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

Ron Orlosky Respondent,

v.

The Law Office of Jay A. Mullinax Petitioner.

CORRECTED PETITION FOR WRIT OF CERTIORARI

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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?

STATEMENT OF THE CASE

On June 23, 2009, Ron Orlosky (hereinafter "Ron") signed a written engagement letter with the Law Office of Jay A. Mullinax, LLC (hereinafter "Law Office") and hired attorney Jay A. Mullinax (hereinafter "Mullinax") to administer the estate and trust of Ron's late wife, Debora L. Orlosky (hereinafter "Debora" or "decedent"). Ron terminated Mullinax's services on or about March 19, 2010, and retained Michael Jordan (hereinafter "Jordan") at the McNair Firm for estate and trust administration matters relating to Debora's estate. When Ron terminated Mullinax, Ron

had an outstanding balance with Mullinax in the amount of $32,101.20, plus interest.

On July 29, 2010, Law Office filed a creditor's claim in the Beaufort County Probate Court for the outstanding balance Ron owed to Law Office, $32,101.20, plus a statutory 8.75% interest rate for services rendered (R. pp. 310-311). On August 20, 2010, three weeks after Law Office filed the creditor's claim against the Estate of Debora L. Orlosky, Ron Orlosky (Spouse, Personal Representative, and Trustee for the Debora L. Orlosky estate and trust) filed suit in the Beaufort County Circuit Court against Law Office for breach of contract, seeking damages of $29,751.68, plus interest, and $89,253.00 (treble damages) for unfair trade practices. Court dismissed the claim for unfair trade practices by summary judgement.

Law Office's creditor's claim against Ron, filed on July 29, 2010, was subsequently removed to the circuit court, and Law Office's claim and Ron's suit were essentially merged.

The case was tried by a jury on April 18-20, 2012, and the jury found in favor for Ron, the Plaintiff, awarding him $80,000.00 for breach of contract (R. pp.16-17). On June 12, 2012, the circuit court's amended judgment awarded Ron $89,354.26 to include interest.

On June 18, 2012, Law Office served a Notice of Appeal on Ron. On August 12, 2015, Mullinax filed a Petition for Rehearing with the Court of Appeals (Appendix I, pp. 602-621), which the Court denied on September 17, 2015 (Appendix J, pp. 622-624).

The Court of Appeals affirmed the judgment of the circuit court. Ron Orlosky in his capacity as Personal Representative of The Estate of Debora L. Orlosky, and in his capacity as trustee of the Debora Laura Orlosky Revocable Trust, v. The Law Office of Jay A. Mullinax, LLC, *Unpublished Op. No. 2015-UP-376 (S.C. Ct. App. filed July 29, 2015)*. Petitioner seeks a writ of certiorari to review that decision.

FACTS

On April 1, 2009, Ron (Respondent) and his wife, Debora, retained the Law Office of Jay A. Mullinax, LLC (Petitioner) for estate planning matters and signed a written engagement letter for the preparation of specific documents at a specific fee range and any additional work on an hourly basis (R. pp. 312-318).

When Ron and Debora engaged Law Office for estate planning matters, they provided Law Office with a completed Estate Planning Questionnaire, dated March 26, 2009 (R. pp. 320-327), and their financial statement, dated March 26, 2009 (R. p. 319), representing the couple's combined estate net value of $6,171,300.00, which included Debora's stock in the decedent's family business, Manor Development Company (hereinafter "Manor"), valued at $2,600,000.00. Ron and Debora subsequently executed their estate planning documents on May 20, 2009. Debora died on June 17, 2009.

On June 23, 2009, Ron (as Personal Representative and Trustee for the Debora Orlosky Estate and Trust) retained Law Office and signed a written engagement letter (R. pp. 261-264) exclusively for services "necessary and appropriate" to administer the estate and agreed to pay Law Office based on the time devoted to the matters, or a minimum of 2.5% of the value of the estate. Based on the financial statement that Ron and Debora provided to Law Office just three months prior, Law Office estimated the value of Debora's estate to be approximately $4.4 million. Ron and Debora valued the Manor stock at $2.6 million on their financial statement (R. p. 319), which comprised a large portion of Debora's estate $4.4 million value.

Although Debora's Trust (R. pp. 203-243) expressed that it was her preference for the Trustee (Ron) not to sell her stock in her family's business, Manor Development Company, and

although the sale of the stock was not necessary, Ron insisted shortly after Debora's death that Law Office negotiate for the sale of the stock. Negotiations for the sale of the Manor stock took place between Law Office and Manor's attorney, David Bjornstrom, (hereinafter "Bjornstrom") from October, 2009, through February, 2010. Law Office negotiated for Manor to offer Ron approximately $156,000.00 above Manor's initial offered price.

Between June 23, 2009, and March 19, 2010, Ron paid Law Office approximately $100,000.00 for Law Office's services. Ron terminated Law Office's services on or about March 19, 2010 (R. p. 292) and retained Jordan at the McNair Law Firm for estate and trust administration matters relating to Debora's estate. When Ron terminated Law Office, Ron had an outstanding balance with Law Office in the amount of $32,101.20, plus interest ($11,103.70 fee for the balance owed on necessary estate administration services) (R. p. 291) under the written contract, and $20,997.50 for the additionally requested services of negotiating the sale of Manor stock). Law Office communicated with McNair Law Firm about the outstanding balance for services rendered without resolution (R. pp. 302-305).

On July 29, 2010, Law Office filed a creditor's claim (R. pp. 310-311) in the Beaufort County Probate Court for the outstanding balance Ron owed Law Office, which was $32,101.20, plus a statutory 8.75% interest rate for services rendered. On August 20, 2010, three weeks after Law Office filed the creditor's claim against the estate of Debora L. Orlosky, Ron (Spouse, Personal Representative and Trustee for the Debora L. Orlosky Estate and Trust) filed suit in the Beaufort County Circuit Court against Law Office for breach of contract, seeking damages of $29,751.68 (plus interest) and $89,253.00 (treble damages) for unfair trade practices. Law Office filed a counterclaim for Breach of Contract on the Plaintiff and Unjust Enrichment/Quantum Meruit (R. pp.

24-27).

Law Office's creditor's claim against the Estate of Debora L. Orlosky, filed on July 29, 2010, was subsequently removed to the circuit court, and Law Office's claim and Ron's suit were essentially merged. Discovery began on or about October 19, 2010, and the parties did not reach a settlement. The case went to trial and, upon motion by the Defendant, the Court dismissed the claim of unfair trade practices by granting a summary judgment on April 18, 2012.

On April 18 - 20, 2012, the case was tried by a jury which found in favor for Ron and awarded him $80,000.00 for breach of contract. On June 12, 2012, the circuit court's amended judgment awarded Ron $89,354.26 to include interest. The Court of Appeals affirmed the action on July 29, 2015 and denied the petition for rehearing on September 17, 2015.

The decisions of the lower courts involve novel questions of law for South Carolina, a decision of the Court of Appeals in conflict with prior state and federal court decisions in South Carolina, and rulings on federal questions that directly conflicts with well-established case law and statutory law.

ARGUMENTS

1. 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. The Court based its decision on two propositions. Firstly, that "The Manor Development Company Shareholder's Agreement (between the decedent and her siblings), which Orlosky provided to Mullinax (at an unknown date after the litigants' contract was signed), clearly contained a provision setting forth 'the formula' for

calculating the 'sales price' of the shares." The Court seems to imply that the "sales price" somehow related to the actual fair market value of the property, but the sales price did not relate to fair market value under federal statutory law, case law, and regulations, the standard which is determinative of the fair market value. Secondly, the Court surmised that notwithstanding that all of the decedent's documents in evidence supported the estate's value of $4,444,148.03, that because Mullinax purportedly did not bill Ron based on the $4,444,148.03 valuation until December 11, 2009, the Court inferred that Mullinax had knowledge of Orlosky's "alleged estate value" of $3,000,000.00.

The Court's contention that the Manor Shareholder agreement, between siblings, contained a formula for calculating "sales price" is correct; however, because federal law is determinative of calculating the fair market value of the estate in this case, and because Ron did not even follow the Manor Development Company's Shareholder Agreement in determining the 2010 actual "sales price" of the stock, the actual sales price was irrelevant to the 2009 date of death fair market value of the stock and, thus, irrelevant to calculating the fee owed to Mullinax under the contract. Federal law and federal courts have emphatically supported Mullinax's position concerning the calculation and analysis of arriving at an estate's fair market value. South Carolina Courts have also weighed in in support of Mullinax's position. The South Carolina Court of Appeals' decision in this case is in direct conflict with a South Carolina Federal Court decision from 2012 (discussed later).

The following, from **Estate of Bernard Curry v. United States of America** (706 F.2d 1424 (1983), gives a summation of one reason why the post death "sales price" has no relevance to the "date of death" "fair market value" of the estate:

> "Section 2001 of the Internal Revenue Code of 1954, 26 U.S.C. § 2031(a) provides that the value of the gross estate of the decedent is determined by including "all property" therein. The corresponding Treasury Regulations provide that the value of

includible property is its "fair market value" at the time of decedent's death. Section 20.2031-1(b), Treasury Regulations on Estate Tax (1954 Code). That regulation states further that the "fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of the relevant facts." *Id.* The first question for our purposes thus becomes whether the property of which the fair market value is to be assessed should be viewed as it exists in the hands of the estate, or as it may exist if fortuitously balkanized through a chain of post-death transactions.

We believe that the first perspective comports more fully with the nature of the estate tax. As the Supreme Court has explained, the estate tax was not conceived as "a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death." *YMCA v. Davis*, 264 U.S. 47, 50, 44 S.Ct. 291, 292, 68 L.Ed. 558 (1924). Other courts have emphasized that the resultant "valuation is determined by *the interest that passes*, and the value of the interest before or after death is pertinent only as it serves to indicate the value *at* death." *United States v. Land*, 303 F.2d 170 (5th Cir.1962) (emphasis in original); *see also Estate of Bright v. United States*, 658 F.2d 999 (5th Cir.1981)."

The bargain "sales price" between siblings in this case, which did not even emanate from a properly followed formula in the siblings' Manor Development Company's Shareholder's agreement, was irrelevant to the value of the stock in this case. The Treasury Regulations provide for a "willing buyer, willing seller..." standard in order to reach a "fair market value" for estate purposes (Treas. Reg. § 20.2031-1(b)) (R.p. 460). Congress specifically created and designed Internal Revenue Chapter 14 §2701-2704 to be particularly restrictive with family agreements attempting to set a sales price intended to depress fair market value for estate purposes (R.pp. 460-466).

Treasury Regulations specifically state, "The fair market value of a particular item of property includible in the decedent's gross estate is not to be determined by a forced sale price" (Treas. Reg. § 20.2031-1(b)). The "sales price" formula referred to by the Court of Appeals in its

order and the calculations done by Manor's CPA firm and relied upon by Ron to determine a "sales price" were calculated under a "force sale" scenario. In fact, under the forced sale scenario, Manor's CPA deducted a forced sale "hypothetical federal and state (income) tax (of) 40% from the value of the stock (R. p. 332, line 9). As a general rule, in situations where it is unlikely that a corporation would be liquidated and no disposition of the corporation's appreciated assets is expected to occur in the near future, the present value of the potential tax liability at a far off future date may be de minimis [for discounting stock value] (TAM 9150001). South Carolina Federal Court specifically disallows hypothetical income taxes to be deducted in order to arrive at a fair market value of corporate stock. *Morrow v. Martschink*, 922 F.Supp.1093 (1995) In support of its ruling, the Federal Court in *Morrow* indicated that "in valuing a corporation for buy-out purposes in *Segall v. Shore*, 269 S.C. 31, 236 S.E.2d 316 (1977), the South Carolina Supreme Court rejected an appraisal that made a deduction for taxes to be paid in a hypothetical corporate liquidation. The court found no reason in the course of a corporate valuation to subject the Plaintiff's interest to a corporate tax, which may never be paid. *Id.* 236 S.E.2d at 318." In the present case, Ron deducted a hypothetical 40% tax liability, ($1,608,523.87, one-third of the $4,830,402.00 tax liability of the entire Corporations stock), in order to arrive at his alleged "fair market value" for the Manor stock (R. p. 332). Deducting hypothetical income taxes, in this case, in order to arrive at a fair market value is not allowed under federal law or South Carolina law. Additionally, there is no evidence in the record that Manor Company intended to liquidate and cause a taxable gain. In fact, the Manor Company was reclaiming its own shares in the purchase. Manor was certainly not liquidating.

In addition to deducting a hypothetical tax in order to arrive at a depressed fair market value for the Manor stock, Ron also discounted the stock value by deducting a lack of marketability and

lack of control discount. Although Mullinax's valuation for the stock was higher than Ron's, Mullinax did not try to inflate the value of Manor stock; Mullinax simply followed federal and state law. The Court should take specific note that Mullinax's own calculations of the estate's fair market value of $4,446,148.03, included significant discounts in valuing the stock at $2,672,378.20 (R. p. 360, amount listed as 1/3 division of all Manor Stock). Mullinax's calculations clearly included legitimate discounts of 20% for a lack of marketability (R. p. 360, showing $2,672,378.20 discount for 100% of the Manor stock 1/3rd discount for the decedent's 1/3rd ownership) and 25% for lack of control (R. p. 360, showing $2,672,378.20 discount for 100% of the Manor stock 1/3rd discount for the decedent's 1/3rd ownership). Mullinax included these discounts in his calculations of the stock's legitimately recognized fair market value under Internal Revenue Code and Treasury Regulations (R. p. 360). Mullinax's calculations resulted in a specific discount of $1,781,585.47 to the decedent's portion of the Manor Stock (discount of $1,781,585.47 is 1/3rd of the aforementioned discounts of the whole Manor Company, of which decedent owned one-third). Mullinax used the aforementioned discounts of 20% and 25% (identical to Shareholder's Agreement discounts in Article 4.5) because the discounts were independently supported by the Internal Revenue Code, Treasury Regulations, and case law.

Even if all of the discounts claimed by Ron were allowed in determining a "sales price", and the sales price had some relationship to the "fair market value", it is clear from the record that Ron's "sales price" did not come from his adherence to the Shareholder Agreement. Ron did not follow the terms of Shareholder Agreement, and his randomly chosen formula in the Shareholder Agreement cannot be used as a factor in determining the stock's "fair market value" (R.pp. 460-466). Although Ron may have fooled the jury into believing that he followed the Shareholder Agreement, a simple

reading of the Shareholder Agreement shows otherwise. It is worth noting that neither Ron, his attorneys, the Circuit Court, nor the Court of Appeals have referred specifically to provisions in the Shareholder Agreement to show the route in which Ron arrived at the sales price. The reason for the omission is rather clear; Ron did not follow the Shareholder Agreement in order to arrive at the sales price. Ron's failure to follow the Shareholder Agreement prohibits its consideration in determining the fair market value of the stock and the estate. In estate matters, federal law requires that in order for a family's Shareholder Agreement to have a bearing on estate value, the parties must strictly adhere to its terms (Treas. Regs. § 25.2703-1). That did not happen here.

The Shareholder Agreement provides that **"For one hundred and eighty days** following the death of a Transferor Shareholder (Decedent) the successor trustee or any co-trustee (and any subsequent transferee) may sell Shares as determined under Article 4..." (R. p. 245, Article 2.4). Ron disregarded this provision and sold the stock more than **one hundred and eighty (180) days** after the death of the Transferor Shareholder, thus, the alleged "sales price" is irrelevant to the "fair market value".

There are more reasons that the sales price has no bearing on the estate value. For valuing family owned businesses in estates, Congress specifically created Chapter 14 (IRC §2701-2704) of the Internal Revenue Code to determine the value of property transferred between family members without regard to "any restriction on the right to sell or use such property". IRC §2703 was specifically enacted to more effectively address valuation distortions which purport to reduce the value of property in the hands of the transferor, but have no practical effect on the actual value of the property in the hands of the transferees (See Internal Revenue Service National Office Field Service Advice Memorandum #200143044). The Internal Revenue Code and Treasury Regulations expressly

and specifically disregard a "sale price" in a family's Shareholder Agreement when a transaction occurs that "substantially modifies" a right or restriction in the Shareholder Agreement (Treas. Regs. §25.2703-1(c)(1). A **"substantial modification"** is any discretionary modification of a right or restriction, whether or not authorized by the terms of the agreement, which results in a more than de minimis change to the quality, **value**, or **timing** of the rights of any party with respect to property subject to the right or restriction (Treas. Regs. §25.2703-1(c)(1); Revenue Reconciliation Act of 1990, P.L. 101-508, § 11602(e)(1)(A)(ii); Treas. Regs. § 25.2703-2) (R.pp. 460-466). Under the Shareholder Agreement, Article 2.4 could only be used to set a sales price to occur within 180 days. Thereafter, Ron was limited to sell the shares under the higher price of Article 2.7, where a discount to the sales price under Article 4.5(b) was not allowed. After 180 days, the sales price discount of $1,428,284.00 (R. p. 331, "discount for lack of control") was no longer a part of any sales price formula available to Ron under the Shareholder Agreement. Ron disregarded the Shareholder Agreement restriction and subtracted the $1,428,284.00 discount to deflate the stock value anyway. **A discount of $476,094.67** (1/3rd of $1,428,284.00 for decedent's share) **is more than a de minimis change in value**, and thus, disallowed for calculating a fair market value (see Treas. Regs. §25.2703-1(c)(1)).

The aforementioned is not the only substantial modification made to the Shareholder Agreement in order for Ron to arrive at a deflated stock value. Additionally, the Shareholder Agreement expressly indicates that the fair market value of the real property "shall be determined by appraisal" in accordance with provisions of this Section 4.4 (R. p. 251). Ron conducted no appraisals for the company's real property as required by the Shareholder Agreement. Even though the stock's "sales price" occurring almost a year after the decedent's death had nothing to do with

the "date of death fair market value", it was a sham to say that Ron followed the Shareholder Agreement or any pathway to a Shareholder Agreement sales price.

All parties agreed that the "fair market value" of the estate was determinative of the legal fees owed under the litigants' contract formula. Clearly, Ron did not think the sales price had anything to do with fair market value. Ron expressly wrote to Law Office during "sales price" negotiations to express that "Regardless of where we end up on the price, I want to sell." (R. p. 345; R. p. 167, line 5- p. 168, line 7).

Ron even admitted that the "value" of the stock had nothing to do with its "sale price" under the buy-sell agreement. (Initial Br. of Orlosky, p. 521, n. 8). Specifically, Ron testified that under the Shareholder Agreement, no matter if the value was "Three Million [or] Four Million", Ron would not have received more [than $1.5 Million] "regardless of the value" (R. p. 76, line 14-p. 77, line 1; Initial Br. of Orlosky, p. 521, n. 8). To conclude that the stock's "sales price" had something to do with its value is to deny Ron's own testimony and argument in his Initial Brief.

Ron relied exclusively on a single Certified Public Accountant letter to arrive at his alleged stock's fair market value. The Certified Public Accountant letter states, inter alia, "we have reviewed the Manor Development Co. Shareholder Agreement... for the purpose of determining the appropriate redemption price for the shares held by the Estate of Debora L. Orlosky..." (R. p. 328). The Certified Public Accountant firm goes out of its way and continues by stating, "We have not performed any valuation procedures and **do not purport to represent that the findings herein are a representation of *fair market value (emphasis added)*** (R. p. 328). Fair market value being defined as the amount at which property would change hands between a hypothetical willing seller

and a hypothetical willing buyer when neither is action under compulsion and when both have reasonable knowledge of the relevant facts" (R. p. 328, ¶ 2).

The contract required Ron to pay Mullinax a minimum fee based on a percentage of the date of death estate value (R. p. 263). This fact has never been in dispute. The Court of Appeals implies in its order that a "sales price" in the Shareholder Agreement is equivalent to [fair market] value. It is not. The record clearly shows throughout that references to the estate "value" are referring to the "fair market value" as defined by Treasury Regulations §20.2031-1(b), as required for federal estate tax purposes and South Carolina Probate Code §§62-3-706 and §62-3-708.

Ron's own attorney testified that the alleged $1.58 million dollar sales price [allegedly] in the Shareholder Agreement "might not have been an actual fair market value", but he [attorney] just wanted it to be recognized by the IRS. (R. p. 110, lines 10-13) When Ron's attorney was asked if he independently evaluated the value of the stock, he admitted that he simply accepted the fact that the decedent had signed the Shareholder Agreement and Ron confirmed it (R. p. 106, lines 9-15).

Ron's testifying attorney was handed the Shareholder Agreement at trial and asked if he had done anything to evaluate whether or not the $1.58 million was the appropriate amount of money the estate was entitled to for the decedent's stock. (R. p. 106, lines16-20) Ron's attorney slyly avoided the question and simply replied that "...my client said that he was comfortable with that number...and there was no need to do make-work or unnecessary work..." (R. p. 106, lines 21-25). When asked where in the Shareholder Agreement the amount of $1.58 million dollars was derived, Ron's attorney could not even identify it (R. p. 108, lines 11-20); instead, he referred to a calculation by the purchaser's accounting firm as the source of the $1.58 million dollar figure (R.p. 108, line 17-20). Ron's attorney eventually admitted that he had not ever looked at the CPA's calculations upon

which he had relied (R. p. 110, line 24- p. 111, line 1). These actions and inactions by the testifying attorney (Jordan), which led to the deceit of the jury, are in direct violation of Treasury Circular 230 requirements and his obligations under those guidelines (R.pp. 462-466, 485).

In addition to the Court of Appeals' reliance on the Shareholder Agreement's sales price to substantiate the estate's fair market value, the Court also relied on **Mullinax's** billing to make its decision. The Court surmised that notwithstanding all of the decedent's multiple documents supporting the estate's value of $4,444,148.03, that because Mullinax did not expressly bill based on the $4,444,148.03 valuation until December 11, 2009, the Court inferred that Mullinax had previous knowledge of Ron's alleged estate value of $3,000,000.00.

The Court's inference comes from Mullinax's invoice dated December 11, 2009, wherein, Mullinax bills Ron for $36,103.70 (an adjustment of only $11,103.70 to Law Firm's earlier cumulative bills projected to be $100,000.00. A June 2009 $25,000.00 retainer, June 2009 $25,000.00 first payment, October 2009 $25,000.00 second payment, December 2009 $25,000.00 third payment, $11,103.70 adjustment, for a total of $111,103.70) This was to adjust to the then verified estate value of $4,444,148.03 (2.5% of $4,444,148.03 = $111,103.70) (R. pp. 263, 271-272, 273-274, 281-282 – bills for June 2009, October 2009, December 2009).

Using the Court's own analysis, if Mullinax's December 11, 2009 invoice had only billed Ron for $25,000.00, Mullinax would have collected a cumulative $100,000.00 (represented by a $25,000.00 retainer, $25,000.00 first payment, $25,000.00 second payment, $25,000.00 third payment). In other words, if Mullinax had not adjusted for the estate value in the December 11, 2009, bill, Mullinax would still have collected $100,000.00 from Orlosky. It's no accident that $100,000.00 happens to represent exactly 2.5% of an estate value of $4,000,000.00. Mullinax's first

collection of $25,000.00 in June of 2009 put Mullinax on course to collect $100,000.00, without any adjustment for estate value. Clearly, Mullinax's billing, from the very beginning and the signing of the contract, was based on an estimated estate value of $4,000,000.00.

It is also worth noting that even after Mullinax received confirmation of his $4,444,148.03 estate value, he invoiced Orlosky for the adjusted balance on December 11, 2009, but graciously asked that Orlosky only pay $25,000.00 toward that balance (R. pp.281-282).

2. 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 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)). Under the Court of Appeals' interpretation of the statute, if two devisee children of a decedent litigate against one another, and one serves as Personal Representative, then that "Personal Representative child" can testify and allege conversations with the decedent for his or her personal benefit. The other child, not a Personal Representative, does not have the ability to present contradictory testimony about alleged conversations with the decedent.

In this case, we have a Personal Representative/Trustee (Ron), who happens to be the sole life-time beneficiary of the estate and trust, and also, by default, the sole expectant beneficiary of success in this litigation. Ron's testimony about the decedent's alleged conversations, which contradicted all of the decedent's documentation in evidence, was not alleged on behalf of the estate, but rather for Ron's personal pecuniary gain -- exclusively. On the other hand, we have

Mullinax, a creditor with equal equitable rights as a beneficiary, who was prohibited from contradicting Ron's alleged communication with the decedent, because Mullinax was not the Personal Representative and could not testify as to the decedent's conversations with him. The Court of Appeals' interpretation of this statute with this result is inequitable and does not comport with the spirit and purpose of the law.

The lower courts' decision may have overlooked or misapprehended the spirit or portions of the Dead Man statute (S.C. Code §19-11-20 (1985)), particularly when it omitted critical portions of the statute and certain facts it in its interpretation. In particular, the Court's decision may have overlooked Ron's multiple roles during testimony. The statute should be read in an effort to interpret the spirit of the law, while adhering to its plain language.

This Court should reconsider such an interpretation in light of the fact that fiduciaries (e.g. Personal Representatives, Trustees) are frequently parties to actions where they have a specific pecuniary interest. As noted, based on the lower Court's interpretation, a fiduciary, as in this instance, can testify about alleged communication with the decedent for his or her own personal pecuniary benefit, but a defendant/creditor (non-fiduciary) (Mullinax, here) does not have the same right to testify about conversations with the decedent. Such an interpretation is not in keeping with the intention or spirit of the statute.

As noted in Mullinax's briefs, essentially, the dead man's statute 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); (R.p. 451). Mullinax outlines the statutory implications in Petitioner's Initial Brief. (R.pp. 450-452).

Under the statute, Orlosky should not and does not have the right to testify about alleged communication with the decedent for his own pecuniary benefit, just because he happens to serve as a fiduciary in the same litigation. The lower court incorrectly focuses on the portion of the statute that is expressly and purposefully bracketed and set apart, inside two commas, with references to the "insane and lunatics." Although the rest of the statute applies to those situations, those situations are not pertinent here. There were no alleged insane or lunatics in this case, and that portion of the statute is irrelevant here.

The pertinent portion of the statute reads:

> "[N]o party to an action or proceeding, no person who *has a legal or equitable interest which may be affected by the event of the action or proceeding*, no person who, previous to such examination, has had such an interest, however the same may have been transferred or come to the party to the action or proceeding, and *no assignor of anything in controversy in the action shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased*, ... ,when such examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness or the interest previously owned or represented by him..." (emphasis added).

Essentially, the rule 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 statute specifically applies to Ron, who fits every criteria from the pertinent portions of the statute. The Petitioner outlines additional statutory implications in Petitioner's Initial Brief. (R.pp. 450-452).

3. DID THE COURT ERR WHEN IT FAILED TO REASONABLY CHARGE THE JURY WITH CLARITY ON THE LAW AND ISSUES IN THE CASE, THEREBY PREDJUDICING THE DEFENDANT?

The Court of Appeals' Court Order indicates that Mullinax did not preserve its argument

concerning error in the trial court's jury charges. The Court based its decision on two premises. The Court indicates that the record does not contain any proposed charges from Mullinax. Secondly, the Court suggest that Mullinax never raised the arguments to the trial court either before or after it charged the jury.

The Court correctly states that the record does not contain any proposed charging orders from Mullinax. Unfortunately, in addition to the Circuit Court's loss of the court reporter and her hearing transcript for an extended period of time, the Circuit Court also lost the charging orders presented to the Circuit Court by Mullinax.

The record specifically shows that Mullinax presented charging orders to the Circuit Court (R. p. 123, lines 17-19), that the Circuit Court received them (R. p. 123, line 20), that there was discussion on them, and that the Circuit Court refused to use them. While it is correct to say that the record does not contain any proposed charges from Mullinax, it was the Circuit Court that lost them, and thus they were unavailable to Mullinax for the record. The Court of Appeals, who oversaw the loss of the court reporter and her transcript, knew that Mullinax chose from the Court of Appeals' ultimatums to move forward with an incomplete and inaccurate record, rather than to move forward without a record. Thus, the petitioner comes to this Court without records lost by the Circuit Court.

The matters contained in the balance of the Court of Appeals decision on this matter are more fully addressed in the Mullinax's Final Reply Brief, pp. 467-474. In particular, the Brief contains a summation of the issues drafted and articulated best by South Carolina Supreme Court Chief Justice Jean Toal and in support of Mullinax's position on this presented issue. In summary, in order to preserve this issue on appeal, Mullinax was not required to revisit the issue of the charging order in ad nauseum, after other requirements were met.

The Supreme Court of South Carolina has the authority to correct this error of law and inequitable injustice. The petitioner respectfully requests that it do so.

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?

The Court indicates that the issue of quantum meruit is not properly before the Court because the issue was not submitted to the jury by the trial court. Although Mullinax included quantum meruit in its pleadings and testimony, the Court correctly states that the trial court did not charge the jury on quantum meruit. The trial court chose not to do so, although Mullinax clearly supplied the trial Court with the appropriate charging order (R. p. 123, lines 17-19). Afterward, the trial Court lost Mullinax's charging orders and thus, the charging orders were unavailable for the record. Under the Court of Appeals' decision, in this case, the trial court's general duty to charge the jury with the current and correct law is meaningless. Under the application of the Court rules in this case, it was the Petitioner's responsibility to supply the Appellate Court with an adequate record, even when the trial court and the court reporter lost parts of the record. The Petitioner neither has, nor ever had, a copy of the charging order that Petitioner's attorney gave to the Circuit Court, nor can it be produced. Yet, under the Court's application of the rules, the Petitioner is responsible for producing a lost document was directly provided to the Court, on the record (R. p. 123, lines 17-19).

As the record indicates and the Court of Appeals recognizes, neither a court nor a jury has reviewed or ruled on Mullinax's claim of quantum meruit. Mullinax certainly made the quantum meruit argument in its pleadings and to the jury. (R. pp. 25-26, 50) (R. pp. 474-478; R. pp. 564-567) It was the trial Court, not Mullinax, that failed to present the matter to the jury.

As noted in Fields v. Regional Medical Center Orangeburg, (354 S.C. 445, 581 S.E.2d 489 (Ct. App. 2003):

> When evidence is erroneously excluded by the trial court, the appellate court usually engages in the following analysis to determine whether prejudice has occurred. First, the court considers, inter alia, whether the error may be deemed harmless because equivalent or cumulative evidence or testimony was offered; the aggrieved party still managed to accomplish his primary objective, such as eliciting testimony about an issue or effectively cross-examining a witness; the jury's verdict or a proper court ruling rendered the wrongly excluded evidence moot because it was relevant to an issue that did not have to be reached; the aggrieved party failed to establish a claim or defense even when both the admitted and excluded evidence are considered; or the wrongly excluded evidence involved a generally known fact.
>
> Second, the appellate court considers whether, viewing a case as a whole, the wrongly excluded evidence or testimony was so crucial and important in proving the aggrieved party's claim or defense that its exclusion constitutes prejudicial error, i.e., the aggrieved party demonstrates there is a reasonable probability the jury's verdict was influenced by the lack of the challenged evidence. Fields v. Regional Medical Center Orangeburg, 354 S.C. 445, 581 S.E.2d 489 (Ct. App. 2003).

Here, the lower Court never presented Mullinax claim to the jury, causing prejudicial error. The Supreme Court has the authority and ability to review this matter for a justiciable result. The Petitioner respectfully requests that it do so.

5. DID THE COURT 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?

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. In support of its conclusion, the Court referred to the fact that only issues raised in a directed verdict motion can properly be raised in 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).

At trial, Mullinax's case in chief centered around Mullinax's obligation to abide by the statutory law and public policy that required the filing of an Estate Tax Return (706), as required under law and public policy. In fact, Mullinax testified that "I can mention now or later my obligations under the Internal Revenue Code" (R. p. 143, lines 7-9). Mullinax continued, "I can lose my law license and my ability to practice before the Internal Revenue Service by not filing tax returns that should be filed..." (R. p. 143, lines 10-13). Mullinax further testified that the basis of this contention was "it was my obligation – and I can refer to [Department of Treasury] Circular 230 which governs all people who practice before the Internal Revenue Service. (R. p. 143, lines 16-19). Mullinax further emphasized, "I can lose my license or be disbarred from the practice of law if my clients avoid a tax return" (R. p. 144, lines 1-3). Mullinax added that "... I was not going to assist in the avoidance by my client of filing a tax return, nor would I have done that with Mr. Orlosky" (R. p. 144, lines 11-13).

Ironically, Ron's private act of personally filing an "Estate Tax Return extension" impeaches his contention that he did not believe an Estate Tax Return was lawfully due (R. p. 143, lines 2-5). The record is littered with Mullinax's references to obligations under the Internal Revenue Code, [Department of Treasury] Circular 230, and the South Carolina Probate Code.

In light of the fact that Mullinax did raise the issue to the lower court in a motion for a directed verdict, and that the motion appears in the record, the Petitioner respectfully requests that the Court reconsider this issue and overturn the lower court's decision.

6. SHOULD 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?

The Court suggests that it should not overturn the jury verdict because of the "two issue" rule. In particular, the Court points to quantum meruit as an issue that should not be disturbed on appeal. Ironically, neither the jury nor the court ever ruled on the matter of quantum meruit. Thus, the Supreme Court's present consideration of quantum meruit would be the first instance of judicial consideration of this matter. The trial court's failure to charge the jury (prejudicial error) and the trial court's failure to rule on the matter resulted in quantum meruit never being considered. The Supreme Court's ruling of first impression would not be overturning a verdict, it would merely be providing one – in the first instance.

Mullinax agrees with the Court that Law Office did not complete the work specified in the contract. In order for Law Office to legally complete the work specified in the contract, while abiding by the law and ethical obligations to the Court, Ron was required to sign an accurate Inventory and Appraisement for the Probate Court and sign an Estate Tax Return for the Internal Revenue Service. Ron refused to agree to sign an accurate Inventory and Appraisement for the Probate Court or an accurate Estate Tax Return for the Internal Revenue Service (R. p. 146, lines 18-25). Ron's refusal to sign these required documents made it impossible for Law Office to legally complete the work under the contract (R. p. 146, lines 18-25). As noted in Mullinax's briefs, the law did not require Law Office to complete work under a contract when it was against public policy. Courts will not enforce a contract which violates public policy, statutory law, or constitutional provisions. *Berkebile v. Outen*, 426 S.E.2d 760, 311 S.C. 50 (S.C. 1993). Thus, a contract which contravenes public policy is void and cannot be the basis of an action for breach. A contract which

contravenes public policy is void, and an action cannot be maintained for either [313 S.C. 278] its breach or for inducing its breach. *Jackson v. Bi-Lo Stores*, Inc., 437 S.E.2d 168, 313 S.C. 272 (S.C.App.1993).

Not only did the law prevent Law Office from completing Ron's interpretation of the contract – an interpretation requiring illegal work, but the law does not hold Law Office liable for failure to complete a contract requiring illegal work. Furthermore, Mullinax was more than willing to complete the contract under a lawful interpretation that avoided fraud to the South Carolina courts and the Internal Revenue Service, but Ron's insistence in pursuing illegal action under the contract prevented Mullinax from completing the work in a legal and ethical way.

The Court of Appeals indicated, "In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed ***unless a review of the record discloses that there is no evidence which reasonably support the jury's findings***" (emphasis added here).

All of Ron's evidence concerning his alleged deflated value of the stock exposes the unreasonableness of the jury's findings. Because Ron's methodology for deflating the value of the stock is directly in conflict with Internal Revenue Code provisions and Treasury Regulations, as well as settled federal law and South Carolina law, then it is the prerogative and presumed duty of the Court to interpret the laws at issue. The jury is not the arbiter of statutory interpretation, nor is this Court bound by the resulting errors.

The lower Court apparently relies on the testimony of Ron's attorney in reaching its decision. It is correct to say that Orlosky did pay Law Office's competitor to testify against Mullinax for $350.00 per hour, and over $30,000.00 in compensation (as of time of testimony), in defense of Law

Office's claim of approximately $32,000.00. Although the competitor attorney provided no evidence that he knew what volume of work or time Law Office provided to Orlosky, the competitor miraculously concluded that he could have done Law Office's work for less compensation. The competitor's testimony reveals that he did not review the Shareholder Agreement or become familiar with it; that he did not review the CPA calculations; that he ignored the CPA's view that its calculations were not the stock's fair market value; and that he ignored and could not even cite any foundational Internal Revenue Codes, Treasury Regulations, Treasury Circular 230 provisions, and well-established case law on these matters. In fact, he made no reference to any of those items. Certainly, any payment for his services should be significantly less than those of Law Office; after all, Mullinax provided all of the aforementioned references and citations. It is remarkable that none of Orlosky's attorneys ever mentioned an Internal Revenue Code or Treasury Regulation in oral argument, testimony, or in any legal brief filed in this case. In fact, Orlosky's attorneys refused to provide any legal defense to Mullinax's overwhelming references to the specific Internal Revenue Code and Treasury Regulation that govern the valuation of the estate and stock in this matter. The Petitioner respectfully requests that this Court not be blind to these laws.

The inaccurate and fraudulent evidence resulting in the alleged deflated value of the stock has a direct bearing on the completion of the contract and the appropriate compensation in this case. Certainly, incomplete, inaccurate, and fraudulent testimony and work can be completed in a cheaper way than complete, accurate, and lawful work. The compensation should be commensurate with the work performed.

The Court suggests that evidence in the record supports the jury's finding that Law Office was entitled to $20,000.00. Although the Court does not specify the evidence on which it relies, the

inference is that the $20,000.00 figure derives from the invoice exclusively for services beyond the necessary estate administration requirements (R. pp. 302-305). As the Court is aware, these are billable hours for the matters for which Mullinax claimed "quantum meruit", for which Orlosky paid Law Office nothing, and Court failed to charge the jury. It was agreed in the very beginning that Orlosky would pay a minimum fee based on the percentage of the estate value, thus, no hourly invoices were prepared for those essential services.

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

December 23, 2015

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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

Ron Orlosky — Respondent,

v.

The Law Office of Jay A. Mullinax — Appellant.

PROOF OF SERVICE

I certify that I have served a copy of the Corrected Petition for Writ of Certiorari on Mr. Ron Orlosky, sent via U.S. Mail, postage prepaid on December_____ 2015, addressed to his attorney of record, Mr. John R.C. Bowen, P.O. Drawer 21119, Hilton Head Island, SC 29926.

December 23, 2015

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December 23, 2015

VIA FEDERAL EXPRESS
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Ron Orlosky v. The Law Office of Jay Mullinax
Appellate Case No. 2015-002154

Dear Ms. Kitchings:

Enclosed please find one (1) copy of the **Corrected Petition for Writ of Certiorari**; submitted for filing with the South Carolina Supreme Court, as well as one (1) copy of the **Proof of Service**.

The **Corrected Petition for Writ of Certiorari** now reflects page references to the Corrected Appendix filed on October 26, 2015 and the appropriate case caption and reference. Also, a Table of Authorities was added to the Petition for the Court's reference. These are the only three changes to the previously filed petition.

If you have questions, please don't hesitate to contact our office. Thank you for your time and attention to this matter.

Very truly yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax

Jay A. Mullinax, Esquire

/Enclosures
JAM:rjb
Cc: Mr. John R.C. Bowen

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