THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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Case No. 2013-CP-07-01491
Appellate Case No. 2014-002249

IN RE: Estate of Valerie D'Agostino

Nicholls & Crampton, P.A., [illegible]

Appellant,

v.

Estate of Valerie D'Agostino, Respondent.

FINAL INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. **DID THE COURT ERR WHEN IT WRONGLY DECIDED THAT THE CASE TURNED ON AMBIGUITY IN THE CONTRACT, EVEN THOUGH ALL OF THE PARTIES AGREED ON THE CONTRACT'S MEANING?**

2. **DID THE COURT ERR WHEN IT FAILED TO APPLY NORTH CAROLINA LAW TO A NORTH CAROLINA CONTRACT?**

3. **WOULD THE COURT HAVE RULED IN THE FAVOR OF THE PLAINTIFF IF IT HAD APPLIED NORTH CAROLINA LAW TO THE NORTH CAROLINA CONTRACT?**

STATEMENT OF THE CASE

This is an appeal from the Beaufort County Master in Equity's grant of judgment (R. pp. 1-16) to Respondent (Ronald Huther, as Personal Representative of the Estate of Valerie D'Agostino) for a Disallowance of Claim (R. pp. 545-547) on a Creditor's Claim (R. pp. 543-544) filed by Nicholls & Crampton, P.A. (Appellant). Nicholls & Crampton, P.A. (Nicholls) initially filed a Statement of Creditor's Claim (R. p. 540) against the Estate of Richard D'Agostino (Richard's Estate) on December 27, 2011 for $4,542.94 for legal services (including interest) rendered to Richard D'Agostino (Richard) and related to the Estate of Valerie D'Agostino (Valerie's Estate). Richard died before paying the outstanding balance for Nicholl's services, and Nicholls filed the aforementioned claim against Richard's Estate. Richard's Estate subsequently disallowed the claim (R. p. 541) on or about January 10, 2012, claiming the unpaid balanced was owed by Valerie's Estate, that being the estate to whom the services related.

After receiving the disallowance from Richard's Estate, which alleged the liability of the claim lay with the estate to whom the services related (Valerie's Estate), Nicholls did not subsequently pursue the claim against Richard's Estate and the Beaufort County Probate Court dismissed the Petitioner's claim against Richard's Estate. (R. pp. 574-579)

On September 26, 2012, Nicholls filed a Statement of Creditor's Claim (R. pp. 543-544) against Valerie's Estate in the amount of $3,789.75, plus interest and attorney fees, representing the same principal amount previously claimed against Richard's Estate.

In March 2013, Valerie's Estate disallowed Nicholl's claim by mailing a Disallowance of Claim (R. pp. 545-547) to Nicholls, arguing, inter alia, that because Richard contracted individually with Nicholls, and not as Personal Representative of the Valerie's Estate, that Valerie's Estate was not responsible for paying the claim. In response, on May 7, 2013, Nicholls commenced this action by filing a Petition for Allowance of Claim (R. pp. 525-549) against Valerie's Estate, arguing, inter alia, that when the North Carolina Court appointed Richard as Foreign Personal Representative of the Valerie's Estate on July 12, 2010, his powers as the Foreign Personal Representative "relate back" to his acts prior to his appointment, thus ratifying his prior act of contracting individually with Nicholls for services related to Valerie's Estate on June 10, 2010.

The Honorable Marvin H. Dukes, III, Master In Equity, Beaufort County held a preliminary hearing on October 16, 2013. The Court ruled that depositions of both parties must be taken in person within 60 days of October 21, 2013. The parties held depositions on December 9, 2013 and Clark & Stevens, P.A moderated a mediation on December 10, 2013. The Mediator, William C. Clark, determined that the parties were at an impasse and that the parties could benefit from further mediation. No further mediation was undertaken.

The Court scheduled a final hearing for May 19, 2014 and gave the parties 30 days to file any motions. On April 22, 2014, Nicholls filed a Motion for Summary Judgment with the Court.

A hearing on all pending matters was held on May 19, 2014. Following the parties' submission of additional filings for Court consideration, the Court ruled in favor of Valerie's Estate on July 8, 2014, and issued an Order (R. pp. 1-16) dated September 16, 2014.

On October 14, 2014, Nicholls filed a Notice of Appeal on counsel for Valerie's Estate.

FACTS

Valerie D'Agostino (Valerie) died on October 17, 2009, domiciled in Beaufort County, South Carolina. She was survived by her husband, Richard, and her adult children from a previous marriage, Ronald Huther (Huther) and Heidi Pallesen. On or about January 8, 2010, the Beaufort County South Carolina Probate Court appointed Richard D' Agostino as Domiciliary Personal Representative for Valerie's Estate. (R. p. 570)

On or about March 5, 2010, unaware of the Beaufort County South Carolina probate and appointment of Richard on January 8, 2010 (R. p. 570), the Wake County, North Carolina Court improperly appointed Huther as Personal Representative/Administrator for Valerie's Estate in North Carolina, in response to Huther's application for Letters of Administration in the North Carolina Court. The North Carolina Court admitted the improper nature of its appointment of Huther in its July 12th, 2010 Order, wherein it then appointed Richard as Foreign Personal Representative in North Carolina. (R. pp. 594-595) As referenced in Nicholls' Motion for Sanctions (R. pp. 581-585) against Huther and Huther's

attorney, David B. Alexander, Huther swore in his application for Letters of Administration, under oath, that "I [Huther] am the person entitled to apply for letters or am applying after all persons having prior right have renounced". Valerie's husband, Richard, D'Agostino, who had priority to be appointed Personal Representative for his late wife's estate in North Carolina, had never renounced his right to be appointed as the Personal Representative of Valerie's Estate in North Carolina, and he did not subsequently do so.

In June 2010, after learning that Huther opened Valerie's Estate in the North Carolina Court, Richard's South Carolina attorney contacted Nicholls, a North Carolina law firm. On June 10, 2010, Richard consented to, approved, and signed an Engagement Letter (R. pp. 533-534) with Nicholls. The Engagement Letter stated that it was for professional legal service fees, costs, disbursements, and payment policy relating to the "Estate of Valerie D'Agostino" (which appeared as the subject line). Nicholls thereafter worked with Richard to remove Huther as Personal Representative of Valerie's Estate in North Carolina.

On or about July 2, 2010, Nicholls filed a Motion for Sanctions against Huther in Wake County, North Carolina for filing a fraudulent application for Letters of Administration in North Carolina. (R. pp. 581-583) Approximately ten days later, on or about July 12, 2010, Huther petitioned the North Carolina Court to resign as Personal Representative, by filing a Petition for Approval or Resignation of Administrator/Personal Representative (R. pp. 596-599) of Valerie's Estate. The Assistant Clerk of Superior Court of Wake County, North Carolina issued an Order (R. pp. 594-595) approving Huther's resignation on July 12, 2010, and the Court appointed Richard as Foreign Personal Representative in North Carolina (R. pp. 594-595). In its Order, the Court ordered Huther to file an accounting of his conduct. Richard signed an Oath/Affirmation (R. p. 600) and Application for Letters of

Administration (R. p. 601) in Wake County in North Carolina on July 13, 2010 to be recognized as Personal Representative of Valerie's Estate in North Carolina.

By that point, Nicholls had rendered legal services to Richard relating to Valerie's Estate from June 8, 2010 through September 23, 2010, resulting in fees of $13,289.75. (R. p. 535-538) For those services, Richard paid Nicholls with three checks totaling $9,500.00, leaving an unpaid balance of $3,789.75. Nicholls sent an invoice for the outstanding balance to Richard D' Agostino, but he failed to pay. (R. p. 538)

In order to settle the issues between parties, Richard signed a Private Family Settlement Agreement on August 14, 2010. (R. pp. 560-567) The Agreement's purpose was to settle all of the claims (including Motion for Sanctions) between parties and to ensure that all costs and attorney's fees were paid. After Richard signed the Agreement on August 14, 2010, some modifications were needed and the parties drafted a new Agreement.

As of September 21, 2010, Richard, Nicholls, Huther, and Heidi Pallesen signed the revised Private Family Settlement Agreement. (R. pp. 560-567) The Family Settlement Agreement, stated that the "Estate of Valerie D' Agostino shall pay all currently due attorney's fees to Anthony E. Griffis which are anticipated to be $13,500.00, together with any additional attorney's fees to F. Timothy Nicholls (Nicholls) not to exceed $2,000.00. The Estate of Valerie D' Agostino has paid no fees to Nicholls since the signing of that Agreement was filed with the Court.

On or about September 24, 2010, Nicholls filed a Withdrawal of Motion for Sanctions with the Wake County, North Carolina Court Clerk. (R. p. 587) Nicholls and other parties requested to be advised when Valerie's Estate was closed in Wake County, North Carolina.

In November, Nicholls received an email from Richard's South Carolina attorney, Tony Griffis, stating that Huther and Heidi Pallesen filed an action in the South Carolina Probate Court to remove Richard as Personal Representative. Huther and Heidi Pallesen filed this action on September 22, 2010, the day after the Private Family Settlement Agreement was executed by all parties. This action voided the Private Family Settlement Agreement.

On or about October 22, 2010, Ronald W. Huther filed a Final Account with the Wake County Court in North Carolina, in compliance with that Court's Order relating to Huther's resignation as Personal Representative. (R. pp. 594-595) At that point, Richard's goal to replace Huther as Personal Representative in North Carolina was complete and Richard no longer needed Nicholls assistance. However, Richard still owed $3,789.75 to Nicholls for its services.

The payment policy in the Nicholls Engagement Letter, approved and signed by Richard on June 10, 2010, stated that "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". Nicholls made demands upon Richard to remit payment, but Richard never paid the outstanding balance owed. (R. pp. 535-539)

Richard died on April 11, 2011 and the Court, thereafter, appointed Christopher D'Agostino (Richard D'Agostino's son), as the Personal Representative of Richard's Estate. Nicholls then made demands upon Christopher D'Agostino (Christopher) for payment of the unpaid balance. Despite Nicholls' demands, Christopher, as Personal Representative of Richard's Estate, failed to pay the outstanding balance.

Nicholls filed a Statement of Creditor's Claim (R. p. 540) against the Estate of Richard on December 27, 2011 for $4,542.94 for legal services (including interest) rendered to Richard. On January 10, 2012, Christopher executed a Notice for Disallowance of Claim (R. p. 541), disallowing the claim against Richard's Estate for $4,542.94. Christopher's Notice of Disallowance of Claim included the following statement:

> This claim represents fees due from the Estate of Valerie D' Agostino, 2009ES07889, whereby decedent [Richard D'Agostino] was serving as Personal Representative. These fees are due from that estate [of Valerie D'Agostino] rather than the decedent's estate [of Richard D'Agostino]. The engagement letter signed by decedent [Richard D'Agostino] did not in any way 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.

Nicholls did not subsequently pursue the claim against Richard's Estate and the Beaufort County Probate Court dismissed the Petitioner's claim against Richard's Estate. (R. pp. 574-579)

On September 26, 2012, Nicholls filed a Statement of Creditor's Claim against Valerie's Estate 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." (R. pp. 543-544)

In December 2012, Sean Bolchoz, attorney for Christopher D'Agostino (Personal Representative of Richard's Estate), filed an executed "Global" Settlement Agreement and General Release with the Beaufort County Probate Court. (R. pp. 515-521) The "Global" Settlement concerned various issues of contention between Valerie's Estate and Richard's Estate. Although the parties to the "Global" Settlement purported to "resolve" the Nicholls's

claim, the parties to the "Global" Settlement did not include Nicholls or its attorney in the discussions, drafting or execution of the "Global" Settlement Agreement.

In the "Global" Settlement Agreement, Richard's Estate did agree to pay $4,929.08 to Valerie's Estate (to be held in escrow with Twenge + Twombley Law Firm) pending resolution of the Nicholls claim against Richard's Estate. Those funds were never paid to Nicholls

In March 2013, approximately six months after Nicholls filed a claim against Valerie's Estate, Valerie's Estate mailed to Nicholls a Notice of Disallowance of Claim. 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.

On May 7, 2013, Nicholls filed a Petition for Allowance of Claim against Valerie's Estate to recover the funds that Richard failed to pay Nicholls for services related to Valerie's Estate. (R. pp. 525-549)

Each party served the opposing party a Request for Production, and each party complied with the request. Petitioner filed a Motion for Deposition by Telephone on behalf of Nicholls on or around August 9, 2013, which was later denied.

A hearing was scheduled for October 16, 2013 between the parties before the Honorable Marvin H. Dukes, III, Master in Equity. The Court ruled depositions to be taken in

person within 60 days of October 21, 2013, and on the same date. Depositions were held on December 9, 2013. Mediation was held on December 10, 2013 by Clark & Stevens, P.A. The Mediator, William C. Clark determined that the parties were at an impasse and that the parties could benefit from further mediation. No further mediation was undertaken.

On April 9, 2014, a hearing was held and Judge Dukes ordered that a final hearing be scheduled for May 19, 2014, allowing the parties 30 days to file any motions. On April 22, 2014, Nicholls filed a Motion for Summary Judgment with the Court. (R. pp. 455-523)

A final hearing was held on May 19, 2014 and after multiple post-trial memorandums, the Court filed judgment on July 8, 2014 in favor of Valerie's Estate. The Court ordered counsel for Valerie's Estate to prepare an Order for the Court. Counsel for Valerie's Estate prepared a draft Order and the parties subsequently disputed over the content of the Order.

Ultimately, counsel for Valerie's Estate filed a final Order with the Court and the Court signed the Order on September 16, 2014.

ARGUMENTS

I. THE COURT ERRED WHEN IT WRONGLY DECIDED THAT THE CASE TURNED ON AMBIGUITY IN THE CONTRACT, EVEN THOUGH ALL OF THE PARTIES AGREED ON THE CONTRACT'S MEANING.

The Court's analysis proclaims that "the threshold question before the Court is whether Richard a) contracted with Petitioner in his individual capacity, b) contracted in his capacity as Personal Representative of Valerie's Estate, or c) whether the contract is ambiguous on

this point". Ironically, both the Plaintiff and the Defendant agree on the answer to each of these inquiries.

Both the Plaintiff and the Defendant agree that at the time the contract was signed, Richard, in his individual capacity, contracted with the Petitioner Nicholls. Richard hired Nicholls to have Ronald W. Huther removed as the North Carolina Personal Representative/Administrator after the North Carolina Court improperly appointed Huther instead of Richard. [See R. pp. 581-585, Court Order Motion for Sanctions filed on or about July 8, 2010] Richard also hired Nicholls to dismiss the Wake County, North Carolina probate proceeding so that Valerie's Estate could exclusively be administered in Valerie's domicile, Beaufort County, South Carolina, which was the proper jurisdiction for Valerie's probate. All parties agreed in the Family Settlement Agreement that Valerie's Estate was properly being probated in Beaufort County, South Carolina. Richard advanced personal funds in pursuit of these efforts, both in South Carolina and in North Carolina. Advancing funds on behalf of an estate is not only common among individuals awaiting appointment as Personal Representative, it is practically universally practiced in such circumstances. A Personal Representative rarely has access to a decedent's funds until after he is appointed by a Court as Personal Representative. The fact that Richard personally advanced funds in pursuit of these actions has no bearing on the liability of Valerie's Estate for Richard's efforts. Furthermore, the Beaufort County Probate Court had expressly prohibited Richard from disbursing funds without advance authorization from the Court. (R. p. 570)

Under common law, a personal representative has personal liability for a contract the personal representative enters into in his fiduciary capacity, unless the contract expressly excludes personal liability. Although North Carolina Courts and laws do not address this

issue directly, Uniform Probate Code §3-808, adopted in many states, does. Additionally, South Carolina laws recognize the "dual liability" that can be shared by a personal representative and an estate. Specifically, South Carolina Code §62-3-808(d) states, inter alia, that "claims based on contracts... may be asserted against the estate by a proceeding against the personal representative in his fiduciary capacity, '*whether or not the personal representative is individually liable therefor.*'" As you will see below, Richard's entered into the contract in North Carolina individually, but the act was later ratified as an act in his fiduciary capacity when the North Carolina Court appointed him as Foreign Personal Representative in North Carolina.

In this instance, Richard D' Agostino had to hire Nicholls in his individual capacity. North Carolina law prohibited Richard from taking action as a Domiciliary Personal Representative in North Carolina before the North Carolina Court appointed him as Foreign Personal [ancillary] Representative. Specifically, N.C. Gen. Stat. §28A-26-6 (2013) provides that "(a) A domiciliary personal representative of a nonresident decedent may invoke the jurisdiction of the courts of this State [North Carolina] ***"after"*** qualifying as ancillary [foreign] personal representative in this State except that the domiciliary personal representative may invoke such jurisdiction prior to qualification for the purpose of appealing from a decision of the clerk of superior court regarding a question of qualification."

The lower Court suggests that Richard could have contracted as a Foreign Personal Representative to pursue the aforementioned actions in a North Carolina court. However, North Carolina law expressly prohibits such actions. (see N.C. Gen. Stat. §28A-26-6 (2013)). The lower Court also suggests that because Richard was a potential heir in Valerie's Estate, that somehow implies that Nicholls legal representation of Richard should be personally

borne by Richard. Nothing in the Court's Order shows any personal benefit to Richard as a result of his actions in North Carolina. In fact, Richard renounced his right to take anything under Valerie's Estate. Richard's actions in the North Carolina Court were for administrative efficiency for the estate administration. "The mere fact that a fiduciary may also have an interest in the estate as a beneficiary does not, without more, support a finding that the actions of the fiduciary are taken solely for her benefit as beneficiary." (See In re Dawson Est., 689 N.E.2d 1008, 1012, 117 Ohio App. 3d 51, 57-8 (Ohio Ct. App. 1996)

Both the Plaintiff and the Defendant agree that ***at the time the contract was signed***, Richard did not contract in his capacity as Personal Representative of Valerie's Estate. Richard contracted in his individual capacity. As noted, North Carolina law prohibited Richard from contracting and taking action as Domiciliary Personal Representative in a North Carolina court, before the North Carolina court appointed Richard as Foreign Personal Representative.

As you can see, although the Plaintiff's and Defendant's interpretation of the contract is identical, both parties agree that the contract is ambiguous. Here, all parties agree with the same interpretation and any alternative interpretation to the contract is irrelevant. The mere fact that a contract can be interpreted in more than one way has no bearing on the case if the contracting parties agree with an identical meaning. Because both the Plaintiff and the Defendant agree on the interpretation of the contract, ambiguity in the contract is immaterial to the outcome of this case. The lower Court, which based its decision wholly on the ambiguity in the contract, completely overlooks the principle behind the issue of ambiguity in a contract.

Here, we have an action to recover attorney's fees pursuant to a fee agreement between an attorney and his client. An action to recover attorney's fees pursuant to a fee agreement between an attorney and his client is an action at law. Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997). 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. 2001). Here, the lower Court made an error at law when it wrongly applied South Carolina law to a North Carolina contract and when it concluded that ambiguity in the contract had a bearing on the outcome of the case. When there is a question of law, as in this case, the Appellate Court should review the case using the de novo standard. The lower Court based its decision on ambiguity in the contract. However, because the issue of ambiguity plays no role in the interpretation of the contract when all parties agree with the same interpretation, the lower Court's use of ambiguity for its ruling is reversible error. As such, this Appellate Court should reverse the lower Court's ruling and find in favor of Nicholls, the Appellant.

II. THE COURT ERRED WHEN IT FAILED TO APPLY NORTH CAROLINA LAW TO A NORTH CAROLINA CONTRACT.

The definition of a breach of contract is a failure to person a contractual promise without legal excuse. Ralph King Anderson, Jr. South Carolina Requests to Charge – *Civil §* 19-2 (2002). The action is one at law. Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc., 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004), predicated on the existence of a contract. Tidewater Supply Co., Inc. v. Industrial Electric Co., 253 S.C. 483, 171 S.E.2d 607 (1969). More specifically, an action to recover attorney's fees pursuant to a

fee agreement between an attorney and his client is an action at law. Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997). This case is an action to recover attorney fees between an attorney and his client, thus, it is an action at law.

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. 2001). Here, the lower Court made an error at law when it chose to apply South Carolina law to a North Carolina contract. When there is a question of law, as in this case, the Appellate Court should review the case using the de novo standard.

In order to recover for a breach of contract the party must allege and prove: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage suffered by the plaintiff as direct and proximate results of the breach. Fuller v. Eastern Fire & Casualty Insurance Co., 240 S.C. 75, 124 S.E.2d 602, 610 (1962).

Valerie D'Agostino died on October 17, 2009, domiciled in Beaufort County, South Carolina, which was the proper jurisdiction and venue for the decedent's probate administration. Valerie D'Agostino's children, Ronald Huther and Heidi Pallesen, later signed a Private Family Settlement Agreement in September 2010, agreeing that South Carolina was the proper venue.

On June 10, 2010, Richard signed an Engagement Letter with Nicholls for professional legal service fees, costs, disbursements, and payment policy relating to "Estate of Valerie D'Agostino", as indicated in the Engagement Letter's subject line. Everyone agrees that the Engagement Letter was a binding contract entered into by the parties.

After signing the contract with Richard, Nicholls subsequently filed actions in the Wake County, North Carolina Superior Court to remove Huther as North Carolina Personal Representative/Administrator (case 10-E-702), to dismiss the North Carolina probate proceeding, and a Motion for Sanctions against Huther. Huther subsequently filed a Petition for Approval or Resignation of Administrator of Valerie's Estate on or about July 12, 2010. All of these actions taken by Nicholls on behalf of Richard, took place in North Carolina in a North Carolina Court case.

In South Carolina, the general rule in contracts cases is often stated to be that the law applied will be that of the place where the contract is made and is to be performed. *See, e. g.,* *Murphy v. Equitable Life Assurance Society,* 197 S.C. 393, 15 S.E.2d 646 (1941); *Knight v. Fidelity & Cas. Co. of N. Y.,* 184 S.C. 362, 192 S.E. 558 (1937), as cited in *Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc.*, 410 F. Supp. 967 - Dist. Court, D. South Carolina 1976.

In Livingston v. Atlantic Coast Line R. Co., 176 S.C. 385, 180 S.E. 343 (1935), the court stated:

> "The act of the parties in entering into a contract at a particular place, in the absence of anything shown to the contrary, sufficiently indicates their intention to contract with reference to the laws of that place; hence the rule as it is usually stated is that a contract as to its validity and interpretation is governed by the law of the place where it is made, the lex loci contractus; or more accurately, that contracts are to be governed as to their nature, validity and interpretation by the law of the place where they are made, unless the contracting parties clearly appear to have had some other place in view." 13

C.J. 248. This view is widely-held and is generally in conformity with that of the Restatement (Second) of Conflict of Laws §187 (1971), as cited in *Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc.*, 410 F. Supp. 967 - Dist. Court, D. South Carolina 1976.

Here, the lower Court's order expressly indicates that it relies exclusively on "South Carolina law" to interpret the "North Carolina contract". The Court's only mention of North Carolina law is when the Court refers to Nicholls' citation of N.C. Gen. Stat. §28A-13-1. The Court only refers to the North Carolina Probate Code in conjunction with a reference to a similar provision in the South Carolina Code §62-3-701. The Court's only reference to North Carolina law comes in response to the Plaintiff's comparison of North Carolina and South Carolina laws. The Court never uses North Carolina law to interpret the North Carolina contract. The failure of the lower Court to use North Carolina law to interpret a North Carolina contract is in direct conflict with South Carolina conflict of laws principles, which requires that the contract be interpreted with the law of the state where it is signed and performed. (See Murphy v. Equitable Life Assurance Society, 197 S.C. 393, 15 S.E.2d 646 (1941)).

Here, the North Carolina contract was signed and performed in North Carolina, by a North Carolina law firm (Nicholls), in a North Carolina case. The lower Court's application of South Carolina law to interpret a North Carolina contract caused an outcome that was different than if the lower Court had applied North Carolina law to interpret the North Carolina contract. In this case, the application of the respective states' laws to the contract result in very different outcomes.

Although the lower Court makes mention of the pivotal N.C. Gen. Stat. §28A-13-1 in its Order, it ignores other North Carolina laws which provide context and meaning to that statute. An analysis of the application of North Carolina law to this case appears later in this brief. Because the lower Court ignored the application of North Carolina law to provide context and meaning to the North Carolina contract, this Court should reverse the lower Court ruling because the outcome of the case is different when applying North Carolina law.

III. THE COURT WOULD HAVE RULED IN THE FAVOR OF THE PLAINTIFF IF IT HAD APPLIED NORTH CAROLINA LAW TO THE NORTH CAROLINA CONTRACT.

The Court's own Order shows that it did not apply North Carolina law to interpret the North Carolina contract. If the Court had interpreted the North Carolina contract by applying North Carolina law, the outcome of the case would have been much different.

An action to recover attorney's fees pursuant to a fee agreement between an attorney and his client is an action at law. Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997). 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. 2001). Here, the lower Court made an error at law when it chose to apply South Carolina law to a North Carolina contract. When there is a question of law, as in this case, the Court should review the case using the de novo standard.

The lower Court addresses the Nicholls' arguments in the section of its Order titled "Arguments of Petitioner". First, the Court addresses Nicholls' claim that N.C. Gen. Stat.

§28A-13-1 supports the position that the powers of the personal representative "relate back" to the personal representative's acts prior to his appointment.

Nicholls argued that N.C. Gen. Stat. §28A-13-1 provides that:

> "The duties and powers of a personal representative commence upon the personal representative's appointment. The powers of a personal representative relate back to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative." (1973, c. 1329, s. 3; 2007-502, s. 17; 2011-344, s. 4.)

In dismissing Nicholls' argument of the "relation back" doctrine, the lower Court suggests that Richard could have entered into the contract as Personal Representative for the purpose of filing actions in the North Carolina Court --- prior to the North Carolina Court appointing him as Foreign Personal Representative. The lower Court bases its theory on the fact that a South Carolina Court had already appointed Richard as the Domiciliary Personal Representative in South Carolina. (R. p. 570) Therefore, according to the lower Court's interpretation, Richard could have contracted to take action in the North Carolina Courts by using his authority as South Carolina's Domiciliary Personal Representative.

North Carolina law, however, prohibited Richard from taking action as a Foreign Personal Representative in North Carolina until after his appointment by a North Carolina

court. Specifically, N.C. Gen. Stat.§28A-26-6 (2013) provides that "(a) A domiciliary personal representative of a nonresident decedent may invoke the jurisdiction of the courts of this State [North Carolina] '***after***' qualifying as ancillary personal representative in this State [North Carolina] except that the domiciliary personal representative may invoke such jurisdiction prior to qualification for the purpose of appealing from a decision of the clerk of superior court regarding a question of qualification."

North Carolina law expressly prohibited Richard from taking action in the North Carolina courts until a North Carolina Court appointed him as Foreign Personal Representative. Ironically, one of Richard's major pursuits in the North Carolina Court was to have the North Carolina Court appoint him as the Foreign Personal Representative. By the time Richard filed his aforementioned actions in the North Carolina Court, the North Carolina Court had already improperly appointed Huther as Personal Representative under false pretenses. Richard had no legal authority under North Carolina law to act in his capacity as South Carolina Domiciliary Personal Representative in North Carolina. It was not until after Huther resigned as North Carolina Personal Representative and the North Carolina Court appointed Richard as Foreign Personal Representative that Richard could take action as Personal Representative in a North Carolina court. (See N.C. Gen. Stat.§ 28A-26-6 (2013)) Of course, once the North Carolina Court appointed Richard as Foreign Personal Representative in North Carolina, then Richard's appointment "relate[ed] back" to ratify his acts occurring prior to his appointment. (See N.C. Gen. Stat. N.C. §28A-13-1))

North Carolina courts have long recognized the "relation back" doctrine in these contexts. In Burcl v. N.C. Baptist Hosp., Inc., 306 N.C. 214, 293 S.E.2d 85 (1982), the North Carolina Court thoroughly addresses North Carolina's "relation back" doctrine, as applied

since the enactment of North Carolina Rules of Civil Procedure 15 and 17. (G.S. 1A-1, Rule 15 and G.S. 1A-1, Rule 17). In fact, the *Burcl* Court even makes reference to Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963), which the Court describes as "the most thoroughly considered decision by this Court on the ["relation back" doctrine] point in question." The *Burcl* Court describes the Graves decision as "a well-researched opinion by Justice, later Chief Justice Sharp, [where] the Court noted: "[I]t is the universal rule that all previous acts of the personal representative prior to his appointment which were beneficial in nature to the estate and which would have been within the scope of his authority had he been duly qualified, are validated upon his appointment which relates back to the death of the intestate for this purpose." 260 N.C. at 692, 133 S.E.2d at 764. The *Burcl* Court also indicated that Graves was (at that point) its only decision on the "relation-back" question which recognized this principle. This principle is now codified in North Carolina G.S. 28A-13-1.

The *Burcl* Court also recognized, however, that state courts were not in accord on whether the due appointment of a personal representative "will relate back so as to validate *an action* brought prior to the appointment." 260 N.C. at 693-94, 133 S.E.2d at 764 (emphasis supplied)." In *Burcl*, a foreign administrator of a decedent's estate, from Virginia, sued prior to qualifying locally as ancillary [foreign] administrator and sought to plead in the trial court to show this act and have the pleading "relate back" to the commencement of the action. The Court found that under North Carolina's Rules of Civil Procedure 15 and 17(a) that the pleading should be permitted. Prior to enactment of Rule 15 and 17(a), the appointment of a foreign administrator as ancillary administrator would not relate back to the action, because the foreign administrator had no capacity to bring such an action in North

Carolina.

The *Burcl* Court goes on to say that "It is at once apparent from the face of Rules 15(c) and 17(a) that they have changed our approach to the problems, respectively, of whether a given pleading relates back to the beginning of the action and how to deal with a claim brought by a party who has no capacity to sue. Whether an amendment to a pleading relates back under Rule 15(c) depends no longer on an analysis of whether it states a new cause of action; it depends, rather, on whether the original pleading gives "notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." N.C.R.Civ.P. 15(c). The Official Comment to North Carolina Rule 15(c) quotes *Wachtell, New York Practice under the CPLR* 141 (1963), in part as follows: "The amended pleading will therefore relate back if the new pleading merely amplifies the old cause of action, or now even if the new pleading constitutes a new cause of action, provided that the defending party had originally been placed on notice of the events involved." *See also* Sizemore, *General Scope and Philosophy of the New Rules,* 5 Wake Forest Intra.L.Rev. 1, 22-23 (1969). (Burcl v. N.C. Baptist Hosp., Inc., 306 N.C. 214, 293 S.E.2d 85 (1982))

The *Burcl* Court goes on to explain that Federal courts in interpreting Rules 15(c) and 17(a) have uniformly held that amendments showing a change in plaintiff's capacity to maintain the action relate back to the action's commencement. See 3 J. Moore, Moore's Federal Practice ¶ 15.15[4.-1] at 15-212 (1982); C. Wright & A. Miller, Federal Practice & Procedure, § 1555 (1971). This principle has been specifically applied to wrongful death actions in which the plaintiff had not under applicable state law duly qualified as the personal representative until after the statute of limitations had run on the claim. The courts have

permitted plaintiffs to show by a new pleading the due qualification and have the pleading relate back to the action's commencement. *See, e.g.,* Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir.), *cert. dismissed,* 448 U.S. 911, 101 S.Ct. 25, 65 L.Ed.2d 1141 (1980); Hunt v. Penn Central Transp. Co., 414 F.Supp. 1157 (W.D.Pa. 1976); McNamara v. Chemical Corp., supra, 328 F.Supp. 1058; Holmes v. Pennsylvania New York Central Transp. Co., 48 F.R.D. 449 (N.D.Ind.1969); cf. Longbottom v. Swaby, 397 F.2d 45 (5th Cir. 1968) (complaint allowed, amended to change description of plaintiffs from "minor children" to "dependents," a substantive change under applicable law); Crowder v. Gordon's Transport, Inc., 387 F2d. 413 (8th Cir. 1967) (complaint amended to show claims brought by minor children of decedent). Indeed, this is the result reached presently "in the great majority of cases" more recently decided by state courts. Annot., "Running of Statute of Limitations as Affected by Doctrine of Relation Back of Appointment of Administrator," 3 A.L.R.3d 1234, 1237 (1965). Presumably this is because more states have adopted the federal rules or rules similar to them. (Burcl v. N.C. Baptist Hosp., Inc., 306 N.C. 214, 293 S.E.2d 85 (1982))

The *Burcl* Court agreed with the Fourth Circuit Court of Appeals' *Davis* decision, supra, 615 F.2d 606, that plaintiff's motion to "amend" her complaint by showing her due qualification as ancillary administrator is more properly denominated a supplemental pleading under Rule 15(d) because the matter allegedly occurred after the original complaint was filed. As the Court in *Davis* said, however: "For relation back purposes, the technical distinction between [a supplemental pleading and an amendment of a former pleading] is not of critical importance, and is frequently simply disregarded by courts [citation omitted]. So long as the test of Fed.R.Civ.P. 15(c) is met, a supplemental pleading should ordinarily be given the same relation back effect as an amended pleading [citation omitted]. On that basis,

our analysis will treat Fed.R. 15(c) as applying to the supplemental pleading actually attempted here." *Id.* at 609, n. 3. We also agree with this statement from C. Wright & A. Miller, Federal Practice & Procedure, § 1508 at 556: "There is little basis to distinguish an amended and a supplemental pleading for purposes of relation back if defendant had notice of the subject matter of the dispute and was not prejudiced in preparing his defense." (Burcl v. N.C. Baptist Hosp., Inc., 306 N.C. 214, 293 S.E.2d 85 (1982))

The *Burcl* Court states that Rule 17(a) permits the real party in interest to ratify the action after its commencement and to have the ratification relate back to the commencement. Rule 17(a) expressly authorizes the former substitution of one party for another. Rule 15, particularly subsection (c), when considered in light of Rule 17(a), just as clearly authorizes the latter change in capacity in which the same plaintiff brings his claim. *Burcl v. N.C. Baptist Hosp., Inc.*, 306 N.C. 214, 293 S.E.2d 85 (1982)) The North Carolina Court reaffirmed and emphasized the *Burcl* Court's decision in Talman v. City of Gastonia NC (NC Court of Appeals) 2009, 682 S.E.2d 428 (2009).

Additionally, although South Carolina case law should not be applied in the context of the North Carolina contract, it is instructive to note that South Carolina Courts hold similar views of the "relation back" doctrine when applied to a foreign personal representative. (See Thomas v. Grayson, 318 S.C. 82, 456 S.E.2d 377 (1995)).

North Carolina's "relation back" doctrine should give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. (See N.C. Gen. Stat. §28A-13-1)) The lower Court Order suggests that Nicholls' actions in the North Carolina court were not "beneficial" to Valerie's Estate. The Court Order specifically cites the fact that Richard's efforts to stop the North Carolina

probate proceeding as an example of actions that did not "benefit" the estate. Richard only made efforts to stop the North Carolina probate proceeding after it was commenced by Huther under Huther's sworn false pretense that 1) Huther had priority to be appointed as Personal Representative/Administrator, and 2) that Richard had renounced his priority right to serve. Richard had priority and he never renounced his priority right for appointment as Personal Representative/Administrator in North Carolina. As with any estate administration, assuring that the Court is not misled and that the estate is administered according to the law is "beneficial" to the estate. That is exactly what Richard's actions did here.

It should be noted, however, that North Carolina Courts have not spoken directly on the issue of the meaning of what acts by the person appointed are "beneficial to the estate". Other states have generally accepted that attorneys may recover their fees from the estate if they have been retained by the personal representative or person interested in the estate, as long as their services have benefited the estate. (See In re Paris Est., 699 Sp. 2d 301, 301-03 (Fla. Ct. App. 1997) (where personal representative incurred legal fees in preventing probate of will procured by bad faith, and actions benefitted the estate, personal representative was entitled to litigation attorney fees); In re Brock Est:, 695 So. 2d 714, 717 (Fla. Ct. App. 1996) (citing Fla. Stat. Ann. §733.106(3) and holding that attorney fees for services which were necessary for or beneficial to the estate may be awarded).

"Benefit" does not necessarily mean the attorney's actions have resulted in the enhancement in value or increase in assets of the estate. Rather, the estate is benefitted whenever an action determines what is appropriate under the will. (Trynin. Est., 252 Cal. Rptr. 787,789, 205 Cal. App. 3d 1040 (Cal. Ct. App. 1988). See also In re Estate of Lewis, 442 So. 2d 290, 292-93 (Fla. Ct. App. 1983) (allowing attorney's fees for services rendered

to estate beneficiary and stating that benefit as interpreted by the courts is not restricted to services that bring about an enhancement in value of the estate, but includes simply "effectuating the testamentary intention set forth in the will"); Samuels v. Ahern Est., 436 So. 2d 1096, 1097 (Fla. Ct. App. 1983) (chargeable fees for services which benefit estate are not limited to an enhancement in value or increase in assets); In re Peterson Est., 570 N.W.2d 463, 467 (Iowa Ct. App. 1997) (where estate had a substantial interest in securing appointment of executor named in will, and this interest was advanced by defending the will, the estate benefited, and the co-executors were entitled to attorney's fees); In re Burmeister Est., 854 P.2d 195, 124 Wash.2d 282 (Wash. 1994) (citing Wash. Rev. Code Ann. §11.96.140 and stating that attorney fees may be appropriately awarded even if estate is not substantially benefitted and statue contemplates situation where attorney fees may be justly assessed against estate). Consequently, if the services of an attorney are for the common benefit of an estate, it is irrelevant who employs the attorney, and award of attorney fees from the estate is proper. (In re Kjorvestad Est., 287 N.W.2d 465, 468 (N.D. 1980) ("crucial factor is whether the services of the attorney were to the common benefit of the estate; not by whom he was employed" (emphasis in original internal citation omitted)); Merchants and Planters Bank v. Myers, 644 S.W.2d 683, 688 (Tenn. Ct. App. 1982) (stating general rule that for attorney's fees to be awarded out of the estate, the attorney must be employed by personal representative, but noting exception where an attorney's services inured to benefit of the estate.)

CONCLUSION

For the foregoing reasons, Appellant respectfully prays that the Court reverse the judgment of the Circuit Court and award Appellant Nicholls the amount of its claim plus

interest and additional relief that the Court deems equitable.

Respectfully submitted,

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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Appellate Case No. 2014-002249

Nicholls & Crampton, P.A., Appellant,

v.

Estate of Valerie D'Agostino, Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Initial Brief of Appellant complies with Rule 211(b), SCACR.

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