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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity

Appellate Case No. 2014-002249

Estate of Valerie D'Agostino,

Respondent,

v.

Nicholls & Crampton, P.A.,

Petitioner.

PETITION FOR A 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 on September 23, 2016.

### **QUESTIONS PRESENTED**

1. THE SUPREME COURT SHOULD GRANT CERTIORARI AND THE TRIAL 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.
2. THE COURT ERRED WHEN IT WRONGLY DECIDED THAT THE CASE TURNED ON AMBIGUITY IN THE CONTRACT, EVEN THOUGH ALL OF THE PARTIES AGREED ON THE CONTRACT'S MEANING.
3. THE COURT ERRED WHEN IT FAILED TO APPLY NORTH CAROLINA LAW TO A NORTH CAROLINA CONTRACT.
4. THE COURT WOULD HAVE RULED IN THE FAVOR OF THE APPELLANT IF IT HAD APPLIED NORTH CAROLINA LAW TO THE NORTH CAROLINA CONTRACT.

### **STATEMENT OF THE CASE**

Valerie D'Agostino (hereinafter "Valerie") died on October 17, 2009, domiciled in Beaufort County, South Carolina. (R. p. 320, lines 19-25, R. p. 321, lines 1-21) She was survived by her husband, Richard D'Agostino (hereinafter "Richard"), and her adult children from a previous marriage, Ronald Huther (hereinafter "Huther") and Heidi Pallesen. On or about January 8, 2010, the Beaufort County South Carolina Probate Court appointed Richard as Domiciliary Personal Representative for Valerie's Estate. (R. p. 570)

On or about March 5, 2010, unaware of the Beaufort County South Carolina probate and appointment of Richard from January 8, 2010 (R. p. 570), the Wake County, North Carolina Court improperly appointed Huther as Personal Representative/Administrator for Valerie's Estate in North Carolina, in response to Huther's fraudulent application for Letters of Administration in the North Carolina Court. The North Carolina Court subsequently admitted the improper nature of its appointment of Huther in its Order dated July 12, 2010, wherein it properly appointed Richard as Foreign Personal Representative in North Carolina. (R. pp. 594-595)

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

On or about July 2, 2010, Nicholls filed a Motion for Sanctions against Huther in Wake County, North Carolina for filing a fraudulent application for Letters of Administration in North Carolina. (R. pp. 581-583) Approximately ten (10) days later, on or about July 12, 2010, Huther petitioned the North Carolina Court to resign as Personal Representative, by filing a Petition for Approval or Resignation of Administrator/Personal Representative (R. pp. 596-599) of Valerie's Estate. The Assistant Clerk of Superior Court of Wake County, North Carolina issued an Order (R. pp. 594-595) approving Huther's resignation on July 12, 2010, and the Court appointed Richard as Foreign Personal Representative in North Carolina (R. pp. 594-595). Richard signed an

Oath/Affirmation (R. p. 600) and Application for Letters of Administration (Plaintiff's Designation of Matter 1d) in Wake County in North Carolina on July 13, 2010 to be recognized as Personal Representative of Valerie's Estate in North Carolina.

By that point, Nicholls had rendered legal services to Richard relating to Valerie's Estate from June 10, 2010 through September 23, 2010, resulting in fees of \$13,289.75. (R. pp. 535-538) For those services, Richard paid Nicholls with three checks totaling \$9,500.00, leaving an unpaid balance of \$3,789.75. Nicholls sent an invoice for the outstanding balance to Richard D' Agostino, but he failed to pay. (R. p. 538)

The payment policy in the Nicholls Engagement Letter, approved and signed by Richard on June 10, 2010, stated that "We will send you detailed, itemized monthly bills reflecting our charges. All statements sent to you are payable within thirty (30) days. Any charges not paid within said thirty days will accrue interest from the due date at the rate of one and one-half (1 ½) percent per month until paid". Nicholls made demands upon Richard to remit payment, but Richard never paid the outstanding balance owed. (R. pp. 533-539)

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

Nicholls initially filed a Statement of Creditor's Claim (R. p. 540) against the Estate of Richard D' Agostino (hereinafter "Richard's Estate") on December 27, 2011 for \$4,542.94 for legal services (including interest) rendered to Richard D' Agostino (hereinafter "Richard") and related to

the Estate of Valerie D'Agostino (hereinafter "Valerie's Estate"). Richard died before paying the outstanding balance for Nicholls' services, and Nicholls filed the aforementioned claim against Richard's Estate. Richard's Estate subsequently disallowed the claim (R. p. 541) on or about January 10, 2012, claiming the unpaid balanced was owed by Valerie's Estate, that being the estate to whom the services related.

After receiving the disallowance from Richard's Estate, which alleged the liability of the claim lay with the estate to whom the services related (Valerie's Estate), Nicholls did not subsequently pursue the claim against Richard's Estate, Nicholls did not file a summons and complaint, and the Beaufort County Probate Court dismissed the Petitioner's informal claim against Richard's Estate. (R. pp. 543-544)

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

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

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

The Court scheduled a final hearing for May 19, 2014 and gave the parties 30 days to file any motions. On April 22, 2014, Nicholls filed a Motion for Summary Judgment with the Court. (R. pp. 455-523) Following the parties' submission of additional filings for Court consideration, the Court ruled in favor of Valerie's Estate on July 8, 2014, and issued an Order (R. pp. 1-16) dated September 16, 2014.

On October 14, 2014, Nicholls filed a Notice of Appeal and served counsel for Valerie's Estate. (R. p. 658) The Court of Appeals affirmed the judgment of the circuit court. Estate of Valerie D'Agostino v. Nicholls & Crampton, P.A., Unpublished Op. No. 2016-UP-366 (S.C. Ct. App. filed July 20, 2016). Petitioner seeks a writ of certiorari to review that decision.

## ARGUMENTS

- I. **THE SUPREME COURT SHOULD GRANT CERTIORARI AND THE TRIAL 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.**

The Court of Appeals affirmed the Trial Court's order based on the premise that Nicholls "failed to appeal" the master's ruling that Nicholls "was estopped and/or barred from now taking the position that Richard D'Agostino contracted with it in his representative capacity."

"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) If there are no inconsistent statements of facts, there is no estoppel.

Nicholls directly appealed and proved that it never took inconsistent positions in these matters. In fact, there is "no evidence" in the record of the Appellant taking inconsistent positions. Estoppel cannot exist without inconsistent positions. The Court of Appeals order suggests that the Appellant did not appeal the issue of "estoppel". However, the fact that the Appellant appealed and proved that an "essential element" of estoppel was absent in the case, which, by definition, destroys any ruling of estoppel, as well as ambiguity.

The Court of Appeals cites the Trial 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 Trial Court's premise of estoppel was based on an unsupported alleged fact that: "**that**

*Nicholls & Crampton 'took the position that Richard D'Agostino contracted with it in his representative capacity.'*” There is “no evidence” in the record that Appellant ever took that position. Neither the Respondent nor the Trial Courts can show any evidence in the record of such a claim.

If the aforementioned alleged fact is false, then there are no inconsistent positions, and estoppel fails. Although the Appellant Court suggests that Nicholls did not appeal the issue of “estoppel”, **Nicholls’ Initial Brief to the Court of Appeals, Argument #1 is “exclusively dedicated” to disproving estoppel** by showing that Nicholls never “took the *position that Richard D’Agostino contracted with it in his representative capacity.*” As mentioned above, 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)).

Nicholls’ Initial Brief to the Court of Appeals, Argument #1, attacks the alleged fact on which the Court based both its ruling on “ambiguity” and “estoppel”. Although Nicholls does not specifically mention the term “estoppel”, Nicholls directly appealed and attacked the alleged fact on which estoppel was based, and that is all that is needed to appeal the issue and ruling.

If an “essential element” of any legal defense (e.g. estoppel) is absent, the entire legal defense collapses. If a required element of “estoppel” (or any legal defense) is absent in this case, and this ruling is upheld, then the case sets a new and far reaching precedent in South Carolina jurisprudence that will reverberate in almost every estate in South Carolina. The ramifications are substantial and severe.

The Trial Courts’ error stems from a misreading of the facts. Nicholls, a North Carolina law firm, has always maintained that Richard D’Agostino signed the North Carolina contract concerning the Estate of Valerie D’Agostino on June 8, 2010 (R. pp. 28-29), in his individual capacity. Nicholls

reiterates this position throughout its Trial Court filings. However, although Richard signed the contract in his individual capacity, once the North Carolina Court appointed Richard as Personal Representative, his powers retroactively “relate back” to give acts prior to appointment the same effect as those occurring after. North Carolina law expressly provides for this. (N.C. Gen. Stat. §28A-13-1.)

Because Richard signed the contract concerning Valerie’s estate administration, in his individual capacity, Nicholls had a right to make a claim against Richard’s estate. However, although Richard chose not to further pursue that claim against Richard’s estate, Nicholls was legally justified in filing a claim against Valerie’s estate based on Richard’s appointment as Personal Representative in North Carolina. South Carolina expressly recognizes the “dual liability” that can be shared by a personal representative and an estate. Specifically, South Carolina Code §62-3-808(c) states, *inter alia*, that “claims based on contracts... may be asserted against the estate by a proceeding against the personal representative in his fiduciary capacity, *‘whether or not the personal representative is individually liable therefor.’*”

Although Nicholls maintains that Richard [originally] signed the contract in his individual capacity, Nicholls also recognizes that North Carolina law retroactively imputes the powers of personal representative on the act of signing that contract for the advancement of the estate administration. The North Carolina “relation back” doctrine is common in many states, including in South Carolina. (See South Carolina Code of Laws §62-3-701 and *Thomas v. Grayson*, 318 S.C. 82, 456 S.E.2d 377 (1995))

Nicholls recognition that Richard signed the contract in his individual capacity on June 10, 2010 and Nicholls’ recognition that Richard’s powers as Personal Representative related back to signing the contract under North Carolina law, are not inconsistent positions. The relation back

doctrine in estate administration is imperative to the appropriate administration of estates. Otherwise, those individuals nominated in a Will or given a statutory priority for serving as personal representative would be discouraged from taking initial steps to open estate administration for proper oversight. Why would any individual or lawyer take steps to advance the estate administration when he or she believes that the advancement of funds and time would not be reimbursed by the estate, once the individual is appointed as personal representative?

The affirmation of this case stands for the position that the North Carolina relation back law (N.C. Gen. Stat. §28A-13-1) will not be recognized in South Carolina. Furthermore, it places South Carolina's relation back law (South Carolina Code of Laws §62-3-701) on shaky ground.

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

The Court's analysis proclaims that "the threshold question before the Court is whether: a) Richard contracted with Petitioner in his individual capacity, b) Richard contracted in his capacity as Personal Representative of Valerie's Estate, or c) whether the contract is ambiguous on this point". Ironically, both Nicholls and Valerie's Estate agree on the answer to each of these inquiries.

Both Nicholls and Valerie's Estate agree that at the time the contract was signed, Richard, in his individual capacity, contracted with the Petitioner Nicholls. Richard hired Nicholls to have Huther removed as the North Carolina Personal Representative/Administrator after the North Carolina Court improperly appointed Huther instead of Richard. (R. pp. 581-585) Richard also hired Nicholls to dismiss the Wake County, North Carolina probate proceeding so that Valerie's Estate could exclusively be administered in Valerie's domicile, Beaufort County, South Carolina, which

was the proper jurisdiction for Valerie's probate. All parties agreed in the Family Settlement Agreement that Valerie's Estate was properly being probated in Beaufort County, South Carolina. Richard advanced personal funds in pursuit of these efforts, both in South Carolina and in North Carolina. Advancing funds on behalf of an estate is not only common among individuals awaiting appointment as Personal Representative, it is practically universally practiced in such circumstances. A Personal Representative rarely has access to a decedent's funds until after he is appointed by a Court as Personal Representative. The fact that Richard personally advanced funds in pursuit of these actions has no bearing on the liability of Valerie's Estate for Richard's efforts. Furthermore, the Beaufort County Probate Court had expressly prohibited Richard from disbursing funds without advance authorization from the Court. (R. p. 570)

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

In this instance, Richard had to hire Nicholls in his individual capacity. North Carolina law prohibited Richard from taking action as a Domiciliary Personal Representative in North Carolina

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

The Trial Court suggests that Richard could have contracted as a Foreign Personal Representative to pursue the aforementioned actions in a North Carolina court. However, North Carolina law expressly prohibits such actions. (See N.C. Gen. Stat. §28A-26-6 (2013)). The Trial Court also suggests that because Richard was a potential heir in Valerie’s Estate, that Nicholls’ legal representation of Richard should be personally borne by Richard. Nothing in the Court’s Order shows any personal benefit to Richard as a result of his actions in North Carolina. In fact, Richard renounced his right to take anything under Valerie’s Estate. Richard’s actions in the North Carolina Court were for administrative efficiency for the estate administration. “The mere fact that a fiduciary may also have an interest in the estate as a beneficiary does not, without more, support a finding that the actions of the fiduciary are taken solely for her benefit as beneficiary.” (See In re Dawson Est., 689 N.E.2d 1008, 1012, 117 Ohio App. 3d 51, 57-8 (Ohio Ct. App. 1996))

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

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

Here, we have an action to recover attorney's fees pursuant to a fee agreement between an attorney and his client. An action to recover attorney's fees pursuant to a fee agreement between an attorney and his client is an action at law. Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997). If an error raises a question of law, the analysis for the standard of review stops, and the de novo standard applies. N. Am. Rescue Prods., Inc. v. Richardson, 720 S.E.2d 53, 58 (S.C. Ct. App. 2001). Here, the Trial Court made an error at law when it concluded that ambiguity in the contract had a bearing on the outcome of the case. When there is a question of law, as in this case, the appellate court should review the case using the de novo standard. The Trial Court based its decision on ambiguity in the contract. However, because the issue of ambiguity plays no role in the interpretation of the contract when all parties agree with the same interpretation, the Trial Court's use of ambiguity for its ruling is reversible error. As such, this Court should reverse the Trial Court's ruling and find in favor of Nicholls, the Appellant.

### **III. THE COURT ERRED WHEN IT FAILED TO APPLY NORTH CAROLINA LAW TO A NORTH CAROLINA CONTRACT.**

The definition of a breach of contract is a failure to perform a contractual promise without legal excuse. Ralph King Anderson, Jr. South Carolina Requests to Charge – *Civil § 19-2* (2002). The action is one at law. Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc., 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004), predicated on the existence of a contract. Tidewater Supply Co., Inc. v. Industrial Electric Co., 253 S.C. 483, 171 S.E.2d 607 (1969). More specifically, an action to recover attorney’s fees pursuant to a fee agreement between an attorney and his client is an action at law. Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997). This case is an action to recover attorney fees between an attorney and his client, thus, it is an action at law.

If an error raises a question of law, the analysis for the standard of review stops, and the de novo standard applies. N. Am. Rescue Prods., Inc. v. Richardson, 720 S.E.2d 53, 58 (S.C. Ct. App. 2001). Here, the Trial Court made an error at law when it chose to apply South Carolina law to a North Carolina contract. When there is a question of law, as in this case, the appellate court should review the case using the de novo standard.

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

Valerie died on October 17, 2009, domiciled in Beaufort County, South Carolina, which was the proper jurisdiction and venue for the decedent’s probate administration. On June 10, 2010, Richard signed an Engagement Letter with Nicholls for professional legal service fees, costs, disbursements, and payment policy relating to “Estate of Valerie D’Agostino”, as indicated in the Engagement Letter’s subject line. (R. pp. 533-534) Each party agrees that the Engagement Letter was a binding contract entered into by the parties.

After signing the contract with Richard, Nicholls subsequently filed actions in the Wake County, North Carolina Superior Court to remove Huther as North Carolina Personal Representative/Administrator (case 10-E-702), to dismiss the North Carolina probate proceeding, and a Motion for Sanctions against Huther. (R. pp. 581-585) Huther subsequently filed a Petition for Approval or Resignation of Administrator of Valerie's Estate on or about July 12, 2010. (R. pp. 596-598) All of these actions taken by Nicholls on behalf of Richard, took place in North Carolina in a North Carolina Court case.

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

Here, the Trial Court's order expressly indicates that it relies exclusively on "South Carolina law" to interpret the "North Carolina contract". The failure of the Trial Court to use North Carolina law to interpret a North Carolina contract is in direct conflict with South Carolina conflict of laws principles, which requires that the contract be interpreted with the law of the state where it is signed and performed. (See *Murphy v. Equitable Life Assurance Society*, 197 S.C. 393, 15 S.E.2d 646 (1941)).

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

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

#### **IV. THE COURT WOULD HAVE RULED IN THE FAVOR OF THE APPELLANT IF IT HAD APPLIED NORTH CAROLINA LAW TO THE NORTH CAROLINA CONTRACT.**

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

An action to recover attorney's fees pursuant to a fee agreement between an attorney and his client is an action at law. Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997). If an error raises a question of law, the analysis for the standard of review stops, and the de novo standard applies. N. Am. Rescue Prods., Inc. v. Richardson, 720 S.E.2d 53, 58 (S.C. Ct. App. 2001). Here, the Trial Court made an error at law when it chose to apply South Carolina law to a North Carolina contract. When there is a question of law, as in this case, the Court should review the case using the de novo standard.

The Trial Court addresses the Nicholls' arguments in the section of its Order titled "Arguments of Petitioner". (R. pp. 11-13) First, the Court addresses Nicholls' claim that N.C. Gen. Stat. §28A-13-1 supports the position that the powers of the personal representative "relate back" to the personal representative's acts prior to his appointment.

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

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

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

North Carolina law, however, prohibited Richard from taking action as a Foreign Personal Representative in North Carolina until after his appointment by a North Carolina court. Specifically, N.C. Gen. Stat. §28A-26-6 (2013) provides that “(a) A domiciliary personal representative of a nonresident decedent may invoke the jurisdiction of the courts of this State [North Carolina] *‘after’* qualifying as ancillary personal representative in this State [North Carolina] except that the domiciliary personal representative may invoke such jurisdiction prior to qualification for the purpose of appealing from a decision of the clerk of superior court regarding a question of qualification.”

North Carolina law expressly prohibited Richard from taking action in the North Carolina courts until a North Carolina Court appointed him as Foreign Personal Representative. (See N.C. Gen. Stat. § 28A-26-6 (2013)) Of course, once the North Carolina Court appointed Richard as Foreign Personal Representative in North Carolina, then Richard's appointment "relate[ed] back" to ratify his acts occurring prior to his appointment. (See N.C. Gen. Stat. N.C. §28A-13-1))

North Carolina courts have long recognized the "relation back" doctrine in these contexts. In Burcl v. N.C. Baptist Hosp., Inc., 306 N.C. 214, 293 S.E.2d 85 (1982), the North Carolina Court thoroughly addresses North Carolina's "relation back" doctrine, as applied since the enactment of North Carolina Rules of Civil Procedure 15 and 17. (G.S. 1A-1, Rule 15 and G.S. 1A-1, Rule 17). In fact, the Burcl Court even makes reference to Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963), which the Court describes as "the most thoroughly considered decision by this Court on the ["relation back" doctrine] point in question." The Burcl Court describes the Graves decision as "a well-researched opinion by Justice, later Chief Justice Sharp, [where] the Court noted: "[I]t is the universal rule that all previous acts of the personal representative prior to his appointment which were beneficial in nature to the estate and which would have been within the scope of his authority had he been duly qualified, are validated upon his appointment which relates back to the death of the intestate for this purpose." 260 N.C. at 692, 133 S.E.2d at 764. The Burcl Court also indicated that Graves was (at that point) its only decision on the "relation-back" question which recognized this principle. This principle is now codified in North Carolina G.S. 28A-13-1.

The Burcl Court also recognized, however, that state courts were not in accord on whether the due appointment of a personal representative "will relate back so as to validate *an action* brought prior to the appointment." 260 N.C. at 693-94, 133 S.E.2d at 764 (emphasis supplied)." In Burcl, a foreign administrator of a decedent's estate, from Virginia, sued prior to qualifying locally as

ancillary [foreign] administrator and sought to plead in the Trial Court to show this act and have the pleading “relate back” to the commencement of the action. The Court found that under North Carolina’s Rules of Civil Procedure 15 and 17(a) that the pleading should be permitted. Prior to enactment of Rule 15 and 17(a), the appointment of a foreign administrator as ancillary administrator would not relate back to the action, because the foreign administrator had no capacity to bring such an action in North Carolina.

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

North Carolina’s “relation back” doctrine should give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. (See N.C. Gen. Stat. §28A-13-1)) The Trial Court Order suggests that Nicholls’ actions in the North Carolina Court were not “beneficial” to Valerie’s Estate. The Court Order specifically cites the fact that Richard’s efforts to stop the North Carolina probate proceeding as an example of actions that did not “benefit” the estate. Richard only made efforts to stop the North Carolina probate proceeding after it was fraudulently commenced by Huther under Huther’s sworn false pretense that 1) Huther had priority to be appointed as Personal Representative/Administrator, and 2) that Richard had renounced his priority right to serve. Richard had priority and he never renounced his priority right for appointment as Personal Representative/Administrator in North Carolina. As with any estate administration, assuring that the Court is not misled and that the estate is administered according to the law is “beneficial” to the estate. That is exactly what Richard’s actions did here.

It should be noted, however, that North Carolina Courts have not spoken directly on the issue

of the meaning of what acts by the person appointed are “beneficial to the estate”. Other states have generally accepted that attorneys may recover their fees from the estate if they have been retained by the personal representative or person interested in the estate, as long as their services have benefited the estate. (See In re Paris Est., 699 So. 2d 301, 301-03 (Fla. Ct. App. 1997) (where personal representative incurred legal fees in preventing probate of will procured by bad faith, and actions benefitted the estate, personal representative was entitled to litigation attorney fees); In re Brock Est., 695 So. 2d 714, 717 (Fla. Ct. App. 1996) (citing Fla. Stat. Ann. §733.106(3) and holding that attorney fees for services which were necessary for or beneficial to the estate may be awarded).

“Benefit” does not necessarily mean the attorney’s actions have resulted in the enhancement in value or increase in assets of the estate. Rather, the estate is benefitted whenever an action determines what is appropriate under the Will. (Trynin. Est., 252 Cal. Rptr. 787,789, 205 Cal. App. 3d 1040 (Cal. Ct. App. 1988). See also In re Estate of Lewis, 442 So. 2d 290, 292-93 (Fla. Ct. App. 1983) (allowing attorney’s fees for services rendered to estate beneficiary and stating that benefit as interpreted by the courts is not restricted to services that bring about an enhancement in value of the estate, but includes simply “effectuating the testamentary intention set forth in the Will”); Samuels v. Ahern Est., 436 So. 2d 1096, 1097 (Fla. Ct. App. 1983) (chargeable fees for services which benefit estate are not limited to an enhancement in value or increase in assets); In re Peterson Est., 570 N.W.2d 463, 467 (Iowa Ct. App. 1997) (where estate had a substantial interest in securing appointment of executor named in Will, and this interest was advanced by defending the Will, the estate benefitted, and the co-executors were entitled to attorney’s fees); In re Burmeister Est., 854 P.2d 195, 124 Wash.2d 282 (Wash. 1994) (citing Wash. Rev. Code Ann. §11.96.140 and stating that attorney fees may be appropriately awarded even if estate is not substantially benefitted and statute contemplates situation where attorney fees may be justly assessed against estate). Consequently, if

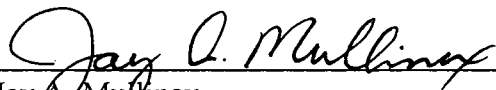
the services of an attorney are for the common benefit of an estate, it is irrelevant who employs the attorney, and award of attorney fees from the estate is proper. (In re Kjørvestad Est., 287 N.W.2d 465, 468 (N.D. 1980)) “crucial factor is whether the services of the attorney were to the common benefit of the estate; not by whom he was employed” (emphasis in original internal citation omitted)); Merchants and Planters Bank v. Myers, 644 S.W.2d 683, 688 (Tenn. Ct. App. 1982) (stating general rule that for attorney’s fees to be awarded out of the estate, the attorney must be employed by personal representative, but noting exception where an attorney’s services inured to benefit of the estate.)

### CONCLUSION

For the reasons stated, petitioner asks the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

November 1<sup>st</sup>, 2016

  
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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity

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Appellate Case No. 2014-002249

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Estate of Valerie D'Agostino,

Respondent,

v.

Nicholls & Crampton, P.A.,

Petitioner.

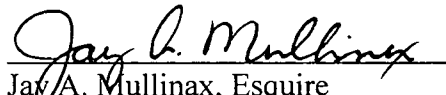
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PROOF OF SERVICE

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I certify that I have served a copy of the Petition for Writ of Certiorari on the Estate of Valerie D'Agostino, sent via U.S. Mail, postage prepaid on November 2, 2016, addressed to its attorney of record, Mr. J. Ashley Twombly, Esquire, 311 Carteret Street, Beaufort, SC 29902.

November 1<sup>st</sup>, 2016

  
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