

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. 2012-212331

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,

Respondent,

v.

The Law Office of Jay A.
Mullinax, LLC,

Petitioner.

CORRECTED APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

Jay A. Mullinax, Esquire
2 Park Lane, Suite 303
Hilton Head Island, SC 29928
(843) 785-6101
Bar No. 68293
Attorney for Petitioner

VOLUME TWO

John R.C. Bowen, Esquire
P.O. Box 21119
Hilton Head Island, SC 29926
(843) 689-5700
Bar No. 791
Attorney for Respondent

Stephen A. Spitz
1134 Clearspring Drive
Charleston, SC 29412
(843) 377-2154
Bar No. 5287

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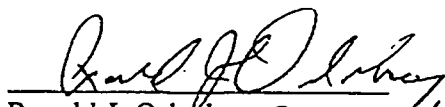
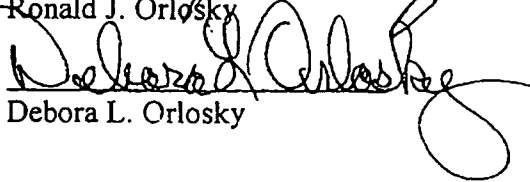
Again, we appreciate the opportunity to work with you in connection with these matters and look forward to our relationship. If you find the above arrangement acceptable, please sign the enclosed copy of this letter and return it to us along with a retainer in the amount of Six Thousand and Forty-Four Dollars (\$6,044.00).

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC


Jay A. Mullinax, Esquire

Enclosure


Ronald J. Orlosky

Debora L. Orlosky

**Law Office of Jay A. Mullinax, LLC
TERMS OF ENGAGEMENT
FOR ESTATE PLANNING SERVICES
FOR RONALD J. ORLOSKY and DEBORA L. ORLOSKY**

I appreciate your decision to retain my firm for your estate planning. This document contains important information about the relationship between you and my firm. My work will be limited strictly to legal services, unless otherwise described in the letter that accompanies this document. You are not relying on me for business, investment, accounting, or valuation decisions, or to investigate the character or credit of other persons or firms (such as insurance companies or investment advisors), unless otherwise specified in the letter.

My Duty to Preserve Your Confidential Information

Estate planning is a personal matter that requires you to disclose sensitive information about your family relationships and financial matters, and it may involve difficult questions. You agree to provide me with all information needed to perform legal services. You will be responsible for making decisions on matters not involving legal determinations. I urge you to make a complete disclosure of your financial matters and your wishes concerning your estate. Failure to do so could make it impossible for me to give proper advice to you. I will not be responsible for consequences caused by your failure to disclose essential information.

The ethics rules require me to keep information that you disclose to me confidential and not to disclose it to persons outside this firm without your permission. I may disclose information to other persons in the firm as needed to do your work, on a "need to know" basis, but I will not make unnecessary disclosures.

If persons outside my firm work with me with your permission (such as your accountant, a bank trust officer, a financial planner, an insurance agent, or another law firm), you agree that I can disclose information to them that they need to fulfill their role in your estate planning. Unless you instruct otherwise, you agree that I can disclose information to them that in my judgment is necessary for your best interests.

My Duty To Share Information With Each of You

I will represent both of you jointly in your estate planning. I owe duties to each of you, and each of you has an obligation to disclose to me all information that is relevant to both spouses' estate planning. You agree that among us (the two of you and my firm), there will be no confidentiality of communications or information, unless and until one of you instructs me otherwise. If one of you discloses information to me that is relevant to the other spouse's estate planning, I can disclose that information to the other spouse if I think it is necessary to fulfill my duties to the other spouse in your estate planning.

Either of you can terminate your permission for me to disclose information to the other spouse at any time, if you give me clear directions not to disclose. However, if you do terminate that permission, I must then decide if a conflict of interest has arisen that prevents me from adequately representing the other spouse. I will make that decision in my sole professional judgment. If I believe that I cannot adequately represent the other spouse without the disclosure, I will notify each of you separately in writing that a conflict of interest has arisen that prevents me from representing either one of you in your estate planning. I could not represent either one of you in your estate planning after that without the consent of both of you. Even if you revoke my permission to disclose information, you should be aware that if there is ever litigation between the two of you, I could be compelled to testify about information obtained from you or about advice that I gave to you in your estate planning.

If this agreement concerning confidentiality is not acceptable to you, you must advise me immediately so that other arrangements can be made.

If You Become Disabled

The ethics rules that govern attorneys state that if you become unable to make adequately considered decisions, whether because of mental disability or other reasons, I may attempt to continue a normal attorney-client relationship with you as much as is possible. Those rules also state that I may seek the appointment of a guardian or to take other actions to protect your interests if I reasonably believe that to be necessary.

You can designate other persons to act on your behalf under a durable power of attorney and to make decisions for you concerning your estate planning, such as making gifts of your assets and signing trust agreements on your behalf. If you authorize someone to act on your behalf, and if I believe their authority is broad enough to allow them to instruct me on your estate planning, you agree that I can continue to do estate planning work for you by dealing with them, and that I can rely on instructions from them. You agree that I can communicate with them and disclose information they need to make informed decisions on your behalf, including information that is protected by the attorney-client privilege. However, if I believe that they do not have the authority to act on your behalf, or if I believe they are not acting in your best interests, I reserve the right to refuse to act on their instructions and instead to take whatever action that I reasonably believe is necessary to protect your interests.

How I Charge for Services Rendered

I usually bill for estate planning work in two ways: a fixed amount (which may be expressed in a range), and an amount based on my time billed at standard hourly rates. I will bill you for my time at my standard hourly rates, unless you and I agree on a fixed amount.

Fixed Fee Arrangements

If I agree on a fixed amount, my fees will not be limited to that amount if you do not accurately disclose information that I request and need for your work, or if you materially change the terms, conditions, scope, or nature of the work after we agreed on the fixed amount. If this happens, you agree to pay me for my time billed at my standard hourly rates, unless we agree on a revised fixed amount.

Hourly Basis Fee Arrangements

I adjust my hourly rates periodically. I consider the ability, experience, and reputation of our lawyers and legal assistants when I set hourly rates. Changes are usually made each January 1, but sometimes they are made at other times. If your bill is based on hourly rates, increases in rates will apply to all time beginning with the month when the rates are changed. Work done before that month will be billed at the hourly rate that was previously in effect.

I generally record and bill my time in quarter hour units. If my or a paralegal's total time on your work is less than one-quarter hour for the entire day, one-quarter hour will be billed for that day. If my or a paralegal's total time on your work is more than one-quarter hour for that day (whether done at one time or not), only the time actually spent will be billed.

Costs and Expenses

I will bill you for out-of-pocket expenses that I pay on your behalf and for my internal costs. Out-of-pocket expenses generally include items such as travel expenses, filing, recording, and registration fees charged by government agencies. My internal costs include things like photocopying, long distance telephone calls, fax transmissions, courier services, terminal time for computer research, and complex document production. Rather than tracking precise and exact costs for every single internal charge (which would ultimately result in higher hourly rates), I charge fixed costs on a reasonable basis for these types of expenses. My charges for these internal costs may exceed the actual direct costs that I pay to outsiders (such as the telephone company or photocopying contractors).

Sometimes it is necessary to hire other persons to provide services for you, such as accounting or appraisal firms. Their work may have more confidentiality if I (rather than you) request their services, and so I may hire them. However, you will be responsible for paying their fees and expenses, whether paid directly to them or to me in reimbursement.

How I Will Bill You

I will bill you periodically for my services and costs. I will attempt to provide as much billing information as you reasonably require. I can discuss with you the various billing formats available that best suit your needs.

If my fees are based on time, bills generally will be rendered on a monthly basis, but sometimes I may bill less frequently. My bills are due when rendered. If a bill is not paid within 30 days after it is mailed to you, interest will accrue on the unpaid balance of that bill beginning on the 30th day and accruing thereafter. Interest charges will apply to specific monthly bills. Payments made on past due accounts will be applied first to the oldest outstanding bill. If the bills are not paid reasonably soon after they are rendered, I reserve the right to stop work until your account is brought current.

If I have to bring collection efforts for payment, you agree that you will be obligated to pay the costs of collection procedures, including reasonable attorneys fees incurred by me (whether paid to the firm or another firm retained by me).

Each of you agrees that you will be jointly and severally responsible for the payment of all amounts owed to me, and that I can seek payment in full from either one of you at my election. An agreement between the two of you to limit your responsibility for payment of amounts owed to me will not be binding upon me unless I also agree in writing to those limits.

I may require a retainer for your work. Unless you and I agree otherwise, the retainer will be applied to the final statement, and any unused portion will be returned to you. I may also request an advance cost deposit (in addition to the advance fee deposit) when I expect to incur substantial costs on your behalf.

Conflicts with Other Clients

Sometimes my firm is asked to represent a client who has interests that are adverse to another client whom I represent in other matters. Just as you may wish to hire other law firms that compete with me, I want to be able to consider representing other persons who may be competitors in your business or occupation or who may have interests that are potentially adverse to yours--but only in matters that are unrelated to the work that I do for you. The ethics rules that govern attorneys permit me to accept multiple representations if certain requirements are met.

While I represent you, I will not represent another client in matters that are directly adverse to your interests unless and until I have made full disclosure to you of all relevant facts, circumstances, and implications. You agree that I can represent other clients whose interests are adverse to yours if I confirm to you in good faith that the following conditions are met: (i) there is no substantial relationship between the other client's matter and my work for you, both now and in the past; (ii) my representation of

the other client will not involve or disclose any confidential information I have received from you (with the use of screening measures, if appropriate); and (iii) the other client also consents to my representation of you, based on full disclosure of all relevant facts, circumstances, and implications.

You agree that these rules will govern your right to object to me representing other clients whose interests are adverse to yours. You will have the right to contest (but only if done in good faith) my statement to you that these conditions have been met. If you make a good faith objection to my statement, I will have the burden of proving that these conditions have been met.

When I finish your work, the attorney-client relationship between us will end unless you and I have expressly agreed to a continuation for other matters. Either you or I can terminate the attorney-client relationship before the work is finished, subject to ethical restraints.

Your Agreement with Me

Your agreement to my representation constitutes your acceptance of these terms and conditions. If any of them are unacceptable to you, please tell me now so that I can resolve any differences and proceed with a clear understanding of our relationship.

Ronald & Debora Orlosky Financial Statement

3/26/2009

Ron 211-38-0203
Deb 664-04-2264



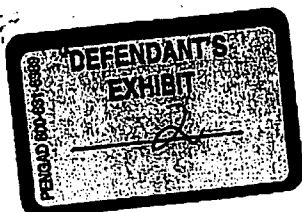
Assets

Schwab Account	6825-5891	\$165,000
Schwab Account	6825-5684	\$197,000
Schwab IRA Account	8404-1743	\$470,000
IRA - Deb		\$112,000
401k - Ron		\$586,000
Stock Options - value before taxes		\$227,000
529 Plan		\$46,000
Manor Development Co. Stock		\$2,600,000
Real Estate		
Hilton Head, SC home		\$850,000
Lake Tahoe house - 1/3 ownership		\$500,000
Smith Ranch condo - 1/3 ownership		\$400,000
Autos		
2004 Saab Aero		\$16,000
2006 Toyota Sienna		\$20,000
1995 Subaru Legacy		\$3,000
Checking & Savings Accounts		
Coastal States Checking Account		\$4,300
Coastal States Checking Account		\$2,000
Coastal States Savings Account		\$57,000
Certificate of Deposit		\$50,000
	Total	\$6,315,300

Liabilities

Line of Credit - Hilton Head property	\$140,000
Credit Card	\$4,000
Total	\$144,000

Net Worth \$6,171,300



ESTATE PLANNING QUESTIONNAIRE

Date: 3/26/09

1. Husband's Full Name: RONALD JOSEPH ORLOSKY
Date of Birth: 1/22/51 Place of Birth: JUNIATOWN, PA
Social Security No. 211-33 0203 U.S. Citizen: Yes ☒ No ☐
Other Names known by: _____
2. Are you presently employed? Yes ☐ No ☒ For how long? _____
Occupation (former if retired): MGR MANUFACTURING SERVICES
Employer: THE HERSHEY COMPANY
Business Address: 100 CAPITAL A DRIVE HERSHEY, PA 17033
Office Telephone No.: _____ Email Address: ORLO246P@ROADRUNNER.COM
Mobile Phone No. 717-805-7924 Fax No.: _____
3. Wife's Full Name: DEBORA LARA ORLOSKY
Date of Birth: 9/25/55 Place of Birth: SAN FRANCISCO, CA
Social Security No. 564-04-2264 U.S. Citizen: Yes ☒ No ☐
Other Names known by: DEBORA LARA (MARRIED NAME)
Are you presently employed? Yes ☒ No ☐ For how long? 36 YRS
Occupation (former if retired): DIRECTOR / VICE PRESIDENT
Employer: MANOR DEVELOPMENT
Business Address: 3100 DUTTON AVE SANTA ROSA, CA
Office Telephone No.: 707-256-2551 Email Address: DLO246@ROADRUNNER.COM
Mobile Phone No. 717-243-4852 Fax No.: _____
4. Home Address: _____ Resident Since: 2007
Street Address/P.O. Box: 1 MARSHVIEW DRIVE
City: HILTON HEAD State: SC Zip Code: 29928-3111
County: BEAUFORT Home Telephone Number: 843-671-6756
Other Residences: _____
5. Advisors:
Accountant: _____
Trust Officer: _____
Insurance Agent: KRISTEN CHAO COSTAL PLAINS INSURANCE
Investment Advisor: JOEL ANDRAGIO CHARLES SCHUBERT
6. Date of Marriage: 3/2/91 Where Living When Married: HUNNELSTOWN, PA 17036
7. Prior Marriages: Husband: Yes ☒ No ☐ Wife: Yes ☒ No ☐

8. Names of children of present marriage, whether natural or adopted:

A. ALEXIS J OALOSKY Phone No.: _____
 Date of Birth: 10/7/90 SSN: _____
 Name of Child's Spouse (if any): _____
 Address: 1 MAASHVIEW DRIVE HILTON HEAD SC 29928
 Grandchild: _____ Date of Birth: _____ SSN: _____
 Grandchild: _____ Date of Birth: _____ SSN: _____
 Grandchild: _____ Date of Birth: _____ SSN: _____

B. VALERIE M OALOSKY Phone No.: _____
 Date of Birth: 7/22/94 SSN: _____
 Name of Child's Spouse (if any): _____
 Address: 1 MAASHVIEW DRIVE HILTON HEAD SC 29928
 Grandchild: _____ Date of Birth: _____ SSN: _____
 Grandchild: _____ Date of Birth: _____ SSN: _____
 Grandchild: _____ Date of Birth: _____ SSN: _____

C. Jessica J Oallosky Phone No.: _____
 Date of Birth: 5/8/92 DOD: 9/23/99 SSN: _____
 Name of Child's Spouse (if any): _____
 Address: _____
 Grandchild: _____ Date of Birth: _____ SSN: _____
 Grandchild: _____ Date of Birth: _____ SSN: _____
 Grandchild: _____ Date of Birth: _____ SSN: _____

9. Names of children of prior marriage (Indicate whether husband's or wife's);

A. DANIEL J OALOSKY (HUSBAND) Phone No.: _____
 Date of Birth: 9/9/77 SSN: _____
 Name of Child's Other Parent: MARILYN REINHART
 Name of Child's Spouse (if any): _____
 Address: 2322 17th STREET PHILADELPHIA PA 19145
 Grandchild: _____ Date of Birth: _____ SSN: _____
 Grandchild: _____ Date of Birth: _____ SSN: _____
 Grandchild: _____ Date of Birth: _____ SSN: _____

B. KEVIN C OALOSKY (HUSBAND) Phone No.: _____
 Date of Birth: 11/10/21 SSN: _____
 Name of Child's Other Parent: MARILYN REINHART
 Name of Child's Spouse (if any): _____
 Address: 3121 ELLWOOD AVE APT #1 RICHMOND VA 23221
 Grandchild: _____ Date of Birth: _____ SSN: _____
 Grandchild: _____ Date of Birth: _____ SSN: _____
 Grandchild: _____ Date of Birth: _____ SSN: _____

C. _____ Phone No.: _____
 Date of Birth: _____ SSN: _____
 Name of Child's Other Parent: _____
 Name of Child's Spouse (if any): _____
 Address: _____
 Grandchild: _____ Date of Birth: _____ SSN: _____
 Grandchild: _____ Date of Birth: _____ SSN: _____
 Grandchild: _____ Date of Birth: _____ SSN: _____

10. Do you have any other relatives dependent upon you for support? Yes ☐ No ☒

(If yes, give names and relationships): _____

11. Names and addresses of other or alternate persons to receive property: _____

12. Please list any specific items or amounts that you wish to give to any individuals or organizations:

NAME

GIFT

13. All other tangible personal property (automobiles, clothing, furniture, pictures, etc.) to be distributed to: (check one)

- ☒ Spouse; if spouse predeceased, to children equally *INCOME STREAM FROM BELOW*
☒ Children equally *FOR ALL OTHER PROPERTY THAN LISTED BELOW*
☒ Other (specify): *TAKE HOUSE, MARRIAGE DEVELOPMENT STOCK, STAFFORD TRUST, CARRIE TRUST TO GO TO ALLEN & VALERIE (50-50)*

14. Do you have a present Will: Yes ☒ No ☐ (If yes, attach a copy) *INCOME TO RONALD FOR DURATION OF HIS LIFE*

15. Have you ever created a trust? Yes ☐ No ☒

If yes, attach a copy and list approximate value: \$ _____

16. Do you have a prenuptial agreement in effect? Yes ☒ No ☐ (If yes, attach a copy) *RON IS EXCLUDED FROM STOCK OWNERSHIP*

17. Do you have any obligations under a divorce decree from a prior marriage? Yes ☐ No ☒ *IN MARRIAGE DEVELOPMENT*

18. Have you ever received a substantial amount by inheritance? Yes ☒ No ☐

If yes, when? *2005* Approximate Amount: \$ *350,000*

19. Are you a beneficiary of a trust that was created by someone else? Yes ☒ No ☐

If yes, attach a copy and list approximate value: \$ _____

20. Do you anticipate receiving an inheritance? Yes ☒ No ☐

If yes, give approximate amount: \$ *400,000*

21. Have you given away more than \$3,000 in money or property to any person in any single year after 1976 (or \$10,000 in 1982 or later)? Yes ☐ No ☒ (If yes, list amounts by years below or on the reverse side)

Year: _____ Amount: \$ _____

Year: _____ Amount: \$ _____

22. Are you receiving or will you receive an annuity? Yes ☐ No ☒
 If yes, to who will the payments be made? _____
 Is this a Life Annuity? Yes ☐ No ☒
 Will the amounts continue after your death? Yes ☐ No ☐
 For how long? _____ What will the amount of each payment be? _____
23. a. Do you now or have you ever participated in a plan maintained by an employer that will provide benefits in the event of your retirement and/or death? Yes ☒ No ☐ Not sure ☐
 b. If yes, have you made any elections with respect to beneficiary designations, survivor benefits, spousal rights, waivers, or forms of payment under your employer's plan(s)? Yes ☒ No ☐
24. Do you presently have, or were you ever a participant in a Qualified Plan or an IRA? Yes ☒ No ☐
25. Please attach copies of your designation of beneficiary form and your most recent IRA and/or retirement plan benefit statements. DEBRA, THEN CHILDREN EQUALLY
26. Who will serve as your personal representative? (Indicate relationship to you.)
 Each spouse for the other? Yes ☒ No ☐ Someone else? _____
 Alternate (if above person(s) unable to serve): DANIEL J ORLOSKY (SON)
27. Your choice to act as guardian of your minor children (if applicable): DANIEL J ORLOSKY
- City and state of residence: PHILADELPHIA, PA 19145
 Alternate(s): _____
 City and state of residence: _____
28. Do you have a safe deposit box? Yes ☐ No ☒
 If yes, where is it located: _____
 Name(s) deposit box is listed under: _____
29. Please circle any of the following states in which you have lived or acquired property while married:
 Arizona Louisiana Texas Idaho Wisconsin
California Nevada Washington New Mexico None
30. Do you own any property in a foreign country? Yes ☐ No ☒
31. Are you concerned that one or more of your children or grandchildren will not behave responsibly with money that you give them? Yes ☒ No ☐
32. Are any of your children or grandchildren attending private school, college, or graduate school? Yes ☒ No ☐ FALL 2009
33. Do you have any relative who regularly incurs significant medical bills? Yes ☐ No ☒

LIST OF ASSETS			
Attach additional sheets if necessary			
Assets	Approximate values		
	Husband	Wife	Joint
Real Estate			
Residence. Address: <u>1 MARSHVIEW DRIVE</u> <u>HILTON HEAD, SC</u>			
Approximate value of residence:			\$ <u>850,000</u>
Approximate mortgage balance:			\$ <u>140,000</u>
Estimated value of furnishings:			<u>200,000</u> +

LIST OF ASSETS

(Attach and attach sheets if necessary)

Assets	Approximate Values		
	Husband	Wife	Joint
Real Estate (continued)			
Other real estate. Address: <i>PARSONS LLS</i> <i>TAHOE CITY, CA</i>		<i>Tahoe House</i> <i>1/3 ownership</i>	<i>Condo 1/3 ownership</i> <i>San Rafael, CA</i>
Approximate value:		<i>\$500,000 1/3</i>	<i>\$400,000 1/3</i>
Approximate mortgage balance:		<i>—</i>	<i>—</i>
Estimated value of furnishings:		<i>\$60,000⁰⁰</i>	<i>—</i>
Stocks			
Publicly traded stock. Name of corporation:			
Type of shares:			
Exchange on which traded:			
Closely-held stock. Name of corporation:			
Type of shares:			
Exchange on which traded:			
Bonds			
Issuer:			
Face Value:			
Interest Rate:			
Maturity Date:			
Mutual Funds			
Name of Fund:			
Fund Group:			
Number of Units:			
Bank Accounts, Certificates of Deposit, Money Market Funds, Etc.			
Name of Bank or Institution:			
Type of Account:			
Approximate Balance or Value:			

LIST OF ASSETS			
Assets	Approximate values		
	Husband	Wife	Joint
Bank Accounts, Certificates of Deposit, Money Market Funds, Etc. (continued)			
Name of Bank or Institution:		Harborside Bank	
Type of Account:		CD	
Approximate Balance or Value:		50,000	
Mortgages, Notes, or Debts (Owed to you by someone else)			
Debtor's Name:			
Date Acquired:			
Approximate Balance Remaining:			
Other Business Interests (Non-Corporate)			
Name of Partnership, Limited Liability Company, or Sole Proprietorship:			
Percentage of Ownership Interest:			
Number of Other Partners or Members in Business:			
Retirement Accounts			
IRAs - Who is it with? VANGUARD			
Balance:			
Pension or Profit Sharing - Who is it with? CHARLES SCHWAB			
Balance:			
Other (indicate type) - Who is it with?			
Balance:			
Annuities (Value to be filled in by attorney)			
Who is it with?			
Principal Value:			
Monthly/Annual Installment:			

LIST OF ASSETS

(Attach additional sheets if necessary)

Assets	Approximate Values		
	Husband	Wife	Joint
Miscellaneous Property			
<u>Motor Vehicles</u> (including boats, etc.) - Describe, List Value and Amount Owed:	2004 SAAB 9-3 \$18,000 1995 SUBARU LEGACY \$20,000 NOTHING OWED	2006 TOYOTA SIENNA \$20,000 NOTHING OWED	
<u>Jewelry and Art</u> - Describe, List Value and Amount Owed:			
<u>Other Valuable Items</u> - Describe, List Value and Amount Owed:			

LIST OF DEBTS

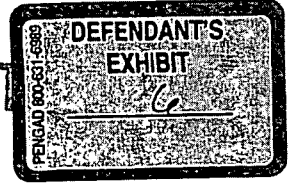
(Attach additional sheets if necessary)

For What Is The Debt Owed And To Whom Is The Debt Owed? (List any mortgages or other substantial debts owed by you that are not shown above)	Approximate Amounts		
	Husband	Wife	Joint
HARRISIDE COMMUNITY BANK LINE OF CREDIT			\$140,000

LIFE INSURANCE

Company	Policy Number	Type of Individual Group	Issue or Effective Date	Face Value	Cash Value	Person Insured	Policy Owner	Beneficiary	Annual Premium	Loan Against Policy
PRINCIPAL	3 842 510	INDIVIDUAL	7/16/87	\$ 74,425	6030	RONALD	RONALD	NEBORA	\$ 48.2	NO

EXHIBIT



November 15, 2009

Manor Development Company
3100 Dutton Avenue, Suite 222
Santa Rosa, CA 95407

Attention: Duke Lang

Dear Duke:

In accordance with our agreement, we have reviewed the Manor Development Co. Shareholder Agreement and the related computations of Estimated Stock Valuation as of June 17, 2009 for the purposes of determining the appropriate redemption price for the shares held by the Estate of Debora L. Orlosky as determined by Article 4 Sections 4.1 through 4.5 of that agreement.

We have not performed any valuation procedures and do not purport to represent that the findings herein are a representation of fair market value. 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 acting under compulsion and when both have reasonable knowledge of the relevant facts.

Article 4 defines "Agreed Upon Value" as the purchase price of Shares to be sold, where there is not a valid third party offer to purchase at a stated price, shall be fair market value. In this case, fair market value shall be Adjusted Book Value as determined in Article 4 (Section 4.2) less appropriate discounts for lack of marketability and lack of control (Section 4.5).

The attached two page summary of stock valuation takes into effect the provisions as outlined in Article 4 and the resultant valuation for a 33.333% interest is \$1,428,284.

If we can be of any further assistance, please contact us.

Very truly yours

A handwritten signature in black ink, appearing to read "Cal B. Kimes".

Cal B. Kimes, Partner
Pisenti & Brinker LLP

enclosures

Local partnership. Global solutions.

3550 Round Barn Blvd., Suite 100, Santa Rosa, CA 95403
(707) 542-3343 • Fax (707) 527-5608

Offices in Santa Rosa, Petaluma and Napa www.pbllp.com
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Manor Development Corporation
Calculation of Agreed Upon Value per Shareholder Agreement
17-Jun-09

Assets:

Cash checking	137,494	
Cash savings	200,650	
Wells Fargo brokerage	1,000,000	
Stock - Changing Parameters	571,908	
Net adjusted value of buildings (see attached)	14,636,998	
Net adjusted value of vacant land (see attached)	492,533	
Other assets	<u>55,888</u>	
Total Assets		17,095,471

Liabilities:

Current liabilities	32,919	
Deposits	18,468	
Notes payable	9,008,391	
Prepayment penalties	<u>894,271</u>	
Total Liabilities		<u>9,954,049</u>

Net value before discounts	7,141,422
Discount for lack of marketability (20%)	<u>(1,428,284)</u>
Net value after marketability discount	5,713,138
Discount for lack of control (25%)	<u>(1,428,284)</u>
Agreed upon value	<u><u>4,284,853</u></u>
One-third thereon	<u><u>1,428,284</u></u>

Manor Development Corporation
Calculation of Adjusted Value of Real Property
17-Jun-09

Value of Income Properties (per The Crocker Company appraisal)	20,710,000	
Selling expense @ 6%	<u>(1,242,600)</u>	
Net Sale Price	19,467,400	19,467,400
Cost - Land	411,381	
Cost - Buildings	11,108,068	
Less accumulated depreciation	<u>(4,128,054)</u>	
	<u>7,391,395</u>	<u>7,391,395</u>
Gain on sale	<u>12,076,005</u>	
Less Federal and State tax 40%		<u>4,830,402</u>
Net adjusted value of buildings		<u>14,636,998</u>
Vacant Land		
Oak Manor II - 2.5 acres	640,000	
Selling expense @ 10%	<u>(64,000)</u>	
Net Sale Price	576,000	576,000
Cost	<u>(367,333)</u>	
Gain on sale	<u>208,667</u>	
Less Federal and State tax 40%	<u>83,467</u>	
Net adjusted value of vacant land		<u>492,533</u>

Manor Development Corporation
Calculation of Agreed Upon Value per Shareholder Agreement
17-Jun-09

Section 4.2 Adjusted Book Value

Shareholders' equity per Company's balance sheet		784,939

4.2(a) Real property adjustment (see attached schedule)

Net adjusted value of buildings	14,636,998	
Net adjusted value of vacant land	<u>492,533</u>	
	15,129,531	
Book value	<u>(7,878,777)</u>	7,250,754

4.2(b) Not applicable

4.2(c) Unrecorded liabilities - Prepayment penalties		(894,271)

4.2(d) Not applicable - tax effect included in 4.2(a) above

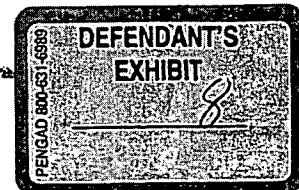
4.2(e) Not applicable

4.2(f) Not applicable

Net value before discounts	7,141,422	
Discount for lack of marketability (20%)	<u>(1,428,284)</u>	
Net value after marketability discount	5,713,138	
Discount for lack of control (25%)	<u>(1,428,284)</u>	
Agreed upon value	<u><u>4,284,853</u></u>	

One-third thereon		<u><u>1,428,284</u></u>

EXHIBIT



BUY SELL AGREEMENT STOCK VALUE - MARCH 14 2006

March 14, 2006 - Income Properties value as of 12/31/2005

Value of Income Properties

		18,505,362.00
Selling expense @ 7%		<u>-1,149,339.45</u>
Net Sale Price	17,356,022.55	17,356,022.55
Cost - Land	468,120.00	
Cost - Buildings	7,551,201.00	
Depreciation	<u>(2,864,188.00)</u>	
BASE	5,155,133.00	<u>5,155,133.00</u>
Taxable Income	12,200,889.55	
State tax @ 9.1%	1,110,280.95	
Fed tax @ 30%	<u>3,660,266.87</u>	
Total Tax	4,770,547.81	(3,954,833.06)

Liquidated Value 13,401,189.49

VACANT LAND

Oak Manor II - 4.5 Acres

Total 4.5 Acres @ \$250,000 per acre

Less: Selling expense @10%

Net Sale Price	985,000.00	1,125,000.00
Cost	<u>335,750.00</u>	<u>(140,000.00)</u>
Taxable Income	649,250.00	985,000.00
state @ 9.1%	59,081.75	
Fed @ 30%	<u>194,775.00</u>	
Less: Total Tax	253,856.75	<u>(361,381.75)</u>

Liquidated Value La 623,618.25

Total Liquidated Value Land & Bldgs.

14,024,807.74

Page 1 of 2

SUMMARY - BUY SELL AGREEMENT March 14, 2006

Assets -12/31/2004

Cash	58,211.46	
Stock - Rydex	2,033,746.00	
Income Property	13,401,189.49	
Vacant Property	623,618.25	
Autos & Equipment	<u>36,000.00</u>	
TOTAL ASSETS		\$16,152,765.20

LIABILITIES

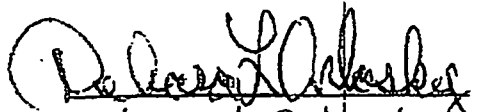
NOTES PAYABLE	9,524,802.00	
TOTAL LIABILITIES		\$9,524,802.00

LIQUIDATED VALUE - MARCH 14, 2006 **\$6,627,963.20**

VALUE PRE SHARE (91.75 shares) **\$72,239.38**

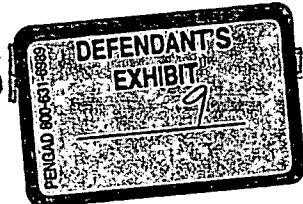
Page 2 of 2


Pamela Jean Miles


Debora L Orlowsky

COPY
Deb

EXHIBIT



ANNUAL SHAREHOLDER'S MEETING
OF
MANOR DEVELOPMENT CO.
A California Corporation
March 6, 2007

According to the notice of the annual meeting, a signed copy being attached hereto, the Annual Meeting of the Shareholders of Manor Development Co. was called to order by Boyd R. Lang Jr. (Duke) at 10:00 on March 06, 2007 at the office of the corporation at 3100 Dutton Avenue, Suite #222, Santa Rosa California.

Upon noting the presence of all shareholders either in person or by telephone the President stated that a quorum of shareholders was present. The President submitted the form of Notice of the Annual Meeting, and then read the roll of stockholders as they appear on the books of the Corporation.

Upon a motion duly made, seconded and carried, the President was directed to attach a copy of the Notice to these Minutes.

Upon a request by the President, the Treasurer presented her report. The Treasurer stated that the accounts, Pinenti & Brinker are still making their annual adjustments to the books, but she estimated that the company would show an operating gain of \$47,000.00 for the year of 2006. After discussion, the report was approved and on motion duly made and seconded, the President was directed to attach a copy of the report to these Minutes.

Attached to the Treasurer's report was the annual valuation of the stock of the corporation.

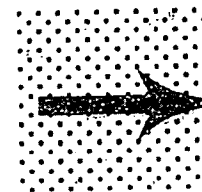
Upon a motion duly made, seconded and upon a vote it was;

RESOLVED that; the valuation of the Corporation Stock as referred to in the Buy-sell Agreement from this date until changed will be \$ 74,404.66 per share.

The next order of business was the election of Directors to serve for the next year. The following were duly nominated and were, upon affirmative vote of the stockholders, elected as directors of the Corporation to serve the term set forth in the By-Laws of the Corporation or until their successors are elected. All being present accepted.

Boyd R. Lang Jr. - President
Pamela J. Miles - Secretary / Treasurer
Debora L. Orlosky - Vice President

SIGN
HERE



Shareholders Meeting Cont.

The President then read his report of the activities for the last year. The report to be made part of these minutes.

After discussion and due deliberation by the shareholders, upon motion duly made, seconded and carried by affirmative vote it was:

RESOLVED, that all of the decisions made and acts and action taken by the Board of Directors and the officers of the corporation since the last meeting of the shareholders are ratified and approved.

The president then gave notice to the directors that according to the bylaws of the Corporation, the annual meeting of the Directors would convene upon the close of this meeting.

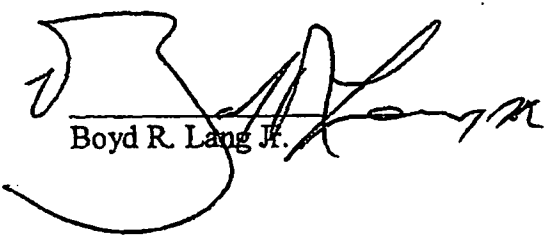
There being no further business, on motion duly made, seconded and carried, the meeting was adjourned.

Pamela J. Miles, Secretary /Treasurer

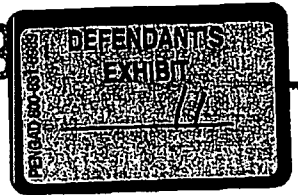
SHAREHOLDERS APPROVAL;

Debora L. Orlosky

Pamela J. Miles



Boyd R. Lang Jr.



**TREASURER'S REPORT
TO THE
STOCKHOLDERS
OF
MANOR DEVELOPMENT CO.**

MARCH 6, 2007

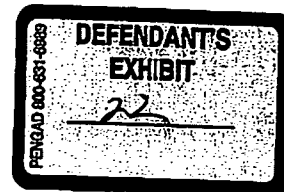
As Treasurer, I have reviewed the company books for the year of 2006. The company books have been submitted to the accountants Pisenti & Brinker for tax preparation. For the year ending December 31, 2004, Manor Development Co. showed and operating gain of \$47,000.00. The Federal and State tax returns are being prepared, and will be signed by the Company President, Boyd Lang Jr. when they are completed.

The annual revaluation of the corporation stock (*as of this date 3/06/07*) has been prepared. This valuation is based on the year-end assets, liabilities, income and expenses for the year 2006. A copy of the calculations which show a value of \$ 74,404.66 per share have been attached hereto.

As Treasurer I hereby recommend that the Stockholders establish the value of the stock for the Buy / Sell Agreement at \$74,404.66 per share.

BY _____

Pamela J. Miles
Secretary / Treasurer,
Manor Development Co.



LAW OFFICE OF JAY A. MULLINAX, LLC
THE COURTYARD BUILDING
32 OFFICE PARK ROAD, SUITE 211
HILTON HEAD ISLAND, SC 29928
Tel: (843) 785-6101 Fax: (843) 785-6104
www.sc-estateplanning.com

June 30, 2009

VIA U.S. POSTAL SERVICE
Probate Court for Beaufort County
102 Ribaut Road, Room 100
Beaufort, SC 29902

Re: Estate of: Debora Laura Orlosky
Probate File No.: NOT YET ASSIGNED

Dear Sir/Madam:

Relative to the above captioned, I am enclosing an original and one (1) copy of the Application and Petition for Probate of Will and Appointment (Form #300PC) and Affidavit (Form #150PC). Also enclosed is an original and one (1) copy of an Affidavit of No Personal Property Memorandum. Lastly, I am enclosing the original Last Will and Testament, and an original Certificate of Death. Please file the originals and return the clocked copies to me in the enclosed self-addressed, stamped envelope. Our firm's check in the amount of Seventy Dollars (\$70.00) is enclosed for the initial filing fee.

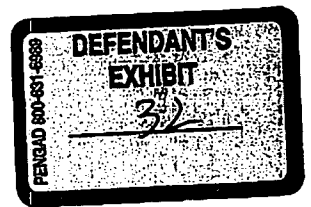
If you have any questions or require anything further to appoint the personal representative and open the estate file, please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your time and attention to this matter.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

/Enclosures
JAM:rkm



LAW OFFICE OF JAY A. MULLINAX, LLC
THE COURTYARD BUILDING
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Tel: (843) 785-6101 Fax: (843) 785-6104
www.sc-estateplanning.com

July 9, 2009

VIA U.S. POSTAL SERVICE

Attn: Devan Kociuruba, Deputy Clerk
Probate Court for Beaufort County
102 Ribaut Road, Room 100
Beaufort, SC 29902

Re: Estate of: Debora Laura Orlosky
Probate File No.: 2009-ES-0700512

Dear Sir/Madam:

Pursuant to your request, enclosed please find a copy of the trust page naming the trustee in the above referenced estate.

If you have any questions or require anything further, please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your time and attention to this matter.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

/Enclosures
JAM:rkkm



LAW OFFICE OF JAY A. MULLINAX, LLC
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www.sc-estateplanning.com

July 9, 2009

VIA U.S. POSTAL SERVICE

Attn: Devan Kociuruba, Deputy Clerk
Probate Court for Beaufort County
102 Ribaut Road, Room 100
Beaufort, SC 29902

Re: Estate of: Debora Laura Orlosky
Probate File No.: 2009-ES-0700512

Dear Sir/Madam:

Please allow this correspondence to serve as a request for twenty (20) additional Certificates of Appointment as Personal Representative in the above referenced matter. Enclosed please find a check in the amount of Ten Dollars (\$10.00) to cover the costs for the certificates.

If you have any questions or require anything further, please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your time and attention to this matter.

Sincerely yours,

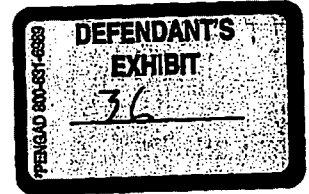
LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

/Enclosure
JAM:rkmm

LAW OFFICE OF JAY A. MULLINAX, LLC

**THE COURTYARD BUILDING
32 OFFICE PARK ROAD, SUITE 211
HILTON HEAD ISLAND, SC 29928
Tel: (843) 785-6101 Fax: (843) 785-6104
www.sc-estateplanning.com**



July 20, 2009

VIA U.S. POSTAL SERVICE

**Attn: Devan Kociuruba, Deputy Clerk
Probate Court for Beaufort County
102 Ribaut Road, Room 100
Beaufort, SC 29902**

**Re: Estate of: Debora Laura Orlosky
Probate File No.: 2009-ES-07-00512**

Dear Ms. Kociuruba:

Relative to the Estate of Debora Laura Orlosky, I am enclosing an original and one (1) copy of the Information to Heirs and Devisees (Form 305PC) and Proof of Delivery (Form 120PC). Please file the original and return clocked copies to me in the self-addressed stamped envelope provided for your convenience.

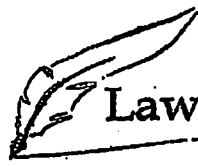
If you have any questions or require anything further, please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your time and attention to this matter.

Sincerely,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

**/Enclosures
JAM:rkcm**



Law Office of Jay A. Mullinax, LLC

**THE COURTYARD BUILDING
32 OFFICE PARK ROAD, SUITE 211
HILTON HEAD ISLAND, SC 29928**

September 22, 2009

VIA U.S. POSTAL SERVICE

**Attn: Devan Kociuruba, Deputy Clerk
Probate Court for Beaufort County
102 Ribaut Road, Room 100
Beaufort, SC 29902**

Re: Estate of: Debora Laura Orlosky
Probate File No.: 2009-ES-0700512

Dear Ms. Kociuruba:

Enclosed please find an original and one (1) copy of a Motion for Extension (Form #352PC) in regard to the above referenced estate. Please file the original and return a clocked copy to me in the self-addressed stamped envelope provided for your convenience.

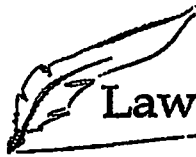
If you have any questions or require anything further, please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your time and attention to this matter.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

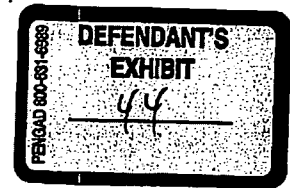
/Enclosures
JAM:rkkm



Law Office of Jay A. Mullinax, LLC

THE COURTYARD BUILDING
32 OFFICE PARK ROAD, SUITE 211
HILTON HEAD ISLAND, SC 29928

October 9, 2009



VIA U.S. POSTAL SERVICE

David G. Bjornstrom
P.O. Box 1498
Santa Rosa, CA 95402-1498

Re: Estate of Debora Laura Orlosky

Dear Mr. Bjornstrom:

As you are aware, I am the attorney representing Ronald Joseph Orlosky as Personal Representative for the Estate of Debora Laura Orlosky and as Trustee of the Debora Laura Orlosky Revocable Trust. In that capacity, I am collecting information and arranging for the final disposition of the assets of Debora Laura Orlosky.

Our records indicate that Debora Laura Orlosky had an ownership interest in the following real estate:

751 Deer Valley Road, San Rafael, California (Parcel #155-420-08)

In order to administer Debora Laura Orlosky's estate we require the value of Mrs. Orlosky's interest in the aforementioned property, as of June 17, 2009. Based on our records, the Estate of Boyd R. Lang listed Debora Laura Orlosky as an anticipated successor in interest to 1/3rd interest in the San Rafael, California property. Please provide us with the value of the above listed property at your earliest convenience. Additionally, please provide us with any property appraisals or other information that was used in the valuation of the property.

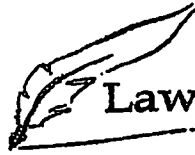
If you have any questions please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your assistance in this matter.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

JAM:rk
Cc: Ronald Joseph Orlosky



Law Office of Jay A. Mullinax, LLC

**THE COURTYARD BUILDING
32 OFFICE PARK ROAD, SUITE 211
HILTON HEAD ISLAND, SC 29928**

October 9, 2009



VIA U.S. POSTAL SERVICE

**David G. Bjornstrom
P.O. Box 1498
Santa Rosa, CA 95402-1498**

Re: Estate of Debora Laura Orlosky

Dear Mr. Bjornstrom:

As you are aware, I am the attorney representing Ronald Joseph Orlosky as Personal Representative for the Estate of Debora Laura Orlosky and as Trustee of the Debora Laura Orlosky Revocable Trust. In that capacity, I am collecting information and arranging for the final disposition of the assets of Debora Laura Orlosky.

Our records indicate that Debora Laura Orlosky had an ownership interest in the following real estate:

**3301 Dardanelles Avenue, Tahoe City, California
(Lot 95, Dollar Point Unit No. 2 AP#93-091-16)**

In order to administer Debora Laura Orlosky's estate we require the value of Mrs. Orlosky's interest in the aforementioned property, as of June 17, 2009. Based on our records, the late Boyd R. Lang gifted interest in the Tahoe City, California property to Mrs. Orlosky over the course of several years. If you are aware of it, please provide us with an approximate percentage of Mrs. Orlosky's undivided interest and the value of the above listed property at your earliest convenience. Additionally, please provide us with any property appraisals or other information that was used in the valuation of the property. If you do not have any of this information, please advise us if you are aware of who might have it.

If you have any questions please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your assistance in this matter.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

JAM:rkm

Cc: Boyd "Duke" Lang, Jr. & Ronald Joseph Orlosky



Law Office of Jay A. Mullinax, LLC

**THE COURTYARD BUILDING
32 OFFICE PARK ROAD, SUITE 211
HILTON HEAD ISLAND, SC 29928**



October 15, 2009

VIA U.S. POSTAL SERVICE

**Ms. Connie Simmons, Deputy Clerk
Beaufort County Probate Court
102 Ribaut Road, Room 100
Beaufort, SC 29902**

**Re: Estate of: Debora Laura Orlosky
Probate File No.: 2009-ES-07-00512**

Dear Ms. Simmons:

Relative to the Estate of Debora Laura Orlosky, I am enclosing an original and one (1) copy of the Inventory and Appraisement: Original. Please file the original and return a clocked copy to me in the envelope provided. Also, please note that in Schedule 'A', 'B' and 'E' there is some information missing. We are currently in the process of retrieving this information and plan to file a Supplemental Inventory and Appraisement upon our receipt of this information.

If you have any questions or require anything further, please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your continued assistance.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

**/Enclosures
JAM:rkm**



From: orlo2468@roadrunner.com
Sent: Thu 12/17/2009 10:17 AM
To: jay@mullinax-law.com
Subject: Bjornstrum

Jay, did you make contact with Bjornstrum? If not, I'll call Duke to discuss this matter with him directly.

Also, to better help me understand, can you tell me the court case you cited that doesn't allow for the capital gains tax deduction on an asset-based valuation. Or if you can, e-mail a synopsis to me, that would be great.

Regardless of where we end up on the price, I want to sell. So if we have to make a written notice to Manor today because of the 6 month timing, then we need to do it.

Thanks.

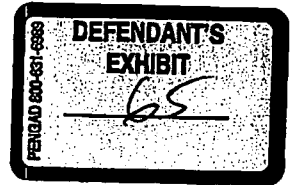
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Ron Orlosky
843-671-6756 (h)
717-805-7924 (c)
orlo2468@roadrunner.com



Law Office of Jay A. Mullinax, LLC

**2 PARK LANE, SUITE 303
HILTON HEAD ISLAND, SC 29928**



January 14, 2010

VIA U.S. POSTAL SERVICE

**Ms. Connie Simmons, Deputy Clerk
Beaufort County Probate Court
102 Ribaut Road, Room 100
Beaufort, SC 29902**

**Re: Estate of: Debora Laura Orlosky
Probate File No.: 2009-ES-07-00512**

Dear Ms. Simmons:

Relative to the Estate of Debora Laura Orlosky, please be advised that we are still currently in the process of retrieving information relative to the filing of a Supplemental Inventory and Appraisalment. As soon as this information is made available to us, we will forward a Supplemental Inventory and Appraisalment to the Probate Court.

If you have any questions or require anything further, please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your continued assistance in this matter.

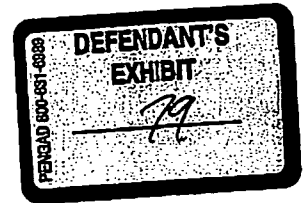
Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

JAM:rkcm

LAW OFFICE OF JAY A. MULLINAX, LLC
THE COURTYARD BUILDING
32 OFFICE PARK ROAD, SUITE 211
HILTON HEAD ISLAND, SC 29928
Tel: (843) 785-6101 Fax: (843) 785-6104
www.sc-estateplanning.com



June 23, 2009

VIA US POSTAL SERVICE / FACSIMILE

Bank of America, N.A.
Credit Inquiry Section
Mail Stop SC-250-02-46
Columbia, SC 29202-3289

Re: Estate of Debora Laura Orlosky
Interest Checking Account:
Regular Checking Account:
Fixed Term CD:

To Whom It May Concern:

As we discussed, I am the attorney representing Ronald Joseph Orlosky as Personal Representative for the Estate of Debora Laura Orlosky. In that capacity, I am collecting information and arranging for the final disposition of the assets of Debora Laura Orlosky.

Our records indicate that Debora Laura Orlosky had several accounts with your institution. We have enclosed an Account Statement for your reference. In order to administer Debora Laura Orlosky's estate we require the value of these accounts, including interest, as of June 17, 2009. Please respond by _____, with this information.

For your reference, I am enclosing a copy of the Death Certificate Debora Laura Orlosky, the Beaufort County, South Carolina Probate Court's Certificate of Appointment—appointing Ronald Joseph Orlosky as Personal Representative of the Debora Laura Orlosky Estate, and Authorization to Release Information.

Please contact me at 843-785-6101 if you have any questions. Thank you for your assistance in this matter.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

Enclosures JAM:ink

LAW OFFICE OF JAY A. MULLINAX, LLC

**THE COURTYARD BUILDING
32 OFFICE PARK ROAD, SUITE 211
HILTON HEAD ISLAND, SC 29928
Tel: (843) 785-6101 Fax: (843) 785-6104
www.sc-estateplanning.com**

July 2, 2009

VIA COURIER

**Attn: Ansley Grogan
Harbourside Community Bank
852 William Hilton Parkway
Hilton Head Island, SC 29926**

Re: Ronald J. Orlosky and Debora L. Orlosky

Dear Ms. Grogan:

Enclosed please find a Certified Copy of the Certificate of Death of the late Mrs. Debora Laura Orlosky.

If you have any questions or require anything further, please do not hesitate to contact my paralegal, Rachel Michaud or myself.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

**/Enclosures
JAM:rkm**

LAW OFFICE OF JAY A. MULLINAX, LLC
THE COURTYARD BUILDING
32 OFFICE PARK ROAD, SUITE 211
HILTON HEAD ISLAND, SC 29928
Tel: (843) 785-6101 Fax: (843) 785-6104
www.sc-estateplanning.com

July 9, 2009

VIA U.S. POSTAL SERVICE

Attn: Ansley Grogan
Harbourside Community Bank
852 William Hilton Parkway
Hilton Head Island, SC 29926

Re: Estate of Debora Laura Orlosky
Acct #: 5141211894 (CD)

Dear Ms. Grogan:

Please be advised that I am the attorney representing Ronald Joseph Orlosky as Personal Representative for the Estate of Debora Laura Orlosky. In that capacity, I am collecting information and arranging for the final disposition of the assets of Debora Laura Orlosky.

Our records indicate that Debora Laura Orlosky had several accounts with your institution. In order to administer Debora Laura Orlosky's estate we require the value of these accounts, including interest, as of June 17, 2009. Please respond by July 31, 2009, with this information.

For your reference, I am enclosing a copy of the Death Certificate of Debora Laura Orlosky, the Beaufort County, South Carolina Probate Court's original Certificate of Appointment—appointing Ronald Joseph Orlosky as Personal Representative of the Debora Laura Orlosky Estate, and a copy of two (2) Authorizations to Release Information.

If you have any questions please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your assistance in this matter.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

/Enclosures

JAM:rkm

Cc: Ronald Joseph Orlosky (without enclosures)

LAW OFFICE OF JAY A. MULLINAX, LLC

**THE COURTYARD BUILDING
32 OFFICE PARK ROAD, SUITE 211
HILTON HEAD ISLAND, SC 29928
Tel: (843) 785-6101 Fax: (843) 785-6104
www.sc-estateplanning.com**

July 10, 2009

VIA U.S. POSTAL SERVICE

NowU
Pennsylvania 529 Investment Plan
P.O. Box 55378
Boston, MA 02205-5378

Re: Estate of Debora Laura Orlosky
Acct #: 575355380-01

Dear Sir or Madam:

Please be advised that I am the attorney representing Ronald Joseph Orlosky as Personal Representative for the Estate of Debora Laura Orlosky and as Trustee of the Debora Laura Orlosky Revocable Trust. In that capacity, I am collecting information and arranging for the final disposition of the assets of Debora Laura Orlosky.

Our records indicate that Debora Laura Orlosky had several accounts with your institution. In order to administer Debora Laura Orlosky's estate we require the value of these accounts, including interest, as of June 17, 2009. Please respond by August 21, 2009, with this information.

Also, please advise us if Mrs. Orlosky made the Internal Revenue Code §529(c)(2)(B) five-year averaging election for excess contributions to the 529 plan within five years of June 17, 2009. If she did make such an election within this timeframe, please advise us of the amount(s) and time(s) of her contribution(s) and election(s).

For your reference, I am enclosing a copy of the Death Certificate of Debora Laura Orlosky, the Beaufort County, South Carolina Probate Court's Certificate of Appointment—appointing Ronald Joseph Orlosky as Personal Representative of the Debora Laura Orlosky Estate, respective pages of the Debora Laura Orlosky Revocable Trust naming Ronald Joseph Orlosky as Trustee, and two (2) Authorizations to Release Information.

If you have any questions please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your assistance in this matter.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

/Enclosure
JAM:rk

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August 10, 2009

VIA U.S. POSTAL SERVICE
Changing Parameters Fund
259 Oak Grove Ave
Menlo Park, CA 94025

Re: Estate of Debora Laura Orlosky
Acct #: 100321

Dear Sir or Madam:

Please be advised that I am the attorney representing Ronald Joseph Orlosky as Personal Representative for the Estate of Debora Laura Orlosky and as Trustee of the Debora Laura Orlosky Revocable Trust. In that capacity, I am collecting information and arranging for the final disposition of the assets of Debora Laura Orlosky.

Our records indicate that Debora Laura Orlosky had several accounts with your institution. In order to administer Debora Laura Orlosky's estate we require the value of these accounts, including interest, as of June 17, 2009. Please respond by August 21, 2009, with this information.

For your reference, I am enclosing a copy of the Death Certificate of Debora Laura Orlosky, the Beaufort County, South Carolina Probate Court's Certificate of Appointment—appointing Ronald Joseph Orlosky as Personal Representative of the Debora Laura Orlosky Estate, respective pages of the Debora Laura Orlosky Revocable Trust naming Ronald Joseph Orlosky as Trustee, and two (2) Authorizations to Release Information.

If you have any questions please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your assistance in this matter.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

/Enclosures
JAM:rk
Cc: Ronald Joseph Orlosky

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August 10, 2009

VIA U.S. POSTAL SERVICE

Attn: Beth Birdwell
Coastal States Bank
P.O. Box 4800
Hilton Head Island, SC 29938

Re: Estate of Debora Laura Orlosky

Dear Ms. Birdwell:

Please be advised that I am the attorney representing Ronald Joseph Orlosky as Personal Representative for the Estate of Debora Laura Orlosky and as Trustee of the Debora Laura Orlosky Revocable Trust. In that capacity, I am collecting information and arranging for the final disposition of the assets of Debora Laura Orlosky.

Our records indicate that Debora Laura Orlosky had several accounts with your institution. In order to administer Debora Laura Orlosky's estate we require the value of these accounts, including interest, as of June 17, 2009. Please respond by August 21, 2009, with this information.

For your reference, I am enclosing a copy of the Death Certificate of Debora Laura Orlosky, the Beaufort County, South Carolina Probate Court's Certificate of Appointment—appointing Ronald Joseph Orlosky as Personal Representative of the Debora Laura Orlosky Estate, respective pages of the Debora Laura Orlosky Revocable Trust naming Ronald Joseph Orlosky as Trustee, and two (2) Authorizations to Release Information.

If you have any questions please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your assistance in this matter.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

/Enclosures
JAM:rkm
Cc: Ronald Joseph Orlosky

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www.sc-estateplanning.com

August 10, 2009

VIA U.S. POSTAL SERVICE

Attn: Jeff Anderton, Investment Advisor
Charles Schwab & Co.
22A N. 2nd Street
Harrisburg, PA 17101

Re: Estate of Debora Laura Orlosky
Acct #: 6825-5891, Acct #: 6825-5684, and Acct #: 8404-1743 (IRA)

Dear Mr. Anderton:

Please be advised that I am the attorney representing Ronald Joseph Orlosky as Personal Representative for the Estate of Debora Laura Orlosky and as Trustee of the Debora Laura Orlosky Revocable Trust. In that capacity, I am collecting information and arranging for the final disposition of the assets of Debora Laura Orlosky.

Our records indicate that Debora Laura Orlosky had several accounts with your institution. In order to administer Debora Laura Orlosky's estate we require the value of these accounts, including interest, as of June 17, 2009. Please respond by August 21, 2009, with this information.

For your reference, I am enclosing a copy of the Death Certificate of Debora Laura Orlosky, the Beaufort County, South Carolina Probate Court's Certificate of Appointment—appointing Ronald Joseph Orlosky as Personal Representative of the Debora Laura Orlosky Estate, respective pages of the Debora Laura Orlosky Revocable Trust naming Ronald Joseph Orlosky as Trustee, and two (2) Authorizations to Release Information.

If you have any questions please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your assistance in this matter.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

/Enclosures
JAM:rk
Cc: Ronald Joseph Orlosky

LAW OFFICE OF JAY A. MULLINAX, LLC

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August 27, 2009

VIA U.S. POSTAL SERVICE

Beth Birdwell
Coastal States Bank
P.O. Box 4800
Hilton Head Island, SC 29938

Re: Estate of Debora Laura Orlosky

Dear Ms. Birdwell:

As you may know, I am the attorney representing Ronald Joseph Orlosky as Personal Representative for the Estate of Debora Laura Orlosky and as Trustee of the Debora Laura Orlosky Revocable Trust. Please allow this correspondence to serve as a follow up regarding my prior written request (enclosed) for the collection of the late Mrs. Orlosky's account information.

Our records indicate that Debora Laura Orlosky had several accounts with your institution. In order to administer Debora Laura Orlosky's estate we require the value of these accounts, including interest, as of June 17, 2009. Please provide this information by September 8, 2009 as it is required in order to administer Mrs. Orlosky's estate. Please advise me if you are unable to provide the requested information by September 8, 2009.

I previously provided to you, copies of the Death Certificate of Debora Laura Orlosky, the Beaufort County, South Carolina Probate Court's Certificate of Appointment—appointing Ronald Joseph Orlosky as Personal Representative of the Debora Laura Orlosky Estate, respective pages of the Debora Laura Orlosky Revocable Trust naming Ronald Joseph Orlosky as Trustee, and two (2) Authorizations to Release Information.

If you have any questions please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your assistance in this matter.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

/Enclosure
JAM:rk

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August 27, 2009

VIA U.S. POSTAL SERVICE

Changing Parameters Fund
259 Oak Grove Ave
Menlo Park, CA 94025

Re: Estate of Debora Laura Orlosky
Acct #: 100321

Dear Sir or Madam:

As you may know, I am the attorney representing Ronald Joseph Orlosky as Personal Representative for the Estate of Debora Laura Orlosky and as Trustee of the Debora Laura Orlosky Revocable Trust. Please allow this correspondence to serve as a follow up regarding my prior written request (enclosed) for the collection of the late Mrs. Orlosky's account information.

Our records indicate that Debora Laura Orlosky had several accounts with your institution. In order to administer Debora Laura Orlosky's estate we require the value of these accounts, including interest, as of June 17, 2009. Please provide this information by September 8, 2009 as it is required in order to administer Mrs. Orlosky's estate. Please advise me if you are unable to provide the requested information by September 8, 2009.

I previously provided to you, copies of the Death Certificate of Debora Laura Orlosky, the Beaufort County, South Carolina Probate Court's Certificate of Appointment—appointing Ronald Joseph Orlosky as Personal Representative of the Debora Laura Orlosky Estate, respective pages of the Debora Laura Orlosky Revocable Trust naming Ronald Joseph Orlosky as Trustee, and two (2) Authorizations to Release Information.

If you have any questions please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your assistance in this matter.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

/Enclosure
JAM:rkcm

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HILTON HEAD ISLAND, SC 29928
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August 27, 2009

VIA U.S. POSTAL SERVICE

NowU
Pennsylvania 529 Investment Plan
P.O. Box 55378
Boston, MA 02205-5378

Re: Estate of Debora Laura Orlosky
Acct #: 575355380-01

Dear Sir or Madam:

As you may know, I am the attorney representing Ronald Joseph Orlosky as Personal Representative for the Estate of Debora Laura Orlosky and as Trustee of the Debora Laura Orlosky Revocable Trust. Please allow this correspondence to serve as a follow up regarding my prior written request (enclosed) for the collection of the late Mrs. Orlosky's account information.

Our records indicate that Debora Laura Orlosky had several accounts with your institution. In order to administer Debora Laura Orlosky's estate we require the value of these accounts, including interest, as of June 17, 2009. Please provide this information by September 8, 2009 as it is required in order to administer Mrs. Orlosky's estate. Please advise me if you are unable to provide the requested information by September 8, 2009.

Also, please advise us if Mrs. Orlosky made the Internal Revenue Code §529(c)(2)(B) five-year averaging election for excess contributions to the 529 plan within five years of June 17, 2009. If she did make such an election within this timeframe, please advise us of the amount(s) and time(s) of her contribution(s) and election(s).

I previously provided to you, copies of the Death Certificate of Debora Laura Orlosky, the Beaufort County, South Carolina Probate Court's Certificate of Appointment—appointing Ronald Joseph Orlosky as Personal Representative of the Debora Laura Orlosky Estate, respective pages of the Debora Laura Orlosky Revocable Trust naming Ronald Joseph Orlosky as Trustee, and two (2) Authorizations to Release Information.

If you have any questions please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your assistance in this matter.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

/Enclosures

JAM:rk

Cc: Ronald Joseph Orlosky

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September 8, 2009

VIA U.S. POSTAL SERVICE

Changing Parameters Fund
259 Oak Grove Ave
Menlo Park, CA 94025

Re: Estate of Debora Laura Orlosky
Acct #: 100321

Dear Sir or Madam:

As you may know, I am the attorney representing Ronald Joseph Orlosky as Personal Representative for the Estate of Debora Laura Orlosky and as Trustee of the Debora Laura Orlosky Revocable Trust. Please allow this correspondence to serve as a follow up regarding my prior written requests (enclosed) as well as some additional requests for the collection of the late Mrs. Orlosky's account information.

Our records indicate that Debora Laura Orlosky had several accounts with your institution. In order to administer Debora Laura Orlosky's estate we require the value of these accounts (including interest), the ownership of each account, and the beneficiary designations, as of June 17, 2009. Please provide this information as soon as possible as it is required in order to administer Mrs. Orlosky's estate.

I previously provided to you copies of the Death Certificate of Debora Laura Orlosky, the Beaufort County, South Carolina Probate Court's Certificate of Appointment—appointing Ronald Joseph Orlosky as Personal Representative of the Debora Laura Orlosky Estate, respective pages of the Debora Laura Orlosky Revocable Trust naming Ronald Joseph Orlosky as Trustee, and two (2) Authorizations to Release Information.

If you have any questions please do not hesitate to contact my paralegal, Rachel Michaud or myself. Thank you for your assistance in this matter.

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

/Enclosure
JAM:rkm



Tab #		<u>Fair Market</u> <u>Value (706)</u>	<u>Buy/Sell</u> <u>Discounted</u> <u>Price</u>	<u>Ron's Estate</u>
1	<u>Manor-</u>			
↓	Assets:			
	Cash Checking	\$137,494.00	\$137,494.00	
	Cash Savings	\$200,650.00	\$200,650.00	
	Wells Fargo Brokerage	\$1,000,000.00	\$1,000,000.00	
	Stock - CP	\$571,908.00	\$571,908.00	
	Value of Buildings	\$20,710,000.00	\$14,636,998.00	adj Includes selling expense:
	Value of Vacant Land	\$640,000.00	\$492,533.00	adj Includes selling expense:
	Other Assets	\$55,888.00	\$55,888.00	
	Total	\$23,315,940.00	\$17,095,471.00	
	Liabilities:			
	Current	-\$32,919.00	-\$32,919.00	
	Deposits	-\$18,468.00	-\$18,468.00	
	Notes	-\$9,008,391.00	-\$9,008,391.00	
	Prepayment Penalty	-\$894,271.00	-\$894,271.00	
	Total	-\$9,954,049.00	-\$9,954,049.00	
	Net	\$13,361,891.00	\$7,141,422.00	
	Discounts:			
	Lack of Marketability	\$10,689,512.80	\$5,713,137.60	
	Lack of Control	\$8,017,134.60	\$4,284,853.20	
	1/3 division-	\$2,672,378.20	\$1,428,284.40	\$1,428,284.40
	1/3 division Forced Sale-	\$3,563,170.93	\$1,904,379.20	\$1,904,379.20
	1/3 division Actual Sale-		\$1,585,076.00	\$1,585,076.00
	<u>Real Estate-</u>			
2	HHI Home	\$475,000.00	\$475,000.00	\$950,000.00 (trust)
3	Tahoe Home	\$400,000.00	\$400,000.00	
4	San Rafael Home	\$318,333.33	\$318,333.33	
5	Furnishings- HHI	\$100,000.00	\$100,000.00	\$100,000.00
↓	Furnishings- Tahoe	\$60,000.00	\$60,000.00	
	Total	\$1,353,333.33	\$1,353,333.33	\$1,050,000.00
	<u>Bank Accounts-</u>			
6	CSB Account #1	\$21,675.08	\$21,675.08	\$21,675.08
↓	CSB Account #2	\$856.46	\$856.46	\$856.46
	CSB Savings	\$1,025.14	\$1,025.14	\$1,025.14
7	CD	\$41,398.23	\$41,398.23	
8	CS Custodian Acct#1	\$2,227.70	\$2,227.70	
9	CS Custodian Acct#2	\$2,360.08	\$2,360.08	
10	Schwab Investment	\$220,271.84	\$220,271.84	\$172,541.04
	529 Plan			\$46,000.00

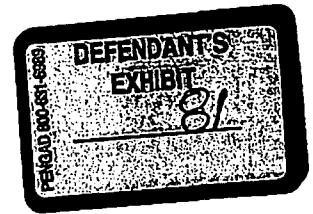
		Total	\$289,814.52	\$289,814.52	\$242,097.71
	<u>Retirement Accts-</u>				
	IRA- Schwab				\$470,138.86
11	IRA- CP		\$110,621.98	\$110,621.98	
	401K- Vanguard				\$595,632.46
	Total		\$110,621.98	\$110,621.98	\$1,065,771.32
	<u>Misc Property-</u>				
	2004 Saab				\$15,000.00
	1995 Subaru				\$3,000.00
5	2006 Sienna		\$20,000.00	\$20,000.00	
	Total		\$20,000.00	\$20,000.00	\$18,000.00
	<u>Life Insurance-</u>				
	Principal				\$74,425.00
	Total				\$74,425.00
	<u>Debts-</u>				
12	Credit Card		-\$2,000.00	-\$2,000.00	-\$2,000.00
↓	Mortgages		-\$70,000.00	-\$70,000.00	-\$70,000.00
	Total		-\$72,000.00	-\$72,000.00	-\$72,000.00
	<u>Marital Trust-</u>				\$900,000.00
	Grand Total of all assets:		\$4,446,148.03	\$3,130,054.23	\$4,706,578.43
	Grand Total of all assets (w forced sale):		\$5,336,940.76	\$3,606,149.03	\$5,182,673.23
	Grand Total of all assets (w actual sale price)		\$1,773,769.83		

LAW OFFICE OF JAY A. MULLINAX, LLC

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www.sc-estateplanning.com



April 1, 2009

VIA HAND DELIVERY

Mr. and Mrs. Ronald J. Orlosky
1 Marshview Drive
Hilton Head Island, SC 29928

Re: Engagement Letter as Counsel

Dear Mr. and Mrs. Ronald J. Orlosky:

On behalf of the firm, I thank you for engaging my firm to represent you as legal counsel. We look forward to working with you with regard to your estate planning matters and appreciate the confidence you have placed in us.

It is the policy of the firm to require an engagement letter to avoid misunderstandings as to the scope of the matter, the fees to be charged, and the possibility of conflicting representation. Enclosed with this letter is a summary of our standard terms of engagement that will apply to our representation, except to the extent of any conflict with this letter, in which case the terms of this letter will control. Because this language is designed to be used for a broad spectrum of clients, it may appear somewhat formal and complicated; unfortunately, that is necessary to cover all of the relevant areas. Thank you for your understanding and cooperation.

You have asked me to advise you in planning and preparing Wills and Revocable Trusts for each of you and pursuant to our discussion at the meeting, related estate planning documents such as Health Care Powers of Attorney and Durable Powers of Attorney. I quoted you a fee range of Five Thousand Two Hundred Dollars (\$5,200.00) to Six Thousand Dollars (\$6,000.00) for the Wills, Revocable Trusts, Health Care Powers of Attorney, Durable Powers of Attorney, and Quit Claim Deed based on your situation as I understood it. Barring significant changes or additions, this would be my fee for preparing these documents. I also agreed to charge you \$275.00 per hour for my consultations and any other work in regard to your file. The initial consultation is included in your fee range listed above. Based on our initial meeting, I do not anticipate that additional consultations will be necessary.

I anticipate no additional costs other than the court cost, of \$44.00, for recording the Durable Powers of Attorney and Quit Claim Deed with the Beaufort County Register of Deeds Office.

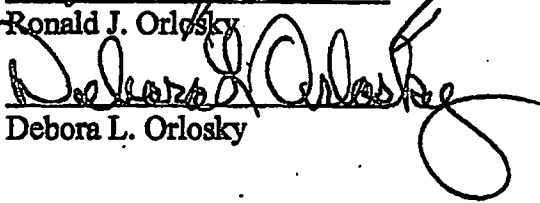
Again, we appreciate the opportunity to work with you in connection with these matters and look forward to our relationship. If you find the above arrangement acceptable, please sign the enclosed copy of this letter and return it to us along with a retainer in the amount of Six Thousand and Forty-Four Dollars (\$6,044.00).

Sincerely yours,

LAW OFFICE OF JAY A. MULLINAX, LLC


Jay A. Mullinax, Esquire

Enclosure


Ronald J. Orlosky

Debora L. Orlosky

**Law Office of Jay A. Mullinax, LLC
TERMS OF ENGAGEMENT
FOR ESTATE PLANNING SERVICES
FOR RONALD J. ORLOSKY and DEBORA L. ORLOSKY**

I appreciate your decision to retain my firm for your estate planning. This document contains important information about the relationship between you and my firm. My work will be limited strictly to legal services, unless otherwise described in the letter that accompanies this document. You are not relying on me for business, investment, accounting, or valuation decisions, or to investigate the character or credit of other persons or firms (such as insurance companies or investment advisors), unless otherwise specified in the letter.

My Duty to Preserve Your Confidential Information

Estate planning is a personal matter that requires you to disclose sensitive information about your family relationships and financial matters, and it may involve difficult questions. You agree to provide me with all information needed to perform legal services. You will be responsible for making decisions on matters not involving legal determinations. I urge you to make a complete disclosure of your financial matters and your wishes concerning your estate. Failure to do so could make it impossible for me to give proper advice to you. I will not be responsible for consequences caused by your failure to disclose essential information.

The ethics rules require me to keep information that you disclose to me confidential and not to disclose it to persons outside this firm without your permission. I may disclose information to other persons in the firm as needed to do your work, on a "need to know" basis, but I will not make unnecessary disclosures.

If persons outside my firm work with me with your permission (such as your accountant, a bank trust officer, a financial planner, an insurance agent, or another law firm), you agree that I can disclose information to them that they need to fulfill their role in your estate planning. Unless you instruct otherwise, you agree that I can disclose information to them that in my judgment is necessary for your best interests.

My Duty To Share Information With Each of You

I will represent both of you jointly in your estate planning. I owe duties to each of you, and each of you has an obligation to disclose to me all information that is relevant to both spouses' estate planning. You agree that among us (the two of you and my firm), there will be no confidentiality of communications or information, unless and until one of you instructs me otherwise. If one of you discloses information to me that is relevant to the other spouse's estate planning, I can disclose that information to the other spouse if I think it is necessary to fulfill my duties to the other spouse in your estate planning.

Either of you can terminate your permission for me to disclose information to the other spouse at any time, if you give me clear directions not to disclose. However, if you do terminate that permission, I must then decide if a conflict of interest has arisen that prevents me from adequately representing the other spouse. I will make that decision in my sole professional judgment. If I believe that I cannot adequately represent the other spouse without the disclosure, I will notify each of you separately in writing that a conflict of interest has arisen that prevents me from representing either one of you in your estate planning. I could not represent either one of you in your estate planning after that without the consent of both of you. Even if you revoke my permission to disclose information, you should be aware that if there is ever litigation between the two of you, I could be compelled to testify about information obtained from you or about advice that I gave to you in your estate planning.

If this agreement concerning confidentiality is not acceptable to you, you must advise me immediately so that other arrangements can be made.

If You Become Disabled

The ethics rules that govern attorneys state that if you become unable to make adequately considered decisions, whether because of mental disability or other reasons, I may attempt to continue a normal attorney-client relationship with you as much as is possible. Those rules also state that I may seek the appointment of a guardian or to take other actions to protect your interests if I reasonably believe that to be necessary.

You can designate other persons to act on your behalf under a durable power of attorney and to make decisions for you concerning your estate planning, such as making gifts of your assets and signing trust agreements on your behalf. If you authorize someone to act on your behalf, and if I believe their authority is broad enough to allow them to instruct me on your estate planning, you agree that I can continue to do estate planning work for you by dealing with them, and that I can rely on instructions from them. You agree that I can communicate with them and disclose information they need to make informed decisions on your behalf, including information that is protected by the attorney-client privilege. However, if I believe that they do not have the authority to act on your behalf, or if I believe they are not acting in your best interests, I reserve the right to refuse to act on their instructions and instead to take whatever action that I reasonably believe is necessary to protect your interests.

How I Charge for Services Rendered

I usually bill for estate planning work in two ways: a fixed amount (which may be expressed in a range), and an amount based on my time billed at standard hourly rates. I will bill you for my time at my standard hourly rates, unless you and I agree on a fixed amount.

Fixed Fee Arrangements

If I agree on a fixed amount, my fees will not be limited to that amount if you do not accurately disclose information that I request and need for your work, or if you materially change the terms, conditions, scope, or nature of the work after we agreed on the fixed amount. If this happens, you agree to pay me for my time billed at my standard hourly rates, unless we agree on a revised fixed amount.

Hourly Basis Fee Arrangements

I adjust my hourly rates periodically. I consider the ability, experience, and reputation of our lawyers and legal assistants when I set hourly rates. Changes are usually made each January 1, but sometimes they are made at other times. If your bill is based on hourly rates, increases in rates will apply to all time beginning with the month when the rates are changed. Work done before that month will be billed at the hourly rate that was previously in effect.

I generally record and bill my time in quarter hour units. If my or a paralegal's total time on your work is less than one-quarter hour for the entire day, one-quarter hour will be billed for that day. If my or a paralegal's total time on your work is more than one-quarter hour for that day (whether done at one time or not), only the time actually spent will be billed.

Costs and Expenses

I will bill you for out-of-pocket expenses that I pay on your behalf and for my internal costs. Out-of-pocket expenses generally include items such as travel expenses, filing, recording, and registration fees charged by government agencies. My internal costs include things like photocopying, long distance telephone calls, fax transmissions, courier services, terminal time for computer research, and complex document production. Rather than tracking precise and exact costs for every single internal charge (which would ultimately result in higher hourly rates), I charge fixed costs on a reasonable basis for these types of expenses. My charges for these internal costs may exceed the actual direct costs that I pay to outsiders (such as the telephone company or photocopying contractors).

Sometimes it is necessary to hire other persons to provide services for you, such as accounting or appraisal firms. Their work may have more confidentiality if I (rather than you) request their services, and so I may hire them. However, you will be responsible for paying their fees and expenses, whether paid directly to them or to me in reimbursement.

How I Will Bill You

I will bill you periodically for my services and costs. I will attempt to provide as much billing information as you reasonably require. I can discuss with you the various billing formats available that best suit your needs.

If my fees are based on time, bills generally will be rendered on a monthly basis, but sometimes I may bill less frequently. My bills are due when rendered. If a bill is not paid within 30 days after it is mailed to you, interest will accrue on the unpaid balance of that bill beginning on the 30th day and accruing thereafter. Interest charges will apply to specific monthly bills. Payments made on past due accounts will be applied first to the oldest outstanding bill. If the bills are not paid reasonably soon after they are rendered, I reserve the right to stop work until your account is brought current.

If I have to bring collection efforts for payment, you agree that you will be obligated to pay the costs of collection procedures, including reasonable attorneys fees incurred by me (whether paid to the firm or another firm retained by me).

Each of you agrees that you will be jointly and severally responsible for the payment of all amounts owed to me, and that I can seek payment in full from either one of you at my election. An agreement between the two of you to limit your responsibility for payment of amounts owed to me will not be binding upon me unless I also agree in writing to those limits.

I may require a retainer for your work. Unless you and I agree otherwise, the retainer will be applied to the final statement, and any unused portion will be returned to you. I may also request an advance cost deposit (in addition to the advance fee deposit) when I expect to incur substantial costs on your behalf.

Conflicts with Other Clients

Sometimes my firm is asked to represent a client who has interests that are adverse to another client whom I represent in other matters. Just as you may wish to hire other law firms that compete with me, I want to be able to consider representing other persons who may be competitors in your business or occupation or who may have interests that are potentially adverse to yours—but only in matters that are unrelated to the work that I do for you. The ethics rules that govern attorneys permit me to accept multiple representations if certain requirements are met.

While I represent you, I will not represent another client in matters that are directly adverse to your interests unless and until I have made full disclosure to you of all relevant facts, circumstances, and implications. You agree that I can represent other clients whose interests are adverse to yours if I confirm to you in good faith that the following conditions are met: (i) there is no substantial relationship between the other client's matter and my work for you, both now and in the past; (ii) my representation of

the other client will not involve or disclose any confidential information I have received from you (with the use of screening measures, if appropriate); and (iii) the other client also consents to my representation of you, based on full disclosure of all relevant facts, circumstances, and implications.

You agree that these rules will govern your right to object to me representing other clients whose interests are adverse to yours. You will have the right to contest (but only if done in good faith) my statement to you that these conditions have been met. If you make a good faith objection to my statement, I will have the burden of proving that these conditions have been met.

When I finish your work, the attorney-client relationship between us will end unless you and I have expressly agreed to a continuation for other matters. Either you or I can terminate the attorney-client relationship before the work is finished, subject to ethical restraints.

Your Agreement with Me

Your agreement to my representation constitutes your acceptance of these terms and conditions. If any of them are unacceptable to you, please tell me now so that I can resolve any differences and proceed with a clear understanding of our relationship.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CASE NO.: 2010-CP-07-4146
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,	)	
	)	NOTICE OF MOTION AND MOTION
Plaintiff,	)	TO TAX COSTS AND AWARD
	)	INTEREST
vs.	)	
	)	
THE LAW OFFICE OF JAY A.	)	
MULLINAX, LLC AND JAY A.	)	
MULLINAX, individually,	)	
	)	
Defendants.	)	
	)	

TO: THE HONORABLE ROGER M. YOUNG AND THOMAS C. TAYLOR, ESQUIRE,
ATTORNEY FOR THE DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney for the plaintiff hereby moves for an Order taxing costs in the amount of \$465.00 as provided in Rule 54 of the *South Carolina Rules of Civil Procedure* and awarding interest against the defendant in the amount of \$8,889.26 pursuant to the provisions of §15-35-400, *South Carolina Code of Laws for 1976*, as amended.

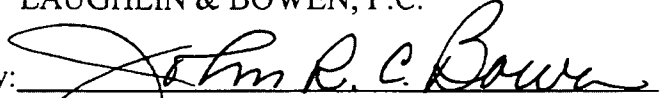
The grounds for this Motion are that on December 1, 2010 the plaintiff served an Offer of Judgment upon defendant offering to take judgment against defendant in the amount of \$29,751.68. This offer was not accepted by defendant, and plaintiff thereafter obtained a verdict more favorable than the offer: to wit Eighty-Thousand Dollars (\$80,000.00). §15-35-400, *South Carolina Code of Laws for 1976*, as amended, provides that under the foregoing circumstances,

plaintiff is allowed to recover from defendant "eight percent interest computed on the amount of the verdict or award from the date of the offer."

This Motion is further supported by the affidavit of counsel attached hereto.

Movant certifies that he has not consulted with opposing counsel regarding this particular matter prior to filing this Motion, but that opposing counsel has advised him that defendant is not willing to discuss a resolution of the judgment. For this reason, he believes that such consultation would be unavailing, and is not required.

LAUGHLIN & BOWEN, P.C.

By: 

John R.C. Bowen, SC Bar # 791

Attorneys for Plaintiff

Post Office Drawer 21119

Hilton Head, South Carolina 29925

Tel (843) 689-5700

Fax (843) 689-9300

John@laughlinandbowen.com

Jcerrati@laughlinandbowen.com

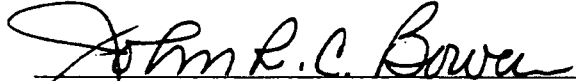
April 21, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CASE NO.: 2010-CP-07-4146
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,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	AFFIDAVIT OF JOHN R.C. BOWEN
	)	
THE LAW OFFICE OF JAY A.	)	
MULLINAX, LLC	)	
	)	
Defendant.	)	
	)	

Personally appeared before me the undersigned John R.C. Bowen who, being first duly sworn, deposes and says that:

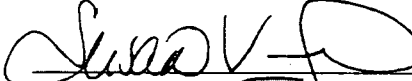
1. He served an Offer of Judgment for \$29,751.68 , a copy of which is attached, upon Thomas C. Taylor, Esquire as attorney for the defendant on December 1,2010.
2. Defendant did not accept the offer, and plaintiff obtained a verdict more favorable than the offer, to wit: for \$80,000.00.
3. The plaintiff has incurred recoverable costs in the amount of \$465.00 as set forth on the attached itemized list.
4. Pursuant to §15-35-400, a copy of which is attached, plaintiff is entitled to an award of \$8,889.26 representing interest at 8% on the amount of the verdict from December 1, 2010 to April 20, 2012.

FURTHER AFFIANT SAYETH NOT


John R.C. Bowen

Sworn to and subscribed before me this

23 day of April, 2012.


Notary Public for South Carolina
My Commission Expires: 7-21-2020

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2010-CP-07-4146

10 DEC -3 PM 1:50
CLERK OF COURT
BEAUFORT COUNTY, S.C.

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,)

Plaintiff,)

vs.)

OFFER OF JUDGMENT

THE LAW OFFICE OF JAY A.)
MULLINAX, LLC AND JAY A.)
MULLINAX, individually,)

Defendants.)

TO: THOMAS C. TAYLOR, ESQUIRE, ATTORNEY FOR THE DEFENDANTS.

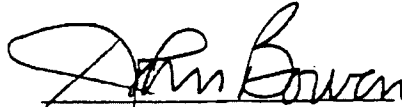
PLEASE TAKE NOTICE THAT the plaintiff, pursuant to §15-35-400 hereby offers to take judgment against the above named defendants on the within claims against them for the total sum of \$29,751.68. You may accept this offer by filing a written acceptance with the Clerk of Court for Beaufort County within twenty (20) days after notification of this offer or prior to or on the tenth (10th) day before the actual trial date, whichever date first occurs, and by serving a copy of this acceptance upon the undersigned. In the event that a written acceptance is not filed and served as aforesaid, this offer will be considered to have been rejected. If this offer of judgment is not accepted, and if plaintiff obtains a verdict or determination at least as favorable as this offer, plaintiff is allowed to recover from defendants:

- (1) administrative, filing, or other court costs from the date hereof until judgment; and,

- (2) eight percent interest computed on the amount of the verdict or award from the date of the offer.

LAUGHLIN & BOWEN, P.C.

By:

A handwritten signature in black ink, appearing to read "John Bowen", written over a horizontal line.

John R.C. Bowen

SC Bar # 791

Attorneys for Plaintiff

P. O. Drawer 21119

Hilton Head Island, SC 29925

(843)689-5700

November 30, 2010

SECTION 15-35-400. Offer of judgment; acceptance; consequences of nonacceptance; attorney's fees.

(A) Offer of Judgment. Except in domestic relations actions, after commencement of any civil action based upon contract or seeking the recovery of money damages, whether or not other relief is sought, any party may, at any time more than twenty days before the actual trial date, file with the clerk of the court a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein, for property, or to the effect specified in the offer. The offeror shall give notice of the offer of judgment to the offeree's attorney, or if the offeree is not represented by an attorney, to the offeree himself, in accordance with the service rules for motions and other pleadings set forth in the South Carolina Rules of Civil Procedure. Within twenty days after notification, or at least ten days prior to the trial date, whichever date is earlier, the offeree or his attorney may file with the clerk of the court a written acceptance of the offer of judgment. Upon the filing, the clerk shall enter immediately judgment of the stipulation. If the offer of judgment is not accepted within twenty days after notification or prior to or on the tenth day before the actual trial date, whichever date occurs first, the offer shall be considered rejected and evidence thereof is not to be admissible except in a proceeding after the trial to fix costs, interests, attorney's fees, and other recoverable monies. Any offeror may withdraw an offer of judgment prior to its acceptance or prior to the date on which it would be considered rejected by giving notice to the offeree or his attorney in accordance with the service rules for motions and other pleadings outlined in the South Carolina Rules of Civil Procedure. Any offeror may file a subsequent offer of judgment in any amount provided that the subsequent offer supersedes any earlier offer that was rejected by the offeree or withdrawn by the offeror, and, on filing, terminates any rights of interest or costs that may have been applicable to the superseded offer. Notwithstanding this provision, an offer is not considered rejected upon the making of a counteroffer by the offeree, but shall remain effective until accepted, rejected, or withdrawn as provided in this subsection. Any and all offers of judgment and any acceptance of offers of judgment must be included by the clerk in the record of the case.

(B) Consequences of NonAcceptance. If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall be allowed to recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until judgment; (2) if the offeror is a plaintiff, eight percent interest computed on the amount of the verdict or award from the date of the offer; or (3) if the offeror is a defendant, a reduction from the judgment or award of eight percent interest computed on the amount of the verdict or award from the date of the offer.

(C) This section shall not be interpreted to abrogate the contractual rights of any party concerning the recovery of attorney's fees or other monies in accordance with the provisions of any written contract between the parties to the action.

HISTORY: 2005 Act No. 32, Section 3, eff July 1, 2005, for causes of action arising after that date.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2010-CP-07-4146

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,)

Plaintiff,)

vs.)

THE LAW OFFICE OF JAY A.)
MULLINAX, LLC AND JAY A.)
MULLINAX, individually,)

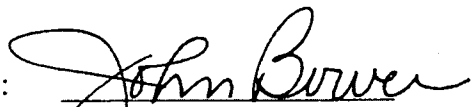
Defendants.)

CERTIFICATE OF SERVICE
FOR MOTION TO TAX COSTS
AND AWARD INTEREST

This is to certify that I, John R.C. Bowen, an employee of the law firm of Laughlin & Bowen, P.C. have this day served a true and correct copy of the within and foregoing Motion to Tax Costs and Award Interest on Thomas C. Taylor, Esquire attorney for defendants by U.S. Mail to assure delivery as follows, to-wit:

Thomas C. Taylor, Esquire
Thomas C. Taylor, LLC
P.O. Box 5550
Hilton Head Island, SC 29925

This 23 day of April, 2012.

By: 
John R.C. Bowen
Post Office Drawer 21119
Hilton Head Island, SC 29925
(843) 689-5700

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
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,)
)
Plaintiff,)
)
vs.)
)
THE LAW OFFICE OF JAY A.)
MULLINAX, LLC AND JAY A.)
MULLINAX, individually,)
)
Defendants.)
)
_____)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-07-4146

**NOTICE OF MOTION AND MOTION FOR
DIRECTED VERDICT AND FOR
JUDGMENT NOTWITHSTANDING THE
VERDICT**

2012 APR 27 PM 12:56
CLERK OF COURT
BEAUFORT COUNTY, SC

**TO: THE HONORABLE ROGER M. YOUNG AND JOHN R.C. BOWEN, ESQUIRE,
ATTORNEY FOR THE PLAINTIFF:**

YOU WILL PLEASE TAKE NOTICE that pursuant to Rule 59 of the South Carolina Rules of Civil Procedure (SCRCP), the Defendants will, ten (10) days after the filing of this Notice of Motion and Motion, or as soon as thereafter as the Court schedules same for Hearing, move this Honorable Court to direct a verdict in favor of the Defendant.

As the basis of this Motion, the Defendant shows that the Order Ending Case is a final Judgment as contemplated under the Rules, and that same fails to address certain claims made by the Defendant sufficient to insure that same are preserved for appeal. Specifically, the Defendant moves this Court to direct a verdict in the Judgment to address the following claims as proscribed under Rule 50(a) & 50(b):

1. The present verdict for \$80,000.00 against the Defendant was rendered on April 26, 2012.

Rule 50(a) & 50(b) allows this motion for the aforementioned and following reasons:

- a. A motion under Rule 50(a) & 50(b) is aimed at the sufficiency of the evidence. In this case, as outlined below, the Court allowed testimony and evidence into to the case which was prohibited under the South Carolina Code of Laws §19-11-20 (Dead Man Statute). The Court also allowed fraudulent testimony by the only non-party witness, an active attorney for the Plaintiff, who was prohibited under the South Carolina Rules of Professional Conduct from providing candid testimony which could be adverse against his client. This evidence was allowed by the Court as a matter of law and as a matter of law; the

✓

Court should remove such testimony from consideration in the case. The Plaintiff's case rises and falls solely on the aforementioned testimony which should not have been allowed in this case, and the Court should remove the unauthorized testimony and direct a verdict in favor of the Defendant.

b. In order to insure that all of the Defendant's positions are properly preserved for appeal, the Defendant moves this Court to direct a verdict in the Judgment to address the following claims:

1. The present verdict for \$80,000.00 against the Defendant was rendered on April 26, 2012 and is premised on the fact that the Defendant breached a contract with the Plaintiff. The non-contradicted evidence by both parties suggests that the contract was for the legal services necessary for the administration of the subject estate and that the Defendant discharged the Plaintiff prior to the closing of the estate administration, making it impossible for the Defendant to perform the services under the contract. As a matter of law, the Defendant should not be held liable for the Plaintiff's actions (firing the Defendant) which made the Defendant's ability to perform the Defendant's duties under the contract impossible. Defendant moves to direct a verdict in the Judgment to reflect the fact that the Plaintiff discharged the Defendant making it a legal impossibility for the Defendant to fulfill its duties under the terms of the contract. The Judgment should be altered or amended to reduce the Defendant's liability on a contract that the Plaintiff made impossible for the Defendant to perform.

2. Alternatively, if the Court believes that the Defendant is owed less than the amount that would have been owed for the completion of the services contemplated in the contract, the Court should consider the evidence provided at the trial to determine the portion of the Defendant's services performed under the contract. The Plaintiff's witness and attorney for the estate expressly testified that the only thing remaining in the estate administration was to file the documents to close the estate. The South Carolina Probate Code §62-3-1001 outlines the estate closing procedures in one-half page of the South Carolina Probate Code §62-3-1001 which consists of over 650 pages. Therefore, according to all of the evidence presented by all parties, all other necessary estate administration was completed prior to trial. According to the testimony of the plaintiff's estate attorney (Michael Jordan) and the documentation presented in the trial, Michael Jordan had only prepared one interim accounting and one supplemental inventory to file with Probate Court. It was not contradicted that the Defendant had prepared and filed the original inventory with the Probate Court and that no accounting was due to the Court during the estate's employment of the Defendant. Furthermore, the evidence presented along with testimony, which was not contradicted, showed that the Defendant's collected values for the estate property were the only values shown on the draft estate tax return prepared by Michael Jordan. Therefore, it is blatantly false and a fraud upon the Court by the Plaintiff's estate attorney, Michael Jordan, that that when the Defendant was fired by the Plaintiff that the Defendant's services were at the "beginning" of the estate administration. The Judgment should be altered or amended to reflect what the Court believes that the Defendant is owed based on the portion of the services completed by the Defendant as performed under the contract.

3. Alternatively, if the Court believes that the sums owed under the contract should be in an amount claimed by the Plaintiff in its complaint, the Plaintiff claimed that the Defendant was

owed a minimum of 2.5% of the value of the estate under the subject contract. Although the Defendant disagrees with the Plaintiff's estate value and testimony, the Plaintiff proffered documentation and testimony by an attorney for the estate (Michael Jordan), which purports the estate value of \$2,809,932.96 on a draft estate tax return (Form 706). Using the Plaintiff's own complaint and evidence, the Plaintiff owes the Defendant a minimum of \$70,248.32 for services that were ultimately prevented by the Plaintiff's act of firing the Defendant before the conclusion of the matter. The Judgment should be altered or amended to compensate the Defendant the minimum of \$70,248.32 for services that were ultimately prevented by the Plaintiff's act of firing the Defendant before the conclusion of the matter.

4. Alternatively, using the Plaintiff's own evidence provided at the time of the contract, the Plaintiff testified that the subject stock was valued at \$2,600,000.00, thereby increasing the overall estate value by \$1,200,000.00, resulting in an estate value of \$3,829,932.96. By using the Plaintiff's own evidence, the minimum fee owed by the Plaintiff to the Defendant under the contract was \$95,748.32 (2.5% of \$3,829,932.96). The Judgment should be altered or amended to compensate the Defendant the minimum of \$95,748.32 (2.5% of \$3,829,932.96) for services that were ultimately prevented by the Plaintiff's act of firing the Defendant before the conclusion of the matter, or, alternatively, in an amount proportional to the necessary services provided to administer the estate.

5. As mentioned above, the Plaintiff's estate attorney, Michael Jordan, committed fraud upon the Court when he testified that the Defendant was fired by the Plaintiff at the "beginning" of the estate administration. He also committed fraud upon the Court about the value of the estate and the only possible reason for the Defendant's conclusion of the estate value. Specifically, the Plaintiff's estate attorney, Michael Jordan, testified that the only possible reason for the Defendant to value the estate at a higher value than the amount proffered by Michael Jordan was for the Defendant to inflate the amount of the fee owed by the Plaintiff to the Defendant under the contract. The value of the estate is determinative of the necessity to file a Federal Estate Tax Return (IRS Form 706). Michael Jordan testified as to being authorized to practice before the Internal Revenue Service and it was not contested. Defendant testified as to being authorized to practice before the Internal Revenue Service and it was not contested. Treasury Department Circular No. 230 provides the Regulations Governing Practice before the Internal Revenue Service, Title 31 Code of Federal Regulations, Subtitle A, Part 10, updated (June 3, 2011) (Exhibit "A"). Treasury Department Circular No. 230 requires, in part, the following from those practicing before the Internal Revenue Service: §10.21, §10.22, §10.34, §10.37, §10.51 and §10.52. Under the provisions of Treasury Department Circular No. 230, both Defendant and Michael Jordan were charged with duties concerning the valuing of the estate and the proper application of the law. Michael Jordan testified that neither he nor his firm did any independent analysis or independent research concerning the value of the estate, the figures provided to them by the client, or the application of law necessary to appropriately determine whether an estate tax return was due to the Internal Revenue Service. Yet, Michael Jordan testified that he advised the client that no estate tax return was due. However, Michael Jordan's testimony admits that he is in direct violation of his requirements under the Treasury Department Circular No. 230 as someone who practices before the Internal Revenue Service (Exhibit "A"). Additionally, Michael Jordan

testified that he based his information solely on information from the client and did not evaluate the operation of the Shareholder's Agreement's which was according to him, determinative of the value of the stock. However, the Defendant testified that the Shareholder's Agreement was not determinative of the fair market value of the stock, specifically referring to Chapter 14 of the Internal Revenue Code and the companion Treasury Regulations which directly disregard the value of stock in Shareholder Agreements if the Shareholder Agreements do not follow the Internal Revenue Code Chapter 14 and the companion regulations. All testimony and corresponding documentation from the Plaintiff and the Defendant exclusively show that the Shareholder Agreement was not followed in consummating a sale under it, and that the parties disregard of the terms of the Shareholder agreement that resulted in sale price value difference of approximately \$500,000.00. Under Internal Revenue Code Chapter 14 and the companion regulations, the parties' disregard of the terms of the Shareholder Agreement excludes the Shareholder Agreement from consideration in valuing the stock. The omission of this fact is fraudulent upon the Court by Michael Jordan, who did not even mention Internal Revenue Code Chapter 14 or its companion Treasury Regulations. It should be noted that under Treasury Department Circular No. 230 (Exhibit "A"), incompetence is no excuse in determining the value of an estate or its assets. Even if the parties complied with the Shareholder Agreement as suggested by the Plaintiff and his single witness, Michael Jordan, and contradicted by the only documentation provided, the parties did not comply with Internal Revenue Code Chapter 14. Even if the parties complied with the general rules of Internal Revenue Code Chapter 14, the parties did not comply with the companion Treasury Regulations, in part, with Treasury Regs. §25.2703-1(c)(1) when the parties disregarded the terms (requiring a sale within 180 days of decedent's death) resulting in a \$500,000.00 change in sales price that was not allowed under the Shareholder Agreement. Therefore, the Judgment should be altered or amended to compensate the Defendant in amount that would be appropriate without considering the fraudulent testimony of Michael Jordan regarding the value of the estate.

6. In consideration of the fact that the Plaintiff's estate attorney, Michael Jordan, committed fraud upon the Court when he testified that the Defendant was fired by the Plaintiff at the "beginning" of the estate administration, that he fraudulently testified that the estate value was only increased by the Defendant to increase his fee, and that he fraudulently testified as to the application of the law to the facts and fraudulently omitted settled laws, codes, and regulations in his testimony, such testimony should be struck in its entirety. It should be considered that Michael Jordan, who testified fraudulently, was the only witness who testified in the case other than the parties to the case. Therefore, the Judgment should be altered or amended to compensate the Defendant in amount that would be appropriate without considering the fraudulent testimony of Michael Jordan who was a paid witness and attorney for the estate who is prohibited by the South Carolina Rules of Professional Conduct from providing any testimony against the interest of his client in this case.

7. Additionally, the Defendant's claimed that the only applicable contract was dated June 23, 2009, which expressly alluded to the services to be provided by the Defendant as those services that were necessary and appropriate for the administration of the estate under the laws of South Carolina. Necessary services for the administration of the estate are outlined by the South

Carolina Probate and Trust Code and Internal Revenue Code §2053 and companion Treasury Regulations which do not include expenses related to the sale of estate property that is unnecessary for the payment of estate debts. The Defendant provided services for the sale of stock that was unnecessary for the administration of the estate and unnecessary to pay estate debts. Plaintiff and Plaintiff's witness testified that the Defendant's efforts directly resulted in the Plaintiff selling the subject stock at an additional profit of \$156,000.00 for the estate. This evidence was supported by documentation evidence and not contradicted by testimony or documentation. Therefore, the Judgment should be altered or amended to compensate the Defendant for the services which resulted in the Plaintiff's additional profit of \$156,000.00.

8. The Plaintiff (Ronald Orlosky) is incompetent to testify in this case regarding any transaction or communication between the Plaintiff and the decedent, Deborah Orlosky, under the Dead Man Statute, South Carolina Code of Laws §19-11-20. Pursuant to the Dead Man Statute, the Defendant adamantly objected to the Plaintiff's testimony in this case which liberally included testimony transactions and communications between the Plaintiff and the decedent. The Court ruled against the Defendant's objections and allowed the Plaintiff to testify unencumbered about any transaction or communication between the Plaintiff and the decedent. In part, the Plaintiff adamantly testified about conversations that Plaintiff had with the decedent which contradicted the terms in the decedent's sworn testamentary documents such as decedent's Revocable Trust. Plaintiff also testified liberally about conversations that Plaintiff had with the decedent which directly contradicted the evidentiary documents signed by the decedent concerning the value of the decedent's estate, including particulars about the decedent's stock value. Dead man's statute essentially prohibits any interested person from testifying concerning conversations or transactions with decedent if testimony could affect his or her interest. *Hanahan v. Simpson* (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses (key) 125. The rule embodied in this section [Code 1962 26-402] [South Carolina Code of Laws §19-11-20] aims to prevent testimony "as to communications and transactions with persons deceased" in the cases therein enumerated, on the ground that it is against public policy to allow witnesses to testify as to matters, when, if such testimony is untrue, it cannot be contradicted. *Trimmier v Thomson* (1894) 41 SC 125, 19 SE 291. *Harris v Berry* (1957) 231 SC 201, 98 SE2d 251. In determining the applicability of the dead man's statute precluding testimony by, inter alia, "a person having an interest which may be affected by the event of the trial," the test is whether the witness has a certain or vested legal interest, and the interest may possibly be affected by the direct, legal operation of the judgment. *U.S. Fire Ins. Co. v. Macloskie* (S.C. App. 1995) 320 S.C. 459, 465 S.E.2d 759 rehearing denied. Witness (key) 140 (2). All documentary evidence and testimony showed that the Plaintiff (Ronald Orlosky) has and had a vested legal interest affected by the direct, legal operation of the judgment in this case. Therefore, his testimony concerning his communications and transactions with the decedent are expressly prohibited under the Dead Man Statute and aforementioned case law. Ronald Orlosky's unauthorized testimony rested heavily on the purported intentions of the decedent that directly contradicted the decedent's sworn testamentary documents such as decedent's Revocable Trust. Plaintiff Ronald Orlosky also testified liberally about conversations that Plaintiff had with the decedent which directly contradicted the evidentiary documents signed by the decedent concerning the value of the decedent's estate. The documentary evidence and testimony expressly shows that Ronald Orlosky

is the primary beneficiary of the decedent's estate (income and principal) during Ronald Orlosky's lifetime, and that the Plaintiff's use of the estate assets for his own personal benefit is solely in the Plaintiff's discretion as Personal Representative and Trustee of the decedent's estate and trust. Therefore, the Judgment should be altered or amended to compensate the Defendant in amount that would be appropriate without considering the testimony of Ronald Orlosky whose testimony was based heavily on information prohibited under the Dead Man Statute.

For all of the foregoing reasons, the Defendant prays that this Court direct a verdict in its Judgment to reflect the evidence revealed at trial, as is set forth above.

I SO MOVE.

LAW OFFICE OF THOMAS C. TAYLOR, LLC



Thomas C. Taylor
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Hilton Head Island, SC 29938
S.C. Bar #: 5499
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Email: tom@thomastaylorlaw.com

ATTORNEY FOR DEFENDANTS
THE LAW OFFICE OF JAY A. MULLINAX, LLC
and
JAY A. MULLINAX, individually

Hilton Head Island, South Carolina

Dated: August 14, 2012

Treasury Department Circular No. 230

**Regulations Governing Practice before the Internal Revenue Service
Title 31 Code of Federal Regulations,
Subtitle A, Part 10, published (June 3, 2011)**

Subpart B — Duties and Restrictions Relating to Practice Before the Internal Revenue Service

§ 10.21 Knowledge of client's omission. A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.

§ 10.22 Diligence as to accuracy.(a) *In general.* A practitioner must exercise due diligence — (1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters; (2) In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and (3) In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service.(b) *Reliance on others.* Except as provided in §§ 10.34, 10.35 and 10.37, a practitioner will be presumed to have exercised due diligence for purposes of this section if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person. (c) *Effective/applicability date.* This section is applicable on September 26, 2007.

§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers.**(a) Tax returns.**

(1) A practitioner may not willfully, recklessly, or through gross incompetence —

(i) Sign a tax return or claim for refund that the practitioner knows or reasonably should know contains a position that —

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Internal Revenue Code (Code) (including the related regulations and other published guidance); or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(ii) Advise a client to take a position on a tax return or claim for refund, or prepare a portion of a tax return or claim for refund containing a position, that —

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Code (including the related regulations and other published guidance); or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(2) A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted willfully, recklessly, or through gross incompetence.

(b) *Documents, affidavits and other papers* —

(1) A practitioner may not advise a client to take a position on a document, affidavit or other paper submitted to the Internal Revenue Service unless the position is not frivolous.

(2) A practitioner may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service —

(i) The purpose of which is to delay or impede the administration of the Federal tax laws;

(ii) That is frivolous; or

(iii) That contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation.

(c) *Advising clients on potential penalties* —

(1) A practitioner must inform a client of any penalties that are reasonably likely to apply to the client with respect to —

(i) A position taken on a tax return if —

(A) The practitioner advised the client with respect to the position; or

(B) The practitioner prepared or signed the tax return; and

(ii) Any document, affidavit or other paper submitted to the Internal Revenue Service.

(2) The practitioner also must inform the client of any opportunity to avoid any such penalties by disclosure, if relevant, and of the requirements for adequate disclosure.(3) This paragraph (c) applies even if the practitioner is not subject to a penalty under the Internal Revenue Code with respect to the position or with respect to the document, affidavit or other paper submitted.(d)

Relying on information furnished by clients. A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted to the Internal Revenue Service, or preparing or signing a tax return as a preparer, generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.(e) *Effective/applicability date.* Paragraph (a) of this section is applicable for returns or claims for refund filed, or advice provided, beginning August 2, 2011. Paragraphs (b) through (d) of this section are applicable to tax returns, documents, affidavits, and other papers filed on or after September 26, 2007.

§ 10.37 Requirements for other written advice.

(a) *Requirements.* A practitioner must not give written advice (including electronic communications) concerning one or more Federal tax issues if the practitioner bases the written advice on unreasonable factual or legal assumptions (including assumptions as to future events), unreasonably relies upon representations, statements, findings or agreements of the taxpayer or any other person, does not consider all relevant facts that the practitioner knows or should know, or, in evaluating a Federal tax issue, takes into account the possibility that a tax return will not be

audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised. All facts and circumstances, including the scope of the engagement and the type and specificity of the advice sought by the client will be considered in determining whether a practitioner has failed to comply with this section. In the case of an opinion the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with, or employed by the practitioner's firm) in promoting, marketing or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code, the determination of whether a practitioner has failed to comply with this section will be made on the basis of a heightened standard of care because of the greater risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances.(b) *Effective date.* This section applies to written advice that is rendered after June 20, 2005.

Subpart C — Sanctions for Violation of the Regulations

§ 10.51 Incompetence and disreputable conduct.

(a) *Incompetence and disreputable conduct.* Incompetence and disreputable conduct for which a practitioner may be sanctioned under §10.50 includes, but is not limited to —

(1) Conviction of any criminal offense under the Federal tax laws.(2) Conviction of any criminal offense involving dishonesty or breach of trust.(3) Conviction of any felony under Federal or State law for which the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service.(4) Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing the information to be false or misleading. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, and any other document or statement, written or oral, are included in the term "information." (5) Solicitation of employment as prohibited under §10.30, the use of false or misleading representations with intent to deceive a client or prospective client in order to procure employment, or intimating that the practitioner is able improperly to obtain special consideration or action from the Internal Revenue Service or any officer or employee thereof.(6) Willfully failing to make a Federal tax return in violation of the Federal tax laws, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax.(7) Willfully assisting, counseling, encouraging a client or prospective client in violating, or suggesting to a client or prospective client to violate, any Federal tax law, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof. (8) Misappropriation of, or failure properly or promptly to remit, funds received from a client for the purpose of payment of taxes or other obligations due the United States.(9) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the Internal Revenue Service by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of an advantage or by the bestowing of any gift, favor or thing of value.

(10) Disbarment or suspension from practice as an attorney, certified public accountant, public accountant, or actuary by any duly constituted authority of any State, territory, or possession of the United States, including a Commonwealth, or the District of Columbia, any Federal court of record or any Federal agency, body or board.

(11) Knowingly aiding and abetting another person to practice before the Internal Revenue Service during a period of suspension, disbarment or ineligibility of such other person.

(12) Contemptuous conduct in connection with practice before the Internal Revenue Service, including the use of abusive language, making false accusations or statements, knowing them to be false, or circulating or publishing malicious or libelous matter.

(13) Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws. False opinions described in this paragraph (a)(13) include those which reflect or result from a knowing misstatement of fact or law, from an assertion of a position known to be unwarranted under existing law, from counseling or assisting in conduct known to be illegal or fraudulent, from concealing matters required by law to be revealed, or from consciously disregarding information indicating that material facts expressed in the opinion or offering material are false or misleading. For purposes of this paragraph (a)(13), reckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances. A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted knowingly, recklessly, or through gross incompetence. Gross incompetence includes conduct that reflects gross indifference, preparation which is grossly inadequate under the circumstances, and a consistent failure to perform obligations to the client.

(14) Willfully failing to sign a tax return prepared by the practitioner when the practitioner's signature is required by Federal tax laws unless the failure is due to reasonable cause and not due to willful neglect.

(15) Willfully disclosing or otherwise using a tax return or tax return information in a manner not authorized by the Internal Revenue Code, contrary to the order of a court of competent jurisdiction, or contrary to the order of an administrative law judge in a proceeding instituted under §10.60.

(16) Willfully failing to file on magnetic or other electronic media a tax return prepared by the practitioner when the practitioner is required to do so by the Federal tax laws unless the failure is due to reasonable cause and not due to willful neglect.

(17) Willfully preparing all or substantially all of, or signing, a tax return or claim for refund when the practitioner does not possess a current or otherwise valid preparer tax identification number or other prescribed identifying number.

(18) Willfully representing a taxpayer before an officer or employee of the Internal Revenue Service unless the practitioner is authorized to do so pursuant to this part.

(b) *Effective/applicability date.* This section is applicable beginning August 2, 2011.

§ 10.52 Violations subject to sanction.

(a) A practitioner may be sanctioned under §10.50 if the practitioner —

(1) Willfully violates any of the regulations (other than §10.33) contained in this part; or

(2) Recklessly or through gross incompetence (within the meaning of §10.51(a)(13)) violates §§ 10.34, 10.35, 10.36 or 10.37.

(b) *Effective/applicability date.* This section is applicable to conduct occurring on or after September 26, 2007.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

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,

Plaintiff,

vs.

THE LAW OFFICE OF JAY A.
MULLINAX, LLC AND JAY A.
MULLINAX, individually,

Defendants.

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

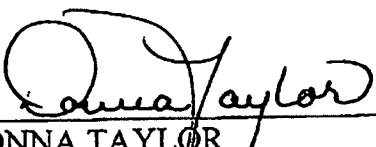
CASE NO.: 2010-CP-07-4146

CERTIFICATE OF SERVICE

2012 APR 27 PM 12:56
DONNA TAYLOR
CLERK OF COURT
BEAUFORT COUNTY, S.C.

I, Donna Taylor, the undersigned employee of the Law Office of Thomas C. Taylor, LLC, Attorney for **THE LAW OFFICE OF JAY A. MULLINAX, LLC AND JAY A. MULLINAX, individually**, do hereby certify that I have served a copy of the foregoing, Notice Of Motion and Motion For Relief From Judgment, Notice Of Motion And Motion To Alter Or Amend Judgment, Notice Of Motion And Motion For A New Trial, and Notice Of Motion And Motion For Directed Verdict And For Judgment Notwithstanding The Verdict upon the counsel for the Plaintiff, John R.C. Bowen, by e-mail attachment and mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

John R. C. Bowen, Esquire
Laughlin & Bowen, P.C.
P.O. Drawer 21119
Hilton Head Island, SC 29925-1119
john@laughlinandbowen.com


DONNA TAYLOR
Legal Assistant to Thomas C. Taylor

Hilton Head Island, South Carolina
April 26, 2012

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

14TH JUDICIAL CIRCUIT

COUNTY OF BEAUFORT)

CASE NO.: 2010-CP-07-4146

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

MOTION AND ORDER INFORMATION

Plaintiff,)

FORM AND COVER SHEET

vs.)

THE LAW OFFICE OF JAY A.)
MULLINAX, LLC AND JAY A.)
MULLINAX, individually,)

Defendant.)

2012 APR 27 PM 12:56
CLERK OF COURT
BEAUFORT COUNTY, S.C.

Plaintiff's Attorney:

Thomas C. Taylor, Esq., Bar No. 5499
Address:
22A Bow Circle, Hilton Head Island, SC 29928
Phone: 843/785-5050 Fax 843/785-5030
E-mail: tom@thomastaylorlaw.com Other: _____

Defendant's Attorney:

John R. C. Bowen, Esq., Bar No. 791
Address:
P.O. Drawer 21119, Hilton Head Isl., SC 29925
Phone: (843)689-5700 Fax (843)689-9300
E-mail: john@laughlinandbowen.com Other: _____

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Notice of Motion and Motion For Directed Verdict And For Judgment
Notwithstanding The Verdict

Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

April 26, 2012
Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ _____

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached
order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
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,)
)
Plaintiff,)
)
vs.)
)
THE LAW OFFICE OF JAY A.)
MULLINAX, LLC AND JAY A.)
MULLINAX, individually,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-07-4146

**NOTICE OF MOTION AND MOTION FOR
A NEW TRIAL**

**TO: THE HONORABLE ROGER M. YOUNG AND JOHN R.C. BOWEN, ESQUIRE,
ATTORNEY FOR THE PLAINTIFF:**

YOU WILL PLEASE TAKE NOTICE that pursuant to Rule 59 of the South Carolina Rules of Civil Procedure (SCRCP), the Defendants will, ten (10) days after the filing of this Notice of Motion and Motion, or as soon as thereafter as the Court schedules same for Hearing, move this Honorable Court to order a new trial in the Judgment.

As the basis of this Motion, the Defendant shows that the Order Ending Case is a final Judgment as contemplated under the Rules, and that same fails to address certain claims made by the Defendant sufficient to insure that same are preserved for appeal. Specifically, the Defendant moves this Court to order a new trial in the Judgment to address the following claims as proscribed under Rule 59:

1. The present verdict for \$80,000.00 against the Defendant was rendered on April 26, 2012.

Rule 59(a) allows this motion for the aforementioned and following reasons:

- a. A great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *E.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and

ruled upon by the trial judge to be preserved for appellate review."); *Long v. Dunlap*, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); *Gaffney v. Peeler*, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court).

b. In recently clarifying the law on the presentation and use of additional sustaining grounds in an appeal, we emphasized we did not "mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000); ^[4] see also Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 55-60 (2002).

c. The decision to grant or deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and will not ordinarily be disturbed on appeal. *South Carolina State Highway Dep't v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (1976).

d. As the basis of this Motion, the Defendant shows that the Order Ending Case is a final Judgment as contemplated under the Rules, and that same fails to address certain claims made by the Defendant sufficient to insure that same are preserved for appeal. In order to insure that all of the Defendant's positions are properly preserved for appeal, the Defendant moves this Court to grant a new trial based on the following claims as proscribed under Rule 59(a) and other allowances for a new trial. A motion under Rule 59(a) and a new trial is based on errors in the evidence, improper jury charges, or an improper verdict and is aimed at the fairness of the verdict and not at the sufficiency of the evidence. In this case, as outlined below, the Court allowed testimony and evidence into to the case which was prohibited under the South Carolina Code of Laws §19-11-20 (Dead Man Statute). The Court also allowed fraudulent testimony by the only non-party witness, an active attorney for the Plaintiff, who was prohibited under the South Carolina Rules of Professional Conduct from providing candid testimony which could be adverse against his client. This evidence was allowed by the Court as a matter of law, and as a matter of law, the Court should grant a new trial because such testimony provided the Plaintiff's case in chief and such testimony was improperly allowed in this case. The Plaintiff's case rises and falls solely on the aforementioned testimony and the Court should grant a new trial based on the allowance of testimony that should not have been allowed. Courts have recognized that a new trial is appropriate where comments by one attorney attacked the credibility of another attorney. *Dial v. Niggel Associated, Inc.*, ___ S.C. ___, 476 S.E.2d 700.

e. The Defendant prays for a new trial based on the Thirteenth Juror Concept. The trial court may grant a new trial under the common law "thirteenth juror" doctrine, in which the trial court makes its own view of the evidence and finds that the evidence does not justify the verdict. *Pinckney v. Winn-Dixie Stores, Inc.*, 311 S.C. 1, 426 S.E.2d 327 (Ct App. 1992). Our supreme court has repeatedly refused to abolish this doctrine. *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990); *Bailey v. Peacock*, 318 S.C. 13, 455 S.E.2d 690 (1995). In *Worrell v. South Carolina Power Co.*, 186 S.C. 306, 313, 195 S.E. 635, 641 (1938), the Supreme Court stated: "As has often been said, the trial judge is the thirteenth juror, possessing the veto power to the Nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality."

f. Importantly, the trial court is not required to explain any reasons for its ruling under the “thirteenth juror” doctrine because [t]he effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror “hangs” the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor jury is required to give reasons for this outcome. Similarly, because of the “thirteenth juror” verdict, no purpose would be served by requiring the trial judge to make factual findings. *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265, 267 (1990).

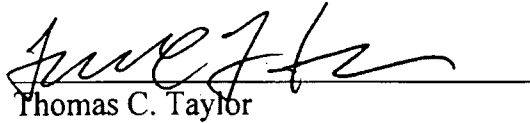
g. The Defendant prays for a new trial based on the Grossly Excessive or Inadequate Verdict. If the verdict is grossly excessive or inadequate so as to have resulted from passion, caprice, prejudice, or outside influences, the trial court must grant a new trial absolute. *Cock-N-Bull Steakhouse, Inc. v. Generali Ins. Co.*, ___ S.C. ___, 466 S.E.2d 727 (1996). Otherwise, the trial court abuses its discretion. *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993). The standard to be applied by the trial court appears to be one of “shocking” the conscience. See *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993); *Sullivan v. Davis*, 317 S.C. 462, 454 S.E.2d 907 (Ct App. 1995).

h. The Defendant prays for a new trial based on the New Trial Nisi concept. The trial court has no duty to question a jury’s verdict of liability, but no damages, unless a party requests. *Smith v. Philips*, 318 S.C. 453, 458 S.E.2d 428 (1995). However, if a party moves for a new trial and argues the verdict is either excessive or inadequate, the trial court must distinguish between awards that resulted from passion, caprice, or prejudice and awards that are merely unduly liberal or conservative. *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993). If the verdict is so grossly excessive or inadequate that the amount awarded is so shockingly disproportionate to the injuries, as to indicate that the jury acted by passion, caprice, prejudice, or other considerations not found in evidence, and not merely different from that which the trial court would have been awarded, the trial court must grant a new trial absolute. *Id.* If the jury was unduly liberal or conservative in its damage award, the trial court alone has the power to alter the verdict by granting a new trial nisi. *Id.* The jury’s calculation of damages, however, is entitled to substantial deference. *Brabham v. Southern Asphalt Holders, Inc.*, 223 S.C. 421, 76 S.E.2d 301 (1953).

i. The Defendant prays for a new trial based on the New Trial Nisi Remittitur. A party moves for a new trial nisi remittitur to have the trial court reduce a verdict that is merely excessive. *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, ___ S.C. ___, 466 S.E.2d 727 (1996). Typically, the defendant moves for a new trial nisi remittitur and, if granted, receives a new trial unless the plaintiff remits a portion of the verdict. If the plaintiff declines the remittitur amount, “a new trial is essential.” *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). A motion for a new trial nisi remittitur is governed by the same principles that apply a motion for a new trial nisi additur. *Toole v. Toole*, 260 S.E.2d 235, 195 S.E.2d 389 (1973). Each motion is addressed to the sound discretion of the trial judge, and the appellate courts have a duty to review the exercise of that discretion. *Id.* Ordinarily, if the plaintiff accepts the remittitur amount, when given the choice between remittitur amount or new trial, he is bound by the election and may not appeal. However, if the defendant appeals the verdict, the plaintiff may cross appeal the remittitur, even if plaintiff accepted the amount prior to the defendant’s appeal. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993).

For all of the foregoing reasons, the Defendant prays for an order granting a new trial.

LAW OFFICE OF THOMAS C. TAYLOR, LLC



Thomas C. Taylor
Post Office Box 5550
Hilton Head Island, SC 29938
S.C. Bar #: 5499
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Email: tom@thomastaylorlaw.com

ATTORNEY FOR DEFENDANTS
THE LAW OFFICE OF JAY A. MULLINAX, LLC
and
JAY A. MULLINAX, individually

Hilton Head Island, South Carolina

Dated: April 26, 2012

Treasury Department Circular No. 230

Regulations Governing Practice before the Internal Revenue Service
Title 31 Code of Federal Regulations,
Subtitle A, Part 10, published (June 3, 2011)

Subpart B — Duties and Restrictions Relating to Practice Before the Internal Revenue Service

§ 10.21 Knowledge of client's omission. A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.

§ 10.22 Diligence as to accuracy.(a) *In general.* A practitioner must exercise due diligence — (1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters; (2) In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and (3) In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service.(b) *Reliance on others.* Except as provided in §§ 10.34, 10.35 and 10.37, a practitioner will be presumed to have exercised due diligence for purposes of this section if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person. (c) *Effective/applicability date.* This section is applicable on September 26, 2007.

§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers.

(a) *Tax returns.*

(1) A practitioner may not willfully, recklessly, or through gross incompetence —

(i) Sign a tax return or claim for refund that the practitioner knows or reasonably should know contains a position that —

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Internal Revenue Code (Code) (including the related regulations and other published guidance); or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(ii) Advise a client to take a position on a tax return or claim for refund, or prepare a portion of a tax return or claim for refund containing a position, that —

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Code (including the related regulations and other published guidance); or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(2) A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted willfully, recklessly, or through gross incompetence.

(b) Documents, affidavits and other papers —

(1) A practitioner may not advise a client to take a position on a document, affidavit or other paper submitted to the Internal Revenue Service unless the position is not frivolous.

(2) A practitioner may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service —

(i) The purpose of which is to delay or impede the administration of the Federal tax laws;

(ii) That is frivolous; or

(iii) That contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation.

(c) Advising clients on potential penalties —

(1) A practitioner must inform a client of any penalties that are reasonably likely to apply to the client with respect to —

(i) A position taken on a tax return if —

(A) The practitioner advised the client with respect to the position; or

(B) The practitioner prepared or signed the tax return; and

(ii) Any document, affidavit or other paper submitted to the Internal Revenue Service.

(2) The practitioner also must inform the client of any opportunity to avoid any such penalties by disclosure, if relevant, and of the requirements for adequate disclosure.(3) This paragraph (c) applies even if the practitioner is not subject to a penalty under the Internal Revenue Code with respect to the position or with respect to the document, affidavit or other paper submitted.(d)

Relying on information furnished by clients. A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted to the Internal Revenue Service, or preparing or signing a tax return as a preparer, generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.(e) *Effective/applicability date.* Paragraph (a) of this section is applicable for returns or claims for refund filed, or advice provided, beginning August 2, 2011. Paragraphs (b) through (d) of this section are applicable to tax returns, documents, affidavits, and other papers filed on or after September 26, 2007.

§ 10.37 Requirements for other written advice.

(a) *Requirements.* A practitioner must not give written advice (including electronic communications) concerning one or more Federal tax issues if the practitioner bases the written advice on unreasonable factual or legal assumptions (including assumptions as to future events), unreasonably relies upon representations, statements, findings or agreements of the taxpayer or any other person, does not consider all relevant facts that the practitioner knows or should know, or, in evaluating a Federal tax issue, takes into account the possibility that a tax return will not be

audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised. All facts and circumstances, including the scope of the engagement and the type and specificity of the advice sought by the client will be considered in determining whether a practitioner has failed to comply with this section. In the case of an opinion the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with, or employed by the practitioner's firm) in promoting, marketing or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code, the determination of whether a practitioner has failed to comply with this section will be made on the basis of a heightened standard of care because of the greater risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances.(b) *Effective date.* This section applies to written advice that is rendered after June 20, 2005.

Subpart C — Sanctions for Violation of the Regulations

§ 10.51 Incompetence and disreputable conduct.

(a) *Incompetence and disreputable conduct.* Incompetence and disreputable conduct for which a practitioner may be sanctioned under §10.50 includes, but is not limited to —

(1) Conviction of any criminal offense under the Federal tax laws.(2) Conviction of any criminal offense involving dishonesty or breach of trust.(3) Conviction of any felony under Federal or State law for which the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service.(4) Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing the information to be false or misleading. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, and any other document or statement, written or oral, are included in the term "information." (5) Solicitation of employment as prohibited under §10.30, the use of false or misleading representations with intent to deceive a client or prospective client in order to procure employment, or intimating that the practitioner is able improperly to obtain special consideration or action from the Internal Revenue Service or any officer or employee thereof.(6) Willfully failing to make a Federal tax return in violation of the Federal tax laws, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax.(7) Willfully assisting, counseling, encouraging a client or prospective client in violating, or suggesting to a client or prospective client to violate, any Federal tax law, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof. (8) Misappropriation of, or failure properly or promptly to remit, funds received from a client for the purpose of payment of taxes or other obligations due the United States.(9) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the Internal Revenue Service by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of an advantage or by the bestowing of any gift, favor or thing of value.

(10) Disbarment or suspension from practice as an attorney, certified public accountant, public accountant, or actuary by any duly constituted authority of any State, territory, or possession of the United States, including a Commonwealth, or the District of Columbia, any Federal court of record or any Federal agency, body or board.

(11) Knowingly aiding and abetting another person to practice before the Internal Revenue Service during a period of suspension, disbarment or ineligibility of such other person.

(12) Contemptuous conduct in connection with practice before the Internal Revenue Service, including the use of abusive language, making false accusations or statements, knowing them to be false, or circulating or publishing malicious or libelous matter.

(13) Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws. False opinions described in this paragraph (a)(13) include those which reflect or result from a knowing misstatement of fact or law, from an assertion of a position known to be unwarranted under existing law, from counseling or assisting in conduct known to be illegal or fraudulent, from concealing matters required by law to be revealed, or from consciously disregarding information indicating that material facts expressed in the opinion or offering material are false or misleading. For purposes of this paragraph (a)(13), reckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances. A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted knowingly, recklessly, or through gross incompetence. Gross incompetence includes conduct that reflects gross indifference, preparation which is grossly inadequate under the circumstances, and a consistent failure to perform obligations to the client.

(14) Willfully failing to sign a tax return prepared by the practitioner when the practitioner's signature is required by Federal tax laws unless the failure is due to reasonable cause and not due to willful neglect.

(15) Willfully disclosing or otherwise using a tax return or tax return information in a manner not authorized by the Internal Revenue Code, contrary to the order of a court of competent jurisdiction, or contrary to the order of an administrative law judge in a proceeding instituted under §10.60.

(16) Willfully failing to file on magnetic or other electronic media a tax return prepared by the practitioner when the practitioner is required to do so by the Federal tax laws unless the failure is due to reasonable cause and not due to willful neglect.

(17) Willfully preparing all or substantially all of, or signing, a tax return or claim for refund when the practitioner does not possess a current or otherwise valid preparer tax identification number or other prescribed identifying number.

(18) Willfully representing a taxpayer before an officer or employee of the Internal Revenue Service unless the practitioner is authorized to do so pursuant to this part.

(b) *Effective/applicability date.* This section is applicable beginning August 2, 2011.

§ 10.52 Violations subject to sanction.

(a) A practitioner may be sanctioned under §10.50 if the practitioner —

(1) Willfully violates any of the regulations (other than §10.33) contained in this part; or

(2) Recklessly or through gross incompetence (within the meaning of §10.51(a)(13)) violates §§ 10.34, 10.35, 10.36 or 10.37.

(b) *Effective/applicability date.* This section is applicable to conduct occurring on or after September 26, 2007.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

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,

Plaintiff,

vs.

THE LAW OFFICE OF JAY A.
MULLINAX, LLC AND JAY A.
MULLINAX, individually,

Defendants.

IN THE COURT OF COMMON PLEAS

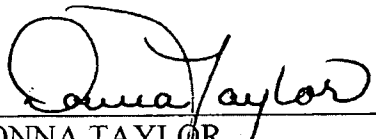
FOURTEENTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-07-4146

CERTIFICATE OF SERVICE

I, Donna Taylor, the undersigned employee of the Law Office of Thomas C. Taylor, LLC, Attorney for **THE LAW OFFICE OF JAY A. MULLINAX, LLC AND JAY A. MULLINAX, individually**, do hereby certify that I have served a copy of the foregoing, **Notice Of Motion and Motion For Relief From Judgment, Notice Of Motion And Motion To Alter Or Amend Judgment, Notice Of Motion And Motion For A New Trial, and Notice Of Motion And Motion For Directed Verdict And For Judgment Notwithstanding The Verdict** upon the counsel for the Plaintiff, John R.C. Bowen, by e-mail attachment and mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

John R. C. Bowen, Esquire
Laughlin & Bowen, P.C.
P.O. Drawer 21119
Hilton Head Island, SC 29925-1119
john@laughlinandbowen.com


DONNA TAYLOR
Legal Assistant to Thomas C. Taylor

Hilton Head Island, South Carolina
April 26, 2012

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

FOURTEENTH JUDICIAL CIRCUIT

RON ORLOSKY in his capacity as)

CASE NO.: 2010-CP-07-4146

Personal Representative of THE)

ESTATE OF DEBORA L.)

ORLOSKY, and in his capacity as)

trustee of the DEBORA LAURA)

ORLOSKY REVOCABLE)

TRUST,)

)

Plaintiff,)

**NOTICE OF MOTION AND MOTION FOR
RELIEF FROM JUDGMENT**

vs.)

)

THE LAW OFFICE OF JAY A.)

MULLINAX, LLC AND JAY A.)

MULLINAX, individually,)

)

Defendants.)

_____)

**TO: THE HONORABLE ROGER M. YOUNG AND JOHN R.C. BOWEN, ESQUIRE,
ATTORNEY FOR THE PLAINTIFF:**

YOU WILL PLEASE TAKE NOTICE that pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure (SCRCP), the Defendants will, ten (10) days after the filing of this Notice of Motion and Motion, or as soon as thereafter as the Court schedules same for Hearing, move this Honorable Court to direct a verdict in favor of the Defendant.

1. The present verdict for \$80,000.00 against the Defendant was rendered on April 26, 2012.

Rule 60(b) allows this motion for the aforementioned and following reasons:

a. Under Rule 60 (b), the trial court can relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b);
- (3) *fraud, misrepresentation, or other misconduct of an adverse party;*

b. Specifically, Rule 60 (b)(3) permits the trial court to set aside a judgment for, among other things, fraud upon the court. *Momani v. Van Surdam*, 296 S.C. 409, 373 S.E.2d 691 (Ct App. 1988). Relief pursuant to Rule 60 (b)(3), like Rule 60 (b)(1), requires a meritorious defense. *Bowers v. Bowers*, 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991).

c. The following provides the information necessary for the Court to grant relief in this case:

1. The present verdict for \$80,000.00 against the Defendant was rendered on April 26, 2012 and is premised on the fact that the Defendant breached a contract with the Plaintiff. The non-contradicted evidence by both parties suggests that the contract was for the legal services necessary for the administration of the subject estate and that the Defendant discharged the Plaintiff prior to the closing of the estate administration, making it impossible for the Defendant to perform the services under the contract. As a matter of law, the Defendant should not be held liable for the Plaintiff's actions (firing the Defendant) which made the Defendant's ability to perform the Defendant's duties under the contract impossible. Defendant moves to direct a verdict in the Judgment to reflect the fact that the Plaintiff discharged the Defendant making it a legal impossibility for the Defendant to fulfill its duties under the terms of the contract. The Judgment should be granted to relieve the Defendant from the Judgment.

2. Alternatively, if the Court believes that the Defendant is owed less than the amount that would have been owed for the completion of the services contemplated in the contract, the Court should consider the evidence provided at the trial to determine the portion of the Defendant's services performed under the contract. The Plaintiff's witness and attorney for the estate expressly testified that the only thing remaining in the estate administration was to file the documents to close the estate. The South Carolina Probate Code §62-3-1001 outlines the estate closing procedures in one-half page of the South Carolina Probate Code §62-3-1001 which consists of over 650 pages. Therefore, according to all of the evidence presented by all parties, all other necessary estate administration was completed prior to trial. According to the testimony of the plaintiff's estate attorney (Michael Jordan) and the documentation presented in the trial, Michael Jordan had only prepared one interim accounting and one supplemental inventory to file with Probate Court. It was not contradicted that the Defendant had prepared and filed the original inventory with the Probate Court and that no accounting was due to the Court during the estate's employment of the Defendant. Furthermore, the evidence presented along with testimony, which was not contradicted, showed that the Defendant's collected values for the estate property were the only values shown on the draft estate tax return prepared by Michael Jordan. Therefore, it is blatantly false and a fraud upon the Court by the Plaintiff's estate attorney, Michael Jordan, that that when the Defendant was fired by the Plaintiff that the Defendant's services were at the "beginning" of the estate administration. The Judgment should be granted to relieve the Defendant from the Judgment.

3. Alternatively, if the Court believes that the sums owed under the contract should be in an amount claimed by the Plaintiff in its complaint, the Plaintiff claimed that the Defendant was owed a minimum of 2.5% of the value of the estate under the subject contract. Although the Defendant disagrees with the Plaintiff's estate value and testimony, the Plaintiff proffered documentation and testimony by an attorney for the estate (Michael Jordan), which purports the estate value of \$2,809,932.96 on a draft estate tax return (Form 706). Using the Plaintiff's own complaint and evidence, the Plaintiff owes the Defendant a minimum of \$70,248.32 for services that were ultimately prevented by the Plaintiff's act of firing the Defendant before the conclusion

of the matter. The Judgment should be granted to relieve the Defendant from the Judgment.

4. Alternatively, using the Plaintiff's own evidence provided at the time of the contract, the Plaintiff testified that the subject stock was valued at \$2,600,000.00, thereby increasing the overall estate value by \$1,200,000.00, resulting in an estate value of \$3,829,932.96. By using the Plaintiff's own evidence, the minimum fee owed by the Plaintiff to the Defendant under the contract was \$95,748.32 (2.5% of \$3,829,932.96). The Judgment should be granted to relieve the Defendant from the Judgment.

5. As mentioned above, the Plaintiff's estate attorney, Michael Jordan, committed fraud upon the Court when he testified that the Defendant was fired by the Plaintiff at the "beginning" of the estate administration. He also committed fraud upon the Court about the value of the estate and the only possible reason for the Defendant's conclusion of the estate value. Specifically, the Plaintiff's estate attorney, Michael Jordan, testified that the only possible reason for the Defendant to value the estate at a higher value than the amount proffered by Michael Jordan was for the Defendant to inflate the amount of the fee owed by the Plaintiff to the Defendant under the contract. The value of the estate is determinative of the necessity to file a Federal Estate Tax Return (IRS Form 706). Michael Jordan testified as to being authorized to practice before the Internal Revenue Service and it was not contested. Defendant testified as to being authorized to practice before the Internal Revenue Service and it was not contested. Treasury Department Circular No. 230 provides the Regulations Governing Practice before the Internal Revenue Service, Title 31 Code of Federal Regulations, Subtitle A, Part 10, updated (June 3, 2011) (Exhibit "A"). Treasury Department Circular No. 230 requires, in part, the following from those practicing before the Internal Revenue Service: §10.21, §10.22, §10.34, §10.37, §10.51 and §10.52. Under the provisions of Treasury Department Circular No. 230, both Defendant and Michael Jordan were charged with duties concerning the valuing of the estate and the proper application of the law. Michael Jordan testified that neither he nor his firm did any independent analysis or independent research concerning the value of the estate, the figures provided to them by the client, or the application of law necessary to appropriately determine whether an estate tax return was due to the Internal Revenue Service. Yet, Michael Jordan testified that he advised the client that no estate tax return was due. However, Michael Jordan's testimony admits that he is in direct violation of his requirements under the Treasury Department Circular No. 230 as someone who practices before the Internal Revenue Service (Exhibit "A"). Additionally, Michael Jordan testified that he based his information solely on information from the client and did not evaluate the operation of the Shareholder's Agreement's which was according to him, determinative of the value of the stock. However, the Defendant testified that the Shareholder's Agreement was not determinative of the fair market value of the stock, specifically referring to Chapter 14 of the Internal Revenue Code and the companion Treasury Regulations which directly disregard the value of stock in Shareholder Agreements if the Shareholder Agreements do not follow the Internal Revenue Code Chapter 14 and the companion regulations. All testimony and corresponding documentation from the Plaintiff and the Defendant exclusively show that the Shareholder Agreement was not followed in consummating a sale under it, and that the parties disregard of the terms of the Shareholder agreement that resulted in sale price value difference of approximately \$500,000.00. Under Internal Revenue Code Chapter 14 and the companion

regulations, the parties' disregard of the terms of the Shareholder Agreement excludes the Shareholder Agreement from consideration in valuing the stock. The omission of this fact is fraudulent upon the Court by Michael Jordan, who did not even mention Internal Revenue Code Chapter 14 or its companion Treasury Regulations. It should be noted that under Treasury Department Circular No. 230 (Exhibit "A"), incompetence is no excuse in determining the value of an estate or its assets. Even if the parties complied with the Shareholder Agreement as suggested by the Plaintiff and his single witness, Michael Jordan, and contradicted by the only documentation provided, the parties did not comply with Internal Revenue Code Chapter 14. Even if the parties complied with the general rules of Internal Revenue Code Chapter 14, the parties did not comply with the companion Treasury Regulations, in part, with Treasury Regs. §25.2703-1(c)(1) when the parties disregarded the terms (requiring a sale within 180 days of decedent's death) resulting in a \$500,000.00 change in sales price that was not allowed under the Shareholder Agreement. Therefore, the Judgment should be granted to relieve the Defendant from the Judgment.

6. In consideration of the fact that the Plaintiff's estate attorney, Michael Jordan, committed fraud upon the Court when he testified that the Defendant was fired by the Plaintiff at the "beginning" of the estate administration, that he fraudulently testified that the estate value was only increased by the Defendant to increase his fee, and that he fraudulently testified as to the application of the law to the facts and fraudulently omitted settled laws, codes, and regulations in his testimony, such testimony should be struck in its entirety. It should be considered that Michael Jordan, who testified fraudulently, was the only witness who testified in the case other than the parties to the case. Therefore, the Judgment should be granted to relieve the Defendant from the Judgment that would be appropriate without considering the fraudulent testimony of Michael Jordan who was a paid witness and attorney for the estate who is prohibited by the South Carolina Rules of Professional Conduct from providing any testimony against the interest of his client in this case.

7. Additionally, the Defendant's claimed that the only applicable contract was dated June 23, 2009, which expressly alluded to the services to be provided by the Defendant as those services that were necessary and appropriate for the administration of the estate under the laws of South Carolina. Necessary services for the administration of the estate are outlined by the South Carolina Probate and Trust Code and Internal Revenue Code §2053 and companion Treasury Regulations which do not include expenses related to the sale of estate property that is unnecessary for the payment of estate debts. The Defendant provided services for the sale of stock that was unnecessary for the administration of the estate and unnecessary to pay estate debts. Plaintiff and Plaintiff's witness testified that the Defendant's efforts directly resulted in the Plaintiff selling the subject stock at an additional profit of \$156,000.00 for the estate. This evidence was supported by documentation evidence and not contradicted by testimony or documentation. Therefore, the Judgment should be granted to relieve the Defendant from the Judgment.

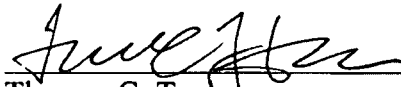
8. The Plaintiff (Ronald Orlosky) is incompetent to testify in this case regarding any transaction or communication between the Plaintiff and the decedent, Deborah Orlosky, under the

Dead Man Statute, South Carolina Code of Laws §19-11-20. Pursuant to the Dead Man Statute, the Defendant adamantly objected to the Plaintiff's testimony in this case which liberally included testimony transactions and communications between the Plaintiff and the decedent. The Court ruled against the Defendant's objections and allowed the Plaintiff to testify unencumbered about any transaction or communication between the Plaintiff and the decedent. In part, the Plaintiff adamantly testified about conversations that Plaintiff had with the decedent which contradicted the terms in the decedent's sworn testamentary documents such as decedent's Revocable Trust. Plaintiff also testified liberally about conversations that Plaintiff had with the decedent which directly contradicted the evidentiary documents signed by the decedent concerning the value of the decedent's estate, including particulars about the decedent's stock value. Dead man's statute essentially prohibits any interested person from testifying concerning conversations or transactions with decedent if testimony could affect his or her interest. *Hanahan v. Simpson* (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses (key) 125. The rule embodied in this section [Code 1962 26-402] [South Carolina Code of Laws §19-11-20] aims to prevent testimony "as to communications and transactions with persons deceased" in the cases therein enumerated, on the ground that it is against public policy to allow witnesses to testify as to matters, when, if such testimony is untrue, it cannot be contradicted. *Trimmier v Thomson* (1894) 41 SC 125, 19 SE 291. *Harris v Berry* (1957) 231 SC 201, 98 SE2d 251. In determining the applicability of the dead man's statute precluding testimony by, inter alia, "a person having an interest which may be affected by the event of the trial," the test is whether the witness has a certain or vested legal interest, and the interest may possibly be affected by the direct, legal operation of the judgment. *U.S. Fire Ins. Co. v. Macloskie* (S.C. App. 1995) 320 S.C. 459, 465 S.E.2d 759 rehearing denied. Witness (key) 140 (2). All documentary evidence and testimony showed that the Plaintiff (Ronald Orlosky) has and had a vested legal interest affected by the direct, legal operation of the judgment in this case. Therefore, his testimony concerning his communications and transactions with the decedent are expressly prohibited under the Dead Man Statute and aforementioned case law. Ronald Orlosky's unauthorized testimony rested heavily on the purported intentions of the decedent that directly contradicted the decedent's sworn testamentary documents such as decedent's Revocable Trust. Plaintiff Ronald Orlosky also testified liberally about conversations that Plaintiff had with the decedent which directly contradicted the evidentiary documents signed by the decedent concerning the value of the decedent's estate. The documentary evidence and testimony expressly shows that Ronald Orlosky is the primary beneficiary of the decedent's estate (income and principal) during Ronald Orlosky's lifetime, and that the Plaintiff's use of the estate assets for his own personal benefit is solely in the Plaintiff's discretion as Personal Representative and Trustee of the decedent's estate and trust. Therefore, the Judgment should be granted to relieve the Defendant from the Judgment that would be appropriate without considering the testimony of Ronald Orlosky whose testimony was based heavily on information prohibited under the Dead Man Statute.

For all of the foregoing reasons, the Defendant prays that this Court relieve the Defendant in its Judgment, as is set forth above.

I SO MOVE.

LAW OFFICE OF THOMAS C. TAYLOR, LLC



Thomas C. Taylor

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Hilton Head Island, SC 29938

S.C. Bar #: 5499

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Fax: 843-785-5030

Email: tom@thomastaylorlaw.com

ATTORNEY FOR DEFENDANTS

THE LAW OFFICE OF JAY A. MULLINAX, LLC

and

JAY A. MULLINAX, individually

Hilton Head Island, South Carolina

Dated: April 26, 2012

Treasury Department Circular No. 230

Regulations Governing Practice before the Internal Revenue Service
Title 31 Code of Federal Regulations,
Subtitle A, Part 10, published (June 3, 2011)

Subpart B — Duties and Restrictions Relating to Practice Before the Internal Revenue Service

§ 10.21 Knowledge of client's omission. A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.

§ 10.22 Diligence as to accuracy.(a) *In general.* A practitioner must exercise due diligence — (1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters; (2) In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and (3) In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service.(b) *Reliance on others.* Except as provided in §§ 10.34, 10.35 and 10.37, a practitioner will be presumed to have exercised due diligence for purposes of this section if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person. (c) *Effective/applicability date.* This section is applicable on September 26, 2007.

§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers.

(a) Tax returns.

(1) A practitioner may not willfully, recklessly, or through gross incompetence —

(i) Sign a tax return or claim for refund that the practitioner knows or reasonably should know contains a position that —

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Internal Revenue Code (Code) (including the related regulations and other published guidance); or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(ii) Advise a client to take a position on a tax return or claim for refund, or prepare a portion of a tax return or claim for refund containing a position, that —

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Code (including the related regulations and other published guidance); or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(2) A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted willfully, recklessly, or through gross incompetence.

(b) Documents, affidavits and other papers —

(1) A practitioner may not advise a client to take a position on a document, affidavit or other paper submitted to the Internal Revenue Service unless the position is not frivolous.

(2) A practitioner may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service —

(i) The purpose of which is to delay or impede the administration of the Federal tax laws;

(ii) That is frivolous; or

(iii) That contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation.

(c) Advising clients on potential penalties —

(1) A practitioner must inform a client of any penalties that are reasonably likely to apply to the client with respect to —

(i) A position taken on a tax return if —

(A) The practitioner advised the client with respect to the position; or

(B) The practitioner prepared or signed the tax return; and

(ii) Any document, affidavit or other paper submitted to the Internal Revenue Service.

(2) The practitioner also must inform the client of any opportunity to avoid any such penalties by disclosure, if relevant, and of the requirements for adequate disclosure.(3) This paragraph (c) applies even if the practitioner is not subject to a penalty under the Internal Revenue Code with respect to the position or with respect to the document, affidavit or other paper submitted.(d)

Relying on information furnished by clients. A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted to the Internal Revenue Service, or preparing or signing a tax return as a preparer, generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.(e) *Effective/applicability date.* Paragraph (a) of this section is applicable for returns or claims for refund filed, or advice provided, beginning August 2, 2011. Paragraphs (b) through (d) of this section are applicable to tax returns, documents, affidavits, and other papers filed on or after September 26, 2007.

§ 10.37 Requirements for other written advice.

(a) *Requirements.* A practitioner must not give written advice (including electronic communications) concerning one or more Federal tax issues if the practitioner bases the written advice on unreasonable factual or legal assumptions (including assumptions as to future events), unreasonably relies upon representations, statements, findings or agreements of the taxpayer or any other person, does not consider all relevant facts that the practitioner knows or should know, or, in evaluating a Federal tax issue, takes into account the possibility that a tax return will not be

audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised. All facts and circumstances, including the scope of the engagement and the type and specificity of the advice sought by the client will be considered in determining whether a practitioner has failed to comply with this section. In the case of an opinion the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with, or employed by the practitioner's firm) in promoting, marketing or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code, the determination of whether a practitioner has failed to comply with this section will be made on the basis of a heightened standard of care because of the greater risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances.(b) *Effective date.* This section applies to written advice that is rendered after June 20, 2005.

Subpart C — Sanctions for Violation of the Regulations

§ 10.51 Incompetence and disreputable conduct.

(a) *Incompetence and disreputable conduct.* Incompetence and disreputable conduct for which a practitioner may be sanctioned under §10.50 includes, but is not limited to —

(1) Conviction of any criminal offense under the Federal tax laws.(2) Conviction of any criminal offense involving dishonesty or breach of trust.(3) Conviction of any felony under Federal or State law for which the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service.(4) Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing the information to be false or misleading. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, and any other document or statement, written or oral, are included in the term "information." (5) Solicitation of employment as prohibited under §10.30, the use of false or misleading representations with intent to deceive a client or prospective client in order to procure employment, or intimating that the practitioner is able improperly to obtain special consideration or action from the Internal Revenue Service or any officer or employee thereof.(6) Willfully failing to make a Federal tax return in violation of the Federal tax laws, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax.(7) Willfully assisting, counseling, encouraging a client or prospective client in violating, or suggesting to a client or prospective client to violate, any Federal tax law, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof. (8) Misappropriation of, or failure properly or promptly to remit, funds received from a client for the purpose of payment of taxes or other obligations due the United States.(9) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the Internal Revenue Service by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of an advantage or by the bestowing of any gift, favor or thing of value.

(10) Disbarment or suspension from practice as an attorney, certified public accountant, public accountant, or actuary by any duly constituted authority of any State, territory, or possession of the United States, including a Commonwealth, or the District of Columbia, any Federal court of record or any Federal agency, body or board.

(11) Knowingly aiding and abetting another person to practice before the Internal Revenue Service during a period of suspension, disbarment or ineligibility of such other person.

(12) Contemptuous conduct in connection with practice before the Internal Revenue Service, including the use of abusive language, making false accusations or statements, knowing them to be false, or circulating or publishing malicious or libelous matter.

(13) Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws. False opinions described in this paragraph (a)(13) include those which reflect or result from a knowing misstatement of fact or law, from an assertion of a position known to be unwarranted under existing law, from counseling or assisting in conduct known to be illegal or fraudulent, from concealing matters required by law to be revealed, or from consciously disregarding information indicating that material facts expressed in the opinion or offering material are false or misleading. For purposes of this paragraph (a)(13), reckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances. A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted knowingly, recklessly, or through gross incompetence. Gross incompetence includes conduct that reflects gross indifference, preparation which is grossly inadequate under the circumstances, and a consistent failure to perform obligations to the client.

(14) Willfully failing to sign a tax return prepared by the practitioner when the practitioner's signature is required by Federal tax laws unless the failure is due to reasonable cause and not due to willful neglect.

(15) Willfully disclosing or otherwise using a tax return or tax return information in a manner not authorized by the Internal Revenue Code, contrary to the order of a court of competent jurisdiction, or contrary to the order of an administrative law judge in a proceeding instituted under §10.60.

(16) Willfully failing to file on magnetic or other electronic media a tax return prepared by the practitioner when the practitioner is required to do so by the Federal tax laws unless the failure is due to reasonable cause and not due to willful neglect.

(17) Willfully preparing all or substantially all of, or signing, a tax return or claim for refund when the practitioner does not possess a current or otherwise valid preparer tax identification number or other prescribed identifying number.

(18) Willfully representing a taxpayer before an officer or employee of the Internal Revenue Service unless the practitioner is authorized to do so pursuant to this part.

(b) *Effective/applicability date.* This section is applicable beginning August 2, 2011.

§ 10.52 Violations subject to sanction.

(a) A practitioner may be sanctioned under §10.50 if the practitioner —

(1) Willfully violates any of the regulations (other than §10.33) contained in this part; or

(2) Recklessly or through gross incompetence (within the meaning of §10.51(a)(13)) violates §§ 10.34, 10.35, 10.36 or 10.37.

(b) *Effective/applicability date.* This section is applicable to conduct occurring on or after September 26, 2007.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

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,

Plaintiff,

vs.

THE LAW OFFICE OF JAY A.
MULLINAX, LLC AND JAY A.
MULLINAX, individually,

Defendants.

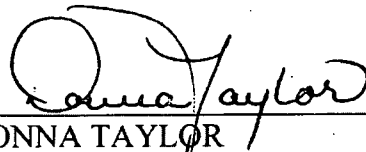
IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-07-4146

CERTIFICATE OF SERVICE

I, Donna Taylor, the undersigned employee of the Law Office of Thomas C. Taylor, LLC, Attorney for **THE LAW OFFICE OF JAY A. MULLINAX, LLC AND JAY A. MULLINAX, individually**, do hereby certify that I have served a copy of the foregoing, **Notice Of Motion and Motion For Relief From Judgment, Notice Of Motion And Motion To Alter Or Amend Judgment, Notice Of Motion And Motion For A New Trial, and Notice Of Motion And Motion For Directed Verdict And For Judgment Notwithstanding The Verdict** upon the counsel for the Plaintiff, John R.C. Bowen, by e-mail attachment and mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

John R. C. Bowen, Esquire
Laughlin & Bowen, P.C.
P.O. Drawer 21119
Hilton Head Island, SC 29925-1119
john@laughlinandbowen.com



DONNA TAYLOR
Legal Assistant to Thomas C. Taylor

Hilton Head Island, South Carolina
April 26, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	
	)	
RON ORLOSKY in his capacity as	)	CASE NO.: 2010-CP-07-4146
Personal Representative of THE	)	
ESTATE OF DEBORA L.	)	
ORLOSKY, and in his capacity as	)	
trustee of the DEBORA LAURA	)	
ORLOSKY REVOCABLE	)	
TRUST,	)	
	)	
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO
	)	ALTER OR AMEND JUDGMENT
vs.	)	
	)	
THE LAW OFFICE OF JAY A.	)	
MULLINAX, LLC AND JAY A.	)	
MULLINAX, individually,	)	
	)	
Defendants.	)	
	)	

**TO: THE HONORABLE ROGER M. YOUNG AND JOHN R.C. BOWEN, ESQUIRE,
ATTORNEY FOR THE PLAINTIFF:**

YOU WILL PLEASE TAKE NOTICE that pursuant to Rule 59 of the South Carolina Rules of Civil Procedure (SCRCP), the Defendants will, ten (10) days after the filing of this Notice of Motion and Motion, or as soon as thereafter as the Court schedules same for Hearing, move this Honorable Court to alter or amend the Judgment against the Defendant.

As the basis of this Motion, the Defendant shows that the Order Ending Case is a final Judgment as contemplated under the Rules, and that same fails to address certain claims made by the Defendant sufficient to insure that same are preserved for appeal. Specifically, the Defendant moves this Court to alter or amend the Judgment to address the following claims as proscribed under Rule 59:

1. The present verdict for \$80,000.00 against the Defendant was rendered on April 26, 2012.

a. Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical. Neither contains any provision for a motion for "reconsideration." However, federal courts consider it appropriate for a party to make a "motion for reconsideration" under Rule 59(e) even though the rule mentions only a "motion to alter or amend a judgment." This view holds true even when a party mislabels a post-trial motion. *See Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 837 (7th Cir. 1999) (Rule 4(a) (4), FRAP, restates long-accepted practice of considering motions for reconsideration, a practice independent of any appellate rule); 12 *Moore's Federal Practice* § 59.30[2] [a] and [7]; 11 Wright, Miller & Kane § 2810.1; 20 *Moore's Federal Practice* §§ 304.13[2] and 304.13[4]

[b] (3d ed. 2003). "[T]he wisdom of giving district courts the opportunity promptly to correct their own alleged errors is all the justification needed" for the practice of freely allowing a motion for reconsideration. *Blair*, 181 F.3d at 837.

In fact, the United States Supreme Court explicitly has described a motion under federal Rule 59(e) as one which "involves *reconsideration* of matters properly encompassed in a decision on the merits." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174, 109 S.Ct. 987, 990, 103 L.Ed.2d 146, 154 (1989) (a request relating to discretionary prejudgment interest is a part of the plaintiff's compensation and thus a part of the decision on the merits, which means a Rule 59(e) motion raising prejudgment interest tolled the time for appeal; Court cited precedent in which Rule 59(e) motions relating to attorney's fees and case costs are deemed collateral issues, thus such motions did not toll the time for appeal) (emphasis added). The Court explained its decision furthered the goals of avoiding piecemeal appeals and fostering informed appellate review. *Osterneck*, 489 U.S. at 177-178, 109 S.Ct. at 992, 103 L.Ed.2d at 156.

b. The commentators explain that the approach taken in today's rules allowing a motion for reconsideration which addresses the merits of the case at hand originated in the common law. "It is absolutely necessary *to justice*, that there should, upon many occasions, be opportunities of *reconsidering* the cause by a new trial." 11 Wright, Miller & Kane § 2801 (quoting a 1757 opinion written by an English judge) (emphasis in original); 12 *Moore's Federal Practice* 59 App. 102 (even before 1946 amendment adding subdivision (e) to Rule 59, courts routinely found that motions seeking such relief as rehearing or reconsideration were proper under Rule 59, although the motions were not literally or technically motions for a new trial).

c. Third, our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. Fourth, South Carolina appellate courts do not recognize the "plain error rule," under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party. *Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002); *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001).

d. Our mandatory preservation requirements make it doubly important that litigants generally be freely allowed to file a first, written Rule 59(e) motion without concern a later appeal will be deemed untimely.

e. Fifth, civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party, but a careful consideration of this issue has led us to conclude that is precisely the effect of an unwarranted expansion of *Quality Trailer*. Cf. *Gamble v. State*, 298 S.C. 176, 379 S.E.2d 118 (1989) (stating rules applicable to post-conviction relief actions should not be construed in manner which operate as a trap for the unwary or deprive an applicant of the adjudication on the merits of his original petition); Rule 1, SCRCP (civil procedure rules "shall be construed to secure the just,

speedy, and inexpensive determination of every action").

f. If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review. But in filing the motion, he may unwittingly forfeit the right to an appeal if an appellate court later determines the Rule 59(e) motion was unnecessary because he already had raised the issue and obtained a ruling. We strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place. *Elam v. SC Department of Transportation* 602 S.E.2d 772 (S.C. 2004)

g. In order to insure that all of the Defendant's positions are properly preserved for appeal, the Defendant moves this Court to alter or amend the Judgment to address the following claims:

1. The present verdict for \$80,000.00 against the Defendant was rendered on April 26, 2012 and is premised on the fact that the Defendant breached a contract with the Plaintiff. The non-contradicted evidence by both parties suggests that the contract was for the legal services necessary for the administration of the subject estate and that the Defendant discharged the Plaintiff prior to the closing of the estate administration, making it impossible for the Defendant to perform the services under the contract. As a matter of law, the Defendant should not be held liable for the Plaintiff's actions (firing the Defendant) which made the Defendant's ability to perform the Defendant's duties under the contract impossible. Defendant moves to alter or amend the Judgment to reflect the fact that the Plaintiff discharged the Defendant making it a legal impossibility for the Defendant to fulfill its duties under the terms of the contract. The Judgment should be altered or amended to reduce the Defendant's liability on a contract that the Plaintiff made impossible for the Defendant to perform.

2. Alternatively, if the Court believes that the Defendant is owed less than the amount that would have been owed for the completion of the services contemplated in the contract, the Court should consider the evidence provided at the trial to determine the portion of the Defendant's services performed under the contract. The Plaintiff's witness and attorney for the estate expressly testified that the only thing remaining in the estate administration was to file the documents to close the estate. The South Carolina Probate Code §62-3-1001 outlines the estate closing procedures in one-half page of the South Carolina Probate Code §62-3-1001 which consists of over 650 pages. Therefore, according to all of the evidence presented by all parties, all other necessary estate administration was completed prior to trial. According to the testimony of the plaintiff's estate attorney (Michael Jordan) and the documentation presented in the trial, Michael Jordan had only prepared one interim accounting and one supplemental inventory to file with Probate Court. It was not contradicted that the Defendant had prepared and filed the original inventory with the Probate Court and that no accounting was due to the Court during the estate's employment of the Defendant. Furthermore, the evidence presented along with testimony, which was not contradicted, showed that the Defendant's collected values for the estate property were the only values shown on the draft estate tax return prepared by Michael Jordan. Therefore, it is blatantly false and a fraud upon the Court by the Plaintiff's estate attorney, Michael Jordan, that that when the Defendant was fired by the Plaintiff that the Defendant's services were at the

“beginning” of the estate administration. The Judgment should be altered or amended to reflect what the Court believes that the Defendant is owed based on the portion of the services completed by the Defendant as performed under the contract.

3. Alternatively, if the Court believes that the sums owed under the contract should be in an amount claimed by the Plaintiff in its complaint, the Plaintiff claimed that the Defendant was owed a minimum of 2.5% of the value of the estate under the subject contract. Although the Defendant disagrees with the Plaintiff's estate value and testimony, the Plaintiff proffered documentation and testimony by an attorney for the estate (Michael Jordan), which purports the estate value of \$2,809,932.96 on a draft estate tax return (Form 706). Using the Plaintiff's own complaint and evidence, the Plaintiff owes the Defendant a minimum of \$70,248.32 for services that were ultimately prevented by the Plaintiff's act of firing the Defendant before the conclusion of the matter. The Judgment should be altered or amended to compensate the Defendant the minimum of \$70,248.32 for services that were ultimately prevented by the Plaintiff's act of firing the Defendant before the conclusion of the matter.

4. Alternatively, using the Plaintiff's own evidence provided at the time of the contract, the Plaintiff testified that the subject stock was valued at \$2,600,000.00, thereby increasing the overall estate value by \$1,200,000.00, resulting in an estate value of \$3,829,932.96. By using the Plaintiff's own evidence, the minimum fee owed by the Plaintiff to the Defendant under the contract was \$95,748.32 (2.5% of \$3,829,932.96). The Judgment should be altered or amended to compensate the Defendant the minimum of \$95,748.32 (2.5% of \$3,829,932.96) for services that were ultimately prevented by the Plaintiff's act of firing the Defendant before the conclusion of the matter, or, alternatively, in an amount proportional to the necessary services provided to administer the estate.

5. As mentioned above, the Plaintiff's estate attorney, Michael Jordan, committed fraud upon the Court when he testified that the Defendant was fired by the Plaintiff at the “beginning” of the estate administration. He also committed fraud upon the Court about the value of the estate and the only possible reason for the Defendant's conclusion of the estate value. Specifically, the Plaintiff's estate attorney, Michael Jordan, testified that the only possible reason for the Defendant to value the estate at a higher value than the amount proffered by Michael Jordan was for the Defendant to inflate the amount of the fee owed by the Plaintiff to the Defendant under the contract. The value of the estate is determinative of the necessity to file a Federal Estate Tax Return (IRS Form 706). Michael Jordan testified as to being authorized to practice before the Internal Revenue Service and it was not contested. Defendant testified as to being authorized to practice before the Internal Revenue Service and it was not contested. Treasury Department Circular No. 230 provides the Regulations Governing Practice before the Internal Revenue Service, Title 31 Code of Federal Regulations, Subtitle A, Part 10, updated (June 3, 2011) (Exhibit “A”). Treasury Department Circular No. 230 requires, in part, the following from those practicing before the Internal Revenue Service: §10.21, §10.22, §10.34, §10.37, §10.51 and §10.52. Under the provisions of Treasury Department Circular No. 230, both Defendant and Michael Jordan were charged with duties concerning the valuing of the estate and the proper application of the law. Michael Jordan testified that neither he nor his firm did any independent

analysis or independent research concerning the value of the estate, the figures provided to them by the client, or the application of law necessary to appropriately determine whether an estate tax return was due to the Internal Revenue Service. Yet, Michael Jordan testified that he advised the client that no estate tax return was due. However, Michael Jordan's testimony admits that he is in direct violation of his requirements under the Treasury Department Circular No. 230 as someone who practices before the Internal Revenue Service (Exhibit "A"). Additionally, Michael Jordan testified that he based his information solely on information from the client and did not evaluate the operation of the Shareholder's Agreement's which was according to him, determinative of the value of the stock. However, the Defendant testified that the Shareholder's Agreement was not determinative of the fair market value of the stock, specifically referring to Chapter 14 of the Internal Revenue Code and the companion Treasury Regulations which directly disregard the value of stock in Shareholder Agreements if the Shareholder Agreements do not follow the Internal Revenue Code Chapter 14 and the companion regulations. All testimony and corresponding documentation from the Plaintiff and the Defendant exclusively show that the Shareholder Agreement was not followed in consummating a sale under it, and that the parties disregard of the terms of the Shareholder agreement that resulted in sale price value difference of approximately \$500,000.00. Under Internal Revenue Code Chapter 14 and the companion regulations, the parties' disregard of the terms of the Shareholder Agreement excludes the Shareholder Agreement from consideration in valuing the stock. The omission of this fact is fraudulent upon the Court by Michael Jordan, who did not even mention Internal Revenue Code Chapter 14 or its companion Treasury Regulations. It should be noted that under Treasury Department Circular No. 230 (Exhibit "A"), incompetence is no excuse in determining the value of an estate or its assets. Even if the parties complied with the Shareholder Agreement as suggested by the Plaintiff and his single witness, Michael Jordan, and contradicted by the only documentation provided, the parties did not comply with Internal Revenue Code Chapter 14. Even if the parties complied with the general rules of Internal Revenue Code Chapter 14, the parties did not comply with the companion Treasury Regulations, in part, with Treasury Regs. §25.2703-1(c)(1) when the parties disregarded the terms (requiring a sale within 180 days of decedent's death) resulting in a \$500,000.00 change in sales price that was not allowed under the Shareholder Agreement. Therefore, the Judgment should be altered or amended to compensate the Defendant in amount that would be appropriate without considering the fraudulent testimony of Michael Jordan regarding the value of the estate.

6. In consideration of the fact that the Plaintiff's estate attorney, Michael Jordan, committed fraud upon the Court when he testified that the Defendant was fired by the Plaintiff at the "beginning" of the estate administration, that he fraudulently testified that the estate value was only increased by the Defendant to increase his fee, and that he fraudulently testified as to the application of the law to the facts and fraudulently omitted settled laws, codes, and regulations in his testimony, such testimony should be struck in its entirety. It should be considered that Michael Jordan, who testified fraudulently, was the only witness who testified in the case other than the parties to the case. Therefore, the Judgment should be altered or amended to compensate the Defendant in amount that would be appropriate without considering the fraudulent testimony of Michael Jordan who was a paid witness and attorney for the estate who is prohibited by the South Carolina Rules of Professional Conduct from providing any testimony against the interest

of his client in this case.

7. Additionally, the Defendant's claimed that the only applicable contract was dated June 23, 2009, which expressly alluded to the services to be provided by the Defendant as those services that were necessary and appropriate for the administration of the estate under the laws of South Carolina. Necessary services for the administration of the estate are outlined by the South Carolina Probate and Trust Code and Internal Revenue Code §2053 and companion Treasury Regulations which do not include expenses related to the sale of estate property that is unnecessary for the payment of estate debts. The Defendant provided services for the sale of stock that was unnecessary for the administration of the estate and unnecessary to pay estate debts. Plaintiff and Plaintiff's witness testified that the Defendant's efforts directly resulted in the Plaintiff selling the subject stock at an additional profit of \$156,000.00 for the estate. This evidence was supported by documentation evidence and not contradicted by testimony or documentation. Therefore, the Judgment should be altered or amended to compensate the Defendant for the services which resulted in the Plaintiff's additional profit of \$156,000.00.

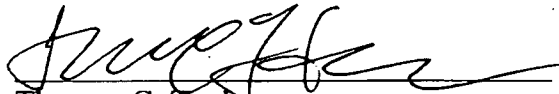
8. The Plaintiff (Ronald Orlosky) is incompetent to testify in this case regarding any transaction or communication between the Plaintiff and the decedent, Deborah Orlosky, under the Dead Man Statute, South Carolina Code of Laws §19-11-20. Pursuant to the Dead Man Statute, the Defendant adamantly objected to the Plaintiff's testimony in this case which liberally included testimony transactions and communications between the Plaintiff and the decedent. The Court ruled against the Defendant's objections and allowed the Plaintiff to testify unencumbered about any transaction or communication between the Plaintiff and the decedent. In part, the Plaintiff adamantly testified about conversations that Plaintiff had with the decedent which contradicted the terms in the decedent's sworn testamentary documents such as decedent's Revocable Trust. Plaintiff also testified liberally about conversations that Plaintiff had with the decedent which directly contradicted the evidentiary documents signed by the decedent concerning the value of the decedent's estate, including particulars about the decedent's stock value. Dead man's statute essentially prohibits any interested person from testifying concerning conversations or transactions with decedent if testimony could affect his or her interest. *Hanahan v. Simpson* (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses (key) 125. The rule embodied in this section [Code 1962 26-402] [South Carolina Code of Laws §19-11-20] aims to prevent testimony "as to communications and transactions with persons deceased" in the cases therein enumerated, on the ground that it is against public policy to allow witnesses to testify as to matters, when, if such testimony is untrue, it cannot be contradicted. *Trimmier v Thomson* (1894) 41 SC 125, 19 SE 291. *Harris v Berry* (1957) 231 SC 201, 98 SE2d 251. In determining the applicability of the dead man's statute precluding testimony by, inter alia, "a person having an interest which may be affected by the event of the trial," the test is whether the witness has a certain or vested legal interest, and the interest may possibly be affected by the direct, legal operation of the judgment. *U.S. Fire Ins. Co. v. Macloskie* (S.C. App. 1995) 320 S.C. 459, 465 S.E.2d 759 rehearing denied. Witness (key) 140 (2). All documentary evidence and testimony showed that the Plaintiff (Ronald Orlosky) has and had a vested legal interest affected by the direct, legal operation of the judgment in this case. Therefore, his testimony concerning his communications and transactions with the decedent are expressly prohibited under

the Dead Man Statute and aforementioned case law. Ronald Orlosky's unauthorized testimony rested heavily on the purported intentions of the decedent that directly contradicted the decedent's sworn testamentary documents such as decedent's Revocable Trust. Plaintiff Ronald Orlosky also testified liberally about conversations that Plaintiff had with the decedent which directly contradicted the evidentiary documents signed by the decedent concerning the value of the decedent's estate. The documentary evidence and testimony expressly shows that Ronald Orlosky is the primary beneficiary of the decedent's estate (income and principal) during Ronald Orlosky's lifetime, and that the Plaintiff's use of the estate assets for his own personal benefit is solely in the Plaintiff's discretion as Personal Representative and Trustee of the decedent's estate and trust. Therefore, the Judgment should be altered or amended to compensate the Defendant in amount that would be appropriate without considering the testimony of Ronald Orlosky whose testimony was based heavily on information prohibited under the Dead Man Statute.

For all of the foregoing reasons, the Defendant prays that this Court alter or amend its Judgment to reflect the evidence revealed at trial, as is set forth above.

I SO MOVE.

LAW OFFICE OF THOMAS C. TAYLOR, LLC



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ATTORNEY FOR DEFENDANTS

THE LAW OFFICE OF JAY A. MULLINAX, LLC

and

JAY A. MULLINAX, individually

Hilton Head Island, South Carolina

Dated: *April 26, 2012*

Treasury Department Circular No. 230

**Regulations Governing Practice before the Internal Revenue Service
Title 31 Code of Federal Regulations,
Subtitle A, Part 10, published (June 3, 2011)**

Subpart B — Duties and Restrictions Relating to Practice Before the Internal Revenue Service

§ 10.21 Knowledge of client's omission. A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.

§ 10.22 Diligence as to accuracy.(a) *In general.* A practitioner must exercise due diligence — (1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters; (2) In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and (3) In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service.(b) *Reliance on others.* Except as provided in §§ 10.34, 10.35 and 10.37, a practitioner will be presumed to have exercised due diligence for purposes of this section if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person. (c) *Effective/applicability date.* This section is applicable on September 26, 2007.

§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers.

(a) Tax returns.

(1) A practitioner may not willfully, recklessly, or through gross incompetence —

(i) Sign a tax return or claim for refund that the practitioner knows or reasonably should know contains a position that —

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Internal Revenue Code (Code) (including the related regulations and other published guidance); or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(ii) Advise a client to take a position on a tax return or claim for refund, or prepare a portion of a tax return or claim for refund containing a position, that —

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Code (including the related regulations and other published guidance); or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(2) A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted willfully, recklessly, or through gross incompetence.

(b) *Documents, affidavits and other papers* —

(1) A practitioner may not advise a client to take a position on a document, affidavit or other paper submitted to the Internal Revenue Service unless the position is not frivolous.

(2) A practitioner may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service —

(i) The purpose of which is to delay or impede the administration of the Federal tax laws;

(ii) That is frivolous; or

(iii) That contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation.

(c) *Advising clients on potential penalties* —

(1) A practitioner must inform a client of any penalties that are reasonably likely to apply to the client with respect to —

(i) A position taken on a tax return if —

(A) The practitioner advised the client with respect to the position; or

(B) The practitioner prepared or signed the tax return; and

(ii) Any document, affidavit or other paper submitted to the Internal Revenue Service.

(2) The practitioner also must inform the client of any opportunity to avoid any such penalties by disclosure, if relevant, and of the requirements for adequate disclosure.(3) This paragraph (c) applies even if the practitioner is not subject to a penalty under the Internal Revenue Code with respect to the position or with respect to the document, affidavit or other paper submitted.(d)

Relying on information furnished by clients. A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted to the Internal Revenue Service, or preparing or signing a tax return as a preparer, generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.(e) *Effective/applicability date.* Paragraph (a) of this section is applicable for returns or claims for refund filed, or advice provided, beginning August 2, 2011. Paragraphs (b) through (d) of this section are applicable to tax returns, documents, affidavits, and other papers filed on or after September 26, 2007.

§ 10.37 Requirements for other written advice.

(a) *Requirements.* A practitioner must not give written advice (including electronic communications) concerning one or more Federal tax issues if the practitioner bases the written advice on unreasonable factual or legal assumptions (including assumptions as to future events), unreasonably relies upon representations, statements, findings or agreements of the taxpayer or any other person, does not consider all relevant facts that the practitioner knows or should know, or, in evaluating a Federal tax issue, takes into account the possibility that a tax return will not be

audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised. All facts and circumstances, including the scope of the engagement and the type and specificity of the advice sought by the client will be considered in determining whether a practitioner has failed to comply with this section. In the case of an opinion the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with, or employed by the practitioner's firm) in promoting, marketing or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code, the determination of whether a practitioner has failed to comply with this section will be made on the basis of a heightened standard of care because of the greater risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances. (b) *Effective date.* This section applies to written advice that is rendered after June 20, 2005.

Subpart C — Sanctions for Violation of the Regulations

§ 10.51 Incompetence and disreputable conduct.

(a) *Incompetence and disreputable conduct.* Incompetence and disreputable conduct for which a practitioner may be sanctioned under §10.50 includes, but is not limited to —

(1) Conviction of any criminal offense under the Federal tax laws. (2) Conviction of any criminal offense involving dishonesty or breach of trust. (3) Conviction of any felony under Federal or State law for which the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service. (4) Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing the information to be false or misleading. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, and any other document or statement, written or oral, are included in the term "information." (5) Solicitation of employment as prohibited under §10.30, the use of false or misleading representations with intent to deceive a client or prospective client in order to procure employment, or intimating that the practitioner is able improperly to obtain special consideration or action from the Internal Revenue Service or any officer or employee thereof. (6) Willfully failing to make a Federal tax return in violation of the Federal tax laws, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax. (7) Willfully assisting, counseling, encouraging a client or prospective client in violating, or suggesting to a client or prospective client to violate, any Federal tax law, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof. (8) Misappropriation of, or failure properly or promptly to remit, funds received from a client for the purpose of payment of taxes or other obligations due the United States. (9) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the Internal Revenue Service by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of an advantage or by the bestowing of any gift, favor or thing of value.

(10) Disbarment or suspension from practice as an attorney, certified public accountant, public accountant, or actuary by any duly constituted authority of any State, territory, or possession of the United States, including a Commonwealth, or the District of Columbia, any Federal court of record or any Federal agency, body or board.

(11) Knowingly aiding and abetting another person to practice before the Internal Revenue Service during a period of suspension, disbarment or ineligibility of such other person.

(12) Contemptuous conduct in connection with practice before the Internal Revenue Service, including the use of abusive language, making false accusations or statements, knowing them to be false, or circulating or publishing malicious or libelous matter.

(13) Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws. False opinions described in this paragraph (a)(13) include those which reflect or result from a knowing misstatement of fact or law, from an assertion of a position known to be unwarranted under existing law, from counseling or assisting in conduct known to be illegal or fraudulent, from concealing matters required by law to be revealed, or from consciously disregarding information indicating that material facts expressed in the opinion or offering material are false or misleading. For purposes of this paragraph (a)(13), reckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances. A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted knowingly, recklessly, or through gross incompetence. Gross incompetence includes conduct that reflects gross indifference, preparation which is grossly inadequate under the circumstances, and a consistent failure to perform obligations to the client.

(14) Willfully failing to sign a tax return prepared by the practitioner when the practitioner's signature is required by Federal tax laws unless the failure is due to reasonable cause and not due to willful neglect.

(15) Willfully disclosing or otherwise using a tax return or tax return information in a manner not authorized by the Internal Revenue Code, contrary to the order of a court of competent jurisdiction, or contrary to the order of an administrative law judge in a proceeding instituted under §10.60.

(16) Willfully failing to file on magnetic or other electronic media a tax return prepared by the practitioner when the practitioner is required to do so by the Federal tax laws unless the failure is due to reasonable cause and not due to willful neglect.

(17) Willfully preparing all or substantially all of, or signing, a tax return or claim for refund when the practitioner does not possess a current or otherwise valid preparer tax identification number or other prescribed identifying number.

(18) Willfully representing a taxpayer before an officer or employee of the Internal Revenue Service unless the practitioner is authorized to do so pursuant to this part.

(b) *Effective/applicability date.* This section is applicable beginning August 2, 2011.

§ 10.52 Violations subject to sanction.

(a) A practitioner may be sanctioned under §10.50 if the practitioner —

(1) Willfully violates any of the regulations (other than §10.33) contained in this part; or

(2) Recklessly or through gross incompetence (within the meaning of §10.51(a)(13)) violates §§ 10.34, 10.35, 10.36 or 10.37.

(b) *Effective/applicability date.* This section is applicable to conduct occurring on or after September 26, 2007.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

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,

Plaintiff,

vs.

THE LAW OFFICE OF JAY A.
MULLINAX, LLC AND JAY A.
MULLINAX, individually,

Defendants.

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-07-4146

CERTIFICATE OF SERVICE

I, Donna Taylor, the undersigned employee of the Law Office of Thomas C. Taylor, LLC, Attorney for **THE LAW OFFICE OF JAY A. MULLINAX, LLC AND JAY A. MULLINAX, individually**, do hereby certify that I have served a copy of the foregoing, **Notice Of Motion and Motion For Relief From Judgment, Notice Of Motion And Motion To Alter Or Amend Judgment, Notice Of Motion And Motion For A New Trial, and Notice Of Motion And Motion For Directed Verdict And For Judgment Notwithstanding The Verdict** upon the counsel for the Plaintiff, John R.C. Bowen, by e-mail attachment and mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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DONNA TAYLOR
Legal Assistant to Thomas C. Taylor

Hilton Head Island, South Carolina
April 26, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CASE NO.: 2010-CP-07-4146
	)	
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,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	PLAINTIFF'S MEMORANDUM IN
	)	OPPOSITION TO DEFENDANT'S
THE LAW OFFICE OF JAY A.	)	POST-TRIAL MOTIONS
MULLINAX, LLC AND JAY A.	)	
MULLINAX, individually,	)	
	)	
Defendants.	)	
	)	

TO: THE HONORABLE ROGER M. YOUNG AND THOMAS C. TAYLOR, ESQUIRE,
ATTORNEY FOR THE DEFENDANTS

Plaintiff, by and for his memorandum in opposition to the defendants' post-trial motions respectfully submits the following.

BRIEF STATEMENT OF FACTS

This action involved a claim by plaintiff that defendant had breached its written contract with plaintiff by charging and collecting more than was due under the contract for legal services, and specifically the clause regarding charges due upon termination. Defendant's counterclaim, also for breach of contract, alleged that defendant was due additional sums under the agreement. The case was tried before a jury between April 18, 2012 and April 20, 2012. On April 20, 2012, the jury returned a verdict in favor of the plaintiff in the amount of \$80,000.00, and also found

for the plaintiff on defendant's counterclaim.

During the trial, the plaintiff introduced evidence of the relevant contract provision governing payment upon termination which provided that:

4. **Termination of Engagement**
 - (a) The Personal Representative/Trustee, once determined, may terminate this engagement at any time by notice in writing to me. Upon receipt of such notice, subject to such court approval, as may be necessary in the context of the situation, I will promptly cease providing any services to the estate or trust as allowed by law. **The estate or trust will be responsible for paying for my services rendered up to the time I receive such notice** and for such reasonable services that I provide thereafter in connection with the transfer of responsibility for the matters I am providing to new counsel. . . [emphasis added]

Plaintiff testified that his understanding of that provision was that if he terminated defendant, defendant was entitled to be paid only for the time he had spent and expenses incurred on the case through the date of termination, plus such additional work involved in transferring the file to a new attorney. Notwithstanding the contract provisions and repeated requests for defendant's time and billing records, plaintiff testified that Mullinax refused to provide any detailed time and billing records for the work done on the Estate prior to the termination, and insisted he was due additional sums for work on the Estate and for "extra work" which he claimed was outside of the contract.¹

Mr. Orlosky testified that he had actually paid the defendant \$100,000.00 over a six or seven month period, and that he had terminated the defendant because he felt defendant was not properly performing the job for which he was hired, had not kept plaintiff informed of his

¹ The defendant acknowledged in his testimony that he did not keep time and expense records for the work performed under the contract because he "chose to charge the minimum amount due by the estate."

activities, and had on occasion acted contrary to plaintiff's instructions.² At the time of the termination, he testified, defendant had not completed or filed an accurate Inventory and Appraisement with the Probate Court, had not prepared even a draft of a tax return, and that he himself had been forced to seek an extension of time from the IRS because defendant had not prepared a return. Orlosky testified that following the termination of defendant he hired Michael L.M. Jordan to complete the administration of his late wife's estate, and had paid Mr. Jordan more than \$30,000.00 to do the work that he had engaged defendant to perform. He further testified that he felt that the services actually performed by the defendant on his behalf were worth, at most \$20,000.00 and that he was due a refund.

Michael L.M. Jordan of the McNair Firm, the attorney hired to complete the work on the estate, testified that at the time his firm took over the matter very little had been done. He further testified that, although this was not a complex estate, he had essentially had to start over from the beginning. After more than a year of work, his firm had done all that was necessary to administer the estate and to determine whether or not a tax return was necessary, for which they had billed plaintiff just over \$30,000.00.³ His testimony was that his firm would have billed at most about \$20,000.00 for the work done by defendant, and probably far less.

DEFENDANT'S MOTIONS

² This testimony was corroborated by the testimony of plaintiff's witness Mr. Boyd Lang, who also testified at length concerning the value of Manor Development Stock and its value under an agreement with the decedent and other owners.

³ Mr. Jordan indicated that only about \$23,000.00 was for estate administration, and the remainder was for responding to and defending the plaintiff from defendant's claim for additional fees.

The defendant has filed and served the following captioned post-trial motions: Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict, Motion for New Trial, Motion for Relief from Judgment, and Motion to Alter or Amend Judgment. Each of these motions contains essentially the same arguments as follows:

1. The amount of the verdict is excessive and should be reduced;
2. The Court should exercise its powers under the “Thirteenth Juror” doctrine, and should grant a new trial because the verdict is excessive, because plaintiff’s estate attorney “committed fraud upon the Court . . .,” and because evidence prohibited by the “Dead Man Statute” was improperly admitted.
3. The Court should grant relief from judgment and set the verdict aside because plaintiff’s estate attorney “committed fraud upon the Court . . .,” and,
4. The Court should “alter or amend its judgment” to comport with the defendant’s view of the evidence adduced at trial.

For this reason, plaintiff is submitting this single Memorandum in response to all four motions.

DISCUSSION

I. Motion for Directed Verdict and for Judgment Notwithstanding the Verdict

A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability. *Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972). When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Harvey v. Strickland*, 350 S.C. 303, 308, 566 S.E.2d 529, 532 (2002). In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct.App.2002).

In the recent case of *Cody P. v. Bank of America, N.A.*, 395 S.C. 611, 720 S.E.2d 473 (S.C.App. 2011), the Court of Appeals observed that “[I]n ruling on a motion for JNOV, the

trial court must view the evidence, and the inferences that can reasonably be drawn from the evidence, in a light most favorable to the party opposing the motion. *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E. 2d 886 (2006). The trial court should deny a motion for JNOV when the evidence yields more than one inference or its inferences are in doubt. *Id.* “

In this case, plaintiff presented evidence from which the jury could have easily concluded that the value of the services rendered by defendant were worth no more than \$20,000.00, and that plaintiff was entitled to a refund of \$80,000.00 or the \$100,000.00 he had already paid. While the defendant presented testimony that in fact the services were worth far more, and that the plaintiff owed him at least \$32,000.00 more than had been paid, the jury obviously did not find the defendant's evidence credible. Since under *Harvey* the trial court has no authority to decide credibility issues or to resolve conflicts in the testimony or evidence, the court should deny the defendant's motion.

II. Motion for New Trial. Motion for Relief from Judgment, and Motion to Alter or Amend Judgment.

In these motions the defendant urges that the Court should exercise its powers under the “Thirteenth Juror” doctrine, and should grant a new trial because (1) the verdict is excessive, (2) plaintiff's estate attorney “committed fraud upon the Court . . .;” and, (3) because evidence prohibited by the “Dead Man Statute” was improperly admitted.

The “thirteenth juror” doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds the evidence does not justify the verdict. *Folkens v. Hunt*, 300 S.C. 251, 254, 387 s.e.2D 265, 267 (1990). The “thirteenth juror” doctrine is not used when the trial judge

has found the verdict was inadequate or unduly liberal and, therefore, is not a vehicle to grant a new trial nisi additur. *Bailey v. Peacock*, 318 S.C. 13, 455 S.E.2d 690 (S.C. 1995). Furthermore it is well settled that compelling reasons must be given to justify invading the jury's province. *Bailey*, Id at 14; *North American Rescue Products, Inc. v. Richardson*, 396 S.C. 124, 720 S.E.2d 53 (S.C.App. 2011). Here, defendant gives no "compelling reason" for the court to justify invading the jury's province.

The defendant also argues that plaintiff's estate attorney committed fraud upon the court by his testimony. In *Chewning v. Ford Motor Co.*, 354 S.C. 72, 579 S.E.2d 605 (S.C. 2003) our Supreme Court undertook for the first time to define fraud upon the court in connection with setting aside a final judgment. The court observed that in *Evans v. Gunter*, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct.App.1988), "the Court of Appeals described "fraud upon the court" as "that species of fraud which does, or attempts to, subvert the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." (citing H. Lightsey, J. Flanagan, *South Carolina Civil Procedure*, 408 (2nd ed.1985))." The Court further observed that "Fraud upon the court is a "serious allegation ... involving 'corruption of the judicial process itself.' " *Cleveland Demolition Co., Inc. v. Azcon Scrap Corp.*, *supra* 827 F.2d at 986 quoting *In re Whitney-Forbes*, 770 F.2d 692, 698 (7th Cir. 1985); and that ... '[F]raud on the court,' whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court. A proper balance between the interests of finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing--what can properly be characterized as a deliberate scheme to defraud--

before relief from a final judgment is appropriate.... Thus, when there is no intent to deceive, the fact that misrepresentations were made to a court is not of itself sufficient basis for setting aside a judgment for 'fraud on the court.' *United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir. 2002) quoting *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1267 (10th Cir. 1995).

The Supreme Court also undertook to distinguish Intrinsic and Extrinsic Fraud as follows: "Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." *Hilton Head Ctr. of South Carolina v. Public Serv. Comm'n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). Intrinsic fraud, on the other hand, is fraud which was presented and considered in the trial, *Hagy v. Pruitt*, 339 S.C. 425, 529 S.E.2d 714 (2000). It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud. *Hilton Head Ctr. v. South Carolina Pub. Serv. Comm'n*, *supra*. "Relief is granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments." *Mr. G. v. Mrs. G.*, 320 S.C. 305, 308, 465 S.E.2d 101, 103 (Ct.App.1995).of all judgments." *Mr. G. v. Mrs. G.*, 320 S.C. 305, 308, 465 S.E.2d 101, 103 (Ct.App.1995).

The defendant does not argue, nor will the record of the trial demonstrate that Mr. Jordan committed either intrinsic nor extrinsic fraud. Indeed, the matters of which the defendant complains were fully explored by defendant in Mr. Jordan's lengthy deposition taken prior to

trial, and the defendant himself testified at length concerning Mr. Jordan's actions. The defendant was not deprived of an opportunity to be heard, nor the opportunity to present his case. There was a real contest before the court on the very subject matter which defendant now addresses, and the jury chose to find for the plaintiff on that subject matter. The court simply was not misled in determining the issues, and should deny defendant's relief on those grounds.

Finally, the defendant argues that evidence prohibited by the "Dead Man Statute" was improperly admitted. Specifically, and although the defendant claims that plaintiff testified "liberally" concerning conversations that he had with his wife during her life, the defendant objected to only one instance where the plaintiff testified that he and his wife had discussed the fact that it had always been intended that her brother, Mr. Lang, would eventually buy out his siblings interest in the company founded by their father. While it is correct that SC Code Ann. §19-11-20 prohibits an "interested" person from testifying about transactions/conversations had with a decedent if such testimony could affect his or her interests, the testimony to which the defendant objected was not about such a transaction or conversation. The testimony adduced was at best on a collateral issue regarding the sale of stock which was an asset of the decedent's estate, and was completely unrelated to the issue of the defendant's breach of contract. Again, the court should deny the relief requested by defendant on these grounds.

CONCLUSION

For the foregoing reasons, the court should deny the defendant's motions, and should allow the verdict of the jury to remain undisturbed.

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Respectfully submitted,

LAUGHLIN & BOWEN, P.C.

By:


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May 3, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2012-212331

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,

Respondent,

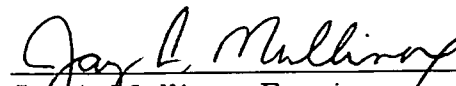
v.

The Law Office of Jay A.
Mullinax, LLC,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.


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APPENDIX B

FINAL BRIEF OF APPELLANT [PETITIONER]

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2012-212331

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,

Respondent,

v.

The Law Office of Jay A.
Mullinax, LLC,

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR WHEN IT DENIED THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT BASED ON ESTOPPEL?
2. DID THE COURT ERR 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 OF LAWS §19-11-20)?
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?
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?
5. DID THE CIRCUIT 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?

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 his 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 Law office, \$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 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.

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

On April 18 - 20, 2012, the case was tried by a jury which found in favor for Ron, the Plaintiff, 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.

On June 18, 2012, Law Office served Notice of Appeal on Ron.

FACTS

On April 1, 2009, Ron (Respondent) and his wife, Debora, retained the Law Office of Jay A. Mullinax, LLC (Appellant) 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. 306-312).

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. 314-321) and their financial statement dated March 26, 2009 (R. pp. 313), representing the couple's combined estate net value of \$6,171,300.00, which included Debora's shares in the 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. 255-258) 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. 313), which comprised a large portion of Debora's estate value, but the stock produced extremely low income.

Although Debora's Trust (R. pp. 197-237), expressed that it was her preference

for the Trustee (Ron) not to sell her interest in her family's business, Manor Development Company, 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 the purchaser to offer Ron approximately \$156,000.00 above the purchaser'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. 286) and retained Jordan at the McNair 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 necessary estate administration services (R. p. 285) 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. 296-299).

On July 29, 2010, Law Office filed a creditor's claim (R. pp. 304-305) 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. 18-20).

Law Office's creditor's claim against 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.

ARGUMENTS

I. THE COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON EQUITABLE ESTOPPEL.

Law Office made multiple motions for a directed verdict based on equitable estoppel. (R. p. 117, line 24- p. 120, line 16; R. p. 174, line 16- p. 177, line 23). Essentially, the motions assert that Ron was estopped from alleging a different estate value than the one he asserted at the formation of the contract -- when Ron's original value was used to entice Law Office to enter the contract.

Equitable estoppel operates to deny a party the right to prove an otherwise important fact. *Maher v. Tietex Corp.*, 500 S.E.2d 204, 331 S.C. 371 (S.C.App. 1998). The doctrine of estoppel applies if a person, by his or her actions, conduct, words, or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his or her prejudice or injury. *Rushing v. McKinney*, 633 S.E.2d 917, 370 S.C. 280 (S.C.App. 2006).

With regard to the party estopped, the elements of equitable estoppel are: (1) conduct amounting to a false representation or concealment of material facts, "or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party [370 S.C. 294] subsequently attempts to assert;" (2) the intention or expectation that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. *Southern Dev. Land & Golf Co., v. South Carolina Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993). "As related to the party claiming the estoppel, the essential elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position." *Id.*

Law Office and Ron entered into a contract wherein Ron was to pay Law Office based on a percentage of the value of Debora's estate. (R. pp. 255-258). Shortly before Law Office and Ron entered into the contract, Ron and Debora represented to Law Office that Debora's estate was valued at approximately \$4,400,000.00. (R. p. 313). This value was bolstered by additional documents, collected by Law Office. (R. pp. 327-329). Based on Ron's agreement to pay for the services covered in the contract, Law

Office completed much of the work, and Ron subsequently asserted that the estate value was much less than what he and Debora had earlier asserted. (R. p. 69, lines 18-25).

Ron agreed to pay for the services with the intention or expectation that his agreement would be acted upon by Law Office to do the work. Ron's latent and unsubstantiated claim that the value of the estate is less than previously thought, does not hold water. Regardless, Ron's intentions are inconsequential with regard to the claimed value. With regard to equitable estoppel, an intentional misrepresentation by the defendant is not necessary. *Dillon County Sch. Dist. Number Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct.App.1985). An aggrieved party's reasonable reliance on the words or conduct of the party being estopped is sufficient. *Id.* Bad faith is not always necessary to equitable estoppel. *Ellis v. Metropolitan Cas. Ins. Co. of New York*, 197 S.E. 510, 187 S.C. 162 (S.C. 1938).

Leading up to the signing of the written contract, Ron and Debora did not provide Law Office with any documentation or evidence that contradicted their assertion that Debora's estate was valued at approximately \$4,400,000.00. Therefore, Law Office lacked knowledge of and means of knowledge of the assertions Ron made at trial to devalue the estate. As a result of Ron and Debora's representations as to the value of Debora's estate, Law Office relied on the conduct of Ron and Debora, and Law Office took a prejudicial change in position by agreeing to a fee based on the Plaintiff's unilateral representations about Debora's estate value. Now, after Law Office provided services, Ron wants to change his earlier asserted estate value which was used to entice Law Office into the contract.

The Law Office asserted equitable estoppel on more than one occasion during the trial. (R. p. 117, line 24- p. 120, line 16; R. p. 174, line 16- p. 177, line 23). The Court should reverse the lower Court's ruling and grant Law Office's motion for a directed verdict.

II. 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)).

In reviewing the admission or exclusion of evidence, the trial court's ruling will not be disturbed on appeal absent a clear abuse of discretion. *Hofer v. St. Clair*, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *Conner v. City of Forest Acres*, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." *Hanahan v. Simpson*, 326 S.C. 140, 156, 485 S.E.2d 903, 911 (1997).

The South Carolina Dead Man's Statute, S.C. Code Ann. § 19-11-20 (1985) provides, in pertinent part:

"[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*, insane or lunatic as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person or as assignee or committee of such insane person or lunatic, 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). It is undisputed that Ron was a lifetime beneficiary to Debora’s estate and trust. As such, Ron had a present and vested pecuniary interest in the outcome of the case.

The rule is founded on the principle that it is against public policy to allow a witness thus interested to testify as to such matters when such testimony, if untrue, cannot be contradicted. *Trimmier v. Thomson*, 41 S.C. 125, 19 S.E. 291 (1894); *Harris v. Berry*, 231 S.C. 201, 98 S.E.2d 251 (1957). Because this statute is an exception to the general rule of witness competency, it requires a restrictive reading on which the party requesting its muzzling effect bears the burden. See *Havird v. Schissell*, 252 S.C. 404,

166 S.E.2d 801 (1969); James F. Dreher and W.M. Von Zharen, A Guide to Evidence Law in South Carolina, 21-22 (2nd Ed.1987).

Law Office's attorney, Tom Taylor (hereinafter "Taylor"), objected to Ron's testimony under the Dead Man's Statute when Ron began to testify about alleged communications with the decedent. (R. p. 58, lines 8-14). Ron's trial attorney, John R. C. Bowen (hereinafter "Bowen"), alleged that Ron "was testifying about a conversation that he had with his wife during her life, and I believe that he can testify as to what he understood her wishes to be." (R. p. 58, lines 16-19). Taylor objected on the grounds, inter alia, that Ron was prohibited under the Dead Man's Statute from testifying about something that a deceased person told him that could benefit him under the terms of the will, which is exactly what Ron proposed to do. (R. p. 58, line 24-p. 59, line 6).

Taylor also objected under the Dead Man's Statute to Ron's proposed testimony about communications with the decedent that directly contradicted what the decedent expressed in her estate documents, which were signed by the decedent twenty-eight (28) days before her death. (R. p. 59, lines 4-6; R. pp. 227-228). Taylor further objected under the Dead Man's Statute and provided the Court with a copy of *Hanahan v. Simpson*, 326 S.C. 140, 151, 485 S.E.2d 903, 909 (1997), which stands for the principle that 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." (R. p. 59, lines 13-14). Taylor also refers to the case standing for the principle that it is against public policy to allow a witness thus interested to testify

as to such matters when such testimony, if untrue, cannot be contradicted. (R. p. 59, lines 17-21).

The Court asked Ron's trial attorney, Bowen, what testimony he planned to introduce and Bowen replied that he was unsure but that he believed his client was going to testify that "ultimately since the decedent's two daughters had no active interest, no participatory role, that ultimately the plan was for him to take over the whole property." (R. p. 60, lines 4-11). This proposed testimony, which was eventually allowed by the Court over Taylor's objection, contradicts the decedent's own documents and handwritten notes which expressly prohibits Ron from ownership of the Manor stock, which according to the decedent's documents, was intended to be for her daughters. (R. p. 316, questions 13 and 17). The handwritten notes on the Estate Planning Questionnaire, under "prenuptial agreement", expressly mentions that "Ron is excluded from stock ownership in Manor Development." (R. p. 316, question 17).

Taylor further objected, under the Dead Man's Statute, to Ron's potential testimony about the appropriateness of the sale of the Manor stock. It is claimed that such testimony could benefit Ron if he were to try to convince the jury that the decedent desired to sell the stock despite the fact that the decedent's Trust document, which she signed 28 days before she passed away, expressly states that "I prefer that the Trustees not sell shares of stock or other interests in Manor Company because I believe that the best interests of the beneficiaries will be served by retention of those interests in the trust's portfolio." (R. pp. 227-228). Taylor objected that it could benefit

Ron to use alleged conversations with the decedent (that are unable to be contradicted) to convince the jury that the sale of the stock, under the circumstances Ron advances, were appropriate. (R. p. 60, line 20- p. 61, line 2). The alleged statements of the decedent's desires could cloud the definition of "necessary and appropriate" which are defined under the terms of the written contract. The jury could confuse "what is necessary in order to administer the estate" and what is "necessary in order to fulfill the decedent's wishes".

Due to the restrictive reading of the statute, courts have recognized many exceptions the rule. The Dead Man's Statute is inapplicable in testimony where the witness's present or previous interest will not be affected by the event of trial; *See Hanahan*, 326 S.C. at 152-53, 485 S.E.2d at 909-10. If the statute is not applicable to the current case, then it is hard to imagine the statute has any meaning left at all. (Quoting Chief Justice Jean Toal in *Brooks v. Kay*, 530 S.E.2d 120, 339 S.C. 479 (S.C. 2000).

The Court overruled Taylor's objection stating that the focuses of Ron's predicted testimony "are not going to be something that will be decided by this jury" (R. p. 61, lines 11-18). Taylor stood by his position that Ron's testimony would be to try to convince the jury that it was appropriate to try to value the stock for One Point Five Million Dollars. Taylor further stated that the testimony has a direct benefit to Ron because of "Mr. Mullinax's Counterclaim that he deserved more money because the stock in the estate should have been valued at Two Point Six Million Dollars. If Mr.

Orlosky could convince the jury it was appropriate to sell that stock at One Point Five Eight, that would benefit him.” (R. p. 61, line 19- p. 62, line 3).

Testimony concerning conversations between Ron and the decedent, Debora should have been deemed inadmissible under the Dead Man's Statute because any alleged conversation would not be able to be contradicted. Everything in the record overwhelmingly points to the fact that the decedent did not want Ron to sell the stock, however, each conversation that Ron testified about between himself and the decedent contradicts the decedent's trust (R. pp. 227-228), and, handwritten notes (R. p. 316, questions 13 and 17). Furthermore, Ron had a present and vested pecuniary interest in the outcome of the case, therefore, the Court's exception to the Dead Man's rule is not a valid reason to overrule Taylor's objections.

Where testimony in violation of the Dead Man's Statute is cumulative to other properly admitted testimony, the admission of the improper testimony may be held to be harmless. See *McBeth v. Bishop*, 278 S.C. 443, 298 S.E.2d 441 (1982). Ron's testimony does not fall under a harmless error analysis and does not avoid the application of the statute because Ron's testimony was not cumulative to any properly admitted evidence.

No one offered evidence or testimony in evidence that suggests that prior to Law Office's discharge, that Office failed to accomplish anything that was “necessary and appropriate” under the written contract. Ron's own attorney, Jordan's, testimony

bolsters the position that Office accomplished everything that was required under the terms of the written contract, up until the time of the discharge.

Ron's testimony alleging communication with the decedent was not cumulative to any other evidence. It was directly contradictory to all other written evidence, including sworn documents and unsworn documents from the decedent, some as recent as 28 days before her death. (R. p. 316, questions 13 and 17; R. pp. 227-228). Such testimony, which should have been prohibited under the Dead Man's Statute, is not cumulative. As such, the portions of Ron's testimony, as it relates to the aforementioned matter, which were erroneously admitted in violation of the Dead Man's Statute were not cumulative to other testimony so as to render its admission harmless error. *Brooks v. Kay*, 530 S.E.2d 120, 339 S.C. 479 (S.C. 2000).

The contract between Ron and Law Office expressly circumscribed that Ron was to pay Law Office "based on the time devoted to the estate or a minimum of two and a half percent (2.5%) of the value of the estate" for the "services that are necessary and appropriate to administer the estate under the laws of South Carolina". (R. p. 255, ¶ numbered 1; R. p. 257, ¶ numbered 2).

At the time that Ron and Law Office signed the contract, the following documents were available to both parties concerning the Manor stock: Ron and Debora's Financial Statement dated March 26, 2009 (R. p. 313) and Ron and Debora's Estate Planning Questionnaire dated March 26, 2009 (R. pp. 314-321). In the Financial Statement (R. p. 313), Ron and Debora listed Debora's estate to include her interest in Manor stock, valued by Ron and Debora at \$2,600,000.00.

Additional documents related to the value of Debora's interest in Manor stock, dated prior to Debora's death, also valued Debora's interest in Manor stock at \$2,600,000.00. (R. pp. 326-327).

By using the information on the documents provided by Ron and Debora at the time the parties signed the written contract, the subject stock was valued at \$2,600,000.00, resulting in an approximate estate value of \$4,446,148.03 (R. pp. 354-355).

Over the objections of Taylor, Ron testified about communications with the decedent, wherein, he alleged that on several occasions, the decedent, Debora, stated her intention was for Ron to sell the Manor Stock. (R. p. 58, line 8; R. p. 62, lines 9-15). Selling the stock required that the stock be sold under the terms of a shareholder buy-sell agreement. (R. pp. 238-254). Ron testified liberally about his communications with the decedent about the shareholder's alleged process of updating (i.e. modifying) the terms of the buy-sell agreement. (R. p. 62, line 25 – p. 63, line 15). Taylor objected to this testimony under the Dead Man's Statute. (R. p. 63, lines 16-22). Although Ron failed to sell the Manor stock under the required provisions of the buy-sell agreement, a sale's price was allegedly calculated using a provision listed in the buy-sell agreement. The provision used to calculate the sale's price of the stock was not one that was allowed under the circumstances, but Ron agreed to sell the stock at the offered price of \$1,585,076.00 even though all of the decedent's documentation leading up to her death, (R. pp. 326-329) refers to the value of her Manor stock as \$2,600,000.00. The fact that Ron opted to sell stock valued at \$2,600,000.00, for \$1,585,076.00, does not change the stock's value, nor does it change the definition of "fair market value" as

defined by the Department of the Treasury; and it does not change the fact that the fair market value of the stock was \$2,600,000.00. (R. p. 313; R. pp. 326-327; and R. pp. 328-329). Ron expressly wrote to Law Office to express that “Regardless of where we end up on the price, I want to sell.” (R. p. 339; R. p. 161, line 5- p. 162, line 7). Clearly, Ron’s selling price had nothing to do with the stock’s value.

Ron’s testimony about communications with the decedent suggested that the decedent wanted to sell the Manor stock that modifications were being made to the Manor stock buy-sell agreement (R. pp. 238-254), and, that the Manor buy sell agreement dictated not only an optional “sale’s price, but the value of the stock as well. Ron’s trial attorney, Bowen, opened Ron’s case by stating to the jury that “the ‘*chief dispute*’ between Ron and Mr. Mullinax was as to the ‘value’ of his wife’s [Debora’s] or his late wife’s [Debora’s] interest in a family company [Manor] that she and her brother and sister owned in California.” (R. p. 57, lines 17-20). Under the terms of the contract between Ron and Mullinax, the “value” of the estate was determinative of what Ron owed to Mullinax under the contract. (R. p. 257, ¶ numbered 2).

In pursuit of Ron’s endeavor to sell the stock, Duke Lang (hereinafter “Duke”), the managing shareholder (de facto “purchaser”) of Manor, hired a Certified Public Accountant (CPA) firm to determine the sale price of the stock. The Certified Public Accountant firm replied to Duke in a letter dated November 15, 2009. (R. pp. 322-325).

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. pp. 322-325). The Certified Public Accountant firm 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. 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. 322, ¶ 2). In other words, Ron's bases the value of his wife's stock on a "value" that the Certified Public Accountant firm expressly states it is unwilling to purport as "a representation of fair market value". The Certified Public Accountant made a point to express this fact by stating it in writing in a letter addressed to Duke.

Additionally, the CPA's calculations were made on November 15, 2009, approximately 150 days after the decedent died. However, the CPA based its calculations stated in their letter (R. p. 322, ¶ 3), "...Article 4 (Section 4.2) less appropriate discounts for lack of marketability and lack of control (Section 4.5)" of the shareholder agreement. The Shareholder agreement does provide a sale price provision for the sale of the Manor stock upon the death of a shareholder. (R. pp. 239-240, Section 2.4). Although the Shareholder Agreement does not dictate the value for estate tax purposes, it does speak to the sale price, and it specifically requires that for Article 2.4 (Transfer upon Death) to apply, the sale must take place within 180 days. (R. pp. 239-240, Section 2.4). Ron did not sell the Manor stock until 2010, more than 180 days after the decedent's death which occurred on June 17th, 2009. Therefore, Article 2.4 of the agreement cannot be used in order to dictate the sale price.

Law Office put into evidence a document titled “Annual Shareholder Meeting of Manor Development Co.”, wherein all three shareholders voted and resolved on March 6, 2006 that “the valuation of the Corporation Stock as referred to in the Buy-sell Agreement [a/k/a Shareholder Agreement] from this date until changed will be \$74,404.66 per share.” (R. pp. 328-329). Using Manor’s declared value for the buy sell agreement, the decedent’s shares, representing one-third of the company, would have been valued at approximately \$2,500,000.00 million dollars. This value is consistent with the decedent’s documents where she values her own shares to be worth \$2,600,000.00 in March 2009, three months before her death. (R. p. 313). This value is also consistent with “Summary – Buy Sell Agreement Stock Value” document, signed by the decedent, providing the buy sell stock value of \$72,239.38 per share. (R. p. 327).

The value of an asset for federal estate tax purposes according to the Department of Treasury Regulations, the definition of 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 relevant facts.” Treas. Reg. § 20.2031-1(b).

The taxing authorities are well aware that owners of closely held companies may be tempted to set an artificially low price in the buy-sell agreement in an attempt to reduce the federal estate tax of a deceased owner, especially when the owners are related. Internal Revenue Code § 2703 was established to preclude related parties from depressing the value of and interest in a family-controlled entity through buy-sell agreements. (I.R.C. § 2703).

There are problems with using an artificially low price to reduce the estate tax value of the interest. The buy-sell agreement may not qualify as a bona fide business arrangement or fail to satisfy the comparability test under § 2703, if the agreement is subject to that section, although, if a regulatory exception applies, the agreement will be deemed to be a bona fide business arrangement and not a testamentary device.

The general rule under § 2703 is that, for purposes of estate, gift, and generation-skipping transfer taxes, the value of any property is determined without regard to any right or restriction relating to the property. A right or restriction means any option, agreement or other right to acquire or use the property at a price less than the fair market value (determined without regard to the option, agreement, or right) or any restriction on the right to sell or use such property. A right or restriction may be contained in a partnership agreement, articles of incorporation, corporate bylaws, a shareholders' agreement, or any other agreement or may be implicit in the capital structure of the entity.

Under I.R.C. § 2703(b), a right or restriction will not be disregarded if it satisfies the following three requirements: the right or restriction is a bona fide business arrangement; (Treas. Regs. § 25.2703-1(a)(3)); the right or restriction is not a device to transfer the property to members of the decedent's family for less than full and adequate consideration in money or money's worth; and the terms of the right or restriction are comparable to similar arrangements entered into by persons in an arm's length transaction.

I.R.C. § 2703 applies to any right or restriction created or substantially modified after October 8, 1990. The regulations provide some guidance as to what will be considered a substantial modification. For example, 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. (Revenue Reconciliation Act of 1990, P.L. 101-508, § 11602(e)(1)(A)(ii); Treas. Regs. § 25.2703-2; Treas. Regs. § 25.2703-1(c)(1)).

The Plaintiff's estate attorney, Jordan, committed fraud upon the Court when he testified about the value of the estate and the only possible reason for the Defendant's conclusion of the estate value. Specifically, the Plaintiff's estate attorney, Jordan, testified that the only possible reason for the Defendant to value the estate at a higher value than the amount proffered by Jordan was for the Defendant to inflate the amount of the fee owed by the Plaintiff to the Defendant under the contract. (R. p. 98, lines 7-19).

The value of the estate is determinative of the necessity to file a Federal Estate Tax Return (IRS Form 706). Both Jordan and Mullinax testified as to being authorized to practice before the Internal Revenue Service and it was not contested. Treasury Department Circular No. 230 (Treas. Regs. Subtitle A, Part 10) provides the Regulations Governing Practice before the Internal Revenue Service, Title 31 Code of Federal Regulations, Subtitle A, Part 10, updated (June 3, 2011).

Treasury Department Circular No. 230 requires compliance with, in part, the following sections from those practicing before the Internal Revenue Service: §10.21 Knowledge of client's omissions, §10.22 Diligence as to accuracy, §10.34 Standards with respect to tax returns and documents, affidavits and other papers, §10.37 Requirements for other written advice, §10.51 Incompetence and disreputable conduct and §10.52 Violations subject to sanction.

The applicable portions of Treasury Department Circular No. 230 mandated that Mullinax comply with the law, which included adhering to the law as it applied to having Ron file an Estate Tax Return.

Both Mullinax and Jordan, practicing before the Internal Revenue Service, were charged with duties concerning the valuing of the estate and the proper application of the law. Jordan's testimony shows that he is in direct violation of his requirements under the Treasury Department Circular No. 230 as someone who practices before the Internal Revenue Service. Jordan testified that neither he nor his firm did any independent analysis or independent research concerning the value of the estate, the figures provided to them by the client, or the application of law necessary to appropriately determine whether an estate tax return was due to the Internal Revenue Service. (R. p. 99, line 23 - p. 100, line 15; R. p. 103, line 25 - p. 104, line 9; R. p. 104, line 24 - p. 105, line 5). Without conducting independent research of the figures provided to Jordan, he advised his client that no estate tax return was due. (R. p. 97 lines 3-12).

Although Jordan could not cite a specific provision in the Shareholder Agreement that would allow a sale at the price he used, Jordan claimed that the value he used for the Manor stock is the number signed by Debora in the shareholder's agreement (R. p. 100, line 9- p. 101, line 1). Jordan testified that he did not feel the need to question the CPA's calculation regarding the sale's price, of the Manor Stock, which Jordan used as its value. (R. p. 103, lines 12- 19). Jordan used the sale price as the value in spite of the fact that the CPA firm wrote that "we have not performed any valuation procedures and do not purport to represent that the findings herein are a representation of fair market value. (R. p. 322-325). Jordan testifies that he used the number that the CPA provided as the value of the Manor Stock, even though the CPA firm clearly states that the number should not be used to "represent the fair market value." As a result of Jordan's decision to represent the sale's price as the "fair market value", Jordan advised Ron that no estate tax return was due. (R. p. 97, lines 3-12).

Jordan's testimony shows that he is in direct violation of his requirements under the Treasury Department Circular No. 230 as someone who practices before the Internal Revenue Service. Jordan testified that he based his information solely on information from the client and did not evaluate the operation of the Shareholder's Agreement's which was according to him, determinative of the value of the stock value. Jordan stated that his client, Ron, was "comfortable" with the [alleged] number in the shareholder's agreement and that he did not feel the need to do anymore work because it would be unnecessary. (R. p. 100, line 16- p. 101, line 1).

Mullinax testified that the Shareholder's Agreement was not determinative of the fair market value of the stock. Mullinax specifically referred to Chapter 14 of the Internal Revenue Code and the companion Treasury Regulations which directly disregard the sale's price in a Shareholder Agreement if the Shareholder's Agreement or the Shareholders do not follow the requirements of Internal Revenue Code Chapter 14 and the companion regulations. (R. p. 103, line 1- p. 104, line 13).

All testimony and corresponding documentation from Ron and Law Office exclusively show that the Shareholder Agreement was not followed in consummating a sale. Jordan could not even cite the provision used to lead to the CPA's calculated sales price. Even still, the Shareholder Agreement plainly shows that the provision that Ron allegedly used to determine a sale's price does not allow a sale under the circumstances in this case. The provision used required a sale within 180 days of the decedent's death, yet the sale happened long after the 180 day deadline. This strict provision directly impacts the respect that the Internal Revenue Service shows to a Shareholder Agreement and its impact on value.

Under the provisions of the Shareholder Agreement, because the sale did not take place within 180 days, the next available option required the purchase to occur at a formula price approximately \$500,000.00 higher than the 180 day provision. (R. p. 243, Article 3.12).

Under Internal Revenue Code Chapter 14 and the companion regulations, the parties' disregard of the terms of the Shareholder Agreement excludes the Shareholder

Agreement from consideration in valuing the stock when there is more than a *de minimis* change to the quality, value, or timing of the rights of any party with respect to property that is subject to the right or restriction is a substantial modification. Specifically, Treasury Regs. §25.2703-1(c)(1) disregards “any discretionary modification of a right or restriction, whether or not authorized by the terms of the agreement, that results in other than a *de minimis* change to the quality, value, or timing of the rights of any party with respect to property that is subject to the right or restriction is a substantial modification.” When the parties disregarded the terms (requiring a sale within 180 days of decedent’s death), resulting in a \$500,000.00 change in required sales price, that was more than a *de minimis* change to the “quality, value, or timing of the rights of any party” under the Shareholder Agreement. Thus, even if the Shareholder’s Agreement had met the other criteria as a factor proscribing value, which it did not, here, it does not meet the most basic standards which require compliance with its own terms.

The omission of this fact is fraudulent upon the Court by Jordan, who did not even mention Internal Revenue Code Chapter 14 or its companion Treasury Regulations. It should be noted that under Treasury Department Circular No. 230, incompetence is no excuse in determining the value of an estate or its assets. Jordan testified he was not familiar with Treasury Department Circular No. 230 and, therefore, was not aware of the information it contained, or the fact that he was disregarding its provisions. (R. p. 107, lines 4-15).

In consideration of the fact that the Plaintiff's estate attorney, Jordan, committed fraud upon the Court by (1) testifying that the Defendant was fired by the Plaintiff at the "beginning" of the estate administration (R. p. 89, lines 14 – 18); (2) by testifying that the estate value was only increased by the Defendant to increase his fee (R. p. 98, lines 7-19); (3) by fraudulently testifying as to the application of the law to the facts, and fraudulently omitting settled laws, codes, and regulations in his testimony, such testimony should be struck in its entirety. It should be considered that Jordan, was the only witness who testified in the case other than the parties. Jordan testified to the fact that he is prohibited ethically under South Carolina from testifying against his client, Ron and that Ron is paying him \$350 an hour to be giving testimony in the trial. (R. p. 104, lines 1-10).

III. 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?

A trial court must charge the current and correct law. *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000); *see also Brown v. Smalls*, 325 S.C. 547, 481 S.E.2d 444 (Ct.App.1997) (trial judge is required to charge current and correct law applicable to issues presented). A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. *Keaton ex rel. Foster v. Greenville Hosp. System*, 514 S.E.2d 570, 334 S.C. 488 (S.C. 1999). "When instructing the jury, the trial court is required to charge only principles of law that apply to the

issues raised in the pleadings and developed by the evidence in support of those issues." *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). The substance of the law is what must be instructed to the jury, not any particular verbiage. *Keaton ex rel. Foster v. Greenville Hosp. System*, 514 S.E.2d 570, 574, 334 S.C. 488, 496 (S.C. 1999). A jury charge which is substantially correct and covers the law does not require reversal. *Id.* To entitle an appellant to reversal, the trial court's instructions must be not only erroneous, but also prejudicial. *Arkwright Mills v. Clearwater Mfg. Co.*, 217 S.C. 530, 61 S.E.2d 165 (1950).

"When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues." *Tucker v. Reynolds*, 268 S.C. 330, 335, 233 S.E.2d 402, 404 (1977).

In this case the Defendant, Law Office, made two counterclaims against the Plaintiff, Ron, one for breach of contract and another for Quantum Meruit (R. pp. 18-20; R. p. 116, lines 14 – 23). Law Office's claim against Ron for breach of contract was based on the party's written contract. (R. pp. 255-258; R. p. 178, line 21 – p. 179, line 4). Law Office's second claim against Ron for quantum meruit was based on an implied contract. "[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." *QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 202, 600 S.E.2d 105, 108 (Ct. App. 2004) (internal quotation marks omitted). Unfortunately, when the Court dismissed Law Office's claim for quantum meruit, the Court made it clear that it was unfamiliar with the synonymous meanings between

“quantum meruit”, “quasi-contract”, and “implied by law contract.” (R. p. 117, line 9). Although Ron’s claim for quantum meruit was dismissed (R. p. 117, line 13), Law Office’s claim for quantum meruit survived. Ron had one claim against Law Office.

At the conclusion of the testimony, the Court instructed the jury that it would hear each party’s closing argument and then the Court would charge on the law. Before the closing arguments, the Court instructed the jury that “Under the procedural rules, since the Plaintiff has the burden of proving his case, he will have the first argument and he may also have a right to close” (R. p. 179, lines 22-24). The Court failed to mention either of the Defendant’s (Law Office) two counterclaims to the jury or the Defendant’s burden of proof regarding either counterclaim. As a result, the closing of the trial was reminiscent of the beginning, when in the Court’s opening instructions it makes only a vague reference to one of the Defendant’s two counterclaims. (R. p. 56, lines 13-18).

The Court reminded the jury of the Ron’s claim before the closing arguments, but the Court failed to remind the jury about the Law Office’s counterclaims. As a result of the Court’s instructions focusing exclusively on the Ron’s claim, the Court overtly impressed the jury to focus on the Ron’s claim and disregard Law Office’s counterclaims. Law Office was left to hope that the jury would recall the Court’s vague reference to one of the Defendant’s (Law Office) two counterclaims, made at the beginning of the trial. (R. p. 56, lines 13-18). The primary focus of the Court’s opening instructions to the jury were on the Plaintiff’s claim against the Defendant, thereby prejudicing the Defendant (Law Office). (R. p. 54, line 25 – p. 56, line 23).

In the Court's opening charge to the jury, it proclaimed, "but the Plaintiff does have the burden of proving this case. The Defendant does not have to prove anything or disprove what the Plaintiff says." (R. p. 56, lines 9-12). The Court continues by making a vague reference to one of the Defendant's two counterclaims. (R. p. 56, lines 13-18). Unfortunately, it is impossible to decipher from the Court's instructions to which of the Defendant's (Law Office) counterclaims it is referring. (R. p. 56, lines 13-18). Nevertheless, it is the Court's only reference to either of the Defendant's counterclaims during the Court's opening instructions.

Prior to the closing arguments, the Court completely omitted reference to the Defendant's counterclaims, thereby failing to task the jury with considering the Defendant's evidence against the Plaintiff. Because the Court instructed the jury specifically on the Plaintiff's claim before the closing argument, but did not even mention the Defendant's counterclaims to the jury, the instructions were prejudicial.

At the conclusion of the closing statements, the Court instructed the jury that "Now, in a civil case – we talked about the burden of proof. The Plaintiff has the burden of proof in the case." (R. p. 185, lines 15-17). The Court again implies that the Plaintiff is the only one with a claim in this case and that the Plaintiff has the only burden of proof.

The Court's implication mirrors its statements when it failed to address either of the Defendant's counterclaims at the beginning of the charge. (R. p. 179, lines 22-24). The Court does attempt to correct its oversight later in the charge by stating "We have

a claim and a counterclaim, so the Plaintiff has the burden of proof in proving his claim...The Defendant has denied this claim, and on his counterclaim the defendant has the burden of proving his counter claim..." (R. p. 185, line 17 – p. 186, line 1). The Court once again refers to only one of the Defendant's two counterclaims. The jury is left to wonder which counterclaim, and whether one of the Defendant's counterclaims is simply unimportant or dismissed by the Court.

The Court repeatedly refers to the Plaintiff's (Ron) claim against the Defendant (Law Office) throughout its charge and refers to it as a breach of contract or the Defendant's breach of the contract. (R. p. 55, lines 13 – 22; R. p. 56, lines 8 – 12; R. p. 56, lines 19-20). However, the Court only mentions one of the Defendant's two counterclaims and it does not even identify the nature of the Defendant's claim. In fact, throughout the trial, from the opening until the jury verdict, the Court never once specifically refers to the Defendant's claim of quantum meruit/unjust enrichment.

The Court eventually refers to one of the Defendant's counterclaims in its closing charge, but just like in its opening charge, the Court repeatedly refers to the Plaintiff's claim and rarely refers to either of the Defendant's counterclaims. It is reasonable to believe that because the Court frequently mentioned the Plaintiff's claim against the Defendant, but rarely mentions either of the Defendant's claims against the Plaintiff, the jury focused more on the Plaintiff's claim and considered it paramount. On the other hand, it is reasonable to believe that because the Court rarely mentioned either of the Defendant's counterclaims, the jury was likely to give the counterclaims less

weight. After all, the Court gave the Defendant's counterclaims less weight in its charge and instructions to the jury.

The Defendant's (Law Office) counterclaims were for the Plaintiff's breach of the written contract (R. pp. 255-258), for necessary services and the Plaintiff's breach of the implied contract (Quantum Meruit/Unjust Enrichment) for additional requested services that were unnecessary. (R. pp. 18-20). A large portion of the case centers around the fact that the Plaintiff, Ron, and the Defendant, Law Office, entered into an implied agreement for the Defendant to negotiate the sale of the estate's Manor Stock. Law Office's negotiations for the sale of the Manor stock was an unnecessary service for the administration of the estate. Services that were unnecessary for the administration of the estate fell outside scope of the written contract. However, Ron requested that the Law Office provide these services.

The Defendant had the burden to prove that the parties entered into an implied contract for the services beyond the scope of the written contract. Unfortunately, in the Court's closing charge, it states that "the parties have admitted that there was a binding contract, so I will not instruct you that you are to determine if there was a contract." (R. p. 187, lines 10-12). The Court's reference is to a single contract. The basic premise of the Defendant's claim of quantum meruit is to show a contract implied at law. *Myrtle Beach Hosp. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000).

The Defendant's counterclaim of quantum meruit alleges that the parties entered into an implied contract. The Defendant had the burden to prove the implied

contract to the jury. In its charging order, the Court simply states that the parties have admitted there was “a contract”. (R. p. 187, lines 10-12). The Court does not distinguish between the written contract and the implied contract, both of which were at issue in the case. The jury was left to infer that the Court only wants it to consider one contract, and not consider the Defendant’s implied contract (for quantum meruit).

When defining the word ‘contract’ to the jury, the Court frequently uses the word “written” when explaining a contract. (R. p. 188, lines 1, 21, and 24). The Court fails to give an explanation of how to infer the formation of an implied contract, and how an implied contract may have been breached by the Plaintiff, Ron.

Generally, an alleged error in a portion of a charge must be considered in light of the whole charge, and must be prejudicial to the appellant to warrant a new trial. *Priest v. Scott*, 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976). The entirety of the Court’s closing charge and opening instructions were erroneous and prejudicial to the Defendant.

The Court’s overwhelming focus on the Plaintiff’s (Ron) claim and the Court’s failure to adequately address the Defendant’s (Law Office) counterclaims with clarity in both the closing charge and opening instructions was prejudicial to the Defendant. In light of the whole charge, the Defendant’s counterclaims take a back seat to the Plaintiff’s claim both in the eyes of the Court and by instruction, in the eyes of the jury. The Court failed to adequately charge the jury with the task of determining whether or not the Defendant proved that the Plaintiff breached the implied contract, and the

Court only refers to a "written" contract in the closing charge. Together, the opening and closing charges are prejudicial to the Defendant because the Court frequently tasks the jury with determining whether or not the Plaintiff had proven the burden of proof against the Defendant. The Court fails to provide similar attention or adequacy to the Defendant's counterclaims against the Plaintiff. The charges are prejudicial to the Defendants because the Court fails to mention the implied contract between and Plaintiff and the Defendant and fails to define an implied contract to the jury.

IV. 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?

"[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." *QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 202, 600 S.E.2d 105, 108 (Ct. App. 2004) (internal quotation marks omitted). As such, an action based on a theory of quantum meruit sounds in equity. *Columbia Wholesale Co. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). When reviewing an action in equity, an appellate court reviews the evidence to determine facts in accordance with its own view of the preponderance of the evidence. *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010).

The elements of a quantum meruit claim are as follows: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value. *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 617-18, 703 S.E.2d 221, 225 (2010).

The Defendant made a quantum meruit claim against the Plaintiff. However, in this case, the Court failed to charge the jury or even mention the Defendant's claim of quantum meruit against the Plaintiff. Nevertheless, the claim was made and the Defendant's evidence supports that claim.

Here, Ron and Mullinax agree that they entered into a written contract for Law Office to preform "services that are necessary and appropriate to administer the estate under the laws of South Carolina and rules of court having jurisdiction of the estate". (R. pp. 255 – 256, ¶ numbered 1). Ron was to pay Law Office a minimum of 2.5% of the estate value for "necessary services" under the terms of the written contract.

With regard to the administration of estates, actual and necessary services are more fully described in Treas. Regs. §20.2053-3(a), wherein it recognizes these activities are those for the collection of assets, payment of debts, and distribution of property to the persons entitled to it. Treas. Regs. §20.2053-3(a) expressly excludes from necessary activities those that are "not essential to the proper settlement of the estate, but incurred for the individual benefit of the heirs, legatees, or devisees...". In fact, Treas. Regs. §20.2053-3(d)(2) expressly excludes the sale of property as necessary unless the sale is necessary in order to pay the decedent's debts, expenses of administration, or taxes, to preserve the estate or effect distribution. Mullinax alludes

to these facts in his testimony. (R. p. 143, lines 6-23; R. p. 144, lines 9-21; R. p. 149, lines 7-21).

Sometime after the signing of the original contract, Ron wanted Law Office to perform additional unnecessary services. Specifically, Ron requested that Law Office negotiate for the sale of the decedent's stock in Manor Development. (R. p. 296). At trial, no one claimed that the sale of the Manor stock was necessary.

Ron's attorney, Jordan, testified that Law Office's efforts resulted in Ron receiving an amount of \$261,000.00 above the original offer. (R. p. 103, lines 17-24). Ron also testified that Law Office's negotiations resulted in a higher sale price for the Manor stock. (R. p. 83, line 13- p. 84, line 13). Mullinax testified that Ron received an additional \$156,000.00 above the original offer. (R. p. 155, lines 9-25). Ron eventually sold the stock for \$1,585,000.00 (R. p. 78, lines 7-17), (approximately \$185,000.00 above the original offer) as a result of Law Office's negotiations.

After Ron requested that Law Office perform the unnecessary services of negotiating for the sale of the Manor stock, the parties did not prepare or sign another written contract. However, based on previous dealings with Ron, Law Office billed Ron for the additional, services regarding negotiations for the sale of the Manor Stock at standard hourly rates for the firm, an amount of \$20,997.50. Law Office stated in his correspondence attached to the invoice that "these charges were for the additional services rendered that were not necessary in order to administer the estate or trusts under the laws of South Carolina, and therefore not included in our charges for those necessary administration expenses. (R. pp. 296-299). Ron was familiar with Law Office's billing practices, because Ron and Debora signed an earlier Engagement Letter

for Estate Planning Services (R. pp. 359-360), with Law Office on April 1, 2009, which included the following provisions:

How I Charge for Services Rendered

I usually bill for estate planning work in two ways: a fixed amount (which may be expressed in a range), and an amount based on my time billed at standard hourly rates. I will bill you for my time at my standard hourly rates, unless you and I agree on a fixed amount.

Fixed Fee Arrangements

If I agree on a fixed amount, my fees will not be limited to that amount if you do not accurately disclose information that I request and need for your work, *or if you materially change the terms, conditions, scope, or nature of the work after we agreed on the fixed amount. If this happens, you agree to pay me for my time billed at my standard hourly rates, unless we agree on a revised fixed amount.* (emphasis added)

Although there was no separate written agreement circumscribing the unnecessary services requested by Ron during the estate administration, Ron was familiar with the terms of engagement for services with Law Office. Law Office's efforts netted an extra approximate amount of between \$156,000.00 and \$261,000.00 to the estate and trust. Law Office's negotiations benefited Ron, however, he never paid Law Office anything for negotiating the additional windfall to the estate and trust. Law Office subsequently filed a claim in the Probate Court for the unpaid legal services, which included these related fees for unnecessary services. Thereafter, Ron filed a

claim in Circuit Court and all of the matters, including Law Office's initial claim, were merged in the Circuit Court case.

The evidence shows by a preponderance of the evidence that Law Office's services, which were not covered by the June 23, 2009 written contract (R. pp. 255-258), conferred a pecuniary benefit on Ron, that Ron realized that benefit when he sold the stock for the increased sale price negotiated by Law Office, and Ron retained the full amount of that benefit under conditions that make it unjust for Ron to retain it without paying its value. Therefore, the Court should award Law Office an amount equal to its value. The evidence shows that Law Office's hourly charges for these unnecessary charges amounts to \$20,997.50. However, in consideration of Ron's eventual sale of the Manor Stock with the additional benefit of \$185,000.00 thanks to Law Office's negotiations, the Court may determine that Ron should pay a higher amount to Law Office for these services.

V. THE COURT ERRED WHEN IT ALLOWED A BREACH OF CONTRACT CLAIM BASED ON THE PLATINIFF'S INTERPRETATIONS OF THE CONTRACT, THAT IF FOLLOWED, WOULD VIOLATE STATUTORY LAW AND PUBLIC POLICY.

The definition of a breach of contract is a failure to person 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).

“In an action at law, on appeal of a case tried by a jury, the jurisdiction of this [c]ourt 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 supports the jury's findings.” *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

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, there is a question of law, and the de novo standard should be applied.

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).

Ron and Law Office agree that they entered into a written contract for Law Office to perform “services that are necessary and appropriate to administer the estate under the laws of South Carolina and rules of court having jurisdiction of the estate” (R. pp. 255-256, ¶ numbered 1). Ron and Law Office also agreed that Ron was to pay Law Office a minimum of 2.5% of the estate value for “necessary services” under the

terms of the written contract (R. p. 257, ¶ numbered 2). The Engagement Letter summarized the necessary services that may be performed under the contract.

For administration of estates, actual and necessary services are more fully described in Treasury Regs. §20.2053-3(a), wherein it recognizes these activities are those for the collection of assets, payment of debts, and distribution of property to the persons entitled to it. Treasury Regs. §20.2053-3(a) expressly excludes from necessary activities those that are “not essential to the proper settlement of the estate, but incurred for the individual benefit of the heirs, legatees, or devisees...”. In fact, Treasury Regs. §20.2053-3(d)(2) expressly excludes the sale of property as necessary unless the sale is necessary in order to pay the decedent’s debts, expenses of administration, or taxes, to preserve the estate or effect distribution. Mullinax alludes to these facts in his testimony. (R. p. 143, lines 6-23; R. p. 144, lines 9-21; R. p. 149, lines 7-21).

A large portion of the value of Debora’s estate included stock in one private corporation, Manor Development (“Manor”). As Personal Representative of Debora’s estate and Trustee of Debora’s trust, Ron requested that Law Office negotiate the sale of the Manor stock against the stated testamentary preference of Debora. The sale of the stock (e.g. property) was not required in order to pay the decedent’s debts, expenses of administration, or taxes, to preserve the estate or effect distribution. Treasury Regs. §20.2053-3(d)(2). Because the sale of the Manor stock was unnecessary, Law Office’s negotiations for the sale of the Manor stock was not covered by the written contract, which limited its scope to necessary services (R. pp. 255-256, ¶ numbered 1).

At the time the parties entered into the written contract, Ron and Law Office did not contemplate that negotiations for the sale of the Manor stock would be “necessary and appropriate” under the terms of the written contract. Except for Ron’s testimony that should have been disallowed under the Dead Man’s Statute, all of the evidence suggest that the sale of the estate’s Manor stock was disfavored by the decedent and her documents, and the sale was unnecessary for the administration of the estate.

At no time has there been any allegation that the sale of the Manor stock was necessary to administer the estate under the terms of the written contract. In fact, the evidence shows that the sale of the stock was expressly discouraged by the decedent, Debora, including in her own sworn trust, signed 28 days prior to her death. (R. pp. 227-228, Article 21.3).

Although the sale of the Manor stock was unnecessary, Ron requested that Mullinax preform those additional services and subsequently claimed that the services for the sale of the stock should be included in the original fees for necessary services. (R. p. 64, line 19–p. 65, line 13). Under Ron’s theory of the written contract, unlimited services would be considered “necessary” and would be required by Mullinax under a buffet of unlimited legal services at a set fee. (R. p. 64, line 19–p. 65, line 13).

Ron’s own attorney, Jordan, testified about those things that were “necessary” for the administration of the estate. (R. p. 106, lines 5-17). According to the list provided in testimony by Ron’s own attorney (Jordan), Law Office preformed all actions that were “necessary and appropriate” for the estate administration – at least until Ron discharged Law Office of its responsibilities.

When asked what is “necessary and appropriate” for the administration of the estate, Ron’s attorney, Jordan, testified about what was “necessary and appropriate” that would have to be done to open up and proceed to take on and take through an estate such as Debora’s. Taking Jordan’s descriptive list in turn, the evidence shows that Law Office achieved each action that was deemed “necessary and appropriate”, under the terms of the contract, as listed by Ron’s own attorney.

First, Ron’s attorney, Jordan, testified that to do what is “necessary and appropriate” for the estate administration, “the first question you have to ask the surviving spouse or the personal representative is what are the assets that are there, and then comes identifying what the those assets are.” (R. p. 106, lines 9-17). Law Office had accomplished these steps by gathering estate asset information through the firm’s questionnaires and communications with Ron and Debora prior to and after her death. (R. p. 313; R. pp. 314-321). Since Ron and Debora visited Law Office and requested preparation of their estate planning documents less than 4 months before Debora passed away, it was appropriate to use the previously gathered questionnaire and list of asset information as a starting point for gathering date of death asset values.

Secondly, Jordan testified that “necessary and appropriate” actions would include, that “you take those assets and determine the value of the estate at the date of death.” (R. p. 106, lines 12-13). Law Office took the asset information the firm gathered and determined the date of death value by communicating with the various entities about the real estate, bank accounts and insurance policies (R. p. 336-337; R. p. 341; R.

p. 158, line 21-p. 159, line 14; R. p. 130, line 1-p. 131, line 19). Law Office gathered all the estate asset date of death values and prepared an itemized asset spread sheet (R. pp. 354-355, "fair market value (706) column"), to use in preparing a Federal Estate Tax Return (Form 706) draft for the estate. Law Office also used the information to prepare and file the Probate Court Inventory and Appraisement. (R. pp. 270-274).

Thirdly, Ron's attorney, Jordan, testified that in order to do what is "necessary and appropriate", you then "determine any debts or obligations that need to be satisfied...". Law Office determined whether or not the estate had debts or obligations (R. p. 320), and, determined how the estate was going to pay the debts. (R. p. 132, lines 7- 20). Throughout the process of gathering information regarding the assets and debts of the estate, Law Office dealt with the Probate Court by filing various required probate documents in accordance with the South Carolina Probate Code. (R. pp. 331-335; R. p. 338; R. p. 340). In response to questioning concerning the list of potential services on the firm engagement letter, Mullinax testified that his firm had completed each required task in a timely manner, up until the time of discharge. (R. p. 126, line 7 – p. 143, line 5). Law Office's engagement letter and Jordan's testimony describing "necessary and appropriate" estate administration tasks are fairly identical in substance.

There was no testimony or documents in evidence that suggests that prior to Law Office's discharge, that Law Office failed to accomplish anything that was "necessary and appropriate" under the written contract. The testimony from Ron's own

attorney, Jordan, bolsters the position that Law Office accomplished everything that was required under the terms of the written contract, up to the time of discharge.

A contract may give a right to demand performance, but no cause of action arises until a party refuses or neglects to perform some duty required by the terms of the contract.

Tillinghast v. Boston & Port Royal Lumber Co., 39 S.C. 484, 18 S.E. 120 (1983)(mere fact one enters into contract gives no cause of action; action does not arise until there is some breach) *overruled on other grounds in Hendrix v. Hendrix*, 296 S.C. 200, 371 S.E.2d 528, 530 (1988). No allegation was made that Law Office refused to complete its duties under the terms of the contract. A complaint which alleges no breach of contractual duty fails to state a cause of action. *Seebaldt v. First Federal Savings & Loan Ass'n*, 269 S.C. 691, 239 S.E.2d 726, 727 (1977).

Under the terms of the written contract, the Summary of Services to be Performed for the Estate section states that the firm would provide services that are necessary and appropriate to administer the estate, including to "Prepare, assist, or coordinate for the preparation of all tax returns for the estate, including federal estate tax and generation-skipping tax returns..." (R. p. 256, ¶ (e)).

Law Office gathered the estate assets and values and determined that the estate value was \$4,446,148.03. (R. pp. 354-355). The estate value, under the law, required that Law Office transcribe the collected values to an Estate Tax Return and that Ron file it with the Internal Revenue Service. (I.R.C. §2010(c)).

The gathering of the asset information and preparation of the Federal Estate Tax Return was "necessary" for the administration of the estate and was included in Law Office's set fee in the written contract. Although the law required Ron to file an

Estate Tax Return with the Internal Revenue Service, no estate “tax” was owed because of the way Law Office had drafted the estate planning documents. (R. pp. 197-237).

Ron alleged that the estate value was below \$3,500,000.00 and thus, a 706 was never signed. Law Office insisted that the estate was valued at \$4,446,148.03 and that Ron must file an Estate Tax Return. Although Law Office had collected much of the information to complete a Federal Estate Tax Return, because Ron and Law Office disagreed on the fair market value of assets in the estate, Law Office could not complete a Federal Estate Tax Return (Form 706) for Ron to sign. (R. p. 132, line 21- p. 133, line 15).

This provided Law Office with a dilemma. Mullinax testified that he was authorized to practice before the Internal Revenue Service and it was not contested. Under the provisions of Treasury Department Circular No. 230 (Treas. Regs. Subtitle A, Part 10), as an attorney practicing before the Internal Revenue Service, Law Office was charged with duties concerning the valuing of the estate and the proper application of the law.

Treasury Department Circular No. 230, provides the Regulations Governing Practice before the Internal Revenue Service, Title 31 Code of Federal Regulations, Subtitle A, Part 10. Treasury Department Circular No. 230 requires compliance with, in part, the following sections from those practicing before the Internal Revenue Service: Treasury Regs. §10.21 Knowledge of client’s omissions, Treasury Regs. §10.22 Diligence as to accuracy, Treasury Regs. §10.34 Standards with respect to tax returns

and documents, affidavits and other papers, Treasury Regs. §10.37 Requirements for other written advice, Treasury Regs. §10.51 Incompetence and disreputable conduct and Treasury Regs. §10.52 Violations subject to sanction.

The applicable portions of Treasury Department Circular No. 230 mandated that Law Office comply with the law, which included adhering to the law as it applied to having Ron file an Estate Tax Return. For Law Office to disregard the rule of law and assist Ron in avoiding what was required under the law would be an egregious matter. Law Office did not go along with Ron's scheme but encouraged Ron's compliance with the law, by insisting that he file the Federal Estate Tax Return.

If Law Office had followed Ron's wishes and assisted Ron in failing to properly file an Estate Tax Return, it would mean that Law Office would have violated the law and it would be against all applicable legal and ethical standards. Furthermore, it would result in Law Office being sanctioned and potential loss of Law Office's livelihood as a practitioner practicing before the Internal Revenue Service. Law Office had no intention of assisting in this plan.

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).

Any damage to Ron, was as a direct and proximate cause of Ron discharging Law Office and preventing Law Office from completing his duties under the written contract.

To recover for a breach of contract the plaintiff must allege and prove 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). Although Law Office did not breach the written contract, if Law Office had breached the written contract, Ron suffered no damage as a result of the transaction. In fact, the overall actions of Law Office directly and proximately resulted in a negotiated gain for the estate in the amount of between \$156,000.00 and \$261,000.00. Mullinax's, Ron's and Jordan's testimony all agree that Law Office's actions resulted in a gain for the estate (R. p. 155, lines 9 - 25; R. p. 102, line 11- p. 103, line 24; R. p. 83, line 13-p. 84, line 13). Ron alleges that he paid Mullinax \$100,000.00 in all toward all services (R. p. 69, lines 9-13), and, that Mullinax's direct and sole efforts resulted in an unexpected windfall for the estate in the amount of between \$156,000.00 and \$261,000.00.

The plaintiff bears the burden of proving damages resulting from the breach. *Fuller v. Eastern Fire & Casualty Insurance Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962).

Although Ron admitted that he discharged Law Office from its duties under the written contract, Ron failed to prove that he suffered any damaged caused by Law Office.

Law Office did show its damages from Ron's breach of the written contract. Specifically, Ron was to pay Law Office a minimum of 2.5% of the estate value for "necessary services" under the terms of the written contract dated June 23, 2009 (R.

pp. 255-258). The estate value information provided by Ron and Debora in their estate planning questionnaire (R. pp. 314-321) and financial statement (R. p. 313) which contained information from the questionnaire, was available at the time the contract was executed. Debora's portion of the estate value was approximately \$4,400,000.00. Under the written contract, with a \$4,400,000.00 estate, Ron would owe Law Office approximately \$110,000.00 ($2.5\% \times \$4,400,000.00$) for the necessary estate administration services.

Because the estate value information provided by Ron and Debora in their estate planning questionnaire (R. pp. 314-321) and financial statement (R. p. 313), were unverified, Law Office initially billed Ron a partial amount of \$25,000.00, and "attempted to ask for less fee than what the two point five percent might be, because I wanted to make sure that the values given to me were roughly accurate" (R. p. 124, line 17 – p. 125, line 4).

According to Ron and Debora's own documentation that they provided to Law Office, 2.5% of the estate value is equal to \$110,000.00 (approximately 2.5% of \$4,400,000.00). After collecting the date of death values of the estate's assets, Law Office prepared a spreadsheet containing the updated information (R. pp. 354-355), Law Office concluded that the estate was in fact worth approximately \$4,400,000.00 and billed Ron accordingly to the written contract. (R. p. 257; R. p. 145, line 20-p. 148, line 15). Once Mullinax completed most of the work, Ron unjustifiably discharged Mullinax and failed to pay what Ron owed to Mullinax under the terms of the contract.

Damages in a breach of contract action are to place the nonbreaching party in the position he or she would have been had there been no breach and the contract was

performed. *Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (Ct.App. 1996). The proper measure of compensation is the loss actually incurred as the result of the breach. *Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (Ct.App. 1996).

Ron presented no evidence that he was damaged by the transactions with Law Office. Therefore, the Court should overturn the lower court ruling and Ron should receive no funds from Law Office since Law Office did not breach the contract.

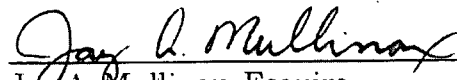
Ron did breach the written contract by unjustifiably discharging Law Office and Law Office is therefore due a remedy. There must be a "certain standard or fixed method by which the loss may be estimated with a fair degree of accuracy." *South Carolina Federal Savings Bank v. Thorton-Crosby Development, Co*, 303 S.C. 74, 399 S.E.2d 8, 11 (Ct. App. 1990), *aff'd*, 310 S.C. 232, 423 S.E.2d 114 (1992). The damages for Ron's breach of contract are specific. Ron owed Law Office 2.5% of the value of the estate for the necessary estate administration services. This amounted to approximately \$110,000.00 (2.5% of \$4,400,000.00), less the amount already paid.

CONCLUSION

For the foregoing reasons, Appellant respectfully prays that the Court reverse the judgment of the Circuit Court and award Appellant the amount of its claim for its breach of contract claim in the amount of \$111,153.70 plus interest and for its claim for quantum meruit/unjust enrichment in the amount of \$20,997.50 plus interest or additional relief that the Court deems equitable.

Respectfully submitted,

June ____, 2014


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APPENDIX C
FINAL BRIEF OF RESPONDENT

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 2010-CP-07-4146

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

Respondent

v.

The Law Office of Jay A. Mullinax, LLC

Appellant

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

In Response To Appellant's First Issue

1. In a case at law, dealing with a claimed lawyer's fee on one side, and a breach of contract on the other side, was it error to take contested facts in a legal case and permit a jury to resolve them?
2. Even assuming, purely for sake of argument, that it might have been a possible error, hasn't the Defendant - Appellant waived his equitable estoppel argument, by permitting the Judge below to charge the jury, without objection, the factual questions found in the so-called equitable estoppel argument?
3. Did the Lower Court commit an error of law when it denied Appellant's Motion for Directed Verdict on equitable estoppel, when several necessary elements for equitable estoppel, were never proven?
4. On policy grounds, should a lawyer be permitted to use equitable estoppel against a client when the client merely desires to ask reasonable questions about how the lawyer's attorney fees ad the progress of his own case?

In Response To Appellant's Second Issue

5. Has the Dead Man's Statute actually been violated on this record?
6. Assuming a technical violation exists, doesn't at least one exception to the Statute exist on this record?
7. Even assuming, for purely academic argument only, a technical violation existed, without a valid exception, are there truly sufficient grounds of prejudice to actually

reverse the trial judge's discretionary decision to admit the testimony in question in this case?

In Response To Appellant's Third Issue

8. Can the defendant Appellant now argue on appeal about jury charges that he never objected to at trial?
9. At all events, did the Circuit Court prejudicially err in giving jury charges that both sides below accepted as fair?

In Response To the Appellant's Fourth Issue

10. Even beyond the written fee agreement, was the defendant's argument for even more money, submitted, but squarely rejected, by the jury below?

In Response To The Appellant's Fifth Issue

11. Is a verdict to pay the defendant the actual worth of his professional services, as determined by a jury, against public policy or in violation of a Statute?
12. Even assuming a technical violation, hasn't that error clearly been waived, and not preserved on appeal, by not objecting to jury charges actually given by trial judge?

STATEMENT OF THE CASE

The case was commenced by Ron Orlosky ("Orlosky") on August 20, 2010 by the filing of a Summons and Complaint, Notice of Motion and Motion to Remove to the Circuit Court, and proposed Order with the Beaufort County Probate Court. These pleadings, served upon The Law Office of Jay A. Mullinax, LLC and Jay A. Mullinax (herein collectively "Mullinax") on that same date, asserted causes of action for Breach of Contract and for Violations of the South Carolina UTPA both in connection with Mullinax's handling of the Estate of Debra Orlosky, the plaintiff's late wife. On August 23, 2010, the Beaufort County Probate Court entered its Order granting Orlosky's motion, and removing the case to the Court of Common Pleas for Beaufort County. Mullinax's Answer, filed October 19, 2010, included a general denial, affirmative defenses, and included counterclaims against Orlosky for Breach of Contract, or in the alternative for Unjust Enrichment. Orlosky replied to the Counterclaim by general denial of the material allegations on October 25, 2010, and Mullinax then filed an Amended Answer and Counterclaim dated October 29, 2010 to which was added an additional affirmative defense. Again, by Reply filed November 11, 2010, Orlosky denied the material allegations of the Amended Answer and Counterclaim.

On December 1, 2010, Orlosky served an Offer of Judgment on Mullinax in which he offered to take judgment against Mullinax for the Total sum of \$29,751.68. This offer was not accepted by Mullinax who, on February 1, 2011, served an Offer of Judgment offering to take judgment on the Counterclaim in the amount of \$32,101.20. On April 9, 2012, plaintiff amended his complaint to seek additional damages, and to add a third cause of Action for Quantum Meruit. Mullinax answered on April 16, 2012 asserting the same

counterclaims as before, but omitting the additional affirmative defense. The case was tried before the Honorable Roger M. Young and a jury between April 18, 2012 and April 20, 2012. On April 20, 2012, the jury returned a verdict in favor of Orlosky in the amount of \$80,000.00, and also found for Orlosky on Mullinax's counterclaim.

Appellant's post trial motions for a Directed Verdict and for Judgment NOV, for A New Trial, for Relief from Judgment, and To Alter or Amend dated April 26, 2012 were denied by order dated May 17, 2012. In that same Order, the Honorable Roger M. Young granted Orlosky's Motion to Tax Costs and Award Interest filed April 25, 2012, and directed entry of Judgment for Orlosky in the total sum of \$89,354.26. Appellant then served notice of intention to appeal the verdict and the Order of May 17, 2012, and this appeal follows.

FACTS

Although the parties do agree on some significant facts, there are also very substantial differences between the parties on many other facts that are very much in dispute. Sadly, everyone can agree that Debora Orlosky passed away on June 17, 2009.¹ A few days following her death, on June 23, 2009, her husband Ron Orlosky ("Orlosky"), the named Personal Representative of his late wife's Estate and Trustee of her Trust, retained The Law Office of Jay A. Mullinax, LLC ("Mullinax"). Mullinax agreed to provide the services necessary for the administration of the Estate² and the Trust. The Mullinax engagement letter stated "We agree to represent you as Personal Representative and Trustee under the terms of this agreement. At the conclusion of your role in one capacity, this agreement will continue to control our relationship as to your remaining roles." (Plaintiff's Exhibit 5 - R. pp. 255-258).

¹ Nonetheless, even on this seemingly simple fact, Lawyer Mullinax did at least suggest he might use a different date in a formal document. To use his own words:

Q: "So, you are saying that you might put a different date than the date she really died?"

A: "It's possible, yes"

(R. p. 164, lines 7-9).

² At the time of her death her estate essentially consisted of a one-third (1/3) interest in two pieces of real estate in California, bank and brokerage accounts, personal items, and a 1/3 interest in a closely held family company which was a part of her trust. The company, Manor Development, was a California real estate management company owned by Mrs. Orlosky, her brother, and her sister. The value and disposition of the stakeholder's interest was subject to a binding shareholder's agreement which had been executed several months before her death, and by which each of the family member's spouses had also agreed to be bound. This agreement provided a formula for valuation if the shareholder wished to sell, and a different formula for valuation should the company seek to force a sale. (Plaintiff's Exhibit 2 - R. pp. 238-254).

On or about June 23, 2009, Orlosky paid the requested retainer of \$25,000.00. On June 30, 2009, a mere seven days later, Mullinax sent an invoice for a second \$25,000.00 to which he claimed to be entitled for having filed the Petition for the appointment of Orlosky as Personal Representative of the Estate and Trustee of the Trust. (Plaintiff's Exhibit 6 - R. pp. 259-264 and Plaintiff's Exhibit 7 - R. pp. 265-266). On October 2, 2009, Mullinax again invoiced Orlosky for an additional \$25,000.00, bringing the total billed and paid in the four months since his late wife's death to \$75,000. (Plaintiff's Exhibit 8 - R. pp. 267-268). Significantly, during the four month period, the only document which Mullinax had completed and filed with the Probate Court, apart from the Petition for Informal Appointment, was a Motion for an Extension of Time to file the Inventory. (Plaintiff's Exhibit 9 - R. p. 269). On October 19, 2009, Mullinax filed an Inventory (Plaintiff's Exhibit 10 - R. pp. 270-274) which was largely incomplete. On December 11, 2009, Mullinax invoiced Orlosky for an additional \$25,000.00. (Plaintiff's Exhibit 11 - R. pp. 275-276). He further informed Orlosky that he would be required to pay additional sums totaling \$36,103.70 of which \$25,000 should be paid at that time. This sum, Mullinax contended, was to "make up the new minimum." Orlosky then made additional payments totaling \$25,000.00 bringing to \$100,000.00 the total paid to Mullinax over the six month period.

During the period from December, 2009 to March, 2010, Orlosky became increasingly dissatisfied with Mullinax's services. Typical was an exchange of letters and emails concerning Plaintiff's Exhibit 16. The Plaintiff was attempting to get the details of why he had been billed an additional \$15,000 in extra charges, and he wanted to discuss the sale of the stock and the stage of completion of the work. (R. p. 73, line 21 - p. 74, line 1).

In response, Orlosky testified that prior to scheduling an appointment with him, Mullinax demanded payment of an additional "\$11,100". (R. p. 74, lines 2-5).

The dissatisfaction, in part, was as a result of what Orlosky felt to be a sort of "bait and switch" resulting from Mr. Mullinax's unilateral decision to change the minimum payment required and to bill as additional services for matters which Orlosky believed were included as part of the agreement. Additionally, as a result of discussions with his brother-in-law in California, he discovered that Mullinax was not following his instructions with respect to the sale of the Manor Development stock, and had not been sending him copies of relevant documents and correspondence which were contrary to his instructions. (R. p. 74, line 24 - p. 76, line 24; Court's Exhibit 1, Deposition of Boyd Lang - R. p. 192, line 13 - p. 193, line 5 and p. 194, line 20 - p. 196, line 21). Orlosky communicated with Mullinax about these concerns, and requested that Mullinax follow his wishes/instructions, and that he receive copies of all documents. (Plaintiff's Exhibit 20 - R. pp. 287-288). Also, he began to question the amounts being charged inasmuch as little appeared to have actually been done in the Estate or the Trust.

Orlosky specifically requested that Mullinax provide a detailed "summary of the hours worked and expenses incurred" in order that he could understand what he was being billed for, (R. p. 74, lines 16-25 and Plaintiff's Exhibit 17 - R. pp. 283-284), however

Mullinax did not comply with the request.³

Rather, Mullinax wrote to Orlosky informing him that if he failed to promptly pay his bills, he would cease working on the file, that he would not meet until Orlosky paid an additional \$11,103.70, and he further claimed entitlement to receive \$26,103.70 for "extra work." (Plaintiff's Exhibit 16 - R. pp. 281-282). In that same letter, Mullinax acknowledged that there was "significant" work remaining to be done on the estate file. On March 4, 2010, Orlosky requested that Mullinax provide him with the following information by March 15, 2010:

- Status of the Estate - please provide a listing of the activities that have been accomplished to date.
- Remaining Activities - please provide a listing of the activities that remain to be done to complete all required estate tasks up to and including the estate closing process.
- Expenses - please provide a detailed accounting of all expenses related to the handling of the estate from day one until today. This accounting should include the date, time spent, description of activity, and who performed the task (attorney or paralegal).
- Expected Future Costs - Please provide me with your best estimate of the expenses involved to complete all remaining activities and close the estate.

(Plaintiff's Exhibit 17 - R. pp. 283-284). Mullinax again did not respond, and on March 19,

³ Ultimately, the Plaintiff was forced to send his requests for information from his own lawyer in a certified letter dated March 4, 2010 to the Mullinax Law Firm. He never received any written signature that the certified letter was received. When the Post Office investigated, at the request of the Plaintiff, he was told that they attempted to deliver on March 6th and March 7th. The letter was never picked up. (R. pp. 77, lines 1-10). In essence, the letter had been refused. "Confused about it" (R. p. 77, line 7), the Plaintiff then elected to personally go to the Mullinax Law Firm and give the letter to the receptionist. Even then, Plaintiff was never given answers to the questions he had.

2010, Orlosky terminated the contract with Mullinax, in a letter which reads in part as follows:

Effective today, March 19, 2010, I am terminating your engagement as the attorney for the Estate of Debora Laura Orlosky.

I expect your full cooperation with new counsel during the transition process.

Considering that a final complete inventory, the IRS 706 form, the Manor stock sale, any estate closing documents, as well as other estate-related documents have not been finalized or filed, the estate work is very much incomplete. Therefore, I again ask for you to please provide me with a detailed summary of the hours worked and expenses incurred prior to March 19, 2010, so that the financial matters may be settled. You have already received \$100,000 and I suspect that I will be entitled to a refund.

(Plaintiff's Exhibit 19 - R. p. 286).

Mullinax never did directly address any of the Plaintiff's questions. Instead, he only responded by sending additional invoices. He also never produced any detailed time or expense records for the purported work done, prior to the date of his termination, because he candidly admitted at the trial that he did not actually keep such time records to begin with⁴. Further, Mullinax provided very few documents to Mr. Orlosky's new counsel who,

⁴ Mullinax testified at trial that he did not maintain any detailed time and billing records. He testified as follows in response to the following question:

Q: Do you have any time records for any of the times indicated to do the things that were necessary to administer the Estate?

A. No, I don't.

(R. p. 167, lines 16-19).

In fact, in response to a further question, he testified again that:

Q. You don't have any time records so you couldn't tell us anyway?

A. I don't have any time records from which to find that out.

(R. p. 168, lines 7-10).

in essence, had to start from the beginning on the matter. Nonetheless, Mullinax continued to insist that he was due additional monies, and filed a Creditors Claim against the Estate of Debora Orlosky in the amount of \$32,101.20.

The agreement between the parties (which was drafted solely and exclusively by Mullinax himself) provided as follows with respect to Mullinax's compensation if the agreement were terminated by the client:

4. Termination of Engagement

(a) The Personal Representative/Trustee, once determined, may terminate this engagement at any time by notice in writing to me. Upon receipt of such notice, subject to such court approval, as may be necessary in the context of the situation, I will promptly cease providing any services to the estate or trust as allowed by law. **The estate or trust will be responsible for paying for my services rendered up to the time I receive such notice** and for such reasonable services that I provide thereafter in connection with the transfer of responsibility for the matters I am providing to new counsel. . . [emphasis added]

(Plaintiff's Exhibit 5 - R. pp. 255-258). Notwithstanding these provisions, Mullinax failed and refused to provide any detailed time and billing records for the work done on the Estate prior to the termination, and continued to insist he was due additional sums for work on the Estate and for "extra work" which he claimed was not covered by the engagement agreement⁵. Finally, in June, 2010, he provided an itemized invoice for the "extras" which

⁵ Ultimately, the Plaintiff would discover that the Mullinax Law Firm only filed a single, very incomplete document, with the Probate Court. (R. p. 66, lines 19-25). In the meantime, more and more billing statements were being sent to the Plaintiff. (R. p. 67, line 24 - p. 68, line 2; p. 71, line 25 - p. 72, line 14; Plaintiff's Exhibit 11 - R. pp. 275-276, Plaintiff's Exhibit 12 - R. pp. 277-278, and Plaintiff's Exhibit 13 - R. pp. 279-280.)

included matters dating as far back as July 15, 2009; however in his own sworn testimony he stated that no detailed time and billing records for the matters which he claims were part of his engagement exist.

Mr. Michael Jordan of the McNair Law Firm, a certified specialist in Taxation, Estate Planning, and Probate with 39 years of experience, testified at trial. Mr. Jordan expressed the formal legal opinion that the work done by Mullinax represented "just the start of the administration process," and that if his firm had done the same work they would have billed between "\$5,000 and \$10,000" for the work done by Mr. Mullinax prior to the termination. (R. p. 95, lines 19-22; p. 96, lines 2-12). It was also his opinion that Mullinax had inflated the value of the estate from its true value of \$2,384,307.56 to \$4,444,148.03 for the purpose of charging additional fees to the estate, and further that Mullinax improperly imposed "additional charges" for work which was already included in the scope of work under the agreement. (R. p. 92, lines 5-19; p. 93, lines 3-22; p. 97, line 20 - p. 98, line 22; Plaintiff's Exhibit 31 - R. pp. 300-303).

At no time during the representation was Plaintiff ever given answers to the basic questions he had asked, including what was left to be done on the Estate, and an itemized list of the endless charges he was asked to repeatedly pay. In fact, as the relations between the Client and the Lawyer deteriorate, perhaps the ultimate surprise was that even after Mr. Mullinax was terminated, and after \$100,000 had been paid in attorney fees, the Plaintiff was to receive yet another claim filed in the Probate Court by Mullinax claiming that he is

still due \$32,101.20, and preventing him from being able, to this day, to close his late wife's estate.

ARGUMENT

I.

Defendant Has No Valid Equitable Estoppel Argument For Several Independent Reasons

A. The Lower Court Made No Error Of Law By Concluding That The Question of What Attorney Fee Was Rightfully Earned, Was A Highly Contested Fact, Not Suitable For Equitable Estoppel, And Properly Left To A Jury.

The Lower Court properly left the question of the amount of the Appellant's Attorney's fee to a jury as it was a heavily contested issue of conflicting facts in a case of law⁶.

The Appellant was paid \$100,000 by the Respondent. If the jury decision stands, \$80,000, will be returned to the Respondent. Thus, the lawyer will be paid \$20,000 for his time and efforts in this case. If this does happen, and the verdicts below on the counterclaim and claim are affirmed, neither side will receive what they hoped for. Respondent accepts the jury verdict and does not seek any modification on appeal. He can accept the jury's determination.

Moreover, this case includes far more than merely the overcharging of attorney's fees, it is also claimed in this record, and the jury heard evidence, that the lawyer

⁶ A fee dispute between a lawyer and a client is an action at law. See Lester v. Dawson, 372 S.C. 263, 491 S.E.2d 240 (1997). Even a suit to recover attorneys' fees, when based on an implied contract asserting a quantum meruit measure of recovery, is an action at law. See Weatherford v. Price, 340 S.C. 572, 532 S.E.2d 310 (S.C. App. 2000).

mishandled the case, breached his own contract, repeatedly refused to properly communicate with his own client, and deliberately ignored certified mail sent to him by the client asking for clarification⁷. The Lower Court's jury charge clearly discussed that it was for the jury to decide who, if anyone, had unjustifiably breached the contract.

Now, the parties have admitted that there was a binding contract, so I will not instruct you that you are to determine if there was a contract. In this case both parties agree that there was a contract, but there is a claim that both have breached the contract that existed between the parties.

In a breach of contract a party is only entitled to recover if you find that it has been proven by the preponderance of the evidence or the greater weight of the evidence that the other party **unjustifiably breached** the contract. [emphasis added]

(R. p. 187, lines 10-20).

* * * *

You can believe one witness over another or many against one. You can accept all of a witness' statements, or you can reject it in its entirety. You can accept it or reject it. You can accept a part of a witness' testimony, you can reject a part of it.

(R. p. 185, lines 10-14). In short, the very fact questions (and others) that the Defendant now seeks to invoke as an Equitable Estoppel defense, were submitted without objection to the Jury, as part of sharply conflicting factual testimony. Accordingly, this Court can

⁷ Any and all of those issues might be part of the jury's verdict for \$80,000. It is further submitted that the jury could have found that he breached his contract for any or all of these reasons. To suggest just one, consider the role of Rule 1.4, S.C.R.P.C.

simply determine that the question of estoppel has been deliberately waived by not properly preserving objections to the jury charge in this case.

It has long been S.C. jurisprudence that failure to object or otherwise challenge a jury charge precludes issues from being raised on appeal. See Munn v. Asseff, 226 S.C. S4, 83S.E.2d 642, 643-44 (1954). See also S.C. Jurisprudence, Appeal and Error, Section 81, Pg. 155 (“failure to object to a charge makes the charge the law of the case.”). It certainly bears repeating that the jury did not find the Defendant was entitled to nothing. To the contrary, they awarded the Defendant thousands and thousands of dollars that he does not have to remit or refund. (\$20,000 in total). Having partially won, but also having partially lost, the Defendant now claims his LLC is entitled to a full second bite at the apple, and he asserts that even in a highly contested factual and legal dispute, he is actually entitled to equitable estoppel his own Client from even questioning his fees. Did the Defendant breach his agreement by over-charging the Estate? Did the Plaintiff really take advantage of the Defendant and demand vast legal work but refuse to pay for its real value and worth? Was the fee agreement breached by the Lawyer? Was it breached by the Client? All of these contested factual questions were submitted to the jury, without objection, for its due deliberation. As is so often the case, neither side wholly agrees with the jury. So what?

Furthermore, the jury verdict reflects “real justice” in this case. Indeed, the jury awarded Defendant more money than perhaps he was entitled to in the first place. Michael Jordan concluded the legal fees that Mullinax should have charged, if he had completed all

the work, should have been around \$30,000 total, for all his legal work, both inside and outside the fee agreement. Without objection, the jury heard him say under oath:

[S]o, if I were looking at the total thing I would say the bill for the work he did on this Estate – we probably would have had a bill of somewhere around Thirty Thousand Dollars.

That would be okay and be reasonable.

(R. p. 108, lines 3-7). Michael Jordan also testified:

Q. And was it reasonable for Mr. Mullinax to want to be paid a Hundred or a Hundred and Thirty-Two Thousand Dollars based on the work that had been done?

A. **I don't think it was reasonable.**
[emphasis added]

(R. p. 108, lines 8-11).

So, if this unobjected testimony was considered by the jury, and clearly it may have been, the verdict is very sound, and their conclusions are faithful to the law. In short, they reached a fair and just verdict, one that did not give either side precisely what they either hoped or desired. The Defendant claims he is entitled to Equity. But a basic equitable maxim is that "Equity follows the Law" not that Equity overrules Legal Juries in contested legal cases of fact. On this ground as well, it is clear the Lawyer's first argument is in error.

B. Several Necessary Elements of Estoppel Were Never Proven

- 1. There Was a Failure of Proof That An Attorney Can “Reasonably Rely” Upon A Lay Client’s Innocent Estimate Of The Ultimate Value of An Estate, When That Question Turns On Complex Questions of Law, That Require Independent Legal Research.**

In the Appellant’s Brief, Appellant argues that he is entitled to equitable estoppel. Even if for academic purposes only, that might otherwise be accurate, it is still clear as a matter of law that the Appellant had to prove a number of elements necessary for an equitable estoppel to exist, including his “reasonable reliance” on the words or conduct of the Plaintiff in this case. See Appellant’s Initial Brief, Pg. 7, where he acknowledges this is an element he must prove to the Judge’s satisfaction on his Motion for a Directed Verdict.

Specifically, he had to prove to the jury and/or Judge’s satisfaction (He never asked the Court to make an independent determination of this question, merely to rule upon a directed verdict motion) that he “reasonably relied” upon an initial estimate, by an innocent client, of what his wife’s estate might be worth. Even assuming for a moment, without certainly conceding this fact, that the Plaintiff’s innocent initial estimate of the estate might have been mistaken, it is clear that no estoppel exists as a matter of law.

First, it is the lawyer, not the client, who is an expert in probate court and the valuation process of an estate. It is the lawyer, not the client, who has ethical and fiduciary

duties not the other way around. It is the lawyer who is an expert in the law, not the client. The matter of estate valuation and administration is sufficiently complex, strange, and difficult for a client to understand, that it is extraordinarily odd for Appellant to argue that he "reasonable relied" on a lay, innocent client's understanding as to how the law might value a particular estate that has one very substantial asset, Manor Development Corporate stock, that is governed by a valid Buy-Sell Agreement.

It is extremely noteworthy that the Appellant, in his brief at page 7 in the final paragraph, does not cite a single South Carolina case in support of his novel legal position that it is the client, and not the lawyer, that has a duty to undertake independent legal research as to whether or not the Estate should be valued by a valid Buy-Sell Agreement concerning corporate stock, or whether it should be valued by a different manner.

And, it is equally telling that none of the five cases the Appellant cites in his brief on Pages 6 and 7, concerning equitable estoppel, deals in any way with a lawyer attempting to use equitably estoppel against an innocent lay client concerning a complex point of law. In short, the Appellant on this appeal asks this Court to adopt an utterly novel use of equitable estoppel and cites no precedent at all in support of the novel position that clients, not lawyers, have the duty to determine a legal question, the proper evaluation on an estate. On this ground alone, the Lower Court was surely on solid legal ground in rejecting the Appellant's claim for a directed verdict. (R. p. 119, line 2 - p. 120, line 16.)

2. Appellant Also Failed To Prove On This Record That He Lacked Knowledge Or Means Of Acquiring the Knowledge About The Value of This Stock

To show both why it is so utterly unreasonable for a lawyer to **reasonably** rely upon an innocent client's initial estimate of what an estate might have been worth, and to also show that the Appellant - Lawyer certainly had it within his own ability to determine this legal question, one need only compare what the other estate expert, Michael Jordan of the McNair Law Firm, who also testified in this case, did in distinct contrast to the Appellant.

Unlike the Appellant, Mr. Jordan knew he could not ask his client to determine this legal question and he testified that he undertook independent legal research and wrote a memorandum of law on the complex legal question of whether or not the IRS would recognize the legitimacy of a shareholders' agreement in terms of Buy - Sell Agreement.

By contrast, Mr. Mullinax not only failed to produce a memorandum of law, he actually refused to answer any questions at all about how he determined the valuation of the stock. (See Respondent's Statement of Facts, earlier in this brief, which is obviously directly contrary to the Appellant's Statement of Facts and which the Jury clearly accepted in light of the verdicts on both the Plaintiff's Claim and the Defendant's Counterclaim). On this additional ground as well, it is clear on the record that Mr. Mullinax did not prove to either the satisfaction of the Trial Judge (who turned down the directed verdict motion) or the Jury

(who ruled against him on his counterclaims and for the Plaintiff on the claim of being overcharged) that he was entitled to a verdict in his favor.

In fact, with regard to "means of knowledge" Mr. Mullinax merely asserts, without discussion of the independent legal research he could have done, as Mr. Jordan did, and without citation to any case authority, that his "Law Office lacked knowledge of and means of knowledge of the assertions" made by the Plaintiff in this case. Appellant's Brief, Pg. 7 (near the bottom of the page). But, this conclusion is in error, or so a Jury and a Judge could determine, by merely comparing what another Estate Attorney did.

**3. The Directed Verdict Motion Was Also
Denied On At Least One Further Ground
The Reasonable Attorney Fee To Be
Charged In This Case Was Highly
Contested Throughout The Trial**

Estoppel implies a single statement. But, the statements about what the attorney fee was going to be, and how it was going to be computed, was very much contested in this case. For example, when the question first came up, in the form of a Motion for Directed Verdict, Counsel for the Respondent argued to the Lower Court the following:

Mr. Bowen: He kind of ignores the fact also that their position is not all based on valuation and should have been based on hourly. It looks like Mr. Mullinax was charging valuation and hourly. It was kind of like the maximum that no one should have charged.

(R. p. 119, line 24 - p. 120, line 3).

**C. Even Assuming All The Elements of Equitable Estoppel
Had Been Proven, There Still Remains A Fundamental
Policy Flaw in Appellant's Estoppel Argument.**

Moreover, equitable estoppel is inapplicable on this record for a further fundamental flaw in the Lawyer's argument. An excellent policy argument exists that estoppel is not applicable (at all) in lawyer-client fee disputes on grounds of public policy. In the famous case, DeStefano v. City of Charleston, 403 S.E.2d 648 (S.C. 1991), the South Carolina Supreme Court held that no estoppel should ever exist when public officers of limited authority made mere mistakes or errors in telling the public something about official municipal policies. The reason for this rule is plain: The general public can not be estopped about the law itself, because to do so would cause a much greater harm to the public than the value of correcting a mere mis-statement.

Even assuming, without agreeing, that the Plaintiff may have made a simple mistake in some preliminary financial information given to the Defendant, he was merely expressing an opinion, not a fact, and to hold all Clients to their initial opinions, and estopped then, would do great harm to the attorney - client relationship.

It is the lawyer who has the special expertise, it is the Lawyer who has the special knowledge, it is the Lawyer and the legal profession that the Courts regulates to make sure that all professional fee agreements (and, for that matter, all other professional agreements between Clients and Lawyers) are appropriate and reasonable and fair and ethical. When there is a dispute between a Client and a Lawyer, what possible policy justification exists

to bar the Client from even being permitted to make a legal argument that the Lawyer failed to earn his fee because he breached his own fee agreement? There is virtually no valid reason, and absolutely no policy justification or prior case law to bar a Client from at least putting his or her point of view in front of a jury about the reasonableness or unfairness of a professional fee. Estoppel should really play little or no role in that decision between Clients and Lawyers as it is enormously disruptive to an already fragile attorney - client relationship. (See also Wagner v. Graham, 370 S.E.2d 95 (S.C. App. 1998) where the Court of Appeals squarely held that estoppel had no role to play at all where an unlicensed contractor sought to sue for his own work. The statute requiring that fee be based upon a professional license simply because the statute was enacted to protect the public and therefore could not be the subject of an estoppel.)

Respectfully, this very same logic fully applies to the many regulations, restrictions, and safeguards that surround a lawyer's fee agreement, which are quite often in dispute. In short, if the Court sees fit to look into the merits of this matter, and not simply decide that jury charge, without objection, failed to preserve this argument, then on the merits the Lawyer in at least this case (and perhaps other lawyers as well) should not easily be permitted to argue that everyone in the world is truly "estopped" to question their own fees.

Finally, even assuming that an equitable estoppel could conceivably exist in some highly limited Lawyer - Client fee context, that rule certainly has no application here, the Plaintiff - Respondent submits, where here the Client repeatedly paid the Lawyer's demand

for more and more and more fees, adding up to at least \$100,000 in around nine months, but when the lawyer refused to even respond to legitimate questions by the Client as to what additional amounts of legal work needed to be done, what it would cost and so on. (See the subsequent further testimony of Mr. Jordan, from the McNair Firm, that the Mullinax Law Firm did not properly perform its agreement to do various legal work for the Estate, because of its protests about selling this particular stock, in Mr. Jordan's professional opinion, was not prudent) Mr. Jordan's testimony:

This was a prudent number, and I think it would be imprudent for a trustee to retain such a concentration of assets without diversification. I think that would scare me if I were the Trustee.

Q. So from what you just told me, not only did you believe it was prudent for him to sell the stock, but it would have been imprudent not to do so?

A. That's what I said.

Mr. Bowen: I don't believe I have any further questions for Mr. Jordan.

(R. p. 109, line 19 - p. 110, line 3).

Naturally, this was a contested fact flatly denied by the Defendant. The Trial Judge, instead of using equitable estoppel in the middle of a highly contested factual case, properly left these issues for a jury.

In Brief Summary

Not only were the jury charges unobjected to, in this case, and not only do they fully include the very facts that Appellant insists should now be held as fully established by an equitable estoppel, they were highly contested facts in a legal case and were very rightfully submitted to the Jury. Further, as at least one true expert testified, the Defendant's fee was not reasonable and it is always open for a Client to question a Lawyer's fee arrangement, and no matter what the Lawyer may say or not say, as a matter of social policy, the Court should deny any request to use equitable estoppel to bar a Client from asserting the Lawyer has not been fair and reasonable in charging a professional fee.

Respectfully, for the good of the public, and the legal profession itself, please categorically reject the Defendant's argument as it asks this Court to do nothing less than to fundamentally change the lawyer - client relationship.

II.
There is No Dead Man Statute Problem
On the Record for Several Reasons

A. The Jury was never asked to decide what the Respondent's late Wife said or did not say.

Disappointed in the jury verdict, the Appellant - Lawyer attributes the disappointing result to his assertion that "Dead Man's Statute" has been violated. With all due respect, this assertion is off target.

The dead man statute is an exception to the general rule of witness competency. Even the Appellant recognizes this fact in his own brief when he notes the statute calls for a "restrictive reading." See Appellant's Initial Brief, Pg. 10. The Statute itself is found in S.C. Code Ann. at Section 19-11-20 (1985). Moreover, since this is a rule of evidence, it follows the general rule that "the admission of evidence is a matter left to the direction of the trial judge and absent a clear abuse, will not be disturbed on appeal". See Carlyle v. Tuomey Hospital , 305 S.C. 187, 193, 404 S.E.2d 630, 663 (1991).

When the question of the Dead Man's Statute, first came up in the trial, it was in the context of some testimony by the Plaintiff about the advisability of selling the closed company stock held by the estate. Concerning the claim this testimony should be excluded, the trial judge correctly noted that this was a fee dispute case, and not a case about the sale or no sale of stock, and the jury was not going to be asked to decide whether or not the stock

should, or should not, be sold or what the Respondent's wife said or didn't say on this subject.

Since this was not an issue for the jury to even decide, it is enormously difficult to understand how the testimony about selling or not selling could possibly effect their decision (indeed, they were going to independently hear from several witnesses without objection about the sale of the stock, including the Plaintiff's own trial expert). Because it was a question that it need not decide, the lower court was on solid ground when Judge Young told both counsel in the Trial:

The Court: As far as this matter goes, it is not whether he had the right to do it, to sell the stock or not sell the stock, to get the cash or not get the cash. That is not going to be an issue for the jury to decide.

So he can testify about it because it is not an issue prohibited by the Deadman's Statute, because his interests you are talking about right now are not going to be something that will be decided by the jury.

(R. p. 61, lines 11-18).

The Plaintiff - Respondent submits this is sound and it would provide countless problems to future trial judges in South Carolina if questions, not to be actually decided by the jury, could suddenly fall under the Dead Man's Statute. This is especially true because the Dead Man Statute calls for a "restrictive reading," not the very broad liberal interpretation of the Dead Man's Statute asked for by the Defendant - Appellant on this appeal. The Court should also review the testimony by Plaintiff - Orlosky that the legal fee he believed he

should have been charged was utterly irrelevant to the value of the stock to begin with, whether or not it was or was not sold, due to a valid Buy-Sell Agreement that was binding upon the Estate and the Plaintiff.⁸ That testimony is quoted below in the footnote and it remains uncontradicted on this record. In short, for two utterly independent reasons, both because the jury was not going to decide the question to begin with, and because -- with or without an actual sale -- the question of the stock value itself, dealing with the Estate, was

⁸ See the R. p. 70, lines 1-7; p. 70, line 14 - p. 71, line 1 where the Plaintiff testified:

Q. Did Mr. Mullinax tell you at that time or at any time previous to that that you shouldn't sell the Manor Development stock

A. No.

Q. Did he advise you at any time not to sell?

A. No.

Q. If the value of the company had been as Mr. Mullinax thought it ought to be, under the [buy-sell] agreement could you or the estate have received any more?

A. No, I was bound by what the agreement said, the buy and sell agreement, and that was what was required to be done.

Q. So did it matter if the value was Three Million, Two Million, Four Million?

A. No.

Q. Would you have gotten any more regardless of the value?

A. No.

Q. Would there have been more to the estate or proceeds going into the trust from the sale?

A. No.

already fixed by a valid Buy-Sell Agreement,⁹ there was no violation of the Dead Man's Statute when the Plaintiff briefly testified about the sale of the stock in the Estate.

Moreover, there are "many" exceptions to the Dead Man's Statute that have always been recognized, and at least one of these exceptions quite clearly fit the facts here.

B. At All Events, There Is A Recognized Exception To The Dead Man Statute Present In This Case

Assuming for Academic Purposes Only, a Dead Man Statute Issue Exists, (and candidly Plaintiff does not see it) it is clear that at least one exception to the Statute also exist in this case. Michael Jordan, Esquire, Plaintiff's Expert at Trial, independently testified (totally without regard to anything the Plaintiff may have said to his Wife, prior to her death, and totally independently of whatever she said or did not say to him) that he personally held the professional opinion that the stock should be sold. Normally, Mr. Jordan testified, "a

⁹ Hanahan v. Simpson, 485 S.E.2d 903 (S.C. 1997) is a key case. There, the South Carolina Supreme Court noted that Dead Man's Statute has been "sharply criticized" in recent years Id. at 484 S.E.2d 909. and that as a result a number of exceptions now exist to the statute.

For example, the Court noted in Hanahan that a witness is prohibited from testifying under the Dead Man's statute only if his or present or previous interest will be affected by the events of trial. But, long prior to the trial, the status of a sale had long been fixed and determined by a valid Buy-Sell Agreement that had nothing to do with the Plaintiff. Moreover, under the Will, all the proceeds from the sale were also prearranged and fixed, and again this had nothing to do with the Plaintiff as all the stock sale proceeds were to flow solely to the deceased's own two daughters.

In short, with the price settled, with the beneficiaries predetermined, the Plaintiff, quite literally, was not "an interested person" as that term has come to be defined, with regard to the sale of the stock. The money was not going to him nor was the price to be determined by him. As the trial focused on the contested question of attorney fees, and overcharging, and not the stock, the Lower Court's conclusions on the Statute's irrelevancy can be squarely affirmed under the Hanahan v. Simpson.

trust should not be heavily invested in one stock"...It is prudent to diversify." (See R. p. 111, lines 3-10).

In light of this professional, independent, cumulative testimony, which is clearly cumulative to the Plaintiff himself testifying that he thought the stock should be sold, even if the Plaintiff was referring to a prior conversation with his own wife, and even though he would not benefit directly either from holding the stock or selling it (as the ultimate beneficiary was going to be his wife's two daughters) it was - at worse - mere harmless error as the cases in South Carolina have again and again held in applying the Dead Man's Statute, when the same thought was testified to by others in the trial independently and without objection. In short, there certainly should not be an outright reversal if same evidence was independently introduced by someone else. See, for examples, Harris v. Campbell, 358 S.E.719 (S.C. App. 1987) (reversal is not warranted where evidence is erroneously admitted so long as it is merely cumulative); McBeth v. Bishop, 298 S.E.2d 441, 442 (S.C. 1982) (Consequently, admission of testimony, although technically in violation of the statute, affords no grounds upon which to reverse the verdict, because it was merely cumulative to other testimony).

In Brief Summary

The trial court, in its sound discretion, makes the first and most important call about the Dead Man's Statute. In this case, given that the Statute is not favored, and given that the Jury was not going to be called upon to decide any of the issues to begin with, specifically

whether or not the stock should or should not be sold, it only makes logical sense to affirm what the sound Circuit Court Judge ruled. But, if for some reason, this Court wants to probe further into a truly lower court discretionary decision (and the bright line test, when the question is not even going to arise in the jury room, no dead man statute issue is present). This is especially true when it is shown, as here, it is cumulative testimony from a true expert in this field to do exactly what the Plaintiff wanted to do and what he said his late wife talked to him about (which was a very brief part of the overall trial). In short, there is no reversible error here.

III.

The Judge Below Made No Inappropriate Charges To the Jury. But Even Assuming That He Had, Because the Appellant Failed to Object To Charges That Were Made, Appellant Has Clearly Waived His Rights to Object To Jury Charges Given, And Has Failed to Properly Preserve This Alleged Error on Appeal.

In the Defendant - Appellant's Claimed Third Error Below (See his Initial Brief, Page. 25 -32) the Defendant complains about the jury charges given to the jury. Starting at Page 409 of the trial transcript, the Court instructed the Jury. As is certainly the better practice, the Judge very carefully ended his charge with the following statement:

Now, before you begin to deliberate on your verdict I must give the attorneys an opportunity to tell me if I have left something out of my charge or stated something incorrectly.

(R. p. 190, lines 16-19).

Neither the Appellant nor the Respondent suggested any changes or had any objections. (See R. p. 191, lines 2-8). **(Nothing from the Plaintiff and Nothing from the Defendant).**

In light of these uncontested facts, it is a little surprising that Appellant now takes Pages 25-32 to complain about something that he voluntarily accepted, without exception, reservation, or complaint, at trial. Of course, a timely objection could have been immediately corrected below, thus saving potentially years of time and much additional expenses.

It is a settled rule of appellate practice that objections never voiced or heard or ruled upon below concerning the jury charge means as a matter of law that those objections are not

properly preserved for argument on appeal. See, for example, Floyd v. Floyd, 615 S.E.2d 465 (S.C. App. 2005) (an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon the trial judge to be properly preserved for appellate review); Wilder v. Wilder, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal but must be raised and ruled by the trial judge to be preserved for possible appellate review). In short, this argument fails as a matter of law¹⁰.

In Brief Summary

The Appellant failed to raise this argument below. He has waived it. Merely for academic purposes, it does merit adding that Judge's charge to the jury appears to be fair and just to both sides, and even his own Attorney at the time had no objections, complaints or additions.

¹⁰

Merely for the record, even if this issue had been properly preserved, Respondent also submits that the jury charges were fair and impartial for both sides. It is well settled that jury charges have to be considered as a whole, and a mere isolated portion which might even be misleading, is still not enough to constitute a reversible error. See Keaton ex rel. Foster v. Greenville Medical System, 514 S.E.2d 570 (S.C. 1999)

IV.
**The Jury Verdict That Appellant Take Nothing Under His
Counterclaim Is Fully Supported By Evidence On the
Record.**

The main contested factual issue in this three day trial was just how much Mr. Mullinax's law firm was entitled to, if anything, under the contested facts and circumstances of this case. Both sides acknowledged a contract existed. Both sides also claimed that the other side breached that contract. The issue of how much was owed, and if one or the other of the parties breached the contract, was sharply contested.

The Appellant now argues in his own personal view, that the "preponderance of the evidence" supports his additional claim of another \$20,997 (even beyond the over \$100,000 he was previously paid by the Plaintiff). But, Respondent submits that the Appellant's counterclaim for additional funds was sharply contested and was appropriately left to the Jury to be decide as a contested factual issue. The Jury elected, as was their role and right, to award zero dollars on the Appellant's counterclaim and there is substantial evidence in the record to uphold this determination. Appellant is not entitled to second-guess this decision on appeal.

The Trial Judge, the Honorable Roger Young, personally and carefully explained the Appellant's counterclaim on the jury verdict form to the Jury. (R. p. 189, line 24 - p. 190, line 11). Neither side had any objection whatsoever to his comments to the jury, and neither side objected in his submitting this contested question to the jury at the end of the trial.

Concerning the Appellant's claim for additional funds, even the Appellant admits there is no writing that reflects an actual agreement about these charges. See Appellant's Brief on Appeal, Pg. 35 (at the bottom of the page, where he openly acknowledges "although there was no separate written agreement . . ."). Concerning this hotly contested issue, the jury elected not to see the matter the way the Appellant hoped. Appellant truly cites no law on pages 32 to 37 of Appellant's Initial Brief to remotely justify overturning their verdict on this point.

Indeed, the Respondent respectfully suggests to this Honorable Court that there are any number of reasons **right on the record** to support the jury's verdict that the Defendant never proved his counterclaim. To mention merely two obvious arguments that jury may well have adopted: The jury could have simply decided that Respondent's trial counsel was right when he argued in its closing argument that Mullinax Law Firm simply failed as a matter of evidence to prove his claims of additional funds. Further, the jury could have also decided that Mr. Mullinax's Law Firm breached his own retainer agreement, and never closed the Estate, and therefore was never entitled to anywhere near the funds he thought he was entitled to – much less additional claims for even more legal fees, based upon a contested implied agreement not reduced to a writing.

The record reflects that Trial Counsel for the Plaintiff argued to the Jury in his closing argument:

Mr. Mullinax tells you as he sits here today that he can't tell you the time he spent on the case. He can't tell you the dates he did anything. He can't tell you much he billed for anything because he did not keep any time records for the things he said were necessary and appropriate for administering the Estate. Yet he claims that it is worth Hundred and Eleven Thousand Dollars, or that it's worth some higher number.

(R. p. 181, line 22 - p. 182, line 4).

Obviously, this was a jury issue to be decided by the jury, in the jury room, and the mere fact that the jury came to a very different conclusion than Mr. Mullinax personally hoped is hardly grounds to overturn the jury verdict. Of course, it has long been established that in this state every reasonable presumption exists in favor of a general jury verdict for one side or the other. See Goldkist, Inc. v. C&S National Bank, 333 S.E.2d 67,73 (S.C.App. 1985). In fact, even Mr. Mullinax's own trial counsel, agreed in his closing statement that this question was factual, and contested, and recognized that this was a genuine jury question. Specifically, Mullinax's trial lawyer told the jury:

"When you look at the credibility of witnesses, I ask that you really judge them "

(R. p. 183, lines 19-20).

Apparently, the jury did just that and concluded that Mullinax Law Firm was entitled to zero on its counterclaim. It is extraordinarily hard to see how Appellant can complain on appeal, about something Mullinax never objected to, and where the jury only did what Mullinax's own trial lawyer asked them to do at trial, determine his credibility.

In short, in the eyes of the jury, there simply was no merit in Appellant's claim for additional funds, particularly when he refused to explain to his own client the basis for most of his written claims he had made, much less his unwritten claim for even more fees.

V.
**Neither Statutes Nor Public Policy Bar The
Plaintiff From The Recovery the Jury
Awarded Him Based Upon The Appellant's
Overcharges**

Appellant also argues on appeal, even if he did breach the agreement, and overcharge the Respondent, it would be against "public policy" and various "statutes" to uphold the jury verdict for the Respondent for \$80,000. **But this is hardly what he argued to the jury.** At trial, Appellant's trial lawyer, recognizing that this was a contested factual question, and asked the jury the following key question in Mullinax's own closing argument:

You will have the contract that they made, and the question you have to decide is who breached the contract. Did Mr. Mullinax breach it or was he doing everything he could in a reasonable manner in his professional capacity?

(R. p. 184, lines 12-15)

Appellant now argues in his Initial Brief something very different to this Court. He argues that finding him in breach of the contract would be contrary to statutory law and in violation of public policy. This argument, of course, is premised if, but only if, one agrees and accepts completely Mullinax's very strained version of the applicable facts in this matter.

In fact, there were (and are) two sides – in this dispute, and it certainly was the jury's prerogative not to agree with Mullinax's version of the facts and instead side with the Plaintiff. Looking at the jury's verdict, it is clear that they did side (in part) with Plaintiff - Respondent and partially rejected Mullinax's version of the underlying facts in this case.

Specifically, Mullinax Law Firm totally overlooks and fails to discuss why Michael Jordan, Esq., a genuine specialist in both taxation and estate planning in the McNair Law Firm, who dramatically disagreed with his "legal position" about how this Estate should be handled, and what the proper method of determining its value should be, should not have been considered by the jury in this case. To say the least, Michael Jordan was a very impressive witness, or so the jury certainly could have decided.

First, Mr. Michael Jordan has vast legal experience, as he testified that he has practiced law for 39 years, in the field of estates and estate administration. (R. p. 85, line 11).

Second, his practice is virtually **exclusively** in estate planning, and probate and trust. (R. p. 85, lines 21-22). He holds two specialty certifications from the South Carolina Supreme Court, (1) in estate planning and probate law and the (2) in taxation law. (R. p. 86, lines 7-10).

Third, he has received special professional awards and outstanding professional public recognition in both of these two fields, including being invited to join the American College of Trusts & Estates Counsel and labeled in this field, Best Lawyer in South Carolina, in his speciality. (R. p. 87, lines 11-16). **Thus, his opinions might well have carried special weight with the jury.**

It is therefore particularly significant that Michael Jordan first squarely testified that the Estate was in a very "preliminary stage" (R. p. 89, lines 14-25), **with most of the legal**

work yet to be done, when he was initially engaged to administer the estate. Specifically, Michael Jordan undertook significant legal research to determine whether or not a tax return should be filed by the Estate, and he also did significant legal research as to how the Estate should be valued. (See Plaintiff's Exhibit 26 - R. pp. 291-295).

Quoting him directly:

So, the principal asset of this Estate being the stock in the Manor Development Company, one of the questions that I had to determine in my own mind was whether for estate tax reporting purposes it was appropriate to take the value in the buy sell agreement [for \$1,500,000] as to the value of the stock

I did research that led me to the professional conclusion that if the IRS were presented the issue that they would recognize the legitimacy of the shareholders' agreement;

This memo is a summary of the research.

(R. p. 90, line 16 - p. 91, line 3).

In sharp contrast, Mr. Mullinax did no research at all. It is also highly relevant that Michael Jordan was being paid by the hour. Mr. Jordan's decision, or a jury could have decided, about how to value this estate, had absolutely nothing whatsoever to do with the fee that he was charging the Plaintiff to administer the Estate. (See R. p. 88, lines 1-6; p. 88, lines 14-16). Again by distinct contrast, the Appellant, the Mullinax Law Firm, based its principal fee upon a percentage of the value of the Estate itself. So, instead of a modest fee, if the Estate was not that large, the Mullinax Law Firm would receive a much larger, and much more substantial fee, if the value of the stock was not governed by the buy-sell

agreement, with its \$1,500,000 value, but a much higher fee based upon a very different, and higher, valuation of that stock.

Again, it bears reiterating, Michael Jordan did substantial impartial legal research and came to the legal conclusion that Estate simply had far less than the value that Mullinax claimed it had. From this central dispute of fact, between lawyers, much of the rest of the case can easily be explained. Mullinax, during his time working at that time, did no legal research at all on this question.

When Jordan took over the legal administration of the estate from Mullinax, it was his professional opinion that no more than 20 to 25% of the estate work had been completed (See R. p. 95, lines 1-5), and that even if all the work had been done, and completed by Mullinax Law Firm, Mr. Jordan further testified that on the basis of the actual value of the work, actually completed by Mr. Mullinax before he was discharged, the McNair Law Firm would have only billed Five to Ten Thousand Dollars. (R. p. 95, lines 19-22).¹¹

However, because only 1/4 of the work was completed (at most) and because Mr. Jordan firmly believed after his research memo (Plaintiff's Exhibit 26 - R. pp. 291-295) there could be no greater value for estate purposes than the buy-sell agreement for the stock, Mr.

¹¹ This testimony is significant and is quoted in full in context:

Q. Let me ask you, had you performed the work that Mr. Mullinax did prior to the time you took over, do you know or have an idea of what your firm would have charged?

A. For that work, probably Five to Ten Thousand Dollars.
(R. p. 95, lines 19-22).

Jordan was asked the ultimate question as an expert, as to the reasonableness of Mullinax's own interpretation of the value of the Estate, and the professional value work he had accomplished prior to be discharged. Quoting directly from Jordan's testimony:

Q. Was it reasonable for Mr. Mullinax to want to be paid a Hundred or a Hundred Thirty - Two Thousand Dollars based upon the work that had been done?

A. I don't think it was reasonable¹².

(R. p. 108, lines 8-11)

Thus, the jury had ample evidence to support its apparent conclusion that Mullinax did not properly perform his contract with the Estate, that he did in fact grossly overcharge the Estate, and that it was certainly within the bounds of the evidence submitted at trial that Mullinax had breach its contract with the Plaintiff.

Of course, it is a settled rule of law and of civil procedure that issues of fact in an action for the recovery of money are tried by a jury, unless a jury trial be waived. S.C.R.C.P. 38(a). And, it is equally settled that an action for breach of contract seeking monetary damages is an action at law. See S.C. Fed. Savings Bank v. Thorton - Crosby Development Co., 423 S.E.2d 114 (1992).

So, in essence, like so many contract disputes, this case comes down to a rather simple factual dispute: the jury was required to determine, whether or not Mullinax's

¹² In fact, the jury could if it so desired – compare the McNair Law Firm for two full years of work on the Estate (which was approximately \$30,000) with Mullinax Law Firm fee of \$132,000 with most of the work still left to do. (See R. p. 95, lines 8-12).

charges were proper or not, and whether or not Mullinax's fees were unfair and beyond what they should have been. If they found, as Michael Jordan stated, and as the Plaintiff himself testified (see the Plaintiff's subsequent testimony discussed in this Section of the Respondent's Initial Brief), then his charges were not reasonable, and the jury really could and did very properly determine that he overcharged the Plaintiff. In short, the jury had evidence, if they believed, that the contract had been breached, and the Plaintiff - Respondent suffered very real damages.

On the other hand, if the jury could have also found that Mullinax had properly charged for his services in a reasonable manner, and if they made that factual determination they could have found that his contract was fair and appropriate, and there was no breach of contract. In short, this was a true contested fact and it very properly was decided in the jury room by an impartial jury. Proof that at trial, this central question, **as even Mullinax's own trial lawyer recognized below**, in his own closing argument to the jury, was for the jury to

be decide in the jury room.¹³

Mullinax makes one final argument in his brief that should be addressed. He asserts that "Ron (referring to the Plaintiff) presented no evidence that he was damaged by the transactions with the [Mullinax] Law Office." (Appellant's Initial Brief, Pg. 47).

Contrary to Mullinax's argument of "no damages", there is very strong evidence, again if believed by the jury, that there were significant damages to the Plaintiff. As discussed above, Michael Jordan testified that the Mullinax bills were not reasonable. Further, the Plaintiff himself at the trial directly testified to damages the breach of contract created. The Court's attention is directed to the following testimony:

- Q. Do you believe that you have been treated fairly by Mullinax or the Estate?
- A. Obviously the Estate has not been treated fairly
- Q. Do you believe that he has been overpaid?
- A. Certainly. I think he has been overpaid.
- Q. If you believe you have overpaid him, how much would you ask the jury to refund?
- A. Based upon my analysis as I said before, I would say Eight to Eight-five Thousand Dollars.

¹³ Not only did Mullinax's own lawyer argue this to the Jury in his closing argument, "the question you have to decide is who breached the contract. Did Mr. Mullinax breach it or was he doing everything he could in a reasonable manner in his professional capacity? (See R. p. 184, lines 12-15).

The Judge charged the jury this very question in his own charge when he charged the jury it was up to them to decide whether or not Mullinax had "overcharged" the Plaintiff under his agreement. (See R. p. 185, lines 17-21).

It also merits noting that this charge was given with no objections of any kind by either Plaintiff's or Defendant's counsel. (Transcript, R. p. 191, lines 2-9).

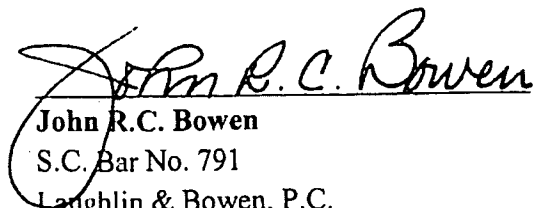
(R. p. 81, line 23 - p. 82, line 6).¹⁴ Further, in response to the question "Do you have an opinion as to what the value of Mr. Mullinax's work..." he replied "maybe in the Fifteen to Twenty Thousand Dollar range." (R. p. 79, line 23 - p. 81, line 2).

In brief summary, the jury could have accepted, if they found this credible, the Plaintiff was overcharged by \$80,000 - \$85,000. They could also accepted Mr. Jordan's testimony that actual work performed by lawyer Mullinax was very "incomplete" and Mr. Jordan had to almost start over from scratch. (R. p. 80, lines 11-23). On either basis, there was evidence on the record of real damages for Mr. Mullinax's failure to do what he should have done.

¹⁴ Plaintiff - Respondent submits that it is hardly an accident that the jury, apparently finding him to be credible, awarded damages at \$80,000.

CONCLUSION

This was a fair trial. It dealt with a question of breach of contract and it raised factual issues very much in dispute during the trial itself. The Judges charges were never objected to, the issues of contested fact were properly joined and very properly submitted to a jury for their exclusive determination, and the case should be affirmed.


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June 16, 2013
Hilton Head Island, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Beaufort County
Roger M. Young, Circuit Court Judge

Case No. 2010-CP-07-4146

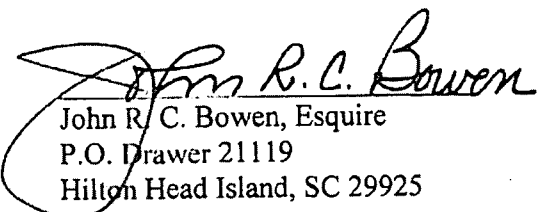
Ron Orlosky in his capacity as Personal Representative of
The Estate of Debora L. Orlosky and in his capacity as trustee
of the Debora Laura Orlosky Revocable Trust.....Respondent

v

The Law Office of Jay A. Mullinax, LLC, ...Appellant

CERTIFICATE OF COUNSEL

I, John R. C. Bowen, counsel for the Respondent, certify that Respondent's Final
Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.


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APPENDIX D

FINAL REPLY BRIEF OF APPELLANT [PETITIONER]

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2012-212331

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,

Respondent,

v.

The Law Office of Jay A.
Mullinax, LLC,

Appellant.

FINAL REPLY BRIEF OF APPELLANT

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

Appellant, Law Office of Jay A. Mullinax, LLC, submits this Reply Brief. By reference, Appellant adopts the Statement of Issues, Statement of the Case, and the Statement of Facts presented in its Initial Brief of Appellant.

ARGUMENTS

I. THE COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON EQUITABLE ESTOPPEL.

During the trial, the Appellant (a/k/a "Law Office") made multiple motions for a directed verdict based on equitable estoppel. (R. p. 117, line 24- p. 120, line 16; R. p. 174, line 16- p. 177, line 23). Essentially, Law Office's motions for equitable estoppel assert that Respondent, (a/k/a Ron), was estopped from alleging a different estate value than the one he claimed at the formation of the contract -- when Ron's original value was used to entice Law Office to enter the written contract. (R. pp. 255-258).

Rather than directly addressing the Appellant's motion to the trial Court on equitable estoppel, the Respondent mischaracterizes the Court's direct ruling on the Appellant's motions, and claims that the equitable estoppel was a matter for the jury. The Respondent provides no evidence for this position and does not challenge the validity of the Court's ruling on these motions.

The Court ruled on Law Office's motions for equitable estoppel and denied those motions as a **matter of law**. The Respondent states that "a basic equitable maxim is that 'Equity follows the Law.'" (Initial Br. of Respondent, p. 14). Law Office agrees with the Respondent's statement that equity follows the law, and here, the law is clear. Matters of law are properly before the Court, and not the jury.

The Appellant's motions of equitable estoppel, (an issue of law), were made to and ruled on by the Court, and not by the jury, as alleged in the Respondent's Initial Brief. (Initial Br. of Respondent, p. 12, last full sentence). 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. 2011). Under the de novo standard, a court examines the issue with a fresh set of eyes using the same analytical framework the lower court used, but the lower court's own resolution gets no deference. *Lewis v. Lewis*, 709 S.E.2d 650, 654-55 (S.C. 2011).

Therefore, any argument that uses the jury's verdict does not have merit since this issue of law (equitable estoppel) was not deliberated by the jury at any point during the trial.

The Respondent makes several assertions in its opening argument and supplies no references to any evidence in the record. Furthermore, the unsubstantiated assertions frequently have no relevance to the legal issues before this honorable Court. The Respondent also fills its response with irrelevant rhetorical questions. The Appellant cannot possibly respond to these assertions and

rhetorical questions, and does not wish to waste the time of the Appellate Court with such responses.

In arguing against the Appellant's argument for equitable estoppel, the Respondent relies on his own attorney's (Michael Jordan, hereinafter "Jordan") advocacy in Jordan's testimony. Jordan, a competitor of the Appellant who was testifying after the Respondent paid him \$30,000.00, alleged that he (Jordan) could have done the same work as the Appellant did for the Respondent, for \$30,000.00, and that the Appellant's fees were unreasonable. (R. p. 108, lines 3-7). Jordan later admits that estate administration is like peeling back an onion and you don't really know what you're going to find and what your are going to get. (R. p. 105, lines 16-21). Apparently, Jordan bases his opinion about legal fees on multiple complaints about his own bills. When asked if he had the experience at times of clients complaining about their bills, Jordan said, "Oh, absolutely. Especially in this field. It is common and I have had a client to argue about it." (R. p. 105, lines 12-15).

In addition, Jordan, a paid attorney for the Respondent, portrays that he can read minds and determine the actions of Law Office by stating what, he [Jordan] would have charged the client if he had done the work previously done by Law Office. (Initial Br. of Respondent, p. 14). Jordan, who is not an expert on legal fees, could not possibly be able to determine what a reasonable fee would be when he is unaware of the precise effort and time Law Office devoted to the estate in research, consultations, interoffice conferences, and other activities.

The reason the Respondent provides rhetorical questions and statements that

have nothing to do with equitable estoppel, instead of providing contradictory evidence to the Appellant's argument, is simple -- there is no evidence that the Respondent can give in order to contradict the Appellant's assertion of equitable estoppel.

The Respondent's second argument against equitable estoppel suggests that the Respondent should not be bound by fundamental contract law and rules of evidence. As noted above, the motions for a directed verdict on equitable estoppel assert that Ron was estopped from alleging a different estate value than the one he asserted at the formation of the contracts. The equitable estoppel argument relates directly and expressly to the time of the contract's formation.

Law Office and Ron entered into a contract wherein Ron was to pay Law Office a minimum fee based on a percentage of the value of Debora's estate. (R. pp. 255-258). Shortly before Law Office and Ron entered into the contract, Ron and Debora represented to Law Office that Debora's estate was valued at approximately \$4,400,000.00. (R. p. 313). In recognition of her imminent death, and the value of her estate (above \$3.5 million estate tax exemption), Debora subsequently executed a Revocable Trust designed to prevent an estate tax liability. (R. pp. 197-237, Articles 5.2; 13; 18.3; 19.19; 19.20; 23.4; 24.2; 24.4; 26.1).

It is reasonable for an attorney to believe that a client is able to determine an estimated value of their own assets. The rule that a property owner is competent to present an opinion as to the property's value is well recognized. See *Leis v. South Carolina State Highway Dept.*, 278 S.C. 170, 173, 293, S.E.2d 434, 436 (1982);

Seaboard Coast Line R.R. v. Harrelson, 262 S.C. 43, 46, 202 S.E.2d 4,5 (1974); *Rogers v. Rogers*, 280 S.C. 205, 209, 311 S.E.2d 743, 746 (Ct. App. 1984). In *Rogers*, the South Carolina Court of Appeals noted that an owner of property “is competent to estimate its value as a matter of law,” citing *Seaboard Coast Line R.R.* and *Wignore on Evidence*. 280 S.C. at 209, 311 S.E.2d at 746. It would be illogical and a waste of both the attorney and client’s time and money for an attorney to scrutinize and analyze each estimate provided by the client. If an attorney acted in this manner, he ultimately would portray the notion that the attorney believes that the client is incapable of understanding their own basic assets. In this case, the decedent, more than any other person, understood the value of her interest in a family business she had for years. The Appellant relied on that intimate knowledge and the corporate documents as well as the Appellant’s subsequent independent research.

The Appellant’s equitable estoppel argument contends that the Respondent is bound by the value he presented at the time of the formation of the contract. This is a basic premise of equitable estoppel and contract law. The Respondent implies that a party to a contract cannot be bound by the principle of equitable estoppel unless he or she is an attorney. The Respondent cites no precedent for such a contention because it has no basis in the law. The Appellant provided ample case law concerning equitable estoppel which did not involve attorneys. As long as the elements of equitable estoppel are met, as in this case, parties to a contract are bound by equitable estoppel, regardless of their legal training.

In ruling on a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence, and the court does not have the authority to decide credibility issues or to resolve conflicts in the testimony. *Garrett v. Locke*, 309 S.C. 94, 419 S.E.2d 842 (Ct. App. 1992). Here, where the Appellant's motions of and elements of equitable estoppel (an issue of law) were made to and ruled on by the Court, there is no evidence that contradicts the Appellant's equitable estoppel argument.

The Respondent's argument contrasts Jordan's legal research to Law Office's research. Respondent stated that Jordan researched the issue and provided a memorandum of law while Law Office failed to do any research. That assertion is completely false. Mullinax was able to testify multiple times that not only did Law Office conduct research on the estate value, but that the Law Office also researched other issues regarding the estate administration and Ron's inquiries (R. p. 139, lines 14-20; R. p. 156, line 6 - p. 157 line 7; R. p. 160, lines 1-16; R. p. 161, lines 5-20; R. p. 163, lines 4-9).

A detailed discussion of Law Office's research and Jordan's research is outlined further on p. 25 – 27.

Respondent's argument attempts to relate case law on municipal employees' mis-statements about municipal policies, with a client's alleged misstatement about the value of her property. Under the Respondent's argument, "the general public should not be estopped about the law itself." (Initial Br. of Respondent, p. 19, end of first ¶). If the court adopted such a rule, contract laws would no longer apply to the

public. This argument is without merit. The value of Debora's estate was calculated in documents provided to Law Office (R. pp. 327-329), to which Debora expressly agreed, leading up to the formation of the contract.

The Respondent states in its Initial Brief that Law Office "did not properly perform its agreement to do various legal work for the Estate, because its protests about selling this particular stock..." (Initial Br. of Respondent, p. 21, ¶ 1). The written contract between Law Office and Ron for estate administration states that "I will provided services that are necessary and appropriate to administer the estate under the laws of South Carolina..." (R. pp. 255-256, ¶ numbered 1). It was testified by Mullinax that the sale of the stock was not necessary, as "necessary" is described under the Treasury Regulations. (R. p. 143, lines 6-21). The Respondent provides no legal authority to contradict Appellant's argument. In fact, Jordan could not cite one single statute, code, or regulation to bolster his position on anything. Mullinax was able to cite the Internal Revenue Code and Treasury Regulations throughout his testimony, which outlines what is considered "necessary" in order to administer an estate. (R. p. 143, lines 5-23; R. p. 154, lines 3-17; R. p. 164, line 18 – p. 165, line 4; R. p. 166, lines 14-19).

Furthermore, the Respondent categorizes Jordan's testimony as a "professional opinion" (Initial Br. of Respondent, p. 21, end of first ¶) when he testifies that he believes it was prudent to sell the stock. (R. p. 109, line 19- p. 110, line 3). Although Jordan testifies that it would be "imprudent for a trustee to retain such a concentration of assets without diversification", the Debora Laura Orlosky

Revocable Trust dated May 20, 2009 expressly states under Article 21.3 that “I [Debora] prefer that Trustees not sell shares of stock or other interests in Manor Company because I believe that the best interests of the beneficiaries will be served by retention of those interests in the Trust’s portfolio. I [Debora] intentionally excuse the Trustees from the duty to diversify investments by the sale or other disposition of interests in Manor Company...” (R. pp. 227-228, Article 21.3). Debora was aware that the Manor Stock was a large part of her portfolio, however, she still preferred that the Trustee, Ron, not sell the Manor Stock. Jordan, an advocate for Respondent, fails to account for the decedent’s wishes in his testimony when suggesting that as a general rule, estate stock should be sold to diversify investments.

The Respondent closes his argument against equitable estoppel by stating that “at least one true expert testified, the Defendant’s fee was not reasonable” (Initial Br. of Respondent, p. 22). Jordan was never submitted to the Court as an expert witness, for any purpose, nor was Jordan’s information submitted to Appellant as an expert witness whom the party proposes to use at the trial as stated in S.C.R.C.P Rule 33(b)(6). Furthermore, Jordan testified to the fact that he is prohibited ethically under South Carolina Laws from testifying against his client, Ron and that Ron was paying him \$350 an hour to give testimony in the trial. (R. p.104, lines 1-10).

The Respondent now pleads with the court to ignore the evidence, excuse the absence of any contrary evidence to the Appellant’s argument, and to declare the

legal principal of equitable estoppel inapplicable to contracts between law firms and their clients. The legal issue of equitable estoppel was decided by the trial judge as a matter of law and is now before this honorable court for review. The Appellant prays that this honorable Court will reverse the trial court and grant the Appellant's motion for a directed verdict on equitable estoppel.

II. 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)).

Both parties agree that this is a contract dispute. As noted on the record, it is a dispute involving a contract signed by the Respondent, his wife, and the Appellant; a contract signed by the Respondent, and the Appellant; and a quasi-contract between the Respondent and the Appellant. It is undisputed that the jury was to decide on issues related to these contracts.

The Respondent correctly alleges that the jury was not asked to decide whether or not the estate's stock should be sold. But under the terms of the written contract, the value of the estate was determinative of what Ron (Respondent), owed to Law Office (Appellant) for necessary services. (R. p. 257, ¶ numbered 2). The Respondent asserts that the "value" of the stock was equal to the alleged "sale price" under the buy-sell agreement. The Appellant argues that the sale price under the

buy-sell agreement was not determinative of the stock value. (R. p. 152, line 17- p. 153, line 32). The Respondent's choice to sell the stock was optional and unnecessary in order to administer the estate. Furthermore, the selling of the stock was even discouraged by the decedent's own documents. (R. pp. 227-228, Article 21.3).

By allowing the Respondent, Ron, to testify that the decedent allegedly wanted to sell the stock, and by implying that the optional sale was mandatory and determinative of its value, the jury likely inferred an improper view of the decedent's wishes and the written buy-sell agreement. The Respondent even admitted that the value of the stock had nothing to do with its sale price under the buy-sell agreement. (Initial Br. of Respondent, p. 25, n. 8). Specifically, the Respondent points out that Ron testified that under the optional sale, 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". (Initial Br. of Respondent, p. 25, n. 8).

The jury was to consider the written contract's limited scope of "necessary services" for a set minimum fee based on the value of Debora's estate. The sale of the stock was unnecessary to administer the estate, and the jury was expected to consider the charges related to the unnecessary services under the quasi-contract; although the court never charged the jury on the matter. The record is replete with the Respondent, Ron's; testimony about alleged conversations with the decedent about these matters. The Court allowed this testimony over the numerous objections of the Appellant. (See Initial Br. of Appellant, p. 10-11).

The Respondent stated in its Initial Brief that “since this [Dead Man Statute] is a rule of evidence, it follows the general rule that “the admission of evidence is a matter left to the direction of the trial judge and absent a clear abuse, will not be disturbed on appeal”. (Initial Br. of Respondent, p. 23, second ¶). The trial Court ruled on the testimony prohibited under the Dead Man Statute. The first question of statutory interpretation is whether the statute’s meaning is clear on its face. “If the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.” *Kennedy v. South Carolina Retirement System*, 549 S.E.2d 243, 345 S.C. 339 (S.C. 2000) citing *Paschal v. State Election Comm’n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). Essentially, the rule prohibits any interest 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 Appellant outlines the statutory implications in Appellant’s Initial Brief. (Initial Br. of Appellant p. 8-10). The statute is plain and unambiguous.

Ron’s testimony about the decedent’s alleged opinion on selling the stock pollutes the documented evidence and facts presented to the jury by overwhelmingly contradicting the decedent’s own words and the implication of the terms of the written contract as well as the quasi contract. The alleged statements of the decedent’s desires could cloud the definition of “necessary and appropriate” which circumscribe the minimum legal fee under the written contract. The jury

could confuse “what is necessary in order to administer the estate” and what is “necessary in order to fulfill the decedent’s wishes”. By allowing the Respondent, Ron, to testify regarding alleged communications with the decedent, there is clear abuse and prejudice against the Appellant since the alleged communications, which cannot be contradicted, clearly challenge the Appellant’s documented evidence of Debora’s wishes.

The Respondent stated in its Initial Brief that “the legal fee he [Ron Orlosky] believed he should have been charged was utterly irrelevant to the value of the stock...” (Initial Br. of Respondent, p. 24-25). This is incorrect. The Respondent, Ron, signed a written contract promising to pay Appellant a minimum of fee of 2.5% of the estate value for “necessary services”. Once Ron decided to sell the stock (an unnecessary service), the Appellant charged the Respondent for these additional services. Although the jury was not going to decide whether or not the stock should be sold, the alleged “necessity” of selling the stock was clearly connected to the calculation of legal fees.

At the time the parties entered into the written contract, the Respondent, Ron and the Appellant, Law Office, did not contemplate that negotiations for the sale of the Manor stock would be considered “necessary and appropriate” services under the terms of the written contract. Therefore, it was not included in the minimum fee charged in the written contract for “necessary services”, which was signed by the Respondent, Ron. (R. pp. 255-258). The actual and necessary services are detailed in the Initial Brief of Appellant, p. 33, last paragraph through p. 34,

first paragraph.

At trial, no one claimed that the sale of the Manor stock was necessary, and the Respondent provides no evidence from the record or statutory evidence to contradict this explicit point in the law.

Respondent argues that the “Dead Man Statute evidence” becomes cumulative when Michael Jordan (hereinafter “Jordan”), a paid advocate attorney for Respondent, testifies. The Respondent relies on one, single general statement made by Jordan, to support its contention that the evidence prohibited by the Dead Man Statute, was cumulative. It is worth noting that despite the fact that the Respondent refers to Jordan as an “Expert at Trial” (Initial Br. of Respondent, p. 26), Jordan was not qualified as a Trial Expert under S.C.R.C.P 33(b)(6); and it is deceiving to refer to Jordan as a “Trial Expert”.

Jordan did testify that “I [Jordan] would hate to have a trust that was heavily invested in one stock because the family had always been connected... It is prudent to diversify”. (R. p. 111, lines 3-10). It is clear that Jordan was making a general statement and not referring specifically to Debora’s investments. Jordan certainly does not testify that sale of the stock was “necessary” for the estate administration. Even if Jordan had suggested that the stock should be sold, there is no evidence in the record that Jordan has any qualifications as an investment advisor. It is also worthy of note that Jordan admitted that he was unfamiliar with the Manor business (stock) and he rarely recommends that his clients sell family assets such as a closely-held corporation. (R. p. 110, lines 6-23). Clearly, Jordan was

serving as an advocate on behalf of his client's actions, not as an independent witness.

The Respondent's, (Ron's) testimony was the only testimony that contained alleged conversations with the decedent about the decedent's wishes and the decedent's estimate about the value of her stock. Therefore, there was no cumulative evidence in the Respondent's favor. Ron testified to alleged conversations with the decedent that portrays the idea that Debora wanted to sell the stock. On the other hand, the Appellant, Law Office, has documented evidence showing that Debora did not want the stock to be sold (R. pp. 227-228, Article 21.3), which Ron tries to contradict. By allowing the Respondent, Ron, to testify regarding alleged communications with the decedent, there is clear abuse and prejudice against the Appellant. The Court should reverse the decision of the trial Court based on the improper admission of the testimony that should have been disallowed under the Dead Man Statute.

III. 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 Respondent argues that the Appellant did not preserve the issue concerning the charging order because the Appellant did not object after the Court read the charging order to the jury. The Respondent's assertion of this rule fails for

two reasons.

Firstly, once a party requests a charge and the trial court denies it, that party does not have to raise another objection to the ruling or resubmit the charge to preserve the issue for appellate review. *State v. Grant*, 275 S.C. 404, 272 S.E. 2d 169 (1980). In accord with this principle, where a contested issue of law has been argued during the course of the trial and ruled upon by the trial court, an objection need not be made to that portion of the charge dealing with same issue previously ruled upon by the trial court. *Id.* In *State v. Johnson*, 315 S.C. 485, 445 S.E.2d 637 (1994), the Court stated, “We clarify that neither our opinion in *Whipple* [*State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996)], nor our Rule 20(b), SCRimP . . . have altered the long-standing rule that where a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court’s instructions.” *Johnson*, 333 S. C. at 65 n. 1, 508 S.E.2d at 30 n.1.

In *Keaton ex rel. Foster v. Greenville Hosp. System*, 514 S.E.2d 570, 334 S.C. 488 (S.C.1999), the Supreme Court addressed the *Whipple* problem in the civil context. In *Keaton*, prior to the jury being charged, the defendant submitted a request for a jury charge. However, the trial judge inadvertently omitted the charge when charging the jury.

The court in *Keaton* held that the plaintiff’s objection was preserved despite the plaintiff not objecting to the charge after it was read to the jury. The Court noted that, in *Johnson*, it clarified the confusion in *Whipple* by stating that where a

party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at the conclusion of the court's instructions. The Court noted that *Johnson* was a criminal case that involved Rule 20(b), SCRCrimP. However, the Court held that Rule 20(b), SCRCrimP, was the criminal procedure equivalent to Rule 51, SCRCrP, at issue in *Keaton*.

The Appellant argued the contested issue of law (ruling for a directed verdict motion for equitable estoppel/quantum meruit) during the trial. (Appellant Trial Motions: R. p. 116, line 14- p. 117, line 20; R. p. 180, lines 5-21; R. p. 83, line 13- p. 84, line 13; R. p. 103, lines 17-24; R. p. 155, lines 16-25; R. p. 163, lines 23-25). The Court sustained the Appellant's claim of quantum meruit/unjust enrichment, but dismissed the Respondent's claim of quantum meruit.

In addition to arguing its claim of unjust enrichment/quantum meruit, the Appellant provided the written charging order to the Court and there was an opportunity for discussion, (R. p. 112, line 8- p. 114, line 17), but the Court chose not to use it for the jury charge. In fact, the Court did not provide any charging order to the jury on the Appellant's claim of quantum meruit/unjust enrichment. During the Court's charging order, the Court did not utter a single word to the jury about the Appellant's claim of unjust enrichment or quantum meruit. Because the Court determined not to use the proposed charging order, the Appellant was not required to object after the Court read the charging order to the jury. It is well settled law, where a party requests a jury charge and, after opportunity for discussion, the trial

judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court's instructions." *Johnson*, 333 S. C. at 65 n. 1, 508 S.E.2d at 30 n.1.

The Respondent's assertion that the Appellant's argument fails as a matter of law is incorrect for another reason. Even if the Appellant's preservation of the charging order issue had required the Appellant's objection following the Court's charge to the jury (and it did not), the Court's omission of any reference to the Appellant's claim of unjust enrichment/quantum meruit intimated an opinion on the facts in the case to the jury. A trial judge should not intimate to the jury any opinion on the facts of a case, whether intentionally or unintentionally. *Sierra v. Skelton*, 414 S.E.2d 169, 307 S.C. 217 (S.C.App. 1991) citing *China v. City of Sumter*, 51 S.C. 453, 29 S.E. 206 (1898). As cited by South Carolina Supreme Court Justice Toal in a unanimous opinion in *Keaton ex rel. Foster v. Greenville Hosp. System*, 514 S.E.2d 570, 574, 334 S.C. 488, 496 (S.C. 1999), "A jury charge is correct if [334 S.C. 496] '[w]hen the charge is read as a whole, it contains the correct definition and adequately covers the law.'" *State v. Johnson*, 315 S.C. 485, 487, 445 S.E.2d 637, 638 n.1 (1994) (citing *State v. Hoffman*, 312 S.C. 386, 440 S.E.2d 869 (1994); see also *State v. Rabon*, 275 S.C. 459, 272 S.E.2d 634 (1980) (holding that a jury charge which is substantially correct and covers the law does not require reversal). In this case, the Court failed to instruct the jury or even utter a word on the Appellant's claim of unjust enrichment/quantum meruit. As a result, the trial Court did not meet the most basic and fundamental criteria of the law, namely, its

requirement to charge the jury on the correct definition and adequately cover the law. See *State v. Johnson*, 315 S.C. 485, 487, 445 S.E.2nd 637, 638 n.1 (1994).

Therefore, in light of the Court's declination of the charging order on the Appellant's claim for unjust enrichment/quantum meruit, and the Court's failure to utter a single word of instruction to the jury or reference to the Appellant's claim of unjust enrichment/quantum meruit, this honorable Court should reverse the decision of the trial court and rule in favor of the Appellant based on the evidence of the quasi-contract, unjust enrichment/quantum meruit or order a new trial.

IV. 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?

Rather than address the legal arguments on the matter, or provide any evidence in contradiction to the Appellant's Brief, the Respondent prefers to plead with the Court of Appeals to blindly ignore the law and instead to simply rely on the jury, without review.

Appellant made a claim against the Respondent for quantum meruit / unjust enrichment. (R. p. 115, lines 14-19). The trial Court failed to charge the jury on the Appellant's claim of quantum meruit, however, a final decision on the Appellant's claim on quantum meruit and unjust enrichment is not dependent on the trial court's decision. Here, the trial Court did not charge the jury or utter a word about

the Appellant's claim of unjust enrichment and quantum meruit, and therefore, the jury did not contemplate or have any findings of fact on the matter. As a result, this matter is in substantial need of an adequate appellate review.

When reviewing an action in equity, an appellate court reviews the evidence to determine facts in accordance with its own view of the preponderance of the evidence. *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). Even if the trial Court had charged the jury on unjust enrichment and quantum meruit (which it did not), the appellate review would still require a finding of reasonable evidence supporting a jury decision. (See *Brown v. Volunteer State Life Insurance Co.*, 212 S.C. 537, 48 S.E. (2d) 507). The elements of a quantum meruit claim can be found in Appellant's Initial Brief on p. 33, first paragraph.

Respondent, Ron, and Appellant, Law Office, agreed that they entered into a written contract for Law Office to perform the limited services that are "necessary and appropriate' to administer the estate under the laws of South Carolina and rules of court having jurisdiction of the estate". (R. pp. 255-256, ¶ 1; R. p. 169, line 24 – p. 170, line 10). Under the written contract for limited services, Ron was to pay Law Office a minimum of 2.5% of the estate value for "necessary services". The Respondent requested that the Appellant provide unnecessary services beyond the scope of the written agreement, namely, the negotiation for the sale of Manor stock. This fact is not in dispute.

The Respondent provided no evidence at trial to refute the limited scope of

the terms of this written agreement, its circumscribed scope and corresponding fee, or any evidence that suggested that the Appellant's negotiation for the sale Manor stock was "necessary" as described under Treas. Regs. §20.2053-3(a) and Treas. Regs. §20.2053-3(d)(2), or covered under the terms of the written contract.

At the Respondent's request, Law Office spent time on the unnecessary task of negotiation for sale of the Manor stock and based its fees for these unnecessary services on its standard hourly rates for the firm (which Ron had agreed to in R. pp. 359-360), which totaled \$20,997.50. Law Office stated in his correspondence attached to the invoice, (R. pp. 296-299) that "these charges were for the additional services rendered that were not necessary in order to administer the estate or trusts under the laws of South Carolina, and therefore not included in our charges for necessary administration expenses".

Although it is clear from all evidence that the Appellant provided these unnecessary services to the Respondent and the Respondent benefited from the Appellant's work by receiving an amount of between \$156,000.00 and \$261,000.00 above the original offer (R. p. 103, lines 17-24), the Respondent paid the Appellant nothing for these efforts.

The Respondent's attorney, Jordan, even testified that the Appellant's negotiation efforts resulted in Ron receiving an amount of \$261,000.00 above the original offer. (R. p 103, lines 17-24). Ron also testified that Law Office's negotiations resulted in a higher sale price for the Manor stock. (R. p. 83, line 13- p. 84, line 13). Mullinax testified that Ron received an additional \$156,000.00 above

the original offer. (R. p. 155, lines 9-25). Ron eventually sold the stock for \$1,585,000.00 (R. p. 78, lines 7-17), (approximately \$185,000.00 above the original offer) as a result of the Appellant's negotiations.

The evidence shows by a preponderance of the evidence that Law Office's services, which were not covered by the June 23, 2009 written contract (R. pp. 255-258), conferred a pecuniary benefit on Ron, that Ron realized that benefit when he sold the stock for the increased sale price negotiated by Law Office, and Ron retained the full amount of that benefit under conditions that make it unjust for Ron to retain it without paying its value.

All of the evidence at trial, including testimony by the Respondent and his attorney, points to the fact that the Appellant met each of the elements of its claim of unjust enrichment and quantum meruit. Therefore, the Court should award Law Office an amount equal to its value. The evidence shows that Law Office's hourly charges for the Respondent's requested services, beyond those that were necessary, amounts to \$20,997.50. However, in consideration of Ron's eventual sale of the Manor Stock resulting in additional benefits of between \$156,000.00 and \$261,000.00, thanks to Law Office's research and negotiations, the Court may determine that Ron should pay more than \$20,997.50 to Law Office for these services.

V. THE COURT ERRED WHEN IT ALLOWED A BREACH OF CONTRACT CLAIM BASED ON THE PLATINIFF'S INTERPRETATIONS OF THE CONTRACT, THAT IF FOLLOWED, WOULD VIOLATE STATUTORY LAW

AND PUBLIC POLICY.

The Appellant argues in its fifth issue that it did not breach the written contract and any alleged breach is without merit because a Court 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). Appellant further argues that although the Appellant provided all required services under the contract, the Respondent discharged the Appellant without cause because the Appellant refused to conspire with the Respondent to avoid the required filing of an estate tax return. Specifically, the Appellant refused to misrepresent values on an Inventory and Appraisement to the Probate Court, whereby the Respondent would avoid fees owed to the State of South Carolina and the mandatory filing of an estate tax return with the Internal Revenue Service.

The Respondent failed to address almost every part of the Appellant's twelve page argument on statutory law and public policy and instead, relies heavily on discussing Jordan's résumé (who was never presented to the Court as an Expert Witness). Although Respondent comments on (witness) Jordan's résumé, he fails to note (witness) Mullinax's résumé. Jordan holds one law degree, while Mullinax holds two law degrees. Mullinax is one of approximately fifteen attorneys in South Carolina with a Masters of Laws in Estate Planning (LL.M.). Mullinax also has been licensed to practice law in Virginia, New York, and Maryland. After being commissioned as an officer in the U.S. Army, the military trained Mullinax in 1989 to deal with estate administrations. Mullinax received additional training from the

Internal Revenue Service in 1990, and has been authorized to represent taxpayers before the Internal Revenue Service since 1990. (R. p. 121, line 20 – p. 123, line 20).

Besides discussing Jordan's resume, Respondent also focuses his argument on quoting both attorneys' opening and closing arguments which the jury should not consider as evidence. It seems evident that the Respondent believes that this Court's consideration of the attorneys' statements are paramount for a ruling in its favor. It is likely that the layperson jury relied heavily on the attorney's arguments, rather than the evidence, in reaching its verdict.

The attorney for the Respondent, Jordan, essentially testified that the Appellant performed all of the necessary services that were required under the written contract, until the Respondent discharged the Appellant. (Initial Br. of Appellant, p. 40, last paragraph – p. 42, first paragraph). There was not one single piece of evidence that showed any failure on the part of the Appellant to perform all required duties under the written contract, until discharged by the Respondent. The Appellant filed numerous filings with the Probate Court in accordance with the South Carolina Probate Code (R. pp. 331-335; R. p. 338; R. p. 340). The necessary filings for each of the forty-six South Carolina Probate Courts are listed and described in detail in the 2012 South Carolina Bar's Handbook for Probate Practitioners, edited by Jay A. Mullinax (Mullinax), attorney in this case. Appellant also conducted a large amount of research, and gathered the values of all of the estate assets which were required for the Probate Court and the Estate Tax Return calculations. (R. pp. 354-355). In fact, the Appellant's research directly led to a net

windfall of between \$156,000 and \$261,000 for the estate and trust. The research by the Respondent's attorney, Jordan, did not lead to any net increase to the value of the estate or trust, although Jordan had charged the estate \$30,000.00 for his services.

In the Initial Brief of Respondent, the Respondent frequently uses testimony from Jordan where he states that "probably a quarter of the work was done by the time we [Jordan] took it over." (R. p. 95, lines 1-9). This is incorrect. Mullinax testified that he had completed almost all of the estate administration work, and only had one paragraph left to complete under South Carolina Probate Code § 62-3-1001. (R. p. 171, line 24 – p. 172, line 7).

It is hard to believe that when Ron came to Jordan, Jordan was able to calculate what percentage of work was done by Law Office, when Jordan (or anyone) is unable determine exactly what work will be done in the future. When Jordan was asked "if you take on an estate and begin to do this administrative work it is kind of like peeling back an onion, is that correct?" Jordan's reply was "That's a fair analogy" (R. p. 105, lines 16-21). Jordan clearly agrees that an attorney is unable to foresee the future work for an estate, and therefore, he could not possibly be able to calculate what percent of work had been completed when there was still work that had to be done before the estate could close.

The Respondent, again, relied on Jordan's testimony as it related to the value of the estate and the Appellant's interrelated fee. A full discussion of these issues appear in the Appellant's Initial Brief p. 16-18.

We will address new points raised by the Respondent here.

Jordan only cites two cases in his research memorandum, but cites no Internal Revenue Code Section or Treasury Regulation (R. pp. 291-295). Jordan's research is touted repeatedly throughout the Initial Brief of Respondent. In the research memorandum, Jordan expresses that one of his two cited cases "is directly on point, since it deals with siblings." (R. pp. 291-295). This case, *Littick Est. v. Comr.*, 31 T.C. 181 (1958), cited by Jordan, took place prior to the enactment of Internal Revenue Code §2703 (October 8, 1990), which now provides statutory guidelines for cases like the present one. *Littick* no longer holds the same value as it did before the 1990 statutes. Additionally, the Internal Revenue Service (IRS) did not simply agree to follow the decision in *Littick*, as characterized by Jordan in his memorandum, the IRS simply acquiesced in the result, withdrew in part, and issued an Action on Decision 1984-64 wherein it acquiesced based on the Court's finding of adequate consideration.

The Appellant does agree that the Respondent's other cited case, *Estate of Joseph H. Lauder v. Comm'r*, T.C. Memo 1992-736, is (one that took place after enactment of Internal Revenue Code §2703 (October 8, 1990)), is directly on point here. In *Lauder*, the price set in a buy-sell agreement was not binding for estate tax purposes because it adopted an arbitrary formula, was not the result of arm's-length negotiations between the parties, appeared to grossly undervalue the stock, and there was not effort to obtain an appraisal or analysis of the stock's fair market value. *Estate of Joseph H. Lauder v. Comm'r*, T.C. Memo 1992-736. Here, the

Appellant's Shareholder Agreement meets each of the aforementioned criteria and there is no evidence in the record to contradict these facts. There was an arbitrary formula, no evidence of an arm's length negotiation between the parties, appeared to grossly underestimate the stock, and there was no effort to obtain an appraisal or analysis of the stock's fair market value.

In Jordan's cited case, *Estate of Joseph H. Lauder v. Comm'r*, T.C. Memo 1992-736, the Tax Court stated: "It is incumbent on the estate to demonstrate that the agreement establishes a fair price for the stock. Where the estate fails in its burden of proof and the court finds that the restrictive agreement sets an artificially depressed price... [the restrictive agreement will not be binding on the IRS]. (*Lauder*, T.C. Memo 1992-736). The Respondent in this case even admitted that he was willing to sale the stock at any price. (R. pp. 339; R. p. 161, line 5- p. 162, line 7). The stock's selling price clearly had nothing to do with the value of the stock.

In Jordan's cited case, *Lauder*, (T.C. Memo 1992-736), the Court further stated: As a consequence of our holding that the formula price is not binding for purposes of the Federal estate tax, further proceedings will be necessary to determine the fair market value of the EJJ stock held by decedent on the date of his death. Secs. 2031, 2033. While we do not here render the [buy-sell] agreements invalid per se, we hold that for Federal estate tax purposes they have no viability and that the valuation provisions are, simply put, an artificial device to minimize such taxes. To reflect the foregoing, "*An appropriate order will be issued*". (T.C. Memo 1992-736). Jordan fails to reveal the aforementioned in his memorandum or

in his testimony, nor does he reveal that the Tax Court ultimately rejected the estate's \$29 million valuation of the decedent's stock, holding that the fair market value of the stock was \$50 million. *Estate of Joseph H. Lauder v. Comm'r*, T.C. Memo 1994-527. It is clear that Jordan's own legal research conflicts with the overt advocacy of his testimony.

The Respondent briefly argues against the Appellant's assertion that no damages were suffered by the Respondent. The third element in order to recover for a breach of contract is: 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). The Respondent's sole argument relies on Jordan's testimony that Law Office's bills were unreasonable, and therefore, the Respondent suffered damages. As noted earlier, Jordan basis his opinion about legal fees on multiple complaints about his own bills. (R. p. 105, lines 12-15). Jordan also seems to presume that the quality and specifics of Law Office's services are identical to his own. A comparison of the quality and results of the research and recitation of statutory citations and regulations during testimony shows that Law Office's services are vary significantly from Jordan's.

As for the specific fees charged, like Law Office, the State of South Carolina Probate Court charges for estate settlement based on the respective estate's value. See South Carolina Code of Laws §8-21-790(5). South Carolina Probate Courts charge additional fees for extra services. See South Carolina Code of Laws §8-21-790. Some states, such as Florida, provide that compensation for ordinary services

of attorneys “for the Personal Representative” in estate administration is “presumed to be reasonable” if based on the compensable value of the estate. See Fla. Stat. §733.6171(3) (2012). In addition to fees for ordinary services, Florida also allows for the attorney “for the Personal Representative” additional compensation for any extraordinary service. See Fla. Stat. §733.6171(4) (2012). An attorney “for the Trustee” is due additional compensation for ordinary services, under Florida law, and it is “presumed to be reasonable” if it is based on a percentage of the trust value. See Fla. Stat. §736.1007(2) (2012). In addition to fees for ordinary services, Florida also allows for the attorney “for the Trustee” additional compensation for any extraordinary service. See Fla. Stat. §736.1007(5) (2012). The Respondent’s witness, Jordan, testified that firms frequently charge a minimum for these services based on a percentage of the estate value. Law Office’s minimum fee for necessary services was reasonable under the circumstances in light of the fact South Carolina Courts calculate fees in the same way, and other states statutorily presume such fees are reasonable.

It is clear that through Law Office’s efforts, Ron was able to obtain an extra approximate amount of between \$156,000.00 and \$261,000.00 for the estate and trust while negotiating for the sale of the Manor Stock (which was not necessary in order to administer the estate). In addition to the fees under the written contract, the Respondent owed Appellant additional fees for the quasi-contract (quantum meruit), for Appellant’s efforts of negotiating the sale of the Manor Stock. Not only were the Law Office fees reasonable, it is hard to consider that Respondent suffered

damages when he received an extra \$156,000.00 to \$261,000.00 through Appellant's research and negotiation efforts, on top of providing necessary services.

Ron disagreed with the Respondent's value and did not want to sign an estate tax return or an Inventory and Appraisalment with the information that Law Office had calculated; and Ron saw an opportunity to avoid paying for services already rendered. Ron even found one of the Appellant's competitors (Jordan) to go along with his scheme.

Law Office refused to file an estate tax return and Inventory and Appraisalment with values that Law Office knew were incorrect. Treas. Regs. §10.51 states that "Incompetence and disreputable conduct for which a practitioner may be sanctioned under §10.40 includes but is not limited to... (6) Willfully failing to make a Federal tax return in violation of the Federal tax laws, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax. (7) Willfully assisting, counseling, encouraging a client or prospective client to violate, any Federal tax law, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof. Law Office was aware of these Treasury Regulations and did not want to file any documentation or fail to file any documentation, with calculations that the Law Office knew were incorrect.

When comparing Law Office's research (which resulted in extra money for the estate and Trust) with Jordan's "research", the distinction is clear. Jordan made it clear that he used numbers that Ron was "comfortable with", and Jordan did not

conduct very much research other than a memorandum which contradicts Respondent's position about Fair Market Value. See *Estate of Joseph H. Lauder v. Comm'r*, T.C. Memo 1994-527. Jordan's memorandum overtly fails to reveal that the Tax Court ultimately rejected the proposed valuation in that case and ultimately uses the same methods to find the estate's value as Law Office did in order to accurately determine the true fair market value for Manor Stock and Debora's final estate value.

Law Office conducted its calculations of the Manor Stock's fair market value and the value of Debora's estate by following applicable case law, Internal Revenue Codes, the Treasury Regulations, the rules for the Probate Court, and the Internal Revenue Service. It is unfair to say that because Law Office refused to commit fraud in the Probate Court and the Internal Revenue Service, that it breached its contracts with Ron.

Therefore, the Respondent failed to prove the second element of breach of contract and the Court can determine that there was no breach or unjustifiable failure to perform the contract by Appellant. The Court can conclude that the Respondent failed to prove two of the three elements in order to recover for a breach of contract. In addition, the Respondent also failed to give adequate argument that the Respondent suffered damages by the Appellant as direct and proximate results of the breach. The Respondent clearly gained (approximately \$156,000.00 to \$261,000.00) from the Appellant efforts, and in no way suffered damages as a result of the Appellant's actions.

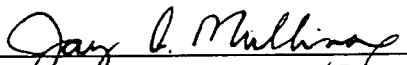
Unfortunately, the Appellant's damage of not being compensated according to the contracts is specific and significant. The Court should reverse the trial Court for the aforementioned reasons and award the Appellant the appropriate damage.

CONCLUSION

For the foregoing reasons, Appellant respectfully prays that the Court reverse the judgment of the Circuit Court and award Appellant the amount of its claim for Respondent's breach of contract in the amount of \$111,153.70 plus interest and for Appellant's claim for quantum meruit/unjust enrichment in the amount of \$20,997.50 plus interest or additional relief that the Court deems equitable.

Respectfully submitted,

June ____, 2014


Jay A. Mullinax, LL.M. (Estate Planning)
Law Office of Jay A. Mullinax, LLC
2 Park Lane, Suite 303
Hilton Head Island, SC 29928
(843) 785-6101
Bar No. 68293
Attorney for Appellant

APPENDIX E

RESPONDENT'S MOTION FOR INVOLUNTARY DISMISSAL
AND MEMORANDUM IN SUPPORT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Beaufort County
Roger M. Young, Circuit Court Judge

Case No. 2010-CP-07-4146

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.....
Respondent

v

The Law Office of Jay A. Mullinax, LLC, ...Appellant

**RESPONDENT'S MOTION FOR INVOLUNTARY DISMISSAL
AND MEMORANDUM IN SUPPORT**

Pursuant to Rule 206(a), SCACR, Respondent Ron Orlosky, by and through his undersigned counsel, hereby moves to dismiss the above captioned appeal on the grounds that The Law Office of Jay A. Mullinax, LLC (Appellant) has failed to comply with the requirements of the South Carolina Appellate Court Rules (Rules) as more fully set forth below in the Memorandum in Support. The grounds for this Motion are Appellant has failed to meet its burden to provide the Transcript and has not filed its initial brief in the nearly ten months since having filed their Notice of Appeal with this Court. Appellant's unwarranted delay in this appeal is prejudicial to the Respondent, and the appeal should be dismissed.

MEMORANDUM IN SUPPORT

BACKGROUND

On April 20, 2012 a Beaufort County Jury returned a verdict in favor of Respondent and against Appellant in the amount of \$80,000.00 actual damages. On April 26, 2012 Appellant filed post-trial motions for Directed Verdict, Relief from Judgment To Alter or Amend Judgment, and for a New Trial Absolute or New Trial Nisi Remittitur which were denied on May 17, 2012. Appellant filed the Notice of Appeal on June 18, 2012, and requested the transcript from the court reporter and from the Beaufort County Clerk of Court on June 25, 2012.

DISCUSSION

Appellant has failed to comply with the Rules regarding the receipt of the trial transcript, has not files its initial brief, and the intentional delay has prevented the appeal from going forward to the prejudice and detriment of Respondent.

Rule 207(a)(1), SCACR, provides the transcript must be requested within 10 days after the date of service of the notice of appeal. Rules 201(a)(2) and (3), SCACR, establish the time in which the court reporter is required to provide the requested transcript. An appellant is not required to file its initial brief until 30 days after receiving the trial transcript. Rule 208(a)(1).

The only correspondence from Appellant to the court reporter of which Respondent is aware is the June 25, 2012 letter to the reporter initially requesting the transcript. Copies of this letter were provided to Respondent's counsel, the Clerk of the Court of Appeals, and the Beaufort County Clerk of Court. Also on June 25 Appellant

sent a letter to the Beaufort County Clerk of Court in which it is acknowledged that the reporter was no longer employed by the court and could not be located. (Copies of these letters are included at **Attachment A**) This letter too was provided to Respondent's counsel and to the Clerk of the Court of Appeals. However, Appellant failed to provide a copy of either letter to the Office of Court Administration as required by Rule 207(a)(1), SCACR. The purpose of the Rules' notification requirement is to ensure that everyone - the opposing party and all of the necessary court officials - is apprised of the status of the appeal and when to expect receipt of the transcript. This notification assists in identifying and addressing problems with the delivery of the transcript so the appeal can proceed timely. The appeal in this case has been delayed unnecessarily because of Appellant's failure to meet its obligation under Rule 207(a)(1), SCACR.

Additionally, and although Appellant notified Court Administration of the fact that the transcript had not been received by letter of September 6, 2012, that letter represents the last effort made by the Appellant to pursue its appeal. Since it is the Appellant's responsibility to either obtain the transcript or to initiate a motion to proceed without one, the lack of any activity to move the appeal forward after more than ten months appears deliberate. The Appellant clearly was aware that the court reporter could not be found when he wrote to the Beaufort County Clerk of Court of June 25, 2012. However, when he wrote to Court Administration more than two months later, that fact was not mentioned in his letter of September 6, 2012. (**Attachment B**)

Respondent attempted on four separate occasions to communicate with Appellant to determine the status of the appeal or any extension which may have been granted the

court reporter to deliver the transcript. Copies of those letters dated September 19, 2012, October 1, 2012, February 8, 2013, and February 15, 2013 are included at Attachment C. Appellant failed to respond to any of these inquiries, and ignored Respondent's letters.

On March 21, 2013, and at the request of the Beaufort County Probate Court, Michael L.M. Jordan, Esquire contacted the Clerk of the Court of Appeals to ascertain the status since The Estate of Debora Orlosky which he represents has not been able to be closed as a result of and pending the outcome of this appeal. (Attachment D) Subsequently, the Court communicated with Appellant on March 25, 2013, and On March 29, 2013 Appellant again advised that it had not received the transcript. In its communication with the Court, Appellant again fails to mention anything about the inability to contact the court reporter or the fact that transcripts are not available.

(Attachment E)

Since June of 2012 Appellant has taken no action to move its appeal forward and has communicated no intent to do so to this Court or to Respondent. Not only is the Respondent unable to close the Probate Estate of his late wife, but he is unable to collect the substantial judgment awarded to him by the jury almost a year ago. Thus, Respondent's rights are being prejudiced by the Appellant's seemingly deliberate delay in prosecuting its appeal. Because Appellant is not required to file a brief until after receipt of the transcript, the longer Appellant can unduly delay receiving the transcript or making the appropriate motion to proceed with the appeal in the absence of the transcript, the longer Respondent's must wait before being able to go forward, either in this appeal or in

the winding up of his late wife's Probate Estate.

This delay should not be tolerated, and Rule 260(a), SCACR, mandates dismissal: Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk **shall** issue an order of dismissal, which shall have the same force and effect as an order of the appellate court. . . . The clerk shall remit the case to the lower court or administrative tribunal in accordance with Rule 221 . . . (Emphasis added). "[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this. Court with an orderly mechanism through which to guide appeals in this State." *Henning v. Kaye*, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992).

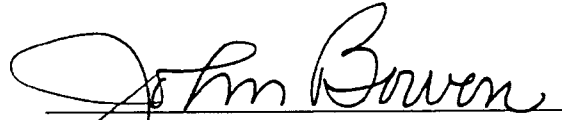
In *Henning*, the respondent moved for dismissal of the appeal because the appellant failed to follow several Rules regarding the formatting and content of the brief and record on appeal. 307 S.C. at 437-38, 415 at 794. The Supreme Court declined to dismiss the appeal, instead providing fifteen days for the appellant to file a compliant brief and record on appeal, but said, "this Court would be completely justified in dismissing this appeal based on appellant's numerous violations of the Rules." *Henning*, 307 S.C. at 437, 415 at 794. In *Henning*, unlike the present case, Appellant had attempted to move his appeal along, and had filed the initial brief; it was simply filed improperly. Accordingly, the Supreme Court declined to sanction Appellant by dismissing the appeal. Dismissal seems a harsh result when a party effectively has moved his appeal through the system. However, dismissal is appropriate in the instant case.

Appellants has made virtually no effort, other than filing a Notice of Appeal and sending a letter requesting a transcript to an address they apparently know is incorrect, to prosecute the appeal of the order denying the post trial motions in favor of the Jury's Verdict. The delay persists even in the face of a letter from this Court concerning the transcript to which the Appellant has disingenuously replied only that his "office has not received the transcript or notification of an extension" rather than advising the Court of the well known problems with the court reporter, or requesting some other relief. Appellant has not made sufficient efforts to procure the transcript or follow the Rules, and effectively is allowing its Appeal to languish in the system to the detriment of the Respondent.. Since it is the Appellant's responsibility to move the appeal forward, and since it appears that Appellant has made no good faith efforts to that end, this appeal should be dismissed pursuant to Rule 260(a), SCACR, for failure to comply with this Court's Rules.

CONCLUSION

Because Appellant has neglected to secure the trial transcript, follow the Rules, or make any genuine effort to prosecute its appeal, Respondent respectfully requests this appeal be dismissed pursuant to Rule 260(a), SCACR, for failure to comply with the requirements of the Rules, and remitted to circuit court.

Respectfully submitted,

A handwritten signature in black ink, reading "John Bowen". The signature is fluid and cursive, with a large loop at the beginning of the first name and a long, sweeping underline that extends across the entire signature.

John R. C. Bowen, S.C. Bar No. 791

john@laughlinandbowen.com

Laughlin & Bowen, P.C.

Post Office Drawer 21119

Hilton Head Island, SC 29925

(843) 689-5700

April 5, 2013

Hilton Head Island, South Carolina

APPENDIX F

[PETITIONER'S] APPELLANT'S RESPONSE AND MEMORANDUM TO RESPONDENT'S
MOTION FOR INVOLUNTARY DISMISSAL AND MEMORANDUM IN SUPPORT

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Beaufort County

Roger M. Young, Circuit Court Judge

Case No. 2010-CP-07-4146

RECEIVED

APR 23 2013

SC Court of Appeals

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

Respondent

v.

The Law Office of Jay A. Mullinax, LLC

Appellant

**APPELLANT'S RESPONSE AND MEMORANDUM TO RESPONDENT'S MOTION FOR
INVOLUNTARY DISMISSAL AND MEMORANDUM IN SUPPORT**

Pursuant to South Carolina Appellate Court Rule 240, Appellant, The Law Office of Jay A. Mullinax, LLC, by and through undersigned counsel, hereby responds and objects to the Respondent's Motion for Involuntary Dismissal and Memorandum in Support on the grounds that Appellant has fully complied with all necessary South Carolina Appellate Court Rules (Rules) as more fully set forth below in the Memorandum in Support. The Respondent's Motion fails to provide a legitimate basis for dismissal of the Appellant's appeal.

MEMORANDUM IN SUPPORT

BACKGROUND

The Appellant agrees with all Background information supplied in the Respondent's Memorandum in Support for his Motion for Involuntary Dismissal. The Respondent's Motion to Dismiss and Memorandum in Support alleges that the Appellant has not complied with Rule 207. The Appellant filed Notice of Appeal on June 18, 2012. The Appellant requested a copy of the transcript from the Court Reporter on June 25, 2012.

DISCUSSION

Pursuant to Rule 207(a)(1), in appeals from the court of common pleas, the transcript must be ordered within ten (10) days after the date of service of the notice of appeal. The Appellant complied with the requirements of Rule 207(a)(1) by requesting the transcript from the Court Reporter and from the Beaufort County Clerk of Court on June 25, 2012, which is seven (7) days after the Notice of Appeal was filed, and within the ten (10) day requirement of Rule 207(a)(1). Rule 207(a)(1) also requires Appellant to contemporaneously furnish all counsel of record, the Office of Court Administration, and the clerk of the appellate court with copies of all correspondence with the court reporter. Appellant complied with this requirement of Rule 207(a)(1) by contemporaneously furnishing all counsel of record, the Office of Court Administration, and the clerk of the appellate court with copies of all correspondence with the court reporter on June 25, 2012. (Exhibit A)

Rules 207(a)(2-4) require the Court Reporter to deliver the transcript within sixty (60) days from the date of the request or request an extension from the Office of Court

Administration. The Appellant has not received the transcript or notice of any extension being granted to the Court Reporter by the Office of the Court Administration.

Pursuant to Rule 207(a)(5), if appellant has not received the transcript within the allotted time nor received notification of an extension within ten (10) days after the allotted time, appellant shall notify the Office of Court Administration, the clerk of the appellate court, and the court reporter in writing. The Appellant complied with the requirements of Rule 207(a)(5) by notifying the Office of Court Administration, the clerk of the appellate court, and the court reporter in writing on September 6, 2012 (Exhibit B) that the Appellant had not received the transcript.

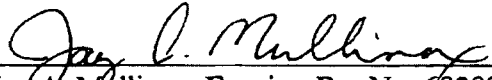
Respondent alleges that the Appellant knowingly sent requests for the transcript to an incorrect address for the Court Reporter. This allegation is false. The Appellant sent requests to the Court Reporter to the address given to the Appellant by the Beaufort County Circuit Court. The Appellant is unaware of any other address for the Court Reporter and all attempts to contact her have been unsuccessful.

As the Respondent indicates in its Motion to Dismiss and Memorandum in Support, "the grounds for this Motion are Appellant has failed to meet its burden to provide the Transcript and has not filed its initial brief..." Respondent subsequently acknowledges that "Appellant is not required to file a brief until thirty (30) days after receipt of the transcript." The Respondent also acknowledges in his Motion that the Appellant has complied with the Rules by requesting the transcript from the Court Reporter on June 25, 2012 and subsequently followed up with the Office of Court Administration, the clerk of the appellate court, and the court reporter on September 6, 2012 as required by 207(a)(5).

CONCLUSION

The Appellant has fully complied with the Rules. The Respondent's Motion to Dismiss alleging that the Appellant has failed to meet the requirements under Rule 207 are false and without merit. A ruling in favor of the Respondent would prejudice the Appellant for no fault of its own. The Respondent's assumptions and false accusations regarding the aforementioned do not serve as a cognitive basis for the dismissal of the Appellant's appeal. The Respondent's Motion should be dismissed. Furthermore, in light of the fact that the Respondent's alleged facts contradict his own Motion, the Court should consider action under Rule 269 because the Motion is frivolous under the Respondent's own facts.

April 18, 2013


Jay A. Mullinax, Esquire, Bar No. 68293
Law Office of Jay A. Mullinax, LLC
2 Park Lane, Suite 303
Hilton Head Island, SC 29928
(843) 785-6101



Law Office of Jay A. Mullinax, LLC

2 PARK LANE, SUITE 303
HILTON HEAD ISLAND, SC 29928

June 25, 2012

VIA U.S. POSTAL SERVICE

Ms. Deborah Everett
1104 Green Street
Beaufort, SC 29902

Re: 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
Case No.: 2010-CP-07-4146

Dear Ms. Everett:

On April 18-20, 2012, the above case was tried before the Honorable Roger M. Young, Circuit Court Judge, in Beaufort County. My records indicate that you were the court reporter for this case. Please accept this as my formal request for the transcript of the proceedings. I agree to pay the per page charge for this transcript as provided by Rule 607, SCACR.

If you have any questions or require anything further, please do not 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, Esquire

JAM:lnk

Cc: John R.C. Bowen, Esquire
South Carolina Court of Appeals
Office of Court Administration



Law Office of Jay A. Mullinax, LLC

2 PARK LANE, SUITE 303
HILTON HEAD ISLAND, SC 29928

September 6, 2012

VIA U.S. POSTAL SERVICEOffice of Court Administration
1015 Sumter Street, Suite 200
Columbia, SC 29201Re: Ron Orlosky, Respondent v. The Law Office of Jay A. Mullinax, LLC, Appellant
Appellate Case No.: 2012-212331

To Whom It May Concern:

Pursuant to Rule 207(a)(5), please allow this correspondence to serve as notice that our office has failed to receive the transcript that was requested in correspondence sent to Ms. Deborah Everett, the court reporter, on June 25, 2012. Also, we have not received notification of an extension. Please advise our office if you require any further action on our part in order to obtain the requested transcript.

If you have any questions, please do not 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, Esquire

JAM:lnk

Cc: Ms. Jenny Abbott Kitchings, Clerk of Court, South Carolina Court of Appeals
Mr. John R.C. Bowen, Esquire
Ms. Deborah Everett, Court Reporter

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 2010-CP-07-4146

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,

Respondent,

v.

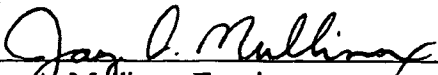
The Law Office of Jay A.
Mullinax, LLC,

Appellant.

CERTIFICATE OF SERVICE

I certify that I have served the Appellant's Response and Memorandum to Respondent's Motion for Involuntary Dismissal and Memorandum in Support on Ron Orlosky by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record, John R. C. Bowen, Esquire, Laughlin & Bowen, P.C., P.O. Drawer 21119, Hilton Head Island, SC 29925, Attorney for Respondent.

April 18, 2013


Jay A. Mullinax, Esquire
Law Office of Jay A. Mullinax, LLC
2 Park Lane, Suite 303
Hilton Head Island, SC 29928
(843) 785-6101

APPENDIX G

ORDER DENYING MOTION FOR INVOLUNTARY DISMISSAL

The South Carolina Court of Appeals

Ron Orlosky in his capacity as Personal Representative
of The Estate of Debora L. Orlosky, and in his capacity
as trustee of the Deborah Laura Orlosky Revocable Trust,
Respondent,

v.

The Law Office of Jay A. Mullinax, LLC., Appellant.

Appellate Case No. 2012-212331

ORDER

After careful consideration, Respondent's motion for involuntary dismissal is denied.


FOR THE COURT

Columbia, South Carolina

cc:

Jay Anthony Mullinax
John R.C. Bowen

FILED
LG. 6-6-13

APPENDIX H
ORDER AFFIRMING CIRCUIT COURT DECISION

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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,
Respondent,

v.

The Law Office of Jay A. Mullinax, LLC, Appellant.

Appellate Case No. 2012-212331

Appeal From Beaufort County
Roger M. Young, Sr., Circuit Court Judge

Unpublished Opinion No. 2015-UP-376
Heard December 8, 2014 – Filed July 29, 2015

AFFIRMED

Jay Anthony Mullinax, of Law Office of Jay A.
Mullinax, LLC, of Hilton Head Island, for Appellant.

John R.C. Bowen, of Laughlin & Bowen, PC, of Hilton
Head Island, and Stephen A. Spitz, of Charleston, for
Respondent.

PER CURIAM: The Law Office of Jay Mullinax (Mullinax) appeals a jury verdict in favor of client 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, on Orlosky's breach of contract claim and Mullinax's counterclaim.

1. We find the trial court did not err when it denied Mullinax's motion for a directed verdict on equitable estoppel. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001) (listing the elements of equitable estoppel as to the party being estopped as: (1) conduct by the estopped party amounting to a false representation or a concealment of material facts; (2) an intention that such conduct be acted upon by the other party; and (3) actual or constructive knowledge of the true facts); *id.* (listing the elements for the party asserting the estoppel as: (1) a lack of knowledge and of a means of knowing the truth as to the facts in question; (2) a reliance upon the conduct of the estopped party; and (3) a prejudicial change in position); *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992) ("Prejudice to the other party is an essential element of equitable estoppel."); *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 122, 145 S.E.2d 922, 927 (1965) (stating the party asserting estoppel bears the burden of proof). The Manor Development Company Shareholder's Agreement, which Orlosky provided to Mullinax, clearly contained a provision setting forth the formula for calculating the sales price of the shares. In addition, in its brief Mullinax claims it was enticed into entering into the contract to provide legal services (Contract) by the representation by Orlosky and his wife Debora Orlosky (Wife) during their estate planning that Wife's estate was valued at approximately \$4.4 million. However, the record shows when Mullinax began its representation of the estate, it valued the estate at \$3 million and did not value it at \$4.4 million until the December 11, 2009 bill when it demanded additional fees based on the increased valuation. Thus, the record contains evidence Mullinax had knowledge of a lower valuation of the stock and did not rely on a higher valuation of the estate in entering into the Contract to represent the estate.

2. We find no merit to Mullinax's argument the trial court erred when it allowed Orlosky to testify extensively about alleged communications with Wife that impacted his interest in alleged violation of the Dead Man's Statute as this testimony was offered by Orlosky, the personal representative, on behalf of the estate. *See* S.C. Code Ann. § 19-11-20 (2014) ("[N]o party to an action or proceeding . . . shall be examined in regard to any transaction or communication

between such witness and a person at the time of such examination deceased, insane or lunatic as a witness *against a party then prosecuting or defending the action as executor* . . . 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)); *Kelly v. Peeples*, 294 S.C. 63, 65-66, 362 S.E.2d 636, 638 (1987) (stating testimony falls within the Dead Man's Statute when it (1) deals with a transaction or communication between an appellant and the deceased; (2) is against a party prosecuting or defending the action as executor, heir-at-law, legatee, devisee, or survivor of such deceased person; and (3) affects a present interest of the opposing party).

3. We find Mullinax did not preserve its argument concerning error in the trial court's jury charges. Mullinax never raised the arguments it makes on appeal to the trial court either before or after it charged the jury, and the record does not contain any proposed charges from Mullinax. *See* Rule 51, SCRCP ("No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection."); *Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 36, 491 S.E.2d 571, 577 (1997) (concluding complaint about a jury charge was not preserved for appellate review when the appellant failed to raise the issue at trial); *Wells v. Halyard*, 341 S.C. 234, 240, 533 S.E.2d 341, 344 (Ct. App. 2000) (stating the appellate court will not review the failure to give a requested jury charge where the request to charge does not appear on the record); *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 213, 723 S.E.2d 597, 608 (Ct. App. 2012) ("The record must show that the issue was raised in the trial court."); *Harkins v. Greenville Cnty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (stating the appellant has the burden of providing an adequate record on appeal).

4. We find Mullinax's argument it was entitled to damages for its claim for quantum meruit is not properly before this court as the issue was not submitted to the jury. *See* Rule 51, SCRCP ("No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection."); *Creech*, 328 S.C. at 36, 491 S.E.2d at 577 (concluding complaint about a jury charge was not preserved for appellate review when the appellant failed to raise the issue at trial); *Wells*, 341 S.C. at 240, 533 S.E.2d at 344 (stating the appellate court will not review the failure to give a requested jury

charge where the request to charge does not appear on the record); *Solley*, 397 S.C. at 213, 723 S.E.2d at 608 ("The record must show that the issue was raised in the trial court."); *Harkins*, 340 S.C. at 616, 533 S.E.2d at 891 (stating the appellant has the burden of providing an adequate record on appeal).

5. We find unpreserved Mullinax's argument 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. Mullinax did not raise the issue of a violation of public policy or statutory law when moving for a directed verdict. Accordingly, it is not preserved. *See Scoggins v. McClellion*, 321 S.C. 264, 267, 468 S.E.2d 12, 14 (Ct. App. 1996) (holding an issue not raised in a directed verdict motion will not be considered on appeal concerning the denial of the directed verdict); *In re McCracken*, 346 S.C. 87, 93, 551 S.E.2d 235, 238 (2001) (stating only issues raised in a directed verdict motion can properly be raised in a JNOV motion).

6. Regardless of any alleged errors concerning the valuation of the Manor stock, we find evidence in the record to support the jury's verdict. *See Cole v. Raut*, 378 S.C. 398, 406-07, 663 S.E.2d 30, 34 (2008) ("Under the two-issue rule, when a jury returns a general verdict in a case involving two or more issues or defenses, and the verdict is supported as to at least one issue or defense that has been presented to the jury free from error, the verdict will not be reversed."); *id.* at 407; 663 S.E.2d at 34 ("The application of the two-issue rule is separate and distinct from a prejudicial error inquiry, and operates to uphold a jury verdict that is sustained by the facts of the case."); *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 270, 705 S.E.2d 73, 76 (Ct. App. 2010) (stating an action for breach of contract is an action at law); *Weatherford v. Price*, 340 S.C. 572, 578, 532 S.E.2d 310, 313 (Ct. App. 2000) ("An ordinary suit to recover attorney's fees, even one based on an implied contract asserting a quantum meruit measure of recovery, is an action at law."); *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976) ("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 supports the jury's findings."). In addition to disputing the value of the estate, Orlosky contended Mullinax had not completed the work specified in the Contract and therefore was not entitled to the fee amount it sought. In awarding Orlosky \$80,000, the jury allowed Mullinax to retain \$20,000 Orlosky had paid. The attorney Orlosky retained to replace Mullinax testified that he believed Mullinax had done approximately 20 to 25% of

the work necessary to administer the estate. He stated that if his firm had performed the work Mullinax had performed, it would charge probably \$5,000 to \$10,000. He opined the \$132,000 Mullinax sought was not a reasonable fee for the work it had performed. The evidence in the record supports the jury's finding that Mullinax was entitled to \$20,000 as a reasonable fee for the work it performed and Orlosky was entitled to the remaining \$80,000 he had previously paid Mullinax.

AFFIRMED.

HUFF, SHORT, and KONDUROS, JJ., concur.

APPENDIX I
PETITION FOR REHEARING

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2012-212331

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,

Respondent,

v.

The Law Office of Jay A.
Mullinax, LLC,

Appellant.

PETITION FOR REHEARING

Jay A. Mullinax, LL.M. (Estate
Planning)
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Bar No. 68293
Attorney for Appellant

Pursuant to Rule 221 SCACR, Appellant, Law Office of Jay A. Mullinax, LLC, hereby petitions this Court for a rehearing of 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, Respondent v. The Law Office of Jay A. Mullinax, LLC, Appellant, Appellate Case No. 2012-212331.

MEMORANDUM IN SUPPORT

On December 8, 2014, an oral argument was held between Respondent's Counsel of Record, Mr. Stephen A. Spitz and Appellant's attorney, Mr. Jay A. Mullinax. The Unpublished Opinion was filed on July 29, 2015.

I. Equitable Estoppel

The Court'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, which Orlosky provided to Mullinax (at an unknown date after the contract was signed), "clearly contained a provision setting forth 'the formula' for calculating the 'sales price' of the shares." Secondly, the Court surmised that notwithstanding the multiple documents supporting the estate's value of \$4,444,148.03, that because Mullinax purportedly did not bill based on the \$4,444,148.03 valuation until December 11, 2009, the Court inferred that Mullinax had knowledge of the Orlosky's "alleged estate value" of \$3,000,000.00.

Orlosky did not follow the Manor Development Company's Shareholder Agreement in determining the 2010 "sales price" of the stock and the sales price was irrelevant to the 2009 date

of death value of the stock, and thus, irrelevant to calculating the fee owed to Mullinax under the contract.

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)."

All parties agreed that under the terms of the contract that the "fair market value" of the estate was determinative of the legal fees owed under the contract formula. Clearly, the Orlosky did not think the sales price had anything to do with fair market value. Orlosky expressly wrote to Law Office to express that "Regardless of where we end up on the price, I want to sell." (R. p. 339; R. p. 161, line 5- p. 162, line 7).

The Orlosky 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. 25, n. 8). Specifically, Orlosky testified that under the optional sale, no matter if the value was "Three Million [or] Four Million", Orlosky would not have received more [than \$1.5 Million] "regardless of the value". (R. p. 70, lines 1-7; p. 70, line 14-p. 71, line 1; Initial Br. of Orlosky, p. 25, n. 8). To conclude that the stock's "sales price" had something to do with its value is to deny Orlosky's own testimony and argument in its Initial Brief.

The Certified Public Accountant letter used by Orlosky to allege a "fair market value" 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. pp. 322-325). 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. 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. 322, ¶ 2).

The contract required Orlosky to pay Mullinax a minimum fee based on a percentage of the date of death estate value. (R. p. 257) That 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.

Orlosky’s own attorney testified that the alleged \$1.58 million dollar sales price 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. 104, lines 10-13) When Orlosky’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 Orlosky confirmed it. (R. p. 100, lines 9-15)

Orlosky’s 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. 100, lines 16-20) Orlosky’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. 100, lines 21-25) When asked where in the Shareholder Agreement the amount of \$1.58 million dollars was

derived, Orlosky's attorney could not even identify it (R. p. 102, line 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. 102, line 17-20) Orlosky's attorney eventually admitted that he had not ever looked at the CPA's calculations on which he had relied. ((R. p. 104, line 24- p. 105, line 1) These actions and inactions, which led to the deceit of the jury, are in direct violation of Treasury Circular 230 requirements and Orlosky's attorney's obligations under those guidelines. (See Mullinax's Final Initial Brief p. 20-24 and 43-44)

As noted, any alleged "sales price" in the Manor Development Company's 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)) (Mullinax's Initial Brief, p. 18) The Internal Revenue Chapter 14 §§2701-2704 were specifically created and designed to be particularly restrictive with family agreements attempting to set a sales price intended to depress fair market value for estate purposes. (See Mullinax's Initial Brief, pp.s 18-24)

The Treasury Regulations are rather specific when they say that "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 calculations done by the purchaser's CPA firm and relied on by the Orlosky to determine a "sales price" were made under a "force sale" standard, deducting a forced sale "hypothetical 40% tax liability" from the value of the stock. (R. p. 324) 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. (TAM

9150001) There is no evidence in the record that Manor Company intended to liquidate, in fact, the company was reclaiming its own shares, it certainly was not liquidating.

The Court should take 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. 354 amount listed as 1/3 division of all Manor Stock) It is clear that Mullinax's calculations included legitimate discounts of 20% for a lack of marketability (R. p. 354 showing \$2,672,378.20 discount) and 25% for lack of control (R. p. 354 showing \$2,672,378.20 discount). Mullinax included these discounts in the calculations of the stock's legitimately recognized fair market value under Internal Revenue Code and Treasury Regulations. (R. P. 354) Mullinax's calculations resulted in an specific discount of \$1,781,585.47 to the decedent's Manor Stock (\$1,781,585.47 is 1/3rd of the aforementioned discounts of the whole Manor Company, of which decedent owned one-third). Although Orlosky did not follow the Shareholder Agreement, Mullinax used the aforementioned discounts of 20% and 25% (identical to Shareholder's Agreement discounts in Article 4.5) because they were in keeping with Internal Revenue Standards and Treasury Regulations.

Even if all of the discounts claimed by Orlosky 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 Orlosky's "sales price" did not come from the Shareholder Agreement. Orlosky did not follow the Shareholder Agreement, and thus any sales price under it cannot be used as a factor in determining a "fair market value". (See Mullinax's Initial Brief, pp.s 18-24) Although Orlosky may have fooled the jury into believing that he followed the Shareholder Agreement, a simple reading of the Shareholder Agreement shows otherwise. The Court of Appeals may not as easily be fooled.

The Shareholder Agreement provides that “**For one hundred and eighty days**” following the death of a Transferor Shareholder (Decedent) may sell Shares as determined under Article 4.” (R. p. 239) Orlosky sold the stock more than one hundred and eighty days following the death of the Transferor Shareholder, thus, the alleged “sales price” is irrelevant to the “fair market value”, for two reasons.

The Internal Revenue Code and Treasury Regulations expressly disregard any restriction in these family arrangements (e.g. Shareholder Agreements) that modify the restriction in a way that results in more than a de minimis change in value. (Revenue Reconciliation Act of 1990, P.L. 101-508, § 11602(e)(1)(A)(ii); Treas. Regs. § 25.2703-2; Treas. Regs. § 25.2703-1(c)(1)) (See Mullinax’s Initial Brief pp.s 18-24) Under the Shareholder Agreement, Article 2.4 could only be used to set a sales price to occur within 180 days. Thereafter, Orlosky 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) is not allowed. After one hundred and eighty days, the sales price discount of \$1,428,284.00 (R. p. 325 “discount for lack of control”) was no longer a part of any sales price formula available to Orlosky under the Shareholder Agreement.

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. 245) Orlosky conducted no appraisals for the company’s real property in accordance with the Shareholder Agreement. Even though the “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 Orlosky followed the Shareholder Agreement or any pathway to a Shareholder Agreement sales price.

The Court surmised that notwithstanding the 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 knowledge of the Orlosky's alleged estate value of \$3,000,000.00.

The Court's inference comes from Mullinax's invoice dated December 11, 2009. In that invoice, Mullinax bills Orlosky for \$36,103.70 (an adjustment to the earlier cumulative bills of a June 2009 \$25,000.00 retainer, June 2009 \$25,000.00 first payment, October 2009 \$25,000.00 second payment, for a total of \$111,000.00) to adjust to the then verified estate value of \$4,444,148.03 (2.5% of \$4,444,148.03 = \$111,000). (R. pp.s 258, 265-266, 267-268, 275-276 – bills for June 2009, October 2009, December 2009)

All charges and invoices leading to Mullinax's December 11, 2009 invoice were on schedule to have Orlosky pay Mullinax \$100,000.00. As of the December 11, 2009 invoice, in accordance with the contract, Mullinax had collected a \$25,000.00 retainer (as required under the contract), a first payment of \$25,000.00 (from a June 30, 2009 invoice), and billed Orlosky an additional \$25,000.00 for his second payment on October 2, 2009, for a total of \$75,000. Under the contract, Orlosky owed Mullinax a third payment.

Using the Court's own analysis, if Mullinax's December 11, 2009 invoice had only billed Orlosky for \$25,000.00 (representing an alleged amount based on an estate valuation of \$3,000,000.00), 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 value in the December 11, 2009 bill, Mullinax would still have collected \$100,000.00. 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.

It's 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 only asked that Orlosky pay \$25,000.00 toward that balance. (Invoice dated December 11, 2009)

II. Dead Man Statute

The Court's decision may have overlooked or misapprehended 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 in its interpretation. In particular, the Court's decision may have overlooked Orlosky's multiple roles during testimony. Orlosky was "sole life-time beneficiary of any proceeds gained from the litigation" in addition to being "personal representative of the estate" and "trustee of the trust". Under the Court's interpretation of the dead man's statute, Orlosky should have been allowed to testify for his personal pecuniary benefit as sole lifetime beneficiary of the litigation proceeds – because he also happened to be serving as "personal representative of the estate" and "trustee of the trust". We believe that this interpretation accepts a portion of the statute while disregarding other portions. The statute should be read

The 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. Based on the Court's interpretation, a fiduciary, as in this instance, can testify for his or her own personal pecuniary benefit, but a defendant (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 interest 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). (Mullinax's Initial Brief p. 9) Mullinax outlines the statutory implications in Appellant's Initial Brief. (Initial Br. of Appellant p. 8-10). The statute is plain and unambiguous. Under the statute, Orlosky should not and does not have the right to testify for his own pecuniary benefit in the litigation just because he happens to serve as a fiduciary in the same litigation.

The statute reads, in full:

"[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*, insane or lunatic as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person or as assignee or committee of such insane person or lunatic, 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 interest 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 Appellant outlines the statutory implications in Appellant's Initial Brief. (Initial Br. of Appellant p. 8-10). The statute is plain and unambiguous.

III. Charging Orders (Quantum Meruit)

The 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 charge the jury.

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

The record specifically shows that Mullinax presented charging orders to the Court (R. p. 116, lines 17-19), that the Court received them (R. p. 116, lines 20), that there was discussion on them, and that the 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 Court that lost them, and thus they were unavailable to Mullinax for the record. Of course, as this Court is aware, Mullinax chose to move

forward with an incomplete and inaccurate record, as an alternative to moving forward without a record. Mullinax made this choice in response to the ultimatum by the Court of Appeals.

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.s 14-18. In particular, the Brief contains a summation of the issues drafted and articulated best by South Carolina Supreme Court Chief Justice Jean Toal.

The Court of Appeals has the authority to correct this error of law an inequitable injustice. The Appellant respectfully requests that it do so.

IV. Quantum Meruit is not properly before the Court because it was not submitted to the jury. (e.g. no charging order by the lower Court, jury never received it)

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. 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 orders. (R. p. 116, lines 17-19) Afterward, the trial Court lost Mullinax's charging orders and thus, the charging orders were unavailable for the record. In practice and in this case, the trial court's general duty to charge the jury with the current and correct law is without meaning or effect. Under the application of the Court rules, it is the Appellant's responsibility to supply the Appellate Court with an adequate record, even if the trial court and the court reporter lose parts of the record.

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.s 19-20, 44) (R. references in Mullinax's Final Initial Brief p. 32-36 and Mullinax's Final Reply Brief p. 18-21) It was the 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)

The Court of Appeals has the authority and ability to review this matter for a justiciable result. The Appellant respectfully requests that it do so.

V. Public Policy Issue

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). (ROA, p. 372, para. #5.) Mullinax also outlined this issue in its Motion for Relief from Judgment. (ROA, p. 396, para. #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". (ROA, p. 136, lines 7-9) Mullinax continued that "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..." (ROA, p. 136, 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. (ROA, p. 136, lines 1-13) Mullinax further emphasized "I can lose my license or be

disbarred from the practice of law if my clients avoid a tax return.” (ROA, p. 137, 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.” (ROA, p. 137, lines 11-13)

Ironically, Mr. Orlosky’s private act of personally filing an “Estate Tax Return extension” impeaches his contention that he didn’t believe an Estate Tax Return was lawfully due. (ROA, p. 136, lines 2-5). The record is littered with Mullinax’s references to its 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 Appellant respectfully requests that the Court reconsider this issue.

VI. Two-issue rule

The Court suggests that it should not overturn the jury verdict based on the “two issue” rule. In particular, it points to the quantum meruit issue 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, for the Court of Appeals to now consider the trial court’s failure to charge the jury (prejudicial error) and the trial court’s failure to rule on the matter, well, it would not be overturning a verdict, it would merely be providing one – in the first instance.

Mullinax agrees with the Court that Mullinax did not complete the work specified in the contract. In order for Mullinax to legally complete the work specified in the contract while abiding by the law and ethical obligations to the Court, Orlosky was required to sign an accurate

Inventory and Appraisement for the Probate Court and sign an Estate Tax Return for the Internal Revenue Service. Orlosky 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. 140, lines 18-25) Orlosky's refusal to sign these required documents made it impossible for Mullinax to legally complete the work under the contract. (R. p. 140, lines 18-25) As noted in Mullinax's briefs, the law didn't require Mullinax's 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 Mullinax from completing the contract under Orlosky's interpretation, but the law does not hold Mullinax liable for failure to complete a contract when the Orlosky's actions prevented Mullinax from doing so lawfully.

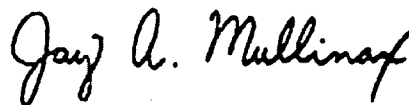
The Court apparently relies on the testimony of Orlosky's attorney in reaching its decision. It is correct to say that Orlosky did pay Mullinax's competitor to testify against Mullinax for \$350.00 per hour, and over \$30,000.00 in compensation (as of time of testimony), in defense of Mullinax's claim of approximately \$32,000.00. Yes, although the competitor attorney provided no evidence that he knew what volume of work or time Mullinax provided to Orlosky, the competitor miraculously concluded that he could have done the Mullinax'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, that he ignored and could not even cite the foundational Internal Revenue Codes, Treasury Regulations, Treasury Circular 230, and well established case law on these matters. Certainly. Any payment for his services should be less than those of Mullinax, after all, Mullinax provided all of the aforementioned. The Court suggests that evidence in the record supports the jury's finding that Mullinax 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. p. 296-299) As the Court is aware, these are the matters for which Mullinax claimed "quantum meruit", for which Orlosky paid Mullinax nothing, and Court failed to charge the jury.

The Appellant respectfully requests that this Honorable Court reconsider its decision in light of the aforementioned reasons in keeping with the spirit of Benjamin Franklin, who said:

"For having lived long, I have experienced many instances of being obliged, by better information or fuller consideration, to change opinions, even on important subjects, which I once thought right, but found to be otherwise."

Benjamin Franklin, Date: September 17, 1787



August 12, 2015

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Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2012-212331

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,

Respondent,

v.

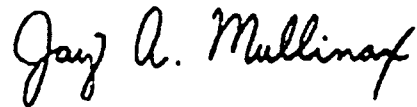
The Law Office of Jay A.
Mullinax, LLC,

Appellant.

CERTIFICATE OF SERVICE

I certify that I have served the Petition for Rehearing on Mr. Ron Orlosky, by depositing a copy of it in the United States Mail, postage prepaid on August 12, 2015, addressed to his attorney of record, Mr. John R.C. Bowen, P.O. Drawer 21119, Hilton Head Island, South Carolina 29925-1119.

August 12, 2015



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APPENDIX J

ORDER DENYING PETITION FOR REHEARING

The South Carolina Court of Appeals

Ron Orlosky in his capacity as Personal Representative
of The Estate of Debora L. Orlosky, and in his capacity
as trustee of the Deborah Laura Orlosky Revocable Trust,
Respondent,

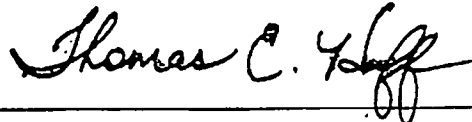
v.

The Law Office of Jay A. Mullinax, LLC., Appellant.

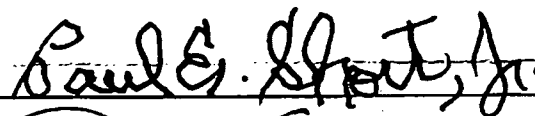
Appellate Case No. 2012-212331

ORDER

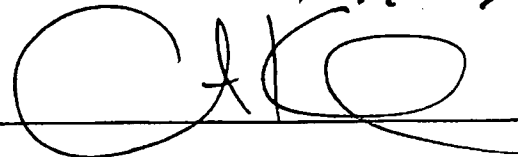
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

FILED

cc:

Jay Anthony Mullinax, Esquire
John R.C. Bowen, Esquire

September 17, 2015

Stephen A. Spitz, Esquire
The Honorable Roger M. Young, Sr.