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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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
Unpublished Opinion No. 2015-UP-042

YANCEY ENVIRONMENTAL SOLUTIONS, LLC. . . . . Petitioner,

vs.

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

This certifies that a PETITION FOR REHEARING was made and finally ruled upon by the South Carolina Court of Appeals on the matters raised by this petition.

REASONS CERTIORARI SHOULD BE GRANTED

This Petition for Certiorari should be granted because it provides this Court with an opportunity to amplify for the bench and bar discrete proximate cause standards of proof and damages flowing from a breach of the fiduciary duty of loyalty (in this case, by a lawyer's preconsidered desertion of the client ten days before the deadline to close on a $42M transaction), as demarcated from those associated with a negligence claim. This case also presents an opportunity for this Court to provide guidance on the standards of review and the standards of proof for the evidence necessary to survive a motion for directed verdict on the proximate cause element of a legal malpractice claim arising from a transactional underlying matter, and also to distinguish those from the "case-within-the-case" standards for a litigation-related underlying matter. To date, this Court has not directly addressed these standards.[1] Understanding the distinctions and dichotomies between the evidence necessary to show "proximate cause" for damages resulting from a breach of fiduciary as compared to the evidence for "proximate cause" under a professional

[1] The reported legal malpractice cases appealing from an order granting a motion for a directed verdict do not address evidentiary standards of proof for proximate cause on a negligence claim arising from a transactional underlying matter. *See Bass v. Farr*, 315 S.C. 400, 434 S.E.2d 274 (1993) (transactional underlying matter, but does not address proximate cause); *RFT Management Co., LLC v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 336, 732 S.E.2d 166, 173 (2012) (same); and *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 760 S.E.2d 399 (2014) (litigation underlying matter).

negligence claim will help resolve any existing uncertainty. The basis and underlying facts supporting the claims in this case provide this Court with these opportunities to clarify these "proximate cause" matters of proof, which were not available in *RFT Management Co.* or *Spence v. Wingate*, 395 S.C. 148, 716 S.E.2d 920 (2011).

It is clear both the Court of Appeals and the trial court struggled with these concepts as applied to the evidence and testimony presented during the trial of this case. Neither court addressed the existence or non-existence of evidence showing harms "proximately resulting from" Respondents' breach of their fiduciary duties of loyalty, which is the standard stated, but not explained, by this Court in *RFT Mgmt. Co.*, 399 S.C. at 336, 732 S.E.2d at 173 (citing *Spence v. Wingate*, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011). The trial court did not address the evidence and expert testimony from which the jury could have inferred that the subject $42M conservation easement transaction would have closed in 2007 if the lawyer had not abandoned the client only ten days before the end of the end of the target 2007 tax year.

The Court of Appeals' Opinion, on the other hand, did not directly address any of the trial court's evidentiary findings or omissions when it affirmed using Rule 220(c), SCACR. Instead, the Court of Appeals effectively modified the agreement between the parties through which it imposed a new evidentiary requirement that Petitioner present evidence that the payment of the consulting fee was "conditioned" on the "completion of the transaction by the end of 2007," even though there was evidence of the landowners' objective to record the easement in 2007 and their

intent to pay the fee if it had been recorded on time. The Court of Appeals further modified the agreement by inferring that the landowners' tax objectives would have allowed the easement to be recorded in *any* tax year other than 2007, and also notwithstanding the terms of Respondents' engagement as counsel to assist in getting it recorded that year. The Court of Appeals then imposed a new, unprecedented requirement for Petitioner to prove it "was otherwise impossible" for the easement to close at some later date after the 2007 tax year objective of the parties. The Court of Appeals ignored the evidence of the parties' intent to close in 2007. Maybe more importantly, the Court of Appeals ignored Respondents' admissions on their commitment to "get[] all this done before the end of the [2007] year" as part of the terms of their engagement.

The lack of clarity on the "proximately resulting from" standard of proof may explain why both courts misapplied the "any evidence" standard of review, and also explain why the Court of Appeals concluded that "there was no evidence that Respondents' withdrawal from representation of [Petitioner] prevented Justice Family Farms from recording the conservation easement, and then paying [Petitioner]'s fee, after 2007." Such proof was not necessary because there was evidence that the reason Petitioner did not earn a fee "proximately resulted from" Respondents' withdrawal. Tracking the Court of Appeals' language, Respondents' withdrawal from representation of Petitioner prevented Justice Family Farms from recording the conservation easement *in 2007*, and then paying Petitioner's fee. All

of this was for the jury.[2] Granting this Petition provides the Court an opportunity to clarify these proximate cause issues for the bench and bar.

QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err in:

A) finding that no evidence existed on the record that the conservation easement was required to be "recorded in time" to "have the tax advantages in the year 2007?"

B) finding that Petitioner was required, but failed, to present "evidence that Respondents' withdrawal from representation of [Petitioner] prevented Justice Family Farms from recording the conservation easement, and then paying [Petitioner]'s fee, after 2007?"

C) failing to make a finding on whether the trial court improperly weighed evidence on proximate cause when it granted Respondents' motion for directed verdict?

D) failing to make a finding on whether the trial court improperly excluded evidence that would have further established the causal link between Respondents' tortious withdrawal as counsel and Petitioner's damages?

STATEMENT OF FACTS

Yancey A. McLeod, Jr. (Mr. McLeod) and James C. Justice, II (Mr. Justice) entered into an agreement in October 2007 whereby Mr. McLeod's company,

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[2] *See Gause v. Smithers,* 403 S.C. 140, 742 S.E.2d 644, 649 (2013) ("[p]roximate cause is normally a question of fact for determination by the jury, and may be proved by direct or circumstantial evidence" and "[o]nly in rare or exceptional cases may the issue of proximate cause be decided as a matter of law").

YANCEY ENVIRONMENTAL SOLUTIONS, LLC (YES), would coordinate the professional services by the lawyer, appraiser, and wildlife biologist, and locate a charitable grantee organization in order to record a conservation easement in the 2007 calendar year on the "Black River Farm" property in Clarendon County owned by Mr. Justice's companies, in exchange for a 4% commission based on an expected $45,000,000 tax deduction once the easement was recorded.[3] Mr. McLeod testified that after he explained to Mr. Justice the concepts behind the conservation easement, Mr. Justice told him, "Let's do it."[4]

Based on the trial court's rulings, it is important to emphasize that Mr. Justice, individually, did not own the subject "Black River Farms" property in Clarendon County as it was owned by JUSTICE FAMILY FARMS, LLC (JFF), which is owned by JAMES C. JUSTICE COMPANIES, INC., of which Mr. Justice is the principal shareholder.[5] G. Harold Hanlin, J.D. (Mr. Hanlin) with RICHARDSON PLOWDEN & ROBINSON, P.A. (Law Firm), the lawyer for the transaction, finalized a Consulting Services

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[3] (Trial transcript, 134:20-135:5, ROA 57-58; 142:13-24, ROA 65; 145:3-12, ROA 68; 305:22-307:4, ROA 228-230; 322:7-13, ROA 245); (Trial transcript, 470:18-472:7, ROA 366-368; 475:4-17, ROA 371; 482:6-483:17, ROA 378-379; 484:10-17, ROA 380; 489:10-13, ROA 385; 490:3-491:4, ROA 386-387; 622:8-15, ROA 518); (JFF 30(b)(6) testimony, 7:18-9:18, ROA 882-884; 11:3-20, ROA 886; 16:19-17:10, ROA 891-892; 18:23-19:12, ROA 893-894; 19:13-23, ROA 894; 20:1-18, ROA 895; 23:20-24:7, ROA 898-899; 30:4-31:6, ROA 905-906; 32:19-34:1, ROA 907-909; 35:22-36:9, ROA 910-911; 40:2-21, ROA 915; 68-9:12, ROA 943).

[4] (Trial transcript, 652:25-654:10, ROA 548-550).

[5] (Trial transcript, 345:20-346:1, ROA 268-269); (JFF 30(b)(6) testimony, 7:18-8:2, ROA 882-883); (McLeod letter to Justice with Consulting Services Agreement, Nov. 26, 2007, Pl. trial ex. 7, ROA 1050); (Hanlin e-mail, Nov. 7, 2007, Pl. trial ex. 3, ROA 1060).

Agreement to memorialize the agreement identifying "James C. Justice – Justice Family Farms, LLC" collectively as the "Owner" of the property.[6]

The parties proceeded in earnest to complete the easement in the 2007 tax year, although the Consulting Services Agreement was never signed by a representative of JFF or Mr. Justice and no formal "closing" date had been set.[7] Mr. Miller testified that Mr. Justice "was in agreement with the process moving forward towards establishing a conservation easement, so that we could have the tax advantages in the year 2007, by 12-31 of that year."[8] Mr. Miller testified it was JFF's understanding that the project was moving forward and the company was planning to use the deductions from the conservation easement as part of its "tax calculations for 2007" and that it was the company's "understanding that everything was on track."[9] Mr. Miller also testified that JFF understood that Mr. Hanlin and the Law Firm had been "brought in to handle all the legal aspects of the entire conservation

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[6] (Trial transcript, 142:13-24, ROA 65; 143:22-144:17, ROA 66-67; 322:7-13, ROA 245); (Trial transcript, 490:19-494:14, ROA 386-390); (McLeod letter to Justice with Consulting Services Agreement, Nov. 26, 2007, Pl. trial ex. 7, ROA 1050); (Hanlin e-mail, Nov. 7, 2007, Pl. trial ex. 3, ROA 1060); (Hanlin letter, Dec. 5, 2007, Pl. trial ex. 10, ROA 1062).

[7] (Trial transcript, 145:3-12, ROA 68; 236:16-21, ROA 139; 307:10-308:4, ROA 230-231; 324:1-15, ROA 247); (Trial transcript, 457:14-24, ROA 353; 494:1-495:3, ROA 390-391; 562:15-563:12, ROA 458-459; 569:17-570:7, ROA 465-466); (Hanlin e-mail, Nov. 7, 2007, Pl. trial ex. 3, ROA1060); (YES e-mail, Dec. 27, 2007, noting that COLT had approved the easement gift, Pl. trial ex. 34, ROA 1083).

[8] (JFF 30(b)(6) testimony, 17:11-19:12, ROA 892).

[9] (JFF 30(b)(6) testimony, 20:7-18, ROA 895).

easement transaction" and that "Mr. Justice agreed to move forward with that."[10] JFF was expecting to be advised when the documents were ready, to schedule a meeting, to sign the documents, to record the easement, to send the materials to its tax preparers for the 2007 returns, and to pay the stewardship fees and other associated professional fees, including the fees to YES.[11] It was JFF's "intent to move forward with this easement based on the information that we had, the proposed value of the property, and **it was <u>our</u> intent to have it done by the end of the year for tax advantage**."[12]

On December 17, 2007, the IRS sent a letter to Mr. McLeod informing him of an investigation into YES, which was unrelated to the plans for the JFF easement. The IRS letter was e-mailed to Mr. Hanlin on the morning of December 20, 2007.[13] Later in the day on December 20, 2007, Mr. Hanlin told Mr. McLeod that, based on the IRS letter and investigation, he had been directed by the Law Firm to terminate the client-lawyer relationship with YES on all matters, including the JFF matter.[14]

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

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[10] (JFF 30(b)(6) testimony, 22:2-23, ROA 897-898).

[11] (JFF 30(b)(6) testimony, 30:4-31:6, ROA 905-906; 33:6-34:1, ROA 908-909).

[12] (JFF 30(b)(6) testimony, 32:19-33:5, ROA 907-908) (emphasis added).

[13] (Trial transcript, 262:20-264:19, ROA 185-187); (Trial transcript, 551:8-24, ROA 447); (Mohr e-mail, Dec. 20, 2007 with IRS letter, Pl. trial ex. 23, ROA 1070).

[14] (Trial transcript, 554:13-555:22, ROA 450-451); (Hanlin e-mail, Dec. 20, 2007, Pl. trial ex. 24, ROA 1076); (Hanlin letter, Dec. 21, 2007, Pl. trial ex. 25, ROA 1077).

said, "Hal just told me that Richardson Plowden had terminated all relationships with me immediately. I don't have any choice but to call Jim Justice and recommend he postpone this project."[15] Since December 20th was so close to the end of the tax year, coupled with the fact that conservation easements are very complex legal matters, especially when using a $45,000,000 wetlands mitigation value for the before-easement value, the jury heard testimony that it would have been a waste of time to try to obtain a lawyer to take Mr. Hanlin's place. Mr. McLeod and YES' expert testified that no competent tax lawyer would have been available to take over the project because of the complexities of the JFF conservation easement project (or virtually any conservation easement) and because there were only ten days left before the end of the 2007 tax year.[16]

Because Respondents had terminated the client-lawyer relationship, abandoned the JFF conservation easement project and left YES with no tax counsel and no hopes of finding replacement counsel for such a complicated matter in such a short time period, Mr. McLeod testified that he was left with no choice other than to recommend to Mr. Justice that JFF not move forward with closing the easement in 2007.[17] A conference call was arranged for Christmas Eve, December 24, 2007, between Mr. Justice, his local lawyer, Steven Ball, his CPA, Mr. Harrah, and Mr. McLeod, and Mr. Crosby Lewis, the lawyer Mr. McLeod had engaged to represent

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[15] (Trial transcript, 555:18-22, ROA 451).

[16] (Trial transcript, 387:14-390:14, ROA 310-313; 397:1-6, ROA 320; 398:24-399:15, ROA 321-322; 402:3-12, ROA 325); (Trial transcript, 557:23-558:17, ROA 453-454).

[17] (Trial transcript, 555:18-22, ROA 451).

YES for the IRS investigation.

During the telephone conference, Mr. McLeod recommended to Mr. Justice that the easement on the JFF property be postponed based on the IRS investigation.[18] Mr. McLeod was too embarrassed to tell Mr. Justice that Mr. Hanlin and the Law Firm had abandoned the project.[19] Mr. McLeod also testified that Mr. Justice had made it clear that while he had lots of advisers and lawyers and CPA's "that he didn't have anybody that knew anything about conservation easements."[20]

Mr. McLeod testified that if Respondents had not withdrawn and remained as counsel, he would have recommended to Mr. Justice that they proceed with the JFF easement.[21] Mr. McLeod testified that if Mr. Hanlin "hadn't quit I would have been perfectly willing to move forward with [the JFF easement], I knew I hadn't done anything wrong." *Id.* YES sought to admit the testimony of JFF's designee, Mr. Miller,[22] that if Mr. McLeod had recommended they proceed with the conservation easement, notwithstanding the IRS investigation, they would have accepted his advice, closed on the easement by the end of 2007, taken the tax deduction, and

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[18] (JFF 30(b)(6) testimony, 31:7-32:18, ROA 906-907).

[19] (Trial transcript, 558:18-559:17, ROA 454-455; 559:23-560:11, ROA 455-456; 651:5-11, ROA 547; 654:2-655:14, ROA 550-551); (Trial transcript, 340:1-3, ROA 263).

[20] (Trial transcript, 651:12-19, ROA 511; 652:7-18, ROA 548).

[21] (Trial transcript, 560:12-20, ROA 456).

[22] This testimony was not admitted. The trial court sustained Respondents' objections to this testimony, notwithstanding Rules 701 and 803(3), SCRE. (Trial transcript, 796:1-820:1, ROA 659). See Petitioner's discussion of the trial court's error in Argument III(A) beginning on page 18.

paid YES the professional fees it would have earned.[23]

Expert testimony from Gregory B. Adams, J.D., LL.M., J.S.D., was given at trial during which he concluded that Respondents breached their professional, fiduciary, and contractual duties to YES by terminating their client-lawyer relationship and abandoning the JFF conservation easement before it was recorded.[24] Dr. Adams also testified that there was "**an unmistakable causal link** between [Respondents'] wrongful withdrawal ... and the fact that the deal did not get done and Mr. McLeod did not earn his 1.8 million dollar fee."[25]

At the close of the YES' case at trial, the trial court denied Respondents' motion for directed verdict on the grounds that there was "a question of fact to submit to the jury" based on the testimony "from the 30(b)(6) witness and Mr. Harrah, all that combined together is enough to get past this motion."[26] At the close of Respondents' case at trial, however, the trial court granted Respondents' second motion for a directed verdict on the proximate cause issue, notwithstanding the abundance of evidence and testimony already before the jury on those issues. Admittedly acknowledging that he was "struggling with this," the trial court made an oral ruling granting the motion on the grounds that YES had not submitted evidence

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[23] (JFF 30(b)(6) testimony, 30:14-31:6, ROA 905; 38:14-39:9, ROA 913-914); (Harrah memo to YES, Sept. 30, 2008, PI trial ex. 38, ROA 1065).

[24] (Trial transcript, 265:7-272:24, ROA 188-195; 273:12-277:3, ROA 196-200).

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

[26] (Trial transcript, 867:12-ROA 685).

from Mr. Justice thereby "breaking the causal link."[27] The trial court's written order was based on the same grounds.[28] YES appealed.

The Court of Appeals issued its Opinion on January 28, 2015, affirming the trial court's order granting directed verdict, but not on the same grounds that YES had not submitted evidence from Mr. Justice to establish "the causal link." Instead, the Court of Appeals affirmed "on the sole ground" that

> there was no reasonable inference from the evidence that the oral agreement between [YES] and Jim Justice Jr. conditioned the payment of [YES]'s consulting fee on the completion of the transaction by the end of 2007. Further, [YES] did not present evidence that it was otherwise impossible to complete the transaction in 2008 after retaining replacement counsel. .... For these reasons, there was no evidence that Respondents' withdrawal from representation of [YES] prevented Justice Family Farms from recording the conservation easement, and then paying [YES]' fee, after 2007. (Ct. App. Opinion at 3).

YES filed a Petition for Rehearing on February 11, 2015. On March 12, 2015, the Court of Appeals issued an Order denying YES' Petition for Rehearing.

LEGAL ANALYSIS

I. The Court of Appeals' Opinion Overlooked Evidence In The Record That YES' Loss of a Fee Proximately Resulted from Respondents' Breach of Their Fiduciary Duties.

A. The parties' agreement was to have the easement recorded in time to "have the tax advantages in the year 2007."

The Court of Appeals erred in finding that "there was no reasonable inference

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[27] (Trial transcript, 1147:19-1148:13, ROA 869-870); *see also* (Trial transcript, 1149:2-16, ROA 871; 1150:7-21, ROA 872; 1152:17-22, ROA 874; 1153:4-8, ROA 875).

[28] (Order Granting Respondents' Motion for Directed Verdict, ROA 5).

from the evidence that the oral agreement between [YES] and Jim Justice, Jr. conditioned the payment of Petitioner's consulting fee on the completion of the transaction by the end of 2007." This was error because there was substantial evidence and inferences from that evidence that the conservation easement was required to be finalized by the end of 2007 to satisfy Mr. Justice and the Justice companies' intent to obtain tax advantages resulting from the easement being recorded in that year. Respondents' abrupt withdrawal from the representation prevented the easement from closing in 2007. As a proximate result, YES did not earn the fee it otherwise would have earned if Respondents had not quit.

Mr. Justice and the Justice companies retained YES to have a conservation easement recorded in 2007 and YES retained Respondents as tax counsel to assist in those efforts. 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 the JFF designee specifically testify that "if Mr. McLeod 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***."[29] The jury also heard the JFF 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."[30]

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[29] JFF 30(b)(6) testimony; (ROA 908-909) (emphasis added).

[30] JFF 30(b)(6) testimony; (ROA 893-894) (emphasis added).

This evidence was in the record from which the jury could have reasonably inferred that YES' loss of the $1.8M fee proximately resulted from Respondents' breach of their fiduciary duties of loyalty when they withdrew as counsel ten days before December 31, 2007 tax year deadline. *See*, *RFT Mgmt. Co.*, 399 S.C. at 336, 732 S.E.2d at 173 (citing *Spence v. Wingate*, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011). *See also Tuten v. Joel*, 410 S.C. 104, 116, 763 S.E.2d 54, 61 (Ct. App.), *cert. denied* (2014) ("proximate cause is ordinarily a jury question" and "court may decide proximate cause as a matter of law 'when the evidence is susceptible to only one inference.'") (internal citations omitted). Mr. Justice and the Justice Companies were intent on completing this major conservation easement in order to offset their tax liability for the year 2007, and would have paid YES if the easement had been timely recorded. The Court of Appeals and the trial court erred in ruling otherwise.

B. <u>Supporting Evidence In The Record</u>.

During trial, the jury heard testimony and reviewed exhibits that would have provided a reasonable inference that the agreement between YES and Justice did, in fact, "condition[] the payment of Appellant's consulting fee on the completion of the transaction by the end of 2007." (Ct. App. Opinion at 3.) The JFF 30(b)(6) designee gave testimony regarding the intent of the parties and the necessity of the conservation easement being recorded by the end of 2007:

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.[31]

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.**

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20:14 ....., 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.[32]

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.[33]

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

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[31] JFF 30(b)(6) designee testimony; (ROA 893-894) (emphasis added).

[32] JFF 30(b)(6) designee testimony; (ROA 895) (emphasis added).

[33] JFF 30(b)(6) designee testimony; (ROA 900-901).

30:13 move forward with preparing our tax returns for 2007.[34]

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.[35]

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 Mr. McLeod 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*.**[36]

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.[37]

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[34] JFF 30(b)(6) designee testimony; (ROA 905).

[35] JFF 30(b)(6) designee testimony; (ROA 907-908).

[36] JFF 30(b)(6) designee testimony; (ROA 908-909) (emphasis added).

[37] JFF 30(b)(6) designee testimony; (ROA 909). This testimony was not allowed by the trial court.

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.[38]

In addition, an email from Respondent Hanlin to Mr. McLeod, with a copy to a partner at Richardson Plowden, was submitted to the jury in which Respondent Hanlin discussed the conservation easement project.[39] Respondent Hanlin wrote about the information needed "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 "***getting all this done before the end of the year will be a challenge for everyone***, . . ., 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:

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

[38] JFF 30(b)(6) designee testimony; (ROA 954).

[39] Plaintiff's Trial Ex. 3; (ROA 1060).

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.

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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***.[40]

Also, the jury received the Richardson Plowden Fee agreement and heard the expert testimony from Dr. Adams explaining the fee agreement and that under the circumstances the Respondents had "the responsibility was to do what needed to be done to bring this conservation easement into existence before the end of the year so that Mr. Justice would be able to make the donation and get the tax deduction in 2007."[41] Dr. Adams later, in response to a question about why the conservation easement was not recorded in 2008, testified that Mr. Justice apparently was not interested and, "for whatever reason, whatever his tax situation was at the time. The time when he had the critical need for it in 2007 had come and gone.[42]

The jury even heard Respondent Hanlin testify that it was "our plan" to get the easement recorded by December 31, 2007.[43]

Further, the jury reviewed a letter from YES to Justice enclosing the

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

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

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

[43] Respondent Harold Hanlin, Trial Testimony; (ROA 832-833).

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** . . .."[44]

The Court of Appeals Opinion overlooked or misapprehended the testimony and evidence from which the jury could have reasonably inferred that Mr. Justice and the Justice companies intended "to pay [YES the] fee had the easement moved forward and been recorded in time,"[45] 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."[46] All of this and the other evidence cited could be inferred by the jury as a proximate link between Respondents' withdrawal and YES' "damages proximately resulting from the wrongful conduct of the defendant." *See RFT Management Co., LLC v. Tinsley & Adams, L.L.P.*, 399 S.C. at 336, 732 S.E.2d at 173. The Court of Appeals' opinion should be reversed and the trial court's order granting Respondents' motion for directed verdict should be vacated.

II. The Court of Appeals' Ruling That There Was "No Evidence That it Was Otherwise Impossible to Complete the Transaction in 2008 after Retaining Replacement Counsel" Was Not Based on Any Evidence in the Record and Improperly Expanded and Modified the Terms of the Agreement That Was in the Record.

A. The Court of Appeals' ruling improperly changed the terms of the agreement between YES and Justice to have an easement recorded in 2007.

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[44] Plaintiff's Trial Ex. 7 (emphasis added) (ROA 1050).

[45] JFF 30(b)(6) designee testimony; (ROA 908-909).

[46] JFF 30(b)(6) designee testimony; (ROA 893-894).

The Court of Appeals erred in substantially modifying the evidence and testimony on the scope and terms of Mr. Justice's agreement with YES to record a conservation easement *in the 2007 tax year.* It did so when it found that "[YES] did not present evidence that it was otherwise *impossible* to complete the transaction *in 2008* after retaining replacement counsel." (Ct. App. Opinion at 3) (emphasis added). There was no evidence in the record indicating Mr. Justice and his companies ever indicated an intent to record an easement in any year other than 2007. The Court of Appeals' ruling should be reversed because there was no evidence to support this ruling. See *N. Am. Rescue Products, Inc. v. Richardson*, 769 S.E.2d 237, 240 (S.C. 2015), *reh'g denied* (Mar. 19, 2015). The only evidence in the record was that Mr. Justice and his companies intended to record an easement in 2007 for tax purposes. After Respondents abandoned the $45M project with only ten days before the end of the 2007 tax year, it was practically "impossible" to retain "replacement counsel" in time to get the easement recorded in 2007.[47] 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 at a critical time to get the easement recorded in the year 2007 as per the YES' agreement with Mr. Justice and his companies.

B. The Court of Appeals erred in finding that Crosby Lewis was retained as "replacement counsel."

The Court of Appeals' opinion erroneously concludes that YES obtained

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[47] Dr. Adams Trial Testimony; (ROA 260); McLeod Trial Testimony; (ROA 453).

"replacement counsel" to "complete the transaction in 2008." (Ct. App. Opinion at 3). No such evidence or testimony was presented at the trial case. The testimony that was given at trial showed that Mr. McLeod retained an old friend, Crosby Lewis, as counsel to assist only in the IRS investigation with no involvement whatsoever in the easement transaction.[48] There simply was no "replacement counsel" retained to take over the Justice easement matter.

This erroneous conclusion by the Court of Appeals' appears to bolster its other erroneous conclusion that Mr. Justice and his companies intended on filing an easement at any time after 2007. It follows that because there is no evidence that Mr. Justice and the Justice companies ever intended to record the easement in any year other than 2007, there is also no evidence YES engaged "replacement counsel" to take over after Respondents abandoned the project in 2007, the only year it was retained to record a conservation easement.

These erroneous findings are additional reasons why the Court of Appeals' opinion should be reversed and the trial court's order granting Respondents' motion for directed verdict should be vacated.

III. The Trial Court Improperly Weighed the Evidence When It Granted Respondents' Motion For Directed Verdict.

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

"In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence." *Manios v.*

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[48] McLeod Trial Testimony; (ROA 453).

Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126, 146, 697 S.E.2d 644, 654 (2010). Whether a defendant's acts or omissions proximately caused harm to a plaintiff is almost always a question of fact for a jury. *See Tuten v. Joel*, 410 S.C. at 116, 763 S.E.2d at 61. The trial court's order granting Respondents' motion for a directed verdict based on an alleged *lack* of causation evidence was plain error and should be reversed and remanded for retrial.

The trial court erred in granting Respondents' motion for a directed verdict because, in the light most favorable to YES, there was evidence in the record that, because the Law Firm and Mr. Hanlin withdrew from the representation, YES was not able to recommend its clients, Mr. Justice and JFF, proceed with the conservation easement thereby proximately resulting in the loss of the fees it would have earned from that easement. *See Manios*, 697 S.E.2d at 655. Further, there was evidence of JFF's intent to proceed with the conservation easement right up to the point when Mr. McLeod had to recommend otherwise based on the Respondents' withdrawal from the client-lawyer relationship.[49]

Through testimony and exhibits, evidence was before the jury establishing that but for Respondents' improper withdrawal, JFF would have closed on and recorded the conservation easement before the end of 2007 and YES would have been paid a substantial fee. Far more than a "scintilla of evidence" was before the jury to show that YES' damages proximately resulted from Respondents' acts and omissions. Therefore, the trial court order directing the verdict was improper.

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[49] (JFF 30(b)(6) designee, 32:19-33:5, ROA 907-908) and (JFF 30(b)(6) designee testimony, 68:9-12, ROA 943).

B. There was testimony in the record that JFF intended to proceeded with the easement.

The Court erred in finding that the testimony by Mr. Miller, JFF corporate designee, that was admitted into evidence concerning the corporation's intent to close on the easement was not sufficient to defeat Respondents' motion for a directed verdict. Respondents never disputed that JFF was a party to the contract. Their contention, and the trial court's error, was that because Mr. Justice was the decision-maker for that corporation, his testimony was necessary to establish the corporation's intent. This ruling was in error.

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

The findings the trial court's findings that "what [JFF] might have intended is simply not pertinent" is contrary to the evidence on the record.[50] This finding constitutes reversible error because it ignores the evidence in the record from which the jury could have reasonably concluded that JFF would have closed on the easement if Respondents had not withdrawn as tax counsel, thereby establishing proximate cause. This finding constitutes reversible error because it contains an erroneous conclusion that Mr. Miller's testimony, the corporate designee for JFF,

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[50] (Order Granting Defendants' Motion For Directed Verdict at 9, ROA 13).

was not sufficient to establish the corporation's intent.

C. The trial court did not apply the proper standard of review of the facts and inferences from those facts to Respondents' motion for a directed verdict.

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

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

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

weighing the evidence instead of determining whether a scintilla of evidence existed on which the jury could make the determination of its weight.[51] In this matter, the trial court erred in determining the weight of the evidence instead of focusing on the court's true role, which should have been to view the evidence in the favor of YES, the non-moving party, and determine if a scintilla of evidence was in the record, and if so, to allow the case to be submitted to the jury.

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that the Court should grant Petitioner's PETITION FOR A WRIT OF CERTIORARI. The need for clarification of the "proximately resulting from" standard and the evidence necessary to satisfy the proximate cause element on a motion for directed verdict against a breach of fiduciary duty claim, and distinguished from the standards and proofs associated with a negligence claim will benefit the bench and bar. Guidance is also needed on the standards of review and the standards of proof for the evidence necessary to survive a motion for directed verdict on the proximate cause element of legal malpractice claims, when those claims arise from a transactional underlying matter. The "case-within-the-case" standards for litigation-related underlying matters need to be distinguished.

In addition, both the trial court and Court of Appeals committed reversible errors in granting and affirming the directed verdict in this case based on the evidence and expert testimony presented. The Court of Appeals' opinion should be

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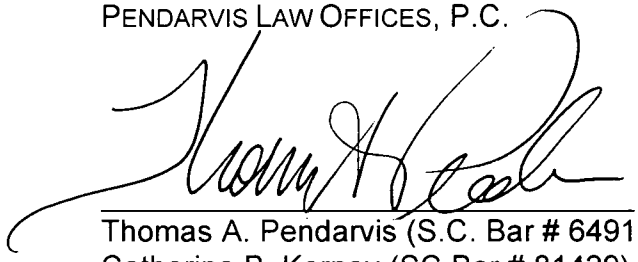
[51] (Trial transcript, 1147:19-1148:13, ROA 869-870).

reversed and the trial court's order granting Respondents' motion for directed verdict should be vacated. Petitioner respectfully requests that the PETITION FOR A WRIT OF CERTIORARI be granted to address all of these issues.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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Counsel for Petitioner

Beaufort, South Carolina

April 9, 2015

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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
Unpublished Opinion No. 2015-UP-042

YANCEY ENVIRONMENTAL SOLUTIONS, LLC. . . . . Petitioner,

vs.

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

PROOF OF SERVICE

I, Thomas A. Pendarvis, a lawyer with PENDARVIS LAW OFFICES, P.C., certify that I have served one (1) copy of the PETITION FOR WRIT OF CERTIORARI on counsel for Respondents, Susan P. McWilliams, J.D., Daniel C. Leonardi, J.D. and Burl F. Williams, J.D., by depositing a copy of the same in the United States Mail, postage prepaid, on the 9th day of April, 2015 addressed as follows:

Susan P. McWilliams, J.D.
Daniel C. Leonardi, J.D.
Burl F. Williams, J.D.
NEXSEN PRUET, LLC
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April 9, 2015

Beaufort, South Carolina

PENDARVIS LAW OFFICES, PC

April 9, 2015

VIA UPS OVERNIGHT MAIL
Daniel E. Shearouse, Clerk
SUPREME COURT OF SOUTH CAROLINA
1231 Gervais Street
Columbia, SC 29201

Re: YANCEY ENVIRONMENTAL SOLUTIONS, L.L.C. v. RICHARDSON PLOWDEN & ROBINSON, P.A. AND GEORGE HAROLD HANLIN, J.D.
APPELLATE CASE NO. 2012-212687

Dear Mr. Shearouse:

Enclosed for service upon you, please find an original (unbound) and six copies of a PETITION FOR WRIT OF CERTIORARI in connection with the above matter. Also enclosed please find an original and one copy of a PROOF OF SERVICE together with our firm's check in the amount of $100.00 for the filing fee.

Also enclosed for filing with your office, please find an original (unbound) and one copy of an APPENDIX.

Should you have any questions, please feel free to contact our office. With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

Thomas A. Pendarvis

TAP/lat
Enclosures
cc w/encls: SC Court of Appeals (w/Petition for Writ of Certiorari & Proof of Service)
Susan P. McWilliams, J.D.
Daniel C. Leonardi, J.D.
Burl F. Williams, J.D.

ec w/encls: Yancey A. McLeod, Jr., J.D.

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The Supreme Court of South Carolina

Pendarvis Law Office, PC

04/10/2015

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Fee Type:	Case Initiation Fee
Amount:	$100.00
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