

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2015-002154

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S.C. SUPREME COURT

Ron Orlosky,

Respondent,

v.

The Law Office of Jay A.
Mullinax, LLC,

Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S RETURN TO
PETITION FOR WRIT OF CERTIORARI

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INDEX

Questions Presented iii

Adoption of Statement of Issues on Appeal, Statement of the Case, and Statement of Facts1

Statement of Facts Supplement in Reply to Respondent.....1

Arguments

I. THE COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION FOR A DIRECTED VERDICT ON EQUITABLE ESTOPPEL.....2

II. THE COURT ERRED WHEN IT ALLOWED THE PLAINTIFF TO TESTIFY EXTENSIVELY ABOUT ALLEGED COMMUNICATIONS WITH THE DECEDENT THAT IMPACTED HIS INTEREST IN VIOLATION OF THE DEAD MAN’S STATUTE (S.C. Code Ann. §19-11-20 (1985)).....8

III. THE COURT ERRED WHEN IT FAILED TO REASONABLY CHARGE THE JURY WITH CLARITY ON THE LAW AND ISSUES IN THE CASE, THEREBY PREDJUDICING THE DEFENDANT.....9

IV. THE DEFENDANT SHOWED BY A PREPONDERANCE OF EVIDENCE THAT IT PROVIDED REQUESTED SERVICES TO THE PLAINTIFF BEYOND THE SCOPE OF THE WRITTEN CONTRACT WHICH RESULTED IN A PECUNIARY BENEFIT TO THE PLAINTIFF, FOR WHICH THE PLAINTIFF PAID THE DEFENDANT NOTHING (QUANTUM MERUIT).....9

V. THE COURT ERRED WHEN IT ALLOWED A BREACH OF CONTRACT CLAIM BASED ON THE PLAINTIFF’S INTERPRETATIONS OF THE CONTRACT THAT, IF FOLLOWED, WOULD HAVE VIOLATED STATUTORY LAW AND PUBLIC POLICY.....9

VI. BECAUSE BOTH ISSUES RELIED ON BY THE COURT OF APPEALS UNDER THE “TWO ISSUE RULE” ARE DEPENDENT ON THE SAME EVIDENCE, BECAUSE ONE FAILS, THEY BOTH FAIL.12

Conclusion.....12

CASES

Lewis v. Lewis, 709 S.E.2d 650. 654-55 (S.C. 2011).....3,5

Long v. Conroy, 246 S.C. 225, 143 S.E.2d 459 (1965).....8

N. Am. Rescue Prods. Inc. v. Richardson, 720 S.E. 2d 53, 58 (S.C. Ct. App. 2011).....2,5

STATUTES

Dead Man’s Statute (S.C. Code § 19-11-20 (1985)).....8

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals September 17, 2015.

QUESTIONS PRESENTED

1. Did the Court err when it denied Defendant’s motion for a directed verdict based on equitable estoppel?
2. Did the Court err when it allowed the Plaintiff to testify extensively about alleged communications with the decedent that impacts his interest in violation of the Dead Man’s Statute (S.C. Code § 19-11-20 (1985))?
3. Did the Court err when it failed to reasonably charge the jury with clarity on the law and issues in the case, thereby prejudicing the Defendant?
4. Did the Defendant show by a preponderance of evidence that it provided requested services to the Plaintiff beyond the scope of the written contract which resulted in a pecuniary benefit to the Plaintiff, for which the Plaintiff paid the Defendant nothing (Quantum Meruit)?
5. Did the Court of Appeals err when it allowed a breach of contract claim based on the Plaintiff’s interpretations of the contract that, if followed, would violate statutory law and public policy?
6. Are both issues relied on by the Court of Appeals under the “Two Issue Rule” dependent on the same evidence, so if one fails, they both fail?

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

Petitioner, Law Office of Jay A. Mullinax, LLC (hereinafter “Law Office”), submits this Reply Brief. By reference, except as supplemented below in response to Respondent’s Return, Law Office adopts the Statement of Issues, Statement of the Case, and the Statement of Facts presented in Law Office’s Petition for Writ of Certiorari.

SUPPLEMENTAL FACTS

Respondent, Ron Orlosky (hereinafter “Ron”) alleges some his arguments as “facts”. Law Office has or will address Ron’s arguments elsewhere. However, some of Ron’s allegations purported as “facts” will be addressed here. Ron suggests that he “timely paid” Law Office for its services. (Ron’s Return, p. 5) The record clearly shows that Ron did not even “timely pay” his uncontested fees. (R. pp. 281-288; p. 291) Ron alleges that Law Office “kept no time records”. (Ron’s Return, p. 5) Yet, a detailed billing of Law Office’s quantum meruit charges appears in the Record. (R. pp. 302-305), charges unpaid by Ron.

Ron alleges that Law Office failed to communicate effectively with him. (Ron’s Return, p. 5) Yet, it’s clear from the record that Ron did not want to meet with Law Office or want extensive communication from it, even after Law Office offered meetings to Ron. (R. p. 287-288; p. 291) Ron remained silent.

Ron alleges that his attorney (Jordan) has earned a LL.M. (Master of Laws) degree, and thus Jordan’s testimony should be given more weight. Although we agree with Ron that a witness with a LL.M. in this area of the law should be given more weight, **Jordan has no LL.M.; Mullinax was the only witness in this case that has earned an LL.M. (Masters of Laws).**

Mullinax’s LL.M. happens to be in Estate Planning, a degree filled with taxation issues and other issues germane to this case. (R. p. 568). Additionally, Mullinax was also the only witness to reference any Internal Revenue Code sections, Treasury Regulations, statutes, and other public laws and policies during his testimony. Also, Law Office is the only party (or non-party) to submit any reference to any Internal Revenue Code sections, Treasury Regulations, statutes, and other public laws and policies into the Record.

ARGUMENTS

I. THE COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION FOR A DIRECTED VERDICT ON EQUITABLE ESTOPPEL.

The Court of Appeal’s Order states that the trial court did not err when it denied Mullinax’s motion for a directed verdict on equitable estoppel. During the trial, the “Law Office” made multiple motions for a directed verdict based on equitable estoppel. (R. p. 117, line 24- p. 120, line 16; R. p. 174, line 16- p. 177, line 23). The trial Court ruled on this “**matter of law**”, against Law Office. Contrary to Ron’s contention to this Court, this issue was not a “matter of fact” for the jury. Therefore, any of Ron’s arguments that uses the jury’s verdict, to circumvent the Court’s purview to rule on the law, does not have merit since this “issue of law” (equitable estoppel), decided by the lower Court, was not deliberated by the jury at any point during the trial. This Court now has the opportunity to review this “matter of law”, which was incorrectly decided by the lower Court.

If an error raises a question of law, the analysis for the standard of review stops, and the de novo standard applies. *N. Am. Rescue Prods. Inc. v. Richardson*, 720 S.E. 2d 53, 58 (S.C. Ct. App. 2011). Under the de novo standard, a court examines the issue with a fresh set of eyes using the

same analytical framework the lower court used, but the lower court's own resolution gets no deference. *Lewis v. Lewis*, 709 S.E.2d 650, 654-55 (S.C. 2011).

Essentially, Law Office's motions for equitable estoppel asserted that Ron, was estopped from alleging a different estate value than the one Ron claimed at the formation of the contract -- when Ron's original value was used to entice Law Office to enter into the written contract. (R. pp. 261-264). Specifically, Ron and the decedent (Debora), presented Mullinax with a March 2009 Financial Statement, just months before the decedent's death, wherein it lists Debora's estate value at approximately \$4.4 Million Dollars. (R. p. 319) and Ron's assets at approximately \$1.6 Million. (R. p. 319) **Ron and Debora's Financial Statement specifically lists Debora's Manor Stock value as \$2.6 Million Dollars.** (R. p. 319) Ron asserted at trial that the value of the Manor Stock was \$1.58 Million Dollars even though his and the decedent's own Financial Statement (R. p. 319) and all of the Manor Stock documents (R. p. 333 valuing stock at \$72,239.38 per share in 2006 for decedent's total stock value of \$2,407,979.33; R. p. 334 valuing stock at \$74,404.66 per share in 2007 for decedent's total stock value of \$2,480,155.09) in the record attested that the value of the Manor Stock was approximately \$2.6 Million Dollars for several successive years leading up to 2009.

Ron failed to produce official Manor records for 2008 and 2009 to Law Office, during discovery, or for the Record. Ron presented nothing at trial that suggested any change in the value of the stock between March 2009 (date of Financial Statement) and the date of the decedent's death, in June 2009. Additionally, one month before her death, Debora went to extraordinary length during her dying days to execute a Revocable Trust expressly designed to prevent an estate tax liability. (R. pp. 203-243, Articles 5.2; 13; 18.3; 19.19; 19.20; 23.4; 24.2; 24.4; 26.1). She created this type trust because she knew she had an estate valued over \$4.4 Million Dollars, about

a million dollars over the estate taxable amount. Even after the decedent's death Ron knew the estate was valued at \$.4.4 Million Dollars. In February 2010, eight months after the decedent's death, Ron wrote to Mullinax asking, "What stands in the way of filing the 706 [estate tax return], now that all assets have been identified. I am not in favor of filing an extension and there only remains 3 weeks to complete [706 estate tax return] within the 9 month [extension request] period." (R. p. 293). Ron knew the estate value was approximately \$4.4 Million Dollars, even eight months after his wife's death, and months before he changed his story at trial. In fact, in Ron's March 19th, 2010 correspondence terminating Law Firm's services, Ron indicates that he is disturbed that the IRS 706 [estate tax return] had not yet been finalized or filed. (R. p. 292) The only reason Ron was concerned about filing the estate tax return was because Ron knew, everyone knew, that Debora's estate was valued at \$4.4 Million Dollars. Ron personally filed an extension for the estate tax return, a tax return Ron later claimed he did not owe. Ron also knew that the legitimate estate value of \$4.4 Million Dollars, required to appear on the estate tax return, would result in a higher fee owed to Law Firm and to the Probate Court (State of South Carolina). Ron didn't want to pay for the legal services, even after the majority of the services were complete. So, Ron changed his story and claimed that although he and Debora claimed her \$4.4 Million Dollar estate value for years, now, when he owed Law Office and the Probate Court (State of South Carolina) fees based on that value, Ron's view of the estate value was miraculously much lower.

The Court should have granted Law Office's motion and estopped Ron from asserting a revised stock value (and estate value) different from what Ron and Debora (the decedent) asserted leading up to the formation of the contract, identical to the amount he claimed up until eight months after Debora (decedent) died.

Not only was the Court's ruling on equitable estoppel a matter of law, but Law Office's Argument #1 in the Petition for Writ of Certiorari outlines how the **value of the stock in this case is a matter of statutory law** to be interpreted by the Courts, not a jury. Unless the Court is now relinquishing its authority to determine matters of law to the jury, then this Court should weigh in on the lower Court's ruling on equitable estoppel (with a de novo standard). In order to do this, the Court must also review and interpret the expressed statutory law that are determinative of estate value. Statutory interpretation is not the purview of the jury. Statutory interpretation lies exclusively with the Courts. Up to this point, Law Office's statutory arguments have not been contradicted or challenged by the Courts, by Ron, or his numerous attorneys. A de novo interpretation of the law, required in this case, remains uninitiated by any court.

Rather than directly addressing Law Office's motions to the trial Court on equitable estoppel, Ron's Return mischaracterizes the Court's direct ruling on Law Office's motions, and claims that the equitable estoppel was a matter for the jury. Ron provides no evidence for this position and does not challenge the fact that the Court ruled on these motions, not the jury.

Law Office's **motions of equitable estoppel, (an issue of law)**, were made to and ruled on by the Court, and not by the jury, as alleged by Ron. If an error raises a question of law, the analysis for the standard of review stops, and the de novo standard applies. *N. Am. Rescue Prods. Inc. v. Richardson*, 720 S.E. 2d 53, 58 (S.C. Ct. App. 2011). Under the de novo standard, a court examines the issue with a fresh set of eyes using the same analytical framework the lower court used, but the lower court's own resolution gets no deference. *Lewis v. Lewis*, 709 S.E.2d 650, 654-55 (S.C. 2011). Therefore, any argument that uses the jury's verdict does not have merit since this issue of law (equitable estoppel), decided by the Court, was not deliberated by the jury at any point during the trial.

Ron indicates that Mullinax did not complete the work in the contract once Ron fired Mullinax. Mullinax had no authority to complete the work in the contract once Ron fired Mullinax. Additionally, Law Office explains in Argument #5 of in the Petition for Writ of Certiorari that Ron made it impossible for Mullinax to complete the contract once Ron interpreted the contract in a manner that was against statutory law and public policy. Mullinax was more than willing to complete the contract using an interpretation that was not against public policy or statutory law.

Ron suggests that Mullinax's Law Firm's filing of a creditor's claim to collect legal fees should somehow prevent the Law Firm from collecting the fees. Yes, that's right. Ron's position is based on the premise that the Law Firm's claim prevented another attorney from "closing the estate", one of the tasks the Law Firm was hired to do. Ron's suggestion that Law Firm should be prevented from making a lawful claim for legal fees is without merit. Law Firm's claim certainly has no bearing on the Law Firm's refusal to complete the contract in the manner Ron wanted, a manner that was against public policy and statutory law.

Ron suggests that the value of the estate was a factual question. As noted in Law Office's Petition, Argument #1, the valuation of the estate was a matter to be determined by statutory law, not a factual question for the jury. Ron also asserts that his attorney (Michael Jordan) testified about the value of the estate. Ron's attorney (Jordan) expressly testified that neither he nor his firm did any independent valuation of the [Manor] stock and that he simply accepted the number given to him by his client. (R. p. 105, line 23- p. 106, line 15; R. p. 109, line 25 - p. 110, line 9; R. p.110 line 24 – p. 111, line 1) In fact, Jordan admitted that he did not even review the Shareholder Agreement or the CPA calculations on which his client purportedly relied. (R. p. 106, lines 16 – p. 107 line 1; R. p. 110, lines 25 – p. 111 line 1)

Ron also alleges in bold print (Respondent's Return to Petition for Writ of Certiorari, p. 6 and p. 12) that Ron's attorney Jordan's testimony (Ron paid \$30,000 for Jordan's services up to the time of testimony) (R. p. 101 line 6-9), should be given weight because Jordan allegedly earned an LL.M. (Master of Laws) degree. In fact, **Jordan has no LL.M. degree**, but **Mullinax has earned an LL.M. in Estate Planning**. (R. p. 568) Ron alleges that Jordan was presented to the Court (and jury) as an expert witness. Although Ron repeatedly alleged Jordan was an expert to the jury, Jordan was never admitted to the Court or to Law Office as an expert witness under the rules of evidence or procedure, but the jury likely believed that Jordan's completion of an advertising test, that allows him to advertise as an expert, made him an expert witness. No party qualified as a Court expert for this case, and this Court, unlike the jury, should not be deceived by Ron's suggestion that an expert witness testified. Ironically, Jordan's alleged "expert" testimony was completely absent of any reference to any statute, Internal Revenue Code, or Treasury Regulation governing the issues in the case. In fact, neither Jordan, Ron, or anyone on behalf of Ron ever cited or provided a single Internal Revenue Code section, Treasury Regulation, or statute, to support Ron's or Jordan's positions. By stark contrast, Mullinax filled his testimony and the record with references to each of these materials and laws. (Multiple citations omitted.) Unlike Jordan, Mullinax referred to these specific references in his testimony and submissions to the Court in the Record, not to his naked opinion. (Multiple citations omitted.) Additionally, Ron submitted Jordan exclusively as a fact witness, not for opinion testimony. Jordan, however, implied his opinion in his testimony, especially about issues for which he admitted he had not reviewed any documents or information, particularly about the alleged "sales price" relating to the value of the stock.

Ron would like for this Court to ignore the fact that federal law expressly negates Ron's argument that the "sales price" of the stock has any relation to the fair market value in this case. Ron would also like for this Court to ignore the fact that Ron maintained the value of the estate to be at \$4.4 Million Dollars at least until eight (8) months after the decedent's death, thus, Ron should have been estopped from claiming another value, which was determinative of the fees owed to Law Office under the contract.

II. THE COURT ERRED WHEN IT ALLOWED THE PLAINTIFF TO TESTIFY EXTENSIVELY ABOUT ALLEGED COMMUNICATIONS WITH THE DECEDENT THAT IMPACTED HIS INTEREST IN VIOLATION OF THE DEAD MAN'S STATUTE (S.C. Code Ann. §19-11-20 (1985)).

The Dead Man's Statute essentially prohibits any interested person from testifying concerning conversations or transactions with the decedent if the testimony could affect his or her interest. (See *Long v. Conroy*, 246 S.C. 225, 143 S.E.2d 459 (1965)).

The trial Court allowed Ron to testify about alleged conversations with the decedent, testimony which served as the foundation of Ron's alleged valuation of the decedent's estate, a value determinative of the attorney fees owed to Law Firm. (R. pp. 555-560) The attorney fees owed by Ron to Law Firm is the preeminent issue in this case and Ron is the sole pecuniary beneficiary of the outcome in this case. Ron is also the only witness that the Court allowed to testify about alleged communications with the decedent.

Ron alleges, again in his Return, that the Shareholder (buy-sell) Agreement was determinative of the estate's stock value. The Shareholder (buy-sell) Agreement was not determinative of the estate's stock value because of express Internal Revenue Codes and Treasury Regulations, as cited by Law Office in Argument #1 and Argument #5 of its Petition for Writ of Certiorari. Additionally, Law Office fully and preemptively addresses each of Ron's Return's

arguments and fully analyzes the application of the Dead Man's Statute to this case in Law Office's Petition for Writ of Certiorari. Ron did not challenge Law Office's analysis of the Dead Man's Statute in Ron's Return. Ron would like for the Court to ignore the fact that a plain reading of the Dead Man's Statute, as analyzed in Law Office's Petition, results in a reversal of the lower courts' decisions. Ron would also like for the Court to ignore the fact that Ron did not challenge Law Office's analysis of the Dead Man's Statute on a single point.

III. THE COURT ERRED WHEN IT FAILED TO REASONABLY CHARGE THE JURY WITH CLARITY ON THE LAW AND ISSUES IN THE CASE, THEREBY PREDJUDICING THE DEFENDANT.

Ron does not challenge or even respond to Law Office's arguments on these matters. Law Office reasserts and affirms its unchallenged Argument #3 from its Petition for Writ of Certiorari.

IV. THE DEFENDANT SHOWED BY A PREPONDERANCE OF EVIDENCE THAT IT PROVIDED REQUESTED SERVICES TO THE PLAINTIFF BEYOND THE SCOPE OF THE WRITTEN CONTRACT WHICH RESULTED IN A PECUNIARY BENEFIT TO THE PLAINTIFF, FOR WHICH THE PLAINTIFF PAID THE DEFENDANT NOTHING (QUANTUM MERUIT).

Ron does not challenge or even respond to Law Office's arguments on these matters. Law Office reasserts and affirms its unchallenged Argument #4 from its Petition for Writ of Certiorari.

V. THE COURT ERRED WHEN IT ALLOWED A BREACH OF CONTRACT CLAIM BASED ON THE PLAINTIFF'S INTERPRETATIONS OF THE CONTRACT THAT, IF FOLLOWED, WOULD HAVE VIOLATED STATUTORY LAW AND PUBLIC POLICY.

Mullinax argued that the trial court erred when it allowed a breach of contract claim based on the plaintiff's interpretations of the contract that, if followed, would violate statutory law and public policy. The Court of Appeals ruled that Mullinax did not raise the issue of a violation of public policy or statutory law when moving for a directed verdict and a JNOV motion.

Mullinax specifically raised the aforementioned issue to the lower court and did so expressly in a Motion for a Directed Verdict and for Judgment notwithstanding the Verdict (JNOV) (R. pp. 379-380, ¶5.). Mullinax also outlined this issue in its Motion for Relief from Judgment (R. p. 403, ¶5). The lower Court was in error when it overlooked that Law Firm expressly raised this issue in Motion for a Directed Verdict and for Judgment notwithstanding the Verdict (JNOV) (R. pp. 379-380, ¶5.).

Ron does not challenge, explain or provide any reason why the Court of Appeals' decision, based on the alleged failure for Law Office to preserve the issue in a JNOV motion, should be upheld in the face of the fact Law Office clearly preserved the issue in a JNOV motion.

Ron does, however, suggest that testimony from his attorney (Jordan) should be considered in disregarding this issue. In part, Ron and his attorneys suggests that this Court should give weight to Jordan's testimony because Jordan allegedly earned an LL.M. (Masters of Law) degree. As noted above, Ron's allegations here, and to the jury, are false. **Jordan has never earned an LL.M. degree. Mullinax, on the other hand, has earned an LL.M. in Estate Planning**, a degree filled with academic rigors in taxation. Mullinax referred directly to Internal Revenue Codes, Treasury Regulations, statutes, and other public laws and policies to support his assertions at trial. Jordan did not cite or refer to a single statute, Internal Revenue Code, Treasury Regulation, or any other public law to support his naked assertions at trial. In fact, Jordan could not even point to the alleged provision in the Shareholder Agreement wherein his client allegedly relied for a sales price. Jordan also admitted that he never even reviewed the CPA calculations arriving at a sales price, a number that the CPA firm expressly indicated was not fair market value for the stock, the basis of Jordan's alleged estate valuation.

Ron alleges, again, that the estate value was an issue of fact for the jury. As the Court can see from this argument, the matter of the estate value was a matter of statutory law and public policy, to be decided by the Court. Law Office's Argument #1 in the Petition for Writ of Certiorari outlines how the value of the stock is a matter of law to be interpreted by the Courts, not a jury.

The fact is that Ron did not want to pay for Law Office's legal services that Ron agreed to in the Contract. For Ron to value the estate properly and file the Estate Tax Return would be an admission that he owed Law Office what he agreed to in the Contract. Ron would also owe more fees to the Probate Court (State of South Carolina), under the correct valuation. Ron filed an estate tax return extension with the Internal Revenue Service, without assistance or knowledge of Mullinax, because Ron anticipated filing an estate tax return on a \$4,400,000.00 estate. As soon as Ron fired Law Office, Ron changed his voiced opinion about the value of the estate because the Law Office fees and Probate Court (State of South Carolina) fees were determined by the fair market value of the estate. Ron did not want to pay more to the Probate Court (State of South Carolina) or to Law Office. As the March deadline for filing the estate tax return (706) approached, Ron didn't really want to talk to Law Office about it either.

Ron alleges that Law Office did not properly communicate with Ron. The record is absent of any indication of this until February 24th, 2010. At that time, it was Ron who refused to communicate with Law Office. Law Office wrote to Ron on February 25th in response to Ron's February 24th correspondence, inviting Ron to schedule a time to meet with Law Office to answer his questions. (R. p. 287) In that correspondence, Law Office reminded Ron that Ron had not previously wanted extensive correspondence from Law Office. Ron did not reply or communicate with Law Office again for three weeks, until March 15th. Again, on March 16th, Law Office invited

Ron to meet to answer his questions. (R. p. 291) Ron's next communication was on March 19th, firing Law Office. (R. p. 292)

It is worth noting that as of December 2009, Ron owed Law Office \$26,103.70, and as of March 16th, 2010, that balance remained unpaid. It is certainly correct to say that Law Office requested payment for charges that were several months delinquent. (R. p. 287; 291) In fact, Law Office requested that Ron meet to answer any questions about his billing. (R. p. 291). Ron never responded or made any effort to meet with Law Office to address any concerns with his billing or anything else.

Lastly, even if Law Office had not properly raised this issue in a Motion for a Directed Verdict and for Judgment notwithstanding the Verdict (JNOV), which it did, this Court still has the authority to reverse the lower Courts' decisions based on the fact that the decisions are in conflict with current South Carolina case law and federal statutory law.

VI. BECAUSE BOTH ISSUES RELIED ON BY THE COURT OF APPEALS UNDER THE "TWO ISSUE RULE" ARE DEPENDENT ON THE SAME EVIDENCE, BECAUSE ONE FAILS, THEY BOTH FAIL

Ron does not challenge or even respond to Law Office's arguments on these matters. Law Office reasserts and affirms its unchallenged Argument #6 from its Petition for Writ of Certiorari.

CONCLUSION

Ron would like for the Court to ignore the fact that the decisions of the lower courts involve novel questions of law for South Carolina, ignore this Court of Appeals decision which is in conflict with prior state and federal court decisions in South Carolina and elsewhere, and ignore the lower courts' rulings on federal questions of law that directly conflicts with well-established case law and statutory law. Ron would like for the Court to relinquish its authority to review issues

of law to the jury. Ron would like for the Court to ignore that he and his multiple attorneys failed to cite or challenge any statutory authority or legal analysis in response to Law Office's statutory and case law arguments.

Ron would like for this Court to ignore the fact that a plain reading of the Dead Man's Statute, as analyzed in Law Office's Petition, results in a reversal of the lower courts' decisions and that Ron did not challenge Law Office's analysis of the Dead Man's Statute on a single point.

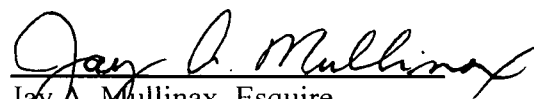
Ron would like for the Court to ignore the fact that the lower Court failed to charge the jury on a critical matter in this case, thus prejudicing Law Office. Ron would like for this Court to ignore the fact if the lower Court had properly charged the jury on this matter (quantum meruit), the evidence in the record would have resulted in the case being decided differently.

Ron would like for the Court to ignore the fact that the lower Court erred when it overlooked the fact that Mullinax specifically preserved an issue by raising it in a Motion for a Directed Verdict and for Judgment notwithstanding the Verdict (JNOV).

Petitioner prays that this honorable Court not ignore any of the aforementioned. For the reasons stated, petitioner asks the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

December 11, 2015


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THE STATE OF SOUTH CAROLINA
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APPEAL FROM BEAUFORT COUNTY
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Roger M. Young, Circuit Court Judge

Appellate Case No. 2015-002154

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Respondent,

S.C. SUPREME COURT

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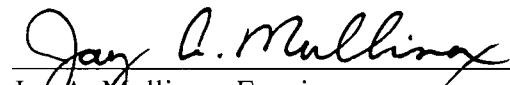
The Law Office of Jay A.
Mullinax, LLC,

Petitioner.

CERTIFICATE OF SERVICE

I certify that I have served the Petitioner's Reply to Respondent's Return to Petition for Writ of Certiorari on Mr. Ron Orlosky, by depositing a copy of it in the United States Mail, postage prepaid, on December 11, 2015, addressed to his attorney of record, John R. C. Bowen, Esquire, P.O. Drawer 21119, Hilton Head Island, South Carolina 29925-1119.

December 11th, 2015


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