IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge
Case No. 2010-CP-08-1771

Appellate Case No. 2014-000183

North Pleasant, LLC and Vanguard Development Group, LLC ..... Appellants,

v.

South Carolina Coastal Conservation League and Edward Dana Beach of whom the South Carolina Coastal Conservation League is the .....Respondent.

INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA COASTAL CONSERVATION LEAGUE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTION

STATEMENT OF THE ISSUES ON APPEAL

I. When the Respondent acted as a nonprofit corporation in fulfillment of its mission to protect the environment of coastal South Carolina and did not engage in "trade" or "commerce," did the Circuit Court err in granting summary judgment as to Appellants' SCUTPA cause of action?

II. When the only evidence introduced at trial was that the sole proximate cause of the buyer's decision not to proceed with the contract was learning from Berkeley County officials that it had insufficient utility access to support a dense residential development on the property to be purchased, did the Circuit Court err in granting the Respondent's Motion for Directed Verdict as to Appellants' tortious interference with a contract and tortious interference with a prospective contractual relation causes of action?

III. When the only evidence presented at trial was that the Respondent's representatives appeared at community meetings and stated their view that dense development in rural areas led to higher taxes for the surrounding land owners but there was no evidence that anyone heard those statements, or took any action based on them, or that those statements caused the Appellants harm, did the Circuit Court err in granting the League's Motion for a Directed Verdict as to Appellants' injurious falsehood cause of action?

IV. When Appellant Vanguard Development had no contract with the potential buyer, did the Circuit Court err in granting Respondent's Motion for a Directed Verdict as to its tortious interference with a contract and tortious interference with prospective contractual relation causes of action?

STATEMENT OF THE CASE

On May 20, 2010, Appellants North Pleasant, LLC ("North Pleasant") and Vanguard Development Group, LLC ("Vanguard Development") (collectively "Appellants") filed a complaint against Respondent South Carolina Coastal Conservation League ("the League" or "Respondent") and Edward Dana Beach ("Dana Beach"), alleging causes of action for tortious interference with a contract, tortious interference with prospective contractual relations, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), and injurious falsehood. **(Compl. ¶¶ 17-48).** In their Complaint, Appellants allege that statements made by the League

caused a prospective purchaser of a tract of land owned by Appellant North Pleasant to decide not to purchase the land. **(Compl. ¶¶ 6-16).**

On July 30, 2012, the League and Dana Beach filed a Motion for Summary Judgment as to all causes of action. **(Mot. for Summ. J.)** On December 18, 2012, the Honorable Roger Young granted the League and Dana Beach's Motion in part: granting the Motion as to tortious interference with contractual relations and tortious interference with prospective contractual relations of action against Dana Beach; granting the Motion as to the cause of action for Unfair Trade Practices Act as to both Dana Beach and the League; and denying the Motion for the causes of action for tortious interference with contractual relations and tortious interference with prospective contractual relations as to the League. **(Order, December 18, 2012).** All parties filed Motions to Alter or Amend the Court's Order of December 18, 2012 **(Defs.' Mot. to Alter or Amend filed February 14, 2013; Pls.' Mot. to Alter or Amend filed January 2, 2013).** By Order dated March 4, 2013, the Circuit Court issued an Order clarifying that "[t]he Court meant to deny the Motion for Summary Judgment on the injurious falsehood cause of action as to the [L]eague and to grant it as to [Dana] Beach." **(Order, filed March 4, 2013).**

The remaining causes of action against the League as the sole defendant proceeded to trial in Berkeley County on December 9-11, 2013. At the conclusion of Appellants' case, the League moved for a directed verdict as to all causes of action. **(Trial Tr. 341:22-352:14).** The Honorable Roger Young granted the League's Motion for a Directed Verdict as to all three remaining causes of action. **(Trial Tr. 387:12-395:5).** Appellants filed a Motion to Alter or Amend on December 19, 2013 which was denied on January 17, 2014. **(Motion to Alter or**

Amend filed December 19, 2013 and Order of January 17, 2014). Appellants filed a Notice of Appeal on January 7, 2014. **(Notice of Appeal).**[1]

FACTS

Founded in 1989, the League is a non-profit, tax-exempt charitable organization under Section 501(c)(3) of the Internal Revenue Code. The League's mission is to protect the natural environment of the South Carolina coastal plain and to enhance the quality of life of local coastal communities by working with individuals, businesses and government to ensure balanced solutions. **(Trial Tr. 224:2-19)**

In 2005 North Pleasant bought a large parcel of woodlands in Berkeley County in the middle of the Francis Marion National Forest commonly known as the Keystone tract ("the Keystone tract") from International Paper Company for between $19,000,000 and $20,000,000. **(Trial Tr. 60:3-5; 102:25-103:2).** The principals in North Pleasant are members of the Reynolds family, who have been involved as developers for a number of large-scale residential projects, including Reynolds Plantation in Georgia. **(Trial Tr. 58:24-59:20).** They are sophisticated businessmen with substantial experience in real estate transactions. **(Trial Tr. 58:17-23).**

Because of the Keystone tract's critical location in the heart of the national forest and its proximity to several historic properties along the Cooper River, both then-Governor Sanford and

[1] Appellants' Notice of Appeal references "the orders of the Honorable Roger M. Young dated December 18, 2012 and February 26, 2012 granting summary judgment . . . as to all claims against Edward D. Beach." **(Notice of Appeal).** However, Appellants have not advanced any argument in their Brief that summary judgment was improperly granted as to Dana Beach. Therefore, to the extent Appellants appealed that ruling, any argument as to that ruling have been abandoned and should not be considered. See Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) (("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.")(citations omitted)).

the South Carolina Department of Natural Resources ("DNR") urged North Pleasant, after it purchased the Keystone tract, to implement a low-density development or consider the sale of the Keystone tract to a conservation buyer who would protect it in its natural state. **(Trial Tr. 103:3-107:4)** In December 2005, DNR made a written proposal to North Pleasant to purchase the entire Keystone tract for $26,000,000, millions more than North Pleasant has paid in acquiring the Keystone tract just months earlier. **(Trial Tr. 107:5-110:1; Def.'s Trial Ex. 4).** Additionally, that offer exceeded North Pleasant's appraisal of the Keystone tract, which was completed approximately two months before the DNR offer. **(Trial Tr. 111:1-16; Def.'s Trial Ex. 5)**. North Pleasant refused the offer and took the position that it would accept no less than $35,000,000 for the Keystone tract. **(Trial Tr. 112:7-19).**

Around this same time, a number of organizations, including The Nature Conservancy and the League and other concerned groups and individuals, engaged in conversations with large property owners in the Highway 41 corridor to control sprawl and dense development along the Cooper River and in and adjoining the Francis Marion National Forest. **(Trial Tr. 148:22-150:18; 232:8-22).** These efforts included assisting developer D.R. Horton to complete a land swap with the United States Forest Service to move D.R. Horton's proposed development next to the national forest to a more suitable location and requesting the Berkeley County government to lower the zoning density in that area. **(Trial Tr. 295:10-296:7).** The United States Forest Service believed that high density residential development was incompatible with the purposes, uses, and maintenance of the national forest and opposed the high density residential development being considered by North Pleasant. **(Trial Tr. 114:11-115:8; 295:10-296:7).**

On March 15, 2007, in the midst of this activity and concern, North Pleasant entered into a sales contract with Vanguard Properties of the Carolinas, LLC, ("Vanguard Properties" or

"Pittenger")[2] for the sale of a large portion of the Keystone tract—approximately 2600 acres out of 4300 acres ("the Property")—for $23,920,000. **(Pls.' Trial Ex. 27 at Vanguard 23-24; 112-124; Trial Tr. 69:1-5).** As required by the sales contract, Pittenger put $50,000 earnest money down at the time it entered into the contract. **(Trial Tr. 157:12-17).**

The sales contract included a 60 day inspection period for Pittenger to determine whether the Property met its criteria for acquisition and resale. **(Trial Ex. 27 at Vanguard 112-124).** By its terms, Pittenger could unilaterally terminate the sales contract for any reason before the end of the inspection period, and North Pleasant would be obligated to return the earnest money. **(Trial Ex. 27 at Vanguard 112-124).**

Pittenger's standard practice was to put a property under contract and then investigate the prospects for profitable development during the due diligence period. **(Trial Depo. Designation of R. Pittenger, 14:17-15:21).** As part of its initial due diligence Pittenger would investigate, among other things, the existing physical and regulatory conditions of the property including environmental, archeological, endangered species, wetlands, zoning, and the availability of utilities. **(Trial Depo. Designation of R. Pittenger, 20:8-14).** In the case of this Property, Pittenger wanted to confirm during the due diligence period that the physical conditions and the zoning entitlements allowed for residential development on the Property with a minimum density of one residential unit per acre. **(Trial Depo. Designation of R. Pittenger, 57:6-9).**

During the 60-day inspection period, Pittenger engaged in normal due diligence for a property of this type and had lingering concerns about an endangered species report, title objections, and surveying issues. **(Trial Depo. Designation, R. Pittenger 20:2-18; Trial Tr.**

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2 Vanguard Properties is controlled by the Robert Pittenger Company; throughout this brief, Vanguard Properties and the Robert Pittenger Company entities are collectively referred to as Pittenger.

158:1-159:5, Pls.' Trial Ex. 32). The sales contract provided that on May 21, 2007—the end of due diligence—Pittenger would deposit an additional $450,000 of earnest money. **(Trial Tr. 157:12-24; Ex. 27 Vanguard 113).** Pittenger decided to move forward and deposited the additional $450,000 on May 21, but on May 20 requested an extension of the due diligence period until June 5, 2007, which North Pleasant granted. **(Trial Tr. 166:4-6; 76:14-20).**

At some point during May 2007, Hamilton Davis, an employee of the League, learned that Pittenger was considering acquiring an interest in the Keystone tract. **(Trial Tr. 225:24-227:2).** He did not know the level of Pittenger's interest or whether a contract existed. **(Trial. Tr. 228:9-15; 230:21-231:4; 255:13-256:9).** Hamilton Davis located a number for Pittenger and placed a phone call to Daniel Burns, a senior manager with Pittenger, to begin a conversation with him about what Pittenger might have in mind for the Property and to tell him about ongoing conservation efforts by adjoining landowners and others in the area. **(Trial Tr. 229:4-7; 256:10-257:14).** Hamilton left the following voice mail message for Burns, introducing himself and asking that Burns call him back:

> Hey Mr. Burns this is Hamilton Davis and I work for the Coastal Conservation League in Charleston South Carolina. I wanted to speak with you about ya'll's (sic) recent I guess not purchase but interest in the 2,600 acre parcel in Berkley (sic) County. I wanted to give you some information about what's going on in that area right now that you would probably be interested in. Call me back when you get a chance please 843-725-2061, and again, my name is Hamilton Davis and I work for the Coastal Conservation League. Thank you.

(Trial Pls.' Ex. 5) The record is unclear whether Daniel Burns called back or whether the two only exchange voiced mails—Hamilton Davis remembers Burns calling him back and their having a brief, cordial conversation, while Daniel Burns does not remember whether or not the two ever spoke on the phone or just exchanged voicemail messages. **(Trial Tr. 229:8-18; 257:15-258:6; Trial Depo. Designation of D. Burns, 17:1-24).**

Though Daniel Burns testified he did not specifically remember calling Hamilton Davis back. **(Trial Depo. Designation of D. Burns, 17:1-24).** On the following Monday, at his colleagues' request before he left town for vacation, Burns e-mailed those colleagues and gave his impressions and interpretation of his exchange with Hamilton Davis:

> To recap my conversation on Friday Afternoon:
>
> Received a voicemail from Hamilton Davis with the Coastal [C]onservation League in Charleston, SC and called him back around 4pm, and then forwarded his voicemail for you to be aware of the issue. Hamilton stated that he was aware that we had the Keystone Tract under contract to purchase and that we'd probably like to know that his group, coupled with the efforts of large plantation owners, is trying to stop development in the Hwy 41 corridor because of it's (sic) proximity to the national forest. He said they are particularly targeting the Keystone property since it's such a large tract and adjacent to the forest. He mentioned that DR Horton has a property just south of ours that the Conservation League has fought, and that now DR Horton is trying to do a land swap to get out of the Hwy 41 tract.
>
> The scariest thing mentioned, was that they are working with the county to get rezoning for the Keystone tract to a conservation easement so it can't be development, and said they were getting close with joint efforts from the plantation owners. I don't know how much of this is reality or smoke blowing, but if they've in fact halted DR Horton, they've accomplished something.
>
> Senator[3]- do you know if the Coastal Conservation League can get the county to rezone a property to a conservation easement without the owner's consent?

(Pls.' Trial Ex. 27 at Vanguard 304).

During the week of May 21, Neil Robinson, a prominent land use lawyer retained by Mr. Pittenger to assist him in assessing the zoning entitlements for the Property, arranged for Mr. Pittenger to meet with Dan Davis, the Berkeley County supervisor, to learn more about the availability of utilities and the existing zoning in that area. **(Trial Deposition Designation Pittenger 49:1-10).** At this meeting Supervisor Dan Davis explained to Mr. Pittenger that the

[3] This refers to Mr. Pittenger, at the time a NC state senator. **(Trial Depo. Designation D. Fogarty 8:22-9:2)**

Keystone tract was in an area of Berkeley County that the County did not consider to be a growth area and that the County would not be making water and sewer available to any residential development in that area:

> Q: All right, sir. And do you remember what you told him?
>
> A: Well, you know, we have a comprehensive plan for the county, and it lays out areas where we consider growth areas. That is not a growth area. Number one, we don't have utilities in that area. We have, just on the fringes right near the river where BP and BP is located, but we don't have interior utility lines, water or sewer, so that's just not considered a growth area. So in the immediate future, I don't see that that's going to have a lot of growth.
>
> Q: So the county, if somebody were to -- had been before -- of course, it's a development agreement on that property now, correct, but before that, it was flex one [zoning]; isn't that correct?
>
> A: Right.
>
> Q: And if somebody had put some kind of development up there, the county wasn't going to be running water and sewer up 41?
>
> A: No.
>
> Q. And you told them that; is that correct?
>
> A: Right.

(Trial Tr. 288:23-289:19). Immediately after this meeting where he learned the County's position, Mr. Pittenger decided not to move forward and told his employees, Daniel Burns and Daniel Fogarty, to notify North Pleasant. **(Trial Deposition Designation of R. Pittenger, 49:18-19** ("I called the office and said cancel it"); **54:25-55:1** (". . . what nailed the lid was I had lunch with the three individuals from the county. . .")**).**

Mr. Pittenger's e-mails, immediately following his lunch meeting with Supervisor Dan Davis and other Berkeley County officials, confirm his testimony.

Specifically, at 1:38 p.m. on May 25, 2007, Mr. Pittenger e-mailed Daniel Fogarty as follows:

Max density is one lot in fifteen acres. Get our money back and cancel contract

(Trial Ex. 27, at Vanguard 000374) (Italics added).

Then, two minutes later at 1:40 p.m., Mr. Pittenger sent another e-mail to Daniel Fogarty:

Its (sic) over. Too many conservation easements between us and the river cost prohibitive to run sewer look for land out 176

(Trial Ex. 27, at Vanguard 000375) (Italics added).

Then, less than an hour later at 2:28 p.m. Mr. Pittenger sent a third e-mail to Daniel Fogarty, again instructing Fogarty to have their lawyer terminate the contract because of three issues he discussed with Dan Davis:

tell neil robinson we will terminate the contract following the discussion with Dan Davis who said that there is a significant number of conservation easements between the river and our property that would preclude cost effective sewer lines and also that the maximum density that he saw from the tract was one lot/fifteen acrees (sic)...

(Trial Ex. 27, at Vanguard 381) (Italics added).

Mr. Pittenger testified, without contradiction, the reasons for terminating the contract during the inspection period were as stated in his contemporaneous e-mails: (1) lack of access to municipal sewer and water service; (2) low density zoning requirements in that area of the county; and (3) the number of conservation easements in the area. **(Trial Depo. Designation of R. Pittenger, 51:23-52:13; 55:10-57:9; 58:17-59:11; 69:17-70:19).** In his testimony, Mr. Pittenger recounted his sending these e-mails in succession after his meeting with Dan Davis:

Q: Immediately after that lunch, did you send an e-mail to Daniel Fogarty?

A: Either Fogarty or Burns, one, e-mail or phone call. I said it's done. It's over.

* * *

Q: On page 374 is a printout an e-mail from you to Daniel Fogarty at 1:38 p.m., Friday, May 25th. What did you tell Mr. Fogarty?

A: Per the e-mail, said we can only get one lot per 15 acres, get our money back and cancel the contract.

Q: Then on the next page two minutes later you sent another e-mail, a follow-up to Mr. Fogarty, did you not, at 1:40? Do you see that?

A: Yes.

Q: In that follow-up e-mail you said it's over?

A: Yeah.

Q: Too many conservation easements between us and the river, cost prohibitive to run sewer, look for land out 176, correct?

A: Uh-huh.

Q: Is that an accurate statement of your views at the time?

A: Yes. I mean there was a combination of those two e-mails, very low density and the fact of not having other properties that could be developed that would make sewer cost effective as well.

Q: Then if we go to page 381. There is another e-mail within the hour, and this one is from you to Daniel Fogarty at 2:38 p.m. on Friday May 25th, and in this you say tell Neil Robinson we will terminate the contract following the discussion with Dan Davis, who said that there is a significant number of conservation easements between the river and our property that would preclude cost effective sewer lines and also that the maximum density that he saw from the tract was one lot/15 acres. Is that what you instructed Mr. Fogarty to do?

A: Yes.

Q: And in your estimation, was that the primary reason why you terminated?

A: Those two reasons.

Q: Are the primary reasons you terminated, correct?

A: Correct.

Q: And the only two reasons that you stated in your e-mail, correct?

A: Well, that was enough.

(Trial Depo. Designation R. Pittenger 70:20-72:21).

Daniel Fogarty, the recipient of these e-mails, testified that the exchange of communications with Hamilton Davis on the prior Friday, seven days earlier, did not play a role in the decision to terminate the contract; it was the information Mr. Pittenger learned from his meeting with Supervisor Dan Davis that caused Pittenger to terminate the contract. **(Trial Depo. Designation of D. Fogarty 46:3-9** (stating that his "recollection of this has a lot to do with meeting with Dan Davis, not with Hamilton Davis").

Additionally, Daniel Burns, the only person from Pittenger who had any contact with the League (through his brief exchange with Hamilton Davis) did not have any role in the decision to terminate the contract:

Q: And is it true that ultimately Mr. Pittenger made a decision not to buy the Keystone tract?

A: Yes.

Q: And did you have any role in that decision at all?

A: I did not.

Q: Okay. It was purely his own decision?

A: Yes.

(Trial Depo. Designation of D. Burns, 19:24-20:6).

While he did not have a role in the actual decision to terminate the contract, Daniel Burns agreed that the e-mails from Mr. Pittenger accurately represented his understanding of why Mr.

Pittenger decided to terminate the contract. **(Trial Depo. Designation of D. Burns, 23:16-24:1)** (citing the number of conservations easements, sewer and density as the "three big factors").

By letter dated May 25, 2007, the same day as Mr. Pittenger's meeting with Supervisor Dan Davis, Pittenger gave notice that it had decided to terminate the contract. **(Pls.' Trial Ex. 27 at Vanguard 377)**. North Pleasant did not object to Pittenger's exercise of its right under the contract to terminate and promptly returned Pittenger's earnest money. **(Trial Depo. Designation of R. Pittenger 79:1-13).** In fact, Jamie Reynolds, a principal in North Pleasant, testified that Pittenger was entitled to cancel the contract without penalty, that the earnest money was returned, and that Pittenger had not breached the Purchase agreement by exercising its right not to proceed with the closing:

> Q: And when you refunded the $500,000, I think you testified you agreed he was entitled to that money, correct?
>
> A: Yes, sir. I sent it back.
>
> Q: He didn't breach his agreement, did you (sic)?
>
> A: I'm not a lawyer, but no, I don't think he breached his agreement.
>
> Q: Did you send an e-mail saying you think he was fully entitled?
>
> A: Yes, I did.

(Trial Tr. 94:12-21).

After the contract was terminated, North Pleasant worked with the League (and specifically Hamilton Davis, on behalf of the League) and was able to persuade Berkeley County to approve a Development Agreement, vesting the zoning characteristics in place for the Keystone tract. **(Trial Tr. 95:20-96:23; 97:25-99:11; 251:16-255:6).** During this collaborative process where they sought the League's help, North Pleasant never mentioned that they had any grievance with the League and certainly never told the League their intention to file this lawsuit

against the League and Dana Beach, its executive director, seeking millions of dollars in damages. **(Trial Tr. 99:12-100:24).**

Three years after the termination of the contract, and one day before the statute of limitations would have run, North Pleasant brought this suit against the League and Dana Beach contending, among other things, that Hamilton Davis' short Friday afternoon exchange with Daniel Burns was the proximate cause of Pittenger's decision to exercise his contractual right to unilaterally terminate the purchase contract. **(Compl. at ¶ 16).** Vanguard Development, North Pleasant's real estate agent, also a Plaintiff and Appellant, has sought to recover the real estate commission it would have earned had Pittenger purchased the property. **(Compl., ¶¶ 23-28; 34-38, 39-48).**

The case went to trial on three causes of action—tortious interference with a contract, tortious interference with prospective contractual relations, and injurious falsehood—in Berkeley County on December 9-11, 2013. At the conclusion of Appellants' case, the League moved for a directed verdict as all causes of action and the Honorable Roger Young granted the Motion in full. **(Trial Tr. 341:22-352:14; 387:12-395:5).** This appeal followed.

STANDARD OF REVIEW

I. Summary Judgment

"In reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP." Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). Under Rule 56 (c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." S.C.R. Civ. P. 56(c). "In

determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Law, at 434, 629 S.E.2d at 648 (citing Fleming v. Rose, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002); and Conner v. City of Forest Acres, 348 S.C. 454, 462, 560 S.E.2d 606, 610 (2002)).

II. Directed Verdict

A trial court's granting of a directed verdict motion "can only be reversed by [an appellate c]ourt when there is no evidence to support the ruling below." Creech v. South Carolina Wildlife & Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997); see also, Law, at 368 S.C. 424, 434-35, 629 S.E.2d at 648 (2006) (("The appellate court will reverse the trial court's ruling on a JNOV motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law.")(citation omitted)).

"When reviewing a ruling on a motion for a directed verdict, [the appellate court] must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party." 5 Star, Inc. v. Ford Motor Co., 27398, 2014 WL 2601506, *1 (S.C. June 11, 2014) (citing Hurd v. Williamsburg Cnty., 363 S.C. 421, 426, 611 S.E.2d 488, 491 (2005)). "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476-77, 514 S.E.2d 126, 130 (1999). Only "[i]f the evidence as a whole is susceptible of more than one reasonable inference" should the trial judge submit the case to the jury. *Id.* 5 Star, 27398, 2014 WL 2601506, at *1 (citations omitted).

ARGUMENT

I. The Circuit Court properly granted summary judgment as to Appellants' SCUTPA cause of action because the League is not engaged in "trade" or "commerce."

a. The League is not engaged in "trade" or "commerce" as defined by the SCUTPA.

The Circuit Court properly concluded that there was no genuine issue of material fact and that the League was entitled to judgment as a matter of law as to Appellants' SCUTPA cause of action because the League "is a public advocacy group that is not engaged in trade or commerce as defined by S.C. Code Ann. § 39-5-10 (b)." **(Order, December 18, 2012).**

An action for damages may be brought under SCUTPA for "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. CODE §§ 39-5-20(a); and *see* § 39-5-140(a). The action complained of must be "unfair" or "deceptive" and the defendant's conduct must be in the conduct of trade or commerce. See e.g., Springs Mortgage Corp., 310 S.C. 514, 517, 518, 426 S.E.2d 304, 306 (S.C. 1993) (affirming the dismissal of a claim for violation of SCUTPA because the complaint "fails to describe an unfair act in the conduct of trade or commerce."). Actions that are not undertaken in the conduct of trade or commerce are beyond the reach of the SCUTPA. See Foggie v. CSX Transportation, Inc., 315 S.C. 17, 24, 431 S.E2d 587, 591 (S.C. 1993), Moore v. Williamsburg Regional Hosp., 560 F. 3rd 166, 178, (4th Cir. 2009). Because such actions are beyond the reach of SCUTPA, claims asserted pursuant to SCUTPA which do not involve conduct in trade or commerce are properly disposed of at the summary judgment stage. Health Promotion Specialists, LLC v. S. Carolina Bd. of Dentistry, 403 S.C. 623, 639, 743 S.E.2d 808, 816 (2013) (affirming summary judgment because "[w]e find this act, which is alleged to have been unfair, does not fall within

the definition of trade or commerce as it did not involve advertisement, sale, or distribution of services or property within a business context.").

The language "in the conduct of any trade or commerce" "include[s] the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. CODE § 39-5-10. By the plain language of the statutory definition, it is clear that the League is not engaged in trade or commerce as defined in the Act, and the alleged actions complained of by Plaintiffs were not in the conduct of trade or commerce.

The League is a nonprofit corporation engaged in pursuing its mission of protecting the environment of coastal South Carolina. It is not unlike other nonprofit organizations, including environmental advocacy groups, which raise funds among supporters in the community to pay the costs of achieving their charitable or public purpose. This purpose does not involve the advertising, selling, or distribution of services, property, or articles, commodities, or things of value. While courts recognize that the legislature did not intend to limit "trade" and "commerce" only to the transactions listed, those transactions covered by the statute, but falling outside the list, must be of a similar type of transaction. See e.g. Baker v. Chavis, 306 S.C. 203, 208-09, 410 S.E.2d 600, 603-04 (Ct. App. 1991)(". . . the acquisition of a lease, when, as here, it is done by purchasing a club's equity, constitutes trade and commerce within the meaning of the UTPA.").

Appellants cite Bretton v. State Lottery Comm'n, 41 Mass. App. Ct. 736, 740, 673 N.E.2d 76, 79 (1996). In that case, the court found that a state lottery commission was not subject to Massachusetts' unfair trade practices act because it was not involved in acts or practices in a "business context." Id. Notably, in reaching its determination that the lottery

commission was not engaged in trade or commerce, the court even mentioned that the only other organization(s) statutorily allowed to engage in similar activities were "certain nonprofit organizations":

> The commission's lotteries exist in an environment where similar lawful activities within the Commonwealth consist only of government sponsored lotteries, and "raffles" and "bazaars" conducted by certain nonprofit organizations under permits issued pursuant to statutory authority. See G.L. c. 271, § 7A. Thus created, protected and regulated by and pursuant to statute, the commission's activities hardly resemble endeavors conducted in a conventional business context. Given this dissimilarity, we conclude that "[t]he deterrence goals of c. 93A are inapplicable" to the commission's lottery activities. Poznik v. Massachusetts Med. Professional Ins. Assn., supra at 53, 628 N.E.2d 1.

Id.[4]

In this case, the League, through its employee, Hamilton Davis, did not engage in trade or commerce—he did not offer anything for sale or distribution. He did what he commonly did, made a phone call in furtherance of the mission of his employer, a nonprofit organization concerned with the environmental health of coastal South Carolina. In granting summary judgment as to Plaintiffs' SCUTPA cause of action, the Circuit Court properly found that "[n]othing in the now completed discovery shows that the activities of the SCCCL as shown in the record make its activities as a public advocacy group fall within this definition in subsection (b). The activities of the SCCCL do not provide its immunity from suit for tortious conduct;

[4] Appellants note in footnote 8 of their brief that Massachusetts courts have stated that status as a charitable corporation is not, in and of itself, dispositive of the issue whether a particular organization engages in conduct of trade or commerce. Brief of Appellant, at 32, n.8. However, it is worth noting that in the only case cited by Appellants that involved a charitable organization, the Court found that the alleged actions were not undertaken in the conduct of trade or commerce. See Planned Parenthood Fed'n of Am., Inc. v. Problem Pregnancy of Worcester, Inc., 398 Mass. 480, 494, 498 N.E.2d 1044, 1052 (1986) (finding in a case where the organization gave "pregnancy tests, pregnancy counseling advice and other services relative to pregnancy . . ." that "the Legislature intended to exclude the activities engaged in by a corporation such as PP, Inc. from the reaches of" the Massachusetts corollary to SCUTPA).

however, even the most nefarious acts of the League complained of in this lawsuit, which is essentially that the League extorts money from businesses and developers on behalf of its members and contributors, does not cause a public advocacy group to fall within the definition [of subsection (b)]." **(Order, December 18, 2012).**

Therefore, because the League does not engage in trade or commerce, as defined by SCUTPA, the Circuit Court's Order granting summary judgment as for that cause of action should be affirmed.

b. Even if the League were engaged in "trade" or "commerce" as defined by SCUTPA, the granting of summary judgment should be affirmed because there was no evidence that the League engaged in any unfair or deceptive practice.

"An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 269, 536 S.E.2d 399, 407 (S.C. Ct. App. 2000) (citing Young v. Century Lincoln-Mercury, Inc., 302 S.C. 320, 396 S.E.2d 105 (Ct. App.1989), *aff'd in part, rev'd in part on other grounds*, 309 S.C. 263, 422 S.E.2d 103 (1992). "A deceptive practice is one which has a tendency to deceive." Id. (citation omitted) "Even a truthful statement may be deceptive if it has a capacity or tendency to deceive." Id. (action omitted). The undisputed facts in this case are clear that Mr. Pittenger's decision was based upon information he obtained during his meeting with Dan Davis. Any of the other allegations regarding an unfair or deceptive practice on the part of the League do not relate to the transaction and thus are not relevant to this lawsuit. Appellants do not articulate any unfair or deceptive action taken that in any way impacted Pittenger's decision to terminate the contract in this case. Appellants do make numerous allegations about the League's activities with respect to other unrelated projects. However, putting aside whether these allegations could be supported by any evidence, Appellants do not

articulate how any of their complaints with the League's activities affected Mr. Pittenger's decision.

Therefore, as an alternative affirming ground, the Court should affirm the Circuit Court's order granting the League's Motion for Summary Judgment as to the SCUTPA cause of action because there was no genuine issue of material fact as to whether the League engaged in any practice that was deceptive or unfair; in fact, there was absolutely no evidence supporting such a conclusion.

II. The Circuit Court properly granted the League's Motion for Directed Verdict as to Appellants' tortious interference with a contract and tortious interference with prospective contractual relations causes of action because no evidence introduced at trial supported a conclusion that the League was the proximate cause of Pittenger's decision not to proceed with the contract and close on the Property.

a. The only evidence introduced at trial was that Mr. Pittenger made his decision based upon factors he learned during his meeting with Dan Davis, the Berkeley County Supervisor.

Appellants alleged that Pittenger decided, during the due diligence period, not to purchase the Property based on the brief exchange between Hamilton Davis and Daniel Burns. No testimony or other evidence admitted at trial, however, support that theory. In fact, as the Circuit Court properly ruled, the evidence presented at trial, when viewed in the light most favorable to Appellants, is susceptible only to one reasonable inference: Hamilton Davis's voicemail for Daniel Burns and possible follow up phone conversation was not the proximate cause of Pittenger's decision not to purchase the Property or the proximate cause of Appellants' alleged damages. The evidence is, rather, that the information that Mr. Pittenger learned at his meeting with Dan Davis, the Berkeley County Supervisor, caused him to decide not to purchase the property.

Both Appellants' cause of action for tortious interference with a contract and Appellants' cause of action for tortious interference with a prospective contractual relationship require a plaintiff to show damages proximately caused by wrongful conduct. For example, "[t]he elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." Camp v. Springs Mortgage Corp., 310 S.C. 514, 517, 426 S.E.2d 304, 305 (S.C. 1993) (citations omitted). "[A]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties." Threlkeld v. Christoph, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct. App. 1984). "Therefore, it does not protect a party to a contract from actions of the other party." Id. "[T]he alleged act of interference must influence, induce, or coerce one of the parties to the contract to abandon the relationship or breach the contract." Focused Systems, Inc. v. Aerotek, Inc., 2011 at *2 (citing Bocook Outdoor Media, Inc. v. Summey Outdoor Adver., Inc., 294 S.C. 169, 363 S.E.2d 390, 394 (Ct. App.1987), *overruled on other grounds by,* O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (S.C. 1993)). "In order to maintain a cause of action for interference with a contract that is terminable at will, the plaintiff must show that, but for the interference, the contractual relationship would have continued." Focused Systems, Inc. v. Aerotek, Inc., C.A. No. 6:10–2899, 2011 WL 2162729, *2 (D.S.C. June 2, 2011) (citations and internal quotation marks omitted).

"[I]n order to constitute actionable interference with a contract, it must appear that the act complained of was the proximate cause of the injury or damage." Smith v. Citizens and Southern Nat. Bank of South Carolina, 241 S.C. 285, —, 128 S.E.2d 112, 114 (S.C. 1962) (citations omitted); see also, Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 559, 671 S.E.2d

79, 85-86 (Ct. App. 2008) (stating that ". . . in order for damages to be recoverable the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess, or speculation.") (citations omitted).

While the elements of a cause of action for tortious interference with prospective contractual relations are different, a plaintiff seeking to recovery on a cause of action for tortious interference with prospective contractual relations must still provide proof of damages proximately caused by wrongful conduct. Specifically, "[t]o establish a cause of action for intentional interference with prospective contractual relations, the plaintiff must prove: (1) that the defendant intentionally interfered with the plaintiff's potential contractual relations, (2) for an improper purpose or by improper methods, and (3) that the interference caused injury to the plaintiff. D.R. Horton, Inc. v. Wescott Land Co., LLC, 398 S.C. 528, 537, 730 S.E.2d 340, 355 (Ct. App. 2012) (citing Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990)). "While it is not necessary that the interfering party intend harm, it is necessary that he intend to interfere with a prospective contract." Id. (citing Eldeco, Inc. v. Charleston Cnty. Sch. Dist., 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007)). "If a defendant acts for more than one purpose, his improper purpose must predominate in order to create liability." Crandall Corp. v. Navistar Intern. Transp. Corp., 302 S.C. 265, 267, 395 S.E.2d 179, 180 (S.C. 1990) (citations omitted).

The Circuit Court correctly granted Respondent's Motion for a Directed Verdict, because Mr. Pittenger's testimony is clear that Supervisor Dan Davis and the other individuals from Berkeley County gave him information bearing on the major issues that were important to him in determining whether to move forward to acquire the property: the availability of public water

and sewer service, and the county's plans related to density. **(Trial Depo. Designation of R. Pittenger 69:17-70:19)** (Pittenger stating that the county officials at the lunch informed him of a proposal to change the zoning of that area to allow only one house per 15 acres, that running utilities to the Keystone tract would be cost prohibitive, and that there were a large number of conservation easements in the area). These issues were all matters that impacted how Pittenger could use the property, and specifically whether he would achieve his minimum threshold density of one unit per acre he required in order to purchase a tract of raw land. **(Trial Depo. Designation of R. Pittenger 20:8-14)** ("Q. What is the typical due diligence that your firm would perform for an acquisition of property like this? A. We want to see Phase I, environmental. We look for archeological, endangered species, wetlands. We want to know about zoning. We want to know about utilities."); **(Trial Depo. Designation of R. Pittenger, 57:6-9)** (Mr. Pittenger stating that his plans for the Property hinged on the ability to develop the Property with a minimum density of one residential unit per acre).

After the meeting with Supervisor Dan Davis, Mr. Pittenger e-mailed Daniel Fogarty multiple times explaining that he thought they would only be able to have zoning for one lot per 15 acres and that it would be cost prohibitive to run sewer to the property because there were too many conservation easements on properties between the Keystone tract and the river. **(Trial Depo. Designation of R. Pittenger 71:1-72:21).**

Mr. Pittenger may have been under the impression that water was available for residential use because Josh Hulen, the broker for North Pleasant, had told Pittenger that there was a water line in front of the property:

Q:.....[D]id you talk to Mr. Fogarty about the availability of water?

A: Yes.

Q: All right. Did you tell him that the water line was only for industrial use for Nucor and that the owners of that property would not have access to it?

A: No.

Q. What did you tell them?

A: I told them water was available at the property.

Q: Was that correct?

A: There is a water line in front of the property.

Q: Did you have any information whether or not that water line could be accessed for residential use by the owners of this property?

A: I didn't represent that there was available for residential use. I told him there was water in front of the property.

(Trial Tr. Depo. Designation of R. Pittenger 213:8-24) In one of the e-mails sent minutes after meeting with Dan Davis, Mr. Pittenger instructed Fogarty that he had decided not to purchase the property based on the information he learned from that meeting:

Q: . . . There is another e-mail within the hour, this one from you to Daniel Fogarty at 2:38 p.m. on Friday May 25th, and in this you say tell Neil Robinson we will terminate the contract following the discussion with Dan Davis, who said there is a significant number of conservation easements between the river and our property that would preclude cost effective sewer lines and also that the maximum density that he saw from the tract was one lot/15 acres. Is that what you instructed Mr. Fogarty to do?

A: Yes

Q: And in your estimation, was that the primary reason why you terminated?

A: Those two reasons.

Q: Are those the primary reasons you terminated, correct?

A: Correct.

Q: And the only two reasons that you stated in your e-mail, correct?

A: Well, that was enough.

(Trial Depo. Designation of R. Pittenger 71:25-72:21). As is made clear by Mr. Pittenger's testimony, the information Mr. Pittenger learned at his meeting with Dan Davis convinced him not to purchase the property. Mr. Pittenger knew best the motivations for his decision, since it was his decision, alone. **(Trial Depo. Designation of D. Burns, 19:24-20:6);** (both stating that Mr. Pittenger acted alone in making the decision not to purchase the Keystone tract)).

Fogarty's testimony confirms that the information Mr. Pittenger learned at the meeting caused him to decide not to purchase the property. **(Trial Depo. Designation of D. Fogarty, 49:21-24**). In describing the result of Mr. Pittenger's meeting with Dan Davis and his perception of the reasons Mr. Pittenger sent him the e-mail instructing him exercise their right to terminate the contract without penalty, Fogarty stated: "As I've said before, there was a pool of issues. And you pile them all together, and it breaks the camel's back. But I mean, you know, ***that meeting was one and done***." **(Id.)** ((emphasis added).

Furthermore, even if such a minor event—Hamilton Davis' voicemail and possible short follow up conversation with Daniel Burns—could somehow be considered to have played a role in the causal chain of events that led to Mr. Pittenger's decision, no evidence presented at trial would support a conclusion that it was the proximate cause of the damages claimed by the Plaintiffs, as required to recover under these two causes of action. See Smith v. Citizens and Southern Nat. Bank of South Carolina, 241 S.C. 285, 288, 128 S.E.2d 112, 114 (1962) ("in order to constitute actionable interference with a contract, it must appear that the act complained of was the proximate cause of the injury or damage") (citations omitted); D.R. Horton, at 537, 730 S.E.2d at 355 (stating the elements of tortious interference with a prospective contract).

Appellants, in arguing that Hamilton Davis's voice mail and possible follow up conversation with Daniel Burns somehow caused Mr. Pittenger to decide not to purchase the

property completely disregard the testimony and engage in pure speculation and invention. For a jury to believe their theory of liability, the jury would have to disregard Mr. Pittenger's unchallenged, unequivocal, and uncontradicted testimony as to why he decided to cancel the contract. No one testified that the reason Mr. Pittenger terminated the contract was related to the League, nor was his credibility ever impeached. Therefore, because the testimony was susceptible to one conclusion only and a reasonable jury is not entitled to disregard uncontradicted testimony, the Circuit Court's Order granting the League's Motion for a Directed Verdict should be affirmed. See Page v. Crisp, 303 S.C. 117, 118-19, 399 S.E.2d 161, 162 (Ct. App. 1990) ("We recognize that a jury is not required to believe testimony when reasonable persons could disagree as to facts, but it is not permitted to disbelieve testimony unless there is good reason for questioning the credibility of the witnesses."); Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476-77, 514 S.E.2d 126, 130 (1999) ("When the evidence yields only one inference, a directed verdict in favor of the moving party is proper.").

b. The Circuit Court's Order granting the League's Motion for a Directed Verdict should be affirmed in the alternative as to the cause of action for tortious interference with a prospective contract, because a contract existed and there was no evidence of a prospective contractual relationship.

The existence of the sales contract precludes any recovery on a claim for interference with prospective contractual relations as a matter of law. See Egrets Pointe Townhouses Prop. Owners Ass'n, Inc. v. Fairfield Communities, Inc., 870 F. Supp. 110, 116 (D.S.C. 1994) ("Because there was a valid contract in existence between Southern and the Association at the inception of this action, this court finds that ***the existence of that contract precludes any recovery on a claim for interference with prospective contractual relations***") (double emphasis added)).

Here, the uncontradicted evidence was that there was a contract between North Pleasant and Pittenger. **(Pls.' Trial Ex. 27, at Vanguard 112-124).** Additionally, there was no evidence of any prospective contractual relationship. Therefore, as alternative to the grounds mentioned above, the Circuit Court's granting the League's Motion for a Directed Verdict should be affirmed as to the cause of action for tortious interference with a prospective contract because a contract existed and there was no evidence of a prospective contractual relationship.

III. The Circuit Court properly granted the League's Motion for a Directed Verdict as to Appellants' injurious falsehood causes of action.

a. The Circuit Court correctly ruled that no evidence presented at trial supported any reasonable inference that any employee or agent of the League had published falsehoods that caused Appellants any harm.

(i) South Carolina has not recognized the tort of injurious falsehood outside the context of slander of title.

The only South Carolina cases mentioning injurious falsehood are in the context of an action for slander of title and are completely distinguishable from this case, which does not involve any disparagement of title. See e.g. Solley v. Navy Federal Credit Union, Inc., 397 S.C. 192, 206-07, 723 S.E.2d 597, 604-05 (Ct. App. 2012); Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 19, 567 S.E.2d 881, 890 (Ct. App. 2002) ("Slander of title is grounded in the tort of injurious falsehood") (citation omitted); Huff v. Jennings, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct. App. 1995) (discussing slander of title). Therefore, because South Carolina has not recognized the tort of injurious falsehood outside the context of slander of title, the Circuit Court's Order granting the League's Motion for Directed Verdict as to Appellants' injurious falsehood cause of action should be affirmed.

(ii) Appellants presented no evidence upon which a reasonable jury could have concluded that any false statement was made by the League.

Assuming *arguendo* that South Carolina recognizes the tort of injurious falsehood beyond the context of slander of title, Appellants would have had to have presented at least some evidence of a false statement, which they failed to do at trial. See Rest. 2d Torts § 623A (a claim for injurious falsehood requires a false statement). Furthermore, they would have to have presented evidence that the League knew that the statement it made was false (or acted in reckless disregard to its truth or falsity) and that the false statement resulted in harm to the plaintiff. See Rest. 2d Torts § 623A(a)-(b); see also, id. at cmt. d. ("A principal basis for liability for injurious falsehood has been that the publisher knew that the statement was false or that he did not have the basis of knowledge or belief professed by his assertion. This is the same test as that for scienter in the tort of deceit.").

The only alleged statements Appellants asserted supported their cause of action for injurious falsehood were "false statements to residents and landowners and to the county concerning the development planned for the property by Vanguard Properties and such statements were harmful to Plaintiffs as such false statements engendered and aroused opposition to said development and caused Vanguard Properties to abandon their plans for the development and refuse to purchase the property." **(Compl. ¶ 45)**. Appellants have indicated that these "false statements made to landowners and the county" regarded the effect of dense development on local property taxes.

There was no proof of any specific statement at trial. **(Trial Tr. 246:23-249:3)** (Hamilton Davis discussing that he attended community cookouts and discussed the costs associated with development with those in attendance). Any general statement about the costs associated with dense development or the effect of increasing property taxes as property values

increase is a matter of opinion upon which people differ, not a factual statement, and there was no evidence to support a finding that Hamilton Davis acted in reckless disregard of the truth or with knowledge that such a statement was false. **(Trial Tr. 249:4-251:15)** (Hamilton Davis discussing that he had reviewed written studies discussing the effect of new development on the cost of services and property taxes). Furthermore, Appellants presented no evidence at trial that anyone relied on these statements, that anyone even heard these statements, or that these statements had anything at all to do with Pittenger's decision to terminate the contract. The only evidence presented with respect to the statements was Hamilton Davis' own testimony that he discussed the issues with members of the community at community events. **(Trial Tr. 246:23-249:3).**

Therefore, because no evidence presented at trial supported a conclusion that such a statement was made as a factual statement, that it was false, that it was made with knowledge of its falsity (or reckless disregard of the truth), or that any such statement caused Mr. Pittenger not to proceed with the contract, the Circuit Court's order granting the League's Motion for a Directed Verdict should be affirmed as to Appellants' injurious falsehood cause of action.

Likewise, though not contained in the pleadings to the extent Appellants now contend that Hamilton Davis' communication with Daniel Burns is the basis of their injurious falsehood cause of actions, they failed to present competent evidence at trial supporting such a claim. Appellants did not present any actual evidence of a false statement made by Hamilton Davis in his communication with Daniel Burns, that such a false statement was made with knowledge of its falsity (or reckless disregard of the truth), or that any such statement caused Mr. Pittenger not to proceed with the contract.

Appellants presented no evidence from which a reasonable jury could conclude that his alleged statements (the wording and precise substance of which are unknown and unremembered by both Hamilton Davis and Daniel Burns) were statements of fact and that they were false. Other than the recorded voice mail message there was no evidence of any statement made by Hamilton Davis. Daniel Burns did not remember the communication. Appellants' attempt to attribute Burn's subsequent commentary of his impressions of what Hamilton Davis said in an e-mail sent several days after the communication as Hamilton Davis' quotations. They were not. The Court did not believe one witness over another or weigh the evidence; there was no conflicting testimony or conflicting evidence as to what Hamilton Davis actually said. **(Trial Tr. 355:24-357:2)**. Therefore, because no evidence presented at trial supported a conclusion that such a statement was made as a factual statement, that it was false, or that it was made with knowledge of its falsity (or reckless disregard of the truth), the Circuit Court's order granting the League's Motion for a Directed Verdict should be affirmed as to Appellants' injurious falsehood cause of action.

(iii) Appellants failed to present any evidence at trial upon which a reasonable jury could conclude that any statements made by the League, whether true or false, caused Mr. Pittenger to decide not to proceed to closing on the Keystone tract.

Even if Appellants had made a slight showing that any alleged statements made by the League were false, Appellants would also have to have presented competent evidence that the League knew the alleged statements were false and enough of the surrounding circumstances to know that some third party would act in reliance on the statements. See Rest. 2d Torts § 623A at cmt. b (stating that to be liable for injurious falsehood, ". . . [t]he publisher must . . . know enough of the circumstances so that he should as a reasonable man recognize the likelihood that

some third person will act in reliance upon his statement, or that it will otherwise cause harm to the pecuniary interests of the other because of the reliance.").

Appellants argue that reliance is not an element of an injurious falsehood cause of action, and argue that the Circuit Court erred by finding that they had to present evidence upon which a reasonable jury could find that the alleged false statements made by the League caused Mr. Pittenger to decide not to proceed to closing on the Keystone tract. **(Brief of Appellant, 19-20).** They do not appear to contest they were required to prove causation and damages. Appellants, however, do not explain how their property interest could have been damaged by alleged false statements if no one relied upon them. Appellants appear to argue that if the League ever said anything that was a false statement about the possible effects of dense development, then they are entitled to recover against the League because Pittenger terminated the contract.

The Appellants did not present any evidence that anyone heard or relied upon any statements regarding the effects on property taxes of new development in rural Berkeley County. Appellants argue, though, that the League fomented general opposition to development, which eventually caused Mr. Pittenger not to purchase the Keystone tract. Even assuming this were a colorable theory, no evidence links any opposition to development in the area to anything said or done by the League. Further, there was no evidence linking any general opposition to development in the national forest to Pittenger's decision to terminate the contract. As discussed at length above, the only evidence presented at trial was clear: Mr. Pittenger decided not to proceed with the purchase of the Keystone tract based upon information he learned in a meeting with Supervisor Dan Davis and for no other reason. **(Trial Tr. 381:18-22)** ((THE COURT: But you have to disregard what Mr. Pittenger said. There are reasons for it, and he said, [t]he reasons

that I backed out on this deal was (sic) because of what Dan Davis told me at Kiawah Island a week or so later.").

b. The Circuit Court properly ruled that the statements allegedly made by the League in its activities as an environmental advocacy organization were subject to protection of the First Amendment:

The Circuit Court properly ruled that the statements allegedly made by the League—statements regarding the effect of dense development on property taxes and utilities at various public meetings—were protected by the First Amendment of the United States Constitution. **(Trial Tr. 390-94).** Specifically, the Circuit Court ruled that the Motion for a Directed Verdict should be granted because ". . . [t]o the extent that [the] Coastal Conservation League played a role in making these changes on the zoning and in organizing neighborhood opposition to that sort of thing, I think it's protected by the First Amendment, and I don't find what they did could, by any jury, be found to be anything other than a valid and reasonable exercise of their First Amendment rights." **(Trial Tr. 394:14-20).**

The League's comments at a public meeting are protected by the First Amendment of the United States Constitution which protects free speech. See U.S. Const., am. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"). The United States Supreme Court has held that individual citizens and private organizations are immune from liability associated with their petitioning of governmental bodies. See City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 366, (1991). This immunity from liability applies with equal force to an organization like the League. In fact, even a neighborhood civic association that actively lobbies local government is immune from liability associated with their petitioning

of governmental bodies. Gibson v. City of Alexandria, 855 F. Supp. 133, 135 (E.D. Va. 1994) discussing Christian Gospel Church, Inc. v. San Francisco, 896 F.2d 1221 (9th Cir. 1990) the court stated as follows:

> In Christian Gospel Church, a neighborhood civic association lobbied a local planning commission to deny a use permit to the plaintiff church. The church [] sued the city planning and zoning commissions and other governmental entities, as well as the neighborhood association and one of its individual members, for violating the church's civil rights. In rejecting this cause of action, the Ninth Circuit noted that the neighborhood association was ***doing what citizens should be encouraged to do***, taking an active role in the decisions of government. This right to petition is so important to our system of government that the courts have shielded citizens from liability even when the position promoted was wrongful.

Gibson, at 135 (internal citations and quotations omitted) (double emphasis added).

Therefore, the Circuit Court should be affirmed because League is immune from liability for any statements made as part of its advocacy related to land use, land conservation, zoning, property taxes, and other public issues.

IV. The Circuit Court's Order properly granted the League's Motion for a Directed Verdict as to Vanguard Development for the additional reason that it was not a party to the sales contract.

In addition to all of the reasons discussed above with respect to Appellant North Pleasant, which apply with equal force to Vanguard Development, the Circuit Court's order granting the League's Motion for a Directed Verdict as to Vanguard Development's causes of action for tortious interference with a contract, tortious interference with a contract, and injurious falsehood for the additional reason that Vanguard Development was not a party to the sales contract. Vanguard Development had a listing agreement with North Pleasant. **(Plaintiffs' Trial Ex. 2)**. Under this listing agreement, Vanguard Development would have been entitled to receive 3% of North Pleasant's proceeds if Pittenger had proceeded to closing. **(Trial Tr. 307:14-19)**. While the sales contract recognized that there would be a commission paid for the sale (to both the

buyer and the seller's agent), Vanguard Development was not actually a party to the sales contract. **(Trial Tr.2 11: 9-113; 305:17-307:11)**; see also, **(Trial Ex. 27 at Vanguard 112-124)**.

A non-party to a contract cannot maintain an action for interference with that contract. See e.g., In re Earth Structures, Inc., ADV. 09-80118-HB, 2010 WL 5173705, *5 (D.S.C. Bankr. Oct. 27, 2010) (finding that Mr. Wicker "has no direct claim for tortious interference with a contract . . . as a matter of law" because "Mr. Wicker has not directed the court to any portion of the record that would indicate the existence of valid contracts between Mr. Wicker in his individual capacity and the clients of ESI."); See also e.g., Threlkeld v. Christoph, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct. App. 1984) ((stating the general rule that "an action for tortious interference protects ***the property rights of the parties to a contract*** against unlawful interference by third parties.") (double emphases added)).

It is worth noting that the South Carolina Supreme Court has specifically ruled that a broker who will be entitled to a commission at the closing of a transaction is not a third-party beneficiary of that contract. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005) (holding that a broker was not third-party beneficiary of a sales contract because a third-party beneficiary is a party that the contracting parties intend to directly benefit—the broker's "expected benefit was merely incidental.") (citation omitted)).

Because the benefit to Vanguard Development if Pittenger had decided to proceed to closing on the purchase of the Property would have been merely and incidental benefit, and all of Vanguard Development's causes of action against the League are dependent upon Pittenger's decision not to proceed to closing on the sales contract for the Property, the Circuit Court's order

granting the League's Motion for a Directed Verdict as to all causes of action against Vanguard Development should be affirmed.

CONCLUSION

Therefore, for all of these reasons, this Court should affirm the Circuit Court's Order granting the League's Motion for Summary Judgment as to Appellants' SCUTPA cause of action and affirm the Circuit Court's Order granting the League's Motion for a Directed Verdict as to Appellants' causes of action for tortious interference with a contract, tortious interference with prospective contractual relations, and injurious falsehood.

Respectfully Submitted,

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July 9, 2014
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge
Case No. 2010-CP-08-1771

Appellate Case No. 2014-000183

North Pleasant, LLC and Vanguard Development Group, LC ..... Appellants,

v.

South Carolina Coastal Conservation League and Edward Dana Beach of whom the South Carolina Coastal Conservation League is the .....Respondent.

PROOF OF SERVICE

I certify that I have served the Respondents' Initial Brief and Designation of Matters to be included in the Record on Appeal on the Appellants' by depositing a copy of it in the United States Mail, Postage prepaid, on July 9, 2014, addressed to their attorneys of record as follows:

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Respectfully Submitted,
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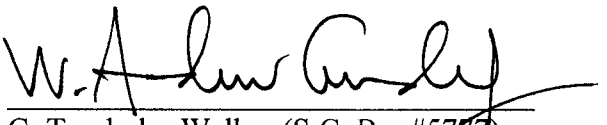

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Charleston, South Carolina

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Re: North Pleasant, LLC and Vanguard Development, LLC, Appellants v. South Carolina Coastal Conservation League and Edward D. Beach, Respondents
Appellate Case No.: 2014-000183
Our File No.: 6803.004

Dear Ms. Kitchings,

Enclosed please find the Respondent's Designation of Additional Matter to be Included in the Record on Appeal, Certificate of Counsel, Initial Brief of Respondent South Carolina Coastal Conservation League, and Proof of Service for filing for the above-referenced matter.

Thank you for your assistance please let me know if you have any questions or concerns regarding this matter.

Sincerely,
PRATT-THOMAS WALKER

W. Andrew Gowder, Jr.

Enclosures
cc: Stanley E. Barnett, Esquire
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