THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Case No. 2010-CP-07-4146

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

v

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Court of Appeals correct in concluding at Point Six in their opinion that even assuming errors in valuation of Manor Stock, evidence in the record independently supports the jury's general verdict for the Plaintiff?

2. Were the lower court and the Appellate Court correct that there is no Dead Man Statute (S.C. Code § 19-11-20 (1985)) problem on this record?

3. Was the Court of Appeals correct in holding defendant's claim of alleged violations of statutory law and public policy have not been properly preserved for appellate review?

4. Independent of Question Three, and even assuming appellate review is possible, are defendant's allegations about statutory violations and/or violations of public policy, merely another contested issue of fact with conflicting testimony between the defendant and others, simply one more issue for the jury to decide, and which were found by the jury to be wrong and erroneous?

5. What was the real motivation for defendant to stop work on this file?

STATEMENT OF THE CASE

The case was commenced by Ron Orlosky ("Orlosky") on August 20, 2010 by the filing of a Summons and Complaint, Notice of Motion and Motion to Remove to the Circuit Court, and proposed Order with the Beaufort County Probate Court. These pleadings, served upon The Law Office of Jay A. Mullinax, LLC and Jay A. Mullinax (herein collectively "Mullinax") on that same date, asserted causes of action for Breach of Contract and for Violations of the South Carolina UTPA both in connection with Mullinax's handling of the Estate of Debra Orlosky, the plaintiff's late wife. On August 23, 2010, the Beaufort County Probate Court entered its Order granting Orlosky's motion, and removing the case to the Court of Common Pleas for Beaufort County. Mullinax's Answer, filed October 19, 2010, included a general denial, affirmative defenses, and counterclaims against Orlosky for Breach of Contract, or in the alternative for Unjust Enrichment. Orlosky replied to the Counterclaim by general denial of the material allegations on October 25, 2010, and Mullinax then filed an Amended Answer and Counterclaim dated October 29, 2010 to which was added an additional affirmative defense. Again, by Reply filed November 11, 2010, Orlosky denied the material allegations of the Amended Answer and Counterclaim.

On December 1, 2010, Orlosky served an Offer of Judgment on Mullinax in which he offered to take judgment against Mullinax for the Total sum of $29,751.68. This offer was not accepted by Mullinax who, on February 1, 2011, served an Offer of Judgment offering to take judgment on the Counterclaim in the amount of $32,101.20. On April 9, 2012, plaintiff amended his complaint to seek additional damages, and to add a third cause of Action for Quantum Meruit. Mullinax answered on April 16, 2012 asserting the same

counterclaims as before, but omitting the additional affirmative defense. The case was tried before the Honorable Roger M. Young and a jury between April 18, 2012 and April 20, 2012. On April 20, 2012, the jury returned a verdict in favor of Orlosky in the amount of $80,000.00, and also found for Orlosky on Mullinax's counterclaim.

Mullinax's post trial motions for a Directed Verdict and for Judgment NOV, for A New Trial, for Relief from Judgment, and To Alter or Amend dated April 26, 2012 were denied by order dated May 17, 2012. In that same Order, the Honorable Roger M. Young granted Orlosky's Motion to Tax Costs and Award Interest filed April 25, 2012, and directed entry of Judgment for Orlosky in the total sum of $89,354.26.

On June 18, 2012, Mullinax filed with the Court of Appeals and served on Orlosky a Notice of Appeal. On July 29, 2015, the Court of Appeals affirmied the Jury Verdict from the Beaufort County Circuit Court in their unpublished opinion. Mullinax filed a Petition for Rehearing with the Court of Appeals on August 12, 2015 which was denied by the Court on September 17, 2015. This Petition for Writ of Certiorari which Mullinax filed on October 16, 2015 followed.

STATEMENT OF THE FACTS

Contested Issues of Fact Are At The Heart of this Case

A **jury** decided this breach of contract case. The jury's general verdict was a typical compromise – neither side received precisely what they had hoped for. The Jury permitted Mullinax to retain $20,000.00 of the $100,000.00 Orlosky had paid as legal fee, and awarded Plaintiff (a former client of the firm) the right to recover the remaining $80,000.00 he had previously paid as attorney fees, finding that sum was never really earned by Mullinax.

To set the stage: the parties to this South Carolina contract, on one side was a S.C. Law Firm, the Law Office of Jay A Mullinax, LLC. The Mullinax Law Firm was the defendant below, and the party that drew the contract to define the scope of the representation, and to reduce to writing the client's obligation to pay attorney fees. Mullinax now seeks Certiorari in this Court after losing both in Circuit Court and the Court of Appeals. On the other side of the agreement is the Law Firm's own former client, Ron Orlosky. Mr. Orlosky was the plaintiff below and the party who won in both Circuit Court and the Court of Appeals. He opposes the Petition for Certiorari on several independent and distinct grounds, including (among others):

(1) That the trial below was correctly decided by the jury.

(2) That there was substantial evidence to support his legal claims that the law Firm did not perform the contract and lacked a valid legal defense for failure to perform. Indeed, the Law Firm itself deliberately prevented the contract from being performed by anyone, even including another law firm, by filing a document so that the Estate could not be closed without paying him what he claimed he is owed.

(3) That the Court of Appeals was also correct in finding that a number of the Law Firm's arguments advanced in its Petition have not been properly preserved for appellate review.

(4) That the Court of Appeals was also correct in noting that the jury's general verdict for the Plaintiff can be supported on a number of alternative independent grounds, each of which independently supports the jury verdict.

(5) That none of the traditional reasons to grant Certiorari are present on this Record.

The Contract itself concerned the administration of the Estate of the Plaintiff's deceased wife, Debora Laura Orlosky and is marked as Plaintiff's Exhibit No. 5. (Plaintiff's

Exhibit 5 - R. pp. 255-258).

The plaintiff below, Ron Orlosky, alleged that the defendant **failed to properly finish or perform or to keep him timely informed** about the professional legal work discussed in the contract (an agreement drafted by Mullinax) and further alleged that the very limited legal work that was done was clearly insufficient to justify the excessive fee of $100,000, which had already been timely paid by Mr. Orlosky. The plaintiff, it should be noted, filed suit in his joint capacity both as a Personal Representative for his deceased Wife's Estate, and in his capacity as a Trustee of his wife's revocable trust against the Law Firm for, among other matters, breach of contract and return of some or all of the excessive fee that he was charged. The actual dispute between the parties centered around three highly contested issues of fact:

(1) Whether or not Mullinax had properly earned the $100,000.00 fee that Orlosky paid for professional legal services;

(2) Whether or not Mullinax kept the plaintiff properly and adequately informed about what was happening to the Estate or breached the contract by failing to follow client's instructions or to ever provide reasons to the plaintiff for why it failed to perform its agreement;

(3) Whether or not the Law Firm was actually entitled to (over and beyond the $100,000.00 already paid) for an additional sum of over $30,000 that Mullinax claimed was owed for work allegedly beyond the scope of the agreement itself, when it was admitted at trial that the Law Firm kept no time records and could not in any way independently substantiate **any** of the time it spent on any part of this Estate.

The case was tried before the Honorable Roger Young and a jury. On the plaintiff's behalf, there was testimony from one key independent additional witness, Michael Jordan, Esquire, a McNair Law Firm S.C. Lawyer-Shareholder on Hilton Head. Mr. Jordan is a **certified specialist** by the South Carolina Supreme Court in the area of Probate, Estate, and Tax work. **He has an LLM in taxation**. By distinct contrast, the defendant is **not** a certified specialist in probate, estate, or taxation by the South Carolina Supreme Court.

On the defendant's side of the case, the defense relied upon a single solitary witness - Mullinax himself - and then promptly rested. **The defense did not elect to call even a single witness to either bolster or corroborate anything that the defendant himself said.** In short, the jury was asked to believe what the defendant said, on his own behalf, without further support.[1]

After due deliberation, the jury found that the Law Firm had substantially overbilled the Plaintiff and should return $80,000 of the $100,000 prior payments. The jury further found that the Law Firm was entitled to recover nothing on its counterclaim for the alleged further legal services above and beyond the written contract. Of course, by simple math, it is clear as a matter of law the **jury did find** for the Law Firm, in part, and concluded that the

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[1] The plaintiff believes that it is significant that the entire defense the defendant presented at trial, that the contract he drafted violates public policy, and all the cases he now cites in support of that contention, are solely and exclusively based upon his own version of the "facts" of this contested case, whereas the plaintiff had a certified specialist not only testify but that this particular witness for the plaintiff independently researched his own conclusions and he submitted that written report as evidence in this case to be considered by the jury, if they so elected.

In short, there is no writing - at any time - to corroborate that the defendant ever even told the plaintiff that he thought something was illegal and there is no writing during the course of the representation that reflects this purported fact.

Law Firm was properly entitled to retain the not insubstantial sum of $20,000 in legal fees that had been already paid. In summary, it is fair to say (as is so often typical) the jury found at least some wisdom on both sides of this contested case.

The Court of Appeals affirmed this jury verdict, holding that the experienced trial judge below had conducted a trial without any material substantial reversible error, and further held that even if there was any material error, in light of various facts that were uncontested and undisputed, the uncontested evidence in the case **was clearly sufficient to uphold the jury's general verdict**.

Mullinax filed a Petition for Rehearing, which was denied. Apparently, unhappy that the Law Firm will, as the case now stands, only retain a $20,000 fee, but not the $100,000 fee that was previously billed and paid, the Mullinax, electing to represent his own professional corporation, has filed a Petition for Certiorari to this Court.

In the lower court, one of the key factual disputes turned on whether or not Mullinax had, in fact, performed (and properly earned) the $100,000 that was admittedly paid by Ron Orlosky without either protest or complaint at the time. The record reflects the Mullinax required the Orlosky to pay **$25,000** upon retaining the Law Firm, an additional **$25,000** <u>one week later</u>, shortly thereafter required another payment of **$25,000,** and finally required an additional **$25,000,** which was all paid by Orlosky, without protest or complaint.

When, having paid $100,000, the plaintiff then innocently inquired as to just how much more the ultimate fee might be and what work had been done – **he was never given an answer**. Unsatisfied, and being, so to speak, left totally in the dark, after having already paid $100,000, only then did Orlosky seek the counsel of another law firm. Ultimately, this

case followed seeking the return of much of what had been paid on the grounds of breach of contract and excessive fees.

Concerning the disputed fee, one of the very key, and sharply contested, **questions of fact** was the **overall value** of the Estate itself. Mullinax insisted that the Estate was worth over $4,000,000 and perhaps even over $5,000,000.[2] The plaintiff and an independent tax expert, Michael Jordan, Esquire of McNair Law firm, emphatically disagreed. This figure is critical because the fee for services rendered by Mullinax was squarely based, in large part, upon the value of the Estate. It cannot be contested that Mullinax's fee sharply increaded when the Estate was valued , **as it was by him,** for over $4,000,000. The higher the value of the Estate, the higher the Law Firm's fee. As will be discussed subsequently, there is a dramatic difference in factual conclusions between the parties as to what the proper value of the Estate really was.

ARGUMENT

I. Even Assuming There Were Errors Made in the Valuation of the Estate, There Was Independent Evidence in the Record to Support the Jury's Verdict

In one of its most significant conclusions, the Court of Appeals explicitly noted that:

> **"Regardless of any alleged errors concerning the valuation of the Manor stock, we find evidence in the record to support the jury's verdict."**
>
> (See Orlosky in his capacity as Personal Representative of The Estate of Debora L. Orlosky, and in his capacity as trustee of the Debora Laura Orlosky Revocable Trust v. The Law Office of Jay A. Mullinax, LLC, Court of Appeals Unpublished Opinion No. 2015-UP-376, p. 4, point 6, first sentence)

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[2] It is interesting that even Mullinax comes up with different numbers as to the value of the Estate - suggesting (at least to this Plaintiff) that this is most clearly a true factual question.

Very respectfully, the Respondent suggests that this Court's final point, number six of the unpublished opinion is fully supported by the record and truly dispositive concerning the Appeallant's Petition. Further, the Appellant's vain attempts to undermine point six in his Petition for Certiorari are misplaced and lack all support in the record or in law for all of the following reasons:

A. **Everyone in this case, even the Mullinax himself, agrees that he did not complete the tasks that he agreed to do**. Indeed, even Mr. Mullinax concedes at Page 16 of his own Petition for rehearing where he stated, **"Mullinax agrees with the Court that Mullinax did not complete the work specified in the contract."** (See Appellant's Petition for Rehearing, Final Paragraph, Page 16).

It was deeply contested at trial, however, why the work was left uncompleted and the Estate never closed. In his own testimony, Mr. Mullinax has offered several different suggestions as to why the work was not able to be completed. For one example, the jury might have concluded that it was Mullinax's own conduct that barred completion of the work for the estate. After all, he did testify as follows:

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

A. **I did not complete it but it could not be closed** while a claim or litigation is pending. **Emphasis Added**.

Q. You have a claim against the Estate?

A. Yes, I do.

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

A. I don't have any idea.

Q. And that's as far as you know?

A. As far as I know.

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

Thus, if the jury found this particular testimony credible, it would certainly support the jury reaching the dual conclusions that even the defendant himself testified that (1) "I did not complete it" and (2) "it could not be closed" because of Mr. Mullinax's very own conduct, by filing his own personal claim against the Estate (on behalf of his Law Firm), thus deliberately preventing the Estate from being closed (the very thing he was hired to do).[3] When a party, by his or her own conduct, prevents a contract from being performed, it has long been the rule of law that this wrongful conduct, by itself, is actionable.[4]

See, for example, the classic South Carolina case of Champion v. Whaley, 311 S.E. 2d 404 (S.C. App. 1984), written by the late Honorable Randall Bell (one of the original six Judges that sat on the Court of Appeals when it was first constituted), where Judge Bell explicitly noted that a broker did not have to prove his normal obligations for finding a buyer ready, willing, and able to be awarded his broker's fee if the owner and seller of the property **prevented** the broker from doing his job by his own conduct, then the normal rules for breach of contract fundamentally changed. Specifically, this Court wrote more than 30 years

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[3] Without any time records submitted to the plaintiff, it was Mr. Mullinax's claim that he was entitled to at least an additional $30,000, for "additional" work he did which he claims (and Orlosky disputes) is outside of contract he himself drew.

[4] Mr. Mullinax admitted that he fully was aware that "you can't close an estate wen a claim is filled" and he himself filed a claim for monies a jury determined was excessive. (R. p. 171, line 25).

ago:

> "Thus, a broker who sues for his commission ordinarily has the burden of proving that any conditions precedent to the duty of the seller to pay have been fulfilled. [citations omitted] But, if the seller prevents a condition from occurring, then the condition is excused and his obligation to pay becomes unconditional."

As the Court wrote later in the opinion, the Defendant cannot take advantage of the uncertainty created by his own wrongdoing. (Id at Champion v. Whaley, 311 S.E. 2d 407 (S.C. App. 1984)). The jury in this case might well have concluded, as they had every right to do, that Mr. Mullinax was not entitled to take advantage of his wrongdoing by deliberately preventing the Estate from being closed, because of his alleged claim (unsupported by evidence) that he had earned $100,000 fee, which was paid by the Plaintiff, and was owed an additional $30,000, for even more undocumented work.

Further, if the jury believed that it was wrongful, not to complete the tasks assigned to him under the contract he drew, and that it is **inappropriate** for a lawyer to prevent an estate from closing when he was hired to do the closing, then the jury verdict would be fully, and independently supported by evidence in the record (coming ironically, directly from the Appellant's own testimony).

B. In part, of course, the question of the valuation of the Estate is a factual issue that turns on the credibility of the people who testified about that question. The defense relied solely upon Mr. Mullinax's testimony at trial with regards to the valuation of the Estate, while the plaintiff presented testimony on the valuation through an expert. Mr. Jordan testified that he was certified by the South Carolina Supreme Court as an expert or specialist in taxation law. Specifically, in answering Mr. Bowen, Mr. Jordan stated as follows:

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

A. **Yes. (Emphasis Added)**

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

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

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

A. I have been invited to attend as a member of both the American College of Trusts and Estate Counsel. These are invitation organizations, and I think you have to have a degree or recognition in order to get invited to attend. I have also had numerous recognitions as **Best Lawyer in South Carolina** and that type of thing.

(R. 87, lines 9-16).

Obviously, if the jury believed Mr. Mullinax's testimony and contrasted that testimony with Mr. Jordan's testimony (specialized, with recognitions from South Carolina Supreme Court, and the American College of Trusts and Estate Counsel with an LLM and found by his own peers to be one of the "Best Lawyers" in S.C. in this area of law) they were certainly free to believe, if they so desired, that one lawyer was in a better position to determine the value of the Estate. Moreover, since Mr. Mullinax was squarely testifying in direct support of his own legal work, and in his own legal fees, the jury would be additionally free to give this factor as much or as little or no weight as they deemed appropriate.

D. In short, with these sharply contrasting professional backgrounds, and with the factor of personal gain inherent in one witness but absent in the other, the jury was free to clearly decide, whether or not to believe, in whole or in part, Mr. Jordan's further testimony that

when he took over the Estate Administration after $100,000 had been paid to Mr. Mullinax, he was very "surprised" to discover the following, or so he testified under oath:

1. "I would say that we are **basically in the preliminary stage** or dealing with the preliminary issues." **[Emphasis Added]** (R. p. 89, lines 17-18).

2. "There had been some communication about the Manor Development Company stock with the folks in California **but in essence no real work had been done." [Emphasis Added]** (R. p. 89, lines 23-25).

3. Mr. Jordan further believed, and so testified, that in his professional opinion, it was not reasonable for Mr. Mullinax to be paid $100,000 or $132,000 for the work that had been done. (R. p. 108, lines 8-11).

4. Finally, Mr. Jordan was squarely asked whether or not Mr. Orlonsky, the Respondent in this case, was correct in his belief that he had been overcharged by the Appellant's Law Firm.

In telling language, he testified:

> Q. Let me ask you, had you performed the work that Mr. Mullinax did prior to the time you took over, do you know or have an idea of what your firm would have charged?
>
> A. **For that work, probably five to ten thousand dollars. [Emphasis Added]**

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

If the jury accepted this testimony, from a certified expert in the field of taxes, the jury may have further concluded that Mr. Jordan was also accurate when he testified a little later in the record that there was no legitimate tax or other reason to value the Estate at more

than Two Point Eight Million Dollars.[5] Thus, it obviously follows that it was surely within the Jury's prerogative to find that Mr. Mullinax had very substantially overcharged the Respondent when he used a much higher number without tax justification. Of course, the jury could also have rejected Mr. Jordan's analysis and opinions, and concluded that he failed to consider a variety of factors, as Mr. Mullinax has repeatedly argued. **(See Appellant's Petition for Rehearing, Pg. 18,** where the Appellant claims that the Respondent's new lawyer and his law firm failed to follow a large number of relevant tax considerations). Clearly, on this record, the question of what was the value of the Estate itself was a **highly contested issue of fact for the jury to determine**.[6]

At all events, it is clear beyond argument that since there was a truly contested factual question as to the value of the Estate, and since the jury's final verdict falls squarely within the evidence submitted in this trial by either one side or the other, under the most settled of S.C. principles, a jury verdict that squarely falls within the testimony of one side or the other is certainly within the jury's province. As our Supreme Court has repeatedly held, a breach of contract action, is an **action at law**. See Small v. Springs Industries, Inc., 292 S.C. 481,

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[5] Mr. Jordan's and his law firm's estimate was that an estate tax return would be under $3,000,000 and therefore there was no filing requirement at all. (See R. p. 97, lines 1-12).

[6] If one is looking for possible clues to the pathway the jury might have taken to reach its final verdict, Mr. Jordan also testified that "I believe you just said that you estimated that maybe Mr. Mullinax had done twenty percent of the work? And, answered promptly, "I think it's fair to say that." (R. p. lines 1-3). If the jury accepted this estimate, from the only true tax expert in this entire case, it is easy to see that 20% of the $100,000.00 that was paid had been earned and thus fully and totally explains the $20,000.00 jury award to the Appellant with the remaining $80,000.00 to be paid back and returned to the Respondent.

357 S.E.2d 452 (1987) and this Court's standard of review in an action at law is limited to correcting errors of law. This Court will not reverse a **jury's factual findings** unless there is no evidence in the record which reasonably supports the jury's findings. Id. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).[7]

Even if one looks at Federal Law (as Mr Mullinax urges this Court to do) it is clear that the question of the valuation of an estate is frequently a genuine contested **question of fact in Federal Courts.** See, for merely one recent example, the case of Estate of Shirley G. Giouacchini, Deceased v. Commissioner of Internal Revenue, T.C. Memo 2013-27 (Docket No. 20122-05) where the Tax Court stated at pages 32 and 33, "Valuation is not an exact science and **each case necessarily turns on its own particular facts. Emphasis Added,** citing Estate of Spruill v. Commissioner, 88 T.C. 1197, 1228 (1987).[8]

In brief summary concerning Court of Appeals Point No. 6, the Respondent submits that the Court of Appeals was on firm and solid legal ground when it held that the jury verdict was a permissible one, based as it was on the contested factual question of the value of the Estate. Similarly, the jury had the right to follow the expert's suggestions, and conclude, as they did, that 80% of the monies paid by the Respondent should be returned to

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

[8] The Ninth Circuit has stated, "It is the rule in this circuit that the Tax Court's determination of the value of property is a finding of fact, which we will reverse only for clear error. Bryant v Commissioner, 790 F.2d 1463, 1465 (9th Cir. 1986); Ebben v Commissioner, 783 F.2d 906, 908-09 (9th Cir. 1986)

the Respondent. In short, this was a simple case where a lawyer failed to perform his own agreement with a client and overcharged his client for services never rendered.

II. The Trial Court and the Court of Appeals Were Both on Sound Grounds When They Found for Separate and Distinct Reasons That the S.C. Deadman Statute Did Not Bar Ron Orlosky's, In His Capacity as Personal Representative, From Testifying About Conversations with His Own Deceased Wife About Their Joint Reasons for Wanting to Sell the Manor Stock From His Wife's Estate

From the perspective of the plaintiff below, we don't need to spend a lot of time on this point. Searching for anything that might create a possible new trial, the Petitioner argues that the Deadman Statute has been violated below. Respectfully, for several reasons, that is simply an erroneous argument. Mr. Orlosky was a Personal Representative of his Wife's Estate. The plaintiff testified about this sale of personal property from the Estate.

This case dealt exclusive with the single issue of attorney fee, and whether or not it was excessive or reasonable. As the able Trial Judge instantly recognized, the sale or lack of sale of some personal stock from the Estate – had absolutely nothing to do with an issue the Jury was going to be asked to decide. The testimony on the Record speaks volumes about this issue. Mr. Orlosky testified that he was bound by the "buy-sell" agreement and stated:

> Q. If the value of the company had been as Mr. Mullinax thought it ought to be, under the agreement could you or the estate have received any more?
>
> A. No, I was bound by what the agreement said, the buy and sell agreement, and that was what was required to be done.
>
> Q. So did it matter if the value was Three Million, Two Million, Four Million?
>
> A. No.
>
> Q. Would you have gotten any more regardless of the value?

A. No.

Q. Would there have been more to the estate or proceeds going into the trust from the sale?

A. No.

(R. p. 70, line 14 - p. 71, line 1).

If the jury elected to consider and find this testimony persuasive then there really are multiple reasons why no real Dead Man Statute issue exists in this case. Specifically (1) The jury was never asked to decide the question, directly or indirectly, of whether or not the Manor stock in the Estate should or should not be sold. Since that was not an issue in this case, the dead man statute is truly inapplicable; (2) The testimony above reflects that the buy – sell agreement was binding upon the Personal Representative and further binding upon him in his role as Trustee. Accordingly, neither he personally, nor his children benefitted one way or the other from the sale as the price had long ago been fixed in the Buy-Sell Agreement itself. With the testimony not benefitting or harming the Estate, it is simply outside the scope of the Dead Man Statue; (3) None of this has anything at all to do with the question of whether or not the attorney fees charged were excessive (the real issue in this case); (4) Finally, as the Court of Appeals seemed to recognize in their opinion, the Statute was not even applicable to this situation to begin with as it does not affect the present interest of the opposing party. For any or all of these reasons, this is not an issue.

III. The Court of Appeals Was Also On Sound Ground When It Found That Questions of Public Policy and Statutory Law Were Not Properly Preserved By the Defendant and Should Not Be Considered In His Petition for Certiorari

This Court's attention is first directed to point five of the Court of Appeals Unpublished Opinion. Where, the Court notes that the failure to properly raise and preserve the issues of statutory law and public policy as a valid justification for the defendant to stop working on the contract (but still file a claim against the Estate). Of course, if this Court agrees with the Court of Appeals on point five, then the principal defense the Petitioner asserts in his Petition for Certiorari, that he cannot complete the contract because to do so was unlawful, fails immediately on the grounds that it was not properly preserved and cannot be properly considered even if the Certiorari Petition were to be granted. On this ground as well, the Petition lacks merit and this Court should toss it aside. Of course, the "real" tax expert in this case, Michael Jordan from the McNair Law Firm, completely disagreed with this so-called defense and said, in so many words, that it was made up and this is merely a contested issue of fact, decided against the Defendant at trial, which he now seeks to litigate again in the South Carolina Supreme Court.

IV. Moreover, The Collective Exhibits (Offered Into Evidence By Either the Defendant or the Plaintiff) Along With The Testimony of Several Witnesses Certainly Suggests That The Defenses Raised By The Defendant Are Merely Another Contested Question of Fact As To Whether Or Not They Reflect The Real Reason The Defendant Would Not Work Further On The File And Provide No Basis To Grant The Defendant's Petition Now.

But, for the moment, merely assuming the Court of Appeals is wrong, and this issue was properly preserved (purely for sake of argument) and further assuming (again purely for sake of argument) that the Defendant can relitigate in a case of law and not equity an adverse

jury determination of a factual dispute, it is respectfully suggested that the jury could have totally rejected the defendant's purported concerns as not being the real reason at all as to why he refused to continue to work on this file.

If one looks at every single defense Exhibit, in the entire record, (and for that matter all of the plaintiff's Exhibits as well) there is not a single document, or memorandum of law, or even an email from the defendant, that even hints that he had any concern about a violation of public policy or statutory law. He claims now, of course, that these were paramount considerations and they were so important that he could be placing his law license in jeopardy, but there is not a single hint of this would-be defense in the entire record (save, of course, his own testimony not corroborated by anyone. C**ertainly, no written paper exists** that indicates the defendant ever even shared this concern with the plaintiff or actually ever had such a concern at all. What the paper record does reflect, over and over and over, is that the defendant certainly did have one concern, money. Indeed, in an extraordinary document, Mullinax told the plaintiff that he must refuse to meet with the Orlosky (then his existing client) until and unless he was paid yet even more funds. See, merely as one example of many such statements, Plaintiff's Exhibit No. 29 (R. p. 296).

If it really was so important, not to do something improperly and in violation of alleged public policy, if it really was so critical, why – the jury may have asked themselves, when looking at all of this evidence, would the defendant himself not at least send a single email, or draft a memorandum of law, or written something instead of constantly asking for more and more funds? Again, we have only the defendant's own word that he ever even considered what he now says to this Honorable Court was so critically important and his

"reason" not to honor the contract he himself wrote. In fact, the Exhibits in this transcript reflect a single overriding and quite different concern, his own pocketbook. There is ample evidence in the record, if the jury wanted to believe it, that the defendant routinely did not transmit critical information to the plaintiff. See for example, the independent witness, Boyd Lang, Jr., who testified that he could not understand why the **defendant refused to even communicate with his own client**. (Court Exhibit 1 - R. pp. 192-196). Certainly, the plaintiff repeatedly and affirmatively stated under oath that Mr. Mullinax routinely withheld important information from him. (R. p. 75, lines 7-16).

In short, this was yet another **credibility issue** that clearly was for the jury to decide. In a case at law, where there are conflicting witnesses that swear to different matters, it is of course the jury's prerogative to accept one version of the facts and reject another version. If, as the evidence surely can be interpreted to suggest, that this was actually so insignificant to the defendant that he did not even bother to write it down, that the real reason for his growing anger and frustration with the plaintiff, who had already paid him $100,000.00, were the questions starting to come from the Plaintiff himself about the endless billing statements, and when the Plaintiff actually started to ask the Defendant directly to explain why an endless set of bills were sent one after another after another, without real justification or explanation. Carefully consider, for example, Plaintiff's Exhibit No. 22 (R. pp. 289-290), ending with Plaintiff's reasonable request for detailed listing of hours worked and expenses incurred on the case (which, of course, the Defendant deliberately ignored). Or, consider and contrast Plaintiff's Exhibit No. 26 (R. pp. 291-295) written by Michael Jordan – evidencing

a thoughtful legal memorandum with a thorough conclusion explaining his thought process[9] with absolutely nothing that was ever written by the Defendant on this key subject, and what inferences a jury is entitled to draw on this conflicting evidence.

Respectfully, this was yet one more disputed issue of fact, in a case full of disputed factual issues, and the defendant having failed at trial or on appeal to convince anyone of the rightness of his position simply marches on – asking this Court to grant certiorari for yet another attempt.

CONCLUSION

This was a fair trial. This was a fair result. There is nothing novel, or important, or in conflict with other decisions in this record. Respectfully, don't grant the Petitioner's plea for yet another forum to make another set of arguments that have failed twice.

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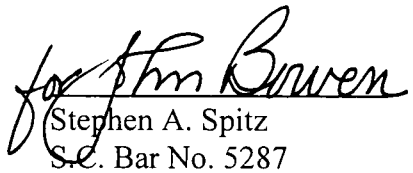
[9] See in particular, Plaintiff's Exhibit No. 26 - R. p. 295: "The Manor Development Company Shareholder Agreement appears to be will drafted and prepared by an experienced attorney. It defines a business purpose, which appears to be the most valid reason for the execution of the agreement. The valuation formula appears to be reasonable and an attempt to reflect fair market value. The agreement appears to be equally binding on all the shareholder to the company."

Very Respectfully Submitted,



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December 4, 2015
Hilton Head Island, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Case No. 2010-CP-07-4146

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

v

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

CERTIFICATE OF SERVICE

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

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December 4, 2015
Hilton Head Island, South Carolina