

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. Supreme Court

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Unpublished Opinion No. 2015-UP-042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.

APPENDIX - VOL 3 OF 3

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2010-CP-40-3297

YANCEY ENVIRONMENTAL SOLUTIONS, LLC,

Plaintiff,

vs.

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

Defendants.

**PLAINTIFF'S MOTION TO ALTER
OR AMEND JUDGMENT
GRANTING DEFENDANTS'
MOTION FOR DIRECTED
VERDICT**

2012 MAY 31 PM 12:00

RICHLAND COUNTY
FILED

TO: SUSAN P. MCWILLIAMS, J.D. AND DANIEL C. LEONARDI, J.D., COUNSEL FOR DEFENDANTS:

NOTICE

PLEASE TAKE NOTICE THAT Plaintiff YANCEY ENVIRONMENTAL SOLUTIONS, LLC ("YES"), through its undersigned counsel, will move ten days after service of this motion or as soon thereafter as counsel can be heard at the Richland County Judicial Center, Columbia, South Carolina, for an Order pursuant to Rule 52(a) and Rule 59(e), SCRCP, altering or amending the Order issued by the Honorable Eugene C. Griffith, Jr., dated April 15, 2012 and received by counsel for the Plaintiff on May 14, 2012, granting Defendants' Motion for Directed Verdict.

MOTION

Plaintiff YANCEY ENVIRONMENTAL SOLUTIONS, LLC's motion pursuant to Rule 52(a) and Rule 59(e), SCRCP, for the Court to reconsider and alter or amend its Order granting Defendants' Motion for Directed Verdict is based on mistakes and omissions identified in the factual findings and errors and omissions contained in the conclusions of law set forth therein. This motion is also based on the trial court's failure to apply the proper standard

of review. Plaintiff further assert that the grounds for this motion are also contained the trial transcript; any rulings and orders issued in this litigation; any memoranda of law submitted in this litigation; and/or any related motions, correspondence, e-mails, or other relevant documents which have been submitted, produced, or identified to the trial court in this litigation.

A copy of the Order is attached hereto and incorporated herein by reference as **Exhibit 1.**

SUMMARY OF THE ARGUMENTS

For the reasons hereinafter set forth, Plaintiff seeks reconsideration and vacation of the Order in its entirety on the following particulars:

1. Evidence was in record from which jury could conclude the Defendants' acts and omissions caused harm to YES.
2. The Order does not apply the proper standard of review for its ruling pursuant to Rule 50, SCRCP.
3. The factual findings set forth in the Order are not accurate, are incomplete, are outside the evidence presented, and/or present a biased and unfair representation of the acts or conduct referenced therein.
4. The trial court erred in sustaining Defendants' objections to evidence concerning causation.
5. A written Order is not necessary as the propriety of the ruling is governed exclusively by the existence or absence of evidence in the record.

ARGUMENTS

I. **Evidence Was in Record from Which Jury Could Conclude Defendants' Acts and Omissions Caused Harm to YES.**

Whether a defendant's acts or omissions caused harm to a plaintiff is almost always a question of fact for a jury. See *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006); *Oliver v. South Carolina Dept. of Highways & Pub. Transp.*, 309 S.C. 313, 318, 422 S.E.2d 128, 131 (1992) (causation issues generally present questions of fact for the jury). The Order granting Defendants' motion for a directed verdict based on an alleged lack of causation evidence was plain error and should be altered or amended.

A. **Standard for Proof of Causation – Breach of Fiduciary Duty claims.**

A breach of fiduciary duty claim is a separate cause of action from a legal professional negligence claim. See *Government of Rwanda v. Rwanda Working Group*, 227 F. Supp.2d 45 (D.C.Cir. 2002); *Homa v. Friendly Mobile Home Manor, Inc.*, 93 Md.App. 337, 612 A.2d 322 (Md. App.1992).

"One standing in a fiduciary relationship with another is subject to liability to the other for harm **resulting from** a breach of duty imposed by the [fiduciary] relation." *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004) (emphasis added). For a claim for breach of fiduciary duty, causation is established¹ where a plaintiff shows that

¹ There is authority that in a breach of fiduciary duty claim it is the actual breach that is the harm and allowing the claim to be maintained without requiring specific proof of causation or specific damages. See 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.5:108 (2d ed. Supp. 1997) (explaining that, in a breach of fiduciary duty claim, the breach of loyalty is the harm and the client is not required to prove causation or specific

the defendant's conduct was a material element or a substantial factor in bringing about the loss. *Smith v. Hastie*, 367 S.C. 410, 417, 626 S.E.2d 13, 17 (Ct. App. 2005) (“One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.”) (emphasis added). See also, *Spector v. Mermelstein*, 485 F.2d 474, 480 (2d Cir. 1973); *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1291 (Utah Ct. App. 1996) (“In legal malpractice actions based on breach of fiduciary duty, clients must show that if the attorney had adhered to the ordinary standards of professional conduct and had not breached fiduciary duties, the client would have benefitted.”), *rev'd on other grounds*, 37 P.3d 1130 (Utah 2001).

The remedial consequences of a fiduciary's disloyalty – in light of the extremely high standard of conduct – explains why a loser causal link between a fiduciary's breach and the beneficiary's loss is the appropriate standard of proof in a breach of fiduciary duty claim as compared to the traditional negligence standard of “but-for” causation. Generally, the fiduciary's disloyalty may have inflicted loss on the beneficiary by warping how the fiduciary performed, depriving the beneficiary of the value of loyal performance but doing so in a manner that is difficult to prove. Many courts considering causation in a breach of fiduciary duty context have concluded that the standard of causation in this context should not be so difficult to establish so as not to undermine the underlying objectives of fiduciary accountability.

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

The reason why a plaintiff need only show the breach was a substantial factor in causing his losses, and “does not have to show strict ‘but for’ causation or proximate cause,” is that:

the function of such an action, unlike an ordinary tort or contract case, is not merely to compensate the plaintiff for wrongs committed by the defendant but ... to prevent [such wrongs], by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates ...

Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537, 543 (2d Cir. 1994), *citing* (*Diamond v. Oreamuno*, 24 N.Y.2d 494, 498 (1969)). Under this prophylactic rule, a defendant “cannot enjoy impunity by showing that [plaintiff’s] losses might have resulted from other possible causes.” *Milbank*, 13 F.3d at 543. For “breaches of a fiduciary relationship in any context comprise a special breed of cases that often loosen normally stringent requirements of causation and damages.” *Id.* See also, *Fisher v. Reich*, No. 92 Civ. 4158, 1995 WL 23966, at *14 (S.D.N.Y. Jan. 10, 1995) (applying “substantial factor” standard in a fiduciary breach action against a law firm in conflict-ridden representation); *Estate of Re v. Kornstein, Veisz & Wexler*, 958 F. Supp. 907, 924 (S.D.N.Y. 1997) (applying “substantial factor” test to prove causation of harm from a firm’s undisclosed amassing of a total of \$500,000 in referrals from the Paul Weiss law firm, which also represented the client’s adversary in an unsuccessful brokerage arbitration); *2175 Lemoine Ave. Corp. v. Finco, Inc.*, 640 A.2d 346, 351 (N.J. Super. Ct. App. Div. 1994) (holding that the test of proximate cause in a lawyer-negligence case “is satisfied where the negligent conduct is a substantial contributing factor in causing the [client’s] loss”);

Northwestern Nat. Ins. Co. v. Alberts, 769 F. Supp. 498, 506 (S.D.N.Y. 1991) (plaintiff alleging breach of fiduciary duty not required to meet the higher standard of loss or proximate causation); *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 995-96 (2d Cir. 1983) (rejecting argument that breach of fiduciary duty requires that defendant's conduct be the proximate cause of plaintiff's injury).

The foregoing “resulting from” or “substantial factor” standards, which are the standards in South Carolina, are preferable to stringent application of a “but for” standard because it better advances the objective of accountability by fiduciaries allowing the courts and juries to consider and formulate remedial alternatives. Because South Carolina’s fiduciary doctrine embodies deterrent and prophylactic goals, applying “resulting from” or “substantial factor” standards for factual cause supports these goals and is, in fact, the law in South Carolina. See *Smith v. Hastie*, 367 S.C. at 417, 626 S.E.2d at 17. Such a relaxed causal requirements is appropriate, especially when the beneficiary's ability to prove but-for causation can be limited by the nature of the relationship with the fiduciary. This is especially likely to be so when the fiduciary's role requires the exercise of substantial discretion. Such a risk is appropriately borne by the fiduciary, who, after all, undertook to act loyally on the beneficiary's behalf and then chose to act disloyally, as was shown by the evidence presented during the trial of this case. At a minimum, if the breach of fiduciary causation standard announced in *Smith v. Hastie* is overruled and “but-for” causation becomes the applicable standard, the burden of proof should fall on the fiduciary, not the beneficiary. Either way, the trial court’s Order did not apply the proper standard of proof on YES’s breach of fiduciary duty claim. The Order should be altered or amended to correct this error.

B. Standard for Proof of Causation – Negligence claims.

The plaintiff must prove proximate cause in a professional negligence action. *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488, 497 (Ct. App.1998); *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App.1996). Causation in fact is proved by establishing entry would not have occurred "but for" the defendant's negligence. *Handlesmann v. McCardle*, 275 S.C. 46, 267 S.E.2d 531 (1980). "Legal cause it is proved by establishing foreseeability." *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978). "Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, the plaintiff need not prove that the actor should have contemplated a particular event which occurred." *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990); *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978). Something is said to be foreseeable when it can be seen or known in advance; in other words, when it is reasonable to anticipate that something is a likely result of an act, omission, or failure of oversight. The law requires a jury to consider foreseeability because a person is not responsible for a consequence that is merely possible. A person is responsible only for a consequence that is probable according to ordinary and usual experience. See BLACK'S LAW DICTIONARY, 332 (abridged 5th ed. 1983); William L. Prosser, LAW OF TORTS § 41 (4th ed. 1971).

A plaintiff, therefore, proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App.1996). Proximate cause is the efficient or direct cause of an injury. *Id.* Negligence is deemed to be the proximate cause of an

injury when, without such negligence, the injury would not have occurred or could have been avoided. *Id.* Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence. *Id.*

In other words, a "plaintiff must show she most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice." *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55, 58 (1997) (legal professional negligence claim); *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988) (legal professional negligence claim); *Floyd v. Kosko*, 285 S.C. 390, 329 S.E.2d 459 (Ct. App. 1985) (legal professional negligence claim). The lawyer's negligence does not have to be the sole cause, but must be "at least a contributing proximate cause of the injuries." *Shealy v. Walters*, 273 S.C. 330, 256 S.E.2d 739, 742 (1979).

A defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence. *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d by 46 (1990); *Childers v. Gas Lines, Inc.*, 248 S.C. 316, 149 S.E.2d 761 (1966). "A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence." *Id.* Proof of proximate cause must also be established by expert testimony where either the origin of the injury is obscure and not readily apparent to a layperson or where there are several equally probable causes of the condition. *Welch v. Whitaker*, 282 S.C. 251, 317 S.E.2d 758 (Ct. App. 1984).

Under South Carolina law, a plaintiff does not have to prove that the defendants

were the sole proximate cause of the plaintiff's injury, only that the defendants' negligence was at least one of the proximate causes of the injury. See *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006). "The question of proximate cause ordinarily is one of fact for the jury, and it may be resolved either by direct or circumstantial evidence." *Id.* A jury must determine whether a plaintiff's damages would have occurred "but-for" the defendant's negligence and whether such damages were reasonably foreseeable. See *id* at 662-63.

The issues of foreseeability and proximate cause should be determined by the jury as long as the plaintiff offers "some evidence" that a genuine issue of material fact exists as to each element of the claim. *Eadie v. Krause*, 381 S.C. 55, 64 n.5, 671 S.E.2d 389, 393 n.5 (Ct. App. 2008).

In this case, although the trial court's Order recognized the proper standard of proof for causation in a negligence claim, as set forth herein it erred when applying that standard to the testimony and evidence in the record. YES presented way more than a scintilla of evidence showing that but-for the improper withdrawal by Defendants, the conservation easement would have been recorded and the Plaintiff would have earned a significant fee for its role as the coordinator of the easement. The Order should be altered or amended accordingly.

C. Standard for Proof of Causation – Breach of Contract claims.

To recover for a breach of contract, the plaintiff must establish three elements by the preponderance of the evidence:

- (1) a binding contract entered into by the parties;

- (2) breach or unjustifiable failure to perform the contract; and
- (3) damage suffered by the plaintiff as a direct and proximate result of the breach.

A binding, valid contract must exist for there to be a cause of action for breach of contract. The plaintiff must prove each element of the contract sued on. The elements of a contract are offer, acceptance, and valuable consideration. See Ralph King Anderson, Jr., S.C. REQUESTS TO CHARGE-CIVIL § 19-3 (2002).

Breach of a contract is a failure without legal excuse to perform any promise which forms a whole or a part of a contract, including the refusal of a party to recognize the existence of the contract or the doing of something inconsistent with its existence. When performance of a duty under a contract is due, any nonperformance is a breach. In other words, a party breaches a contract when he does not perform as he agreed to perform under the contract.

A party's contractual duty is found in the obligation assumed by the party to the contract. A party's failure to comply with the contractual duty constitutes the breach. Nonperformance of a valid contract is a breach thereof. A breach occurs when a party refuses or neglects to perform some duty required by the terms of the contract. A breach of contract is any unjustified failure to perform any promise, express or implied, that is a part of the contract, or a violation or nonfulfillment of the obligations, agreements or duties imposed by the contract, or the commission or omission of some act that violates the express or implied undertakings contained in the contract. A breach may occur when a party without legal excuse fails to perform any promise that is all or part of the contract, or knowingly prevents, hinders or makes more costly the other party's performance, or in

advance of the due date of his performance, repudiates his promise to perform—that is, repudiates or renounces the contract.

The plaintiff is entitled to recover if a preponderance of the evidence shows that the defendant did, in fact, breach the contract between the two parties. See *Tillinghast v. Boston & Port Royal Lumber Co.*, 39 S.C. 484, 18 S.E. 120 (1893), *overruled on other grounds by Hendrix v. Hendrix*, 296 S.C. 200, 371 S.E.2d 528 (1988); *Sechrest v. Forest Furniture Co.*, 141 S.E.2d 292 (N.C. 1965) (nonperformance of valid contract is breach); 17A AM. JUR. 2D CONTRACTS § 716 (1991); RESTATEMENT (SECOND) OF CONTRACTS § 235 (1981); BLACK'S LAW DICTIONARY 188 (6th ed. 1990) (defining the phrase "breach of contract").

The trial court's Order makes no reference to the standard of proof for causation on YES's breach of contract claim. Furthermore, the Order makes no attempt to apply the proper standard of proof on YES's breach of contract claim to the evidence and testimony in the record. The Order should be altered or amended to correct these errors.

D. Omitted Facts and Inferences From Those Facts That Were In Evidence.

There was evidence before the jury showing that the Defendant lawyer and Defendant law firm allowed YES to believe its lawyers were actively working on the Justice conservation easement matter on which he was engaged involving a material deadline of December 31, 2007, without the lawyers advising the client of material facts, *i.e.*, the lawyers were preparing to terminate the relationship. The Defendants' withdrawal from the representation on the eve of the deadline and without finding substitute lawyers was a substantial factor in bringing about YES's losses.

1. The Court's Order Misstates Facts and Evidence in Its "Summary of Evidence Presented at Trial."

The Court's Order contains numerous misstatements of fact or evidence in its "Summary of Evidence Presented at the Trial." Plaintiff seeks reconsideration, alteration and/or amendment of the factual findings set forth in the Order on the grounds that the factual findings are not accurate, are incomplete, are outside the evidence presented and/or present a biased and unfair representation of the acts or conduct referenced therein, including the following particulars:

- a. The findings on page 3 of the Court's Order describes the Black River Farms' conservation easement as "proposed."
 - i. This finding ignores the voluminous evidence that the Justice Companies' conservation easement on the Black River Farms property was in the final stages of being finalized.
 - ii. This finding ignores the evidence on the record that shows that all of the pertinent parties and professionals necessary to complete the easement had been engaged and were preparing their part of the work needed in order to create the conservation easement.
 - iii. This finding ignores the evidence on the record that demonstrates that the necessary easement documents and reports had either been completed or were in the process of being finalized when Defendants withdrew

as tax counsel on the transaction.

- b. The Court's Order omits facts regarding the question presented over Justice Family Farms, LLC's ownership of the Black River Farm property and Defendant Hanlin's involvement with identifying Justice Family Farms, LLC as the owner to be included on the Consulting Services Agreement.
 - i. This omission fails to recognize the evidence on the record that Plaintiff raised the question of ownership of the Black River Farm property to Defendant Hanlin during the course of his representation of Plaintiff.
 - ii. This omission fails to recognize the evidence on the record that Defendant Hanlin was the attorney tasked to determine the true ownership of the Black River Farm property.
 - iii. This omission fails to recognize the evidence on the record that Defendant Hanlin was the attorney who listed Justice Family Farms, LLC as a party to the contract when he drafted the Consulting Services Agreement.
- c. The Court's Order omits evidence of the prior business and personal relationships between YES and the Justice Companies prior relationships.
 - i. This omission fails to recognize the importance of the

prior relationship between YES and the Justice Companies in explaining why both parties were comfortable with moving forward with the conservation easement without the formality of signed engagement agreements.

- ii. This omission fails to recognize the importance of the prior relationship between YES and the Justice Companies in explaining why the Justice Companies trusted YES, was confident in YES' professional abilities and was comfortable moving forward with a "hands-off" manner in the day-to-day process of creating the conservation easement.
 - iii. This omission fails to recognize the importance of the prior relationship between YES and the Justice Companies in explaining why the Justice Companies immediately accepted YES' recommendation not to move forward on the conservation easement.
- d. The findings in the Court's Order presents Mr. Justice as the owner of the property and the only person involved on the Justice Companies' side of the conservation easement project.
- i. This finding omits the undisputed evidence on the record that all of the Black River Farms land and corporations involved were ultimately owned by the

James C. Justice Companies, Inc.

- ii. This finding ignores the evidence on the record that several Justice Companies and other individuals employed by these companies were involved in the easement project.
 - iii. This finding ignores the evidence on the record that several Justice Companies and other individuals employed by these companies made some decisions regarding the conservation easement project
 - iv. This finding ignores the evidence on the record that several Justice Companies and other individuals employed by these companies presented testimony at trial.
- e. The Court's Order omits the fact that Mr. Harrah also testified that YES' fees were reduced from 5% to 4%, in corroboration of Mr. McLeod's testimony.
- i. This finding ignores the evidence on the record that demonstrates the modification and existence of an actual contract between YES and the Justice Companies.
- f. The Court's Order generally characterizes Defendant Hanlin's testimony as "fact" and Mr. McLeod's testimony as "testimony."
- i. These findings have the effect of giving credence to

Defendant's testimony as facts and portraying Mr. McLeod's testimony as more strictly his version or interpretation of events.

- g. The Court's Order omits discussion of the testimony of Cary H. Hall, Jr., J.D. and W. Curtis Elliott, J.D. regarding the impossibility of finding qualified tax counsel with 10 days left in the year.
 - i. These omissions fail to recognize the testimony on the record by two experts attorneys in the field of conservation easements as to the uniqueness of this type of speciality in the practice of law.
 - ii. These omissions fail to recognize the testimony on the record by two experts attorneys in the field of conservation easements as to the impossibility of finding a replacement tax counsel 10 days before the closing of this conservation easement.
- h. The findings on page 6 of the Court's Order improperly characterizes Mr. McLeod as being able "to get Justice" to pay the various professional bills.
 - i. This finding ignores the testimony on the record that the Justice Companies, not Mr. Justice, paid the various professional bills.
 - ii. This finding ignores the testimony on the record that the

Justice Companies willingly paid the various professional bills.

- i. The Court's Order omits discussion of the mutual agreement between Plaintiff and the Justice Companies to reduce the \$50,000 retainer fee to a one-time \$15,000 payment.
- i. This omission ignores the evidence on the record that demonstrates the modification, partial performance and existence of an actual contract between YES and the Justice Companies.
- j. The findings contained in the entire final paragraph on page 7 of the Court's Order are not statements of fact but conclusions of law that paint the Defendants in the best light possible and demonstrates a bias against the Plaintiff or bias against legal malpractice claims, legal professional negligence claims, or breach of fiduciary duty claims against lawyers and law firms.

Plaintiff respectfully requests that the Court alter or amend its Order to remove the misstatements or mischaracterizations of fact; remove the conclusions of law that is stated as fact and include the omitted facts, which serve to give a more complete picture of the facts in evidence.

2. The Court's Order Misstates Facts and Evidence in Its "Discussion."

The Court's Order contains numerous misstatements of fact or evidence in its "Discussion" section. YES seeks reconsideration, alteration, and/or amendment of the conclusions set forth in the Order on the grounds that they are not accurate, are

incomplete, are outside the evidence presented and/or present a biased and unfair representation of the acts or conduct referenced therein. including the following particulars:

- a. The findings contained in the entire first paragraph on page 7 of the Court's Order improperly characterizes the Court's statements on the record.
 - i. This finding ignores the evidence on the record that the Court did not orally rule that "YES 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 2007."
 - ii. This finding ignores the evidence on the record that the Court limited its oral ruling granting directed verdict to its opinion that Plaintiff failed to produce any evidence as to whether Mr. Justice intended to close the easement but for the recommendation of Mr. McLeod.
- b. The findings in footnote number 2 on page 8 of the Court's Order is contrary to the ruling and intent of the Court in granting Defendants' motion for directed verdict.
 - i. This finding ignores the evidence on the record that the Court did not address any of these other arguments in support of directed verdict in favor of the Defendants.

- ii. This finding ignores the fact that the transcript is not yet available for this trial and YES is not able to verify that these arguments were made or preserved by Defendants on the record at trial.
- c. The Court's Order improperly focuses on the ownership of the Black River Farm property in its discussion of the testimony given by the Justice Family Farm, LLC Rule 30(b)(6) designee, Terry Miller.
 - i. This finding ignores the evidence on the record that JFF was a party to the 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.
 - ii. This finding ignores the evidence on the record showing that the actual ownership of the Black River Farms property is irrelevant to the claims in this matter.
 - iii. This finding ignores the evidence on the record showing that the Justice Companies are the ultimate owners of the Black River Farms property.
- d. The findings on page 9 of the Court's Order which state that "what JFF might have intended is simply not pertinent" is contrary to the evidence on the record.
 - i. This finding ignores the evidence on the record that JFF

was a party to the contract, partially performed 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.

- ii. This finding ignores the fact that the Court concluded erroneously that the corporate designee for JFF lacked the capacity to testify as to Mr. Justice' intent.
- e. The findings on pages 9 and 10 of the Court's Order which discusses Rule 703 of the South Carolina Rules of Evidence and Plaintiff's expert witness, Dr. Gregory Adams and the limitations of this testimony are improperly asserted.
 - i. The findings ignore the fact that Dr. Adams testified at trial regarding the evidence he relied on in forming his expert opinions.
 - ii. The findings ignore the fact that, as part of his testimony, Dr. Adams conveyed to the jury the statement of Mr. Justice to Terry Miller, the JFF designee.
 - iii. The findings ignore the fact that Defendants failed to object at trial and thereby failed to preserve any objection or argument against the admissibility of this testimony.
 - iv. The findings ignore the fact that Defendants cannot

remedy their failure to object at trial by attempting to make admissible testimony inadmissible in their drafting of the proposed order for this Court.

Plaintiff respectfully requests that the Court alter or amend its Order to remove the misstatements or mischaracterizations of facts and conclusions; remove the conclusions of law that is stated as fact and include the omitted facts, which serve to give a more complete picture of the facts in evidence.

E. Errors / Omissions in “Summary of Evidence Presented at Trial”.

The “Summary of Evidence Presented at Trial” section of the Order contained errors and omissions, which if accurately and completely stated should have resulted in a denial of Defendants’ motion. Plaintiff contends that based upon the appropriate standard of review, that section should have read as follows with the omitted portions and omitted footnotes shown in bold:

SUMMARY OF EVIDENCE PRESENTED AT TRIAL

The plaintiff, Yancey Environmental Solutions, LLC (“YES”) brought this action against its former attorneys, Richardson Plowden & Robinson, P.A. (“RPR”) and George Harold “Hal” Hanlin (“Hanlin”), **asserting claims for breach of fiduciary duty, professional negligence, and breach of contract arising out RPR’s and Hanlin’s withdrawal as counsel ten days before the closing on a planned \$45M conservation easement project. The conservation easement project was on approximately 3,000 acres of a working farm in Clarendon County.**

The farm was owned by James C. Justice Companies, Inc., through one of its limited liability companies. When this conservation project began, there were some questions as to what entity actually owned the Clarendon County property known as Black River Farms. In order to ensure that the proper parties were named in the contract, YES sought advice from Hanlin who modified the Consulting Services Agreement to include “James C. Justice - Justice Family Farms, LLC” as the

parties to the contract with YES. Mr. Justice, the majority shareholder of James C. Justice Companies, Inc., is a wealthy businessman from West Virginia with large land holdings in West Virginia and South Carolina. The owner of YES, Yancey A. McLeod, Jr. ("McLeod") and Mr. Justice had prior professional and personal relationships which led to Mr. Justice approaching Mr. McLeod in 2007 regarding the Black River Farms Property. After different ideas were discussed and discarded, Mr. McLeod proposed the placement of a conservation easement to Mr. Justice in the fall of 2007 and in connection therewith, sent at least one proposed consulting services agreement to Mr. Justice for his signature.

The consulting services agreement was between YES, on the first part, and Mr. Justice and Justice Family Farms, LLC (collectively "Justice"), on the second part. Under the terms of the proposed consulting services agreement, Justice was required to pay YES a \$50,000 "non-refundable retainer" for its services in recommending contractors to perform the various tasks to complete the conservation easement, including a qualified appraiser, an environmental engineer to complete a Baseline Documentation Report, and a qualified charitable organization to receive the donation of the conservation easement. Under the consulting services agreement, Justice was not obligated to donate the property under the conservation easement. However, if Justice did so within two years of recording the conservation easement, and then took a charitable deduction on a tax return, Justice would be obligated to pay YES 5% of the conservation value of the property.² Justice never signed this agreement and never paid YES the full \$50,000 non-refundable retainer, but Justice did pay YES \$15,000 approximately a year after the December 31, 2007 date on which the parties' intended to record the easement. The \$15,000 check dated November 13, 2008 was issued by the James C. Justice Companies, Inc. and signed by Mr. Justice with reference to "Justice Family Farms" on the comment line. (Plf. Exhibit # 41).³

² McLeod testified that this 5% was later reduced to 4% in a telephone call with David Harrah, the contact person for Mr. Justice and Justice Family Farms.

³ Later investigations performed 2012 revealed that Black River Forms, LLC was the actual owner of the Black River Farms property. Black River Farms, LLC was originally incorporated in West Virginia, but is no longer an active limited liability corporation. While there was some evidence that Black River Forms, LLC was subsumed by Justice Family Forms, LLC, there was no evidence disputing that all of these corporations were ultimately owned by James C. Justice Companies, Inc.

McLeod described himself at trial as “the quarterback,” directing all of the contractors and other individuals involved to ensure the conservation easement was prepared correctly so as to ensure that Justice would be entitled to a charitable deduction for his donation. McLeod also testified that **Mr. Justice was the ultimate decision-maker for his companies, so that he would have the last word on the actual decision to place the conservation easement. This testimony was confirmed at trial by David Harrah, Justice’s in-house CPA in 2007, as well as Terry Miller, the secretary of several of the Justice companies and who was the Rule 30(b)(6) designee testifying on behalf of Justice Family Farms, LLC with the knowledge and express consent of Mr. Justice. Both Harrah and Miller were involved in the conservation easement project and both testified consistently that Mr. Justice was the ultimate decision maker in the business dealings of the Justice companies.**

RPR and Hanlin’s involvement with the proposed conservation easement began in late October, 2007, when McLeod contacted Hanlin at RPR by telephone and asked for advice regarding whether the projected value of the rejected mitigation bank proposal could serve as the “highest and best use” value for purposes of the proposed conservation easement on the Black River Farm. Hanlin thereafter researched a variety of tax issues related to the proposed conservation easement. Hanlin sent YES an engagement letter dated December 5, 2007 to document the retention, which McLeod signed and returned on behalf of YES. **The engagement letter provided that RPR was to be paid a fee of one third of the fees YES obtained from the Justice project contingent upon whether any fees were paid. Based upon the preliminary appraisal showing an approximate \$45M conservation easement value, RPR and Hanlin’s fees would have been \$600,000, which apparently caused some concern to the RPR Executive Committee as evidence was presented showing many internal e-mails about the propriety of the contingent fee agreement, a revised fee agreement at an hourly rate, and multiple Executive Committee meetings regarding the propriety of the existing fee agreement, none of which was disclosed to YES or McLeod during the representation. Experts for both parties provided testimony regarding the propriety of the fee agreement and Hanlin and RPR’s decision not to discuss these matters with McLeod.**

In November, 2007, Hanlin, McLeod, and Sue Green, then the president of an organization known as Community Open Land Trust (“COLT”), toured the Black River Farm and COLT agreed to accept the donation of the conservation easement, if Justice made it, on behalf of COLT. McLeod arranged for Mulkey Engineering to work on the Baseline Documentation Report and Dr. Darroll Hawkins of Highview Engineering to

prepare the requisite appraisals for the conservation easement. Justice never signed the letter of intent COLT sent or paid the required contribution to COLT for accepting the conservation easement. Similarly, Justice never signed the proposed agreement for engaging Hawkins to prepare the appraisal required in order for the conservation easement to qualify under the applicable provision of the Internal Revenue Code. **Justice did, however, subsequently make payments to Mulkey Engineering, Dr. Hawkins, and YES for the professional services they provided pursuant to the Consulting Services Agreement, confirming the existence of the Justice companies' agreement with YES.**

The testimony and evidence showed that all of the professionals, including Hanlin, actively worked toward preparing the documents materials necessary toward the conservation easement for the end of the 2007 calendar year. The designee for Justice Family Farms, LLC testified that Justice intended to place an easement on the Clarendon County property in the 2007 calendar year based on Justice's tax plans for the 2007 tax year and their conservation objectives. Plaintiff's expert, Dr. Gregory B. Adams, testified that he reviewed the testimony from the designee from Justice Family Farms, LLC, wherein the designee described Mr. Justice as having said "We were in the boat" as to Justice's commitment to proceed with the conservation easement project in 2007.

On December 19, 2007, McLeod's sister and administrative assistant, Mary Mohr, opened a letter from the Internal Revenue Service, which notified YES and McLeod individually that it was instigating an investigation into prior conservation easements in which YES and McLeod had been involved (and other entities not pertinent to this case). It notified YES and McLeod that they would be required to produce documentation in connection with the investigation by January 17, 2008. Mohr forwarded the letter to Hanlin on December 20, 2007 and advised him that she had not yet shown it to McLeod.

Hanlin **testified that he** promptly called Mohr and asked her to show the letter from the IRS to McLeod. **According to his testimony,** Hanlin then consulted with RPR management regarding what Hanlin perceived to be potential conflicts with YES and McLeod in light of two prior conservation easements Hanlin had handled in which he represented the landowners, not YES. Hanlin testified that based on his review of the IRS investigation notice, the two prior easements would be subject to the IRS investigation and it would be possible he would be called upon to testify either for or against McLeod. After concluding that RPR and Hanlin should withdraw, Hanlin called McLeod and informed him that he was withdrawing from representing

YES on the proposed Justice conservation easement and all other matters. Neither RPR nor Hanlin ever sent a bill to YES for the work done to date by Hanlin on the Justice conservation easement and neither ever sought or received any money for work performed on this matter. **Hanlin never explained to McLeod or YES any connection between his concern about a possible conflict of interest from the IRS' plans to investigate prior conservation easements and why he felt he needed to withdraw as counsel on the Justice conservation easement project. McLeod testified that the telephone call from Hanlin, where Hanlin withdrew from all representation lasted less than 1 minute. McLeod testified that immediately after the telephone call from Hanlin terminating the representation, he turned to Mohr and said words to the effect that "We have to postpone the Justice project." YES contends this is evidence from which the jury could have concluded that Defendants' withdrawal was a cause or a substantial factor that caused the conservation easement project to fail resulting in YES losing the fees it would have earned.**

At some point on the same day, the 20th of December, McLeod retained and met with Crosby Lewis, Esquire concerning the IRS investigation. Hanlin followed his call on the 20th with a letter on the 21st of December. McLeod testified at trial that he did not make any attempts to find alternative counsel to replace Hanlin because **based upon his decades of experience in these type matters** he deemed it impossible to find qualified tax counsel to close the transaction with only eleven days left in the year. **The jury also heard testimony from Plaintiff's expert with substantial experience representing parties involved in conservation easements, Curtis Elliott, Esquire, and from Cary Hall, Esquire, a tax attorney involved in the subsequent IRS investigation, that based upon their experience no qualified, prudent lawyer with experience in handling conservation easement matters would have accepted the representation with only ten or eleven days left in the year.**

On December 24, 2007, McLeod and Crosby called Mr. Justice, his in-house counsel Steven Ball, and Harrah. During the call, McLeod told Justice that he had received the notice of the IRS investigation and he told Justice that in light of the IRS investigation, he recommended that Justice postpone the proposed conservation easement on Black River Farm. McLeod testified that he did not, however, inform Mr. Justice of the withdrawal by RPR and Hanlin **because he was embarrassed the lawyer and law firm retained provide tax advice concerning the easement had withdrawn. Dr. Adams testified that Mr. McLeod was not obligated to "tattle" on Hanlin and RPR's improper withdrawal and that it was clear that the only reason Mr. McLeod did not recommend the project**

proceed was because Hanlin and RPR's withdrawal meant there would be no tax counsel to provide the advice necessary to properly accomplish a successful \$45M conservation easement.⁴ Mr. Elliott also testified that in his professional experience IRS audits of conservation easements are frequent and likely. Mr. Justice agreed to postpone the project during the call and thereafter, McLeod informed Hawkins, the appraiser, Epps, the engineer, and Sue Green of COLT that Justice had decided to postpone the project. McLeod testified that after the IRS investigation was eventually dropped in October 2008, despite several attempts to get Justice interested in donating the Black River Farm as envisioned under the conservation easement project, he was never successful. **The jury was certainly entitled to infer that Justice's tax circumstances and planning did not warrant proceeding with the conservation easement after the 2007 calendar year. The Justice Companies paid Mulkey's bill and \$15,000 to YES in November, 2008 and in 2009 to pay the bill of Hawkins for the professional services rendered under the Consulting Services Agreement.**

YES filed this action in May, 2010, and asserted claims for breach of fiduciary duty, legal malpractice, and breach of contract. According to YES, RPR and Hanlin withdrew unilaterally without cause on December 20th, just days before the closing of the Justice conservation easement, leaving it unable to secure qualified alternate tax counsel for the transaction. Accordingly, McLeod testified that he was compelled to recommend in the December 24th call to Justice, Ball, and Harrah that Justice postpone the proposed conservation easement because RPR and Hanlin withdrew on December 20th.

RPR and Hanlin denied they breached their fiduciary duties to YES, committed malpractice, or breached their contract with YES. They

⁴ As part of proof of causation, Plaintiff proffered testimony that YES had three other conservation easement matters that it was working on in December 2007 and that calls were made to the parties in all three of the other projects to inform them of the IRS letter. McLeod was prepared to testify that unlike the Justice project, because each of the landowners in the other three projects had their own tax counsel he was able to recommend that the other projects proceed to closing. Mr. McLeod was also prepared to testify that the other three projects did, in fact, close in the 2007 calendar year, notwithstanding the IRS letter. Defendants objected, claiming that such testimony would be confusing to the jury and was not relevant to proving whether Defendants' withdrawal caused damages to YES. The Court sustained Defendants' objection and this evidence was not submitted to the jury. (Plaintiff contends this ruling was error.)

maintained that their withdrawal was justified under the Rules of Professional Responsibility due to the ***potential*** conflict with their representation of the two landowners in the previous YES-organized conservation easements. **RPR and Hanlin's expert, Nathan Crystal, Esquire, testified that RPR and Hanlin's withdrawal was justified due to the *potential* conflict of interest notwithstanding contrary annotations he co-authored in Annotated South Carolina Rules of Professional Conduct, 2010 Edition. In the annotations of Rule 1.7, RPC, Mr. Crystal and his co-author stated, "[a] lawyer is not disqualified from handling a matter, however, merely because a conflict is possible." *Id.* at p. 101.** However, even assuming that there was a genuine issue of material fact as to the propriety of the withdrawal, RPR and Hanlin maintained that they were still entitled to a directed verdict because there was not even a scintilla of evidence that the withdrawal was the proximate cause of Justice's acceptance of YES's recommendation to postpone the conservation easement project.

II. The Order Does Not Apply the Proper Standard of Review of the Facts and Inferences From Those Facts to Defendants' motion for a directed verdict.

A. The appropriate standard of review.

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 Plaintiff, as the non-moving party, and draw all reasonable inferences in its favor.⁵ *Fleming v. Borden, Inc.*, 450 S.E.2d 589 (1994); *Howard v. State Farm Mut. Ins. Co.*, 450 S.E.2d 582 (1994); *Tubbs v. Bowie*, 308 S.C. 155, 417 S.E.2d 550 (1992); *Hanselman v. McCardle*, 275 S.C. 46, 267 S.E.2d 531 (1980); *Fielding Home For Funerals v. Public Savs. Life Ins. Co.*, 271 S.C. 117, 245 S.E.2d 238 (1978); James F. Flanagan, *SOUTH CAROLINA CIVIL PROCEDURE*, p. 401 (2d ed. 1996).

⁵ The trial court's Order mistakenly cites to *Eadie v. Krause*, 381 S.C. 55, 57, 671 S.E.2d 389, 390 (Ct. App. 2010) as authority on the standard of review for a motion pursuant to Rule 50, SCRCP. The applicable motion at issue in *Eadie* was a motion for summary judgment pursuant to Rule 56, SCRCP. The Order should be altered or amended to remove reference to *Eadie*.

“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), citing, *Collins & Sons Fine Jewelry, Inc. v. Carolina Safety Sys., Inc.*, 296 S.C. 219, 371 S.E.2d 539 (Ct. App. 1988). Nor can the trial court be concerned with the credibility of the witnesses or the weight of the evidence because those are jury issues. *Brown v. Orndorff*, 309 S.C. 320, 422 S.E.2d 151 (Ct. App. 1992). If the evidence is susceptible of more than one reasonable inference, the trial court must submit the case to the jury. *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. Under Rule 50(a), SCRCP, the party seeking a directed verdict has the burden of demonstrating the absence of a genuine issue of material fact. “In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion when either the evidence yields more than one inference or its inference is in doubt.” *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008), *citing Law v. S.C. Dep’t of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). “In essence, the court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his or her favor.” *Id.*;

see also *Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002); *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 292-93, 628 S.E.2d 496, 503 (Ct. App.2006).

If the evidence can support the movant's and the non-movant's case, or the inference against the non-movant is not clear, the motion must be denied. *Strand v. South Carolina Dep't of Highways & Pub. Transp.*, 445 S.E.2d 439 (1994); *Collins v. Bison Moving & Storage, Inc.*, 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998) (granting directed verdict for plaintiff on liability and damages and leaving for jury the amount of damages).

III. The Factual Findings Set Forth in the Order Are Not Accurate, Are Incomplete, Are Outside the Evidence Presented, and/or Present a Biased and Unfair Representation of the Acts or Conduct Referenced Therein.

As reflected in the bold highlights in Section I, E. above that were added to the trial court's findings of fact, the abundance of inaccurate, incomplete, or omitted factual findings or available inferences from the factual findings is readily apparent. In addition, the Order should be amended to include the following evidence or at least reference to the following evidence:

The portion of the testimony from the Justice Family Farms, LLC's designee⁶, Mr. Terry Miller, that was heard by the jury:

⁶ Plaintiff contends that the Court erred in finding that the JFF corporate designee was not able to testify as to the corporation's intent. Under Rule 30(b)(6), SCRCP, "[t]he person so designated shall testify as to matters known or reasonably available to the organization." The plaintiff proffered evidence that JFF was party to the conservation easement contract, that JFF designated Mr. Miller as its corporate designee, that Mr. Justice knew Mr. Miller was testifying as to JFF's intent for the conservation easement and that Mr. Justice informed Mr. Miller of what he understood the corporation's intent was as to the conservation easement - stating: "We were in the boat." "We" the corporation, not "I" the individual.

16:19 Q Why did Justice Family Farms pay this
16:20 invoice from National Resource when there was no signed
16:21 consulting agreement, only a Letter of Intent?

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

18:23 Q Now, there's been some suggestion in
19:1 this lawsuit that there really was no agreement to move
19:2 forward with investigating a conservation easement and my
19:3 question for you is, how did Justice Family Farms take
19:4 the receipt of this proposed Consulting Services
19:5 Agreement with regard to this project?

19:6 A The way I understand it, Mr. Justice
19:7 -- this was the agreement that he had with Mr. McLeod
19:8 and he was under the impression that Mr. McLeod was
19:9 moving forward with this and he was in agreement with the
19:10 process moving forward towards establishing a conserva-
19:11 tion easement, so that we could have the tax advantages
19:12 in the year 2007, by 12-31 of that year.

22:2 Q As a matter of background for this
22:3 exhibit, was Justice Family Farms in touch with the --
22:4 let me back up. What was Justice Family Farms'
22:5 understanding of defendant Hamlin [sic] and defendant
22:6 Richardson and Plowden's role as lawyers in this case,
22:7 in this matter?

22:8 A Mr. McLeod had brought them into
22:9 the entire process to handle the legal aspects of the
22:10 conservation easement. There are numerous facets to
22:11 the easement. With the appraisals and the consultants
22:12 involved, there has to be a legal team in the process and

22:13 Mr. Hamlin [sic] and his firm was brought in to handle all
22:14 legal aspects of the entire conservation easement
22:15 transaction.

22:16 Q Was Justice Family Farms aware of the
22:17 conservation easement expertise that defendant Hamlin [sic] and
22:18 defendant Richardson Plowden had with regard to those
22:19 type matters?

22:20 A Mr. McLeod represented that they were
22:21 tops in the field and that he would recommend them to
22:22 Mr. Justice. Based on that, Mr. Justice agreed to move
22:23 forward with that.

32:19 Q Now, I want to summarize some things
32:20 as we're getting to the real point of this deposition.
32:21 Prior to the telephone call on December 24, 2007, what
32:22 was Justice Family Farms intent, if anything, with regard
32:23 to executing a conservation easement on the Black River
33:1 Farms property?

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

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

68:12 A Yes, sir, it is.

94:14 Q Mr. Miller, we spoke earlier about
94:15 the work that you did to verify that the information in
94:16 your affidavit was accurate and I recall you mentioning
94:17 that you spoke with Mr. Justice. Correct?

94:18 A Yes.

94:19 Q About how long did that conversation
94:20 last?

94:21 A It was just briefly one question as
94:22 to what his intentions were with this easement.

In addition to the Justice Family Farms testimony, the jury received Dr. Adams' testimony – without any objection whatsoever – that he had reviewed Mr. Miller's testimony describing Mr. Justice's statement that "We were in the boat." The trial court's Order, however, concludes to the contrary – in the light most favorable to Defendants, the moving parties – that "it was always up to Justice to decide what he wanted to do" concerning the subject property and the plans for the conservation easement. In the light most favorable to YES, the jury could have concluded that Mr. Justice's statement that "We were in the boat" meant just what he said: That Mr. Justice and his companies intended to follow Mr. McLeod's recommendations. If Defendants had not breached their fiduciary, professional, and contractual duties and remained to provide legal services for YES on the conservation easement project, YES and Mr. McLeod testified that they would have recommended Mr. Justice and his companies proceed with the project.

The Order should be altered or amended to remove the legal conclusion concerning Dr. Adams' testimony repeating to the jury Mr. Justice's statement that "We were in the boat," which is found on last paragraph on page 9 that carries over on to page 10. Curiously, the Order concludes that "while it may have been proper for [Dr.] Adams to repeat what [Mr.] Justice told [Mr.] Miller to explain the basis of his opinions, such evidence, which is clearly hearsay, is not have been admissible to create an issue of fact for the jury as to Justice's intent." This conclusion in the Order is not proper because the Defendants did not object to Dr. Adams' testimony. Rule 103(a)(1), SCRE, required the Defendants to assert a timely objection or motion to strike the admission of Dr. Adams' testimony. See *e.g., Roberts v. Roberts*, 299 S.C. 315, 384 S.E.2d 719 (1989) (a party opposing the introduction of specific evidence must object to it and give grounds for the

objection). Counsel for Defendants' failure to make a timely objection constitutes waiver of the objection. *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981). Generally, evidence admitted without objection becomes competent evidence and cannot be disregarded on a motion for a directed verdict. *Cantrell v. Carruth*, 250 S.C. 415, 158 S.E.2d 208 (1967). The trial court's Order, however, seeks to ignore this competent testimony of Mr. Justice and the Justice companies' intent to proceed with the conservation easement transaction.

In addition, the Order omitted reference to or failed to acknowledge inferences favorable to Plaintiff for the following:

- a) the testimony by the designee for the other party to the Consulting Services Agreement, Justice Family Farms, LLC, that Mr. Justice and his companies intended to proceed with the conservation easement,
- b) the testimony about Mr. Justice's statement that "we were in the boat", and
- c) Mr. Justice's own signature on the \$15,000 check paying YES for professional services rendered under the Consulting Services Agreement.

The conclusions in the Order "that Mr. Justice's failure to participate in the trial of this matter in any way breaks any possible causal link between the loss of the fee to YES and the withdrawal by RPR and Hanlin" omits reference to evidence in the record showing Mr. Justice was aware of this lawsuit and agreed to allow a designee, Mr. Terry Miller, for his single member LLC, Black River Farms, to testify voluntarily. As the record reflected, no subpoena was issued by the South Carolina court for domestication and service on an agent for Justice Family Farms, LLC in West Virginia where Mr. Miller's deposition was taken. Mr. Miller prepared for the deposition, consulted with Mr. Justice about the

testimony on behalf of Justice Family Farms, LLC, and appeared for the deposition voluntarily with Mr. Justice's actual knowledge and consent. Therefore, the conclusion in the Order is simply wrong when it concludes that " Mr. Justice's failure to participate in the trial of this matter in any way," Mr. Justice did participate in this trial, albeit indirectly.

The Consulting Services Agreement was between YES, on the first part, and James C. Justice - Justice Family Farms, LLC, on the second part. In the light most favorable to YES, the fact that Justice Family Farms, LLC was a party to the Consulting Services Agreement with YES and that its' parent company, James C. Justice Companies, Inc. subsequently issued a \$15,000 check with Mr. Justice's signature to YES for services rendered under the Consulting Services Agreement was evidence from which the jury could have concluded that Terry Miller's testimony on behalf of JFF and with Mr. Justice's actual knowledge was sufficient to maintain the causal link between Defendants' breach of their fiduciary, professional, and contractual duties and YES' lost fees.

V. A Written Order Is Not Necessary as the Propriety of the Ruling Is Governed Exclusively by the Existence or Absence of Evidence in the Record.

The general rule is that nothing more than a form order is necessary to memorialize a trial court's ruling on a motion for directed verdict pursuant to Rule 50, SCRCP. See e.g., *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. at 37, 664 S.E.2d at 86 (Ct. App. 2008) (form order memorializing grant of motion for directed verdict). Because the trial transcript is not available, Plaintiff reserves the right to object to portions of the Order making reference to facts or legal conclusions that are not accurate, are incomplete, are outside the evidence presented, and/or present a biased and unfair representation of the acts or conduct referenced in the actual transcript. Whether the trial court's ruling

granting Defendants' motion for a directed verdict pursuant to Rule 50, SCRPC, is controlled by the record of evidence as reflected in the transcript.

IV. The Trial Court Erred in Sustaining Defendants' Objections to Evidence Concerning Causation.

Plaintiff proffered testimony from Justice Family Farms, LLC's designee as to whether Justice would have proceeded with the conservation easement if YES had made a recommendation to proceed, but after Defendants objected claiming the testimony was speculative, the Court sustained Defendants' objection and did not allow the jury to hear the following testimony:

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.

47:1 Q Okay. Tell me exactly what Jim Justice
 47:2 told you. You said it was a brief synopsis, what did he
 47:3 tell you?
 47:4 A I said, Jim, I'm going to be doing a
 47:5 deposition on the Yancey McLeod issue from 2007, you're
 47:6 familiar with that? Yes. Do you feel that that thing
 47:7 would have worked out had it played out to the end and he
 47:8 said absolutely. And that was my only question to him
 47:9 because that was a concern that I had, would this have
 47:10 moved forward, and **he said, We were in the boat. That**

***47:11 was his exact words, We were in the boat on this and it
47:12 would have worked out.***

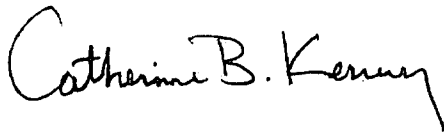
All of the foregoing testimony on pages 34 and 47 should have been presented to the jury.

CONCLUSION

Based upon the foregoing, Plaintiff respectfully submits that the trial court should reconsider its rulings on Defendants' motion and alter or amend its Order Granting Defendants' Motion for Directed Verdict because of the mistakes and omissions identified in the factual findings and errors and omissions contained in the conclusions of law as set forth herein. The trial court should also reconsider its rulings on Defendants' motion and alter or amend its Order based on errors in applying the proper standard of review.

Respectfully submitted,

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May 24, 2012

RECEIVED MAY 14 2012

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF RICHLAND	)	IN THE CIRCUIT COURT
	)	
Yancey Environmental Solutions, LLC,	)	
	)	Case No.: 2010-CP-40-3297
Plaintiff,	)	
	)	
vs.	)	
	)	
Richardson Plowden & Robinson, P.A.	)	
and George Harold Hanlin, J.D.,	)	
	)	
Defendants.	)	
	)	

ORDER GRANTING DEFENDANTS' MOTION FOR DIRECTED VERDICT

This matter came before the Court for a jury trial on the plaintiff's claims for breach of fiduciary duty, legal malpractice, and breach of contract. The plaintiff was represented by Thomas A. Pendarvis and Catherine "Carey" B. Kerney of Pendarvis Law Offices, P.C. The defendants were represented by Susan P. McWilliams and Daniel C. Leonardi of Nexsen Pruet, LLC. After the jury was selected, the plaintiff presented its evidence from February 28, 2012 through March 5, 2012. At the conclusion of the plaintiff's case in chief, the defendants moved pursuant to Rule 50 of the South Carolina Rules of Civil Procedure ("SCRCivP"), for a directed verdict. After careful consideration and due deliberation, the undersigned respectfully denied the defendants' motion. The defendants then presented their evidence from March 5 through March 6, 2012. The plaintiff offered no rebuttal evidence. At the conclusion of all of the evidence presented in the case, the defendants renewed their motion for directed verdict pursuant to Rule 50. After additional careful consideration and due deliberation, the Court grants the defendants' motion, for the following reasons.

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STANDARD OF REVIEW UNDER RULE 50

When considering a party's Rule 50 motion for directed verdict, the trial court must view the evidence and any reasonable inferences therefrom in the light most favorable to the nonmoving party. *Eadie v. Krause*, 381 S.C. 55, 57, 671 S.E.2d 389, 390 (Ct. App. 2010); *Law v. S.C. Dep't of Corrs.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Cutchin v. South Carolina Dept. of Highways & Public Transportation*, 301 S.C. 35, 389 S.E.2d 646 (1990). However, the court cannot ignore facts unfavorable to the nonmoving party and must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts. *Hopson v. Clary*, 321 S.C. 312, 468 S.E.3d 305 (Ct. App. 1996); *Haulbrooks v. Overton*, 295 S.C. 380, 368 S.E.2d 676 (Ct. App. 1988). No jury issue is created if the evidence taken as a whole is susceptible to only one reasonable inference, however, and in such an instance, a directed verdict is proper. *Hopson*, 321 S.C. at 314, 468 S.E.2d at 307; *Whelan v. Welch*, 304 S.C. 548, 405 S.E.2d 836 (Ct. App. 1991).

STANDARD FOR LEGAL MALPRACTICE

In an action for legal malpractice, the client must prove four elements: (1) the existence of an attorney-client relationship; (2) breach of a duty by the attorney; (3) damage to the client; and (4) proximate causation of the client's damages by the breach. *Smith v. Haynsworth, Marion, McKay & Guerard*, 322 S.C. 433, 435 n. 2, 472 S.E.2d 612, 613, n. 2 (1996). Each of these elements must be proven by a preponderance of the evidence. Failure to prove any of the elements means that the claimant cannot recover damages from the attorney. *Shealy v. Walters*, 273 S.C. 330, 256 S.E.2d 739 (1979).

Moreover, the client is required to prove not only the damages alleged, but also that the attorney's alleged failure to follow generally recognized practices and procedures applicable to

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his profession under the circumstances existing at the time was the proximate cause of the client's alleged injuries. Accordingly, even if an attorney could be considered negligent in the handling of a matter or breached a duty or contract with the client, the client is not entitled to any damages where the outcome of the underlying transaction would have been the same, regardless of the attorney's actions. *Eadie*, 381 S.C. at 63, 671 S.E.2d at 392-393; *Hall v. Fedor*, 349 S.C. 169, 174, 561 S.E.2d 654, 657 (Ct. App. 2002); *Floyd v. Kosko*, 285 S.C. 390, 329 S.E.2d 459 (1985); *Gunnels v. Roach*, 243 S.C. 248, 133 S.E.2d 757 (1963); *King v. J.C. Penny Co.*, 238 S.C. 336, 120 S.E.2d 229 (1961); *Burnette v. Augusta Coca-Cola Bottling Co.*, 157 S.C. 359, 154 S.E. 645 (1930); *Welch v. Whitaker*, 282 S.C. 251, 317 S.E.2d 758 (Ct. App. 1984); *Hanselmann v. McCardle*, 275 S.C. 46, 267 S.E.2d 531 (1980); *Kemmerlin v. Wingate*, 274 S.C. 62, 261 S.E.2d 50 (1979).

SUMMARY OF EVIDENCE PRESENTED AT TRIAL

The plaintiff, Yancey Environmental Solutions, LLC ("YES") brought this action against its former attorneys, Richardson Plowden & Robinson, P.A. ("RPR") and George Harold "Hal" Hanlin ("Hanlin"), arising out of a proposed conservation easement on 3000 acres of a working farm in Clarendon County owned by James C. Justice, II ("Justice"), or one of his limited liability companies, known as "the Black River Farm." Justice, the majority shareholder of James C. Justice Companies, Inc., is a wealthy businessman from West Virginia with large land holdings in West Virginia and South Carolina. The owner of YES, Yancey A. McLeod, Jr. ("McLeod") proposed the placement of a conservation easement to Justice in the fall of 2007 and in connection therewith, sent at least one proposed consulting services agreement to Justice for his signature. Under the terms of the proposed consulting services agreement, Justice was required to pay YES a \$50,000 "non-refundable retainer" for its services in recommending

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contractors to perform the various tasks to complete the conservation easement, including a qualified appraiser, an environmental engineer to complete a Baseline Documentation Report, and a qualified charitable organization to receive the donation of the conservation easement. Under the consulting services agreement, Justice was not obligated to donate the property under the conservation easement. However, if he did so within two years of recording the conservation easement, and then took a charitable deduction on his tax return, he would be obligated to pay YES 5% of the conservation value of the property.¹ Justice never signed this agreement and never paid YES the \$50,000 non-refundable retainer.

McLeod described himself at trial as “the quarterback,” directing all of the contractors and other individuals involved to ensure the conservation easement was prepared correctly so as to ensure that Justice would be entitled to a charitable deduction for his donation. McLeod also testified that Justice was the ultimate decision-maker for his companies and his property, so that he would have the last word on the actual decision to place the conservation easement. This testimony was confirmed at trial by Harrah, Justice’s in-house CPA in 2007, as well as Terry Miller, the secretary of several of Justice’s companies. Both Harrah and Miller testified consistently that Justice made all the decisions in his business dealings.

RPR and Hanlin’s involvement with the proposed conservation easement began in late October, 2007, when McLeod contacted Hanlin at RPR by telephone and asked for advice regarding whether the projected value of the rejected mitigation bank proposal could serve as the “highest and best use” value for purposes of the for the proposed conservation easement on the Black River Farm. Hanlin thereafter researched a variety of tax issues related to the proposed conservation easement. Hanlin sent YES an engagement letter dated December 5, 2007 to document the retention, which McLeod signed and returned on behalf of YES.

¹ McLeod testified that this 5% was later reduced to 4% in a telephone call from Harrah.

APPENDIX1033

In November, 2007, Hanlin, McLeod, and Sue Green, then the president of an organization known as Community Open Land Trust ("COLT"), toured the Black River Farm and COLT agreed to accept the donation of the conservation easement, if Justice made it, on behalf of COLT. McLeod arranged for Mulkey Engineering to work on the Baseline Documentation Report and Dr. Darroll Hawkins of Highview Engineering to prepare the requisite appraisals for the conservation easement. Justice never signed the letter of intent COLT sent him or paid the required contribution to COLT for accepting the conservation easement. Similarly, Justice never signed the proposed agreement for engaging Hawkins to prepare the appraisal required in order for the conservation easement to qualify under the applicable provision of the Internal Revenue Code.

On December 19, 2007, McLeod's sister and administrative assistant, Mary Mohr, opened a letter from the Internal Revenue Service, which notified YES and McLeod individually that it was instigating an investigation into prior conservation easements in which YES and McLeod had been involved (and other entities not pertinent to this case). It notified YES and McLeod that they would be required to produce documentation in connection with the investigation by January 17, 2008. Mohr forwarded the letter to Hanlin on December 20, 2007 and advised him that she had not yet shown it to McLeod. Hanlin promptly called Mohr and asked her to show the letter from the IRS to McLeod. Hanlin then consulted with RPR management regarding what Hanlin perceived to be potential conflicts with YES and McLeod in light of two prior conservation easements Hanlin had handled in which he represented the landowners, not YES. Hanlin testified that based on his review of the IRS investigation notice, the two prior easements would be subject to the IRS investigation and it would be possible he would be called upon to testify either for or against McLeod. After concluding that RPR and

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Hanlin should withdraw, Hanlin called McLeod and informed him that he was withdrawing from representing YES on the proposed Justice conservation easement and all other matters. Neither RPR nor Hanlin ever sent a bill to YES for the work done to date by Hanlin on the Justice conservation easement and neither ever sought or received any money for work performed on this matter.

At some point on the same day, the 20th of December, McLeod retained and met with Crosby Lewis, Esquire concerning the IRS investigation. Hanlin followed his call on the 20th with a letter on the 21st of December. McLeod testified at trial that he did not make any attempts to find alternative counsel to replace Hanlin because he deemed it impossible to find qualified tax counsel to close the transaction with only eleven days left in the year.

On December 24, 2007, McLeod and Crosby called Justice, his in-house counsel Steven Ball, and Harrah. During the call McLeod told Justice that he had received the notice of the IRS investigation and that in light of the IRS investigation, he recommended that Justice postpone the proposed conservation easement on Black River Farm. McLeod testified that he did not, however, inform Justice of the withdrawal by RPR and Hanlin. Justice agreed to postpone the project during the call and thereafter, McLeod informed Hawkins, the appraiser, Epps, the engineer, and Sue Green of COLT that Justice had decided to postpone the project. McLeod testified that after the IRS investigation was eventually dropped in October, 2008, despite several attempts to get Justice interested in donating the Black River Farm as envisioned under the conservation easement project, he was never successful. He was able, however, to get Justice to pay Mulkey's bill and \$15,000 to YES in November of 2008 and in 2009 to pay the bill of Hawkins.

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YES filed this action in May, 2010, and asserted claims for breach of fiduciary duty, legal malpractice, and breach of contract. According to YES, RPR and Hanlin withdrew unilaterally without cause on December 20th, just days before the closing of the Justice conservation easement, leaving it unable to secure qualified alternate tax counsel for the transaction. Accordingly, McLeod testified that he was compelled to recommend in the December 24th call to Justice, Ball, and Harrah that Justice postpone the proposed conservation easement because RPR and Hanlin withdrew on December 20th.

RPR and Hanlin denied they breached their fiduciary duties to YES, committed malpractice, or breached their contract with YES. They maintained that their withdrawal was justified under the Rules of Professional Responsibility due to the potential conflict with their representation of the two landowners in the previous YES-organized conservation easements. However, even assuming that there was a genuine issue of material fact as to the propriety of the withdrawal, RPR and Hanlin maintained that they were still entitled to a directed verdict because there was not even a scintilla of evidence that the withdrawal was the proximate cause of Justice's acceptance of YES's recommendation that he postpone of the conservation easement project.

DISCUSSION

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 Justice during the telephone conference on December 24, 2007 from "postpone" to "proceed." Because YES did not inform Justice of the fact of the defendants' withdrawal on December 20th, it is clear there is no direct evidence that the withdrawal caused Justice not to proceed. Rather, there are two possible reasons Justice did not proceed, based on the evidence offered by YES: it was either the

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disclosure of the IRS investigation or the recommendation from McLeod that Justice postpone the conservation easement. Accordingly, in order to submit its case to the jury, YES 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. *Shealy v. Walters*, 273 S.C. 330, 256 S.E.2d 739 (1979).

However, after thoroughly reviewing all of the evidence offered at trial, and after much deliberation, the Court concludes that there is no issue of fact to go to the jury regarding what Justice would have done. There is no evidence in the record before the Court that Justice ever said that had McLeod recommended on December 24th that he go forward with the transaction, he would have accepted this recommendation and done so. As this Court has noted, it was always up to Justice to decide what he wanted to do in any event. Justice's failure to participate in the trial of this matter in any way breaks any possible causal link between the loss of the fee to YES and the withdrawal by RPR and Hanlin. Indeed, Justice provided no affidavit or deposition during the lengthy discovery phase of this case and did not appear in person at trial to testify. Because YES has failed to adduce any evidence which ties these two events together; accordingly this Court must grant the defendants' motion for directed verdict.²

YES argues, however, that there is evidence in the record of Justice's intent from which the jury could conclude that it was the defendants' withdrawal which caused Justice to postpone

² Because the Court has concluded that the proximate cause link has been broken in this case, by virtue of the absence of any evidence of Justice's intent, it need not address any of the other grounds for directed verdict asserted by the defendants, including that they had fulfilled all of their obligations under the fee agreement with YES as of the date of their withdrawal, that in light of the absence of any signature by Justice to any of the agreements forwarded to him including the consulting services agreement, YES is not entitled to assert the loss of any fee as a result of the defendants' withdrawal, or that there was no reliable evidence in the record to support YES's claim for the lost consulting fee.

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the project and YES to lose its expected fee. The Court has carefully considered YES's arguments and must reject each as ineffective.

First, YES argues that the testimony of the 30(b)(6) designee of Justice Family Farms, LLC ("JFF"), Miller, testified (via videotape deposition) regarding that company's intent to complete the conservation easement on the Black River Farm in 2007. Although the evidence at trial failed to link JFF with the ownership of Black River Farm, even if it were the record owner, this Court must reject YES's argument regarding JFF. This is so because, as noted previously, Miller testified consistently with Harrah and McLeod that Justice was the ultimate decision-maker. Accordingly, what JFF might have intended is simply not pertinent.

Second, YES argues that the consulting services agreement lists the parties to that agreement as YES on the one hand as the consultant and Justice and JFF as the landowners on the other. YES argues that even though Justice never signed the agreement, such was not necessary because McLeod and Justice had "shaken hands on the deal" and had a contract, notwithstanding the lack of signatures. YES further points to the \$15,000 check written to YES in late 2008 as "proof" that Justice intended to go forward with the conservation easement, as the check identifies both YES and JFF on its face. However, just as Miller was not competent to testify as to Justice the decision-maker's intent, so also is an unsigned agreement and a check insufficient to create a genuine issue of material fact as to Justice's intent.

Finally, YES argues that there is evidence of Justice's intent in the record, through the direct testimony of YES's expert, Professor Greg Adams. Adams repeated a statement allegedly made by Justice to Miller in response to a question regarding whether he (Justice) would have gone forward with the conservation easement if it had "played out to the end." Adams testified that Justice told Miller in sum or substance, words to the effect that "we were in the boat."

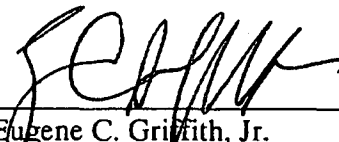
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Apparently in reliance on Rule 703 of the South Carolina Rules of Evidence ("SCRE"), YES argues that Adams, as an expert, was permitted in giving his opinion to rely on this statement attributed to Justice, even though not admitted in evidence or admissible in evidence. However YES's reliance on Rule 703 is misplaced. Rule 703 does not create an exception to the rule against hearsay. Rather, the law in South Carolina is clear that although an expert may testify to evidence even though it is inadmissible under the hearsay rule, that evidence is not admitted for its truth, but only for the limited purpose of explaining the basis of the expert's opinion. *Jones v. Doe*, 372 S.C. 53, 62-63, 640 S.E.2d 514, 519 (Ct. App. 2007); 2 Kenneth S. Broun, et al., *McCormick on Evidence* § 324, at 418 (2006). Thus, while it may have been proper for Adams to repeat what Justice told Miller to explain the basis of his opinions, such evidence, which is clearly hearsay, is not admissible to create an issue of fact for the jury as to Justice's intent.

CONCLUSION

Regardless of the theory of liability asserted: breach of fiduciary duty, legal malpractice, or breach of contract, YES has failed to carry its burden of creating a genuine issue of material fact for the jury regarding Justice's intent to go forward with the conservation easement on his Black River Farm in 2007, had YES recommended that he do so. Accordingly, the Court concludes that the motion for directed verdict by defendants RPR and Hanlin must be granted and it hereby orders that judgment be entered in favor of the defendants and that the plaintiff YES's amended complaint be dismissed.

AND IT IS SO ORDERED.



Eugene C. Griffith, Jr.
Circuit Court Judge

Newberry, SC
April 15, 2012

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Yancey Environmental Solutions, LLC,

Plaintiff,

vs.

Richardson Plowden & Robinson, P.A. and
George Harold Hanlin, J.D.,

Defendants.

IN THE CIRCUIT COURT

Case No.: 2010-CP-40-3297

**DEFENDANTS' RETURN TO
PLAINTIFF'S MOTION TO ALTER OR
AMEND JUDGMENT GRANTING
DEFENDANTS' MOTION FOR A
DIRECTED VERDICT**

Defendants Richardson Plowden & Robinson, P.A. and George Harold Hanlin, Esquire (collectively "the Defendants") file this Return addressing the arguments Plaintiff Yancey Environmental Solutions, LLC ("YES") raises in its Motion to Alter or Amend. Although each argument raised by YES will be addressed in turn below, the Motion should ultimately be denied because it fails to reveal any evidence or legal precedent that this Court overlooked or misapprehended when, viewing the evidence in the light most favorable to YES, it directed a verdict in favor of the Defendants.

DISCUSSION**I. No Evidence Exists in the Record Supporting the Plaintiff's Causes of Action**

YES sued the Defendants on three causes of action: breach of fiduciary duty, legal malpractice, and breach of contract. This Court found all three causes of action failed because YES did not carry its burden of proving that James C. Justice, II ("Justice") would have gone forward with the conservation easement if YES had recommended that he do so. YES asserts that finding was incorrect as to all three causes of action and argues about each one as follows.

A. Breach of Fiduciary Duty

First, YES argues that in South Carolina, a plaintiff need only prove that the defendant's conduct was a "substantial factor" in bringing about any loss caused by a breach of fiduciary duty, not that the breach had to be the "but-for" proximate cause of the loss. In other words, YES argues that this Court erred in requiring it to prove that the Defendants' alleged breach of fiduciary duty proximately caused the conservation easement to fall through. To support this argument, YES relies on one case from South Carolina, *Smith v. Hastie*, 367 S.C. 410, 417, 626 S.E.2d 13, 17 (Ct. App. 2005). However, this case does not stand for the proposition YES claims that it does.

In *Smith v. Hastie*, the trial court granted summary judgment in favor of an attorney on the plaintiff's causes of action, among which was a claim for breach of fiduciary duty. In that case, Hastie represented both Smith and her husband. Smith accused Hastie of breaching his fiduciary duty to her when he advised that she and her then-husband enter into and contribute property to a family limited partnership, despite the fact that the couple had unsuccessfully ended their marriage counseling sessions and were at the brink of separation. The court of appeals reversed the trial court's grant of summary judgment based on an affidavit submitted by Smith from another estate planning attorney in which the attorney emphatically stated that Hastie should have advised Smith of the financial ramifications she would suffer in the event of a divorce. The court of appeals concluded that the affidavit provided some evidence to support Smith's claim such that summary judgment was improper.

In so finding, the court of appeals quoted from *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) and explained, "One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the

relation.”” *Smith v. Hastie*, 367 S.C. at 417, 626 S.E.2d at 17 (quoting *Moore*, 360 S.C. at 253, 599 S.E.2d at 473).

Based on that quote from *Smith v. Hastie*, YES asserts that South Carolina employs a less stringent causation standard in breach of fiduciary duty cases such that a plaintiff need not prove that the breach of duty was the proximate cause of the damages alleged. Instead, YES argues a lesser standard applies, which it describes as the “resulting from” standard or “substantial factor” standard. Not only does this isolated quote from *Smith v. Hastie* **not** create a lesser standard, but the very case from which the *Smith v. Hastie* court lifted the quote specifically confirms the causation standard South Carolina courts employ with regard to breach of fiduciary duty claims: “In a breach of fiduciary case, the plaintiff is entitled to damages for harm **caused by** the breach of a fiduciary duty owed to him or her. Damages in an action for breach of a fiduciary duty are those **proximately resulting from** the wrongful conduct of the defendant.” *Moore*, 360 S.C. at 253, 599 S.E.2d at 473 (emphasis added).

YES cites to no other South Carolina authority for its proposition. To the extent other jurisdictions, such as New York and New Jersey, have a different standard, those standards are not the law of South Carolina and provide no reason for this Court to alter or amend its order granting a directed verdict.

B. Negligence

Next, YES somewhat generically argues that although this Court’s order recognized the proper standard of proof for causation in a negligence claim, “it erred when applying that standard to the testimony and evidence in the record.” Notably, “negligence” was not a cause of action for which the Defendants were sued. Assuming YES makes this argument with regard to its legal malpractice claim, YES fails to specifically point to which evidence existed that would

create an issue of material fact for the jury to decide with regard to Justice's intent to go forward with the conservation easement. Because this argument is not raised with particularity, the Defendants are unable to respond to it. *See* Rule 7(b)(1), SCRPC, (requiring that motions "shall state with particularity the grounds therefor, and shall set forth the relief or order sought.").

C. Breach of Contract

YES further argues that this Court failed to state what standard of proof is required to show causation in a breach of contract claim. However, on pages 2-3 of the Order directing a verdict, this Court specifically explained:

[T]he client is required to prove not only the damages alleged, but also that the attorney's alleged failure to follow generally recognized practices and procedures applicable to his profession under the circumstances existing at the time was the proximate cause of the client's alleged injuries. Accordingly, even if an attorney could be considered negligent in the handling of a matter or breached a duty or contract with the client, the client is not entitled to any damages where the outcome of the underlying transaction would have been the same, regardless of the attorney's actions.

Based on the language excerpted above, this Court clearly found that all three causes of action required YES to show its damages were proximately caused by the Defendants' alleged wrong, be it breach of fiduciary duty, professional malpractice, or breach of contract.

D. Omitted Facts

YES next argues, for over nine pages, that this Court's Order omitted facts which would show that the Defendants' withdrawal from representation was a "substantial factor" in bringing about YES's losses. As explained above, South Carolina requires a plaintiff to prove proximate cause; this State has not adopted the "substantial factor" test. Furthermore, the particular arguments YES makes have no merit. For the Court's convenience, the Defendants respond to each of these arguments in outline form as follows:

1. YES's Allegations that the Order's "Summary of Evidence Presented at Trial" Misstates the Facts.
 - a. YES argues the description of the easement as "proposed" was incorrect. However, YES acknowledges in its arguments that the easement was not finalized when it describes the easement as being "in the process of being finalized."
 - b. YES argues the Order omits facts about the ownership of the Black River Farm Property. The Order need not regurgitate every piece of evidence presented at trial, and YES fails to point out anything in the summary that is incorrect.
 - c. YES argues the Order omits evidence of the prior relationships between YES and the Justice Companies. Again, the Order merely summarizes the facts pertinent to its decision; it need not recite every piece of evidence presented at trial.
 - d. YES argues the Order incorrectly presents Justice as the owner of the property and the only person involved on the Justice Companies' side of the conservation easement. The Order correctly outlines the evidence, on which both parties concurred, that Justice was the ultimate decision-maker for his companies and his property.
 - e. YES argues the Order omits the fact that YES's fees were reduced from 5 to 4%. This reduction in fee was mentioned in footnote 1 of the Order.
 - f. YES's argument that the Order characterizes Hanlin's testimony as fact and McLeod's testimony as testimony is irrelevant. Thus, this argument requires no response.
 - g. YES argues that the Court omits discussion of testimony from two attorneys who explained that it would be impossible to find qualified tax counsel within ten days. Such a discussion was unnecessary in light of this Court's holding that YES failed to establish that Justice, the ultimate decision-maker, intended to go forward with the conservation easement.
 - h. YES's argument that the Order's finding that McLeod was able "to get Justice" to pay the various professional bills is irrelevant. Thus, this argument needs no response.
 - i. YES argues the Order omits discussion of the mutual agreement to reduce the retainer fee from \$50,000 to \$15,000.

That \$15,000 was paid to YES was reflected on page 6 of the Order.

- j. YES complains about the last paragraph on page 7 of the Order, which summarizes the Defendants' argument. The Order accurately reflects the arguments made by the Defendants.
2. This Court's Order Did Not Misstate Facts and Evidence in its "Discussion"
 - a. YES argues the findings in the first paragraph on page 7 of the Order improperly characterize the oral statements of this Court. Even assuming this allegation is true, it is well-settled that "[n]o order is final until it is written and entered." *First Union Nat'l Bank v. Hitman, Inc.*, 306 S.C. 327, 329, 411 S.E.2d 681, 682 (Ct.App.1991); *see also Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly."); *Badeaux v. Davis*, 337 S.C. 195, 204, 522 S.E.2d 835, 839 (Ct.App.1999) ("It is well settled that a judge is not bound by a prior oral ruling and may issue a written order which is in conflict with the oral ruling.").
 - b. YES's arguments that footnote 2 is contrary to the oral ruling is likewise unavailing, based on the authorities cited above.
 - c. YES's argument that the Order improperly focuses on the ownership of the Black River Farm property needs no response. This Court properly focused its Order on the issue it found relevant – that Justice was the ultimate decision-maker with regard to whether the conservation easement would go forward.
 - d. YES argues that the statement in the Order that "what JFF might have intended is simply not pertinent" is contrary to the evidence in the record. However, as addressed above, because all the evidence showed Justice was the ultimate decision-maker, this statement is correct.
 - e. YES's argument regarding the limitations of the expert testimony, discussed on pages 9 and 10 of the Order, has no merit. This Court's Order properly recognized that Rule 703 does not create an exception to hearsay, but merely allows an expert to testify about otherwise inadmissible evidence for the very limited purpose of explaining the basis of the expert's opinion. The inadmissible evidence is not offered for its truth and therefore does not create an issue of fact for the jury.

E. Alleged Errors/Omissions in “Summary of Evidence Presented at Trial”

YES next provides this Court with a re-written “Summary of Evidence Presented at Trial.” This appears to be an attempt by YES’s counsel to submit its own proposed order, even though this Court did not request one from YES. As addressed fully above, YES’s arguments regarding the alleged errors in this Court’s Order have no merit, and this section of the Motion to Alter or Amend deserves no further response.

II. Standard of Review

YES next argues that this Court did not apply the proper Standard of Review to the facts of this case. However, other than pointing out in a footnote that this Court cited to *Eadie v. Krause*, 381 S.C. 55, 57, 671 S.E.2d 389 (Ct. App. 2010), which is a case that involved the grant of summary judgment, not a directed verdict, YES fails to point out any other alleged error and merely reiterates the law of granting a directed verdict. With regard to the citation to *Eadie*, the Defendants note that *Eadie* was one of four citations to the well-known legal proposition, which applies to grants of both summary judgment and directed verdicts, that the trial court must view the evidence and any reasonable inferences therefrom in the light most favorable to the nonmoving party. The citation was not incorrect and need not be removed from the Order.

III. Accuracy of this Court’s Factual Findings

YES further argues this Court’s Order was inaccurate and incomplete, and YES provides two pages of testimony it believes should have been reflected in the Order. Specifically, YES points to language from its Rule 30(b)(6) designee to which the Defendants objected and this Court sustained the objection. This testimony was properly not relied on in this Court’s Order.

YES also argues this Court’s determination – that the expert’s testimony (that he had been told that Justice was “in the boat”) was not admissible to create an issue of fact – was

improper because the Defendants did not object to this testimony. However, no objection to this testimony was necessary because it was admitted only for the limited purpose of explaining the background facts relied upon by the expert; it was **not** admitted for the purpose of proving the statement's truth of the matter asserted.

IV. Appropriateness of a Formal Order

Next, YES appears to argue that a written order is inappropriate because "nothing more than a form order is necessary to memorialize a trial court's ruling on a motion for directed verdict" Neither the appellate court rules nor case law prevents a trial court from issuing a formal order to memorialize its ruling. Although YES cites to cases in which Form 4 orders were issued when a trial court granted a directed verdict, nothing in those cases prevents a trial court from issuing a more formal order.

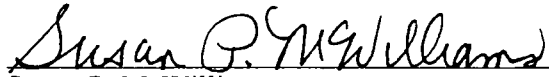
V. Trial Court's Rulings Regarding Objection to Evidence

Finally, YES argues this Court should have allowed into evidence the testimony of its 30(b)(6) designee. YES fails to provide **any** argument regarding why this evidence was admissible. The Defendants objected to it on the grounds the testimony was speculative, and this Court sustained the objections. Such a decision was within the discretion of this Court, and YES fails to offer any reason why this Court abused its discretion in so ruling. *See Gamble v. Int'l Paper Realty Corp.*, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996) (explaining that the admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal).

CONCLUSION

For all of the foregoing reasons, the Defendants respectfully request that this Court deny YES's motion to alter or amend.

Respectfully submitted,

A handwritten signature in cursive script, reading "Susan P. McWilliams", written over a horizontal line.

Susan P. McWilliams

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June 21, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

RECEIVED

APR 09 2012

SC Court of Appeals

YANCEY ENVIRONMENTAL SOLUTIONS, LLC. Appellant,

vs.

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

NOTICE OF APPEAL

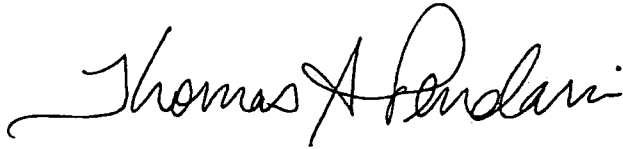
YANCEY ENVIRONMENTAL SOLUTIONS, LLC appeals the Order granting Defendants' Motion for Directed Verdict issued by the Honorable Eugene C. Griffith, Jr., dated March 7, 2012 and received on March 9, 2012, a copy of which is attached as **Exhibit 1**, and the Order denying Plaintiff's Motion to Compel issued by the Honorable DeAndrea G. Benjamin, dated January 19, 2012 and received on February 9, 2012, a copy of which is attached as **Exhibit 2**.

Although the Order granting Defendants' Motion for Directed Verdict is a Form 4 Order and does not expressly state that the trial court intends to issue a more formal Order, instructions were issued to counsel for the Defendants to prepare a formal Order. In the event a formal Order is issued and after the trial court rules on any motions pursuant to

Rules 52(a) and 59, SCRCP, Appellant will file a second Notice of Appeal to include the formal Order and move to consolidate the two appeals.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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

Attorneys for Appellant, YANCEY ENVIRONMENTAL
SOLUTIONS, LLC

April 5, 2012

Beaufort, South Carolina

Other Counsel of Record:

Susan P. McWilliams, J.D.
Daniel C. Leonardi, J.D.
Mary L. Cherry, J.D.
NEXSEN PRUET, LLC
1230 Main Street, Ste. 700
Columbia, SC 29902
SMcWilliams@nexsenpruet.com
DLeonardi@nexsenpruet.com
MCherry@nexsenpruet.com

APPENDIX 1050
FORM 4

RECEIVED
03/09/2012

STATE OF SOUTH CAROLINA
COUNTY OF
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 10 CP-403297

Yancey Environmental Solutions LLC
Etal
PLAINTIFF(S)

Richardson, Plowden & Robinson PA
Etal
DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCF; ☐ Rule 41(a), SCRCF (Vol. Nonsuit); ☐ Rule 43(k), SCRCF (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCF; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Directed Verdict granted to defendants.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

SCANNED

EXHIBIT
1

SCMP
Circuit Court Judge

APPENDIX 1051 215"
Judge Code

3-7-12
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 7th day of March, 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Thomas A. Bendavis

ATTORNEY(S) FOR THE PLAINTIFF(S)

Daniel C. Leonard
Susan Padrick McWilliams

ATTORNEY(S) FOR THE DEFENDANT(S)

Janette W. Brude
CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
9010-3297
CASE NUMBER: 2011CP4003383

Yancey Environmental Solutions LLC

Richardson Plowden And Robinson, PA, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC Vol. Nonsuit;
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : Motion is premature. Issue needs to be decided by trial judge.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researcher should refer to the official court order for judgment details.

Circuit Court Judge h/p Judge Code 2161 Date 01/19/2012

For Clerk of Court Office Use Only

This judgment was entered on the 2 day of Feb, 2012 and a copy mailed first class or placed in the appropriate attorney's box on this 2 day of Feb, 2012 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeannette W. Garcia



Yancey Environmental Solutions, LLC

President - Yancey A. McLeod

November 26, 2007

Mr. James C. Justice
818 Eisenhower Dr.
Beckley, West Virginia 25801

Dear Jim:

I am very excited about your decision to place a conservation easement on the Justice Family Farms, Black River tract in Clarendon County, South Carolina. I have taken the following action in an attempt to expedite the process in order to place the easement in this calendar year:

1. Coordination with my tax attorney, Hal Hanlin, Richardson Plowden, Columbia, South Carolina, about various aspects of the project. Hal is very knowledgeable about conservation matters and serves as board chairman for the Community Open Land Trust, based in South Carolina. It is my recommendation that we use this land trust to receive the gift of the easement, subject, of course, to their agreement to accept. Since Hal is involved as an attorney in the project he would not vote as a board member on the decision to accept. Preliminary discussions with staff members of the trust would indicate their willingness to recommend to the board acceptance of the gift. Hal and I conducted a site visit with their staff on November 16th and they seemed very excited about the project.
2. I would recommend two independent appraisals by qualified appraisers for the project. I have spoken to Henry Beckman, Myrtle Beach, South Carolina, who I have known for many years and who has experience appraising property where the highest and best use was mitigation banking. Although the self contained appraisal would not have to be completed until within 60 days prior to filing of your 2007 tax return, Henry indicated that he could conduct preliminary analysis sufficient to give you an indication of a range of value by years end in order for you to make an informed decision about placement of the easement.

Hal and I have also talked with Dr. Darroll Hawkins, an appraiser in Kentucky who has very unique experience in natural resource oriented appraisals. Dr. Hawkins was with the Corps of Engineers for many years and now does



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appraisals of the intrinsic value of natural resource assets. We used Dr. Hawkins on an appraisal of a wetland mitigation bank in Virginia. We have tentatively scheduled a site visit for Dr. Hawkins on December 10th.

We have requested both appraisers to submit proposals for this work. It may be that we request Henry to conduct a desk review of Dr. Hawkins' appraisal instead of a self contained full appraisal.

I have enclosed duplicate originals of a Consulting Services Agreement for your execution. As this project will require our immediate focused attention in order to place the easement this year, I would appreciate your returning the agreement, together with the initial consulting fee, as soon as possible. If you or any of your attorneys, CPA's or other advisors have any questions for me or Hal, please do not hesitate to call.

I appreciate very much your request for us to assist you with this very worthwhile and exciting conservation project.

Sincerely,



Yancey A. McLeod

YAM/m
Encls.

c: Hal Hanlin
Richardson Plowden
1900 Barnwell St.
Columbia, SC 29201
Office 803-771-4400
hhanlin@rpcrlaw.com

STATE OF SOUTH CAROLINA	)	
	)	CONSULTING
	)	SERVICES AGREEMENT
COUNTY OF RICHLAND	)	

THIS AGREEMENT IS SUBJECT TO BINDING ARBITRATION

This Consulting Services Agreement ("the Agreement" hereafter) entered this 1st day of August, 2007, by and between **James C. Justice - Justice Family Farms**, a (need ownership entity)_____having an address of 818 Eisenhower Dr., Beckley, West Virginia 25801 (together with its successors and assigns hereinafter collectively referred to as "**Owner**"), and **Natural Resource Protection & Mitigation, LLC**, hereinafter referred to as **NRPM**.

Whereas, Owner is interested in exploring opportunities for conservation on certain real estate, as described and depicted in Exhibit A attached and incorporated herein by reference ("the Property," hereafter); and

Whereas, Owner wishes to engage the services of NRPM in accordance with the terms and conditions set forth herein to assist Owner in his choice of certain independent contractors; to coordinate their services in providing legal, engineering, appraisal and tax advice required to incorporate conservation on all or part of the Property; and

Whereas, NRPM agrees to provide its best efforts in assisting Owner in his choice of certain independent contractors and in coordinating their services required to incorporate conservation on the Property; and

Whereas, Owner acknowledges and agrees that NRPM does not guarantee the work of Owner's independent contractors.

Now, therefore, in consideration of the services to be performed by NRPM for Owner as set forth herein, Owner agrees to pay NRPM the sum of Fifty Thousand (\$50,000) Dollars as a non-refundable retainer ("the Retainer," hereafter) upon execution of the Agreement. Owner further agrees to pay a fee based upon the value of any

conservation contribution pertaining to the property. The fee shall equal **five (5%) percent** of the conservation value of the property, as such value is reported on IRS form 8283 pertaining to any conservation contribution made of any interest in the Property. Owner shall not be obligated to make any conservation contribution whatsoever. If Owner elects, however, to make a conservation contribution of any of the Property within two (2yrs.) years of the date hereof, as evidenced by the recordation of a conservation contribution pertaining to the property, then all fees described herein shall be deemed earned, and shall be paid to NRPM promptly. Such fees shall be due and payable prior to recordation of the conservation contribution. However, because the final appraisal of the conservation value of the Property may not be complete prior to recordation of the conservation contribution, then a preliminary calculation of the fee shall be made based upon any good-faith estimate of the conservation value of the Property furnished to Owner by a licensed real estate appraiser, and provided to NRPM by Owner prior to recording of the conservation contribution. Seventy (70%) percent of the fee shall be paid not later than the date on which the conservation contribution is recorded. The final fee shall be calculated using the conservation value of the Property, as shown by the Final Appraisal of the Property. The Final Appraisal shall be that appraisal which is attached to Owner's IRS form 8283 pertaining to any conservation contribution of the Property. After credit for payment made towards the fee, Owner shall promptly, upon filing his tax return for the year of the conservation contribution of the Property, pay any balance of the fee owed to NRPM.

If Owner is taxed as a sole proprietor, then the Final Appraisal shall be the appraisal attached IRS Form 8283 of the individual doing business as Owner.

SCOPE OF SERVICES:

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1. Confirm the location, size and ownership of the property proposed for possible conservation described in Exhibit A.
2. Assist Owner in identifying the benefits of conservation components.
3. Assist Owner in identifying Owner's Financial and Conservation objectives.
4. Assist the Owner in its selection of independent contractors including lawyers, engineers and appraisers.
5. Identify a Grantee qualified to accept the conservation benefits.
6. On behalf of the Owner, assist the Grantee in identification and verification of conservation purposes and other reasonable aspects of the conservation effort that the Grantee may require in accepting the conservation benefits.
7. Represent Owner's interest in working with the Grantee and, together with Owner's attorney, draft an agreement that accomplishes Owner's objectives for land use, while protecting the conservation values and purposes.
8. Coordinate the process set forth above.

CHANGE OF SCOPE:

The scope of the services agreed to be rendered by NRPM herein is based on the identity of the property; its size; its location; its ownership; its engineering suitability; its conservation suitability; the Owner's objectives and the scheduled completion date.

The Parties hereto agree that should any of the elements of the Scope of Services listed above materially change, this Agreement will be amended to set forth such additional services, the additional performance time required to completion, and the additional fees to be paid to NRPM for such services. Should the Parties not be able to agree on the additional services to be rendered, the extension of time to completion date or the amount of such additional fees to be paid NRPM within the thirty (30) days of notification of such additional fees, this Agreement shall terminate upon the payment of any fees then due NRPM and upon the delivery to Owner by NRPM of all work product developed under this Agreement by NRPM to that date.

The Parties hereto agree that should they at any time after recordation of the proposed conservation deed be notified of any investigation or audit of this proposed

qualified conservation gift, by any local, state or federal agency or institution, and request the services of NRPM to represent them in such investigation, such notice shall be forwarded to NRPM in a timely manner and a new Agreement shall be written specifying the additional services to be rendered, the additional time required to completion, and the additional fees to be paid NRPM for such services.

SCHEDULE:

The work on this project will commence upon receipt of the executed agreement and the retainer. It is estimated that the Project will take three months to complete, provided there are no unexpected variables and delays. Extensions of this Agreement will be as set forth herein. Performance of services by NRPM is subject to the timely performance of the services required by the Owner's independent contractors.

Owner acknowledges and agrees that NRPM will coordinate the work of the appropriate professionals. The completion of their respective services in the process will be the responsibility of such professionals and NRPM shall not be responsible or liable in any manner for any substantive work, work product, deliverables, acts or omissions of such professionals.

OWNERSHIP OF DOCUMENTS:

All reports, plans, files, computer generated documents, or any other documents produced by NRPM as part of this Agreement shall remain the property of NRPM and shall not be used by Owner for any other purpose or project without the written consent of NRPM. In the event the Owner uses any NRPM generated documents without written consent of NRPM, such use shall constitute the agreement of Owner to hold NRPM harmless from and against any and all claims, damages, losses and expenses related to or attributed to the unauthorized use of such documents. All reports, plans, contracts or other documentation provided by Owner to NRPM for purposes of this Agreement shall not be provided by NRPM to any other third party without Owner's consent.

DISPUTE RESOLUTIONS:

All claims, disputes, and other matters arising out of or relating to this Agreement or the breach thereof, not resolved by agreement of the Parties, shall be decided by binding arbitration in accordance with the then most current rules of the American Arbitration Association.

ATTORNEY FEES AND COSTS:

In the event of Arbitration to enforce the terms of this Agreement, the prevailing party shall be entitled to recover from the other party, as part of its damages, its reasonable costs, expenses, and attorney fees.

AMENDMENT:

This Agreement, upon execution by both parties hereto, can be amended only by a written instrument signed by both parties.

NO GUARANTEE:

No promise or guarantee by NRPM is made herein regarding the outcome of its services hereunder. Any comments of NRPM regarding the outcome of the Owner's matter are expressions of opinion only. No subsequent statement by NRPM or its employees will be construed as a promise or guarantee as to the outcome of the Owner's matter unless expressly set forth in writing and signed on behalf of NRPM. Payment of NRPM' fees shall not be contingent on the outcome of any work to be performed by NRPM hereunder.

EXPENSES:

Often it is necessary for NRPM to incur expenses for items such as travel, lodging, meals and telephone calls. Similarly, some matters also require advances by NRPM for services such as photocopying, printing, shipping, administrative fees,

computerized legal research, and staff overtime. These "advances" represent out-of-pocket expenses. All travel and out-of-pocket expenses reasonably incurred by NRPM in the performance of this agreement will be reimbursed to NRPM, at net, on a monthly basis.

BILLINGS:

NRPM statements generally will be prepared and mailed in a few days after the end of any month in which those services are rendered and disbursements are made. Payment is due within thirty (30) days of the date of a statement for services. A monthly service charge of 1.5% is due and will be added to the balance of any invoice not paid within thirty (30) days. Payment not made within forty (40) days of the date of the date of a statement is past due and is a breach of this Agreement.

TERMINATION:

Owner will have the right to terminate our representation upon ten (10) days written notice. NRPM will have the same right, subject to its obligation to give Owner reasonable written notice, not to exceed fifteen (15) days, to arrange alternative representation. The Owner agrees to pay NRPM for all fees and expenses advanced and/or incurred for services rendered through the date of termination of the Agreement. NRPM agrees to provide Owner or its representative the right to reproduce copies of all documents produced by NRPM or which NRPM has accumulated on behalf of the Owner.

DISCLAIMER:

In connection with the Agreement, NRPM will not provide legal, engineering, accounting or tax advice or services. As there are tax and legal issues with this project, Owner is encouraged to seek advice from tax and legal professionals.

The parties hereto agree and acknowledge that NRPM was retained in this matter through Owner's contact of NRPM at NRPM's offices in Richland County, South Carolina, without any advertisement or initiation by NRPM in any way.

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The parties agree that this is a South Carolina agreement and that it shall be interpreted according to South Carolina law, and that venue for the resolution of any dispute hereunder shall be Richland County, South Carolina.

In witness whereof, the undersigned have set their hands and seals the date above mentioned.

WITNESSES

**NATURAL RESOURCE PROTECTION
& MITIGATION, LLC**

By: _____
Its: Member and Authorized Agent
Date: _____

WITNESSES

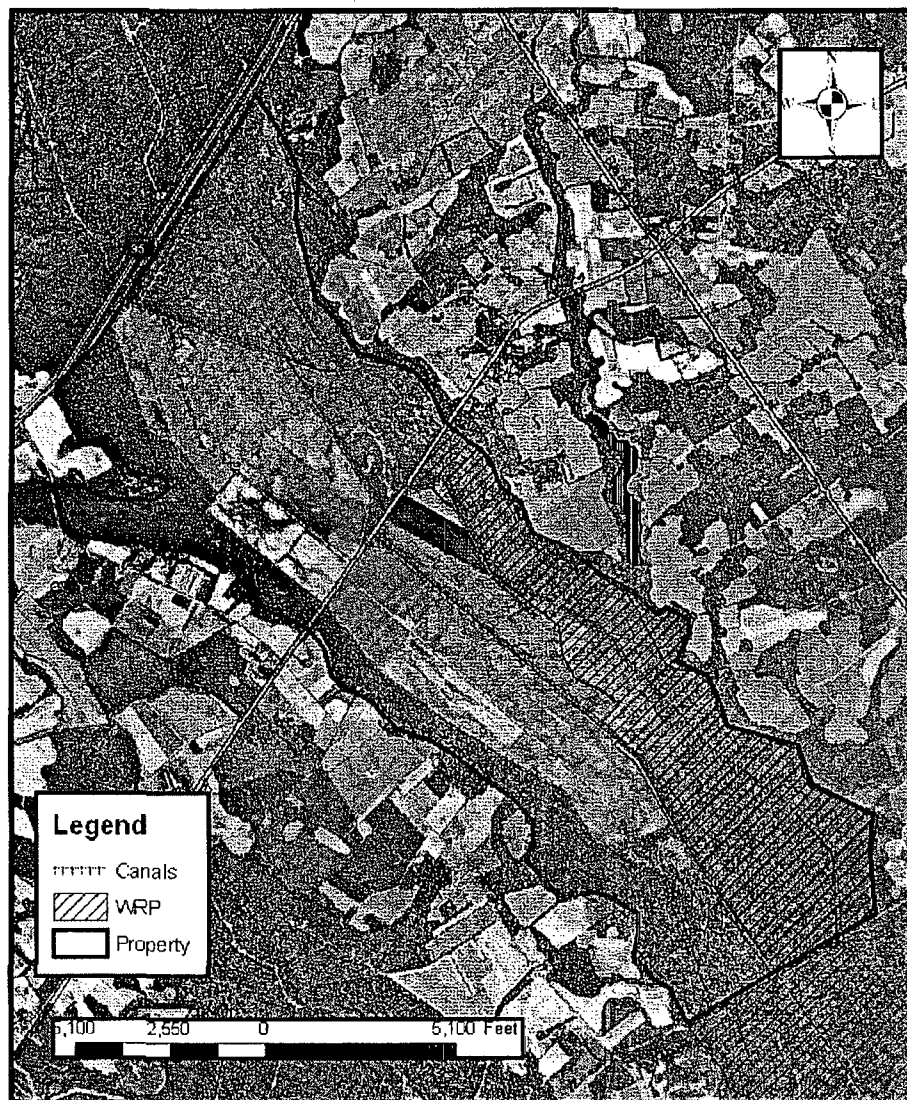
Justice Family Farms, LLC

By: _____
Its: _____
Date: _____

WITNESSES

JAMES C. JUSTICE

EXHIBIT A



Natural Resources Protection
& Mitigation, LLC
One Cook's Mountain Road
Eastover, SC 29044

Jim Justice
Black River Farms

Color Infra-red Map
June, 2007

Yancey Environmental Solutions

From: Hal Hanlin [hhanlin@Richardsonplowden.com]
Sent: Wednesday, November 07, 2007 9:19 AM
To: 'Yancey Environmental Solutions'
Cc: Fred Crawford
Subject: Jim Justice

Hey, Yancey,

This memo is to let you know the initial information that I will need to properly advise you and your client, Jim Justice, as to the probable tax effects of the conservation contribution that he contemplates before the end of this year, but also to advise Fred Crawford of the project so that we can allocate the resources to it that it deserves.

As we discussed yesterday, I looked up Justice Family Farms, LLC, ("JFF") in the SC Secretary of State's records this morning. JFF is a West Virginia LLC registered in SC on February 9, 2007. As you requested, in order to advise Jim about the tax effects of a conservation easement this year, we will need to know the following:

- (1) whether JFF is taxed as a partnership (nearly all LLCs are, but we don't want to assume anything);
- (2) when the LLC was formed;
- (3) when the 4500 acre tract in SC was purchased, the purchase price, and when it was contributed to the LLC;
- (4) who the members of the LLC are, and their percentage interests;
- (5) I understand that if Jim sells his mining interests this year, that his income will be in the \$50 million range; I also understand from you that the probability of the transaction occurring this year is high. Do we have any idea what Jim's income range would be if he does not sell his mining interests this year?
- (6) do we have any idea what percentage of the LLC's income or Jim's income is from farming/ranching vs. other sources?
- (7) some indication from the appraiser of the value of the property, with the mitigation/remediation potential factored in, of course.

I understand that although you and Jim have been discussing the possibilities for this property for quite some time, and he has now given you the go-ahead to proceed, you have not reached a definite arrangement as to the fee to charge for our consultations regarding it, and that you will want our assistance in drafting the consultation agreement. As you know, getting all this done before the end of the year will be a challenge for everyone, and will require everyone's rapid work and attention, but I am, like you, confident that it can be accomplished. I understand that you contemplate a fee of perhaps \$4 million or so, and that our usual 2/3 - 1/3 arrangement would apply. Please correct any errors on my part.

Yancey, as always, I count it a pleasure and a privilege to be able to work with you on a project. Thanks for allowing me to assist with this one.

Hal

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Yancey Environmental Solutions

From: Hal Hanlin [hhanlin@Richardsonplowden.com]
Sent: Wednesday, November 07, 2007 11:13 AM
To: 'Yancey Environmental Solutions'
Cc: Fred Crawford
Subject: Jim Justice

Hey, Yancey,

Thanks for your telephone call. I understand that you intend to discuss with Jim Justice pricing our consulting services in this matter at 5% of the appraised value of the conservation easement. I also understand that you have talked with appraiser Henry Beckham about doing the appraisal work on this project, and that he is experienced in appraising mitigation/remediation projects, and is very willing to work on this project. While we will have to defer to Henry on the value of the easement, you have conservatively estimated the conservation value of this project in the past to be perhaps \$50 million. It could certainly be less or more.

As we have discussed in other projects, the appraisal is not required until the taxpayer (Jim) files his tax return for the year in question, which return can be extended until October 15th of the year following the donation, although the appraisal is acceptable under the regulations if done up to 60 days prior to the donation. Of course, any tax payment is due on April 15th, regardless of the extension, and estimated taxes might be due before that date, depending on circumstances. So Jim's tax savings as a result of this project will occur on April 15, 2008, at the latest, regardless of any extension filed, and could occur earlier.

I suggest that, since you contemplate that a preliminary appraisal would be prepared this year, and that since the conservation contribution would be made this year, that some portion of the fee, if not the majority of the fee, should be payable this year also. I'm sure that arrangement would be beneficial to your cash flow, as it would be to ours as well, and I think would be fair to Jim.

Best regards,
Hal

11/7/2007

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COLUMBIA P.O. Drawer 7788 • Columbia, SC 29202
1900 Barnwell St., Columbia, SC 29201 P 803.771.4400 F 803.779.0016

MYRTLE BEACH P.O. Box 3646 • Myrtle Beach, SC 29578
2103 Farlow St., Suite B, Myrtle Beach, SC 29577 P 843.448.1008 F 843.448.1533

RECEIVED

www.RichardsonPlowden.com

DEC 12 2007

Reply to: Columbia Office
E-Mail: hhanlin@RichardsonPlowden.com
Direct Dial: 576-3704

December 5, 2007

Yancey A. McLeod, Esq.
Yancey Environmental Solutions, LLC
One Cook's Mountain Road
Eastover, South Carolina 29044

RE: Conservation Easement
Jim Justice – Black River Farm
Our File No. 7008-001

Dear Yancey:

This is to confirm our conversations wherein you agreed to retain Richardson Plowden & Robinson, P.A., as your attorneys to assist you in the creation of a conservation easement on certain real property known as Black River Farm, near Manning, South Carolina (the "Property"). This letter is to memorialize our agreements concerning the terms and conditions under which we will be acting as your attorneys.

1. Services to be provided by Richardson Plowden & Robinson, P.A.
 - (a) Consultations with and the provision of legal tax advice to *Yancey Environmental Solutions, LLC* ("YES"), and consultations with tax advisors to Jim Justice regarding the conservation easement being considered for the Property.

2. Services Not Included.

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, unless jointly agreed upon in writing.

3. Fee for Services Rendered.

As compensation for the services to be performed by our firm, we shall be paid a fee of one-third (1/3) of any fees paid to YES by Jim Justice or the owner or operator of Jim Justice's Black River Farm, under the Fee Agreement of YES provided to Jim Justice on November 27, 2007. For any other matters to which we shall mutually agree in writing to serve as attorneys, we shall be paid a reasonable fee determined by multiplying the number of hours spent working on your matters by our

Yancey A. McLeod, Esq.
December 5, 2007
Page 2

regular and customary billing rates for similar services performed by this firm, unless a different agreement is made in writing. Currently, our usual billing rates are \$75 to \$135 per hour for legal assistants, \$145 to \$375 per hour for lawyers. Each attorney has been assigned a billing rate which is determined by his or her experience, expertise and the difficulty of the case. My hourly rate is Two Hundred Fifty and 00/100 Dollars (\$250.00) per hour. These basic hourly billing rates may increase in the future.

While we may, from time to time, for your convenience, furnish you with estimates of the amount of fees we anticipate will be charged with respect to services to be performed under this engagement agreement, such estimates are by their nature inexact and cannot be binding on either of us. Therefore, absent a specific written agreement, any estimates made by us are for planning purposes only and are in all respects subordinate to our regular billing procedures.

Further, any legal services rendered in addition to those specifically set forth in Paragraph 1 above or legal consultations on other matters shall be invoiced pursuant to our standard billing procedures as set forth herein.

4. Disbursements/Costs and Expenses.

In addition to the fees described above, we shall be reimbursed for all out-of-pocket costs, disbursements and expenses incurred by us in connection with legal services performed under this agreement. Included within this category are photocopying charges, filing fees, court and deposition reporter fees, travel expenses, postage, Lexis/Westlaw research charges, long distance telephone charges, Federal Express and Facsimile charges, among other things. In the event that this Firm elects to advance certain costs on your behalf, it is expressly understood that you will reimburse this Firm for such costs.

5. Manner of Billing and Payment.

It may be helpful to describe how our internal billing procedure works so that you will know how the data is generated and how the amount of each statement has been determined.

Each client is assigned a client number and each matter for that client is assigned a separate case number. Each attorney and legal assistant in the office records his or her time by case number on individually prepared daily time sheets. In addition, costs are also recorded. This data (attorney time and costs) is then entered into a computer program and a bill is produced showing all of the services performed, the attorneys who performed each task, the fees charged, and the nature and amount of costs and disbursements.

6. Right of Withdrawal

It is understood and agreed that this Firm has the right to terminate our representation of you in this matter pursuant to Rule 1.16 of the Rules of Professional Conduct. Section 1.16(b)(5) of the

Yancey A. McLeod, Esq.
December 5, 2007
Page 3

Rules of Professional Conduct, as stated above, provides that an attorney may withdraw if the client fails "substantially" to fulfill an obligation to the lawyer. It is expressly understood that a substantial obligation is defined, among other things, as the payment for services and costs. Any fees or costs not paid in thirty (30) days after billing will automatically serve as reasonable warning under such Section and gives this firm the right to withdraw as your attorneys in this matter.

7. Responsibility of Client.

While such extensive consideration of fees and costs may seem unnecessary, we have found that it aids the development of good relationships with our clients and avoids future misunderstandings. Therefore, if you find the foregoing acceptable, please indicate your agreement by signing the enclosed original of this letter and returning it to me in the envelope provided.

Throughout our relationship we want you to be satisfied with the professional services we perform on your behalf; accordingly, we invite your inquiry if you have any questions concerning our representation.

With warmest personal regards, I am

Sincerely yours,

RICHARDSON PLOWDEN & ROBINSON, P.A.

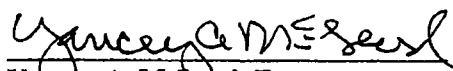
By: 
Hal Hanlin

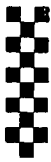
GHH/sdl

Accepted and agreed to this

5th day of December, 2007.

Yancey Environmental Solutions, LLC

By: 
Yancey A. McLeod, Esq.
Its: Authorized Agent



MEMORANDUM TO: Yancey

RE: Attached

September 30, 2008

We have mishandled certain of these bills related to the conservation easement project and Jim Justice asked me to forward the attached to you to assure it appears okay. Please call me at 304-252-8528 or fax a response to David Harrah 304-929-2339. Thank you.

David

3 pages attached

*Bluestone
- Industries*

*20
304 1085
25801*

Highview Engineering, Inc.

4610 Portico Court
Louisville, KY 40299**Invoice**

DATE	INVOICE #
12/31/07	415

BILL TOBlack River Farm
c/o David Harrah
PO Box 1085
Beckley WV 25302

P.O. NO.	TERMS	PROJECT

QUANTITY	DESCRIPTION	RATE	AMOUNT
82	Wetland Appraisal	150.00	12,300.00
44	Data recording for wetland appraisals	36.00	1,584.00
1,151	Reimburse Mileage	0.485	558.24
341	Reimburse Mileage	0.485	165.39
	Per diem	320.00	320.00
	per diem	320.00	320.00
	Lodging	86.02	86.02
		159.26	159.26
		143.98	143.98
	Total Reimbursable Expenses		1,029.26
	The hourly rates expense and the 341 miles reimbursement will be deducted from the fix cost expense when appraisal is completed		
Total			\$15,636.89

Highview Engineering, Inc.

4610 Portico Court
Louisville, KY 40299**Finance Charge**

DATE	INVOICE #
8/8/08	FC 79

BILL TOBlack River Farm
c/o David Harrah
PO Box 1085
Beckley WV 26802**TERMS**

DESCRIPTION	AMOUNT
Finance Charges on Overdue Balance Invoice #415 for 15,536.89 on 12/31/07	2,814.00
Total	\$2,814.00

James C. Justice Companies, Inc.

17315

Date	Invoice Number	Comment	Amount	Discount Amount	Net Amount
12/27/2007	122708	JUSTICE FAMILY FARMS	15,000.00	0.00	15,000.00

Check: 017315	11/13/2008 00-YANC001	YANCEY ENVIRONMENTAL SOLUTION	Check Total:	15,000.00

McLeod000398

James C. Justice Companies, Inc.

17315

Date	Invoice Number	Comment	Amount	Discount Amount	Net Amount
12/27/2007	122708	JUSTICE FAMILY FARMS	15,000.00	0.00	15,000.00

Check: 017315 11/13/2008 00-YANC001 YANCEY ENVIRONMENTAL SOLUTION Check Total: 15,000.00

James C. Justice Companies, Inc.
P O Box 1085
Beckley, WV 25802

Justice

017315

17315

*FIFTEEN THOUSAND AND XX / 100

DATE

AMOUNT

11/13/2008

*****15,000.00*

PAY
TO THE
ORDER
OF

YANCEY ENVIRONMENTAL SOLUTIONS
ONE COOK'S MOUNTAIN ROAD
EASTOVER, SC 29044

[Signature]

Security features are included. Details on back.

MP

McLeod000399

1069

APPENDIX1073

Hal Hanlin

From: Yancey Environmental Solutions [yesyancey@mindspring.com]
Sent: Thursday, December 20, 2007 10:52 AM
To: Hal Hanlin
Cc: Debra
Subject: confidential from Mary

Good morning Hal,

I am attaching a very serious letter from the IRS received in the mail yesterday – Debra and I have reviewed, but, and this is important – I have not shown this to Yancey and unless you tell me otherwise, I do not want him to see this, or know about this, until after Christmas. (we are not doing well financially – we are literally at the end of the rope)

Debra and I are most concerned about the cover letter – the documents they are requesting do not bother us so much.

Please let us know your thoughts –

Mary

Mary Mohr
Yancey Environmental Solutions, LLC
One Cock's Mountain Road
Eastover, SC 29044
Office 803.353.0440
Fax 803.353.8004
yesyancey@mindspring.com

APPENDIX1074

Internal Revenue Service
440 Roper Mountain Rd., Suite E
Greenville, SC 29615

Department of the Treasury

Date: December 17, 2007

Yancey A. McLeod
1 Cooks Mountain Rd.
Eastover, SC 29044

Examiner:

Phyllis Bingham

Examiner's Employee Identification Number:

57-10391

Contact Telephone Number:

864-286-7019

Fax Number:

864-286-7085

Dear Mr. McLeod:

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.

This letter is to schedule a meeting with the examiner.

Appointment Information:

Location: **Internal Revenue Service**
1835 Assembly Room 408
Columbia, SC

Date: Thursday, January 17, 2008

Time: 10:00 AM

Purpose of the Appointment:

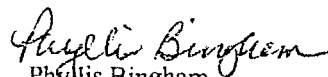
At this appointment we will discuss specific procedures, such as communication methods, response times, and other general expectations. Please have the items listed on the attached Form 4564, *Information Document Request*, available at our first appointment.

If we conclude that penalties, injunction, and/or "pre-filing notification" action is appropriate, you will be afforded an opportunity to present any facts or legal arguments that you feel indicate that such action should not be taken.

Please contact me if you have any questions you would like to discuss.

Thank you for your cooperation.

Sincerely,


Phyllis Bingham
Revenue Agent

Enclosure(s):
Information Document Request Form 4564
Publication 1/Notice 609

Letter 1844 (Rev. 4-2004)
Catalog Number 61129A

APPENDIX1075

Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 01
To: (Name of Taxpayer and Company, Division or Branch)	Subject: IRC 6700 / 6701 Investigation	
Yancey A. McLeod	Submitted to:	
	Dates of Previous Requests: None	

The following request for information applies to Yancey A. McLeod and/or Yancey Environmental Solutions, LLC, Cooks Mountain Timber, LLC, Natural Resource Based Education Centers, Inc. or any other company of which Yancey A. McLeod is an officer, trustee, and/or partner. It also includes any employees, agents or staff of any of the above.

1. All manuals, operations handbooks, prospectuses, offering documents, or other documents which describe the plan, operations or structuring of the conservation easement transactions you have organized or assisted in the organization of, or participated (directly or indirectly) in the sale of any plan or arrangement involving charitable contributions of conservation easements offered to clients, investors, or purchasers.
2. All manuals, operations handbooks, prospectuses, offering documents, or other documents which describe the plan, operations or structuring of the conservation easement transactions you have organized or assisted in the organization of, or participated (directly or indirectly) in the sale of any plan or arrangement involving the sale or purchase of conservation easement tax credits offered to clients, investors, or purchasers.
3. All documents and records used to promote, market, advertise or otherwise describe charitable contributions of conservation easements or the purchase or sale of conservation tax credits to clients, investors or purchasers. These include, but are not limited to, the following:
 - All books, publications, pamphlets, brochures, flyers, or published articles.
 - All media including but not limited to videotapes, audiotapes, or compact discs.
 - All legal, accounting, or other opinions used in the drafting of any and all materials used in the promotion or marketing of conservation easements.
 - List of all seminars you organized or participated in (directly or indirectly) regarding charitable contributions of conservation easements. Include the date of each seminar, the location, agenda or description of seminar topics, and fees received from clients, investors, or purchasers.

Information Due By	1/17/08 @ 10:00 AM	At Next Appointment	☒	Mail In	
FROM	Name and Title of Requestor <i>Phyllis Bingham</i> Phyllis Bingham, Revenue Agent 57-10391				Date: December 17, 2007
	Office Location: 440 Roper Mountain RD., Suite E, Greenville, SC 29615				Page 1

APPENDIX1076

Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 01
To: (Name of Taxpayer and Company, Division or Branch)	Subject: IRC 6700 / 6701 Investigation	
Yancey A. McCleod	Submitted to:	
	Dates of Previous Requests: None	

4. Documents which identify names and addresses of all persons, entities, or organizations involved in the organization (or assisting in the organization) or sale of any tax shelter plan or arrangement promoted or offered involving conservation easements or conservation easement tax credits.

These persons include, but are not limited to, (1) attorneys, (2) Certified Public Accountants, (3) salespersons, (4) appraisers, (5) loan brokers or lenders (6) donee organizations and persons affiliated with the donee organization, and (7) any other persons to whom commissions or finders fees were paid.

5. All documents describing the marketing activities and strategies of any plan or arrangement promoted or offered regarding the charitable contributions of conservation easements and the sale or purchase of conservation easement tax credits. This includes (1) any training manuals provided to staff, salespeople, appraisers or persons affiliated with donee organizations and, (2) any media, including but not limited to, videotapes, audiotapes, or compact discs, used to train staff, salespeople, appraisers or persons affiliated with donee organizations.
6. A list of clients, investors, or purchasers you have organized or assisted in the organization of, or participated (directly or indirectly) in the sale of any plan or arrangement involving conservation easements or conservation easement tax credits during the period beginning January 1, 2004 through the present. The list should include the following information:

- a. name of the customer;
- b. whether the customer is an individual or business;
- c. if an individual, the spouse's name;
- d. taxpayer identification number (social security number or employer identification number);
- e. if an individual, the spouse's social security number;
- f. customer's complete address;
- g. appraisal date(s);
- h. type of property and number of acres;

Information Due By	1/17/08 @ 10:00 AM	At Next Appointment	Σ	Mail In	
FROM	Name and Title of Requestor Phyllis Bingham, Revenue Agent 57-10391				Date: December 17, 2007
	Office Location: 440 Roper Mountain RD., Suite E, Greenville, SC 29615				Page 2

APPENDIX1077

Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 01
To: (Name of Taxpayer and Company, Division or Branch)	Subject: IRC 6700 / 6701 Investigation	
Yancey A. McCleod	Submitted to:	
	Dates of Previous Requests: None	

- i. address of donated property; and
 - j. appraised value
7. All forms, including but not limited to, company formation documents, provided to clients, investors, or purchasers.
 8. All application, contracts, agreements between you (or any associated persons, entities or organizations referred to at the top of page 1 herein) and the clients, investors or purchasers.
 9. All records of payments received from clients, investors, or purchasers of any plan or arrangement involving charitable contributions of conservation easements by you (or any associated persons, entities or organizations referred to at the top of page 1 herein), or their agents, including, but not limited to, general ledgers, cash receipt journals, or bank records.
 10. All documents and records of any statements made with respect to the allowability of tax benefits associated donations of conservation easements or sale or purchase of conservation easement tax credits including statements with respect to the valuation of the conservation easement.
 11. Copies of all Form 8283, *Noncash Charitable Contributions*, prepared, signed, reviewed, approved or executed by you for the period January 1, 2004 to present.
 12. A list of income tax returns and amended returns you prepared, assisted, of advised with respect to the preparation of any portion of the return, claim, or other document claiming a tax benefit for the charitable contribution of a conservation easement for the period January 1, 2003 to present.
 13. All legal, accounting or other opinions utilized in the promotion of any plan or arrangement involving charitable contributions of conservation easements or the sale or purchase of conservation easement tax credits promoted or offered by you or any associated persons, entities or organizations referred to at the top of page 1 herein.

Information Due By	1/17/08 @ 10:00 AM	At Next Appointment	AS	Mail In	
FROM	Name and Title of Requestor Phyllis Bingham, Revenue Agent 57-10391				Date: December 17, 2007
	Office Location: 440 Roper Mountain RD., Suite E, Greenville, SC 29615				Page 3

APPENDIX1078

Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number 01
To: (Name of Taxpayer and Company, Division or Branch)	Subject: IRC 6700 / 6701 Investigation	
Yancey A. McCleod	Submitted to:	
	Dates of Previous Requests: None	

14. All contracts, engagement letters, agreements between you (or any associated persons, entities or organizations referred to at the top of page 1 herein) and the appraiser engaged for the purposes of valuing the real property donated for conservation easement purposes.
15. All correspondence including emails and facsimiles both to and between you (or any associated persons, entities or organizations referred to at the top of page 1 herein) and the client, appraiser, or donee organization or other related party to the transaction from January 2004 to present.
16. Copies of all loan agreements and payments received for loans made to purchasers of conservation easement tax credits.

If you have any questions regarding any of the items requested above, please call me prior to the appointment date at 864-286-7019.

Information Due By	<u>1/17/08 @ 10:00 AM</u>	At Next Appointment	☒	Mail In	
FROM	Name and Title of Requestor <u>Phyllis Bingham, Revenue Agent 57-10391</u>				Date: <u>December 17, 2007</u>
	Office Location: <u>440 Roper Mountain RD., Suite E, Greenville, SC 29615</u>				Page 4

Frank Mack

From: Hal Hanlin
Sent: Thursday, December 20, 2007 1:41 PM
To: Frank Mack
Cc: Fred Crawford; Tony Rebollo
Subject: FW: confidential from Mary
Attachments: IRS Notice.pdf

Frank,

I opened this email a short while ago from Yancey's staff.

I have four recommendations, and would welcome any advice that anyone wishes to offer:

- (1) I have called Mary Mohr to tell her that Yancey needs to be advised of this as soon as possible;
- (2) Since I have some involvement in some of the transactions being reviewed, Yancey needs to retain other counsel to assist him with this – I may be conflicted out at some point if not immediately, and Yancey would be better served to have other counsel from the beginning, and I have advised Mary of this;
- (3) We should terminate any involvement with these projects;
- (4) I should inform any of my clients who might be affected of this notice.

Hal

From: Yancey Environmental Solutions [mailto:yesyancey@mindspring.com]
Sent: Thursday, December 20, 2007 10:52 AM
To: Hal Hanlin
Cc: Debra
Subject: confidential from Mary

Good morning Hal,

I am attaching a very serious letter from the IRS received in the mail yesterday – Debra and I have reviewed, but, and this is important – *I have not shown this to Yancey and unless you tell me otherwise, I do not want him to see this, or know about this, until after Christmas.* (we are not doing well financially – we are literally at the end of the rope)

Debra and I are most concerned about the cover letter – the documents they are requesting do not bother us so much.

Please let us know your thoughts –

Mary

Mary Mohr
Yancey Environmental Solutions, LLC
One Cook's Mountain Road
Eastover, SC 29044
Office 803.353.0440
Fax 803.353.8004
yesyancey@mindspring.com

RPCR 0844

12/20/2007

Nexsen00682

APPENDIX1080



COLUMBIA P.O. Drawer 7788 • Columbia, SC 29202
1900 Barnwell St., Columbia, SC 29201 P 803.771.4400 F 803.779.0016

MYRTLE BEACH P.O. Box 3646 • Myrtle Beach, SC 29578
2103 Farlow St., Suite B, Myrtle Beach, SC 29577 P 843.448.1008 F 843.448.1533

www.RichardsonPlowden.com

Reply to: Columbia Offices
E-Mail: hhanlin@RichardsonPlowden.com
Direct Dial: 576-3704

December 21, 2007

Yancey A. McLeod, Esq.
One Cooks Mountain Road
Eastover, South Carolina 29044-0000

RE: All outstanding matters

Dear Yancey:

As you and I discussed by telephone yesterday, our firm has terminated all representation of you or any entity with which you are affiliated.

We regret that this action is necessary, but the IRS notice which you 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. This termination includes, but is not limited to, any representation of Yancey Environmental Solutions (including the Jim Justice matter and the Gastineau matters), NRB (Natural Resources Based Education Centers), Inc., and representation of you personally.

I will file forms 2848 notifying the IRS of our withdrawal in the next few days in those matters where a form 2848 (Power of Attorney) has been filed.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Hal Hanlin".

Hal Hanlin

GHH

RPCR 0856

"DISCONTINUE
INVESTIGATION"
LTR

Internal Revenue Service

440 Roper Mountain Rd. Suite E
Greenville, SC 29615

Yancey A. McLeod
1 Cooks Mountain Rd.
Eastover, SC 29044

Department of the Treasury**Date:**

October 16, 2008

Taxpayer Identification Number _____

Person to Contact:

Phyllis Bingham

Contact Telephone Number:

864-286-7019

Contact Fax Number:

864-286-7085

Employee Identification Number:

57-10391

Dear Mr. McLeod:

We are discontinuing our investigation into whether you are liable for a penalty under Internal Revenue Code (IRC) section(s) 6700/6701. This letter should not be construed to mean that the Internal Revenue Service (IRS) approves your conduct; rather, it is simply a notice that our investigation has been discontinued at this time. This investigation did not constitute an examination of your income tax return(s).

The IRS is not precluded from taking any additional action against you or others with respect to your conduct. This includes the commencement of income tax examinations of investors/participants whom you advised or aided.

If you have any questions, please contact me.

Thank you for your cooperation.

Sincerely,

Phyllis Bingham
Phyllis Bingham
Revenue Agent

Letter 1866 (Rev. 7-2008)
Catalog Number 61481V

Yancey Environmental Solutions*Dr. HAWKINS
PROPOSAL*

From: DLH4610@aol.com
Sent: Friday, November 16, 2007 11:49 AM
To: hhanlin@Richardsonplowden.com
Cc: yesyancey@mindspring.com
Subject: Re: SC Appraisal Project
Attachments: topo.JPG; JIMJUSTC.CPR.doc

The proposal is attached

See what's new at AOL.com and [Make AOL Your Homepage](#).

Highview Engineering

4610 Portico Court, Louisville Kentucky 40299
(502) 267-7367 FAX (502) 267-7330

Dr. Darroll L. Hawkins, P.E.
President

Environmental Consulting
Wetland Appraisals

November 16, 2007

PROPOSAL

This proposal is in connection with a prior converted wetland complex on the Jim Justice Black River Farm, near Manning, South Carolina. The attached map shows the farm area. Specifically the requested work is an appraisal of the wetland complex based on its value as a wetland after restoration. The restored complex is about 3,000 acres.

Appraisal fees are a fixed price based on acreage and travel expenses.

The fee for a 3,000 acre complex is \$26,000.

Travel expenses are anticipated to be Mileage \$200, Motel \$600, and Per-diem \$350. The total would be \$1,150.

Return trips because of time expiration from delivery of the appraisal would be time and expense. Time would include travel time one way (estimated 7 hours) and time on site (maximum 8 hours). Total 15 hours \$200/hr plus expenses Mileage \$200, Motel \$300, and Per-diem \$150. The total would be \$3,650.

Before I can complete the appraisal itself I will need the following:

1. Deed
2. Deed restrictions
3. Easements
4. Environmental covenants

(I can also do this information gathering, but again at a separate fee.)

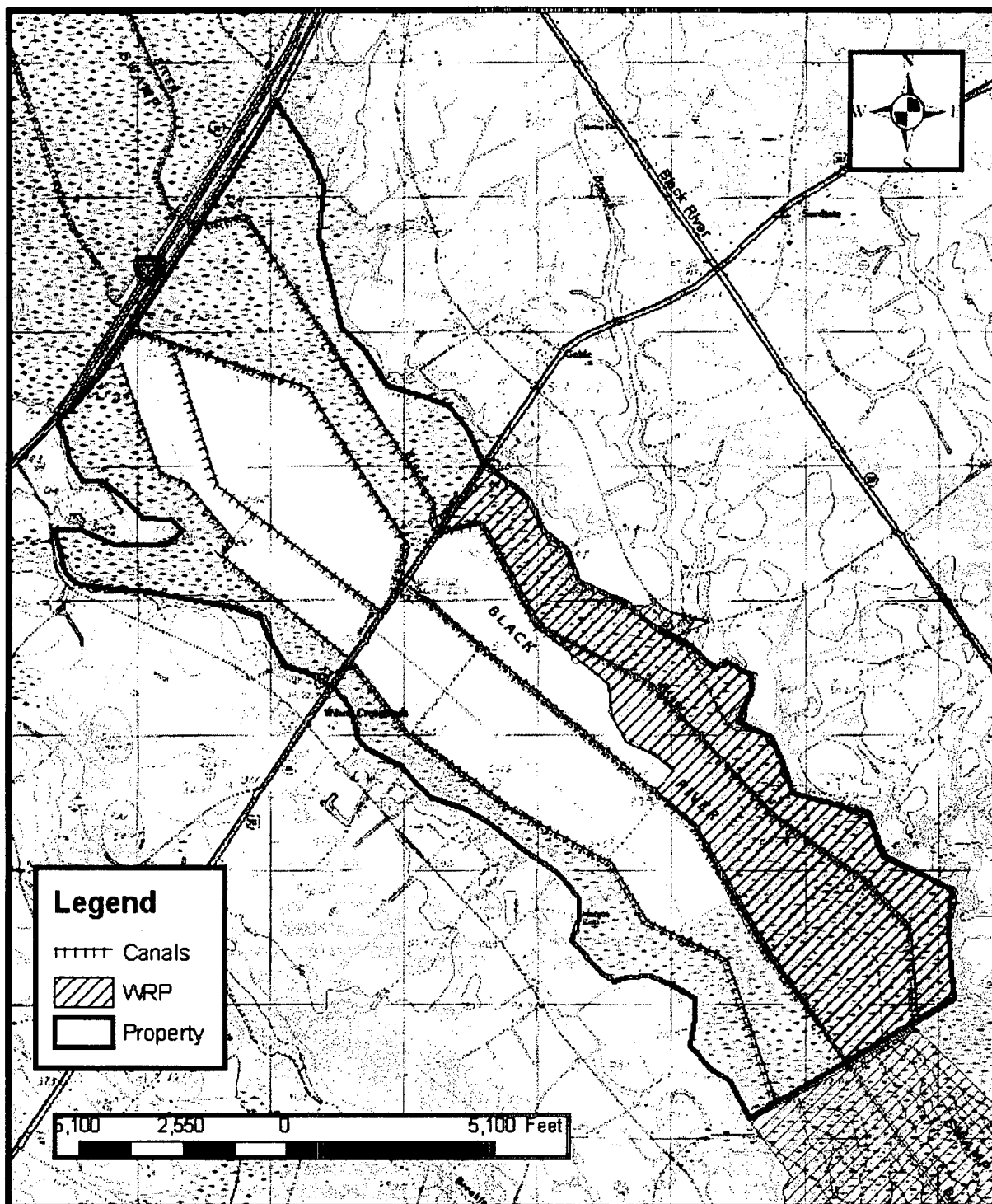
I can be onsite December 11 until inspection is completed.

Deliverables:

Preliminary appraisal via E-mail by December 31, 2007. (Invoice for 3/4 payment)

Finished appraisal mailed by January 15, 2008. (Invoice for 1/4 payment)

Darroll Hawkins
Wetland Appraiser



**Natural Resources Protection
& Mitigation, LLC**
One Cook's Mountain Road
Eastover, SC 29044

**Jim Justice
Black River Farms**

USGS Topo Map
June, 2007

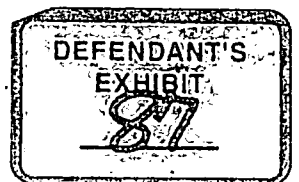


Gibby McLeod

1/3/08

\$300

Crosby
Yancy
Kear



Tim Justice ans. court abandoned because of IRS letter

APPENDIX1086

Yancey Environmental Solutions

From: Yancey Environmental Solutions [yesyancey@mindspring.com]
Sent: Thursday, December 27, 2007 1:49 PM
To: Jim Justice ; David Harrah (dharrah@bluestoneindustries.com)
Subject: Black River Farm tract
Attachments: Statement - Prof. Services 12-27-07.pdf

Jim and David,

I cannot properly express my gratitude and appreciation for your response to our recent conversations regarding the IRS letter I received. My attorney, Crosby Lewis, Columbia, SC, commented to me that "Jim Justice and his advisors must be people of the highest quality – you are very fortunate, Yancey, to have clients of this caliber".

All of the work that has been in progress on the Black River farm tract will be used in a conservation project at the appropriate time. Following our conversations by phone on December 24, I advised the appraiser, Dr. Darroll Hawkins, and our biologists (working on the required baseline report) to cease work at this time and forward statements for work to date. As soon as I receive them I will forward to you. I also am advising the qualified organization which had received board approval to receive the gift, that the project will not close this year.

I have attached our statement for the initial consulting fee in connection with the project and appreciate so much your commitment to pay this. As I mentioned above, all of the work and work-product completed to date will be used when we recommence the project.

I hope you and your families had a wonderful Christmas. I will keep you informed as I defend my honor, character and reputation. I can assure you that I am very proud of each and every conservation project in which I have been honored to participate and will defend the appropriateness of each one they care to question with every ounce of my heart and mind.

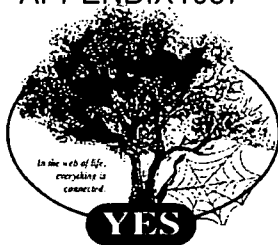
Thank you for your trust, confidence and friendship.

Sincerely,

Yancey

Yancey A. McLeod
Yancey Environmental Solutions, LLC

cc:
C. Lewis



Yancey Environmental Solutions, LLC

President - Yancey A. McLeod

Date: December 27, 2007

Client: Mr. James C. Justice
818 Eisenhower Dr.
Beckley, West Virginia 25801

Project: Justice Family Farms – Clarendon County, SC

Professional Services Statement

For professional services rendered in connection with the initial phase of the conservation project on the Black River tract known as Justice Family Farms.

Professional Fees - Balance Due: \$50,000



One Cook's Mountain Road Eastover, SC 29044 Office 803-353-0440
Fax 803-353-8004 Mobile 803-331-4360 E-mail - yesyancey@mindspring.com

APPENDIX1088

Yancey Environmental Solutions

From: Yancey Environmental Solutions [yesyancey@mindspring.com]
Sent: Friday, December 28, 2007 11:10 AM
To: Dr. Hawkins
Subject: Black River tract

Darroll,

Following up on the message I left on your voice mail on December 24, Jim Justice has decided to postpone the conservation project on the Black River tract in Clarendon County, SC.

Thank you so much for your prompt response to our request of you for an appraisal of the tract. Please forward your statement for services rendered directly to Jim's CPA, David Harrah, whose address and contact information is provided below. Please forward a copy to us for our files as well.

David Harrah
Office - (304) 252-8528 or (304)-252-7188
Email - dharrah@bluestoneindustries.com

I will keep you informed regarding Jim's plans to move forward with this exciting project.

Yancey

Yancey A. McLeod
Yancey Environmental Solutions, LLC
One Cook's Mountain Road
Eastover, SC 29044
Office 803.353.0440
Mobile 803.331.4360
Fax 803.353.8004
yesyancey@mindspring.com

12/28/2007

McLeod000322

1085

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

App. Case No. 2012-212687
Lower Case No. 2010-CP-40-3297

YANCEY ENVIRONMENTAL SOLUTIONS, LLC. Appellant,

vs.

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

INITIAL BRIEF OF APPELLANT

Thomas A. Pendarvis (SC Bar # 64918)
Catherine B. Kerney (SC Bar # 81429)
PENDARVIS LAW OFFICES, P.C.
500 Carteret St., Suite A
Beaufort, South Carolina 29902
843.524.9500 tel
843.524.9501 fax
Thomas@PendarvisLaw.com

Lawyers for Appellant,
YANCEY ENVIRONMENTAL SOLUTIONS, LLC

RECEIVED

MAY 02 2013

SC Court of Appeals

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STATEMENT OF ISSUES

- I. Whether the trial court erred when it granted Respondents' motion for a directed verdict on proximate cause grounds when there was evidence in the record from which the jury could conclude Respondents' acts and omissions proximately caused harm to Appellant.
- II. Whether the trial court erred in finding that testimony given by the corporation's Rule 30(b)(6) designee establishing a corporation's intent to perform on a contract to place a conservation easement on property owned or controlled by the corporation was insufficient evidence of the corporation's intent to perform because there was no direct testimony by a particular principal of the corporation.
- III. Whether the trial court erred in concluding that a corporate principal's testimony was necessary to establish whether the corporation intended to perform on a contract when the corporation was a party to the contract and owned or controlled the subject property.
- IV. Whether the trial court erred in concluding that testimony by an expert for Appellant that the corporation and its principal shareholder intended to perform on the contract was "not admissible to create an issue of fact for the jury" as to the corporate principal's intent when there was no objection to that testimony and when Respondents later included the same testimony in a cross examination question to the expert.
- V. Whether the trial court erred in ruling that evidence of the corporate principal's intent to perform was necessary to establish a causal link when there was evidence that the corporation was a party to the contract, partially performed on the contract, and

intended to perform.

- VI. Whether the trial court erred in excluding testimony and evidence showing three other landowners, all of whom had their own tax counsel, proceeded with closing on their conservation easements, when such evidence was offered to show the effect and proximate cause of Respondents' withdrawal as the only tax counsel for the subject conservation easement project.
- VII. Whether the trial court erred in granting Respondents' motion for directed verdict at the close of Respondents' case on the stated grounds that Appellant had not offered any evidence on proximate cause after previously denying a motion for summary judgment and denying a motion for directed verdict at the close of Appellant's case on the basis that there was evidence in the record on the proximate cause issue.
- VIII. Whether the trial court failed to apply the proper standard of review for its ruling pursuant to Rule 50, SCRPC and erred in granting Respondents' motion for a directed verdict.

STATEMENT OF THE CASE

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

withdrawing Mr. McLeod as a plaintiff and leaving YES as the only remaining plaintiff. (Amended Complaint, ROA ____). On July 19, 2010, Respondents filed an Answer to Amended Complaint and Affirmative Defenses. (Answer, ROA ____).

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

The trial for this matter before a jury began on February 27, 2012 with The Honorable Eugene C. Griffith presiding. At trial, Appellant presented testimony from its expert witnesses, Gregory B. Adams, L.L.M., J.S.D. (Dr. Adams) and W. Curtis Elliott, J.D., and from Mr. McLeod, Sue Green from COMMUNITY OPEN LAND TRUST (COLT), Darroll Hawkins, Ph.D., and Mr. Miller, the Rule 30(b)(6), SCRCF designee for JUSTICE FAMILY FARMS, which was one of the parties to the contract at issue in the underlying transaction. Prior to the close of Appellant's case and to accommodate the witnesses travel schedule, Appellant agreed to allow Respondents to present testimony from David Harrah, CPA, who formerly worked with the JAMES C. JUSTICE COMPANIES, INC.

At the close of Appellant's case, Respondents moved for directed verdict per Rule 50, SCRCF, arguing that Appellant had not presented any evidence to establish the

causation element of the three claims. The trial court denied the motion on the grounds that there was evidence in the record on the proximate cause issue. (Trial transcript 867:12-867:19, ROA ____).

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

On April 15, 2012, less than thirty (30) days after the Form 4 Order was issued, Appellant filed its Notice of Appeal reserving its right to file an Amended Notice of Appeal once the formal Order was issued. (Notice of Appeal, ROA ____). On April 15, 2012, the trial court issued a written Order Granting Respondents' Motion for Directed Verdict. (Order Granting Respondents' Motion for Directed Verdict, ROA ____). On May 24, 2012, Appellant timely filed a Motion to Amend or Alter the Order Granting Defendants' Motion for Directed Verdict (Motion to Amend Order Granting Motion for Directed Verdict, ROA ____). On June 21, 2012, Respondents filed a Return to Appellant's Motion to Alter or Amend. (Return, ROA ____).

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

On June 26, 2012, this Court issued an Order granting additional time for the court reporter to prepare the trial transcript. On July 26, 2012, this Court issued an Order

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

ARGUMENTS

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

A. Facts Relevant to Argument I.¹

Mr. McLeod and James C. Justice, II (Mr. Justice) entered into an agreement in October 2007 whereby Mr. McLeod's company, YES, would coordinate the professional services by the lawyer, appraisers, and wildlife biologist, and locate a charitable grantee organization in order to record a conservation easement in the 2007 calendar year on the "Black River Farm" property in Clarendon County owned by Mr. Justice's companies, in exchange for a 4% commission based on an expected \$45,000,000 tax deduction once the easement was recorded. (Adams testimony, 134:20-135:5, ROA ____; 142:13-24, ROA ____; 145:3-12, ROA ____; 305:22-307:4, ROA ____; 322:7-13, ROA ____); (McLeod testimony, 470:18-472:7, ROA ____; 475:4-17, ROA ____; 482:6-483:17, ROA ____; 484:10-17, ROA ____; 489:10-13, ROA ____; 490:3-491:4, ROA ____; 622:8-15, ROA ____); (Miller

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

testimony, 7:18-9:18, ROA ____; 11:3-20, ROA ____; 16:19-17:10, ROA ____; 18:23-19:12, ROA ____; 19:13-23, ROA ____; 20:1-18, ROA ____; 23:20-24:7, ROA ____; 30:4-31:6, ROA ____; 32:19-34:1, ROA ____; 35:22-36:9, ROA ____; 40:2-21, ROA ____; 68-9:12, ROA ____).

Mr. McLeod testified that after he explained to Mr. Justice the concepts behind the conservation easement, Mr. Justice told him, "Let's do it." (McLeod testimony, 652:25-654:10, ROA ____).

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

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

The parties proceeded in earnest to complete the easement in the 2007 tax year although the Consulting Services Agreement was never signed by a representative of JUSTICE FAMILY FARMS or Mr. Justice and no formal "closing" date had been set. (Adams

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testimony, 145:3-12, ROA ____; 236:16-21, ROA ____; 307:10-308:4, ROA ____; 324:1-15, ROA ____); (McLeod testimony, 457:14-24, ROA ____; 494:1-495:3, ROA ____; 562:15-563:12, ROA ____; 569:17-570:7, ROA ____); (Hanlin e-mail, Nov. 7, 2007, Pl. trial ex. 3, ROA ____); (YES e-mail, Dec. 27, 2007, noting that COLT had approved the easement gift, Pl. trial ex. 34, ROA ____). To explain why JUSTICE FAMILY FARMS paid a prior invoice from one of Mr. McLeod's companies on an earlier project, its Rule 30(b)(6) designee, Mr. Miller, testified that:

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

(Miller testimony, 16:22-17:10, ROA ____).

On behalf of JUSTICE FAMILY FARMS, Mr. Miller testified that Mr. Justice "was in agreement with the process moving forward towards establishing a conservation easement, so that we could have the tax advantages in the year 2007, by 12-31 of that year." (Miller testimony, 17:11-19:12, ROA ____). Mr. Miller testified it was JUSTICE FAMILY FARMS' understanding that the project was moving forward and the company was planning to use the deductions from the conservation easement as part of its "tax calculations for 2007" and that it was the company's "understanding that everything was on track." (Miller testimony, 20:7-18, ROA ____). Mr. Miller also testified that JUSTICE FAMILY FARMS

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understood that Mr. Hanlin and the Law Firm had been “brought in to handle all the legal aspects of the entire conservation easement transaction” and that “Mr. Justice agreed to move forward with that.” (Miller testimony, 22:2-23, ROA ____). JUSTICE FAMILY FARMS was expecting to be advised when the documents were ready, to schedule a meeting, to sign the documents, to record the easement, to send the materials to their tax preparers for the 2007 returns, and to pay the stewardship fees and other associated professional fees, including the fees to YES. (Miller testimony, 30:4-31:6, ROA ____; 33:6-34:1, ROA ____). It was JUSTICE FAMILY FARMS’ “intent to move forward with this easement based on the information that we had, the proposed value of the property, and **it was our intent to have it done by the end of the year for tax advantage.**” (Miller testimony, 32:19-33:5, ROA ____) (emphasis added). The jury reasonably could have inferred that the reference to “our intent” was a reference to JUSTICE FAMILY FARMS’ and Mr. Justice’s intent.

On December 17, 2007, the IRS sent a letter to Mr. McLeod informing him of an investigation into YES, which was unrelated to the plans for the JUSTICE FAMILY FARMS easement. The IRS letter was e-mailed to Mr. Hanlin on the morning of December 20, 2007. (Adams testimony, 262:20-264:19, ROA ____); (McLeod testimony, 551:8-24, ROA ____); (Mohr e-mail, Dec. 20, 2007 with IRS letter, Pl. trial ex. 23, ROA ____). Later in the day on Dec. 20, 2007, Mr. Hanlin called Mr. McLeod informing him that based on the IRS letter and investigation he had been directed by the Law Firm to terminate the client-lawyer relationship with YES on all matters, including the JUSTICE FAMILY FARMS matter. (McLeod testimony, 554:13-555:22, ROA ____); (Hanlin e-mail, Dec. 20, 2007, Pl. trial ex. 24, ROA ____); (Hanlin letter, Dec. 21, 2007, Pl. trial ex. 25, ROA ____).

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

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

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

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

Because Respondents had terminated the client-lawyer relationship abandoning the JUSTICE FAMILY FARMS conservation easement project leaving YES with no tax counsel and no hopes of finding replacement counsel for such a complicated matter in such a short time period, Mr. McLeod testified that he was left with no choice other than to recommend to Mr.

Justice that JUSTICE FAMILY FARMS not move forward with closing the easement in 2007. (McLeod testimony, 555:18-22, ROA ____). A conference call was arranged for Christmas Eve, December 24, 2007, between Mr. Justice, his local lawyer, Steven Ball, his CPA, Mr. Harrah, and Mr. McLeod, and Mr. Crosby Lewis, the lawyer Mr. McLeod had engaged to represent YES for the IRS investigation.

During the telephone conference, Mr. McLeod recommended to Mr. Justice that the easement on the JUSTICE FAMILY FARMS property be postponed based on the IRS investigation. (Miller testimony, 31:7-32:18, ROA ____). Mr. McLeod was too embarrassed to tell Mr. Justice that Mr. Hanlin and the Law Firm had abandoned the project and because Mr. McLeod has a kind personality and tendencies not to say "nasty" things about people. (McLeod testimony, 558:18-559:17, ROA ____; 559:23-560:11, ROA ____; 651:5-11, ROA ____; 654:2-655:14, ROA ____); (Adams testimony, 340:1-3, ROA ____). 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." (McLeod testimony, 651:12-19, ROA ____; 652:7-18, ROA ____).

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

638:18	I wanted to go
638:19	forward, of course, you know, I communicated with
638:20	Mr. Justice many times after 2007 encouraging him
638:21	to move forward and I would love for Jim Justice to
638:22	have picked up the phone and said, "Yancey, that
638:23	sounds great, let's meet at the farm and talk about
638:24	moving forward with the project." But when I say
638:25	in this email that the IRS matter caused us to
639:1	delay the conservation project, the truth is that
639:2	what caused us to delay the conservation project
639:3	was Hal Hanlin and Richardson Plowden quitting.
639:4	Q. That is not what you wrote, is it?
639:5	A. Well, I don't think that on October 2nd,

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

(McLeod testimony, 638:18-639:22, ROA ____).

Mr. McLeod testified that if Respondents had not withdrawn and remained as tax counsel, he would have recommended to Mr. Justice that they proceed with the JUSTICE FAMILY FARMS easement. (McLeod testimony, 560:12-20, ROA ____). Mr. McLeod testified that if Mr. Hanlin "hadn't quit I would have been perfectly willing to move forward with [the JUSTICE FAMILY FARMS easement], I knew I hadn't done anything wrong." *Id.* The JUSTICE FAMILY FARMS' designee, Mr. Miller, testified² that if Mr. McLeod had recommended they proceed with the conservation easement, notwithstanding the IRS investigation, they would have accepted his advice, closed on the easement by the end of 2007, taken the tax deduction, and paid YES the professional fees it would have earned. (Miller testimony, 30:14-31:6, ROA ____; 38:14-39:9, ROA ____); (Harrah memo to YES, Sept. 30, 2008, PI

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

trial ex. 38, ROA ____).

Testimony and evidence was presenting showing that Mr. Justice, through his company, JAMES C. JUSTICE COMPANIES, INC., partially performed on the unsigned Consulting Services Agreement when he issued a \$15,000 check to YES making specific reference to "JUSTICE FAMILY FARMS" on the Comment portion of the check. (JAMES C. JUSTICE COMPANIES, INC. check dated Nov. 13, 2008, Pl. trial ex. 41, ROA ____); (Miller testimony, 38:14-39:9, ROA ____); (McLeod testimony, 630:22-631:13, ROA ____).

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

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

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

(Adams testimony, 338:3-11, ROA ____) (emphasis added).

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

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

(Adams testimony, 343:9-23, ROA ____) (emphasis added).

344:9 Q All right. Now, Professor Adams, isn't it
 344:10 true, ***you said Mr. Justice was in the boat***, isn't
 344:11 it true Mr. Justice didn't sign any of the
 344:12 consulting agreements that were sent to him?
 344:13 A Sure.

(Adams testimony, 344:9-13, ROA ____) (emphasis added).

Respondents did not move to strike any of the foregoing testimony by Dr. Adams.

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

At the close of the Appellant's case at trial, the trial court denied Respondents'
 motion for directed verdict on the grounds that there was "a question of fact to submit to
 the jury" based on the testimony "from the 30(B)(6) witness and Mr. Harrah, all that
 combined together is enough to get past this motion." (Trial transcript, 867:1219, ROA

____). At the close of Respondents' case at trial, however, the trial court granted Respondents' second motion for a directed verdict on the proximate cause issue, notwithstanding the abundance of evidence and testimony on those issues. Admittedly acknowledging that he was "struggling with this," the trial court made an oral ruling granting the motion on the grounds that Appellant had not submitted evidence from Mr. Justice thereby "breaking the causal link". (Trial transcript, 1147:19-1148:13, ROA ____); see *a/so* (Trial transcript, 1149:2-16; 1150:7-21; 1152:17-22; 1153:4-8, ROA ____).

The formal Order issued by the trial court granting Respondents' motion for directed verdict, contains many errors discussed in other parts of this Brief, but includes several factual errors relevant to this Argument. In summarizing the evidence presented at trial, the Order, on page 3 mistakenly states that the subject property was owned by Mr. Justice "or one of his limited liability companies, ..." (Order Granting Defendants' Motion For Directed Verdict, at 3, ROA ____) (emphasis added). There was no evidence presented at trial that Mr. Justice owned the property individually. The Order omits any reference to the fact that Mr. Hanlin had included JUSTICE FAMILY FARMS as a party to the Consulting Services Agreement. (Hanlin e-mail, Nov. 7, 2007, Pl. Trial ex. 3, ROA ____). The Order omits any reference to the testimony and evidence showing JUSTICE FAMILY FARMS' or Mr. Justice's intent to record an easement. See e.g., (McLeod testimony, 470:18-472:7, ROA ____; 475:4-17, ROA ____; 482:6-483:17, ROA ____; 484:10-17, ROA ____; 489:10-13, ROA ____; 490:3-491:4, ROA ____; 622:8-15, ROA ____); (Miller testimony, 7:18-9:18, ROA ____; 11:3-20, ROA ____; 16:19-17:10, ROA ____; 18:23-19:12, ROA ____; 19:13-23, ROA ____; 20:1-18, ROA ____; 23:20-24:7, ROA ____; 30:4-31:6, ROA ____; 32:19-34:1, ROA ____; 35:22-36:9, ROA ____; 40:2-21, ROA ____; 68-9:12, ROA ____).

When making reference to the \$15,000 check paid by to YES, the Order on page 6 makes no reference to the fact that it was JAMES C. JUSTICE COMPANIES, INC. that issued the check and not Mr. Justice individually, or to the fact that Mr. Justice's signature is on the check, or to the fact that "JUSTICE FAMILY FARMS" appears on the Comment portion of the check, or that the payment constitutes a partial performance of the Consulting Services Agreement, all of which is evidence of an intent to perform relevant to the proximate cause issue. (JAMES C. JUSTICE COMPANIES, INC. check dated Nov. 13, 2008, Pl. trial ex. 41, ROA ____); (Miller testimony, 38:14-39:9, ROA ____); (McLeod testimony, 630:22-631:13, ROA ____). See *a/so* (Harrah testimony, 734:22-735:2, ROA ____) (All professionals were paid for work on the easement).

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

In the "Discussion" section the Order inaccurately states that there are two possible reasons Mr. Justice "did not proceed with the conservation easement, based on the evidence offered by YES: it was either the disclosure of the IRS investigation or the

recommendation for [Mr.] McLeod that [Mr.] Justice postpone the conservation easement.” (Order Granting Defendants’ Motion For Directed Verdict, at 7-8, ROA ____). There was no evidence offered by YES, or any other party for that matter, showing that Mr. Justice or JUSTICE FAMILY FARMS at any concerns about the IRS investigation of YES. To the contrary, the only evidence even remotely related to that point was the testimony about the December 24th telephone conversation where after hearing about the IRS investigation and Mr. McLeod’s recommendation not to proceed, Mr. Justice simply said, “Yancey, don’t worry about it.” (McLeod testimony, 558:18-5 5917, ROA ____).³

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

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

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

There were three causes of action alleged in YES' Amended Complaint: professional negligence, breach of fiduciary duty, and breach of contract, each of which had distinct standards of proof for causation and all of which were satisfied by the evidence actually admitted during the trial of the case.

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

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

“One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the [fiduciary] relation.” *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004). For a claim for breach of fiduciary duty, causation is established where a plaintiff shows that the defendant's conduct was a material element or a substantial factor in bringing about the loss. See *Smith v. Hastie*, 367 S.C. 410, 417, 626 S.E.2d 13, 17 (Ct. App. 2005) (“One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.”) There is authority that in a breach of fiduciary duty claim it is the actual breach that is the harm and allowing the claim to be maintained without requiring specific proof of causation or specific damages. See 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL*

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RULES OF PROFESSIONAL CONDUCT § 1.5:108 (2d ed. Supp. 1997) (explaining that, in a breach of fiduciary duty claim, the breach of loyalty is the harm and the client is not required to prove causation or specific injury). See e.g., *Hendry v. Pelland*, 73 F.3d 397, 401 (D.C. Cir. 1996); *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999) (ruling that clients suing their attorney for breach of fiduciary duty need prove only that their attorney breached the duty, not that the breach caused them any injury).

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

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

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

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

2. Standard for Proof of Causation – Negligence claims.

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

Mr. McLeod testified that, notwithstanding the IRS letter, that if Respondents had not withdrawn and remained as tax counsel, he would have recommended to Mr. Justice that they proceed with the JUSTICE FAMILY FARMS easement. (McLeod testimony, 560:12-20, ROA ____). Mr. Miller and Dr. Adams testified that JUSTICE FAMILY FARMS intended to close on the easement. Evidence was submitted to the jury showing that the grantee organization, COLT, would have accepted the easement. (YES e-mail, Dec. 27, 2007, noting that COLT had approved the easement gift, Pl. trial ex. 34, ROA ____). This is

sufficient "causation in fact" evidence to establish that YES' injuries would not have occurred "but for" Respondents' errors.

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

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

A jury could reasonably infer and conclude that it was foreseeable that the JUSTICE FAMILY FARMS' easement would not close in 2007 when the only lawyer and law firm actively involved in the easement withdrew with only ten (10) days remaining before the

end of the tax year. In other words, it was reasonable to anticipate the inability to close on the easement was a likely result of Mr. Hanlin's and the Law Firm's withdrawal.

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

The lawyer's negligence does not have to be the sole cause, but must be "at least a contributing proximate cause of the injuries." *Shealy v. Walters*, 273 S.C. 330, 256 S.E.2d 739, 742 (1979). See also *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330-31, 673 S.E.2d 801, 802-03 (2009) (non-moving party "only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment"); *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006) (plaintiff does not have to prove that defendants were the sole proximate cause of plaintiff's injury, only that defendants' negligence was at least one of the proximate causes of the injury). "The question of proximate cause ordinarily is one of fact for the jury, and it may be resolved either by direct or circumstantial evidence." *Id.* A jury must determine whether a plaintiff's damages would have occurred "but-for" the defendant's negligence and whether such damages were reasonably foreseeable. See *id* at 662-63.

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

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

To recover for a breach of contract, the plaintiff must establish three elements by the preponderance of the evidence: (1) a binding contract; (2) breach of contract; and (3) damages proximately resulting from the breach. *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 146, 697 S.E.2d 644, 655 (2010). The necessary elements of a contract are offer, acceptance, and valuable consideration. *Id.* There was no dispute that YES entered into a contract with the Law Firm to provide legal advice concerning the conservation easement with JUSTICE FAMILY FARMS. (Engagement letter from Mr. Hanlin, dated Dec. 5, 2007, Pl. trial ex.10, ROA ____). This contract of representation provided that "Richardson Plowden & Robinson, P.A., [will act] as [YES'] attorneys to assist [YES] in the creation of a conservation easement on certain real property known as Black River Farm, near Manning, South Carolina (the "Property")." There was no dispute that the law firm (and Mr. Hanlin) withdrew from the client-lawyer relationship and did not finish providing the legal advice necessary for "the creation of a

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conservation easement on certain real property known as Black River Farm” that was owed or controlled by JUSTICE FAMILY FARMS. The sole issue focused on by the trial court in its Order granting the motion for directed verdict was whether there was any evidence to establish damages proximately resulting from the breach.

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

32:19 Q. Now, I want to summarize some things
32:20 as we're getting to the real point of this deposition.
32:21 Prior to the telephone call on December 24, 2007, what
32:22 was Justice Family Farms intent, if anything, with regard
32:23 to executing a conservation easement on the Black River
33:1 Farms property?
33:2 A. It was fully our intent to move forward
33:3 with this easement based on the information that we had,
33:4 the proposed value of the property, and it was our intent
33:5 to have it done by the end of the year for tax advantage.

(Miller testimony, 32:19-33:5, ROA ____).

68:9 Q. Is it your contention as you sit here
68:10 today that Justice Family Farms intended to go through
68:11 with this project?
68:12 A. Yes, sir, it is.

(Miller testimony, 68:9-12, ROA ____).

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

A plaintiff is entitled to recover if a preponderance of the evidence shows that the defendant did, in fact, breach the contract between the two parties. *See Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962); *see also Tillinghast v. Boston & Port Royal Lumber Co.*, 39 S.C. 484, 18 S.E. 120 (1893), *overruled on other grounds by Hendrix v. Hendrix*, 296 S.C. 200, 371 S.E.2d 528 (1988); *Sechrest v. Forest Furniture Co.*, 264 N.C. 216, 141 S.E.2d 292 (1965) (nonperformance of valid contract is breach); 17A Am. Jur. 2d Contracts § 716 (1991); Restatement (Second) of Contracts § 235 (1981); Black's Law Dictionary 188 (6th ed. 1990) (defining the phrase "breach of contract"). Evidence is in the record that Respondents breach their contract when they summarily withdrew from their representation on the transaction. (Adams testimony, 142:13-24, ROA ____; 337:3-14, ROA ____; 339:1-7, ROA ____). Evidence also is in the record that the jury could have relied on to find that YES' damages were a direct and proximate result of Respondents' breach. (Adams testimony, 326:23-327:21, ROA ____; 338:3-11, ROA ____). Despite this evidence, the trial court did not apply the "direct and proximate result of the breach" standard on YES' breach of contract claims.

The trial court's Order made no reference to the standard of proof for causation on YES' breach of contract claim. The trial court applied the wrong standard of review for this

claim, ignored evidence establishing the proximate cause element for the breach of contract claim, and was in error when it granted Respondents' *second* motion for directed verdict. Therefore, YES respectfully requests the Court reverse the Order granting directed verdict and remand for a new trial.

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

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

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

The findings on page 9 of the Court's Order which state that "what [JUSTICE FAMILY FARMS] might have intended is simply not pertinent" is contrary to the evidence on the record: (Order Granting Defendants' Motion For Directed Verdict, at 9, ROA ____). This finding constitutes reversible error because it ignores the evidence in the record from which

the jury could have reasonably concluded that JUSTICE FAMILY FARMS would have closed on the easement if Respondents had not withdrawn as tax counsel, thereby establishing proximate cause. This finding constitutes reversible error because it contains an erroneous conclusion that Mr. Miller's testimony, the corporate designee for JUSTICE FAMILY FARMS, was not sufficient to establish the corporation's intent.

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

A. Facts Relevant to Argument II.

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

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

34:2 Q Thank you. Now, I want you to make
34:3 an assumption to answer the next question I'm going to
34:4 ask you and the assumption is this, assume for the
34:5 purposes of this coming question that -- notwithstanding
34:6 the IRS letter, that during the call on December 24th,
34:7 2007, Yancey McLeod recommended that Justice Family Farms
34:8 move forward with the easement, assume that, and he made
34:9 a recommendation to move forward with the easement.
34:10 Using that assumption, was it more likely than not that
34:11 Justice Family Farms would have proceeded with the
34:12 conservation easement?
34:13 MR. LEONARDI: Object to form.
34:14 BY MR. PENDARVIS:
34:15 A Yes.

(Miller deposition testimony, 34:2-16, ROA ____).

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

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

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

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

The trial court erred in excluding Mr. Miller's testimony that JUSTICE FAMILY FARMS would have closed on the conservation easement if Mr. McLeod had made the recommendation to proceed during the December 24, 2007 telephone call. Mr. McLeod testified that he would have made such a recommendation if Respondents had not

withdrawn as counsel. (McLeod testimony, 560:12-20, ROA ____). This testimony from Mr. Miller would have clearly connected the proximate link between Respondents' acts and omissions and YES' damages. The trial court's erroneous ruling was on the grounds that such testimony was speculative, even though the black-letter law on legal malpractice claims requires the plaintiff to prove what should have happened but for the lawyer's alleged negligence, etc. *See e.g., Eadie v. Krause*, 381 S.C. 55, 671 S.E.2d 389 (Ct. App. 2008); *McNair v. Rainsford*, 330 S.C. 332, 349-50, 499 S.E.2d 488, 497 (Ct. App. 1998) (expert testimony created factual issue for jury to resolve "in regard to the proximate cause of McNair's damages"). Nevertheless, the trial court in this matter sustained Respondents' objections to the admission of testimony by JUSTICE FAMILY FARMS' designee on what it would have done if Respondents had not abandoned their client, which would have allowed Mr. McLeod to inform them of the IRS letter and recommend the proceed with the easement.

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

810:13 THE COURT: All right. Here is my concern on
 810:14 this question, page 34, lines 2 through 15, that
 810:15 hypothetical, is that Mr. Miller wasn't the point
 810:16 man, Mr. Harrah was. Mr. Harrah has testified.
 810:17 Subject to that, Mr. Harrah stated when the coal
 810:18 mine sold, if he was still working for Justice now
 810:19 he perhaps could have been the 30(B)(6) witness, we
 810:20 don't know that, that is not a fact before us, I'm
 810:21 concerned that **if Miller is not the point man how**
 810:22 **does he have all that information relevant to what**
 810:23 **Justice is thinking or doing in December of '07**
 810:24 like Harrah did. Harrah was the guy, he had the

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

(Trial transcript, 810:13-811:6, ROA____) (emphasis added).

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

Since it is not literally possible for a corporation to testify, in order to secure the testimony of a corporation, a corporation must "designate one or more officers, directors or managing agents, or other persons who can sit to testify on its behalf. . . . The persons so designated shall testify as to matters known a reasonably available to the organization." Rule 30(b)(6), SCRCF. "Rule 30(b)(6) is designed 'to avoid the possibility that several officers and managing agents might be deposed in turn, with each disclaiming personal knowledge of facts that are clearly known to persons within the organization and thus to the organization itself." *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006). Therefore, the corporation "must make a conscientious good-faith endeavor to

designate the persons having knowledge of the matters sought by [the party noticing the deposition] and to prepare those persons in order that they can answer fully, completely, unequivocally, the questions posed ... as to the relevant subject matters.” *Id.* quoting *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 151 (S.D.N.Y.1997).

”[T]he duty to present and prepare a Rule 30(b)(6) designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved.” See *United States v. Taylor*, 166 F.R.D. 356, 361-62 *aff’d*, 166 F.R.D. 367 (M.D.N.C. 1996). “The deponent must prepare the designee to the extent matters are reasonably available, whether from documents, past employees, or other sources. Thus, a Rule 30(b)(6) designee does not give his personal opinions, but presents the corporation’s ‘position’ on the topic.” *Id.* at 361. “When a corporation produces an employee pursuant to a rule 30(b)(6) notice, it represents that the employee has the authority to speak on behalf of the corporation with respect to the areas within the notice of deposition. This extends not only to facts, but also to subjective beliefs and opinions.” *Brazos River*, 469 F.3d at 433 citing *Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 25 (E.D.Pa. 1986).

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

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

As part of proof of causation, Appellant proffered testimony that YES had three

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

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

48:7 A. I had four conservation projects I was
 48:8 trying to close that year. And I had just received
 48:9 the shock of this letter from the IRS, which I
 48:10 found preposterous, and I had advised all four of
 48:11 my clients, on whose projects I was working to
 48:12 close year's end in '07, about the IRS letter, and,
 48:13 um, I advised all of them, after we discussed the
 48:14 letter and what it meant, that we should move
 48:15 forward to close the projects, because I had not
 48:16 done anything wrong, and the other three projects
 48:17 closed.
 48:18 The attorneys involved in those
 48:19 projects, after our discussion, decided to move
 48:20 forward to close those projects. I made the same
 48:21 disclosure to Mr. Justice.
 48:22 And it would have been extraordinarily
 48:23 embarrassing, to me, to have to tell anybody,

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48:24 including finding a new tax attorney, if I thought
48:25 that I could find one that could step in at that
49:1 late date, I would also have had to disclose that,
49:2 oh, by the way, my attorney quit on me.
49:3 And that's why I didn't feel the need
49:4 to tell Mr. Justice about Hal Hanlin and Richardson
49:5 Plowden, because that would have also been very
49:6 embarrassing to me.
49:7 I've never advertised a day in my life.
49:8 I have no website. I have no advertising
49:9 materials. I have never so much as sent a letter
49:10 out advertising/soliciting work, and I make my
49:11 living with referrals from clients. And so I did
49:12 what I felt like I needed to do to be faithful to
49:13 my client and represent his best interest and
49:14 recommended that we postpone the project.
49:15 Q. All right. Well, I thought you just
49:16 told me you had advised all four of my clients
49:17 about the IRS letter, and I advised all four of
49:18 what it meant and that they should move forward to
49:19 close the project.
49:20 A. I advised three of them to move forward
49:21 and one of them to postpone.
49:22 Q. All right. And the only one you
49:23 recommended to postpone was the one where your
49:24 personal lawyer had withdrawn. Correct?
49:25 A. That's correct.

(McLeod deposition testimony, 48:7-49:25, attached to App. Jan. 27, 2012 memorandum as Exhibit 8, ROA ____).

YES' entire business operated on word-of-mouth referrals and Mr. McLeod rightly had serious concerns about the message that would be sent by the information that his attorneys had terminated their representation immediately after receipt of the IRS letter. In explanation for the sudden departure, the implication that there was wrong-doing on the part of YES would grow exponentially. Second, YES' recommendation that JUSTICE FAMILY FARMS not move forward with the project before the end of 2007 was directly and proximately caused by Respondents' withdrawal. It matters not whether JUSTICE FAMILY

FARMS knew of Respondents' withdrawal. It only matters whether a jury could determine the withdrawal was the proximate cause of YES being unable to recommend moving forward without an experienced tax lawyer on the project.

The trial court's Order created an unnecessary requirement to establish proximate cause first, by requiring separate evidence of Mr. Justice's intent even though Mr. McLeod's and Mr. Justice's agreement contain no condition or requirement that both JUSTICE FAMILY FARMS and Mr. Justice, individually, execute the documents finalizing the conservation easement. Next, as argued in other sections in this brief, the trial court erred in excluding evidence of Mr. Justice's individual intent to proceed with the conservation easement notwithstanding the IRS investigation of YES.

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

The trial court was in error in making its ruling to exclude the testimony and evidence concerning the other three landowners who closed on their conservation

easements with YES as the consultant notwithstanding the IRS letter. Such evidence would not have been confusing to the jury and was additional evidence bolstering the proximate cause connection between Respondents' tortious withdrawal and the damages suffered by YES.

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

A. Facts Relevant to Argument III.

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

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

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

The trial court was in error when it ruled on page 10 of the Order that Dr. Adams' testimony was "not admissible to create an issue of fact for the jury as to [Mr.] Justice's intent." (Order Granting Defendants' Motion For Directed Verdict, at 10, ROA ____). This part of the Order discusses Rule 703, SCRE and the applicability of the testimony given by Appellant's expert witness, Dr. Adams, to the issue of causation. This ruling is erroneous because there was no objection to this testimony and in fact Dr. Adams'

statement was repeated in a follow-up question. As a result, Respondents failed to preserve any objection or argument against the admissibility of this testimony.

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

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

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

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

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

After denying Respondents' first motion for directed verdict and in granting their second such motion, the trial court stated that it had "wrestled with this whole thing" and was "struggling with this" and that the call on whether there was a causal link was "very close" - all of which demonstrates that the trial court engaged in weighing the evidence instead of determining whether a scintilla of evidence existed on which the jury could make the determination of its weight. (Trial transcript, 1147:19-1148:13, ROA ____). In this

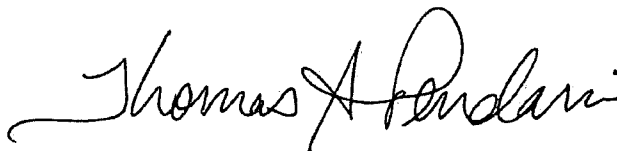
matter, the trial court erred in determining the weight of the evidence instead of focusing on the court's true role, which should have been to view the evidence in the favor of the YES, as the non-moving party, and determine if a scintilla of evidence was in the record, and if so, to allow the case to be submitted to the jury.

CONCLUSION

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

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with a long horizontal line extending from the left side of the name.

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April 29, 2013

Beaufort, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

App. Case No. 2012-212687
Lower Case No. 2010-CP-40-3297

YANCEY ENVIRONMENTAL SOLUTIONS, LLC Appellant,

vs.

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

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COUNTER DESIGNATIONS OF ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT CORRECTLY GRANTED A DIRECTED VERDICT IN FAVOR OF THE RESPONDENTS BASED UPON THE APPELLANT'S FAILURE TO PROVIDE ANY COMPETENT TESTIMONY OR OTHER EVIDENCE CREATING A QUESTION OF FACT AS TO PROXIMATE CAUSE.
2. WHETHER THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE APPELLANT'S FAILURE TO PRODUCE COMPETENT EVIDENCE, TESTIMONY, OR TESTIMONY FROM THE ULTIMATE DECISION-MAKER AND INDIVIDUAL PARTY TO AN ORAL CONTRACT THAT HE WOULD HAVE PROCEEDED TO UNDERTAKE HIS OBLIGATIONS UNDER THE ORAL CONTRACT REQUIRED THE CIRCUIT COURT TO GRANT A DIRECTED VERDICT IN FAVOR OF THE RESPONDENTS.
3. WHETHER THE CIRCUIT COURT CORRECTLY EXCLUDED THE HEARSAY TESTIMONY OF A RULE 30(B)(6) DESIGNEE WHO WAS PURPORTEDLY TESTIFYING AS TO THE INTENT OF AN INDIVIDUAL.
4. WHETHER THE CIRCUIT COURT CORRECTLY EXCLUDED FROM ITS CONSIDERATION OF THE DIRECTED VERDICT MOTION THE INADMISSIBLE HEARSAY TESTIMONY UTILIZED AND REPEATED BY AN EXPERT WITNESS PURSUANT TO RULE 703, SCRE.
5. WHETHER THE CIRCUIT COURT CORRECTLY EXCLUDED, PURSUANT TO RULE 403, SCRE, THE TESTIMONY THAT THREE OTHER LANDOWNERS, NOT PARTIES OR RELATED TO THIS CASE, CLOSED ON THEIR INDIVIDUAL CONSERVATION EASEMENT PROJECTS.
6. WHETHER THE CIRCUIT COURT CORRECTLY EXERCISED ITS DISCRETION IN GRANTING A DIRECTED VERDICT AT THE CLOSE OF ALL OF THE EVIDENCE IN THIS CASE.
7. WHETHER THE CIRCUIT COURT CORRECTLY APPLIED THE RULE 50 STANDARD OF REVIEW IN DETERMINING THAT THE ABSENCE OF EVIDENCE REGARDING PROXIMATE CAUSE REQUIRED IT TO GRANT A DIRECTED VERDICT.

STATEMENT OF THE CASE

The subject appeal involves a legal malpractice action (the “action”) filed by Appellant Yancey Environmental Solutions, LLC (“YES”) against Richardson Plowden & Robinson, P.A. (“RPR”) and George Harold Hanlin, Esquire (“Hanlin”) (collectively referred to hereinafter as “the Respondents”). The appeal is before this Court following the granting of a directed verdict by the Honorable Eugene C. Griffith in favor of the Respondents at the conclusion of all of the evidence.

The action began on May 17, 2010, when Appellant YES and Yancey A. McLeod (“McLeod”) filed a Complaint in the Circuit Court for Richland County, South Carolina. On June 24, 2010, Respondents filed an Answer and a motion to dismiss the claims of McLeod, as an individual. On June 29, 2010, an Amended Complaint was filed, withdrawing McLeod, in his individual capacity, leaving YES as the sole named plaintiff. On July 19, 2010, the Respondents filed an Answer to the Amended Complaint, and asserted various affirmative defenses. The action then proceeded into the discovery phase.

The action was called for trial on February 27, 2012, with the Honorable Eugene C. Griffith presiding. YES presented its case, and at the close of its evidence, the Respondents moved pursuant to Rule 50, SCRPC for a directed verdict. The circuit court denied the motion. The Respondents then presented their defense. At the close of all of the evidence, the Respondents renewed their Rule 50 motion for a directed verdict. The circuit court granted the motion from the bench, and subsequently issued a formal written order setting forth the basis of its decision to direct a verdict for the Respondents (the “Order”). YES moved to alter or amend the Order. The circuit court denied that motion. This appeal followed.

I. The Directed Verdict Should be Affirmed because YES Failed to Present Evidence Showing that the Respondents Proximately Caused it Damages

The subject legal malpractice action stems from a proposed conservation easement¹ transaction that was never completed. (R.p. ___, Order, pp. 3-4, 8-9.) The damages YES sought in the action consisted of the contingent consulting fee it expected to be paid had the transaction been completed. (R.p. ___, Order, pp. 8-9; Transcript, p. 622.) YES is a company that coordinates the placement of conservation easements on real property with landowners. (R.p. ___, Order, p. 4.) In the fall of 2007, YES hired the Respondents to provide tax advice to YES regarding a proposed conservation easement on a South Carolina farm owned by James C. Justice II (“Justice”), a resident of West Virginia, or an entity that he majority owned.² (R.p. ___, Engagement Letter.) During the time Respondents were providing tax advice pursuant to their engagement agreement

¹ A conservation easement is a type of charitable contribution by a landowner. By placing a conservation easement, a landowner agrees to impose certain permanent restrictions on the land. The easement is granted to a “qualified organization” approved by the IRS which monitors the activity on the land and enforces the terms of the easement in perpetuity, including against the landowner and subsequent purchasers. The agreed-to restrictions on the land reduce its value, but the landowner receives a tax deduction in the amount of the decrease in value. Thus, a successful conservation easement can lessen a landowner’s tax liability. For a general discussion of conservation easements, see THE ENFORCEABILITY OF EXACTED CONSERVATION EASEMENTS, 36 VT. L. REV. 261 (2011).

² Record title to the subject farm is held in the name of Black River Farms, LLC. (R.p. ___, Transcript, p. 750.) 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 is 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. (R.p. ___, Transcript, pp. 750-53.) YES contends that Justice Family Farms owned Black River Farms by private agreement. (R.p. ___, Transcript, p. 765.) 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. (Brief of Appellant, p. 6.) The actual ownership is unclear. The issue of ownership is unimportant, however, because as discussed herein, the evidence adduced at trial showed that Justice was the ultimate decision-maker, and in complete control.

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with YES, McLeod, YES's principal, received a letter on December 19, 2007, from the Internal Revenue Service ("IRS"). (R.p. ___, IRS Letter.)

The letter notified McLeod that it was investigating his past involvement in conservation easement transactions to determine if he had wrongfully promoted tax avoidance schemes.³ When the Respondents learned of the IRS investigation, they withdrew from representation of YES on December 20, 2007. The Respondents withdrew because they previously represented other landowners on a number of the conservation easements that were under investigation. (R.p. ___, Withdrawal Letter.) Accordingly, the Respondents determined that a conflict existed that required them to withdraw from their representation of YES. (R.p. ___, Withdrawal Letter; Transcript pp. 957-58, 969-71.)

After McLeod received notice of the IRS investigation, he immediately hired independent counsel, Crosby Lewis, Esquire, to represent him in the investigation. (R.p. ___, Transcript, pp. 556-58.) With that counsel, McLeod held a conference call to notify Justice of the IRS investigation. (R.p. ___, Transcript, pp. 558-59.) During that conference call, however, McLeod did not notify Justice that the Respondents had withdrawn from their engagement with YES. (R.p. ___, Transcript, pp. 559, 650-51.) Instead, McLeod stated that that he was under investigation by the IRS, and recommended to Justice that the proposed conservation easement transaction be

³ After ten months, the IRS notified Mr. McLeod that it was discontinuing its investigation into whether he was liable for a penalty under IRC §§ 6700 and 6701. McLeod was further advised that the letter "should not be construed to mean that the Internal Revenue Service (IRS) approve[d] [his] conduct; rather, it [was] simply a notice that [the IRS'] investigation ha[d] been discontinued at [that] time." (R.p. ___, IRS Letter.)

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postponed until the IRS investigation was concluded. (R.p. ___, Transcript, p. 637.) Justice agreed. (R.p. ___, Transcript, pp. 559-60.)

YES's Amended Complaint contained three claims: professional negligence, breach of fiduciary duty, and breach of contract. (R.p. ___, Amended Complaint, pp. 12-17.) All three of those claims allegedly arose from the Respondents' withdrawal of their representation of YES on December 20, 2007. (R.p. ___, Amended Complaint, pp. 12-17.) YES alleged that the withdrawal proximately caused injury to YES. To support YES's claims, McLeod testified that the IRS investigation had nothing to do with Justice's proposed conservation easement not closing. Rather, McLeod testified that the proposed conservation easement did not close because the Respondents withdrew from their representation of YES. (R.p. ___, Transcript, pp. 636-37.) McLeod testified that if the Respondents had not withdrawn, he would have recommended that Justice proceed with the conservation easement. (R.p. ___, Transcript, pp. 636-37.) He further testified that he was confident that if he had made such a recommendation to Justice, Justice would have proceeded with the transaction and that it would have closed, resulting in an approximate \$1.6 million dollar consulting fee to YES, depending on the size of the valuation appraisal from the qualified appraiser. (R.p. ___, Transcript, p. 622.)

In order to prove its claims, YES was required to submit proof that after Justice learned of the IRS investigation into McLeod's previous work on other conservation easements, if McLeod had recommended that Justice proceed instead of postpone, Justice would have followed McLeod's recommendation and closed on the conservation easement. Evidence of what Justice would have done in this hypothetical scenario was

the crucial link in the causation chain. In a statement to the circuit court regarding this case, 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.

(R.p. ___, Transcript, p. 510.) YES never presented the required hypothetical testimony from Justice—that is, YES never presented testimony that Justice would have proceeded with the closing had McLeod made a recommendation to close the conservation easement at the same time it notified Justice of the IRS investigation. Indeed, YES never presented any testimony from Justice. Accordingly, the circuit court properly directed a verdict for the Respondents.

A. The Timeline

In the spring of 2007, McLeod, on behalf of YES, began discussions with Justice about a potentially profitable wetlands mitigation bank involving Black River Farm (the “Farm”). (R.p. ___, Transcript, pp. 458-65, 910.) The Farm is a working commercial farm, located on a 4500-acre tract in Clarendon County, S.C. At all times pertinent to this action, the Farm was owned by either Justice or an entity that he majority owned.⁴ (R.p. ___, Transcript, pp. 345-46.) Justice is a very wealthy businessman from West Virginia. (R.p. ___, Transcript, pp. 308-11, 723-26; Deposition of Miller, p. 59.)

As noted, McLeod initially proposed that Justice establish a wetlands mitigation bank on the Farm. (R.p. ___, Transcript, p. 458.) A wetlands mitigation bank is generally created when a landowner rehabilitates land that once contained wetlands to its pre-development state. McLeod informed Justice that in order to establish a wetlands

⁴ See n.2, *supra*.

mitigation bank he would have to flood significant portions of the land.⁵ Because the Farm is a working commercial farm, Justice's son did not like the idea of establishing a wetlands mitigation bank. (R.p. ___, Transcript, pp. 467-68.)

On August 3, 2007, McLeod traveled to West Virginia to meet with Mr. Justice and tour another tract of land Justice owned and on which Justice was considering placing a conservation easement. (R.p. ___, Transcript, pp. 469-70.) After that meeting in West Virginia, and in light of Justice's son's reluctance to create a wetlands mitigation bank on the Farm, McLeod and Justice began to explore whether a conservation easement could be placed on the Farm. (R.p. ___, Transcript, pp. 470-71.) Justice was the ultimate decision-maker regarding the proposed conservation easement transaction. (R.p. ___, Miller, p. 59; Transcript, pp. 345-46, 667-68, 679-80, 688, 735, 739, 743.)

On or about late October to early November 2007, McLeod contacted Hanlin at RPR for the first time about providing YES with tax advice related to the proposed conservation easement on the Farm. (R.p. ___, Transcript, pp. 471, 473, 475, 910-12.) Around that time, Hanlin brought to McLeod's attention an organization known as Community Open Land Trust ("COLT"). Hanlin indicated that he served on the Board of COLT and believed that it might be interested in serving as the qualified donee organization for the proposed conservation easement on the Farm. (R.p. ___, Transcript, pp. 473, 919.)

McLeod contacted an appraiser, Dr. Darroll Hawkins ("Hawkins") of Highview Engineering, about submitting a proposal for the requisite appraisal of the Farm. On

⁵ For a general discussion of wetlands mitigation banks, see PROTECTING SOUTH CAROLINA'S WETLANDS IN THE WAKE OF SOLID WASTE AGENCY, 53 S.C. L. REV. 757 (2002).

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November 16, Hawkins transmitted a proposal to McLeod describing the information he needed to complete the appraisal, the time that would be required, and the cost of the appraisal. (R.p. ___, November 16, 2007 e-mail from Hawkins.)

On or about November 26, 2007, McLeod forwarded to Justice a Consulting Services Agreement with YES (“the Draft Agreement”). (R.p. ___, Draft Agreement.) The proposed parties to the Draft Agreement were James C. Justice, Justice Family Farms, LLC and YES. (R.p. ___, Draft Agreement, pp. 1, 8.) The Draft Agreement referred to James C. Justice, individually, and Justice Family Farms, LLC collectively, as the Owners. (R.p. ___, Draft Agreement, p. 1) (stating “hereinafter collectively referred to as ‘Owner’”). The opening “Whereas” clause of the Draft Agreement stated that “Owner is interested in exploring opportunities for conservation of certain real estate” (R.p. ___, Draft Agreement, p. 1.) The Draft Agreement required Justice to first pay a \$50,000 “non-refundable retainer” and then 5% of the conservation value of the property. (R.p. ___, Draft Agreement, p. 2.) Consistent with the definition of Owner and the proposed parties, the Draft Agreement contained separate signature blocks for both Justice and Justice Family Farms, LLC. (R.p. ___, Draft Agreement, p. 8.) Neither Justice nor an officer of Justice Family Farms, LLC ever signed the Draft Agreement, and the \$50,000 non-refundable retainer was never paid.⁶ (R.p. ___, Transcript, pp. 662-63.)

Notwithstanding the absence of the \$50,000 retainer and the un-executed copy of the Draft Agreement, YES and the Respondents continued their work on the creation of a

⁶ 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 abandoned. (R.p. ___, Justice Check.)

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conservation easement on the Farm. On December 5, 2007, Hanlin formalized his representation of YES in the engagement letter. (R.p. ___, Engagement Letter.)⁷

Then, on December 19, 2007, McLeod's administrative assistant, Mary Mohr ("Mohr"), opened a letter from the Internal Revenue Service that was addressed to McLeod. 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.**

(R.p. ___, IRS Letter) (emphasis added).

The following day, Mohr e-mailed the letter from the IRS to Hanlin stating, "I am attaching a very serious letter from the IRS received in the mail yesterday — Debra and I have reviewed, but, and this is important — I have not shown this to Yancey [McLeod] and unless you tell me otherwise, I do not want him [McLeod] to see this, or know about this, until after Christmas." (R.p. ___, December 20, 2007 e-mail.) Hanlin promptly called Mohr and told her to show the IRS letter to McLeod. (R.p. ___, Transcript pp. 955-56, 958-59.)

That same day, Hanlin discussed with management at RPR the implication of the IRS letter upon his current representation of YES and his past representation of the

⁷ 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." (R.p. ___, Engagement Letter.) 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" (R.p. ___, Engagement Letter.)

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landowners whose easements were under investigation. (R.p. ____, Transcript, pp. 959-61.) After those discussions with RPR management, Hanlin informed McLeod that he and RPR were withdrawing from further representation of YES. (R.p. ____, Transcript, pp. 963-64.) On December 21, 2007, Hanlin memorialized his withdrawal in a letter to McLeod. (R.p. ____, December 21, 2007 Letter; Transcript, p. 965.) In pertinent part, Hanlin's letter stated that "the IRS notice which you [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." (R.p. ____, December 21, 2007 Letter.)

On December 24, 2007, McLeod telephoned Justice in West Virginia to inform him of the IRS investigation, and to recommend that the project be postponed. Also in attendance in West Virginia for the telephone call were David Harrah (Justice's accountant) and Stephen Ball (Justice's in-house lawyer). Harrah testified that McLeod never mentioned that the Respondents had withdrawn from their representation of YES. (R.p. ____, Transcript, p. 723.) McLeod's testimony mirrored that of Harrah. McLeod testified that on the December 24, 2007, telephone call he never told Justice or Harrah that the Respondents had withdrawn. (R.p. ____, Transcript, pp. 636-37.) Harrah also testified that during that telephone call, 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." (R.p. ____, Transcript, p. 722). Accordingly, the proposed conservation easement on the Farm was postponed.⁸

⁸ In defense of the IRS investigation, McLeod also retained the services of Mr. Cary H. Hall, Jr., Esquire ("Hall") (Hall's first name was misspelled "Kerry" in the trial transcript). Hall's testimony was introduced at trial through his deposition. Hall

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On December 27, 2007, McLeod sent an e-mail to Justice referencing their call on December 24, advising 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. (R.p. ___, December 27, 2007 e-mail to Justice.) Also on December 27, McLeod e-mailed Sue Green of COLT informing her that "Mr. Justice has decided to postpone the project." (R.p. ___, December 27, 2007 e-mail to COLT.) The following day, McLeod e-mailed the appraiser, Hawkins, as well as his business partner in NRPM, Jim Lewis, informing them that "Jim Justice has decided to postpone the conservation project on the Black River tract in Clarendon County, SC." (R.p. ___, December 28, 2007 e-mails to Lewis and Hawkins.) McLeod advised Hawkins and Lewis to send their final invoices directly to Harrah. (R.p. ___, December 28, 2007 e-mails to Lewis and Hawkins.) The proposed conservation easement on the Farm was never revived.

B. Justice was the Decision Maker

YES's damages claim in this case is based upon terms found in the un-executed Draft Agreement. That agreement contemplated that if the conservation easement were closed and used for a tax deduction, YES would be entitled to 5% of the conservation value of the property. Evidence adduced at trial showed that Justice stated that the proposed 5% commission should be reduced to 4%. (R.p. ___, Transcript, p. 728.) There is also trial testimony that Justice instructed YES to begin work on the proposed conservation easement project. (R.p. ___, Transcript, pp. 470-71, 652-53.) Viewing the evidence in the light most favorable to YES, evidence was introduced at trial tending to

testified that the proposed Justice conservation easement was "abandoned because of [the] IRS letter." (R.p. ___, Transcript, pp. 894-95; Hall Notes.)

show that YES and Justice entered into an oral contract for YES to provide preliminary services related to the proposed conservation easement. Pursuant to that oral contract, YES and McLeod looked to Justice to make every decision regarding the proposed conservation easement. For that reason, YES was required to present the testimony of Justice as to what he would have done if YES had suggested that he consummate the proposed conservation easement, notwithstanding the IRS investigation.

The following trial testimony from various witnesses conclusively shows that Justice was the decision-maker.

1. McLeod's Testimony

McLeod acknowledged repeatedly during his testimony that every decision related to the conservation easement would ultimately be made by Justice:

Q: Isn't it also true with respect to the conservation easement that was proposed for the Black River Farm Mr. Justice had no obligation, even if he had signed one of your consulting agreements he had no obligation to do it, isn't that right?

A: Sure.

(R.p. ___, Transcript, p. 667.)

Q: So there is also a risk that he might at the very last minute just decide, "You know what, I don't want to do it"?

A: Absolutely, that would be a possibility.

Q: That would have been his right under this agreement, right?

A: Of course.

...

Q: Just as you didn't give any guarantee to Mr. Justice of what might be his actual charitable deduction, right?

A: Well, I wasn't expecting him to make the final decision to execute these documents and record it and place a permanent easement on his

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property without having some idea what the expected charitable gift would be.

(R.p. ___, Transcript, p. 668.)

Q: All right. Oh, the closing date was December 31st?

A: Everything was to be done by December 31st in order for Mr. Justice to have the charitable gift in the calendar year 2007.

(R.p. ___, Transcript, p. 673.)

Q: And even up until the 12/31 this is a deal that just might not have gone forward, no matter what, whether Mr. Hanlin was involved or anybody else, right?

A: Well, that would have been his call for sure.

Q: It would have been Mr. Justice's call?

A: Right

(R.p. ___, Transcript, pp. 679-80.)

Q: All right. And in any event, Mr. Justice would have to have input into those draft restrictions, right, or whatever restrictions you put in the easement, right?

A: Well, he would ultimately have to approve the document but I think he trusted me to put in the language on the reserve right to accomplish his stated objective of keeping it as a farm.

Q: You would have sent them to Mr. Justice for review?

A: Of course.

(R.p. ___, Transcript, p. 688.)

2. Miller's Testimony

James T. Miller, the Rule 30(b)(6) designee and treasurer for Justice Family Farms, LLC, testified at trial by video-taped deposition. (R.p. ___, Miller, p. 6, ll. 12-18.) In his deposition he stated that he had worked for Justice for 27 years. (R.p. ___,

Miller, p. 17, l. 51) In unequivocal terms, Miller testified that Justice was the ultimate decision-maker:

Q: Mr. Justice, II, is the ultimate decision maker in these companies. Correct?

A: He's the majority owner, that's correct, and the ultimate decision maker.

Q: The buck stops with him, so to speak?

A: That's correct.

(R.p. ___, Miller, p. 59).

3. Harrah's Testimony

Harrah, the former in-house accountant to Justice, testified at trial. (R.p. ___, Transcript, p. 709, ll. 16-25; p. 710, ll. 1-2.) Harrah was designated by Justice to oversee the work on the proposed conservation easement. (R.p. ___, Transcript, p. 912.) Throughout his questioning, he consistently referred to Justice as the person that would ultimately decide on matters pertaining to the proposed conservation easement. The following transcript citations from the trial make this very point.

Q: Mr. Pendarvis mentioned the December 24 phone call. Describe for the jury how Mr. Justice reacted when he was told that the easement was not going to go forward?

A: First of all I didn't recall that Mr. Justice was part of the phone call but I think my impression is – well, it is not my impression, it's the way it would be. If Jim wanted to go through and have this done by 12/31/2007 he would have done it regardless of what I thought, Mr. McLeod thought, if he thought that is what he wanted to do he would have done it.

Q: And tell the jury why you believe that about Mr. Justice.

A: Well, I mean, he's the guy that makes the decisions and whenever he sold his company he went completely opposite of the advice of Goldman Sachs and did it the way he wanted to do it. If he wants to do it he'll do it, that is just the way Jim [Mr. Justice] is.

(R.p. ___, Transcript, p. 743, ll. 10-25; p. 744, ll. 1-3.)

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THE WITNESS: I think, I guess the best thing that I can say in that regard is, you know, it was my understanding that these documents were being prepared to close on December 31, okay? If on December the 24 someone had come in like Mr. McLeod did and said, "I don't think I can in good conscience go forward with this," if he had said there were some other reason, "I physically can't do it, I have some kind of an issue," and Jim really wanted to do that he would have closed that transaction

BY MR. PENDARVIS:

Q. But up until that point it is your understanding Mr. Justice was continuing to proceed with this transaction?

A. Well, Mr. Justice saw the same documents that I did and knew the dating that was put in those documents but I don't know that we hadn't seen some of these, what the easement meant, what the restrictions meant in black and white, I guess, on that particular property, so that would be a decision that he would have made after he saw that and understood what that really meant to him.

(R.p. ___, Transcript, p. 739, ll. 2-25; p. 740, ll. 1-18.)

Q. Now, when we, you were telling me back in your deposition in December that, and you testified that you understood that the goal was to finish this conservation easement by the end of 2007?

A. Well, what I said, the goal that Mr. McLeod was working on was to do that and for the various reasons that he had, I'm just not sure that, I'm not sure I understand that was a drop dead date for Jim [Mr. Justice].

(R.p. ___, Transcript, p. 735, ll. 20-25; p. 736, ll. 1-4.)

4. Professor Greg Adams' Testimony

Professor Greg Adams ("Adams") testified as YES's expert witness regarding the professional duties owed by a lawyer. During his cross-examination, he agreed with all of the testimony detailed above:

Q: This property, you don't deny that the property involved was owned by Mr. Justice, correct, or some corporate entity?

A: One of his entities, right.

Q: But there is no denying that Mr. Justice was the final decision maker, right?

A: Of course.

(R.p. ___, Transcript, pp. 345-46.)

The evidence introduced at trial established that Justice was the ultimate decision-maker with regard to the proposed conservation easement. Accordingly, YES was required to affirmatively present evidence that, notwithstanding the IRS investigation, if McLeod had recommended proceeding with the conservation easement, Justice would have done so.

C. The Circuit Court's Ruling

At the close of all of the evidence, the Respondents renewed their Rule 50 motion for a directed verdict. Following argument by counsel for the parties, the circuit court ruled from the bench. The court noted that:

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.

(R.p. ___, Transcript, pp. 1147-48.)

After the circuit court ruled from the bench, it memorialized its ruling in a formal written Order. (R.p. ___, Order.) In that Order the circuit court 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 Justice during the telephone conference on December 24, 2007 from 'postpone' to 'proceed.'" (R.p. ___, Order, p. 7.) 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." (R.p. ___, Order, p. 7.) The 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." (R.p. ___, Order, pp. 7-8.) Accordingly, the 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." (R.p. ___, Order, p. 8.) From that line of reasoning, the circuit court correctly concluded that YES's failure to present evidence regarding proximate cause—that is, what Justice would have done—required it to grant a directed verdict. (R.p. ___, Order, p. 8.)

The record of this trial is silent as to what Justice's decision would have been if he had received a recommendation from McLeod to proceed with the conservation easement, notwithstanding the IRS investigation. For that reason, the circuit court properly issued its Order granting a directed verdict.

D. Proximate Cause and the Standard of Proof

The central question in this appeal is whether YES presented a question of fact on the issue of proximate cause. South Carolina courts routinely decide issues of proximate cause, as a matter of law. *E.g., Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 288, 701 S.E.2d 742, 748-49 (2010) (affirming summary judgment and finding that legal malpractice claim failed "for lack of proximate cause"); *McKnight v. S.C. Dept. of Corrections*, 382 S.C. 380, 386-90, 684 S.E.2d 566, 568-71 (Ct. App. 2009). As noted

above, YES's Amended Complaint enumerated three claims: (1) professional negligence, (2) breach of fiduciary duty, and (3) breach of contract.

1. Professional Negligence

The professional negligence claim requires a showing of: (1) the breach of a duty by RPR and Hanlin; (2) damages to YES; and (3) that the breach **proximately caused** the damages to YES. *Smith v. Haynsworth, Marion, McKay & Guerard*, 322 S.C. 433, 435 n.2, 472 S.E.2d 612, 613 n.2 (1996) (emphasis added).

2. Breach of Fiduciary Duty

In order to establish a claim for breach of fiduciary duty, a plaintiff must show: (1) the existence of a fiduciary duty; (2) a breach of that duty owed to YES by the Respondents; and (3) damages **proximately resulting** from the wrongful conduct of the Respondents. *RFT Mgmt. Co. v. Tinsley & Adams, LLP*, 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (Ct. App. 2012) (emphasis added). In South Carolina, in a legal malpractice action, a claim for breach of fiduciary duty arising out of the same facts is duplicative of the legal malpractice claim. *Id.* at 337, 732 S.E.2d at 173 (holding that where breach of fiduciary duty claim arises out of the same facts as legal malpractice claim, it is duplicative of legal malpractice claim).

3. Breach of Contract

A breach of contract claim requires a showing of: (1) the existence of the contract; (2) its breach; and (3) the damages caused by such breach. *Branch Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a **proximate result** of such breach." *Id.* (citation omitted) (emphasis added).

4. Proximate Cause

The standard of proof for each of YES's claims required it to affirmatively present evidence of proximate cause. "Ordinarily proximate cause is a question for the jury, but when the evidence is susceptible to only one inference, it becomes a matter of law for the court. *McKnight*, 385 S.C. at 387, 684 S.E.2d at 569. "Proximate cause is the efficient or direct cause; the thing that brings about the complained of injuries." *Id.* at 387, 684 S.E.2d at 569. Proximate cause requires both causation in fact and legal cause. *Id.* at 386-87, 684 S.E.2d at 569.

"Causation in fact is demonstrated by establishing the plaintiff's injury would not have occurred 'but for' the defendant's [conduct]" *McKnight*, 385 S.C. at 386-87, 684 S.E.2d at 569. YES was required to show that but for the withdrawal of the Respondents, McLeod would have recommended that Justice close on the proposed conservation easement **and** Justice would have closed on the conservation easement. In order to prove that Justice would have gone forward, YES was required to present the testimony of Justice. As the circuit court stated in its written Order granting a directed verdict, YES was required to show 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." (R.p. ___, Order, p. 8.)

The circuit court correctly applied the law in directing a verdict for the Respondents on this issue. During the oral motion for reconsideration, the circuit court noted that the testimony showed "consistently [that] 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.'" (R.p. ___, Transcript, p. 1150.) The court

continued, “I can’t figure out, 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” (R.p. ___, Transcript, p. 1150.) The circuit court correctly determined that YES failed to prove that Respondents’ withdrawal proximately caused its alleged damages.

5. Breach of Fiduciary Duty Does Not Have a Lessened Standard of Proof

In an effort to avoid the proximate cause requirement, YES argues in its brief that a claim for breach of fiduciary duty has a lessened standard of proof—that is, that it did not need to present evidence of proximate cause on that claim. (Appellant’s Brief, at pp. 17-19.) This issue was raised for the first time in Appellant’s Rule 59 motion to reconsider the Order granting a directed verdict. (R.p. ___, YES’s Rule 59 Motion.) Accordingly, it is not preserved for appellate review. Issue preservation aside, it is not the law of this state.

i. Issue Preservation

A party may not use a post-trial motion to reconsider to raise an argument for the first time. *Kiawah Property Owners Group v. Public Service Comm’n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004). Rather, the party is required to raise the issue to the circuit court before it makes a ruling. See *Queens Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006). During trial, the Appellant had two opportunities to advance its theory that damages for breach of fiduciary duty contain a lessened standard of proof: (1) in opposition to the Respondents’ Rule 50 motion at the close of YES’s case-in-chief, and

(2) in opposition to the Respondents' Rule 50 motion at the close of all of the evidence.

The Appellant did not advance this legal theory at the proper time.

In fact, during argument on the first Rule 50 motion, Appellant offered a different argument than the one advanced in its brief before this Court:

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.

(R.p. ___, Transcript, p. 857.) During the argument on the second Rule 50 motion, the Appellant did not raise this issue. (R.p. ___, Transcript, pp. 1117-47.) The first time that the Appellant raised this issue was in its Rule 59 motion to reconsider the Order granting a directed verdict. (R.p. ___, YES's Rule 59 Motion.) Accordingly, this issue is not preserved for appellate review. *Kiawah Property*, 359 S.C. at 113, 597 S.E.2d at 149.

ii. Appellant's Argument is Not the Law

YES argues that in South Carolina, a plaintiff need only prove that the defendant's conduct was a "substantial factor" in bringing about any loss caused by a breach of fiduciary duty, not that the breach had to be the "but-for" proximate cause of the loss. In other words, YES claims that the circuit court erred in requiring it to prove that the Respondents' alleged breach of fiduciary duty proximately caused the proposed conservation easement deal not to close. To support this argument, YES relies on one case from South Carolina: *Smith v. Hastie*, 367 S.C. 410, 417, 626 S.E.2d 13, 17 (Ct. App. 2005). However, that case does not stand for the proposition YES claims that it does.

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In *Smith v. Hastie*, the trial court granted summary judgment in favor of an attorney on the plaintiff's causes of action, among which was a claim for breach of fiduciary duty. In that case, Smith accused her husband's attorney, Hastie, of breaching his fiduciary duty to her when he advised that Smith and her then-husband enter into and contribute property to a family limited partnership. *Id.* at 413, 626 S.E.2d at 15. The allegations centered on the fact that the couple had just unsuccessfully ended their marriage counseling sessions and were on the brink of separation. *Id.* at 413, 626 S.E.2d at 14-15.

The court of appeals reversed the trial court's grant of summary judgment, relying on, among other things, the affidavit Smith presented from another estate planning attorney. *Id.* at 419, 626 S.E.2d at 18. In that affidavit, the attorney opined that Hastie should have advised Smith of the financial ramifications she would suffer in the event of a divorce. Accordingly, the court of appeals found some evidence to support Smith's claim that summary judgment was improper. In so finding, the court quoted from *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004), and explained, "One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." *Smith*, 367 S.C. at 417, 626 S.E.2d at 17 (quoting *Moore*, 360 S.C. at 253, 599 S.E.2d at 473).

Based on that quote from *Smith*, YES asserts that South Carolina employs a less stringent causation standard in breach of fiduciary duty cases such that a plaintiff need not prove that the breach of duty was the proximate cause of the damages alleged. YES argues a lesser standard applies, which it describes as the "resulting from" standard or "substantial factor" standard. Not only does this isolated quote from *Smith* not create a

lesser standard, but the very case from which the *Smith* Court lifted the quote specifically describes the causation standard South Carolina courts employ with regard to breach of fiduciary duty claims: “In a breach of fiduciary case, the plaintiff is entitled to damages for harm **caused by** the breach of a fiduciary duty owed to him or her. Damages in an action for breach of a fiduciary duty are those **proximately resulting from** the wrongful conduct of the defendant.” *Moore*, 360 S.C. at 253, 599 S.E.2d at 473 (emphasis added); accord *RFT Mgmt. Co. v. Tinsley & Adams, LLP*, 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (Ct. App. 2012).

YES cites to no other South Carolina authority for its improper legal proposition. To the extent other jurisdictions may have a different standard, those standards are not the law of South Carolina.

II. The Rule 30(b)(6) Testimony of Miller

A. Miller’s Testimony Did Not Create a Question of Fact Regarding Proximate Cause

Miller testified as the corporate designee for the deposition of Justice Family Farms, LLC.⁹ As the corporate designee, Miller’s testimony bound Justice Family Farms, LLC. At a Rule 30(b)(6) deposition, the “corporation appears vicariously through its designee.” *Int’l Assoc. of Machinists and Aerospace Workers v. Werner-Masuda*, 390 F. Supp. 2d 479, 487 (D. Md. 2005). For that reason, the testimony “represents the knowledge of the corporation.” *Id.* The Rule 30(b)(6) deposition did not bind Justice,

⁹ As noted in n.2 *supra*, the ownership of the Farm was never conclusively established at trial. But even assuming, *arguendo*, that Justice Family Farms, LLC owned the Farm, as discussed herein and below, because Justice was a party to the oral contract and the ultimate decision-maker, YES was required to present his testimony. For that reason, the testimony of Miller did not create a factual question regarding proximate cause.

individually. Accordingly, the Justice Family Farms, LLC's deposition could not serve as a substitute for Justice's required testimony.

In YES's brief before this Court, it acknowledges that the oral contract was between YES and Justice: "Mr. McLeod and James C. Justice, II (Mr. Justice) entered into an agreement in October 2007 whereby Mr. McLeod's company, YES, would coordinate" the placement of a conservation easement. (Brief of Appellant, p. 5). This acknowledgement is fatal to YES's effort to utilize the Rule 30(b)(6) deposition of Miller to speak for Justice. Justice was the other party to the agreement; accordingly, without his testimony YES was unable to create a question of fact regarding proximate cause. There is not a scintilla of evidence in the record of this trial as to what Justice would have done.

Notwithstanding YES's acknowledgment that the oral agreement was between YES and Justice, it also endeavors to argue that Justice Family Farms, LLC was a party to the oral agreement (Brief of Appellant, Statement of the Case, p. 3) and that the company's testimony alone was sufficient to create a question of fact. But even assuming it was a party, it was only a co-party. And when a contract contains two parties on one side, the assent of each is required to enforce the contract. *See Dean v. Dean*, 229 S.C. 430, 93 S.E.2d 206 (1956) (noting that where multi-party contract required signatures from all parties, it could not be enforced when one party did not sign). Accordingly, for YES to prove its case it was required to present the testimony of Justice.

B. The Intent of Justice Family Farms, LLC is Not at Issue

This appeal has nothing to do with Justice's or Justice Family Farms, LLC's intent to work toward the completion of a proposed conservation easement. At trial, YES presented testimony to the general effect that Justice agreed for YES to take the

preliminary step for Justice to later determine whether to place a conservation easement on the Farm. (R.p. ___, Transcript, pp. 652-53.) In its brief, YES argues that Justice and Justice Family Farms, LLC intended to place a conservation easement on the Farm. (Brief of Appellant, pp. 7-8, 15.) For example, on page 15 of YES's brief it states that "testimony regarding Justice Family Farms [LLC's] intent and Justice's intent to close on the conservation easement was sufficient to send the proximate cause issue to the jury." (Brief of Appellant, p. 15.) But the central question of this appeal is not intent; it is whether Justice would have agreed to place a conservation easement on the Farm, notwithstanding the IRS investigation, if McLeod had made that recommendation. The record in this case, however, is void as to what Justice would have done in that situation. Accordingly, the circuit court properly granted a directed verdict for the Respondents.

C. **The Circuit Court Properly Excluded the Hearsay Portion of Miller's Testimony**

During the deposition of Justice Family Farms, LLC's Rule 30(b)(6) deposition, the designee, Miller, was asked to respond to a hypothetical question.

Q. Thank you. Now, I want you to make an assumption to answer the next question I'm going to ask you and the assumption is this, assume for the purposes of this coming question that -- notwithstanding the IRS letter, that during the call on December 24th, 2007, Yancey McLeod recommended that Justice Family Farms move forward with the easement, assume that, and he made a recommendation to move forward with the easement. Using that assumption, was it more likely than not that Justice Family Farm would have proceeded with the conservation easement?

MR. LEONARDI: Object to form.

A. Yes.

(R.p. ___, Miller, p. 34.) During the trial of this case, YES sought to introduce the above testimony, and the Respondent renewed its objection. Each side then presented argument regarding its admissibility. (R.p. ___, Transcript, pp. 787–820.) The circuit court sustained the Respondents' objection and ruled that the above colloquy could not be presented for the jury's consideration. The circuit court properly excluded the above colloquy.

The testimony from Miller, as to what Justice would allegedly have done had he received a different recommendation from McLeod, was hearsay and was properly excluded. Rule 801, SCRE. Miller testified in his deposition that he had one conversation with Justice in preparation for his deposition as Justice Family Farms, LLC's Rule 30(b)(6) designee and as part of that conversation, allegedly learned something of Justice's intent regarding the proposed conservation easement. (R.p. ___, Miller, p. 47.) The purpose for which YES offered this testimony—to establish Justice's intent—is classic hearsay. That is, the alleged statements to Miller by Justice are out of court statements offered to prove the truth of the matter asserted (*i.e.*, that Justice intended to go forward with the proposed conservation easement). *See* Rule 801(c), SCRE (defining hearsay).¹⁰ No exception to the hearsay rule salvages this testimony.¹¹

¹⁰ Justice's statements to Miller are not a prior statement by a witness testifying at trial or an admission of a party-opponent. Accordingly, the provisions of Rule 801(d)(1) and (2), SCRE, do not apply.

¹¹ Specifically, exceptions (1) through (3) do not apply because Justice's statements were not made contemporaneously with the events mentioned in the statement (*i.e.* consideration of the easement). Exception (4) does not apply because the statements were not made for purposes of medical diagnosis or treatment. Exceptions (5) through (18) do not apply because the statements are not records or recordings. Exceptions (19) through (21) do not apply because the statements did not address reputation. Exceptions (22) and (23) do not apply because the statements are not judgments.

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The fact that Miller was serving as Justice Family Farms, LLC's Rule 30(b)(6) designee at the time of this testimony is irrelevant to the hearsay analysis. "[T]he fact that a witness is a 30(b)(6) witness does not create a hearsay exception allowing him 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); *see also 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"). This rule "holds especially true when there is no independent evidentiary basis that might otherwise prove the truth of the hearsay, such as corroborating testimony from the hearsay declarant." *Cooley*, 693 F. Supp. 2d at 792; *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). "Numerous courts have rejected hearsay evidence by a corporate deponent when there is no additional evidence to support the statements." *Century Pacific, Inc. v. Hilton Hotels Corp.*, 528 F. Supp. 2d 206, 215 n.5 (S.D.N.Y. 2007) (citing *Digene Corp. v. Ventana Med, Sys., Inc.*, 316 F. Supp. 2d 174, 181 n. 10 (D. Del. 2004); *Efferson v. Kaiser Aluminum & Chem. Corp.*, 816 F. Supp. 1103, 1116 n. 31 (E.D. La. 1993)).

Here, there is no other evidence to corroborate that Justice would have gone forward with placing the conservation easement had defendants not withdrawn from representation of YES. YES's sole evidence on this critical point is Miller's hearsay statement of Justice's alleged intent. The Respondents had no ability to cross-examine Justice regarding the truth of his intent as allegedly expressed in this private conversation.

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Every indicia of hearsay is present. *See Hall v. Fedor*, 349 S.C. 169, 175-76, 561 S.E.2d 654, 657 (Ct. App. 2002) (noting that where plaintiff's deposition testimony concerning what a third party told him about settlement negotiations, which was offered to establish that plaintiff could have recovered more absent alleged malpractice by defendant attorney, was hearsay that was inadmissible).

In order to establish the required proximate cause question of fact, YES was required to present testimony *from Justice*, as a party to the oral agreement, and as the ultimate decision-maker. Only Justice himself could testify as to what he would or would not have done if McLeod had advised him that he was under investigation by the IRS, but still recommended proceeding with the conservation easement. YES recognized this testimony from Justice was required, but improperly attempted to circumvent this requirement by introducing Miller's hearsay testimony. The circuit court properly excluded this inadmissible hearsay testimony.

i. The Circuit Court's Ruling

Following the argument of counsel, during which time the Respondents detailed the inadmissibility of the subject evidence based upon the reasoning and cases discussed above, the circuit court expressed concern over the above testimony. YES notes that the circuit court took an individual knowledge approach, versus a corporate knowledge approach. (R.p. ___, Transcript, p. 810.) Nevertheless, the circuit court did not specifically rule on this objection at that point in the proceeding. Rather, following subsequent argument by counsel the circuit court finally ruled on the objection. The second ruling involved this testimony: "I'm not going to allow, I have already ruled, page 36, lines 10 through 23, and I'm not going to allow the question on page 34, 2 through 15." (R.p. ___, Transcript, pp. 818-19.) From that ruling it is not clear that the circuit

court rested its decision upon its initial individual knowledge versus corporate knowledge reasoning. YES did not ask the Court for clarification. (R.p. ___, Transcript, p. 819.)

As discussed above, the subject testimony was properly excluded because it was inadmissible hearsay testimony. To the extent the circuit court excluded the testimony for a different reason, the same correct result was reached: exclusion of the testimony. Accordingly, any error complained of by YES is harmless error. *See S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 498, 732 S.E.2d 205, 213 (Ct. App. 2012) (noting that “whatever doesn’t make any difference, doesn’t matter”).

III. The Circuit Court Correctly Excluded Testimony of Other Projects

During McLeod’s direct examination, his counsel sought to elicit testimony regarding three other projects that McLeod was working on during the same timeframe he was working on Justice’s conservation easement. (R.p. ___, Transcript, pp. 494-95.) The Respondents responded by asking the circuit court to take up a legal matter outside the hearing of the jury. The circuit court granted that request. (R.p. ___, Transcript, p. 495.)

The Respondent then allowed Mr. McLeod to provide a proffer.

THE COURT: Leave Mr. McLeod there for a moment in case you want to proffer some testimony.

All right, for purposes of the record, Mr. Pendarvis, go ahead and ask your next question, then I want to hear the objection, I want to see where this is going.

MR. PENDARVIS: The question would be, Mr. McLeod, was Yancey Environmental Solutions [YES] working on other conservation easement matters in the November, December time period, 2007?

At a late point in the testimony, I’m trying to keep this chronological for the jury, but at a point in time in late

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December there is evidence these other easements were recorded, the easements went through and Mr. McLeod - -

Q. Let's fast forward to that point. Mr. McLeod, you received, this is in context of after having received the IRS letter, after Richardson Plowden had withdrawn, Mr. Hanlin had withdrawn, did you communicate to your other clients any information about the IRS letter?

A. I called all four clients with whom I was working on conservation projects in the year 2007 after receiving the IRS letter and told each of them about the letter.

Q. Did any of those four easements close in the year 2007?

A. Three of them did.

Q. And which easement did not close in the year 2007?

A. Mr. Justice.

Q. Did you relay the same information about the IRS letter to all four of those landowners?

A. I did.

Q. And notwithstanding the information about the IRS letter, did the other three easements close?

A. Yes, sir.

Q. I would like to show you a copy of, I have a couple, the letters that memorialize recording or recorded copies of the easements.

(R.p. ____, Transcript, pp. 496-97.)

Following this proffer, the Respondents articulated the basis of their objection.

In all of those cases those three landowners or tax attorneys or whoever he talked to, you know, for whatever reasons they may have had, including they may have been done, their work may have all been done, I don't know, but Mr. Hanlin was not involved in any of those transactions, so what the jury is being asked to speculate about is, "Well, we know that three other people in three separate deals with separate lawyers, separate facts and circumstances made

their decision to go ahead and record, that means Mr. Justice would have,” and that is, you [know], Your Honor, that is not admissible to show what Mr. Justice would have done.

(R.p. ___, Transcript, p. 497, l. 20 – p. 498, l. 19; p. 498, l. 24 – p. 499, l. 12.)

Following the counter argument of YES, the circuit court decided to exclude testimony of the other projects on which McLeod worked in 2007. The basis for his ruling was as follows:

I think that under Rule 403, that although relevant, this is going to create confusion to the jury. That is what I think. It is too much information.

....

[I]t is my ruling that we not bring those other three deals into this trial because of the, my belief is the relevance would be outweighed by the confusion and misleading the jury as to these decision makers that had to make such an unusual type conservation easement.

(R.p. ___, Transcript, p. 531, ll. 2-5, 21 – p. 532, l. 2.)

A. The Circuit Court Properly Exercised its Discretion

The trial court properly exercised its discretion in excluding the evidence. ““An appellate court reviews Rule 403 rulings pursuant to an abuse of discretion standard and gives great deference to the trial court.”” *Johnson v. Horry County Solid Waste Authority*, 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2012) (citing *Lee v. Bunch*, 373 S.C. 654, 658, 647 S.E.2d 197, 199 (2007)). ““A trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.”” *Id.* at 534, 698 S.E.2d at 838 (citing *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)). The trial court determined that introducing evidence of the other three projects would likely confuse or mislead the jury.

Accordingly, the trial court properly exercised its discretion and ruled to exclude testimony on YES's other three projects.

B. YES Did Not Make an Adequate Proffer of the Excluded Testimony to Challenge the Circuit Court's Decision

"An alleged erroneous exclusion of evidence is not a basis for establishing prejudice on appeal in the absence of an adequate proffer of evidence in the court below." *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990). After the Respondents objected to YES's line of questioning, the circuit court allowed McLeod to make a proffer. As noted above, McLeod testified that he worked on four conservation easements during 2007, that he told all of the landowners about the IRS investigation, and that all of the landowners closed except for Justice. The information McLeod provided to the circuit court did not create a sufficient basis for establishing prejudice.

The Respondents argued to the circuit court that YES should not be allowed to introduce the other transactions because of their dissimilarity to the proposed conservation easement on the Farm. The objection related to the well-established rule of other incidents evidence. In South Carolina, "evidence of similar accidents, transactions, or happenings is admissible . . . where there is some special relation between the [transactions] tending to prove or disprove some fact in dispute." *Watson v. Ford Motor Co.*, 389 S.C. 434, 454, 699 S.E.2d 169, 179 (2010). "A plaintiff bears the burden of demonstrating the other [transactions] are 'substantially similar to the [transaction] at issue.'" *Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 77, 735 S.E.2d 650, 657 (2012).

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In order to introduce such evidence, the proponent “must present a factual foundation for the court to determine that the other [transactions] were substantially similar to the [transaction] at issue.” *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). In making the substantial similarity analysis, the Court must analyze four factors: (1) the [transactions] are similar; (2) the alleged defect is similar; (3) causation related to the defect in the other incidents; and (4) exclusion of all reasonable secondary explanations for the cause of the other incidents. *Watson*, 389 S.C. at 543, 699 S.E.2d at 179. The substantially similar standard exists because other incident evidence “has the potential to be ‘highly prejudicial.’” *Branham v. Ford Motor Co.*, 390 S.C. 203, 230, 701 S.E.2d 5, 19 (2010).

YES’s proffer made no effort to set forth a proper foundation to show that the other projects were substantially similar to the proposed conservation easement on the Farm. In an effort to remedy the failure to provide an adequate proffer, YES cites the deposition testimony of McLeod in the brief it filed with this Court. (Appellant’s Brief, pp. 31-32.) The testimony McLeod provided in his deposition has no bearing upon the correctness of the circuit court’s decision. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (noting that issue preservation rules exist to “enable the lower court to rule properly after it has considered all relevant facts, law, and arguments”) (quoting *I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). Accordingly, YES’s inclusion of the deposition transcript is not proper, and the court is not obligated to review that testimony in its analysis of this issue.

Inadequate proffer in the trial court aside, the deposition transcript of McLeod does not even provide this Court with the proper factual foundation to determine whether

the other projects, in 2007, were substantially similar. For example, McLeod does not state whether the other projects were of the same magnitude as the proposed conservation easement on the Farm. He does not state whether the other projects had already been completed. Accordingly, YES has failed to demonstrate prejudice. *Greenville Memorial*, 301 S.C. at 244, 391 S.E.2d at 547.

IV. **The Circuit Court Correctly Excluded Its Consideration of the Inadmissible Hearsay Testimony Provided by Adams During Its Decision to Grant a Directed Verdict**

YES argued that the circuit court erred by not considering Professor Adams' re-statement of Miller's re-statement of Justice's alleged statement that he was "in the boat." Adams provided this testimony during his cross-examination:

I think all of the testimony in this case has shown, with not a single contradiction, that [Mr. Justice] was firmly committed. He, as the testimony said, he was in the boat, he had made that decision, he was going to do it, when the package of documents came for the closing he was going to sign them, they were going to be recorded.

(R.p. ___, Transcript, p. 343.) The circuit court properly excluded the above testimony from its consideration of the directed verdict motion because it was inadmissible hearsay relied upon by an expert. The Respondents were not required to enter a contemporaneous objection or a motion to strike.

A. **The Testimony is Hearsay**

The subject testimony is hearsay. Both parties agreed on that very point. In trying to sort out what testimony had been redacted from Miller's video-taped deposition, the circuit court queried:

THE COURT: Did you all agree on all the hearsay stuff, that has all been eliminated, redacted from the video, it is clear Mr. Justice told him?

MR. PENDARVIS: That part is out. The part, “I’m in the boat,” that little section is out, it’s not in the tape.

(R.p. ___, Transcript, p. 817.)

B. The Hearsay Statement by Adams Was Not Admissible for Its Truth

The use of hearsay by an expert is not admitted to prove the truth of the hearsay asserted; rather, pursuant to Rule 703, SCRE, it is admitted to explain the basis of an expert witness’s opinion. *Jones v. Doe*, 372 S.C 53, 62-63, 640 S.E.2d 514, 519 (Ct. App. 2006). The *Jones* Court explained that:

[t]he expert may testify to evidence even though it is inadmissible under the hearsay rule, but allowing the evidence to be received for this purpose does not mean it is admitted for its truth. It is received only for the limited purpose of informing the jury of the basis of the expert’s opinion and therefore does not constitute a true hearsay exception.

Id. at 63, 640 S.E.2d at 519 (quoting 2 Kenneth S. Broun et al., McCormick on Evidence § 324, at 418 (2006)). Adam’s hearsay statement could not be used for its truthfulness. It is for that reason that the Respondents did not need to object to this testimony. It is for that reason, as well, that the circuit court properly excluded the testimony from its consideration. *Jones*, 372 S.C at 63, 640 S.E.2d at 519 (disregarding hearsay evidence relied upon by expert witness and affirming the granting of summary judgment).

YES argues that since no objection was placed on the record, the testimony of Adams became competent evidence. To support that proposition YES cites to *Cantrell v. Carruth*, 250 S.C. 415, 158 S.E.2d 208 (1967). According to YES, *Cantrell* stands for the proposition that “evidence admitted without objection becomes competent evidence and cannot be disregarded on a motion for a directed verdict.” (Brief of Appellant, p. 35). *Cantrell* is distinguishable because it did not address the unique role of Rule 703

and an expert's ability to testify regarding otherwise inadmissible hearsay evidence. Cantrell merely stands for the proposition that if otherwise admissible, yet objectionable, testimony is introduced without objection, then the failure to object to that evidence precludes a party from challenging the use of that testimony for purposes of a directed verdict.

Cantrell fell and was injured when she sought to get out of the way of a delivery truck owned by defendant Carruth. *Cantrell*, 250 S.C. at 417, 158 S.E.2d at 209. Cantrell alleged that Carruth was liable for her injuries because his delivery truck approached her in a negligent and reckless manner, and for that reason she fell trying to avoid it. *Id.* at 419, 158 S.E.2d at 210. After the close of the evidence, the circuit court directed a verdict in favor of Carruth. On appeal, Cantrell pointed to evidence tending to prove her negligence claim.

She directed the court to her testimony that, "the pickup truck was coming at her 'too fast' and she started to run in order to get out of its way because she 'would have been dead' if she hadn't gotten out of the way." *Id.* at 420, 158 S.E.2d at 210-11. Cantrell further noted that no objection was entered to that testimony. *Id.* at 420, 158 S.E.2d at 210-11. Carruth argued that that testimony was nothing more than a "conclusion on the part of the appellant and no weight c[ould] validly be assigned to" it. *Id.* at 420, 158 S.E.2d at 211. The Supreme Court disagreed, noting that, "[s]ince the foregoing testimony was received, without objection, it bec[a]me[] competent and c[ould] [not] be disregarded upon a motion for a . . . directed verdict." *Id.* at 420, 158 S.E.2d at 210-11.

The testimony noted in *Cantrell* was admissible, yet objectionable, evidence to establish the truth of Cantrell's allegations. Consequently, the failure of Carruth to object meant that the testimony could be used in the Court's analysis of the directed verdict motion. The hearsay testimony from Adams was not admissible to establish the truth of YES's allegations. Accordingly, it could not serve as a basis for the circuit court's analysis of the directed verdict motion.

C. The Hearsay Testimony is Not Relevant to the Proximate Cause Issue

The testimony that Justice was allegedly "in the boat" only related to the intent of Justice to proceed with the concept of placing a conservation easement on the Farm. It had nothing to do with proceeding, notwithstanding the IRS investigation into McLeod. The following colloquy with Miller makes that point clear:

Q. Okay. Who else did you speak to recently after being presented with the draft affidavit?

A. I asked Mr. Jim Justice what his feeling was toward this, about this transaction, and he gave me a brief synopsis of what he thought was going on and how it would have ended up. And that was the only individual I talked to, the rest of it was just looking through the documents that we had in our files.

Q. Okay. Tell me exactly what Jim Justice told you. You said it was a brief synopsis, what did he tell you?

A. I said, Jim, I'm going to be doing a deposition on the Yancey McLeod issue from 2007, you're familiar with that? Yes. Do you feel that that thing would have worked out had it played out to the end and he said absolutely. And that was my only question to him because that was a concern that I had, would this have moved forward, and he said, We were in the boat. That was his exact words, We were in the boat on this and it would have worked out.

(R.p. ____, Miller, pp. 46-47.) It would have "worked out," but the IRS started an investigation of McLeod on December 17, 2007, and he recommended that Justice

postpone the project. (R.p. ___, Transcript, p. 637.) The above testimony does not state what Justice would have done had McLeod recommended that Justice proceed with the conservation easement, notwithstanding the IRS investigation.

The circuit court's decision did not rest on Justice's intentions; it rested upon the absence of testimony from Justice about what he would have done, had McLeod both notified him of the IRS investigation and recommended that he move forward. (R.p. ___, Order, p. 8.) The record of this trial is void as to what Justice would have done under that scenario. For that reason, YES's reliance on that testimony is misplaced.

V. The Circuit Court Applied the Correct Standard in Deciding that No Question of Fact Existed on Proximate Cause

When a party moves for a directed verdict, the court must “view[] the evidence and all reasonable inferences in the light most favorable to the nonmoving party.” *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (citations omitted). In doing so, the Court is not tasked with “decid[ing] credibility issues or to resolve conflicts in the testimony or evidence.” *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (citations omitted). The role of the Court is to “determine whether a verdict for the party opposing the motion would [be] reasonably possible under the facts.” *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997) (citations omitted). The Rule 50 standard “does not[, however,] authorize submission of speculative, theoretical and hypothetical views to the jury.” *Id.* at 149, 485 S.E.2d at 908. South Carolina appellate courts have “repeatedly recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture or speculation.” *Id.* at 149, 485 S.E.2d at 908.

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Contrary to YES's argument in its brief, the circuit court did not weigh the evidence; it decided there was *no evidence*. Following the circuit court's decision to grant a directed verdict, YES 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.

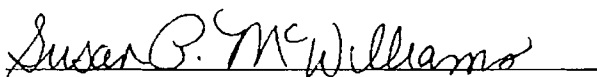
(R.p. ___, Transcript, pp. 1152-53.) YES's references to statements by the circuit court that it was "wrestling" with its decision do not reflect a weighing of the evidence; rather, they reflect a judge *wrestling* with the burden of knowing that the law required him to direct a verdict against a litigant 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.

CONCLUSION

Justice was the decider; however, his decision was never presented at the trial. The circuit court ruled correctly and was within its discretion in excluding the challenged testimony. The circuit court correctly applied the Rule 50 standard of review. Accordingly, the circuit court properly directed a verdict in favor of the Respondents. The Respondents respectfully submit that the decisions of the circuit court should be affirmed and its Order upheld.

Respectfully submitted,

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June 28, 2013

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

App. Case No. 2012-212687
Lower Case No. 2010-CP-40-3297

YANCEY ENVIRONMENTAL SOLUTIONS, LLC. Appellant,

vs.

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

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SC Court of Appeals

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ARGUMENTS IN REPLY

When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and champion. *Grievance Committee v. Rottner*, 152 Conn. 59, 65, 203 A.2d 82 (1964) (Comley, J.).

Appellant, YANCEY ENVIRONMENTAL SOLUTIONS, LLC ("YES"), wishes to brief the Court further and to respond to several of the arguments raised in their Brief by Respondents, RICHARDSON PLOWDEN & ROBINSON, P.A. and George Harold Hanlin, J.D.

I. RESPONDENTS' BRIEF IGNORES THE "BIG PICTURE" FLAWS IN THE TRIAL COURT'S PROXIMATE CAUSE ANALYSIS OF THE TESTIMONY AND EVIDENCE CONCERNING THE FORESEEABILITY OF HARM AND CAUSE OF FINANCIAL DAMAGES TO YES.

The trial court's Order and Respondents' Brief both go to great lengths in focusing on minute aspects of trial testimony or other evidence applied to a strained interpretation of the agreement YES had with its two clients, James C. Justice, II and Justice Family Farms, LLC, to justify the errant ruling granting Respondents' motion for directed verdict on the grounds that such evidence was "incompetent" or "ineffective" or "not pertinent" to create a genuine issue of material fact for the jury's resolution on proximate cause. The common fatal flaws in the trial court's Order and Respondents' Brief are their conclusions that 1) because James C. Justice, II (Mr. Justice) was the single Member who owned and controlled Justice Family Farms¹,

¹

Respondents' summary statement on page 6 of their Brief that the Black River Farm property "was owned either by [Mr.] Justice or an entity that he majority

his individual testimony was *required* to create a genuine issue of material fact on proximate cause and 2) all of the testimony and other evidence the jury heard and saw establishing that Mr. Justice and Justice Family Farms would have closed on the easement, taken the tax deduction, and paid professional fees to YES had to be ignored. At the end of the day, Mr. Justice's individual intent was conveyed to the jury through the testimony of his twenty (20+) year employee, Mr. Terry Miller, who Mr. Justice chose and prepared to testify on behalf of Justice Family Farms for this lawsuit.

Respondents' Brief and the trial court's Order both miss the "big – proximate cause – picture" and abundant fact questions presented by the direct and circumstantial evidence introduced during the trial; especially when all with facts and inferences from those facts are viewed in the light most favorable to YES. As our Supreme Court recently reminded us in *Gause v. Smithers*, "[p]roximate cause is normally a question of fact for determination by the jury, and may be proved by direct or circumstantial evidence." 403 S.C. 140, 742 S.E.2d 644, 649 (2013) (quoting from *Player v. Thompson*, 259 S.C. 600, 606, 193 S.E.2d 531, 533 (1972)). And "[o]nly in rare or exceptional cases may the issue of proximate cause be decided as a matter of law." *Id.* (quoting from *Bailey v. Segars*, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct. App. 2001)).

Respondents' citation to *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390

owned" is not supported by any evidence, in the record or not, or even by arguments of counsel summarized in Fn. 2 on page 3 of their own Brief. There is no evidence Mr. Justice individually ever owned that property.

S.C. 275, 701 S.E.2d 742, 748-49 (2010) as authority that proximate cause issues are “routinely” decided by trial court as a matter of law is not correct. In *Harris Teeter*, it was undisputed that the plaintiff’s expert did not opine that the defendant-lawyer’s conduct “most probably caused” injury to the plaintiff-former client. Dr. Adams’ testimony and opinions to the jury in this case easily met and exceeded that requirement. *E.g.*, (Adams testimony, 338:3-11, ROA ____).

Therefore, this was not one of the rare or exceptional cases, unless a new exception is to be carved out for special “proximate cause” treatment to protect lawyers and law firms in legal malpractice cases. *Cf.*, Mahaffey, CAUSE-IN-FACT AND THE PLAINTIFF’S BURDEN OF PROOF WITH REGARD TO CAUSATION AND DAMAGES IN TRANSACTIONAL LEGAL MALPRACTICE MATTERS: THE NECESSITY OF DEMONSTRATING THE BETTER DEAL, 37 Suffolk U. L. Rev. 393 (2004); Maloy, PROXIMATE CAUSE: THE FINAL DEFENSE IN LEGAL MALPRACTICE CASES, 36 U. Mem. L. Rev. 655 (2006). This case, instead, involves unexceptional, traditional expert testimony, fact witness testimony, and other evidence that created genuine questions of disputed fact on the proximate cause elements for breach of fiduciary duty, professional negligence, and breach of contract claims. These claims are based on the acts and omissions of Respondents, a lawyer and law firm, abandoning their client literally days before a \$45,000,000 conservation easement had to be recorded to achieve the tax objectives all of the parties involved were striving to obtain. For the purposes of this appeal, Respondents’ liability must be taken as true, as the trial court’s incorrect ruling only dealt with proximate cause elements of YES’ three causes of action.

It is important to remember that while the trial court’s Order and

Respondents' Brief both recognize that the jury heard testimony from fact witnesses, Plaintiff's experts, and received other evidence on proximate cause, the defect in their analysis and application of long-standing standards of review and law is their conclusion that of all the testimony and evidence did not constitute a "scintilla of evidence" creating a genuine issue of material fact to be resolved by the jury, all because Mr. Justice did not testify.

It is hornbook law that in legal malpractice cases

The trial judge should decide what issues of law are to be decided only by the court and what are of fact to be decided only by the trier of fact. . . . The courts agree that usually . . . the causation of damages and the extent of damages are issues for the trier of fact.

The rule is that the issue of proximate causation—whether the attorney's negligence caused damage—raises an issue of fact, except where reasonable persons cannot disagree.

As an issue of fact, the resolution of causation depends on whether the attorney's conduct was a substantial factor in the result or whether there should have been a better result had the attorney done otherwise. Usually, the answer to this issue concerning litigation malpractice is the result of a recreation of the underlying action in which the error occurred, a determination inextricably involved with factual matters.

Mallen and Smith, 4 LEGAL MALPRACTICE § 37:18, p. 1589-1590, 1608, 1611 (2013 ed.) (footnotes with numerous citations omitted).

In a "big – proximate cause – picture" fashion, there were an abundance of fact matters and genuine disputed questions of fact presented by the direct and

circumstantial evidence introduced during the trial from which the jury could have reasonably concluded that:

1. It was reasonably foreseeable and more likely than not that the conservation easement project would not go forward when Respondents, as the only tax counsel, withdrew with only ten (10) days before the end of the tax year when the conservation easement had to be recorded.

2. It was reasonably foreseeable and more likely than not that YES would be unable to find substitute counsel to handle the \$45,000,000 conservation easement with only ten (10) days remaining in the tax year when Respondents abandoned the representation.

3. It was reasonably foreseeable and more likely than not that YES would have to recommend the conservation easement be postponed because there was no tax counsel providing legal advice.

4. It was reasonably foreseeable and more likely than not that, if Respondents had not withdrawn, YES would have recommended to Mr. Justice that Justice Family Farms or one of the other Justice companies proceed with the conservation easement for recording in 2007, as all the parties had planned and were diligently working towards until Respondents quit.

5. It was reasonably foreseeable and more likely than not that, if Respondents had not withdrawn allowing YES to recommend proceeding, Mr. Justice, through Justice Family Farms or one of the other Justice companies would have accepted Mr. McLeod's proposal to proceed with the conservation easement, closed on the easement, and paid the associated professional fees.

6. It was reasonably foreseeable and more likely than not that the jury would have believed Mr. McLeod's testimony, as noted in Respondents' Brief on page 5 that "he was confident that if he had made such a recommendation to [Mr.] Justice, [Mr.] Justice would have proceeded with the transaction and that it would have closed, resulting in an approximate \$1.8 million dollar consulting fee to YES, ..."

7. It was reasonably foreseeable and more likely than not that because Mr. Justice was the sole owner of Justice Family Farms, LLC (and the other corporations that were involved in the ownership and operation of the Black River Farm property in South Carolina) and because of the nature of the relationship with Mr. McLeod and YES, that he did in fact authorize, approve, and meet with his twenty (20+) year employee, Mr. Terry Miller, prepare him to testify on behalf of Justice Family Farms about their intent to proceed with the closing, inform him that they would have proceeded with the closing had Mr. McLeod made such a recommendation during the December 24, 2007 telephone conference, inform him that they would have taken the tax deduction, and inform him that they would have paid YES the 4% fees.

8. It was reasonably foreseeable and more likely than not that the jury would have believed Dr. Adams' expert opinions of that the testimony and evidence created "an unmistakable causal link between [Respondents]' wrongful withdrawal on the 20th of December and the fact that the deal did not get done and Mr. McLeod did not earn his \$1.8 million dollar fee."

9. It was reasonably foreseeable and more likely than not that the jury

would have concluded that Mr. Miller's testimony on behalf of Justice Family Farms as guided by Mr. Miller's conversations and relationship with Mr. Justice was sufficient to inform them of what Mr. Justice's individual intent would have been had Respondents not abandoned their representation of YES, which would have allowed to YES to recommend proceeding with the easement.

The jury empaneled in 2012 did not get the opportunity to answer any of these questions or reach any findings of fact raised by the direct and by the circumstantial evidence they heard during the trial, which when viewed in the light most favorable to YES, was sufficient to defeat Respondents' motion for a directed verdict. See *Gause*, 742 S.E.2d at 649; *Player*, 193 S.E.2d at 533. "Ordinarily, foreseeability is a question of fact to be decided by the jury." *Steele v. Rogers*, 306 S.C. 546, 551, 413 S.E.2d 329, 332 (Ct. App. 1992) (reversing grant of summary judgment based on trial court's factual conclusions on foreseeability) (citing *Jamison v. The Pantry, Inc.*, 301 S.C. 443, 392 S.E.2d 474 (Ct. App. 1990) (foreseeability is a jury question where defendant made illegal sale of beer to minor)).

Generally, in a legal malpractice action the plaintiff must show it "most probably would have been successful" or would have "gotten a better result" in the underlying matter if the lawyer satisfied their fiduciary duties or met the standard of care. See *Brown v. Theos*, 345 S.C. 626, 550 S.E.2d 304 (2001); *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002). YES was not required to prove that Respondents' negligence was "the sole proximate cause of the injury." *Gause*, 742 S.E.2d at 649. The testimony and other evidence the jury heard and saw was more than sufficient

to create a genuine issue of material fact on whether Respondents' last-minute abandonment proximately caused financial damages to YES.

II. RESPONDENTS ARE ASKING THE COURT TO CHANGE THE STANDARD FOR A DIRECTED VERDICT FROM AN "ANY EVIDENCE" STANDARD TO AN "ANY COMPETENT EVIDENCE" STANDARD.

The trial court applied an incorrect standard to the testimony and other evidence in the record when it granted Respondents' motion for directed verdict. In their Brief, Respondents argue that the trial court's granting of directed verdict was proper because Appellant failed to provide any "*competent*" testimony or other evidence creating a question of fact as to proximate cause. (Respondents' Brief, Counter Designations of Issues on Appeal #1, p. 1). This simply is not the standard in South Carolina, nor should it be. Furthermore, the trial court erred and Respondents' Brief follows those in lock step with those erroneous legal conclusions that Dr. Adams' expert testimony, Mr. McLeod's testimony, Mr. Miller's 30(b)(6) testimony, Mr. Harrah's testimony, the Consulting Services Agreement, the \$15,000 check from the James C. Justice Companies, Inc. were deemed "incompetent" or "ineffective" or "not pertinent" to create a genuine issue of material fact for the jury's resolution on proximate cause.

Under Rule 50(a), SCRCP, "[w]hen upon a trial the case presents only questions of law the judge may direct a verdict." *Id.* This is an "any evidence" standard. See *Washington v. Whitaker*, 317 S.C. 108, 113-114, 451 S.E.2d 894, 897-98 (1994) (citing *Waites v. S.C. Windstorm and Hail Under. Assoc.*, 279 S.C. 362, 307 S.E.2d 223 (1983) (this Court is not concerned with the weight of the evidence, but whether there is any evidence from which the jury is warranted in

making a finding)).

As described in Appellant's brief and further below, the record is replete with testimony and other evidence creating much more than a scintilla of evidence for the jury to be able to determine whether Respondents' last-minute withdrawal as counsel for YES on the "James C. Justice – Justice Family Farms, LLC" conservation easement proximately caused damages to YES. In other words, whether a jury would have believed the testimony from Dr. Adams, Mr. McLeod, Mr. Elliott, and Mr. Miller (the Justice Family Farms, LLC designee) and other evidence showing that had Respondents not withdrawn, Mr. McLeod would have recommended the project go forward, the easement would have been recorded, and YES would have been paid the 4% fee. The trial judge erred in using an "any *competent* evidence" standard in granting the motion for directed verdict.²

III. Testimony Concerning Mr. Justice's Intent to Move Forward with the Conservation Easement Was Properly Before the Jury and a Part of the Record.

Based on the testimony and evidence presented at trial, it was plain error for the trial court to rule that "what [Justice Family Farms] might have intended is simply not pertinent" . . . "regarding that company's intent to complete the conservation easement on the Black River Farm in 2007." (Order, p. 9; ROA ____). Justice Family Farms was a party to the Consulting Services contract prepared by Respondents

²

As argued elsewhere in Appellant's Brief and in this Reply Brief, Appellant does not concede that any of the testimony or other evidence introduced at trial is or was "incompetent" or otherwise not available for consideration in the light most favorable to Appellant and with all reasonable inferences drawn in its favor.

and all the parties, including Respondents, were operating under that understanding. The jury heard at least a portion of the testimony by Justice Family Farms' designee and saw the copy of the check paying for professional services that also referenced Justice Family Farms. To rule that all of the foregoing testimony and other evidence did not create a scintilla of evidence on proximate cause was error and should be reversed.

Notwithstanding that Justice Family Farms was one of YES' clients and party to the Consulting Services Agreement, the trial court's Order and Respondents' Brief misapprehend the consequences of the testimony the jury heard about Mr. Justice's intent and plans to proceed with the easement.

A. Testimony by YES' expert, Dr. Adams.

Respondents objected to the testimony of YES' expert witness, Gregory B. Adams, L.L.M., J.S.D., for the first time when they slipped their objection into their proposed Order denying YES' post-trial motion pursuant to Rule 59, SCRCP, that was submitted to the trial judge. During cross-examination, in response to a question regarding Mr. Justice's commitment to the easement project, Dr. Adams testified that, "[Mr. Justice] **was in the boat, he had made that decision, he was going to do it**, when the package of documents came to the closing they were going to sign them, they were going to be recorded. (Trial transcript, 343:15-21; ROA ____) (emphasis added). Respondents' very next question was "All right. Now, Professor Adams, isn't it true, **you said Mr. Justice was in the boat**, isn't it true Mr. Justice didn't sign any of the consulting agreements that were sent to him?" (Trial

transcript, 344:9-12; ROA ____) (emphasis added).

First, Respondents' failed to make a contemporaneous objection to the testimony of Dr. Adams to the first question, therefore, the Respondents did not preserve an objection to the admissibility of that testimony. *See Parr v. Gaines*, 309 S.C. 477, 481, 424 S.E.2d 515, 518 (Ct. App. 1992) ("Although limited exceptions exist, objections to the admission of evidence must be made when evidence is presented at trial to preserve error for appeal.") Further, not only did Respondents fail to make a contemporaneous objection, Respondents' counsel repeated that testimony in the next question to Dr. Adams. Therefore, expert testimony regarding Mr. Justice's intent to move forward with the conservation easement – that he was "in the boat" – was properly before the jury. Despite Respondents' claims to the contrary, which cite no authority, South Carolina courts require objections to the admissions of evidence to be made when evidence is presented at trial. *See Id.* Failure to make a contemporaneous objection cannot be cured by later motions. *See id.*

Second, Dr. Adams' testimony was exactly the type of testimony that is allowed to be given by an expert witness. An expert witness may, and usually, states his opinion based on facts not within his firsthand knowledge. *See Hundley ex rel. Hundley v. Rite Aid of South Carolina*, 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct. App. 2000). An expert witness may base his opinion on testimony that is otherwise not admissible if it is the type of evidence that is normally relied upon to make opinions. *See id.* Further, "an expert may testify as to matters of hearsay for the purpose of showing what information he relied on in giving his opinion of value."

Id. Dr. Adams relied on the Justice Family Farms' affidavit and the deposition testimony of the company's corporate designee which is exactly the type of evidence reasonably relied on by experts in the legal field. The *Hundley* Court went onto note that:

expert witness testimony is a widely-recognized exception to the rule against hearsay testimony. The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion. Moreover, the opinion of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience. *Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive in his opinion, that opinion is regarded as evidence in its own right and is not as hearsay in disguise.*

Id. (quoting *United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971) (en banc) (1972)) (emphasis added by South Carolina Court of Appeals).

Finally, Dr. Adam's testifies that "as the testimony said, he was in the boat, he had made the decision, he was going to do it." (Trial transcript, 343:18-19; ROA ____). Dr. Adams did not testify that Mr. Justice said he was in the boat, only that testimony showed that Mr. Justice had made the decision, was "in the boat" and was going to do the conservation easement. All of which was admissible opinion testimony, properly given by an expert witness and properly on the record, therefore the jury could rely on it in determining proximate cause.

Dr. Adam's testimony as to Mr. Justice's intent to move forward with the

conservation easement was sufficient evidence to prove proximate cause and send the matter to the jury, whose job it was to determine the weight of the evidence. The trial court

wrongly granted Respondents' motion for directed verdict.

B. Testimony by David Harrah.

Respondents argue in their Brief and argued at trial that "Mr. Justice was the Decision Maker." See e.g. (Respondents' Brief, p. 11). As part of their argument, Respondents argued that "[e]vidence adduced at trial showed that [Mr.] Justice stated that the proposed 5% commission should be reduced to 4%" citing testimony given by Mr. Harrah. The actual testimony given by Mr. Harrah and cited in their Brief actually provided the jury with additional evidence of Mr. Justice's intent to proceed with closing on the easement. Mr. Harrah testified about his conversations with Mr. Justice concerning the decision to move forward with the conservation easement as follows:

- Q Mr. Harrah, did there come a time you had a discussion regarding the percentage fee in the consulting services agreement?
- A Yes.
- Q Okay. And describe that discussion.
- A I had that draft of that agreement and I had given it to Jim and said that I had gotten it from Yancey and it had a five percent fee as part of the remuneration to him and Jim said make it four. ***That's just the way he would do it.*** So I did contact Mr. McLeod and said ***Jim said that the fee needs to be four instead of five and he said fine.***

(Trial transcript, 728:8-19; ROA ____) (emphasis added).

Mr. Harrah's testimony provided jury the with further evidence of the intent

of both parties to the contract, Mr. Justice, individually, and as a Member of Justice Family Farms, LLC, to proceed with the conservation easement. The trial court's ruling granting Respondents' motion for directed verdict was error in light of the testimony and other evidence presented to the jury.

IV. Evidence of the Company's Intent to Move Forward with the Easement Was Sufficient to Prove Proximate Cause and Evidence of James Justice's Intent Was Not Required.

Respondents argued that:

In order to prove its claims, YES was required to submit proof that after Justice learned of the IRS investigation into McLeod's previous work on other conservation easements, if McLeod had recommended that Justice proceed instead of postpone, Justice would have followed McLeod's recommendation and closed on the conservation easement.

(Respondents' Brief, p. 19).

Since YES had two clients per the Consulting Services Agreement prepared by Respondents, Mr. Justice and Justice Family Farms,³ and especially because Mr. Justice, individually, did not own the land, the Respondents' argument would be correct only if it is changed to read as follows:

3

Respondents can make no reference to any place in the trial transcript or the briefs on appeal where YES agreed that the contract was only between YES and Mr. Justice, because it never happened. YES always argued, consistent with the facts and truth, that both Mr. Justice and Justice Family Farms were its clients and both were parties to the contract. In fact, representatives of Justice Family Farms were the primary in performing the contract, renegotiating the fees paid to YES, communicating with YES, and writing the checks for payment to YES and the other vendors. Respondents misquote YES' Brief by only using a portion of the statement to make it seem that YES acknowledged Mr. Justice as the only party. *Compare* (Brief of Respondents at 24) with (Brief of Appellant at 5).

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In order to prove its claims, YES was required to submit proof that after Justice or Justice Family Farms learned of the IRS investigation into McLeod's previous work on other conservation easements, if McLeod had recommended that Justice or Justice Family Farms proceed instead of postpone, Justice or Justice Family Farms would have followed McLeod's recommendation and closed on the conservation easement.

The testimony adduced and other evidence submitted to the jury satisfied these requirements. The record is clear on Justice Family Farms' intent to move forward with the easement. As the Justice Family Farms designee testified during his deposition, and the jury heard at trial, "Q: Is it your contention as you sit here today that Justice Family Farms intended to go through with this project? A: Yes, sir, it is." (Justice Family Farms 30(b)(6) testimony, 68:9-12; ROA____).

And, while no one disputes that Mr. Justice was the ultimate decision maker, Respondents argued that Mr. Justice was the *only* decision maker. (Brief of Respondents at 12, ROA____). This is simply untrue as the record reflects the facts that the easement project was turned over to an employee of Justice Family Farms, Mr. Harrah, to manage and make decision on a day-to-day basis. (Trial testimony, 712:9-714:6; ROA____); (Justice Family Farms 30(b)(6) testimony, 18:6-10; ROA____; "David Harrah, our Chief Financial Officer at the time, made contact direct with Mr. McLeod. And I'm sure Jim spoke to Mr. McLeod from time to time as to how it was progressing, but David was the immediate contact with Mr. McLeod."); (Justice Family Farms 30(b)(6) testimony, 57:5-20; ROA____). Additionally, the record shows that "in the normal course of business, Mr. Justice or his son, Mr. Justice, III, James Justice, III, will authorize work with professionals, attorneys, accountants, legal

representatives, consultants of all types” and authorized payment of those professionals’ invoices. (Justice Family Farms 30(b)(6) testimony, 16:10-18; ROA____). Also, while Mr. Justice did not make every decision, as the head of the Justice Companies, he did make many of the major decisions, including decisions about the various entities he owned, how he titled his real property, who he appointed to manage the project, as well as who he chose to testify on behalf of Justice Family Farms and what the designee was told about Justice Family Farms’ intent concerning the conservation easement.

Respondents further argued that the directed verdict was proper because “[t]he record of this trial is silent as to what Justice’s decision would have been if he had received a recommendation from McLeod to proceed with the conservation easement, notwithstanding the IRS investigation.” The record is not silent as to Mr. Justice’s intent, in fact, the jury heard testimony that the Justice Family Farms designee prepared for his testimony by meeting with Mr. Justice and questioning him regarding the conservation easement. From that, the jury was free to understand that the Justice Family Farms testimony was given with the input and intention of Mr. Justice. (Justice Family Farms 30(b)(6) testimony, 94:14-22; ROA____). Further, the jury heard testimony from the expert witness as to Mr. Justice’s intent.

Moreover, the trial court wrongfully excluded the testimony of the Justice Family Farms corporate designee who testified “Yes” in response to the question “Notwithstanding the IRS letter, that during the call on December 24th, 2007, Yancey McLeod recommended that Justice Family Farms move forward with the easement.

Using that assumption, was it more likely than not that Justice Family Farms would have proceeded with the conservation easement?" (Justice Family Farms 30(b)(6) testimony, 34:2-15; ROA____). The question asked whether it was "more likely than not that Justice Family Farms would have proceeded with the conservation easement" and the Justice Family Farm designee testified "Yes." This testimony is not hearsay as Respondents have argued and as the trial court incorrectly ruled because the company designee is testifying as to the company's intent, not offering any statement made by Mr. Justice in hearsay fashion "for the truth of the matter asserted." No exception to hearsay need be given because this is not hearsay testimony. It is well-settled law argued to the trial court in response to Respondents' objections that 30(b)(6) designees can testify regarding the intent and opinions of the company. See e.g., *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 690 (2012) ("the designee **must** also testify about the corporation's position, beliefs and opinions") (emphasis added) (citations omitted).

Respondents argue "[b]ut the central question of this appeal is not intent; it is whether Justice would have agreed to place a conservation easement on the Farm, notwithstanding the IRS investigation, if McLeod had made that recommendation. First, this sentence should read "whether Mr. Justice or Justice Family Farms would have agreed..." and that evidence was objected to by Respondents and improperly excluded by the trial court. Respondents are attempting to object to the evidence on one hand and point to the lack of that very evidence on the other. In other words, they want to "eat their cake and have it too."

In addition, Respondents now argue that because Justice Family Farms and

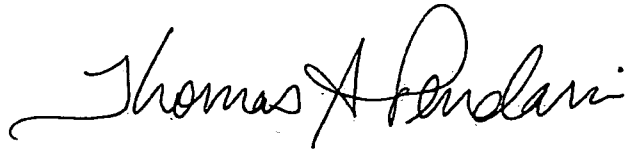
James Justice were both parties to the contract, YES was required to present Mr. Justice's and the company's testimony as to their intent. Again, Respondents cite no authority for this proposition except possibly the case of *Dean v. Dean*, 229 S.C. 430, 93 S.E.2d 206 (1956). However, *Dean* provides no support to their argument because the contract in *Dean* required all parties to sign it in order for it to become effective. Respondents can cite to no such provision in the subject Consulting Services Agreement because there is none. Also, since Mr. Justice, individually, did not own the Black River Farms property, he could not, as an individual owner, have signed the conservation easement, the more necessary party to the contract was the company, Justice Family Farms. Only the company owned the real estate, only the company could grant the easement and, depending on the corporation documents or resolutions, the easement could have been signed on behalf of the company by many other corporate representatives, not necessarily Mr. Justice. As Mr. Justice's signature was not required, neither was his testimony on his individual intent to move forward with the easement.

CONCLUSION

For all of the above reasons, the trial court should be reversed and this matter should be remanded for a trial on the merits.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with a large initial "T" and "P".

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July 18, 2013

Beaufort, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

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

YANCEY ENVIRONMENTAL SOLUTIONS, LLC. Appellant,

vs.

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

REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and champion. *Grievance Committee v. Rottner*, 152 Conn. 59, 65, 203 A.2d 82 (1964) (Comley, J.).

Appellant, YANCEY ENVIRONMENTAL SOLUTIONS, LLC ("YES"), wishes to brief the Court further and to respond to several of the arguments raised in their Brief by Respondents, RICHARDSON FLOWDEN & ROBINSON, P.A. and George Harold Hanlin, J.D.

I. Respondents' Brief Ignores the "Big Picture" Flaws in the Trial Court's Proximate Cause Analysis of the Testimony and Evidence Concerning the Foreseeability of Harm and Cause of Financial Damages to Yes.

The trial court's Order and Respondents' Brief both go to great lengths in focusing on minute aspects of trial testimony or other evidence applied to a strained interpretation of the agreement YES had with its two clients, James C. Justice, II and Justice Family Farms, LLC, to justify the errant ruling granting Respondents' motion for directed verdict on the grounds that such evidence was "incompetent" or "ineffective" or "not pertinent" to create a genuine issue of material fact for the jury's resolution on proximate cause. The common fatal flaws in the trial court's Order and Respondents' Brief are their conclusions that 1) because James C. Justice, II (Mr. Justice) was the single Member who owned and controlled Justice Family

Farms¹, his individual testimony was *required* to create a genuine issue of material fact on proximate cause and 2) all of the testimony and other evidence the jury heard and saw establishing that Mr. Justice and Justice Family Farms would have closed on the easement, taken the tax deduction, and paid professional fees to YES had to be ignored. At the end of the day, Mr. Justice's individual intent was conveyed to the jury through the testimony of his twenty (20+) year employee, Mr. Terry Miller, who Mr. Justice chose and prepared to testify on behalf of Justice Family Farms for this lawsuit.

Respondents' Brief and the trial court's Order both miss the "big – proximate cause – picture" and abundant fact questions presented by the direct and circumstantial evidence introduced during the trial; especially when all with facts and inferences from those facts are viewed in the light most favorable to YES. As our Supreme Court recently reminded us in *Gause v. Smithers*, "[p]roximate cause is normally a question of fact for determination by the jury, and may be proved by direct or circumstantial evidence." 403 S.C. 140, 742 S.E.2d 644, 649 (2013) (quoting *Player v. Thompson*, 259 S.C. 600, 606, 193 S.E.2d 531, 533 (1972)). And "[o]nly in rare or exceptional cases may the issue of proximate cause be decided as a matter of law." *Id.* (quoting *Bailey v. Segars*, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct. App. 2001)).

¹

Respondents' summary statement on page 6 of their Brief that the Black River Farm property "was owned either by [Mr.] Justice or an entity that he majority owned" is not supported by any evidence, in the record or not, or even by arguments of counsel summarized in Fn. 2 on page 3 of their own Brief. There is no evidence Mr. Justice individually ever owned that property.

APPENDIX1203

Respondents' citation to *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 701 S.E.2d 742, 748-49 (2010) as authority that proximate cause issues are "routinely" decided by trial court as a matter of law is not correct. In *Harris Teeter*, it was undisputed that the plaintiff's expert did not opine that the defendant-lawyer's conduct "most probably caused" injury to the plaintiff-former client. Dr. Adams' testimony and opinions to the jury in this case easily met and exceeded that requirement. See, e.g., (Adams testimony, 338:3-11, ROA 261).

Therefore, this was not one of the rare or exceptional cases, unless a new exception is to be carved out for special "proximate cause" treatment to protect lawyers and law firms in legal malpractice cases. Cf., Mahaffey, CAUSE-IN-FACT AND THE PLAINTIFF'S BURDEN OF PROOF WITH REGARD TO CAUSATION AND DAMAGES IN TRANSACTIONAL LEGAL MALPRACTICE MATTERS: THE NECESSITY OF DEMONSTRATING THE BETTER DEAL, 37 Suffolk U. L. Rev. 393 (2004); Maloy, PROXIMATE CAUSE: THE FINAL DEFENSE IN LEGAL MALPRACTICE CASES, 36 U. Mem. L. Rev. 655 (2006). This case, instead, involves unexceptional, traditional expert testimony, fact witness testimony, and other evidence that created genuine questions of disputed fact on the proximate cause elements for breach of fiduciary duty, professional negligence, and breach of contract claims. These claims are based on the acts and omissions of Respondents, a lawyer and law firm, abandoning their client literally days before a \$45,000,000 conservation easement had to be recorded to achieve the tax objectives all of the parties involved were striving to obtain. For the purposes of this appeal, Respondents' liability must be taken as true, as the trial court's incorrect

ruling only dealt with proximate cause elements of YES' three causes of action.

It is important to remember that while the trial court's Order and Respondents' Brief both recognize that the jury heard testimony from fact witnesses, Plaintiff's experts, and received other evidence on proximate cause, the defect in their analysis and application of long-standing standards of review and law is their conclusion that of the testimony and evidence did not constitute a "scintilla of evidence" creating a genuine issues of material fact to be resolved by the jury, all because Mr. Justice did not testify.

It is hornbook law that in legal malpractice cases:

The trial judge should decide what issues of law are to be decided only by the court and what are of fact to be decided only by the trier of fact. . . . The courts agree that usually . . . the causation of damages and the extent of damages are issues for the trier of fact.

The rule is that the issue of proximate causation-whether the attorney's negligence caused damage—raises an issue of fact, except where reasonable persons cannot disagree.

As an issue of fact, the resolution of causation depends on whether the attorney's conduct was a substantial factor in the result or whether there should have been a better result had the attorney done otherwise. Usually, the answer to this issue concerning litigation malpractice is the result of a recreation of the underlying action in which the error occurred, a determination inextricably involved with factual matters.

Mallen and Smith, 4 LEGAL MALPRACTICE § 37:18, p. 1589-1590, 1608, 1611 (2013 ed.) (footnotes with numerous citations omitted).

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In a “big – proximate cause – picture” fashion, there was an abundance of fact matters and genuine disputed questions of fact presented by the direct and circumstantial evidence introduced during the trial from which the jury could have reasonably concluded that:

1. It was reasonably foreseeable and more likely than not that the conservation easement project would not go forward when Respondents, as the only tax counsel, withdrew with only ten (10) days before the end of the tax year when the conservation easement had to be recorded.

2. It was reasonably foreseeable and more likely than not that YES would be unable to find substitute counsel to handle the \$45,000,000 conservation easement with only ten (10) days remaining in the tax year when Respondents abandoned the representation.

3. It was reasonably foreseeable and more likely than not that YES would have to recommend the conservation easement be postponed because there was no tax counsel providing legal advice.

4. It was reasonably foreseeable and more likely than not that, if Respondents had not withdrawn, YES would have recommended to Mr. Justice that Justice Family Farms or one of the other Justice companies proceed with the conservation easement for recording in 2007, as all the parties had planned and were diligently working towards until Respondents quit.

5. It was reasonably foreseeable and more likely than not that, if Respondents had not withdrawn allowing YES to recommend proceeding, Mr. Justice, through Justice Family Farms or one of the other Justice companies would

have accepted Mr. McLeod's proposal to proceed with the conservation easement, closed on the easement, and paid the associated professional fees.

6. It was reasonably foreseeable and more likely than not that the jury would have believed Mr. McLeod's testimony, as noted in Respondents' Brief on page 5 that "he was confident that if he had made such a recommendation to [Mr.] Justice, [Mr.] Justice would have proceeded with the transaction and that it would have closed, resulting in an approximate \$1.8 million dollar consulting fee to YES, ..."

7. It was reasonably foreseeable and more likely than not that because Mr. Justice was the sole owner of Justice Family Farms, LLC (and the other corporations that were involved in the ownership and operation of the Black River Farm property in South Carolina) and because of the nature of the relationship with Mr. McLeod and YES, that he did in fact authorize, approve, and meet with his twenty (20+) year employee, Mr. Terry Miller, prepare him to testify on behalf of Justice Family Farms about its intent to proceed with the closing, inform him that it would have proceeded with the closing had Mr. McLeod made such a recommendation during the December 24, 2007 telephone conference, inform him that it would have taken the tax deduction, and inform him that it would have paid YES the 4% fees.

8. It was reasonably foreseeable and more likely than not that the jury would have believed Dr. Adams' expert opinions of that the testimony and evidence created "an unmistakable causal link between [Respondents'] wrongful withdrawal on the 20th of December and the fact that the deal did not get done and Mr. McLeod

did not earn his \$1.8 million dollar fee.”

9. It was reasonably foreseeable and more likely than not that the jury would have concluded that Mr. Miller’s testimony on behalf of Justice Family Farms as guided by Mr. Miller’s conversations and relationship with Mr. Justice was sufficient to inform them of what Mr. Justice’s individual intent would have been had Respondents not abandoned their representation of YES, which would have allowed YES to recommend proceeding with the easement.

The jury empaneled in 2012 did not get the opportunity to answer any of these questions or reach any findings of fact raised by the direct evidence and by the circumstantial evidence they heard during the trial, which, when viewed in the light most favorable to YES, was sufficient to defeat Respondents’ motion for a directed verdict. See *Gause*, 742 S.E.2d at 649; *Player*, 193 S.E.2d at 533. “Ordinarily, foreseeability is a question of fact to be decided by the jury.” *Steele v. Rogers*, 306 S.C. 546, 551, 413 S.E.2d 329, 332 (Ct. App. 1992) (reversing grant of summary judgment based on trial court’s factual conclusions on foreseeability) (citing *Jamison v. The Pantry, Inc.*, 301 S.C. 443, 392 S.E.2d 474 (Ct. App.1990) (foreseeability is a jury question where defendant made illegal sale of beer to minor)).

Generally, in a legal malpractice action the plaintiff must show it "most probably would have been successful" or would have "gotten a better result" in the underlying matter if the lawyer satisfied their fiduciary duties or met the standard of care. See *Brown v. Theos*, 345 S.C. 626, 550 S.E.2d 304 (2001); *Summer v.*

Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997); *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002). YES was not required to prove that Respondents' negligence was "the sole proximate cause of the injury." *Gause*, 742 S.E.2d at 649. The testimony and other evidence the jury heard and saw was more than sufficient to create a genuine issue of material fact on whether Respondents' last-minute abandonment proximately caused financial damages to YES.

II. Respondents Are Asking the Court to Change the Standard for a Directed Verdict from an "Any Evidence" Standard to an "Any Competent Evidence" Standard.

The trial court applied an incorrect standard to the testimony and other evidence in the record when it granted Respondents' motion for directed verdict. In their Brief, Respondents argue that the trial court's granting of directed verdict was proper because Appellant failed to provide any "*competent*" testimony or other evidence creating a question of fact as to proximate cause. (Brief of Respondents, Counter Designations of Issues on Appeal #1 at 1). This simply is not the standard in South Carolina, nor should it be. Furthermore, the trial court erred in its finding, and Respondents' Brief follows in lock step with those erroneous legal conclusions, that Dr. Adams' expert testimony, Mr. McLeod's testimony, Mr. Miller's 30(b)(6) testimony, Mr. Harrah's testimony, the Consulting Services Agreement, and the \$15,000 check from the James C. Justice Companies, Inc. were deemed "incompetent" or "ineffective" or "not pertinent" to create a genuine issue of material fact for the jury's resolution on proximate cause.

Under Rule 50(a), SCRCP, "[w]hen upon a trial the case presents only

questions of law the judge may direct a verdict.” *Id.* This is an “any evidence” standard. See *Washington v. Whitaker*, 317 S.C. 108, 113-14, 451 S.E.2d 894, 897-98 (1994) (citing *Waites v. S.C. Windstorm and Hail Under. Assoc.*, 279 S.C. 362, 307 S.E.2d 223 (1983) (this Court is not concerned with the weight of the evidence, but whether there is any evidence from which the jury is warranted in making a finding)).

As described in Appellant’s brief and further below, the record is replete with testimony and other evidence creating much more than a scintilla of evidence for the jury to be able to determine whether Respondents’ last-minute withdrawal as counsel for YES on the “James C. Justice – Justice Family Farms, LLC” conservation easement proximately caused damages to YES. In other words, whether a jury would have believed the testimony from Dr. Adams, Mr. McLeod, Mr. Elliott, and Mr. Miller (the Justice Family Farms, LLC designee) and other evidence showing that had Respondents not withdrawn, Mr. McLeod would have recommended the project go forward, the easement would have been recorded, and YES would have been paid the 4% fee. The trial judge erred in using an “any competent evidence” standard in granting the motion for directed verdict.²

²

As argued elsewhere in Appellant’s Brief and in this Reply Brief, Appellant does not concede that any of the testimony or other evidence introduced at trial is or was “incompetent” or otherwise not available for consideration in the light most favorable to Appellant and with all reasonable inferences drawn in its favor.

III. Testimony Concerning James Justice's Intent to Move Forward with the Conservation Easement Was Properly Before the Jury and a Part of the Record.

Based on the testimony and evidence presented at trial, it was plain error for the trial court to rule that "what [Justice Family Farms] might have intended is simply not pertinent" . . . "regarding that company's intent to complete the conservation easement on the Black River Farm in 2007." (Order at 9; ROA 13). Justice Family Farms was a party to the Consulting Services contract prepared by Respondents and all the parties, including Respondents, were operating under that understanding. The jury heard at least a portion of the testimony by Justice Family Farms' designee and saw the copy of the check paying for professional services that also referenced Justice Family Farms. To rule that all of the foregoing testimony and other evidence did not create a scintilla of evidence on proximate cause was error and should be reversed.

Notwithstanding that Justice Family Farms was one of YES' clients and party to the Consulting Services Agreement, the trial court's Order and Respondents' Brief misapprehend the consequences of the testimony the jury heard about Mr. Justice's intent and plans to proceed with the easement.

A. Testimony by YES' expert, Dr. Adams.

Respondents objected to the testimony of YES' expert witness, Gregory B. Adams, L.L.M., J.S.D., for the first time when they slipped their objection into their proposed Order denying YES' post-trial motion pursuant to Rule 59, SCRCP, that was submitted to the trial judge. During cross-examination, in response to a

question regarding Mr. Justice's commitment to the easement project, Dr. Adams testified that, "[Mr. Justice] **was in the boat, he had made that decision, he was going to do it**, when the package of documents came to the closing they were going to sign them, they were going to be recorded. (Trial transcript, 343:15-21; ROA 266) (emphasis added). Respondents' very next question was "All right. Now, Professor Adams, isn't it true, **you said Mr. Justice was in the boat**, isn't it true Mr. Justice didn't sign any of the consulting agreements that were sent to him?" (Trial transcript, 344:9-12; ROA 267) (emphasis added).

First, Respondents' failed to make a contemporaneous objection to the testimony of Dr. Adams to the first question, therefore, the Respondents did not preserve an objection to the admissibility of that testimony. *See Parr v. Gaines*, 309 S.C. 477, 481, 424 S.E.2d 515, 518 (Ct. App. 1992) ("Although limited exceptions exist, objections to the admission of evidence must be made when evidence is presented at trial to preserve error for appeal.") Further, not only did Respondents fail to make a contemporaneous objection, Respondents' counsel repeated that testimony in the next question to Dr. Adams. Therefore, expert testimony regarding Mr. Justice's intent to move forward with the conservation easement – that he was "in the boat" – was properly before the jury. Despite Respondents' claims to the contrary, which cite no authority, South Carolina courts require objections to the admissions of evidence to be made when evidence is presented at trial. *See id.* Failure to make a contemporaneous objection cannot be cured by later motions. *See id.*

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Second, Dr. Adams' testimony was exactly the type of testimony that is allowed to be given by an expert witness. An expert witness may, and usually, states his opinion based on facts not within his firsthand knowledge. See *Hundley ex rel. Hundley v. Rite Aid of South Carolina*, 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct. App. 2000). An expert witness may base his opinion on testimony that is otherwise not admissible if it is the type of evidence that is normally relied upon to make opinions. See *id.* Further, "an expert may testify as to matters of hearsay for the purpose of showing what information he relied on in giving his opinion of value." *Id.* Dr. Adams relied on the Justice Family Farms' affidavit and the deposition testimony of the company's corporate designee which is exactly the type of evidence reasonably relied on by experts in the legal field. The *Hundley* Court went onto note that:

expert witness testimony is a widely-recognized exception to the rule against hearsay testimony. The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion. Moreover, the opinion of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience. *Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive in his opinion, that opinion is regarded as evidence in its own right and is not as hearsay in disguise.*

Id. (quoting *United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971) (en banc))

(1972)) (emphasis added by South Carolina Court of Appeals).

Finally, Dr. Adam's testifies that "as the testimony said, he was in the boat, he had made the decision, he was going to do it." (Trial transcript, 343:18-19; ROA 266). Dr. Adams did not testify that Mr. Justice said he was in the boat, only that testimony showed that Mr. Justice had made the decision, was "in the boat" and was going to do the conservation easement. All of which was admissible opinion testimony, properly given by an expert witness and properly on the record, therefore the jury could rely on it in determining proximate cause.

Dr. Adam's testimony as to Mr. Justice's intent to move forward with the conservation easement was sufficient evidence to prove proximate cause and send the matter to the jury, whose job it was to determine the weight of the evidence. The trial court wrongly granted Respondents' motion for directed verdict.

B. Testimony by David Harrah.

Respondents argue in their Brief and argued at trial that "Mr. Justice was the Decision Maker." See *e.g.* (Respondents' Brief, p. 11). As part of their argument, Respondents argued that "[e]vidence adduced at trial showed that [Mr.] Justice stated that the proposed 5% commission should be reduced to 4%" citing testimony given by Mr. Harrah. The actual testimony given by Mr. Harrah and cited in their Brief actually the jury with additional evidence of Mr. Justice's intent to proceed with closing on the easement. Mr. Harrah testified about his conversations with Mr. Justice concerning the decision to move forward with the conservation easement as follows:

Q. Mr. Harrah, did there come a time you had a discussion regarding the percentage fee in the consulting services agreement?

A. Yes.

Q. Okay. And describe that discussion.

A. I had that draft of that agreement and I had given it to Jim and said that I had gotten it from Yancey and it had a five percent fee as part of the remuneration to him and Jim said make it four. ***That's just the way he would do it.*** So I did contact Mr. McLeod and said ***Jim said that the fee needs to be four instead of five and he said fine.***

(Trial transcript, 728:8-19; ROA 624) (emphasis added).

Mr. Harrah's testimony provided jury the with further evidence of the intent of both parties to the contract, Mr. Justice, individually, and as a Member of Justice Family Farms, LLC, to proceed with the conservation easement. The trial court's ruling granting Respondents' motion for directed verdict was error in light of the testimony and other evidence presented to the jury.

IV. Evidence of the Company's Intent to Move Forward with the Easement Was Sufficient to Prove Proximate Cause and Evidence of James Justice's Intent Was Not Required.

Respondents argued that:

In order to prove its claims, YES was required to submit proof that after Justice learned of the IRS investigation into McLeod's previous work on other conservation easements, if McLeod had recommended that Justice proceed instead of postpone, Justice would have followed McLeod's recommendation and closed on the conservation easement.

(Respondents' Brief, p. 19).

Since YES had two clients per the Consulting Services Agreement prepared by Respondents, Mr. Justice and Justice Family Farms,³ and especially because Mr. Justice, individually, did not own the land, the Respondents' argument would be correct only if it is changed to read as follows:

In order to prove its claims, YES was required to submit proof that after Justice or Justice Family Farms learned of the IRS investigation into McLeod's previous work on other conservation easements, if McLeod had recommended that Justice or Justice Family Farms proceed instead of postpone, Justice or Justice Family Farms would have followed McLeod's recommendation and closed on the conservation easement.

The testimony adduced and other evidence submitted to the jury satisfied these requirements. The record is clear on Justice Family Farms' intent to move forward with the easement. As the Justice Family Farms designee testified during his deposition, and the jury heard at trial, "Q: Is it your contention as you sit here today that Justice Family Farms intended to go through with this project? A: Yes, sir, it is." (Justice Family Farms 30(b)(6) testimony, 68:9-12; ROA 943).

And, while no one disputes that Mr. Justice was the ultimate decision maker, Respondents argued that Mr. Justice was the *only* decision maker. (Brief of

³

Respondents can make no reference to any place in the trial transcript or the briefs on appeal where YES agreed that the contract was only between YES and Mr. Justice, because it never happened. YES always argued, consistent with the facts and truth, that both Mr. Justice and Justice Family Farms were its clients and both were parties to the contract. In fact, representatives of Justice Family Farms were the primary in performing the contract, renegotiating the fees paid to YES, communicating with YES, and writing the checks for payment to YES and the other vendors. Respondents misquote YES' Brief by only using a portion of the statement to make it seem that YES acknowledged Mr. Justice as the only party. *Compare* (Brief of Respondents at 24) with (Brief of Appellant at 5).

Respondents at 12). This is simply untrue as the record reflects the facts that the easement project was turned over to an employee of Justice Family Farms, Mr. Harrah, to manage and make decision on a day-to-day basis. (Trial testimony, 712:9-714:6; ROA 608); (Justice Family Farms 30(b)(6) testimony, 18:6-10; ROA 893); "David Harrah, our Chief Financial Officer at the time, made contact direct with Mr. McLeod. And I'm sure Jim spoke to Mr. McLeod from time to time as to how it was progressing, but David was the immediate contact with Mr. McLeod."); (Justice Family Farms 30(b)(6) testimony, 57:5-20; ROA 932). Additionally, the record shows that "in the normal course of business, Mr. Justice or his son, Mr. Justice, III, James Justice, III, will authorize work with professionals, attorneys, accountants, legal representatives, consultants of all types" and authorized payment of those professionals' invoices. (Justice Family Farms 30(b)(6) testimony, 16:10-18; ROA 891). Also, while Mr. Justice did not make every decision, as the head of the Justice Companies, he did make many of the major decisions, including decisions about the various entities he owned, how he titled his real property, who he appointed to manage the project, as well as who he chose to testify on behalf of Justice Family Farms and what the designee was told about Justice Family Farms' intent concerning the conservation easement.

Respondents further argued that the directed verdict was proper because "[t]he record of this trial is silent as to what Justice's decision would have been if he had received a recommendation from McLeod to proceed with the conservation easement, notwithstanding the IRS investigation." The record is not silent as to Mr. Justice's intent, in fact, the jury heard testimony that the Justice Family Farms

designee prepared for his testimony by meeting with Mr. Justice and questioning him regarding the conservation easement. From that, the jury was free to understand that the Justice Family Farms testimony was given with the input and intention of Mr. Justice. (Justice Family Farms 30(b)(6) testimony, 94:14-22; ROA 969). Further, the jury heard testimony from the expert witness as to Mr. Justice's intent.

Moreover, the trial court wrongfully excluded the testimony of the Justice Family Farms corporate designee who testified "Yes" in response to the question "Notwithstanding the IRS letter, that during the call on December 24th, 2007, had Yancey McLeod recommended that Justice Family Farms move forward with the easement. Using that assumption, was it more likely than not that Justice Family Farms would have proceeded with the conservation easement?" (Justice Family Farms 30(b)(6) testimony, 34:2-15; ROA 909). The question asked whether it was "more likely than not that Justice Family Farms would have proceeded with the conservation easement" and the Justice Family Farm designee testified "Yes." This testimony is not hearsay as Respondents have argued and as the trial court incorrectly ruled because the company designee is testifying as to the company's intent, not offering any statement made by Mr. Justice in hearsay fashion "for the truth of the matter asserted." No exception to hearsay need be given because this is not hearsay testimony. It is well-settled law, argued to the trial court in response to Respondents' objections, that 30(b)(6) designees can testify regarding the intent and opinions of the company. See e.g., *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 690 (2012) ("the designee **must** also testify about the corporation's

position, beliefs and opinions”) (emphasis added) (citations omitted).

Respondents argue “[b]ut the central question of this appeal is not intent; it is whether Justice would have agreed to place a conservation easement on the Farm, notwithstanding the IRS investigation, if McLeod had made that recommendation. First, this sentence should read “whether Mr. Justice or Justice Family Farms would have agreed...” and that evidence was objected to by Respondents and improperly excluded by the trial court. Respondents are attempting to object to the evidence on one hand and point to the lack of that very evidence on the other. In other words, they want to “eat their cake and have it too.”

In addition, Respondents now argue that because Justice Family Farms and James Justice were both parties to the contract, YES was required to present Mr. Justice’s and the company’s testimony as to their intent. Again, Respondents cite no authority for this proposition except possibly the case of *Dean v. Dean*, 229 S.C. 430, 93 S.E.2d 206 (1956). However, *Dean* provides no support to their argument because the contract in *Dean* required all parties to sign it in order for it to become effective. Respondents can cite to no such provision in the subject Consulting Services Agreement because there is none. Also, since Mr. Justice, individually, did not own the Black River Farms property, he could not, as an individual owner, have signed the conservation easement, the more necessary party to the contract was the company, Justice Family Farms. Only the company owned the real estate, only the company could grant the easement and, depending on the corporation documents or resolutions, the easement could have been signed on behalf of the company by many other corporate representatives, not necessarily Mr. Justice. As

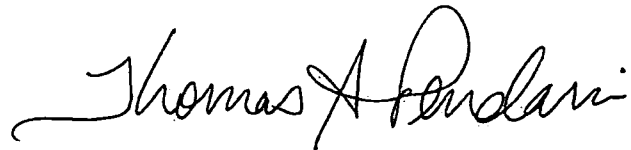
Mr. Justice's signature was not required, neither was his testimony on his individual intent to move forward with the easement.

CONCLUSION

For all of the above reasons, the trial court should be reversed and this matter should be remanded for a trial on the merits.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

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August 16, 2013

Beaufort, South Carolina

APPENDIX1220

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

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

YANCEY ENVIRONMENTAL SOLUTIONS, LLC. Appellant,

vs.

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

BRIEF OF APPELLANT

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STATEMENT OF ISSUES

- I. Whether the trial court erred when it granted Respondents' motion for a directed verdict on proximate cause grounds when there was evidence in the record from which the jury could conclude Respondents' acts and omissions proximately caused harm to Appellant.
- II. Whether the trial court erred in finding that testimony given by the corporation's Rule 30(b)(6) designee establishing a corporation's intent to perform on a contract to place a conservation easement on property owned or controlled by the corporation was insufficient evidence of the corporation's intent to perform because there was no direct testimony by a particular principal of the corporation.
- III. Whether the trial court erred in concluding that a corporate principal's testimony was necessary to establish whether the corporation intended to perform on a contract when the corporation was a party to the contract and owned or controlled the subject property.
- IV. Whether the trial court erred in concluding that testimony by an expert for Appellant that the corporation and its principal shareholder intended to perform on the contract was "not admissible to create an issue of fact for the jury" as to the corporate principal's intent when there was no objection to that testimony and when Respondents later included the same testimony in a cross examination question to the expert.
- V. Whether the trial court erred in ruling that evidence of the corporate

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

- VI. Whether the trial court erred in excluding testimony and evidence showing three other landowners, all of whom had their own tax counsel, proceeded with closing on their conservation easements, when such evidence was offered to show the effect and proximate cause of Respondents' withdrawal as the only tax counsel for the subject conservation easement project.
- VII. Whether the trial court erred in granting Respondents' motion for directed verdict at the close of Respondents' case on the stated grounds that Appellant had not offered any evidence on proximate cause after previously denying a motion for summary judgment and denying a motion for directed verdict at the close of Appellant's case on the basis that there was evidence in the record on the proximate cause issue.
- VIII. Whether the trial court failed to apply the proper standard of review for its ruling pursuant to Rule 50, SCRCP and erred in granting Respondents' motion for a directed verdict.

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

ARGUMENTS

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

A. Facts Relevant to Argument I.¹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

anything wrong.” *Id.* The JUSTICE FAMILY FARMS’ designee, Mr. Miller, testified² that if Mr. McLeod had recommended they proceed with the conservation easement, notwithstanding the IRS investigation, they would have accepted his advice, closed on the easement by the end of 2007, taken the tax deduction, and paid YES the professional fees it would have earned. (JFF 30(b)(6) testimony, 30:14-31:6, ROA 905; 38:14-39:9, ROA 913-914); (Harrah memo to YES, Sept. 30, 2008, PI trial ex. 38, ROA 1065).

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

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

²

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

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

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

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

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

343:9 **Q.** Your testimony is that the withdrawal
 343:10 torpedoed the deal completely ignores the fact that
 343:11 the deal might not have even been capable of being
 343:12 done at that time because they didn't have Mr.
 343:13 Justice's commitment, did they?

343:14 **A.** They believed they had it and I think that
 343:15 was a reasonable belief. I think all the testimony
 343:16 in this case has shown, with not a single
 343:17 contradiction, that he was firmly committed. He,
 343:18 as the testimony said, **he was in the boat**, he had
 343:19 made that decision, he was going to do it, when the
 343:20 package of documents came for the closing he was
 343:21 going to sign them, they were going to be recorded.
 343:22 The only thing that derailed this was Mr. Hanlin
 343:23 abandoning Y.E.S. on the 20th of December.

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

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

344:13 A. Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Standard for Proof of Causation – Negligence claims.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Facts Relevant to Argument II.

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

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

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

34:15 **A.** Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

for a new trial.

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

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

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

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

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48:13 um, I advised all of them, after we discussed the
48:14 letter and what it meant, that we should move
48:15 forward to close the projects, because I had not
48:16 done anything wrong, and the other three projects
48:17 closed.

48:18 The attorneys involved in those
48:19 projects, after our discussion, decided to move
48:20 forward to close those projects. I made the same
48:21 disclosure to Mr. Justice.

48:22 And it would have been extraordinarily
48:23 embarrassing, to me, to have to tell anybody,
48:24 including finding a new tax attorney, if I thought
48:25 that I could find one that could step in at that

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

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

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

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

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

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

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

A. Facts Relevant to Argument III.

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

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

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

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

admissibility of this testimony.

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

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

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

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

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

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

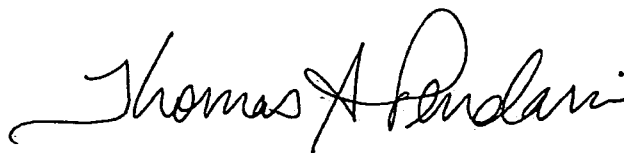
weighing the evidence instead of determining whether a scintilla of evidence existed on which the jury could make the determination of its weight. (Trial transcript, 1147:19-1148:13, ROA 869-870). In this matter, the trial court erred in determining the weight of the evidence instead of focusing on the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

CONCLUSION

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

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

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August 16, 2013
Beaufort, South Carolina

APPENDIX1266

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

App. Case No. 2012-212687
Lower Case No. 2010-CP-40-3297

YANCEY ENVIRONMENTAL SOLUTIONS, LLC Appellant,

vs.

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

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COUNTER DESIGNATIONS OF ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT CORRECTLY GRANTED A DIRECTED VERDICT IN FAVOR OF THE RESPONDENTS BASED UPON THE APPELLANT'S FAILURE TO PROVIDE ANY COMPETENT TESTIMONY OR OTHER EVIDENCE CREATING A QUESTION OF FACT AS TO PROXIMATE CAUSE.
2. WHETHER THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE APPELLANT'S FAILURE TO PRODUCE COMPETENT EVIDENCE, TESTIMONY, OR TESTIMONY FROM THE ULTIMATE DECISION-MAKER AND INDIVIDUAL PARTY TO AN ORAL CONTRACT THAT HE WOULD HAVE PROCEEDED TO UNDERTAKE HIS OBLIGATIONS UNDER THE ORAL CONTRACT REQUIRED THE CIRCUIT COURT TO GRANT A DIRECTED VERDICT IN FAVOR OF THE RESPONDENTS.
3. WHETHER THE CIRCUIT COURT CORRECTLY EXCLUDED THE HEARSAY TESTIMONY OF A RULE 30(B)(6) DESIGNEE WHO WAS PURPORTEDLY TESTIFYING AS TO THE INTENT OF AN INDIVIDUAL.
4. WHETHER THE CIRCUIT COURT CORRECTLY EXCLUDED FROM ITS CONSIDERATION OF THE DIRECTED VERDICT MOTION THE INADMISSIBLE HEARSAY TESTIMONY UTILIZED AND REPEATED BY AN EXPERT WITNESS PURSUANT TO RULE 703, SCRE.
5. WHETHER THE CIRCUIT COURT CORRECTLY EXCLUDED, PURSUANT TO RULE 403, SCRE, THE TESTIMONY THAT THREE OTHER LANDOWNERS, NOT PARTIES OR RELATED TO THIS CASE, CLOSED ON THEIR INDIVIDUAL CONSERVATION EASEMENT PROJECTS.
6. WHETHER THE CIRCUIT COURT CORRECTLY EXERCISED ITS DISCRETION IN GRANTING A DIRECTED VERDICT AT THE CLOSE OF ALL OF THE EVIDENCE IN THIS CASE.
7. WHETHER THE CIRCUIT COURT CORRECTLY APPLIED THE RULE 50 STANDARD OF REVIEW IN DETERMINING THAT THE ABSENCE OF EVIDENCE REGARDING PROXIMATE CAUSE REQUIRED IT TO GRANT A DIRECTED VERDICT.

STATEMENT OF THE CASE

The subject appeal involves a legal malpractice action (the “action”) filed by Appellant Yancey Environmental Solutions, LLC (“YES”) against Richardson Plowden & Robinson, P.A. (“RPR”) and George Harold Hanlin, Esquire (“Hanlin”) (collectively referred to hereinafter as “the Respondents”). The appeal is before this Court following the granting of a directed verdict by the Honorable Eugene C. Griffith in favor of the Respondents at the conclusion of all of the evidence.

The action began on May 17, 2010, when Appellant YES and Yancey A. McLeod (“McLeod”) filed a Complaint in the Circuit Court for Richland County, South Carolina. On June 24, 2010, Respondents filed an Answer and a motion to dismiss the claims of McLeod, as an individual. On June 29, 2010, an Amended Complaint was filed, withdrawing McLeod, in his individual capacity, leaving YES as the sole named plaintiff. On July 19, 2010, the Respondents filed an Answer to the Amended Complaint, and asserted various affirmative defenses. The action then proceeded into the discovery phase.

The action was called for trial on February 27, 2012, with the Honorable Eugene C. Griffith presiding. YES presented its case, and at the close of its evidence, the Respondents moved pursuant to Rule 50, SCRPC for a directed verdict. The circuit court denied the motion. The Respondents then presented their defense. At the close of all of the evidence, the Respondents renewed their Rule 50 motion for a directed verdict. The circuit court granted the motion from the bench, and subsequently issued a formal written order setting forth the basis of its decision to direct a verdict for the Respondents (the “Order”). YES moved to alter or amend the Order. The circuit court denied that motion. This appeal followed.

I. The Directed Verdict Should be Affirmed because YES Failed to Present Evidence Showing that the Respondents Proximately Caused it Damages

The subject legal malpractice action stems from a proposed conservation easement¹ transaction that was never completed. (R. pp. 7-8; 12-13). The damages YES sought in the action consisted of the contingent consulting fee it expected to be paid had the transaction been completed. (R. pp. 12-13; p. 518, lines 8-15). YES is a company that coordinates the placement of conservation easements on real property with landowners. (R. p. 8). In the fall of 2007, YES hired the Respondents to provide tax advice to YES regarding a proposed conservation easement on a South Carolina farm owned by James C. Justice II (“Justice”), a resident of West Virginia, or an entity that he majority owned.² (R. pp. 1062-1064). During the time Respondents were providing tax advice pursuant to their engagement agreement with YES, McLeod, YES’s principal,

¹ A conservation easement is a type of charitable contribution by a landowner. By placing a conservation easement, a landowner agrees to impose certain permanent restrictions on the land. The easement is granted to a “qualified organization” approved by the IRS which monitors the activity on the land and enforces the terms of the easement in perpetuity, including against the landowner and subsequent purchasers. The agreed-to restrictions on the land reduce its value, but the landowner receives a tax deduction in the amount of the decrease in value. Thus, a successful conservation easement can lessen a landowner’s tax liability. For a general discussion of conservation easements, see THE ENFORCEABILITY OF EXACTED CONSERVATION EASEMENTS, 36 VT. L. REV. 261 (2011).

² Record title to the subject farm is held in the name of Black River Farms, LLC. (R. p. 645, 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 is 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. (R. p. 645, line 20-p. 648, line 2). YES contends that Justice Family Farms owned Black River Farms by private agreement. (R. p. 649, 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. (Brief of Appellant, p. 7). The actual ownership is unclear. The issue of ownership is unimportant, however, because as discussed herein, the evidence adduced at trial showed that Justice was the ultimate decision-maker, and in complete control.

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received a letter on December 19, 2007, from the Internal Revenue Service (“IRS”). (R. pp. 1071-1075).

The letter notified McLeod that it was investigating his past involvement in conservation easement transactions to determine if he had wrongfully promoted tax avoidance schemes.³ When the Respondents learned of the IRS investigation, they withdrew from representation of YES on December 20, 2007. The Respondents withdrew because they previously represented other landowners on a number of the conservation easements that were under investigation. (R. p. 1077). Accordingly, the Respondents determined that a conflict existed that required them to withdraw from their representation of YES. (R. p. 1077; p. 754, line 20-p. 755, line 23; p. 766, line 21-p. 768, line 18).

After McLeod received notice of the IRS investigation, he immediately hired independent counsel, Crosby Lewis, Esquire, to represent him in the investigation. (R. p. 452, line 20-p. 454, line 17). With that counsel, McLeod held a conference call to notify Justice of the IRS investigation. (R. p. 454, line 18-p. 455, line 15). During that conference call, however, McLeod did not notify Justice that the Respondents had withdrawn from their engagement with YES. (R. p. 455, line 23-p. 456, line 1; p. 546, line 21-p. 547, line 5; p. 548, lines 7-18). Instead, McLeod stated that that he was under investigation by the IRS, and recommended to Justice that the proposed conservation

³ After ten months, the IRS notified Mr. McLeod that it was discontinuing its investigation into whether he was liable for a penalty under IRC §§ 6700 and 6701. McLeod was further advised that the letter “should not be construed to mean that the Internal Revenue Service (IRS) approve[d] [his] conduct; rather, it [was] simply a notice that [the IRS’] investigation ha[d] been discontinued at [that] time.” (R. p. 1078).

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easement transaction be postponed until the IRS investigation was concluded. (R. p. 533, lines 7-25). Justice agreed. (R. p. 455, lines 3-17; p. 455, line 23-p. 456, line 1).

YES's Amended Complaint contained three claims: professional negligence, breach of fiduciary duty, and breach of contract. (R. p. 26, ¶ 31-p. 30, ¶ 59). All three of those claims allegedly arose from the Respondents' withdrawal of their representation of YES on December 20, 2007. (R. p. 26, ¶ 31-p. 30, ¶ 59). YES alleged that the withdrawal proximately caused injury to YES. To support YES's claims, McLeod testified that the IRS investigation had nothing to do with Justice's proposed conservation easement not closing. Rather, McLeod testified that the proposed conservation easement did not close because the Respondents withdrew from their representation of YES. (R. p. 532, line 15-p. 533, line 25; p. 534, line 24-p. 535, line 3). McLeod testified that if the Respondents had not withdrawn, he would have recommended that Justice proceed with the conservation easement. (R. p. 532, line 15-p. 533, line 25; p. 534, line 24-p. 535, line 3). He further testified that he was confident that if he had made such a recommendation to Justice, Justice would have proceeded with the transaction and that it would have closed, resulting in an approximate \$1.6 million dollar consulting fee to YES, depending on the size of the valuation appraisal from the qualified appraiser. (R. p. 518, lines 8-15).

In order to prove its claims, YES was required to submit proof that after Justice learned of the IRS investigation into McLeod's previous work on other conservation easements, if McLeod had recommended that Justice proceed instead of postpone, Justice would have followed McLeod's recommendation and closed on the conservation easement. Evidence of what Justice would have done in this hypothetical scenario was

the crucial link in the causation chain. In a statement to the circuit court regarding this case, 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.

(R. p. 406, lines 14-19). YES never presented the required hypothetical testimony from Justice—that is, YES never presented testimony that Justice would have proceeded with the closing had McLeod made a recommendation to close the conservation easement at the same time it notified Justice of the IRS investigation. Indeed, YES never presented any testimony from Justice. Accordingly, the circuit court properly directed a verdict for the Respondents.

A. The Timeline

In the spring of 2007, McLeod, on behalf of YES, began discussions with Justice about a potentially profitable wetlands mitigation bank involving Black River Farm (the “Farm”). (R. p. 354, line 10-p. 361, line 14; p. 707, lines 4-25). The Farm is a working commercial farm, located on a 4500-acre tract in Clarendon County, S.C. At all times pertinent to this action, the Farm was owned by either Justice or an entity that he majority owned.⁴ (R. p. 268, line 20-p. 269, line 1). Justice is a very wealthy businessman from West Virginia. (R. p. 231, line 8-p. 234, line 22; p. 619, line 8-p. 622, line 17; p. 934, lines 20-23).

As noted, McLeod initially proposed that Justice establish a wetlands mitigation bank on the Farm. (R. p. 354, lines 18-22). A wetlands mitigation bank is generally created when a landowner rehabilitates land that once contained wetlands to its pre-

⁴ See n.2, *supra*.

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development state. McLeod informed Justice that in order to establish a wetlands mitigation bank he would have to flood significant portions of the land.⁵ Because the Farm is a working commercial farm, Justice's son did not like the idea of establishing a wetlands mitigation bank. (R. p. 363, line 15-p. 364, line 4).

On August 3, 2007, McLeod traveled to West Virginia to meet with Mr. Justice and tour another tract of land Justice owned and on which Justice was considering placing a conservation easement. (R. p. 365, line 19-p. 366, line 11). After that meeting in West Virginia, and in light of Justice's son's reluctance to create a wetlands mitigation bank on the Farm, McLeod and Justice began to explore whether a conservation easement could be placed on the Farm. (R. p. 366, line 18-p. 367, line 7). Justice was the ultimate decision-maker regarding the proposed conservation easement transaction. (R. p. 934, lines 20-23; p. 268, line 24-p. 269, line 1; p. 563, line 16-p. 563, line 8; p. 575, line 19-p. 576, line 6; p. 584, lines 5-15; p. 639, line 17-p. 640, line 3).

On or about late October to early November 2007, McLeod contacted Hanlin at RPR for the first time about providing YES with tax advice related to the proposed conservation easement on the Farm. (R. p. 367, lines 22-24; p. 369, lines 5-9; p. 371, lines 4-17; p. 707, line 4-p. 709, line 2). Around that time, Hanlin brought to McLeod's attention an organization known as Community Open Land Trust ("COLT"). Hanlin indicated that he served on the Board of COLT and believed that it might be interested in serving as the qualified donee organization for the proposed conservation easement on the Farm. (R. p. 369, lines 16-21; p. 716, lines 7-17).

⁵ For a general discussion of wetlands mitigation banks, see PROTECTING SOUTH CAROLINA'S WETLANDS IN THE WAKE OF SOLID WASTE AGENCY, 53 S.C. L. REV. 757 (2002).

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McLeod contacted an appraiser, Dr. Darroll Hawkins (“Hawkins”) of Highview Engineering, about submitting a proposal for the requisite appraisal of the Farm. On November 16, Hawkins transmitted a proposal to McLeod describing the information he needed to complete the appraisal, the time that would be required, and the cost of the appraisal. (R. pp. 1079-1081).

On or about November 26, 2007, McLeod forwarded to Justice a Consulting Services Agreement (“the Draft Agreement”). (R. pp. 1050-1059). The proposed parties to the Draft Agreement were James C. Justice, Justice Family Farms, LLC and Natural Resource Protection & Mitigation, LLC. (R. pp. 1052; 1058). The Draft Agreement referred to James C. Justice, individually, and Justice Family Farms, LLC collectively, as the Owners. (R. p. 1052) (stating “hereinafter collectively referred to as ‘Owner’”). The opening “Whereas” clause of the Draft Agreement stated that “Owner is interested in exploring opportunities for conservation of certain real estate” (R. p. 1052). The Draft Agreement required Justice to first pay a \$50,000 “non-refundable retainer” and then 5% of the conservation value of the property. (R. pp. 1052-1053). Consistent with the definition of Owner and the proposed parties, the Draft Agreement contained separate signature blocks for both Justice and Justice Family Farms, LLC. (R. p. 1058). Neither Justice nor an officer of Justice Family Farms, LLC ever signed the Draft Agreement, and the \$50,000 non-refundable retainer was never paid.⁶ (R. p. 558, line 16-p. 559, line 8).

Notwithstanding the absence of the \$50,000 retainer and the un-executed copy of the Draft Agreement, YES and the Respondents continued their work on the creation of a

⁶ 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 abandoned. (R. p. 1069).

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conservation easement on the Farm. On December 5, 2007, Hanlin formalized his representation of YES in the engagement letter. (R. pp. 1062-1064).⁷

Then, on December 19, 2007, McLeod's administrative assistant, Mary Mohr ("Mohr"), opened a letter from the Internal Revenue Service that was addressed to McLeod. (R. pp. 1071-1075). 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.**

(R. p. 1071) (emphasis added).

The following day, Mohr e-mailed the letter from the IRS to Hanlin stating, "I am attaching a very serious letter from the IRS received in the mail yesterday—Debra and I have reviewed, but, and this is important—I have not shown this to Yancey [McLeod] and unless you tell me otherwise, I do not want him [McLeod] to see this, or know about this, until after Christmas." (R. p. 1070). Hanlin promptly called Mohr and told her to show the IRS letter to McLeod. (R. p. 752, line 2-p. 753, line 7; p. 755, line 24-p. 756, line 5).

That same day, Hanlin discussed with management at RPR the implication of the IRS letter upon his current representation of YES and his past representation of the

⁷ 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." (R. p. 1062). 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" (R. p. 1062).

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landowners whose easements were under investigation. (R. p. 756, lines 5-11; p. 757, line 14-p. 758, line 17; p. 760, line 25-p. 761, line 12). After those discussions with RPR management, Hanlin informed McLeod that he and RPR were withdrawing from further representation of YES. (R. p. 760, lines 11-24). On December 21, 2007, Hanlin memorialized his withdrawal in a letter to McLeod. (R. p. 1077; p. 762, lines 4-10). In pertinent part, Hanlin's letter stated that "the IRS notice which you [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." (R. p. 1077).

On December 24, 2007, McLeod telephoned Justice in West Virginia to inform him of the IRS investigation, and to recommend that the project be postponed. Also in attendance in West Virginia for the telephone call were David Harrah (Justice's accountant) and Stephen Ball (Justice's in-house lawyer). Harrah testified that McLeod never mentioned that the Respondents had withdrawn from their representation of YES. (R. p. 619, lines 2-4). McLeod's testimony mirrored that of Harrah. McLeod testified that on the December 24, 2007, telephone call he never told Justice or Harrah that the Respondents had withdrawn. (R. p. 532, line 21-p. 533, line 2). Harrah also testified that during that telephone call, 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." (R. p. 618, line 22-p. 619, line 1). Accordingly, the proposed conservation easement on the Farm was postponed.⁸

⁸ In defense of the IRS investigation, McLeod also retained the services of Mr. Cary H. Hall, Jr., Esquire ("Hall") (Hall's first name was misspelled "Kerry" in the trial transcript). Hall's testimony was introduced at trial through his deposition. Hall

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On December 27, 2007, McLeod sent an e-mail to Justice referencing their call on December 24, advising 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. (R. pp. 1083-1084). Also on December 27, McLeod e-mailed Sue Green of COLT informing her that "Mr. Justice has decided to postpone the project." (R. p. 466, line 22-p. 467, line 14). The following day, McLeod e-mailed the appraiser, Hawkins, as well as his business partner in NRPM, Jim Lewis, informing them that "Jim Justice has decided to postpone the conservation project on the Black River tract in Clarendon County, SC." (R. p. 1085; p. 470, lines 6-21). McLeod advised Hawkins and Lewis to send their final invoices directly to Harrah. (R. p. 1085; p. 470, lines 6-21). The proposed conservation easement on the Farm was never revived.

B. Justice was the Decision Maker

YES's damages claim in this case is based upon terms found in the un-executed Draft Agreement. That agreement contemplated that if the conservation easement were closed and used for a tax deduction, YES would be entitled to 5% of the conservation value of the property. Evidence adduced at trial showed that Justice stated that the proposed 5% commission should be reduced to 4%. (R. p. 624, lines 8-19). There is also trial testimony that Justice instructed YES to begin work on the proposed conservation easement project. (R. p. 366, line 18-p. 367, line 7; p. 548, line 19-p. 549, line 8). Viewing the evidence in the light most favorable to YES, evidence was introduced at trial tending to show that YES and Justice entered into an oral contract for YES to provide preliminary services related to the proposed conservation easement. Pursuant to that oral

testified that the proposed Justice conservation easement was "abandoned because of [the] IRS letter." (R. p. 691, line 22-p. 692, line 4; p. 1082).

contract, YES and McLeod looked to Justice to make every decision regarding the proposed conservation easement. For that reason, YES was required to present the testimony of Justice as to what he would have done if YES had suggested that he consummate the proposed conservation easement, notwithstanding the IRS investigation.

The following trial testimony from various witnesses conclusively shows that Justice was the decision-maker.

1. McLeod's Testimony

McLeod acknowledged repeatedly during his testimony that every decision related to the conservation easement would ultimately be made by Justice:

Q: Isn't it also true with respect to the conservation easement that was proposed for the Black River Farm Mr. Justice had no obligation, even if he had signed one of your consulting agreements he had no obligation to do it, isn't that right?

A: Sure.

(R. p. 563, lines 16-22).

Q: So there is also a risk that he might at the very last minute just decide, "You know what, I don't want to do it"?

A: Absolutely, that would be a possibility.

Q: That would have been his right under this agreement, right?

A Of course.

...

Q: Just as you didn't give any guarantee to Mr. Justice of what might be his actual charitable deduction, right?

A: Well, I wasn't expecting him to make the final decision to execute these documents and record it and place a permanent easement on his property without having some idea what the expected charitable gift would be.

(R. p. 564, lines 2-8; lines 12-19).

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Q: All right. Oh, the closing date was December 31st?

A: Everything was to be done by December 31st in order for Mr. Justice to have the charitable gift in the calendar year 2007.

(R. p. 569, lines 12-16).

Q: And even up until the 12/31 this is a deal that just might not have gone forward, no matter what, whether Mr. Hanlin was involved or anybody else, right?

A: Well, that would have been his call for sure.

Q: It would have been Mr. Justice's call?

A: Right

(R. p. 575, line 25-p. 576, line 6).

Q: All right. And in any event, Mr. Justice would have to have input into those draft restrictions, right, or whatever restrictions you put in the easement, right?

A: Well, he would ultimately have to approve the document but I think he trusted me to put in the language on the reserve right to accomplish his stated objective of keeping it as a farm.

Q: You would have sent them to Mr. Justice for review?

A: Of course.

(R. p. 584, lines 5-15).

2. Miller's Testimony

James T. Miller, the Rule 30(b)(6) designee and treasurer for Justice Family Farms, LLC, testified at trial by videotaped deposition. (R. p. 881, lines 9-18). In his deposition he stated that he had worked for Justice for 27 years. (R. p. 892, lines 4-5). In unequivocal terms, Miller testified that Justice was the ultimate decision-maker:

Q: Mr. Justice, II, is the ultimate decision maker in these companies. Correct?

A: He's the majority owner, that's correct, and the ultimate decision maker.

Q: The buck stops with him, so to speak?

A: That's correct.

(R. p. 934, line 20-p. 935, line 2).

3. Harrah's Testimony

Harrah, the former in-house accountant to Justice, testified at trial. (R. p. 605, line 22-p. 606, line 2). Harrah was designated by Justice to oversee the work on the proposed conservation easement. (R. p. 608, lines 9-24). Throughout his questioning, he consistently referred to Justice as the person that would ultimately decide on matters pertaining to the proposed conservation easement. The following transcript citations from the trial make this very point.

Q: Mr. Pendarvis mentioned the December 24 phone call. Describe for the jury how Mr. Justice reacted when he was told that the easement was not going to go forward?

A: First of all I didn't recall that Mr. Justice was part of the phone call but I think my impression is – well, it is not my impression, it's the way it would be. If Jim wanted to go through and have this done by 12/31/2007 he would have done it regardless of what I thought, Mr. McLeod thought, if he thought that is what he wanted to do he would have done it.

Q: And tell the jury why you believe that about Mr. Justice.

A: Well, I mean, he's the guy that makes the decisions and whenever he sold his company he went completely opposite of the advice of Goldman Sachs and did it the way he wanted to do it. If he wants to do it he'll do it, that is just the way Jim [Mr. Justice] is.

(R. p. 639, line 10-p. 640, line 3).

THE WITNESS: I think, I guess the best thing that I can say in that regard is, you know, it was my understanding that these documents were being prepared to close on December 31, okay? If on December the 24 someone had come in like Mr. McLeod did and said, "I don't think I can in good conscience go forward with this," if he had said there were some other reason, "I physically can't do it, I have some kind of an issue," and Jim really wanted to do that he would have closed that transaction

BY MR. PENDARVIS:

Q. But up until that point it is your understanding Mr. Justice was continuing to proceed with this transaction?

A. Well, Mr. Justice saw the same documents that I did and knew the dating that was put in those documents but I don't know that we hadn't seen some of these, what the easement meant, what the restrictions meant in black and white, I guess, on that particular property, so that would be a decision that he would have made after he saw that and understood what that really meant to him.

(R. p. 635, line 17-p. 636, line 1; p. 636, lines 7-18).

Q. Now, when we, you were telling me back in your deposition in December that, and you testified that you understood that the goal was to finish this conservation easement by the end of 2007?

A. Well, what I said, the goal that Mr. McLeod was working on was to do that and for the various reasons that he had, I'm just not sure that, I'm not sure I understood that was a drop dead date for Jim [Mr. Justice].

(R. p. 631, line 20-p. 632, line 4).

4. Professor Greg Adams' Testimony

Professor Greg Adams ("Adams") testified as YES's expert witness regarding the professional duties owed by a lawyer. During his cross-examination, he agreed with all of the testimony detailed above:

Q: This property, you don't deny that the property involved was owned by Mr. Justice, correct, or some corporate entity?

A: One of his entities, right.

Q: But there is no denying that Mr. Justice was the final decision maker, right?

A: Of course.

(R. p. 268, line 20-p. 269, line 1).

The evidence introduced at trial established that Justice was the ultimate decision-maker with regard to the proposed conservation easement. Accordingly, YES was

required to affirmatively present evidence that, notwithstanding the IRS investigation, if McLeod had recommended proceeding with the conservation easement, Justice would have done so.

C. The Circuit Court's Ruling

At the close of all of the evidence, the Respondents renewed their Rule 50, SCRCP motion for a directed verdict. Following argument by counsel for the parties, the circuit court ruled from the bench. The court noted 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.

(R. p. 869, line 20-p. 870, line 7).

After the circuit court ruled from the bench, it memorialized its ruling in a formal written Order. (R. pp. 5-14). In that Order the circuit court 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 Justice during the telephone conference on December 24, 2007 from 'postpone' to 'proceed.'" (R. p. 11). 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." (R. p. 11). The 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.” (R. pp. 11- 12). Accordingly, the 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.” (R. p. 12). From that line of reasoning, the circuit court correctly concluded that YES’s failure to present evidence regarding proximate cause—that is, what Justice would have done—required it to grant a directed verdict. (R. p. 12).

The record of this trial is silent as to what Justice’s decision would have been if he had received a recommendation from McLeod to proceed with the conservation easement, notwithstanding the IRS investigation. For that reason, the circuit court properly issued its Order granting a directed verdict.

D. Proximate Cause and the Standard of Proof

The central question in this appeal is whether YES presented a question of fact on the issue of proximate cause. South Carolina courts routinely decide issues of proximate cause, as a matter of law. *E.g., Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 288, 701 S.E.2d 742, 748-49 (2010) (affirming summary judgment and finding that legal malpractice claim failed “for lack of proximate cause”); *McKnight v. S.C. Dept. of Corrections*, 382 S.C. 380, 386-90, 684 S.E.2d 566, 568-71 (Ct. App. 2009). As noted above, YES’s Amended Complaint enumerated three claims: (1) professional negligence, (2) breach of fiduciary duty, and (3) breach of contract.

1. Professional Negligence

The professional negligence claim requires a showing of: (1) the breach of a duty by RPR and Hanlin; (2) damages to YES; and (3) that the breach **proximately caused** the

damages to YES. *Smith v. Haynsworth, Marion, McKay & Guerard*, 322 S.C. 433, 435 n.2, 472 S.E.2d 612, 613 n.2 (1996) (emphasis added).

2. Breach of Fiduciary Duty

In order to establish a claim for breach of fiduciary duty, a plaintiff must show: (1) the existence of a fiduciary duty; (2) a breach of that duty owed to YES by the Respondents; and (3) damages proximately resulting from the wrongful conduct of the Respondents. *RFT Mgmt. Co. v. Tinsley & Adams, LLP*, 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (Ct. App. 2012) (emphasis added). In South Carolina, in a legal malpractice action, a claim for breach of fiduciary duty arising out of the same facts is duplicative of the legal malpractice claim. *Id.* at 337, 732 S.E.2d at 173 (holding that where breach of fiduciary duty claim arises out of the same facts as legal malpractice claim, it is duplicative of legal malpractice claim).

3. Breach of Contract

A breach of contract claim requires a showing of: (1) the existence of the contract; (2) its breach; and (3) the damages caused by such breach. *Branch Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). “The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach.” *Id.* (citation omitted) (emphasis added).

4. Proximate Cause

The standard of proof for each of YES’s claims required it to affirmatively present evidence of proximate cause. “Ordinarily proximate cause is a question for the jury, but when the evidence is susceptible to only one inference, it becomes a matter of law for the court. *McKnight*, 385 S.C. at 387, 684 S.E.2d at 569. “Proximate cause is the

efficient or direct cause; the thing that brings about the complained of injuries.” *Id.* at 387, 684 S.E.2d at 569. Proximate cause requires both causation in fact and legal cause. *Id.* at 386-87, 684 S.E.2d at 569.

“Causation in fact is demonstrated by establishing the plaintiff’s injury would not have occurred ‘but for’ the defendant’s [conduct]” *McKnight*, 385 S.C. at 386-87, 684 S.E.2d at 569. YES was required to show that but for the withdrawal of the Respondents, McLeod would have recommended that Justice close on the proposed conservation easement and Justice would have closed on the conservation easement. In order to prove that Justice would have gone forward, YES was required to present the testimony of Justice. As the circuit court stated in its written Order granting a directed verdict, YES was required to show 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.” (R. p. 12).

The circuit court correctly applied the law in directing a verdict for the Respondents on this issue. During the oral motion for reconsideration, the circuit court noted that the testimony showed “consistently [that] 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.’ (R. p. 872, lines 9-12). The court continued, “I can’t figure out, 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” (R. p. 872, lines 12-17). The circuit court correctly determined that YES failed to prove that Respondents’ withdrawal proximately caused its alleged damages.

5. **Breach of Fiduciary Duty Does Not Have a Lessened Standard of Proof**

In an effort to avoid the proximate cause requirement, YES argues in its brief that a claim for breach of fiduciary duty has a lessened standard of proof—that is, that it did not need to present evidence of proximate cause on that claim. (Appellant’s Brief, at pp. 19-21). This issue was raised for the first time in Appellant’s Rule 59 motion to reconsider the Order granting a directed verdict. (R. pp. 990-1035). Accordingly, it is not preserved for appellate review. Issue preservation aside, it is not the law of this state.

i. **Issue Preservation**

A party may not use a post-trial motion to reconsider to raise an argument for the first time. *Kiawah Property Owners Group v. Public Service Comm’n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004). Rather, the party is required to raise the issue to the circuit court before it makes a ruling. See *Queens Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006). During trial, the Appellant had two opportunities to advance its theory that damages for breach of fiduciary duty contain a lessened standard of proof: (1) in opposition to the Respondents’ Rule 50 motion at the close of YES’s case-in-chief, and (2) in opposition to the Respondents’ Rule 50 motion at the close of all of the evidence. The Appellant did not advance this legal theory at the proper time.

In fact, during argument on the first Rule 50 motion, Appellant offered a different argument than the one advanced in its brief before this Court:

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.

(R. p. 684, lines 15-24). During the argument on the second Rule 50 motion, the Appellant did not raise this issue. (R. p. 839, line 16-p. 869, line 14). The first time that the Appellant raised this issue was in its Rule 59, SCRCF motion to reconsider the Order granting a directed verdict. (R. pp. 990-1035). Accordingly, this issue is not preserved for appellate review. *Kiawah Property*, 359 S.C. at 113, 597 S.E.2d at 149.

ii. Appellant's Argument is Not the Law

YES argues that in South Carolina, a plaintiff need only prove that the defendant's conduct was a "substantial factor" in bringing about any loss caused by a breach of fiduciary duty, not that the breach had to be the "but-for" proximate cause of the loss. In other words, YES claims that the circuit court erred in requiring it to prove that the Respondents' alleged breach of fiduciary duty proximately caused the proposed conservation easement deal not to close. To support this argument, YES relies on one case from South Carolina: *Smith v. Hastie*, 367 S.C. 410, 417, 626 S.E.2d 13, 17 (Ct. App. 2005). However, that case does not stand for the proposition YES claims that it does.

In *Smith v. Hastie*, the trial court granted summary judgment in favor of an attorney on the plaintiff's causes of action, among which was a claim for breach of fiduciary duty. In that case, Smith accused her husband's attorney, Hastie, of breaching his fiduciary duty to her when he advised that Smith and her then-husband enter into and contribute property to a family limited partnership. *Id.* at 413, 626 S.E.2d at 15. The allegations centered on the fact that the couple had just unsuccessfully ended their

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marriage counseling sessions and were on the brink of separation. *Id.* at 413, 626 S.E.2d at 14-15.

The court of appeals reversed the trial court's grant of summary judgment, relying on, among other things, the affidavit Smith presented from another estate planning attorney. *Id.* at 419, 626 S.E.2d at 18. In that affidavit, the attorney opined that Hastie should have advised Smith of the financial ramifications she would suffer in the event of a divorce. Accordingly, the court of appeals found some evidence to support Smith's claim that summary judgment was improper. In so finding, the court quoted from *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004), and explained, "One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." *Smith*, 367 S.C. at 417, 626 S.E.2d at 17 (quoting *Moore*, 360 S.C. at 253, 599 S.E.2d at 473).

Based on that quote from *Smith*, YES asserts that South Carolina employs a less stringent causation standard in breach of fiduciary duty cases such that a plaintiff need not prove that the breach of duty was the proximate cause of the damages alleged. YES argues a lesser standard applies, which it describes as the "resulting from" standard or "substantial factor" standard. Not only does this isolated quote from *Smith* **not** create a lesser standard, but the very case from which the *Smith* Court lifted the quote specifically describes the causation standard South Carolina courts employ with regard to breach of fiduciary duty claims: "In a breach of fiduciary case, the plaintiff is entitled to damages for harm **caused by** the breach of a fiduciary duty owed to him or her. Damages in an action for breach of a fiduciary duty are those **proximately resulting from** the wrongful conduct of the defendant." *Moore*, 360 S.C. at 253, 599 S.E.2d at 473 (emphasis added);

accord *RFT Mgmt. Co. v. Tinsley & Adams, LLP*, 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (Ct. App. 2012).

YES cites to no other South Carolina authority for its improper legal proposition. To the extent other jurisdictions may have a different standard, those standards are not the law of South Carolina.

II. The Rule 30(b)(6) Testimony of Miller

A. Miller's Testimony Did Not Create a Question of Fact Regarding Proximate Cause

Miller testified as the corporate designee for the deposition of Justice Family Farms, LLC.⁹ As the corporate designee, Miller's testimony bound Justice Family Farms, LLC. At a Rule 30(b)(6) deposition, the "corporation appears vicariously through its designee." *Int'l Assoc. of Machinists and Aerospace Workers v. Werner-Masuda*, 390 F. Supp. 2d 479, 487 (D. Md. 2005). For that reason, the testimony "represents the knowledge of the corporation." *Id.* The Rule 30(b)(6) deposition did not bind Justice, individually. Accordingly, the Justice Family Farms, LLC's deposition could not serve as a substitute for Justice's required testimony.

In YES's brief before this Court, it acknowledges that the oral contract was between YES and Justice: "Mr. McLeod and James C. Justice, II (Mr. Justice) entered into an agreement in October 2007 whereby Mr. McLeod's company, YES, would coordinate" the placement of a conservation easement. (Brief of Appellant, p. 6). This acknowledgement is fatal to YES's effort to utilize the Rule 30(b)(6) deposition of Miller

⁹ As noted in n.2 *supra*, the ownership of the Farm was never conclusively established at trial. But even assuming, *arguendo*, that Justice Family Farms, LLC owned the Farm, as discussed herein and below, because Justice was a party to the oral contract and the ultimate decision-maker, YES was required to present his testimony. For that reason, the testimony of Miller did not create a factual question regarding proximate cause.

to speak for Justice. Justice was the other party to the agreement; accordingly, without his testimony YES was unable to create a question of fact regarding proximate cause. There is not a scintilla of evidence in the record of this trial as to what Justice would have done.

Notwithstanding YES's acknowledgment that the oral agreement was between YES and Justice, it also endeavors to argue that Justice Family Farms, LLC was a party to the oral agreement (Brief of Appellant, Statement of the Case, p. 3) and that the company's testimony alone was sufficient to create a question of fact. But even assuming it was a party, it was only a co-party. And when a contract contains two parties on one side, the assent of each is required to enforce the contract. *See Dean v. Dean*, 229 S.C. 430, 93 S.E.2d 206 (1956) (noting that where multi-party contract required signatures from all parties, it could not be enforced when one party did not sign). Accordingly, for YES to prove its case it was required to present the testimony of Justice.

B. The Intent of Justice Family Farms, LLC is Not at Issue

This appeal has nothing to do with Justice's or Justice Family Farms, LLC's intent to work toward the completion of a proposed conservation easement. At trial, YES presented testimony to the general effect that Justice agreed for YES to take the preliminary step for Justice to later determine whether to place a conservation easement on the Farm. (R. p. 548, line 19-p. 549, line 8). In its brief, YES argues that Justice and Justice Family Farms, LLC intended to place a conservation easement on the Farm. (Brief of Appellant, pp. 8-9, 17). For example, on page 17 of YES's brief it states that "testimony regarding Justice Family Farms [LLC's] intent and Mr. Justice's intent to close on the conservation easement was sufficient to send the proximate cause issue to the jury." (Brief of Appellant, p. 17). But the central question of this appeal is not intent;

it is whether Justice would have agreed to place a conservation easement on the Farm, notwithstanding the IRS investigation, if McLeod had made that recommendation. The record in this case, however, is void as to what Justice would have done in that situation. Accordingly, the circuit court properly granted a directed verdict for the Respondents.

C. The Circuit Court Properly Excluded the Hearsay Portion of Miller's Testimony

During the deposition of Justice Family Farms, LLC's Rule 30(b)(6) deposition, the designee, Miller, was asked to respond to a hypothetical question.

Q. Thank you. Now, I want you to make an assumption to answer the next question I'm going to ask you and the assumption is this, assume for the purposes of this coming question that -- notwithstanding the IRS letter, that during the call on December 24th, 2007, Yancey McLeod recommended that Justice Family Farms move forward with the easement, assume that, and he made a recommendation to move forward with the easement. Using that assumption, was it more likely than not that Justice Family Farm would have proceeded with the conservation easement?

MR. LEONARDI: Object to form.

A. Yes.

(R. p. 909, lines 2-15). During the trial of this case, YES sought to introduce the above testimony, and the Respondent renewed its objection. Each side then presented argument regarding its admissibility. (R. p. 650, line 19-p. 683, line 1). The circuit court sustained the Respondents' objection and ruled that the above colloquy could not be presented for the jury's consideration. The circuit court properly excluded the above colloquy.

The testimony from Miller, as to what Justice would allegedly have done had he received a different recommendation from McLeod, was hearsay and was properly excluded. Rule 801, SCRE. Miller testified in his deposition that he had one

conversation with Justice in preparation for his deposition as Justice Family Farms, LLC's Rule 30(b)(6) designee and as part of that conversation, allegedly learned something of Justice's intent regarding the proposed conservation easement. (R. p. 922, lines 4-12). The purpose for which YES offered this testimony—to establish Justice's intent—is classic hearsay. That is, the alleged statements to Miller by Justice are out of court statements offered to prove the truth of the matter asserted (*i.e.*, that Justice intended to go forward with the proposed conservation easement). *See* Rule 801(c), SCRE (defining hearsay).¹⁰ No exception to the hearsay rule salvages this testimony.¹¹

The fact that Miller was serving as Justice Family Farms, LLC's Rule 30(b)(6) designee at the time of this testimony is irrelevant to the hearsay analysis. “[T]he fact that a witness is a 30(b)(6) witness does not create a hearsay exception allowing him 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); *see also 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”). This rule “holds especially true when there is no independent evidentiary basis that might otherwise prove the truth of the hearsay, such as corroborating testimony

¹⁰ Justice's statements to Miller are not a prior statement by a witness testifying at trial or an admission of a party-opponent. Accordingly, the provisions of Rule 801(d)(1) and (2), SCRE, do not apply.

¹¹ Specifically, exceptions (1) through (3) do not apply because Justice's statements were not made contemporaneously with the events mentioned in the statement (*i.e.* consideration of the easement). Exception (4) does not apply because the statements were not made for purposes of medical diagnosis or treatment. Exceptions (5) through (18) do not apply because the statements are not records or recordings. Exceptions (19) through (21) do not apply because the statements did not address reputation. Exceptions (22) and (23) do not apply because the statements are not judgments.

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from the hearsay declarant.” *Cooley*, 693 F. Supp. 2d at 792; *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). “Numerous courts have rejected hearsay evidence by a corporate deponent when there is no additional evidence to support the statements.” *Century Pacific, Inc. v. Hilton Hotels Corp.*, 528 F. Supp. 2d 206, 215 n.5 (S.D.N.Y. 2007) (citing *Digene Corp. v. Ventana Med, Sys., Inc.*, 316 F. Supp. 2d 174, 181 n. 10 (D. Del. 2004); *Efferson v. Kaiser Aluminum & Chem. Corp.*, 816 F. Supp. 1103, 1116 n. 31 (E.D. La. 1993)).

Here, there is no other evidence to corroborate that Justice would have gone forward with placing the conservation easement had defendants not withdrawn from representation of YES. YES’s sole evidence on this critical point is Miller’s hearsay statement of Justice’s alleged intent. The Respondents had no ability to cross-examine Justice regarding the truth of his intent as allegedly expressed in this private conversation. Every indicia of hearsay is present. *See Hall v. Fedor*, 349 S.C. 169, 175-76, 561 S.E.2d 654, 657 (Ct. App. 2002) (noting that where plaintiff’s deposition testimony concerning what a third party told him about settlement negotiations, which was offered to establish that plaintiff could have recovered more absent alleged malpractice by defendant attorney, was hearsay that was inadmissible).

In order to establish the required proximate cause question of fact, YES was required to present testimony *from Justice*, as a party to the oral agreement, and as the ultimate decision-maker. Only Justice himself could testify as to what he would or would not have done if McLeod had advised him that he was under investigation by the IRS, but still recommended proceeding with the conservation easement. YES recognized this

testimony from Justice was required, but improperly attempted to circumvent this requirement by introducing Miller's hearsay testimony. The circuit court properly excluded this inadmissible hearsay testimony.

1. The Circuit Court's Ruling

Following the argument of counsel, during which time the Respondents detailed the inadmissibility of the subject evidence based upon the reasoning and cases discussed above, the circuit court expressed concern over the above testimony. YES notes that the circuit court took an individual knowledge approach, versus a corporate knowledge approach. (R. p. 673, lines 13-24). Nevertheless, the circuit court did not specifically rule on this objection at that point in the proceeding. Rather, following subsequent argument by counsel the circuit court finally ruled on the objection. The second ruling involved this testimony: "I'm not going to allow, I have already ruled, page 36, lines 10 through 23, and I'm not going to allow the question on page 34, 2 through 15." (R. p. 681, line 24-p. 682, line 1) (emphasis added). From that ruling it is not clear that the circuit court rested its decision upon its initial individual knowledge versus corporate knowledge reasoning. YES did not ask the Court for clarification. (R. p. 682, lines 23-24).

As discussed above, the subject testimony was properly excluded because it was inadmissible hearsay testimony. To the extent the circuit court excluded the testimony for a different reason, the same correct result was reached: exclusion of the testimony. Accordingly, any error complained of by YES is harmless error. See *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 498, 732 S.E.2d 205, 213 (Ct. App. 2012) (noting that "whatever doesn't make any difference, doesn't matter").

III. The Circuit Court Correctly Excluded Testimony of Other Projects

During McLeod's direct examination, his counsel sought to elicit testimony regarding three other projects that McLeod was working on during the same timeframe he was working on Justice's conservation easement. (R. p. 390, line 15-p. 391, line 7). The Respondents responded by asking the circuit court to take up a legal matter outside the hearing of the jury. The circuit court granted that request. (R. p. 391, lines 8-11).

The Respondent then allowed Mr. McLeod to provide a proffer.

THE COURT: Leave Mr. McLeod there for a moment in case you want to proffer some testimony.

All right, for purposes of the record, Mr. Pendarvis, go ahead and ask your next question, then I want to hear the objection, I want to see where this is going.

MR. PENDARVIS: The question would be, Mr. McLeod, was Yancey Environmental Solutions [YES] working on other conservation easement matters in the November, December time period, 2007?

At a late point in the testimony, I'm trying to keep this chronological for the jury, but at a point in time in late December there is evidence these other easements were recorded, the easements went through and Mr. McLeod - -

Q. Let's fast forward to that point. Mr. McLeod, you received, this is in context of after having received the IRS letter, after Richardson Plowden had withdrawn, Mr. Hanlin had withdrawn, did you communicate to your other clients any information about the IRS letter?

A. I called all four clients with whom I was working on conservation projects in the year 2007 after receiving the IRS letter and told each of them about the letter.

Q. Did any of those four easements close in the year 2007?

A. Three of them did.

Q. And which easement did not close in the year 2007?

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A. Mr. Justice.

Q. Did you relay the same information about the IRS letter to all four of those landowners?

A. I did.

Q. And notwithstanding the information about the IRS letter, did the other three easements close?

A. Yes, sir.

Q. I would like to show you a copy of, I have a couple, the letters that memorialize recording or recorded copies of the easements.

(R. p. 391, line 22-p. 393, line 12).

Following this proffer, the Respondents articulated the basis of their objection.

In all of those cases those three landowners or tax attorneys or whoever he talked to, you know, for whatever reasons they may have had, including they may have been done, their work may have all been done, I don't know, but Mr. Hanlin was not involved in any of those transactions, so what the jury is being asked to speculate about is, "Well, we know that three other people in three separate deals with separate lawyers, separate facts and circumstances made their decision to go ahead and record, that means Mr. Justice would have," and that is, you [know], Your Honor, that is not admissible to show what Mr. Justice would have done.

(R. p. 394, line 24-p. 395, line 12).

Following the counter argument of YES, the circuit court decided to exclude testimony of the other projects on which McLeod worked in 2007. The basis for his ruling was as follows:

I think that under Rule 403, that although relevant, this is going to create confusion to the jury. That is what I think. It is too much information.

....

[I]t is my ruling that we not bring those other three deals into this trial because of the, my belief is the relevance would be outweighed by the confusion and misleading the jury as to these decision makers that had to make such an unusual type conservation easement.

(R. p. 427, line 2-p. 428, line 2).

A. The Circuit Court Properly Exercised its Discretion

The trial court properly exercised its discretion in excluding the evidence. ““An appellate court reviews Rule 403 rulings pursuant to an abuse of discretion standard and gives great deference to the trial court.”” *Johnson v. Horry County Solid Waste Authority*, 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2012) (citing *Lee v. Bunch*, 373 S.C. 654, 658, 647 S.E.2d 197, 199 (2007)). ““A trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.”” *Id.* at 534, 698 S.E.2d at 838 (citing *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)). The trial court determined that introducing evidence of the other three projects would likely confuse or mislead the jury. Accordingly, the trial court properly exercised its discretion and ruled to exclude testimony on YES’s other three projects.

B. YES Did Not Make an Adequate Proffer of the Excluded Testimony to Challenge the Circuit Court’s Decision

“An alleged erroneous exclusion of evidence is not a basis for establishing prejudice on appeal in the absence of an adequate proffer of evidence in the court below.” *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990). After the Respondents objected to YES’s line of questioning, the circuit court allowed McLeod to make a proffer. As noted above, McLeod testified that he worked on four conservation easements during 2007, that he told all of the landowners about the IRS

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investigation, and that all of the landowners closed except for Justice. The information McLeod provided to the circuit court did not create a sufficient basis for establishing prejudice.

The Respondents argued to the circuit court that YES should not be allowed to introduce the other transactions because of their dissimilarity to the proposed conservation easement on the Farm. The objection related to the well-established rule of other incidents evidence. In South Carolina, “evidence of similar accidents, transactions, or happenings is admissible . . . where there is some special relation between the [transactions] tending to prove or disprove some fact in dispute.” *Watson v. Ford Motor Co.*, 389 S.C. 434, 454, 699 S.E.2d 169, 179 (2010). “A plaintiff bears the burden of demonstrating the other [transactions] are ‘substantially similar to the [transaction] at issue.’” *Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 77, 735 S.E.2d 650, 657 (2012).

In order to introduce such evidence, the proponent “must present a factual foundation for the court to determine that the other [transactions] were substantially similar to the [transaction] at issue.” *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). In making the substantial similarity analysis, the Court must analyze four factors: (1) the [transactions] are similar; (2) the alleged defect is similar; (3) causation related to the defect in the other incidents; and (4) exclusion of all reasonable secondary explanations for the cause of the other incidents. *Watson*, 389 S.C. at 543, 699 S.E.2d at 179. The substantially similar standard exists because other incident evidence “has the potential to be ‘highly prejudicial.’” *Branham v. Ford Motor Co.*, 390 S.C. 203, 230, 701 S.E.2d 5, 19 (2010).

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YES's proffer made no effort to set forth a proper foundation to show that the other projects were substantially similar to the proposed conservation easement on the Farm. In an effort to remedy the failure to provide an adequate proffer, YES cites the deposition testimony of McLeod in the brief it filed with this Court. (Appellant's Brief, pp. 34-35). The testimony McLeod provided in his deposition has no bearing upon the correctness of the circuit court's decision. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (noting that issue preservation rules exist to "enable the lower court to rule properly after it has considered all relevant facts, law, and arguments'") (quoting *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). Accordingly, YES's inclusion of the deposition transcript is not proper, and the court is not obligated to review that testimony in its analysis of this issue.

Inadequate proffer in the trial court aside, the deposition transcript of McLeod does not even provide this Court with the proper factual foundation to determine whether the other projects, in 2007, were substantially similar. For example, McLeod does not state whether the other projects were of the same magnitude as the proposed conservation easement on the Farm. He does not state whether the other projects had already been completed. Accordingly, YES has failed to demonstrate prejudice. *Greenville Memorial*, 301 S.C. at 244, 391 S.E.2d at 547.

IV. The Circuit Court Correctly Excluded Its Consideration of the Inadmissible Hearsay Testimony Provided by Adams During Its Decision to Grant a Directed Verdict

YES argued that the circuit court erred by not considering Professor Adams' re-statement of Miller's re-statement of Justice's alleged statement that he was "in the boat." Adams provided this testimony during his cross-examination:

I think all of the testimony in this case has shown, with not a single contradiction, that [Mr. Justice] was firmly committed. He, as the testimony said, he was in the boat, he had made that decision, he was going to do it, when the package of documents came for the closing he was going to sign them, they were going to be recorded.

(R. p. 266, lines 15-21). The circuit court properly excluded the above testimony from its consideration of the directed verdict motion because it was inadmissible hearsay relied upon by an expert. The Respondents were not required to enter a contemporaneous objection or a motion to strike.

A. The Testimony is Hearsay

The subject testimony is hearsay. Both parties agreed on that very point. In trying to sort out what testimony had been redacted from Miller's video-taped deposition, the circuit court queried:

THE COURT: Did you all agree on all the hearsay stuff, that has all been eliminated, redacted from the video, it is clear Mr. Justice told him?

MR. PENDARVIS: That part is out. The part, "I'm in the boat," that little section is out, it's not in the tape.

(R. p. 680, lines 14-20).

B. The Hearsay Statement by Adams Was Not Admissible for Its Truth

The use of hearsay by an expert is not admitted to prove the truth of the hearsay asserted; rather, pursuant to Rule 703, SCRE, it is admitted to explain the basis of an expert witness's opinion. *Jones v. Doe*, 372 S.C 53, 62-63, 640 S.E.2d 514, 519 (Ct. App. 2006). The *Jones* Court explained that:

[t]he expert may testify to evidence even though it is inadmissible under the hearsay rule, but allowing the evidence to be received for this purpose does not mean it is admitted for its truth. It is received only for the limited purpose of informing the jury of the basis of the expert's

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opinion and therefore does not constitute a true hearsay exception.

Id. at 63, 640 S.E.2d at 519 (quoting 2 Kenneth S. Broun et al., McCormick on Evidence § 324, at 418 (2006)). Adam's hearsay statement could not be used for its truthfulness. It is for that reason that the Respondents did not need to object to this testimony. It is for that reason, as well, that the circuit court properly excluded the testimony from its consideration. *Jones*, 372 S.C at 63, 640 S.E.2d at 519 (disregarding hearsay evidence relied upon by expert witness and affirming the granting of summary judgment).

YES argues that since no objection was placed on the record, the testimony of Adams became competent evidence. To support that proposition YES cites to *Cantrell v. Carruth*, 250 S.C. 415, 158 S.E.2d 208 (1967). According to YES, *Cantrell* stands for the proposition that "evidence admitted without objection becomes competent evidence and cannot be disregarded on a motion for a directed verdict." (Brief of Appellant, p. 38). *Cantrell* is distinguishable because it did not address the unique role of Rule 703 and an expert's ability to testify regarding otherwise inadmissible hearsay evidence. *Cantrell* merely stands for the proposition that if otherwise admissible, yet objectionable, testimony is introduced without objection, then the failure to object to that evidence precludes a party from challenging the use of that testimony for purposes of a directed verdict.

Cantrell fell and was injured when she sought to get out of the way of a delivery truck owned by defendant Carruth. *Cantrell*, 250 S.C. at 417, 158 S.E.2d at 209. *Cantrell* alleged that Carruth was liable for her injuries because his delivery truck approached her in a negligent and reckless manner, and for that reason she fell trying to avoid it. *Id.* at 419, 158 S.E.2d at 210. After the close of the evidence, the circuit court

directed a verdict in favor of Carruth. On appeal, Cantrell pointed to evidence tending to prove her negligence claim.

She directed the court to her testimony that, “the pickup truck was coming at her ‘too fast’ and she started to run in order to get out of its way because she ‘would have been dead’ if she hadn’t gotten out of the way.” *Id.* at 420, 158 S.E.2d at 210-11. Cantrell further noted that no objection was entered to that testimony. *Id.* at 420, 158 S.E.2d at 210-11. Carruth argued that that testimony was nothing more than a “conclusion on the part of the appellant and no weight c[ould] validly be assigned to” it. *Id.* at 420, 158 S.E.2d at 211. The Supreme Court disagreed, noting that, “[s]ince the foregoing testimony was received, without objection, it bec[a]me[] competent and c[ould] [not] be disregarded upon a motion for a . . . directed verdict.” *Id.* at 420, 158 S.E.2d at 210-11.

The testimony noted in *Cantrell* was admissible, yet objectionable, evidence to establish the truth of Cantrell’s allegations. Consequently, the failure of Carruth to object meant that the testimony could be used in the Court’s analysis of the directed verdict motion. The hearsay testimony from Adams was not admissible to establish the truth of YES’s allegations. Accordingly, it could not serve as a basis for the circuit court’s analysis of the directed verdict motion.

C. The Hearsay Testimony is Not Relevant to the Proximate Cause Issue

The testimony that Justice was allegedly “in the boat” only related to the intent of Justice to proceed with the concept of placing a conservation easement on the Farm. It had nothing to do with proceeding, notwithstanding the IRS investigation into McLeod. The following colloquy with Miller makes that point clear:

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Q. Okay. Who else did you speak to recently after being presented with the draft affidavit?

A. I asked Mr. Jim Justice what his feeling was toward this, about this transaction, and he gave me a brief synopsis of what he thought was going on and how it would have ended up. And that was the only individual I talked to, the rest of it was just looking through the documents that we had in our files.

Q. Okay. Tell me exactly what Jim Justice told you. You said it was a brief synopsis, what did he tell you?

A. I said, Jim, I'm going to be doing a deposition on the Yancey McLeod issue from 2007, you're familiar with that? Yes. Do you feel that that thing would have worked out had it played out to the end and he said absolutely. And that was my only question to him because that was a concern that I had, would this have moved forward, and he said, We were in the boat. That was his exact words, We were in the boat on this and it would have worked out.

(R. p. 921, line 16-p. 922, line 12). It would have "worked out," but the IRS started an investigation of McLeod on December 17, 2007, and he recommended that Justice postpone the project. (R. p. 533, lines 15-25). The above testimony does not state what Justice would have done had McLeod recommended that Justice proceed with the conservation easement, notwithstanding the IRS investigation.

The circuit court's decision did not rest on Justice's intentions; it rested upon the absence of testimony from Justice about what he would have done, had McLeod both notified him of the IRS investigation and recommended that he move forward. (R. p. 12). The record of this trial is void as to what Justice would have done under that scenario. For that reason, YES's reliance on that testimony is misplaced.

V. **The Circuit Court Applied the Correct Standard in Deciding that No Question of Fact Existed on Proximate Cause**

When a party moves for a directed verdict, the court must “view[] the evidence and all reasonable inferences in the light most favorable to the nonmoving party.” *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (citations omitted). In doing so, the Court is not tasked with “decid[ing] credibility issues or to resolve conflicts in the testimony or evidence.” *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (citations omitted). The role of the Court is to “determine whether a verdict for the party opposing the motion would [be] reasonably possible under the facts.” *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997) (citations omitted). The Rule 50 standard “does not[, however,] authorize submission of speculative, theoretical and hypothetical views to the jury.” *Id.* at 149, 485 S.E.2d at 908. South Carolina appellate courts have “repeatedly recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture or speculation.” *Id.* at 149, 485 S.E.2d at 908.

Contrary to YES’s argument in its brief, the circuit court did not weigh the evidence; it decided there was **no evidence**. Following the circuit court’s decision to grant a directed verdict, YES 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

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consistent with what, there is an absence of evidence what
Jim Justice would do, an absence.

(R. p. 874, line 23-p. 875, line 8). 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, they 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.

CONCLUSION

Justice was the decider; however, his decision was never presented at the trial. The circuit court ruled correctly and was within its discretion in excluding the challenged testimony. The circuit court correctly applied the Rule 50 standard of review. Accordingly, the circuit court properly directed a verdict in favor of the Respondents. The Respondents respectfully submit that the decisions of the circuit court should be affirmed and its Order upheld.

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Respectfully submitted,

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September 3, 2013

Columbia, South Carolina

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Yancey Environmental Solutions, LLC, Appellant,

v.

Richardson Plowden & Robinson, P.A. and George
Harold Hanlin, Respondents.

Appellate Case No. 2012-212687

Appeal From Richland County
Eugene C. Griffith Jr., Circuit Court Judge

Unpublished Opinion No. 2015-UP-042
Heard December 9, 2014 – Filed January 28, 2015

AFFIRMED

Thomas A. Pendarvis and Catherine Brown Kerney, both
of Pendarvis Law Offices, PC, of Beaufort, for
Appellant.

Susan Pedrick McWilliams, Daniel G. Leonardi, and
Tanya Amber Gee, all of Columbia, and Burl F.
Williams, of Greenville, all of Nexsen Pruet, LLC, for
Respondents.

PER CURIAM: In this legal malpractice action, Appellant Yancey Environmental Solutions, LLC challenges the circuit court's granting of a directed verdict to Respondents, Richardson Plowden & Robinson, P.A. and George Harold Hanlin. Appellant argues the circuit court improperly weighed the evidence of proximate cause rather than focusing on its sufficiency. Appellant also seeks review of several of the circuit court's evidentiary rulings. We affirm.

"In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion when either the evidence yields more than one inference or its inference is in doubt." *Estate of Carr ex rel. Bolton v. Circle S Enters., Inc.*, 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008) (citations omitted). "However, this rule does not authorize submission of speculative, theoretical, or hypothetical views to the jury." *Id.* (citation omitted).

In essence, the court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his or her favor. The appellate court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence.

Id. at 38-39, 664 S.E.2d at 86 (citations omitted). Nonetheless, "[i]f the evidence as a whole is susceptible to only one reasonable inference, no jury issue is created and the motion was properly granted." *Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996) (citation omitted).

"A plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) (citations omitted).

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. *See Hopson*, 321 S.C. at 314, 468 S.E.2d at 307 ("If the evidence as a whole is susceptible to only one reasonable inference, no jury issue is created" (citation omitted)).

Accordingly, we affirm the directed verdict for Respondents. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *Guffey v. Columbia/Colleton Reg'l Hosp., Inc.*, 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005) (holding an appellate court will affirm a directed verdict when there is no evidence on any one element of the alleged cause of action); *Eadie v. Krause*, 381 S.C. 55, 64-65, 671 S.E.2d 389, 393 (Ct. App. 2008) ("In the context of a legal malpractice action, the plaintiff bears the burden of proving the alleged malpractice proximately caused damage to [the] plaintiff[,] and the defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence." (citation omitted)); *Brown v. Theos*, 338 S.C. 305, 312, 526 S.E.2d 232, 236 (Ct. App. 1999) (holding the defendants' alleged legal malpractice in the plaintiff's conviction for various drug offenses was not the cause of his incarceration; rather, the plaintiff's plea of no contest to drug charges after having been granted a new trial on the ground of ineffective assistance of counsel caused his incarceration), *aff'd*, 345 S.C. 626, 550 S.E.2d 304 (2001).

Appellant's remaining issues challenge rulings on evidence offered to show that, had McLeod recommended recording the conservation easement in 2007 despite the pending IRS investigation, Justice Family Farms most probably would have done so. We need not reach the merits of these evidentiary rulings because we affirm on the sole ground set forth above. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an

appellate court need not address the remaining issues on appeal when resolution of a prior issue is dispositive).

AFFIRMED.

WILLIAMS, GEATHERS, and McDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

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

YANCEY ENVIRONMENTAL SOLUTIONS, LLC. Appellant,

vs.

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

PETITION FOR REHEARING

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SC Court of Appeals

ARGUMENT FOR REHEARING

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

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

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

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

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

After listening to testimony about Mr. Justice and the Justice companies' intent to close on the easement in 2007 for tax purposes, the jury heard Justice Family Farms' designee specifically testify that "if Yancey McLeod put the entire easement together and he would have earned his fee, **it was our intention to pay his fee had the easement moved forward and been recorded in time**." Justice Family Farms 30(b)(6) testimony; (ROA 908-909) (emphasis added). The jury also heard the Justice Family Farms' designee testify that Mr. Justice and the Justice companies were in "agreement with the process moving forward towards establishing a conservation easement, **so that we could have the tax advantages in the year 2007**, by 12-31 of that year." Justice Family Farms 30(b)(6) testimony; (ROA 893-894) (emphasis added).

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

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

A. Evidence In The Record

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

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

(ROA 893-894) (Emphasis added).

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

(ROA 895).

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

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(ROA 900-901).

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

(ROA 905).

32:19 Q. Now, I want to summarize some things
32:20 as we're getting to the real point of this deposition.
32:21 Prior to the telephone call on December 24, 2007, what
32:22 was Justice Family Farms intent, if anything, with regard
32:23 to executing a conservation easement on the Black River
33:1 Farms property?
33:2 A. It was fully our intent to move forward
33:3 with this easement based on the information that we had,
33:4 the proposed value of the property, and it was our intent
33:5 to have it done by the end of the year for tax advantage.

(ROA 907-908).

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

(ROA 908-909) (emphasis added).

34:2 Q. Thank you. Now, I want you to make

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34:3 an assumption to answer the next question I'm going to
34:4 ask you and the assumption is this, assume for the
34:5 purposes of this coming question that -- notwithstanding
34:6 the IRS letter, that during the call on December 24th,
34:7 2007, Yancey McLeod recommended that Justice Family Farms
34:8 move forward with the easement, assume that, and he made
34:9 a recommendation to move forward with the easement.
34:10 Using that assumption, was it more likely than not that
34:11 Justice Family Farms would have proceeded with the
34:12 conservation easement?
34:13 MR. LEONARDI: Object to form.
34:14 BY MR. PENDARVIS:
34:15 A. Yes.

(ROA 909).

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

(ROA 910-911).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

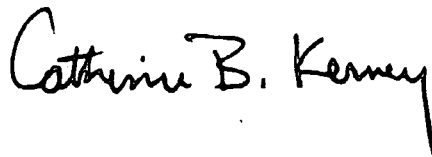
“In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence.” *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 146, 697 S.E.2d 644, 654 (2010). The Opinion concludes that no evidence existed that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

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

CONCLUSION

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

Respectfully submitted,



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Lawyers for Appellants

February 11, 2015

Beaufort, South Carolina

The South Carolina Court of Appeals

Yancey Environmental Solutions, LLC, Appellant,

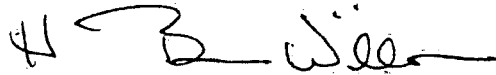
v.

Richardson Plowden & Robinson, P.A. and George
Harold Hanlin, Respondents.

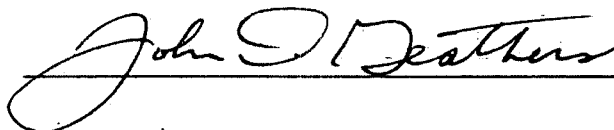
Appellate Case No. 2012-212687

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

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Susan Pedrick McWilliams, Esquire
Daniel C. Leonardi, Esquire

FILED

March 12, 2015

Burl F. Williams, Esquire