

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge for Beaufort County

Op. No. 2016-UP-366 (S.C. Ct. App. filed July 20, 2016)
Appellate Case No. 2014-002249

IN RE: Estate of Valerie D'Agostino

Nicholls & Crampton, P.A..... Petitioner

-vs.-

Estate of Valerie D'Agostino Respondent

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. Did the Court of Appeals correctly conclude that Nicholls & Crampton failed to appeal Judge Dukes' estoppel ruling?
- II. Did Judge Dukes correctly determine that the contract between Nicholls & Crampton and Richard D'Agostino was ambiguous?
- III. Is Nicholls & Crampton's argument that North Carolina law should be applied in this case preserved for review, and if so, would North Carolina law provide a different result?
- IV. Are there special and important reasons to grant this Petition?

COUNTER-STATEMENT OF THE CASE

Petitioner Nicholls & Crampton, P.A., (Nicholls & Crampton) filed a creditor's claim against Respondent Estate of Valerie D'Agostino (Valerie's Estate) in the Beaufort County Probate Court seeking \$3,789.75 plus interest for legal services performed pursuant to a contract. (R. pp. 603-604). Valerie's Estate timely filed and served a Notice of Disallowance of the claim. (R. pp. 545-547). Nicholls & Crampton then filed a Petition for Allowance of Claim, and Valerie's Estate removed the matter to Circuit Court. (R. pp. 17-42; R. pp. 606-607).

A final hearing on the claim was held on May 19, 2014 before the Honorable Marvin H. Dukes, III. The parties stipulated that this matter would be tried by Judge Dukes in a summary fashion and that Judge Dukes would issue findings of fact and conclusions of law. (R. p. 3). In his Final Merits Hearing Order (Order), Judge Dukes found as a matter of fact and concluded as a matter of law that Nicholls & Crampton was estopped from arguing that Richard D'Agostino contracted with Nicholls & Crampton as Personal Representative of the Estate of Valerie D'Agostino because it had taken the

position that Richard contracted “not in a representative capacity” in a prior proceeding. (R. pp. 1-16). Nicholls & Crampton did not file a Motion for Reconsideration or any other post-trial motions. Nicholls & Crampton filed a Notice of Appeal dated October 14, 2014. (R. pp. 658-659).

The Court of Appeals affirmed Judge Dukes’ ruling in an unpublished opinion filed on July 20, 2016. Nicholls & Crampton filed a Petition for Rehearing that was denied by Order filed on September 23, 2016. On November 1, 2016, Nicholls & Crampton mailed its Petition for Writ of Certiorari to the Clerk of the Supreme Court.

FACTS

Valerie D’Agostino died on October 17, 2009. (R. p. 353, lines 6-9). She was survived by her two children (Ronald Huther and Heidi Pallesen) and her husband (Richard D’Agostino). On January 8, 2010, the Beaufort County Probate Court issued fiduciary letters appointing Richard D’Agostino (Richard) as Personal Representative of Valerie’s Estate. (R. p. 570).

Ronald Huther (Huther) opened an estate for his mother Valerie D’Agostino in North Carolina and was appointed as Administrator of the North Carolina Estate. In seeking the appointment, Huther relied upon the advice of a North Carolina attorney and the North Carolina attorney’s interpretation of a waiver that had been previously executed by Richard. (R. p. 358, line 6-R. p. 359, line 7). In his request to be appointed as the fiduciary for the North Carolina estate, Huther stated that he was the person entitled to apply for the fiduciary position or was applying after all persons having prior right have renounced. (R. p. 354, line 25-p.355, line 3; R. p. 358, line 6-R. p. 359, line 7; R. p. 359, lines 12-23).

On June 10, 2010, Richard hired Nicholls & Crampton. The scope of representation was to “provide legal services on your behalf in connection with the administration of your deceased wife’s estate in Wake County, NC (the “Matter”).” (R. pp. 533-534). Richard signed a contract with Nicholls & Crampton as “Rich D’Agostino,” and the words “personal representative” do not appear in the contract. (R. pp. 533-534). Richard paid the \$1,500.00 retainer called for by the contract to Nicholls & Crampton by a personal check from his individual checking account. (R. p. 580). At the time Richard hired Nicholls & Crampton, Richard was not only the Personal Representative of Valerie’s Estate, but also was a beneficiary of Valerie’s Estate.

Timothy Nicholls, an attorney at Nicholls & Crampton as well as the Nicholls & Crampton’s 30(b)(6) designee, testified that he drafted the contract. (R. p. 163, lines 8-15). Mr. Nicholls also testified that the contract was not clear as to whether Richard was individually responsible for Nicholls & Crampton’s fees or if Valerie’s Estate was responsible for Nicholls & Crampton’s fees. (R. p. 176, lines 14-21).

Mr. Nicholls also testified about the substance of work Nicholls & Crampton performed for Richard, including:

- analyzing whether Richard individually would inherit more money under North Carolina or South Carolina intestacy laws (R. p. 165, line 22-R. p. 166, line 7; R. p. 167, line 15-R. 169, line 3; R. p. 174, line 21-R. p. 175, line 4; R. p. 180, line 6-R. p. 181, line 7; R. p. 588; R. p. 660);
- bringing a motion for sanctions on behalf of Richard individually against Huther (R. p. 175, lines 6-17; and R. pp. 581-583); and

- negotiating a settlement on behalf of Richard individually and consenting “to it as attorney for Richard D’Agostino” (R. p. 187, lines 18-24; and R. p. 191, lines 2-10).

When it turned out that Huther arguably was not entitled to serve as the fiduciary of Valerie’s North Carolina estate, Huther agreed to resign as the fiduciary of the North Carolina estate. On July 12, 2010, Huther’s resignation as the fiduciary of the North Carolina estate was accepted. (R. p. 372, lines 7-10; and R. pp. 594-599).

On April 11, 2011, Richard died owing money to Nicholls & Crampton for the legal work it performed for Richard. (R. p. 575). After Richard’s death, Nicholls & Crampton first filed a claim against the Estate of Richard D’Agostino with the Beaufort County Probate Court related to the legal work Nicholls & Crampton had performed for Richard. In that claim, Nicholls & Crampton took the position that “Richard J. D’Agostino *personally, and not in a representative capacity*, contracted” with Petitioner. (R. pp. 571-573) (emphasis added). Mr. Nicholls also stated in an email dated January 30, 2012, that Nicholls & Crampton had not filed a claim against Valerie’s Estate because its “claim has always been against [Richard D’Agostino] *personally*.” (R. p. 196, line 10-R. p. 198, line 2; R. p. 589) (emphasis added).

Over the objection of Nicholls & Crampton, Nicholls & Crampton’s claim against Richard’s Estate was ultimately dismissed with prejudice by the Beaufort County Probate Court pursuant to an order dated March 6, 2013. (R. pp. 574-579). That order was never appealed or otherwise challenged.

Eighteen months after filing a claim against Richard’s Estate and arguing that Richard was “personally” liable for the claim and that Richard had entered into the

contract with Nicholls & Crampton “not in a representative capacity”, Nicholls & Crampton filed a claim against Valerie’s Estate. In the new claim, Nicholls & Crampton argued that Richard hired Nicholls & Crampton in his capacity “as Personal Representative of the Estate of Valerie D’Agostino.” (R. pp. 603-604). In its claim, Nicholls & Crampton moved for full payment under what it asserted was a breach of the contract. (R. p. 87, lines 14-19). Valerie’s Estate disallowed Nicholls & Crampton’s creditor’s claim. (R. pp. 545-547), and Judge Dukes, after the final merits hearing, determined as a matter of fact and concluded as a matter of law that Valerie’s Estate properly disallowed Nicholls & Crampton’s creditor’s claim.

Judge Dukes’ order was based on several independent grounds, including (1) that Nicholls & Crampton was estopped from arguing that Richard contracted in his “representative capacity” because Nicholls & Crampton had previously filed a claim against Richard’s Estate for the same fees stating that “Richard J. D’Agostino *personally, and not in a representative capacity*, contracted” with Petitioner (R. pp. 571-573) (emphasis added), (2) that the contract was ambiguous at best as to whether Valerie’s Estate or Richard individually was liable for Nicholls & Crampton’s fees, and (3) construing the ambiguity against Nicholls & Crampton provided that Valerie’s Estate was not responsible for Nicholls & Crampton’s claim. (R. pp. 1-16).

The Court of Appeals affirmed Judge Dukes’ decision. The Court of Appeals determined that Nicholls & Crampton failed to appeal Judge Dukes’ decision that Nicholls & Crampton was estopped from taking the position that Richard contracted with Nicholls & Crampton in a representative capacity. Because Judge Dukes’ order was based on more than one ground, the Court of Appeals affirmed under the two issue rule.

STANDARD OF REVIEW

Actions that proceed upon causes of action seeking the common law remedy of money damages are regarded as actions at law. 4 S.C. Jur. Action § 10. Actions for money damages based on a breach of contract are therefore actions at law. E.g., R&G Construction, Inc., v. Lowcountry Regional Transportation Authority, 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000).

“In an action at law, on appeal of a case tried without a jury, the appellate court’s standard of review extends only to the correction of errors of law. The trial judge’s findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge’s findings.” Consignment Sales, LLC, v. Tucker Oil Company, 391 S.C. 266, 270-71, 705 S.E.2d 73, 76 (Ct. App. 2010).

ARGUMENT

- I. The Court of Appeals correctly concluded that Nicholls & Crampton failed to appeal Judge Dukes’ ruling that estoppel barred Nicholls & Crampton’s claim and that this unappealed ruling is now the law of the case.**

In his Order, Judge Dukes found that while Nicholls & Crampton was pursuing its claim against the Estate of Richard D’Agostino, Nicholls & Crampton

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

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

Nicholls & Crampton did not appeal Judge Dukes’ rulings and order relating to estoppel. In fact, the words “estoppel,” “waiver,” “inconsistent positions,” “estopped,” and/or “barred” do not appear in Nicholls & Crampton’s Brief to the Court of Appeals. (Nicholls & Crampton’s App. Brief). “Any unappealed portion of the trial court’s judgment is the law of the case, and must therefore be affirmed.” Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 398, 593 S.E.2d 183, 189 (Ct. App. 2004). Thus, the Court of Appeals correctly found that Judge Dukes’ Order relating to estoppel is now the law of this case and correctly affirmed Judge Dukes’ Order based on the two issue rule.¹

a. *Argument 1 of Nicholls & Crampton’s Brief to the Court of Appeals does not mention or otherwise challenge Judge Dukes’ estoppel ruling.*

In its Petition for a Writ of Certiorari, Nicholls & Crampton contends that Argument 1 of its Brief to the Court of Appeals actually appealed Judge Dukes’ ruling, stating “Argument #1 is ‘exclusively dedicated’ to disproving estoppel” (Pet. for

¹ It should also be noted that Judge Dukes’ ruling was not solely based on estoppel but also on waiver and the doctrine of inconsistent positions. Nicholls & Crampton did not appeal any of these rulings.

Cert. p. 7) However, a review of Nicholls & Crampton's brief establishes that Argument 1 contends that there was no ambiguity in the contract, discusses dual liability theory, and erroneously concludes that Judge Dukes' use of ambiguity in its ruling constituted reversible error. The word "estoppel" is nowhere to be found.

b. Nicholls & Crampton's contention that it never took inconsistent positions related to estoppel is simply misplaced.

Nicholls & Crampton's sole argument now related to estoppel is that "it never took inconsistent positions in this matter" and that there is "no evidence" in the record of [Nicholls & Crampton] taking inconsistent positions." (Pet. for Cert. p. 6). Nicholls & Crampton does not appeal any other issue related to the estoppel ruling. This contention is simply not supported by the Record.

After Richard's death, Nicholls & Crampton first filed a claim against the Estate of Richard D'Agostino with the Beaufort County Probate Court. In that claim, Petitioner took the position that "Richard J. D'Agostino personally, *and not in a representative capacity*, contracted" with Petitioner. (R. pp. 571-573) (emphasis added).²

² Mr. Nicholls also stated in an email dated January 30, 2012, that Nicholls & Crampton had not filed a claim against Valerie's Estate, which by that time had been opened for more than two years, because its "*claim has always been against [Richard D'Agostino] personally.*" (R. p. 196, line 10-R. p. 198, line 2; R. p. 589) (emphasis added). In response to questions about this email, the following exchange took place:

Q: Isn't it true, though, that you stated that you didn't file a claim against [Valerie D'Agostino's] estate because . . . your [claim] has always been against Mr. D'Agostino personally?
MR. MULLINAX: Object to the form.
A: That is what it says, yes.
Q: And that was true when you wrote it, right?
A: Yeah.

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

After its claim against Richard's Estate was dismissed with prejudice on procedural grounds, Nicholls & Crampton then filed a claim against Valerie's Estate. (R. p. 528; R. p. 540; R. p.541; R. pp. 574-579). In the claim against Valerie's Estate, Nicholls & Crampton changed positions and claimed that Richard hired Nicholls & Crampton in his capacity "as Personal Representative of the Estate of Valerie D'Agostino," (R. pp. 603-604). Accordingly, there is evidence that Nicholls & Crampton took inconsistent positions regarding who was responsible for paying Nicholls & Crampton's legal fees.

Because Judge Dukes' decision was based on more than one ground and Nicholls & Crampton did not appeal the estoppel ground, the Court of Appeals properly affirmed Judge Dukes' decision under the two issue rule. "Where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

The Court should end its review of this Petition for a Writ of Certiorari here because it is clear that the Court of Appeals properly found that Nicholls & Crampton did not appeal Judge Dukes' estoppel ruling; nevertheless, Respondent can show that the other arguments that Nicholls & Crampton raises in its Petition for a Writ of Certiorari are without merit.

Nicholls & Crampton's claim against the Estate of Richard D'Agostino was ultimately dismissed with prejudice by the Beaufort County Probate Court pursuant to an order dated March 6, 2013. (R. pp. 574-579).

II. Judge Dukes correctly determined that the contract between Nicholls & Crampton and Richard D’Agostino was ambiguous as to whether Valerie’s Estate or Richard individually was responsible for Nicholls & Crampton’s fees and properly construed that ambiguity against Nicholls & Crampton as the drafter of the contract.

As an independent basis for finding in favor of Respondent, Judge Dukes found as a matter of fact and concluded as a matter of law that the contract drafted by Nicholls & Crampton was ambiguous “at best” as to who was responsible for payment of Nicholls & Crampton’s fees and then construed that ambiguity against Nicholls & Crampton.

a. The language used in the contract does not suggest that Valerie’s Estate was responsible for Nicholls & Crampton’s fees.

The contract contains a scope of representation that states “[y]ou have requested that we provide legal services on your behalf in connection with the administration of your deceased wife’s estate in Wake County, NC (the “Matter”).” The re line of the letter states “Estate of Valerie V. D’Agostino.” Richard D’Agostino’s signature block states “Rich D’Agostino.” (R. pp. 533-534). As Judge Dukes noted in his order, Richard had two interests in Valerie’s Estate: his individual interest as a beneficiary and his interest as a personal representative. Judge Dukes found that “the contract does not mention that [Valerie’s E]state will be responsible for the fees incurred . . .” (R. pp. 6-8).³

Additionally, none of the terms of the contract suggest that Valerie’s Estate will be responsible for Nicholls & Crampton’s fees. In fact, the contract does not contain the words “personal representative” or suggest that work is being performed on behalf of Valerie’s Estate. (R pp. 533-534). Importantly, Judge Dukes found that at the time the

³ The parties’ course of conduct also suggests that Richard was personally responsible for payment of the fees. First, Richard paid the retainer called for under the contract from his personal funds and not from Valerie’s Estate’s funds. (R. p. 580). Second, Nicholls sent an email stating that its “*claim has always been against [Richard D’Agostino] personally.*” (R. p. 196, line 10-R. p. 198, line 2; R. p. 589).

contract was signed, Richard had been appointed as the personal representative of Valerie's Estate since January 2010. (R. p. 570). Further, the contract could have easily included language specifying that Valerie's Estate was responsible for Nicholls & Crampton's fees or that work was being performed on behalf of Valerie's Estate. (R. pp. 533-534).

b. Nicholls & Crampton admitted the contract was ambiguous

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

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

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

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

Thus, Judge Dukes correctly concluded that the contract was ambiguous as to whether Richard individually or Valerie's Estate was responsible for payment of Nicholls & Crampton's fees.

c. Judge Dukes correctly construed the ambiguous contract against Nicholls & Crampton.

South Carolina law is clear that "any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the ambiguous language." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 205, 687 S.E.2d 714, 718 (Ct. App. 2009) (underline added). Therefore, the contract must be construed "liberally and most

strongly in favor of the party who did not write or prepare the contract.” Myrtle Beach Lumber Co. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981). Nicholls & Crampton’s 30(b)(6) representative testified that he drafted the contract. (R. p. 163, lines 8-15). A reasonable construction of the contract, much less a liberal construction construed most strongly against Nicholls & Crampton is that Richard was individually responsible for fees incurred.⁴

Accordingly, Judge Dukes correctly construed the contract against Nicholls & Crampton, the drafting party, when he found that Richard was individually responsible for fees and Valerie’s Estate properly disallowed Nicholls & Crampton’s claim. (R.p.15). Even if this Court disagrees with Judge Dukes’ estoppel ruling and disagrees with the Court of Appeals’ ruling that Nicholls & Crampton failed to appeal the estoppel ruling, this Court should affirm Judge Dukes’ Order based on this independent ground of construing the ambiguous contract against Nicholls & Crampton.

⁴ This finding is also supported by since Nicholls’ own emails and testimony establish that legal work was performed for Richard personally. For example, Mr. Nicholls testified that the work performed pursuant to the contract included determining if Richard would receive more money under North Carolina or South Carolina intestacy law, filing a motion for sanctions on behalf of Richard individually, and negotiating a resolution of the North Carolina matters for Richard individually. (R. p. 165, line 22-R. p. 166, line 7; R. p.167, line 15– R. p.169, line 3; R. p. 174, line 21–R. p. 175, line 17; R. p. 180, line 6–R. p. 181, line 7; R. p. 187, lines 18-24; R. p. 191, lines 2-10; R. pp. 581-583; R. p. 588; and R. pp.660-661). During his deposition, Nicholls & Crampton’s 30(b)(6) designee acknowledged that he sent an email to his co-counsel wherein he stated he “did not file a claim in [Valerie D’Agostino’s] estate as we were never advised to do so by her estate and *our claim has always been against [Richard D’Agostino] personally.*” (emphasis added) (R. p. 589).

III. Nicholls & Crampton's argument that North Carolina law should be applied in this case is not preserved for review and even if preserved for review, lacks merit.

- a. Nicholls & Crampton's argument that North Carolina law generally, including N.C.G.S.A. § 28A-13-1 (relation back statute) and § 28A-26-6, should have been applied to this case is not preserved for review.*

Nicholls & Crampton argues, for the first time on appeal, that North Carolina law rather than South Carolina law should be applied in this case. This argument is not preserved for review and is also without merit.

In order to be preserved for review, an issue must be raised to and ruled upon by the lower court. E.g. Gause v. Smithers, 403 S.C. 140, 742 S.E.2d 644 (2013) (in order to be preserved for review, an issue must be raised to and ruled upon by the trial judge).

A review of the Record establishes that Nicholls & Crampton never argued that North Carolina law applies to this matter. In fact, Nicholls & Crampton cited and relied upon South Carolina law when arguing its case to Judge Dukes. For example,

- At the May 19, 2014, hearing, Nicholls & Crampton repeatedly cited S.C. Code Ann. § 62-3-701 and S.C. Code Ann. § 62-3-714 as well as S.C. Code Ann. § 62-1-111 and S.C. Code Ann. § 62-3-808 (R. p. 69, line 20-R. p. 70, line 7; R. p. 72, lines 11-16; R. p. 100, lines 15-22; R. p. 101, line 4-R. p. 103, line 6; R. p. 120, lines 4-24; R. p. 127, line 15-R. p. 129, line 22);
- In its May 22, 2014, letter to Judge Dukes, Nicholls & Crampton extensively quoted S.C. Code Ann. § 62-3-701, § 62-3-808, § 62-3-714, § 62-3-202, and § 62-1-111; (R. pp. 613-618);
- In its May 28, 2014, letter to Judge Dukes, Nicholls & Crampton cites S.C. Code Ann. §62-3-701. (R. pp. 626-627); and

- In its June 27, 2014, letter to Judge Dukes, Nicholls & Crampton cites S.C. Code Ann. § 62-3-308 and § 62-3-701. (R. pp. 637-638)

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

Because Nicholls & Crampton never argued that North Carolina law controlled, Judge Dukes never had the opportunity to rule upon the issue. Nicholls & Crampton did not file a Motion for Reconsideration or other post-trial motion asking Judge Dukes to apply North Carolina law. Therefore, Nicholls & Crampton's argument that North Carolina law applies to this case was never raised to nor ruled upon by Judge Dukes, and is not preserved for review.

b. Nicholls & Crampton's "relation back" argument lacks merit.

Applying North Carolina law would not change the results here. Nicholls & Crampton's argument can be summarized as follows: Richard had not been appointed as Personal Representative of the North Carolina Estate at the time he entered into the contract with Nicholls & Crampton. Therefore, when he later was appointed as Personal Representative of Valerie's Estate, Richard's appointment related back to acts taken by him prior to his appointment.

Generally speaking, both South Carolina and North Carolina law provide that when a personal representative is appointed by a probate court, the appointment relates back in time to give acts undertaken by the person appointed prior to appointment that

are beneficial to the estate the same effect as those occurring after appointment.⁵ In other words, the appointment relates back in time to ratify acts taken by the person appointed prior to formal appointment that are beneficial to the estate.

However, Judge Dukes specifically and correctly found that the relation back statutes of the South Carolina Probate Code (S.C. Code Ann. § 62-3-701) and the North Carolina Probate Code (N.C.G.S.A § 28A-13-1) did not support Nicholls & Crampton's claim against Valerie's Estate. (R.p.11). As Judge Dukes concluded, Nicholls & Crampton's argument ignores the fact that Richard was appointed by the Beaufort County Probate Court as Personal Representative for the Estate of

⁵ The relation back statutes at issue provide as follows:

S.C. Code Ann. § 62-3-701:

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

N.C.G.S.A. § 28A-13-1

The duties and powers of a personal representative commence upon the personal representative's appointment. The powers of a personal representative relate back to give acts by the person appointed **which are beneficial to the estate occurring prior to appointment** the same effect as those occurring thereafter. However, a person named executor in a will may, prior to appointment, carry out written instructions of the decedent relating to the decedent's body, funeral and burial arrangements; provided that a health care agent authorized in a valid health care power of attorney to make body, funeral, and burial arrangements shall have precedence in making these arrangements, both before and after qualification of the decedent's personal representative, to the extent provided in G.S. 32A-19(b). A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative. (emphasis added).

Thus, the powers of a personal representative relate back to give acts by the person appointed as personal representative which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter.

Valerie D'Agostino on January 8, 2010. (R. p. 570). Richard signed the contract with Nicholls & Crampton on June 10, 2010. (R. pp. 533-534). There is no reason why Nicholls & Crampton could not have drafted the contract to provide that Richard was entering into the contract in his capacity as Personal Representative of Valerie D'Agostino's South Carolina estate. In addition, nothing prevented Richard from making sure the contract provided that Valerie's Estate, not him personally, was responsible for Nicholls & Crampton's fees. As Judge Dukes found, "there is no reason why [Nicholls & Crampton] could not have drafted the contract to specify that [Valerie's Estate] was responsible for the fees." (R. p. 9). Accordingly, even if the relation back statutes were applicable this would have no bearing on whether or not the terms of the contract provided that Valerie's Estate was responsible for Nicholls & Crampton's fees. Therefore, neither the North Carolina nor the South Carolina relation back statutes help Nicholls & Crampton.

Finally, in order for the relation back statutes to apply, the actions taken must be beneficial to Valerie's Estate. However, Judge Dukes determined in its Order that it was "far from clear" that Richard's actions and the actions of Nicholls & Crampton were beneficial to Valerie's Estate and found that Nicholls & Crampton "has not shown that the work he performed was beneficial to the Estate of Valerie D'Agostino." (R. pp. 12, 14). Nicholls & Crampton performed work for Richard individually, determining whether North Carolina or South Carolina intestacy law was more financially beneficial to Richard, filing a motion for sanctions on behalf of Richard individually, and negotiating and consenting to a proposed settlement as Richard's attorney. (R. p. 165, line 22-R. p. 166, line 7; R. p. 167, line 15-R. p. 169, line 3; R. p. 174, line 21-R. p.

175, line 17; R. p. 180, line 6–R. p. 181, line 7; R. p. 187, lines 18-24; R. p. 191, lines 2-10; R. pp. 581-583; R. p. 588; and R. p.660-661). In addition, the work of Nicholls & Crampton resulted in at least two additional years of litigation for Valerie’s Estate. (R. p. 376, lines 12-23; R. p. 445, line 5-R. p. 446, line 2). Therefore, there is certainly support for Judge Dukes’ conclusion that Nicholls & Crampton’s and Richard’s actions were not beneficial to Valerie’s Estate and that the relation back statutes of South Carolina and North Carolina therefore do not apply.

c. Nicholls & Crampton’s arguments based on N.C.G.S.A. § 28A-26-6 are not preserved for review.

To the extent that Nicholls & Crampton now argues that N.C.G.S.A § 28A-26-6 prohibited Richard from entering into a contract as personal representative, that argument is not preserved for review. N.C.G.S.A. § 28A-26-6 addresses when a domiciliary personal representative of a nonresident decedent may invoke the jurisdiction of North Carolina courts. Nicholls & Crampton argues that N.C.G.S.A. § 28A-26-6 prohibited Richard from taking any action, including signing the contract, as a foreign personal representative until he was appointed as a personal representative in North Carolina.

Nicholls & Crampton’s arguments relating to N.C.G.S.A. § 28A-26-6 were neither raised to nor ruled upon by Judge Dukes. A review of the entire Record establishes that Nicholls & Crampton did not mention, cite, or otherwise rely upon N.C.G.S.A. § 28A-26-6 during the proceeding before Judge Dukes. In fact, the only North Carolina statute ever mentioned by Nicholls & Crampton is N.C.G.S.A § 28A-13-1, the relation back statute. Because these issues were never raised to Judge Dukes, Judge Dukes never ruled upon them.

d. Even if preserved for review, Nicholls & Crampton's arguments based on N.C.G.S.A. § 28A-26-6 lack merit.

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

Accordingly, Judge Dukes correctly found that the relation back statutes of South Carolina and North Carolina do not apply to the instant case because Richard was the Personal Representative at the time he signed the contract with Nicholls & Crampton.

IV. Special and important reasons do not exist to grant the Petition.

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(a), SCACR. There are no special and important reasons to grant this petition.

First, the Court of Appeals issued an unpublished opinion in this case; therefore, the opinion has no precedential value. Rule 268(d)(2), SCACR (“Memorandum opinions and unpublished orders have no precedential value . . .”).

Second, despite Nicholls & Crampton’s hyperbolic contention that the Court of Appeals’ decision “places South Carolina’s relation back law . . . on shaky ground,” that simply is not the case. Because the Court of Appeals’ decision is based on the two issue

rule, the opinion does not even address South Carolina's relation back law. In addition, Judge Dukes properly applied the relation back statutes of North and South Carolina and determined that they did not apply to this case because (1) Richard was the Personal Representative of Valerie's Estate when he signed the contract with Nicholls & Crampton and did not sign in his representative capacity and (2) there was no benefit to Valerie's Estate.

Finally, none of the considerations governing review, as set forth in Rule 242(b), SCACR, apply in this case. This appeal does not raise any novel issues of law; there was no dissent at the Court of Appeals; there is no conflict between this decision and prior decisions of this Court; there are no substantial constitutional issues; and there is no federal question included in the appeal.

CONCLUSION

For the reasons contained herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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November 30, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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DEC -2 2016

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

Appellate Case No. 2014-002249

IN RE: Estate of Valerie D'Agostino

Nicholls & Crampton, P.A..... Appellant

-vs.-

Estate of Valerie D'Agostino Respondent

CERTIFICATE OF SERVICE

The undersigned, Andrea Smith, hereby avers that she is a Paralegal with TWENGE + TWOMBLEY LAW FIRM, Attorneys for Respondent, and that on the 30th day of November 2016 a true and accurate copy of the attached of Respondent's Return to Petition for a Writ of Certiorari was placed in an envelope with first class postage thereon prepaid through the United States Postal Service and mailed to the following:

Jay A. Mullinax, Esquire
Law Office of Jay A. Mullinax, LLC
2 Park Lane, Suite 303
Hilton Head Island, SC 29928
Attorney for Appellant

BY:



Andrea Smith, Paralegal to
TWENGE + TWOMBLEY LAW FIRM