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**SC SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

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App. Case No. 2015-000739

Opinion No. 2015-UP-042 (S.C. Ct. App. filed January 28, 2015)

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

vs.

RICHARDSON PLOWDEN & ROBINSON, P.A. and  
GEORGE HAROLD HANLIN, J.D. ....Respondents.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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This appeal involves a legal malpractice action arising from a proposed conservation easement on a 4,500 acre farm in Clarendon County, South Carolina. As pitched to the landowner, if he had agreed to encumber his land in perpetuity with a conservation easement, he stood to gain millions of dollars in federal tax benefits based on a valuation of the conservation easement. If the landowner decided he did not want to make the conservation easement, he had no obligation to do so. The proposed conservation easement transaction did not close, however, and after nearly three years, this lawsuit was filed.

Interestingly, the landowner did not bring this lawsuit. Rather, the plaintiff below was the consultant who pitched the project to the landowner and stood to receive a contingency fee worth 4% of the conservation value of the property. The consultant sued his own lawyers, who were retained to provide certain tax advice to him, not the landowner. The consultant claimed that the deal did not close because the lawyers withdrew from their representation shortly before the end of the year.

The lawyers withdrew from representing the consultant when they learned that the consultant had received an IRS investigation letter notifying the consultant that his consulting company, himself individually, and the previous conservation easement projects he had promoted, were under federal investigation as tax avoidance schemes. Since the lawyers had been counsel to the landowners in a number of those projects promoted by the consultant, they had a conflict with proceeding with the instant representation of the consultant. After the lawyers withdrew, the consultant retained counsel for the IRS investigation and then phoned the landowner and told him that he was under investigation by the IRS and recommended that the project be postponed. The

landowner agreed. The consultant never mentioned his lawyers' withdrawal to the landowner in this conversation.

Nearly three years after the consultant recommended that the landowner postpone the transaction, which to this day has never been consummated, the consultant filed this lawsuit claiming that the lawyers' withdrawal scuttled the deal and the consultant was damaged by the loss of the anticipated million-plus consulting fee. The consultant claimed that if the lawyers had not withdrawn, he would not have recommended to the landowner that the conservation easement project be postponed. Rather, he asserted he would have recommended that the landowner move forward, notwithstanding the existence of the IRS investigation that would have included this very conservation easement. What the landowner would have done in response to this hypothetical recommendation was therefore absolutely critical to the question of whether the lawyers' withdrawal proximately caused the loss of the consulting fee. The problem, however, is that the consultant produced no testimony from the landowner at trial, either live or by deposition. Once all of the evidence was in, the circuit court properly directed a verdict in favor of the lawyers, as the consultant failed to establish that the lawyers' withdrawal proximately caused the conservation easement not to close.

**I. PETITIONER'S JUSTIFICATION FOR WHY THIS COURT SHOULD GRANT A WRIT OF CERTIORARI IS CONTRIVED.**

The parties to this case are Petitioner/Plaintiff Yancey Environmental Solutions, LLC ("YES" or "Petitioner") and Respondents/Defendants Richardson Plowden & Robinson, P.A. ("RPR") and one of its lawyers, George Harold Hanlin, Esquire ("Hanlin") (collectively referred to hereinafter as "Respondents"). As summarized above, the trial of this case ended when the circuit court granted a directed verdict in

favor of Respondents on all of YES's causes of action following the close of all the evidence. The circuit court's order correctly determined that YES failed to present evidence that its alleged damages were proximately caused by Respondents. The court of appeals correctly affirmed the directed verdict, and correctly denied YES's petition for rehearing. This Court should, likewise, deny the Petition for a Writ of Certiorari because this case does not present any of the characteristics enumerated in Rule 242(b), SCACR.<sup>1</sup>

Rule 242(b), SCACR, provides a list of case characteristics identified by this Court as good examples for when it will grant a writ of certiorari. YES does not even attempt to identify any of these characteristics as a premise for this petition. Instead, it maintains that this case presents the court with an opportunity to provide guidance to the bench and bar on two issues of proximate cause regarding a legal malpractice claim: (1) "proximate cause standards of proof and damages flowing from a breach of fiduciary duty of loyalty . . . as demarcated from those associated with a negligence claim"; and (2) "standards of review and 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 litigation-related underlying matter." (Petition, 1). The flaw in Petitioner's argument is that the bench and bar do not need any guidance with respect to proximate cause. The law is well established. Furthermore, none of the legal arguments underlying the supposed guidance Petitioner seeks is preserved for appellate review. Each of the grounds advanced by Petitioner will be addressed in turn below.

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<sup>1</sup> There is no novel question presented in this case; no judge from the court of appeals dissented from the opinion; the court of appeals' opinion does not present any conflict with an opinion of this Court; there are no constitutional issues presented; and there are no federal questions presented.

Petitioner's appellate strategy before this Court seeks to draw a distinction between proximate cause for a negligence claim and a breach of fiduciary duty claim. However, during argument before the circuit court on Respondents' first Rule 50 motion, Petitioner took the opposite position:

Now . . . the claims in the case deal[] with breach of fiduciary duty. . . . [And] when we looked at the, even the negligence case and even if the Court were to lump the b[reach] of fiduciary case into the professional negligence case, proximate cause has two components. There is a causation in fact, that's but for, and there is a second cause, the legal cause, and the legal cause is for[e]seeability.

(App. 687, lines 15-24). In fact, the first time Petitioner sought to raise the above issue was in its Rule 59, SCRCF, motion to reconsider the Order granting a directed verdict. (App. 993–1038). This issue, thus, is not preserved for appellate review. *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (noting that party may not use a post-trial motion to reconsider to raise an argument for the first time). Petitioner has not cited to a single legal authority that would support the proposition that the legal standard for proximate cause varies with the different legal claims of each case.

Petitioner also seeks to suggest that the proximate cause standard for a malpractice action varies, depending on whether the malpractice action stems from a transactional matter as opposed to a litigation matter. However, the first time Petitioner raised this issue was in its petition to this Court. Accordingly, this argument is not preserved for appellate review. *I'On, LLC v. Town of Mt. Pleasant*, 388 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (noting issue is not preserved unless it has been raised and ruled upon in lower court). Furthermore, Petitioner has not cited to a single legal authority that would support the proposition that the legal standard for proximate cause

varies with the different facts of each case. Hence, Petitioner's argument on this issue is wholly without merit.

Once the spin and gloss of Petitioner's opening statement are set aside, it becomes clear that this is nothing more than a routine case in which a litigant failed to present required causation testimony. As the circuit court noted below during re-hearing arguments:

MR. PENDARVIS: Your honor, one last thing. You don't think there is the weight the evidence carries but there is evidence and I think the court might want to take a look, our response would be, Your Honor, on a directed verdict it is not the weight of the evidence, it's the existence of it.

THE COURT: That is what I'm saying, there is the existence of no evidence of what Jim Justice, everything is consistent with what, there is an absence of evidence what Jim Justice would do, an absence.

(App. 877, line 23–878, line 8). As will be detailed below, the absence of evidence from the critical actor (Jim Justice) in this malpractice action foreclosed any right to relief by Petitioner. And, as a result, the circuit court correctly directed a verdict.

## **II. COUNTER-STATEMENT OF THE CASE**

### **A. Background Facts and the Circuit Court's Order**

Petitioner YES is a consulting company that coordinates with landowners for the placement of conservation easements on their real property. (App. 11). The legal malpractice action stems from a proposed conservation easement transaction that was never completed. (App. 10–11, 15–16). The damages YES sought in the action consisted of a contingent consulting fee it expected to be paid by the landowner had the transaction been completed. (App. 15–16; 521, lines 8-15). The background of the case follows.

In the spring of 2007, Yancey A. McLeod (“Mr. McLeod”), the principal of YES, began discussions with a very wealthy business executive from West Virginia, James C. Justice, II (“Mr. Justice”). (App. 234, line 8–237, line 22; 622, line 8–625, line 17; 937, lines 20-23). Their discussions centered on potential federal tax benefits that Mr. Justice could obtain by placing environmental restrictions on a 4,500 acre farm he owned in Clarendon County, South Carolina (the “Farm”). (App. 357, line 10–364, line 14; 710, lines 4-25). At all times pertinent to this action, the Farm was owned by an entity that Mr. Justice majority-owned and controlled.<sup>2</sup> (App. 271, line 20–272, line 1).

Initially, the discussion between Mr. McLeod and Mr. Justice focused on creating a wetlands mitigation bank, which is a potentially lucrative exercise that generally involves a landowner rehabilitating to its pre-development state land that once contained wetlands. Mr. McLeod informed Mr. Justice that in order to establish a wetlands mitigation bank he would have to flood significant portions of the land. Because the Farm is a working commercial farm, however, Mr. Justice’s son did not like the idea of establishing a wetlands mitigation bank. (App. 366, line 15–367, line 4).

On August 3, 2007, Mr. McLeod traveled to West Virginia to meet with Mr. Justice and to tour a tract of land Mr. Justice owned and on which he was considering

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<sup>2</sup> Record title to the subject farm is held in the name of Black River Farms, LLC. (App. 648, lines 20-24). The South Carolina Secretary of State has no record of this entity. The West Virginia Secretary of State has a record of two different Black River Farms, LLC. The first entity was at the time of trial owned by a company called Mechel Bluestone, which is a Justice entity; the second entity is owned individually by Justice, and another individual named Brian Wright. (App. 648, line 20–651, line 2). YES contends that Justice Family Farms owned Black River Farms by private agreement. (App. 652, lines 21-25). YES also contends that Black River Farms is owned by Justice Family Farms, which is owned by James C. Justice Companies, Inc., which is majority owned by Justice. (App. 1099). The issue of ownership is unclear but also unimportant, because as discussed herein, it was undisputed at trial that Mr. Justice was the ultimate decision-maker regarding the proposed conservation easement.

placing a conservation easement. (App. 368, line 19–369, line 11). After that meeting in West Virginia, and in light of Mr. Justice’s son’s reluctance to create a wetlands mitigation bank on the Farm, Mr. McLeod and Mr. Justice began to explore whether to place a conservation easement on the Farm. (App. 369, line 18–370, line 7). Mr. Justice was the ultimate decision-maker regarding the proposed conservation easement transaction. (App. 934, lines 20-23; 271, line 24–272, line 1; 566, line 16–567, line 8; 578, line 19–579, line 6; 587, lines 5-15; 642, line 17–643, line 3).

On or about late October to early November 2007, Mr. McLeod contacted Mr. Hanlin, a tax lawyer with RPR, about providing YES with tax advice related to the proposed conservation easement on the Farm. (App. 370, lines 22-24; 372, lines 5-9; 374, lines 4-17; 710, line 4–712, line 2). Mr. McLeod and Mr. Hanlin had worked together previously on conservation easement transactions; however, in those previous transactions, Mr. Hanlin had represented the landowners, not YES. (App. 707, line 20–709, line 24).

On or about November 26, 2007, Mr. McLeod forwarded to Mr. Justice a consulting services agreement (“the Draft Agreement”). (App. 1053–62). The proposed parties to the Draft Agreement were James C. Justice and Justice Family Farms, LLC. (App. 1055, 1061). The Draft Agreement referred to James C. Justice, individually, and Justice Family Farms, LLC collectively, as the Owners. (App. 1055). The opening “Whereas” clause of the Draft Agreement stated that “Owner is interested in exploring opportunities for conservation of certain real estate . . . .” (App. 1055). The Draft Agreement required Mr. Justice to first pay a \$50,000 “non-refundable retainer” and then 5% of the conservation value of the property. (App. 1055–56). Consistent with the

definition of Owner and the proposed parties, the Draft Agreement contained separate signature blocks for *both* Mr. Justice *and* Justice Family Farms, LLC. (App. 1061). However, neither Mr. Justice nor an officer of Justice Family Farms, LLC, ever signed the Draft Agreement, or paid the \$50,000 non-refundable retainer.<sup>3</sup> (App. 561, line 16–562, line 8).

On December 5, 2007, Mr. Hanlin formalized his representation of YES with an engagement letter. (App. 1065–67).<sup>4</sup> Then, on December 19, 2007, Mr. McLeod’s administrative assistant, Mary Mohr (“Ms. Mohr”), opened a letter from the Internal Revenue Service (“IRS”) that was addressed to McLeod. (App. 1074–78). The letter stated as follows:

We have reviewed materials regarding your participation in tax avoidance transactions. We are considering penalties and injunctions under Internal Revenue Code sections 6694, 6695, 6700, 6701, 7402, 7407 and 7408 for promoting and/or preparing documents relating to these transactions. *In addition, we will consider issuing “pre-filing notification” letters to the persons who have participated in these transactions.*

(App. 1074) (emphasis added).

The following day, Ms. Mohr e-mailed the IRS letter to Mr. Hanlin, stating, “I am attaching a very serious letter from the IRS received in the mail yesterday—Debra and I

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<sup>3</sup> Ultimately, YES did receive a check for \$15,000 from James C. Justice Companies, Inc. The check was issued on November 13, 2008, well after the project had been postponed. (App. 1072).

<sup>4</sup> The Respondents specifically agreed to provide the following representation: “Consultations with and the provision of legal tax advice to [YES], and consultations with tax advisors to Jim Justice regarding the conservation easement being considered for the property.” (App. 1065). The Respondents limited the engagement as follows: “Our legal responsibilities are limited to the services specified above, and it is expressly understood that this Firm will not be responsible to pursue any additional matters beyond those stated in Paragraph 1 above . . . .” (App. 1065).

have reviewed, but, and this is important—I have not shown this to Yancey [Mr. McLeod] and unless you tell me otherwise, I do not want him to see this, or know about this, until after Christmas.” (App. 1073). Mr. Hanlin promptly called Ms. Mohr and told her to show the IRS letter to Mr. McLeod immediately. (App. 755, line 2–756, line 7; 758, line 24–759, line 5).

That same day, Mr. Hanlin discussed with management at RPR the implication of the IRS letter upon his current representation of YES and his past representation of the landowners whose easements, along with Mr. McLeod and YES, were under investigation. (App. 759, lines 5-11; 760, line 14–761, line 17; 763, line 25–764, line 12). After those discussions with RPR management, Mr. Hanlin informed Mr. McLeod that he and RPR were withdrawing from further representation of YES. (App. 763, lines 11-24). On December 21, 2007, Mr. Hanlin memorialized his withdrawal in a letter to Mr. McLeod. (App. 1080; p. 765, lines 4-10). In pertinent part, Mr. Hanlin’s letter stated that “the IRS notice which you [Mr. McLeod] received on Wednesday, December 19, 2007, pertains to projects that I have worked on as well, and you and I could find ourselves in a position of conflict. For that reason, it is best that others represent you from the beginning.” (App. 1080).

Mr. McLeod made no effort to replace Mr. Hanlin on the conservation easement project. (App. 551, lines 6-12). However, Mr. McLeod did act immediately to retain counsel to combat the IRS. By the evening December 20, 2007, the day he received Mr. Hanlin’s withdrawal letter, Mr. McLeod already had retained and met with Crosby

Lewis, Esquire, and within a few days also retained Carey (misspelled “Kerry” at trial) H. Hall, Jr. (“Mr. Hall”) (App. 452, line 23–453, line 14; p. 552, lines 4-18).<sup>5</sup>

Then, on December 24, 2007, Mr. McLeod and Mr. Lewis telephoned Mr. Justice in West Virginia to inform him of the IRS investigation and to recommend that the project be postponed. (App. 532, line 24–533, line 6; 545, lines 18-20). Also in attendance in West Virginia for the telephone call were David Harrah (Mr. Justice’s accountant) and Stephen Ball (Mr. Justice’s in-house lawyer). Mr. McLeod testified that during the December 24 telephone call he never told Mr. Justice or Mr. Harrah that Respondents had withdrawn. (App. 535, line 21–536, line 2). Mr. Harrah likewise testified that Mr. McLeod never mentioned that Respondents had withdrawn from their representation of YES. (App. 622, lines 2-4). Mr. Harrah also testified that during that telephone call, Mr. McLeod stated that the IRS letter “called into question some of these types of transactions and that he couldn’t in good conscience move forward with this transaction.” (App. 621, line 22–622, line 1). Accordingly, the proposed conservation easement on the Farm was postponed.

On December 27, 2007, Mr. McLeod sent an e-mail to Mr. Justice referencing their call on December 24, advising Mr. Justice that all of the work done to-date could be used when the project was recommenced. He also forwarded an invoice for the requested \$50,000 initial consulting fee. (App. 1086–87). The proposed conservation easement on the Farm was never revived.

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<sup>5</sup> Mr. Hall’s testimony was introduced at trial through his deposition. Mr. Hall testified that the proposed Justice conservation easement was “abandoned because of [the] IRS letter.” (App. 694, line 22–695, line 4; 1085 (bottom of page)).

YES's Amended Complaint contained three claims: professional negligence, breach of fiduciary duty, and breach of contract. (App. 29, ¶ 31–33, ¶ 59). All three of those claims allegedly arose from Respondents' withdrawal of their representation of YES on December 20, 2007. (App. 29, ¶ 31–33, ¶ 59). YES alleged that the withdrawal proximately caused injury to YES. To support YES's claims, Mr. McLeod testified that the IRS investigation had nothing to do with Mr. Justice's proposed conservation easement not closing. Rather, Mr. McLeod testified that the proposed conservation easement did not close because Respondents withdrew from their representation of YES. (App. 535, line 15–536, line 25; 537, line 24–538, line 3). Mr. McLeod testified that, if Respondents had not withdrawn, he would have recommended that Mr. Justice proceed with the conservation easement. (App. 535, line 15–536, line 25; 537, line 24–538, line 3). Mr. McLeod further testified that he was confident that if he had made such a recommendation to Mr. Justice, then Mr. Justice would have proceeded with the conservation easement and YES would have earned a \$1.6 million dollar consulting fee, depending on the value of the conservation easement from the qualified appraiser. (App. 521, lines 8-15).

YES's damages were based on a term found in the un-executed Draft Agreement. The term in that agreement contemplated that if the conservation easement were closed and used for a tax deduction by Mr. Justice, YES would be entitled to a cash payment representing 5% of the conservation value of the property. (App. 1058-59). Testimony introduced at trial showed that Mr. Justice stated that the proposed 5% commission should be reduced to 4%. (App. 630, lines 8-19). There is also trial testimony that Mr.

Justice instructed YES to begin work on the proposed conservation easement project. (App. 369, line 18–370, line 7; 551, line 19–552, line 8).

Viewing the evidence in the light most favorable to YES, evidence was introduced at trial tending to show that YES and Mr. Justice entered into an oral agreement for YES to provide services related to the proposed conservation easement. Pursuant to that oral agreement, Mr. Justice was required to make every decision regarding the proposed conservation easement. For that reason, YES was required to present the testimony of Mr. Justice at trial. In order to prove its claims at trial, YES was required to submit evidence that *after* Mr. Justice learned of the IRS investigation into Mr. McLeod’s previous work on other conservation easements, *if* Mr. McLeod had recommended that Mr. Justice proceed instead of postpone, Mr. Justice would have followed Mr. McLeod’s recommendation and closed on the conservation easement.

Evidence of what Mr. Justice would have done in this hypothetical scenario was the crucial link in the causation chain. In a statement to the circuit court, counsel for YES made this point explicitly:

Legal malpractice cases all hinge on things that didn’t happen and always having to prove, in a litigation matter, a case within a case, and in a transaction matter, “we would proceed if proper advice had been given,” were always in hypothetical land.

(App. 409, lines 14-19). YES never presented the required hypothetical testimony from Mr. Justice—that is, YES never presented testimony that Mr. Justice would have proceeded with the closing had Mr. McLeod made a recommendation to close the conservation easement at the same time it notified Mr. Justice of the IRS investigation. Indeed, YES never presented *any* testimony from Mr. Justice.

YES did not subpoena Mr. Justice for a *de benne esse* deposition in West Virginia, and did not even get an affidavit from him. Instead, YES took a Rule 30(b)(6) deposition of a Justice Family Farms designee and attempted to substitute the corporate intent of Justice Family Farms for that of Mr. Justice, the undisputed decision-maker. Although not a basis for the court of appeals' decision below, it is axiomatic that while corporate intent may, indeed must, be presented through the testimony of a human designee, the opposite is not true. In order to establish a person's intent, that person must testify.<sup>6</sup> YES attempted to use the corporation's designee's testimony at trial to introduce the critical proximate cause evidence for what *Mr. Justice* would have done in the hypothetical situation. The circuit court correctly ruled that YES could not use the Rule 30(b)(6) deposition of Justice Family Farms to introduce testimony about what Mr. Justice, himself, would have done in the hypothetical situation.

At the close of all of the evidence, Respondents renewed their motion for a directed verdict pursuant to Rule 50, SCRCF. Following argument by counsel, the circuit court directed a verdict from the bench, concluding the critical lack of evidence as to Mr. Justice's intent. (App. 872, line 20–873, line 7). The circuit court, thereafter, memorialized its ruling in a formal written Order. (App. 8–17). In its Order, the circuit court noted that “YES's theory at trial was that if RPR and Hanlin had not withdrawn

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<sup>6</sup> Rule 30(b)(6) does not create a hearsay exception to allow a designee under that Rule to simply repeat statements made by corporate officers and employees, if those statements are being offered for their truth. *Cooley v. Lincoln Elec. Co.*, 693 F. Supp. 2d 767, 791 (N.D. Ohio 2010); *accord Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 435 (5th Cir. 2006) (noting that Rule 30(b)(6) deponent “could not offer any testimony at trial . . . to the extent that information was hearsay not falling within one of the authorized exceptions”); *see also Sara Lee Corp. v. Kraft Foods Inc.*, 276 F.R.D. 500, 503 (N.D. Ill. 2011) (discussing dangers of allowing a corporate designee to testify as a fact witness in lieu of the actual witness to the facts).

from representing it on December 20, 2007, it would have changed its recommendation to Mr. Justice during the telephone conference on December 24, 2007 from ‘postpone’ to ‘proceed.’” (App. 14). The court noted that, “[b]ecause YES did not inform Justice of the fact of the defendants’ withdrawal . . . , it is clear there is no direct evidence that the withdrawal caused Justice not to proceed.” (App. 14). The circuit court reasoned that only two explanations existed for why the proposed conservation easement did not close: (1) “it was either the disclosure of the IRS investigation,” or (2) “the recommendation from McLeod that Justice postpone the conservation easement.” (App. 14–15).

The circuit court correctly concluded that in order for YES to have presented a question of fact for the jury, it was required to “offer some scintilla of evidence that, had McLeod recommended that Justice proceed with the proposed conservation easement in the face of the IRS investigation, rather than postpone, Justice most probably would have done so in December of 2007.” (App. 15). From that line of reasoning, the circuit court correctly concluded that YES’s failure to present evidence regarding proximate cause—that is, what Mr. Justice would have done—required it to grant a directed verdict. (App. 15).

B. YES’s Appeal to the Court of Appeals

After entry of the Rule 50 order, YES filed a notice of appeal, and the case proceeded to the court of appeals. YES’s appeal focused on, among other legal issues, the evidentiary ruling excluding a portion of Justice Family Farms’ Rule 30(b)(6) deposition. Specifically, the brief addressed whether the circuit correctly excluded the corporate designee’s testimony that sought to state what Mr. Justice would have done had McLeod presented him with the hypothetical scenario discussed above. (App. 1120–23).

Following oral argument, the panel affirmed the circuit court's order pursuant to Rule 220(c), SCACR. Instead of addressing the circuit court's reasoning, and the Rule 30(b)(6) evidentiary issue, among others, the panel affirmed on an alternative ground:

Here, we acknowledge the evidence shows that Justice Family Farms, LLC was planning on recording a conservation easement on Black River Farms in 2007. However, 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. Further, Appellant did not present evidence that it was otherwise impossible to complete the transaction in 2008 after retaining replacement counsel. In fact, Appellant's principal, Yancey McLeod, did not even tell Justice that Respondents withdrew from representing Appellant. For these reasons, there was no evidence that Respondents' withdrawal from representation of Appellant prevented Justice Family Farms from recording the conservation easement, and then paying Appellant's fee, after 2007.

(App. 1313). Following a review of the trial record, the court of appeals apparently concluded that even if the excluded Rule 30(b)(6) testimony had been admitted, there was still no evidence that Mr. Justice required YES to ensure the conservation easement closed in 2007. Accordingly, the court of appeals concluded that it did not need to address any of the evidentiary challenges raised in YES's brief and affirmed the directed verdict. (App. 13–14).

### **III. LAW/ANALYSIS**

Petitioner raised four questions for this Court to review. (Petition, 4). The first two questions (styled as "A" and "B") address the court of appeals' alternative basis to affirm; the third and fourth questions (styled as "C" and "D") address whether the court of appeals erred in not ruling on legal issues raised in Petitioner's brief. Respondents will address each question in the order presented to this Court.

**A. The Court of Appeals correctly identified the dearth of evidence that Mr. Justice required that the conservation easement close in 2007.**

As discussed below, the court of appeals correctly identified an evidentiary gap in Petitioner's theory of its case. The court of appeals concluded 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." (App. 1313).

*i. Intent versus Requirement*

The oral agreement between YES and Mr. Justice did not require YES to ensure the conservation easement closed in any given year.<sup>7</sup> In its petition to this Court, YES argues that it was the *intent* of the parties (YES and Mr. Justice) to have the conservation easement completed and recorded by the end of 2007. (Petition, 7, 12, 15). But, intent to close and a requirement that a transaction actually close are not the same thing.

Petitioner seeks to create the appearance that *intent* is the same as a *requirement* by filling pages upon pages of its petition with cites to testimony and evidence showing that YES was working to close the conservation easement in 2007. For example, Petitioner cites to a number of snippets from portions of the Justice Family Farms Rule 30(b)(6) deposition that was admitted into evidence. Petitioner also cites to language in an e-mail sent from Mr. Hanlin to Mr. McLeod. The e-mail from Mr. Hanlin states that he (Mr. Hanlin) needs certain information to be able to "advise . . . as to the probable tax effects of the conservation contribution that he [Mr. Justice] contemplates before the end of the year." (Petition, 16). So desperate is Petitioner for support for its argument that it

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<sup>7</sup> Indeed, the Draft Agreement specifically recognized that Mr. Justice could elect to wait up to two years before recording the conservation easement, and if it were recorded during that two-year window, then that event would trigger an obligation to pay the consulting contingency fee. (App. 1056).

cites its own expert witness (not one with personal knowledge) for the proposition that “this had to be done by December 31st.” (Petition, 17). That same “expert” witness also speculated that the deal was never revived because, “for whatever reason, whatever his tax situation was at the time . . . . [t]he time when he [Mr. Justice] had the critical need for it [the conservation easement] in 2007 had come and gone.”<sup>8</sup>

Petitioner baldly claims that the oral agreement with Mr. Justice required Petitioner to consummate the conservation easement by December 31, 2007, yet this claim is not supported by any testimony or evidence. Petitioner writes that “Mr. Justice and the Justice companies retained YES to have a conservation easement recorded in 2007.” (Petition, 12). That sentence has no citation. Petitioner also writes that, “Whether the easement could have been recorded in 2008 or later is simply not relevant to whether YES sustained injuries from Respondent’s 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.” (Petition, 19). That sentence has no citation. The bottom line: Petitioner never adduced any evidence tending to establish that Mr. Justice required Petitioner to complete the conservation easement by the end of 2007.

*ii. The Existence or Non-Existence of Evidence*

“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.” *Sims v. Giles*, 343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct. App. 2001). Petitioner failed to introduce any evidence that Mr. Justice required that the proposed conservation easement be completed

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<sup>8</sup> The evidence presented at trial, however, showed without challenge, that Mr. Justice earned significantly more income in 2008 than he did in 2007. (App. 622, line. 8–625, line 17).

and of record in 2007. Again, YES did not subpoena Mr. Justice for a deposition and Mr. Justice did not appear at trial, notwithstanding Mr. McLeod's professed close relationship with him. (App. 457, line 18–458, line 3; App. 354, lines 1-21). Accordingly, the court of appeals correctly affirmed the entry of a directed verdict.

**B. The Court of Appeals correctly concluded that YES failed to present any evidence that its lawyers' withdrawal prevented the conclusion of the conservation easement after 2007.**

As noted above, the court of appeals recognized that the oral agreement between YES and Mr. Justice did not require YES to complete the conservation easement in 2007. The court of appeals then took the next logical step to determine whether there was any evidence in the record that the conservation easement could not have been completed after 2007. The clear import of this inquiry was that *if* YES had presented any evidence that 2007 was the only year that the conservation easement could have been recorded, *then* Respondents' withdrawal might have created a factual dispute for resolution by the jury. Based on a careful review of the record, the court of appeals correctly concluded that YES failed to present any such evidence.

Petitioner attempts to attack the court of appeals' legal reasoning by arguing it "substantially modif[ied] . . . the scope and terms of Mr. Justice's agreements with YES to record a conservation easement in the 2007 tax year." (Petition, 19). However, Petitioner's modification claim is based upon the same faulty premise discussed above regarding Question A: that Mr. Justice's oral agreement with YES *required* a 2007 closing. Petitioner also repeats the bald claim that a post-2007 closing date was not possible because the "critical time to get the easement recorded [was] in the year 2007." (Petition, 19). The inference behind this claim is that Mr. Justice had a specific tax motivation to file a conservation easement in 2007, but that no such motivation existed in

2008 or later. Unsurprisingly, Petitioner fails to cite anything to support that claim (Petition, 19), as there is, in fact, no such evidence in the record to support Petitioner's statement.<sup>9</sup>

YES's damages theory is premised on the acceptance of its argument that Respondents' withdrawal in December 2007 prevented it from completing the conservation easement for Mr. Justice and earning a fee. The court of appeals concluded that there was no evidence that the closing had to occur in 2007, and, likewise, no evidence that the closing could not have occurred in any year following 2007.<sup>10</sup> "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." *Sims*, 343 S.C. at 714, 541 S.E.2d at 861. The court of appeals reasoned that "there was no evidence that Respondents' withdrawal from representation of Appellant prevented Justice Family Farms from recording the conservation easement, and then paying Appellant's fee, after 2007." (App. 1313). The court of appeals employed sound legal reasoning and the petition should be denied.

**C. The circuit court did not err in directing a verdict in Respondents' favor.**

Question C of the Petition insists that the circuit court erred when it granted a directed verdict. In support of Question C, Petitioner makes two related arguments on

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<sup>9</sup> See also n.8, *supra*.

<sup>10</sup> Petitioner also takes issue with a statement in the court of appeals' decision that Petitioner could have used replacement counsel to complete the easement in 2008. Petitioner claims that the court of appeals erred by concluding that it found "Crosby Lewis was retained as 'replacement counsel.'" (Petition, 19 (Header "B")). The court of appeals did not state that Mr. Lewis was replacement counsel, only that YES could have found replacement counsel and completed the transaction in 2008. (App. 1313). Petitioner apparently attempts to portray a confused court of appeals. Like its other arguments, such an attempt is futile.

proximate cause. (Petition, 21, 23–24). First, Petitioner argues that the evidence before the jury created a question of fact on proximate cause and that the trial court erred in concluding that there was no evidence of proximate cause. (Petition, 21). Second, Petitioner argues that the trial judge erred in weighing the evidence and concluding that the evidence did not sufficiently show proximate cause. (Petition, 23–24). Each argument will be addressed below.

*i. There Was No Question of Fact Regarding Proximate Cause Presented At Trial.*

At the conclusion of all of the evidence, the circuit court directed a verdict in favor of Respondents. Petitioner contends that decision was erroneous, based on its argument that, “in the light most favorable to YES, there was evidence in the record that, because [Respondents] withdrew from the representation, YES was not able to recommend its clients, Mr. Justice and JFF, proceed with the conservation easement,” and “there was evidence of JFF’s intent to proceed with the conservation easement right up to the point when . . . McLeod had to recommend otherwise based on Respondents’ withdrawal.” (Petition, 21).

Petitioner’s arguments omit a very important piece of the story: *what Mr. Justice would have done*. In the circuit court’s Order, it noted that, “YES’s theory at trial was that if RPR and Hanlin had not withdrawn from representing it on December 20, 2007, it would have changed its recommendation to Mr. Justice during the telephone conference on December 24, 2007 from ‘postpone’ to ‘proceed.’” (App. 14). The court noted that, “[b]ecause YES did not inform Justice of the fact of the defendants’ withdrawal . . . , it is clear there is no direct evidence that the withdrawal caused Justice not to proceed.” (App. 14). The circuit court then reasoned that only two explanations existed for why the

proposed conservation easement did not close: (1) “it was either the disclosure of the IRS investigation,” or (2) “the recommendation from McLeod that Justice postpone the conservation easement.” (App. 14–15). The circuit court concluded that in order for YES to have presented a question of fact for the jury, it was required to “offer some scintilla of evidence that, had McLeod recommended that Justice proceed with the proposed conservation easement in the face of the IRS investigation, rather than postpone, Justice most probably would have done so in December of 2007.” (App. 15).

During the colloquy between counsel for Petitioner and the circuit court, following its ruling from the bench, this point was made clear:

MR. PENDARIVS: Your Honor, Mr. Jim Justice was not the only party to the contract. Justice Family Farms was the other party to the consulting services agreement. Justice Family Farms’ designee gave testimony to this jury about the intent of the companies and also Dr. Adams in his expert opinion having reviewed the Justice Family Farms testimony said Jim Justice said, “we were in the boat.”

THE COURT: And I will represent to everyone here, my law clerk and I discussed that exact testimony moments ago. I mean, I am with you on, yes, I agree that’s what we heard but what was consistently said by the Justice people, whether Harrah or Miller, Jim Justice makes all the decisions, Jim Justice makes all the decisions, the buck stops with Jim Justice, and yes, the 30(b)(6) guy said, “We were prepared to go forward, we were going forward, we were in the boat,” all those sort of things. Justice makes the final decision, consistently that was presented by them and I don’t find a question of fact as to that. I mean, there is nobody disputed that Justice makes the decisions.

(App. 873, line 19–App. 874, line 16).

The circuit court correctly identified the fact that the only person who could provide the causal link in the chain of proximate cause did not testify. Later in the colloquy, the circuit court stated:

THE COURT: . . . [B]ut consistently Jim Justice does exactly what Jim Justice wants to do or intends to do and there is nothing for me, before me from Jim Justice to say, “We would have done the deal.” I can’t figure, I didn’t figure out why he wasn’t asked something or wasn’t provided, I can’t figure that out. That is not my problem, not my duty. But Justice never said what he would have done and I can’t get away from that . . . .

(App. 875, lines 9-17).

“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.” *Sims*, 343 S.C. at 714, 541 S.E.2d at 861. The circuit court concluded that Petitioner failed to provide a key piece of evidence required to connect the alleged wrongful withdrawal to Petitioner’s alleged damages. Petitioner failed to provide the required evidence, and the circuit court properly entered a directed verdict for Respondents.

ii. *The Circuit Court Did Not Apply an Improper Standard of Review in Granting a Directed Verdict.*

Petitioner next argues that the circuit court applied an incorrect standard of review in granting the directed verdict because, according to Petitioner, the trial judge improperly “weighed” the evidence. Petitioner advances this argument by pulling the trial judge’s words from the transcript out of the context in which they were spoken. In its Petition, Petitioner writes that, “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.’” (Petition, 23). Petitioner then contends all of these words show that the “trial court engaged in a weighing of the evidence instead of whether a scintilla of evidence existed.” (Petition, 23–24).

Petitioner's argument is belied by a review of the complete record before this Court. Contrary to YES's argument in its Petition, the circuit court did not weigh the evidence; it decided there was *no evidence*. As noted above, the circuit court stated that:

I think I have wrestled with this whole thing since summary judgment motions but I don't believe, looking at the facts, there is a question of fact to submit to the jury about what Justice would have done or didn't do, I don't see it. I think his failure to present an affidavit, his failure to testify, present a deposition, as to what he would have done or wouldn't have done, it isn't here and that is breaking the causal link, the proximate cause to the breach, the damages. I can't tie it together and for that reason I'm going to grant the directed verdict.

(App. 872, line 20–873, line 7). Following the circuit court's decision to grant a directed verdict, YES itself attempted to steer the court into discussing the weight of the evidence.

MR. PENDARVIS: Your honor, one last thing. You don't think there is the weight the evidence carries but there is evidence and I think the court might want to take a look, our response would be, Your Honor, on a directed verdict it is not the weight of the evidence, it's the existence of it.

THE COURT: That is what I'm saying, there is the existence of no evidence of what Jim Justice, everything is consistent with what, there is an *absence of evidence* what Jim Justice would do, an absence.

(App. 877, line 23–878, line 8) (emphasis added). YES's references to statements by the circuit court that it was "wrestling" with its decision do not reflect a weighing of the evidence; rather, the statements reflect a judge *wrestling* with the burden of knowing that the law required him to direct a verdict against a litigant that had spent a lot of time and energy presenting its case, but had failed to present testimony or other evidence to support its legal theory.

**D. Petitioner failed to preserve for review by this Court alleged errors by the circuit court in excluding evidence.**

Although Petitioner identifies Question D as an issue pertaining to whether the circuit court erroneously excluded certain evidence, it does not argue in its petition any grounds for reversal of that decision. Petitioner does not have a section of the petition that addresses the circuit court's exclusion of certain evidence, nor does the petition contain any legal arguments for why Petitioner believes the circuit court erred. Indeed, the only two references to the exclusion of testimony are in footnote 22 on page 9 and in footnote 37 on page 15. The first reference in footnote 22 states two rules of evidence it believes the circuit court improperly applied, but does not advance any argument for this Court to review. The footnote directs the Court's attention to Part III.A. for a "discussion of the trial court's error." Part III.A., however, contains no such discussion. The second reference found at footnote 37 merely notes that the testimony was excluded and nothing more. Accordingly, Question D has been waived or abandoned as a basis for granting a writ of certiorari. *Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) (finding issue abandoned where litigant merely cited a court rule, but no other legal authority, and "present[ed] no argument as to how the [lower] court's ruling" was in error); *see also* Rule 242(d)(4), SCACR ("Failure of a petitioner to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition."). To the extent Question D has not been waived, Respondents incorporate herein their briefing at the court of appeals on this issue (App. 1293–98), and submit the circuit court correctly excluded the testimony.

#### IV. CONCLUSION

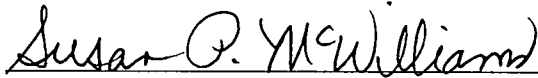
The court of appeals correctly identified an alternative basis to affirm the circuit court's decision to enter a directed verdict. The court of appeals reviewed the record, applied sound legal reasoning, and properly made use of Rule 220(c), SCACR. Petitioner's arguments against the court of appeals' reasoning lack merit and are unsupported in the record.

Even if this Court concludes that the court of appeals erred in affirming on alternative grounds, this Court should still deny the petition because the circuit court correctly directed a verdict in Respondents' favor and nothing in the Petition alters this conclusion.

The circuit court identified an evidentiary gap in Petitioner's case. The circuit court correctly recognized that Mr. Justice was the only one that would decide whether to place a conservation easement on the Farm. Because Petitioner was not damaged unless Mr. Justice would have proceeded to place the conservation easement on the Farm, notwithstanding the IRS investigation, it was incumbent upon Petitioner to present Mr. Justice's testimony on this exact point. Petitioner failed to do so, and, therefore, failed to prove its case. Petitioner has provided no legal argument for this Court to review regarding any of the circuit court's evidentiary rulings. Accordingly, Petitioner has waived all challenges to the circuit court's evidentiary rulings.

This is a routine case where a litigant failed to present required causation testimony. This is not the type of case this Court has identified in Rule 242(b), SCACR, as warranting consideration for granting the discretionary writ of certiorari. Respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,



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*George Harold Hanlin, J.D.*

May 22, 2015

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

**SC SUPREME COURT**

Eugene C. Griffith, Jr., Circuit Court Judge

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App. Case No. 2015-000739

Opinion No. 2015-UP-042 (S.C. Ct. App. filed January 28, 2015)

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

vs.

RICHARDSON PLOWDEN & ROBINSON, P.A. and  
GEORGE HAROLD HANLIN, J.D. ....Respondents.

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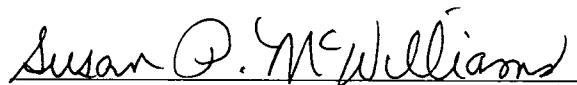
**PROOF OF SERVICE**

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I certify that this 22<sup>nd</sup> day of May, 2015, I have served the foregoing Return to Petition  
for Writ of Certiorari via U.S. Mail, first class postage prepaid, on the following counsel:

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Columbia, South Carolina