

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

75020

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

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

YANCEY ENVIRONMENTAL SOLUTIONS, LLC. Appellant,

vs.

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

PETITION FOR REHEARING

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SC Court of Appeals

Thomas A. Pendarvis (SC Bar # 64918)
Catherine B. Kerney (SC Bar # 81429)
PENDARVIS LAW OFFICES, P.C.
500 Carteret St., Suite A
Beaufort, SC 29902-5066
(843) 524.9500 tel.
(843) 524.9501 fax.
Thomas@PendarvisLaw.com
Carey@PendarvisLaw.com

Counsel for Appellant, YANCEY ENVIRONMENTAL
SOLUTIONS, LLC

ARGUMENT FOR REHEARING

Pursuant to Rule 221, SCRPC, Appellant, YANCEY ENVIRONMENTAL SOLUTIONS, LLC, (YES) respectfully petitions the Court for rehearing on the Opinion issued on January 28, 2015, affirming the circuit court's order granting Respondents' motion for directed verdict. Respectfully, the Opinion overlooked or misapprehended the evidence on the record and inferences from that evidence with regard to the parties' intent to close on the conservation easement by December 31, 2007, in order for Justice Family Farms, LLC and its principal, Jim Justice, to be able to take advantage of the resulting tax deductions that were needed for the 2007 tax year.

I. EVIDENCE WAS IN THE RECORD THAT THE CONSERVATION EASEMENT WAS REQUIRED TO BE "RECORDED IN TIME" TO "HAVE THE TAX ADVANTAGES IN THE YEAR 2007."

Affirming solely on one ground, the Court found that "there was no reasonable inference from the evidence that the oral agreement between Appellant and Jim Justice, Jr. conditioned the payment of Appellant's consulting fee on the completion of the transaction by the end of 2007." Opinion at p. 3. And in conjunction with this finding, the Court found that "[f]urther, Appellant did not present evidence that it was otherwise impossible to complete the transaction in 2008 after retaining replacement counsel." *Id.*

In fact, the trial record is replete with evidence that the conservation easement was required to be finalized by the end of 2007 to satisfy Mr. Justice and the Justice companies' intent and motivation to obtain tax advantages resulting from the easement being recorded in that year. Mr. Justice and the Justice companies engaged YES to get a conservation easement recorded in 2007 and YES retained Respondents as tax counsel to assist in those efforts. Evidence was in the record showing that as "a natural and

probable consequence of [Respondents'] negligence" and breach of their duties in withdrawing as tax counsel, YES sustained damages in the loss of the fee it otherwise would have earned. *See Eadie v. Krause*, 381 S.C. 55, 64-65, 671 S.E.2d 389, 393 (Ct. App. 2008). Whether the easement could have been recorded in 2008 or later is simply not relevant to whether YES sustained injuries from Respondents' withdrawal as tax counsel defeating the ability to get the easement recorded in the year 2007 as planned and intended by all of the parties.

After listening to testimony about Mr. Justice and the Justice companies' intent to close on the easement in 2007 for tax purposes, the jury heard Justice Family Farms' designee specifically testify that "if Yancey McLeod put the entire easement together and he would have earned his fee, **it was our intention to pay his fee had the easement moved forward and been recorded in time.**" Justice Family Farms 30(b)(6) testimony; (ROA 908-909) (emphasis added). The jury also heard the Justice Family Farms' designee testify that Mr. Justice and the Justice companies were 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." Justice Family Farms 30(b)(6) testimony; (ROA 893-894) (emphasis added).

Mr. Justice and the Justice Companies were interested in completing this major conservation easement in order to offset their tax liability for the year 2007. Their particular fiscal situation for the year 2007 created the need for the tax deductions flowing from this conservation easement. When the transaction could not close before the end of 2007, due to the last minute withdrawal by the lawyers (Respondents), then the deal did not have the same value and the conservation easement did not close. While it might have been

technically possible to complete the transaction in 2008, those particular tax incentives were lost and the motivation for the easement had disappeared. In fact, seven years later, the conservation easement has still not happened. This is due to the fact that the tax incentives were unique and particular to the 2007 fiscal year. Thus, while the mechanics of creating a conservation easement could technically take place at any time, the motivation for the conservation easement was lost after the end of 2007 and the mutual intent of the parties was defeated once the lawyers withdrew and the transaction could not close before the end of 2007.

A. Evidence In The Record

During trial, the jury heard testimony and reviewed exhibits that would have provided a reasonable inference that the agreement between Appellant and Justice “conditioned the payment of Appellant’s consulting fee on the completion of the transaction by the end of 2007.” Opinion at p. 3. The Justice Family Farm 30(b)(6) designee testified on numerous occasions regarding the intent of the parties and the necessity of the conservation easement being recorded by the end of 2007:

18:23 **Q.** Now, there’s been some suggestion in
19:1 this lawsuit that there really was no agreement to move
19:2 forward with investigating a conservation easement and my
19:3 question for you is, how did Justice Family Farms take
19:4 the receipt of this proposed Consulting Services
19:5 Agreement with regard to this project?
19:6 **A.** The way I understand it, Mr. Justice
19:7 -- this was the agreement that he had with Mr. McLeod
19:8 and he was under the impression that Mr. McLeod was
19:9 moving forward with this and he was in agreement with the
19:10 process moving forward towards establishing a conserva-
19:11 tion easement, ***so that we could have the tax advantages***
19:12 ***in the year 2007***, by 12-31 of that year.

(ROA 893-894) (Emphasis added).

20:1 Q. And just so I'm clear on this, was there
20:2 a general date by which Justice Family Farms desired to
20:3 have the conservation easement recorded?
20:4 A. It would have had to been in place by
20:5 December 31st for us to take tax advantages of the
20:6 easement being recorded and in place.
20:7 Q. Can you describe for me Justice Family
20:8 Farms awareness, if anything, about what the various
20:9 professionals associated with this project would have
20:10 been doing between November and December 31, 2007?
20:11 A. We were relying on Mr. McLeod to keep
20:12 the project moving. It was our understanding that the
20:13 project was continuing to move forward. We had not heard
20:14 any issues that the project was not moving forward, so we
20:15 were under the impression that it was -- everything was
20:16 in place and we were using that easement as part of our
20:17 tax calculations for 2007 as to our tax liability and it
20:18 was our understanding that everything was on track.

(ROA 895).

25:13 Q. And the date of this e-mail
25:14 transmittal is November 30, 2007. And if you refer to
25:15 the second paragraph of defendant Hamlin's [sic.] cover e-mail
25:16 message, was there any -- take a moment and look at
25:17 that, please.
25:18 A. I see that.
25:19 Q. Were there any concerns or anything
25:20 inconsistent with the plan that's referenced by Mr. --
25:21 excuse me, defendant Hamlin's [sic.] statement that everyone
25:22 would be, quote, "-- stretched to get this done before
25:23 the end of the year,"?
26:1 A. There was no concern on our end.
26:2 This is -- there's a push in all businesses to get
26:3 transactions done by the end of the year for tax
26:4 purposes. It's fairly common in business for that to
26:5 happen today. Mr. McLeod represented that everything was
26:6 on track and there shouldn't be any issues and we were
26:7 not concerned about it happening.
26:8 Q. Did defendant Hamlin [sic.] relay any
26:9 communications to Justice Family Farms otherwise, that
26:10 there may be some problems with getting the project
26:11 completed by December 31, 2007?
26:12 A. No, sir.

(ROA 900-901).

30:4 **Q.** In early-December, 2007, what did
30:5 Justice Family Farms believe it needed to do finish this
30:6 easement?
30:7 **A.** We believed that at some point we
30:8 would get a phone call that all the documents were ready
30:9 and we would have a meeting of everyone involved, we
30:10 would sign the documents and the documents would then be
30:11 recorded in the court and it would be official. We would
30:12 send these documents to our tax preparers and they would
30:13 move forward with preparing our tax returns for 2007.

(ROA 905).

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.

(ROA 907-908).

33:15 **Q.** Prior to the telephone call on
33:16 December 24th, 2007, what was Justice Family Farms
33:17 intent, if anything, with regard to satisfying the terms
33:18 of the consulting services agreement with YES to pay all
33:19 the professional fees in the event the conservation
33:20 easement was recorded?
33:21 **A.** There again, if Yancey McLeod put the
33:22 entire easement together and he would have earned his
33:23 fee, **it was our intention to pay his fee had the easement**
34:1 **moved forward and been recorded in time.**

(ROA 908-909) (emphasis added).

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.

(ROA 909).

35:22 Q. And I'm passing to you now an e-mail
35:23 marked as Exhibit 12. And does this e-mail reflect the
36:1 value that was later communicated to Justice Family Farms
36:2 on this -- the tax value of this easement?
36:3 A. Yes.
36:4 Q. And that's essentially the last
36:5 sentence of the third full paragraph?
36:6 A. That is correct.
36:7 Q. And what was the date of this e-mail?
36:8 A. This e-mail is dated December 27th,
36:9 2007.
36:10 Q. And based on Justice Family Farms'
36:11 understanding, would that have been sufficient time to
36:12 accomplish the easement in the 2007 calendar year?
36:13 MR. LEONARDI: Object to form.
36:14 BY MR. PENDARVIS:
36:15 A. Yes. Based on our experience, all
36:16 the paperwork could have been done in a short time and
36:17 we still had four days to get everything signed and
36:18 recorded. Recording would take a very short time to do.
36:19 Q. Notwithstanding the opinion, did
36:20 Justice Family Farms believe that receiving this
36:21 information on December 27th gave sufficient time for it
36:22 to decide whether to finish the easement plans?
36:23 A. Yes.

(ROA 910-911).

79:4 Q. Okay. And that reconfirms for you that
79:5 the December 24th phone call, the decision was made to
79:6 postpone the easement. Correct?
79:7 A. Yes.
79:8 Q. And that that was fine with Mr. Justice.
79:9 Correct?
79:10 A. Well, it was not fine, we would lose the
79:11 tax deduction, but --
79:12 Q. For 2007?
79:13 A. Yes.

(ROA 954) (Justice Family Farms 30(b)(6) designee testimony).

In addition, an email from Respondent Hanlin to Appellant, with a copy to a partner at Richardson Plowden, was submitted to the jury in which Respondent Hanlin discussed the conservation easement project. Plaintiff's Trial Ex. 3.¹ Respondent Hanlin wrote "[t]his memo is to let you know the initial information that I will need to properly advise you and your client, Jim Justice, as to the probable tax effects of the conservation contribution **that he contemplates before the end of the year**, but also to advise [the firm partner] of the project so that we can allocate the resources to it that it deserves." *Id.* (emphasis added). Respondent Hanlin went on to state "[a]s you know, **getting all this done before the end of the year will be a challenge for everyone**, and will require everyone's rapid work and attention, but I am, like you, confident that it can be accomplished." *Id.* (emphasis added).

In addition, the jury heard expert testimony regarding that email as follows:

143:17 Q. Dr. Adams, can you describe for the jury,
143:18 could you describe a little bit about -- I'm sorry
143:19 about that. Could you describe for the jury

¹ The Court of Appeals panel affirmed solely on the lack of evidence to create a reasonable inference that the conservation easement was required to close prior to the end of 2007, which was not a finding made by the trial court. As this issue was not part of the trial court's ruling and was not raised or briefed by either party, certain trial exhibits relevant to this point were not included on the record on appeal. However, these exhibits were submitted to the jury and are part of the record of the case.

143:20 basically what this exhibit you're looking at
143:21 demonstrates in terms of the initial engagement?
143:22 **A.** Well, this is an email from Mr. Hanlin to Mr.
143:23 McLeod in which he is setting forth the initial
143:24 information that he will need to properly advise
143:25 Mr. McLeod and his client Mr. Justice as to the
144:1 probable tax effects of the conservation
144:2 contribution it contemplates toward the end of this
144:3 year. He says, "Also to advise Frank Crawford of
144:4 the project so we can allocate the resources." So
144:5 the law firm would be ready to put all the, all the
144:6 people that it needed and all the other resources
144:7 to get this done in the two months remaining before
144:8 the end of the year, and then he lists a number of
144:9 things, he's looked up Justice Family Farms, LLC,
144:10 in the Secretary of State's records and he has
144:11 learned something about that and he asks then some
144:12 questions about how the LLC is taxed, whether it is
144:13 taxed as a partnership or not, when it was formed,
144:14 when the 4,500 acre tract was purchased, what the
144:15 purchase price was, when it was contributed to the
144:16 LLC, who the members of the LLC are and their
144:17 percentage interest.
144:18 **A.** Then he is talking about Jim Justice's income
144:19 this year. There already are apparently
144:20 discussions of him selling his interest, he is
144:21 going to have a block of income, sizeable income in
144:22 2007 which would be a reason why a wealthy taxpayer
144:23 might want to do a conservation easement in a
144:24 particular year, to get that deduction on that
144:25 year's tax return, so Mr. Hanlin is expressing at
145:1 the outset he's aware of this and the need to get
145:2 this done.
145:3 **Q.** Is there any reference in this email, Dr.
145:4 Adams, as to the timing of the transaction?
145:5 **A.** "As you know, getting all this done before
145:6 the end of the year will be a challenge for
145:7 everyone and we will require everyone's rapid work
145:8 and attention but I am, like you, confident it can
145:9 be accomplished."
145:10 So, yes, from the very beginning Mr. Hanlin
145:11 and the law firm knew **this had to be done by**
145:12 **December 31st.**

Gregory B. Adams, Trial Testimony; (ROA 66-68) (emphasis added).

Further, an email from Respondent Hanlin to a partner at Richardson Plowden was submitted to the jury in which Respondent Hanlin discussed the Justice Companies tax savings motivations for closing the easement in 2007. Respondent Hanlin wrote, “[Justice] has *more motivation to get this done this year than we thought.*” Plaintiff’s Trial Ex. 4 (emphasis added). In addition, the jury heard expert testimony regarding that email as follows:

150:7 Q. Describe for the jury the essence of this
150:8 email?

150:9 A. This is an internal email, November 20, 2007,
150:10 from Mr. Hanlin to Fred Crawford, the partner in
150:11 the law firm, in which he is talking about the Jim
150:12 Justice conservation easement and how things are
150:13 coming along.

150:14 Q. How does Mr. Hanlin describe this
150:15 conservation easement in the first part of this
150:16 email?

150:17 A. He calls it a mega conservation easement.

150:18 Q. Is there any reference to what is happening
150:19 on the Justice end of the deal?

150:20 A. Yes. He comments that they hadn’t got the
150:21 signed consultation agreement back, or specific
150:22 words, “The news still seems to be all good, the
150:23 client Jim Justice kicked the matter to his CPA
150:24 yesterday, that is Mr. David Harrah. Yancey and I
150:25 had separate conversations with the CPA today, he
151:1 seems to be on board.”

151:2 Q. Thank you. Toward the bottom of the email,
151:3 Dr. Adams, is there any reference to again the
151:4 motivation for Mr. Justice to do an easement that
151:5 year?

151:6 A. Yes, sir, there is. They have learned a
151:7 little bit more about Mr. Justice’s businesses, his
151:8 income and the next to last paragraph says, “The
151:9 other good news is that Jim’s bump in income does
151:10 not result from the sale of an asset, but from
151:11 ordinary income sources. Apparently the price of
151:12 coal has shot up this year, resulting in Jim’s bump
151:13 in income of, say, 30 to 50 million dollars. His
151:14 accountant wasn’t sure exactly. Nice problem to
151:15 have from coal mining.”

Gregory B. Adams, Trial Testimony; (ROA 73-74).

Also, the jury received the Richardson Plowden Fee agreement and heard the expert testimony regarding that agreement as follows:

199:16 But then in paragraphs one and two, if they
199:17 are read technically in a narrow way they seem to
199:18 provide specific tax service. Specific services to
199:19 be provided involve legal tax advice and
199:20 consultation with tax advisers to Mr. Justice.
199:21 And, so, in this case there have been contentions
199:22 that this is really a narrow scope of this
199:23 undertaking, that all the law firm agreed to do
199:24 here was to provide legal tax advice and to consult
199:25 as requested with Mr. Justice's advisers. There
200:1 had been interpretations of this that the broad
200:2 language at the beginning and the circumstances
200:3 meant that the responsibility was to do what needed
200:4 to be done to bring this conservation easement into
200:5 existence before the end of the year so that Mr.
200:6 Justice would be able to make the donation and get
200:7 the tax deduction in 2007.

Gregory B. Adams, Trial Testimony; (ROA 122-123).

The jury also heard expert testimony as to why the conservation easement was required to close in 2007:

360:2 **Q.** 2011? In fact we're here in 2012, he can
360:3 still do it, right?
360:4 **A.** He can still do it.
360:5 **Q.** All right. Now, so when you keep saying he
360:6 killed the deal, that is just not right, is it, Mr.
360:7 Justice could do this deal today if he wanted to
360:8 with Mr. McLeod or anybody else, right?
360:9 **A.** He could resurrect the deal but the deal is
360:10 dead right now.
360:11 **Q.** But Mr. McLeod in fact got another lawyer,
360:12 right, in 2008?
360:13 **A.** He did.
360:14 **Q.** And they actually called Jim Justice, didn't
360:15 they?
360:16 **A.** Right.
360:17 **Q.** And Jim Justice wasn't interested, right?

360:18 **A.** He was not for whatever reason, whatever his
360:19 tax situation was at the time. The time when he
360:20 had the critical need for it in 2007 had come and
360:21 gone.

Gregory B. Adams, Trial Testimony; (ROA 283).

The jury even heard Respondent Hanlin testify that it was “our plan” to get the easement recorded by December 31, 2007. Respondent Harold Hanlin, Trial Testimony; (ROA 832-833).

Further, the jury reviewed a letter from YES to Justice enclosing the Consulting Services Agreement, that letter memorialized the terms of the oral agreement made between YES and Justice and noted “[a]s this project will require immediate focused attention **in order to place the easement this year**” Plaintiff’s Trial Ex. 7 (emphasis added) (ROA 1050). The Justice Family Farms’ designee’s testimony is worth mentioning again: “There again, if Yancey McLeod put the entire easement together and he would have earned his fee, **it was our intention to pay his fee had the easement moved forward and been recorded in time.**” Justice Family Farms’ designees testimony (ROA 908-909) (emphasis added).

B. Evidence was in the record requiring the completion of the easement by the end of 2007 as a condition for payment of YES’ consulting fee.

The Opinion overlooked or misapprehended the import of the testimony and evidence referenced in the foregoing section.

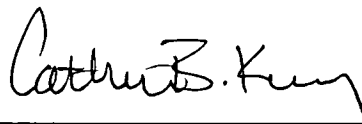
“In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence.” *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 146, 697 S.E.2d 644, 654 (2010). The Opinion concludes that no evidence existed that there was a requirement that the

easement transaction had to be finalized prior to the end of 2007. Appellant respectfully submits that the Court of Appeals overlooked the abundance of evidence in the record from which the jury could have made a reasonable inference with regard to the parties' intent "to pay his fee had the easement moved forward and been recorded in time" (ROA 908-909), in order for Justice Family Farms and Mr. Justice to be able to take advantage of the resulting "tax advantages in the year 2007, by 12-31 of that year." (ROA 893-894).

CONCLUSION

Based upon the foregoing, Appellant, YANCEY ENVIRONMENTAL SOLUTIONS, LLC, respectfully requests this Court grant its petition for rehearing.

Respectfully submitted,



Thomas A. Pendarvis (SC Bar # 64918)
Catherine B. Kerney (SC Bar # 81429)
PENDARVIS LAW OFFICES, P.C.
500 Carteret St., Suite A
Beaufort, SC 29902-5066
(843) 524.9500 tel.
(843) 524.9501 fax.
Thomas@PendarvisLaw.com
Carey@PendarvisLaw.com

Lawyers for Appellants

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Beaufort, South Carolina