

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

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

YANCEY ENVIRONMENTAL SOLUTIONS, LLC. Appellant,

vs.

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

REPLY BRIEF OF APPELLANT

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

Attorneys for Appellant, YANCEY ENVIRONMENTAL
SOLUTIONS, LLC

RECEIVED
AUG 20 2013
SC COURT OF APPEALS

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Arguments in Reply	1
I. Respondents' Brief Ignores the "Big Picture" Flaws in the Trial Court's Proximate Cause Analysis of the Testimony and Evidence Concerning the Foreseeability of Harm and Cause of Financial Damages to YES.	1
II. Respondents Are Asking the Court to Change the Standard for a Directed Verdict from an "Any Evidence" Standard to an "Any <i>Competent Evidence</i> " Standard.	8
III. Testimony Concerning James Justice's Intent to Move Forward with the Conservation Easement Was Properly Before the Jury and a Part of the Record.	10
A. Testimony by YES' expert, Dr. Adams.	10
B. Testimony by David Harrah.	13
IV. Evidence of the Company's Intent to Move Forward with the Easement Was Sufficient to Prove Proximate Cause and Evidence of James Justice's Intent Was Not Required.	14
Conclusion	19

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001)	2
Brown v. Theos, 345 S.C. 626, 550 S.E.2d 304 (2001)	7
Dean v. Dean, 229 S.C. 430, 93 S.E.2d 206 (1956)	18
Gause v. Smithers, 403 S.C. 140, 742 S.E.2d 644 (2013)	2, 7, 8
Grievance Committee v. Rottner, 152 Conn. 59, 203 A.2d 82 (1964)	1
Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002)	7, 8
Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 701 S.E.2d 742 (2010)	3
Hundley ex rel. Hundley v. Rite Aid of South Carolina, 339 S.C. 285, 529 S.E.2d 45(Ct. App. 2000)	12
Parr v. Gaines, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992)	11
Player v. Thompson, 259 S.C. 600, 193 S.E.2d 531 (1972)	2, 7
QBE Ins. Corp. v. Jorda Enterprises, Inc., 277 F.R.D. 676 (2012)	17
Steele v. Rogers, 306 S.C. 546, 413 S.E.2d 329 (Ct. App. 1992)	7
Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997)	7, 8
United States v. Williams, 447 F.2d 1285 (5 th Cir. 1971) (en banc)	12, 13
Waites v. S.C. Windstorm and Hail Under. Assoc., 279 S.C. 362, 307 S.E.2d 223 (1983)	9
Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994)	9

ARGUMENTS IN REPLY

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

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

I. Respondents’ Brief Ignores the “Big Picture” Flaws in the Trial Court’s Proximate Cause Analysis of the Testimony and Evidence Concerning the Foreseeability of Harm and Cause of Financial Damages to Yes.

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

Farms¹, his individual testimony was *required* to create a genuine issue of material fact on proximate cause and 2) all of the testimony and other evidence the jury heard and saw establishing that Mr. Justice and Justice Family Farms would have closed on the easement, taken the tax deduction, and paid professional fees to YES had to be ignored. At the end of the day, Mr. Justice's individual intent was conveyed to the jury through the testimony of his twenty (20+) year employee, Mr. Terry Miller, who Mr. Justice chose and prepared to testify on behalf of Justice Family Farms for this lawsuit.

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

1

Respondents' summary statement on page 6 of their Brief that the Black River Farm property "was owned either by [Mr.] Justice or an entity that he majority owned" is not supported by any evidence, in the record or not, or even by arguments of counsel summarized in Fn. 2 on page 3 of their own Brief. There is no evidence Mr. Justice individually ever owned that property.

Respondents' citation to *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 701 S.E.2d 742, 748-49 (2010) as authority that proximate cause issues are "routinely" decided by trial court as a matter of law is not correct. In *Harris Teeter*, it was undisputed that the plaintiff's expert did not opine that the defendant-lawyer's conduct "most probably caused" injury to the plaintiff-former client. Dr. Adams' testimony and opinions to the jury in this case easily met and exceeded that requirement. See, e.g., (Adams testimony, 338:3-11, ROA 261).

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

ruling only dealt with proximate cause elements of YES' three causes of action.

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

It is hornbook law that in legal malpractice cases:

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

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

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

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

In a “big – proximate cause – picture” fashion, there was an abundance of fact matters and genuine disputed questions of fact presented by the direct and circumstantial evidence introduced during the trial from which the jury could have reasonably concluded that:

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

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

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

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

5. It was reasonably foreseeable and more likely than not that, if Respondents had not withdrawn allowing YES to recommend proceeding, Mr. Justice, through Justice Family Farms or one of the other Justice companies would

have accepted Mr. McLeod's proposal to proceed with the conservation easement, closed on the easement, and paid the associated professional fees.

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

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

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

did not earn his \$1.8 million dollar fee.”

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

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

Generally, in a legal malpractice action the plaintiff must show it "most probably would have been successful" or would have "gotten a better result" in the underlying matter if the lawyer satisfied their fiduciary duties or met the standard of care. See *Brown v. Theos*, 345 S.C. 626, 550 S.E.2d 304 (2001); *Summer v.*

Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997); *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002). YES was not required to prove that Respondents' negligence was "the sole proximate cause of the injury." *Gause*, 742 S.E.2d at 649. The testimony and other evidence the jury heard and saw was more than sufficient to create a genuine issue of material fact on whether Respondents' last-minute abandonment proximately caused financial damages to YES.

II. Respondents Are Asking the Court to Change the Standard for a Directed Verdict from an "Any Evidence" Standard to an "Any Competent Evidence" Standard.

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

Under Rule 50(a), SCRCP, "[w]hen upon a trial the case presents only

questions of law the judge may direct a verdict.” *Id.* This is an “any evidence” standard. See *Washington v. Whitaker*, 317 S.C. 108, 113-14, 451 S.E.2d 894, 897-98 (1994) (citing *Waites v. S.C. Windstorm and Hail Under. Assoc.*, 279 S.C. 362, 307 S.E.2d 223 (1983) (this Court is not concerned with the weight of the evidence, but whether there is any evidence from which the jury is warranted in making a finding)).

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

²

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

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

Based on the testimony and evidence presented at trial, it was plain error for the trial court to rule that "what [Justice Family Farms] might have intended is simply not pertinent" . . . "regarding that company's intent to complete the conservation easement on the Black River Farm in 2007." (Order at 9; ROA 13). Justice Family Farms was a party to the Consulting Services contract prepared by Respondents and all the parties, including Respondents, were operating under that understanding. The jury heard at least a portion of the testimony by Justice Family Farms' designee and saw the copy of the check paying for professional services that also referenced Justice Family Farms. To rule that all of the foregoing testimony and other evidence did not create a scintilla of evidence on proximate cause was error and should be reversed.

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

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

Respondents objected to the testimony of YES' expert witness, Gregory B. Adams, L.L.M., J.S.D., for the first time when they slipped their objection into their proposed Order denying YES' post-trial motion pursuant to Rule 59, SCRCP, that was submitted to the trial judge. During cross-examination, in response to a

question regarding Mr. Justice's commitment to the easement project, Dr. Adams testified that, "[Mr. Justice] **was in the boat, he had made that decision, he was going to do it**, when the package of documents came to the closing they were going to sign them, they were going to be recorded. (Trial transcript, 343:15-21; ROA 266) (emphasis added). Respondents' very next question was "All right. Now, Professor Adams, isn't it true, **you said Mr. Justice was in the boat**, isn't it true Mr. Justice didn't sign any of the consulting agreements that were sent to him?" (Trial transcript, 344:9-12; ROA 267) (emphasis added).

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

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

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

Id. (quoting *United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971) (en banc))

(1972)) (emphasis added by South Carolina Court of Appeals).

Finally, Dr. Adam's testifies that "as the testimony said, he was in the boat, he had made the decision, he was going to do it." (Trial transcript, 343:18-19; ROA 266). Dr. Adams did not testify that Mr. Justice said he was in the boat, only that testimony showed that Mr. Justice had made the decision, was "in the boat" and was going to do the conservation easement. All of which was admissible opinion testimony, properly given by an expert witness and properly on the record, therefore the jury could rely on it in determining proximate cause.

Dr. Adam's testimony as to Mr. Justice's intent to move forward with the conservation easement was sufficient evidence to prove proximate cause and send the matter to the jury, whose job it was to determine the weight of the evidence. The trial court wrongly granted Respondents' motion for directed verdict.

B. Testimony by David Harrah.

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

Q. Mr. Harrah, did there come a time you had a discussion regarding the percentage fee in the consulting services agreement?

A. Yes.

Q. Okay. And describe that discussion.

A. I had that draft of that agreement and I had given it to Jim and said that I had gotten it from Yancey and it had a five percent fee as part of the remuneration to him and Jim said make it four. ***That's just the way he would do it.*** So I did contact Mr. McLeod and said ***Jim said that the fee needs to be four instead of five and he said fine.***

(Trial transcript, 728:8-19; ROA 624) (emphasis added).

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

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

Respondents argued that:

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

(Respondents' Brief, p. 19).

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

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

The testimony adduced and other evidence submitted to the jury satisfied these requirements. The record is clear on Justice Family Farms' intent to move forward with the easement. As the Justice Family Farms designee testified during his deposition, and the jury heard at trial, "Q: Is it your contention as you sit here today that Justice Family Farms intended to go through with this project? A: Yes, sir, it is." (Justice Family Farms 30(b)(6) testimony, 68:9-12; ROA 943).

And, while no one disputes that Mr. Justice was the ultimate decision maker, Respondents argued that Mr. Justice was the *only* decision maker. (Brief of

³

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

Respondents at 12). This is simply untrue as the record reflects the facts that the easement project was turned over to an employee of Justice Family Farms, Mr. Harrah, to manage and make decision on a day-to-day basis. (Trial testimony, 712:9-714:6; ROA 608); (Justice Family Farms 30(b)(6) testimony, 18:6-10; ROA 893); “David Harrah, our Chief Financial Officer at the time, made contact direct with Mr. McLeod. And I’m sure Jim spoke to Mr. McLeod from time to time as to how it was progressing, but David was the immediate contact with Mr. McLeod.”); (Justice Family Farms 30(b)(6) testimony, 57:5-20; ROA 932). Additionally, the record shows that “in the normal course of business, Mr. Justice or his son, Mr. Justice, III, James Justice, III, will authorize work with professionals, attorneys, accountants, legal representatives, consultants of all types” and authorized payment of those professionals’ invoices. (Justice Family Farms 30(b)(6) testimony, 16:10-18; ROA 891). Also, while Mr. Justice did not make every decision, as the head of the Justice Companies, he did make many of the major decisions, including decisions about the various entities he owned, how he titled his real property, who he appointed to manage the project, as well as who he chose to testify on behalf of Justice Family Farms and what the designee was told about Justice Family Farms’ intent concerning the conservation easement.

Respondents further argued that the directed verdict was proper because “[t]he record of this trial is silent as to what Justice's decision would have been if he had received a recommendation from McLeod to proceed with the conservation easement, notwithstanding the IRS investigation.” The record is not silent as to Mr. Justice’s intent, in fact, the jury heard testimony that the Justice Family Farms

designee prepared for his testimony by meeting with Mr. Justice and questioning him regarding the conservation easement. From that, the jury was free to understand that the Justice Family Farms testimony was given with the input and intention of Mr. Justice. (Justice Family Farms 30(b)(6) testimony, 94:14-22; ROA 969). Further, the jury heard testimony from the expert witness as to Mr. Justice's intent.

Moreover, the trial court wrongfully excluded the testimony of the Justice Family Farms corporate designee who testified "Yes" in response to the question "Notwithstanding the IRS letter, that during the call on December 24th, 2007, had Yancey McLeod recommended that Justice Family Farms move forward with the easement. Using that assumption, was it more likely than not that Justice Family Farms would have proceeded with the conservation easement?" (Justice Family Farms 30(b)(6) testimony, 34:2-15; ROA 909). The question asked whether it was "more likely than not that Justice Family Farms would have proceeded with the conservation easement" and the Justice Family Farm designee testified "Yes." This testimony is not hearsay as Respondents have argued and as the trial court incorrectly ruled because the company designee is testifying as to the company's intent, not offering any statement made by Mr. Justice in hearsay fashion "for the truth of the matter asserted." No exception to hearsay need be given because this is not hearsay testimony. It is well-settled law, argued to the trial court in response to Respondents' objections, that 30(b)(6) designees can testify regarding the intent and opinions of the company. See *e.g.*, *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 690 (2012) ("the designee must also testify about the corporation's

position, beliefs and opinions”) (emphasis added) (citations omitted).

Respondents argue “[b]ut the central question of this appeal is not intent; it is whether Justice would have agreed to place a conservation easement on the Farm, notwithstanding the IRS investigation, if McLeod had made that recommendation. First, this sentence should read “whether Mr. Justice or Justice Family Farms would have agreed...” and that evidence was objected to by Respondents and improperly excluded by the trial court. Respondents are attempting to object to the evidence on one hand and point to the lack of that very evidence on the other. In other words, they want to “eat their cake and have it too.”

In addition, Respondents now argue that because Justice Family Farms and James Justice were both parties to the contract, YES was required to present Mr. Justice’s and the company’s testimony as to their intent. Again, Respondents cite no authority for this proposition except possibly the case of *Dean v. Dean*, 229 S.C. 430, 93 S.E.2d 206 (1956). However, *Dean* provides no support to their argument because the contract in *Dean* required all parties to sign it in order for it to become effective. Respondents can cite to no such provision in the subject Consulting Services Agreement because there is none. Also, since Mr. Justice, individually, did not own the Black River Farms property, he could not, as an individual owner, have signed the conservation easement, the more necessary party to the contract was the company, Justice Family Farms. Only the company owned the real estate, only the company could grant the easement and, depending on the corporation documents or resolutions, the easement could have been signed on behalf of the company by many other corporate representatives, not necessarily Mr. Justice. As

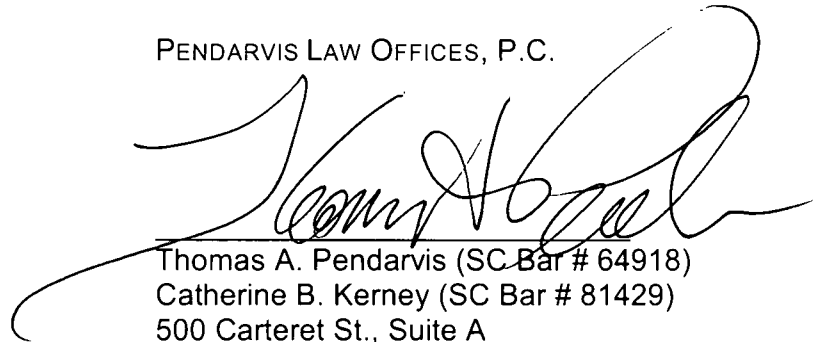
Mr. Justice's signature was not required, neither was his testimony on his individual intent to move forward with the easement.

CONCLUSION

For all of the above reasons, the trial court should be reversed and this matter should be remanded for a trial on the merits.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

A large, stylized handwritten signature in black ink, appearing to read 'Tom Pendarvis', is written over the typed name and address.

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.
843.524.9500 tel
843.524.9501 fax
Thomas@PendarvisLaw.com
Carey@PendarvisLaw.com

Lawyers for Appellant, YANCEY
ENVIRONMENTAL SOLUTIONS, LLC

August 16, 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,

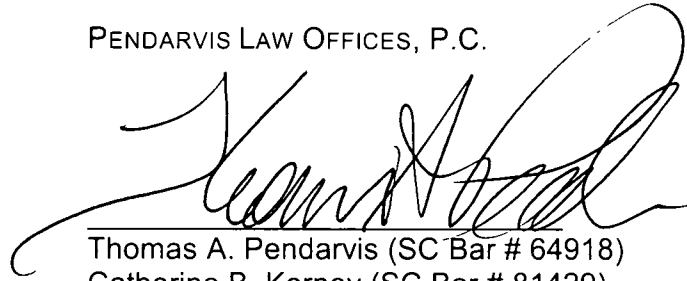
vs.

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

Certificate of Counsel

The undersigned, as counsel for the Appellant, hereby certifies that, to the best of my knowledge and belief, the FINAL BRIEF OF APPELLANT and the FINAL REPLY BRIEF OF APPELLANT comply with Rule 211(b) of the South Carolina Appellate Court Rules.

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis (SC Bar # 64918)

Catherine B. Kerney (SC Bar # 81429)

500 Carteret St., Suite A

Beaufort, SC 29902-5066

(843) 524.9500 tel.

(843) 524.9501 fax.

Thomas@PendarvisLaw.com

Carey@PendarvisLaw.com

Attorneys for Appellant, YANCEY ENVIRONMENTAL
SOLUTIONS, LLC

August 16, 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.

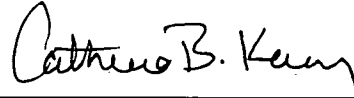
RICHARDSON PLOWDEN & ROBINSON, P.A. and
George Harold Hanlin, J.D... Respondents.

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 BRIEF OF APPELLANT; one (1) copy of the REPLY BRIEF OF APPELLANT and one (1) copy of the 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 16th day of August, 2013 addressed as follows:

Susan P. McWilliams, J.D.
Daniel C. Leonardi, J.D.
Tanya A. Gee, J.D.
Burl F. Williams, J.D.
NEXSEN PRUET, LLC
1230 Main Street, Ste. 700

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis (SC Bar # 64918)

Catherine B. Kerney (SC Bar # 81429)

500 Carteret St., Suite A

Beaufort, SC 29902-5066

(843) 524.9500 tel.

(843) 524.9501 fax.

Thomas@PendarvisLaw.com

Carey@PendarvisLaw.com

Attorneys for Appellant, YANCEY ENVIRONMENTAL
SOLUTIONS, LLC

August 16, 2013

Beaufort, South Carolina