

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

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SC Court of Appeals

YANCEY ENVIRONMENTAL SOLUTIONS, LLC. Appellant,

vs.

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

RECORD ON APPEAL - VOL 3 of 3; Pages 731 - 1085

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1 Q Now let me show you, there was some testimony
2 about Plaintiff's Exhibit 2. Let me ask you just
3 very quickly about Plaintiff's Exhibit 2.

4 A Yes, ma'am, I see it.

5 Q What is Plaintiff's Exhibit 2? It says it's
6 a new client matter form. What is that?

7 A Well, it is simply a form that Richardson
8 Plowden would have used internally to create a new
9 file and it would have been a trigger to open a
10 file on the computer, assign a number to it so that
11 things could be tracked, my time could have been
12 tracked, the work that I did on the matter could
13 have been tracked. It was for internal purposes.

14 Q All right. Now look, calling your attention
15 to Defendant's Exhibit 55 which we just marked,
16 which is your email to Miss Lummer about the fee
17 agreement?

18 A Yes, ma'am.

19 Q Did you instruct her to set it up as an
20 hourly arrangement?

21 A No. It looks like I instructed her on the
22 second sentence on that lower email, "Please
23 prepare a fee agreement. The fee will be one-third
24 of any fees paid to Yancey Environmental Solutions
25 by Justice."

1 Q All right. Now looking again, I apologize
2 for jumping back and forth, Mr. Hanlin, but looking
3 at Plaintiff's 2, can you tell by that, any date or
4 anything on the document, exactly when this file,
5 new client matter form was first filled out?

6 A Well, the document itself, I'm not sure I can
7 tell. There is a date indicated in the upper
8 left-hand corner that says 10/27 but I don't know
9 if that's the date this was created or if that's
10 the last date the form was revised or just what
11 that is, but it appears this was done in response
12 to my email of November 28th.

13 Q And in fact is this a document, Plaintiff's
14 Exhibit 2, is this something that you review and
15 approve or who handles setting this up?

16 A No, Sandra, my assistant, would have set this
17 up and I don't recall that I ever saw this until
18 this action.

19 Q All right. But in any event, was Y.E.S. ever
20 sent a bill either montly or otherwise in
21 connection with your work in this matter?

22 A No, ma'am. And if I could, I would add there
23 was never any agreement to bill them hourly. The
24 problem with an hourly billing is that has to be
25 paid concurrently and, you know, that would have

1 been, I think, problematical for Y.E.S.

2 Q All right. Did Y.E.S. -- let me ask you
3 about one more document just to make sure.

4 Let me ask you to look at Plaintiff's Exhibit
5 7, Mr. Hanlin.

6 A Yes, ma'am.

7 Q This is the letter that Mr. McLeod has
8 testified about he sent to Mr. Justice. Correct?

9 A It appears to be, yes, ma'am.

10 Q And it has the proposed consulting agreement
11 attached, correct?

12 A Yes, ma'am.

13 Q All right. Now, under the proposed
14 consulting agreement did Y.E.S. have a guarantee of
15 payment?

16 A Well, I think the consulting agreement
17 contemplates two things. One thing it contemplates
18 is a nonrefundable retainer of \$50,000 and then it
19 also contemplates payment based on the value of an
20 easement if in fact an easement is recorded.

21 Q Under the proposed consulting agreement if
22 Mr. Justice had signed it would he have been
23 obligated to place the conservation easement?

24 A No, ma'am. He could have decided whatever he
25 wanted to decide at any stage.

1 Q All right. Do you have any explanation for
2 why the Plaintiff's Exhibit 2, the new client
3 matter form, doesn't say contingent, the box isn't
4 checked contingent, do you know why?

5 A I don't know why. I know that I did not use
6 the word contingent in reference to this matter and
7 the reason is because contingent fees have a
8 particular meaning under the tax code and so I
9 never used the word contingent in describing this
10 representation.

11 Q But in fairness the one-third/two-thirds
12 split is akin to a contingent fee, is that fair?

13 A I called it a percentage. There are issues
14 with that in the tax code but it is not an hourly
15 fee, it is not a flat fee.

16 Q All right. And did you satisfy yourself
17 there were no issues with this agreement under the
18 tax code or otherwise?

19 A I did.

20 Q All right. Now let me hand you Plaintiff's
21 Exhibit 6 which there was some testimony yesterday
22 by someone.

23 A Yes, ma'am.

24 Q Do you recognize this email, Mr. Hanlin?

25 A I do. Give me just a second to look it over,

1 if you don't mind. Yes, ma'am, it's an email sent
2 by me to Yancey Environmental Solutions on November
3 21st, 2007.

4 Q And the subject is farm land conservation
5 easements, correct?

6 A That's correct. And there is also some
7 analysis of S corporations versus other
8 corporations and what the deductions could be in
9 those circumstances.

10 Q Now, the next to last sentence you said, "I
11 want to be sure that I'm thinking about this
12 correctly and that we get the right language in our
13 documents. When you have a chance could you give
14 me a call and help me think this through?" Do you
15 see that?

16 A I do.

17 Q All right. To what documents were you
18 referring?

19 A Well, I don't know that we were talking about
20 any specific document at that time. We would have
21 wanted to incorporate the thoughts expressed here
22 into the conservation easement itself at some point
23 and the question was is the fact that this property
24 is being preserved for farm land by itself enough
25 to qualify as a conservation easement, and I was

1 expressing to Mr. McLeod that it looked like there
2 needed to be some other public benefit, not just
3 preservation of farm land.

4 One of the nice things about this property,
5 though, it is bisected by a highway, so that the
6 farm land that was preserved would have been
7 available for viewing by the public and that kind
8 of thing, so I think we resolved that question to
9 my satisfaction.

10 Q Do you recall talking with Mr. McLeod after
11 the 21st about these issues with respect to the
12 preservation of farm land?

13 A I don't know that I have independent
14 recollection of a conversation with Mr. McLeod but
15 this email suggests that we did have that
16 conversation.

17 Q All right. And I'm handing you what has
18 previously been entered as Defendant's Exhibit 45.
19 Do you recall ever receiving that model easement
20 language that Mr. McLeod had?

21 A This is an email directed to me from Mr.
22 McLeod but to be honest, I do not remember
23 receiving it.

24 Q All right. Actually you're not on this, Mr.
25 Hanlin. Please look at it carefully. You're not

1 on there.

2 A I'm sorry. It looks like Yancey McLeod, I'm
3 sorry, to Yancey at Mindspring.dot com, and just
4 guessing, but it looks like it was sent by Yancey's
5 son to Yancey.

6 Q I'm just asking if you ever got it. You do
7 you recall getting it?

8 A I don't recall. I just don't recall whether
9 I did or not.

10 Q All right. But you see it is dealing with
11 some of these farm land issues?

12 A I do.

13 Q Now, one of the other issues that is
14 mentioned in Plaintiff's Exhibit 6, before we leave
15 that, Mr. Hanlin, in the first paragraph, it's the
16 tax advantages. Do you see that?

17 A First paragraph or second paragraph?

18 Q Well, there are some discussions of
19 deductions first.

20 A Well, it is all talking about tax. Let's
21 see.

22 Q Do you see that?

23 A Tax advantages?

24 Q No, I'm just asking in general.

25 A Oh, yes, sure. Is that what you were talking

1 about?

2 A That's right.

3 Q Now, there has been some testimony in the
4 case about a change of law, in the laws regarding
5 conservation easements between 2006 and 2007. Is
6 that right?

7 A Well, there was, yes, it talks about --

8 Q I'm sorry, 2007 and 2008, I'm sorry.

9 A Yes, it talks about the carry forward and the
10 maximum deduction as compared to for 2006 and 2007.
11 And what occurred was that there were very
12 favorable, generally very favorable tax laws for
13 2006 and 2007 dealing with conservation easements.
14 And just to put it in a nutshell, in 2006 and 2007
15 a landowner, taxpayer could deduct up to 50 percent
16 off his adjusted gross income, if he made a
17 contribution in the first year he could deduct that
18 amount, and if he still had some deduction left he
19 could carry that forward for up to fifteen years.
20 And that was better than it had been. Prior to
21 2006 and 2007 a taxpayer could deduct only up to 30
22 percent off his adjusted gross income and could
23 only carry forward the deduction for five years,
24 and so the tax law generally was more favorable in
25 years 2006 and 2007 but as applied to a particular

1 taxpayer, it just depended on what their
2 circumstances were, so even though the law was
3 different in 2007 than, say, it was in 2008, for a
4 particular individual it might not make any
5 difference at all. And so we knew that the
6 favorable tax situation was going to expire at the
7 end of 2007 but even then there was pending
8 legislation to make those tax changes permanent and
9 in fact those tax changes were made permanent, as I
10 recall, in the farm bill that was passed in May of
11 2008. So, these tax benefits that we thought might
12 expire at the end of 2007, or might not, eventually
13 were made permanent, as permanent as anything is in
14 the tax code. In 2008, May of 2008, I think is
15 when that was passed.

16 Q All right. Now, a couple more subjects
17 before we go back to our chronology. Now, there
18 has been some emails, Mr. Hanlin, entered in this
19 case. Let me show you first Plaintiff's Exhibit 8
20 and ask if you could take a look at that?

21 A Yes, ma'am, I see it.

22 Q All right. And do you remember getting this
23 email from Mr. Rebollo?

24 A I do.

25 Q And who is Tony Rebollo?

1 A Tony Rebollo is a tax attorney at Richardson
2 Plowden.

3 Q Is he, do you know whether or not he handles
4 conservation easement transactions?

5 A He does not.

6 Q All right. Now, did you have any further
7 discussions and followup with Mr. Rebollo?

8 A I think there were several emails actually,
9 and I think that Mr. Rebollo and I talked in the
10 hallway, that kind of thing.

11 Q And did you satisfy yourself with respect to
12 who the client was and who the firm did represent
13 and who it didn't represent?

14 A Well, we had some discussion in the firm
15 about that and, yes, we decided that it wouldn't be
16 proper for us to represent anybody in the
17 transaction other than Y.E.S.

18 Q And then we have already looked at,
19 yesterday, the letter to Mr. Justice that you sent.
20 Correct?

21 A Yes, right.

22 Q And let me show you -- let me back up before
23 I leave that. Did Mr. Harrah ever ask you for any
24 tax advice on behalf of Mr. Justice?

25 A No. Initially, after I got his contact

1 information from Mr. McLeod I called Mr. Harrah and
2 just talked to him generally about conservation
3 easements and how they worked and the tax benefits
4 and that kind of thing, and he seemed very passive,
5 very disinterested.

6 Q Did he ask you to represent Mr. Justice?

7 A No, absolutely not.

8 Q Would you have represented Mr. Justice?

9 A I couldn't have. There would have been a
10 conflict between representing Mr. Justice and
11 representing Y.E.S. at that point. We had already
12 given tax advice to Y.E.S. from virtually the
13 commencement of the representation, so for me to be
14 a tax adviser to Mr. Justice would have been
15 improper.

16 But the first conversation I had with Mr.
17 Harrah, I don't remember exactly how long it
18 lasted, 30 minutes, half an hour, maybe something
19 like that, and I laid all this out and, I mean, he
20 had no questions, which is very unusual.

21 Q Now let me show you what has been marked as
22 Plaintiff's Exhibit 20. It's another email string
23 between you and Mr. Rebollo.

24 A Yes, ma'am, I see that.

25 Q Now, Mr. Rebollo has sent this to you and to

1 Mr. Mack. Correct?

2 A Yes.

3 Q All right. And what was Mr. Mack's role at
4 the firm at the time?

5 A Mr. Mack was the managing shareholder at the
6 time.

7 Q All right. Now, Mr. Rebollo said, "I still
8 don't fully understand RPR's role. I realize I
9 haven't worked on any of this and that transactions
10 like the one under consideration are not my area so
11 if I am way off base with respect to the following
12 questions and concerns that may be why."

13 Now, had Mr. Rebollo been involved in
14 connection with the proposed transaction for the
15 Black River Farms?

16 A Not involved. We occasionally bounced
17 questions off each other in the law firm and so he
18 knew about the transaction but he was not involved
19 in the transaction.

20 Q And it is, is Plaintiff's Exhibit 20, does he
21 raise a series of questions?

22 A He does.

23 Q All right. And did you respond to him in
24 connection with these questions?

25 A Well, I believe I did. I don't see the

1 response here but we did, I believe we talked about
2 it at some point or might have sent him an email.
3 I'm sure if I did it's available. But I looked at
4 each of these concerns and I was satisfied that we
5 did not run afoul of any of the things that he
6 brought up.

7 Q All right. Now, why didn't you send all
8 these emails or copy Mr. McLeod on all these emails
9 or talk to him about them?

10 A Well, I didn't think that any material issues
11 were raised. For instance, Mr. Rebollo talks about
12 whether this is a reportable transaction, and
13 reportable transactions are an area that need
14 cautious proceeding but generally reportable
15 transactions fit in several categories. One is if
16 the attorney says to the client, "This is
17 confidential information that I'm giving you, you
18 cannot reveal it to any other person." In other
19 words, the attorney tries to keep it proprietary.

20 Another category would be a listed
21 transaction. The IRS maintains a list of
22 transactions and those listed transaction generally
23 are when someone purchases an interest in a
24 business or partnership and then tries to take
25 deductions that are either equal to or

1 approximately equal to or even greater than their
2 investment in the transaction. In other words,
3 what they are trying to do is purchase a deduction
4 and the IRS frowns on that.

5 So the issues that he raised were not issues
6 in this case. For instance, when you're talking
7 about a reportable transaction, usually a
8 reportable transaction has both a purchase and a
9 deduction. In this case we only had a deduction.
10 There was no purchase, there was no purchase by
11 anybody on behalf of Jim Justice who swoops in,
12 grabs a tax deduction and leaves, which is what the
13 reportable transactions typically are.

14 So, all we had was the donation of a
15 conservation easement and a conservation easement
16 is a program established by the United States
17 government, it's established by Congress, so if
18 someone wants to make a conservation contribution
19 it's certainly not a reportable transaction in that
20 context and it's something that is sanctioned by
21 Congress. I mean, this is not a reportable
22 transaction.

23 So, that is just an example, you know. He
24 raises other questions but I was satisfied those
25 questions didn't pertain to this transaction.

1 Q All right. Now, also marked earlier in
2 Professor Adams' testimony were Plaintiff's 13, 16
3 and 17 and I ask you, Mr. Hanlin, if you could
4 explain what those documents are?

5 A Well, these are apparently draft documents of
6 some type dealing with Mr. McLeod or Mr. McLeod's
7 client, Y.E.S.' client and as I testified in my
8 deposition I don't have an independent recollection
9 of these. I don't know precisely what they are
10 for.

11 In looking at some of the additional
12 correspondence pertaining to these, it looks like
13 these were done in contemplation of representing
14 other clients of Y.E.S. or representing Y.E.S. in
15 reference to other clients.

16 Q In other deals?

17 A Yes, ma'am.

18 Q Now, there are a couple minutes of the
19 executive committee. Were you on the executive
20 committee, Mr. Hanlin?

21 A No, ma'am.

22 Q Let me show you Plaintiff's Exhibits 12 and
23 14, I think.

24 A Yes, ma'am.

25 Q Did you attend either of those meetings, if

1 you recall?

2 A I remember that I did attend one meeting of
3 the executive committee. I don't see on Exhibit 14
4 from December 12th that I was present. There is a
5 reference to me, GHH, on the minutes of the
6 December 6 meeting.

7 Q That is Plaintiff's 12?

8 A That's Plaintiff's 12.

9 Q All right. Now, the Plaintiff's 12 states
10 that FMM was going to work with GHH. Is GHH you?

11 A That's correct.

12 Q And who again is the FMM?

13 A FMM would have been Mr. Frank Mack.

14 Q The entire sentence of these minutes say EC
15 reviewed information regarding potential cases
16 relating to conservation easements

17 Do you recall discussing that subject matter
18 with EC?

19 A I do.

20 Q Concerns were raised regarding fee
21 arrangements and documentation of legal issues and
22 advice. Do you see that?

23 A Yes, ma'am, I do.

24 Q And do you recall discussing that with the
25 executive committee?

1 A I do. I don't remember if this meeting or
2 some other meeting but I did talk with the
3 executive committee about these conservation
4 easements and making sure that our fee agreement
5 was proper.

6 Q All right. Was there a concern that Mr.
7 Justice might think that the firm represented him
8 as well?

9 A Well, I think --

10 MR. PENDARVIS: Your Honor, I object,
11 leading.

12 MS. MCWILLIAMS: I'll rephrase it, Your
13 Honor.

14 THE COURT: Rephrase it. . Sustained as to
15 leading.

16 BY MS. MCWILLIAMS:

17 Q Do you recall specifically what the executive
18 committee's concern was with respect to the
19 documentation of legal issues and advice?

20 A Well, I think the EC was concerned that we do
21 this properly and that we knew who our client was
22 and they wanted it done the right way.

23 Q All right. As far as you know were you
24 satisfied or was the executive committee satisfied
25 when you left the meeting that you were going to

1 address those issues with Mr. Mack?

2 A Well, I really couldn't say about the EC, I'm
3 sorry. I don't know if they continued to meet
4 after I left or if they adjourned at that point, I
5 really don't know. But Mr. Mack and I did have
6 some follow-up discussions about the arrangements.

7 Q All right. And in connection with the
8 letters that were sent to, the fee agreement that
9 was sent to Mr. McLeod and the letter that was sent
10 to Mr. Justice, both dated December 5th, did anyone
11 else in the firm review those before they went?

12 A I believe that Mr. Mack would have reviewed
13 those.

14 Q All right. And after those were sent did you
15 ever get any questions from your client Y.E.S.
16 about either document, either the fee agreement or
17 the letter to Mr. Justice?

18 A No, ma'am.

19 Q Let me show you one more, two more.
20 Plaintiff's Exhibit 22, I ask you, Mr. Hanlin, if
21 you recognize that?

22 A I recognize this from these proceedings, yes,
23 ma'am.

24 Q All right. And does that appear to be the
25 conservation easement in connection with this

1 matter?

2 A Let's see. It says County of Clarendon, let
3 me see who is on the signature pages. It refers to
4 3,000 acres. I believe that does pertain to that.

5 Q Do you recall Miss Green's testimony she
6 recalls discussing with you the conservation
7 easement, do you recall that?

8 A I remember her saying that she prepared a
9 conservation easement. Whether we discussed it, I
10 don't recall.

11 Q Does it appear that document that was on the
12 Richardson Plowden server, there has been any
13 changes made to it?

14 A I see a couple editorial ticks, if you would.
15 There are a couple lines on the left margin of this
16 exhibit and that could and probably does indicate
17 that a change was made.

18 Q Do you know, as we sit here today do you
19 recall what the changes are?

20 A I don't recall what the changes are. I see
21 that there is two formatting changes but I don't
22 know, three or four formatting changes. All I know
23 is what I see, I don't recall making any changes to
24 this document.

25 Q All right. You don't recall working on the

1 conservation easement for Mr. Justice's easement?

2 A I don't.

3 Q All right. Now, one more. Let me show you
4 Plaintiff's Exhibit 21 which appears to be a draft.

5 Well, let me ask you is that a draft letter you
6 sent?

7 A Yes, ma'am, I see that.

8 Q And I'm handing you back Plaintiff's Exhibit
9 15, Mr. Hanlin. In that email is there any
10 indication that you're preparing a letter to Mr.
11 McLeod? I want to call your attention to the next
12 to last paragraph.

13 A Yes. Let me take a second to read here.
14 Yes, ma'am, I see that.

15 Q All right. It says, "I am working, Sandra
16 and I are also working on a letter memorializing
17 our discussion with Yancey about various
18 considerations pertaining to the project"?

19 A Yes, ma'am, I see that.

20 Q That is December 13th.

21 A The email from me to Mr. Mack is written on
22 December 13, yes, ma'am.

23 Q All right. And do you know whether or not
24 the document that I have handed you, the letter
25 that is dated December 19th, do you know whether

1 that's the letter you were working on?

2 A It appears so. To be honest, I have no
3 independent recollection of whether these go
4 together but that certainly seems to be what the
5 document suggests.

6 Q Do you recall working on the letter to Mr.
7 McLeod?

8 A I do. I do recall working on a letter to Mr.
9 McLeod.

10 Q And do you know why that was not sent to Mr.
11 McLeod?

12 A I don't know. It looks to me like if I were
13 going to send that it would have required some
14 additional revisions. I don't know that there was
15 any discussion to send it, in any case.

16 Q All right. What happened on the 20th of
17 December, the next day after that document?

18 A On the 20th of December we got an email from
19 Miss Mohr about a letter from the IRS to Mr.
20 McLeod.

21 Q Okay. Let me show you Plaintiff's Exhibit
22 23. Is that the document you just made reference
23 to?

24 A Yes, ma'am, it is.

25 Q Do you remember that day?

1 A I do.

2 Q All right. And when you -- the email is from
3 Mary to you, is that correct?

4 A It's from Yancey Environmental Solutions to
5 me and it's addressed, concludes, Mary Mohr, yes,
6 so it was sent by Mary to me.

7 Q All right. And what was your first thought
8 when you saw that email that had the letter
9 attached?

10 A Well, I thought it was a very serious matter,
11 and the letter from the IRS is dated December 17
12 and it was like there is a 30 day response time and
13 by the time I got the letter it was Thursday,
14 December 20.

15 Q All right. Now, what did Miss Mohr say she
16 was going to do with the letter with respect to Mr.
17 McLeod?

18 A The email says that they received this notice
19 yesterday from the IRS and that she and another
20 staffer have reviewed it and it's important but
21 they haven't shown it to Yancey and said they
22 weren't going to, unless I told them otherwise,
23 until after Christmas.

24 Q All right. Did you tell, did you give any
25 instruction to Miss Mohr in that regard?

1 A Well, my recollection is that we needed to
2 take immediate action, that Yancey needed to know
3 about it right away.

4 Q And did you tell her she should tell him
5 about it?

6 A I believe I did. I don't remember if it was
7 by email or just by telephone but I believe I did.

8 Q All right. Now, why is the IRS notice
9 serious?

10 A Well, it's different from any IRS notice I
11 have ever seen and it delves into all, it looks
12 like all conservation matters, conservation
13 easement matters within the statute of limitations
14 and I don't remember ever seeing anything like this
15 before.

16 Q All right. What was the scope of the letter?

17 A Well, it is asking for all documentation for
18 Mr. McLeod, Y.E.S., and other related, and some
19 other related entities, I'm paraphrasing, and let
20 me look. It asks for all documentations
21 specifically pertaining to conservation easement
22 transactions that he's organized or assisted in
23 organization of, all manuals, operations handbooks,
24 prospectuses, all documents and records used to
25 promote, market or advertise, all books, all

1 publications, all legal, accounting and other
2 opinions, list of seminars organized. It just goes
3 on and on about all the things that are required,
4 beginning on January 1st, 2004, through the
5 present.

6 Q Did you believe that you could --

7 MR. PENDARVIS: Your Honor, I object, it's
8 leading.

9 THE COURT: She hadn't quite asked. Let her
10 rephrase it.

11 Q How did you interpret Miss Mohr's email which
12 says, "Deborah and I are most concerned about the
13 cover letter"? What, if anything, did you think
14 she was asking you?

15 A Well, first of all I think she was asking me
16 for advice on this particular matter and I think
17 she was trying to break this to Mr. McLeod gently
18 but I think that was misguided, I think he needed
19 to know about it immediately.

20 Q Did you provide any legal advice with respect
21 to Y.E.S. or its response to the IRS investigation?

22 A No, I didn't.

23 Q And why not?

24 A Well, because it would have been a conflict
25 of interest. I had worked with Mr. McLeod on some

1 of the transactions that would have been
2 encompassed by this notice and so it would have
3 been improper for me to try to give Mr. McLeod
4 advice about this notice when my clients,
5 landowners in separate transactions, expected me to
6 be loyal to them, so there could easily have been
7 some conflict between their interest and Mr.
8 McLeod's interest, I just couldn't do it.

9 Q Did you have a duty of loyalty to Mr. McLeod?

10 A Well, I did have a duty of loyalty to Mr.
11 McLeod but that only takes us as far as the ethical
12 restrictions go and if I have a duty to a client
13 but my ethical requirements tell me I have to do
14 something else, then I have to abide by my ethical
15 requirement.

16 Q Did you have a duty of loyalty to these other
17 clients? Who were they, by the way?

18 A I did have a duty of loyalty to those clients
19 and I have a duty that continues even after the
20 representation is completed. The clients that
21 would have been affected by this were one who had
22 an island off Beaufort and another one who had some
23 property in Clarendon and Sumter counties..

24 Q All right. Now, what did you do after
25 receiving this from Miss Mohr?

1 A Well, I let her know that we needed to make
2 Yancey aware of this immediately rather than later.
3 He only had a 30 day window to answer, according to
4 the terms of the letter, so he needed to be aware
5 of it as soon as possible. And I considered my
6 ethical obligations, considered what I had to do,
7 what I could do, looked at the rule book about
8 ethics and thought about it for a couple hours and
9 then after that I sent an email to Mr. Mack who is
10 managing shareholder of the firm and talked with
11 him about what we should do.

12 Q Let me show you what has been marked as
13 Plaintiff's Exhibit 24. Is that the email you just
14 referenced?

15 A It is.

16 Q All right. Now, Mr. Hanlin -- I will let you
17 read that.

18 A I've seen it.

19 Q Did you want to withdraw from representing
20 Y.E.S.?

21 A No. I was very, very disappointed that I had
22 to withdraw. I thought this was a great project, I
23 wanted to be involved with it, I had been very
24 enthusiastic about it, was delighted to present it
25 to the Community Open Land Trust and I hated to

1 withdraw.

2 Q Now, you heard Professor Adams' testimony
3 that you, all you had to do was convert your fee
4 from a percentage or contingent fee to hourly and
5 you could continue. Do you agree with that?

6 A I do not agree with that.

7 Q Why? Could you explain it?

8 A Changing the fee agreement doesn't change the
9 duties that you have to the client and former
10 client, and I was in a position of conflict. I
11 could not, I could not see that I could give Mr.
12 McLeod my full and undivided attention and loyalty
13 and abide by my obligations to my other client.

14 Q Did Mr. Mack agree with you?

15 A He did.

16 Q Now, Plaintiff's 24, I believe is the email
17 from you to Mr. Mack. Is that right?

18 A Yes.

19 Q And it says you have four recommendations.
20 Do you see that?

21 A I do.

22 Q All right. And the first one was -- can you
23 explain for the jury what that first recommendation
24 was?

25 A Will, the first recommendation apparently

1 already occurred, it says, "I called Mary Mohr and
2 told her Yancey should be advised as soon as
3 possible."

4 Q So you had already called Mary Mohr, is that
5 correct?

6 A I believe that's correct.

7 Q And number two, what did you say?

8 A I said, "Since I have some involvement in
9 some of the transactions being reviewed, Yancey is
10 to retain other counsel to assist him with this. I
11 may be conflicted out at some point. Yancey would
12 be better served to have other counsel from the
13 beginning and I have advised Mary of this."

14 Q And number three?

15 A Number three, "We should terminate any
16 involvement in these projects, with these
17 projects."

18 Q So, that means -- what did that mean in terms
19 of your ability to collect a fee?

20 A Well, I think I had concluded we would not
21 collect any fee at all for this project.

22 Q All right. What was the firm's position with
23 respect to your working and collecting a fee?

24 A Generally or in respect to this?

25 Q Generally.

1 A Well, generally, I mean, all of the attorneys
2 are expected to work hard and be productive and
3 bring in fees.

4 Q Had you had any issues prior to this time
5 that had affected your ability to work and produce
6 fees?

7 A I had had some health issues, I think in
8 2006, so I was not as productive in that year as I
9 wanted to be.

10 Q And had this transaction eventually been
11 consummated did you have any expectation that that
12 would be a good fee for the firm?

13 A Yes, it would be a good fee and of course the
14 fee agreement was with the firm, Richardson
15 Plowden, not me specifically. The firm is not, I
16 guess maybe medium sized firm by Columbia
17 standards, not the largest, not the smallest, but
18 at that time they had I think about a hundred
19 employees and they paid their employees
20 competitively, the healthcare for them and all that
21 and, you know, they do pro bono work, I bet
22 probably a week doesn't go by when they are not
23 representing somebody in court who can't afford to
24 pay for it, so it would have been a nice fee for
25 them but, you know, at a firm like that you get

1 paid on an hourly basis sometimes, part of the time
2 you don't get paid at all and every now and then
3 you get a good fee that makes a good deal that
4 makes up for the time you don't get paid. It would
5 have been a good fee for them but I think their
6 primary concern was do this the right way and make
7 sure we complied with our obligations.

8 Q Did you consider -- well, let me ask it this
9 way. Do you know, based on your withdrawal, did
10 you know what Mr. McLeod planned to do? Let me
11 back up just a minute. Did you have any
12 conversation with Mr. McLeod on the 20th about the
13 IRS letter?

14 A I believe that was the day that he and I
15 talked and I let him know that we would have to
16 withdraw from this and all other representation.

17 Q And during that conversation did Mr. McLeod
18 discuss with you alternate plans for the Justice
19 transaction?

20 A He did not.

21 Q Did he tell you, did he make any statement
22 with respect to whether or not that would affect
23 the Justice transaction going forward?

24 A He did not.

25 Q And before we leave Plaintiff's Exhibit 24,

1 Mr. Hanlin, the fourth recommendation was, "I
2 should inform any of my clients who might be
3 affected by this notice." Do you see that?

4 A I do.

5 Q All right. And do you know whether or not
6 you did that?

7 A I did not do that. I considered that and
8 decided that would be a violation of my duties to
9 Mr. McLeod. I still had a duty of confidentiality
10 to him, whether it be as a client or former client,
11 and I concluded I could not inform my other
12 clients.

13 Q And if the other clients had asked you for
14 representation in connection with the IRS could you
15 have represented them?

16 A Well, no. I already knew a lot about Mr.
17 McLeod and his operation. I hadn't been involved
18 in every conservation easement that he had ever
19 done but I had been involved in some so I still had
20 a duty of confidentiality to Mr. McLeod on some
21 issues and I had a duty of confidentiality to these
22 other clients.

23 Q Basically you were out?

24 A I was out all around.

25 Q Let me show you what has been previously

1 marked as Plaintiff's Exhibit 25. I'm kind of
2 papering you in, Mr. Hanlin, I apologize. Do you
3 recognize that document?

4 A I do. It is dated December 21st, 2007, and
5 it says that we're withdrawing as to all matters
6 with Mr. McLeod.

7 Q All right. But Mr. McLeod knew before that,
8 is that correct?

9 A Yes, ma'am. He knew as a result of our
10 conversation on the day previous.

11 Q All right. Now, I believe you have already
12 testified -- well, let me ask you this. At the
13 point of withdrawal on December 20 did you send a
14 partial bill or a bill for the work that had been
15 done thus far?

16 A No, ma'am.

17 Q No bill was ever sent?

18 A No, ma'am, not to my knowledge.

19 Q And as of December 20 had a closing date been
20 set for the Justice transaction?

21 A No, ma'am.

22 Q Had you received any instructions from Mr.
23 Harrah with respect to finalizing any documents for
24 Mr. Justice?

25 A No, ma'am.

1 Q Well, what did you think that Mr. -- back
2 that up. Did you know what would happen with
3 respect to the IRS investigation or the Justice
4 project, from Mr. McLeod's standpoint?

5 A No, ma'am.

6 Q And after you withdrew were you ever asked
7 for any input with respect to, "What do we do about
8 the IRS investigation or the Justice project?"

9 A No, ma'am.

10 Q Now, there has been some testimony from
11 Professor Adams you did not immediately turn over
12 your file to Mr. McLeod.

13 A That's true.

14 Q Do you recall that?

15 A Yes..

16 Q Why did you not do that?

17 A Well, a lot of the file had already been
18 copied to Mr. McLeod in the form of emails and that
19 kind of thing but I never received any request from
20 Mr. McLeod, I didn't know where he wanted me to
21 send the file.

22 Q All right. Would you have been willing to do
23 that?

24 A Certainly.

25 Q Have you ever had a situation where you have

1 had to send a file out on behalf of a client where
2 you were conflicted out?

3 A I don't recall.

4 Q Now, were you aware at anytime after December
5 20 -- strike that. Did Mr. McLeod ever tell you
6 that he was going to make any recommendations to
7 Mr. Justice?

8 A No, ma'am.

9 Q After December 20, Mr. Hanlin, did you
10 attempt to influence Mr. McLeod in connection with
11 what he disclosed to the IRS?

12 A No, ma'am.

13 Q Did Mr. McLeod ask for any assistance in
14 finding substitute counsel?

15 A No, ma'am.

16 Q And did Mr. McLeod's new lawyers, there has
17 been some testimony regarding Crosby Lewis and
18 Carey Hall, did either of those ever contact you
19 and stated they needed anything from your files?

20 A No, ma'am.

21 Q How would you describe your feelings after
22 you had to withdraw?

23 A I was pretty low and stayed that way for a
24 long time. I wanted to be part of the transaction
25 but I couldn't and it was very frustrating for me,

1 very disappointing for me.

2 Q Were you disappointed for Mr. McLeod?

3 A I was. You know, I didn't know what would
4 occur but I just didn't have the opportunity to
5 assist him any further.

6 Q At any point, Mr. Hanlin, from December 20,
7 2007, until you were served this lawsuit did Mr.
8 McLeod ever inform you, call you, write you, tell
9 you that he blamed you for the transaction not
10 going forward with Mr. Justice?

11 A No, ma'am.

12 MR. PENDARVIS: I object.

13 THE COURT: I'm going to allow that question.

14 Q Did he?

15 A No, ma'am.

16 MS. MCWILLIAMS: Beg the Court's indulgence
17 just a minute.

18 Q Now, Mr. Hanlin, are you aware of any reason
19 that this proposed Justice transaction could not
20 have closed in 2008?

21 A In 2008, no, ma'am, I'm not aware of any
22 reason. In fact, the testimony from Mr. Harrah
23 seemed to indicate that Mr. Justice's income was
24 even greater in 2008 than it was in 2007.

25 Q As we sit here today do you recall Professor

1 Adams telling the jury all you had to do was stay
2 in, finish the transaction, get the fee and worry
3 about the IRS later because the IRS investigation
4 wasn't until January 17th? Did you hear that
5 testimony?

6 A I heard it.

7 Q Do you agree that was an option for you?

8 A No, ma'am.

9 Q And could you explain to the jury why?

10 A Well, there are several considerations. One
11 is that the IRS had given Mr. McLeod a 30 day
12 deadline and a couple of those days had already
13 ticked by so I thought he needed to focus on that
14 pretty immediately, which was why even though Miss
15 Mohr had suggested that we wait until after
16 Christmas to inform Mr. McLeod, I insisted that she
17 inform him right away. They were asking for
18 volumes of documents and thirty days was a short
19 time in which to comply with that kind of request.

20 I'm sorry, your question again?

21 Q Well, as we sit here today was there anything
22 that you think you could have done differently to
23 allow Mr. McLeod to get his fee and you to get your
24 fee and then worry about the conflict later?

25 A Well, it doesn't matter what the fee is. It

1 could have been \$600,000, it could have been
2 \$6,000,000, we can only do the right thing and I
3 just didn't see that it was the right thing to
4 continue to represent Mr. McLeod and, you know,
5 part of that was the confidentiality issues that we
6 had already discussed. I mean, part of it is that
7 if you continue to represent someone you learn
8 things about that person and then if at some other
9 point you're compelled to testify by another
10 person, then I have done the client a disservice by
11 learning more about them and things that go on.

12 So, it just wasn't the right thing for me to
13 do and generally, of course, all these
14 relationships are subject to attorney-client
15 privilege. In other words, under normal
16 circumstances I can't be compelled to reveal what
17 transpired between a client and myself but there is
18 an exception under the rules of professional
19 conduct and if I'm commanded by a judge to testify
20 about these things I have to testify.

21 Q Well, at the point in December, December 20,
22 2007, did you have any reason to believe that Mr.
23 McLeod was a promoter, an illegal promoter?

24 A Well, I had been to Mr. McLeod's office, I
25 had seen some materials pertaining to at least one

1 land transaction where the possibility of a
2 conservation easement was mentioned and so even
3 though in my heart of hearts I do not believe and
4 did not believe that Mr. McLeod had ever promoted
5 any forbidden transaction, I didn't know that. I
6 had been involved in a couple of the transactions
7 that Mr. McLeod has participated in. I had not
8 been involved in all. Part of the problem, if you
9 continue to represent someone I think you have to
10 do it wholeheartedly and if you're afraid to ask
11 questions because of what it might, what the
12 consequences might be in other circumstances, then
13 you're hobbling yourself and not being fair to the
14 client. The client is entitled to the undivided
15 loyalty of his attorney.

16 Q Did you have the other circumstances, meaning
17 the other clients?

18 A I did.

19 MS. McWILLIAMS: One moment, Your Honor.

20 Q I asked you about were you aware of any
21 reason it couldn't close in '08. Would that be
22 true for every year since '08, until now, or do you
23 know?

24 A Well, I think that the law has reverted again
25 in 2011. I'm not sure about exactly when it

1 reverted.

2 As far as the contribution and the tax
3 benefits, my recollection is the tax benefits ended
4 up being the same in 2008 as they were in 2007,
5 they were the same in 2009 and they were the same
6 in 2010 and so there was a change in 2011 but the
7 favorable tax benefit existed for all that time.
8 But as I said earlier, you have to look at an
9 individual's own tax situation and it might not
10 have made any difference at all to an individual
11 taxpayer, so if we're talking about Mr. Justice, he
12 might have had more incentive in 2008 than 2007.

13 I understand that his transaction that we had
14 been concerned about in 2007 actually closed, if I
15 recall correctly, in 2009 so certainly from the
16 testimony of Mr. Harrah it appeared that he had
17 more incentive in 2008 than 2007 and he might have
18 had even more incentive in 2009. I don't know his
19 circumstances but just from what I have heard from
20 the testimony, that is what I believe to be true.

21 Q As we sit here today you're not aware of any
22 reason why the transaction couldn't, if Mr. Justice
23 wanted to, have been done in other years?

24 A I'm not aware of any reason that couldn't be
25 done.

1 MS. McWILLIAMS: Thank you. I have no
2 further questions.

3 THE COURT: All right.

4 Ladies and gentlemen, this is a good time to
5 take a break. Miss Meyer, you all step back in the
6 jury room. You can't discuss the case. Step back
7 there, we'll have you back shortly.

8 (The jury was excused from the courtroom).

9 (Recessed at 10:20 a.m.).

10 (Resumed at 10:36 a.m.).

11 MR. PENDARVIS: Before we call the jury in, I
12 have some questions involving discovery, things I
13 didn't want to ask, some matters I would like to
14 make sure I'm clear so I don't step afoul, haven't
15 gotten a ruling yet, I don't want to run afoul of
16 what the Court is thinking about that. I want to
17 ask the Court if there is going to be a ruling
18 before I question the witness.

19 THE COURT: Give me a hypothetical what you
20 are thinking about.

21 MR. PENDARVIS: After the second deposition
22 of Mr. Hanlin we got new conservation documents
23 that have different information on them from what
24 had been produced from COLT and I was unable to ask
25 Mr. Hanlin about that, I didn't have the documents

1 when I took his deposition the second time. That
2 is one example. There are just some other things,
3 that is the easiest example to give you.

4 THE COURT: Why can't you characterize this
5 in your deposition, "I didn't have this document in
6 your deposition, can you answer this question for
7 me now," just phrase it this way?

8 MR. PENDARVIS: I could. I could also say,
9 "You all decided not to give me this document."
10 There is a lot of ways I could do that. I'm asking
11 for guidance.

12 THE COURT: I just think your
13 characterization about, "You all failed to do this,
14 I didn't have this when I asked at the deposition,
15 so I ask you that today," you didn't have it, not
16 that, "You all failed to give it to me."

17 MR. PENDARVIS: Okay.

18 THE COURT: All right. You can handle it
19 that way.

20 MR. PENDARVIS: I can handle it a lot of
21 ways, Your Honor, to the best advantage of my
22 client I think it is only fair, I will state on the
23 record I think it is only fair I be able to, you
24 know, delve into the fact they didn't look, they
25 didn't produce it, they didn't ask, they chose not

1 to let me have it and I get to say at least I have
2 taken his deposition twice. I guess I'm asking.

3 MS. McWILLIAMS: Your Honor, may I be heard?

4 THE COURT: Yes, ma'am.

5 MS. McWILLIAMS: In the first place, I
6 thought the Court had already ruled this was not to
7 be injected into the trial of the case. I think it
8 is confusing for the jury and given that Mr. Hanlin
9 was not at Richardson Plowden at the time, it is
10 inherently unfair and that clearly implicates the
11 conduct of the lawyers and as I said before, we're
12 talking about duties of loyalty. The conduct of
13 who failed to look for what and this wasn't
14 provided, that clearly implicates both Nexsen Pruet
15 and the defendant and I just don't think that's
16 fair. I think that we, I have been on record that
17 as soon as the documents were discovered after Miss
18 Lummer's deposition and I stated at the summary
19 judgment hearing on January 27th we will make the
20 witnesses available if need be, I think I stated,
21 "I'll come to Beaufort if I need to," and none of
22 that was taken advantage of. And of course as I
23 said, Nexsen Pruet already paid for additional
24 depositions during which, frankly, the only main
25 subject with the exception of two witnesses was

1 Circular 230, and so the suggestion that a lawyer
2 that is no longer at the firm could somehow be
3 impeached or made to look sloppy by the discovery
4 that went on in the case implicates issues that are
5 not in the case, I think it is improper, I think
6 it's not relevant and certainly is unduly
7 prejudicial under 403 and frankly, Your Honor, at
8 this stage, as I said, I will have to examine my
9 ethical obligations at that point and I think it is
10 improper.

11 MR. PENDARVIS: Your Honor, brief response?

12 She chose to ask him about this conservation
13 document. It sounds as if they recommended every
14 bit of it. He is the guy drafted and gave
15 testimony on what changes to make. To suggest we
16 get it Monday the week before trial --

17 THE COURT: I don't think he testified to
18 that.

19 MR. PENDARVIS: To the extent he made
20 changes, edited the format.

21 THE COURT: I don't think he testified he
22 remembered making the marks, I think was his
23 characterization. I'm going to let you ask the
24 question, "I wasn't provided it, I didn't have an
25 opportunity to ask you about this document when I

1 took your deposition," that way. All the other I
2 think would be patently prejudicial and so I don't
3 want that to become an issue for the jury.

4 MR. PENDARVIS: I'll make sure that doesn't
5 happen, Your Honor.

6 Next question?

7 THE COURT: All right.

8 MR. PENDARVIS: There were discovery requests
9 made for both defendant Hanlin and defendant
10 Richardson Plowden to produce information related
11 to their assets for punitive damages issues. That
12 was denied, trial court said it wasn't ripe and,
13 you know, that is Judge Benajmin's ruling.

14 THE COURT: I didn't say that.

15 MR. PENDARVIS: Judge Benjamin made a ruling,
16 we dealt with it. I'm at this point now where it
17 is ripe and I'm asking the Court, what I had
18 suggested in a proposed order to Judge Benjamin,
19 her discussion of this before she ruled that the
20 motion wasn't ripe, she said, "Well, the way I have
21 seen it dealt with, Mr. Pendarvis," words to this
22 effect were, "The defendant would put some type of
23 statement of their net worth in a sealed envelope,
24 it would be submitted to the trial judge and if and
25 when that conduct triggered the question for

1 punitive damages to the jury became known that
2 would be produced to you during the trial."

3 I'm at this point where I've got the witness
4 on the stand and I need to ask these questions.
5 The testimony of Dr. Adams and Mr. McLeod in the
6 case, we suggest for breach of fiduciary duty and
7 the law of South Carolina does trigger the jurors'
8 decision on whether to award punitive damages and I
9 need to know, under the Gambel case, their ability
10 to pay.

11 MS. McWILLIAMS: Your Honor, first of all we
12 have still pending defendant's motion to bifurcate
13 and what Judge Benjamin described is exactly what,
14 her experience with it was ours and if at the point
15 the Court determined that it will be submitting the
16 issue of punitive damages to the jury and the jury
17 indicates that it is willing to consider a punitive
18 damage, they have to find by clear and convincing
19 evidence, that sort of thing, then at that point
20 Judge Benjamin said, "What I have seen done in
21 other cases, the Court publishes to the jury the
22 statement of net worth."

23 I can't imagine, I mean, that is why in a
24 motion to bifurcate when you're on the liability
25 side you don't go into it otherwise, and as the

1 Court is aware that is now by statute. It doesn't
2 apply specifically to this case because it was
3 filed in 2010, but the statute specifically says
4 the defendant is entitled to a bifurcation, so we
5 will have over the lunch break, if the Court wants
6 to have those sealed, that has not been directed
7 but we'll get them and give them to the judge, but
8 I don't think Mr. Pendarvis now gets to inject it
9 into this case, what Mr. Hanlin's net worth is. I
10 think it is still premature and I don't think under
11 our bifurcation motion that it's appropriate to
12 inject it here.

13 MR. PENDARVIS: Response?

14 THE COURT: Yes, sir.

15 MR. PENDARVIS: If they are willing to
16 provide the Court sealed envelopes with net worth
17 statements for Mr. Hanlin and Richardson Plowden I
18 don't need to go there, we can deal with that.

19 THE COURT: They said they would do that.
20 Whether it gets to the jury or not --

21 MR. PENDARVIS: I understand that, that is
22 why I'm dealing with this now, Your Honor, rather
23 than --

24 THE COURT: All right.

25 MR. PENDARVIS: But if I don't, if that's the

1 agreement, that there will be these sealed
2 envelopes submitted to the Court, then I'm happy,
3 let's get into this cross exam, let's get going.

4 THE COURT: All right. Let's get this
5 cross-examination done, that is probably what I'm
6 going to do in light of hearing the rest of the
7 testimony. That seems appropriate, that seems like
8 it's appropriate under the law, it's appropriate
9 they can do that and that will accomplish
10 everyone's goals.

11 MR. PENDARVIS: If the information is
12 available and if we get to that point that is the
13 concern I've got, I have my witness on the stand
14 for that issue.

15 THE COURT: Okay. Very well. Anything else?

16 MR. PENDARVIS: Nothing, Your Honor.

17 THE COURT: Bring the jury.

18 MR. PENDARVIS: Just for your benefit, I'm
19 going to be asking some questions right off the bat
20 with transcript from depositions of Mr. Hanlin, so
21 we might as well get those out to keep things
22 moving smoothly.

23 (The jury returned to the courtroom).

24 MR. PENDARVIS: Your Honor, I have a copy for
25 you.

1 THE COURT: Is a copy okay?

2 MS. McWILLIAMS: Sure.

3 THE COURT: Okay.

4 BAILIFF: The jury is all present, Your
5 Honor.

6 THE COURT: Very well, we'll continue.

7 Mr. Pendarvis.

8 MR. PENDARVIS: May it please the Court,
9 ladies and gentlemen of the jury.

10 Before we get started, there will be some
11 questions coming up about Exhibit 1. I have made
12 some copies, Madam Forelady, of Exhibit 1 for the
13 jurors' benefit.

14 CROSS EXAMINATION BY MR. PENDARVIS:

15 Q Mr. Hanlin.

16 A Yes, sir.

17 Q You didn't tell the truth in your deposition
18 when you testified repeatedly that you only had one
19 telephone conversation with Mr. Harrah, isn't that
20 true?

21 MS. McWILLIAMS: Objection, Your Honor, that
22 is not -- no foundation.

23 A No, sir.

24 THE COURT: Rephrase that question, I don't
25 think that --

1 Q Did you testify in your deposition that you
2 spoke to Mr. David Harrah only one time?

3 A I testified to talking to him one time and to
4 this day that's the only conversation I remember
5 having with Mr. Harrah. I know that we have looked
6 at time records and they indicate that there were
7 additional communications but I only remember one
8 telephone conversation.

9 Q But your time records show that you
10 communicated with Mr. Harrah, including emails and
11 messages and telephone calls, nine times. Isn't
12 that correct?

13 A Well, I don't have my time record in front of
14 me but I don't doubt that's true. We did have
15 emails back and forth on occasion, I did leave
16 messages for him, so I don't know exactly what
17 those communications consisted of but as I said, I
18 remember talking to him one time.

19 Q Let's take a look at Exhibit 1 which should
20 be in front of you. Mr. Hanlin, let me know when
21 you find Exhibit 1.

22 A I don't see it. Mr. Pendarvis, I'm not
23 seeing it. I would be glad to look at a copy of it
24 if you have one.

25 Q I have one but it has my note in the

1 corner -- here it is right here.

2 A Thank you, sir.

3 Q To speed things along, Mr. Harrah, Mr.

4 Hanlin, I suggest on page three of Exhibit 1 --

5 A Yes, sir.

6 Q Midway through the page it shows a telephone

7 conference, it says with Mr. Justice's CPA David

8 Harrah, November 20, do you see that?

9 A Yes, sir, I do.

10 Q And then below that, down toward the bottom

11 of the page, beginning on November 26, it shows

12 telephone conference with David Harrah, doesn't it?

13 A Yes, sir, it does.

14 Q .3 hours?

15 A That's correct.

16 Q Farther down it shows a third telephone call

17 conference with Mr. Harrah. Do you see that?

18 A On the same page?

19 Q Same page.

20 A Yes, sir.

21 Q And right below that is another, references a

22 second conference with David Harrah, brief revised

23 consulting agent, do you see that?

24 A I see that. I think it should have been

25 brief revised consulting agreement or something, I

1 don't think agent is correct but yes, sir, I see
2 that.

3 Q And then if you turn to the next page, page
4 4, probably two-thirds of the way down the page, do
5 you see email letter, proposal to Jim Justice, copy
6 to David Harrah, CPA?

7 A Yes, sir, I do.

8 Q If we turn to page 5, December 1, about
9 halfway through the page, last entry on December
10 1st, email to David Harrah, CPA, and to Mary Mohr,
11 do you see that?

12 A Yes, sir, I see that.

13 Q Farther down the page, probably two-thirds of
14 the way down, December 4th, telephone conference
15 with David Harrah, CPA, to Mr. Justice, .3 hours,
16 do you see that?

17 A Yes, sir, I do.

18 Q Turning to the sixth page, about two-thirds
19 of the way down, December 18, receipt and review of
20 message from David Harrah, CPA?

21 A Yes, sir, I see that.

22 Q Do you see that?

23 A Yes, sir.

24 Q And below that, the next day, December 19th,
25 almost, the last entry before the last at the

1 bottom on page six, the day before you quit, right,
2 the 19th?

3 A December 19th, yes, sir.

4 Q It references telephone call to David Harrah,
5 CPA, regarding payment of the retainers, signature,
6 and left detailed message?

7 A Yes, sir, I see that.

8 Q So, when you stated in your deposition
9 several times that you had, and if you would like
10 to look at your deposition transcript, Mr. Hanlin,
11 this was a deposition that was taken of you on
12 February 8th, 2011.

13 A Yes, sir.

14 Q You've got a copy of the transcript in front
15 of you?

16 A Uh-huh (Affirmative).

17 Q Page 73, beginning on line 16, you testified,
18 "To be honest," it is actually on the 17th line,
19 "To be honest, I had one conversation with Mr.
20 Harrah, couldn't get him to respond to anything,
21 that, dash, any telephone calls except for that
22 one." Do you remember testifying like that?

23 A Yes, sir, I do, and to this day I remember
24 only one conversation with Mr. Harrah and I know
25 that on several occasions we tried to get him or

1 Mr. Justice to sign the proposal for Y.E.S. and to
2 sign the proposal for Community Open Land Trust and
3 to sign the proposal for the appraiser and they
4 never would, they never signed those things.

5 Q You testified that because of this lack of
6 communication, we're looking at page 120 of your
7 deposition, you felt that that was indicative of a
8 lack of interest on his part?

9 A Yes, sir.

10 Q They had called you back the day before you
11 quit?

12 A Well, we had left messages from time to time
13 and like I say, I remember talking to him one time.
14 My time record indicates I talked to him maybe more
15 than one time but I never got a signed engagement
16 for Y.E.S., I never got a signed engagement for
17 Community Open Land Trust, never got a signed
18 engagement for the appraiser. I think that
19 indicates disinterest.

20 Q And you spent, according to your time record,
21 2.5 hours of time communicating back and forth with
22 Mr. Harrah?

23 MS. MCWILLIAMS: Object to form.

24 Q Is that correct?

25 A I don't know. I haven't totaled up the time

1 but I can tell you a lot of that was messages back
2 and forth but the object of all that was to see if
3 they wouldn't proceed, see if they would not sign
4 the consulting services agreement with Y.E.S., to
5 sign the commitment with Community Open Land Trust
6 and to sign the commitment for the appraiser and
7 they never would do any of those things.

8 Q Let's talk a little bit about the
9 conservation easement document itself.

10 A Yes, sir.

11 Q Do you remember in your deposition -- well,
12 let's back up a second. Before your deposition was
13 taken we didn't have copies of these conservation
14 easement documents, did we?

15 MS. McWILLIAMS: Object to the form, Your
16 Honor. The Court has already ruled on that.

17 MR. PENDARVIS: Foundation for the question.

18 THE COURT: Stick within my ruling, I will
19 let you ask the question.

20 THE WITNESS: Just to clarify, I had left
21 Richardson Plowden at the end of 2008. What was
22 produced to you, I wouldn't have the vaguest
23 notion, by Richardson Plowden. In other words, I
24 wasn't looking through their electronic records, to
25 be honest, Mr. Pendarvis, I don't know what they

1 gave you and what they didn't.

2 BY MR. PENDARVIS:

3 Q We know I didn't show you a copy of the
4 conservation easement document during your
5 deposition on February 8, 2011, did I?

6 A I believe that's correct, yes, sir.

7 Q I just need to put in context why we're
8 asking these questions now.

9 A I understand.

10 Q You were asked, and if you would like to look
11 at your deposition, page 125 --

12 MS. MCWILLIAMS: Your Honor, I have to object
13 to that. It is improper use of deposition
14 testimony. He has got to ask a question first.

15 THE COURT: Yes, he does.

16 MR. PENDARVIS: Sure.

17 BY MR. PENDARVIS:

18 Q Mr. Hanlin, you remember being asked about
19 preparation of documents led to this conservation
20 easement?

21 A Yes, sir.

22 Q And do you remember testifying that the
23 development of the entire project hadn't gotten to
24 the point where creation of a conservation easement
25 document was necessary?

1 A I might very well have said that. I don't
2 remember saying that but I might very well have.

3 Q If you would like to take a look at page 78
4 of your deposition, please, sir.

5 MS. McWILLIAMS: Your Honor, same objection,
6 this is not proper cross-examination.

7 THE COURT: All right. You all come here.

8 (Unrecorded bench conference).

9 BY MR. PENDARVIS:

10 Q Mr. Hanlin, do you have a copy of Exhibit 42?

11 A I'll take a look. No, sir.

12 Q Mr. Hanlin, I believe you've got a copy now.
13 Your attorney had a copy of it. I'm also going to
14 pass up to you another version of the document that
15 was marked as Exhibit 22.

16 A Yes, sir, I see those.

17 Q Now, with those two documents in mind I would
18 like to turn back to Exhibit 1, your time and
19 billing record, in particular page 6.

20 A I've got it, yes, sir. Yes, sir, I've got
21 it.

22 Q Now, the general topic we're talking about,
23 Mr. Hanlin, is preparation of documents for the
24 conservation easement.

25 A Yes, sir.

1 Q And you have given some testimony earlier
2 from the email that is marked as Exhibit 6 dated
3 November 21, where you're discussing with Yancey
4 and Y.E.S. --

5 A I'm sorry, you're referring to --

6 Q Referring to Exhibit 6 in your testimony,
7 about, "Getting the right language in our
8 documents." Do you remember that?

9 A Yes, sir.

10 Q That email?

11 A I remember that testimony. I'm looking for
12 the email, I'm sorry.

13 Q That's generally the topic. You remember the
14 testimony about, "Getting the right language in our
15 documents"?

16 A Yes, sir, I do.

17 MS. McWILLIAMS: Your Honor, I think the
18 witness is entitled, if he is going to ask him
19 about the document, I know it is up there --

20 THE COURT: We've got plenty of documents and
21 time to locate it. I'm trying to keep up with it
22 myself.

23 A Is this Number 6?

24 Q Yes, sir, the email from November 21st, 2007.

25 A Yes, sir. I've got what appears to be

1 Exhibit 6, an email from me to Y.E.S. dated
2 November 21st.

3 Q Now, is it your position that for this
4 conservation easement document you weren't
5 obligated to help craft the conservation easement
6 document that would be recorded for this Justice
7 project?

8 A Yes, sir.

9 Q But you did help craft this document, did you
10 not?

11 A Well, I did several things that weren't
12 required by my engagement agreement. For instance,
13 I think the engagement agreement referred to giving
14 tax advice to Mr. McLeod or Yancey Environmental
15 Solutions, but when he needed some assistance
16 coordinating with David Harrah, the appraiser, I
17 was happy to do that, happy to set up a meeting and
18 also happy to set up a meeting at the farm with Sue
19 Green and Brenda Davis and Mr. McLeod. So, I did
20 some things that my engagement agreement did not
21 require me to do.

22 Q Did you transmit an email copy of this
23 conservation easement document to Sue Green?

24 A I didn't recall transmitting an easement
25 document to Sue Green.

1 Q Let's take a look at page 6 of your time and
2 billing record.

3 A Yes, sir.

4 Q And does it not reflect an entry on December
5 18th, says, "Emailed easement document to Sue
6 Green"?

7 A Yes, sir, but as I testified in my deposition
8 we were working, Sue Green and I were working on
9 more than one thing at that time and we need to
10 establish, I think, to everybody's satisfaction
11 that not all the time entries on this document,
12 this draft bill, were accurate or belonged on this
13 draft bill and as we discussed in my deposition I
14 don't know that I ever saw this draft bill. As far
15 as I know all this time was kept in this computer
16 program and was printed out sometime after the fact
17 and I have not gone back through to make sure all
18 these things were accurate. For instance, I think
19 we established in my deposition that another entry
20 on 12/18, an email to Frank Cooper regarding
21 document completion schedule, et cetera, had
22 nothing to do with this. I think that we just
23 decided there are other entries, there was at least
24 one that pertains to drafting of a will that didn't
25 have anything to do with this and what I said in my

1 deposition and I maintain now still is that Sue
2 Green and I were working on other things. Whether
3 this entry on 12/18 related to conservation
4 easement or Justice properties, I do not know. I
5 do not recall emailing a document to Sue Green, an
6 easement document to Sue Green for this matter.

7 Q Do you have that Sue Green's document that is
8 marked Exhibit 42, Sue Green's is 42, is this the
9 final version after you made edits?

10 MS. McWILLIAMS: Object to form.

11 A Well, I don't know that I made any edits.

12 THE COURT: Well, rephrase that question.
13 I'm not certain I understood it.

14 Q Mr. Hanlin, is Exhibit 42 the final version
15 of the conservation easement document, as compared
16 to Exhibit 22 that was your draft?

17 A Well, I'm not sure. I think there are
18 several questions in that question. Would you
19 break it down for me, please, sir?

20 Q Comparing the draft copy of this conservation
21 document that was on your, Richardson Plowden's
22 file server marked as Exhibit 22 --

23 A Yes, sir.

24 Q Comparing that document to Exhibit 42 that
25 was obtained from Sue Green --

1 A Yes, sir.

2 Q My question is, is Miss Green's version the
3 final version of the conservation document?

4 A Miss Green's version being Exhibit Number --

5 Q 42.

6 A 42? Well, I don't think either one of them
7 is a final version of the conservation document.

8 Q Let me ask it a different way.

9 A Yes, sir.

10 Q Is COLT's version, Miss Green's version, 42,
11 a later draft of an earlier version that was on
12 your server, Richardson Plowden server marked as
13 Exhibit 42?

14 A I don't know that for sure but I will say
15 that if we look on, what is the, not page numbers
16 on this, but if we look under section 3.2 I see
17 that there are some formatting changes on Exhibit
18 Number 22 that appear to be consistent with
19 formatting changes incorporated into Exhibit Number
20 42 but I don't know in which order those formatting
21 changes happened.

22 Q Well, Exhibit 22, your reference to
23 subsection 3, if you look at page 4 of Exhibit 22,
24 subsection 3 was originally numbered, the last
25 paragraph at the bottom of the page was originally

1 numbered 3.6, and Exhibit 22 shows a change of that
2 3.6 number to 3.2, subparagraph A.

3 Do you see that?

4 A Yes, sir, I see that.

5 Q And if we look at page 4 of Exhibit 42,
6 and -- I'm sorry, let me back up. That section was
7 entitled educational uses. Do you see that?

8 A I'm trying to catch up with you.

9 Q I'm sorry.

10 A All right, sir, what paragraph were you
11 talking about?

12 Q The paragraph that is entitled educational
13 uses, toward the bottom of page 4 of Exhibit 42.

14 A Yes, sir, I see that.

15 Q Do you see it has the final number 3.2,
16 subparagraph 8 ?

17 A I see a number, looks like 3.8 or 3.6 that
18 has been stricken and looks like 3.2, parenthesis
19 8, is the new number.

20 Q So, Exhibit 42 is a later draft of Exhibit
21 22, correct?

22 A Well, I would only be guessing. I mean, that
23 could be right. I just don't know.

24 Q Now let's go back to the point in time where
25 you get a call from Mr. McLeod about the Justice

1 project, at the very beginning of your involvement.

2 A Yes, sir.

3 Q You knew from the very beginning that Y.E.S.
4 didn't own the Black River farm property, correct?

5 A Yes, sir.

6 Q You knew from the beginning that Y.E.S. was
7 not going to be taking a charitable deduction for
8 any conservation easement placed on the Black River
9 Farms property, didn't you?

10 A Yes, sir.

11 Q And you knew Y.E.S. didn't need any tax
12 advice about charitable contributions for its own
13 benefit, correct?

14 A No, sir. Mr. McLeod was interested in
15 knowing whether his methodology for valuing this
16 easement was a proper way to do it so that he could
17 then talk to Mr. Justice about the possibility of
18 doing that. So I think he did need tax advice on
19 his own account in order to determine whether he
20 had a viable idea to propose to Mr. Justice.

21 Q That was in his role as a consultant to Mr.
22 Justice, correct?

23 A Well, I don't know he had a consulting
24 agreement at that point. I think that was a way
25 that he wanted to try to conserve the property but

1 I don't know that he was an agent for Mr. Justice
2 at that point.

3 Q You knew if the Justice easement had gone
4 forward the only tax effect on Y.E.S. was going to
5 be income tax that any H and R block agent could
6 handle on a tax return, right?

7 A The only tax effect? Would you repeat that
8 question.

9 Q If the Justice easement had gone forward and
10 Justice had paid consulting fees to Y.E.S., the
11 only tax effect on Y.E.S. from the conservation
12 easement would have been income tax, right?

13 A If the methodology that Mr. McLeod were
14 suggesting resulted in a conservation easement for
15 Mr. Justice, then Mr. McLeod's entity, Y.E.S.,
16 would have had income and I don't know who would
17 have filled out the income tax returns.

18 Q And you knew that Mr. Justice and his company
19 were clearly the intended beneficiaries of the
20 advice, tax issues that Yancey and Y.E.S. were
21 consulting with you about, correct?

22 A No. I think my intended beneficiary of my
23 tax advise was Yancey and Yancey Environmental
24 Solutions so Mr. McLeod could then go to Mr.
25 Justice with a viable proposal for a conservation

1 easement.

2 Q You never told Yancey, did you, that when you
3 started giving advice about the mitigation value,
4 the highest and best use, you were going to take a
5 position that would create a conflict of interest
6 that prevented you from representing Justice, did
7 you?

8 A When we first started talking the only
9 conversation that we had was whether this was a
10 viable methodology for valuing the property. I
11 don't think I was ever asked to represent Jim
12 Justice, certainly not by Jim Justice.

13 Q I understand that but at the point in time
14 when Mr. McLeod is calling you to ask about this
15 concept you never said, "Well, hold on, Yancey,
16 before I give you advice on this, if you're
17 thinking about using me for this Justice project
18 I'm going to be in a conflict position"? You never
19 said that, did you?

20 A No, sir. I'm afraid my crystal ball is not
21 quite that good.

22 Q But you testified you knew that Y.E.S. wasn't
23 going to be taking a tax deduction for a charitable
24 contribution on the Black River conservation
25 easement, right?

1 A I knew Mr. McLeod was wanting to conserve
2 this property and he was looking for a viable way
3 to convince Mr. Justice that should be done and
4 what he asked me was to supply him tax advice about
5 whether mitigation value could be used to value the
6 property and I gave him that advice.

7 Q When do you think you gave the first advice
8 to Mr. McLeod about the mitigation concept?

9 A Well, I remember that we talked about it
10 probably at the end of October sometime. I think I
11 had done some research. I don't remember exactly
12 when I advised Mr. McLeod about that but it would
13 have probably been sometime a week or two later,
14 maybe in October.

15 Q In the prior projects you have worked on with
16 Mr. McLeod, the island near Beaufort and the pond
17 property in Sumter county, I think?

18 A Yes, sir.

19 Q Was Mr. McLeod -- Mr. McLeod was talking to
20 you during that project about various aspects of
21 things like the conservation easement document or
22 the fees, the fee simple documents that were used
23 in those transactions, wasn't he?

24 A Yes, sir, but my role in the transaction was
25 different. I was retained by the landowner in

1 those cases to represent them. In one case I had
2 known the landowner almost twenty years, since I
3 had started practicing law, and the other case I
4 knew the landowner because we had been in third
5 grade together.

6 Q In early November, 2007, you never pulled out
7 the rules of professional conduct and reviewed the
8 conflict of interest provisions when you were
9 making the decision -- excuse me, let me restate
10 that. In November, 2007, you started the process
11 of giving advice to Mr. McLeod, October or
12 November?

13 A Yes.

14 Q You never pulled out the rules of conduct to
15 check the conflict rules as to whether that advice
16 was going to create a conflict with your
17 representation of the landowner in that matter, did
18 you?

19 A Well --

20 MS. McWILLIAMS: Object to form, Your Honor.

21 THE COURT: Go ahead, answer that question.

22 A Again, I had never been asked to represent
23 the landowner and so that situation didn't present
24 itself. At that point, no, I had not pulled it
25 out.

1 Q You had never consulted a conservation
2 easement consultant until this?

3 A No, sir.

4 Q Did Mr. McLeod represent to you, "Mr. Hanlin,
5 I need you to represent Y.E.S. in this matter"?

6 A Well, he asked me for tax advice and when he
7 asked me for tax advice I took that as a request to
8 represent him in providing tax advice.

9 Q So the answer is no, Yancey never
10 specifically said, "I want to hire you to represent
11 Y.E.S. in this matter," did he?

12 A Well, I don't recall that he did. He did ask
13 me to provide him with tax advice and that is what
14 I did.

15 Q Let's fast forward all the way to December
16 20.

17 A Yes, sir.

18 Q You knew when you called Yancey to terminate
19 the relationship that was going to kill the deal,
20 didn't you?

21 A No, sir.

22 Q And your testimony to this jury is that you
23 believed Yancey would be able to find a lawyer to
24 step in with ten days left on a \$45,000,000
25 conservation easement? Is that your testimony?

1 A Well, I think that it depended on the
2 commitment of the landowner and we hadn't been
3 successful in getting the landowner to sign
4 anything at that point in time. I think if Mr.
5 Justice had all of a sudden woken up and said, "I
6 want this transaction to go forward," it could have
7 gone forward.

8 Q We're off base here, now, because your
9 testimony is about whether Mr. McLeod and Y.E.S.
10 could have found another lawyer December 21 to take
11 over this easement and you're conditioning that on
12 Justice being willing, we'll get to that in a
13 minute but I want to get to the question. Is it
14 your testimony Mr. McLeod could have found a
15 competent lawyer with knowledge of how to handle
16 conservation easement of \$45,000,000 magnitude
17 between December 20 and January 1?

18 A Well, I think that from the limited scope of
19 my engagement, yes, he could have found someone who
20 could have looked at the situation to determine
21 whether a mitigation bank would serve as a basis
22 for deciding on the value of the conservation
23 easement. I think he could have found somebody to
24 give him competent tax advice in that time frame,
25 yes, sir, I do.

1 Q And back to the question on Mr. Justice, I
2 mean, the day before David Harrah called you and
3 you didn't call him back to find out what their
4 status was before you decided to quit Y.E.S., isn't
5 that true?

6 A Well, when I got the notice pertaining to
7 Yancey I thought immediate action on several fronts
8 was necessary and contacting Mr. Harrah was not the
9 first priority.

10 Q How were you going to decide whether your
11 withdrawal was going to have a material adverse
12 effect on your client without finding out, as you
13 said, whether Mr. Justice had woken up?

14 A Well, I don't think Mr. Justice in fact ever
15 did wake up but I hadn't received any communication
16 over the month or two that we worked on this that
17 Mr. Justice was interested in proceeding.

18 Q That is not responsive to my question. How
19 were you going to find out your withdrawal wasn't
20 going to cause material adverse harm on your
21 client? You're contemplating, let's put this in
22 context, you're contemplating withdrawal from the
23 representation, correct?

24 A Yes, sir.

25 Q You meet with other members in your law firm

1 about what do in this letter, correct?

2 A Yes, sir.

3 Q Before you could make a decision whether this
4 withdrawal you all were thinking about is going to
5 harm your client you had to call Harrah back to
6 find out, didn't you?

7 A No, sir.

8 Q How were you going to find out if Justice was
9 ready to go, without making a phone call, to return
10 Mr. Harrah's call?

11 A Well, I thought that Mr. McLeod's letter from
12 the IRS deserved immediate attention and so we
13 devoted ourselves to that. But as I have
14 testified, I don't think that it would have been
15 impossible to find another tax attorney to opine on
16 the issues that Mr. McLeod had asked me to opine
17 about. So I think that another attorney could have
18 been found to do that and that if Mr. Justice had
19 wanted to close the transaction, as Mr. Harrah
20 testified, I think he would have.

21 Q But you hadn't finished all your own work
22 that Mr. McLeod had asked you to do, had you?

23 A Well, I had answered his questions.

24 Q Really? Let's take a look at the December
25 14th email that has been marked as Exhibit 18.

1 A Yes, sir.

2 Q Mr. McLeod is asking you to give your legal
3 advice on whether this base line document report is
4 in conformity of 170(H) of the Internal Revenue
5 Code, isn't he?

6 A Yes, sir.

7 Q Did you ever respond to that email?

8 A I believe I did. I believe I called Mr.
9 McLeod to talk to him about it.

10 Q Did you make any changes or suggestions to
11 this base line report?

12 A I don't recall that I did. It looked very
13 thorough and complete to me.

14 Q You never responded by email and gave him
15 anything in writing that confirmed this base line
16 report was in compliance with 170(H), did you?

17 A I don't recall that I did, no, sir.

18 Q In fact, if we want to take a look at your
19 deposition, I asked you in your deposition --

20 MS. MCWILLIAMS: Your Honor, I object. This
21 is not the proper use of a deposition. He has to
22 get the question and answer first.

23 MR. PENDARVIS: Very good.

24 THE COURT: I sustain your objection. Ask
25 the question, he responds and then you can go to

1 the deposition.

2 BY MR. PENDARVIS:

3 Q Mr. Hanlin, didn't you state in your
4 deposition --

5 MS. MCWILLIAMS: Same objection.

6 Q Did you respond --

7 THE COURT: Wait a minute. Let's take a
8 break. You all step back in the jury room. We'll
9 take a break, I've got a phone call I need to
10 respond to, then we'll address this also.

11 (The jury was excused from the courtroom).

12 THE COURT: All right. Let's deal with the
13 deposition first. Mr. Hanlin, you can step down.

14 THE WITNESS: Thank you, sir.

15 THE COURT: As I understand it, Miss
16 McWilliams, your objection is use of the
17 deposition. Just to be clear, ask the question,
18 let him answer. I kind of lost track of whether or
19 not he had answered and you were in the step of
20 that question.

21 MR. PENDARVIS: I will make sure it is clear.
22 He gave testimony he had called Mr. McLeod to
23 respond to the request for information about the
24 base line report. In his deposition he said, "I
25 don't think I did."

1 THE COURT: All right. That will be proper.

2 I lost track, what was the original question?

3 MR. PENDARVIS: I'll clear it up.

4 MS. MCWILLIAMS: Just for the record, the way
5 it is supposed to be done is, "Isn't it true, Mr.
6 Hanlin, you did not call Mr. McLeod about that to
7 give him your opinion," and if he says, "No, I
8 think I did call him," then he gets to pull out the
9 deposition. He can't do it that way, you can't get
10 an answer and then say well, that is not what you
11 said before, he has to give inconsistent answer.

12 MR. PENDARVIS: He did. I asked him did he
13 respond to the email, he said, "I called him." I
14 asked him in his deposition, "Did you make any
15 comments about this base line report?" "I don't
16 think I did."

17 THE COURT: That's inconsistent, you called
18 him or didn't.

19 MS. MCWILLIAMS: I think it has to be an
20 inconsistent statement. I understand. He
21 certainly can't pick up the deposition first and
22 say, "Didn't you tell me this?" He has got to have
23 a --

24 MR. PENDARVIS: You objected, I clarified it.

25 THE COURT: You can't just use the

1 deposition, "Please read your deposition to the
2 jury." Anyway, you all know the rules so I'm going
3 to allow you to proceed with the cross-examination
4 that is proper.

5 I have to make a quick phone call.

6 (Recessed at 11:32).

7 (Resumed at 11:42).

8 THE COURT: All right, Mr. Hopkins, go ahead
9 and get the jury.

10 BAILIFF: I'll be glad to, Your Honor.

11 (The jury returned to the courtroom).

12 BAILIFF: The jury is all present, Your
13 Honor.

14 THE COURT: Thank you very much.

15 Mr. Pendarvis, you may proceed.

16 BY MR. PENDARVIS:

17 Q Mr. Hanlin, at no point in time before
18 December 20 did you tell Yancey or anyone at Yancey
19 Environmental Solutions that it didn't look like to
20 you there was going to be enough time to finish the
21 easement, that, "We have stopped"?

22 A No, sir. Yancey and I and Sue Green were in
23 regular communication about trying to get the
24 document signed, consulting services agreement, the
25 commitment to COLT, and Yancey and I had also been

1 in communication, I think, about the appraiser, Mr.
2 Harrah, so we were in constant communication about
3 that, not constant, not every day, but certainly
4 every few days.

5 Q Well, I'm not really talking about the
6 documents that memorialized the fees people would
7 earn. I'm really talking about the documents
8 necessary and the professional work necessary for
9 the conservation easement. Let me restate my
10 question.

11 With regard to all the professionals working,
12 the appraisers, wildlife biologist, the lawyer and
13 everybody else that was necessary to develop the
14 documents necessary to record the easement and get
15 a tax deduction, at no point in time did you call
16 Yancey Environmental Solutions or Yancey McLeod and
17 say, "We're not going to be able to get this done"?

18 A No, sir.

19 Q And in fact with a billionaire that we have
20 heard Mr. Justice is, no one really needed a signed
21 agreement, if the conservation easement was
22 acceptable to Mr. Justice and he signed it you
23 didn't have any doubt you would get paid, did you?

24 A Yes, sir.

25 Q You did?

1 A Yes, sir.

2 Q And what doubt would you have that you
3 wouldn't get paid if the billionaire Jim Justice
4 and his companies recorded the conservation
5 easement?

6 A Well, I think I was more concerned actually
7 for COLT than for myself. COLT was being squeezed
8 into the position either declining to accept the
9 conservation easement because they hadn't been
10 given the money in their proposal and then being
11 left without the funds necessary to service the
12 easement and the problem that a conservation
13 organization has is that they take on an obligation
14 to monitor the property in perpetuity, forever, and
15 so what they require in order to accept a
16 conservation easement is they require a stewardship
17 contribution and that stewardship contribution was
18 indicated on the letter of intent that Community
19 Open Land Trust sent to Mr. Justice. The Justice
20 organization, Mr. Justice never sent the initial
21 4,000 or 5,000 dollar installment that was required
22 under that agreement and there was no indication to
23 Community Open Land Trust that he was willing to
24 pay any of the rest of the money either, which
25 would have been about \$50,000, \$45,000, \$50,000..

1 And the reason that money is needed is because the
2 land trust has to go out every year and make sure
3 that the land is being kept the way that the
4 landowner has promised to keep the land and so they
5 have to do an annual assessment, they have to make
6 sure the land is being kept that way, so that is
7 part of what that money is used for.

8 The other part of the money is there in case
9 the landowner violates his agreement to keep the
10 land in a certain way and in this case the
11 landowner would have been promising to keep the
12 land in farm land forever, so if he had at some
13 point or some subsequent owner decided to stop
14 farming, then Community Open Land Trust would have
15 had the obligation to bring legal action against
16 them to compel them to comply with the terms of the
17 conservation easement.

18 So, did we have concerns about being paid?
19 Absolutely, and probably more on behalf of
20 Community Open Land Trust than me but certainly
21 whether I would be paid a fee was a big question
22 and, you know, I would like to think that Mr.
23 Justice, if he had decided to proceed with the
24 conservation easement, would have done everything
25 that we were asking him to do but he hadn't signed

1 anything that he said he would and so it puts
2 everybody kind of in a pickle when you've got
3 someone like that that won't sign an agreement, and
4 the problem, too, is that, you know, talking about
5 Community Open Land Trust, you know, if they accept
6 the easement without having received that
7 conservation contribution in advance what do they
8 do then? Do they have to chase after a billionaire
9 to get the money that they need to maintain the
10 easement? It's a real pickle.

11 Q And you want this jury to believe you had a
12 serious doubt that Jim Justice and his companies
13 weren't going to pay at closing or before closing a
14 \$45,000 endowment fee for the easement when he was
15 getting a \$45,000,000 tax deduction?

16 A Yes, sir, that is my testimony, and I tell
17 you, you know, if somebody has that much money, the
18 question comes up, well, why should we be fronting
19 this money for a billionaire? If he really is who
20 we have been told he is and he has all that much
21 money why is it that he won't pay \$4,000 to
22 Community Open Land Trust to do this conservation
23 easement, why is it he hasn't already written a
24 check for \$50,000 for this conservation easement if
25 that is what he wants to do, why is it that he

1 won't pay the appraiser that is necessary for this
2 and why is it that he won't pay the \$50,000 that
3 Mr. McLeod had asked for as a nonrefundable
4 retainer? If he is so awash in money why is it
5 that he hasn't done those things?

6 Q But you were working on that very project
7 with that circumstance right up until the day
8 before you quit, on December 19th you were
9 finishing a letter, correct?

10 A We were working on it with growing unease,
11 and if you follow the correspondence between Yancey
12 and us and Community Open Land Trust there are,
13 there is correspondence, there is emails going back
14 and forth about getting the commitment signed, when
15 are these things going to be signed, and so as time
16 went by our uneasiness about that was growing.
17 Yes, we had, I had understood from Mr. McLeod that
18 Mr. Justice was on board with this but I hadn't
19 seen any independent verification of that.

20 Q But you knew Mr. McLeod had a prior
21 relationship with Mr. Justice, didn't you?

22 A I didn't know exactly what the prior
23 relationship was. I think that Mr. McLeod had
24 indicated that he had done a WPA easement on some
25 other property that belonged to Mr. Justice. I

1 didn't know the circumstances of that and I think
2 he had talked at some point to Mr. Justice about
3 the mitigation bank which Mr. Justice decided not
4 to do. I think that at some point he also talked
5 to Mr. Justice about a conservation easement on Mr.
6 Justice's homeplace, which Mr. Justice decided not
7 to do, so I didn't know what Mr. Justice, his
8 position on this was.

9 Q In the fall of 2007 values about projected
10 mitigation, highest and best use values were
11 suggesting that the -- let me get it right -- the
12 conservation easement value, the mitigation value
13 was going to be about the same, somewhere in the 45
14 to 50 million dollar range, wasn't it?

15 A Well, we were contemplating something on that
16 order. I don't -- of course all that would have
17 depended ultimately on the appraisals that we
18 received and when you do a conservation easement
19 what you do is really two appraisals in one. First
20 of all you have to decide what the value of the
21 property is at its highest and best use and then
22 you have to take the property before it's
23 restricted to determine that highest and best use,
24 highest and best use in that value. Then what you
25 do, you decide through an appraisal what the value

1 of the property is after the easement has been
2 imposed and then you find the difference, and so in
3 order to arrive at a number there would have had to
4 have been an appraisal of the property before the
5 easement was imposed and after the easement was
6 imposed, then you could determine what the
7 conservation value of the property was.

8 Q I wasn't clear, Mr. Hanlin, that isn't why I
9 was using the word projected range, we all know in
10 the fall of 2007, November, October, November,
11 2007, no appraisals had been done?

12 A Correct.

13 Q That's correct?

14 A Correct.

15 Q And you and Mr. McLeod and others were
16 working on projected values, correct?

17 A Well, I'm not sure what you mean by working
18 on. We made some assumptions and we knew that at
19 some point the appraisals would come back and give
20 us definitive numbers but we did know that there
21 would be considerable conservation value to this
22 property.

23 Q And per your emails to Mr. Crawford and
24 others that range was in the 45 to 50 million
25 dollar range, correct?

1 A That was what we estimated, yes, sir.

2 Q Thank you. Now, under the consulting
3 services agreement that Mr. McLeod sent to Mr.
4 Justice his fee after negotiations was going to be
5 four percent, correct?

6 A Well, I think that Mr. McLeod had originally
7 proposed five percent and as I recall Mr. Harrah
8 came back and said four percent. I don't know
9 whether there would have been any further
10 negotiation on that.

11 Q Let's assume four percent is the number.

12 A All right, sir.

13 Q And we'll use the bottom end of the range,
14 45,000,000, four percent of 45,000,000 is 1.8
15 million dollars, correct?

16 A That's approximately correct, yes, sir.

17 Q And based on the December 5th engagement
18 letter from you and Richardson Plowden to Y.E.S.
19 the terms of compensation for Y.E.S. was going to
20 be a third of whatever was paid by Jim Justice or
21 the owner or operator of Black River Farms to
22 Y.E.S., is that correct?

23 A No, sir. It would have been two-thirds.

24 Q You were going to be paid two-thirds?

25 A No, sir. You asked about Y.E.S.

1 Q I'm sorry, Richardson Plowden's compensation
2 would have been one-third of what Jim Justice or
3 owner or operator of Black River Farms paid to
4 Y.E.S., correct?

5 A Yes, sir.

6 Q And in the assumption that \$45,000,000 number
7 was in range, the fee that Richardson Plowden would
8 have gotten was about 600,000, correct?

9 A Assuming that those numbers proved correct,
10 yes, sir.

11 Q And again everybody is working with
12 assumptions on range of value in the fall of 2007
13 when all these fee agreements and consulting
14 service agreements were being exchanged, correct?

15 A Yes, sir. We assumed the numbers would be in
16 that range but, again, we were waiting for
17 appraisals.

18 Q And the other partners and members of the
19 executive committee, Richardson Plowden, were
20 concerned, very concerned about the size of the fee
21 in relation to the amount of services you were
22 providing, weren't they?

23 A Well, they expressed that we should make sure
24 that we did this the right way and that we
25 represented, we knew who we represented. I think

1 that they were certainly concerned that we do this
2 the right way and they had raised questions about
3 what we were doing and what the fee was and that
4 kind of thing, yes, sir.

5 Q This morning you gave some testimony about
6 Exhibit 16, it may still be in front of you, this
7 draft hourly fee agreement. Do you remember that
8 testimony?

9 A Yes, sir, I do.

10 Q And I wrote this down when you testified
11 because I was a little surprised. You testified
12 that this document was being, this draft, hourly
13 fee agreement was being prepared in contemplation
14 of representing clients of Y.E.S. in other matters.
15 Do you remember that testimony?

16 A Yes, sir, I do, and as I testified in my
17 deposition I didn't recall at that time what the
18 purpose of these documents were but as these have
19 been brought to my attention I have gone back and
20 thought about them and as I said earlier my
21 recollection is that these were to be used as some
22 type of templets or documents for additional
23 representation of Y.E.S.' client in similar
24 circumstances.

25 Q Mr. Hanlin, do you have Exhibit 15 in front

1 of you? I will be happy to look.

2 A Yes, sir, I do.

3 Q The truth is this draft document marked
4 Exhibit 16 was the attachment to the email that is
5 marked as Exhibit 15, isn't that correct?

6 A I don't recall.

7 Q Well, Exhibit 15 is an email from you to,
8 dated December 13th, to Mr. Mack. Isn't that
9 correct?

10 A Yes, sir.

11 Q And the first line reads, "Please find
12 attached a new proposed fee agreement for Yancey
13 Environmental Solutions." Do you see that?

14 A Yes, sir, I do.

15 Q And it's your testimony that this document,
16 this draft hourly fee agreement was not being
17 considered to substitute for the fee agreement in
18 place for the Justice project?

19 A It was not being considered by me for that
20 purpose, I don't think. I don't recall if that was
21 the purpose at all, no, sir.

22 Q And is it your testimony that the firm was
23 concerned the \$600,000 fee on this matter was going
24 to be unreasonable or unconscionable or too high?

25 A Well, I can't speak for the firm, I'm not

1 authorized to do that, I don't know exactly what
2 their intentions or concerns were but I know that
3 we did discuss the fee and they just wanted to make
4 sure this was done the right way.

5 Q And in the discussions about the fee there
6 was concern about the size of the fee, in the
7 discussions in which you participated there were
8 concerns about the size of the fee, weren't there?

9 A Well, that was a topic of discussion, yes,
10 sir.

11 Q Is that why Mr. Mack directed you to prepare
12 a revised hourly fee agreement?

13 A Well, I don't recall exactly what Mr. Mack
14 directed me to do at that point in 2007 but we did
15 have some discussions about it. My understanding
16 was that these were for use in the future, which I
17 think is why they are in blank. I think if we had
18 intended that those would be used specifically with
19 Mr. Justice I think the blanks would have been
20 filled in.

21 Q Let's focus in on the withdrawal.

22 A Yes, sir.

23 Q You would agree with me no actual conflict of
24 interest existed on December 20, 2007, wouldn't
25 you?

1 A Well, I don't know that I would agree with
2 that. I mean, I think that, I think that to the
3 extent that you're able you have to consider what
4 could happen in deciding whether a conflict exists.
5 I could frame that as an actual conflict or
6 potential conflict, I think, but either way, the
7 concern was could I give undivided loyalty to Mr.
8 McLeod in proceeding forward when I already had
9 clients that would have been subject to the
10 investigation as indicated by the letter from the
11 IRS. So, I think actually the rules refer to that
12 as a concurrent conflict. I think if you have a
13 conflict, excuse me, where one client's interest
14 might be adversely affected by another, I think
15 some of the rules refer to that as a concurrent
16 conflict.

17 Q But you used the phrase in your testimony
18 just now it could have been a conflict, might be,
19 and I'm asking you is this an actual existing
20 conflict of interest, where your representation of
21 Y.E.S. was materially limited on December 20th,
22 with regard to your representation of former
23 clients in matters from years before? That is not
24 an actual conflict, is it?

25 A Well, I believe it is, because the question

1 is how does a lawyer proceed when he knows that the
2 interests of one client could conflict with the
3 interest of another and you could call that a
4 future conflict but really it affects how the
5 attorney conducts himself from that moment forward
6 and so in that sense I think it's a concurrent
7 conflict.

8 I think that the question is I have these
9 other clients, I have represented them, at some
10 point it might be advantageous for them if I were
11 to testify against Mr. McLeod, it also could be it
12 would be advantageous for Mr. McLeod if I were to
13 testify against them, then how do I conduct myself
14 from that point forward, and part of the problem is
15 if I could be compelled to testify for those
16 earlier clients might something that I learned
17 about Mr. McLeod from that point forward be
18 beneficial to those clients or adverse to Mr.
19 McLeod or vice versa.

20 So, being I think that this is addressed in
21 Rule 1.7 where it talks about a concurrent conflict
22 and whether the attorney believes that he can
23 continue to represent all of the clients properly,
24 and I didn't think I could do that from that point
25 forward.

1 Q Well, we know you were no longer representing
2 the landowners that had recorded easements years
3 before, correct?

4 A It doesn't matter, I still have an obligation
5 to them.

6 Q And that hadn't changed from the first minute
7 when you had, sent a fee agreement to Mr. McLeod,
8 did it?

9 A I still had an obligation to those prior
10 clients ever since I represented them.

11 Q And that obligation existed on the day you
12 sent the fee agreement December 5 to Y.E.S., didn't
13 it?

14 A It did.

15 Q And on December 20th, unlike the work you
16 have done for the other landowners whose easements
17 have been recorded, on December 20 you were ten or
18 eleven days away from recording an easement that
19 would have been the one moment of financial success
20 for Yancey Environmental Solutions, is that
21 correct?

22 A I'm not sure which question you want me to
23 answer.

24 Q You knew on December 20th that in the next
25 ten to eleven days an easement was going to be

1 recorded that would have resulted in a fee to
2 Yancey Environmental Solutions larger than it had
3 ever earned in its history, correct?

4 A No, sir.

5 Q Okay.

6 A I didn't have any commitment from Mr.
7 Justice, I didn't have, COLT didn't have a
8 commitment from him, the appraiser didn't have a
9 commitment from him, I didn't know if that was
10 going to happen at all.

11 Q And you didn't bother to call Mr. Harrah to
12 verify that, did you?

13 A Well, I heard you ask about a phone call that
14 I received from Mr. Harrah on the 19th and I have
15 gone back and looked at the time record, you know,
16 we have agreed that the time record is not
17 completely accurate but what I see on the time
18 record is that I called and left a message for Mr.
19 Harrah, not the other way around.

20 Q And he was calling you back, correct?

21 A I don't see that.

22 Q He had called you, excuse me, on the 18th he
23 had called you back, receipt and review of message
24 from David Harrah, do you see that?

25 A Let me find the document. On the 18th?

1 Q Yes, sir.

2 A Let's see.

3 Q About two-thirds of the way down the page.

4 A Yes, sir, receipt and review message from
5 David Harrah, CPA.

6 Q So you knew he was calling and responding to
7 your calls at least as of December 18th, correct?

8 A He had called, yes, sir.

9 Q And between December 20th and December 31st
10 there was no chance the IRS was going to ask you to
11 give testimony on its investigation when the first
12 meeting wasn't set up until January 17th. Isn't
13 that correct?

14 A I can't assume that, no, sir.

15 Q Okay. The real concern was the termination,
16 in you all's view the concern, if this easement was
17 closed and you were paid a \$600,000 fee on a
18 contingent basis the IRS might consider that to be
19 a violation of some of its rules, isn't that
20 correct?

21 A No, sir. The real concern was to make sure
22 this was done properly, that we only represented
23 those clients that we could represent and that we
24 complied with our ethical obligations.

25 Q If we take, if we take Exhibit 1 reflecting

1 the hours billed on this matter all the way to
2 December 19th, which shows you having worked
3 approximately 73.6 hours, give or take, I
4 understand your testimony is some of these entries
5 aren't correct, I think you testified it is
6 approximately 70 hours, is that correct?

7 A Approximately, yes, sir.

8 Q If you double that and it's assumed from
9 December 20th you worked another 70 hours before
10 December 31, double that, that would be 140 hours
11 and at your typical hourly rate you have testified
12 of 250, that would have been a \$35,000 fee,
13 wouldn't it?

14 A That sounds about right, yes, sir.

15 Q If we take that 140 hours and divided it into
16 600,000, the fee you would have gotten, that would
17 have been \$4,285 an hour. Isn't that correct?

18 A I don't know, sir, I haven't done that math.

19 Q I will represent to you that a calculator did
20 the math for me as well.

21 A Okay.

22 Q If you divide 140 into 600,000 that is
23 \$4,285. In that context you were concerned the IRS
24 might have called this fee unconscionable, weren't
25 you?

1 A No, sir.

2 Q And you never told Yancey or anybody else at
3 Yancey Environmental Solutions that Richardson
4 Plowden had some concerns over the size of the fee,
5 did you?

6 A Well, there were a number of tax related
7 issues raised by different people in the firm and
8 I'm satisfied that those were material risks that
9 you could assert the same concerns in any
10 transaction but it doesn't mean that they're valid
11 or significant and I had reached the conclusion
12 that some of the concerns, that some of the
13 concerns that were raised were not material.

14 Q I was asking about the size of the fee.

15 A Yes, sir.

16 Q Did you ever tell Yancey McLeod or anyone at
17 Yancey Environmental Solutions that you or anyone
18 else at Richardson Plowden had concerns over the
19 size of your fee for the Justice project?

20 A No, sir.

21 Q You knew from the email that Yancey
22 Environmental Solutions was in dire financial shape
23 on December 20, didn't you?

24 A I saw that from the email from Miss Mohr,
25 yes, sir.

1 Q Do you have any reason to doubt it?

2 A No, sir. I mean, I don't know what she
3 considers dire, I don't know what the circumstances
4 were.

5 Q You knew Yancey McLeod was counting on you to
6 be the lawyer for this transaction, didn't you?

7 A No, sir. He asked me to provide him with
8 some tax advice and that's what I did.

9 Q Well, you knew Mr. Justice or Mr. Harrah or
10 any people on the Justice side of this project
11 didn't have tax counsel competent in conservation
12 easement matters as of December 20, 2007, didn't
13 you?

14 A No, sir.

15 Q You had been communicating with a tax lawyer
16 we didn't know about, for Mr. Justice?

17 A No, sir, I didn't say I had communications
18 with any of those. What I said was I didn't know
19 who, what he had in terms of advisers. I was
20 confident that someone of his stature, if they were
21 correct, had advisers that he talked to on a pretty
22 constant basis.

23 Q Well, you knew that as of December 20th,
24 2007, you were the only lawyer actively involved in
25 the Justice conservation project for South

1 Carolina, didn't you?

2 A That would have been an assumption on my
3 part. I did not know that.

4 Q Had you seen any evidence otherwise?

5 A No, sir, I hadn't seen any communications
6 except perhaps with Mr. Ball. I don't remember
7 when I first became aware of Mr. Ball.

8 Q And you knew as of December 20, 2007 -- you
9 were the chairman of the Board for COLT, weren't
10 you?

11 A Yes, sir, I was.

12 Q And you were very familiar with COLT's
13 language that it would accept in a conservation
14 easement, weren't you?

15 A I was familiar with that language, yes, sir.

16 Q And so really you were the only -- were there
17 any other lawyers on the Board of COLT that were
18 involved in the Justice project?

19 A No, sir.

20 Q So you were really unique in this situation,
21 you were the only lawyer that had active
22 involvement in this Justice project and who also
23 had familiarity with the grantee's needs, desires
24 and wishes, isn't that true?

25 A No, sir. Mr. McLeod is an attorney, he was

1 familiar with those things as well.

2 Q Familiar but not a member of the Board of
3 COLT who knew intimately what COLT wanted and would
4 accept as part of a conservation easement, isn't
5 that true?

6 A Well, I think I had a better perspective on
7 COLT probably than Mr. McLeod but I think that Mr.
8 McLeod had been involved in the negotiation of far
9 more conservation easements than I had.

10 Q And negotiation being the key word, you would
11 have been in a unique position to be advising
12 parties to this transaction in terms of negotiating
13 terms between COLT and Justice because you knew
14 everything about COLT, correct?

15 A Well, I'm not sure I could properly advise
16 COLT or Mr. Justice regarding the terms of this
17 easement. I think that what I heard from Miss
18 Green is that she intended to work out this
19 easement but I didn't have a lawyer-client
20 relationship with COLT so I didn't have authority
21 to negotiate an easement from their standpoint and
22 I also did not have a lawyer-attorney relationship
23 with Mr. Justice or anybody in his organization so
24 I didn't have the authority to negotiate it on
25 behalf of Mr. Justice either, so I'm not sure how

1 much I could have done.

2 A There has been testimony in this case there
3 were discussions between you and other members of
4 Richardson Plowden's executive committee about the
5 consequences your withdrawal would have on Yancey
6 Environmental Solutions, weren't there?

7 A There were discussions about the withdrawal,
8 yes, sir.

9 Q I know there were discussions about the
10 withdrawal, I want to make sure the jury is clear,
11 there were not only discussions about the
12 withdrawal, but the effect it was going to have on
13 Yancey Environmental Solutions, weren't there?

14 A Well, in certain senses, yes, there was. One
15 of my concerns was that Mr. McLeod needed to focus
16 on the IRS investigation quickly and one of the
17 reasons for the quick withdrawal, in my mind, was
18 so that Mr. McLeod would have the maximum
19 opportunity to retain other counsel for that
20 purpose.

21 Q And I think you have heard Dr. Adams and
22 others testify that was good advice, I mean, I
23 don't think there is any dispute in this case that
24 the decision and the recommendation you made to
25 Yancey Environmental Solutions to get other

1 attorneys involved to handle the IRS matter was
2 proper, prudent, very good advice. Let's make sure
3 we don't mix things up here. What we're talking
4 about now is completing the Justice project and
5 what I want you to focus on is that you were
6 involved, weren't you, with discussions of
7 Richardson Plowden executive committee members
8 about the effect of your withdrawal from the
9 Justice project, the effect it would have on Yancey
10 Environmental Solutions, weren't there?

11 A I don't recall specific discussions with the
12 executive committee about that.

13 Q How about have you had those discussions with
14 Mr. Mack, didn't you?

15 A We talked about the withdrawal, we talked
16 about the necessity of doing that quickly. I don't
17 remember specific discussions beyond that.

18 Q So it is your testimony that there were no
19 discussions about the effect of the withdrawal on
20 your representation of Yancey -- let me restate
21 that. I want to make sure this is crystal clear.
22 Is it your testimony that you had no discussions
23 with Mr. Mack or anyone else at Richardson Plowden
24 about the effect of your withdrawal, the effect
25 your withdrawal would have on Yancey Environmental

1 Solutions concerning the Justice project?

2 A I don't recall specific discussions of that,
3 no, sir.

4 Q You're not saying it didn't happen, you just
5 don't recall?

6 A I don't recall.

7 Q And the senior lawyers at Richardson Plowden
8 asked you to quit, didn't they?

9 A I think it is more accurate to say we reached
10 that conclusion together.

11 Q And you didn't stop and say, "No, I've got a
12 responsibility because if I withdraw it's going to
13 have a material adverse effect on my client and I
14 can't do that"?

15 A No, sir, I didn't because I didn't believe
16 that to be true, for one thing but, you know, as I
17 have testified, I think that the limited scope of
18 my engagement to give tax advice, I think I had
19 already given Mr. McLeod the tax advice that he
20 needed but if he needed somebody else to come
21 behind I think under the scope of that they could
22 have gone and gotten somebody. I'm not at all
23 convinced the transaction would have occurred
24 anyway. We have gotten no confirmation from Mr.
25 Justice in the form of signed consulting services

1 agreement or a signed agreement with Community Open
2 Land Trust or signed commitment to the appraiser.

3 Q But you said you were sorry when you called
4 Yancey and told him the news that you were
5 terminating all the relations on all matters,
6 didn't you?

7 A I did, and I was and I still am. Yancey is,
8 I think he's a very nice person, I enjoyed working
9 with him.

10 Q You said you were sorry because you knew when
11 you withdrew and quit the project was going to
12 fail, didn't you?

13 A No, sir. You know, I think the project could
14 have been completed in 2007 but even if not, I
15 think it could have been completed in 2008 or later
16 and the information I have from listening to Mr.
17 Harrah here the other day is that Mr. Justice had
18 at least as much financial incentive to complete it
19 in 2008 as did he in 2007.

20 Q You know, I heard that testimony, too, and in
21 December, December 20, 2007, you didn't know that,
22 did you?

23 A Well, I didn't know all those things. I had
24 gotten an indication either from Mr. McLeod or Mr.
25 Harrah that coal prices had been rising in 2007,

1 the latter part of 2007 and I think we also became
2 aware sometime during 2007 that the transaction,
3 the big transaction that Mr. Justice contemplated
4 with his coal company was not going to happen in
5 2007, it was going to happen probably in 2008.

6 Q I'm not talking about Mr. Justice's income.
7 I'm talking about the changes in the tax law that
8 didn't become known to the world, under your
9 testimony, until May of 2008. As of December,
10 2007, you didn't know that that change was going to
11 happen, the understanding and the tax laws you knew
12 at that time was, the great benefits that you
13 described to this jury this morning were going to
14 end on December 31, 2007, did you know that?

15 A Well, the most favorable benefits were going
16 to end on December 31st, 2007, but as I also
17 testified, whether it would have made any
18 difference to the particular individual depended on
19 that particular individual's tax situation and if a
20 person has sufficient income, then those changes
21 wouldn't have made any different to them
22 whatsoever.

23 Q But those are things we don't know. What we
24 do know from the testimony in this case is the plan
25 was Mr. Justice and all the professionals involved

1 was to get this easement recorded by December 31,
2 2007, isn't that correct?

3 A That was our plan but I never saw any
4 movement on Mr. Justice's part to make that happen.

5 Q And after this fiasco, after this termination
6 and this project didn't go forward you didn't get
7 any raises on your salary, bonuses from Richardson
8 Plowden for months and months after that, did you?

9 A Well --

10 Q Yes or no, then you can explain.

11 A Okay. Well, no, my compensation did not
12 change. I left Richardson Plowden about a year
13 later.

14 Q Remember when you testified to this jury that
15 no lawyer should needlessly endanger a client?

16 A Yes, sir, generally I think that's true, I
17 think we also have to be governed by our ethical
18 obligations and they supersede any other
19 obligations we might have.

20 Q On a possible conflict, maybe in the future,
21 correct?

22 A Well, I think we covered this ground but I
23 think there is a definition of concurrent conflict
24 and one of the provisions under that definition is
25 whether the attorney reasonably believes that he

1 can fully represent the current client in light of
2 his past representation of other clients. So, I
3 mean, I think it goes to what the attorney is able
4 to do even from that moment forward.

5 Q And you chose your old clients over your
6 existing client Y.E.S., didn't you?

7 A No, sir. I did the only thing I could do to
8 avoid any further conflict between the two, I
9 withdrew from representation of Yancey so that I
10 would not learn anything that I might later be
11 compelled to divulge. I also withdrew because I
12 had these earlier clients and I didn't know, I
13 didn't believe that I would be able to adequately
14 represent Mr. McLeod, having these other clients
15 that were in, could be in an adverse situation to
16 him.

17 Q But on December 20, 2007, you were already in
18 that circumstance, correct?

19 A Well, I'm not sure that was the case. If I
20 was I certainly didn't appreciate it until the
21 notice from the IRS came and said, "We're
22 investigating all these conservation transactions,"
23 and up until that point I believed that I could
24 represent Mr. McLeod without a conflict with these
25 other clients.

1 Q After you received the IRS notice, you
2 testified you had already had confidential
3 information about Yancey Environmental Solutions,
4 correct?

5 A I'm sorry, what date?

6 Q On December 20, 2007, when you opened that
7 email and you had the IRS letter and you were
8 considering what to do, you knew several things.
9 I'm going go through a few of them. One, you
10 already knew you had confidential information about
11 Yancey Environmental Solutions?

12 A That's correct.

13 Q You had information about easements from
14 other clients?

15 A That's correct.

16 Q You have testified you couldn't represent
17 those clients because of the position you put
18 yourself in with Y.E.S., do you remember that?

19 A That I wasn't going to be able to represent,
20 yes, I could not represent those clients in, for
21 instance, the IRS investigation, that's true.

22 Q So you were already in circumstances, the
23 only variable left was whether to finish the
24 project for Yancey Environmental Solutions and you
25 chose to abandon them, didn't you?

1 A I didn't choose to abandon them, I chose to
2 withdraw from the representation because I did not
3 think that I could give Mr. McLeod the loyalty as
4 an attorney that I thought he deserved and I
5 thought that he needed immediate other counsel to
6 deal with the IRS investigation. The only -- I
7 only saw downside to Mr. McLeod if I continued to
8 represent him.

9 Q I've got a few more questions for you and I
10 want to make sure we're clear. None of them have
11 to do with your representation of Y.E.S. on the IRS
12 investigation. To make sure we're clear, these
13 next few questions have nothing to do with that.

14 A All right, sir.

15 Q With regard to the Justice matter you chose
16 to break the client safety rule, cause no harm to
17 your client, didn't you?

18 A I didn't choose to do that. I did the
19 withdrawal based on my ethical obligations.

20 Q All you cared about was keeping Richardson
21 Plowden out, from getting sanctioned by the IRS,
22 isn't that true?

23 A No, sir, not true at all.

24 Q And you didn't care about Yancey or Y.E.S. or
25 what fees they would have earned if the project had

1 been preserved?

2 A That's not true. As I have testified, I knew
3 of no reason why this couldn't have been done and
4 completed in 2007. I certainly didn't know of any
5 reason it couldn't be completed later. Every
6 indication I had was that Mr. Justice would have at
7 least as much incentive to do it later as he did in
8 2007.

9 MR. PENDARVIS: No further questions.

10 MS. McWILLIAMS: Briefly, Your Honor.

11 REDIRECT EXAMINATION BY MS. McWILLIAMS:

12 Q Mr. Hanlin, Mr. McLeod never raised any
13 questions about the size of your fee or his fee
14 under the consultant services agreement?

15 A No, ma'am.

16 Q And when you had your call with Mr. McLeod on
17 December 20 and advised him of your withdrawal did
18 he ask you to reconsider?

19 A No, ma'am.

20 Q Did he at any point after December 20 call
21 and say, "Hal, could you please just reconsider?"

22 A No, ma'am.

23 Q Did he ever call and say, "Can you help me
24 find another lawyer?"

25 A No, ma'am.

1 Q And did he ever ask you to just stick in just
2 for this transaction?

3 A No, ma'am.

4 MS. McWILLIAMS: I have no further questions.

5 THE COURT: Any recross?

6 MR. PENDARVIS: No.

7 THE COURT: Very well. You may step down,
8 Mr. Hanlin.

9 THE WITNESS: Thank you, Your Honor.

10 (Witness excused).

11 THE COURT: Miss Meyer, 1:45 or 2:00? Do you
12 want 1:45 or 2:00 o'clock? It is 12:30 right now.

13 JUROR: 2:00.

14 THE COURT: 2:00 o'clock is fine, see you
15 back in the jury room at 2:00 o'clock. You can't
16 discuss the case. See you all after lunch.

17 (Jury excused from the courtroom).

18 THE COURT: All right, we'll stand at ease
19 until 2:00 o'clock.

20 (Recessed at 12:36 p.m.).

21 (Reconvened at 2:01 p.m.).

22 THE COURT: All right, are you ready?

23 MS. McWILLIAMS: Yes, Your Honor.

24 THE COURT: All right; Mr. Hopkins, get the
25 jury.

1 begin to discuss the case, even though you have
2 heard all the evidence, because you haven't heard
3 the closing summaries or my instructions so you're
4 still prohibited from discussing the case. See you
5 first thing in the morning. 9:00 o'clock?

6 All right, see you at 9:00.

7 (The jury was excused from the courtroom).

8 THE COURT: All right, have a seat.

9 Do you have motions?

10 MS. MCWILLIAMS: Yes, Your Honor.

11 THE COURT: Very well. Hang on one second,
12 let me find a notebook.

13 All right. Do you all need a break?

14 MS. MCWILLIAMS: We'll go ahead.

15 THE COURT: All right, go ahead.

16 MS. MCWILLIAMS: Pursuant to Rule 50 of the
17 South Carolina Rules of Civil Procedure the
18 defendants move for a directed verdict, renew their
19 motion for directed verdict now at the end of all
20 of the testimony, Your Honor, on the ground that
21 now taking all of the testimony in a light still
22 most favorable to Yancey Environmental Solutions,
23 LLC, that there is no genuine issue of material
24 fact to be submitted to the jury, therefore the
25 defendant is entitled to a judgment as a matter of

1 law.

2 I understand from the prior motion of
3 directed verdict at the end of the plaintiff's case
4 the Court thought that there was a question, some
5 question of fact as to proximate cause and of
6 course that was a subject of much argument at that
7 time, Your Honor. That was Monday morning, this
8 week and, Your Honor, even after the Court has
9 admitted the, and reviewed, played the testimony of
10 Justice Family Farms' designee, now we have the
11 Defendant's side of the story and so as to, there
12 is certainly not any dispute as to the existence of
13 the attorney-client relationship but with respect
14 to the breach of duty by the defendant we submit
15 that now with the testimony of Professor Crystal
16 and Mr. Hanlin that the plaintiffs have, the
17 plaintiff has failed to produce even a cintilla of
18 evidence that the defendant law firm and Mr. Hanlin
19 failed to follow generally recognized practices and
20 procedures applicable to the legal profession under
21 the circumstances which were existing at that time
22 and then furthermore, that their act or omissions
23 proximately caused Y.E.S. to suffer damages.

24 Now, we in no way waive our continuing
25 objection to what Mr. Miller said purporting to be

1 on behalf of Justice Family Farms but what we do
2 know now, based on what Mr. Hanlin has testified,
3 is that when presented with the circumstances of
4 the IRS notice, the Court has now heard Mr.
5 Hanlin's deliberation and there is, I don't believe
6 there is any dispute between what Professor Adams
7 and what Professor Crystal said, which was it is a
8 lawyer's obligation under the rules of professional
9 conduct to analyze whether or not there is a
10 conflict or whether or not under the circumstances
11 the lawyer can continue to represent his or her or
12 its client without being materially limited either
13 in respect to the obligations to that client, to a
14 former client, to a third-party.

15 In this case that is exactly the
16 circumstances that Mr. Hanlin has testified to.
17 What he said was, "I knew that I had these other
18 transactions and I did not reasonably believe I
19 could continue to represent Mr. McLeod or Y.E.S.
20 under those circumstances," and so the second
21 prong, which is whether or not their conduct was,
22 met the standard of care, we submit, Your Honor,
23 that now has been resolved because what Mr. Adams,
24 what Professor Adams said was that there was a lot
25 of criticism about the fee agreement and as we

1 noted earlier, Mr. Hanlin has now explained how
2 they entered into the fee agreement and the
3 plaintiff's own testimony was, "I thought it was
4 unusual but I didn't care," so all of that
5 testimony has been proffered.

6 With respect to either the breach of contract
7 or breach of fiduciary duty, that has been negated
8 by both the testimony of the plaintiff and the
9 explanation given by Mr. Hanlin regarding his
10 thought process with respect to the fee, and
11 respectfully now, Your Honor, that we're near the
12 end of the case, given that the defendant received
13 no fee, there is no evidence they got any fee,
14 there is some evidence obviously that Mr. McLeod
15 and Mr. Justice reached some agreement with respect
16 to payment, I believe the famous check is \$15,000,
17 but there is no evidence that this law firm
18 received any fee, so any of the allegations that
19 are premised here on breach of fiduciary duty or
20 breach of contract with respect to this
21 unconscionable fee or this unreasonable fee under
22 Rule 1.5 simply don't matter, they are not part of
23 the case because we didn't receive a fee, we didn't
24 take a fee and, you know, there is a fairly
25 deceptive argument could have been made by the law

1 firm that given that it's the plaintiff's position
2 that it had a contract with Mr. Justice and in fact
3 I believe the words partial performance has been
4 thrown around in this lawsuit, that the defendant
5 might have said, "We don't care what you got but
6 whatever you got our deal was one-third,
7 two-thirds," but there is simply no evidence, no
8 issue to the jury with respect to the fee.

9 So, what we're then left with, Your Honor, is
10 the fact that it didn't close in general and we're
11 back again to the argument which has been suggested
12 to this jury that if Mr. Justice had, if it had
13 been recommended to Mr. Justice by Mr. McLeod on
14 December 24th in this conference call they got on
15 Christmas Eve, "You know what, I've got the IRS
16 investigation, I'm going to be vindicated, this
17 doesn't have any basis whatsoever, let's go
18 forward," and there was some evidence that most
19 probably Mr. Justice would have done that, then
20 they might have an issue of fact for the jury. But
21 there is no evidence on that.

22 Even taking the testimony from what Mr.
23 Miller testified as the 30(B)(6) for Justice Family
24 Farms, "It was our intent to go forward, we wanted
25 to get the tax deduction, we didn't get the tax

1 deduction because Mr. McLeod told us not to go
2 forward," of course they are not parties here so
3 that doesn't have anything to do with anything but
4 the fact of the matter is Mr. Miller never
5 testified, "Oh, well," Mr. Miller couldn't because
6 he doesn't have personal knowledge, but he never
7 asked, even if you want to go back to the whole
8 issue of what was the foundation for his
9 deposition, he never even asked Mr. Justice, "Hey,
10 Jim, if you had been told by Yancey, rather than
11 stop, you had been told go, would you have done
12 that?" We would still be objecting like crazy
13 because that is hearsay but he didn't ask that
14 question and that testimony was never given in this
15 court, so what the jury has to surmise is that,
16 well, and that is basically what they have to do,
17 they have to speculate as to what was the reason
18 Mr. Justice agreed with the recommendation, because
19 as I said before, I don't want to be a broken
20 record here, Your Honor, but the record is clear
21 Mr. McLeod said, "I told him two things, I told him
22 about the IRS investigation," entirely proper, we
23 agree with that, and he said without any input from
24 the defendants and no disclosure the defendants
25 were no longer there, he said, "I think you need to

1 postpone it," and that's the testimony, that's it.

2 So what did Mr. Justice, what did he decide?

3 And we keep coming back, Judge, Your Honor, you

4 have noted this a number of times, if the

5 disclosure was to Mr. Justice and the decision was

6 by Mr. Justice, and we can't listen to some

7 videotape LLC designee tell us because in fact even

8 if you wanted to look at it he didn't get asked

9 that question, he didn't find out, didn't find out

10 from Mr. Justice and he didn't tell this jury, but

11 why did Mr. Justice accept that recommendation?

12 We'll never know. We could know but we don't know.

13 But what we do know is that on the basis of

14 that recommendation by Mr. McLeod without the

15 disclosure of the, "That I don't have my lawyers,"

16 Mr. Justice agreed and said okay, and of course

17 there was some payment later on and that still

18 doesn't have bearing on whether or not the

19 withdrawal proximately caused the transaction not

20 to go forward. In fact, as we have said, it can't

21 possibly have had any direct cause because he never

22 told Mr. Justice about it. Mr. McLeod has

23 admitted, "I didn't even tell Mr. Justice until

24 sometime in April of 2010," when he wrote him and

25 said, "I need your help." And at that point, and,

1 Your Honor, we have not argued prior to, in the
2 plaintiff's case in chief, but now that all the
3 evidence has come in and Mr. Hanlin has testified
4 and our expert has testified, as difficult as it is
5 to face, the fact of the matter is there is, there
6 are two different stories being told by Mr. McLeod.

7 He tells Mr. Justice the reason he has got to
8 postpone it he has the IRS investigation, now he
9 wants to come in and tell the jury, "No, the real
10 reason I told him that is that my lawyers had
11 withdrawn, and if he gave Mr. Justice the
12 opportunity to evaluate all the evidence, all the
13 facts, "Which there is an IRS investigation and my
14 lawyers have quit," or, "My lawyers have dumped me,
15 my lawyers have withdrawn," then in that event, if
16 there was some cintilla of evidence that Mr.
17 Justice had said, "Wait a minute, you don't have
18 your lawyer here, I'm not going forward," if there
19 was just something to tie it to the lawyer, and it
20 simply isn't.

21 They could have produced that evidence. They
22 didn't produce that evidence even with Terry Miller
23 who came in having given an affidavit and then
24 testifying, they didn't ask the right question. We
25 would still be objecting that it was hearsay but

1 they didn't ask him the right question and it is
2 fundamental under a legal malpractice action the
3 plaintiff has got to show that if the conduct had
4 been otherwise, not as the defendants acted, but as
5 the plaintiff maintains the result would have been
6 different, and there is no evidence of that.

7 And furthermore, Your Honor, we renew our
8 motion for directed verdict on the issue of
9 damages. As we said, even if the Court thought
10 there was a cintilla of evidence to send the case
11 to the jury on the issue of liability, on the issue
12 of damages we just renew that it is entirely
13 speculative for the jury to attempt to base a
14 verdict on a best guess and, Your Honor, we have
15 now been able to review the testimony although it
16 is not the official transcript but it is pretty
17 close, from the court reporter, of Dr. Hawkins and
18 it is clear in two places Dr. Hawkins says that
19 \$45,000 best bet, up in the air, "Rush job that I'm
20 sending you via email, did not include, from which
21 would have to be subtracted the cost of the
22 mitigation." He says that and under that basis,
23 Your Honor, and if the Court would like for me to
24 hand it up, he was asked with respect to his email,
25 which was in evidence as Plaintiff's Exhibit 26,

1 let me hand that up, "Dr. Hawkins, I want to
2 confirm this email here does not contain any
3 information regarding the cost of mitigation,
4 correct? That's correct. So, is there any
5 evidence with respect to what it would cost?" And
6 the answer is no. There is nothing in the record
7 regarding what those costs would be.

8 And he was asked earlier, Your Honor, right
9 at the beginning of the cross-examination,
10 regarding the \$45,000,000 number on the email, "Can
11 you tell me whether, that number does not include
12 cost of mitigation, correct? Answer. That's
13 correct, it is, would be what I would perceive to
14 be the functional value of that piece of property
15 for those eleven characteristics of a wetland if it
16 had been fully mitigated, which it was not."

17 And of course we previously argued, Your
18 Honor, and I don't want to unnecessarily repeat
19 what the Court is already aware of, but one of the
20 arguments that we made at the directed verdict
21 stage was that the patchwork of a foundation, it is
22 really more, we submit it is a house of cards, we
23 want the jury to look at a feasibility study for a
24 mitigation bank that was never done in July of '07
25 and pick some figures out of there, "Jury, we want

1 you to take maybe the cost of actually making it a
2 mitigation bank and then let's come over and apply
3 it to the best guess of Professor Hawkins, Dr.
4 Hawkins, even though he never finished it, and that
5 way you can come up with a value of a conservation
6 easement that Mr. Justice would have put on his tax
7 return."

8 We submit, Your Honor, that is simply not
9 competent evidence on which a jury, they can do
10 nothing but speculate. If there had even been some
11 expert testimony on damages, which there was not,
12 it simply wasn't offered and we would submit that
13 in this type transaction it simply couldn't be
14 offered because Dr. Hawkins got told to stop.

15 Now, he came up with a best guess on one of
16 the wetlands and he said there were numbers and he
17 gave some. As I said, it is a guesstimate, best
18 guess, so we would submit, Your Honor, we just
19 renew that even now at the end of the case nothing
20 has changed which would permit the jury to
21 speculate as to damages.

22 We also, Your Honor, believe at the end of
23 the case now is the appropriate time for the
24 defendant to move for a directed verdict as to the
25 plaintiff's claim for punitive damages. As the

1 Court is well aware, the standard for punitive
2 damages, there must be evidence of willful, wanton,
3 reckless conduct, or I think it it is described
4 sometimes as the defendant just exercises slight
5 care.

6 We would submit, Your Honor, that while Mr.
7 McLeod may not have liked the fact of the
8 withdrawal, that the evidence in the record is the
9 defendant at all times attempted, you know, with
10 benefit of hindsight someone may say well, you
11 should have deliberated more, you should have spent
12 more time. In fact that is what Professor Adams
13 said, you know, you should have more deliberations
14 as to it, but the fact there might have been more
15 deliberations does not change the fact there is no
16 evidence this was a willful, wanton, reckless
17 conduct.

18 In fact Mr. Hanlin has testified on direct
19 and through cross that he did deliberate, he did
20 think about it and he had the dilemma that lawyers
21 have, which is, "I have represented somebody in the
22 past, it might have implications now, given the IRS
23 has sent in this notice," there is nothing in the
24 record that the defendant had any control or
25 otherwise, we didn't have anything to do with the

1 fact the IRS investigation landed on everybody, in
2 everybody's lap December 19th or 20th and then
3 people took action with respect to it.

4 This is simply not a case where the jury
5 should be permitted to consider that this is
6 reckless, willful, wanton, even slight care. You
7 have, this is a case where you have law experts to
8 come in and debate whether or not how this rule
9 applies, demonstrate that the defendant exercised
10 at least slight care and we would submit they did
11 exactly the prudent thing and in fact much of what
12 Professor Adams said, he did not have any criticism
13 of the defendant's decision not to be able to
14 represent Mr. McLeod in the IRS investigation and
15 so, you know, this is simply not a case where there
16 is even any evidence that the conduct of the
17 defendant or the alleged commissions of the
18 defendant represented a lack of or willful, wanton
19 or lack of even slight care. I think to the
20 contrary there is certainly evidence that they
21 called Mr. McLeod, they then wrote Mr. McLeod and
22 beyond that there is no evidence that he asked for
23 the file or any documents caused the transaction
24 not to close.

25 Now, finally, Your Honor, this is really --

1 I apologize, I don't want to overlook, if I may
2 back up actually to the actual damage, Your Honor.
3 We have a provision of a contract that the
4 plaintiff is seeking to enforce, that was not
5 signed, it was not, as far as we know it was not
6 agreed to by Mr. Justice but if it was it was going
7 to be four percent of something. The only aspect
8 of that contract for which there was any reasonable
9 expectation was the \$50,000 nonrefundable retainer
10 and we know that in fact Mr. McLeod has already
11 received a portion of that. So, even if this case
12 were to be submitted to the jury and which we say
13 it should not and the issue of actual damages when
14 considered, we would submit that the evidence
15 establishes that the plaintiff should be limited to
16 the difference between \$50,000 nonrefundable and
17 the amount that the plaintiff has admitted it
18 received. And that is true not only because of the
19 contract but also because of the speculative nature
20 of the rest of the conservation easement valuation
21 which was never made and never submitted. And then
22 finally, Your Honor, to the extent that the jury
23 considers, is permitted to consider damages, which
24 we submit they should not, we think that punitive
25 damages should not be a part of the case.

1 Furthermore, Your Honor, with respect to
2 damages, this is something I know we have pled but
3 I have not argued, that is that now that we're at
4 the end of the case and all the evidence is in
5 there is no evidence that the plaintiff attempted
6 to mitigate his damages. In fact, the only
7 evidence is that the plaintiff simply deemed it
8 impossible and did nothing. However, we have
9 evidence proffered by the plaintiff through Mr.
10 Miller that Justice Family Farms or whatever one of
11 the companies did a conservation easement in 2009
12 and did it in a week. That is what he said, did it
13 in a week, pulled it together, did it in a week.
14 That is assuming of course Mr. Justice wanted to do
15 it.

16 But with that evidence in the case and the
17 evidence that Mr. McLeod admitted that when he
18 wrote Mr. Justice in April of 2010, or August of
19 2010, asking for an affidavit he said, "You will
20 recall everything was done and we were days from
21 closing;" under that, taking that evidence, Your
22 Honor, we submit that the plaintiff has failed to
23 mitigate its damages and had an obligation to do so
24 and all that evidence together can only presume
25 that the transaction could have been done and he

1 did nothing, he did not attempt to replace the
2 lawyers and therefore under that, under that basis
3 the plaintiff should not be permitted to argue to
4 the jury that it suffered these damages.

5 MR. PENDARVIS: My turn?

6 THE COURT: Yes, sir.

7 MR. PENDARVIS: Your Honor, may it please the
8 Court.

9 THE COURT: Yes

10 MR. PENDARVIS: The bottom line, the bottom
11 line is the motion under Rule 50 would require the
12 Court determine the jury, whether they believe Dr.
13 Adams versus Professor Crystal, whether they
14 believe Yancey McLeod or Mr. Hanlin, whether they
15 believe Justice Family Farms' designee Mr. Miller
16 over Mr. Harrah who no longer is employed, those
17 factual disputes, who believes what is certainly in
18 the jurors' province, not for the Court. It is not
19 an undisputed matter of law, a decision the Court
20 is able to make.

21 One thing in particular and I was really
22 careful to listen to Professor Crystal. Professor
23 Crystal's opinions, he specifically said in
24 response to, "Have you developed opinions," he
25 said, "Yes, I've developed opinions on the breach

1 of fiduciary duty and the professional negligence
2 claim." He made no statement whatsoever as to the
3 breach of contract and in particular, Your Honor,
4 the contract, the breach of contract claim is
5 focused on Exhibit 10, and Exhibit 10 has a right
6 of withdrawal provision in it and it says, "It is
7 understood and agreed that this law firm has the
8 right to terminate our representation of you in
9 this matter pursuant to Rule 1.16 of the rules of
10 professional conduct," and it goes on to elaborate
11 under 1.6, 1.5, which deals with the client fails
12 to substantially fulfill an obligation to the
13 lawyer.

14 So, certainly with Dr. Adams opinion 1.6
15 requirements were not satisfied and specifically
16 the 1.5 issue, there is no evidence whatsoever in
17 this case that Yancey McLeod, Yancey Environmental
18 Solutions failed to substantially fulfill an
19 obligation to the lawyer regarding the lawyers'
20 service or payment therefore and we submit that
21 given that Professor Adams' opinions, excuse me,
22 Professor Crystal's opinions were specifically
23 limited to the professional negligence and breach
24 of fiduciary duty claims, at a minimum the breach
25 of contract claim goes to the jury. But we submit

1 all of it goes to the jury, given the testimony on
2 both sides of the case.

3 The suggestion, by the way, that the
4 plaintiffs just simply didn't ask the right
5 questions, well -- endeavoring to be nice, not
6 consistent with the argument of this Court
7 regarding the testimony in the written transcript
8 from Mr. Miller, questions posed on paragraph, page
9 34, page 36 where we asked, we respectfully request
10 to submit to the jury the questions that were posed
11 to Mr. Miller in his deposition as the designee for
12 Justice Family Farms that if Mr. McLeod had
13 represented, advised about the lawyer and
14 recommended it to proceed what would they do? The
15 jury didn't get that because of the defendant's
16 suggestion, to suggest it wasn't asked is not
17 consistent with the evidence that has been
18 presented to the Court, might not have gone to the
19 jury, but that is just not consistent.

20 In addition, the suggestion, the argument was
21 made that now that the Court has heard Mr. Hanlin's
22 explanations about his deliberations and what have
23 you after he got the IRS letter, now as a matter of
24 law the Court should take this away from the jury,
25 well, the jury did hear testimony that Professor

1 Adams had reviewed both deposition transcripts of
2 Mr. Hanlin and in his opinion, his testimony, Dr.
3 Adams' testimony nonetheless was that in his
4 opinion Mr. Hanlin and Richardson Plowden had
5 indeed breached duties, professional duties,
6 fiduciary duty and contractual duties, so the idea
7 that the testimony from, former testimony from Mr.
8 Hanlin, not that the deposition testimony somehow
9 defeats Dr. Adams' opinions as a matter of law, and
10 we contend this case should go to the jury. There
11 has never been any dispute that the defendant
12 didn't receive a fee. There has never been a
13 contention that they should have gotten a fee or
14 they got some fee, that is just not really part of
15 this case. In fact we say they weren't entitled to
16 any credit for the fee based on their breach of
17 fiduciary duty. I'm not certain where that came
18 from.

19 And I also want to make clear on this,
20 Professor Adams in his opinions never said that
21 there was a proximate link between his opinions on
22 the impropriety of the fee and unreasonable nature,
23 unconscionable nature of the fee had any proximate
24 relation to the claims by the plaintiff. What he
25 said was and what we're going to argue to the jury

1 is that it explains the motive on why this law
2 firm, this lawyer would have withdrawn on the eve
3 of the completion of this conservation easement,
4 but there has never been any argument that the fee
5 issue proximately caused injury to Yancey
6 Environmental Solutions. What caused the injury
7 was the sudden, abrupt termination of their
8 representation of Yancey Environmental Solutions in
9 this transaction that was anticipated and everyone
10 else was planning to close in 2007.

11 Now, there was also some argument that Yancey
12 had, Mr. McLeod had told Mr. Justice in that
13 December 24th phone call that he recommended that
14 Mr. Justice proceed with the easement in light of
15 the IRS letter. The jury may have disagreed with
16 the circumstances, the jury may have remembered
17 Curtis Elliott's opinion as a competent tax lawyer
18 that handles conservation easements. Other than
19 Mr. Hanlin, he is the only expert on this point.
20 Professor Crystal acknowledged he wasn't involved
21 in those matters and Mr. Elliott, in his expert
22 opinion told the jury no competent lawyer would,
23 with skills in conservation easements would have
24 touched this case on December 10th, notwithstanding
25 the due diligence requirement, any lawyer getting

1 involved, certainly any conservation easement
2 manifested by the size of this easement and the
3 likelihood of audit by the IRS, that no competent
4 lawyer would have done it.

5 So, what the defense is suggesting to the
6 Court to rule as a matter of law is that Mr. McLeod
7 should have given this advice and recommended Mr.
8 Justice proceed and then have to scramble to find a
9 lawyer when he knows that he's not going to be able
10 to find a competent lawyer. The jury may agree
11 with Mr. McLeod's testimony that he wouldn't have
12 hired a lawyer that said he would have taken the
13 case because Mr. McLeod is familiar enough with the
14 complexity of this transaction to realize that he
15 couldn't have gotten it done and not done in a
16 fashion that would have satisfied all the specific
17 details for a conservation easement.

18 The jury could also agree with Mr. McLeod's
19 explanation of exactly why he didn't tell Mr.
20 Justice about his lawyer withdrawing from this
21 case. The jury heard from Professor Adams, Dr.
22 Adams, that he had read the testimony from Justice
23 Family Farms' designee and Dr. Adams as an expert
24 told the jury that Mr. Justice said, "We're in the
25 boat," and the jury could have believed that, that

1 Mr. Justice knew that the idea was we're going to
2 do this easement and that is absolutely consistent
3 with everything Terry Miller said in his deposition
4 on behalf of Justice Family Farms, so the jury has
5 heard two sources related to companies and Mr.
6 Justice, one source from testimony about what Mr.
7 Justice said and the other from the companies of
8 which Mr. Justice has the controlling interest. In
9 context the jury will know, Mr. McLeod was asked
10 about the April 10th, 2010 letter that Mr. McLeod
11 decided without consulting with his counsel he was
12 going to write Mr. Justice and the jury is going to
13 hear or will be able to conclude that Mr. Justice
14 knew in 2011 when his designee from his company was
15 going to be deposed about this case exactly what
16 happened and that, "Mr. McLeod didn't tell me about
17 the lawyer," but Mr. Justice allowed, you know,
18 cooperated with the easement.

19 For the record, in the clerk of court's
20 office there is no commission for subpoenas to be
21 issued in West Virginia and there was no subpoena
22 issued out of a West Virginia court honoring full
23 faith and credit of South Carolina's directions for
24 issuance of a subpoena. Mr. Justice and his people
25 knew about the reason this easement didn't go

1 forward and that nonetheless the testimony was
2 given from Mr. Miller.

3 And also in terms of causation, the jury also
4 heard, I said this in the first part, I will just
5 repeat it here, the jury also heard Mr. McLeod
6 testify from the witness stand that when he hung up
7 the phone after Mr. Hanlin had told him he was
8 terminating all relationships he turned to Mary
9 Mohr and said, "We've got to call Jim Justice and
10 postpone the project," and if that isn't a causal
11 relationship I don't know what could be more
12 causally related. They did just that. They called
13 Mr. Justice and postponed the relationship.

14 In terms of damages, Your Honor, the jury
15 heard testimony again today from an expert in
16 conservation consulting, a lawyer, Mr. Hanlin, who
17 again today confirmed the \$45,000,000 value range,
18 that the dollars part they were working with, he
19 confirmed the 1.8 million dollar fee earned and the
20 \$600,000 fee that the law firm would have earned,
21 so in addition to the other evidence that's been
22 presented on damages and Dr. Hawkins' professional
23 opinion that we discussed at the first directed
24 verdict motion, there was sufficient clarity on
25 damages.

1 As the Court is aware, plaintiffs are not
2 required to prove damages to an absolute certainty.
3 The reasonable value of Yancey Environmental
4 Solutions' fee from this for their services
5 rendered if this case would have gone forward but
6 for the law firm withdrawal are certainly available
7 to the jury. The other thing that makes this a
8 much easier case than let's just say the whole
9 transaction was Mr. McLeod hiring this law firm to
10 help develop a subdivision, a shopping center,
11 excuse me, and it was going to be his first
12 development. In that circumstance, to develop
13 future profit from a deal that never developed.
14 That's the whole new business damages and the
15 certainty that is required in that circumstances is
16 greater than we have here where we have a specific
17 amount that was sent to Mr. Justice as the minimum
18 amount of conservation easement value that would
19 have been available to the government, we have a
20 very specific four percent fee calculation, they
21 might need a calculator but we're going to show it
22 to them in closing if this case gets to the jury,
23 as we believe it should, so it's going to be a very
24 easy method for the jury to calculate damages.

25 And on top of all that, to the suggestion

1 that there might have been a need to have an
2 agricultural reserve value, Mr. McLeod gave that to
3 the jury in his testimony and his experience, he
4 said, "Well, it would be approximately 200,000 and
5 instead of a 1.8 million dollar fee it would be a
6 1.6 million dollar fee, and that will be up to the
7 jury to determine, notwithstanding the statement in
8 Mr. Hawkins' email that maybe they need to give
9 credit for that amount and Mr. McLeod with his
10 experience in conservation consulting has given
11 that information to the jury.

12 And also we would suggest the jury heard Dr.
13 Hawkins' testimony and it was in the context of a
14 mitigation plan and having gone all the way through
15 the mitigation process and what would be involved
16 and we are not, the plaintiff is not picking from a
17 mitigation value to a conservation easement value.
18 The testimony was, Dr. Hawkins, Mr. McLeod, he
19 testified that the mitigation feasibility report
20 and that information was delivered to Dr. Hawkins
21 because it was relevant to his inquiry and that was
22 the very thing he was there to evaluate, the
23 wetland value of the property and it was certainly
24 appropriate to provide that resource to this expert
25 but the only number that is going to be offered to

1 the jury on value for the easement calculation is
2 the number from Dr. Hawkins' preliminary appraisal.

3 And the jury also heard from Mr. Elliott, Mr.
4 McLeod and from Mr. Hanlin that preliminary values
5 are part of the process. The landowner makes
6 decisions to close on the easement based on a
7 preliminary opinion from the appraiser that the
8 self contained appraisal is not due for 60 days
9 later. It is rare if ever that the self contained
10 appraisal, fully developed appraisal opinion is
11 provided to the landowner at the time of closing.
12 And, Your Honor, if we need to submit some case law
13 we will be happy to.

14 There was some argument there was no evidence
15 on plaintiff's attempt to mitigate. There we
16 disagree. There were letters and emails that are
17 in evidence where Mr. McLeod did his best to
18 convince Mr. Justice to please reconsider this
19 project, emails about the IRS letter, the IRS
20 resolved its investigation, let's proceed, when can
21 we meet, we have a new lawyer, Mr. Wingate. All
22 that was submitted. We easily believe that
23 satisfies our duty to mitigate. As the Court is
24 aware, the burden to establish that plaintiffs
25 failed to mitigate is on the defendant. The

1 defendant didn't offer a single lawyer on this
2 witness stand to say, "I do conservation easement
3 work and if Yancey had only called me, sure, I
4 would have taken this thing, man, heck yes, I would
5 have been happy to earn that fee on December 20 or
6 21st when that phone call came in." So, if there
7 is a suggestion that Mr. McLeod, Yancey
8 Environmental Solutions failed to mitigate, the
9 defendant failed to offer evidence to satisfy their
10 burden of proof in that regard.

11 Now, as to punitive damages, we are once
12 again in the scenario where this whole issue on
13 recklessness, I am quite confident the jury has
14 heard testimony from Professor Adams on the
15 reckless and intentional nature of this withdrawal
16 and if the jury believes Dr. Adams' assessment of
17 the defendant's conduct in light of the
18 circumstances that the parties faced, including the
19 defendants, on December 20 when this letter came,
20 the IRS letter came in, the jury is well within
21 their right to believe this was reckless, willful
22 and wanton, that they made a decision to abandon
23 their client at a time of most critical need and
24 that if they believe Dr. Adams that's certainly
25 reckless conduct supported by expert testimony from

1 a law professor that teaches ethics. So, it is
2 just a matter of a jury assessment of which expert
3 they believe, the plaintiff's or the defendant's.

4 And the last part of the, on the contract
5 terms and the payment of the four percent, the jury
6 heard Mr. Miller testify that they would have paid
7 the fees, they were in agreement, they heard Mr.
8 Miller testify on behalf of Justice Family Farms,
9 five percent or four percent, really I don't think
10 there is any dispute as that was the percent value.
11 There was testimony from the grantor organizations
12 that the companies were prepared to pay the fee for
13 all professionals and four percent was the value.

14 Mr. Miller also testified that if Mr. McLeod
15 had recommended to Mr. Justice to move forward
16 notwithstanding the IRS letter, that they would
17 have done so and in other words, you know, Mr.
18 McLeod had the trust and faith of Mr. Justice and
19 if Mr. McLeod had his lawyer at his side, tax and
20 conservation easement lawyer, Mr. Hanlin of the
21 Richardson Plowden law firm when the phone call
22 came, the recommendation on the 24th, the
23 recommendation would have been let's proceed, let's
24 go forward.

25 We submit, Your Honor, there are facts and

1 inferences from the facts taken in a light most
2 favorable to the plaintiff per Rule 50 and the case
3 law interpreting Rule 50 that this entire case,
4 including the claim for punitive damages, I got
5 that in reverse, claim for breach of fiduciary
6 duty, breach of contract and claim for punitive
7 damages is all appropriate for the jurors'
8 determination.

9 Thank you, Your Honor.

10 MS. MCWILLIAMS: Just briefly. No one, not
11 Adams, not Crystal, not McLeod, not Hanlin, not
12 Miller, not Harrah has testified as to why Mr.
13 Justice postponed the transaction, why did he
14 accept the recommendation? Was it because of the
15 recommendation or was it because of the
16 investigation? We don't have, there is no
17 evidence, so there is no way, Mr. McLeod says,
18 "Well, it's because of my recommendation, I
19 recommended it." But we are going, the fact of the
20 matter is there is nothing that ties Mr. Justice's
21 decision to withdraw to the defendant.

22 Secondly, Your Honor, Professor Crystal did
23 testify that he held his opinions to a reasonable
24 degree of professional responsibility, certainty,
25 professional responsibility, professional ethics,

1 that the withdrawal was consistent with the facts
2 of the case and with 1.16 and therefore under the
3 terms of the engagement there was no breach of
4 contract.

5 Your Honor, this case is not about what
6 caused Mr. McLeod to make this recommendation to
7 postpone, it's about what caused Mr. Justice to
8 postpone and there is no evidence regarding that.

9 Now, I heard again that Dr. Hawkins had given
10 a preliminary opinion of value. I want to repeat
11 for the record, go back and look at that,
12 Plaintiff's 26, it is a best guess and there is
13 absolutely no authority that I'm aware of where a
14 best guess gets to qualify as an opinion of value.
15 In fact they are routinely excluded. Had he been
16 named as an expert and proffered that we would have
17 had the opportunity to point that out to the Court.

18 Your Honor, there is simply also nothing in
19 the record as to why Mr. Justice couldn't have done
20 the easement in '08, or '09 or '10. We understand
21 it is the plaintiff's position, "I tried to get him
22 to do it but he wouldn't do it. The fact of the
23 matter is he didn't do it, and in any of those
24 years he hasn't done it to the present and the
25 answer is he didn't want to do it. And so there is

1 just a dirth of evidence that in fact Mr. Justice
2 was committed to do it and the plaintiff could have
3 subpoenaed, I don't want to be a broken record but
4 where is Mr. Justice, bring him in, and they didn't
5 do that. This is the first we have heard that when
6 Mr. Miller said that he had a subpoena he received,
7 that it was all by agreement. It is not all that
8 surprising that it is by agreement but all that
9 does is underscore my argument, Your Honor, they
10 could have brought in Mr. Justice, they apparently
11 are all in agreement, "We need to work on this."
12 Okay, where is Mr. Justice? That's the competent
13 evidence that is missing in the case and we would
14 renew our motion, Your Honor.

15 THE COURT: You all rest easy one second. I
16 will be right back.

17 (Recessed at 5:15 p.m.).

18 (Resumed at 5:29 p.m.).

19 THE COURT: All right, folks, I have, I
20 walked a path back there in the hall. I think I
21 have wrestled with this whole thing since summary
22 judgment motions but I don't believe, looking at
23 the facts, there is a question of fact to submit to
24 the jury about what Justice would have done or
25 didn't do, I don't see it. I think his failure to

1 present an affidavit, his failure to testify,
2 present a deposition, as to what he would have done
3 or wouldn't have done, it isn't here and that is
4 breaking the causal link, the proximate cause to
5 the breach, the damages. I can't tie it together
6 and for that reason I'm going to grant the directed
7 verdict. And I'm telling you, I'm struggling with
8 this, I don't see, it is just right there and for
9 the record I'm making a gesture with my hand, it is
10 very close for me, but I see a break there, it is
11 not there, I don't see that link, I don't see it.
12 There is not a link, in my opinion. It's a humble
13 opinion.

14 MR. PENDARVIS: May I respond, Your Honor?

15 THE COURT: Yes, you may.

16 MR. PENDARVIS: In the nature of
17 reconsideration?

18 THE COURT: Yes, sir.

19 MR. PENDARVIS: Your Honor, Mr. Jim Justice
20 was not the only party to the contract. Justice
21 Family Farms was the other party to the consulting
22 services agreement. Justice Family Farms' designee
23 gave testimony to this jury about the intent of the
24 companies and also Dr. Adams in his expert opinion
25 having reviewed the Justice Family Farms testimony

1 said Jim Justice said, "We were in the boat."

2 THE COURT: And I will represent to everyone
3 here, my law clerk and I discussed that exact
4 testimony moments ago. I mean, I am with you on,
5 yes, I agree that's what we heard but what was
6 consistently said by the Justice people, whether
7 Harrah or Miller, Jim Justice makes all the
8 decisions, Jim Justice makes all the decisions, the
9 buck stops with Jim Justice, and yes, the 30(B)(6)
10 guy said, "We were prepared to go forward, we were
11 going forward, we were in the boat," all those sort
12 of things. Justice makes the final decision,
13 consistently that was presented by them and I don't
14 find a question of fact as to that. I mean, there
15 is nobody disputed that Justice makes the
16 decisions.

17 MR. PENDARVIS: Respectfully, Your Honor, the
18 testimony that the Court excluded said after
19 Justice Family Farms' designee said, "If asked,
20 have you been told in light of the lawyer
21 withdrawal, would the transaction have proceeded
22 after discussing with Mr. Justice and doing his due
23 diligence on behalf of the corporation, that was a
24 party to the contract, they would have proceeded,"
25 and I think the flaw in the Court's analysis is,

1 Your Honor, the fact is Mr. Justice as the owner
2 took advantage of a corporate organization, a
3 corporate organization that was a party to a
4 contract, the corporate organization with its
5 proper due diligence responded on behalf of the
6 corporation that it would have proceeded.

7 THE COURT: Well, and I keep coming to that,
8 that flips, you're exactly right, from what you're
9 saying but consistently Jim Justice does exactly
10 what Jim Justice wants to do or intends to do and
11 there is nothing for me, before me from Jim Justice
12 to say, "We would have done the deal." I can't
13 figure out, I didn't figure out why he wasn't asked
14 something or wasn't provided, I can't figure that
15 out. That is not my problem, not my duty. But
16 Justice never said what he would have done and I
17 can't get away from that and I understand the
18 corporate analysis because it is kind of a, it's a
19 riddle, corporation 30(B)(6), corporation 30(B)(6)
20 here but it's Yancey McLeod and Jim Justice that
21 are doing the deal.

22 MR. PENDARVIS: Yancey McLeod just like Mr.
23 Justice and his companies is not the plaintiff
24 because the plaintiff is the company that had the
25 contract and the company that had the contract on

1 the plaintiff's side is Yancey Environmental
2 Solutions and it had a contract with two parties,
3 Justice Family Farms being one of them, Justice
4 Family Farms is a party to the contract, a party
5 which by the way is on the check that paid a
6 portion of the consulting services fee. I
7 respectfully disagree with the Court, Your Honor.
8 Mr. Miller said, "I said to Jim, I'm going to be
9 doing a deposition on the Yancey McLeod issue from
10 2007, you're familiar with that?" Mr. Miller is
11 quoting Mr. Justice, he says yes. "Mr. Miller. Do
12 you feel that, do you feel that that thing would
13 have worked out and played out to the end, and he
14 said absolutely." And that was my only question to
15 him because that was the concern I had, they would
16 have moved forward, and I said to him, excuse me,
17 "That was a concern I had, would they have moved
18 forward," and he said, "We were in the boat."

19 So that is the intent of Mr. Justice, that is
20 what Dr. Adams told this jury. If that isn't the
21 intent of Mr. Justice to move forward with this
22 transaction I really don't know what could be
23 better said. Now, this is a designee of a
24 corporation who has been asked and obligated under
25 Rule 30 to do due diligence in order to come and

1 respond on behalf of the interest of the
2 corporation, he went to the source and we provided
3 the Court the other things he did, researched,
4 looked at documents and letters, but he is down to
5 the source that said it, Your Honor. I think the
6 Court is not taking into consideration what Dr.
7 Adams told and what was presented to this jury on a
8 question of fact and that is why we mentioned it in
9 response to their motion, that the jury heard Dr.
10 Adams say, testify he is an expert, they heard from
11 Adams a statement, statement from Jim Justice, the
12 source, the individual for the contract, that they
13 were in the boat and absolutely would proceed and
14 on top of that the company that is the other party
15 to the contract gave abundant testimony on its
16 intent.

17 THE COURT: All right. I mean, I understand
18 your position, you have been very consistent in
19 that, I understand that and I respectfully don't
20 believe there the causal connection has been met.
21 I don't think there is evidence received of that.
22 So, that is my ruling.

23 MR. PENDARVIS: Your Honor, one last thing.
24 You don't think there is the weight the evidence
25 carries but there is evidence and I think the Court

1 might want to take a look, our response would be,
2 Your Honor, on a directed verdict it is not the
3 weight of the evidence, it's the existence of it.

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

9 MR. PENDARVIS: Except that he was absolute
10 that he was on board with it, he absolutely, it
11 would have worked out had it played out to the end
12 and he said absolutely. I think that is evidence,
13 Your Honor.

14 THE COURT: I'm sorry, I don't think the link
15 is there. You all have done a wonderful job of
16 presenting this but I don't think it's there.

17 All right.

18 MR. PENDARVIS: Your Honor, would you take a
19 motion to reconsider, a formal motion under
20 advisement, or --

21 THE COURT: Let's do a written order, you
22 make a motion to reconsider and I'll do that, I
23 think that would be good for your record,
24 considering everything that is here. Let's do it
25 appropriately, let's do a written order, you file

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL DISTRICT,
COUNTY OF RICHLAND

YANCEY ENVIRONMENTAL)
SOLUTIONS, LLC,)
Plaintiff,)

VS:

) CIVIL ACTION NO. 2010-CP-3297
)

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

The videotape deposition of **JAMES TERRY MILLER** in the above-styled matter was taken pursuant to notice for discovery and/or evidentiary purposes, before H. David Stanley, a Notary Public within and for the State of West Virginia at Large, on the 13th day of December, 2011, commencing at 9:18 A.M., EST, at Brown Reporting Agency, 117 Main Street, Beckley, West Virginia.

BROWN REPORTING AGENCY

P.O. Box 5473
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B.R.A.

I N D E X

<u>Plaintiff's Witness:</u>	<u>Direct</u>	<u>Cross</u>
James Terry Miller	5 104	41 (Leonardi) 108 (Leonardi)

<u>Plaintiff's Exhibits:</u>	<u>Marked</u>
Miller Dep. Exhibit No. 1	6
Miller Dep. Exhibit No. 2	7
Miller Dep. Exhibit No. 3	12
Miller Dep. Exhibit No. 4	14
Miller Dep. Exhibit No. 5	15
Miller Dep. Exhibit No. 6	18
Miller Dep. Exhibit No. 7	20
Miller Dep. Exhibit No. 8	21
Miller Dep. Exhibit No. 9	24
Miller Dep. Exhibit No. 10	28
Miller Dep. Exhibit No. 11	34
Miller Dep. Exhibit No. 12	35
Miller Dep. Exhibit No. 13	37
Miller Dep. Exhibit No. 14	38
Miller Dep. Exhibit No. 15	84
Miller Dep. Exhibit No. 16	86
Miller Dep. Exhibit No. 17	87
Miller Dep. Exhibit No. 18	88
Miller Dep. Exhibit No. 19	98
Miller Dep. Exhibit No. 20	102

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 Signature Sheet -- Page 113
 Errata Sheet -- Page 114

B.R.A.

1 VIDEOGRAPHER: We are now on the video
2 record in the matter of Yancey Environmental
3 Solutions, LLC., plaintiffs, versus Richardson,
4 Plowden & Robinson, P.A., and George Harold
5 Hamlin, J.D., defendants, being Civil Action
6 No. 2010-CP-40-3297. My name is Aaron Mann, I
7 am a legal video specialist with Katz Consulting
8 Group located at 179 Summers Street, Suite
9 213, in Charleston, West Virginia. I am not
10 related to any of the parties to this action or
11 to counsel of record, nor do I have a financial
12 interest in this action. Today is December
13 13th, 2011, the time is 9:18 A.M. This
14 deposition is taking place at Brown Reporting
15 Agency, 117 Main Street, in Beckley, West
16 Virginia. This is the 30(b)(6) deposition of
17 James T. Miller. Would counsel please identify
18 themselves for the record?

19 MR. PENDARVIS: I am Thomas Pendarvis,
20 counsel for the plaintiff, Yancey Environmental
21 Solutions, LLC.

22 MR. LEONARDI: My name is Daniel
23 Leonardi, I represent the defendant, Richardson,

B.R.A.

1 Plowden & Robinson, P.A., and George Harold
2 Hamlin, Esquire.

3 MR. HUNTER: I am Roger Hunter, I am
4 general counsel for James C. Justice Companies,
5 Inc., and it's sub, Justice Family Farms, and
6 I'm here to represent our corporate represen-
7 tatives, Mr. James T. Miller, who is known as
8 Terry Miller.

9 VIDEOGRAPHER: Will the court reporter
10 please identify himself and swear the witness,
11 please?

12 COURT REPORTER: David Stanley, Brown
13 Reporting Agency.

14 (Witness Sworn)

15 THEREUPON came,

16 J A M E S T E R R Y M I L L E R
17 called as a witness on behalf of the Plaintiff herein,
18 who, having been first duly sworn according to law,
19 testified as follows:

20 DIRECT EXAMINATION

21 BY MR. PENDARVIS:

22 Q Good morning, Mr. Miller.

23 A Good morning.

1 Q We're here to take the deposition of
2 the designee for Justice Family Farms and I understand
3 that you've accepted that designation. Is that correct?

4 A That's correct.

5 (WHEREUPON, Miller Deposition
6 Exhibit No. 1 was marked for
7 identification purposes)

8 BY MR. PENDARVIS:

9 Q In front of you is a composite exhibit,
10 including an Amended Notice of Videotaped Deposition Rule
11 30(b)(6), the deposition of Justice Family Farms, and
12 also a subpoena duces tecum. And am I correct in
13 understanding that you-all have voluntarily accepted the
14 subpoena and agreed to appear for this deposition today?

15 A That is correct.

16 Q What is your position with Justice
17 Family Farms?

18 A I'm treasurer of the company.

19 Q And did you do anything to prepare for
20 this deposition today?

21 A I reviewed the records that we had. I
22 spoke to our company representatives involved in the
23 action and prepared myself for the affidavit that I

B.R.A.

1 signed and also for the deposition today by doing these
2 things.

3 MR. LEONARDI: What was that, by doing
4 what?

5 THE WITNESS: By doing those things, I
6 prepared myself for this.

7 (WHEREUPON, Miller Deposition
8 Exhibit No. 2 was marked for
9 identification purposes)

10 BY MR. PENDARVIS:

11 Q And in that regard, I am passing to you
12 a copy of your affidavit marked Exhibit 2. Take a moment
13 and review that, Mr. Miller, and my question for you is
14 can you verify that this is a true and correct copy of
15 the affidavit you signed on August 30, 2011, as designee
16 for Justice Family Farms?

17 A Yes, it is.

18 Q Thank you very much. You may want
19 to keep that close to you during the day, you may need to
20 refer to that for some of the questions. Mr. Miller,
21 part of what is involved in this lawsuit involves some
22 property that we understand is owned by Justice Family
23 Farms. Does Justice Family Farms own property in South

1 Carolina?

2 A Yes, they do.

3 Q And where is it located?

4 A They own farms and property primarily
5 in the Clarendon County around Gable and Manning, South
6 Carolina.

7 Q As referenced in Exhibit 2, can we refer
8 to this property as the Black River Farms property?

9 A That's how we refer to it.

10 Q Can you describe for the jury just the
11 nature of the property?

12 A This is primarily farm property. The
13 family bought it in 1989 to farm corn, wheat and soybeans
14 there.

15 Q And for the jury's benefit, Mr. Miller,
16 what family bought this property?

17 A I'm sorry, that's the Justice family.

18 Q And who's the principal shareholder in
19 Justice Family Farms?

20 A The principal shareholder is James C.
21 Justice Companies, Inc. James C. Justice Companies,
22 Inc., is owned by James C. Justice, II, majority owner.

23 Q And is he referred to commonly as Jim

B.R.A.

1 Justice?

2 A That's correct.

3 Q And how is the property being used,
4 the Black River Farm property?

5 A It's still being farmed, corn, wheat
6 and soybeans.

7 Q Did Justice Family Farms place any
8 easements on this property in the year 2003?

9 A There was a 1,000-acre easement that was
10 -- I'm not sure of the exact term, the exact --

11 Q Would it refresh your recollection if I
12 would describe it as a wetlands resource --

13 A Yes.

14 Q -- protection easement?

15 A Yes.

16 Q WRP?

17 A I'm not sure of the exact -- that's
18 what it was called, yes.

19 Q Was anyone in South Carolina involved
20 with Justice Family Farms placement of the WRP easement?

21 A Mr. McLeod assisted in that, Mr. Yancey
22 McLeod, of YES, Environmental Solutions.

23 Q And Yancey Environment Solutions'

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1 initials spell YES, so --

2 A I'm sorry.

3 Q That's okay. Can we refer to that
4 today as YES?

5 A That would be easier, yes.

6 Q All right. And would you describe the
7 relationship between YES, Mr. McLeod and Mr. Justice?

8 VIDEOGRAPHER: Pardon me, sir. I lost
9 my audio again, I need to go off the record.

10 (WHEREUPON, a short recess
11 was taken)

12 VIDEOGRAPHER: We are now back on the
13 video record. The time is 9:47 A.M.

14 BY MR. PENDARVIS:

15 Q Mr. Miller, after a short technical
16 difficulties moment, let's get back into the questions.
17 Flowing from the WRP easement in 2003, would you describe
18 Justice Family Farms' relationship with YES?

19 VIDEOGRAPHER: Hold on, sir. I'm sorry,
20 I'm sorry, I can't hear you.

21 (WHEREUPON, there was a
22 discussion off the record)

23 VIDEOGRAPHER: We are now back on the

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1 video record. The time is 9:52 A.M.

2 BY MR. PENDARVIS:

3 Q Mr. Miller, again, we had another
4 little short technical difficulty break and we -- you had
5 discussed a wetlands resource protection, WRP, easement
6 that Justice Family Farms placed on the property in 2003
7 and you had also mentioned that YES had been involved
8 with the placement of that easement. Would you describe
9 the relationship between YES and Justice Family Farms
10 flowing from that 2003 easement?

11 A Mr. McLeod and Mr. Justice became
12 close friends because of the relationship in 2003,
13 developed a working relationship in -- and respect for
14 each other in their different areas. They both --
15 according to Mr. Justice, they both were very interested
16 in the environment and conservation and because of that
17 connection, that established a bond between them and
18 Mr. Justice relied on Mr. McLeod for advice on conser-
19 vation easements and wetland protection easements, things
20 of that nature.

21 Q By the spring of 2007, what did
22 Justice Family Farms do, if anything, with regard to
23 exploring the possibility of a stream and wetlands

1 restoration project for the Black Farms property?

2 A They explored the possibility of a
3 mitigation bank on the Black River Farm property and
4 Mr. Justice discussed this with Mr. McLeod and asked
5 him to investigate that and Mr. McLeod began the process
6 of doing that.

7 (WHEREUPON, Miller Deposition
8 Exhibit No. 3 was marked for
9 identification purposes)

10 BY MR. PENDARVIS:

11 Q Mr. Miller, I'm passing to you a
12 document marked as Exhibit 3 to your deposition. Is
13 this a copy of a letter that was sent back to Yancey
14 Environmental Solutions enclosing a signed Letter of
15 Intent, signed by Mr. Justice, for this wetlands
16 restoration project?

17 A Yes, it is.

18 Q And the cover letter shows it being
19 sent by a gentleman named Stephen Ball. Who is Mr. Ball?

20 A Mr. Ball is -- at this point, he was
21 general counsel of our companies. He is now Chief
22 Operating Officer of our operations, Mr. Hunter is now
23 the general counsel.

1 Q Were the -- was Mr. McLeod, through
2 YES, evaluating whether a mitigation bank could be placed
3 on the property, Black River Farms property?

4 A That's correct, that was his
5 instructions, to investigate that.

6 Q And in 19 -- excuse me -- by May of
7 2007, what was Justice Family Farms' general plans for
8 the Black River Farms property?

9 A I think the plan was to establish a
10 mitigation bank there. There was still some interest in
11 farming the property, but they wanted to explore all the
12 options as to what they could do with the property as far
13 as a mitigation bank, farming. They had other farms in
14 the area, but Black River Farms adjacent to the Black
15 River, there were opportunities for federal tax credits
16 and mitigation credits and they wanted to explore that
17 possibility.

18 Q During the 2007 year, did Mr. McLeod
19 become involved in any -- looking at any other properties
20 Mr. Justice owned?

21 A I'm not aware of that. Mr. Justice
22 relied on Mr. McLeod in the conservation areas, as I
23 mentioned, so I'm sure there were other discussions.

1 Q Were you aware that Mr. McLeod visited
2 some of Mr. Justice's properties in Union, West Virginia?

3 A At one point -- that's our home farm in
4 Monroe County, West Virginia, at Union, and I know there
5 was a visit there with Mr. Justice and Mr. McLeod because
6 of the -- Mr. Justice wanted to establish the study --
7 it's called Stoney Brook Plantation. He wanted to
8 continue developing that for wildlife.

9 (WHEREUPON, Miller Deposition
10 Exhibit No. 4 was marked for
11 identification purposes)

12 BY MR. PENDARVIS:

13 Q In that regard, I'm going to pass
14 Exhibit 4 to you, an e-mail with some materials attached.
15 Does this reflect your recollection on -- or the
16 company's position on Mr. McLeod's visit to West
17 Virginia?

18 A Yes. This involved the stream that
19 flows through there, it's called Second Creek, and Jim
20 was interested in what he could do with Second Creek, and
21 as far as the low areas and the wetlands areas of Stoney
22 Brook Plantation. And Jim also -- Mr. McLeod also met
23 with Brad Lambert, Brad was our farm manager at the time.

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1 (WHEREUPON, Miller Deposition
2 Exhibit No. 5 was marked for
3 identification purposes)

4 BY MR. PENDARVIS:

5 Q Now, there have been some questions
6 raised in this case about Justice Family Farms and
7 Mr. Justice paying invoices for professional services and
8 I'm going -- in that regard, I'm going to pass to you a
9 document marked Exhibit 5 to your deposition and I'm
10 going to represent to you this is an invoice. Have you
11 seen this invoice before today?

12 A Yes, I have.

13 Q And the third page back shows -- and
14 fourth page back show copies of checks written to pay
15 this invoice. Are these last two pages reflecting a
16 check from Justice Family Farms to the company to pay
17 this invoice?

18 A Yes, it is.

19 Q Are you aware of Mr. McLeod's
20 involvement with Natural Resource Protection &
21 Mitigation, LLC?

22 A At one point, I recall that being the
23 company that he was involved with. I don't know the

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1 exact structure of it or anything like that, but I do
2 know that he was involved with that at one point.

3 Q And the front page refers to the various
4 projects that Mr. McLeod and his companies were working
5 on, the Clarendon County property and the homeplace
6 property?

7 A Yes. The home farm, yes.

8 Q In general, what's the general method
9 by which Mr. Justice and his companies pay invoices?

10 A Typically, in the normal course of
11 business, Mr. Justice or his son, Mr. Justice, III, James
12 Justice, III, will authorize work with professionals,
13 attorneys, accountants, legal representatives, consul-
14 tants of all types. They will authorize that work, the
15 contractor will submit an invoice, that's placed in our
16 accounts payable system, and then at some point within
17 30 to 90 days, that invoice is paid based on when we're
18 instructed to pay those by the Justices.

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

22 A Mr. Justice -- you have to understand,
23 he typically operates on a handshake with most of the

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

11 Q By the fall of 2007, October-November,
12 2007, did Justice Family Farms' plans for the Black River
13 Farm property change with regard to the wetlands
14 mitigation project?

15 A Mr. McLeod came back to Mr. Justice
16 and recommended that it may be better to establish a
17 conservation easement on the Black River property.
18 Because of certain tax advantages, it may be more
19 beneficial to do the easement instead of a mitigation
20 bank. After consideration, Mr. Justice decided that was
21 the way to go and he asked Mr. McLeod to continue
22 pursuing that process as far as a easement, take whatever
23 steps necessary to move towards that in place of a

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1 mitigation bank because of the tax advantages and the
2 values established of the property.

3 Q Inside the Justice companies, was
4 someone assigned to be the contact person for Yancey
5 Environmental Solutions?

6 A My recollection was David Harrah, our
7 Chief Financial Officer at the time, made contact direct
8 with Mr. McLeod. And I'm sure Jim spoke to Mr. McLeod
9 from time to time as to how it was progressing, but David
10 was the immediate contact with Mr. McLeod.

11 (WHEREUPON, Miller Deposition
12 Exhibit No. 6 was marked for
13 identification purposes)

14 BY MR. PENDARVIS:

15 Q Mr. Miller, I'm passing to you now a
16 document marked as Exhibit 6 to the JFF deposition and
17 I'm going to ask if you've had a chance to see and review
18 Mr. McLeod's November 26th letter to Mr. Justice that
19 enclosed a Consulting Services Agreement that was
20 proposed for the Black River Farms conservation easement
21 project?

22 A Yes, I'm familiar with this.

23 Q Now, there's been some suggestion in

1 this lawsuit that there really was no agreement to move
2 forward with investigating a conservation easement and my
3 question for you is, how did Justice Family Farms take
4 the receipt of this proposed Consulting Services
5 Agreement with regard to this project?

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

13 Q And was there any subsequent discussions
14 about the terms of compensation that were set forth in
15 the proposed Consulting Services Agreement?

16 A Mr. Justice reviewed the agreement and
17 his only comment was that he thought maybe that the fee
18 that Mr. McLeod had proposed, the 5 percent fee, was
19 a little high, so he asked David Harrah to go back to
20 Mr. McLeod and propose a 4 percent fee. And Mr. Harrah
21 did that and Mr. McLeod agreed to that and they continued
22 to move forward on the project based on the revised fee
23 structure.

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1 Q And just so I'm clear on this, was there
2 a general date by which Justice Family Farms desired to
3 have the conservation easement recorded?

4 A It would have had to been in place by
5 December 31st for us to take tax advantages of the
6 easement being recorded and in place.

7 Q Can you describe for me Justice Family
8 Farms awareness, if anything, about what the various
9 professionals associated with this project would have
10 been doing between November and December 31, 2007?

11 A We were relying on Mr. McLeod to keep
12 the project moving. It was our understanding that the
13 project was continuing to move forward. We had not heard
14 any issues that the project was not moving forward, so we
15 were under the impression that it was -- everything was
16 in place and we were using that easement as part of our
17 tax calculations for 2007 as to our tax liability and it
18 was our understanding that everything was on track.

19 (WHEREUPON, Miller Deposition
20 Exhibit No. 7 was marked for
21 identification purposes)

22 BY MR. PENDARVIS:

23 Q Mr. Miller, I'm passing to you now a

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1 document marked Exhibit 7, it appears to be an e-mail
2 from defendant Hamlin to Yancey Environment Solutions
3 looking at a proposed letter to Mr. Justice and I want
4 to represent to you that that letter was sent to
5 Mr. Justice, the second page, care of David Harrah. Was
6 Justice Family Farms -- well, first off, did it receive
7 this proposal of an appraisal from Dr. Hawkins, the
8 appraiser?

9 A Yes, that is correct.

10 MR. PENDARVIS: Actually, it would be
11 better if I copied four.

12 MR. LEONARDI: That was Exhibit 6?

13 MR. PENDARVIS: That was Exhibit 7 and
14 really this is about the same thing.

15 (WHEREUPON, Miller Deposition
16 Exhibit No. 8 was marked for
17 identification purposes)

18 BY MR. PENDARVIS:

19 Q Let me pass to you a document marked
20 Exhibit 8, that is the e-mail from defendant Hamlin to
21 Mr. Harrah enclosing the letter we just looked at and
22 behind that letter is the proposal from Dr. Hawkins.
23 Take a moment and look over that for me, please.

1 A Yes.

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

8 A Mr. McLeod had brought them into
9 the entire process to handle the legal aspects of the
10 conservation easement. There are numerous facets to
11 the easement. With the appraisals and the consultants
12 involved, there has to be a legal team in the process and
13 Mr. Hamlin and his firm was brought in to handle all
14 legal aspects of the entire conservation easement
15 transaction.

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

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

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1 Q Did Justice Family Farms and
2 Mr. Justice accept the representations such as on --
3 those made by defendant Hamlin on the second page of
4 Exhibit 8 with regard to the quality of Dr. Hawkins'
5 skills as an appraiser for this project?

6 A There again, Mr. Justice relied on
7 Mr. McLeod's representation of this individual and he
8 was acceptable to handle the appraisal process of the
9 easement.

10 Q Did Justice Family Farms have any
11 objections to the proposals from the appraiser about his
12 compensation and the work he was going to be doing on
13 this project?

14 A No.

15 Q Did anyone ever contact Justice
16 Family Farms about any difficulties in locating any
17 deeds or deed restrictions, easement, or environmental
18 covenants as requested by Dr. Hawkins?

19 A Not that I'm aware of.

20 Q So it's fair to say that Yancey
21 Environmental Solutions or someone on that side of the
22 arrangement was taking care of materials requested by
23 Dr. Hawkins?

1 MR. LEONARDI: Object to the form.

2 BY MR. PENDARVIS:

3 A There again, Mr. Justice relied on
4 Mr. McLeod to move forward with the process. Any issues
5 that would have come up, Mr. McLeod would have resolved
6 those as far as deeds or anything like that. We relied
7 on Mr. McLeod to move forward.

8 Q In addition to the appraisal required
9 for conservation easement, obviously, the easement is
10 given to someone and is -- does Justice Family Farms
11 recall who it was or what entity it was that was going to
12 accept the conservation easement if it had gone forward?

13 A We have -- we've been informed that
14 there was an organization, the Community Open Land Trust,
15 COLT, that Mr. McLeod contacted as far as accepting -- as
16 being the donee for the easement and this was acceptable
17 to us based on representations.

18 (WHEREUPON, Miller Deposition
19 Exhibit No. 9 was marked for
20 identification purposes)

21 BY MR. PENDARVIS:

22 Q I'm going to pass to you now a document
23 marked Exhibit 9 to your deposition. This appears to be

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1 an e-mail transmittal to -- from defendant Hamlin to
2 Mr. Harrah enclosing a letter from Community Open Land
3 Trust and a -- a Letter of Intent from Community Open
4 Land Trust. And did Justice Family Farms receive this
5 proposal from COLT?

6 A Yes.

7 Q Did Justice Family Farms have any
8 objections to the terms of the proposed Letter of
9 Intent from COLT?

10 A No, they did not. They understood
11 the annual fee or the fee that would be to maintain the
12 easement and everything else was in agreement.

13 Q And the date of this e-mail
14 transmittal is November 30, 2007. And if you refer to
15 the second paragraph of defendant Hamlin's cover e-mail
16 message, was there any -- take a moment and look at
17 that, please.

18 A I see that.

19 Q Were there any concerns or anything
20 inconsistent with the plan that's referenced by Mr. --
21 excuse me, defendant Hamlin's statement that everyone
22 would be, quote, "-- stretched to get this done before
23 the end of the year,"?

1 A There was no concern on our end.
2 This is -- there's a push in all businesses to get
3 transactions done by the end of the year for tax
4 purposes. It's fairly common in business for that to
5 happen today. Mr. McLeod represented that everything was
6 on track and there shouldn't be any issues and we were
7 not concerned about it happening.

8 Q Did defendant Hamlin relay any
9 communications to Justice Family Farms otherwise, that
10 there may be some problems with getting the project
11 completed by December 31, 2007?

12 A No, sir.

13 Q Has Justice Family Farms had any
14 experience on other conservation easements?

15 A The one that we talked about in 2003,
16 the wetlands protection transaction. In 2009, we did a
17 large conservation easement here in Raleigh County, West
18 Virginia. It involved roughly 1,000 acres not far from
19 here and that was the largest easement we've done. Right
20 after this one was proposed in 2007, this one was done.
21 The most recent was 2009 right at the end of the year.

22 Q What part of the year did the easement
23 close, the 2009 easement?

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1 A My recollection, it closed mid-December,
2 mid to third week of December, 2009.

3 Q Can you describe the activities during
4 the week or so preceding the closing of that easement?

5 A It was a -- just a flurry of activity
6 to get all the paperwork done, which took, at the most,
7 probably two to three days. Everyone was on board, the
8 appraisal was done, the legal team had all their ducks in
9 a row, the land trust that was accepting the property,
10 they had done their inspections, everything was put
11 together and then at the -- right at the end, all the
12 documents were prepared and they brought them to our
13 Beckley office and we signed them and everything was
14 filed by the end of the year, 2009.

15 Q Was there a single meeting where
16 everybody involved all sat down and signed papers all
17 at the same time?

18 A That's correct.

19 (WHEREUPON, Miller Deposition
20 Exhibit No. 10 was marked for
21 identification purposes)

22 BY MR. PENDARVIS:

23 Q Mr. Miller, I'm passing you another

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1 document, this one has been marked Exhibit 10 to Justice
2 Family Farms deposition. Take a moment and look over
3 this e-mail, transmittal e-mail and the attached letter.

4 A Okay.

5 Q Did Justice Family Farms receive this
6 e-mail and cover letter of December 6, 2007?

7 A Yes.

8 Q Was Justice Family Farms made aware
9 anywhere in this communication, either the e-mail
10 transmittal or the letter, itself, of any concerns that
11 the Black River Farms easement project would not be able
12 to go forward and be recorded in the 2007 year?

13 A No.

14 Q This letter, the second page of
15 Exhibit 10, essentially makes clear that defendant Hamlin
16 and defendant Richardson, Plowden & Robinson was
17 representing Yancey Environment Solutions as its tax
18 consultant for this easement and was not representing
19 Justice Family Farms. Is that a fair characterization?

20 A Yes.

21 Q Did receiving this letter cause any
22 concern to Justice Family Farms?

23 A No. It's my understanding that that

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1 was presented to us earlier, that that was the
2 arrangement that the firm that Mr. Hamlin worked for and
3 Mr. Hamlin were being paid out of Mr. McLeod's proceeds
4 from this, his fee, so we had always assumed they were
5 working for Mr. McLeod.

6 Q There's been testimony in this case,
7 and we're going to talk about this in a minute, about a
8 telephone call that took place on December 24th, 2007.
9 And we just looked at Exhibit 10 that references
10 communications on December 6, sending a letter dated
11 December 5. Now, my question for you is, between receipt
12 of the -- on December 6, 2007, of Exhibit 10 and the
13 phone call on December 24, during that time period did
14 Justice Family Farms have any other communications
15 concerning the Black River Farms property from -- with
16 defendant Hamlin?

17 A No.

18 Q Did anyone from Richardson, Plowden &
19 Robinson call during December 6th to, in particular,
20 December 20 to inquire n the status of this project?

21 A No.

22 Q How about e-mails, were any e-mails
23 received inquiring -- received from defendant Hamlin or

1 defendant Richardson Plowden inquiring into the status of
2 this Black River Farms project?

3 A No.

4 Q In early-December, 2007, what did
5 Justice Family Farms believe it needed to do finish this
6 easement?

7 A We believed that at some point we
8 would get a phone call that all the documents were ready
9 and we would have a meeting of everyone involved, we
10 would sign the documents and the documents would then be
11 recorded in the court and it would be official. We would
12 send these documents to our tax preparers and they would
13 move forward with preparing our tax returns for 2007.

14 Q How about was Justice Family Farms
15 planning to do anything in terms -- on the financial end,
16 paying the stewardship fees and other fees associated
17 with the project?

18 A Absolutely. Back to the agreement that
19 you showed me with COLT, we were in agreement with the
20 fees that they proposed. These were fees -- this was a
21 donation to COLT that they had to have to maintain their
22 inspection of the properties. And it was a donation to
23 them, but it was -- in our mind it was a fee for the

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1 easement and we were in agreement to that and we would
2 have paid that.

3 Q The same response for other fees
4 associated with the conservation easement project?

5 A That is correct. And, in fact, we
6 did pay fees for the work on the project.

7 Q Let's talk a little bit now -- and I
8 made a representation to you there was a December 24,
9 2007, conference call. Are you aware of that conference
10 call?

11 A Yes, I am.

12 Q Who participated in that conference
13 call?

14 A That was Mr. James Justice, II,
15 Mr. David Harrah and Mr. McLeod had an attorney on the
16 call also and I don't recall his name right now.

17 Q If I said Crosby Lewis, would that
18 refresh your recollection?

19 A Let me see. Yes, Crosby Lewis, yes.

20 Q And you're referring now to your
21 affidavit?

22 A And to the best of my recollection,
23 yes, Mr. Steve Ball, our general counsel at the time,

1 was in on the conversation.

2 Q Please tell the jury generally what
3 was discussed during this conference call.

4 A Basically, it was a call from Mr. McLeod
5 to our group that said I have -- Mr. McLeod speaking, I
6 have been contacted by the IRS requesting information on
7 conservation easements I've assisted in in the past and I
8 will be providing this information timely, but it's my
9 recommendation that you-all postpone this easement right
10 now, I feel that some of the easements I've done may be
11 questioned, but I'm going to provide the proper infor-
12 mation and I feel that in time this will all work out,
13 but I recommend that you postpone this easement right
14 now.

15 Q Was there any mention of defendant
16 Hamlin or defendant Richardson, Plowden & Robinson in
17 that conversation?

18 A No, sir.

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

B.R.A.

1 Farms property?

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

6 Q Prior to the telephone call on
7 December 24, 2007, what was Justice Family Farms intent,
8 if anything, with regard to satisfying the terms of the
9 Letter of Intent from COLT?

10 A There's no question we would have had
11 to satisfy that to make everything official and we had
12 every intention of paying their fee as a donation to
13 COLT and move forward with the relationship with COLT
14 and perhaps do other easements in the future with them.

15 Q Prior to the telephone call on
16 December 24th, 2007, what was Justice Family Farms
17 intent, if anything, with regard to satisfying the terms
18 of the consulting services agreement with YES to pay all
19 the professional fees in the event the conservation
20 easement was recorded?

21 A There again, if Yancey McLeod put the
22 entire easement together and he would have earned his
23 fee, it was our intention to pay his fee had the easement

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1 moved forward and been recorded in time.

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

13 MR. LEONARDI: Object to form.

14 BY MR. PENDARVIS:

15 A Yes.

16 (WHEREUPON, Miller Deposition
17 Exhibit No. 11 was marked for
18 identification purposes)

19 BY MR. PENDARVIS:

20 Q Mr. Miller, I'm passing to you a
21 document marked as Exhibit 11 that is an e-mail from
22 Yancey Environmental Solutions to Mr. Justice and
23 Mr. Harrah dated December 27, 2007. Did Justice

1 Family Farms receive this e-mail with the statement for
2 services rendered?

3 A Yes, we did.

4 Q And at some point, did Justice Family
5 Farms pay the professionals who had performed services
6 for the plans for this conservation easement?

7 A Yes, we did.

8 Q We're going to look at some materials
9 on that before we finish today, but I do have one more
10 topic I'd like to address in this deposition. Did
11 Justice Family Farms receive any information on what
12 the appraiser -- on the appraiser's determination of
13 the tax value of the conservation easement in 2007?

14 A We received at some point an estimate
15 that it would be in the \$45 million range and that would
16 be followed up with a formal appraisal document as part
17 of the final documentation of the easement.

18 (WHEREUPON, Miller Deposition
19 Exhibit No. 12 was marked for
20 identification purposes)

21 BY MR. PENDARVIS:

22 Q And I'm passing to you now an e-mail
23 marked as Exhibit 12. And does this e-mail reflect the

1 value that was later communicated to Justice Family Farms
2 on this -- the tax value of this easement?

3 A Yes.

4 Q And that's essentially the last
5 sentence of the third full paragraph?

6 A That is correct.

7 Q And what was the date of this e-mail?

8 A This e-mail is dated December 27th,
9 2007.

10 Q And based on Justice Family Farms'
11 understanding, would that have been sufficient time to
12 accomplish the easement in the 2007 calendar year?

13 MR. LEONARDI: Object to form.

14 BY MR. PENDARVIS:

15 A Yes. Based on our experience, all
16 the paperwork could have been done in a short time and
17 we still had four days to get everything signed and
18 recorded. Recording would take a very short time to do.

19 Q Notwithstanding the opinion, did
20 Justice Family Farms believe that receiving this
21 information on December 27th gave sufficient time for it
22 to decide whether to finish the easement plans?

23 A Yes.

1 Q Okay. I want to go back to the topic
2 we were discussing on payment of the invoices. So by the
3 end of December, 2007, am I correct in stating there was
4 no easement recorded on the Black River Farms property?

5 A That's correct.

6 Q Has an easement been recorded since
7 that time?

8 A Not on that property.

9 (WHEREUPON, Miller Deposition
10 Exhibit No. 13 was marked for
11 identification purposes)

12 BY MR. PENDARVIS:

13 I'm going to pass to you now a document
14 marked Exhibit 13 to your deposition. It appears to be
15 an e-mail from David Harrah to Yancey Environmental
16 Solutions. Take a moment and look over that e-mail and
17 describe for the jury essentially what this message --
18 the message from this e-mail.

19 A Okay.

20 Q In essence, what is this e-mail
21 telling Yancey Environmental Solutions?

22 A Mr. David Harrah is telling Mr. McLeod
23 that Jim, Jim Justice, has approved he billings for the

B.R.A.

1 other parties involved in the easement transaction, he's
2 going to pay the fee that's due them, if there's any late
3 charges in payment, he's not going to pay those, and he's
4 going to pay Mr. McLeod \$15,000 towards his fees on this
5 and if at some point we would move forward with this
6 easement, he will provide Mr. McLeod additional fees
7 based on how things work out with an easement in the
8 future.

9 Q Thank you.

10 (WHEREUPON, Miller Deposition
11 Exhibit No. 14 was marked for
12 identification purposes)

13 BY MR. PENDARVIS:

14 Q I'm going to pass to you now what we
15 call a compilation exhibit. There are multiple documents
16 stapled together as part of Exhibit 14. Take a moment
17 and look over that, then I've got a question or two for
18 you and we're just about finished.

19 A Okay.

20 Q Are these the invoices from the
21 professionals that were paid by Justice Family Farms?

22 A Yes, they are.

23 Q Okay. And the fourth page back, is

B.R.A.

1 that a memorandum from Mr. Harrah about -- to Yancey
2 Environmental Solutions about this payment for
3 professionals issued?

4 A Yes, from David Harrah to Mr. McLeod.

5 Q And from the very beginning of this
6 project, did Justice Family Farms have the financial
7 wherewithal to pay the fees and costs associated with
8 this easement?

9 A Absolutely.

10 MR. PENDARVIS: Let me please take a
11 moment break and we may be finished with direct
12 examination. Go off the record.

13 VIDEOGRAPHER: Going off the video
14 record. The time is 10:32 A.M.

15 (WHEREUPON, a short recess
16 was taken)

17 VIDEOGRAPHER: We are now back on the
18 video record. The time is 10:45 A.M. This
19 begins Tape 2.

20 BY MR. PENDARVIS:

21 Q Mr. Miller, one last set of questions
22 and could you pull out Exhibit 12, the e-mail from the
23 appraiser, please, sir?

1 A I have it.

2 Q Earlier you had given some testimony
3 about Mr. Justice's environmental focus and the follow-up
4 question I have on this Exhibit 12, was the \$45 million
5 tax benefit number identified by the appraiser in Exhibit
6 12, in concert with Mr. Justice's and Justice Family
7 Farms' environmental desires, such that it would have
8 confirmed their willingness to go forward with this
9 easement?

10 MR. LEONARDI: Object to form.

11 BY MR. PENDARVIS:

12 Q Answer if you can.

13 A Yes. The value would have been
14 beneficial to us taxwise, plus it would have allowed
15 the property to have been placed in lifetime easement --
16 or not lifetime, but forever easement and that was in
17 line with Mr. Justice's feeling on conservation and the
18 properties he owns and how careful he is about all of his
19 properties. It also relates back to his relationship
20 with Mr. McLeod as far as conserving the assets that the
21 family has, the Justice family has.

22 MR. PENDARVIS: Thank you very much
23 for your time today. We have no further

1 questions at this point.

2 CROSS-EXAMINATION

3 BY MR. LEONARDI:

4 Q Good morning, Mr. Miller. My name is
5 Dan Leonardi. As I said at the beginning, I represent
6 Richardson, Plowden & Robinson, P.A., and George Harold
7 Hamlin, who is here with me today. I know that you said
8 that you are currently the CFO, is it, of the James C.
9 Justice Companies?

10 A That is correct.

11 Q And what was your position back in
12 December of 2007?

13 A I was the treasurer of the companies.

14 Q Treasurer?

15 A Treasurer, yes.

16 Q And in your capacity as treasurer
17 of the company, did you have any responsibility for
18 exploring this proposed easement, conservation easement
19 transaction?

20 A My primary responsibility was the
21 financial end of the business, the financial reporting
22 and paying bills and cash management.

23 Q If you would get -- take out

B.R.A.

1 Exhibit 2 to your deposition.

2 A Yes, sir.

3 Q Would you tell me the date that this
4 affidavit is signed?

5 A It was signed on August 30th, 2011.

6 Q And when were you first contacted about
7 signing an affidavit in this case?

8 A I don't recall when it was.

9 Q Can you do your best? In a general
10 sense, was it days before this, weeks before this?

11 A It was weeks before.

12 Q It was weeks before?

13 A Yes.

14 Q Okay. And you didn't draft this
15 affidavit, did you?

16 A I did not draft this.

17 Q Okay. Who drafted the affidavit?

18 A I'm not sure who drafted this, I don't
19 know.

20 Q Okay. When you were first contacted
21 about signing an affidavit in this case, who contacted
22 you?

23 A I believe it was Mr. Hunter at his

B.R.A.

1 previous firm and --

2 MR. HUNTER: Let me just caution you
3 there. I'm going to object to the extent this
4 question and others of a similar nature might
5 impinge upon attorney-client privilege. And I
6 will instruct Mr. Miller not to reveal any
7 conversations he had with either me or Mr. Steve
8 Ball, as general counsel for the companies for
9 which Mr. Miller works, because of the attorney-
10 client privilege, as well as work product
11 privileges.

12 BY MR. LEONARDI:

13 Q And going forward, to the extent one of
14 my questions could possibly be answered with information
15 such that Mr. Hunter has directed his comments to, I do
16 not want to know what you spoke to Mr. Hunter about. So
17 that's an appropriate objection and so I'm not asking for
18 that kind of communication, but -- so to the extent that
19 there's a question -- that there's a question that could
20 be answered with that sort of information, I don't want
21 to hear that. Do you understand?

22 A Yes, sir, I do.

23 Q Okay. Now, I understand that you were

B.R.A.

1 contacted at some point by Mr. Hunter about signing an
2 affidavit in this case?

3 A Yes, sir.

4 Q Okay. And then at some point later on,
5 was a draft affidavit presented to you?

6 A Yes, it was.

7 Q Okay. And did you read over the draft
8 affidavit?

9 A I read over the draft affidavit and
10 I satisfied myself that all the answers I was giving was
11 in agreement to what the corporation understood or the
12 LLC understood as part of the transaction.

13 Q All right. Let's take it step-by-step.
14 When you reviewed the draft affidavit, did you make any
15 changes to it?

16 A I think there were some punctuation
17 and wording changes that I made as far as names and
18 things like that. Not to the facts, no.

19 Q Okay. So you did not make any
20 substantive changes to it?

21 A That is correct, yes.

22 Q Okay. And the information contained
23 in the affidavit, it is not based on your personal

B.R.A.

1 knowledge, is it?

2 A It's based on the knowledge of the LLC,
3 Justice Family Farms, LLC.

4 Q All right. How did you satisfy yourself
5 that the affidavit was accurate? What did you do, what
6 steps did you take to verify the information that is in
7 the affidavit?

8 MR. PENDARVIS: Object to the form.

9 BY MR. LEONARDI:

10 Q You can answer.

11 A I spoke to individuals involved in
12 this transaction and I reviewed documents that we had
13 in our files.

14 Q All right. Who did you speak to?

15 A I spoke to Mr. David Harrah
16 primarily and I asked Mr Justice questions about how we
17 -- how he felt about us proceeding with this transaction.

18 Q You spoke to Mr. David Harrah about
19 this affidavit or about this case?

20 A I spoke to him -- let me back up.
21 I was in contact with Mr. Harrah while this was going on.
22 We were in a small office prior to where we are now. I
23 was aware that Mr. -- the conversation on December 24th

B.R.A.

1 and I asked Mr. Harrah what was going on there and he
2 explained that to me and I remember that conversation.
3 I did not speak to him before I signed this, but I did
4 speak to him --

5 Q Years ago?

6 A -- four years ago, yes, when it was
7 all going on.

8 Q All right. But since you were
9 presented with this affidavit, the draft affidavit that
10 you signed --

11 A Right.

12 Q -- you never spoke to Mr. Harrah about
13 the contents?

14 A No. I'm sorry, that was prior to when
15 the transaction was going on.

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

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

B.R.A.

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

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

13 Q Okay. Let's take a look at the
14 affidavit, Exhibit 2, or is it Exhibit 3?

15 MR. PENDARVIS: Two.

16 MR. LEONARDI: Two.

17 BY MR. LEONARDI:

18 Q There are several references in the
19 affidavit to, for example, JFF representatives or JFF
20 officials and what I'd like to do is go through and have
21 you tell me who those individuals are, okay, and I'll
22 refer you to specific instances. Are you ready?

23 A Yes, go ahead.

B.R.A.

1 Q Okay. In Paragraph 4, it says, "In
2 March of 2007, JFF representatives spoke with Mr. Yancey
3 A. McLeod." Do you see that?

4 A I'm sorry, in No. 4?

5 Q Paragraph 4.

6 A Yes, okay, I see that.

7 Q Can you tell me, in that sentence,
8 who JFF representatives refers to?

9 A It was my understanding that it was
10 Mr. Justice, himself, spoke with Mr. McLeod.

11 Q Now, in Paragraph 5, it says, "At the
12 time of these initial project discussions in March, 2007,
13 JFF officials were familiar with Mr. McLeod and YES." To
14 whom does the term JFF officials there in Paragraph No. 5
15 refer?

16 A Mr. Justice, Mr. James Justice, II.

17 Q If you'll turn the page, Paragraph 6,
18 of course, has a reference that says that JFF executed
19 and returned a Letter of Intent. We know that that was
20 Mr. Justice from the exhibit earlier today. Correct?

21 A That's correct.

22 Q And in Paragraph 7, there's a reference
23 to subsequent discussions in July, 2007, between JFF

B.R.A.

1 officials and Mr. McLeod and his colleague, Dr. James
2 Lewis. In that sentence, who did you understand JFF
3 officials to refer to?

4 A I understand that to be Mr. Justice
5 and Mr. David Harrah.

6 Q All right. Paragraph 8 says, "Based on
7 their due diligence, Mr. McLeod and YES indicated to JFF
8 in the late-summer and early-fall of 2007 --". Who do
9 you understand JFF to refer to in Paragraph 8 of your
10 affidavit?

11 A David Harrah.

12 Q All right. In Paragraph 9, it says,
13 "Based on feedback from Mr. McLeod and YES, JFF
14 understood --". Do you see that?

15 A Yes.

16 Q And who there, is it your understanding,
17 is referred to as JFF in Paragraph 9?

18 MR. HUNTER: Let me just interject an
19 objection as to form. I mean, to the extent
20 that the affidavit is written with JFF, it
21 speaks for itself and I don't want to say much
22 more than that.

23 MR. LEONARDI: Okay. Well, I would

B.R.A.

1 like to note, at least, for the record that this
2 deposition is being taken pursuant to the Rules
3 of Civil Procedure in South Carolina and in
4 South Carolina -- I certainly don't want to get
5 crosswise with you, but in South Carolina, you
6 can object to the form and you really can't say
7 anything beyond that, okay, but your objection I
8 understand. I understand your objection. Some
9 of these answers have -- some of these reference
10 have different individuals and so to the extent
11 the witness knows who is referred to, I would
12 like to go through and continue to figure out
13 who -- what individuals are being referred to
14 here.

15 BY MR. LEONARDI:

16 Q So Paragraph 9, "-- JFF understood that
17 an independent appraisal would be necessary --". Who
18 would that refer to?

19 MR. HUNTER: Objection to form.

20 MR. LEONARDI: Now, if you want to make
21 a continuing objection, you can do that.

22 MR. HUNTER: Anytime the affidavit
23 doesn't use JFF officials, I would object as

B.R.A.

1 to form if that type of question was made.

2 MR. LEONARDI: All right.

3 BY MR. LEONARDI:

4 A Do I answer?

5 Q Yes, you do. Yes.

6 A I do not know in that respect.

7 Q Okay. So you don't know who it is

8 that understood that an independent appraisal would be

9 necessary?

10 A I do not know for a fact, no.

11 Q Okay. The next -- Paragraph 10 says,

12 "Mr. McLeod and YES likewise indicated to JFF, based on

13 YES's preliminary due diligence work --," and you can

14 read the rest of that paragraph to yourself for the

15 context. Who do you understand JFF in that paragraph to

16 refer to?

17 A That was David Harrah.

18 Q All right. Skipping to Paragraph 12,

19 it states that, "They further explained to JFF that in

20 addition to paying professional fees, the donor typically

21 also would need to donate to the donee organization a

22 stewardship fee." To whom does JFF in that sentence

23 refer?

B.R.A.

1 A David Harrah.

2 Q You know, I forgot to ask you one
3 question. You were describing the work that you did to
4 assure yourself that the information in this affidavit
5 was correct and you said that the only person you spoke
6 to was Jim Justice. Correct?

7 A Yes.

8 Q And you answered that you reviewed
9 some documents, though, and describe those documents
10 for me.

11 A Primarily the exhibits that have been
12 presented here, things that Mr. Harrah -- that were in
13 the files we had in our office regarding this
14 transaction.

15 Q So you had those documents at your
16 office?

17 A Some of these we did, the invoices,
18 the check copies, things like that.

19 Q Okay. And --

20 A I think we had some of the e-mails
21 in our files also.

22 Do you have more documents than
23 what has --

B.R.A.

1 A I just --

2 Q -- what's been marked as exhibits
3 here today?

4 A As Mr. Pendarvis asked me, some of
5 these I have seen, so we do have those, yes.

6 Q Okay. And I guess just to be clear,
7 is it your understanding based on the exhibits you've
8 seen today, that in Justice Family Farms files or in the
9 files of the Justice companies, there are more documents
10 than just the ones that have been marked as exhibits
11 here?

12 A No. What I'm saying is that I have the
13 -- anything that we've seen here today are things I have
14 seen previously. Some of these --

15 Q Okay.

16 A -- are in the files that we have.

17 Q Okay. But there are no documents that
18 are not presented here today that you have in your files?

19 A Not that I know of, no.

20 Q Okay. And where are those files
21 maintained?

22 A I think they're at -- still at our
23 corporate office here in -- actually, it's called Beaver,

B.R.A.

1 West Virginia. Now, we were in Beckley, we're in Beaver
2 now.

3 Q In Paragraph 13, you can read it to
4 yourself, there is a reference to JFF at the end. The
5 last sentence says, "These were acceptable to JFF." And
6 do you know to whom JFF refers to in Paragraph 13?

7 MR. PENDARVIS: Same objection.

8 MR. HUNTER: Same objection. I object
9 to the form.

10 BY MR. LEONARDI:

11 A I am not -- no, I do not know on that,
12 no.

13 Q In Paragraph 14, it says that, "The
14 potential value of mitigation bank project, it appeared
15 to JFF." Do you understand who JFF in that paragraph
16 refers to?

17 MR. HUNTER: Object to the form.

18 MR. PENDARVIS: Same objection.

19 MR. LEONARDI: I mean, it's a stand-
20 ing objection, do you need to say it every time?

21 MR. HUNTER: I don't know your rules,
22 but if you represent to me I don't need to,
23 then if he understands it as the court reporter,

B.R.A.

1 that it's a standing objection, that's fine.

2 BY MR. LEONARDI:

3 A There again, David Harrah was our tax
4 adviser, it would have been David Harrah.

5 Q Okay. So David Harrah was the tax
6 adviser at that time?

7 A He was the Chief Financial Officer
8 and tax adviser to the Justice family.

9 Q And was there any additional counsel
10 that served as tax advisers on this project for --

11 A Not that I know of. Mr. Harrah was
12 a CPA, so I don't know anyone else.

13 Q Paragraph 15 says, "In the fall of
14 2007 and into December of that year, JFF understood
15 that Mr. McLeod, YES, COLT, and Dr. Lewis, his wildlife
16 consultant," et cetera, et cetera, you can read the rest
17 of the paragraph. Do you understand to whom JFF refers
18 to in Paragraph 15?

19 MR. PENDARVIS: Object to the form.

20 BY MR. LEONARDI:

21 A That would have been Mr. Harrah and
22 myself. I knew that this was all taking place in my
23 position as treasurer. I knew this was all taking place

B.R.A.

1 during that time so I did know that everyone was working
2 on this and I had heard some -- I had heard these names.

3 Q Okay. And Mr. Harrah was the one that
4 had primary responsibility for monitoring the work that
5 they were doing and handling it from the Justice Family
6 Farms end, so to speak?

7 A That's correct.

8 Q Now, 16 says JFF wanted to proceed
9 with the project, who is the JFF referred to in that
10 sentence?

11 MR. PENDARVIS: Object to the form.

12 BY MR. LEONARDI:

13 A That would have been Mr. David Harrah,
14 myself on the financial end, and Mr. Justice.

15 Q In Paragraph 19; there's a reference
16 to Mr. Harrah reporting something to JFF officials and
17 owners, who would that be a reference to?

18 A That would have been Mr. Harrah
19 talking direct to Mr. Justice, II.

20 Q Paragraph 21 says JFF proceeded in
21 good faith, who does JFF refer to there?

22 MR. PENDARVIS: Object to the form.

23 MR. HUNTER: Object to the form.

B.R.A.

1 BY MR. LEONARDI:

2 A That would have been JFF the LLC
3 proceeded in good faith toward completion of the
4 conservation easement project.

5 Q Let's talk for just a moment about
6 what JFF did to further the conservation easement
7 project. What were the steps taken that JFF took to
8 further the conservation easement project?

9 A Back in the beginning, they
10 contacted Mr. McLeod, asked him to investigate this and
11 proceed with whatever was necessary to get this done.
12 They instructed him to hire the professionals that were
13 necessary to document the easement and Mr. Harrah was
14 the point man with Mr. McLeod for this. Any questions,
15 Mr. McLeod was to talk to Mr. Harrah and if there were
16 any issues, Mr. McLeod would have brought those to
17 Mr. Harrah, they would have been resolved, that was our
18 role in this. We had no expertise in doing these things,
19 Mr. McLeod was instructed to hire the proper expertise
20 to move this forward.

21 Q Okay. In Paragraph 22, there's a
22 reference to, "-- JFF understood that it would then have
23 been obligated to pay a 4 percent fee --." In that

B.R.A.

1 sentence, who do you understand JFF to refer to?

2 A That would have been me because I was
3 handling the cash management and I would have -- that
4 would have needed to have been figured into our cash
5 management plan. Mr. Harrah told me what was going on
6 with that and that would have been how the entire -- the
7 proceeds we got out of the entire process, we would have
8 had to deduct 4 percent fee to Mr. McLeod.

9 Q And the last sentence there, "JFF
10 understood that legal fees of Mr. Hamlin and his firm
11 would have been paid out of the fee to YES." Who had
12 that understanding? Was that, again, you?

13 A That was me because that would have been
14 -- that would have been involving the treasury function
15 of the business.

16 Q And in Paragraph 23, JFF officials
17 there, who does that refer to?

18 A That would have been everyone in
19 the -- involved in this. We were all operating on the
20 assumption that it would be recorded. We were all aware
21 of this and we were operating as though it was going to
22 happen.

23 Q And when you say everyone, you mean --

B.R.A.

1 A I'm sorry.

2 Q -- Harrah and who else?

3 A I'm sorry, that would have been
4 myself, Mr. Harry, I'm sure Steve Ball was aware of this,
5 Mr. Justice, II, Mr. Justice, III.

6 Q You have already described, referring
7 to Paragraph 24, the individuals that were on the
8 December 24th, 2007, telephone call. So that reference
9 to JFF officials, I assume, just refers to the indi-
10 viduals that you named that are associated with Justice
11 Family Farms or James C. Justice. Is that correct?

12 A That's correct.

13 Q And in Paragraph 26, it says, "JFF
14 accepted that recommendation --". Who accepted the
15 recommendation?

16 MR. PENDARVIS: Object to the form.

17 BY MR. LEONARDI:

18 A Mr. Justice, II, would have made that
19 decision.

20 Q Mr. Justice, II, is the ultimate
21 decisionmaker in these companies. Correct?

22 A He's the majority owner, that's correct,
23 and the ultimate decisionmaker.

B.R.A.

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

2 A That's correct.

3 Q And then 27, it says, "-- because JFF
4 believed that the professionals had worked in good
5 faith --", et cetera. Do you know who believed that the
6 professionals had worked in good faith? Who does that
7 refer to?

8 MR. PENDARVIS: Object to the form.

9 BY MR. LEONARDI:

10 A Mr. Justice, II.

11 Q And then there's another reference
12 to JFF later on in Paragraph 27 that says JFF caused
13 professional fees to be paid. Who would that be?

14 A That would have been Mr. Justice
15 authorizing us to pay the bills.

16 Q All right. And then it says, "Regarding
17 the fees paid to Mulkey, JFF understood those included
18 fees for Dr. James Lewis' wildlife consulting work on the
19 project." Who is JFF referred to there?

20 A I do not know in that instance.

21 Q Okay. Now, when you spoke with
22 Mr. Justice, did he explain to you -- recently when
23 you were discussing with him that you were going to

B.R.A.

1 testify today, he didn't describe to you that regarding
2 the fees paid to Mulkey, JFF understood those included
3 fees for Dr. James Lewis' wildlife consulting work on the
4 project, did he?

5 A No, huh-uh.

6 Q And that information is, in fact, not
7 in the documents that you reviewed before you signed the
8 affidavit, is it?

9 MR. HUNTER: Objection to form.

10 BY MR. LEONARDI:

11 A I don't recall seeing that, no.

12 Q Okay. And, finally, in Paragraph 28,
13 there's a reference to, "-- JFF had believed that the
14 various professionals --", et cetera, et cetera. Who
15 would that be?

16 A That goes back to the previous
17 question. That would have been everyone involved in
18 this, Mr. Justice, II, Mr. Justice, III, David Harrah,
19 myself, Steve Ball.

20 Q Okay. If you take a look at
21 Paragraph 5 real quick before we change, I believe at
22 the beginning of the deposition, you specified that the,
23 this is, again, in Paragraph 5 of Exhibit No. 2, that

B.R.A.

1 the wetland reserve program easement was on 1,000 acres.
2 In the affidavit, it says 2,000 acres. Do you know
3 which is correct?

4 A It was my understanding that it was
5 1,000 acres. Well, it was in excess of 1,000 acres. I
6 didn't realize it was closer to 2,000 acres, but it was
7 in excess of 1,000 acres and I think I said 1,000
8 previously.

9 Q Okay. And was there a tax benefit
10 associated with the wetland reserve program easement?

11 A I am not familiar with that to state
12 whether there was or not.

13 Q If you'll take a look at Exhibit 3,
14 this is the Letter of Intent and Agency Agreement.

15 A Okay. I have that.

16 Q If you'll take a look at this, the
17 Letter of Intent and Agency Agreement, do you see any
18 reference to this transaction being completed by 2007?

19 A No, I do not.

20 Q And this document did not obligate
21 Mr. Justice or any of his companies to pay anyone any
22 money. Correct?

23 A There's no payment obligations in here

B.R.A.

1 that I see.

2 Q Can you look at Exhibit 5 for a second,
3 please?

4 A Okay. I have No. 5.

5 Q All right. This is a statement of
6 services rendered by Yancey Environment Solutions to
7 Justice Family Farms. Do you see that?

8 A Yes.

9 Q And as Mr. Pendarvis asked you about
10 earlier, this invoice was paid. Correct?

11 A Yes.

12 Q Mr. Justice had asked Yancey
13 Environmental Solutions to investigate the conservation
14 easement, they had done some work in doing that, and
15 Mr. Justice paid him for investigating it. Correct?

16 MR. PENDARVIS: Object to the form.

17 BY MR. LEONARDI:

18 A This was -- yes, that's correct. Yes.

19 Q And this is actually -- and you may
20 have been about to speak about this, but this is actually
21 for more than just the Black River Farm project.
22 Correct?

23 A That is correct, yes.

B.R.A.

1 Q And, of course, as we know, that
2 easement did not close. Correct?

3 A Correct.

4 Q And the easement that is mentioned
5 in Beckley, West Virginia, on Page 2, that also did not
6 close as far as you know. Correct?

7 A Where you see homeplace and Davis
8 Station, is that what you're talking about?

9 Q That's correct. Well, I don't think
10 the Davis Station one is a conservation easement --

11 A Okay.

12 Q -- but homeplace one.

13 A That was just -- that was just easement
14 potential, that wasn't even an easement in process, but
15 it did not close as an easement.

16 Q You used the terms easement potential
17 and process, when does a transaction go from potential to
18 process in your opinion?

19 MR. PENDARVIS: Objection, outside
20 the scope of the deposition notice and the
21 qualifications of this witness.

22 MR. HUNTER: Same objection.

23 THE WITNESS: I'm sorry, do I answer?

B.R.A.

1 MR. LEONARDI: Yeah. The only -- just
2 to make it clear, the only time you don't answer
3 is like when Mr. Hunter told you not to divulge
4 something that's privileged, but there will be
5 objections and you just answer anyway.

6 MR. HUNTER: Yes, I should have said
7 that you should answer after we object.

8 BY MR. LEONARDI:

9 A It's my understanding that once the
10 process started and you bring in professionals, you
11 bring in an appraiser, you bring in the legal team,
12 you bring in the environmental and wildlife consultants,
13 the easement process is started.

14 Q Okay.

15 A If you just ask someone for their
16 opinion, that's just an opinion.

17 Q Okay. Now, when you say bring in these
18 folks, do you mean have some sort of agreement with them?

19 A Bring them into the transaction, either
20 a verbal or written agreement. If you tell someone to
21 move forward with establishing an easement --

22 Q Okay.

23 A -- and that consultant brings in a

B.R.A.

1 team, whoever he needs necessary to make it happen.

2 Q And if you haven't told these various
3 entities that you want them to move forward, then the
4 process hasn't really begun, has it?

5 A You tell the consultant to tell them
6 to move forward and the consultant is your point man
7 in the process and he tells everyone to move forward
8 with it.

9 Q If you'll go ahead and find Exhibit 6
10 to your deposition, please.

11 A Okay. I have six.

12 Q Do you see that Exhibit 6 has attached
13 to it the proposed Consulting Services Agreement?

14 A Yes, I do.

15 Q And as you mentioned, Mr. Justice
16 and no one from Justice Family Farms ever signed this
17 Consulting Services Agreement, did they?

18 A Not to my recollection that they did,
19 no.

20 Q And if you'll turn to Page 2 of this
21 Consulting Services Agreement --

22 A Okay.

23 Q -- you'll see that the second paragraph

B.R.A.

1 at the very top there begins, quote, "Now, therefore, in
2 consideration of the services to be performed by YES for
3 Owner as set forth herein, Owner agrees to pay YES the
4 sum of \$50,000 as a nonrefundable retainer, ("the
5 Retainer," hereafter) upon execution of the Agreement."
6 Neither Jim Justice nor anyone with Justice Family Farms
7 ever paid the \$50,000 retainer to YES, did it?

8 A Not that I'm aware of, no.

9 Q If you'll turn to Exhibit 8 of your
10 deposition, please.

11 A Okay. I have eight.

12 Q And this is the e-mail that attaches
13 a proposal from the appraiser, Darroll Hawkins of
14 Highview Engineering. Is that correct?

15 A That is correct, yes.

16 Q Okay. And if you'll look on the page
17 that is Bates stamped, and by Bates stamped, I just mean
18 it has that serial number, so to speak, on the bottom
19 right-hand corner, the one that says RPCR 0061.

20 A Yes, sir.

21 Q Do you see that it says, "The attached
22 proposal of Highview Engineering for appraisal of
23 approximately 3,000 acres (referred to as "the Jim

B.R.A.

1 Justice Black River Farm near Manning, South Carolina"),
2 dated September 16, 2007, is hereby accepted and agreed."
3 Do you see that?

4 A Yes, I do.

5 Q And neither Jim Justice nor anyone else
6 at Justice Family Farms ever signed this and returned it
7 to Mr. Darroll Hawkins of Highview Engineering, did they?

8 A That is correct.

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

12 A Yes, sir, it is.

13 Q And when did Justice Family Farms
14 make the decision to go forward with the project?

15 MR. HUNTER: Objection to form.

16 BY MR. LEONARDI:

17 A When it was recommended by Mr. McLeod
18 that they postpone the easement on the December -- after
19 the December 24th phone call.

20 Q I'm not sure I understand your answer.
21 When did Jim Justice decide that he wanted to do --

22 A Oh, I'm sorry, I

23 Q -- the conservation easement?

1 A I misunderstood the question. I'm
2 sorry. When did he decide that he wanted to do the
3 easement?

4 Q Yes.

5 A When Mr. McLeod recommended that we
6 should move from a conservation -- from a wetlands
7 mitigation bank to a conservation easement, that's when
8 he decided to change to a conservation easement.

9 Q Okay.

10 A And I don't have the date of when that
11 was.

12 Q Okay. Well, I can represent to you that
13 there are documents that reflect that it was in the mid-
14 summer, mid to late-summer of 2007.

15 A Okay.

16 Q If you would look at Exhibit 9 to your
17 deposition, please.

18 A I have nine.

19 Q Okay. As we discussed earlier in your
20 deposition, this is an e-mail from Hal Hamlin to David
21 Harrah, copied on Yancey Environmental Solutions, and it
22 includes a Letter of Intent from Community Open Land
23 Trust. Do you see that?

B.R.A.

1 A Yes, I do.

2 Q And do you see that Mr. Hamlin
3 explains, "The land trust is spending scant resources
4 to investigate the property, and will be stretched to
5 get this done before the end of the year, as any land
6 trust would be at this time of year. Kindly encourage
7 Mr. Justice to decide how he would like to proceed as
8 soon as that can be done." Do you see that?

9 A Yes, I do.

10 Q And does that confirm for you that
11 Mr. Justice at this point had not made a decision, a
12 final decision, regarding the conservation easement?

13 MR. HUNTER: Objection, asked and
14 answered.

15 BY MR. LEONARDI:

16 A Mr. Justice may not have decided that
17 COLT was the final recipient of this, but he had decided
18 to go forward with the easement. That was decided
19 sometime prior to this.

20 Q So he decided to go forward with it not
21 knowing who would take -- who would receive the easement?

22 A There would have been a doner, I don't
23 know that he had made the decision that COLT was the

B.R.A.

1 final recipient of it. It was my understanding that it
2 was going forward, but maybe the decision was not -- had
3 not been made that it would be COLT at that point.

4 Q Okay. If you'll take a look at the
5 Letter of Intent that's attached --

6 A Okay. I have the letter.

7 Q -- do you see that there is -- on the
8 page Bates labeled COLT 00025 --

9 A Yes, I have 25.

10 Q -- the paragraph reads, "Upon receipt of
11 an initial contribution of \$5,000 and this signed letter,
12 we can get started immediately with the conservation
13 easement process. The remaining contribution is
14 requested before or at closing of conservation easement.
15 We look forward to working with you in the conservation
16 of the Justice Black River Farm." Do you see that?

17 A Yes, I do.

18 Q And do you see that there is a space for
19 acknowledgement of receipt and understanding?

20 A Yes, I do.

21 Q Okay. And no one from Justice Family
22 Farms and Mr. Jim Justice, they did not sign this and
23 return it to COLT or Sue Green, did they?

B.R.A.

1 A As far as I know, they did not.

2 Q Okay. And no one from Justice Family
3 Farms ever forwarded to Sue Green or Yancey McLeod to
4 forward to Sue Green, the \$5,000 initial contribution?

5 A Not that I'm aware of.

6 Q Not November 30th when this was sent and
7 not at anytime in the future?

8 A Not that I'm aware of.

9 Q Now, you said -- you described that in
10 connection with the closing of an easement, there would
11 be documents that are signed. Correct?

12 A Correct.

13 Q All right. And one of those documents
14 would be the conservation easement, itself, the legal
15 document. Isn't that correct?

16 A That's correct.

17 Q All right. Now, what work had Justice
18 Family Farms done on the conservation easement document,
19 itself?

20 A None that I'm aware of.

21 Q Okay. None?

22 A I don't know that it was our position
23 to prepare the documents.

B.R.A.

1 Q Well, wouldn't Justice Family Farms be
2 interested in the terms of the easement?

3 A Absolutely.

4 Q All right. And so my question to you
5 is, what work had they done to craft the terms of the
6 easement?

7 MR. HUNTER: Objection, asked and
8 answered.

9 BY MR. LEONARDI:

10 A There would have been a document
11 submitted for Mr. Justice's review from Mr. McLeod and
12 he would have said yes or no to the terms, present any
13 questions, they would have revised the terms and he would
14 have signed it.

15 Q And you understand that the qualified
16 organization is also very interested in the terms of the
17 conservation easement, don't you?

18 A I'm sure they would be, yes.

19 Q And in this case, Mr. Justice had not
20 seen any proposed terms for the conservation easement,
21 had he?

22 A Not that I'm aware of, no.

23 MR. HUNTER: Objection as to form and

B.R.A.

1 time period..

2 BY MR. LEONARDI:

3 Q And to the extent that -- well, as
4 far as you know, Justice Family Farms and Mr. Justice
5 never saw -- have never seen at anytime any proposed
6 easement terms for this proposed easement transaction?

7 A Not that I'm aware of.

8 Q Okay. And, in fact, if Mr. Justice
9 had wanted to make revisions to that easement, and, of
10 course, the easement would be governing the use of his
11 land forever, if he had wanted to make revisions to it,
12 those revisions would have to be approved by COLT if
13 COLT was going to continue to serve as the qualified
14 organization. Isn't that correct?

15 MR. PENDARVIS: Object to the form.

16 MR. HUNTER: Object to the form.

17 BY MR. LEONARDI:

18 A I can't speak for COLT. I would assume
19 they would have to make -- they would have to approve
20 that, but I can't speak for their processes.

21 Q And the process of negotiating the terms
22 of the conservation easement between Mr. Justice and COLT
23 never began, did it?

B.R.A.

1 MR. PENDARVIS: Object to form.

2 MR. HUNTER: Object to form.

3 BY MR. LEONARDI:

4 A I don't know what discussions Mr. McLeod
5 had with COLT. I don't know.

6 Q Did Mr. McLeod ever forward to you or
7 anyone else at Justice Family Farms proposed conservation
8 easement terms?

9 A Not that I'm aware of.

10 Q Did he ever mention to you-all, we need
11 to get that sorted out?

12 A Not that I'm aware of.

13 Q Now, you mentioned Mr. Justice's
14 affection for land and conservation of land earlier in
15 the deposition. Correct?

16 A Yes.

17 Q And does that apply specifically -- not
18 only all land, I understand that he owns a good bit of
19 land, but also to the homestead here in West Virginia and
20 the farm down in South Carolina?

21 MR. HUNTER: Objection to form, the
22 homestead isn't in West Virginia.

23 MR. PENDARVIS: Objection.

B.R.A.

1 BY MR. LEONARDI:

2 A Are you talking about the home farm or
3 the Homestead resort?

4 Q Well, I'm talking about his homeplace
5 here in West Virginia.

6 A That's called the home farm. Yes, it's
7 in West Virginia, that's correct.

8 Q Okay. Now, has Mr. Justice ever placed
9 a conservation easement on the land in South Carolina
10 since 2007?

11 A No.

12 Q Let's talk about the phone call on
13 December 24th, 2007. Let's talk about why this conser-
14 vation easement did not get placed in 2007. Isn't it
15 true that Yancey McLeod initiated a call to Jim and
16 others to discuss an IRS notice?

17 A Yes, that's correct.

18 Q And he explained that this notice, he
19 was taking it very seriously and he wanted some time to
20 resolve the issues presented by this notice?

21 A That was my understanding of the phone
22 call, yes.

23 Q And because of that -- for that reason,

B.R.A.

1 he wanted to postpone the easement. Correct?

2 A That's how I understood it, yes.

3 Q Okay. And he did not mention that his
4 attorney had withdrawn, did he?

5 A No, sir.

6 Q And, in fact, he had an attorney with
7 him there, Crosby Lewis. Correct?

8 A He represented Mr. Lewis to be his
9 attorney, yes.

10 Q All right. And during that phone call,
11 he explained that the work that had been done on the
12 easement could be used at a later date when the easement
13 went forward. Correct?

14 A That's what I understand, yes.

15 VIDEOGRAPHER: Going off the video
16 record. The time is 11:38 A.M. This concludes
17 Tape 2.

18 (WHEREUPON, a short recess
19 was taken)

20 VIDEOGRAPHER: We're now back on the
21 video record. The time is 11:47 A.M. This
22 begins Tape 3.

1 BY MR. LEONARDI:

2 Q All right. Mr. Miller, referring
3 back to Exhibit 11 to your deposition, this again is the
4 e-mail. I'll let you find it.

5 A I have 11.

6 Q Okay. An e-mail from Yancey
7 Environmental Solutions to Jim Justice and David Harrah
8 and it's dated just after the December 24th phone call.
9 Do you see that?

10 A Yes.

11 Q And do you see at the top of the --
12 the first sentence of the second paragraph is, "All of
13 the work that has been in progress on the Black River
14 Farm tract will be used in a conservation project at the
15 appropriate time." Do you see that?

16 A Yes, I do.

17 Q And then in the third paragraph, the
18 last sentence says, "As I mentioned above, all of the
19 work and work-product completed to date will be used when
20 we recommence the project." Correct?

21 A (No response)

22 Q The third paragraph.

23 A I'm sorry, third.

B.R.A.

1 Q Last sentence.

2 A All the work and work product completed
3 -- yes, I see that.

4 Q Okay. And that reconfirms for you that
5 the December 24th phone call, the decision was made to
6 postpone the easement. Correct?

7 A Yes.

8 Q And that that was fine with Mr. Justice.
9 Correct?

10 A Well, it was not fine, we would lose the
11 tax deduction, but --

12 Q For 2007?

13 A Yes.

14 Q Okay. But he told Yancey during that
15 call that they would consider going forward in the future
16 and that the work could be used then?

17 A That's my understanding.

18 Q Okay. And, in fact, Mr. Justice
19 wanted Yancey to sort out this IRS issue before
20 proceeding with this particular project and that's what
21 Yancey indicated to Mr. Justice as well. Correct?

22 MR. PENDARVIS: Object.

23 MR. HUNTER: Object to the form.

1 BY MR. LEONARDI:

2 A That was my understanding that -- yes.

3 Q Okay. That was a compound question, so
4 I'm going to ask it in the appropriate parts.

5 A Okay.

6 Q Mr. McLeod told Mr. Justice that he
7 wanted to postpone the transaction because he had gotten
8 a notice from the IRS and wanted to clear up the issues
9 associated with that notice. Correct?

10 MR. PENDARVIS: Form, objection.

11 BY MR. LEONARDI:

12 A Yes.

13 Q And, in fact, Mr. Justice was okay
14 with Mr. McLeod clearing up these issues with the IRS
15 before going forward with this transaction. Correct?

16 A As far as I know, that's correct, yes.

17 Q Now, do you know if any other qualified
18 organization was considered for receipt of this proposed
19 easement transaction?

20 A I do not know.

21 Q Have you ever heard of another one aside
22 from COLT?

23 A No, sir, I haven't.

B.R.A.

1 Q And are you aware of any problems that
2 Justice Family Farms had with COLT or the terms proposed
3 by COLT?

4 A No, sir.

5 Q Now, I'd like you to take a look at
6 Exhibit 14, please.

7 A I have 14.

8 Q Let's start with 13, Exhibit 13, please.

9 A I have 13.

10 Q Okay. Now, very soon after the
11 December 24th call, YES submitted an invoice to Justice
12 Family Farms, isn't that correct, and, in fact, it is
13 Exhibit 14?

14 A Yes, I see that.

15 Q Now, you testified earlier that
16 typically Justice Family Farms pays its bills in 30 to
17 90 days. Isn't that correct?

18 A Typically, yes.

19 Q All right. In this instance, do you see
20 that the e-mail marked as Exhibit 13 to your deposition
21 wherein Jim Justice agrees to pay \$15,000 of the \$50,000
22 invoice from YES is dated October 3rd, 2008. Do you see
23 that?

B.R.A.

1 A I see that, yes.

2 Q So it took almost a year in this
3 instance for Justice Family Farms to pay a portion of
4 YES's bill. Isn't that correct?

5 A That's correct, yes.

6 Q And this e-mail states, Exhibit 13, and
7 this is from David Harrah to YES, "The remainder of the
8 fee will be taken up later when and if we go forward."
9 Do you see that?

10 A Yes.

11 Q And does that make it clear to you that
12 Justice Family Farms was still considering whether to do
13 the transaction and when to do it?

14 A It says when and if.

15 Q Okay. If you'll turn to Exhibit 14.

16 A I have 14.

17 Q Do you see that one of the documents in
18 Exhibit 14 is an invoice from Highview Engineering and it
19 is on the page Bates labeled, again, that's the number at
20 the bottom of the right-hand corner, McLeod 3993?

21 A I see that.

22 Q Okay. And do you see the date of that
23 invoice, December 31st, 2007?

B.R.A.

1 A Yes.

2 Q Okay. Now, if you turn to the
3 last page of this exhibit, you'll see an e-mail from
4 Mr. Hawkins indicating to Yancey that he received a
5 check for the invoiced amount. Do you see that?

6 A Yes, I see that.

7 Q And do you see that that e-mail is dated
8 April 28th, 2009?

9 A Yes.

10 Q So it took well over a year for Justice
11 Family Farms to pay Mr. Hawkins for his services.
12 Correct?

13 A That's correct. Well, let's back up, I
14 don't know when the check was received. It doesn't say
15 it was received on that date.

16 Q Okay. Well, let me get another document
17 real quick.

18 MR. LEONARDI: Let's go off the record
19 so I can find a document real quick.

20 VIDEOGRAPHER: Going off the video
21 record. The time is 11:54.

22 (WHEREUPON, a short recess
23 was taken)

B.R.A.

1 VIDEOPHOTOGRAPHER: We're now back on the
2 video record. The time is 11:59 A.M.

3 BY MR. LEONARDI:

4 Q Mr. Miller, we were looking at
5 Exhibit 14, which is a composite exhibit of invoices
6 that were sent to Justice Family Farms, and then some
7 documents reflecting when they were paid or at least when
8 they had been paid at some point in the past. So I
9 mentioned to you that the last page there indicates --
10 is indication from Bill Hawkins, the appraiser, that he
11 received a check and the e-mail is dated well over a year
12 after his invoice date. Do you recall us discussing
13 that?

14 A Yes, sir.

15 Q Okay. And you said, well, perhaps he
16 was paid earlier than that and so I'd like to let you
17 take a look at a couple more documents.

18 MR. LEONARDI: I'd like to have this
19 marked as Exhibit 15.

20 (WHEREUPON, Miller Deposition
21 Exhibit No. 15 was marked for
22 identification purposes)

B.R.A.

1 BY MR. LEONARDI:

2 Q Do you see this is an e-mail from Yancey
3 Environmental Solutions to David Harrah?

4 A Yes, sir.

5 Q Okay. And do you see that it's dated
6 October 2nd, 2008?

7 A Yes, sir.

8 Q And you can go ahead and read it to
9 yourself, but do you see that it reflects that the bills
10 from the professionals have not been paid?

11 A Yes, sir, I see that.

12 Q So some ten months later, it reflects
13 that not only has the professionals not been paid, but
14 also do you see there that it states that YES has not
15 been paid?

16 A (No response)

17 Q In the first paragraph there.

18 A Yes, I see that now. Okay.

19 Q And you see the middle of the second
20 paragraph, it states, "In anticipation of moving forward,
21 I would like to set up a meeting with Jim, me, and a
22 long-time friend and tax attorney, Ken Wingate, to
23 discuss the proper course of action at such time that we

B.R.A.

1 do move forward with the project." Do you see that?

2 A Yes, I do.

3 Q And does that indicate to you that
4 Yancey was suggesting that Ken Wingate is qualified to
5 handle the conservation easement from Yancey's end, from
6 the YES end of things?

7 A I'm not going to speculate on that.

8 MR. LEONARDI: I'd like to have this
9 marked as Exhibit 16.

10 (WHEREUPON, Miller Deposition
11 Exhibit No. 16 was marked for
12 identification purposes)

13 BY MR. LEONARDI:

14 Q All right. Do you see that this e-mail
15 -- what's the date on this e-mail?

16 A This e-mail is dated Wednesday, October
17 22nd, 2008.

18 Q And do you see that it indicates that
19 Mr. Hawkins has not been paid yet?

20 A Darroll Hawkins, yes, I see that.

21 Q Okay.

22 MR. LEONARDI: All right. I'd like to
23 have marked as Exhibit 17 this --.

B.R.A.

1 (WHEREUPON, Miller Deposition
2 Exhibit No. 17 was marked for
3 identification purposes)

4 BY MR. LEONARDI:

5 Q Take a look at Exhibit -- what's been
6 marked as Exhibit 17 to your deposition and let me know
7 when you've had a chance to take a look at it.

8 A I see 17, I've read it. Okay.

9 Q Okay. And do you see that the e-mail
10 on the bottom half is from Darroll Hawkins, he's the
11 appraiser, to Yancey McLeod and it's dated November 12th,
12 2008. Do you see that?

13 A I see that, yes.

14 Q And do you see that Mr. Hawkins
15 indicates to Yancey, "It has been a month since they
16 indicated they would pay." referring to Justice Family
17 Farms. Correct?

18 A Yes. Yes.

19 Q "I have received nothing." the e-mail
20 continues. "My attorney has suggested filing a lien on
21 the property, which would include the invoice amount,
22 reasonable attorney fees, and the highest interest rate
23 allowed under local law. Any thoughts?" Do you see

B.R.A.

1 that?

2 A Yes, I do.

3 Q In an e-mail in return, Yancey
4 Environmental Solutions explains to Mr. Hawkins, quote,
5 "I emailed Jim Justice's CPA last Friday but did not hear
6 back from him." Do you see that?

7 A Yes, sir.

8 MR. LEONARDI: All right. I'd like to
9 have marked as Exhibit 18 to follow that.

10 (WHEREUPON, Miller Deposition
11 Exhibit No. 18 was marked for
12 identification purposes)

13 BY MR. LEONARDI:

14 Q Do you see that Exhibit 18 is an e-mail
15 addressed to Jim Justice and copied on David Harrah from
16 Yancey Environmental Solutions?

17 A I see that, yes.

18 Q And do you see that it's dated
19 November 13th, 2008, almost a year after the --

20 A Yes.

21 Q -- transaction was explored in 2007.
22 Do you see that?

23 A I see that.

B.R.A.

1 Q And do you see that Mr. McLeod indicates
2 to Jim Justice that Dr. Hawkins has spoken with his
3 attorney and the attorney is, quote, "-- apparently ready
4 to move forward if he does not receive payment." Do you
5 see that?

6 A I see that, yes.

7 Q Okay. So does this refresh your
8 recollection that Mr. Hawkins and the other professionals
9 were not paid until Mr. Hawkins had threatened through
10 Yancey McLeod to file a lien on the property. Isn't that
11 the case?

12 MR. PENDARVIS: Object to the form.

13 MR. HUNTER: Object to form.

14 MR. PENDARVIS: It doesn't say that.

15 MR. LEONARDI: Mr. Pendarvis --

16 MR. PENDARVIS: I know. I'm sorry,
17 I'm losing the flow here. Now, what --

18 MR. LEONARDI: I'll ask the question
19 again.

20 BY MR. LEONARDI:

21 Q Does this refresh your recollection
22 that the professionals -- that at the time the
23 professionals were paid, which was apparently after

B.R.A.

1 November 13th, 2008. Correct?

2 A Yes, sir.

3 Q That it had been made clear to Justice
4 Family Farms that Mr. Hawkins' attorney was going to move
5 forward with legal action against the property in South
6 Carolina?

7 MR. PENDARVIS: Object to the form.

8 MR. HUNTER: Objection to form.

9 BY MR. LEONARDI:

10 A And we're referring back to No. 18 where
11 Mr. McLeod is saying to Jim Justice and David Harrah, his
12 attorney is apparently ready to move forward if he does
13 not receive payment?

14 Q Right.

15 A That's what we're talking about?

16 Q Right.

17 A I don't know that we were ever informed
18 that there was going to be a lien filed.

19 Q Okay. But you were informed that
20 someone's attorney was ready to move forward if you
21 didn't pay up?

22 A And that could have meant any number
23 of things. That could have meant a letter from the

B.R.A.

1 attorney saying pay the bill.

2 Q Okay. In any event, it worked because
3 the bills were paid after this was communicated to
4 Justice Family Farms. Isn't that the case?

5 A Yes, it was paid sometime after that.
6 I do not know exactly when it was paid, though.

7 Q Okay. If you would turn back to
8 Exhibit 9 to your deposition, please.

9 A Okay. I have nine.

10 Q Okay. And, again, this is the e-mail
11 from Al Hamlin to David Harrah that attached the Letter
12 of Intent from COLT. Do you see that?

13 A I see that, yes.

14 Q And if you would, turn to the second
15 page of the Letter of Intent. And do you see -- or let
16 me know when you've found that page, it's COLT 24.

17 A Yes, sir, I see that.

18 Q Okay. And do you see towards the bottom
19 of the page there's a bolded section just under the
20 Steward Contribution Range that begins, "Costs associated
21 with the following services and documents are contracted
22 through and paid directly by the property owner." Do you
23 see that?

B.R.A.

1 A I see that.

2 Q Okay. Now, Justice Family Farms never
3 contracted with anyone to have a formal survey done, did
4 they?

5 MR. PENDARVIS: Object to the form.

6 MR. HUNTER: Object to the form.

7 BY MR. LEONARDI:

8 A That would have been left up to
9 Mr. McLeod as part of his duties in the process.

10 Q Do you know whether Mr. McLeod ever
11 contacted anyone to have a survey done?

12 A I do not know.

13 Q Now, the fourth one states Property
14 Title Research and Title Insurance Premium, dash,
15 Property Owner's Attorney. Do you see that?

16 A Yes, I do.

17 Q Okay. And do you know if the property
18 owner's attorney, that is Mr. Justice's attorney, that
19 would be Steve Ball, wouldn't it?

20 MR. PENDARVIS: Object to the form.

21 MR. HUNTER: Object to form.

22 BY MR. LEONARDI:

23 A Mr. Ball does not do that work, we

1 always contract that out.

2 Q Okay. And who do you contract with?

3 A We use a number of different people. We
4 would use someone in the area that was familiar with our
5 properties.

6 Q Okay. And, in fact, in this case, no
7 agreement or contact with anyone had been made to have
8 property title research and the title insurance premium
9 worked on. Correct?

10 A Not that I know of.

11 Q And the last bullet point is Closing
12 and Recording of CE, conservation easement. Do you see
13 that?

14 A Yes, sir, I do.

15 Q Again, it says Property Owner's
16 Attorney. Do you see that?

17 A Yes, sir.

18 Q And as we spoke about earlier, there
19 was no one at Justice Family Farms that was working on
20 any conservation easement documents. Correct?

21 A Not that I know of, no.

22 Q And the next line says, "COLT will
23 endeavor to complete the conservation easement process

B.R.A.

1 prior to December 31st, 2007. This schedule is subject
2 to client's attorney, appraiser and surveyor's schedule."
3 Now, the client's attorney here, who do you understand
4 that to be? That's not Mr. Hamlin. Correct?

5 A No.

6 MR. LEONARDI: We can go off the record.

7 VIDEOGRAPHER: Going off the video
8 record. The time is 12:32 P.M.

9 (WHEREUPON, a short recess
10 was taken)

11 VIDEOGRAPHER: We're now back on the
12 video record. The time is 12:16 P.M.

13 BY MR. LEONARDI:

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

18 A Yes.

19 Q About how long did that conversation
20 last?

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

23 Q After that conversation, did you ever

B.R.A.

1 speak with Mr. Justice about this deposition today?

2 A No, sir.

3 Q Did you speak with anyone else about
4 the deposition today in preparation for it?

5 A Besides attorneys?

6 Q Right.

7 A No, sir.

8 Q Just to be clear, when you say
9 attorneys, are you referring to anyone in addition to
10 Mr. Hunter, your attorney?

11 A I'm sorry, no, Mr. Hunter. No,
12 Mr. Hunter.

13 Q Okay. Have you had any conversations
14 with Mr. Pendarvis?

15 A Mr. Pendarvis? Yes, I did with
16 Mr. Pendarvis.

17 Q When did you have those conversations?

18 A That was yesterday.

19 Q And where did those conversations take
20 place?

21 A In our corporate office.

22 Q So Mr. Pendarvis came over to your
23 corporate office yesterday?

B.R.A.

1 A Yes, sir.

2 Q And met with you about this deposition?

3 A Yes, sir.

4 Q And what time did he meet you there?

5 A I don't recall the exact time. It was
6 sometime yesterday afternoon, evening. I don't recall
7 the exact time.

8 Q It was yesterday, I mean, was it at 2:00
9 or 5:00 or --

10 A Afternoon or evening, 5:00. I don't
11 recall the exact time.

12 Q Okay. And did you look at any documents
13 with Mr. Pendarvis?

14 A No, sir.

15 Q How long did that meeting last?

16 A Twenty minutes probably.

17 Q And I want you to tell me as best you
18 can and tell the jury what Mr. Pendarvis told you during
19 that conversation.

20 A He told me who would be here, the
21 names of everyone involved. He told me that Mr. Hunter
22 would be there along with me and Mr. Hunter may object on
23 some areas as far as attorney-client privilege and things

B.R.A.

1 like that. He told me where it was going to be and he
2 confirmed that I did sign this document, the affidavit,
3 and that I did do some investigation as to what was in
4 the document and that was basically the extent of it.

5 Q So you told him that you talked to
6 Mr. Justice and you looked at a few documents. Correct?

7 A I looked at some documents. I said that
8 I did sign this affidavit, that is my signature, yes, I
9 did.

10 Q And is it your understanding that
11 Mr. Pendarvis drafted the affidavit?

12 MR. HUNTER: Objection.

13 BY MR. LEONARDI:

14 A No, I don't recall who drafted the
15 affidavit. I mentioned that earlier, I don't think I
16 recall who drafted it.

17 Q Okay. Do you remember speaking about
18 anything else with Mr. Pendarvis?

19 A We talked about where he lived and I've
20 been on vacation there. That's all I recall talking
21 about.

22 Q Was anyone else with you when you were
23 speaking to him?

B.R.A.

1 A Mr. Hunter was in the room for half of
2 the time.

3 Q Did Mr. Pendarvis suggest that you
4 review any documents in preparation for the deposition or
5 otherwise?

6 A He asked that I be familiar with the
7 affidavit that I signed.

8 Q Okay. Did he suggest that you review
9 anything else?

10 A No, sir.

11 Q No other documents in the case or
12 deposition transcriptions?

13 A I've never seen deposition transcripts.

14 Q Any other affidavits?

15 A No, sir.

16 MR. LEONARDI: Let me have marked as
17 exhibit -- is this 19, I believe?

18 (WHEREUPON, Hunter Deposition
19 Exhibit No. 19 was marked for
20 identification purposes)

21 BY MR. LEONARDI:

22 Q Take a look at this and let me know when
23 you've had a chance to look it over.

B.R.A.

1 MR. PENDARVIS: I'm going to object
2 to any line of questioning on this document,
3 it's outside the scope of the deposition
4 notice.

5 MR. HUNTER: I will likewise object.
6 And I have some other things to say about it at
7 the appropriate time, which may be now or later.
8 I don't know your rules on these things, but I
9 would have some comments on this at the
10 appropriate time.

11 MR. LEONARDI: Okay. You're welcome to
12 put them on the record now while he's reviewing
13 the document if you want to go ahead and address
14 the subpoena.

15 MR. PENDARVIS: I'd like to make a
16 record objection to the notice.

17 MR. LEONARDI: Okay.

18 MR. PENDARVIS: It's our position
19 this --

20 MR. LEONARDI: Okay. Can we have the
21 witness step out?

22 MR. HUNTER: Sure.

23 MR. PENDARVIS: Sure.

1 (WHEREUPON, the witness was
2 advised to leave the room)

3 MR. PENDARVIS: The plaintiff's
4 position, this effort to serve the subpoena was
5 ineffective, it was never properly served.

6 MR. LEONARDI: Okay. And what was
7 ineffective about it?

8 MR. PENDARVIS: The Rules of Civil
9 Procedure require service by registered mail or
10 personal service, neither of which were
11 accomplished in this case, this subpoena is
12 defective.

13 MR. LEONARDI: Okay.

14 MR. HUNTER: And for the record, West
15 Law Next suggests that under your Civil
16 Procedure Rules 45 and five, that that would be
17 correct and so I have the same concern and
18 objection.

19 MR. LEONARDI: Okay.

20 MR. PENDARVIS: And can we get a
21 stipulation that it was not served registered
22 mail, return receipt requested, and you don't
23 have a green card signed by Mr. Tom Floyd?

B.R.A.

1 MR. LEONARDI: No, but I will introduce
2 just after this, the Affidavit of Personal
3 Service.

4 MR. HUNTER: I'll go get him.

5 MR. PENDARVIS: One -- just a split
6 second, one last thing.

7 MR. HUNTER: One last thing.

8 MR. PENDARVIS: And the Affidavit of
9 Personal Service was not filed with the clerk of
10 the Court, per Rule 5 and Rule 6.

11 MR. LEONARDI: I don't know.

12 MR. PENDARVIS: Is that correct? Would
13 I be served with a copy of it if it had been?

14 MR. LEONARDI: Would you be?

15 MR. PENDARVIS: Would I have been served
16 with a copy if the defendants had filed an
17 Affidavit of Service?

18 MR. LEONARDI: I do not know,
19 Mr. Pendarvis, and I'm not the one being deposed
20 here. I can answer that we have an Affidavit of
21 Service and that it was served on the proper
22 person.

23 MR. PENDARVIS: Thank you.

B.R.A.

1 MR. LEONARDI: Terry, you can come on
2 in.

3 (WHEREUPON, the witness
4 reentered the room)

5 BY MR. LEONARDI:

6 Q Mr. Miller, have you had a chance to
7 look at look at Exhibit 19?

8 A No, I haven't.

9 Q Okay. Please do.

10 A Okay.

11 Q Okay. And do you see that this is a
12 subpoena to Justice Family Farms?

13 A I see that, yes.

14 Q All right.

15 MR. LEONARDI: Can I get this marked as
16 Exhibit 20, please?

17 (WHEREUPON, Miller Deposition
18 Exhibit No. 20 was marked for
19 identification purposes)

20 BY MR. LEONARDI:

21 Q As you take a look at Exhibit 20, do
22 you see that it is an Affidavit of Service?

23 A Yes, sir.

B.R.A.

1 Q Indicating that the subpoena was served
2 on Mr. Tom Floyd, the registered agent for Justice Family
3 Farms in South Carolina. Do you see that?

4 A I see that, yes.

5 Q Okay. And referring back to
6 Exhibit 19, if you'll look at the -- there's a cover
7 letter, of course, but then the first page of the
8 subpoena has State of South Carolina at the top. Do
9 you see that?

10 A Yes, sir.

11 Q And do you see there it says, "You Are
12 Commanded to produce and permit inspection and copying of
13 the following documents or objects in your possession,
14 custody or control at the place, date and time specified
15 below." And then it says, "See Exhibit A attached
16 hereto." Do you see that?

17 A Yes, sir.

18 Q And the place and time is my office
19 in Columbia, South Carolina, by December 9th, 2011.

20 MR. PENDARVIS: Objection, form.

21 BY MR. LEONARDI:

22 A I do see that, yes.

23 Q And if you'll turn to Exhibit A, please.

B.R.A.

1 You have to turn a few pages.

2 A I see Exhibit A.

3 Q And do you see that there is -- Exhibit
4 A contains a description of certain documents?

5 A I see that.

6 Q Okay. Do you have in your possession
7 any documents that are responsive to that? I mean, do
8 you know of any documents that are responsive to that
9 that have not been discussed today, of course?

10 A No, sir.

11 Q Okay. Do you know if anyone has looked
12 for any documents as a result of receiving this subpoena?

13 A I do not know.

14 Q Okay. So do you know the names of
15 anyone that has looked for documents, I guess, is my
16 question?

17 A No, I don't. I've never seen this
18 document.

19 MR. LEONARDI: Okay. That's it.

20 REDIRECT EXAMINATION

21 BY MR. PENDARVIS:

22 Q Mr. Miller, just a few things before
23 we finish up today and I'm going to go in reverse order.

B.R.A.

1 Looking at the purported subpoena that was attached with
2 the cover letter that is Exhibit 19 to this deposition --

3 A Yes, sir.

4 Q -- can you help me on how you would
5 appear at a post office drawer? If you look at the place
6 for the deposition, if a Justice Family Farms designee
7 intended to appear, how would you appear at a post office
8 box -- post office drawer, excuse me?

9 A I do not know.

10 Q Okay. And also going --

11 MR. LEONARDI: Objection.

12 MR. PENDARVIS: Okay. Objection

13 noted.

14 BY MR. PENDARVIS:

15 Q There was some testimony at the very
16 beginning of the cross-examination of Justice Family
17 Farms for this deposition taking apparently some of your
18 testimony out of context. And the testimony I'm
19 referring to is testimony appearing on the last page of
20 your affidavit that was marked as Exhibit 2. If you
21 will, please pull out Exhibit 2 and Exhibit 14.

22 MR. LEONARDI: I'm trying to get 14,

23 hold on.

B.R.A.

1 BY MR. PENDARVIS:

2 Q Turn to the last page of your affidavit
3 and the third page of Exhibit 14. And there was some
4 testimony, I believe, taken out of context and I wanted
5 you to have a moment to look over Exhibit 14. The testi-
6 mony that was elicited was that there was a statement in
7 Paragraph 27 on your affidavit, last sentence, regarding
8 fees paid to Mulkey. You were being questioned about
9 what JFF understood that those included pa -- fees to
10 James lewis.

11 A Yes, I see that.

12 Q And the question then had -- the cross-
13 examination question then had you look at Exhibit 14 and
14 you testified that you weren't sure how that Lewis wild-
15 life statement got in the affidavit. Would you look at
16 exhibit -- Page 3 of Exhibit 14, about one-third of the
17 way down the page, and see if you see any reference to
18 Lewis wildlife and wetland?

19 A This is the one that says Page 2?

20 Q Yes, sir, it says Page 2, but it's
21 actually the third page of the exhibit.

22 A Yes, sir, I do see that.

23 Q Okay. So apparently there was -- and

B.R.A.

1 you testified, did you not, that you looked at invoices
2 and such --

3 A Yes.

4 Q -- as part of your process --

5 A I did --

6 Q -- in preparing this affidavit?

7 A Yes, sir, I did misspeak on that.

8 Q Okay.

9 A This is included in that, in that
10 invoice.

11 Q So your testimony in the affidavit was
12 truthful?

13 A That is correct, yes.

14 Q One last thing. There was some
15 suggestions in several of the cross-examination questions
16 that would lead someone to believe maybe that in creating
17 a conservation easement, that a significant amount of
18 time is required to finalize the details and the various
19 documents that relate to the conservation easement that's
20 being put together. Do you --

21 A Yes, sir, I do.

22 Q -- recall those questions?

23 A Yes, sir.

B.R.A.

1 Q And I want to use the Justice Family
2 Farms 2009 easement as an example for the jury. How long
3 in advance of the final recording of the 2009 easement
4 were all of the terms for the easement papers completed?

5 A That was -- my recollection of that,
6 it was all done in a very short period of time towards
7 the end of the easement. The terms were presented to
8 Mr. Justice, he agreed, and the documents were prepared.
9 That was done fairly fairly quickly at the end of the
10 process.

11 Q Are we talking months or weeks?

12 A Oh, no, this was all done within a week.

13 MR. PENDARVIS: Thank you. No further
14 questions.

15 RECROSS-EXAMINATION

16 BY MR. LEONARDI:

17 Q I have a couple of follow-up questions.

18 A Yes, sir.

19 Q Regarding the 2009 easement, when was
20 that easement closed specifically in 2009?

21 A My recollection, it was mid-December to
22 the end of -- maybe in the third week of December.

23 Q And with respect to the conservation

B.R.A.

1 easement that we've been talking about, not the 2009, but
2 the 2007 --

3 A Yes, sir.

4 Q -- was Justice Family Farms ever made
5 aware of a specific day or two days that, for example,
6 documents were going to be exchanged by overnight to
7 close the document -- or to close the easement? Were
8 they ever made aware of a closing date?

9 MR. PENDARVIS: Objection, outside the
10 scope of redirect.

11 MR. HUNTER: Objection, same.

12 BY MR. LEONARDI:

13 A Not that I'm aware of.

14 Q Finally, and this is -- if you would,
15 please pick up Exhibit 19.

16 A Yes, sir.

17 Q I just want to make it clear that if you
18 look at the first page of the subpoena --

19 A Yes, sir.

20 Q -- do you see that it does not say that
21 you are commanded to appear anywhere? In fact, the
22 portion on there at about a third of the way down, it
23 says you are commanded to appear, you see that box is not

B.R.A.

1 checked, but the box that's checked is you are commanded
2 to produce and permit inspection, in other words, please
3 send us some documents. Do you understand that?

4 A Yes, sir, I see that.

5 Q Okay. So you appreciate that this was
6 not asking you or anyone else from Justice Family Farms
7 to appear anywhere. Do you understand that?

8 A Yes, sir, I do.

9 MR. LEONARDI: Okay. I don't have any
10 further questions.

11 MR. PENDARVIS: No further questions.
12 Mr. Miller, thank you for your time.

13 MR. HUNTER: I have an additional
14 comment. You may be excused for just a second.

15 (WHEREUPON, the witness
16 was advised to leave the room)

17 MR. HUNTER: In addition to other
18 objections to this subpoena, I wanted to note
19 that I think it's defective for the following
20 additional reason, it has a purported return
21 date which is within the 14-day objection period
22 allowed to a recipient and I think on its face,
23 it's defective for that additional reason.

1 That's the only other thing I wanted to add.

2 MR. PENDARVIS: And there may be some
3 -- I'd add an additional objection, there may be
4 some work product materials inclusive in the
5 requested documents.

6 MR. HUNTER: I would join in that.

7 VIDEOGRAPHER: Going off the video
8 record. The time is 12:35 P.M. This concludes
9 the deposition.

10 (Witness Excused)

11 (WHEREUPON, the deposition
12 was concluded)

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA

COUNTY OF RALEIGH, to-wit:

I, H. DAVID STANLEY, a Notary Public within and for the State aforesaid, duly commissioned and qualified, do hereby certify that the foregoing deposition of JAMES TERRY MILLER was duly taken by and before me at the time and place and for the purpose specified in the caption thereof, the said witness having been first duly sworn by me to testify the whole truth and nothing but the truth concerning the matter in controversy.

I do further certify that the said deposition was taken by means of a Stenomask and transcribed on a computer under my supervision.

I further certify that I am not connected by blood or marriage with any of the parties to this action, am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, or financially

B.R.A.

1 decision, and my choice was Curtis Elliott, and so
2 I called Curtis and set up an appointment, and
3 Mr. Harper and his son-in-law and I met with Curtis
4 and one of Curtis's associates the first week in
5 December.

6 Q. All right. But insofar as your
7 experience for yourself, you said you have never
8 had to retain counsel for yourself at the last
9 minute --

10 Is that fair?

11 A. Yes, ma'am, and I --

12 Q. -- other than this case.

13 A. Right, I have been involved with a lot
14 of conservation projects and other projects. I
15 even mentioned the one back when I was in law
16 school with my dad and your firm, and I had been
17 around a lot of tax attorneys late in December and
18 heard them talk about how slammed against the wall
19 and frantically they were trying to finish projects
20 at year's end.

21 So I had a lot on my plate at that
22 moment when Hal Hanlin and Richardson Plowden quit.
23 And, as I said, my first priority was my client.

24 Q. And that's Mr. Justice?

25 A. That's correct. And that's what I was

1 concentrating on. And I felt that it would be
2 futile to try to get a Curtis Elliott, or a
3 competent -- or another competent tax attorney to
4 step in at that late date.

5 Q. All right. Well, what did you have on
6 your plate? You said: I had a lot on my plate.

7 A. I had four conservation projects I was
8 trying to close that year. And I had just received
9 the shock of this letter from the IRS, which I
10 found preposterous, and I had advised all four of
11 my clients, on whose projects I was working to
12 close year's end in '07, about the IRS letter, and,
13 um, I advised all of them, after we discussed the
14 letter and what it meant, that we should move
15 forward to close the projects, because I had not
16 done anything wrong, and the other three projects
17 closed.

18 The attorneys involved in those
19 projects, after our discussion, decided to move
20 forward to close those projects. I made the same
21 disclosure to Mr. Justice.

22 And it would have been extraordinarily
23 embarrassing, to me, to have to tell anybody,
24 including finding a new tax attorney, if I thought
25 that I could find one that could step in at that

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 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 Farms, 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 Farms, LLC was subsumed by Justice Family Farms, 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 & Env'tl. 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), SCRPC, "[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, SCRCP, 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.**

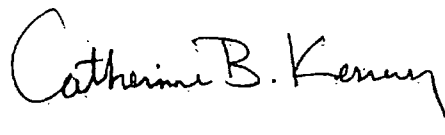
All of the foregoing testimony on pages 34 and 47 should have been presented to the jury.

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

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE CIRCUIT COURT

Yancey Environmental Solutions, LLC,)

Plaintiff,)

vs.)

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

Defendants.)

Case No.: 2010-CP-40-3297

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.

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

7 SCB
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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.

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."

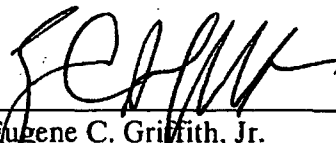
9 SCF 9/10

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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Sch 10/10

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.

**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), SCRCPP, (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.

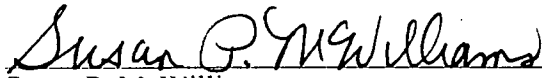
V. Trial Court's Rulings Regarding Objection to Evidence

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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Tanya A. Gee

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NEXSEN PRUET, LLC

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Columbia, South Carolina

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

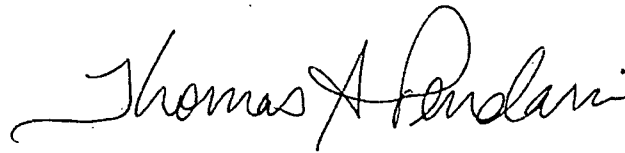
YANCEY ENVIRONMENTAL SOLUTIONS, LLC appeals the Order granting Defendants' Motion for Directed Verdict issued by the Honorable Eugene C. Griffith, Jr., dated March 7, 2012 and received on March 9, 2012, a copy of which is attached as **Exhibit 1**, and the Order denying Plaintiff's Motion to Compel issued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



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Attorneys for Appellant, YANCEY ENVIRONMENTAL
SOLUTIONS, LLC

April 5, 2012

Beaufort, South Carolina

Other Counsel of Record:

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MCherry@nexsenpruet.com

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

FORM 4

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




Circuit Court Judge

2/5"

3-7-12

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 Gedrick McWilliams

~~ATTORNEY(S) FOR THE DEFENDANT(S)~~

CLERK OF COURT

Court Reporter:

RECEIVED FEB - 9 2012
FORM 4

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

JUDGMENT IN A CIVIL CASE
2010 - 3297
CASE NUMBER: 2011CP4003583

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. No. suit);
☐ 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

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



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



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 Bamwell St.
Columbia, SC 29201
Office 803-771-4400
hhanlin@rpcrlaw.com

CONSULTING SERVICES AGREEMENT

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:

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's 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.

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: _____

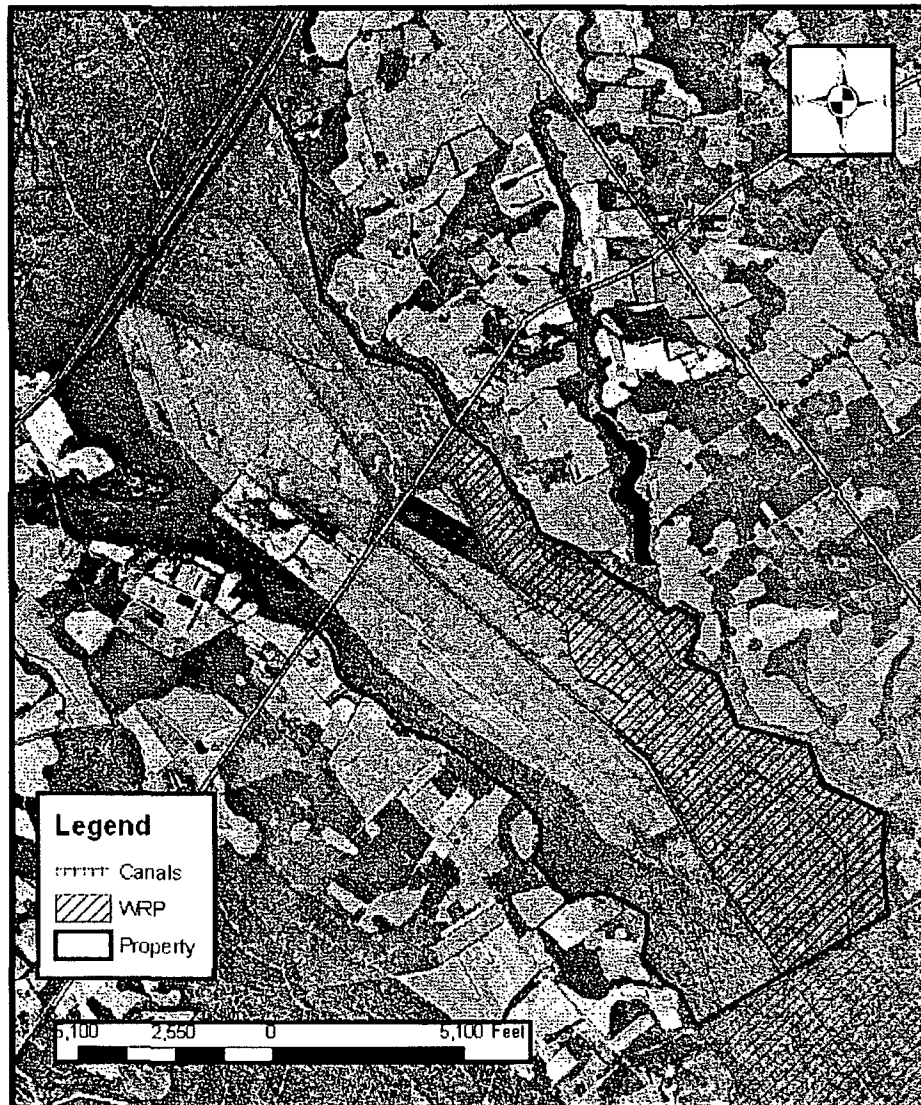
Its: _____

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

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

RECEIVED

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.

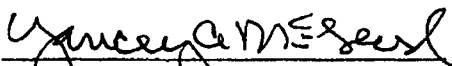
By: 
Hal Hanlin

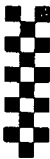
GHH/sdl

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 pgs attached

*Bluestone
Industries*

*304 1085
25801*

RU

Highview Engineering, Inc.

4610 Portico Court
Louisville, KY 40299

Invoice

DATE	INVOICE #
12/31/07	415

BILL TO
Black River Farm c/o David Harrah PO Box 1085 Beckley WV 25802

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 TO

Black River Farm
c/o David Herrin
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.

McLeod000399

1069

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 Cook's Mountain Road
Eastover, SC 29044
Office 803.353.0440
Fax 803.353.8004
yesyancey@mindspring.com

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:

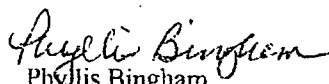
At this appointment we will discuss specific procedures, such as communication methods, response times, and other general expectations. Please have the items listed on the attached Form 4564, *Information Document Request*, available at our first appointment.

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

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

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:
Yancey A. McCleod		IRC 6700 / 6701 Investigation
		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:
- name of the customer;
 - whether the customer is an individual or business;
 - if an individual, the spouse's name;
 - taxpayer identification number (social security number or employer identification number);
 - if an individual, the spouse's social security number;
 - customer's complete address;
 - appraisal date(s);
 - type of property and number of acres;

Information Due By	1/17/08 @ 10:00 AM	At Next Appointment	X	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

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:
<u>Yancey A. McCleod</u>		<u>IRC 6700 / 6701 Investigation</u>
		Submitted to:
		Dates of Previous Requests:
		<u>None</u>

- 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, or 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	<u>1/17/08 @ 10:00 AM</u>	At Next Appointment	<u>X</u>	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 3

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
<u>Yancey A. McCleod</u>		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	<u>X</u>	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

1076

RICHARDSON
RICHARDSON PLOWDEN ROBINSON, P.A.
PLOWDEN
ATTORNEYS AT LAW

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,



Hal Hanlin

GHH

RPCR 0856

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

"DISCONTINUE
INVESTIGATION"
LTR

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

McLeod000391

1078

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](#).

11/16/2007

McLeod000140

1079

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.)

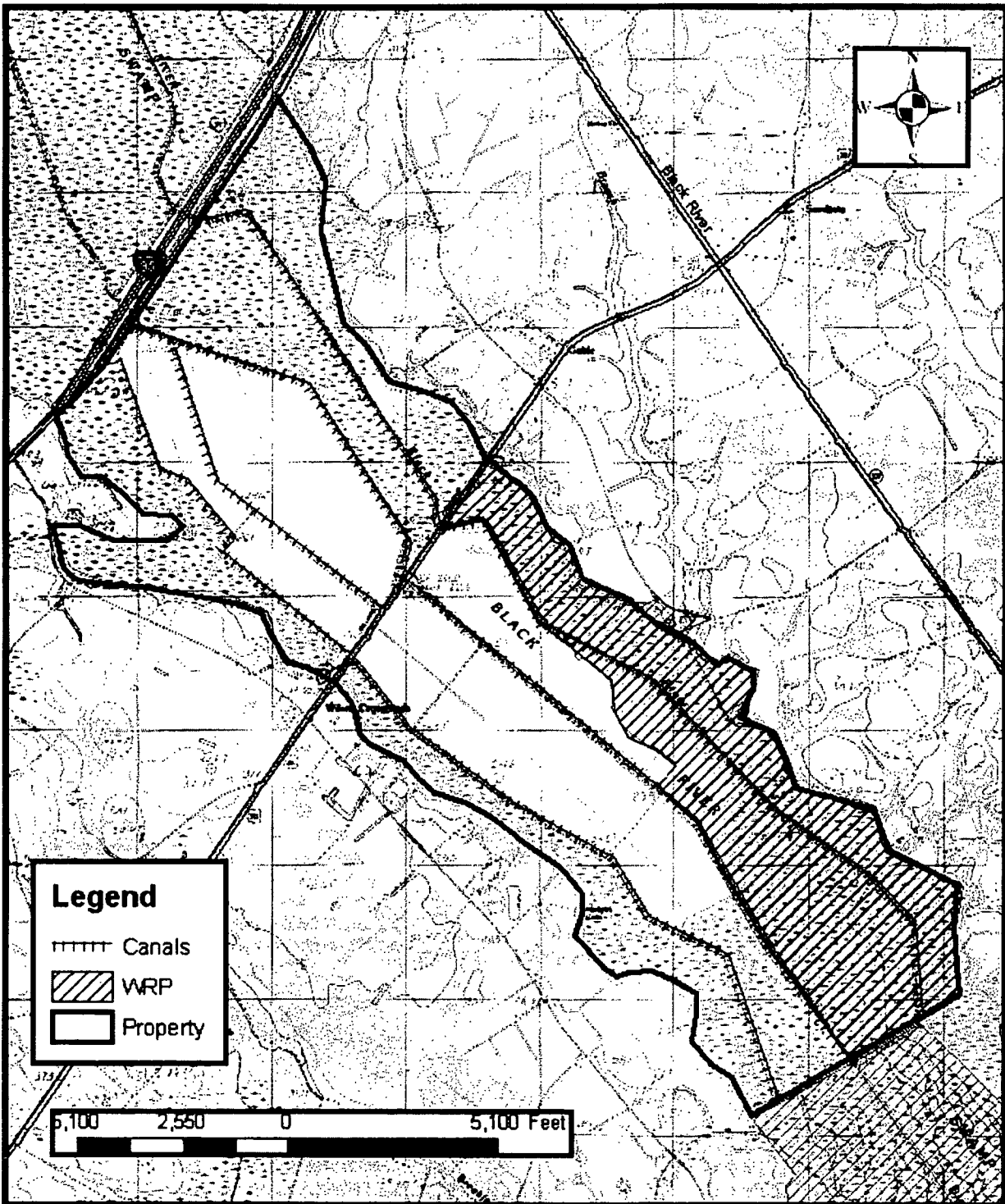
I can be onsite December 11 until inspection is completed.

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

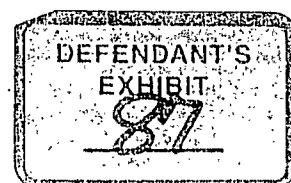
1

Gibby McLeod

1/3/08

\$300

Claudia
Gibby
Kear



Justice was sought abandoned because of IRS letter

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

McLeod000317

1084

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

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.

Certificate of Counsel

Pursuant to Rule 210(g) of the South Carolina Appellate Court Rules, the undersigned, as counsel for Appellant, hereby certifies that, to the best of my knowledge and belief, the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

RECEIVED

AUG 16 2013

SC Court of Appeals

PENDARVIS LAW OFFICES, P.C.

Catherine B. Kerney

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

August 12, 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.

PROOF OF SERVICE

I, Catherine B. Kerney, a lawyer with PENDARVIS LAW OFFICES, P.C., certify that I have served one (1) copy of the RECORD ON APPEAL and CERTIFICATE OF COUNSEL on counsel for Respondents, Susan P. McWilliams, J.D., Daniel C. Leonardi, J.D., Tanya A. Gee, J.D. and Burl F. Williams, J.D., by depositing a copy of the same in the United States Mail, postage prepaid, on the 12th day of August, 2013 addressed as follows:

Susan P. McWilliams, J.D.
Daniel C. Leonardi, J.D.
Tanya A. Gee, J.D.
NEXSEN PRUET, LLC
1230 Main Street, Ste. 700
Columbia, SC 29902

Burl F. Williams, J.D.
NEXSEN PRUET, LLC
55 E. Camperdown Way, Suite 400
Greenville, SC 29601

RECEIVED
AUG 16 2013
SC COURT OF APPEALS

PENDARVIS LAW OFFICES, P.C.

Catherine B. Kerney

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

August 12, 2013

Beaufort, South Carolina