

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge for Beaufort County
Case No.: 2013-CP-07-01491

Appellate Case No. 2014-002249

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SC Court of Appeals

IN RE: Estate of Valerie D'Agostino

Nicholls & Crampton, P.A. Appellant

-vs.-

Estate of Valerie D'Agostino Respondent

RESPONDENT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. The lower court's order should be affirmed because Nicholls did not appeal the lower court's estoppel ruling, and that unappealed ruling is now the law of the case.
- II. Nicholls' argument that N.C.G.S.A. § 28A-26-6 prohibited Richard D'Agostino from entering into a contract as personal representative is not preserved for review because it was never raised to and ruled upon by the lower court and, even if preserved for review, lacks merit.
- III. Nicholls' argument that North Carolina law should be applied in this case is not preserved for review because it was never raised to and ruled upon by the lower court and, even if preserved for review, lacks merit.
- IV. The lower court correctly determined that the engagement letter between Nicholls and Richard D'Agostino was ambiguous as to whether the Estate of Valerie D'Agostino was responsible for Nicholls' fees.
- V. The lower court correctly construed the ambiguous contract against Nicholls and determined that the Estate of Valerie D'Agostino properly disallowed Nicholls' claim.
- VI. The lower court correctly concluded that the relation back doctrine did not apply in this case since Richard was appointed as the Estate's personal representative before he signed the engagement letter.
- VII. Nicholls' argument about what should be considered "beneficial results" to the Estate under the relation back statutes is not preserved for review because it was never raised to and ruled upon by the lower court and, even if preserved for review, lacks merit.

STATEMENT OF THE CASE

Appellant Nicholls & Crampton, P.A., (Nicholls) filed a creditor's claim against Respondent Estate of Valerie D'Agostino (Estate) in the Beaufort County Probate Court. (R. pp. 603-604). The Estate timely filed and served a Notice of Disallowance of Nicholls' Creditor's Claim. (R. pp. 545-547). Nicholls then filed a Petition for

Allowance of Claim, and the Estate removed the matter to Circuit Court. (R. pp. 17-42; R. pp. 606-607).

A final hearing on this matter was held on May 19, 2014, before the Honorable Marvin H. Dukes, III. The parties stipulated that this matter would be tried by Judge Dukes in a summary fashion and that Judge Dukes would issue findings of fact and conclusions of law. (R. p. 3). In his Final Merits Hearing Order, the lower court found as a matter of fact and concluded as a matter of law that Nicholls was estopped from arguing that Richard D'Agostino contracted with Nicholls as Personal Representative of the Estate of Valerie D'Agostino and that Nicholls' claim against the Estate was properly disallowed. (R. pp. 1-16). Nicholls did not file a Motion for Reconsideration or any other post-trial motions. Nicholls filed a Notice of Appeal dated October 14, 2014. (R. pp. 658-659).

FACTS

Valerie D'Agostino died on October 17, 2009. (R. p. 353, lines 6-9). On January 8, 2010, the Beaufort County Probate Court issued fiduciary letters appointing Richard D'Agostino (Richard) as Personal Representative of her Estate. (R. p. 570).

On June 10, 2010, Richard hired Nicholls. The scope of representation was to "provide legal services on your behalf in connection with the administration of your deceased wife's estate in Wake County, NC (the "Matter")." (R. pp. 533-534). Richard signed Nicholls' engagement letter as "Rich D'Agostino," and the words "personal representative" do not appear in the engagement letter. (R. pp. 533-534). Richard paid the \$1,500.00 retainer to Nicholls by a personal check from his individual checking

account. (R. p. 580). At the time Richard hired Nicholls, Richard was not only the Personal Representative of the Estate but also was a beneficiary of the Estate.

Timothy Nicholls, an attorney at Nicholls as well as the Nicholls' 30(b)(6) designee, testified that he drafted the engagement letter. (R. p. 163, lines 8-15). Mr. Nicholls also testified that the engagement letter was not clear as to whether Richard individually was responsible for Nicholls's fees or if the Estate was responsible for Nicholls' fees:

Q: But my question to you is the [engagement] letter does not specify whether or not Mr. D'Agostino is individually responsible for the fees or if the estate [of Valerie D'Agostino] is responsible for the fees, isn't that right? . . .

A: Yeah, I don't think it is clear, yes.

(R. p. 176, lines 14-21).

Mr. Nicholls also testified about the work Nicholls performed for Richard, including:

- analyzing whether Richard would inherit more money under North Carolina or South Carolina intestacy laws (R. p. 165, line 22-R. p. 166, line 7; R. p. 167, line 15-R. 169, line 3; R. p. 174, line 21-R. p. 175, line 4; R. p. 180, line 6-R. p. 181, line 7; R. p. 588; and Supplemental Record on Appeal¹);
- bringing a motion for sanctions on behalf of Richard individually (R. p. 175, lines 6-17; and R. pp. 581-583); and
- negotiating a settlement of the North Carolina issues on behalf of Richard and consenting "to it as attorney for Richard D'Agostino" (R. p. 187, lines 18-24; and R. p. 191, lines 2-10).

¹ Appellant omitted the 6/22/10 Nicholls Email, document #18 in Respondent's Designation of Matter, from the Record on Appeal. Appellant has stated that he will correct this omission; therefore, Respondent is citing the Supplemental Record of Appeal to be filed.

Before Richard hired Nicholls, Ronald Huther had opened an estate for his mother Valerie D'Agostino in North Carolina and had been appointed as Administrator of the North Carolina Estate. In seeking the appointment, Mr. Huther, relying upon the advice of a North Carolina attorney and the North Carolina attorney's interpretation of a waiver that had been previously executed by Richard, requested that he be appointed as the fiduciary for the North Carolina estate stating that he was the person entitled to apply for the fiduciary position or was applying after all persons having prior right have renounced. (R. p. 358, line 6-R. p. 359, line 7; R. p. 359, lines 12-23). Mr. Huther agreed to resign as the fiduciary of the North Carolina estate on July 12, 2010, and as of July 12, 2010, Ronald Huther's resignation as the fiduciary of the North Carolina estate was accepted. (R. p. 372, lines 7-10; and R. pp. 594-599).

On April 11, 2011, Richard died. (R. p. 575). After Richard's death, Nicholls first filed a claim against the Estate of Richard D'Agostino with the Beaufort County Probate Court. In that claim, Petitioner took the position that "Richard J. D'Agostino personally, and not in a representative capacity, contracted" with Petitioner. (underline added) (R. pp. 571-573). Mr. Nicholls also stated in an email dated January 30, 2012, that Nicholls had not filed a claim against the Estate of Valerie D'Agostino, which by that time had been opened for more than two years, because "our claim has always been against [Richard D'Agostino] personally." (R. p. 196, line 10-R. p. 198, line 2; R. p. 589).

Over the objection of Nicholls, Nicholls' claim against the Estate of Richard D'Agostino was ultimately dismissed with prejudice by the Beaufort County Probate

Court pursuant to an order dated March 6, 2013. (R. pp. 574-579). That order was never appealed or otherwise challenged.

Eighteen months after filing a claim against the Estate of Richard D'Agostino, Nicholls filed a claim against the Estate of Valerie D'Agostino, now claiming that Richard hired Nicholls in his capacity "as Personal Representative of the Estate of Valerie D'Agostino," (R. pp. 603-604). In its claim, Nicholls moved for full payment under what it asserted was a breach of the fee agreement contract. (R. p. 87, lines 14-19). The Estate disallowed Nicholls' creditor's claim. (R. pp. 545-547), and the lower court, after the final merits hearing, determined as a matter of fact and concluded as a matter of law that the Estate's disallowance of Nicholls' creditor's claim was proper. The lower court's order was based on several independent grounds, including (1) that Nicholls was estopped from arguing that Richard contracted Nicholls in his representative capacity because Nicholls had previously filed a claim against Richard's Estate for the same fees stating that "Richard J. D'Agostino personally, and not in a representative capacity, contracted" with Petitioner. (underline added) (R. pp. 571-573) and (2) that the engagement letter was ambiguous at best as to whether the Estate or Richard individually was liable for Nicholls' fees. (R. pp. 1-16).

ARGUMENT

I. The lower court's order should be affirmed because Nicholls did not appeal the lower court's estoppel ruling, and that unappealed ruling is now the law of the case.

In its Final Merits Hearing Order, the lower court found that while Nicholls was pursuing its claim against the Estate of Richard D'Agostino, Nicholls

took the position that "Richard J. D'Agostino personally, and not in a representative capacity, contracted" with Petitioner. (Nicholls Dep.

Def. Exh. 20) (underline added). The factual position previously taken by Petitioner is directly at odds with the factual position Petitioner attempts to take in this case. The Court finds that Petitioner is barred by estoppel, waiver and the doctrine against inconsistent positions from taking such a contrary position here. 28 Am. Jur. 2d Estoppel and Waiver § 65 (“Generally, a party will not be permitted to maintain inconsistent positions or to take a positions in regards to a matter that is directly contrary to, or inconsistent with, one previously assumed by him or her, at least whenever he or she had, or was chargeable with, full knowledge of the facts.”).

(R. p. 10). The lower court further found in Finding of Fact 12 that “[i]n making its claim against the Estate of Richard D’Agostino, [Nicholls] stated in its Petition for Allowance that Richard D’Agostino ‘personally and not in a representative capacity’ contacted [Nicholls] to provide legal services in North Carolina” and concluded in Conclusions of Law 6 “[t]hat [Nicholls] is estopped and/or barred from now taking the position that Richard D’Agostino contracted with it in his representative capacity because that position is directly at odds and inconsistent with [Nicholls’] position in the Estate of Richard D’Agostino and its email of January 30, 2012.” (R. pp. 13-15).

Nicholls does not appeal the lower court’s rulings and order relating to estoppel. In fact, the words “estoppel,” “waiver,” “inconsistent positions,” “estopped,” and/or “barred” do not appear in Nicholls’ Brief. “Any unappealed portion of the trial court’s judgment is the law of the case, and must therefore be affirmed.” Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 398, 593 S.E.2d 183, 189 (Ct. App. 2004). The lower court’s Order relating to estoppel is now the law of this case.

Further, “[w]here a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case. *See Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996); *see also First Union Nat’l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511

S.E.2d 372, 378 (Ct. App. 1998) (holding an “unchallenged ruling, right or wrong, is the law of the case and requires affirmance”).” Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

The Court should end its review of this appeal here; nevertheless, the Estate will address the arguments that Nicholls did raise on appeal below.

II. Nicholls’ argument that N.C.G.S.A. § 28A-26-6 prohibited Richard D’Agostino from entering into a contract as personal representative is not preserved for review because it was never raised to and ruled upon by the lower court and, even if preserved for review, lacks merit.

a. Nicholls failed to preserve its argument based on N.C.G.S.A. § 28A-26-6 for appellate review.

Nicholls argues for the first time on appeal that N.C.G.S.A. § 28A-26-6 prohibited Richard from entering into a contract with Nicholls as a personal representative. In order to be preserved for review by an appellate court, an issue must be raised to and ruled upon by the lower court. E.g. Gause v. Smithers, 403 S.C. 140, 742 S.E.2d 644 (2013) (in order to be preserved for review, an issue must be raised to and ruled upon by the trial judge); Regions Bank v. Owens, 402 S.C. 642, 741 S.E.2d 51 (Ct. App. 2013) (same). Nicholls’ arguments relating to N.C.G.S.A. § 28A-26-6 were neither raised to nor ruled upon by the lower court.

A review of the entire record establishes that Nicholls did not mention, cite, or otherwise rely upon N.C.G.S.A. § 28A-26-6 during the proceeding with the lower court. In fact, the only North Carolina statute ever mentioned by Nicholls is N.C.G.S.A § 28A-13-1, which is the relation back statute. Therefore, any argument now relating to N.C.G.S.A. § 28A-26-6 is improper.

Further, because these issues were never raised to the lower court, the lower court never ruled upon them. In the Final Merits Hearing Order, the lower court does not mention or address N.C.G.S.A. § 28A-26-6. (R. pp. 1-16). Nicholls did not file a Motion for Reconsideration or other post-trial motion asking the lower court to rule upon any issues or arguments relating to N.C.G.S.A. § 28A-26-6.

For these reasons, all of Nicholls' arguments relating to N.C.G.S.A. § 28A-26-6 are not preserved for review and are not properly before this Court.

b. Even if the N.C.G.S.A. § 28A-26-6 argument was properly raised and ruled upon, it fails on the merits.

Even if Nicholls had preserved his argument relating to N.C.G.S.A. § 28A-26-6, this argument lacks merit. Nicholls relies upon for N.C.G.S.A. § 28A-26-6 for the proposition that Richard, who was appointed as Personal Representative of the Estate on January 8, 2010, did not have the ability to sign the June 8, 2010 engagement letter with Nicholls in his capacity of personal representative. (R. p. 570; and R. pp. 533-534). This code section does not limit a personal representative in this way.

N.C.G.S.A. § 28A-26-6 governs when “a domiciliary personal representative of a nonresident decedent may invoke the jurisdiction of the courts of [North Carolina].” N.C.G.S.A. § 28A-26-6(a). (underline added). “At most, the statute is simply another way of saying that the foreign administrator must qualify locally before he has capacity to sue in North Carolina.” Burel v. North Carolina Baptist Hospital, 293 S.E.2d 85, 95 (NC 1982) (underline added). Nothing in N.C.G.S.A. § 28A-26-6 prevents a domiciliary personal representative from signing a contract with a North Carolina attorney. Moreover, the statute in no way limited the parties from including language that made the Estate of Valerie D’Agostino responsible for Nicholls’ fees.

In addition, Richard signed the engagement letter with Nicholls on June 10, 2010. (R. pp. 533-534). At that point, he had been the Estate's personal representative for six months and had the ability to sign Nicholls' engagement letter in his capacity as the Estate's personal representative. (R. p. 570). Because Richard did not enter into the engagement letter in his capacity as the Estate's personal representative and because there is no language that makes the Estate in any way responsible for Nicholls' fees, the Estate is not responsible for payment of Nicholls' bill, and the lower court correctly held that the Estate properly disallowed Nicholls' claim.

III. Nicholls' argument that North Carolina law should be applied in this case is not preserved for review because it was never raised to and ruled upon by the lower court and, even if preserved for review, lacks merit.

a. Nicholls failed to preserve its argument that North Carolina law should be applied in this matter for appellate review.

Nicholls also argues for the first time on appeal that North Carolina law, rather than South Carolina law, should be applied in this case. This argument is not preserved for review.

A review of hearing transcript and the letters sent by Nicholls' counsel to the lower court after the hearing establish that Nicholls never argued that North Carolina law applies to the instant matter. In fact, Nicholls cited and relied upon South Carolina law to the lower court:

- At the May 19, 2014, hearing, Nicholls repeatedly cited S.C. Code Ann. § 62-3-701 and S.C. Code Ann. § 62-3-714 as well as S.C. Code Ann. § 62-1-111 and S.C. Code Ann. § 62-3-808 (R. p. 69, line 20-R. p. 70, line 7; R. p. 72, lines 11-16; R. p. 100, lines 15-22; R. p. 101, line 4-R. p. 103, line 6; R. p. 120, lines 4-24; R. p. 127, line 15-R. p. 129, line 22);

- In its May 22, 2014, letter to the lower court, Nicholls extensively quoted S.C. Code Ann. § 62-3-701, § 62-3-808, § 62-3-714, § 62-3-202, and § 62-1-111; (R. pp. 613-618);
- In its May 28, 2014, letter to the lower court, Nicholls cites S.C. Code Ann. §62-3-701. (R. pp. 626-627); and
- In its June 27, 2014, letter to the lower court, Nicholls cites S.C. Code Ann. § 62-3-308 and § 62-3-701. (R. pp. 637-638)

As noted above, the only North Carolina statute even mentioned by Nicholls is N.C.G.S.A § 28A-13-1, which is the relation back statute, and that North Carolina statute was cited by Nicholls in conjunction with the South Carolina relation back statute codified at S.C. Code Ann. § 62-3-701. (R. pp. 613-618; R. pp. 626-627; R. pp. 637-638).

Further, the lower court never ruled upon these issues. In the Final Merits Hearing Order, the lower court did not address whether North Carolina or South Carolina law should apply to this case and relied upon South Carolina law in making its ruling. (R. pp. 1-16). Nicholls did not file a Motion for Reconsideration or other post-trial motion asking the lower court to reconsider its decision to apply South Carolina law or rule upon whether North Carolina law should apply to this case.

For these reasons, Nicholls' argument that North Carolina law applies to this case is not preserved for review.

b. Even if the argument was properly raised and ruled upon, it fails on the merits.

The pending action is a South Carolina probate proceeding to determine if a South Carolina probate estate properly disallowed a claim made against the Estate in South

Carolina. See, e.g., S.C. Code Ann. § 62-1-100(b) (stating that the SC Probate Code applies to estates of decedent dying after the effective date of the Code); S.C. Code Ann. § 62-1-201(4) (defining claims to include liabilities of the decedent arising on contract which arise at or after the death of decedent); S.C. Code Ann § 62-1-301 (confirming that the Probate Code applies to the estates of decedents domiciled in South Carolina); S.C. Code Ann. § 62-3-803 through -807 (setting forth claims procedures). As such, South Carolina law applies to this matter.

IV. The lower court correctly determined that the engagement letter between Nicholls and Richard D’Agostino was ambiguous as to whether the Estate of Valerie D’Agostino was responsible for Nicholls’ fees.

The lower court correctly found as a matter of fact and concluded as a matter of law that the engagement letter drafted by Nicholls was ambiguous “at best” as to whether the Estate was responsible for payment of Nicholls’ fees.

a. The language used in the engagement letter does not include language to suggest that the Estate of Valerie D’Agostino was responsible for Nicholls’ fees.

The scope of representation, as provided in the engagement letter, states “[y]ou have requested that we provide legal services on your behalf in connection with the administration of your deceased wife’s estate in Wake County, NC (the “Matter”).” The re line of the letter states “Estate of Valerie V. D’Agostino.” Richard D’Agostino’s signature block states “Rich D’Agostino.” (R. pp. 533-534). As the lower court notes in its order, Richard had two interests in the Estate of Valerie D’Agostino: his individual interest as a beneficiary and his interest as a personal representative. The lower court found “that Richard D’Agostino individually contracted with Petitioner” and that “the

contract does not mention that Valerie D'Agostino's estate will be responsible for the fees incurred. . . ." (R. pp. 6-8).

b. No terms imply or otherwise suggest that the Estate of Valerie D'Agostino was responsible for Petitioner's fees.

Additionally, none of the terms of the engagement letter suggest that the Estate will be responsible for Nicholls' fees. Indeed, the engagement letter does even not specify whether Richard signed in his capacity as personal representative, and the words "personal representative" do not appear in the letter. (R pp. 533-534). Importantly, at the time the engagement letter was signed, Richard had been acting as the personal representative of the Estate since January 2010. (R. p. 570). Further, the engagement letter could have easily included language that the Estate of Valerie D'Agostino was responsible for Nicholls' fees. (R. pp. 533-534).

c. Nicholls conceded the contract was ambiguous

Timothy Nicholls, a partner at Nicholls, testified that he drafted the engagement letter. (R. p. 163, lines 11-15). Mr. Nicholls also testified that the engagement letter was not clear if Richard was individually responsible for Nicholls' fees or if the Estate was responsible for Nicholls' fees:

Q: But my question to you is the [engagement] letter does not specify whether or not Mr. D'Agostino is individually responsible for the fees or if the estate is responsible for the fees, isn't that right? . . .

A: Yeah, I don't think it is clear, yes.

(R. p. 176, lines 14-21).

The lower court correctly concluded that the engagement letter was ambiguous as to whether Richard individually or the Estate was responsible for payment of Nicholls' fees.

V. The lower court correctly construed the ambiguous contract against Nicholls and determined that the Estate of Valerie D'Agostino properly disallowed Nicholls' claim.

South Carolina law is clear that “any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the ambiguous language.” Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 205, 687 S.E.2d 714, 718 (Ct. App. 2009) (underline added). Nicholls' 30(b)(6) representative testified that he drafted the contract. (R. p. 163, lines 8-15). Therefore, the contract must be construed “liberally and most strongly in favor of the party who did not write or prepare the contract.” Myrtle Beach Lumber Co. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981). A reasonable construction of the engagement letter, much less a liberal construction construed most strongly against Nicholls, the drafting party, is that Richard was individually responsible for fees incurred pursuant to the contract and, therefore, the Estate properly disallowed Nicholls' claim.

a. The lower court's construction was consistent with Nicholls' own emails and testimony and consistent with the fact that Richard individually paid the retainer.

Richard personally and individually paid the retainer called for under the contract. (R. p. 580). This fact certainly supports the lower court's construction of the engagement letter and the lower court's Order that Richard contracted individually with Nicholls. (R. p. 15).

Nicholls' own emails and testimony support the lower court's construction of the contract. For example, Mr. Nicholls testified about the work performed pursuant to the engagement letter, including determining if Richard would receive more money under

North Carolina or South Carolina intestacy law, filing a motion for sanctions on behalf of Richard individually, and negotiating a resolution of the North Carolina matters for Richard individually. (R. p. 165, line 22-R. p. 166, line 7; R. p. 167, line 15- R. p. 169, line 3; R. p. 174, line 21-R. p. 175, line 17; R. p. 180, line 6-R. p. 181, line 7; R. p. 187, lines 18-24; R. p. 191, lines 2-10; R. pp. 581-583; R. p. 588; and Supplemental Record on Appeal). For example, Mr. Nicholls stated that the motion for sanctions was filed on behalf of Richard individually:

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

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

(R. p. 175, lines 12-17).

During his deposition, Nicholls' 30(b)(6) designee acknowledged that he sent an email to his co-counsel wherein he stated he "did not file a claim in [Valerie D'Agostino's] estate as we were never advised to do so by her estate and **our claim has always been against [Richard D'Agostino] personally.**" (emphasis added) (R. p. 589). In response to questions about this email, the following exchange took place:

Q: Isn't it true, though, that you stated that you didn't file a claim against [Valerie D'Agostino's] estate because . . . your [claim] has always been against Mr. D'Agostino personally?

MR. MULLINAX: Object to the form.

A: That is what it says, yes.

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

A: Yeah.

(R. p. 197, line 15-R. p. 198, line 2).

Nicholls' own testimony and emails support the lower court's ruling that the Estate of Valerie D'Agostino properly disallowed Nicholls' claim.

b. The lower court's construction was consistent with the factual position previously taken by Nicholls in the Estate of Richard D'Agostino.

As discussed above, before filing a claim against the Estate of Valerie D'Agostino, Nicholls first filed a claim against the Estate of Richard D'Agostino. In the claim against the Estate of Richard D'Agostino, Nicholls took the position that "Richard J. D'Agostino personally, and not in a representative capacity, contracted" with Nicholls. (underline added) (R. pp. 571-573). The lower court's construction of the contract – that the Estate of Valerie D'Agostino was not responsible for Nicholls' fees - is consistent with Nicholls' previous positions.

VI. The lower court correctly concluded that the relation back doctrine did not apply in this case since Richard was appointed as the Estate's personal representative before he signed the engagement letter.

Nicholls argues that the lower court erred in finding that the relation back statutes of the South Carolina Probate Code (S.C. Code Ann. § 62-3-701) and the North Carolina Probate Code (N.C.G.S.A § 28A-13-1) did not support its claim against the Estate. However, Nicholls' reliance on the relation back statutes is misplaced.

The relation back statutes at issue provide as follows:

S.C. Code Ann. § 62-3-701:

The duties and powers of a personal representative commence upon his appointment. The powers of a personal representative relate back in time to give acts by the person appointed **which are beneficial to the estate occurring prior to appointment** the same effect as those occurring thereafter. Prior to appointment, a person named personal representative in a will may protect property of the decedent's estate and carry out written instructions of the decedent relating to his body, funeral, and burial arrangements. 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. (emphasis added).

N.C.G.S.A. § 28A-13-1

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. However, a person named executor in a will may, prior to appointment, carry out written instructions of the decedent relating to the decedent's body, funeral and burial arrangements; provided that a health care agent authorized in a valid health care power of attorney to make body, funeral, and burial arrangements shall have precedence in making these arrangements, both before and after qualification of the decedent's personal representative, to the extent provided in G.S. 32A-19(b). 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. (emphasis added).

Thus, the powers of a personal representative relate back to give acts by the person appointed as personal representative which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Nicholls argues the relation back statutes apply in this matter because Richard had not been appointed as Personal Representative in the North Carolina Estate at the time he entered into the contract, and when and if he later was appointed as Personal Representative of that Estate, his appointment related back to acts taken by him prior to his appointment.

As the lower court concluded, this argument ignores the fact that Richard was appointed by the Beaufort County Probate Court as Personal Representative for the Estate of Valerie D'Agostino on January 8, 2010, almost six months before he signed Petitioner's contract. (R. p. 570). There is no reason why Richard could not have entered into the contract at issue in his capacity as Personal Representative of Valerie D'Agostino's South Carolina estate. Further, there is no reason why language

could not have been inserted into the contract to hold the Estate of Valerie D'Agostino liable for fees incurred, which is the entity Nicholls now seeks to hold responsible under the contract. Accordingly, the relation back statutes simply do not help Nicholls. The lower court correctly found that relation back statutes do not apply in this case and that the Estate properly disallowed Nicholls' creditor's claim.

VII. Nicholls' argument about what should be considered "beneficial results" to the Estate under the relation back statutes is not preserved for preview because it was never raised to and ruled upon by the lower court and, even if preserved for review, lacks merit.

a. Nicholls failed to preserve its argument relating to the definition of beneficial results for appellate review.

Nicholls argues that the lower court applied the wrong definition of "beneficial results" in applying the relation back statutes. Once again, this issue was not raised to and ruled upon by the lower court and is not preserved for appellate review. E.g. Gause, 403 S.C. at 140, 742 S.E.2d at 644; Regions Bank, 402 S.C. at 642, 741 S.E.2d at 51.

A review of the record establishes that while Nicholls generally raised the relation back statute of North Carolina and South Carolina, it never raised any argument relating to the definition of beneficial results. The lower court determined in its Order that it was "far from clear" that Richard's actions and the actions of Nicholls were beneficial to the Estate and found that Nicholls "has not shown that the work he performed was beneficial to the Estate of Valerie D'Agostino." (R. pp. 12, 14). Nicholls never filed a Motion for Reconsideration or other post-trial motion. Nicholls argues for the first time on appeal that "beneficial results" do not "necessarily mean the attorney's actions have resulted in enhancement of value or increase in assets of the estate" and argues that Richard's actions were beneficial to the Estate. (App. Initial Brief p.25).

For these reasons, Nicholls' argument relating to the definition of beneficial results is not preserved for review and is not properly before this Court.

b. Even if the argument were properly raised and ruled upon, the argument fails on the merits.

As discussed herein, Nicholls performed work for Richard individually, determining whether North Carolina or South Carolina intestacy law was more financially beneficial to Richard, filing a motion for sanctions on behalf of Richard individually, and negotiating and consenting to a proposed settlement as Richard's attorney. (R. p. 165, line 22-R. p. 166, line 7; R. p. 167, line 15-R. p. 169, line 3; R. p. 174, line 21-R. p. 175, line 17; R. p. 180, line 6-R. p. 181, line 7; R. p. 187, lines 18-24; R. p. 191, lines 2-10; R. pp. 581-583; R. p. 588; and Supplemental Record on Appeal). In addition, the work on Nicholls resulted in two additional years of litigation for the Estate. (R. p. 376, lines 12-23; R. p. 445, line 5-R. p. 446, line 2). Therefore, there is certainly support for the lower court's conclusion that Nicholls' and Richard's actions were not beneficial to the Estate, no matter what definition of beneficial results is used.

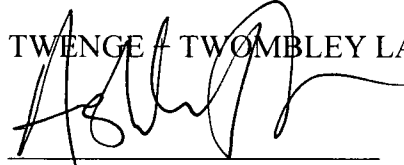
CONCLUSION

For the reasons contained herein and as may be raised in any Supplemental Briefs and at oral arguments, the lower court's Final Merits Hearing Order should be affirmed in its entirety.

Respectfully submitted,

TWENGE + TWOMBLEY LAW FIRM

BY:

A handwritten signature in black ink, appearing to read 'J. Ashley Twombley', written over a horizontal line.

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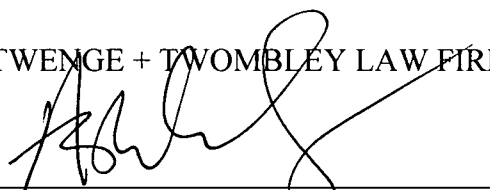
August 20, 2015

CERTIFICATE OF COUNSEL

The undersigned, J. Ashley Twombly, certifies that this Final Brief of Respondents complies with Rule 211(b).

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge for Beaufort County
Case No.: 2013-CP-07-01491

Appellate Case No. 2014-002249

IN RE: Estate of Valerie D'Agostino

Nicholls & Crampton, P.A. Appellant

-vs.-

Estate of Valerie D'Agostino Respondent

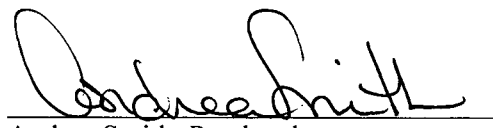
CERTIFICATE OF SERVICE

The undersigned, Andrea Smith, hereby avers that she is a Paralegal with TWENGE + TWOMBLEY LAW FIRM, Attorneys for Respondent, and that on the 21st day of August 2015 a true and accurate copy of the attached of Respondent's Final Brief was placed in an envelope with first class postage thereon prepaid through the United States Postal Service and mailed to the following:

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