ORIGINAL

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

Jay A. Mullinax, LL.M. (Estate Planning)
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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 contact law. The Respondent implies that a party to a contract cannot be bound by the principal 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-staments 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, SCRCP, 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.2nd 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 S*tate 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 simple 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 a 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 EJL 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 Appraisement 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 Appraisement 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 12, 2014

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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 the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Final Reply Brief of Appellant and Certificate of Counsel on Mr. Ron Orlosky, by depositing a copy of it in the United States Mail, postage prepaid on June 12, 2014, addressed to his attorney of record, Mr. John R.C. Bowen, P.O. Drawer 21119, Hilton Head Island, South Carolina 29925-1119.

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