THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge
DeAndrea G. Benjamin, Circuit Court Judge

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Case No. 2010-CP-40-3297
Appellate Case No. 2012-212687

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YANCEY ENVIRONMENTAL SOLUTIONS, LLC. . . . . Appellant,

vs.

RICHARDSON PLOWDEN & ROBINSON, P.A. and
George Harold Hanlin, J.D.. . . . . Respondents.

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# BRIEF OF APPELLANT

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## STATEMENT OF ISSUES

I. Whether the trial court erred when it granted Respondents' motion for a directed verdict on proximate cause grounds when there was evidence in the record from which the jury could conclude Respondents' acts and omissions proximately caused harm to Appellant.

II. Whether the trial court erred in finding that testimony given by the corporation's Rule 30(b)(6) designee establishing a corporation's intent to perform on a contract to place a conservation easement on property owned or controlled by the corporation was insufficient evidence of the corporation's intent to perform because there was no direct testimony by a particular principal of the corporation.

III. Whether the trial court erred in concluding that a corporate principal's testimony was necessary to establish whether the corporation intended to perform on a contract when the corporation was a party to the contract and owned or controlled the subject property.

IV. Whether the trial court erred in concluding that testimony by an expert for Appellant that the corporation and its principal shareholder intended to perform on the contract was "not admissible to create an issue of fact for the jury" as to the corporate principal's intent when there was no objection to that testimony and when Respondents later included the same testimony in a cross examination question to the expert.

V. Whether the trial court erred in ruling that evidence of the corporate

principal's intent to perform was necessary to establish a causal link when there was evidence that the corporation was a party to the contract, partially performed on the contract, and intended to perform.

VI. Whether the trial court erred in excluding testimony and evidence showing three other landowners, all of whom had their own tax counsel, proceeded with closing on their conservation easements, when such evidence was offered to show the effect and proximate cause of Respondents' withdrawal as the only tax counsel for the subject conservation easement project.

VII. Whether the trial court erred in granting Respondents' motion for directed verdict at the close of Respondents' case on the stated grounds that Appellant had not offered any evidence on proximate cause after previously denying a motion for summary judgment and denying a motion for directed verdict at the close of Appellant's case on the basis that there was evidence in the record on the proximate cause issue.

VIII. Whether the trial court failed to apply the proper standard of review for its ruling pursuant to Rule 50, SCRCP and erred in granting Respondents' motion for a directed verdict.

## STATEMENT OF THE CASE

On May 17, 2010, Appellant, YANCEY ENVIRONMENTAL SOLUTIONS, LLC (YES) and Yancey A. McLeod, Jr. (Mr. McLeod) filed a Complaint in the Court of Common Pleas for Richland County, South Carolina, asserting professional negligence, breach of fiduciary duty, and breach of contract claims against RICHARDSON PLOWDEN & ROBINSON, P.A. (Law Firm) and George Harold Hanlin, J.D (Mr. Hanlin) (collectively "Respondents"). On June 24, 2010, Respondents filed an Answer and a Motion to Dismiss Plaintiff's Complaint as to Yancey A. McLeod, Jr. On June 29, 2010, Appellant filed an Amended Complaint withdrawing Mr. McLeod as a plaintiff and leaving YES as the only remaining plaintiff. (Amended Complaint, ROA 15). On July 19, 2010, Respondents filed an Answer to Amended Complaint and Affirmative Defenses. (Answer, ROA 36).

An extensive period of discovery ensued with multiple sets of written discovery requests and responses exchanged, voluminous numbers of documents produced, and multiple depositions conducted in South Carolina, North Carolina, and a Rule 30(b)(6), SCRCP deposition taken in West Virginia of J. Terry Miller (Mr. Miller), the designee for JUSTICE FAMILY FARMS, LLC. On November 30, 2011, Respondents filed a Motion for Summary Judgment and later an Amended Motion for Summary Judgment. On February 15, 2012, the trial court issued an Order denying Defendants' Amended Motion for Summary Judgment on the grounds that there were disputed questions of material fact. (Order Denying Amended Motion for Summary Judgment, ROA 1).

The trial for this matter before a jury began on February 27, 2012 with The

Honorable Eugene C. Griffith presiding. At trial, Appellant presented testimony from its expert witnesses, Gregory B. Adams, L.L.M., J.S.D. (Dr. Adams) and W. Curtis Elliott, J.D., and from Mr. McLeod, Sue Green from COMMUNITY OPEN LAND TRUST (COLT), Darroll Hawkins, Ph.D., and Mr. Miller, the Rule 30(b)(6), SCRCP designee for JUSTICE FAMILY FARMS, which was one of the parties to the contract at issue in the underlying transaction. Prior to the close of Appellant's case and to accommodate the witnesses travel schedule, Appellant agreed to allow Respondents to present testimony from David Harrah, CPA, who formerly worked with the JAMES C. JUSTICE COMPANIES, INC.

At the close of Appellant's case, Respondents moved for directed verdict per Rule 50, SCRCP, arguing that Appellant had not presented any evidence to establish the causation element of the three claims. The trial court denied the motion on the grounds that there was evidence in the record on the proximate cause issue. (Trial transcript, 867:12-867:19, ROA 685).

Respondents then presented testimony from Mr. Hanlin and their expert witness, Nathan M. Crystal, J.D. and read into the record deposition testimony from Cary H. Hall, J.D., a tax lawyer. At the close of their case, Respondents again moved for directed verdict per Rule 50, SCRCP. The trial court granted Respondents' Motion for Directed Verdict and issued a Form 4 Order on March 7, 2012 that stated, "Directed Verdict granted to defendants." (Form 4 Order, ROA 3).

On April 15, 2012, less than thirty (30) days after the Form 4 Order was issued, Appellant filed its Notice of Appeal reserving its right to file an Amended Notice of Appeal once the formal Order was issued. (Notice of Appeal, ROA 1045).

On April 15, 2012, the trial court issued a written Order Granting Respondents' Motion for Directed Verdict. (Order Granting Respondents' Motion for Directed Verdict, ROA 5). On May 24, 2012, Appellant timely filed a Motion to Amend or Alter the Order Granting Defendants' Motion for Directed Verdict (Motion to Amend Order Granting Motion for Directed Verdict, ROA 990). On June 21, 2012, Respondents filed a Return to Appellant's Motion to Alter or Amend. (Return, ROA 1036).

On June 7, 2012, Respondents filed a Motion to Dismiss the Appeal. On June 12, 2012, Appellant filed a Return to Defendants' Motion to Dismiss and on June 18, 2012, Respondents filed a Reply to Plaintiff's Return to Defendants' Motion to Dismiss.

On June 26, 2012, this Court issued an Order granting additional time for the court reporter to prepare the trial transcript. On July 26, 2012, this Court issued an Order granting Respondents Motion to Dismiss on the grounds that the Notice of Appeal was prematurely filed. On July 31, 2012, the Court issued an Order granting an extension to the court reporter to allow additional time to prepare the trial transcript. On August 8, 2012, Appellant filed a new Notice of Appeal, which the Court administratively dismissed pursuant to Rule 207 on November 21, 2012. Appellant filed an unopposed Motion to Reinstate on November 27, 2012 and the Court issued an Order granting Appellant's Petition to Reinstate on January 24, 2013.

## ARGUMENTS

### I. The Evidence in the Record Showing Respondents' Acts and Omissions Proximately Caused Harm to Appellant Made the Trial Court's Ruling Granting Respondents' Motion for Directed Verdict Reversible Error.

#### A. Facts Relevant to Argument I.[1]

Mr. McLeod and James C. Justice, II (Mr. Justice) entered into an agreement in October 2007 whereby Mr. McLeod's company, YES, would coordinate the professional services by the lawyer, appraisers, and wildlife biologist, and locate a charitable grantee organization in order to record a conservation easement in the 2007 calendar year on the "Black River Farm" property in Clarendon County owned by Mr. Justice's companies, in exchange for a 4% commission based on an expected $45,000,000 tax deduction once the easement was recorded. (Trial transcript, 134:20-135:5, ROA 57-58; 142:13-24, ROA 65; 145:3-12, ROA 68; 305:22-307:4, ROA 228-230; 322:7-13, ROA 245); (Trial transcript, 470:18-472:7, ROA 366-368; 475:4-17, ROA 371; 482:6-483:17, ROA 378-379; 484:10-17, ROA 380; 489:10-13, ROA 385; 490:3-491:4, ROA 386-387; 622:8-15, ROA 518); (JFF 30(b)(6) testimony, 7:18-9:18, ROA 882-884; 11:3-20, ROA 886; 16:19-17:10, ROA 891-892; 18:23-19:12, ROA 893-894; 19:13-23, ROA 894; 20:1-18, ROA 895; 23:20-24:7, ROA 898-899; 30:4-31:6, ROA 905-906; 32:19-34:1, ROA 907-909; 35:22-36:9, ROA 910-911; 40:2-21, ROA 915; 68-9:12, ROA 943). Mr. McLeod testified that after he explained to Mr. Justice the concepts behind the conservation

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[1] Unless specifically noted, all of the facts and inferences from those facts are taken from the evidence admitted and testimony given during the trial of this case.

easement, Mr. Justice told him, "Let's do it." (Trial transcript, 652:25-654:10, ROA 548-550).

Based on the trial court's rulings, it is important to emphasize that Mr. Justice, individually, did not own the subject "Black River Farms" property in Clarendon County as it was owned by JUSTICE FAMILY FARMS, LLC, which is owned by JAMES C. JUSTICE COMPANIES, INC., of which Mr. Justice is the principal shareholder. (Trial transcript, 345:20-346:1, ROA 268-269); (JFF 30(b)(6) testimony, 7:18-8:2, ROA 882-883); (McLeod letter to Mr. Justice with Consulting Services Agreement, Nov. 26, 2007, Pl. trial ex. 7, ROA 1050); (Hanlin e-mail, Nov. 7, 2007, Pl. trial ex. 3, ROA 1060).

Mr. Hanlin, the lawyer for the transaction, finalized a Consulting Services Agreement to memorialize the agreement that identified "James C. Justice – Justice Family Farms, LLC" collectively as the "Owner" of the property. (Trial transcript, 142:13-24, ROA 65; 143:22-144:17, ROA 66-67; 322:7-13, ROA 245); (Trial transcript, 490:19-494:14, ROA 386-390); (McLeod letter to Justice with Consulting Services Agreement, Nov. 26, 2007, Pl. trial ex. 7, ROA 1050); (Hanlin e-mail, Nov. 7, 2007, Pl. trial ex. 3, ROA 1060); (Hanlin letter, Dec. 5, 2007, Pl. trial ex. 10, ROA 1062).

The parties proceeded in earnest to complete the easement in the 2007 tax year although the Consulting Services Agreement was never signed by a representative of JUSTICE FAMILY FARMS or Mr. Justice and no formal "closing" date had been set. (Trial transcript, 145:3-12, ROA 68; 236:16-21, ROA 139; 307:10-308:4, ROA 230-231; 324:1-15, ROA 247); (Trial transcript, 457:14-24, ROA 353;

494:1-495:3, ROA 390-391; 562:15-563:12, ROA 458-459; 569:17-570:7, ROA 465-466); (Hanlin e-mail, Nov. 7, 2007, Pl. trial ex. 3, ROA1060); (YES e-mail, Dec. 27, 2007, noting that COLT had approved the easement gift, Pl. trial ex. 34, ROA 1083). To explain why JUSTICE FAMILY FARMS paid a prior invoice from one of Mr. McLeod's companies on an earlier project, its Rule 30(b)(6) designee, Mr. Miller, testified that:

> 16:22 Mr. Justice -- you have to understand,
> 16:23 he typically operates on a handshake with most of the
> 17:1 consultants and professionals that he deals with. He's
> 17:2 done many coal deals and land deals on a handshake and
> 17:3 this was one of those situations. He's very old-school
> 17:4 and his word is his bond and that's -- I've worked for
> 17:5 them for 27 years and that's the way he's always been.
> 17:6 That's the way his father was and that's the way his son
> 17:7 is. And that was -- **his arrangement with Mr. McLeod was**
> 17:8 **he had a handshake and that was good enough for him.** And
> 17:9 he knew at some point there would be an invoice submitted
> 17:10 and he would pay it and we would move on.

(JFF 30(b)(6) testimony, 16:22-17:10, ROA 891-892) (emphasis added).

On behalf of JUSTICE FAMILY FARMS, Mr. Miller testified that Mr. Justice "was in agreement with the process moving forward towards establishing a conservation easement, so that we could have the tax advantages in the year 2007, by 12-31 of that year." (JFF 30(b)(6) testimony, 17:11-19:12, ROA 892). Mr. Miller testified it was JUSTICE FAMILY FARMS' understanding that the project was moving forward and the company was planning to use the deductions from the conservation easement as part of its "tax calculations for 2007" and that it was the company's "understanding that everything was on track." (JFF 30(b)(6) testimony, 20:7-18, ROA 895). Mr. Miller also testified that JUSTICE FAMILY FARMS understood that Mr. Hanlin and the Law Firm had been "brought in to handle all the legal aspects of the

entire conservation easement transaction" and that "Mr. Justice agreed to move forward with that." (JFF 30(b)(6) testimony, 22:2-23, ROA 897-898). JUSTICE FAMILY FARMS was expecting to be advised when the documents were ready, to schedule a meeting, to sign the documents, to record the easement, to send the materials to their tax preparers for the 2007 returns, and to pay the stewardship fees and other associated professional fees, including the fees to YES. (JFF 30(b)(6) testimony, 30:4-31:6, ROA 905-906; 33:6-34:1, ROA 908-909). It was JUSTICE FAMILY FARMS' "intent to move forward with this easement based on the information that we had, the proposed value of the property, and **it was <u>our</u> intent to have it done by the end of the year for tax advantage**." (JFF 30(b)(6) testimony, 32:19-33:5, ROA 907-908) (emphasis added). The jury reasonably could have inferred that the reference to "our intent" was a reference to JUSTICE FAMILY FARMS' and Mr. Justice's intent.

On December 17, 2007, the IRS sent a letter to Mr. McLeod informing him of an investigation into YES, which was unrelated to the plans for the JUSTICE FAMILY FARMS easement. The IRS letter was e-mailed to Mr. Hanlin on the morning of December 20, 2007. (Trial transcript, 262:20-264:19, ROA 185-187); (Trial transcript, 551:8-24, ROA 447); (Mohr e-mail, Dec. 20, 2007 with IRS letter, Pl. trial ex. 23, ROA 1070). Later in the day on December 20, 2007, Mr. Hanlin called Mr. McLeod informing him that based on the IRS letter and investigation he had been directed by the Law Firm to terminate the client-lawyer relationship with YES on all matters, including the JUSTICE FAMILY FARMS matter. (Trial transcript, 554:13-555:22, ROA 450-451); (Hanlin e-mail, Dec. 20, 2007, Pl. trial ex. 24, ROA 1076);

(Hanlin letter, Dec. 21, 2007, Pl. trial ex. 25, ROA 1077).

Immediately after he hung up, Mr. McLeod turned to his office manager/sister and said,

> Mary, Hal just told me that Richardson Plowden had terminated all relationships with me immediately. I don't have any choice but to call Jim Justice and recommend he postpone this project.

(Trial transcript, 555:18-22, ROA 451). Given the immediacy of Mr. McLeod's reaction, it is obvious that the decision to recommend postponing the easement was "proximately caused" by Respondents' withdrawing as counsel for YES on the JUSTICE FAMILY FARMS easement. There was no other tax counsel involved.

Since December 20th was so close to the end of the tax year, coupled with the fact that conservation easements are very complex legal matters, especially when using a $45,000,000 wetlands mitigation value for the before-easement value, the jury heard testimony that it would have been a waste of time to try to obtain a lawyer to take Mr. Hanlin's place. Mr. McLeod and Appellant's expert testified that no competent tax lawyer would have been available to take over the project because of the complexities of the JUSTICE FAMILY FARMS conservation easement project (or virtually any conservation easement) and because there were only ten (10) days left before the end of the 2007 tax year. (Trial transcript, 387:14-390:14, ROA 310-313; 397:1-6, ROA 320; 398:24-399:15, ROA 321-322; 402:3-12, ROA 325); (Trial transcript, 557:23-558:17, ROA 453-454).

Because Respondents had terminated the client-lawyer relationship abandoning the JUSTICE FAMILY FARMS conservation easement project leaving YES with no tax counsel and no hopes of finding replacement counsel for such a

complicated matter in such a short time period, Mr. McLeod testified that he was left with no choice other than to recommend to Mr. Justice that JUSTICE FAMILY FARMS not move forward with closing the easement in 2007. (Trial transcript, 555:18-22, ROA 451). A conference call was arranged for Christmas Eve, December 24, 2007, between Mr. Justice, his local lawyer, Steven Ball, his CPA, Mr. Harrah, and Mr. McLeod, and Mr. Crosby Lewis, the lawyer Mr. McLeod had engaged to represent YES for the IRS investigation.

During the telephone conference, Mr. McLeod recommended to Mr. Justice that the easement on the JUSTICE FAMILY FARMS property be postponed based on the IRS investigation. (JFF 30(b)(6) testimony, 31:7-32:18, ROA 906-907). Mr. McLeod was too embarrassed to tell Mr. Justice that Mr. Hanlin and the Law Firm had abandoned the project and because Mr. McLeod has a kind personality and tendencies not to say "nasty" things about people. (Trial transcript, 558:18-559:17, ROA 454-455; 559:23-560:11, ROA 455-456; 651:5-11, ROA 547; 654:2-655:14, ROA 550-551); (Trial transcript, 340:1-3, ROA 263). Mr. McLeod also testified that Mr. Justice had made it clear that while he had lots of advisers and lawyers and CPA's "that he didn't have anybody that knew anything about conservation easements." (Trial transcript, 651:12-19, ROA 511; 652:7-18, ROA 548).

Mr. McLeod testified concerning later communications with Mr. Justice as follows:

638:18 I wanted to go
638:19 forward, of course, you know, I communicated with
638:20 Mr. Justice many times after 2007 encouraging him
638:21 to move forward and I would love for Jim Justice to
638:22 have picked up the phone and said, "Yancey, that

638:23 sounds great, let's meet at the farm and talk about
638:24 moving forward with the project." But when I say
638:25 in this email that the IRS matter caused us to
639:1 delay the conservation project, the truth is that
639:2 what caused us to delay the conservation project
639:3 was Hal Hanlin and Richardson Plowden quitting.

639:4 **Q.** That is not what you wrote, is it?

639:5 **A.** Well, I don't think that on October 2nd,
639:6 2008, if I had said in this email, "Oh, by the way,
639:7 I also want to tell you all that the reason that I
639:8 advised you all to postpone the project back in
639:9 December, 2007, was that Hal Hanlin and Richardson
639:10 Plowden quit," that wouldn't have been appropriate.
639:11 I was trying, you know, to be a gentleman and
639:12 professional about the whole thing, I didn't see at
639:13 the time, at the moment in time, keep in mind that
639:14 when Hal and Richardson Plowden quit they didn't
639:15 give me any advice whatsoever about how to go
639:16 forward and handle the matter, which was extremely
639:17 delicate. I mean, for all I knew Jim Justice was
639:18 going to jump all over me for failure to produce
639:19 the conservation easement that would have provided
639:20 a $45,000,000 deduction and I was unable to do that
639:21 in good conscience at that time, so, no, I didn't
639:22 say anything about Hal Hanlin in this letter.

(Trial transcript, 638:18-639:22, ROA 534).

Mr. McLeod testified that if Respondents had not withdrawn and remained as tax counsel, he would have recommended to Mr. Justice that they proceed with the JUSTICE FAMILY FARMS easement. (Trial transcript, 560:12-20, ROA 456). Mr. McLeod testified that if Mr. Hanlin "hadn't quit I would have been perfectly willing to move forward with [the JUSTICE FAMILY FARMS easement], I knew I hadn't done

anything wrong." *Id.* The JUSTICE FAMILY FARMS' designee, Mr. Miller, testified[2] that if Mr. McLeod had recommended they proceed with the conservation easement, notwithstanding the IRS investigation, they would have accepted his advice, closed on the easement by the end of 2007, taken the tax deduction, and paid YES the professional fees it would have earned. (JFF 30(b)(6) testimony, 30:14-31:6, ROA 905; 38:14-39:9, ROA 913-914); (Harrah memo to YES, Sept. 30, 2008, PI trial ex. 38, ROA 1065).

Testimony and evidence was presented showing that Mr. Justice, through his company, JAMES C. JUSTICE COMPANIES, INC., partially performed on the unsigned Consulting Services Agreement when he issued a $15,000 check to YES making specific reference to "JUSTICE FAMILY FARMS" on the Comment portion of the check. (JAMES C. JUSTICE COMPANIES, INC. check, Nov. 13, 2008, PI. trial ex. 41, 1068); (JFF 30(b)(6) testimony, 38:14-39:9, ROA 913-914); (Trial transcript, 630:22-631:13, ROA 526-527).

Expert testimony was presented at trial through Dr. Adams that Respondents' terminating their client-lawyer relationship and abandoning the JUSTICE FAMILY FARMS conservation easement before it was recorded was a breach their professional, fiduciary, and contractual duties to YES. (Trial transcript, 265:7-272:24, ROA 188-195; 273:12-277:3, ROA 196-200).

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[2] This testimony was not admitted. The trial court sustained Respondents' objections to this testimony, notwithstanding Rules 701 and 803(3), SCRE. (Trial transcript, 796:1-820:1, ROA 659). See Appellant's discussion of the trial court's error in Argument II(B)(1) beginning on page 25.

Dr. Adams also testified that Respondents' withdrawal and abandonment was the reason the JUSTICE FAMILY FARMS easement did not close, thereby eliminating the fee YES would have earned. (Trial transcript, 326:23-327:21, ROA 249-250; 337:3-14, ROA 260, 359:13-18, ROA 282). Dr. Adams testified on cross examination that

> 338:3 We have evidence from the Justice Companies,
> 338:4 but certainly the kind of evidence that an expert
> 338:5 on evidence that would rely upon and so my opinions
> 338:6 stand on firm footing on the evidence, the sworn
> 338:7 testimony, the affidavits in this case, that **there**
> 338:8 **is an unmistakable causal link between their**
> 338:9 **wrongful withdrawal on the 20th of December and the**
> 338:10 **fact that the deal did not get done and Mr. McLeod**
> 338:11 **did not earn his 1.8 million dollar fee.**

(Trial transcript, 338:3-11, ROA 261) (emphasis added).

On cross examination Dr. Adams also was asked the following:

> 343:9 **Q.** Your testimony is that the withdrawal
> 343:10 torpedoed the deal completely ignores the fact that
> 343:11 the deal might not have even been capable of being
> 343:12 done at that time because they didn't have Mr.
> 343:13 Justice's commitment, did they?
>
> 343:14 **A.** They believed they had it and I think that
> 343:15 was a reasonable belief. I think all the testimony
> 343:16 in this case has shown, with not a single
> 343:17 contradiction, that he was firmly committed. He,
> 343:18 as the testimony said, ***he was in the boat***, he had
> 343:19 made that decision, he was going to do it, when the
> 343:20 package of documents came for the closing he was
> 343:21 going to sign them, they were going to be recorded.
> 343:22 The only thing that derailed this was Mr. Hanlin
> 343:23 abandoning Y.E.S. on the 20th of December.

(Trial transcript, 343:9-23, ROA 266) (emphasis added).

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344:9 **Q.** All right. Now, Professor Adams, isn't it
344:10 true, ***you said Mr. Justice was in the boat***, isn't
344:11 it true Mr. Justice didn't sign any of the
344:12 consulting agreements that were sent to him?

344:13 **A.** Sure.

(Trial transcript, 344:9-13, ROA 267) (emphasis added). Respondents did not move to strike any of the foregoing testimony by Dr. Adams.

Mr. McLeod testified that he told all of his clients about the IRS investigation, and "was furious and hurt and shocked, I hadn't done anything wrong." (Trial transcript, 570:8-17, ROA 466).

At the close of the Appellant's case at trial, the trial court denied Respondents' motion for directed verdict on the grounds that there was "a question of fact to submit to the jury" based on the testimony "from the 30(B)(6) witness and Mr. Harrah, all that combined together is enough to get past this motion." (Trial transcript, 867:12-ROA 685). At the close of Respondents' case at trial, however, the trial court granted Respondents' second motion for a directed verdict on the proximate cause issue, notwithstanding the abundance of evidence and testimony on those issues. Admittedly acknowledging that he was "struggling with this," the trial court made an oral ruling granting the motion on the grounds that Appellant had not submitted evidence from Mr. Justice thereby "breaking the causal link." (Trial transcript, 1147:19-1148:13, ROA 869-870); *see also* (Trial transcript, 1149:2-16, ROA 871; 1150:7-21, ROA 872; 1152:17-22, ROA 874; 1153:4-8, ROA 875).

The formal Order issued by the trial court granting Respondents' motion for directed verdict, contains many errors discussed in other parts of this Brief, but

includes several factual errors relevant to this Argument. In summarizing the evidence presented at trial, the Order, on page 3 mistakenly states that the subject property was owned by Mr. Justice "***or*** one of his limited liability companies, . . .." (Order Granting Defendants' Motion For Directed Verdict at 3, ROA 5) (emphasis added). There was no evidence presented at trial that Mr. Justice owned the property individually. The Order omits any reference to the fact that Mr. Hanlin had included JUSTICE FAMILY FARMS as a party to the Consulting Services Agreement. (Hanlin e-mail, Nov. 7, 2007, Pl. Trial ex.. 3, ROA 1060). The Order omits any reference to the testimony and evidence showing JUSTICE FAMILY FARMS' or Mr. Justice's intent to record an easement. See e.g., (Trial transcript, 470:18-472:7, ROA 366-368; 475:4-17, ROA 371; 482:6-483:17, ROA 378-379; 484:10-17, ROA 380; 489:10-13, ROA 385; 490:3-491:4, ROA 386-387; 622:8-15, ROA 518); (JFF 30(b)(6) testimony, 7:18-9:18, ROA 882-884; 11:3-20, ROA 886; 16:19-17:10, ROA 891-892; 18:23-19:12, ROA 893-894; 19:13-23, ROA 894; 20:1-18, ROA 895; 23:20-24:7, ROA 898-899; 30:4-31:6, ROA 905-906; 32:19-34:1, ROA 907-909; 35:22-36:9, ROA 910-911; 40:2-21, ROA 915; 68-9:12, ROA 943).

When making reference to the $15,000 check paid by to YES, the Order on page 6 makes no reference to the fact that it was JAMES C. JUSTICE COMPANIES, INC. that issued the check and not Mr. Justice individually, or to the fact that Mr. Justice's signature is on the check, or to the fact that "JUSTICE FAMILY FARMS" appears on the Comment portion of the check, or that the payment constitutes a partial performance of the Consulting Services Agreement, all of which is evidence of an intent to perform relevant to the proximate cause issue. (JAMES C. JUSTICE

COMPANIES, INC. check, Nov. 13, 2008, Pl. trial ex. 41, ROA 1068); (JFF 30(b)(6) testimony, 38:14-39:9, ROA 913-914); (Trial transcript, 630:22-631:13, ROA 526-527); see also (Trial transript, 734:22-735:2, ROA 630-631 (testifying that all professionals were paid for work on the easement)).

The Order does accurately conclude on page 7, however, that Mr. "McLeod testified that he was compelled to recommend in the December 24th call to [Mr.] Justice, Ball, and Harrah that [Mr.] Justice postpone the proposed conservation easement because [the Law Firm] and Hanlin withdrew on December 20th." (Order Granting Defendants' Motion For Directed Verdict at 7, ROA 11). This testimony by Mr. McLeod together with the testimony regarding JUSTICE FAMILY FARMS' intent and Mr. Justice's intent to close on the conservation easement was sufficient to send the proximate cause issue to the jury. *See also* (Trial transcript, 740:19-23, ROA 636 (Mr. Harrah testifying that Mr. Justice never advised that he or JUSTICE FAMILY FARMS were going to abandon the project, prior to the December 24, 2007 conference)).

In the "Discussion" section, the Order inaccurately states that there are two possible reasons Mr. Justice "did not proceed with the conservation easement, based on the evidence offered by YES: it was either the disclosure of the IRS investigation or the recommendation for [Mr.] McLeod that [Mr.] Justice postpone the conservation easement." (Order Granting Defendants' Motion For Directed Verdict at 7-8, ROA 11-12). There was no evidence offered by YES, or any other party for that matter, showing that Mr. Justice or JUSTICE FAMILY FARMS had any concerns about the IRS investigation of YES. To the contrary, the only evidence

even remotely related to that point was the testimony about the December 24th telephone conversation where, after hearing about the IRS investigation and Mr. McLeod's recommendation not to proceed, Mr. Justice simply said, "Yancey, don't worry about it." (Trial transcript, 558:18-559:17, ROA 454-455).[3]

### B. It was legal error to grant Respondents' motion for a directed verdict based on the testimony and evidence in the record.

"In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence." *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 146, 697 S.E.2d 644, 654 (2010). Whether a defendant's acts or omissions proximately caused harm to a plaintiff is almost always a question of fact for a jury. *See Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006); *Oliver v. South Carolina Dept. of Highways & Pub. Transp.*, 309 S.C. 313, 318, 422 S.E.2d 128, 131 (1992) (causation issues generally present questions of fact for the jury). The Order granting Respondents' motion for a directed verdict based on an alleged *lack* of causation evidence was plain error and should be reversed and remanded for retrial.

There were three causes of action alleged in YES' Amended Complaint: professional negligence, breach of fiduciary duty, and breach of contract, each of which had distinct standards of proof for causation and all of which were satisfied

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[3] There was an objection at conclusion of that testimony, which was sustained, but it is unclear what portion of Mr. McLeod's testimony was the subject of the objection or the trial court's ruling. Furthermore, there were no instructions to the jury as to what portion of Mr. McLeod's testimony to disregard.

by the evidence actually admitted during the trial of the case.

### 1. Standard for Proof of Causation – Breach of Fiduciary Duty claims.

A breach of fiduciary duty claim is a separate cause of action from a legal professional negligence claim or from a breach of contract claim. *See Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 146, 697 S.E.2d 644, 654 (2010). *See also Government of Rwanda v. Rwanda Working Group*, 227 F. Supp.2d 45 (D.C.Cir. 2002); *Homa v. Friendly Mobile Home Manor, Inc.*, 93 Md. App. 337, 612 A.2d 322 (Ct. App. 1992).

"One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the [fiduciary] relation." *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004). For a claim for breach of fiduciary duty, causation is established where a plaintiff shows that the defendant's conduct was a material element or a substantial factor in bringing about the loss. *See Smith v. Hastie*, 367 S.C. 410, 417, 626 S.E.2d 13, 17 (Ct. App. 2005) ("One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.") There is authority that in a breach of fiduciary duty claim it is the actual breach that is the harm and allowing the claim to be maintained without requiring specific proof of causation or specific damages. *See* 1 Geoffrey C. Hazard, Jr. & W. William Hodes, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.5:108 (2d ed. Supp. 1997) (explaining that, in a breach of fiduciary duty claim, the breach of loyalty is the harm and the client is not required

to prove causation or specific injury). *See e.g., Hendry v. Pelland,* 73 F.3d 397, 401 (D.C. Cir. 1996); *Burrow v. Arce,* 997 S.W.2d 229, 240 (Tex. 1999) (ruling that clients suing their attorney for breach of fiduciary duty need prove only that their attorney breached the duty, not that the breach caused them any injury).

The remedial consequences of a fiduciary's disloyalty – in light of the extremely high standard of conduct – explains why a lesser causal link between a fiduciary's breach and the beneficiary's loss is the appropriate standard of proof in a breach of fiduciary duty claim as compared to the traditional negligence standard of "but-for" causation. Generally, the fiduciary's disloyalty may have inflicted loss on the beneficiary by distorting how the fiduciary performed, depriving the beneficiary of the value of loyal performance but doing so in a manner that is difficult to prove.

The foregoing "resulting from" or "substantial factor" standards, which are the standards in South Carolina, are preferable to stringent application of a "but for" standard because they better advance the objective of accountability by fiduciaries allowing the courts and juries to consider and formulate remedial alternatives. Because South Carolina's fiduciary doctrine embodies deterrent and prophylactic goals, applying "resulting from" or "substantial factor" standards for factual cause supports these goals and is, in fact, the law in South Carolina. *See Smith v. Hastie,* 367 S.C. at 417, 626 S.E.2d at 17. Such a relaxed causal requirement is appropriate, especially when the beneficiary's ability to prove but-for causation can be limited by the nature of the relationship with the fiduciary. Such a risk is appropriately borne by the fiduciary, who, after all, undertook to act loyally on the

beneficiary's behalf and then chose to act disloyally, as was shown by the evidence presented during the trial of this case.

The evidence and testimony shows that Respondents' withdrawal in breach of their fiduciary duties to YES was at least a "substantial factor" in YES not earning a fee from the closing on the JUSTICE FAMILY FARMS' conservation easement. Or stated another way, YES suffered damages when it lost its professional fee "resulting from" Respondents' breach of their fiduciary duties. Under either standard or analysis the trial court's Order granting Respondents' motion for directed verdict was in error and should be reversed and remanded for a new trial.

**2. <u>Standard for Proof of Causation – Negligence claims</u>.**

The plaintiff must prove proximate cause in a professional negligence action. *See McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488, 497 (Ct. App.1998); *Shealy v. Walters*, 273 S.C. 330, 256 S.E.2d 739, 742 (1979). Causation in fact is proved by establishing that the injury would not have occurred "but for" the defendant's negligence. *See Handlesmann v. McCardle*, 275 S.C. 46, 267 S.E.2d 531 (1980).

Mr. McLeod testified that, notwithstanding the IRS letter, that if Respondents had not withdrawn and remained as tax counsel, he would have recommended to Mr. Justice that they proceed with the JUSTICE FAMILY FARMS easement. (Trial transcript, 560:12-20, ROA 456). Mr. Miller and Dr. Adams testified that JUSTICE FAMILY FARMS intended to close on the easement. Evidence was submitted to the jury showing that the grantee organization, COLT, would have accepted the

easement. (YES e-mail, Dec. 27, 2007, noting that COLT had approved the easement gift, Pl. trial ex. 34, ROA 1083). This is sufficient "causation in fact" evidence to establish that YES' injuries would not have occurred "but for" Respondents' errors.

"Legal cause it is proved by establishing foreseeability." *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978). "Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, the plaintiff need not prove that the actor should have contemplated a particular event which occurred." *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990); *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978). Something is said to be foreseeable when it can be seen or known in advance; in other words, when it is reasonable to anticipate that something is a likely result of an act, omission, or failure of oversight.

A plaintiff, therefore, proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence. *See Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App.1996). Proximate cause is the efficient or direct cause of an injury. *See id.* Negligence is deemed to be the proximate cause of an injury when, without such negligence, the injury would not have occurred or could have been avoided. *See id.* Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence. *See id.*

A jury could reasonably infer and conclude that it was foreseeable that the JUSTICE FAMILY FARMS' easement would not close in 2007 when the only lawyer and law firm actively involved in the easement withdrew with only ten (10) days remaining before the end of the tax year. In other words, it was reasonable to anticipate the inability to close on the easement was a likely result of Mr. Hanlin's and the Law Firm's withdrawal.

Dr. Adams gave testimony that Respondents' acts and omissions created an unmistakable causal link between Respondents' acts and omissions and YES' damages. (Trial transcript, 338:3-11, ROA 261). Settled law in South Carolina makes such testimony by an expert sufficient to create a jury question. *See Hatfield v. Van Epps*, 358 S.C. 185, 594 S.E.2d 526 (Ct. App. 2004) (legal malpractice case) ("This [expert testimony] evidence was sufficient to create a jury issue as to whether the alleged breach of the standard of care proximately caused damage to [the client].") It was reversible error for the trial court to rule otherwise.

The lawyer's negligence does not have to be the sole cause, but must be "at least a contributing proximate cause of the injuries." *Shealy v. Walters*, 273 S.C. 330, 256 S.E.2d 739, 742 (1979); *see also Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330-31, 673 S.E.2d 801, 802-03 (2009) (non-moving party "only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment"); *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006) (plaintiff does not have to prove that defendants were the sole proximate cause of plaintiff's injury, only that defendants' negligence

was at least one of the proximate causes of the injury). "The question of proximate cause ordinarily is one of fact for the jury, and it may be resolved either by direct or circumstantial evidence." *Id.* A jury must determine whether a plaintiff's damages would have occurred "but-for" the defendant's negligence and whether such damages were reasonably foreseeable. *See id* at 662-63.

In this case, the trial court's Order recognized the proper standard of proof for causation in a negligence claim yet it erred when applying that standard to the testimony and evidence in the record. YES presented far more than a scintilla of evidence showing that but-for the improper withdrawal by Respondents, the conservation easement would have been recorded and YES would have earned a significant fee for its role as the coordinator of the easement. The trial court incorrectly applied the standard of review in this matter and therefore, Appellant respectfully requests this Court reverse the Order granting directed verdict and remand for a new trial.

### 3. Standard for Proof of Causation – Breach of Contract claims.

To recover for a breach of contract, the plaintiff must establish three elements by the preponderance of the evidence: (1) a binding contract; (2) breach of contract; and (3) damages proximately resulting from the breach. *See Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 146, 697 S.E.2d 644, 655 (2010). The necessary elements of a contract are offer, acceptance, and valuable consideration. *See id.* There was no dispute that YES entered into a contract with the Law Firm to provide legal advice concerning the conservation

easement with JUSTICE FAMILY FARMS. (Engagement letter from Mr. Hanlin, Dec. 5, 2007, Pl. trial ex.10, ROA 1062). This contract of representation provided that "Richardson Plowden & Robinson, P.A., [will act] as [YES'] attorneys to assist [YES] in the creation of a conservation easement on certain real property known as Black River Farm, near Manning, South Carolina (the "Property")." There was no dispute that the law firm (and Mr. Hanlin) withdrew from the client-lawyer relationship and did not finish providing the legal advice necessary for "the creation of a conservation easement on certain real property known as Black River Farm" that was owed or controlled by JUSTICE FAMILY FARMS. The sole issue focused on by the trial court in its Order granting the motion for directed verdict was whether there was any evidence to establish damages proximately resulting from the breach.

The trial court erred in granting Respondents' motion for a directed verdict because, in the light most favorable to YES, there was evidence in the record that because the Law Firm and Mr. Hanlin withdrew from the representation YES was not able to recommend its clients, Mr. Justice and JUSTICE FAMILY FARMS, proceed with the conservation easement thereby proximately resulting in the loss of the fees it would have earned from that easement. *See Manios*, 697 S.E.2d at 655. Further, there was evidence of Justice Family Farms' intent to proceed with the conservation easement right up to the point when Mr. McLeod had to recommend otherwise based on the Respondents' withdrawal from the client-lawyer relationship. For example Mr. Miller testified as follows:

> 32:19 **Q.** Now, I want to summarize some things
> 32:20 as we're getting to the real point of this deposition.
> 32:21 Prior to the telephone call on December 24, 2007, what

32:22 was Justice Family Farms intent, if anything, with regard
32:23 to executing a conservation easement on the Black River
33:1 Farms property?

33:2 **A.** It was fully our intent to move forward
33:3 with this easement based on the information that we had,
33:4 the proposed value of the property, and it was our intent
33:5 to have it done by the end of the year for tax advantage.

(JFF 30(b)(6) testimony, 32:19-33:5, ROA 907-908).

68:9 **Q.** Is it your contention as you sit here
68:10 today that Justice Family Farms intended to go through
68:11 with this project?

68:12 **A.** Yes, sir, it is.

(JFF 30(b)(6) testimony, 68:9-12, ROA 943).

Through testimony and evidence, evidence was before the jury establishing that but for Respondents' improper withdrawal, JUSTICE FAMILY FARMS would have closed on and recorded the conservation easement before the end of 2007 and YES would have been paid a substantial fee. Far more than a "scintilla of evidence" was before the jury to show that Respondents' acts and omissions were the proximate cause of YES' damages. Therefore, the Order directing the verdict was improper.

A plaintiff is entitled to recover if a preponderance of the evidence shows that the defendant did, in fact, breach the contract between the two parties. *See Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962); *see also Tillinghast v. Boston & Port Royal Lumber Co.*, 39 S.C. 484, 18 S.E. 120 (1893), *overruled on other grounds by Hendrix v. Hendrix*, 296 S.C. 200, 371 S.E.2d 528 (1988); *Sechrest v. Forest Furniture Co.*, 264 N.C. 216, 141 S.E.2d 292 (1965)

(nonperformance of valid contract is breach); 17A Am. Jur. 2d Contracts § 716 (1991); Restatement (Second) of Contracts § 235 (1981); Black's Law Dictionary 188 (6th ed. 1990) (defining the phrase "breach of contract"). Evidence is in the record that Respondents breached their contract when they summarily withdrew from their representation on the transaction. (Trial transcript, 142:13-24, ROA 65; 337:3-14, ROA 260; 339:1-7, ROA 262). Evidence also is in the record that the jury could have relied on to find that YES' damages were a direct and proximate result of Respondents' breach. (Trial transcript, 326:23-327:21, ROA 249-250; 338:3-11, ROA 261). Despite this evidence, the trial court did not apply the "direct and proximate result of the breach" standard on YES' breach of contract claims.

The trial court's Order made no reference to the standard of proof for causation on YES' breach of contract claim. The trial court applied the wrong standard of review for this claim, ignored evidence establishing the proximate cause element for the breach of contract claim, and was in error when it granted Respondents' *second* motion for directed verdict. Therefore, YES respectfully requests this Court reverse the Order granting directed verdict and remand for a new trial.

### C. There was testimony in the record that JUSTICE FAMILY FARMS intended to proceeded with the easement.

The Court erred in finding that the testimony by Mr. Miller, JUSTICE FAMILY FARMS corporate designee, that was admitted into evidence concerning the corporation's intent to close on the easement was not sufficient to defeat Respondents' motion for a directed verdict. Respondents never disputed that

JUSTICE FAMILY FARMS was a party to the contract. Their contention, and the trial court's error, was that because Mr. Justice was the decision-maker for that corporation, his testimony was necessary to establish the corporation's intent. This ruling was in error.

As for Mr. Miller's testimony that was admitted, under Rule 30(b)(6), SCRCP, "[t]he person so designated shall testify as to matters known or reasonably available to the organization." Evidence was admitted establishing, for the purposes of a directed verdict motion, that JUSTICE FAMILY FARMS was party to the conservation easement contract, paid for partial performance of the contract and, at the time of the easement project, all parties involved were acting as if JUSTICE FAMILY FARMS was the corporation that owned the land.

The findings on page 9 of the Court's Order which state that "what [JUSTICE FAMILY FARMS] might have intended is simply not pertinent" is contrary to the evidence on the record. (Order Granting Defendants' Motion For Directed Verdict at 9, ROA 13). This finding constitutes reversible error because it ignores the evidence in the record from which the jury could have reasonably concluded that JUSTICE FAMILY FARMS would have closed on the easement if Respondents had not withdrawn as tax counsel, thereby establishing proximate cause. This finding constitutes reversible error because it contains an erroneous conclusion that Mr. Miller's testimony, the corporate designee for JUSTICE FAMILY FARMS, was not sufficient to establish the corporation's intent.

## II. The Trial Court Improperly Excluded Evidence That Would Have Further Established the Link Between Respondents' Tortious Withdrawal as Counsel and YES' Damages.

### A. Facts Relevant to Argument II.

#### 1. Excluded testimony of JUSTICE FAMILY FARMS as to its intent to close on the easement notwithstanding the IRS letter.

Trial court did not allow the jury to hear Mr. Miller's testimony that had Mr. McLeod recommended going forward with the easement, notwithstanding the IRS letter, it was more likely than not that JUSTICE FAMILY FARMS would have proceeded with the easement. (JFF 30(b)(6) testimony, 34:2-15, ROA 909). Specifically, Mr. Miller testified in the Rule 30(b)(6) deposition as follows:

34:2 **Q.** Thank you. Now, I want you to make
34:3 an assumption to answer the next question I'm going to
34:4 ask you and the assumption is this, assume for the
34:5 purposes of this coming question that -- notwithstanding
34:6 the IRS letter, that during the call on December 24th,
34:7 2007, Yancey McLeod recommended that Justice Family Farms
34:8 move forward with the easement, assume that, and he made
34:9 a recommendation to move forward with the easement.
34:10 Using that assumption, was it more likely than not that
34:11 Justice Family Farms would have proceeded with the
34:12 conservation easement?
34:13 MR. LEONARDI: Object to form.
34:14 BY MR. PENDARVIS:

34:15 **A.** Yes.

(JFF 30(b)(6) testimony, 34:2-16, ROA 909).

The trial court sustained Respondents' objections to this testimony based on its interpretation of Rules 701 and 803(3), SCRE. (Trial transcript, 796:1-820:1, ROA 659-683).

### 2. Excluded testimony and evidence showing three other landowners working with YES proceeded with closing on their conservation easements notwithstanding the IRS letter.

The trial court also did not allow Appellant to testify about three other easements that actually closed at the end of the 2007 tax year notwithstanding the IRS letter as all three of those landowners had their own tax counsel. (Trial transcript, 496:3-497:14, ROA 392-393; 500:10-21, ROA 396; 500:22-510:3, ROA 396-406; 518:12-521:11, ROA 414-417; 522:10-526:12, ROA 418-422; 529:21-532:6, ROA 425-428). In other words it was not the fact of the IRS investigation that "killed the deal" with JUSTICE FAMILY FARMS, but was instead the fact that the only tax counsel involved, Respondents, had quit, abandoning their client, YES, and any prospects of the JUSTICE FAMILY FARMS' easement closing in 2007. The trial court ruled pursuant to Rule 403, SCRE, that admitting evidence and testimony showing that the other three easements closed in 2007 tax year would be confusing to the jury. (Trial transcript, 530:24-532:6, ROA 426-428).

### B. Mr. Miller's testimony that notwithstanding the IRS letter JUSTICE FAMILY FARMS would have closed on the easement had Mr. McLeod made such a recommendation should have been admitted into evidence.

The trial court erred in excluding Mr. Miller's testimony that JUSTICE FAMILY FARMS would have closed on the conservation easement if Mr. McLeod had made the recommendation to proceed during the December 24, 2007 telephone call. Mr. McLeod testified that he would have made such a recommendation if Respondents had not withdrawn as counsel. (Trial transcript, 560:12-20, ROA 456). This

testimony from Mr. Miller would have clearly connected the proximate link between Respondents' acts and omissions and YES' damages. The trial court's erroneous ruling was on the grounds that such testimony was speculative, even though the black-letter law on legal malpractice claims requires the plaintiff to prove what should have happened but for the lawyer's alleged negligence. *See e.g.*, *Eadie v. Krause*, 381 S.C. 55, 671 S.E.2d 389 (Ct. App. 2008); *McNair v. Rainsford*, 330 S.C. 332, 349-50, 499 S.E.2d 488, 497 (Ct. App. 1998) (expert testimony created factual issue for jury to resolve "in regard to the proximate cause of McNair's damages"). Nevertheless, the trial court in this matter sustained Respondents' objections to the admission of testimony by JUSTICE FAMILY FARMS' designee on what it would have done if Respondents had not abandoned their client, which would have allowed Mr. McLeod to inform them of the IRS letter and recommend the proceed with the easement.

This evidence was not excluded under any valid evidence objection and instead, the trial court misapprehended the law governing 30(b)(6) designees. In discussing its decision not to allow this testimony, the trial court explained the basis for the ruling:

> 810:13 **THE COURT:** All right. Here is my concern on
> 810:14 this question, page 34, lines 2 through 15, that
> 810:15 hypothetical, is that Mr. Miller wasn't the point
> 810:16 man, Mr. Harrah was. Mr. Harrah has testified.
> 810:17 Subject to that, Mr. Harrah stated when the coal
> 810:18 mine sold, if he was still working for Justice now
> 810:19 he perhaps could have been the 30(B)(6) witness, we
> 810:20 don't know that, that is not a fact before us, I'm
> 810:21 concerned that **if Miller is not the point man how**
> 810:22 **does he have all that information relevant to what**

810:23 **Justice is thinking or doing in December of '07**
810:24 like Harrah did. Harrah was the guy, he had the
810:25 point for Justice, "You watch that, you deal with
811:1 Mr. McLeod, tell me what's going on," that is what
811:2 was going on.
811:3 **Now, how does Miller have competence, not**
811:4 **being the point man in '07, but he's the man, he's**
811:5 **the designee post trial filing, how does that come**
811:6 **in?**

(Trial transcript, 810:13-811:6, ROA 673-674) (emphasis added).

This ruling demonstrated the fundamental misunderstanding of the Rule 30(b)(6) designee, JUSTICE FAMILY FARMS' right to choose who is to testify on its behalf and bind the company on its position, and the designee's duty to review records and talk to witnesses to properly prepare to testify on behalf of the company. The trial court improperly focused on Mr. Miller not having first hand knowledge, which is not required of any Rule 30(b)(6) designee. Further, the testimony was admissible and directly related to JUSTICE FAMILY FARMS' intent to close on the easement, an intent which is vital to the issue of causation in almost all legal malpractice cases.

Since it is not literally possible for a corporation to testify, in order to secure the testimony of a corporation, a corporation must "designate one or more officers, directors or managing agents, or other persons who can sit to testify on its behalf. . . . The persons so designated shall testify as to matters known a reasonably available to the organization." Rule 30(b)(6), SCRCP. "Rule 30(b)(6) is designed 'to avoid the possibility that several officers and managing agents might be deposed in turn, with each disclaiming personal knowledge of facts that are clearly known to

persons within the organization and thus to the organization itself." *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006). Therefore, the corporation "'must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the party noticing the deposition] and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed ... as to the relevant subject matters.'" *Id.* quoting *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 151 (S.D.N.Y.1997). "[T]he duty to present and prepare a Rule 30(b)(6) designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved." *See United States v. Taylor*, 166 F.R.D. 356, 361-62 aff'd, 166 F.R.D. 367 (M.D.N.C. 1996). "The deponent must prepare the designee to the extent matters are reasonably available, whether from documents, past employees, or other sources. Thus, a Rule 30(b)(6) designee does not give his personal opinions, but presents the corporation's 'position' on the topic." *Id.* at 361. "When a corporation produces an employee pursuant to a rule 30(b)(6) notice, it represents that the employee has the authority to speak on behalf of the corporation with respect to the areas within the notice of deposition. This extends not only to facts, but also to subjective beliefs and opinions." *Brazos River,* 469 F.3d at 433 citing *Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 25 (E.D.Pa. 1986).

The trial court erred in finding otherwise and Appellant respectfully requests this Court rule that such evidence was admissible in the hopeful event the trial court's rulings directing a verdict in this case are reversed and this case is remand

for a new trial.

### C. The admission of evidence and testimony showing that three other easements closed in 2007 notwithstanding the IRS letter would not have been confusing to the jury.

As part of proof of causation, Appellant proffered testimony that YES had three other conservation easement matters that it was working on in December 2007 and that calls were made to the parties in all three of the other projects to inform them of the IRS letter. McLeod was prepared to testify that unlike the Justice project, because each of the landowners in the other three projects had their own tax counsel, he was able to recommend that the other projects proceed to closing. Mr. McLeod also was prepared to testify that the other three projects did, in fact, close in the 2007 calendar year, notwithstanding the IRS letter. Respondents objected, claiming that such testimony would be confusing to the jury and was not relevant to proving whether Respondents withdrawal caused damages to YES. The Court sustained Respondents' objection and this evidence was not submitted to the jury. This ruling was erroneous, and should be reversed to prevent this error from happening again at the re-trial of this case in the hopeful event the trial court's Orders are reversed and the matter is remanded.

Mr. Yancey McLeod described exactly why he did not inform Justice Family Farms of Respondents' withdrawal as tax counsel:

48:7 I had four conservation projects I was
48:8 trying to close that year. And I had just received
48:9 the shock of this letter from the IRS, which I
48:10 found preposterous, and I had advised all four of
48:11 my clients, on whose projects I was working to
48:12 close year's end in '07, about the IRS letter, and,

48:13 um, I advised all of them, after we discussed the
48:14 letter and what it meant, that we should move
48:15 forward to close the projects, because I had not
48:16 done anything wrong, and the other three projects
48:17 closed.
48:18 The attorneys involved in those
48:19 projects, after our discussion, decided to move
48:20 forward to close those projects. I made the same
48:21 disclosure to Mr. Justice.
48:22 And it would have been extraordinarily
48:23 embarrassing, to me, to have to tell anybody,
48:24 including finding a new tax attorney, if I thought
48:25 that I could find one that could step in at that

(McLeod deposition testimony, 48:7-48:25, ROA 1049).

YES' entire business operated on word-of-mouth referrals and Mr. McLeod rightly had serious concerns about the message that would be sent by the information that his attorneys had terminated their representation immediately after receipt of the IRS letter. In explanation for the sudden departure, the implication that there was wrong-doing on the part of YES would grow exponentially. Second, YES' recommendation that JUSTICE FAMILY FARMS not move forward with the project before the end of 2007 was directly and proximately caused by Respondents' withdrawal. It matters not whether JUSTICE FAMILY FARMS knew of Respondents' withdrawal. It only matters whether a jury could determine the withdrawal was the proximate cause of YES being unable to recommend moving forward without an experienced tax lawyer on the project.

The trial court's Order created an unnecessary requirement to establish proximate cause first, by requiring separate evidence of Mr. Justice's intent even though Mr. McLeod's and Mr. Justice's agreement contain no condition or requirement that both JUSTICE FAMILY FARMS and Mr. Justice, individually, execute

the documents finalizing the conservation easement. Next, as argued in other sections in this brief, the trial court erred in excluding evidence of Mr. Justice's individual intent to proceed with the conservation easement notwithstanding the IRS investigation of YES.

Third, as Mr. McLeod's testimony above explained, YES was working to close four conservation easements prior to the end of 2007. The three other easements had tax lawyers working on the transactions who were hired by the grantor per the usual procedure. YES gave the same information regarding the IRS letter and investigation to all four easement grantors. As for the three grantors who had their own tax counsel, Mr. McLeod was able to recommend those landowners to proceed with the easements and those landowners closed their easements. JUSTICE FAMILY FARMS was the only land owner of the four that did not have the benefit of its own tax counsel and was relying on the expertise of the tax lawyer for YES to advise on this transaction. Without a tax lawyer, Mr. McLeod was not able to make the same recommendation made to the other three landowners to move forward.

The trial court was in error in making its ruling to exclude the testimony and evidence concerning the other three landowners who closed on their conservation easements with YES as the consultant notwithstanding the IRS letter. Such evidence would not have been confusing to the jury and was additional evidence bolstering the proximate cause connection between Respondents' tortious withdrawal and the damages suffered by YES.

## III. The Trial Court Disregarded Expert Testimony On Causation Based On a Hearsay Objection That Was Never Raised During Trial.

### A. Facts Relevant to Argument III.

On cross examination, Dr. Adams was asked about Mr. Justice's commitment to proceed with the easement. His testimony set forth in Argument I was that Mr. Justice "was in the boat." (Trial transcript, 343:9-344:13, ROA 266-267).

The remarkable and glaring omission in the trial transcript is the absence of any objection to that statement. As shown earlier, not only was there no objection, but Dr. Adams was asked a follow-up question specifically incorporating his prior testimony that "you said Mr. Justice was in the boat, . . ." further emphasizing this statement regarding Mr. Justice's and JUSTICE FAMILY FARMS' intent to close on the easement in 2007.

### B. Respondents Made No Objection to Dr. Adams' Testimony That Mr. Justice "Was In The Boat."

The trial court was in error when it ruled on page 10 of the Order that Dr. Adams' testimony was "not admissible to create an issue of fact for the jury as to [Mr.] Justice's intent." (Order Granting Defendants' Motion For Directed Verdict, at 10, ROA 14). This part of the Order discusses Rule 703, SCRE and the applicability of the testimony given by Appellant's expert witness, Dr. Adams, to the issue of causation. This ruling is erroneous because there was no objection to this testimony and in fact Dr. Adams' statement was repeated in a follow-up question. As a result, Respondents failed to preserve any objection or argument against the

admissibility of this testimony.

Curiously, the Order concludes that "while it may have been proper for [Dr.] Adams to repeat what [Mr.] Justice told [Mr.] Miller to explain the basis of his opinions, such evidence, which is clearly hearsay, is not admissible to create an issue of fact for the jury as to Justice's intent." This conclusion in the Order is not proper because the Respondents did not object to Dr. Adams' testimony. Rule 103(a)(1), SCRE, required the Respondents to assert a timely objection or motion to strike the admission of Dr. Adams' testimony. *See e.g., Roberts v. Roberts*, 299 S.C. 315, 384 S.E.2d 719 (1989) (a party opposing the introduction of specific evidence must object to it and give grounds for the objection). Counsel for Respondents' failure to make a timely objection constitutes waiver of the objection. *See State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981). Generally, evidence admitted without objection becomes competent evidence and cannot be disregarded on a motion for a directed verdict. *See Cantrell v. Carruth*, 250 S.C. 415, 158 S.E.2d 208 (1967).

In the light most favorable to YES, the jury could have concluded that Mr. Justice's statement that "he was in the boat" meant just what he said: That Mr. Justice and his companies intended to follow Mr. McLeod's recommendations. If Respondents had not breached their fiduciary, professional, and contractual duties and remained to provide legal services for YES on the conservation easement project, YES and Mr. McLeod testified that they would have recommended Mr. Justice and his companies proceed with the project.

## IV. The Trial Court Did Not Apply the Proper Standard of Review of the Facts and Inferences From Those Facts to Respondents' motion for a Directed Verdict.

A motion for directed verdict pursuant to Rule 50(a), SCRCP, can be granted only when there is no factual dispute for the jury to decide. The trial court must view the evidence in the light most favorable to the Appellant, as the non-moving party, and draw all reasonable inferences in its favor. See *Mullinax v. J.M. Brown Amusement Co., Inc.*, 333 S.C. 89, 508 S.E.2d 848 (1998).

"The trial court should eliminate from its consideration all evidence contrary to or in conflict with the evidence favorable to the nonmoving party and give to the nonmoving party every favorable inference that the facts reasonably suggest." *Small v. Pioneer Machinery, Inc.*, 316 S.C. 479, 450 S.E.2d 609 (Ct. App. 1995), *cert. denied*, (1995). The trial court cannot be concerned with the credibility of the witnesses or the weight of the evidence because those are jury issues. *See Brown v. Orndorff*, 309 S.C. 320, 422 S.E.2d 151 (Ct. App. 1992). If the evidence is susceptible to more than one reasonable inference, the trial court must submit the case to the jury. *See Tubbs v. Bowie*, 308 S.C. 155, 417 S.E.2d 550 (1992). Pursuant to Rule 50(a), SCRCP, a judge may properly enter a directed verdict only when "the case presents only questions of law." Rule 50(a), SCRCP.

After denying Respondents' first motion for directed verdict and in granting their second such motion, the trial court stated that it had "wrestled with this whole thing" and was "struggling with this" and that the call on whether there was a causal link was "very close" - all of which demonstrates that the trial court engaged in

weighing the evidence instead of determining whether a scintilla of evidence existed on which the jury could make the determination of its weight. (Trial transcript, 1147:19-1148:13, ROA 869-870). In this matter, the trial court erred in determining the weight of the evidence instead of focusing on the court's true role, which should have been to view the evidence in the favor of the YES, as the non-moving party, and determine if a scintilla of evidence was in the record, and if so, to allow the case to be submitted to the jury.

## CONCLUSION

Based on the foregoing, Appellant respectfully requests this Honorable Court reverse the lower court's Order Granting Respondents' Motion for Directed Verdict, remand this case for a new trial, and reverse the trial court's ruling excluding the evidence on the JUSTICE FAMILY FARMS' designee's testimony on its intent and on the evidence concerning the other three easements.

Respectfully submitted,

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August 16, 2013
Beaufort, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge
DeAndrea G. Benjamin, Circuit Court Judge

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Case No. 2010-CP-40-3297
Appellate Case No. 2012-212687

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YANCEY ENVIRONMENTAL SOLUTIONS, LLC. . . . . Appellant,

vs.

RICHARDSON PLOWDEN & ROBINSON, P.A. and
George Harold Hanlin, J.D. . . . . Respondents.

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## Certificate of Counsel

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The undersigned, as counsel for the Appellant, hereby certifies that, to the best of my knowledge and belief, the FINAL BRIEF OF APPELLANT and the FINAL REPLY BRIEF OF APPELLANT comply with Rule 211(b) of the South Carolina Appellate Court Rules.

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**PROOF OF SERVICE**

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I, Catherine B. Kerney, a lawyer with PENDARVIS LAW OFFICES, P.C., certify that I have served one (1) copy of the BRIEF OF APPELLANT; one (1) copy of the REPLY BRIEF OF APPELLANT and one (1) copy of the CERTIFICATE OF COUNSEL on counsel for Respondents, Susan P. McWilliams, J.D., Daniel C. Leonardi, J.D., Tanya A. Gee, J.D. and Burl F. Williams, J.D., by depositing a copy of the same in the United States Mail, postage prepaid, on the 16th$^{th}$ day of August, 2013 addressed as follows:

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