8 what -- it was clear to me, and I think
9 it was clear to him; and that is that
10 we were representing him in connection
11 with the administration of his wife's
12 estate in North Carolina I mean.

13 BY MR. TWOMBLEY:

14 Q But my question to you is the letter
15 does not specify whether or not Mr. D'Agostino
16 is individually responsible for the fees or if
17 the estate is responsible for the fees, isn't
18 that right?

19 MR. MULLINAX: Object to the form.

20 THE WITNESS: Yeah, I don't think
21 it is clear, yes.

22 (Whereupon, Defendant's Exhibit
23 Number 7 was marked for
24 identification.)

25 BY MR. TWOMBLEY:

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q Okay.

3 I will show you what we marked as
4 Defendant's Exhibit 7. I will give you a second.
5 to read that.

6 Is this an E-mail at the bottom that
7 Tony Griffis sent to you?

8 A Yes.

9 Q And Mr. Griffis was asking you to make
10 sure that Rich understood, that is
11 Mr. D'Agostino, that he could potentially be
12 responsible for Mr. Griffis' legal fees,
13 correct?

14 A No, I am not sure what this is saying
15 seeing it out of context without prior E-mails
16 or subsequent ones. I am not sure.

17 Q Well, it says: To make sure Rich
18 understands that his exposure for my fees could
19 be an additional \$8,000.

20 Isn't that what it says?

21 A That is exactly what it says.

22 Q And there is no reference to he
23 wouldn't have to worry about that because it is
24 services being performed for him as personal
25 representative for which he could be reimbursed?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 MR. MULLINAX: Object to the form.

3 THE WITNESS: I don't know what
4 kind of arrangement Griffis had with
5 Rich about their engagement or
6 anything. I do understand that he got
7 paid all his fees, but I don't know.

8 BY MR. TWOMBLEY:

9 Q But irrespective of whether or not he
10 ultimately got paid, I am just trying to discern
11 if there is anything in this E-mail that
12 insinuates or otherwise suggests that the Estate
13 of Valerie D'Agostino is somehow responsible for
14 Mr. Griffis' fees, or if in point of fact Mr.
15 Griffis is asking you to make sure that
16 Mr. D'Agostino knows that Mr. D'Agostino is
17 going to have to pay the fee?

18 MR. MULLINAX: Object to the form.

19 THE WITNESS: Well, again I am not
20 sure he is talking about his fees and
21 his arrangements and South Carolina
22 law. So I am just really not sure. I
23 am not sure other than just well, this
24 is what he says, and I could pass this
25 information onto Mr. D'Agostino.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 BY MR. TWOMBLEY:

3 Q Well, Mr. Griffis was asking you to
4 explain it to Mr. D'Agostino to make sure he
5 understood it, correct?

6 MR. MULLINAX: Object to the form.

7 THE WITNESS: He says make sure
8 that Rich understands his exposure for
9 my fees.

10 BY MR. TWOMBLEY:

11 Q And did you make sure he understood
12 that was his exposure?

13 A I don't know.

14 Q You don't know?

15 A No.

16 Q But you did respond to the E-mail that
17 you would?

18 A Yeah.

19 (Whereupon, Defendant's Exhibit
20 Number 8 was marked for
21 identification.)

22 BY MR. TWOMBLEY:

23 Q Let me show you what I marked as
24 Defendant's Exhibit 8.

25 This is an E-mail from you to Tony

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Griffis, correct?

3 A Uh-huh.

4 Q And it is regarding Mr. D'Agostino?

5 A Yes.

6 Q And in this E-mail you are outlining
7 what North Carolina law, intestacy law would
8 permit with respect to financial benefit to
9 Mr. D'Agostino?

10 A Uh-huh.

11 Q Right?

12 MR. MULLINAX: Object to the form.

13 MR. TWOMBLEY: Can you say yes or
14 no for the court reporter?

15 THE WITNESS: I can. Let me look
16 at it for a second.

17 Yes, it is. It says what I said
18 in the second paragraph about North
19 Carolina intestacy laws, yes.

20 BY MR. TWOMBLEY:

21 Q And you say from what I understand
22 "this" meaning the amount that Mr. D'Agostino
23 would receive under North Carolina is more
24 favorable to Rich than South Carolina?

25 A Uh-huh.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q Is that right?

3 A Correct.

4 Q And you meant he will get more money
5 under North Carolina law than South Carolina
6 law?

7 A Correct.

8 (Whereupon, Defendant's Exhibit
9 Number 9 was marked for
10 identification.)

11 BY MR. TWOMBLEY:

12 Q I will show you what we marked as
13 Number 9. This is an E-mail from Mr. Griffis to
14 you, is that correct?

15 A Yes.

16 Q Now, I understand you didn't draft this
17 E-mail, but I wondered if you could explain the
18 context. The last sentence of the first
19 paragraph says: "He -- I presume that is
20 Mr. D'Agostino -- does not want to lie about
21 anything regardless of the financial
22 consequences to him."

23 A I think what he was talking about there
24 was whether she was a resident of North
25 Carolina.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q And was there ever some suggestion that
3 he lie about it?

4 A No.

5 MR. MULLINAX: Object to the form.

6 THE WITNESS: No.

7 BY MR. TWOMBLEY:

8 Q Do you know if Mr. Griffis asked him to
9 lie about it?

10 A I have no idea.

11 (Whereupon, Defendant's Exhibit
12 Number 10 was marked for
13 identification.)

14 BY MR. TWOMBLEY:

15 Q I will show you what we marked as
16 Defendant's Exhibit 10. This is an E-mail from
17 you to Mr. Griffis, correct?

18 A Yes.

19 Q And you drafted this E-mail and sent it
20 to Mr. Griffis?

21 A I think so.

22 Q And in the last paragraph you say:
23 Also Rich had not seen the invoices -- invoice I
24 sent you last week. He questioned by charges --
25 I presume that was supposed to be he questioned

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 my charges?

3 A Right.

4 Q "I would appreciate your discussing
5 this with him."

6 Would it be fair to say that at least
7 as of July 21, 2010 that Mr. D'Agostino was
8 questioning some of the charges that you had
9 incurred in the work you did?

10 A It appears to be. I don't remember
11 what we talked about.

12 Q Do you remember that he had not seen
13 the invoices and that he was questioning some of
14 the charges?

15 A I sent the invoices per his request
16 to -- I mailed those all to Griffis.

17 Q Right.

18 A So I don't know what Griffis provided
19 to him.

20 Q And I understand and I think that is
21 fair, but what I am trying to establish or what
22 my question is, is that around July 21 of 2010
23 you had actually spoken with Mr. D'Agostino and
24 he informed you that he had not seen the invoice
25 that you had sent Mr. Griffis approximately a

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 week before?

3 MR. MULLINAX: Object to the form.

4 THE WITNESS: I assume that you
5 could infer that from this, yes, that I
6 had spoken with him.

7 BY MR. TWOMBLEY:

8 Q And he was questioning some of the
9 charges?

10 A Again I think you could infer that,
11 yes.

12 Q Well, that is what it says, isn't it?

13 MR. MULLINAX: Object to the form.

14 THE WITNESS: Yes, I am saying
15 yes. I don't remember the specifics of
16 what was discussed. I don't remember
17 whether he questioned a \$5 copy charge
18 or what he questioned. I just don't
19 remember.

20 BY MR. TWOMBLEY:

21 Q And I understand you may not remember
22 the details of his questions, but there was in
23 fact at least some questions about the work that
24 had been done as of July 21, 2010?

25 A Yes, apparently so.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 (Whereupon, Defendant's Exhibit
3 Number 11 was marked for
4 identification.)

5 BY MR. TWOMBLEY:

6 Q I will show you what I will mark as
7 Defendant's Exhibit 11.

8 Have you ever seen this E-mail before?

9 A Well, I think so, yes.

10 Q Is this an E-mail that you sent Steve
11 Glass, Mr. Alexander and Mr. Griffis?

12 MR. MULLINAX: Object to the form.

13 THE WITNESS: Yes.

14 MR. TWOMBLEY: Did I misstate the
15 names on there?

16 MR. MULLINAX: There is two
17 E-mails that I am looking at on here.
18 So I am not sure which E-mail you are
19 referring to.

20 BY MR. TWOMBLEY:

21 Q That is a fair point. I am referring
22 to the bottom one dated July 22, 2010 at 5:46
23 p.m.

24 A Uh-huh.

25 Q That is an E-mail from you to Mr. Glass

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 and Mr. Alexander and Mr. Griffis?

3 A Yes.

4 Q In the numbered paragraph number 4 you
5 wrote, "The only expense of Miss D'Agostino's
6 estate other than court filing fees is a
7 cremation funeral charge of approximately
8 \$2,500, is that correct?

9 A Yes.

10 (Whereupon, Defendant's Exhibit
11 Number 12 was marked for
12 identification.)

13 BY MR. TWOMBLEY:

14 Q Let me show you what we marked as
15 Defendant's Exhibit 12.

16 Now this is a check from David
17 Alexander to Nicholls and Crampton's trust
18 account?

19 A Yes.

20 Q And did you receive this check?

21 A Yes.

22 Q And did you deposit it?

23 A Yes.

24 Q And did you ultimately apply it towards
25 the balance that was owed?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 A Yes.

3 (Whereupon, Defendant's Exhibit
4 Number 13 was marked for
5 identification.)

6 BY MR. TWOMBLEY:

7 Q I will show you what we marked as
8 Number 13.

9 And this E-mail just confirms that you
10 had in fact received that check and that you had
11 deposited it into your administrative trust
12 account?

13 A Correct.

14 (Whereupon, Defendant's Exhibit
15 Number 14 was marked for
16 identification.)

17 BY MR. TWOMBLEY:

18 Q I will give you this what we are
19 marking as 14 and I want to ask you a couple of
20 questions before we talk specifically about it.

21 At some point the parties associated
22 with the North Carolina proceeding began to
23 discuss settlement, is that correct?

24 A Yes.

25 Q And the document that we marked as

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Number 14 is a draft of a Settlement Agreement
3 that was being circulated?

4 A Correct.

5 Q And whose handwriting is that on the
6 front?

7 A Mine.

8 Q And this was produced in the documents
9 you produced in this litigation.

10 Is this something you had in your file?

11 A Yes.

12 Q And did you review this when it came
13 in?

14 A I would have along with Griffis, I
15 assume Miss Pallesen, Mr. Huther. Everyone
16 would have reviewed it.

17 Q If you would turn to page 6 for me
18 there, there appears at the top of page 6 a new
19 term that has been put into the agreement by
20 someone and it says: Specifically excluded from
21 this Settlement Agreement are acts or omissions
22 if any by Richard D'Agostino which may have
23 occurred or might occur within the jurisdiction
24 of the Courts of South Carolina.

25 Do you see that?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 A Yes.

3 Q Did you see that term when you reviewed
4 this document in August of 2010?

5 A I am assuming I did, yes. I mean it is
6 here so --

7 Q The reason I ask is because at some
8 point there were some court filings that
9 suggested that this provision had been
10 surreptitiously inserted into the agreement
11 unbeknownst to the other parties by Mr. Huther,
12 and I just wanted to establish that in fact that
13 is not the case. It was placed in and everybody
14 had an opportunity to review it and consider it?

15 MR. MULLINAX: Object to the form.

16 THE WITNESS: I don't recall that
17 anybody ever questioned that Mr. Huther
18 had done anything like that.

19 BY MR. TWOMBLEY:

20 Q Well, and maybe you haven't and I
21 understand that and appreciate it, but what I do
22 want to establish is that from what it appears
23 on this August 13, 2010 review of the Settlement
24 Agreement that the term that I just read had
25 been placed into the agreement and was there for

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 everybody to see and comment on as far as you
3 know?

4 A As far as I know.

5 (Whereupon, Defendant's Exhibit
6 Number 15 was marked for
7 identification.)

8 BY MR. TWOMBLEY:

9 Q I will show you what we marked as
10 Defendant's Exhibit 15.

11 Is this another copy of the Settlement
12 Agreement, a later version?

13 A Yes.

14 Q And if you will turn to page -- the
15 third page that is numbered paragraph number 3.
16 The agreement provided that you would be paid
17 for your additional fees, but that that was not
18 to exceed \$2,000?

19 MR. MULLINAX: Object to the form.

20 THE WITNESS: That is correct.

21 BY MR. TWOMBLEY:

22 Q Did you understand that question? I
23 mean I think you did, but I just wanted to make
24 sure since there was an objection.

25 A Yeah.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q And this agreement was signed by
3 Richard D'Agostino?

4 A It appears to be, yes.

5 Q And it was also signed by Mr. Griffis
6 and Mr. Nicholls approving and consenting to it?

7 A That is my signature.

8 Q You did in fact consent to it as
9 attorney for Richard D'Agostino?

10 A Well, yeah. Uh-huh.

11 Q And did you believe at this point in
12 time that what this meant is that you would
13 receive an additional maximum of \$2,000 for the
14 work that you had done?

15 MR. MULLINAX: Object to the form.

16 THE WITNESS: From the Estate of
17 Valerie D'Agostino, yes.

18 BY MR. TWOMBLEY:

19 Q "The Estate of Valerie D'Agostino shall
20 pay the currently due attorneys' fees of Anthony
21 Griffis together with additional attorneys' fees
22 not to exceed \$2,000" to you, correct?

23 A Uh-huh, and any other fees would be
24 paid by the respective parties.

25 Q Got you.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 And this Settlement Agreement, I mean
3 is that -- I know you and I know what that
4 means, but that is a contract, right?

5 A Yes.

6 Q And binding on the parties?

7 A Yes.

8 Q And binding on the people who consent
9 to it?

10 A Yes.

11 Q And that agreement was entered into
12 between Mr. D'Agostino individually and
13 Mr. Huther and Mrs. Pallesen, correct?

14 A Yes, that is the way the negotiations
15 fell out.

16 (Whereupon, Defendant's Exhibit
17 Number 16 was marked for
18 identification.)

19 BY MR. TWOMBLEY:

20 Q I will next show you what will be
21 marked as Defendant's Exhibit 16.

22 And I want to focus on the E-mail dated
23 November 3, 2010 at 1:33 p.m.

24 Did you receive this E-mail from Mr.
25 Griffis?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 A I believe I did.

3 Q And prior to that, I apologize,
4 November 2 E-mail you were asking Mr. Griffis to
5 ask Mr. D'Agostino to pay your invoice?

6 A Invoice -- the total, yes, out of the
7 3,000 or whatever -- \$3800, whatever total, yes;
8 which would have included the 2000, yes.

9 Q And Mr. Griffis in the next E-mail is
10 telling you that he will discuss the bill with
11 Mr. D'Agostino and Mr. D'Agostino was being very
12 difficult even paying Mr. Griffis at that point
13 in time?

14 MR. MULLINAX: Object to the form.

15 THE WITNESS: That is what it
16 says, yes.

17 BY MR. TWOMBLEY:

18 Q So this was another instance from -- we
19 first looked at the July 2010 instance when
20 Mr. D'Agostino had questions about the bill, and
21 isn't it true this is another instance where he
22 is resisting paying for your fees?

23 MR. MULLINAX: Object to the form.

24 THE WITNESS: According to this,
25 but I don't have any direct knowledge

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 from D'Agostino about any of that.

3 Griffis talked about it. I didn't.

4 BY MR. TWOMBLEY:

5 Q But Griffis was his lawyer and his
6 agent, correct?

7 A Well, sure.

8 (Whereupon, Defendant's Exhibit

9 Number 17 was marked for

10 identification.)

11 BY MR. TWOMBLEY:

12 Q I will show you what was marked as
13 Defendant's Exhibit 17.

14 Now this is a statement of creditor's
15 claim that was filed by you, is that correct?

16 A Yes.

17 Q And in this claim -- is this your
18 signature at the bottom?

19 A Yes.

20 Q And the amount of the claim was
21 \$4,542.94?

22 A Correct.

23 Q And you stated in the claim that
24 Mr. D'Agostino agreed to be personally liable
25 for the fees in the event they weren't paid by

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 the estate, is that correct?

3 A Yes.

4 Q And at least as of today the estate has
5 not -- Miss Valerie D'Agostino's estate has
6 never agreed to pay your fees, is that correct?

7 A That is correct.

8 Q And in that event you believed
9 Mr. D'Agostino is personally responsible for
10 them?

11 MR. MULLINAX: Object to the form.

12 THE WITNESS: Well yeah, because
13 of the Family Settlement Agreement.

14 (Whereupon, Defendant's Exhibit
15 Number 18 was marked for
16 identification.)

17 BY MR. TWOMBLEY:

18 Q I will show you what I marked as
19 Defendant's Exhibit 18.

20 This is a letter from you to the
21 Beaufort County Probate Court?

22 A Yes.

23 Q And this was a correspondence to the
24 clerk making a claim against Richard
25 D'Agostino's estate, is that correct?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 A Correct.

3 Q And you transmitted this to the clerk
4 and had it filed?

5 A Yes.

6 (Whereupon, Defendant's Exhibit
7 Number 19 was marked for
8 identification.)

9 BY MR. TWOMBLEY:

10 Q I will show you what we marked as
11 Number 19.

12 Now this is an E-mail -- well, the one
13 at the lower half of the page is from you to Mr.
14 Griffis, correct?

15 A Uh-huh.

16 Q And it is dated January 30, 2012?

17 A Correct.

18 Q And can you just read for me the
19 sentence at the bottom that starts: We did not
20 file.

21 Can you read that into the record?

22 A "We did not file a claim in the wife's
23 estate as we were never advised to do so by her
24 estate and our claim has always been against him
25 personally."

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q And the "him" would Mr. D'Agostino?

3 A It would be, yes.

4 Q And was that true that your claim has
5 always been against him personally?

6 MR. MULLINAX: Object to the form.

7 THE WITNESS: Well, not really. I
8 mean our claim was for the work that we
9 did for him against the estate. I mean
10 for the estate. And Griffis said here
11 there is no need to file a claim in her
12 estate because it is an administration
13 fee.

14 BY MR. TWOMBLEY:

15 Q Isn't it true, though, that you stated
16 that you didn't file a claim against the wife's
17 estate because you were never advised to do so
18 and your client has always been against
19 Mr. D'Agostino personally?

20 MR. MULLINAX: Object to the form.

21 THE WITNESS: That is what it
22 says, yes.

23 BY MR. TWOMBLEY:

24 Q And that was true when you wrote it,
25 right?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 A Yeah.

3 (Whereupon, Defendant's Exhibit
4 Number 20 was marked for
5 identification.)

6 BY MR. TWOMBLEY:

7 Q Let me show you what was marked as
8 Defendant's Exhibit Number 20.

9 This is a claim against the estate,
10 another claim against the Estate of Richard
11 D'Agostino, right?

12 A Uh-huh.

13 Q And this is a claim for the legal fees?

14 A Right.

15 Q And is this your signature at the
16 bottom?

17 A Yes.

18 Q And you signed this?

19 A I did.

20 Q You listed yourself as the lawyer at
21 the bottom?

22 A Yeah.

23 Q And are you licensed in South Carolina?

24 A No.

25 Q Now, it says here in the section that

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 starts Rich D'Agostino that has been typed in,
3 that would have been typed in by you or your
4 staff?

5 A Yes.

6 Q And it says: Richard D'Agostino
7 personally and not in a representative capacity.

8 A Uh-huh.

9 Q Contracted on June 8, 2010 with your
10 law firm, correct?

11 A Right.

12 Q And he wasn't a representative at that
13 time?

14 A That is correct.

15 Q Now, it also says the charge for such
16 services was never disputed by Richard
17 D'Agostino, is that correct?

18 A Yes, that is what it says.

19 Q And at least there has been two
20 instances where we have established before that
21 he was in fact disputing or asking questions
22 about the fees?

23 MR. MULLINAX: Object to the form.

24 THE WITNESS: Supposedly.

25 One, where I apparently talked to

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 him about it. Again I don't remember
3 what was said.

4 BY MR. TWOMBLEY:

5 Q I understand.

6 A I mean what was the issue.

7 And the other one was the one that
8 Griffis relayed to me.

9 Q I understand.

10 A And I don't remember that either.

11 (Whereupon, Defendant's Exhibit
12 Number 21 was marked for
13 identification.)

14 BY MR. TWOMBLEY:

15 Q Let me show you what we have marked as
16 Defendant's Exhibit Number 21.

17 Did you receive this letter from
18 Beaufort County Probate Court?

19 A I believe I did.

20 Q It says second notice.

21 Do you recall there was one before
22 this?

23 A No.

24 Q Have any reason to believe that there
25 wasn't one before this?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 A No reason to believe that, no.

3 Q And this is a letter from the court
4 informing you that in order to properly commence
5 an action you needed to file a Summons and a
6 filing fee?

7 A Yes.

8 Q Did you ever respond to the court?
9 Respond to this letter?

10 A I think I did. I thought I filed
11 something, but I can't remember right offhand.
12 I don't have my file with me.

13 Did you look at the court record to
14 see?

15 Q I did.

16 A Did I?

17 Q I am not sure.

18 A Yeah, I can't remember right now. I
19 was thinking I filed something with the court.

20 (Whereupon, Defendant's Exhibit
21 Number 22 was marked for
22 identification.)

23 BY MR. TWOMBLEY:

24 Q I will show you what we marked as
25 Defendant's Exhibit 22.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 This is a letter from Mr. Mullinax to
3 you about representing your firm with respect to
4 this claim?

5 A Correct.

6 Q And did you receive this letter?

7 A Yes, I recall receiving it.

8 Q And the letter required you to transmit
9 a \$1500 retainer to Mr. Mullinax?

10 A Right.

11 Q And did you do that?

12 A Yes.

13 (Whereupon, Defendant's Exhibit
14 Number 23 was marked for
15 identification.)

16 BY MR. TWOMBLEY:

17 Q And was Mr. Mullinax serving as your
18 attorney from that point forward?

19 A Yes.

20 Q Let me show you what I marked as
21 Defendant's Exhibit 23. It is a note in there
22 that I may have scratched it out.

23 Now, this is a letter that Mr. Mullinax
24 has sent to the Beaufort County Probate Court,
25 is that correct?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 A It appears to be.

3 Q And would you go to page 2. There is a
4 copy of the claim that is now being filed
5 against Valerie D'Agostino's estate, correct?

6 A Yes.

7 Q Now, the basis of the claim now says
8 that it is legal services provided to Richard
9 D'Agostino as personal representative of the
10 estate of Valerie D'Agostino.

11 Well, isn't it true as you said
12 repeatedly today that those services were not
13 provided to Mr. D'Agostino as personal
14 representative of Valerie's estate?

15 MR. MULLINAX: Object to the form.

16 THE WITNESS: I haven't said that
17 repeatedly.

18 I have said that when I
19 represented him I was representing him
20 in connection with the administration
21 of his wife's estate in the state of
22 North Carolina.

23 BY MR. TWOMBLEY:

24 Q But he wasn't the personal represent
25 ive of that estate, was he?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 A He became personal representative, yes.

3 Q At that point in time he wasn't?

4 A At what point in time?

5 Q When you were incurring legal fees?

6 MR. MULLINAX: Object to the form.

7 THE WITNESS: Yes, he was

8 appointed while I still representing

9 him.

10 BY MR. TWOMBLEY:

11 Q When did he become appointed?

12 A I want to say it was like July or
13 August of 2010 before the Family Settlement
14 Agreement was entered into.

15 Q Let me ask you this --

16 A Mr. Huther went through this process.
17 I mean he signed a renunciation or a resignation
18 and as the administrator of his mother's estate
19 during all of this process.

20 Q Let me ask you this, are you aware of
21 any document in your file prior to this claim
22 dated September 26, 2012 where anyone says or it
23 is asserted or suggested that the legal fees
24 that were incurred by you were incurred, or the
25 legal services that were provided to

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Mr. D'Agostino were as personal representative
3 of the Estate of Valerie D'Agostino?

4 MR. MULLINAX: Object to the form.

5 THE WITNESS: Am I aware of? Say
6 that again now.

7 BY MR. TWOMBLEY:

8 Q Are you aware of any document or E-mail
9 or note or bill or claim form or anything else
10 that is dated prior to September 26 of 2012 that
11 says that the legal services you provided to
12 Richard D'Agostino were provided to him as
13 personal representative of the Estate of Valerie
14 D'Agostino?

15 A I am not aware of any that specifically
16 say that, no.

17 Q Now, let us talk about Exhibit 23 for a
18 moment.

19 The amount of the claim is now on this
20 document \$3,789.75 plus interest and attorneys'
21 fees.

22 My first question is where did that
23 figure come from?

24 A That figure would have been the --
25 probably the last invoice that I submitted. I

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 don't know.

3 The last invoice on the entire matter.

4 Q Let us back up to where some of those
5 invoices were.

6 A Right here, Exhibit 18, Defendant's
7 Exhibit 18.

8 Q I am looking at the statement of the
9 creditor's claim which was \$4,542.94?

10 A That would have included interest I am
11 sure.

12 Q So you are looking at the fourth page
13 of the invoice?

14 A Yes.

15 Q So the amount of the actual fees was
16 \$3,789.75. And I guess the page behind the last
17 page of Exhibit 18 has factored in the finance
18 charges?

19 A Uh-huh.

20 Q Which brings it to \$4542.94?

21 A Yes.

22 Q When did you start to accrue finance
23 charges on the outstanding balance?

24 A They start to accrue 30 days after they
25 are invoiced.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q So that is 30 days after you send the
3 invoice?

4 A If it is not paid, then interest starts
5 accruing.

6 Q Why does it start 30 days after you
7 invoice it? What is the logic behind that?

8 A To give the client a reasonable period
9 of time to pay the invoice.

10 Q So you provide it to him, give him a
11 chance to look at it, ask any questions about
12 it. If they have no questions, then they need
13 to pay it within 30 days, is that right?

14 A That is correct.

15 Q And let me ask you this, prior to
16 Mr. Mullinax sending in Exhibit 23 to the
17 Beaufort County Probate Court in which I was
18 cc'd on this transmittal letter, are you aware
19 of any instance in where you ever asked or
20 otherwise requested the Estate of Valerie
21 D'Agostino to be responsible for these fees?

22 A Well, the first time that there was an
23 agreement on that was when we signed the Family
24 Settlement Agreement back in September of 2010
25 as I recall.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q But that agreement didn't provide for
3 interest to be paid, did it? The Family
4 Settlement Agreement?

5 MR. MULLINAX: Object to the form.

6 THE WITNESS: No. Probably not,
7 because I think it was assumed that it
8 would be forthcoming right away.

9 BY MR. TWOMBLEY:

10 Q And that agreement also limited your
11 amount to \$2,000?

12 A From the Valerie D'Agostino's estate,
13 that is correct. That is what we worked out as
14 a settlement here. A global settlement of the
15 entire matter, that is right.

16 Q Why do you think you are entitled --
17 giving you I think some benefits of the doubt,
18 why do you think you are entitled to more than
19 the \$2,000 as set forth in the Family Settlement
20 Agreement?

21 A Well, I think I am entitled to it
22 because of the fact that it was agreed that we
23 would be paid by the estate and by
24 Mr. D'Agostino himself, and so I looked at it as
25 a whole amount and not a sub amount there.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 It turns out we didn't get anything. I
3 haven't gotten anything.

4 Q Well, that is not totally correct, is
5 it? I mean Mr. D'Agostino paid you almost
6 \$10,000 in legal fees.

7 A No, he didn't.

8 Q He didn't?

9 A It was paid -- it was paid by -- \$6800
10 by an attorney David Alexander in Durham, and I
11 think Mr. Huther himself paid \$1200 as I recall.
12 So D'Agostino didn't pay me that, no.

13 Q You also got a \$1500 retainer from him?

14 A Yes.

15 Q And it is your belief that other than
16 the \$1500 retainer that you received from
17 Mr. D'Agostino, he never sent you any other
18 checks for services rendered?

19 A Yes.

20 Q Back to my original question, why do
21 you think you are entitled to more than \$2,000
22 from the Estate of Valerie D'Agostino?

23 A Well again, it was part of the global
24 settlement as to how it would be paid. Nobody
25 paid me and I think they owe me that.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q You think they owe you the \$2,000 that
3 is called for in the Family Settlement
4 Agreement?

5 A The whole thing.

6 Q Why do you think they owe you the whole
7 thing?

8 A Because they didn't live up to their
9 contract, their bargain. As you said earlier
10 this is a contract and they didn't live up to
11 it. If they breached the contract, then I think
12 I am entitled to go after the entire thing that
13 remains unpaid.

14 Q Would you agree with me that really
15 what you have got is a claim for breaching that
16 Settlement Agreement?

17 MR. MULLINAX: Object to the form.

18 BY MR. TWOMBLEY:

19 Q If that is your contention?

20 A Well, that probably is -- that probably
21 would be the case, but I would ask the question
22 I understand that subsequent through you and
23 other people an agreement was entered into that
24 I had no knowledge of, about setting aside \$4900
25 to pay my fee. Nobody ever told me about that.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Nobody made mention of that to me, and I just
3 have learned about that in the last day. And
4 then I hear you tell the judge that you
5 negotiated that and that you made offers of that
6 and we refused it. That is totally not correct
7 to be very polite.

8 Q What do you base that on?

9 A What you just told the judge.

10 Q But what do you base your assertion on
11 that what I told the judge is not correct?

12 A Nobody has ever come to me and said
13 will you take \$4900 in settlement of your claim.
14 Not one time has anybody mentioned that to me.
15 I haven't had an opportunity.

16 Q Do you know if anyone has ever
17 mentioned that to Mr. Mullinax?

18 A I don't know that they have.

19 Q Would you agree with me that what I
20 told the judge could have been absolutely
21 correct?

22 MR. MULLINAX: Object to the form.

23 BY MR. TWOMBLEY:

24 Q That you through your attorney was
25 offered to pay the full amount of their claim --

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 of your claim?

3 A Would I agree what? That you told --

4 Q That that is possible?

5 A Oh, it is possible, yeah.

6 Are you suggesting that Mr. Mullinax
7 did not contact me about that?

8 Q I am not suggesting anything, sir.

9 (Whereupon, a short break was
10 taken.)

11 BY MR. TWOMBLEY:

12 Q When we left off we were talking about
13 a lot of things.

14 Mr. Nicholls, explain to me, if you
15 will, in your own words what your understanding
16 is of what happened to the claim that you all
17 filed against the Estate of Richard D'Agostino?
18 And when I say what happened, I mean --

19 A I think it was dismissed.

20 Q But prior to that do you have any
21 understanding of what any negotiations that may
22 have taken place with respect to that claim?

23 A State your question again. I am not
24 sure I understand that -- are you talking about
25 when we filed a claim with the court?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q Right, filed a claim with the court
3 with the Estate of Richard D'Agostino?

4 A Right.

5 Q And we went through those documents
6 this morning. Ultimately it was dismissed
7 because the court said, you know, a Summons had
8 not been filed along with it?

9 A Right.

10 Q But in between the time it got
11 dismissed and when it was filed, are you aware
12 of any point in time where the Estate of Richard
13 D'Agostino said okay, we will pay your claim?

14 A I don't recall anything right now, but
15 possibly you have a document that shows that
16 today. But I don't recall that there was --

17 Q I don't.

18 A Okay.

19 Q I don't have a document that suggests
20 you were aware of that.

21 A Yeah.

22 Q That is why I am just asking you what
23 your understanding is of what happened to that
24 claim?

25 A Well, it was my understanding that I

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 filed a claim, what I thought was a valid claim
3 in South Carolina. And there was another
4 lawyer, I don't remember who it was now, that as
5 I recall sent -- I guess filed an objection to
6 the court, and then I received I guess a notice
7 from the court that the claim had been
8 disallowed. But I don't remember anything
9 really taking place. Certainly no negotiations.

10 Q So to your knowledge there was never a
11 point in time when the Estate of Richard
12 D'Agostino offered to pay your claim in full?

13 A No.

14 (Whereupon, Defendant's Exhibit
15 Number 24 was marked for
16 identification.)

17 BY MR. TWOMBLEY:

18 Q Let me show you what we marked as
19 Defendant's Exhibit 24.

20 And I will represent to you that this
21 is a letter from the lawyer who was representing
22 the estate to our probate court here in
23 Beaufort, and I would direct your attention to
24 the second page, the third numbered paragraph
25 and would ask you that you read that provision

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 to yourself, please.

3 A Say which page?

4 Q The second page, paragraph number 3.

5 A Am I the petitioner?

6 Q Yes.

7 A Okay, I have read the third paragraph.

8 Q Have you ever seen this letter before
9 today?

10 A No, not to my knowledge I haven't.

11 Q Do you have any reason to disbelieve
12 that Sean Bolchoz as Counsel for the Estate of
13 Richard D'Agostino and myself agreed that your
14 claim would be paid in full?

15 MR. MULLINAX: Object to the form.

16 THE WITNESS: What I see in the
17 letter is all I know of.

18 BY MR. TWOMBLEY:

19 Q But I am asking you, do you have any
20 reason to disbelieve that?

21 A Assuming -- assuming all the matters,
22 the facts stated in here are correct, I would
23 have no reason to disbelieve it. I mean I don't
24 know the author of the letter and I don't know
25 any of these facts.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q Well, assume for a moment that the
3 author is Sean Bolchoz who is a licensed
4 practitioner here in South Carolina, and
5 assuming that this letter was written in good
6 faith to Judge Kenneth Fulp who is the probate
7 court judge here in Beaufort?

8 A Uh-huh.

9 Q Now, do you have any reason to
10 disbelieve the fact that there was an agreement
11 to pay your claim in full?

12 MR. MULLINAX: Object to the form.

13 THE WITNESS: No, I don't have any
14 reason to disbelieve that.

15 MR. MULLINAX: Ashley, was that
16 Number 24?

17 MR. TWOMBLEY: Yes, 24.

18 BY MR. TWOMBLEY:

19 Q Let us go back and look and see what
20 the face amount of the claim was that you had
21 filed against the Estate of Richard D'Agostino.

22 Do you remember?

23 A No, I don't.

24 Q Approximately \$4500?

25 A Oh, the one we were looking at earlier?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q Yes.

3 A Yes, I think that was --

4 Q 4,5 --

5 A Yes, with the interest added.

6 Q \$4,542.94, right?

7 A Yes.

8 Q Now, in addition to this it says plus
9 interest.

10 Do you know how much that interest
11 roughly was at that point in time?

12 A No.

13 Q Do you know if it was more or less than
14 \$500?

15 A I don't know whether it was or not.

16 Q If I told you that it was approximately
17 \$500, would that surprise you?

18 MR. MULLINAX: Object to the form.

19 THE WITNESS: No.

20 You are talking about from what
21 period to what period?

22 BY MR. TWOMBLEY:

23 Q Well, we had to guess, but what we
24 calculated was about \$500.

25 Does that sound like a reasonable guess

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 to you?

3 A For what period?

4 Q For any period of time?

5 MR. MULLINAX: Object to the form.

6 THE WITNESS: Well, I mean if you
7 go from the 3500 or 3800 to that 4500,
8 yeah, that would be in the range.
9 \$600.

10 BY MR. TWOMBLEY:

11 Q And I am saying even if you added
12 another 500 to this for any additional interest,
13 does that seem reasonable to you?

14 MR. MULLINAX: Object to form.

15 THE WITNESS: I don't understand
16 that question.

17 Why would I add \$500 past that
18 point?

19 BY MR. TWOMBLEY:

20 Q I don't know, but I am just saying
21 assuming you wanted to add more interest, would
22 \$500 -- I mean if someone got this claim -- let
23 me just rephrase the question -- and said okay,
24 we are going to pay you your \$4,542.94.

25 A Uh-huh.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q And assume for purposes of this
3 question you said, well, that is not the right
4 amount. You actually owe a little more interest
5 now.

6 A Okay.

7 Q Because this was the amount when it was
8 filed in January of 2012.

9 A Okay.

10 Q If I told you that rough math was done
11 and that this number was increased by 500 more
12 dollars, would that seem reasonable to you?

13 A Yes.

14 Q Now, at any point in time did you ever
15 authorize for the legal fees that you had
16 incurred in filing the claim and in prosecuting
17 the claim, did you ever authorize to try to
18 collect those fees?

19 MR. MULLINAX: Objection.

20 BY MR. TWOMBLEY:

21 Q Let me rephrase that.

22 Authorize to collect fees paid to
23 Mr. Mullinax on top of the amount of the claim?

24 MR. MULLINAX: I will object to
25 that, Ashley. I think that goes to my

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 conversations with my client.

3 THE WITNESS: I don't know what
4 your procedure is here.

5 Do I answer it or not?

6 MR. MULLINAX: I will ask you that
7 he not answer your question, Ashley.

8 We can certainly step out and talk
9 about it if you want to.

10 Q Well, I mean you decide what you want
11 to do.

12 A I understand that. But I am
13 represented by an attorney. I don't know
14 whether I can answer.

15 MR. MULLINAX: Ashley, I have
16 raised the objection. If you need to
17 step out and I and my client can talk
18 about it or you and I can talk about
19 it. Whichever way that you want to do
20 it.

21 MR. TWOMBLEY: I think you can
22 talk to your client about it. I mean I
23 want him to answer it unless he is
24 going to --

25 MR. MULLINAX: I advise him not to

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 answer the question because I have
3 objected.

4 MR. TWOMBLEY: I understand.

5 BY MR. TWOMBLEY:

6 Q And I am not your lawyer of course.
7 But I think now you have to make a decision of
8 whether you follow his advice or --

9 A Oh, I follow my attorney's advice.

10 Q Okay.

11 Have you ever sought to collect the
12 fees that you paid Mr. Mullinax?

13 A I just know what my claim is.

14 Q Which is the 4,500 and
15 some-odd-dollars?

16 A Correct.

17 Q I am asking you, have you at any point
18 in time prior to today have you ever attempted
19 to collect the fees that you paid Mr. Mullinax
20 in any of these proceedings?

21 THE WITNESS: Is that the
22 objection you have objected to or not?
23 I don't know.

24 MR. MULLINAX: No, I haven't
25 objected to that.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 BY MR. TWOMBLEY:

3 Q I am just asking for you --

4 A I understand what you are asking.

5 THE WITNESS: I am just trying to
6 see, am I allowed to answer this
7 question?

8 MR. MULLINAX: Ashley, are you
9 referring to a particular document?
10 You referred to a claim document just a
11 minute ago. Are you still referring to
12 the document for him to refer to? The
13 claim for the \$4500?

14 MR. TWOMBLEY: I am just asking
15 Mr. Nicholls if in any of these
16 proceeding is he aware of whether or
17 not he has ever attempted to collect
18 the fees that you pay Mr. Mullinax.

19 MR. MULLINAX: I will object to
20 the form on that. You can answer.

21 BY MR. TWOMBLEY:

22 Q You can answer.

23 A No, I am not aware of it, I asked for
24 more than the \$4,500.

25 (Whereupon, Defendant's Exhibit

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Number 25 was marked for

3 identification.)

4 BY MR. TWOMBLEY:

5 Q All right.

6 Before I ask you about Exhibit 25, have
7 you ever personally spoken to Sean Bolchoz at
8 all?

9 A I don't think so.

10 Q And that is the gentleman who wrote
11 this letter.

12 A Right.

13 Q You never talked to him?

14 A I don't -- I don't recall ever talking
15 with any attorney other than Mr. Mullinax. And
16 of course you today down here regarding this.
17 There was --

18 Q Where did you stay at? Did you spend
19 the night last night?

20 A Yes.

21 Q On Hilton Head or here in Beaufort?

22 A No, here.

23 Why do you ask that question?

24 Q I was just wondering how close you were
25 to Mr. Bolchoz' office?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 A I don't -- where is his office?

3 Q It is over in Hilton Head.

4 A Oh.

5 Q But anyway.

6 A I am pretty sure I have never spoken
7 with Mr. Bolchoz.

8 Q Tell me what your understanding is of
9 the global resolution that was reached with
10 respect to all of the D'Agostino litigation?

11 A In South Carolina?

12 Q Correct.

13 A I don't know. I didn't know anything
14 about it until yesterday, but --

15 Q And you mentioned earlier in your
16 testimony that, and correct me if I am wrong, I
17 am not trying to put words in your mouth, but I
18 think you said that it was your understanding
19 that there had been a global Settlement
20 Agreement had been reached and that you didn't
21 know anything about it, right?

22 A Yes, that is what I just said.

23 Q And you certainly were not aware that
24 as part of that agreement the parties agreed to
25 pay whatever the face amount of your claim was,

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 4,500 and some-odd-dollars?

3 A Correct.

4 Q Now, if we go back to Exhibit 24, Mr.
5 Bolchoz is writing the court. He says, quote,
6 "After our conference/status call with the court
7 last summer."

8 A Where are you reading?

9 Q In paragraph 3 that we pointed to
10 earlier, and I am about three-quarters of the
11 way down or halfway down, "After our
12 conference."

13 A I see it. I got you.

14 Q It says, "After our conference/status
15 call with the court last summer, I called
16 Mr. Mullinax with the news that although I did
17 not believe that his client's claim was valid,
18 Mr. Twombley and I agreed that his claim would
19 be paid in full."

20 Now what your testimony is today that
21 you were never made aware of that? Assuming
22 that it took place?

23 A Assuming it took place I was not aware
24 of it.

25 Q It says instead of the relief I assumed

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 would greet this announcement, that being the
3 announcement that your claim would be paid in
4 full, Counsel blithely informed me that the
5 amount of the petitioner's claim was now
6 significantly higher than what had appeared in
7 the creditor's claim filed a few months before.
8 That would be the claim for 4500 and
9 some-odd-dollars.

10 Now in between the time that claim was
11 filed and February 22, 2013, did the amount of
12 your creditor's claim grow significantly higher
13 than what it appeared in the creditor's claim
14 filed a few months before?

15 MR. MULLINAX: Object to the form.

16 THE WITNESS: No.

17 BY MR. TWOMBLEY:

18 Q Tell me what your understanding is of
19 what provisions were made in the global
20 Settlement Agreement for potentially paying your
21 claim?

22 A All I know is what I read here in
23 paragraph 3, and there had been a letter that
24 Mr. Mullinax wrote. And I don't have it, that
25 mentioned a global settlement but I don't

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 know --

3 (Whereupon, Defendant's Exhibit
4 Number 26 was marked for
5 identification.)

6 BY MR. TWOMBLEY:

7 Q Okay.

8 Well, I want to represent to you that
9 your claim, we tried to pay it. And then we
10 were sorely unable to do that.

11 And I want to show you what I marked as
12 Defendant's Exhibit Number 26 and I want to ask
13 you a question.

14 Now, if you would turn to numbered
15 paragraph 24 of the Memoranda in Support of
16 Petition For Allowance of Claim.

17 Do you see that?

18 A Uh-huh.

19 Q Now, this says the petitioner, which
20 would be you, withdraws its claim regarding
21 attorneys' fees related to this action.

22 Now the attorneys fees being referenced
23 there are the fees incurred by Mr. Mullinax.

24 If I understand your testimony --

25 A Fees incurred by Mr. Mullinax?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q Correct.

3 Well, let me ask you this, you haven't
4 withdrawn your claim for the fees that you
5 incurred, have you?

6 A No.

7 Q And now, paragraph 24 is withdrawing
8 the claim for Mr. Mullinax's legal fees.

9 My question to you is at any point in
10 time prior to this were you ever asserting that
11 you were entitled to Mr. Mullinax's fees?

12 A No.

13 (Whereupon, Defendant's Exhibit
14 Number 27 was marked for
15 identification.)

16 MR. TWOMBLEY: I only got one
17 copy, so I apologize.

18 BY MR. TWOMBLEY:

19 Q I would like to draw your attention --

20 MR. MULLINAX: Ashley, can I get a
21 chance to glance at it before you
22 start, since you only have one copy?

23 MR. TWOMBLEY: Certainly.

24 BY MR. TWOMBLEY:

25 Q I will draw your attention to the third

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 page at the bottom.

3 And ask you that you read that E-mail,
4 please.

5 A I have read it.

6 Q First let me ask you this, in North
7 Carolina if someone files a creditor's claim
8 against an estate, just a phone bill, a legal
9 bill, whatever, and they hire a lawyer to
10 prosecute that claim, so to speak, and it is
11 just a regular claim, you know, nothing, no
12 fraud or nothing of that nature, it is just a
13 typical creditor's claim, are you entitled to
14 recover or is it the claimant entitled to
15 recover the legal fees that they incur in filing
16 the claim and prosecuting the claim?

17 MR. MULLINAX: Object to the form.

18 THE WITNESS: Only if there is a
19 contract provision that provides for
20 that.

21 BY MR. TWOMBLEY:

22 Q And that would be the same in -- you
23 mean if the underlying agreement said if you
24 don't pay the bill and I have to institute a
25 legal proceeding against you, you will be

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 responsible for my attorneys' fees, correct?

3 A Correct.

4 Q Would another instance be if there was
5 a statute in North Carolina that governed the
6 particular matter at issue in the contract?

7 A Yes.

8 Q The same way in South Carolina, though,
9 the two ways are if there is a statute that says
10 you can get your fees you can get them, and then
11 if there is a provision in the contract?

12 MR. MULLINAX: I will object,
13 Ashley. He has already attested to the
14 fact he is not a South Carolina
15 practicing attorney. You are asking
16 him about South Carolina law. I will
17 object to that and ask him not to
18 answer the question.

19 MR. TWOMBLEY: Objection noted.

20 BY MR. TWOMBLEY:

21 Q You can refuse to answer if you like.

22 A I don't know South Carolina law.

23 Q I know, but in North Carolina that is
24 the way it is?

25 A Yes.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q And I am telling you that is the way it
3 is in South Carolina. I am just making sure we
4 are on the same page of the circumstances under
5 which you can actually legally get your fees,
6 and it sounds like they are the same in North
7 Carolina and South Carolina?

8 A Right.

9 MR. MULLINAX: Object to the form.

10 BY MR. TWOMBLEY:

11 Q Now, I don't know what the -- since you
12 didn't know you were going after the fees, I
13 don't think I have any other questions about
14 that document.

15 Actually I do have another question.

16 Was Mr. Mullinax still your attorney on
17 September 27, 2012?

18 A Yes.

19 Q And he was responsible for handling the
20 claims that you were prosecuting in order to get
21 the money that you believed you were entitled
22 to?

23 A Yes.

24 Q He was authorized to file things with
25 the court on your behalf?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 A Yes.

3 Q And that is in fact what you were
4 paying him to do, right?

5 A Correct.

6 Q After the September 27, 2012 E-mail I
7 would now like to turn to page 2 of this
8 document, which is an E-mail dated the same day
9 but later in the day and ask you that you read
10 that from me to Mr. Mullinax and ask that you
11 just read that to yourself.

12 A Where am I reading now?

13 Q It is on the second page. It is a one
14 sentence E-mail from me to Mr. Mullinax. It
15 says: Please provide us with the authority that
16 you have to support your position with respect
17 to attorneys' fees.

18 A Right.

19 Q And then if you will read the E-mail
20 dated on page 1, Friday, September 28, 2012. It
21 again says: Please provide us with the
22 authority you have to support your position that
23 your client is entitled to recover the
24 attorneys' fees he has incurred in pursuing his
25 creditor's claim.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 A Yes.

3 Q Do you see that?

4 A I see it.

5 Q And based on your knowledge at no point
6 in time were you ever seeking to recover the
7 attorneys' fees that Mr. Mullinax incurred in
8 filing the creditor's claim?

9 A Correct.

10 Q Consequently assuming that you were
11 trying to collect the fees that had been
12 incurred in pursuing the claim, the first claim
13 was dismissed, right? The claim that was filed
14 against the Estate of Richard D'Agostino?

15 A Yes, I believe that is correct, yeah.
16 That was one, yeah.

17 Q And I know that you weren't, but if you
18 were, you don't think you would be entitled to
19 collect fees on filing a claim that ultimately
20 got dismissed because it wasn't filed right?

21 MR. MULLINAX: Object to the form.

22 THE WITNESS: Correct.

23 (Whereupon, Defendant's Exhibit
24 Number 28 was marked for
25 identification.)

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 BY MR. TWOMBLEY:

3 Q Let me show you what was marked as
4 Defendant's Exhibit 28.

5 Have you ever seen this letter before?

6 A No, I don't recall it.

7 Q Mr. Nicholls, what is your fee
8 arrangement with Mr. Mullinax?

9 MR. MULLINAX: I am going to
10 object to that question. I know there
11 is things in the record that attest to
12 that, but that is attorney-client
13 privilege.

14 THE WITNESS: I thought we had a
15 copy of it as one of the exhibits, is
16 that not correct?

17 BY MR. TWOMBLEY:

18 Q Yes.

19 A It is what is in there.

20 Q Is it still the same?

21 A Yes.

22 Q And at any point in time has the
23 relationship changed?

24 A In what respect?

25 MR. MULLINAX: Object to the form.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 The same objection.

3 THE WITNESS: With respect that he
4 is not my attorney?

5 BY MR. TWOMBLEY:

6 Q No, with respect to the fee?

7 MR. MULLINAX: The same objection,
8 Ashley, attorney-client privilege and I
9 will ask him not to answer the question
10 if it is asking about privileged
11 information.

12 THE WITNESS: Well, I think that
13 would be attorney-client privilege, my
14 discussions with him.

15 BY MR. TWOMBLEY:

16 Q I am not asking for your discussions.
17 I am just asking for the basic fee arrangement.

18 MR. MULLINAX: Again objection. I
19 am asking you not to answer the
20 question --

21 THE WITNESS: The basic fee
22 arrangement is what is in one of these
23 exhibits.

24 BY MR. TWOMBLEY:

25 Q And my question is and I understand

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 that, but has at any point in time has that
3 changed?

4 A In what respect?

5 MR. MULLINAX: I object once again
6 and ask him not to answer the question.
7 You are asking a attorney-client
8 privileged question.

9 BY MR. TWOMBLEY:

10 Q Are you still paying him by the hour
11 for the work?

12 MR. MULLINAX: Again I object
13 under the same -- I appreciate you go
14 into a different line of questioning
15 because I am going to object every time
16 and ask him not to answer the questions
17 if he is asking questions about our
18 discussions.

19 MR. TWOMBLEY: Just so the record
20 is clear, I understand your objection
21 and I understand Mr. Nicholls has to
22 make a decision whether he is going to
23 follow your advice and answer the
24 question or not. But I am going to
25 continue to ask the questions so that

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 they are properly framed before the
3 court, so that when we have to go in
4 front of the court, the court has to
5 make a decision about which questions
6 he is going to have to answer and which
7 questions he won't have to answer.

8 And so therefore I am going to
9 proceed with each and every one of my
10 questions. You are free to object to
11 them, and you are obviously free to
12 decide whether or not you would like to
13 answer them or not. I am doing that to
14 protect the record. Not to waste
15 everybody's time. Just to make sure.

16 THE WITNESS: That is fine.

17 MR. TWOMBLEY: But for the record,
18 I will state that legal Pleadings have
19 been filed in which you tried to
20 collect your fees. There have been
21 Rule 11 communications sent regarding
22 the basis for that. The fee agreement
23 itself was produced in this litigation.
24 So even if there was a fee, I
25 respectfully believe that it has been

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 waived. And certainly with respect to
3 anything to do with the fee. And so --

4 But we can take that up with the
5 Court. I understand Jay's objection,
6 but the question still remains and you
7 can refuse to answer it or not.

8 THE WITNESS: Okay, I refuse.

9 BY MR. TWOMBLEY:

10 Q Mr. Nicholls, isn't it true that you
11 really had no interest in pursuing this claim
12 anymore?

13 A Where do you gather that?

14 Q Respectfully I don't think I have to
15 answer that.

16 A Well, you are making a assumption.

17 Where do you gather that assumption?

18 Q I am not making an assumption. I am
19 asking a question?

20 A You said is it not true.

21 Q Let me ask it another way.

22 A Yes, I am interested in pursuing this
23 claim.

24 Q Has there ever been any point in time
25 historically where you determined you had no

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 interest in pursuing the claim?

3 A Well, not really. No.

4 Q No, there has never been a point?

5 A No.

6 Q So there has never been a point of time
7 in the past where you were not interested in any
8 financial recovery with respect to this claim?

9 MR. MULLINAX: Object to the form.

10 THE WITNESS: I am interested in
11 financial recovery.

12 BY MR. TWOMBLEY:

13 Q But my question is, has there been any
14 point in time in the past where you weren't?

15 MR. MULLINAX: Object to the form.

16 THE WITNESS: I thought I just
17 answered that I am interested in a
18 financial recovery here.

19 BY MR. TWOMBLEY:

20 Q And it is your testimony that you have
21 always been interested in a financial recovery?

22 MR. MULLINAX: Object to the form.

23 THE WITNESS: If I wasn't, why
24 would I be here?

25 BY MR. TWOMBLEY:

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q I don't know, sir. I am just trying to
3 figure out what is going on.

4 A Well, I would like to know to know too,
5 and I am not sure why I am here except to
6 collect this fee.

7 Q Isn't it true that the amount that is
8 obtained in this matter, that you don't intend
9 to use it to satisfy any of your bills at your
10 firm?

11 A Satisfy any of my firm bills?

12 Q Correct.

13 A Well, Mr. Mullinax's bill would be a
14 firm bill.

15 So I would use that to satisfy his
16 bill.

17 Q I got you.

18 But I am talking about the fees that
19 you incurred and generated in the services that
20 you provided, which is what is at issue in the
21 underlying claim.

22 And isn't it true that at this point in
23 time if you obtain any recovery in this case you
24 don't intend to use it to satisfy any amount of
25 the underlying claim?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 MR. MULLINAX: Object to the form.

3 THE WITNESS: That I don't intend

4 to satisfy the underlying claim?

5 BY MR. TWOMBLEY:

6 Q Right.

7 A What do you mean by that?

8 Q The \$4500 claim that you filed with the
9 court.

10 A No, I -- the claim would come to me and
11 then I would use it to pay firm bills, including
12 Mr. Mullinax's bill. I mean I am not sure what
13 kind of question that is.

14 Q It is all right.

15 Has there ever been any point in time
16 where you told Mr. Mullinax that he can do
17 whatever he wants with the claim? That you
18 don't have any interest in pursuing it anymore?

19 MR. MULLINAX: Object to the form.

20 I am sorry if I interrupted you.

21 Do you want to finish the
22 question?

23 BY MR. TWOMBLEY:

24 Q Has there been any point in time where
25 you have instructed anyone, including

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Mr. Mullinax, that you didn't have any interest
3 in the claim and that Mr. Mullinax could do
4 whatever he wanted to with it?

5 MR. MULLINAX: I will object.

6 Attorney-client privilege, except for
7 what is in the record.

8 I instruct him not to answer the
9 question.

10 THE WITNESS: I am not answering
11 the question.

12 MR. TWOMBLEY: All right.

13 Can we take about a five-minute
14 break and I want to look through my
15 notes and see if we have anything else
16 and talk to Ron.

17 (Whereupon, a short break was
18 taken.)

19 BY MR. TWOMBLEY:

20 Q Mr. Nicholls, you realize you are still
21 under oath?

22 A Yes.

23 Q I understand you may not be able to
24 answer these questions, but I still want to ask
25 them just to make sure I have got a record of

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 it.

3 And the reason, you know, since you
4 didn't know you were going after Mr. Mullinax's
5 legal fees, I don't know how you are going to
6 answer these, but you will just have to do the
7 best you can.

8 What facts are you relying on to
9 support your previous demand for Mr. Mullinax's
10 legal fees in this case?

11 MR. MULLINAX: I am going to
12 object again under attorney-client
13 privilege to our discussions.

14 MR. TWOMBLEY: No, the facts
15 aren't privileged.

16 THE WITNESS: I didn't know I was
17 going after Mr. Mullinax's legal fees,
18 so I don't rely on anything.

19 BY MR. TWOMBLEY:

20 Q Okay.

21 What law, principle, theory, case are
22 you relying on for the recovery of
23 Mr. Mullinax's legal fees in this case or in any
24 other case?

25 A The answer is as I said just

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 previously.

3 Q You have none, because you didn't know
4 you were going after them?

5 A Yeah, yes.

6 Q As we sit here today what amount do you
7 believe that you are entitled to in full
8 satisfaction for your claim?

9 A I don't know what the -- you know, if
10 you added interest per our agreement to it, I
11 don't know what that would come to today. I
12 know that it was \$4500 in that last -- in the
13 filing we looked at previously in -- what was
14 that? September of something.

15 Q But do you know how to calculate that
16 interest?

17 A Sure. I mean if you just took --

18 Q And here is the thing, I am not trying
19 to get you to break out a sheet of paper and do
20 shorthand, but that is one of the things we have
21 asked for, because the numbers change from time
22 to time. You had a \$4500. Prior to that you
23 had the 3,800 and then it had gone up. So one
24 of the topics we noticed in the 30(b)(6)
25 Deposition today was for an explanation as to

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 what do you think you are entitled to and can
3 you just tell us how you calculated that number.

4 A Well, I haven't updated it since -- I
5 mean I don't have an update other than this
6 since November of 2011. I mean I don't have
7 anything in front of me to tell you what it
8 would be. These are calculated internally by a
9 computer, so I don't know what it would be.

10 Q So would it be fair is to say that as
11 we sit here today you don't have any other
12 number other than what is --

13 A Right here, \$4,542.94. That is not
14 only fair to say, it is accurate to say. I
15 don't have another number right now.

16 Q And do you think it is reasonable that
17 the estate of Valerie D'Agostino would have to
18 pay interest on the amount allegedly due prior
19 to September of 2012, which is the first time
20 the estate learned that you were seeking to
21 recover this money from that estate?

22 MR. MULLINAX: Object to the form.

23 THE WITNESS: Well, no, I don't
24 think that is reasonable to say. I
25 mean I sent invoices periodically down

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 to Griffis, who I assume in turn turned

3 them over to Mr. D'Agostino.

4 BY MR. TWOMBLEY:

5 Q No and I understand that.

6 But I am talking about Miss Valerie

7 D'Agostino's estate.

8 A I understand, but we go back to the

9 basic principle that the work I was doing would

10 have been for in effect that estate as it

11 pertained to North Carolina administration.

12 Q Well, that point is debatable, but the

13 point I am trying to understand you on is the

14 way I understood your fee agreement, which I

15 thought was reasonable, is that the person who

16 is responsible for paying is given an

17 opportunity to pay within 30 days. And then if

18 that person doesn't pay, then they are required

19 to pay interest on the amount.

20 And what I am saying is we didn't even

21 know that you wanted us to pay any of those fees

22 until September of 2012. That was the first

23 time we were even made aware that you wanted

24 this estate to pay for it.

25 A We being who?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q Well, the estate of Valerie D'Agostino.

3 A Okay.

4 Q So I am just wondering why you think it
5 is fair that -- we had no idea you wanted our
6 estate to pay it --

7 A Well, the administrator of the estate
8 knew that.

9 Q Not the administrator of Valerie
10 D'Agostino's estate.

11 A Certainly did.

12 MR. MULLINAX: I am going to
13 object to his question. I haven't
14 heard it.

15 THE WITNESS: He certainly did.
16 Mr. D'Agostino was the administrator in
17 North Carolina. He was pointed by the
18 court as administrator of the estate.
19 He knew that.

20 BY MR. TWOMBLEY:

21 Q Right. Well, we will just leave that
22 as it is. I can tell you that from Valerie
23 D'Agostino's estate there is not one -- if there
24 is, let me know -- but I am not aware of one
25 piece of paper that ever says or otherwise

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 suggests that her estate is responsible for your
3 fees until September of 2012.

4 Now yes, you have made Mr. D'Agostino
5 aware and you had made his estate aware that
6 they were responsible for the fees. In fact,
7 you filed a claim with their estate and asserted
8 in that claim that he was individually
9 responsible for those fees, but you didn't make
10 us aware that you thought we were responsible
11 for Valerie D'Agostino's estate --

12 MR. MULLINAX: I will object to
13 the question, Ashley. If there is a
14 question, Ashley.

15 MR. TWOMBLEY: That is fine,
16 object.

17 BY MR. TWOMBLEY:

18 Q Until September of 2012? In other
19 words, even under your theory that interest has
20 been running, we didn't even know you wanted the
21 money from us? Are we looking at that the wrong
22 way?

23 A You see, I don't know what you knew.
24 So that is it.

25 I am trying to think when Griffis filed

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 for both of us the claim with Valerie's estate,
3 and I don't remember the date of it. I don't
4 know whether it was 2011 or 2012. I don't know.
5 I think it was 2011. In fact, I am pretty sure
6 it was.

7 Q Let me ask you this, and I think it is
8 a fair point you may not know when we found out
9 what, but assume for me that the record will
10 establish that no one ever asked the Estate of
11 Valerie D'Agostino to be responsible for your
12 fees until September of 2012, would you agree
13 with me that it wouldn't be fair for that estate
14 to have to pay any interest other than the
15 interest that would start accruing at the time
16 the request was made?

17 MR. MULLINAX: Object to the form.

18 THE WITNESS: No, I don't
19 necessarily agree with that premise,
20 because I am assuming that as
21 administrator of the estate
22 Mr. D'Agostino knew about that. So he
23 was the administrator of her estate, so
24 he knew about it. I mean the fact that
25 a third party Mr. -- or anybody, you or

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 your client didn't know about it until
3 then, no. I think prior to that it was
4 known by the estate.

5 BY MR. TWOMBLEY:

6 Q But what was known is that you thought
7 Mr. D'Agostino's estate was responsible for the
8 payment. You hadn't even filed a claim against
9 our estate. So how would our estate be punished
10 by paying interest on an amount we didn't even
11 know was due?

12 MR. MULLINAX: Object to the form.

13 THE WITNESS: Well again, I think
14 a claim had been filed in 2011.

15 BY MR. TWOMBLEY:

16 Q Well, whatever the date is.

17 A Okay, well, that was a year before.

18 Q Whatever the date is.

19 A A year before.

20 Q My question was until we were made
21 aware of it?

22 MR. MULLINAX: I will object to
23 the form.

24 THE WITNESS: So what you are
25 saying is that if you incur, you

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 provide services and there is a legal
3 fee incurred and you send that to your
4 client and the client -- and you have
5 an interest charge on there, let's say,
6 and the client doesn't pay it, doesn't
7 pull that out of the box, the client
8 dies and two years later that is
9 discovered that it was not fair to
10 charge interest on that on your behalf.

11 Does that make sense?

12 BY MR. TWOMBLEY:

13 Q Well, I don't think those are the
14 facts.

15 A Well, they are very close, they are
16 parallel to this. I don't know what information
17 when Mr. D'Agostino died was turned over to his
18 estate or anybody else, because I wasn't a part
19 of that.

20 Q But I mean you know you had a claim
21 pending against his estate that said I think you
22 are individually responsible to pay these fees,
23 right?

24 A I had a claim against Mrs. D'Agostino's
25 estate too.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q Not at that point in time you did not?

3 A I think I did.

4 Q Let's assume you didn't.

5 Can we assume you didn't?

6 A Okay, we will assume we didn't.

7 Q Let's assume you didn't file a claim
8 against Mrs. D'Agostino's estate until September
9 of 2012, or whatever the date, let's assume
10 September 2011, it doesn't matter. Whenever
11 that date is, would you agree with me that it
12 isn't until that date that interest ought to
13 run?

14 MR. MULLINAX: Object to the form.

15 THE WITNESS: No, I wouldn't agree
16 with that.

17 BY MR. TWOMBLEY:

18 Q Okay, I understand.

19 With respect to Exhibit 26, and I think
20 I know the answer to this question. If you will
21 turn back to the Memo in Support of the Petition
22 For Fees, numbered paragraph 24.

23 MR. MULLINAX: Which one is that,
24 Ashley?

25 MR. TWOMBLEY: 26. It is numbered

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 paragraph 24.

3 THE WITNESS: 24?

4 BY MR. TWOMBLEY:

5 Q Yes.

6 A Okay.

7 Q It says: North Carolina courts have
8 awarded attorneys' fees with similar criteria.

9 That is not correct?

10 MR. MULLINAX: Object to the form.

11 BY MR. TWOMBLEY:

12 Q We established that earlier, right?

13 MR. MULLINAX: Object to the form.

14 THE WITNESS: I don't know what
15 courts may have awarded. I can't speak
16 for every court case in North Carolina.
17 I just can tell you that if there is a
18 contract provision for it or there is
19 statutory provision for attorneys'
20 fees, then the court would award it.

21 If they did it on some equitable
22 basis, I can't begin to tell you.

23 BY MR. TWOMBLEY:

24 Q You are certainly not aware of any --

25 A No.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 Q -- Decision where that has happened?

3 A No, no.

4 Q How long have you been practicing in
5 North Carolina?

6 A Since 1968.

7 Q That is before I was born.

8 A I know.

9 Q And you are not aware of any court
10 awarding a creditor their attorney's fees unless
11 there is a contract or a statute?

12 MR. MULLINAX: Object to the form.

13 You have asked that question.

14 THE WITNESS: I think I have
15 answered that. But no, I am not aware
16 unless a court did it on some equitable
17 basis.

18 BY MR. TWOMBLEY:

19 Q And you are not aware of any equitable
20 basis --

21 A No, I am not.

22 Q How did you decide that continuing to
23 pursue a claim for attorneys' fees quote,
24 "Outweighs the prospect for equity to be
25 achieved for the petitioner."?

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 MR. MULLINAX: I will object. I
3 think that goes to attorney-client
4 privileged discussion.

5 MR. TWOMBLEY: It is in the legal
6 pleading that go was filed with the
7 court.

8 MR. MULLINAX: You are asking him
9 how he got to that point in the
10 discussions that ensued between his
11 attorney to get to that point.

12 MR. TWOMBLEY: It is impossible
13 that it is attorney-client privilege
14 because he said that he didn't even
15 know about it.

16 THE WITNESS: I did not make that
17 assumption.

18 BY MR. TWOMBLEY:

19 Q You didn't make that determination?

20 A Or the determination.

21 Q Do you even know what that means,
22 "Outweighs the prospect for equity"?

23 A No.

24 Q Do you believe that the parties are
25 bound by the Family Settlement Agreement that

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 provided that you would receive \$2,000 from the
3 Estate of Valerie D'Agostino?

4 A Well, at the time I thought that, yes,
5 and that Rich would pay the additional amount
6 that I had claimed.

7 Subsequently the other agreement was
8 entered into, which again I was not a party to
9 that, so I don't know what was -- I guess that
10 agreement was undone, the original agreement,
11 the North Carolina agreement was undone, the
12 South Carolina agreement. Well, actually the
13 family settlement was a South Carolina agreement
14 too, because it was not filed yet. I think it
15 was filed in South Carolina and not North
16 Carolina.

17 Q When you said it was undone, who undid
18 it?

19 A I don't know. I was not a party to the
20 transaction other than if you look at the
21 signatories those would be the ones who undid
22 it.

23 Q Do you have any reason to believe that
24 at any point in time Mr. Huther or the Estate of
25 Valerie D'Agostino said anything different than

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 that they were willing to file the Family
3 Settlement Agreement 100 percent and pay you the
4 \$2,000 that you were allegedly owed? Do you
5 have any reason to believe that is not correct?

6 A Yeah, because they didn't pay it. I
7 thought it was going to be forthcoming and
8 nothing ever came.

9 Q Well, a good point.

10 But other than the fact that you didn't
11 actually receive the money, do you have any
12 reason to believe that they weren't willing to
13 follow it a hundred percent?

14 A Well, they didn't do it.

15 So yeah, I have reason to believe that
16 they weren't going to do it because they didn't
17 do it.

18 Had they done it, I would have said
19 yes, you are absolutely right. But we wouldn't
20 be here today.

21 Q Do you know why they didn't do it? Do
22 you know why they didn't pay you the money?

23 A I have no idea.

24 Q That is all I have got. I would love
25 to sit down with you sometime and explain. It

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 is like two ships passing in the night.

3 A Well, I think he and I probably feel
4 that way too.

5 Q That is all I have got.

6 (Whereupon, a short break was
7 taken.)

8 CROSS-EXAMINATION

9 BY MR. MULLINAX:

10 Q Mr. Nicholls, you know we are still on
11 the record.

12 Mr. Nicholls, you have given your
13 testimony today to Ashley Twombly, attorney for
14 the Defendant in this case and the nature of
15 that had to do with a claim by your law firm, is
16 that correct?

17 A Correct.

18 Q And that was for in general terms for
19 services done and where and by whom and for
20 what?

21 A Done where? Done at Raleigh, North
22 Carolina. Primarily by me. And for whom?
23 Richard D'Agostino, administrator of the Estate
24 of Valerie D'Agostino.

25 Q And your testimony earlier was that

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Richard D'Agostino came to you for these legal
3 services.

4 Can you tell me what prompted him to
5 come to you for legal services?

6 A Well, he was referred by Mr. Griffis,
7 and it was in connection with his wife's estate
8 that had been filed by Mr. Huther in Wake
9 County, North Carolina.

10 Q And when Mr. D'Agostino came to you,
11 under what if any legal authority did he have to
12 take action in that case?

13 A Well, North Carolina law provides that
14 if someone dies intestate there is a pecking
15 order of administrators that the court is to
16 appoint.

17 The first one being a husband or
18 spouse, and then next in line would be children,
19 and then on down the lineal line.

20 Q And so Mr. D'Agostino was a surviving
21 spouse of Mrs. D'Agostino and had priority in
22 that case?

23 A That is correct.

24 Q And you mentioned just now that another
25 case had been filed by Mr. Huther.

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Can you describe how you came to
3 acknowledge that and why that might have been
4 done, if you know?

5 A Well, certainly I think that probably
6 Mr. D'Agostino made me aware of the fact that
7 one had been filed when I first met with him or
8 contacted him, and then of course I would have
9 had a paralegal go downtown and pull the
10 records.

11 Q And do you have any knowledge of any
12 legal reason why Mr. Huther would have had
13 priority to file that action himself without
14 Mr. D'Agostino participating, whom you testified
15 had first priority?

16 A No, I don't know what transpired prior
17 to my --

18 Q And have you represented, besides
19 Mr. D'Agostino, have you represented other
20 personal representatives? And by the way, is
21 that the term they use in North Carolina,
22 personal representative? Or they use executor?

23 A They use all three terms: Executor,
24 administrator.

25 Executor in the case of a testator.

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Administrator in intestacy.

3 And then personal administrator or
4 representative is used in either situation.

5 Q Well, so when Mr. D'Agostino came to
6 you, you had mentioned that he had priority to
7 be appointed as administrator in
8 Mrs. D'Agostino's late wife's estate, is that
9 right?

10 A Yes.

11 Q And is there any law in North Carolina
12 besides the priority law that gives the person
13 in priority the legal authority to take such
14 actions to become appointed?

15 A Say that again.

16 Q Well, what gave Mr. D'Agostino the
17 authority to take action in the court? He
18 wasn't the personal representative yet or
19 executor or administrator, right?

20 A That is correct.

21 Q And what is the normal course of how
22 that happens? How someone is appointed?

23 A How someone is appointed? Well, the
24 person files with the court what is called an
25 Application For Letters and in that he lists --

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 gives just some very general financial
3 information and also lists the names and
4 addresses of the heirs of the estate in the case
5 of an intestacy.

6 Q And did you say that you have
7 represented other administrators in other cases?

8 A Yes.

9 Q And when they filed that action do you
10 consider it something that they are doing
11 personally for their own benefit or otherwise?

12 A Well, it certainly would be in a
13 representative capacity where they are
14 representing the estate. I mean I guess if they
15 are an heir of the estate they are doing that
16 for themselves also, but the estate has to be
17 administered.

18 Q And once that action is filed is the
19 action they take to file that, is that somehow
20 retroactively sanctioned by the court that they
21 have done that as an administrative action on
22 behalf of the estate? If they gather the
23 information for the application and they file
24 the application and they hire an attorney to
25 help them with filing that application, is that

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 an act as a precursor to the administrator that
3 the court sanctions retroactively as a process,
4 or are they personally liable for the attorney's
5 fees they incur to do that?

6 A No, they would not be necessarily
7 personally liable for the attorneys' fees.

8 Q But if they agreed to do so would they
9 be liable for the attorneys' fees individually?

10 A As a matter of law?

11 Q Well, not as a matter of law, but as a
12 matter of practice? Do they have the ability to
13 do that if they wish?

14 A Well, I would say yes that legal fees
15 incurred on behalf of the estate would be paid
16 out of the estate, if that is your question.
17 But even though those legal fees may have been
18 incurred preliminarily to the application itself
19 being filed, I have never had any problem with
20 the court questioning that.

21 Q All right, thank you, Mr. Nicholls.

22 I am going to hand you what has been
23 marked as Defendant's Exhibit 1 and can you
24 identify that for us one more time.

25 A That is the June 8, 2010 engagement

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 letter.

3 Q And you have recited before, but I
4 believe it is in paragraph 2 that -- that
5 engagement letter is between what two parties?

6 A Well, I think it is in paragraph 1. It
7 is addressed to Mr. D'Agostino, and it says: We
8 will provide legal services in connection with
9 the administration of your wife's estate.

10 Q And did your firm provide those legal
11 services?

12 A Yes.

13 Q And did you have any ancillary estate
14 engagement letter or any engagement letter with
15 Mr. D'Agostino besides that one we have here
16 today?

17 A No.

18 Q Did you represent him in any other
19 legal matters as a personal injury case?

20 A No.

21 Q Or anything else?

22 A No.

23 Q Has your firm ever represented him in
24 any other fashion other than with regard to the
25 estate administration of his late wife?

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 A No.

3 Q During the course of the estate
4 administration did you represent him in any
5 other fashion?

6 A No.

7 Q Mr. Nicholls, could you remind us when
8 he hired you the nature of the actions you were
9 to take very briefly? What your objectives were
10 that he outlined for you? What he wanted you to
11 do or your firm to do for him in regard to these
12 matters?

13 A Well, this started because Miss
14 D'Agostino had died in Wake County. It was
15 Mr. D'Agostino's position and I think rightfully
16 so that she was actually a resident of South
17 Carolina, and following her death there was an
18 application filed by Mr. Huther requesting that
19 the court name him as administrator of the
20 estate. Mr. D'Agostino took exception to that,
21 both the fact that she was a resident, but
22 primarily took exception to the fact that
23 Mr. Huther would be administrator of the estate,
24 and also the tangential issue of Mrs. Pallesen
25 who was Mrs. D'Agostino's daughter being named

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 as guardian ad litem and having a substantial
3 amount of money in her possession that should be
4 turned over to the estate.

5 So getting the guardian ad litem, or
6 the general guardianship rather, getting the
7 general guardianship closed and having him named
8 as administrator of the estate. Those were his
9 objectives.

10 Q And you alluded to a document that was
11 filed in court by Mr. Huther that was requesting
12 Letters to appoint him as the fiduciary for the
13 estate of Mrs. D'Agostino.

14 Can you tell us from your memory what
15 would have been included in that petition or
16 application to the court to get him appointed,
17 if you recall?

18 A Well, it would have listed Mr. Huther's
19 name and address and stating the date of death
20 of Miss D'Agostino. It would have listed the
21 beneficiaries of the estate, which in this case
22 it was Mr. Huther listed himself and his sister.

23 Q Have you seen that document?

24 A Yes.

25 Q And does that document include

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Mr. Huther and his sister as beneficiaries on
3 it?

4 A Yes.

5 Q And does it include anyone else?

6 A No.

7 Q Is there anybody else that you know of
8 that is a beneficiary of this estate of
9 Mrs. D'Agostino?

10 A Certainly.

11 Q Who is that?

12 A Mr. D'Agostino the husband.

13 Q Do you know of any reason why
14 Mr. Huther would not have known that
15 Mr. D'Agostino was a beneficiary under his
16 mother's estate?

17 A No, I mean I am assuming he was aware.
18 I think the Death Certificate lists the fact
19 which is filed with the court, lists the fact
20 that she was married.

21 Q Would the Death Certificate have gone
22 with the application that Mr. Huther filed with
23 the court?

24 A It would have been presented to the
25 court. Whether it went simultaneously or not, I

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 don't know. But I assume it did, that would be
3 the normal course.

4 Q Back to Defendant's Exhibit 1, did you
5 go over this engagement letter, or did
6 Mr. D'Agostino go over that engagement letter
7 separately from you and discuss it with you at
8 all?

9 A He went over it. I don't know what
10 involvement -- I did not discuss it separately
11 with him. He -- as you can see I sent this at
12 the request to Mr. Griffis, so I am assuming
13 that Mr. Griffis and he reviewed it.

14 Q Mr. Nicholls, I am going to hand you
15 Defendant's Exhibit Number 2 and if you will
16 recall for the record what that document is?

17 A It is a personal check dated June 10,
18 2010 payable to my firm for \$1500 on an account
19 entitled "Richard J D'Agostino" and his address.

20 Q And what is the date on that check?

21 A June 10, 2010.

22 Q And at that time was he serving by
23 appointment of the court as administrator in the
24 Estate of Mrs. D'Agostino?

25 A No.

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Q And could you tell us generally what
3 the practice is in North Carolina with regard to
4 reimbursements of advanced funds by
5 administrators on estate matters, if any?

6 A The practice in North Carolina is that
7 if funds are advanced, whether by an heir or an
8 administrator of an estate or whatever, it might
9 be that they are entitled to reimbursement.

10 Q Even for expenses prior to being
11 appointed?

12 A Yes.

13 Q Do you know if Mr. D'Agostino's estate
14 was reimbursed for those funds?

15 A I have no idea.

16 Q I am going to hand you Defendant's
17 Exhibit Number 3. I am going to point you to
18 the section that refers to a misrepresentation.
19 Can you look at that paragraph and describe what
20 is meant by that text, and can you tell us who
21 the E-mail is from and to?

22 A Well, there are two E-mails on here and
23 I don't know which one you are referring to.

24 Q Okay.

25 I am going do refer to the one dated

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Monday, June 21 at 4:39 in the afternoon and the
3 second paragraph starting Mr. Belcher.

4 Could you look over that and tell us
5 what that misrepresentation cited in that
6 paragraph is referring to?

7 A Oh, well, that would be the fact that
8 misrepresentation occurred when the original
9 application was filed by Mr. Huther by virtue of
10 the fact that Mr. D'Agostino was not noted. It
11 was not noted to the court that he was the
12 surviving spouse and therefore entitled to serve
13 as the administrator of the Estate of his wife.

14 And that there were only two
15 beneficiaries of the estate, which is not
16 correct.

17 And the fact that she was a resident of
18 North Carolina.

19 Q Was there anything on the application
20 that referred to any pending action in any other
21 court?

22 A As I recall the application has a
23 provision in there that there is no pending
24 administration in any other jurisdiction.

25 Q At the time that that document was

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 filed by Mr. Huther according to your review of
3 that record was there a pending action in any
4 other court?

5 A Yes. As I understand it through what
6 Mr. Griffis provided to me Mr. D'Agostino had
7 already qualified in South Carolina as
8 administrator of his wife's estate.

9 Q And was Mr. Huther aware of that
10 pending action in another court in another
11 state?

12 MR. TWOMBLEY: Object to the form.

13 BY MR. MULLINAX:

14 Q Do you know if notice was given? Are
15 you aware of any notice that was given to
16 Mr. Huther with regard to that pending action in
17 South Carolina?

18 A I don't know what the standard or
19 procedure in South Carolina is for giving
20 notices to heirs. In North Carolina they would
21 have notices if they are listed on the
22 application. They would know something had been
23 filed. But my impression Mr. Griffis had --
24 that somebody had communication, because I know
25 there was a letter subsequently written by Mr.

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Griffis to Mr. Huther. I saw a copy of that
3 advising him of the filing in North Carolina.

4 Q Do you know approximately after the
5 filing of the South Carolina action and the
6 filing of the North Carolina action what date
7 that letter was that you are referring to? Do
8 you have knowledge?

9 A No, I don't.

10 Q Now, and I may have asked this and I
11 apologize, but with regard to the reference on
12 that application of a pending action filed by
13 Mr. Huther in North Carolina after the South
14 Carolina action was filed, was there reference
15 to the pending action in South Carolina?

16 A On the North Carolina application?

17 Q Yes.

18 A No, there doesn't. There appears there
19 was some modification made to the application.
20 Maybe at one time it had been checked and it had
21 been whited out maybe, but I don't know.

22 Q Mr. Nicholls, your earlier testimony
23 referred to providing Mr. D'Agostino information
24 about the benefits from the Estate of
25 Mrs. D'Agostino that he would be due.

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Did you also provide him information
3 about benefits that he would -- or excuse me,
4 that other beneficiaries would receive under
5 Mrs. D'Agostino's estate?

6 A Yes.

7 Q And did you consider the notification
8 of the fiduciary in that case, Mr. D'Agostino,
9 that that was proper representation of him to
10 advise him of how the beneficiaries would
11 receive assets from the estate during the estate
12 administration?

13 A Did I consider it to be proper
14 representation?

15 Q Yes.

16 A Yes, I mean it is quite common that
17 heirs, whether it is intestate or testate that
18 they want to know what they are inheriting.

19 Q So you told Richard D'Agostino what
20 Mr. Huther and his siblings would receive under
21 the intestate heirship of North Carolina, as
22 well as Mr. D'Agostino, is that right?

23 A Certainly.

24 Q All three of them, and you considered
25 all of that to be part of the estate

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 administration?

3 A Yes, of course.

4 Q Did you consider any of that to be
5 personal representation of Mr. D'Agostino when
6 you provided that information?

7 A No, I mean that is public record as to
8 the size of the estate and --

9 Q Is there anything referred to as family
10 allowance or exemptions or homestead exemptions
11 in North Carolina?

12 A Yes, what we have is a widow's
13 allowance which basically can be awarded to a
14 surviving spouse. That is essentially -- not
15 essentially. It is -- comes off the top of the
16 probate estate, and it is -- I believe Mr.
17 Twombly is going to sleep here.

18 MR. TWOMBLY: I am listening to
19 every word. The widow's allowance is
20 part of the probate estate. I am
21 listening to every sentence.

22 THE WITNESS: There is a widow's
23 allowance and it is 10,000. It was
24 \$10,000 at that time so --

25 BY MR. MULLINAX:

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Q And is there any corollary to that for
3 children?

4 A Only if there are minor children or
5 disabled children involved.

6 Q If there were minor children or
7 disabled children would you have advised
8 Mr. D'Agostino of that allowance?

9 A Yes. If it was a North Carolina estate
10 you were ethically required to do that sort of
11 thing, because it comes off the top and it is
12 not subject to the claims of creditors.

13 Q Mr. Nicholls, I am going to have you
14 look at Defendant's Exhibit 6, and I know you
15 testified previously. I just want to point to
16 that issue, back up.

17 Can you describe briefly what that
18 document is you are looking at?

19 A Yes, it is a motion that was filed in
20 Wake, before the clerk in Wake County, North
21 Carolina for sanctions in connection with the
22 original filing of the application of
23 administration in this case.

24 Q When you say the original, just clarify
25 for the record, when you say original

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 application which application are you referring
3 to?

4 A The one by Mr. Huther.

5 Q And what was the nature of the reason
6 for this motion? Can you tell us what the basis
7 of this was?

8 A Yeah, to recover the fees that had been
9 incurred in connection with straightening out
10 this matter.

11 Q When you say the fees that had been
12 incurred?

13 A Legal fees that had been incurred.

14 Q So can you tell us if you recall what
15 the result of that filing ended up being?

16 A I can. The result of this filing was a
17 lawyer in Raleigh named Steve Glass got involved
18 as Mr. Huther's attorney, and Mr. Glass then
19 began discussions with Mr. Huther's former
20 attorney, which was Mr. Alexander and through
21 those negotiations Mr. Alexander agreed that he
22 would pay \$6800 of the fees, and Mr. Huther
23 agreed to pay \$1200. So that is how we came to
24 the \$8,000 in total fees.

25 And then as a result of all of that the

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 family settlement was agreed to in September of
3 2010, and those terms, those payments were
4 recited in that Family Settlement Agreement.

5 Q And that Family Settlement Agreement,
6 was that an adverse order by the court to either
7 party, or was it simply a Settlement Agreement
8 between the parties?

9 A It was a Settlement Agreement between
10 the parties.

11 Q If the parties had not agreed to that
12 settlement would the court have the option to
13 either award attorneys' fees in that action or
14 not award attorneys fees in that action?

15 A Yes.

16 Q Mr. Nicholls, I am going to show you
17 Defendant's Exhibit 7. Is that right, Number 7?

18 A 7.

19 Q And can you tell us, I think there is
20 only one E-mail there, but can you tell us who
21 is that from and to?

22 A There are actually two E-mails, one
23 from Tony Griffis to me dated July 26, where he
24 is talking about how much he is owed on this
25 North Carolina matter and also in South

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Carolina.

3 Q Is he referring in that E-mail to fees
4 that are owed by what estate to whom?

5 A Well, he talks about an estimate that
6 his fees could be assessed against the children,
7 which would be Mr. Huther and his sister; and
8 then the balance would be a 50-50 charge in
9 South Carolina.

10 Q 50-50 charge between whom?

11 A Right offhand I am not sure. Again
12 without -- as I indicated earlier without
13 looking at prior E-mails I am not sure exactly
14 what we are talking about here as to who was
15 going to pay anything. It was just basically
16 Griffis' contention of how much he was owed and
17 then the breakdown of how it could be charged.

18 Q And that was regarding -- exclusively
19 regarding Mr. Griffis' fees, is that right?

20 A Yes.

21 Q And at that point who were you
22 representing in what action at the time you
23 received that E-mail?

24 A I was representing the D'Agostino
25 estate in North Carolina. I didn't have

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 anything to do in South Carolina.

3 Q Which D'Agostino estate?

4 A Valerie -- Rich D'Agostino was alive.

5 Q Right, but you are referring to
6 Mrs. D'Agostino's estate in North Carolina that
7 was ongoing?

8 A Yes.

9 Q And at that point you were representing
10 Mr. D'Agostino on Mrs. D'Agostino's estate, is
11 that right?

12 A Yes.

13 Q Would it have been your -- let me
14 rephrase the question. Scratch that.

15 Would it have been appropriate
16 information for you to know if Mrs. D'Agostino's
17 estate was owing for any of those fees by Mr.
18 Griffis?

19 A Repeat that.

20 Q Mr. Griffis was providing this
21 information to you for what purpose, do you
22 know?

23 A No, I don't know. And that is why I am
24 not clear on this. I don't know why he -- he
25 had a separate arrangement I am assuming with

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Mr. D'Agostino, and I was not involved in that
3 arrangement at all.

4 Q And let me take that.

5 Again, I don't think you need to look
6 at this, but the same exhibit, did any of that
7 have to do with your fees at all?

8 A No.

9 Q I want to refer you to Defendant's
10 Exhibit 8. I will give you a chance to glance
11 at that.

12 A Okay.

13 Q Can you just broadly tell us what that
14 is in regard to? What that E- -- mail who it is
15 from and to and what the issues are in general
16 terms?

17 A Well, there was always a question here
18 on Griffis' part about these two estate
19 administrations running at the same time. That
20 always bothered me that we had one in South
21 Carolina and we had one in North Carolina. And
22 the question was, was okay, we have to get it
23 dismissed in North Carolina if it is going to be
24 a South Carolina estate. So that is ultimately
25 what happened. And so I think it is -- I don't

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 know what -- I guess Griffis -- we were having
3 discussions, and a lot of these things were by
4 phone and then it would be memorialized in these
5 E-mails. But I guess he and I had a discussion
6 about going ahead and closing the South Carolina
7 estate, because we were at that time, we were
8 probably getting ready to go before the court on
9 the motion sanctions. I am not sure when that
10 was filed, but that would be my -- that would be
11 my recollection or a little bit before that.

12 And then we talk about, I am sure he
13 asked me what North Carolina would provide. We
14 were always kind of dealing with an estate, a
15 probate estate of about \$64,000. In the
16 guardianship proceeding there was 60
17 some-thousand-dollars as reported to us, and so
18 that is what was shown on the application. And
19 I think you Ron, had that on your application to
20 begin with too. So we used that same amount as
21 to what was being held in guardianship. So I am
22 sure Tony said what would be the disposition of
23 the probate estate in North Carolina. And so I
24 provided that.

25 Q And is that a representation of what

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 the analysis was with the breakdown of the
3 disposition of the estate under either scenario
4 or one or the other scenarios?

5 A Yeah.

6 Q In South Carolina or North Carolina?

7 A Yeah. I don't know what South Carolina
8 would have provided here.

9 Q But that E-mail is from you to?

10 A Griffis.

11 Q Griffis. Okay. All right.

12 Again, I think you testified earlier
13 that you felt like it was your obligation to
14 advise and participate in advising regarding the
15 disposition in North Carolina, regardless of who
16 the beneficiaries of the estate were, is that
17 right?

18 A Yes.

19 Q I am going to refer you to Defendant's
20 Exhibit 9, and can you tell me who that is from
21 and to? I believe that is an E-mail, and I
22 believe there is only one on there.

23 A From Griffis to me. Apparently he has
24 spoken with Rich about North Carolina
25 jurisdiction and South Carolina.

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Q Is there anything in that E-mail that
3 refers to the filing by Mr. Huther and the
4 nature of that filing on the application in
5 North Carolina?

6 A Well, apparently he had talked to --

7 Q Who is he?

8 A Griffis and Rich had spoken about this
9 issue of dual jurisdiction, so to speak, and the
10 question came up as to where whether
11 Mrs. D'Agostino was a North Carolina resident or
12 not or South Carolina. And that he goes into
13 the background of Mrs. D'Agostino being moved to
14 North Carolina from her nursing home, and what
15 he was saying was, he being Mr. D'Agostino, does
16 not want to say anything that would be different
17 than the facts, regardless of the financial
18 consequences to him. In other words he was
19 saying -- and that was kind of the position all
20 along -- that he wanted to be a South Carolina
21 administration and not North Carolina. Even
22 though by North Carolina law he would be
23 entitled apparently to a greater distribution
24 from the estate.

25 Q And did you assist him in making that

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 occur? To move it from North Carolina to South
3 Carolina?

4 A We got -- the administration that
5 Mr. Huther had signed. Mr. Huther again through
6 this Family Settlement Agreement, negotiations
7 that we went through, resigned as administrator
8 in North Carolina. Mr. D'Agostino was
9 immediately appointed as administrator, and then
10 he resigned as administrator and the estate was
11 closed.

12 Q But back from what your earlier
13 testimony was you said that Mr. D'Agostino
14 recognized from your own advice that the
15 disposition of the estate would be financially
16 less if he was in South Carolina than if in
17 North Carolina, is that right?

18 MR. TWOMBLEY: Objection --

19 MR. MULLINAX: Strike that. I

20 will rephrase.

21 BY MR. MULLINAX:

22 Q Your testimony just now, and correct me
23 if I have misstated it, was that Mr. D'Agostino
24 was aware that moving the estate to South
25 Carolina would result in him receiving less

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 assets from the estate, is that right?

3 MR. TWOMBLEY: Object to the form.

4 THE WITNESS: Pardon?

5 MR. TWOMBLEY: I said object to
6 the form. You can answer.

7 THE WITNESS: Yes, it was my
8 understanding talking with Griffis. I
9 never talked to Mr. D'Agostino about
10 this. It was always through Griffis.

11 BY MR. MULLINAX:

12 Q And you assisted Mr. D'Agostino in
13 making the transition from North Carolina to
14 South Carolina?

15 A Yes.

16 Q And at the time that you assisted him
17 doing that did you believe from Mr. Griffis that
18 it was against the pecuniary interest of
19 Mr. D'Agostino?

20 A I did believe that.

21 Q And you still assisted him in that?

22 A Well, yes.

23 Q I am going to refer to the same
24 document, there Defendant's Exhibit.

25 Is there anything about

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 misrepresentation or lie on that E-mail that you
3 can allude to?

4 A Well, just from what the --

5 MR. TWOMBLEY: Object to the form
6 of the question.

7 THE WITNESS: What Mr. Griffis
8 says here in the second paragraph, that
9 in filing the Application For Letters
10 Mr. Huther under oath had misstated
11 some facts.

12 BY MR. MULLINAX:

13 Q And do you know what those facts were?

14 A Well, one would be that only he and his
15 sister were beneficiaries.

16 Q And why was that not true?

17 A Because Mr. D'Agostino by North
18 Carolina law would be a beneficiary.

19 Q And what else?

20 A He says here that they did not know of
21 any pending probate proceeding in other states,
22 even though I served them with notice of the
23 South Carolina proceeding and Rich's PR
24 appointment and spoke with David Alexander for
25 an hour about that about a month before Ronald

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Huther filed his North Carolina petition. So
3 again he is saying that and --

4 Q Who is he?

5 A Griffis is saying that.

6 Q Okay.

7 He is saying that he served papers on
8 Mr. Huther and/or his attorney in regard to the
9 pending action in South Carolina?

10 A And spoke with Mr. Huther's attorney
11 about that as well.

12 Q And even after that notice was given or
13 service was given the implication from that
14 E-mail from Mr. Griffis was that Mr. Huther
15 filed that action about a month after that
16 notice was given?

17 A Yes.

18 Q Mr. Nicholls, I am going to show you
19 Defendant's Exhibit 12. I believe Defendant's
20 Exhibit 12?

21 A Right.

22 Q Would you remind us what that document
23 is?

24 A This is a check from David Alexander
25 for \$6800 dated August 2, 2010 payable to my

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 firm's trust account.

3 Q And that was payable for what reason?

4 A That was part of the family settlement
5 agreement between Mr. Huther and his attorney
6 Steve Glass and Mr. Alexander were able to work
7 out that Mr. Alexander agreed that he would in
8 effect reimburse Mr. Huther or cover some of the
9 legal fees that the estate had to occur in
10 connection with the misfiling of the original
11 application and the subsequent filing of the
12 correct application and appointment.

13 Q Other than what is on that check do you
14 know the source of those funds at all?

15 A I don't have any idea.

16 Q Do you have any reason to believe that
17 any of those funds came out of the Estate of
18 Valerie D'Agostino?

19 A I would be surprised if they did,
20 because I think at that moment in time the
21 estate had little if any liquid assets.

22 Q Is it your testimony today that you
23 have not been paid \$1 to your knowledge out of
24 the Estate of Valerie D'Agostino for the
25 services rendered in her estate?

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 MR. TWOMBLEY: Object to the form
3 of the question.

4 BY MR. MULLINAX:

5 Q I will rephrase that.

6 Are you aware of any payment that you
7 have received, the source of which is the estate
8 of Valerie D'Agostino's estate?

9 A The only payments that I am aware of
10 that I received were three. One was the initial
11 \$1500 that we have already discussed.

12 Q And what was that? Just to remind us?

13 A That was Mr. D'Agostino's personal
14 check as the retainer.

15 Q Okay.

16 A The second one was the \$6800 from
17 Mr. Alexander.

18 And then the third one was as I recall
19 and understand Mr. Huther gave Mr. Alexander
20 \$1200 and Mr. Alexander in turn put that into
21 his trust account and transferred that money
22 into my trust account.

23 Q You recited to us three payments that
24 you are knowledgeable of, and those are the only
25 payments that you are aware of, is that right,

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 for your services?

3 A I believe that is correct on the -- one
4 of the invoices that is attached to an exhibit
5 we looked at earlier itemized the payments
6 received.

7 Q Okay.

8 And to your knowledge has any -- are
9 you aware of those funds, any of those funds, so
10 much as a dollar or more coming from the Estate
11 of Valerie D'Agostino?

12 A I am not aware of that. In fact I
13 think no, I am not aware of that.

14 Q Okay.

15 I will give you Defendant's Exhibit
16 number 14.

17 Can you remind us what the nature of
18 that document is?

19 A This is one of the drafts of the Family
20 Settlement Agreement. Not the final one, but a
21 draft.

22 Q And the Family Settlement Agreement
23 very broadly, what was the intention of that
24 document?

25 A Well, Rich all along said I want a

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 global settlement. That was language that came
3 back through Griffis, and probably when I talked
4 to him. He wanted a global settlement in the
5 sense he wanted to get this matter resolved and
6 move on.

7 Q When you say this matter, are you
8 referring to something besides your claim? Your
9 firm's claim?

10 MR. TWOMBLEY: Object to the form.

11 THE WITNESS: Am I referring to
12 something else other than?

13 BY MR. MULLINAX:

14 Q When you say this matter what are you
15 referring to?

16 A The matter being the estate in North
17 Carolina and moving the administration down to
18 South Carolina. In other words, resolving all
19 of the North Carolina issues.

20 Q I am going to refer you to paragraph --
21 let me see if I can find the page number here.

22 Page 4 of the Family Settlement
23 Agreement that you are referring to. The top of
24 that page it starts: Will be born?

25 A Uh-huh.

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Q There is an amount of \$2,000 in that
3 paragraph.

4 Can you remind us what that amount is
5 referring to?

6 A Tell me where you are again.

7 Q I am on page 4, I believe, at the top
8 of page 4, the first paragraph. Not the first
9 full paragraph, but the first paragraph that
10 starts: Will be born.

11 It is a carryover paragraph.

12 A Are you sure you are not looking at the
13 final one?

14 Q You know what, I may be. I apologize.
15 Let me see your copy. I think I am looking at
16 the final now, I apologize. I will tell you
17 what, I will just skip to mine. Just hold onto
18 that for a minute.

19 Mr. Nicholls, can you pass this down to
20 the reporter.

21 (Whereupon, Plaintiff's Exhibit
22 Number 1 was marked for
23 identification.)

24 BY MR. MULLINAX:

25 Q I am going to give you a chance to look

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 at this, and then I will direct you to the
3 portion I want to ask you about.

4 A Okay, go ahead.

5 Q First of all, the document there on the
6 top of what I just gave you, are you familiar
7 with that document?

8 A Yeah, this is a transmittal letter from
9 Steve Glass who was Ron's attorney transmitting
10 the Family Settlement Agreement to Tony Griffis,
11 with Tony then to get the agreement executed by
12 Mr. D'Agostino.

13 Q And was this a -- previously we
14 referred to Defendant's Exhibit Number 14, which
15 I have given to you here.

16 Could you tell us the relationship
17 between those two documents, Exhibit Number 14
18 from the Defendant and the one I just gave you?

19 A Well, I mean we negotiated a lot of
20 these -- there was not just one draft. There
21 was probably two or three drafts before we got
22 to the final agreement. So the one that you
23 presented was a draft, and then through
24 discussions between attorneys, primarily between
25 Glass and Alexander, Griffis and to some extent

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 myself this was finalized by the 9/17/10
3 document that I wrote final on it.

4 Q And that is the one you are referring
5 to that has Plaintiff's Exhibit 1?

6 A Yes.

7 Q All right.

8 I will direct you to page 4 -- in other
9 words, skipping the cover page, but page 4 of
10 the private Family Settlement Agreement.

11 A Uh-huh.

12 Q And looking at that paragraph can you
13 describe to us what the \$2,000 is in regard to
14 that paragraph, if you know?

15 A That was what was worked out during all
16 these negotiations that I would receive from the
17 estate, \$2,000.

18 Q What estate is that, Mr. Nicholls?

19 A Valerie D'Agostino's estate, I would
20 receive \$2,000.

21 And then it was agreed that Rich
22 D'Agostino would be responsible personally for
23 the balance of my fee.

24 Q And can you tell me, flip through that
25 document and tell me who you see as signatories

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 to this document are that you recognize?

3 A Well, Mr. Huther and his attorney.

4 Q Is that Ronald Huther?

5 A Yes.

6 And I see Heidi Pallesen who is
7 Mr. Huther's sister. She was never represented
8 in this.

9 Q All right.

10 Was this document to your knowledge
11 finalized, Mr. Nicholls?

12 A To my knowledge it was. I didn't ever
13 hear that Mr. D'Agostino did not execute it.

14 So to my knowledge it was.

15 Q And were you ever paid that \$2,000 that
16 Valerie D'Agostino's estate said they would pay
17 you?

18 A No.

19 Q And could you tell me the date, if any,
20 that is on the signature page of Ronald Huther
21 that you see on that document?

22 A It was dated September 18, 2010. At
23 least that is the date it was notarized, so I
24 assume that is the date it was signed.

25 Q Is there any reason you can think of --

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 scratch that.

3 Can you tell us why you think that
4 Valerie D'Agostino's estate agreed to pay you
5 \$2,000 in this agreement? Do you have any idea?

6 A Well, I guess --

7 Q What was it for?

8 A Legal fees.

9 Q Related to what?

10 A To the North Carolina matters.

11 Q Did you do anything else for them?

12 A After this?

13 Q Before, during, or after unrelated to
14 your services to Rich D'Agostino for the Estate
15 of Valerie D'Agostino?

16 A No.

17 Q So is there any other reason they would
18 have given you \$2,000 other than for those
19 services?

20 A No, that was an amount agreed upon for
21 existing claims. In fact, I did probably a
22 little bit of work after this but I never billed
23 for it.

24 Q Is it your understanding that by
25 accepting \$2,000 from Valerie D'Agostino that

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 that somehow would prohibit you from getting
3 additional fees from other sources?

4 A No.

5 Q Okay.

6 A No, I took everybody at their word that
7 they would pay what they said they would.

8 Q And nobody has paid you out of Valerie
9 D'Agostino's estate --

10 A No one has paid me the 2000 or whatever
11 it is.

12 Q -- Or your firm.
13 Do you have any idea when this document
14 was signed by the last party?

15 A I don't.

16 It was -- I assume it was filed in the
17 probate court here in Beaufort County, but I am
18 not -- I am not privy to that.

19 Q Were you ever a party to any other
20 document that would have superseded this
21 document and the agreement reached by the
22 parties?

23 A No.

24 Q And your firm was a party to this
25 document, is that right?

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 A My firm was a party to it?

3 Q Yes.

4 A Well, it is set for my signature
5 personally, but I would be signing on behalf of
6 the firm.

7 Q To your knowledge was there ever a
8 document that was subsequent to this that
9 withdrew that offer to your firm in payment by
10 Valerie D'Agostino's estate?

11 A No.

12 Q Mr. Nicholls, I am going to refer you
13 to paragraph 6 in that same document. That
14 paragraph refers to full cooperation by the
15 parties.

16 Do you believe that the Estate of
17 Mrs. D'Agostino has cooperated in fulfilling
18 their duties under this obligation?

19 A Well, it talks about the proper and
20 prompt administration of the estate in South
21 Carolina. I don't have any knowledge of that.
22 Cooperation in the closing of North Carolina,
23 that in fact was done.

24 Q I want to refer you to the next page,
25 Mr. Nicholls, below paragraph 9 kind of. I

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 wouldn't call it a salutation, but it begins
3 with: Now therefore.

4 A Uh-huh.

5 Q And it appears that it lists Richard
6 D'Agostino, Ronald Huther, Heidi Pallesen.

7 And what does it say in that paragraph
8 as far as those parties are concerned? Can you
9 read that for us? After their names?

10 A That they have agreed for full
11 consideration the provisions set forth in the
12 agreement.

13 Q Can you read it specifically starting
14 with Richard D'Agostino?

15 A And her children -- I'm sorry, let me
16 back up then. "The heirs at law of the
17 decedents specifically her widower, Richard J.
18 D'Agostino, and her children Ronald W. Huther
19 and Heidi Pallesen have agreed and hereby agree
20 for mutually exchanged and legally sufficient
21 consideration to all the provisions set forth
22 here and above, which are specifically
23 incorporated herein by reference and made a part
24 hereof, except as specifically excluded in
25 paragraph 7 above, the parties waive any

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 defenses or other matters regarding the probate
3 of this estate in North Carolina."

4 Q And you said your firm executed a copy
5 of this document?

6 A I am -- I obviously don't have it in
7 front of me, but I am certain that I did. But I
8 have no idea whether it was filed in the probate
9 court here.

10 Q Do you recall agreeing to these -- the
11 terms of this document?

12 A Yes.

13 Q And what did you believe the result of
14 that would be?

15 A That I would be promptly paid for the
16 fees that were agreed to be paid to my firm. As
17 specifically relates to my firm.

18 Q And that was in September of 2010, is
19 that right?

20 A Correct.

21 Q And do you happen to know the date
22 today, Mr. Nicholls?

23 A The date today?

24 Q Yes.

25 A Yes, it is December 9 of 2013. So it

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 has been over three years.

3 Q So it has been over three years and you
4 still haven't been paid for this or your firm?

5 A Correct.

6 MR. TWOMBLEY: We would be willing
7 to stipulate to about half the stuff if
8 you want to save some time. But it is
9 your time, so you go through as much as
10 you like.

11 BY MR. MULLINAX:

12 Q Mr. Nicholls, I am going to hand you
13 Defendant's Exhibit Number 17 and you tell us
14 what that is?

15 A A Creditor's Claim Statement in the
16 matter of Richard J. D'Agostino.

17 Q And who is that filed by?

18 A My law firm.

19 Q And what were the charges listed on
20 that document?

21 A \$4,542.94.

22 Q And what did that number represent at
23 that time, do you know?

24 A Our final claim bill, plus some accrued
25 interest.

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Q You referred to the document that
3 enunciates what that claim is in regard to. Can
4 you read that for us? Kind of small type.

5 A Legal services rendered in the Estate
6 of Valerie D'Agostino for decedent Richard
7 D'Agostino pursuant to engagement letter, and
8 decedent agrees to be personally liable for said
9 fees in the event they were not paid by the
10 Estate of Valerie.

11 Q Did Mr. D'Agostino agree to pay you
12 personally if Valerie D'Agostino's estate did
13 not pay the claim?

14 MR. TWOMBLEY: Object to the form.

15 BY MR. MULLINAX:

16 Q Let me strike that and rephrase.
17 The agreement between you and
18 Mr. D'Agostino, under that agreement who were
19 the funds to come from to pay those invoices for
20 those services?

21 A Well, I mean -- you mean when we were
22 first engaged?

23 Q Well, then or any time?

24 A Honestly, I don't care -- I didn't care
25 and still don't care whether they came from the

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 estate or whether they came from Mr. D'Agostino
3 individually. It was my understanding all along
4 that we would provide services to him in
5 connection with the estate and that we would get
6 paid.

7 Q And did you fill out that claims form?

8 A Yes.

9 Q And is that your signature at the
10 bottom?

11 A That is.

12 Q And did you believe at the time that
13 statement that is there? About
14 Richard D'Agostino agreeing to pay the fees
15 individually if Mrs. D'Agostino's estate did not
16 pay?

17 A Yeah. I mean yes.

18 Q And what is the date of that claim?

19 A December 27, 2011.

20 Q I am going to hand you Defendant's
21 Exhibit 18, and I turned to a specific page. I
22 don't know if there is page numbers on it.

23 A Page 4.

24 Q Could you describe to us what is on
25 that page.

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 A This is just a summary of our remaining
3 balance on our invoice.

4 Q Does it also show payments on that
5 page?

6 A It does.

7 Q And how much are those payments for?

8 A The total \$9,500.

9 Q And is there an outstanding balance on
10 that page?

11 A There is.

12 Q What is that amount?

13 A \$3,789.75.

14 Q And why is that amount different than
15 the amount of the claim, Mr. Nicholls?

16 A Because of interest that would have
17 accrued between 9/23/2010 and November 30, 2011,
18 a year and some months later.

19 Q And remind me of the amount again on
20 that page, the amount?

21 A \$3,789.75.

22 Q Let me refer you back to the Family
23 Settlement Agreement filed.

24 Mr. Nicholls, I don't think you need to
25 refer to anything here, but the Family

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Settlement Agreement was signed when?

3 A September of 2010.

4 Q So as of September of 2010 shortly
5 after the entry on your bill there that you just
6 alluded to, you said the balance is?

7 A \$3,789.75.

8 Q And that was in September of 2010, is
9 that right?

10 A Correct.

11 Q And the Family Settlement Agreement was
12 signed in September of 2010 as well, right?

13 A Correct.

14 Q And in the family settlement that we
15 just went over the administrator of Valerie
16 D'Agostino's estate agreed to pay \$2,000 toward
17 that invoice, is that right?

18 A Yes.

19 Q Is there any reason that you can think
20 of why the parties to that Settlement Agreement
21 would not have been knowledgeable about a bill
22 that you had outstanding and agreed to pay
23 \$2,000 towards it?

24 MR. TWOMBLEY: Object to the form
25 of the question.

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 BY MR. MULLINAX:

3 Q Let me rephrase it.

4 A I mean --

5 MR. TWOMBLEY: I withdraw my
6 objection.

7 THE WITNESS: I don't know. I
8 have no reason to think that they did
9 know about it. I am assuming that they
10 did.

11 BY MR. MULLINAX:

12 Q Did the Settlement Agreement include
13 \$2,000 that Mr. Huther and the other parties
14 agreed to be paid out of the Estate of Valerie
15 D'Agostino? That was for your fees, right?

16 A Yes.

17 Q The same fees what that were owed in
18 September of 2010?

19 A This invoice was generated after the
20 Settlement Agreement was signed.

21 Q But the date of the charges were when?

22 A The last charge was 9/23/2010.

23 Q So September of 2010 was when the last
24 charge was made and September of 2010 was the
25 date that the Family Settlement Agreement was

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 signed?

3 A Yes, it was probably a few days before.

4 Let me clarify that too.

5 Q Please do.

6 A I don't know exactly when the

7 Settlement Agreement was finally signed by

8 Mr. D'Agostino. I know Mr. Huther signed it on

9 September 18. The invoice is generated 9/23.

10 The Settlement Agreement went to Mr.

11 Griffis. I don't know when he had that signed

12 by Mr. D'Agostino.

13 Q Okay. Thank you for clarifying that.

14 Mr. Nicholls, I am handing you

15 Defendant's Exhibit 19, I believe, and I think I

16 am going to have to borrow the court reporter's

17 other copy to refer to this, if possible.

18 I think only looks like it is two

19 E-mails, but the top E-mail there, I am

20 referring to January 30, Monday. Who is this

21 E-mail from and to?

22 A It is from Griffis to me.

23 Q And what was your relationship with

24 Tony Griffis at the time of this E-mail? Or

25 your firm's?

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 A I mean the only relationship was that
3 he had been involved in the same matter that I
4 was involved in, which was some two years later.

5 Q Was Mr. Griffis providing you
6 information about South Carolina law during this
7 claims process?

8 A Yeah, because I was -- I am sure I
9 probably talked to him or sent him an E-mail or
10 something about a claim since it hadn't been
11 paid and he advised that there is no need to
12 file a claim in her estate because attorneys'
13 fees are not subject to creditor's claim rules.

14 And then he indicated he had already
15 filed for me anyhow so ---

16 Q And were you relying on the information
17 he provided you about South Carolina law?

18 A Yes.

19 Q Is part of this -- can you read the
20 first portion of his E-mail to you on that date
21 leading up to the first comment in that
22 paragraph?

23 A "There is no need to file a claim in
24 her estate."

25 Q And who is the her? Her estate?

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 A Mrs. D'Agostino's.

3 Q At that point did you file a claim in
4 her estate as of that date or shortly
5 thereafter?

6 A I can't remember.

7 He sent a copy to me as I recall of
8 what he had filed, and it included our claim in
9 there.

10 Q In whose estate, though?

11 A Mrs. D'Agostino.

12 Q But you didn't file a claim in
13 Mrs. D'Agostino's estate, is that right? At
14 that point?

15 A Yeah. I don't remember.

16 Q All right.

17 I will refer you to Defendant's Exhibit
18 Number 20, I believe.

19 Can you tell me what that document is?

20 A Well, this is a claim -- petition for
21 allowance in the Estate of Richard D'Agostino,
22 \$4,542.94 plus interest.

23 Q What was the date that that claim was
24 filed or signed?

25 A January 31, 2012.

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Q Was it your plan at that time to file a
3 claim -- and again, what is the date on that
4 document that you are looking at?

5 A January 31, 2012.

6 Q And that is a day after Mr. Griffis
7 sent you that E-mail?

8 A Right.

9 Q Was it your intention at that time to
10 file a claim in both estates for the same fees
11 on January 31, 2012?

12 A Well, I am looking at his last E-mail
13 to me saying you should file Form 373 against
14 his estate before the 30 days is up. So I did
15 what he suggested I do.

16 Q And did you at that same time do you
17 recall filing a claim in Valerie's estate?

18 A No, because he said there wasn't any
19 need to do that. He had already filed it.

20 Q I am going to refer you to Defendant's
21 Exhibit 23.

22 Can you identify it for us?

23 A A claim in the Estate of Valerie
24 D'Agostino dated October of 2009 filed by my
25 firm.

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Q Could you check that date again?

3 A Oh, that is the date of death, I'm
4 sorry.

5 September 26, 2012.

6 Q And what was the date?

7 A It is signed by you as attorney on
8 behalf of creditor Nicholls and Crampton.

9 Q And the claim filed in Rich
10 D'Agostino's estate, when was that claim filed?

11 A January 31, 2012.

12 Q And the Mrs. D'Agostino estate was
13 filed?

14 A September 26, 2012. So nine months
15 later.

16 Q All right.

17 And during the period between those two
18 filings are you aware of any discussions that
19 went on between the parties to try to settle
20 these matters?

21 A No.

22 Q Why did you file the claim if you
23 recall, or why was a claim filed on your behalf
24 in the estate of Valerie D'Agostino's estate?

25 A I would have to refer back to some of

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 our correspondence. I mean these were per your
3 recommendations.

4 Q Did you authorize my law firm to act on
5 your behalf to make a claim for your fees on
6 behalf of your firm?

7 A Yes.

8 Q And under that authorization did you
9 provide the authority to do anything and
10 everything within the scope of the law and the
11 rules to settle that matter?

12 A I don't know whether that was
13 specifically in the engagement letter, but that
14 certainly was my understanding of what would be
15 done.

16 Q Is there anything that would have
17 prohibited it you are aware of?

18 A From settling the matter?

19 Q Well, from the authorization? Was
20 there any restriction on the authorization to
21 settle this matter on your firm's behalf?

22 A No.

23 Q Okay.

24 Did your firm authorize the claim on
25 Mrs. D'Agostino's estate to be filed by my firm?

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 A I am sure that we did. Again, I would
3 have to refer back do correspondence; but I
4 can't imagine that we wouldn't have.

5 Q And what is the amount of the claim on
6 Mrs. D'Agostino's estate? What is the number
7 there?

8 A \$3,789.75.

9 Q And the amount of the claim on
10 Mr. D'Agostino's estate?

11 A \$4,542.94 plus interest.

12 Q And what do you think the difference
13 are between those two numbers?

14 A Interest that had accrued from the
15 initial final invoice date to a year and 13
16 months, 14 months later.

17 Q Is a claim form filed in Valerie
18 D'Agostino's imply interest or express interest
19 on it?

20 A Yes, it says plus interest on it and
21 attorneys' fees.

22 Q Mr. Nicholls, you earlier were made
23 aware of, and even I think it was referred to in
24 a global settlement, Defendant's Exhibit Number
25 25, and if you could pull that exhibit.

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 A Okay.

3 Q And I believe it is your testimony
4 earlier today that you are only recently aware
5 of the text of this document, is that right?

6 A Correct.

7 Q Were you ever personally invited or
8 your firm invited, not through my office, but
9 through any method to participate in this
10 agreement that you have in front of you that you
11 are aware of?

12 A No.

13 Q Were you ever invited or your firm
14 invited through any means whatsoever to
15 participate in settlement negotiations having to
16 do with the terms that you have seen in this
17 document?

18 A No.

19 Q Is anyone in your firm or have they
20 been dealing with this claim issue besides
21 yourself since your last billing invoice?

22 A No.

23 Q Mr. Nicholls, is there anyone outside
24 of your law firm that you are aware of --
25 scratch the question.

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Mr. Nicholls, the communications that
3 you had between yourself and Mr. Griffis, did
4 you bill for that time?

5 A Yes.

6 Q Do you have any knowledge of Mr.
7 Griffis billing for that same time? Do you have
8 any knowledge of that?

9 A No, I have no knowledge.

10 Q Is it your understanding that Mr.
11 Griffis' claims against either Mr. or
12 Mrs. D'Agostino's estates have been satisfied?

13 A I'm sorry, say that again.

14 Q What is your understanding of the
15 disposition of Mr. Griffis' claims at this
16 point, if you know?

17 A Well, I read in paragraph 2 here that
18 Christopher D'Agostino will address, resolve,
19 satisfy the claims of Griffis currently existing
20 against Rich's estate. So I assume that was
21 done.

22 I mean the same thing under number 3
23 for Ashley's invoice. I assume all that was
24 done, but I don't know.

25 Q I am going to refer you to page 2,

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 paragraph 4.

3 Have you had a chance to review that
4 paragraph, or if not if you will take a chance
5 now.

6 A Okay.

7 Q Has your firm ever been offered
8 through communications with me, or are you aware
9 of anything other than what you have heard from
10 the opposing counsel in regard to any settlement
11 offer that includes \$4,929.08 included in this
12 paragraph?

13 A No.

14 Q Mr. Nicholls, this paragraph has to do
15 with your firm's claim, is that right?

16 A Yes.

17 Q And your firm was not a party to this
18 agreement, is that right?

19 A That is correct.

20 Q Do you know the whereabouts of these
21 funds right now?

22 A I assume they are in Mr. Twombly's
23 trust fund.

24 Q Do you have any personal knowledge of
25 that?

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 A No, no.

3 Q Mr. Nicholls, I want to refer you back
4 to the two claims we talked about earlier.

5 You said there was nine months between
6 the filing of the claim in Mr. Richard
7 D'Agostino's estate and the filing of the claim
8 in Valerie D'Agostino's estate.

9 Do you have any explanation for the gap
10 between those time periods, and why you didn't
11 file the claims in Valerie and Richard's
12 concurrently?

13 A No. As I recall I received a letter
14 from some attorney, I don't remember his name,
15 and they had denied -- they denied the claim
16 because I had not filed some form in a timely
17 manner. I can't remember -- the name Hale comes
18 to mind. I can't remember who it was that sent
19 me the letter.

20 And then I don't remember the time of
21 our engagement, but it would have been
22 subsequent to that, that I engaged you to assist
23 us in this matter and then we saw the September
24 filing of the claim.

25 Q I am going to refer you to the filing

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 in Valerie D'Agostino's estate, the claim filed
3 in Valerie D'Agostino's estate, the Exhibit
4 number -- if you could remind us what that is?

5 A This is Number 23.

6 Q Defendant's Exhibit 23. Again can you
7 tell us the dollar amount that is listed on that
8 claim?

9 A \$3,789.75 plus interest and attorney's
10 fees.

11 Q And I know you have been asked this and
12 I apologize for asking it again, but do you know
13 the calculated interest to add to that to come
14 to what you consider the full balance of your
15 fees that are owed? Do you have any idea what
16 that is?

17 A As of now? As of today?

18 Q Sure, as of now?

19 A No, I would have to -- I can't put a
20 pencil to it because I can't multiply anymore.
21 If I could get a calculator I could probably do
22 it.

23 Q Do you think that the 3,700 and
24 some-odd-dollars there is a full balance of what
25 the fees that are owed to your firm?

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 A Excluding interest, yes.

3 Q Excluding interest, okay.

4 But not including interest?

5 A Not including interest.

6 Q So if someone said to you,

7 Mr. Nicholls, we are going to pay the full

8 balance of your fees \$3,700 and some-odd-cents

9 that is listed on that form, would you consider

10 that full satisfaction in settlement of your

11 claim? In terms of meeting everything that your

12 firm is owed?

13 A Well, I mean --

14 Q Is that an amount that what you have

15 billed including interest?

16 MR. TWOMBLEY: Object to the form.

17 THE WITNESS: Yeah, it was --

18 BY MR. MULLINAX:

19 Q Withdraw the question. Let me rephrase

20 it.

21 MR. TWOMBLEY: Well, I don't want

22 the question withdrawn. I just would

23 like the witness to be allowed to

24 answer. He was in the middle of an

25 answer and you interrupted.

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 MR. MULLINAX: Well, I didn't hear
3 a word enunciated, but I would
4 certainly give him an opportunity to
5 answer.

6 BY MR. MULLINAX:

7 Q Is your firm owed more than \$3,700
8 approximately?

9 A As of today?

10 Q Yes.

11 A Yes, with interest.

12 Q Mr. Nicholls, other than a recent offer
13 of \$2,000 made in settlement of these matters,
14 are you aware of any specific dollar figures
15 that have been offered in this case within the
16 last several months in settlement of these
17 claims of your firm?

18 A No, I am not.

19 Q Mr. Nicholls, I am going to mark that
20 Plaintiff's Exhibit 2. I think -- I don't know
21 if that is already in the record or not.

22 (Whereupon, Plaintiff's Exhibit

23 Number 2 was marked for

24 identification.)

25 BY MR. MULLINAX:

1 MULLINAX - NICHOLS (CROSS-EXAMINATION)

2 Q Mr. Nicholls, can you tell me what that
3 document is?

4 A It is a copy of a statement of North
5 Carolina Death Certificate for Valerie
6 D'Agostino.

7 Q Can you tell us if you can tell from
8 this document what representation of the marital
9 status was of Valerie D'Agostino on the date of
10 her death?

11 A Paragraph 11 says that her surviving
12 spouse is Richard D'Agostino.

13 Q To your knowledge was she married to
14 Richard D'Agostino at the time of her death?

15 A To my knowledge. Her daughter said she
16 was.

17 Q Are you aware of any dispute as to the
18 marriage between Valerie D'Agostino and Richard
19 D'Agostino at the time of her death?

20 A No, I wasn't. I had no involvement in
21 their marital --

22 Q Has anyone in this case suggested that
23 they were than married in their communications
24 with you?

25 A No.

1 TWOMBLEY - NICHOLS (REDIRECT EXAMINATION)

2 Q I think that is all I have.

3 REDIRECT EXAMINATION

4 BY MR. TWOMBLEY:

5 Q Just a couple of follow-up's.

6 Exhibit 25, I would like to ask you
7 about.

8 A Okay, the Settlement Agreement.

9 Q Do you know why -- you read paragraph 2
10 on page 2 that said Mr. Griffis' claim was going
11 to be satisfied?

12 A Yes.

13 Q But paragraph 4 -- well, let me just
14 ask you this way, do you know why Griffis' claim
15 was just going to be satisfied and yours wasn't
16 going to be satisfied?

17 MR. MULLINAX: Object to the form.

18 BY MR. TWOMBLEY:

19 Q Do you know of any reason?

20 A No, I don't.

21 Q Even as we sit here today in
22 retrospect, I mean why any reason why Chris
23 D'Agostino and his lawyer, why they would want
24 to pay Mr. Griffis everything he wanted, but
25 they didn't offer to pay you anything?

1 TWOMBLEY - NICHOLS (REDIRECT EXAMINATION)

2 MR. MULLINAX: Object to the form.

3 BY MR. TWOMBLEY:

4 Q Do you know?

5 A No.

6 Q Does that make any logical sense to you
7 at all?

8 MR. MULLINAX: Object to the form.

9 THE WITNESS: No, it doesn't,
10 other than the fact that there was some
11 home cooking there. You are dealing
12 with South Carolina lawyers, and I am
13 up in Raleigh.

14 BY MR. TWOMBLEY:

15 Q I give you that. I give you that.

16 But other than that, other than the
17 fact that there may have been some home cooking,
18 I mean why in the world would they want to pay
19 Mr. Griffis a hundred percent of his money and
20 be done with this matter, something they have
21 been litigating for four years, and not pay you?

22 A No.

23 Q So we don't know why that happened, but
24 let me ask you this, do you know how they came
25 up with the number to set aside \$4,929.08?

1 TWOMBLEY - NICHOLS (REDIRECT EXAMINATION)

2 A No, I assume that somebody must have
3 taken a calculator and taken that \$4500 and
4 added some interest to it.

5 Q Okay.

6 Do you know why -- I mean the agreement
7 calls for them to pay that money to an escrow
8 agent.

9 But is there any reason that you know
10 of why they would want to pay that money to
11 anyone other than you just to be done with the
12 thing?

13 MR. MULLINAX: Object to the form.

14 THE WITNESS: Again, they just
15 didn't want to pay money to a North
16 Carolina lawyer. I don't know. I
17 don't know.

18 BY MR. TWOMBLEY:

19 Q Is that what you still think today that
20 somebody just wanted to --

21 A Yes, that is -- and --

22 Q Despite the fact that there are letters
23 and representations to the court from everyone
24 that that money was offered to you?

25 MR. MULLINAX: Object to the form.

1 TWOMBLEY - NICHOLS (REDIRECT EXAMINATION)

2 THE WITNESS: So ask that question
3 again.

4 BY MR. TWOMBLEY:

5 Q You still think that this was done
6 because of home cooking, as opposed to the fact
7 that somebody expressly rejected settling your
8 claim for that amount?

9 MR. MULLINAX: Object to the form.

10 THE WITNESS: I don't know how the
11 rejection came about.

12 BY MR. TWOMBLEY:

13 Q But I mean you saw the letter from Mr.
14 Bolchoz where he writes to the court that he
15 says, yes, I did think we have a global
16 Settlement Agreement. And I called up
17 Mr. Mullinax on the phone to give him the good
18 news, which was that hey, despite the fact that
19 your claim that is filed is totally invalid and
20 is going to get kicked out of court, which
21 happened to be exactly correct and exactly what
22 happened, despite that fact today is your lucky
23 day because we are going to pay 100 percent of
24 your claim.

25 A I don't know how that came about.

1 TWOMBLEY - NICHOLS (REDIRECT EXAMINATION)

2 Q Now, you talk about Mr. Mullinax and
3 what he was authorized to do.

4 Was he authorized to reject a
5 settlement for a hundred percent of the claim as
6 presented of \$4,542.94?

7 MR. MULLINAX: I am going to
8 object to that.

9 That is attorney-client privilege.

10 MR. TWOMBLEY: You asked him what
11 he was authorized to do and what
12 authorization you gave him. You press
13 that and I am going to ask for fees,
14 because you asked it and you opened the
15 door to it. And I want an answer to
16 that question.

17 MR. MULLINAX: I asked him general
18 authority. You can go back to the
19 record if you like to pull up that if
20 you like. But I didn't go into the
21 specifics of anything other than
22 general issues of authorization of
23 hiring an attorney.

24 BY MR. TWOMBLEY:

25 Q Well, was he authorized to reject a

1 TWOMBLEY - NICHOLS (REDIRECT EXAMINATION)

2 settlement offer in the amount of \$4,542.94?

3 MR. MULLINAX: I am going to
4 object and we can take it up with the
5 judge if you want to, Ashley.

6 MR. TWOMBLEY: I think the witness
7 should answer.

8 MR. MULLINAX: I will direct him
9 not to answer the question.

10 THE WITNESS: Then --

11 MR. TWOMBLEY: I will say on the
12 record that if you don't answer this
13 question you are going to be driving
14 back down to South Carolina to answer
15 it in the future, and so it is up to
16 you.

17 MR. MULLINAX: I appreciate you
18 wouldn't threaten my client.

19 MR. TWOMBLEY: I am not
20 threatening him. I am trying to help
21 your client, because it is about time
22 that somebody started trying to do
23 that.

24 BY MR. TWOMBLEY:

25 Q I am asking you, you were asked on

1 TWOMBLEY - NICHOLS (REDIRECT EXAMINATION)

2 direct examination was Mr. Mullinax authorized
3 to do this. Was Mr. Mullinax authorized to do
4 that. Was he authorized to do this, that, and
5 the other, and I am just asking you one simple
6 follow-up question: Was he authorized to reject
7 the settlement offer of \$4,542.94?

8 MR. MULLINAX: Again, I will
9 object. Again, you pull up the record
10 if you like and we can take it up with
11 the judge, but I never asked him on
12 direct the specific that you are asking
13 him now. It was simply him hiring me
14 as an attorney and authorization as an
15 attorney, any attorney would have in a
16 law firm.

17 So again, you can take it up with
18 the judge, I will direct him not to
19 answer the question.

20 THE WITNESS: Well, I guess I will
21 just have to drive back down here,
22 Ashley.

23 BY MR. TWOMBLEY:

24 Q Or the alternative is you could answer
25 the question I mean.

1 TWOMBLEY - NICHOLS (REDIRECT EXAMINATION)

2 A I understand what my alternatives are.

3 Q I am just trying to save you a trip
4 down here.

5 That is really all I am doing.

6 Was Mr. Mullinax authorized to reject a
7 settlement offer of \$4,929.08?

8 MR. MULLINAX: I will object and
9 advise him not to answer the question.

10 THE WITNESS: At this time I will
11 not answer the question.

12 BY MR. TWOMBLEY:

13 Q Do you plan to come down here for
14 trial?

15 A Pardon?

16 Q Do you plan to attend the trial of this
17 matter?

18 A If I have to I certainly will.

19 Q And I am not trying to insult you by
20 asking this question, but I genuinely don't
21 think you know the answer to it.

22 Do you know why the estate never paid
23 you that \$2,000?

24 A No. No one ever communicated with me
25 on that.

1 TWOMBLEY - NICHOLS (REDIRECT EXAMINATION)

2 Q So as far as you know someone just said
3 I wake up this morning and by God I am not going
4 to follow the agreement we entered into?

5 A No, I don't. I don't know. There was
6 never an explanation for any of it not being
7 paid.

8 Q Well, I want you to know that we always
9 wanted you to get that money, and we would have
10 loved to have given it to you. And I can show
11 you -- I don't have it in front of me --
12 documentary evidence --

13 MR. MULLINAX: Do you have a
14 question for him, Ashley? Ask him a
15 question.

16 MR. TWOMBLEY: This is my
17 deposition.

18 BY MR. TWOMBLEY:

19 Q I can show you where we offered you
20 that \$2,000, or we thought we were offering it
21 to you. Apparently only certain things went
22 back --

23 A 2000 or 4900?

24 Q 2000 right after the Settlement
25 Agreement was entered into.

1 TWOMBLEY - NICHOLS (REDIRECT EXAMINATION)

2 A After this job?

3 Q No, no that one. The first one?

4 A Oh, the first one?

5 Q Absolutely the first one. Back in the
6 day.

7 A And what about this one?

8 Q Absolutely. A hundred percent.

9 I mean why else would we have done
10 that, Mr. Nicholls?

11 MR. MULLINAX: Object to the form.

12 BY MR. TWOMBLEY:

13 Q I mean why would anyone -- I mean Mr.
14 Bolchoz wrote the court and told them that there
15 was a global settlement. And you know I think
16 in Mr. Bolchoz's defense, what he thought is
17 well surely they are going to take the full
18 value of their claim. And then if they won't
19 take the full value of the claim and they said
20 they are entitled to interest in addition to
21 that, how do you think that the amount of the
22 claim was then increased to the amount of the
23 Settlement Agreement? And then why do you think
24 that I am repeatedly E-mailing Mr. Mullinax and
25 saying what is your legal and factual authority

1 TWOMBLEY - NICHOLS (REDIRECT EXAMINATION)

2 for demanding your fees in addition to that
3 amount, because if you have got it we would like
4 to know about it. But pursuant to Rule 11 and
5 South Carolina Frivolous Proceeding Act you need
6 to figure out your factual and legal basis for
7 demanding over 10, \$15,000 worth of fees,
8 because we are not going to let it go.

9 I mean do you think all the letters
10 that Sean --

11 MR. MULLINAX: I am going to
12 object.

13 MR. TWOMBLEY: You can object.

14 MR. MULLINAX: Objection on the
15 record to all of this.

16 BY MR. TWOMBLEY:

17 Q I mean why would Sean write the court
18 and say there was a settlement?

19 MR. MULLINAX: If you have a
20 question, ask him. He is here for a
21 deposition and ask him questions.

22 MR. TWOMBLEY: And I am asking him
23 a question.

24 MR. MULLINAX: Ask him a question.

25 BY MR. TWOMBLEY:

1 TWOMBLEY - NICHOLS (REDIRECT EXAMINATION)

2 Q Why would we do that?

3 A I don't know.

4 Q Why would I write to Mr. Mullinax and
5 say your legal -- and then why would he then
6 file something that says that he is withdrawing
7 the claim for legal fees? Yeah, I mean after
8 the administration has been held up, and they
9 have had to pay me fighting this frivolous
10 claim.

11 A I can't answer this question.

12 Q Well, I can't answer it either. I
13 can't answer it either. That is why I want to
14 know if Mr. Mullinax was authorized to reject
15 these settlement offers from you, and I would
16 still like for to you answer that.

17 I mean have you ever seen the prior
18 versions of this agreement?

19 A No.

20 Q That were actually signed by everybody?

21 MR. MULLINAX: Object to the form.

22 THE WITNESS: A prior version
23 signed?

24 BY MR. TWOMBLEY:

25 Q Of this agreement?

1 TWOMBLEY - NICHOLS (REDIRECT EXAMINATION)

2 A Is this not a signed one?

3 Q Well yes, but there was -- I am just
4 asking, have you ever seen any prior versions of
5 this agreement that actually said where
6 paragraph 2 actually read: Christopher
7 D'Agostino will address, resolve, and satisfy
8 the attorneys fees' claim of Anthony Griffis and
9 Nicholls & Crampton, and where this paragraph,
10 this whole paragraph wasn't even in there.
11 Where it just said his money is going to get
12 paid and your money is going to get paid?

13 A No.

14 MR. MULLINAX: Objection.

15 BY MR. TWOMBLEY:

16 Q Do you know if any of it exist?

17 A If what exist?

18 Q Prior versions for the Settlement
19 Agreement?

20 A No.

21 Q Would you like to see them?

22 MR. MULLINAX: I object to the
23 form.

24 THE WITNESS: You know, I take
25 your word that there were drafts of

1 TWOMBLEY - NICHOLS (REDIRECT EXAMINATION)

2 this. But I have not seen anything. I
3 have not seen anything.

4 BY MR. TWOMBLEY:

5 Q Why do you think we are here today,
6 Mr. Nicholls?

7 A I honestly don't know. I mean over
8 this amount of money? It should have been
9 resolved years ago, and it wasn't.

10 Q And do you know why it wasn't resolved
11 years ago?

12 A No, I don't.

13 Q I think you do now.

14 A Well, I am talking --

15 MR. MULLINAX: Object to the form.

16 If there is a question.

17 THE WITNESS: Well, I am talking
18 about I don't know why --

19 BY MR. TWOMBLEY:

20 Q I understand.

21 A -- Rich didn't pay my bill. I have no
22 idea.

23 Q That is all I have got.

24 RECROSS-EXAMINATION

25 BY MR. MULLINAX:

1 MULLINAX - NICHOLS (RE CROSS-EXAMINATION)

2 Q Mr. Nicholls, were you a party to what
3 they refer to as a global settlement that keeps
4 getting referred to?

5 A This document?

6 Q What is the title at the top there?

7 A It is Defendant's Exhibit 25.

8 Q And what is the title at the top of
9 that document?

10 A Settlement Agreement and General
11 Release. I wasn't a party to it, but I am
12 certainly mentioned in it.

13 Q Were you ever a party to the
14 negotiations for that document?

15 A No.

16 Q Were you ever contacted by any of the
17 parties about that document?

18 A No.

19 Q Were you ever provided a copy of that
20 document until very recently?

21 A No.

22 MR. TWOMBLEY: I object to the
23 fact that you weren't contacted. I
24 think your agent was contacted.

25 THE WITNESS: I am directing the

1 MULLINAX - NICHOLS (RECROSS-EXAMINATION)

2 response to me personally.

3 MR. TWOMBLEY: I am just making my
4 objection.

5 BY MR. MULLINAX:

6 Q Mr. Nicholls, have you seen any
7 document today other than the Family Settlement
8 Agreement and the document that you just
9 referred to there, the most recent Settlement
10 Agreement, that refers to a specific dollar
11 amount related to your fees for payment?

12 A You are saying other than the 2010
13 settlement and the other settlement that was in
14 here? Have I ever seen anything?

15 Q Yes, is there anything else related
16 directly to a dollar figure to be used to pay
17 for your fees?

18 A I don't recall anything.

19 Q Do you recall seeing any documentation
20 today of any offer directly to you or to your
21 agent for any amount in settlement of your
22 claim?

23 A No, I mean we had -- let me get my
24 facts together again.

25 We had the North Carolina Family

1 MULLINAX - NICHOLS (RE CROSS-EXAMINATION)

2 Settlement Agreement.

3 And then we had this agreement which is
4 the -- which is the --

5 We had two settlement agreements,
6 didn't we?

7 Q Let me point you to --

8 A To answer your question, I have not had
9 any knowledge of any amounts offered to me. I
10 have no knowledge of this (indicating.)

11 Q Of all the documents that you have been
12 presented today by the Defendant in this case,
13 is there any that represented to you directly to
14 you or that you had knowledge of in full
15 settlement of your claim? Any offer at all?
16 Directly to you?

17 A Directly to me?

18 Q Or to your agent for that matter?

19 A I can't speak about my agent, but there
20 has been none to me.

21 Q Is there any one that you see that
22 directs a dollar figure to your agent in any of
23 the documents that you have referred to in full
24 settlement of your claim?

25 A (No answer).

1 MULLINAX - NICHOLS (RECROSS-EXAMINATION)

2 Q Is there any offers with a dollar
3 figure attached to it directed to your agent
4 that has been presented to you in settlement of
5 your claim?

6 A Well, the only thing that I am aware of
7 are the documents that Defendant's counsel
8 presented and the letters I mean. And I think
9 you were -- I assume you were copied on them.

10 Q Was there anything with a dollar figure
11 in it? That refers to a dollar figure in it in
12 settlement of your claim?

13 A I can't recall.

14 Q Would you consider a dollar a full
15 settlement of your claim?

16 A \$1?

17 Q Yes.

18 A No.

19 Q I am going to ask you this question
20 again just to get it on the record and make sure
21 it is perfectly clear, and if you don't
22 understand the question I want you to ask me to
23 rephrase it, is there any document that you have
24 been presented today that offered a payment
25 directly to you or your agent in settlement of

1 MULLINAX - NICHOLS (RECROSS-EXAMINATION)

2 your claim? Your firm's claim?

3 A Well, the only thing I can speak to is
4 the letter that I recall. The letter from --

5 MR. TWOMBLEY: Sean Bolchoz.

6 THE WITNESS: The person he just
7 mentioned. That was to the judge, and
8 I think -- I don't know that it had an
9 amount in there. I don't recall an
10 amount being in there.

11 BY MR. MULLINAX:

12 Q Well, by gosh, let us pull it up and
13 let's find out.

14 MR. TWOMBLEY: By gosh, I can tell
15 you --

16 MR. MULLINAX: Well, let us pull
17 it up. I think it is your exhibit,
18 Ashley, and pull it up. From Sean
19 Bolchoz to the Court.

20 MR. TWOMBLEY: I can remember. I
21 can tell you it didn't have an exact
22 number.

23 MR. MULLINAX: Well, let's see.
24 Let's pull it out. I need it on the
25 record.

1 MULLINAX - NICHOLS (RE-CROSS-EXAMINATION)

2 MR. TWOMBLEY: What I just said
3 was on the record. But if you want to
4 go through it again for emotional
5 reasons, that is fine.

6 MR. MULLINAX: Oh yeah, I think I
7 need to make sure it is clear to the
8 Court that there is no actual offer on
9 the table.

10 MR. TWOMBLEY: I guess Sean and I
11 are just going to make this all up.

12 MR. MULLINAX: Let me deal with
13 mine. If you have an objection, please
14 raise it.

15 MR. TWOMBLEY: Objection. This
16 is -- well --

17 MR. MULLINAX: I don't know how
18 many letters we have in here from Sean
19 Bolchoz. Ashley, you seem to be very
20 familiar with that correspondence.

21 MR. TWOMBLEY: I will show it to
22 you. It just says full value -- full
23 amount.

24 MR. MULLINAX: Let us pull it out
25 if you know where it is. I will give

1 MULLINAX - NICHOLS (RECROSS-EXAMINATION)

2 you the exhibits.

3 MR. TWOMBLEY: It is on page 2,
4 paragraph 3: Mr. Twombley and I agree
5 that this claim would be paid in full.

6 BY MR. MULLINAX:

7 Q I am going to refer you to Defendant's
8 Exhibit Number 24, paragraph 3.

9 And could you read the sentence
10 beginning with: After our conference status
11 call --

12 I'm sorry, before you read that, could
13 you remind the court or for the court reporter
14 who that correspondence is from and to?

15 A This is from Sean Michael Bolchoz to
16 Judge -- the Honorable Kenneth E. Fulp, Jr. And
17 the sentence I was asked to read says: "After
18 our conference/status call with this court last
19 summer I called Mr. Mullinax with the news that
20 although I did not believe that his client's
21 claim was valid, Mr. Twombley and I had agreed
22 that his claim would be paid in full."

23 Q Thank you for reading that.

24 Do you see anything in that document
25 anywhere that refers to a specific dollar amount

1 MULLINAX - NICHOLS (RECROSS-EXAMINATION)

2 that has been offered by the Defendant against
3 your claim?

4 A I do not. So I have no idea what a
5 full -- what my claim being paid in full
6 referred to the 4500 or I just -- no, I don't
7 know. I don't see anything in there about any
8 amounts at all. But I am assuming there was
9 some additional correspondence to support what
10 it was.

11 Q Have you seen that correspondence
12 today?

13 A No, I haven't seen it but --

14 Q Are you personally aware of any
15 correspondence of anything like that?

16 A No, I personally haven't seen it. I am
17 not aware of anything. So I don't know what the
18 conference call -- who was involved in the
19 conference call or anything. I don't know what
20 was discussed.

21 Q Okay. You are welcome to look at the
22 rest of that document. I think he is referring
23 to the court's conference call/status conference
24 when everything had been settled, and so the
25 judge and the parties were involved in a

1 MULLINAX - NICHOLS (RE CROSS-EXAMINATION)

2 conference call.

3 MR. MULLINAX: I have nothing
4 further for Mr. Nicholls.

5 MR. TWOMBLEY: I have nothing.

6 (Whereupon, the deposition of
7 Frederick Timothy Nicholls
8 was concluded at 3:17 p.m.)
9
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C E R T I F I C A T E

STATE OF SOUTH CAROLINA:

BEAUFORT COUNTY:

I, Ceil Weser, CSR and Notary

Public in and for the above county and state, do

hereby certify that the foregoing testimony was

taken before me at the time and place

herein before set forth; that the witness was by

me first duly sworn to testify to the truth, the

whole truth, and nothing but the truth, that

thereupon the foregoing testimony was later

reduced by computer transcription; and I certify

that this is a true and correct transcript of my

stenographic notes so taken.

I further certify that I am not of
counsel to either party, nor interested in the
event of this cause.

Ceil Weser, CCR

Notary Public

Beaufort, South Carolina

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN RE:
ESTATE OF VALERIE D'AGOSTINO,

NICHOLLS & CRAMPTON, P.A.

Plaintiff,

vs.

CIVIL ACTION NUMBER
2013-CP-07-01491

ESTATE OF VALERIE D'AGOSTINO,
Defendant.

COPY

-----/

The deposition of RONALD W. HUTHER, a
witness in the above-entitled cause, taken
pursuant to Notice and agreement, before Ceil
Weser, Certified Court Reporter and Notary
Public, at the Offices of Twenge + Twombly, 311
Carteret Street, Beaufort, South Carolina, on
the 9th day of December, 2013, commencing at or
about the hour of 4:16 p.m.

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ALSO PRESENT:

Frederick Nicholls

- - -

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 RONALD W. HUTHER,

3 having been produced and first duly sworn as a
4 witness, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. MULLINAX:

7 Q Would you state your name for the
8 record.

9 A Ronald William Huther.

10 Q And Huther is the way I am to pronounce
11 it, is that right?

12 A That is how I say it, yeah.

13 MR. TWOMBLEY: That is what your
14 mama told you, right?

15 BY MR. MULLINAX:

16 Q Before we get started I want to remind
17 you I represent Nicholls & Crampton Law Firm in
18 North Carolina, and of course we are taking your
19 deposition today. You have been sworn in. You
20 know that all testimony that you give has to be
21 the truth, the whole truth so help you God. And
22 that if you have any questions about what I am
23 asking you to respond to, please stop me, ask me
24 to rephrase the question or enunciate it better.
25 However you need it defined for you. Make sure

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 that the question is clear to you before you
3 answer it, and I will do the best I can in
4 asking the questions.

5 If there is any questions that you
6 have, of course you need to direct those
7 questions to me as opposed to your attorney, and
8 we will certainly give him an opportunity to
9 object to anything during the proceeding that he
10 wants to.

11 If you need a break, certainly let me
12 know. We can certainly take a break for any
13 reason that you need, but make sure that you
14 know that you cannot discuss your deposition
15 until it is concluded with your attorney. So
16 our discussions -- or our deposition will
17 continue until finished we hope.

18 Is there any reason, Mr. Huther, that
19 you cannot give your full testimony today?

20 A No.

21 Q Any reason that your testimony might be
22 hindered by any medications or medical condition
23 that you are aware of?

24 A No.

25 Q Is there any reason that you are aware

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 of that you can not attend a trial in a couple
3 of weeks? In a few weeks?

4 A No.

5 Q What is your date of birth, Mr. Huther?

6 A 9 March 1963.

7 Q Can you give me, Mr. Huther, a brief
8 summary of your civilian education, background?

9 A I am a graduate of Sayville High School
10 on Long Island. I have a BA from the State
11 University of New York at Stonybrook.

12 I got a Masters of Science from Central
13 Michigan University, and a Masters in Science
14 from a University in Pakistan called Quadi Aza
15 University.

16 Q And your two most recent degrees, the
17 Master's of Science, did you receive that while
18 on active duty in the military?

19 A I did.

20 Q And what about your bachelor's degree,
21 was that while you were on active idea with the
22 military?

23 A No, ROTC did that.

24 Q Are you currently on active duty with
25 the military?

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A No, I retired.

3 Q Mr. Huther, can you describe for the
4 record what your relationship is to Valerie
5 D'Agostino?

6 A She is my mother.

7 Q Is she your natural mother?

8 A Yes.

9 Q And do you have any siblings?

10 A My sister Heidi.

11 Q And any other siblings?

12 A No.

13 Q At the time of your birth was your
14 mother married?

15 A Yes.

16 Q And was she married to your father?

17 A Yes.

18 Q And what has become of your father
19 since that time?

20 A He passed away in 1982.

21 Q I'm sorry to hear that.

22 Were they married at the time of his
23 death?

24 A No.

25 Q Were you raised by your mother?

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A Yes.

3 Q Did your mother ever adopt anybody else
4 during her lifetime?

5 A No.

6 Q And can you tell me at the death of
7 your mother, which could you remind us of the
8 date?

9 A October 17, 2009.

10 Q At that time can you tell me did you
11 find out immediately about her death?

12 A Yes.

13 Q And thereafter what actions did you
14 take relative to her estate administration, if
15 any?

16 A We didn't do anything for like several
17 months.

18 And I don't remember the months. Just
19 say January, February, March of 2010 I hired
20 David Alexander to open up an estate in North
21 Carolina.

22 Q Okay.

23 You asked him to open up an estate for
24 your mother?

25 A My mother's estate, yes.

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q And did you meet with him about that
3 representation?

4 A I never met him. I hired him. I had
5 no idea this was going to be litigated. So I
6 actually hired him from my company. We got him
7 for like 8 bucks a month you get legal
8 referrals. So I hired David. I never met him.

9 Q When you say David, you mean David
10 Alexander?

11 A David Alexander. He was in the network
12 of my company.

13 Q And so you hired him for what purpose?

14 A To open up an estate.

15 Q And did you sign any documentation
16 relative to the opening of that estate?

17 A Like a?

18 Q Any document?

19 A Like with the lawyer?

20 Q With the attorney or for the court?

21 A For the attorney I signed a, you know,
22 a contract or whatever. I forget what you guys
23 call it where you hire a lawyer.

24 Q Okay.

25 A And then he drafted up the paperwork

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 for the estate proceedings and then I signed
3 that.

4 Q And did he go over that paperwork with
5 you?

6 MR. TWOMBLEY: I will object to
7 and instruct you not to answer that
8 question.

9 What you did with your attorney is
10 privileged. Certainly whether he went
11 over any documents with you or any
12 discussions you may or may not have had
13 about any documents is privileged, and
14 I will instruct you not to answer that
15 question.

16 THE WITNESS: Okay.

17 BY MR. MULLINAX:

18 Q Is the document you signed in the
19 record today or been produced to your knowledge?

20 A I don't recall if it was produced today
21 or not.

22 Q Do you know of any reason why it would
23 not have been produced in this litigation?

24 A No.

25 Q But you do recall signing some

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 documents filed with the court?

3 A An application that he referenced, an
4 application to be appointed -- I forget the term
5 they use -- representative of my mother's estate
6 in North Carolina.

7 Q And did you review that document before
8 you signed it?

9 A I did.

10 Q Was there anything in that document
11 that you recall that you did not provide to
12 Mr. Alexander?

13 A No. Mr. Alexander knew everything
14 about the case. He knew about Richard
15 D'Agostino. He knew about the circumstances of
16 the guardianship that me and my sister achieved
17 over Richard D'Agostino, and why she was in
18 North Carolina.

19 He knew everything soup to nuts.

20 Q When you say he knew everything
21 including about Mr. D'Agostino, can you describe
22 what you mean by that?

23 A He knew that D'Agostino lived in
24 Bluffton, and he knew that Richard D'Agostino
25 was her husband.

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q Did you become aware during this period
3 of who was due an inheritance from your mother?

4 A Who was due -- no.

5 Q Did you have any conception of where
6 your mother's estate would go?

7 A Yes.

8 Q Where was that?

9 A Well, she had described it to us and
10 Richard D'Agostino was aware of it and he had
11 signed a waiver on her estate. And she also
12 informed us that she had most of her cash assets
13 in life insurance policies and bank accounts,
14 and that it was evenly split 50-50 between my
15 sister and I. So Richard D'Agostino was
16 specifically excluded.

17 Q Was there any last will and testament
18 that your mother left?

19 A No.

20 Q Do you recall, did you become aware
21 during that period what the laws of North
22 Carolina --

23 A I only became aware when Steven Glass
24 informed me after Mr. Nicholls started his
25 procedures. Mr. Alexander was not very clear.

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q And what did Mr. Glass tell you?

3 A He E-mailed me the rule, the specific
4 rule that stated the precedence and how the form
5 was supposed to be filled out.

6 Q And when you say the form, what form
7 are you referring to?

8 A The application.

9 Up until that point I relied on David
10 Alexander to properly fill out the form.

11 Q And you say he was aware of all the
12 information?

13 A Absolutely, and he spoke to Griffis.

14 Q I believe you have heard testimony
15 today that on that form you and your sister were
16 listed as beneficiaries, is that right?

17 A Yes.

18 Q Do you recall providing the information
19 to Mr. Alexander?

20 A He interviewed me and my sister. As I
21 said he knew who everybody was.

22 Q And do you recall putting
23 Mr. D'Agostino on that document?

24 A I didn't put anybody on the document.
25 I relied on Mr. Alexander who prepared the.

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 document.

3 And I guess to maybe clear some of this
4 stuff up, it was my belief with the waiver, and
5 I believe Mr. Alexander probably believed that
6 too, that he was not an heir or a beneficiary.
7 That was certainly my belief and Heidi's belief.

8 Q What was your understanding of what the
9 application would achieve?

10 A What would it achieve? Yeah, we
11 certainly didn't expect litigation.

12 We didn't know where the money was, and
13 we believed this would help us get to where her
14 assets and give us the authority to find all her
15 assets. And before she got sick, she had
16 dementia, she outlined and gave us some
17 documents on life insurance policies, bank
18 accounts, et cetera, and it listed my sister and
19 I as the beneficiaries and she provided me a
20 copy of the waiver that Richard D'Agostino
21 signed before they got married.

22 So our thought was that he has waived
23 his right. He has waived and he knew it. It
24 was not a secret and that we would somehow find
25 where all the money was and would receive the

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 money via life insurance or beneficiaries.

3 Q When you say we would receive the
4 money, you are referring to?

5 A Me and my sister 50-50 is what my
6 mother told us to expect.

7 Q Did you learn from anyone else a
8 different split between those funds?

9 A Only when the litigation started we saw
10 some -- I was informed by Steve Glass some of
11 the stuff that Mr. Nicholls discussed, the North
12 Carolina --

13 MR. TWOMBLEY: Make sure you don't
14 talk about what your lawyer informed
15 you. Those things are privileged.

16 MR. MULLINAX: Ashley --
17 objection.

18 THE WITNESS: But I found out
19 during the litigation let's just say.
20 I saw some E-mails.

21 BY MR. MULLINAX:

22 Q At the time that you signed the
23 application were you aware of any pending action
24 in any other court relative to your mom's
25 estate?

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A I was.

3 Q And what was your knowledge at that
4 time?

5 A That Richard D'Agostino about a month
6 prior, we received a notification that he had
7 opened an estate in South Carolina; and we
8 informed our attorney David Alexander we had a
9 discussion with Anthony Griffis about it.

10 Q So you knew that an estate was pending
11 in South Carolina, is that what I am
12 understanding?

13 A You are understanding that correctly.

14 Q And the application that you signed, do
15 you recall that representing that --

16 A I recall there was a -- what I
17 believed --

18 Q Let me finish the question.

19 Do you recall an application, a section
20 that referred to any of the pending actions with
21 regard to the estate administration?

22 A I do.

23 Q And what do you recall of that?

24 A I recall that there was a block checked
25 that said there was no -- something or words to

1 MULLINAX - HUTHER (DIRECT EXAMINATION)
2 that effect there wasn't an estate being opened
3 somewhere else. I informed David Alexander over
4 the telephone, I was getting ready to sign it --

5 MR. TWOMBLEY: Let us take a break
6 for a minute. I think we will probably
7 waive the privilege, but I will take a
8 break and discuss this with him. We
9 will take a break.

10 (Whereupon, a short break was
11 taken.)

12 MR. TWOMBLEY: We will agree for
13 him to answer these questions as long
14 as you all agree that him answering the
15 questions doesn't waive the
16 attorney/client privilege with respect
17 to all the communications that he had.
18 It just doesn't waive it, period.

19 If you all want to agree to that,
20 because we would like to explain what
21 happened; but I don't want someone to
22 come back and say well, they waived the
23 attorney/client privilege and therefore
24 we can get into everything. So you
25 decide what you would like to do.

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 MR. MULLINAX: I would agree to
3 that with this stipulation, certainly I
4 want you to raise your objection each
5 time if you think it is appropriate, if
6 you think attorney-client privilege is
7 being asked for.

8 But there are certain questions
9 and maybe I can rephrase some of them
10 to get to facts in the case. The fact
11 that he says something to his attorney
12 doesn't make it attorney-client
13 privilege, or he heard something, his
14 knowledge is what I am asking for. So
15 I welcome your objections and I will
16 accept that you are not waiving the
17 attorney/client privilege. But I still
18 think you need to put on the record if
19 you have an objection to a particular
20 question that you think breaches that.
21 I think I am going to try to phrase my
22 questions in a way that won't do that.

23 MR. TWOMBLEY: Why do I need to
24 put an objection on the record for each
25 question if you agree that we are not

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 waiving the attorney/client privilege?

3 MR. MULLINAX: Again, I think some
4 of the nature of the questions, there
5 is a dispute as to whether it is
6 attorney-client privilege or not, I
7 think we need to stipulate. Because if
8 I ask a question and later on you say
9 well, that was attorney-client
10 privilege, that is where my concern
11 lies.

12 In other words, if I ask him 50
13 questions and you think 50 of them are
14 covered under attorney-client
15 privilege, and I think five of them may
16 be, we might have an issue. That is
17 where my concern is.

18 MR. TWOMBLEY: Well, I mean you
19 can still argue that it is not
20 privileged, and if a court says it was
21 not privileged then that wouldn't waive
22 it either, but -- and I won't to every
23 single question. I want you to be able
24 to get the information. I just don't
25 want to have to defend an argument that

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 we have somehow waived the
3 attorney/client privilege.

4 MR. MULLINAX: Okay. Well, if
5 part of the stipulation that you are
6 suggesting is that we take each
7 question up that you have an issue with
8 the attorney-client privilege with the
9 Judge later, I am okay with your
10 stipulation.

11 MR. TWOMBLEY: I would rather him
12 answer them now.

13 MR. MULLINAX: Okay.

14 MR. TWOMBLEY: I mean all I am
15 saying is I don't want -- I am going to
16 let him answer any question that he
17 would like to answer that is pursuant
18 to the discussion we just had.

19 If it goes beyond that, then I am
20 going to object. But I just want to
21 make sure that if he responds to the
22 questions, which I think he will
23 provide you with all the information
24 that you would like, but I just want to
25 make sure that in the future there is

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 not an argument that we have waived the
3 privilege.

4 MR. MULLINAX: I will agree to
5 that. Again, I will only say that I am
6 not going to stipulate to every
7 question that I ask is attorney-client
8 privilege.

9 MR. TWOMBLEY: No, I --

10 MR. MULLINAX: We will take it up
11 with the Judge, and I think we are
12 good.

13 MR. TWOMBLEY: I totally agree
14 with that.

15 MR. MULLINAX: Okay.

16 BY MR. MULLINAX:

17 Q Mr. Huther, before your attorney asked
18 to take a break to discuss that matter with you,
19 I was asking you about the application that you
20 said was prepared by Mr. Alexander in North
21 Carolina to file for the estate of your late
22 mother. So I want to get back to that
23 discussion.

24 You indicated there was some type of
25 block or something on that form that you recall

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 that had to do with pending actions on that
3 estate in other places, is that right?

4 A That is correct.

5 Q And your recollection is what of that
6 particular section?

7 A That I was getting ready to get it
8 notarized, and I called Mr. Alexander and said I
9 believe there is a wrong block checked on it.
10 Should I sign it? And he said, go ahead and
11 sign it and I will make the correction when it
12 gets to my office. So that was just an
13 oversight.

14 Q And regardless of which way the block
15 was checked, when you signed it what was your
16 impression of what that check or noncheck
17 represented?

18 A My impression was when David got the
19 form he was going to make it accurate and that
20 so they didn't have to E-mail -- or I guess he
21 Fed Ex'd me the form.

22 Q What did you think was inaccurate about
23 that representation, whatever it was?

24 A I was expecting the block to say from
25 there is no estate being opened somewhere else.

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 That it would say there is an estate being
3 opened somewhere else. And that David would
4 make that administrative change and that is how
5 I viewed it.

6 Q All right.

7 Mr. Huther, you testified that you
8 hired Mr. Alexander through your company, is
9 that right? Or through your company's plan?

10 A A thing called hire a legal planner.

11 Q Okay.

12 And that is paid through your company?

13 A It is like \$7 a month, you pay and you
14 get hired a legal service.

15 Q And so did any funds come out of your
16 own pocket for that representation?

17 A Yes, me and Heidi paid a fee. I think
18 I paid 2100 and Heidi paid 9. That is roughly.
19 I don't remember the exact details, but
20 something like that.

21 Q And you said 2100 came out of your own
22 pocket?

23 A Yes. I believe so. Something like
24 that.

25 Q And has anyone ever reimbursed you for

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 those funds at all?

3 A No.

4 Q And do you expect reimbursements in any
5 fashion in the future for those funds?

6 A No.

7 Q Do you know if that \$2100 has been
8 claimed on any document as an estate expense or
9 anything like that?

10 A No, it is a write-off.

11 Q When you say a write-off, a
12 write-off --

13 A It means -- I just mentally wrote it
14 off.

15 Q It wasn't claimed on any tax form or
16 anything like that?

17 A Nothing.

18 Q Mr. Huther, can you describe after you
19 hired Mr. Alexander what happened thereafter
20 with regard to the estate administration? What
21 was the next thing that occurred after you hired
22 him and filed the application?

23 A I mean it wasn't shortly thereafter, I
24 think we started hearing from Mr. Nicholls.

25 Q And what do you mean by that, you

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 started hearing from Mr. Nicholls?

3 A I was out of the country on business,
4 and some letters came to my house and I was
5 informed that a lawyer from North Carolina asked
6 my wife to open it and she read it to me. I
7 mean at the time I thought we were completely in
8 the right. So I didn't understand what was
9 going on.

10 So that was really the next major thing
11 that happened was letters from Mr. Nicholls
12 explaining -- I can't remember all the details,
13 but like I should resign from the position as
14 administrator of the estate, words to that
15 effect.

16 Q Was there a point -- you have alluded
17 to the fact that you thought at the time you
18 were in the right.

19 Was there a time that you felt like you
20 were in the wrong?

21 A No, I wouldn't have done it if I
22 thought I was wrong.

23 Q Mr. Huther, do you recall during that
24 period that you served as administrator for your
25 mom's estate in North Carolina obtaining any

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 information that told you what you and your
3 sister would do under the estate?

4 A I don't really recall. I did have
5 discussions with David Alexander, but he never
6 explained the North Carolina split like you
7 explained it. It was never in that details.

8 Like I said we were expecting to
9 inherit the money by what my mother told us was
10 beneficiary information annotated on all her
11 accounts. So we weren't even really worried
12 about that. We thought it was just going to
13 naturally flow out.

14 Q And what does that mean naturally flow
15 out?

16 A She put Heidi and me as beneficiary on
17 all of her accounts. That when she passed away
18 we provided with these accounts with a death
19 certificate that we would receive based on how
20 she annotated her beneficiaries on her accounts
21 and life insurance.

22 Q And at what point during your service
23 as administrator in North Carolina did you
24 determine that you did not want to continue in
25 that role?

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A When I got letters from Mr. Nicholls,
3 then I hired Mr. Glass. Then Mr. Glass said
4 based on the rules in North Carolina and the
5 priority of people, a priority of appointments
6 that I should resign.

7 Q Did you immediately resign once you
8 learned that?

9 A It was immediate. As fast as Steve
10 could put the paperwork together.

11 Q Mr. Huther, I am going to hand you
12 Defendant's Exhibit 6, or at least my copy of it
13 that we can pull his copy.

14 Can you describe to me to me what
15 Defendant's Exhibit 6 is? Are you familiar with
16 that document?

17 A Yes, I saw it a few years ago.

18 Q What is that?

19 A There was a motion by Richard
20 D'Agostino.

21 Q And do you know the nature of that
22 motion?

23 A He wanted me to resign as the executor
24 or administrator of the estate, and it was just
25 a discussion of sanctions. So I guess it is a

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 motion for sanctions against me.

3 Q And was there -- you said you
4 immediately resigned as soon as you had --

5 A I don't mean like that day. I mean
6 within the process. Whatever the process is
7 with my lawyer I resigned.

8 Q Were you aware of this motion before
9 you resigned?

10 A I don't remember the sequence of the
11 events, but they were all happening around the
12 same time. It was all resulting from the
13 actions of Mr. Nicholls. So that was one of the
14 actions. I don't remember all of the actions,
15 but it was all part of the same thing.

16 Q Mr. Huther, can you describe what your
17 knowledge is of what transpired after you
18 resigned as special administrator in a North
19 Carolina court to your knowledge? With your
20 mother's estate? What happened thereafter with
21 your mother's estate that you know of?

22 A Well, Richard was the personal
23 representative in South Carolina of her estate.
24 The matters in North Carolina were settled via
25 the settlement agreement that we negotiated over

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 the course of that summer.

3 Q And the settlement agreement you are
4 referring to?

5 A Is the family settlement agreement.

6 Q The one called the family settlement
7 agreement. Let me see if I can find it.

8 I am going to hand you what is marked
9 as Defendant's Exhibit 14.

10 Is that the document you are referring
11 to?

12 A It says draft by Steve, so I guess this
13 is one of the drafts.

14 Q And do you recall signing an eventual
15 final copy of that document?

16 A Yes.

17 Q Mr. Huther, I am going to hand you
18 Plaintiff's Exhibit 1 right here.

19 And I will ask you to turn to the
20 second page of that.

21 A The second page, okay.

22 Q Are you now looking at the first page
23 of the "Private Family Settlement Agreement"?

24 A I am.

25 Q And do you see a date at the top,

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 9/17/10 filed?

3 A Yes.

4 Q And could you take a minute to look at
5 that document and see if that is the document
6 you recall signing?

7 A I don't have my glasses with me, but it
8 looks like it. It has got my signature and
9 Heidi's signature.

10 Q Can you tell the date of those
11 signatures?

12 A Let's see, my signature was on the
13 18th.

14 Q Of?

15 A September 2010.

16 Q Do you recall a provision in this
17 document relating to fees owed to Nicholls &
18 Crampton Law Firm in North Carolina?

19 A Yes.

20 Q I am going to turn your attention to
21 paragraph number 3 in that document that you
22 signed called Family Settlement Agreement and
23 toward the end of that paragraph it refers to
24 \$2,000, does it not?

25 A Yes.

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q What is your recollection of that
3 amount and who was paying it to whom?

4 A That was an amount that was to be paid
5 by the estate to Mr. Nicholls. Not to exceed
6 that amount.

7 Q Do you know if it was ever paid?

8 A It was not.

9 Q Do you know why it was not paid?

10 A I do.

11 Q Why was it not paid?

12 A Shortly after this agreement was
13 finalized as Mr. Nicholls said this settled the
14 North Carolina issues. But there were a number
15 of South Carolina issues regarding directly
16 Mr. D'Agostino's conduct regarding some of his
17 activities with my mother, and we actually filed
18 some actions in the probate court which caused
19 Mr. D'Agostino to, I believe, illegally receive
20 this agreement.

21 Q You think that Mr. D'Agostino rescinded
22 that agreement?

23 A Yes.

24 Q Have you seen any documentation to that
25 effect?

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A Yes.

3 Q Have you produced that for us during
4 discovery? Or are you aware that your attorney
5 has produced it for us during discovery?

6 A I have no idea.

7 MR. TWOMBLEY: Just so you know we
8 didn't produce it. We referenced the
9 probate court file. It is all in the
10 probate court. They immediately
11 alleged it in filed sworn court
12 documents.

13 BY MR. MULLINAX:

14 Q Have you reviewed the documents you are
15 referring to?

16 A Yes. Ashley sent me --

17 MR. TWOMBLEY: You can't talk
18 about anything I sent you or anything
19 we did.

20 BY MR. MULLINAX:

21 Q Have you reviewed the document that
22 your attorney is suggesting is public record in
23 the probate court called what I think you are
24 referring to as a rescission of Mr. D'Agostino
25 of this agreement?

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A I have seen documents. I don't know
3 what document he is talking about specifically,
4 because I am not a lawyer. I have seen
5 documents.

6 Q Well, let me recap, if I understood
7 your testimony, that this Family Settlement
8 Agreement that we are referring to here you said
9 had to do with North Carolina issues in a North
10 Carolina court, is that right?

11 A That is not what I said.

12 This agreement was to settle our
13 dispute with Mr. D'Agostino related to issues in
14 North Carolina.

15 Q And do you know if this document was
16 ever filed in any court?

17 A I don't recall. I don't know.

18 Q Has anyone ever told you that it was
19 filed in any court?

20 MR. TWOMBLEY: Nothing that we
21 talked about.

22 BY MR. MULLINAX:

23 Q Anyone at all, Mr. Huther? Have you
24 heard any representative from any person,
25 whether it be your attorney or somebody else

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 that this has been filed in any court?

3 A I don't have a strong memory of it. I
4 don't know.

5 Q Did you intend for this document to be
6 filed in court?

7 A If I recall correctly Mr. Griffis was
8 supposed to collect all the signatures and file
9 the document with the court. I don't recall
10 like 100 percent whether or the not he did that
11 or not. I don't know. I know he got all the
12 signatures, whether he filed it at the court I
13 just don't remember. It is a lot of detail I
14 followed.

15 Q At what point do you recall learning of
16 this purported rescission by Mr. D'Agostino that
17 you are referring to?

18 A It was shortly after we initiated
19 proceedings in the probate court here in South
20 Carolina requiring some actions of
21 Mr. D'Agostino.

22 Q Can you approximate a year? And by the
23 way, just to --

24 A It was, you know, roughly the same time
25 frame. The fall of 2010. So September,

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 October, November time frame.

3 Q Are you familiar with other provisions
4 besides the one I just alluded to in this
5 document, Mr. Huther?

6 A I have read the document many times.

7 Q Is there any provisions that you recall
8 being actually provided by and followed through
9 with?

10 A Yes.

11 Q And what are those provisions?

12 A Well, Mr. Nicholls was paid 6800 by
13 Mr. Alexander, and I did pay Mr. Alexander \$1200
14 to pay Mr. Nicholls, which I know that was done
15 because Mr. Alexander informed me when that
16 transaction was done.

17 Heidi was to close out the -- she had
18 to do an accounting of all the accounts. I
19 think they are called the JL. It was a
20 guardian. It was where all the money was, was
21 in a guardian account in Bank of America. She
22 had to do an accounting with a court in Wake
23 County, North Carolina. She did that, and then
24 we had to transfer the money over to the estate,
25 which we did that.

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 So the only thing that I think -- that
3 I can think of that wasn't done was the payment
4 to the attorney.

5 Q The \$2,000 to Mr. Nicholls' firm?

6 A Right.

7 Q With regard to that \$2,000, Mr. Huther,
8 I apologize for what appears to be a silly
9 question, but what were those funds to -- what
10 purpose were those funds to be paid to
11 Mr. Nicholls' firm for? What was the reason
12 they were being paid?

13 A That stipulation was put in there by
14 Mr. Griffis.

15 Q Do you know what the \$2,000 was
16 supposed to be going toward?

17 A Yeah, I assume it was for attorney
18 work, attorney's fees that Mr. Nicholls was
19 owed.

20 Q And that was to be paid by your mom's
21 estate, Valerie D'Agostino?

22 A Yes.

23 Q And that was just the extent of what
24 she was supposed to pay at that time under that
25 agreement?

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A It was very clear. It was not -- for
3 Mr. Nicholls. Mr. Griffis had a different
4 number, but for Mr. Nicholls it specifically
5 stated not to exceed \$2,000.

6 Q Mr. Huther, I am going to present you
7 with Defendant's Exhibit 17.

8 Are you familiar with that document?

9 A I have seen documents that look like
10 this. I don't know if I specifically saw this
11 one.

12 Q Are you familiar with a claim that was
13 filed by Mr. Nicholls' firm against the estate
14 of your mother?

15 A Yes.

16 Q Do you know how you came by that
17 knowledge?

18 A I assume I was informed by somebody.

19 Q Do you recall at the time that you came
20 by that knowledge what the amount of the claim
21 was?

22 A No, I don't recall.

23 Q Would you have known it before you
24 signed or at the time that you signed the Family
25 Settlement Agreement we were talking about just

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 a minute ago?

3 A We signed the Family Settlement
4 Agreement. I only knew what was in that
5 agreement. The stipulation that Griffis put in
6 for his fees and Mr. Nicholls' fees, that is all
7 I know. I just signed that agreement.

8 Q But you did know that some funds were
9 purportedly owed by your mom's estate to
10 Mr. Nicholls' law firm at that time?

11 A As I said, the paragraph you showed me
12 in this Family Settlement Agreement, that block
13 where it says not to exceed \$2,000. That is the
14 extent of what I knew was owed to Mr. Nicholls.

15 Q And do you recall at any time anyone
16 after that date providing you any updated
17 information about any claim filed by
18 Mr. Nicholls?

19 A Yeah, I mean I received updates about
20 the case. I mean a lot of updates about
21 different aspects of the case.

22 Q And do you recall those numbers being
23 higher than \$2,000?

24 A Yes.

25 Q I am going to hand you, Mr. Huther,

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Defendant's Exhibit 18.

3 A Okay.

4 Q I am going to direct your attention to
5 an enclosure, and I think you are looking at it
6 there. Up at the top it says, "An Account with
7 Nicholls & Crampton".

8 Have you seen this document before?

9 A I don't know.

10 Q Do you know what this document is?

11 A It looks like it is the legal fees
12 that -- which goes to D'Agostino.

13 Q And you don't recall seeing this
14 document before today?

15 MR. TWOMBLEY: Object to the form.

16 It misstates his testimony.

17 BY MR. MULLINAX:

18 Q Please correct me, but have you seen
19 this document before today?

20 A I mean I have seen so many documents.
21 I don't specifically recall this one.

22 Q Do you ever recall seeing an invoice
23 from Nicholls & Crampton before today?

24 A I may have glanced at an invoice, but I
25 didn't certainly didn't ever study one.

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q Mr. Huther, can you describe the extent
3 of your personal knowledge of Mr. Nicholls'
4 representation of Mr. D'Agostino and their
5 conversations and dealings with each other?

6 MR. TWOMBLEY: Object to the form
7 of the question.

8 THE WITNESS: I have no idea what
9 Mr. D'Agostino said to his lawyer.

10 BY MR. MULLINAX:

11 Q Do you know what documents he filed on
12 behalf of Mr. D'Agostino?

13 A What documents he filed?

14 Q Mr. Nicholls, right, Nicholls &
15 Crampton filed?

16 A The only documents I know of are the
17 ones maybe related to the motions related to
18 sanctions in North Carolina.

19 Q Were you a party to any of the E-mails
20 between Mr. Nicholls and Mr. D'Agostino during
21 his representation of him?

22 A Between Mr. D'Agostino and
23 Mr. Nicholls?

24 Q Yes.

25 A No.

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q Did you ever sit in on any meetings
3 with Mr. D'Agostino and Mr. Nicholls during the
4 representation by Mr. Nicholls?

5 A Never.

6 Q Mr. Huther, I will represent to you
7 that the document in front of you is in fact an
8 invoice from Nicholls & Crampton and its
9 representation of the -- the representation of
10 Mr. D'Agostino during Nicholls & Crampton's
11 representation of him.

12 My question to you is can you point to
13 any entry on this document that you have
14 personal knowledge of?

15 A That I have personal knowledge of
16 anything on this document?

17 Q Yes.

18 A What do you mean by personal knowledge?

19 Q Were you a party to any of these
20 things?

21 A Whether I was a party to any of it?

22 Q There is a discussion, there is
23 E-mails, telephone conversations --

24 A So what are you saying? I just want to
25 know. So if I was a party of it, okay?

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 MR. TWOMBLEY: Wait to respond. I
3 want to use the restroom for a minute.

4 If you don't mind, Jay?

5 MR. MULLINAX: Yes, you are good.

6 (Whereupon, a short break was
7 taken.)

8 THE WITNESS: I really don't
9 understand your question.

10 BY MR. MULLINAX:

11 Q To ask the question, Mr. Huther, we are
12 looking at a document here entitled, "Nicholls &
13 Crampton. An Account with Nicholls & Crampton",
14 Defendant's Exhibit Number 18.

15 And do you see a list of items there, a
16 list of entries?

17 A I do.

18 Q And in that list of entries I will
19 represent to you that those are entries made by
20 Nicholls & Crampton on the account for
21 Mrs. D'Agostino as you can see there on the top
22 left-hand corner of the page.

23 My question to you is what personal
24 knowledge do you have of any of these particular
25 activities by the law firm of Nicholls &

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Crampton, if any?

3 A I don't have any. I just recognize a
4 couple of names on here. Like Belcher was a
5 lawyer I hired. Glass was a lawyer I hired.

6 But what they talked about I have no
7 knowledge of.

8 Q Do you have any personal knowledge of
9 these activities at all without looking at this
10 document?

11 A Well, this just looked like stuff his
12 lawyer did. Obtain documents. I mean it makes
13 sense to me, but until I saw this I -- well,
14 this is the day-to-day activities of his lawyer.

15 Q I am going to refer, Mr. Huther, to I
16 think the next-to-last page in that same
17 exhibit.

18 A Okay.

19 Q And do you see the number \$3,789.75?

20 A I do.

21 Q And does that number mean anything to
22 you? Does that ring a bell to you?

23 A It doesn't ring a bell, but what I get
24 out of that is after he received his payments
25 from Alexander in May, he is owed 3789.

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q Okay.

3 A And a payment from Richard D'Agostino.
4 So he took in 95 and he is owed 3789.

5 Q And if you turn the page once more,
6 could you tell us what the date at the top right
7 corner of that document is you are looking at
8 right now?

9 A November 2011.

10 Q And what is the amount at the bottom
11 right?

12 A 4,542.94.

13 Q And do you know what that number
14 represents?

15 A That is the balance due Nicholls &
16 Crampton per his statement.

17 Q Mr. Huther, these activities that we
18 are referring to that are itemized here, are you
19 aware of any of these activities that did not
20 occur?

21 A Like I said these look like the
22 day-to-day activities of his lawyer. I don't
23 know whether they occurred or they didn't occur.
24 I assume they occurred.

25 I have no knowledge of any of this

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 stuff.

3 Q Mr. Huther, prior to this litigation
4 can you tell me what interactions you have had
5 with attorneys and lawsuits?

6 A Oh, before this?

7 Q Before this?

8 A Just when I was going on a deployment
9 at the Army, the Army lawyer made a will and a
10 power of attorney and that was it. Never had a
11 lawsuit.

12 Q Are you at all familiar with outside of
13 this lawsuit, do you have any personal knowledge
14 of attorney's hourly rate or billable rate or
15 the way that they bill for their services?

16 A I mean I just learned in this process
17 how they do it.

18 Q Would it surprise you if I told you
19 that an attorney might charge as much as \$275 an
20 hour for the services that are represented on
21 this page?

22 A No, it would not surprise me.

23 Q Would it surprise you if I said that
24 some attorneys charge \$400 per hour for these
25 type of services?

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A No.

3 Q Would it surprise you if I told you
4 that paralegals might be charged at a rate of
5 somewhere between 135 or more for these type of
6 services?

7 A Nothing on this regard surprises me.

8 MR. TWOMBLEY: We will stipulate
9 that all those fees are reasonable. I
10 mean if you want us to do that or you
11 can ask him about it, I mean as far as
12 the rates and all that stuff.

13 BY MR. MULLINAX:

14 Q Mr. Huther, what is your personal
15 knowledge of -- strike that.

16 Mr. Huther, were you involved in the
17 negotiations between the Estate of Valerie
18 D'Agostino and Richard D'Agostino's estate
19 regarding everything covered in the Family
20 Settlement Agreement? Were you involved in
21 that?

22 MR. TWOMBLEY: Object to the form
23 of the question.

24 THE WITNESS: I was involved in
25 the negotiations of the Family

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Settlement Agreement. I don't know if
3 it was on behalf of the Estate of
4 Valerie D'Agostino. I was not the
5 personal representative at that time.
6 I was an heir.

7 BY MR. MULLINAX:

8 Q And you in fact signed that agreement,
9 correct?

10 A Yes.

11 Q Mr. Huther, I am going to hand you
12 Defendant's Exhibit 25.

13 Tell us what it says at the top
14 right-hand corner of that.

15 A "Settlement Agreement and General
16 Release".

17 Q Are you familiar with this document?

18 A I am. I mean I haven't read it in over
19 a year, but a year ago I was familiar with it.

20 Q Were you a signer to this agreement?

21 A I was.

22 Q Does this document represent what you
23 signed?

24 A I believe so. I just read it, but I
25 believe it is accurate.

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q And can you tell me who the parties
3 were to this agreement if you recall? Or if you
4 can tell from the document?

5 A The parties were myself, my sister
6 Heidi Pallison, Chris D'Agostino who was the
7 personal representative of D'Agostino's estate,
8 and Anthony Griffis who was one of the two
9 attorneys who represented D'Agostino in North
10 Carolina.

11 Q And were there any other parties
12 besides those?

13 A Not mentioned in the agreement, but I
14 believe they spoke to you.

15 Q But were there any other parties to
16 this agreement besides the ones you just
17 mentioned?

18 A I don't think I understand the question
19 properly.

20 Q Well, you just listed quite a few
21 people.

22 Do you see any other place for any
23 other signatures?

24 A On the agreement, on this version of
25 the agreement there is no one else listed.

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q Do you know of another copy of this
3 agreement that has someone else listed?

4 A There was a previous version of the
5 agreement which mentions Mr. Nicholls.

6 Q Do you know if that document was signed
7 by Mr. Nicholls?

8 A It just mentions paying him.

9 Q Let me turn your attention to page 2,
10 paragraph 4. In the same document which you
11 just mentioned all the parties, do you see a
12 reference there to a payment for Nicholls &
13 Crampton Law Firm?

14 A Wait a second, let me read this.

15 Q Okay.

16 A Yeah, it mentions, you know, final
17 resolution of Nicholls & Crampton's claim in
18 paragraph 4.

19 Q And can you tell me what you know about
20 this amount that is mentioned? Well, you
21 mentioned the amount. I think there is only one
22 amount mentioned.

23 Do you see that number?

24 A I see \$4,929.08.

25 Q And what do you know about that number?

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A That was the number of the claim that
3 Mr. Nicholls I guess you filed for Mr. Nicholls
4 in the court against Mr. D'Agostino's estate
5 that was -- I don't know what the correct legal
6 term, but was disapproved by the court.

7 Q When you say the claim, are you
8 referring to a client claim in Mr. D'Agostino's
9 estate?

10 A Mr. Nicholls filed a claim against the
11 Estate of Richard D'Agostino for the amount of
12 roughly \$4500 is what I recall.

13 Q And are you familiar with a claim
14 subsequently filed against your mother's estate?

15 A Right.

16 Q And do you know roughly what that
17 number was?

18 A I believe it was 4500 or so also.

19 Q Does this number, this 4,929.08, does
20 that have anything to do with the claim that was
21 filed --

22 A Yes, the \$4900 was to be the amount we
23 were going to pay Mr. Nicholls, plus any
24 additional interest that might have popped up
25 between the time it was going to take to sort

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 out all this stuff.

3 Q And do you know who came up with that
4 number there, Mr. Huther?

5 A I know the number is based on the claim
6 that Mr. Nicholls filed, plus I believe Ashley
7 probably figured in a few extra bucks for
8 interest is kind of how I recall it.

9 Q Okay.

10 Did you get a chance to read this
11 entire paragraph, Mr. Huther, just now?

12 A I didn't read the whole thing.

13 Q Let me give you an opportunity to read
14 the whole thing.

15 A Okay.

16 Q And I apologize for what seemed like a
17 silly question, but can you tell me what your
18 understanding is from this document you signed,
19 what the purpose of that 4,929.08 was?

20 A The purpose was there was going to be a
21 hearing to determine whether or not
22 Mr. D'Agostino's estate had to pay Mr. Nicholls.
23 And if the court said Mr. D'Agostino had to pay
24 Mr. Nicholls' fees, then we were going to give
25 them that money back to pay Mr. Nicholls' fees.

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 In the case the Court said, as it
3 turned out, Mr. D'Agostino didn't have to pay,
4 then we would -- if the court determined that we
5 would have to pay, we would pay Mr. Nicholls.

6 Q And where did those funds come from?
7 What is your understanding of where those funds
8 came from?

9 A I assume they came from D'Agostino's
10 estate.

11 Q When you say D'Agostino, whose --

12 A I am talking about Richard D'Agostino.

13 Q It came from his estate to?

14 A To a trust account being held by
15 Ashley.

16 Q And do you know the whereabouts of
17 those funds today?

18 A I see it on my statement every month.
19 It is in some account that Ashley is -- I
20 haven't gotten into the details with Ashley on
21 that. I am sure it is fully accounted.

22 Q But it is your understanding that Mr.
23 Twombly or his firm still maintains those
24 funds?

25 A Yes.

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q For the purpose of paying Mr. Nicholls'
3 claim?

4 A Yes.

5 Q Mr. Huther, I am going to ask you if
6 you can look at that document, and I will
7 confess to you right now that I don't see a date
8 on it.

9 But do you see a date or have a
10 recollection of the date that this document was
11 signed?

12 A I don't have a recollection, I'm sorry.

13 Q Could you look at the first paragraph
14 for me on the first page down at the last part
15 of that paragraph it says October 2012, does it
16 not? The first paragraph?

17 A Oh the first paragraph, the blank day
18 of October 2012. That rings a bell. About a
19 year ago, yeah.

20 Q Do you think it was probably signed
21 around that date?

22 A I believe so.

23 Q I am going to refer you back to the
24 Family Settlement Agreement.

25 What is the Exhibit number on that?

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A 1.

3 Q Mr. Huther, will you take another quick
4 glance at paragraph 3 in the Family Settlement
5 Agreement, which is Plaintiff's Exhibit Number
6 1, I believe, and does that refer to \$2,000
7 there?

8 A Paragraph 3?

9 Q Paragraph 3, it is the last part of
10 that paragraph I believe. I think it is the
11 last?

12 A Yes.

13 Q And is that the \$2,000 that Valerie
14 D'Agostino's estate agreed to pay Mr. Crampton
15 under that agreement?

16 A Yes.

17 Q And what is the date of that Family
18 Settlement Agreement?

19 A I guess it says 9/17/10.

20 Q And again referring back to, and I am
21 not trying to play ping-pong with you, but back
22 to the second agreement which is Exhibit,
23 Defendant's Exhibit 25, the Settlement
24 Agreement, what is the date of this Settlement
25 Agreement?

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A October 2012.

3 Q So two years before 2000 was agreed to
4 be paid by Valerie D'Agostino's estate?

5 A Yeah.

6 Q Excuse me, two years after.

7 And then 4,900 and some-odd-dollars
8 were set aside from Mr. D'Agostino's estate to
9 also compensate Mr. Nicholls for his fees, is
10 that right?

11 A I don't -- it looks like it was also.
12 It is not 2000 plus 4,000.

13 Q Was 2000 agreed to be paid in 2010?

14 A 2,000 was agreed to be paid in 2010.
15 Later on he filed a claim for 4500.

16 Q And was 49 set aside for the purposes
17 of satisfying Mr. Nicholls' claim, his law
18 firm's claim in 2012?

19 MR. TWOMBLEY: Object to the form
20 of the question.

21 BY MR. MULLINAX:

22 Q Let me rephrase the question.

23 Under the settlement from 2012 did
24 Mr. D'Agostino under that agreement, your
25 understanding of the agreement, did

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Mr. D'Agostino's estate provide \$4900 for the
3 purpose of satisfying Mr. Nicholls' claim?

4 A Yes.

5 Q Mr. Huther, is it your understanding
6 that Mr. Nicholls' claim included interest that
7 was accruing during the period from the initial
8 claim being filed?

9 A Yes.

10 Q Do you know what the interest was that
11 was being claimed?

12 A I asked one time. It was a certain
13 percentage each month.

14 Q Would it surprise you to learn it was
15 1.5 percent per month?

16 A Yeah, that sounds about right. That is
17 kind of what I remember.

18 Q Would it surprise you if I told you
19 that if you added \$2,000 to the \$4900 and
20 change, that it is almost identical to the
21 interest rate that is accumulated on the claim
22 by Mr. Nicholls since the very inception of the
23 first bill he sent?

24 A I don't see a connection with the two
25 numbers. The \$2,000 was not interest.

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q Would it surprise you, though, that if
3 the number that is owed today under the
4 interest, the 1.5 percent per month, is very
5 close to the combination of the two numbers in
6 that document?

7 A It would not surprise me.

8 MR. TWOMBLEY: Did you say it
9 would not?

10 THE WITNESS: It would not.

11 I mean I have no idea how interest
12 is compounded.

13 BY MR. MULLINAX:

14 Q Mr. Huther, during this period from the
15 time you resigned and all the litigation that
16 was going on with both estates, were you under
17 the impression that there were negotiations
18 going on between your attorney and all other
19 parties with regard to all outstanding claim on
20 your mom's estate?

21 MR. TWOMBLEY: Can you repeat the
22 question, please?

23 BY MR. MULLINAX:

24 Q During the period, Mr. Huther, during
25 the period from the time that you resigned as

1 MULLINAX - HUTHER (DIRECT EXAMINATION)
2 personal representative of your mom's estate or
3 administrator of your mom's estate and
4 throughout all the litigation up until this
5 point today, have you been under the impression
6 that your attorney and his law firm have been
7 under negotiations to settle all matters with
8 regard to the estate of your mother?

9 MR. TWOMBLEY: I will instruct you
10 not to answer with respect to anything
11 you learned from me or as a result of
12 our communications I guess.

13 BY MR. MULLINAX:

14 Q Is it your understanding that your
15 attorney has been negotiating on your behalf in
16 regard to these claims?

17 MR. TWOMBLEY: The same objection.

18 MR. MULLINAX: I am merely asking
19 for his knowledge. Not his
20 communication with you.

21 MR. TWOMBLEY: But if he gained
22 that knowledge solely from
23 communications with me, I think that
24 would be privileged.

25 BY MR. MULLINAX:

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q Are you aware of any offers by your
3 attorney in regard to settlement of any claims
4 with regard to Mr. Nicholls' claim specifically?

5 THE WITNESS: Can I answer it?

6 MR. TWOMBLEY: Sure. I mean to
7 the extent you know.

8 THE WITNESS: As far as I know.

9 What I know is that I have been
10 trying to get this thing done. This
11 thing is an albatross around my neck
12 and a drain on my family.

13 BY MR. MULLINAX:

14 Q And we have too, Mr. Huther --

15 A I mean my mother passed away and that
16 was a major event, and for years I have been
17 fighting about this nonsense.

18 When we settled the agreement with
19 Christopher D'Agostino the intent was that all
20 the lawyers were going to get paid, all of them,
21 and that has always been our position. Why
22 this -- you asked me earlier why are you here?

23 Q Again, let me restate the question.

24 Are you aware of any --

25 A Yes, I am aware. I am aware that we

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 tried to settle this claim in October.

3 Q Let me finish the question.

4 Are you aware of any specific offers by
5 your attorney or his firm to settle
6 Mr. Nicholls' claim?

7 THE WITNESS: I mean I can't
8 answer the question without me saying
9 what you have told me. I am kind of in
10 a box, right?

11 MR. TWOMBLEY: Let us talk for a
12 minute and see if we can't get it
13 resolved.

14 (Whereupon, a short break was
15 taken.)

16 MR. TWOMBLEY: Let me put on the
17 record that Mr. Huther and I went and
18 discussed and we have reached an
19 agreement with Counsel that Mr. Huther
20 can respond to these series of
21 questions about the settlement offers
22 with the agreement that Mr. Nicholls
23 and his firm and his counsel will not
24 later argue that we have in any way
25 waived the attorney/client privilege

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 with respect to an issue or any other
3 communications. Right, Jay?

4 MR. MULLINAX: That is right.

5 The only issue there was we are
6 not stipulating that every question
7 that I ask is going to be covered. But
8 we will take that up with the judge if
9 there is a question as to whether it is
10 attorney-client privilege.

11 MR. TWOMBLEY: Sure.

12 BY MR. MULLINAX:

13 Q Mr. Huther, you are still under oath.

14 We will continue with these series of
15 questions.

16 Again I believe my last question and I
17 will try to phrase it as best I can, had to do
18 with settlement offers.

19 Are you aware, Mr. Huther, of any
20 specific dollar figure, settlement offers by
21 your attorney or his law firm to settle
22 Mr. Nicholls' claim in this case?

23 A Yes.

24 Q And can you tell me what offer or
25 offers that you are specifically aware of with

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 regard to dollar figures and how you came about
3 that knowledge?

4 A On multiple occasions we have tried to
5 settle this claim for the full amount.

6 Q What do you think the full amount is,
7 Mr. Huther?

8 A We think the full amount is \$4500. We
9 don't really agree internally among ourselves
10 about the interest rate charging us way back
11 from the beginning on how you guys calculated
12 the interest, since we came in the game late.

13 But we have agreed to pay you up to the
14 amount that D'Agostino's estate paid us. We
15 have already been paid for that. So this is why
16 we are in a state of shock on why this issue is
17 not resolved.

18 Q We join you in that shock, Mr. Huther.

19 Are you familiar with any other
20 settlement offers besides the one that you
21 purport has been represented to you for
22 approximately \$4500.

23 Are you familiar with any other offers
24 that have been made?

25 A On Friday -- I never honestly believed

1 MULLINAX - HUTHER (DIRECT EXAMINATION)
2 we would get to this point. It is so freaking
3 stupid to be sitting here haggling about this.
4 So on Friday --

5 THE WITNESS: Am I allowed to talk
6 about what we discussed already?

7 MR. MULLINAX: We have already
8 stipulated that you are not waiving
9 anything by answering the question.

10 MR. TWOMBLEY: Let us talk about
11 it.

12 (Whereupon, a short break was
13 taken.)

14 MR. TWOMBLEY: We will let him
15 answer under the same stipulation.

16 MR. MULLINAX: Let the record
17 reflect that Mr. Twombley took about a
18 five-minute break with his client to
19 discuss the previous issue and we
20 stipulated the same responses to his
21 claim regarding the attorney/client
22 privilege.

23 BY MR. MULLINAX:

24 Q Okay, Mr. Huther, are you ready to
25 respond to that question?

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A I am.

3 But can you repeat the question?

4 Q The question had to do with any offers
5 by your attorney or his law firm in this case.

6 You have represented just a minute ago
7 in your testimony that you are under the belief
8 that your attorney or his law firm has
9 previously provided an offer to settle
10 Mr. Nicholls' claim in an amount approximately
11 \$4500, is that right?

12 A Yes.

13 Q And when do you think that offer came,
14 Mr. Huther?

15 A I believe that offer came when we were
16 settling the agreement -- right after we settled
17 the agreement with the D'Agostino's. And I
18 believe he offered you to settle the entire
19 claim roughly probably last October, November.

20 Q Of 2012?

21 A Yes.

22 Q And you think that came from your
23 attorney?

24 A Yes.

25 Q And I asked you if you were aware of

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 any other offers that you believe have come from
3 your attorney to settle Mr. Nicholls' claim?

4 A Yes. On Friday as we are getting to
5 this hearing, even though I really honestly
6 don't believe I am responsible for this amount,
7 I asked Mr. Twombly to contact you to see if we
8 could settle the claim per the Family Settlement
9 Agreement of \$2,000. And the response I got was
10 that you rejected that, and we actually came
11 back with a number much higher than the 4500.

12 Q And what number do you believe was come
13 back with, Mr. Huther?

14 A North of 7 K.

15 Q Did you receive anything in writing
16 that indicated that a counteroffer was made with
17 a specific dollar amount from my firm in
18 response to that \$2,000?

19 A Repeat the question.

20 Q Did you receive any correspondence that
21 refers to a specific dollar figure of a counter
22 amount to that \$2,000 you are alluding to?

23 A Again, the only correspondence I got
24 was from my attorney, so I am not sure I can
25 answer that.

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 MR. MULLINAX: We have already
3 stipulated that he is not waiving the
4 attorney/client privilege.

5 MR. TWOMBLEY: Let us take these
6 questions one at a time. For your
7 benefit I want you to know what has
8 happened on our end, so that is why I
9 am trying to be so generous with the
10 attorney-client privilege. But I do
11 want to make sure I protect Mr. Huther.

12 So what is the pending question
13 again? I don't think I have sent him
14 anything.

15 What is the pending question?

16 BY MR. MULLINAX:

17 Q The pending question is, has Mr. Huther
18 received anything in writing that refers to a
19 specific dollar amount of a counteroffer to the
20 \$2,000 that he is representing was made to
21 Mr. Nicholls in satisfaction of his claim?

22 MR. TWOMBLEY: You can answer
23 that.

24 THE WITNESS: Yes.

25 BY MR. MULLINAX:

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q And do you recall what that figure was?

3 A I would say it was -- I can't remember
4 the exact wording, but it was 7,000 or more is
5 what I was told was your response.

6 Q Would it surprise you to learn that no
7 counter offer was made to the \$2,000 with a
8 specific dollar amount at all?

9 A Nothing surprises me on this case.

10 Q You said earlier during this portion of
11 your testimony that you didn't feel like -- I
12 think your terms were and we can have it read
13 back to you -- I am not responsible, and you
14 were referring to Mr. Nicholls' claim?

15 A When I say "I", I mean the estate.

16 Q Okay.

17 And it was your representation in your
18 earlier testimony that there is about \$4900 that
19 is held by your attorney currently for the
20 purpose of satisfying Mr. Nicholls' claim,
21 right?

22 MR. TWOMBLEY: Object to the form.

23 BY MR. MULLINAX:

24 Q You can answer the question.

25 A That is correct.

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q And the source of those funds were from
3 Mr. D'Agostino's estate, is that right?

4 A That is correct.

5 Q And if those funds are not used to
6 satisfy Mr. Nicholls' claim what is going to
7 happen to those funds under your belief?

8 A Those -- Mr. D'Agostino, Chris
9 D'Agostino had a -- he settled our litigation by
10 paying me a sum of money. Part of that sum of
11 money was this fees for Mr. Nicholls. In the
12 event the court determines that I don't have to
13 pay Mr. Nicholls I get to keep -- the estate
14 gets to keep the money.

15 If the court determines we have to pay,
16 then we pay Mr. Nicholls. I believe that is
17 what the agreement says. It is in the
18 agreement.

19 Q Would it surprise you to learn that --

20 A I mean it is written fairly clearly in
21 the agreement of what happened to the money.

22 Q I want to refer you to paragraph 4 of
23 Defendant's Exhibit Number 25, and let you take
24 a look at that.

25 And can you tell me whether that

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 paragraph suggests that you and your sister will
3 get those funds if they are not paid in
4 satisfaction of Mr. Nicholls' claim?

5 A So repeat the question.

6 Q If those funds are not paid in
7 satisfaction of Mr. Nicholls' claim, does that
8 paragraph represent that you and your sister
9 will be provided those funds, disbursed the
10 funds to you?

11 A That is how I understand it.

12 Q And your signature is on that document,
13 is that right?

14 A Yes.

15 Q So you agreed to that stipulation?

16 A Yes.

17 Q And you also agree in the Family
18 Settlement Agreement from 2010 that the estate
19 would pay \$2,000 to Mr. Nicholls' claim, is that
20 right?

21 A I keep repeating myself, not to exceed
22 \$2,000.

23 Q I am sorry, not to exceed \$2,000.

24 Thank you.

25 Mr. Huther, I want to go back to the

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 issues of settlement offers and ask you if other
3 than the written communication that you have
4 received, that you said you recently received in
5 regard to Friday's negotiations, whether you
6 recall receiving any other written documentation
7 of any offer made by your law firm to
8 Mr. Nicholls in satisfaction of this claim?

9 A A written document?

10 Q Has it been represented to you that any
11 other offer has been made to Mr. Nicholls in
12 writing? Someone corresponding with you
13 indicating to you that an offer had been made to
14 Mr. Nicholls?

15 A I don't remember if it is in writing or
16 verbally. But I know there has been offers made
17 about a year ago to settle this claim.

18 Q Would it surprise you to learn that the
19 only offer made by your attorney or his law firm
20 was \$2,000 on Friday and that is the only offer
21 that has ever come from your attorney in this
22 matter?

23 A Well, that would surprise me.

24 Q Well, that is the truth.

25 MR. TWOMBLEY: You know, Jay -- I

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 have tried --

3 MR. MULLINAX: We can step out if
4 you need to.

5 MR. TWOMBLEY: We can step out.
6 But what I think you ought to just do
7 is just call Mr. Bolchoz and ask him.
8 And look at all the documentation. I
9 mean I guess it is possible that there
10 is --

11 MR. MULLINAX: Do you have an
12 objection to my question, Ashley?

13 MR. TWOMBLEY: In general, but not
14 the specific question.

15 But you can go ahead.

16 BY MR. MULLINAX:

17 Q Mr. Huther, are you aware of anything
18 that -- strike that question.

19 Mr. Huther, do you think there is a
20 dispute in this matter as to what the full value
21 of Mr. Nicholls' claim is in this matter?

22 A I understand what Mr. Nicholls' claim
23 is. I think the dispute is, is what you are
24 asking for. That is what I understand is the
25 crux of the problem. That the full value of the

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 claim that we have offered to you is being
3 rejected.

4 MR. TWOMBLEY: Offered.

5 BY MR. MULLINAX:

6 Q What I am asking from Mr. Huther is do
7 you think there is a difference between
8 perceptions of what the full value of
9 Mr. Nicholls' claim is? Do you think that is a
10 matter in dispute in this issue? I mean in this
11 case?

12 A It is potentially in dispute. It is
13 potentially in dispute.

14 A year ago we were willing to settle
15 the claim. You rejected it. A year has passed.

16 Q What offer do you think was made a year
17 ago to settle Mr. Nicholls' claim? What dollar
18 figure do you think you can attach to that?

19 A I believe that I saw E-mails of the
20 amount, of the full amount of the claim.

21 Q And what do you think the full amount
22 of the claim was at the time that the E-mails --

23 A I am going by the documents in front of
24 me, but I believe it was roughly \$4600.

25 Q And do you think -- did that E-mail

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 suggest that that number came to my office or my
3 firm?

4 A Yes, I mean your name was all over why
5 it was being rejected.

6 Q But no, did the E-mail from your
7 recollection, do you recall the correspondence
8 being sent to me with regard to any specific
9 number?

10 A Did I see like your name on the E-mail?

11 Q Me being a recipient of any E-mails
12 that you are referring to?

13 A I would have to check my records. I
14 don't remember who was on the E-mail strings.

15 Q Were any of those documents produced in
16 this case, Mr. Huther, in discovery when we
17 requested that your side produce all the
18 documents relative to this claim?

19 A I didn't handle the discovery, so I
20 have no knowledge on why or which documents were
21 prepared.

22 Q Would it surprise you to learn that no
23 documents have ever been produced whether today
24 or in any other format that give a specific
25 number of an offer that was made to my client in

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 satisfaction of his claim? Would that surprise
3 you?

4 A An offer of \$4600?

5 Q Of any number?

6 A Yeah, that would surprise me.

7 Q Would it surprise you that \$2,000 was
8 not put in writing at all?

9 A No, that wouldn't surprise me. That
10 could have been a telephone call.

11 Q But it would surprise you that no other
12 number has ever been presented to Mr. Nicholls
13 in satisfaction of his claim or --

14 A I don't know what has been presented to
15 Mr. Nicholls. I believe it was presented to you
16 as his attorney here in South Carolina to settle
17 their claim with you. And what I understand is
18 you rejected it asking for additional legal
19 fees, et cetera.

20 Q And when was the last time that legal
21 fees were an issue with regard to this claim
22 that you are aware of?

23 A The legal fees you are asking for?

24 Q Yes.

25 A Jeez, I don't know.

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q Are you aware that we haven't asked for
3 legal fees for quite some time and that has been
4 brought up in today's discussion? Are you under
5 the impression that we are asking for legal fees
6 today?

7 A I believe that you are asking for more
8 than you are entitled to and more than the
9 \$4600.

10 Q So back to that issue, is the amount
11 that you think is in full satisfaction of this
12 claim, do you think that is in dispute in this
13 matter?

14 A In October of 2012 it was not in
15 dispute.

16 Today it is.

17 Q All right.

18 Mr. Huther, I am going to direct you to
19 Defendant's Exhibit 26, and I understand you are
20 not an attorney, but I want to give you that
21 copy of 26 and ask you if you will turn past the
22 cover correspondence and back to something that
23 is referred to as Memorandum in Support of
24 Petition for Allowance of Claim.

25 Have you seen that document before?

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A This document here? Or the front page?

3 Q Yes, before today? Well, that document
4 is part of it. You can turn back to the first
5 page if you like. Right there.

6 A What is the date of it?

7 Q Well, I am looking at the same document
8 you are. If you turn to the back of that
9 particular section it is dated May 7, 2013.

10 A Okay.

11 Q And if you will turn to page --

12 A Let me read it.

13 Q Okay, go ahead.

14 A There is a lot of these kinds of
15 documents I have looked at.

16 Q Okay. I am only going to ask you about
17 one portion of it but --

18 A Like I said, I have seen a lot of these
19 kind of looking things.

20 Q I understand.

21 MR. TWOMBLEY: Do you want to ask
22 him about the specific provisions? I
23 mean he went over it earlier today.

24 If you need more time --

25 THE WITNESS: No, I don't need

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 more time. I just wanted to make sure

3 I had seen this before.

4 BY MR. MULLINAX:

5 Q Mr. Nicholls, I am going to take you
6 right back to this same document. It is the
7 same exhibit we were looking at here, Exhibit
8 Number 26, but earlier in those pages I am going
9 to turn you to that and if you would hold your
10 thumb on that too.

11 A Okay.

12 Q But the document you are looking at
13 there, are you familiar with that document?

14 A What? This one?

15 Q Yes, the one that says Statement of
16 Creditor's Claim up at the top?

17 A This one?

18 Q Yeah.

19 Well, let me see if it is the same.

20 A The one you told me to hold my thumb
21 on.

22 Q Hold on a second. I am sorry there
23 might be two copy of a creditor's claim in here.
24 I need to confirm.

25 MR. TWOMBLEY: There has been

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 several.

3 BY MR. MULLINAX:

4 Q Yes, that is it. That is the one.

5 A Okay.

6 Q Are you familiar with that document?

7 A Yes, I believe I have seen this one.

8 Q And what is the date of that document?

9 Do you see a date?

10 A May 7.

11 Q Okay.

12 And if you will turn back to where I
13 have asked you to keep your thumb in that same
14 exhibit. And you may have to back up a couple
15 of pages, but the document you are looking at
16 now I am going to represent to you a couple of
17 pages back says Memorandum in Support of
18 Petition for Allowance of Claim.

19 Do you see that a couple of pages back?
20 The heading page of that document you are
21 looking at?

22 A Memorandum in Support of Petition in
23 Allowance of Claim, right?

24 Q Yes. If you will turn to paragraph 24
25 in that document. I am going to refer you to

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 paragraph 24, and I am going to ask you very
3 quickly if you will thumb a couple more pages
4 forward, and we will come right back to that
5 paragraph, and tell me what the date of that
6 document is you are looking at now?

7 A You want the date?

8 Q Yes.

9 A It is on the back page, 7 May.

10 Q And the date of the claim that we are
11 looking at is 7 May, right?

12 A 7 May 2013, yes.

13 Q I want to refer you to paragraph 24.

14 A Okay.

15 Q I will give you the opportunity to look
16 through that, but before you do would you read
17 the first sentence of that paragraph for the
18 record:

19 A "The petitioner withdraws his claim
20 regarding attorney fees related to this action."

21 Q And I will let you review the rest of
22 that paragraph without reading out loud.

23 A Who is the respondent?

24 Q The respondent is Valerie D'Agostino.

25 (Whereupon, a short break was

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 taken.)

3 BY MR. MULLINAX:

4 Q We are back on the record, Mr. Huther.
5 You are still under oath. We were discussing
6 Defendant's Exhibit 26, Mr. Huther, and I think
7 I had referred you to paragraph 24 in that
8 exhibit which is a part of, which we have
9 already stipulated a Memorandum in Support of
10 Petition for Allowance of Claim, do you see that
11 paragraph 24?

12 A Yes.

13 Q And I asked you to read that first
14 sentence aloud. Honestly, Mr. Huther, I don't
15 recall whether you read it aloud or not?

16 A I did. I can read it again.
17 "Petitioner withdraws his claim regarding
18 attorneys' fees related to this action."

19 Q And the date of that document is May
20 the 7th, 2013, right?

21 A Correct.

22 Q And the date of the claim that we just
23 referred to in Valerie's estate is dated the
24 same day, right?

25 A Right.

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q And are you aware of any documents
3 after this was filed with the court that claimed
4 attorneys' fees?

5 A After this document?

6 Q Yes.

7 A No.

8 Q And this document does nothing but
9 withdraw any claim in regard to attorney's fees,
10 is that right?

11 A I don't know what else it does. But it
12 does that in paragraph 24.

13 Q So really since the inception of the
14 claim being filed in May, there has been no
15 claim for attorneys' fees, is that right,
16 Mr. Huther?

17 MR. TWOMBLEY: Objection to the
18 form of the question. It is not the
19 inception of the date the claim was
20 filed. It was the day you filed the
21 Petition that would enforce him. It is
22 pending for a long time.

23 BY MR. MULLINAX:

24 Q You can answer the question,
25 Mr. Huther.

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A Can you repeat it, please.

3 Q I am going to withdraw the question.

4 Mr. Huther, since May of 2013 have you
5 been under the impression that there has been
6 any claim for attorney's fees since May of 2013
7 in this case?

8 A Since May, no.

9 Q Mr. Huther, I am going to direct your
10 attention to Defendant's Exhibit 24 if I can
11 find it here.

12 A Okay.

13 Q Mr. Huther, I am just going to
14 represent to you that this is correspondence
15 from Bolchoz Law Firm with the heading of that
16 first page February 22, 2013 to the Honorable
17 Kenneth E. Folk, Jr. of the Beaufort County
18 Probate Court.

19 What I want to ask you about, however,
20 and I would like for you to review very briefly,
21 paragraph 3 in that correspondence from Mr.
22 Bolchoz to the Court -- and I am going to give
23 you the question before you read the paragraph,
24 because it is really quite specific.

25 In paragraph 3 there is a reference to

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 negotiations. I want you to take the
3 opportunity to read that paragraph and tell me
4 what your knowledge of any negotiations that
5 they are referring to there might be?

6 A Okay.

7 Q Can you tell me what knowledge you have
8 or what that is referring to? What negotiations
9 that is referring to there in the beginning of
10 paragraph 3?

11 A It is the negotiation with Chris
12 D'Agostino on settling the issues between
13 Richard D'Agostino's estate and me and my
14 sister.

15 Q And was your attorney representing you
16 in regard to that matter?

17 A Yes.

18 Q And was that Mr. Twombly?

19 A Yes.

20 Q And later in that same paragraph there
21 is a reference to your attorney and Mr. Bolchoz,
22 and I am going to ask you to look at the
23 sentence beginning with after our
24 conference/status call, and we referred to this
25 earlier today.

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 But I want you to have an opportunity
3 to read that sentence to yourself.

4 A Yeah, Ashley referenced this today.

5 Q Yes.

6 A Okay.

7 Q And is it correct to say that this
8 sentence represents that Mr. Twombly and Mr.
9 Bolchoz agree that Mr. Nicholls' claim would be
10 paid in full, according to this correspondence
11 at least?

12 A A year ago.

13 Q And do you recall any agreement being
14 made in writing or otherwise in regard to that
15 particular agreement? I mean was there
16 something put in writing on that?

17 MR. TWOMBLY: You mean other than
18 this letter sent to --

19 MR. MULLINAX: Other than this
20 letter I meant.

21 BY MR. MULLINAX:

22 Q This is dated February 22, 2013 after
23 this letter was written -- or wait a minute.
24 Strike that. Strike that.

25 At what time -- you have read this

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 correspondence where it says that Mr. Twombly
3 and Mr. Bolchoz had agreed that they would pay
4 Mr. Nicholls' claim in full.

5 At what time do you think that
6 agreement was made? What is that referring to?
7 What time?

8 A I recall the transactions. It was
9 September or October of last year.

10 Q Of 2012?

11 A Yes.

12 Q And is that referring to the Settlement
13 Agreement that -- either of the settlement
14 agreements we discussed previously?

15 A Well, Sean had nothing to do with the
16 previous Settlement Agreement.

17 Q Okay.

18 A So they would be referring -- the one
19 that we negotiated last October.

20 Q I am asking you, is that what that is
21 referring to?

22 A I believe so, yes.

23 Q And was Mr. Nicholls a party to that
24 agreement?

25 A No.

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q Or his law firm?

3 A No.

4 Q I think we are about finished,
5 Mr. Huther.

6 One last thing I believe.

7 (Whereupon, Plaintiff's Exhibit
8 Number 3 was marked for
9 identification.)

10 BY MR. MULLINAX:

11 Q Mr. Huther, are you familiar with that
12 document I just handed you?

13 A Yes.

14 Q And what is that document?

15 A That is the interim accounting for my
16 mother's estate that I signed as the PR.

17 Q Of her estate?

18 A Yes.

19 Q And what is date of that document?

20 A 9 November 2013.

21 Q So that was a month ago, is that right?

22 A Yes.

23 Q And can you refer to the first
24 paragraph of text there.

25 What period is this accounting for?

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A It says December 2, 2009 through
3 October 31, 2013.

4 Q I will give you a chance to look
5 through that document. It is pretty short and
6 sweet. Do you need any more time?

7 A No.

8 Q Is that a representation of the funds
9 in your mom's estate from December 2, 2009 to
10 October 31, 2013?

11 A Yes.

12 Q And has there been any funds whatsoever
13 that have come into the estate during that
14 period that are not represented in this
15 document?

16 A No.

17 Q And I apologize for the simpleness of
18 this question, Mr. Huther, but I have got to ask
19 it, does this document represent the \$63,740.24
20 that was in your mom's estate or value as of
21 December 2, 2009?

22 A No. In December 2009 there is probably
23 zero in the estate, because it was in the
24 guardianship account at that time.

25 Q Okay.

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 But when the guardianship account was
3 transferred to the estate, is that the amount
4 that was transferred?

5 A Yes. Everything in the estate is from
6 the guardian account.

7 Q And is this document also representing
8 that as of October 31, 2013 that there is
9 \$63,740.24 in your mother's estate?

10 A Yes.

11 Q And, Mr. Huther, again I apologize for
12 the simplicity of this question, is it your
13 testimony that no funds have been transferred in
14 or out of the estate other than the guardianship
15 funds that you just discussed from your mom's
16 estate since December 2, 2009 until October 31,
17 2013?

18 A Not to my knowledge.

19 Q And whose name or names is on the
20 account with those funds?

21 A It says the Estate of Valerie
22 D'Agostino on the check. And I believe it has
23 my name as the personal representative under it.
24 It is a Bank of America account.

25 Q Okay.

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 MR. MULLINAX: Ashley, I want to
3 ask for a one minute break and check
4 with my client, and I think I am done.

5 MR. TWOMBLEY: Okay.

6 (Whereupon, a short break was
7 taken.)

8 BY MR. MULLINAX:

9 Q Mr. Huther, back on the record.
10 Mr. Huther, I have one, I think one
11 final question for you.

12 Do you want to settle this claim?

13 A Yes.

14 Q That is all I have.

15 CROSS-EXAMINATION

16 BY MR. TWOMBLEY:

17 Q I have a couple of follow-up questions.
18 First is why wasn't Mr. Nicholls a
19 party to this agreement?

20 MR. MULLINAX: Can you tell me
21 what you are referring to, Ashley?

22 MR. TWOMBLEY: Exhibit 25.

23 THE WITNESS: I think everybody
24 thought that if we offered to pay the
25 full value of the claim, that he would

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1 TWOMBLEY - HUTHER (CROSS-EXAMINATION)

2 be happy to receive the full value of
3 the claim. We were all in a state of
4 shock when he said no.

5 BY MR. TWOMBLEY:

6 Q But he certainly had the opportunity to
7 be a part of it if he wanted to?

8 A Right.

9 Q Just to clarify any confusion and to
10 make sure that the record is clear for
11 Mr. Nicholls, your understanding of what
12 happened with the settlement negotiations was
13 that the Estate of Richard D'Agostino offered to
14 pay the full value, and by that I mean the
15 amount that was written on their claim in
16 October of 2012, correct?

17 A That is correct.

18 Q And it is your understanding that that
19 was rejected by Mr. Mullinax because he in
20 addition wanted his legal fees that he had
21 incurred in prosecuting the claim?

22 MR. MULLINAX: Object to the form.

23 BY MR. TWOMBLEY:

24 Q Is that your understanding?

25 A That is one hundred percent my

1 TWOMBLEY - HUTHER (CROSS-EXAMINATION)

2 understanding.

3 Q And is it also your understanding that
4 we wrote for Mr. Mullinax and asked him to
5 explain his legal and factual authority for his
6 assertion that he was entitled to his legal
7 fees?

8 A Yes, you wrote him several times.

9 Q And is it your understanding we never
10 received any response?

11 A Correct.

12 Q Now, because he was unwilling to accept
13 the face amount of the claim -- well, wait let
14 me clarify.

15 After we discovered he was unwilling to
16 accept the face amount of the claim, it was --
17 we increased that amount as a set-aside for the
18 Settlement Agreement to include the potential
19 for interest, correct?

20 MR. MULLINAX: Objection to form.

21 THE WITNESS: That is correct.

22 BY MR. TWOMBLEY:

23 Q That is your understanding, right?

24 A \$4900, yes.

25 Q And that is how we came up with the

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1 TWOMBLEY - HUTHER (CROSS-EXAMINATION)

2 \$4,929?

3 A That is correct.

4 Q Now, contrary to Mr. Mullinax's
5 suggestions, that amount was set aside in the
6 event the claim against Mr. D'Agostino's estate
7 was successful, correct?

8 A Correct. I mean the paragraph is very
9 clear.

10 Q Right.

11 It doesn't even mention the possibility
12 that we might have to pay those fees, does it?

13 A No.

14 Q So this was set up so if Mr. Nicholls
15 was successful in prosecuting his claim against
16 Richard D'Agostino's estate the money would be
17 there to pay that claim, right?

18 A We had to pay it back, right.

19 Q And was that successful?

20 A No, he was not successful.

21 Q And now the agreement then provides
22 that if it is not successful that I as the
23 escrow agent quote, "is authorized to release
24 the fee funds to Huther and Pallison"?

25 A That is correct, yeah.

1 TWOMBLEY - HUTHER (CROSS-EXAMINATION)

2 Q Just so we are clear, so the assertion
3 that this was set up to pay Mr. Nicholls' fee in
4 response to a claim against Valerie's estate?

5 A Oh, it was against D'Agostino --

6 Q And that was against Richard
7 D'Agostino's estate?

8 A That is correct.

9 Q It was never even contemplated that we
10 might have to pay that fee?

11 A Correct.

12 Q By "we", I mean the Estate of Valerie
13 D'Agostino?

14 A Right.

15 MR. MULLINAX: Object to the form.

16 BY MR. TWOMBLEY:

17 Q And of course that was because the fee
18 had always been -- the claim had always been
19 made against Mr. D'Agostino's estate?

20 A Correct.

21 Q Now, as you testified there was a point
22 in time in May of 2013, almost a year after this
23 Settlement Agreement and Exhibit 25 was entered
24 into that Mr. -- I don't know how to refer to
25 who, because Mr. Nicholls didn't know what was

1 TWOMBLEY - HUTHER (CROSS-EXAMINATION)

2 going on, but there was a document filed where
3 the previous demand for attorneys' fees was
4 withdrawn. That was in May of 2000 --

5 A May 7, right.

6 Q Right May 7, 2013.

7 And that was done in quote, "in an
8 effort" -- "The effort to prosecute the claim
9 outweighs the prospect for equity to be
10 achieved", isn't that what the document says?

11 MR. MULLINAX: Object to the form.

12 BY MR. TWOMBLEY:

13 Q Isn't that what the document said?

14 A Right.

15 Q Now, some stuff had happened in between
16 October of 2012 and May 2013, right?

17 A Right.

18 Q And that also prevented equity from
19 being achieved, right?

20 MR. MULLINAX: Object to the form.

21 THE WITNESS: Right.

22 BY MR. TWOMBLEY:

23 Q One of the things that happened is
24 Mr. Nicholls or at least a document purporting
25 to be on his behalf objected to you becoming the

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1 TWOMBLEY - HUTHER (CROSS-EXAMINATION)

2 personal representative of your mother's estate,
3 is that right?

4 A Yes.

5 Q And there were also other significant
6 court filings and additional work that had to be
7 done in response to that, correct?

8 A Right.

9 Q And that was all during a period of
10 time when Mr. Mullinax was demanding that his
11 legal fees be paid, correct?

12 MR. MULLINAX: Object to the form.

13 THE WITNESS: That is correct.

14 BY MR. TWOMBLEY:

15 Q So the assertion that it was going to
16 be withdrawn was after we had specifically
17 E-mailed and asked him? Sent follow-up E-mails
18 asking him? Sent him a Rule 11 and a frivolous
19 proceedings action letter? Set aside the money?
20 Sean Bolchoz offered it to him? I offered it to
21 him, and it is still in nine months afterwards
22 that he --

23 A Yes, nine months --

24 MR. MULLINAX: Objection to the
25 form.

1 TWOMBLEY - HUTHER (CROSS-EXAMINATION)

2 THE WITNESS: -- after the hearing
3 to prevent me from becoming --

4 BY MR. TWOMBLEY:

5 Q And you were aware of every single one
6 of those actions that I took, and they were
7 taken with your express authorization, correct?

8 A Yes, right.

9 Q Now, just to make sure that there was
10 no uncertainty, you at one point in time had
11 offered to pay the face value of the claim,
12 correct?

13 MR. MULLINAX: Object to the form.

14 THE WITNESS: Right, a year ago
15 plus.

16 BY MR. TWOMBLEY:

17 Q And that offer was withdrawn, is that
18 not correct?

19 A That is correct.

20 Q And that was because of the frivolous
21 proceeding to collect fees, right?

22 A Right.

23 Q And the additional money --

24 A A lot of additional legal fees I
25 incurred.

1 TWOMBLEY - HUTHER (CROSS-EXAMINATION)

2 Q And the additional legal fees that you
3 incurred?

4 A Yeah.

5 Q So you just didn't willy-nilly say
6 well, it is on when it is off, and that cost you
7 and the estate a lot of time and money, right?

8 A Right.

9 Q Now, I think you misspoke, you had said
10 that you had seen some communication from me
11 about 6,000, almost \$7,000 or something along
12 those lines like recently? I mean is that true,
13 have you seen any communications from my office
14 about that?

15 A Just on Friday.

16 Q Okay.

17 But other than that?

18 A Other than that I don't recall.

19 Q And that communication was roughly that
20 in response to our \$2,000 settlement offer,
21 which we thought was generous, they were
22 maintaining their demand of roughly \$7,000? I
23 don't have the exact amount in front of me.

24 A Right, I don't recall either.

25 MR. MULLINAX: Object to the form.

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1 TWOMBLEY - HUTHER (CROSS-EXAMINATION)

2 THE WITNESS: But it was roughly

3 7.

4 BY MR. TWOMBLEY:

5 Q And was it further your understanding
6 that we went back to them and expressed that
7 they wanted to give us a serious demand other
8 than -- you know now even an increased amount
9 from what had been demanded before that we would
10 talk to them?

11 A Right. That is how I understand it.

12 Q And of course that was in the hope that
13 we could prevent everyone from sitting through
14 these depositions?

15 A Exactly.

16 Q Which offer has now been withdrawn,
17 correct?

18 A Correct.

19 Q Now, you have said in your testimony
20 you didn't have any idea why we are here.

21 You know why we are here, don't you?

22 A I mean it was a rhetorical question.

23 Q Why are we here?

24 A We are here because we -- initially the
25 D'Agostino estate roughly a year and two months

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1 TWOMBLEY - HUTHER (CROSS-EXAMINATION)

2 ago and then after you tried to settle in full
3 the claim of Mr. Nicholls and that settlement
4 offer, the full amount of their claim was
5 rejected. So when I said I don't know why we
6 are here, I was saying this is stupid, we
7 offered to settle this a year ago and you have
8 rejected our settlement and we are spinning
9 wheels.

10 Q Right.

11 A On this frivolous nonsense. That is
12 what I meant. I didn't mean that we shouldn't
13 be here or something like that. This is
14 important, but it is -- this should have been
15 settled well over a year ago.

16 Q I want to go back just for a minute to
17 the Family Settlement Agreement.

18 The estate was going to pay \$2,000 to
19 Mr. Nicholls, correct?

20 A Correct.

21 Q What were you going to get in return
22 for that?

23 A I mean our intent all along was to
24 remove D'Agostino as the executor of the estate.

25 Q But you were being released from any --

1 TWOMBLEY - HUTHER (CROSS-EXAMINATION)

2 A Oh yeah, you mean in terms of the
3 Settlement Agreement?

4 Q Right.

5 A It was to settle the issues in North
6 Carolina. That is what we were getting our
7 release.

8 Q And did those get settled?

9 A For about a week and then D'Agostino,
10 he rescinded the agreement and then made all the
11 same counterclaims here in South Carolina.

12 Q And so the settlement that Mr. Nicholls
13 worked so hard to achieve, it didn't settle
14 anything, did it?

15 A It settled nothing. It had a shelf
16 life of a couple of weeks.

17 Q And in fact the personal representative
18 of Valerie D'Agostino's estate immediately took
19 the position that the Settlement Agreement was
20 not binding in any way?

21 MR. MULLINAX: Object to the form.

22 THE WITNESS: Correct.

23 BY MR. TWOMBLEY:

24 Q And filed court documents to that
25 effect?

1 TWOMBLEY - HUTHER (CROSS-EXAMINATION)

2 A That is correct..

3 Q Now, putting all that aside, let's
4 assume for purposes of these next few questions
5 that when the original Family Settlement
6 Agreement was entered into that you wanted
7 Mr. Nicholls to get his \$2,000, that you wanted
8 that.

9 Let me ask you this, who was the
10 personal representative of Valerie's estate at
11 that time?

12 A It was Richard D'Agostino.

13 Q And who had the authority to pay
14 Mr. Nicholls his \$2,000?

15 A Mr. D'Agostino.

16 Q You didn't have the authority to write
17 him a check for \$2,000 even if you wanted to,
18 did you?

19 A No.

20 Q In fact, you didn't become the personal
21 representative until a few months ago and that
22 was after Mr. Mullinax fought us to have you
23 appointed?

24 A That is correct.

25 Q So even if you had wanted to pay that

1 TWOMBLEY - HUTHER (CROSS-EXAMINATION)

2 money you couldn't have legally or possibly done
3 it?

4 A No.

5 Q Until recently when you were appointed
6 and that was over Mr. Mullinax's objection?

7 A That is accurate, yes.

8 Q Okay.

9 REDIRECT EXAMINATION

10 BY MR. MULLINAX:

11 Q Mr. Huther, I think I have asked you a
12 similar question earlier, but I want to repeat
13 since the testimony you just gave.

14 Can you produce anything in writing of
15 any offer to settle Mr. --

16 MR. TWOMBLEY: We will stipulate
17 we can't produce anything in writing.

18 MR. MULLINAX: I will let him
19 answer the question if you don't mind.

20 MR. TWOMBLEY: It is a waste of
21 time. It is the way we do it down
22 here, you know we call each other on
23 the phone. It is the way it happened.
24 The way it happened with Sean.

25 MR. MULLINAX: I want to get it on

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1 MULLINAX - HUTHER (REDIRECT EXAMINATION)

2 the record.

3 Ashley, I appreciate your efforts.

4 BY MR. MULLINAX:

5 Q Mr. Huther, again my question is this,
6 is there anything you can produce or your
7 counsel can produce that provides any offer to
8 settle Mr. Nicholls' law firm's claim in this
9 estate other than what is in the two settlement
10 agreements we discussed?

11 A You know, I have seen it in some of
12 these court documents too, where the different
13 lawyers are talking about all times to pay you
14 and you rejecting it.

15 Q Is there any document you can produce
16 with any actual dollar -- when I say dollar
17 figure, I want to clarify my question for you,
18 Mr. Huther, I don't want to confuse it. Because
19 we use terminology a lot like full value which
20 was discussed a minute ago. Value, full value,
21 part value --

22 A No, payment in full. Or fully satisfy
23 the claim. I mean I always took that to mean
24 your claims of 4500. Someone says they are
25 going to pay the full value, that is \$4500.

1 MULLINAX - HUTHER (REDIRECT EXAMINATION)

2 Q I want to set that aside for just a
3 second and ask you a very specific question.

4 Is there anything you can produce in
5 writing from anyone that has provided
6 Mr. Nicholls an offer to settle a claim with an
7 actual dollar figure attached to it?

8 A I don't recall.

9 Q Is there any reason that -- why you or
10 your counsel would not have produced such a
11 document today if there was a settlement offer
12 at any time during these negotiations?

13 MR. TWOMBLEY: Because it doesn't
14 exist. It wasn't in writing.

15 MR. MULLINAX: Again, let him
16 answer the question. You have an
17 objection. Let him answer the
18 question.

19 MR. TWOMBLEY: I will stop the
20 deposition because we have gone over
21 this ad nauseam. We have stipulated
22 that there is nothing in writing. Now
23 you are asking over and over again is
24 there anything in writing. You are
25 harassing him and I won't let you do

1 MULLINAX - HUTHER (REDIRECT EXAMINATION)

2 it.

3 MR. MULLINAX: I am asking him a
4 different question.

5 BY MR. MULLINAX:

6 Q The different question is this, is
7 there any reason why if there is such a document
8 in writing that you or your Counsel --

9 MR. TWOMBLEY: He just said there
10 is no document in writing.

11 Don't answer the question. Move
12 onto the next one. I think that is
13 harassment.

14 MR. MULLINAX: You have already
15 waived the attorney/client privilege.
16 You can't --

17 MR. TWOMBLEY: I have already
18 waived it? I think I expressly said I
19 didn't.

20 MR. MULLINAX: I misspoke, I'm
21 sorry. What I am saying to you is this
22 is a different question.

23 One says that you don't have it.
24 I am asking a different question. The
25 nature of the question is this if it

1 MULLINAX - HUTHER (REDIRECT EXAMINATION)

2 exists could you --

3 MR. TWOMBLEY: It doesn't exist.

4 THE WITNESS: I don't have any
5 documents. Let me just put it out
6 there.

7 MR. MULLINAX: Okay.

8 BY MR. MULLINAX:

9 Q Mr. Huther, this was a subject that was
10 just brought up.

11 I will refer you to Defendant's Exhibit
12 26. I will have to use this copy for a second.
13 But I will show you, this is my copy so it is
14 not the Court's copy.

15 Again in Defendant Exhibit 26, what
16 document do you have in front of you there?

17 A Petition for Allowance of Claim.

18 Q And what is the date of that petition?

19 A It is the same one that we talked about
20 before.

21 Q I know it is.

22 A 7 May.

23 Q And from your earlier testimony do you
24 recall that in this same exhibit that there was
25 a memorandum --

1 MULLINAX - HUTHER (REDIRECT EXAMINATION)

2 A Yes.

3 Q Let me ask you the question -- that
4 there was a memorandum from my office
5 withdrawing any attorney fee claim in this case
6 that is dated the same day as this petition, is
7 that right?

8 A 7 May, yes.

9 Q All right.

10 I think I just have two more questions
11 for you.

12 What is your belief in a number figure,
13 what is your belief that the full value of the
14 claim is, Mr. Huther, of Mr. Nicholls' law firm?

15 A His claim? What he says his claim is?

16 Q Yes, what do you believe is the full
17 value of Mr. Nicholls' claim is in this case?

18 A I have seen various documents, but
19 roughly \$4500 is what he says his claim is.

20 Q The second question and it may be the
21 last, do you believe that anybody in this case
22 believes there is a different number that
23 defines the full value of the claim in this
24 case?

25 A Does anybody have a different claim?

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1 MULLINAX - HUTHER (REDIRECT EXAMINATION)

2 Q Does anyone have a different opinion of
3 what the full value of the claim in this case is
4 that you are aware of?

5 A Does anybody?

6 Q Are you aware of any other definition
7 of the full value of the claim other than your
8 own of about \$4500?

9 A Right, this claim was 4500.

10 I think it is zero.

11 Q All right. I think that is all I have
12 got.

13 MR. TWOMBLEY: I don't have
14 anything else.

15 (Whereupon, the deposition of
16 Ronald W. Huther was concluded at
17 6:43 p.m.)
18
19
20
21
22
23
24
25

1
2 CERTIFICATE
3

4 STATE OF SOUTH CAROLINA:

5 BEAUFORT COUNTY:
6

7 I, Ceil Weser, CSR and Notary

8 Public in and for the above county and state, do
9 hereby certify that the foregoing testimony was
10 taken before me at the time and place
11 herein before set forth; that the witness was by
12 me first duly sworn to testify to the truth, the
13 whole truth, and nothing but the truth, that
14 thereupon the foregoing testimony was later
15 reduced by computer transcription; and I certify
16 that this is a true and correct transcript of my
17 stenographic notes so taken.

18 I further certify that I am not of
19 counsel to either party, nor interested in the
20 event of this cause.
21

22 -----
23 Ceil Weser, CCR

24 Notary Public

25 Beaufort, South Carolina

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