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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge and Master-In-Equity  
Case No. 2013-CP-07-01491

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Appellate Case No. 2014-002249

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Nicholls & Crampton, P.A.,

Appellant,

v.

Estate of Valerie D'Agostino,

Respondent.

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PETITION FOR REHEARING

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**RECEIVED**  
AUG 03 2016  
SC Court of Appeals

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

Appellant [Plaintiff], Nicholls & Crampton, P.A., by and through its attorney, submits this Petition for Rehearing. By reference, Appellant adopts the Statement of Issues, Statement of the Case, and the Statement of Facts presented in its Initial and Reply Briefs of Appellant.

**ARGUMENTS**

- I. THE APPELLANT COURT SHOULD REHEAR THIS CASE AND THE LOWER COURT'S ORDER SHOULD BE REVERSED BECAUSE THE APPELLANT APPEALED THE ESTOPPEL RULING BY SHOWING THAT THERE WERE NOT TWO INCONSISTENT STATEMENTS OF FACT, WHICH IS AN ESSENTIAL ELEMENT OF ESTOPPEL.**

Respondent [Defendant] alleges that the Appellant [Plaintiff] failed to appeal the Lower Court's estoppel ruling and as a result, the Lower Court's Order should be affirmed. The Respondent, and now, the Appellate Court, refers to the Lower Court's Order Conclusion of Law #6, which reads, "I conclude that the Petitioner is estopped and/or barred '*from now taking the position that Richard D'Agostino contracted with it in his representative capacity*' [emphasis added] because that position is directly at odds and inconsistent with Petitioner's position in the Estate of Richard D'Agostino and its email of January 30, 2012." (R. pp. 1-16)

The Lower Court's estoppel ruling was based solely on one alleged fact: "*that Nicholls & Crampton 'took the position that Richard D'Agostino contracted with it in his representative*

*capacity.*” If this alleged fact is untrue, then estoppel fails. The Respondent, and now the Appellant Court, suggests that the Appellant did not appeal the estoppel ruling. **Appellant’s Initial Brief, Argument #1 is “exclusively dedicated” to disproving estoppel** by showing that Nicholls & Crampton never “took the *position that Richard D’Agostino contracted with it in his representative capacity.*” In fact, there is “no evidence” in the record to support such a contention. When there is “no evidence,” an appellate court will reverse. (Holland v. State, 470 S.E.2d 378, 379 (S.C. 1996)).

Appellant’s Initial Brief, Argument #1, attacks the alleged fact on which the Court based both its ruling on “ambiguity” and “estoppel”. Although there is no specific mention of the term “estoppel”, an appeal attacking the alleged fact on which estoppel is based is all that is needed to appeal the ruling. If an “essential element” of any legal defense (e.g. estoppel) is absent, the entire legal defense collapses.

The Lower Court’s ruling expressly indicates that its “**estoppel ruling**” and “**ruling on ambiguity**” were **based on two alleged “facts”** that are “directly at odds with each other”. Both alleged facts must be true in order to support the Court’s ruling on “estoppel” and its ruling on “ambiguity”. The Lower Court based its ruling on an alleged ambiguity in the contract. The alleged ambiguity stems from the inference that the two aforementioned alleged “facts” are both true. However, only one of the two facts appear in the record. Thus, there was no ambiguity because only one alleged fact was true. All sides agreed to the same set of facts. Therefore, when one alleged fact is nonexistent, then there is no premise for ambiguity and there can be no estoppel.

“Judicial estoppel” precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. *See Colleton Reg. Hosp. v. MRS Med. Rev. Sys.*, 866 F. Supp. 896 (D.S.C.1994). The purpose or function of the doctrine is to protect the integrity of the

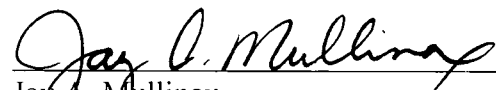
judicial process or the integrity of courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. 31 C.J.S. *Estoppel & Waiver* § 139, at 593 (1996). Judicial estoppel generally applies only to inconsistent statements of fact. *Cannon v. H.K Porter Co.*, 705 F. Supp. 288 (E.D.Va.1989). (See *Hayne Federal Credit Union v. Bailey*, 489 S.E.2d 472 (S.C. 1997))

There are no inconsistent facts in this case. The Appellant appealed and shows that one alleged fact has “no evidence” in the record, so there cannot be any estoppel. The fact that the Appellant appealed and proved that one essential element (fact) is absent in the case, by definition destroys any ruling of estoppel, as well as ambiguity.

Appellant respectfully prays that this Honorable Court schedule this matter for rehearing, and if appropriate, for oral argument.

Respectfully submitted,

August 2, 2016



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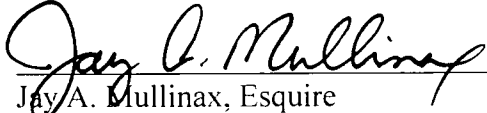
v.

Estate of Valerie D'Agostino, Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing of Appellant on the Estate of Valerie D'Agostino by depositing a copy of it in the United States Postal Service, postage prepaid on August 2, 2016, addressed to its attorney of record, Mr. J. Ashley Twombly, Twenge + Twombly Law Firm, LLC, 311 Carteret Street, Beaufort, South Carolina 29902.

August 2, 2016

  
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