THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 2008-CP-10-2513

Clifford C. Hansen.....Respondent.

v.

Fields Company, LLC; Beechwood Advisory Group, Inc.;
Beechwood Development Group of South Carolina, LLC;
And Beechwood Development Group, Inc. .....Defendants,

Of Whom Beechwood Development Group
Of South Carolina, LLC is the.....Appellant.

FINAL BRIEF OF APPELLANT

Val H. Stieglitz, SC Bar No. 5356
Manton M. Grier, Jr., SC Bar No. 70525
Tanya A. Gee, SC Bar No. 70191
NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Columbia, South Carolina 29201
(803) 771-8900

Attorneys for Appellant Beechwood
Development Group of South Carolina, LLC

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

FACTS 3

ARGUMENTS 12

I. THE TRIAL COURT SHOULD HAVE GRANTED A DIRECTED VERDICT IN FAVOR OF THE APPELLANT BECAUSE ALL OF THE ALLEGED WRONGS WERE COMMITTED PRIOR TO THE APPELLANT'S EXISTENCE, AND THERE IS NO EVIDENCE THAT THE APPELLANT HAD FULL KNOWLEDGE OF THESE FACTS AND CIRCUMSTANCES WHEN IT ALLEGEDLY "RATIFIED" THESE ACTS 12

A. Standard of Review 13

B. The Question of Whether a Later-Formed LLC Can Be Liable for the Pre-Formation Acts of Its Promoter Has Never Been Addressed in South Carolina 13

C. Even Assuming South Carolina Adopted a Concept Akin to "Ratification" to Impose Liability on a Later-Formed Corporate Entity, There is No Evidence in the Record That the Appellant Had Knowledge of Fields' Acts, and Therefore, the Appellant Did Not Ratify Those Acts 15

D. Hansen's Theory That Ratification of One Contract is Ratification of Every Pre-Formation Act of a Promoter Has Never Been Recognized in South Carolina or in Any Other State 18

E. No Contract Exists That Could be Ratified That Would Entitle Hansen to Owning a Percentage of the Water Company, So the Damages Awarded by the Jury Were Speculative 22

TABLE OF CONTENTS (continued)

PAGE

F. If South Carolina Were to Adopt Hansen's Theory That An Entity is Liable for the Unknown, Pre-Formation Wrongdoings of Its Promoter, This New Rule Would Unleash a Universe of Unknown Risks for Innocent Investors and Would Wreak Havoc on Economic Development in South Carolina 23

II. ABSENT A FINDING THAT THE APPELLANT RATIFIED THE ACTIONS OF FIELDS, ALL OF HANSEN'S CAUSES OF ACTION FAIL AS A MATTER OF LAW 24

A. There Can be No Breach of Fiduciary Duty Because The Relationship Between the Appellant and Hansen Was Not Fiduciary in Nature 24

B. There Can be No Breach of Contract or Breach of Contract With Fraudulent Intent Because the Appellant and Hansen Never Entered Into a Contract With Each Other 25

C. There Can be No Negligent Misrepresentation Because Hansen Does Not Allege Any False Representation Was Made by the Appellant 25

D. There Can be No Conversion Against the Appellant Because All of the Allegations Stem From Actions of Fields Committed Prior to the Appellant's Existence And a Promoter's Torts Cannot be Ratified by a Corporation 25

E. There Was No Intentional Interference With Prospective Contract Because the Appellant Did Not Have an Improper Purpose or Use Improper Methods When It Entered Into The Contract With Milner 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES ..... **PAGE**

Arch Aluminum & Glass Co. v. Haney, 964 So.2d 228 (Fla. Ct. App. 2007) 26, 27

Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005) 25

Bivens v. Watkins, 313 S.C. 228, 437 S.E.2d 132 (Ct. App. 1993) 24

Burns v. Veritas Oil Co., 230 S.W. 440 (Tex. Civ. App. 1921) 26, 27

Cf. State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011) 18

Clifton v. Tomb, 21 F.2d 893 (4th Cir. 1927) 14, 16

Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 395 S.E.2d 179 (1990) 26, 27, 28

Duggin v. Adams, 360 S.E.2d 832 (Va. 1987) 27

Equitable Trust Co. of Columbia v. Columbia Nat. Bank, 145 S.C. 91, 142 S.E. 811 (1928) 16

Fisk v. Leith, 3 P.2d 535 (Or. 1931) 26, 27

French v. Gabriel, 788 P2d 569 (Wash. App. Ct. 1990) 15

In re Vortex Fishing Systems, Inc., 277 F.3d 1057 (9th Cir. 2002) 15

Lincoln v. Aetna Casualty & Surety Co., 300 S.C. 188, 386 S.E.2d 801 (Ct. App. 1989) 13

McLaughlin v. Williams, 379 S.C. 451, 665 S.E.2d 667 (Ct. App. 2008) 25

McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 626 S.E.2d 884 (2006) 13

Mid-South Mgmt. Co. v. Sherwood Dev. Corp., 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007) 23

Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) 24

Pope v. Heritage Comms., Inc., 395 S.C. 404, 717 S.E.2d 765 22

Southern Bell Telephone & Telegraph Co. v. WRNO, 216 S.C. 533, 59 S.E.2d 146 (1950) 18, 19

Tulsa Tribune Co. v. Commissioner of Internal Revenue, 58 F.2d 937 (10th Cir. 1932) 18, 19

STATUTES

S.C. Code Ann. § 33-44-102(e) 16

S.C. Code Ann. § 33-44-201 ..... 14, 23

OTHER AUTHORITIES

14 C.J. at 259 19

18 Am. Jur. 2d Corporations § 123 14

18 Am. Jur. 2d Corporations § 131 ..... 15, 16

1A Fletcher Cyclopedia Corporations § 218 ..... 26, 27

Black's Law Dictionary (9th ed. 2009) 15
Fletcher, Cyclopedia Corporations § 2235 16
Merriam Webster Dictionary, http://www.merriam-webster.com/dictionary/ratify 17

STATEMENT OF ISSUES ON APPEAL

I. ALL OF THE WRONGS ALLEGED AGAINST THE BEECHWOOD DEVELOPMENT GROUP OF SOUTH CAROLINA, LLC ("THE APPELLANT"), WERE COMMITTED BY ROBERT FIELDS PRIOR TO THE APPELLANT'S EXISTENCE AND THERE IS NO EVIDENCE THESE WRONGFUL ACTS WERE RATIFIED BY THE APPELLANT.

A. STANDARD OF REVIEW

B. THE QUESTION OF WHETHER A LATER-FORMED LLC CAN BE LIABLE FOR THE PRE-FORMATION ACTS OF ITS PROMOTER HAS NEVER BEEN ADDRESSED IN SOUTH CAROLINA.

C. EVEN ASSUMING SOUTH CAROLINA ADOPTED A CONCEPT AKIN TO "RATIFICATION" TO IMPOSE LIABILITY ON A LATER-FORMED CORPORATE ENTITY, THERE IS NO EVIDENCE IN THE RECORD THAT THE APPELLANT HAD KNOWLEDGE OF FIELDS' ACTS, AND, THEREFORE, THE APPELLANT DID NOT RATIFY THOSE ACTS.

D. HANSEN'S THEORY THAT RATIFICATION OF ONE CONTRACT IS RATIFICATION OF EVERY PRE-FORMATION ACT OF A PROMOTER HAS NEITHER BEEN RECOGNIZED IN SOUTH CAROLINA NOR IN ANY OTHER STATE.

E. NO CONTRACT EXISTS THAT COULD BE RATIFIED THAT WOULD ENTITLE HANSEN TO OWNING A PERCENTAGE OF THE WATER COMPANY, SO THE DAMAGES AWARDED BY THE JURY WERE SPECULATIVE.

F. IF SOUTH CAROLINA WERE TO ADOPT HANSEN'S THEORY THAT AN ENTITY IS LIABLE FOR THE UNKNOWN, PRE-FORMATION WRONGDOINGS OF ITS PROMOTER, THIS NEW RULE WOULD UNLEASH A UNIVERSE OF UNKNOWN RISKS FOR INNOCENT INVESTORS AND WOULD WREAK HAVOC ON ECONOMIC DEVELOPMENT IN SOUTH CAROLINA.

II. ABSENT A FINDING THAT THE APPELLANT RATIFIED THE ACTIONS OF ROBERT FIELDS, ALL OF CLIFFORD HANSEN'S CAUSES OF ACTION FAIL AS A MATTER OF LAW, AND THE TRIAL COURT SHOULD HAVE DIRECTED A VEDICT OR ENTERED JUDGMENT NOTWITHSTANDING THE VERDICT IN FAVOR OF THE APPELLANT.

STATEMENT OF THE CASE

Clifford Hansen decided to try to buy a water company in Elloree, South Carolina. When that company was purchased a year-and-a-half later by Beechwood Development Group of South Carolina, LLC (hereinafter "the Appellant"), Hansen filed a Complaint on March 17, 2005 against Robert Fields; Fields Company, LLC; Beechwood Advisory Group, Inc.; Dennis Byrd; Beechwood Development Group of South Carolina, Inc.; and the Appellant, asserting causes of action for (1) breach of fiduciary duty, (2) breach of contract, (3) breach of contract accompanied by a fraudulent act, (4) fraud, (5) constructive fraud, (6) misrepresentation, (7) conversion, (8) negligence, and (9) interference with prospective contractual relations. (R. pp. 32-52). He amended his Complaint on January 8, 2010, adding Beechwood Development Group, Inc. and dropping Robert Fields and Dennis Byrd as Defendants. (R. pp. 13-31).

Prior to trial, Hansen settled his claims with Beechwood Advisory Group, Inc. (R. pp. 64-65). Two other Defendants, Fields Company, LLC, and Beechwood Development Group, Inc., did not file an answer and were in default. (R. p. 74, lines 3-4). The remaining Defendant, the Appellant, took the case to trial.[10] At trial, Hansen voluntarily dismissed his causes of action for fraud, constructive fraud, and negligence, and he went forward on the six remaining causes of action. (R. p. 76, lines 6-7; R. p. 109). A jury returned a verdict in favor of Hansen on all six causes of action. Hansen elected to receive damages for the intentional interference with prospective contractual relations, and the jury awarded a verdict of $1,189,408. (R. pp. 3, 804, 811).

[10] Duffy and Young, LLC, and not Nexsen Pruet, LLC, was trial counsel for the Appellant.

At the close of Hansen's case and at the close of all evidence, the Appellant moved for a directed verdict, arguing that the causes of action alleged against it were committed by other entities and that all of the wrongs alleged occurred prior to its formation. (R. pp. 549-64). The Appellant reiterated this argument in its Motion for a Judgment notwithstanding the verdict. (R. p. 814). Additionally, Appellant argued that its relationship with Hansen was not fiduciary in nature, no contract existed between it and Hansen that could be breached, it made no false representations to Hansen, it did not ratify the actions of the other entities which may be liable to Hansen, and the damages awarded to Hansen were speculative. The trial court denied these motions, and this appeal was filed on October 25, 2011. (R. pp. 1-2, 581, 668, 814).

FACTS

Clifford Hansen and Beechwood Development Company of South Carolina, LLC (hereinafter "the Appellant") are the only parties to this appeal. However, the legal storm that has raged between these two parties swirls around one person: Robert Fields, the man who introduced the parties to each other and who committed all the wrongs for which Hansen seeks to hold the Appellant liable. Undoubtedly, both parties are victims of Fields, and although the jury determined that, as between the two parties, Hansen deserved a million-dollar-plus verdict, the Appellant was not liable to Hansen as a matter of law, and the trial court erred by allowing this action to be decided by a jury.

Hansen, who worked in water companies early in his career and who had since moved to New York to work as a stock broker and trader, decided in January 2003 that he wanted to purchase a water bottling company. (R. p. 114, lines 21-25; p. 115; p. 116, lines 9-25; p. 117, lines 1-5; p. 119, lines 12-25). He looked at several such companies in

the Southeast, and one in particular drew his attention—Hickory Springs Water Company located in Elloree, South Carolina, and owned by George Milner. (R. pp. 120-22). In the spring of 2003, Milner agreed to sell his company to Hansen for $3.95 million. (R. pp. 125, 130-31, 817-22). Pursuant to this agreement, Hansen had 60 days to acquire financing, and Milner promised not to offer the company to any other entity during that time period.

As Hansen attempted to finance this purchase, he quit his job in New York and moved to Charleston, South Carolina. There, he borrowed money from family members to pay for the following: (1) an accounting firm to prepare a due diligence report; (2) a consultant to draw up business plans; (3) and attorneys to help him set up a limited liability company, Carolina Springs, LLC, which was to be the name of his water company. (R. pp. 132-34). While trying to locate investors, Hansen contacted David Fields, who had helped a friend of Hansen's finance a project in the past. (R. p. 164, lines 8-25). David Fields suggested his son, Robert, might be able to help Hansen obtain financing to purchase the water company. (R. p. 164, lines 18-21).

Soon after this suggestion, Hansen met with Robert Fields (hereinafter "Fields"), who was a partner in an entity called Beechwood Advisory Group, Inc. (hereinafter, "the Advisory Group"). (R. p. 164, lines 21-23). According to Hansen, Fields was interested in helping Hansen obtain financing for the deal but was concerned that the asking price for the water company was too high. (R. p. 165, lines 1-3). This concern had been raised by other potential investors, so Hansen went back to Milner, who agreed to reduce the sales price to $2.95 million. (R. p. 165, lines 7-12).

With the selling price reduced, Hansen returned to Fields, and Fields agreed that

the Advisory Group would help Hansen secure financing. (R. p. 166, lines 3-24). Hansen entered into an agreement with the Advisory Group on December 16, 2003, requiring Hansen to advance a $10,000 retainer and pay a $100,000 fee at closing. (R. p. 167, lines 22-25; pp. 168-70; pp. 840-41). A week later, when Hansen had failed to pay the $10,000, the Advisory Group sent Hansen a "Notice of Intention," which among other things, notified Hansen that if he did not pay the $10,000 retainer by December 30, the Advisory Group would withdraw from "servicing and forwarding" his acquisition of the water company. (R. pp. 174, 843). In that Notice, the Advisory Group reserved its right to acquire the water company on its own account, but promised it would pay Hansen 1% of the net cash transaction cost as a finder's fee. Hansen failed to pay the $10,000 by December 30. (R. p. 843).

On January 12, 2004, approximately two weeks after the deadline for paying the retainer had passed, the Advisory Group sent Hansen a letter, formalizing its withdrawal from representing him in acquiring the water company. (R. p. 842). In that letter, the Advisory Group again stated it reserved the right to purchase the water company independently, and if it were successful in that endeavor, would stand by its offer to compensate Hansen with a finder's fee. (R. p. 842). During that same week , the four partners of the Advisory Group—Fields, Dennis Byrd, Richard Gregg, and Andrew Easter—plus one other gentleman, Rolf Richter, executed a shareholder agreement to create a new corporation called Beechwood Development Group, Inc. (hereinafter "Development Corporation"). (R. p. 176, lines 7-23). The purpose of this corporation was to purchase the water company, and Hansen testified that, since January of 2004, he was aware of both this corporation's creation and its purpose. (R. p. 176, lines 18-19).

The Appellant was not yet in existence at this time, nor were its majority investors—Pat Cobb, Tom Finnegan, and James Feldman—involved in any of the above discussions, agreements, or transactions.

Even after the Advisory Group notified Hansen it was no longer working on his behalf, and even after Hansen knew the Development Corporation was created for the purpose of purchasing the water company, Hansen continued to work with Fields to acquire the water company. (R. p. 176, lines 18-25; pp. 177-84). In February 2004, Hansen spoke to Fields about a potential investor from Texas, David Hunt. (R. p. 176, lines 20-23). With Hansen's knowledge, Fields flew to Texas to discuss the acquisition with Hunt. (R. pp. 177-79). Before the trip, Fields and Hansen signed another letter of understanding. The letter begins by explaining that the Advisory Group (not the Appellant) will assist Hansen in acquiring the water company according to the agreement that follows. The agreement stipulated that any deal with David Hunt would result in Hansen being a 25% owner of the water company. (R. pp. 180-83, 920-22). Although, the agreement began by stating that it was between the Advisory Group and Hansen, Fields indicated by his signature that he was signing it on behalf of the Development Corporation. Notably, the Appellant (an entity which did not yet exist) was not named in this agreement or otherwise implicated. (R. pp. 920-22).

Despite the terms of this new agreement, Fields returned from Texas and sent an e-mail to George Milner (the owner of the water company), with Hansen copied on it, proposing that Hunt and the Development Corporation purchase the water company for $2.95 million, with Hunt owning 60 percent and the Development Corporation owning 40 percent. (R. p. 184, lines 18-25). Under this proposal, Hansen had no ownership interest.

Two weeks later, on April 3, 2004, Fields emailed a prospectus of the water company to a potential investor named Pat Cobb. (R. p. 185). Again, Hansen was copied on this correspondence. The prospectus had contact information for Fields and Hansen on the cover page. The prospectus stated that Carolina Springs (Hansen's LLC) had raised $500,000, and that Hansen would be the CEO of the water company. (R. pp. 186-87). Hansen admitted at trial that he had not raised the $500,000 as represented. (R. p. 188, lines 11-16).

Three days later, on April 6, 2004, the deal appeared to change again. Fields sent an email to Cobb, again copying Hansen, which stated, "the deal is a million . . . from Hunt for sixty percent; [the Development Corporation] now only puts in two fifty for fifteen percent; another investor, two fifty for fifteen percent; and ten percent will be for the owner/operator, Hansen, who's on an earned-in basis." (R. p. 191, lines 1-6).

As the deal continued to change, so too did Fields and Hansen's relationship. On May 10, 2004, the two of them met with a man named Sid Shingler. (R. p. 192, lines 4-13). At this meeting, Hansen learned that Fields planned for Shingler to run the plant and that Hansen's "team was out." (R. p. 193, lines 11-15). Hansen left the meeting angry. (R. p. 194, lines 7-10). He went to Bank of America to attempt to secure a loan and finance the deal on his own. After approaching Bank of America, he received a letter back, which explained that in order for the bank to agree to underwrite a loan, it would need to review the three most recent years of financial statements, tax returns, and balance sheets from the water company. (R. p. 196, lines 2-9). Hansen once had all of this information, but he lost the data when his laptop crashed, so he contacted Fields requesting the information. (R. p. 196, lines 16-18).

On May 26, 2004, Hansen received a letter from the Advisory Group, signed by Fields, which reiterated that it had terminated its representation of Hansen on January 12, but acknowledged that since that time it had allowed Hansen "to bring forward potential co-investors for a possible asset acquisition of [the water company] by us or others with whom we may be working." (R. pp. 197, 952-53). The letter noted that none of those investors had been able or willing to move forward, and because of that the Advisory Group believed "it would no longer be productive or in [Hansen's and the Advisory Group's] best interests for [Hansen] to continue to offer to [the Advisory Group] other potential investors for the acquisition of assets of [the water company]." (R. pp. 952-53). The letter further states that the Advisory Group felt it was necessary to clarify to Hansen and other parties with whom the Advisory Group was engaged in discussions that the Advisory Group was no longer affiliated with Hansen in any way. (R. pp. 952-53). Finally, Fields acknowledged in the letter that Hansen had "recently requested certain data and information," but stated "[i]nasmuch as the materials you are requesting were prepared by us, at our sole expense and for our internal purposes, following termination of our advisory services representation of you and Carolina Springs on January 12, we are not in a position to provide you with any of the requested information." (R. pp. 952-53).

At that point, Hansen admittedly "got a little crazy." (R. p. 201, lines 14-16). He sent an e-mail to Fields threatening to sue him and claiming, untruthfully, that he had recorded their conversations. (R. p. 201, lines 17-18; p. 202, lines 15-17). Hansen and Fields then parted ways, each attempting to purchase the water company to the exclusion of the other. (R. p. 372). Meanwhile, Milner, the seller of the company, became more

eager to sell it. As Milner explained, he was willing to sell his company in the middle of 2003, but had no pressing need to do so, but by the spring of 2004, he was hungry to sell. (R. p. 204, lines 5-21; p. 353). Significantly, Milner no longer had any agreement with Hansen to sell the business as all the previous agreements between the two had long expired, thereby leaving Milner free to deal with whomever he wished. (R. pp. 358, 359, 363).

On May 26, 2004, Hansen sent Milner a proposed new letter of understanding in yet another stab at resurrecting his attempt to purchase the company. (R. p. 203, lines 15-23). Milner did not sign Hansen's proposed new letter of understanding. (R. p. 203, lines 20-23).

Several days later, Fields emailed Milner and asked him to give Hansen the first opportunity to close the deal "if it has legs." (R. p. 378, lines 13-25; p. 379, lines 1-15). Fields was agreeing to step aside and let Hansen close the deal. Milner responded by stating that, "I appreciate your suggestion that I proceed with the Hansen, et al. offer to purchase the assets of [the water company] if it has legs. Should this path fail, I understand that Beechwood [the Development Corporation] is a viable backup . . . ." (R. p. 378, lines 21-25). At trial, Milner explained that although he did not have any legal obligation to Hansen, he felt he had an ethical obligation to give Hansen one last shot to buy the company himself. (R. p. 379, lines 11-15). Hansen, however, could not come up with the financing to close the deal, despite having tried to do so for over a year and despite Fields' agreement to step aside. Once Milner realized Hansen could not put up the money to back up his offer, Milner turned to Fields. Milner had waited a long time and given ample opportunities for Hansen to close the deal, but he could wait no longer.

On July 15, 2004, a letter of intent to purchase the water company was entered into between Milner, on behalf of the water company, and Fields, on behalf of the Development Corporation. (R. p. 367, lines 24-25). Meanwhile, on July 12, 2004, the Appellant—Beechwood Development Group of South Carolina, LLC—was formed. The Appellant had the following shareholders: the Development Corporation (consisting at the time of Fields, Byrd, Gregg, and Easter), plus three new investors, Pat Cobb, Tom Finnegan and James Feldman. (R. pp. 478, 512). Cobb, Finnegan, and Feldman had recently entered the picture and had no relationship with Hansen. In fact, Cobb and Finnegan testified that they had never seen Hansen prior to trial. The Development Corporation owned 48% of the Appellant's shares, and the new investors owned 52%. However, the Development Corporation's shares were later disbursed among Finnegan, Byrd, Gregg, Easter, and Fields; as an entity, the Development Corporation no longer owns any of the Appellant's shares. (R. p. 512).

Ultimately, the water company was bought by two groups: the Appellant purchased 48% of the company and Greenbax (owned by Piggly Wiggly) purchased the remainder. (R. p. 494, lines 23-25). The deal that was struck between the water company and the Appellant is different from the terms of the July 15, 2004 letter of intent between Milner and Fields, which Fields signed on behalf of the Development Corporation. (R. p. 536, lines 4-8).

After the Appellant partnered with Greenbax to purchase the water company, Hansen sued several entities: Fields, LLC, the company Fields owned with his father; the Development Corporation; the Advisory Group; and the Appellant. (R. pp. 32-52). He also sued Fields and Byrd individually but dismissed them when he amended his Complaint. (R. pp. 13-31). Fields, LLC and the Development Corporation, which had been formed for the sole purpose of purchasing the water company and no longer owned any interest in it, went into default. The Advisory Group, which had signed an agreement to help Hansen retain financial backers, and on whose behalf Fields had been an agent, settled with Hansen prior to trial. (R. pp. 64-65). Additionally, Hansen settled with both Byrd and Gregg individually prior to trial.

The Appellant answered Hansen's Complaint and proceeded to trial. The Appellant argued it was not liable to Hansen because it was not created until after all the alleged wrongs had been committed by Fields, and it was not aware of and did not participate in any of those alleged wrongs. Its primary owners—Cobb and Finnegan—were innocent investors who knew nothing of Hansen. Specifically, Finnegan testified that he was not introduced to the deal until May 2004, after Hansen and Fields had parted ways and each knew the other was independently pursuing the water company. (R. p. 650). Finnegan was not aware of any dealings Fields had had with Hansen, and prior to the formation of the Appellant, Fields was "absolutely not" acting on Finnegan's behalf in any dealings Fields had had with Hansen. (R. p. 537, lines 13-20). Likewise, Cobb had no idea Hansen "was out there," and Cobb never agreed to be partners with Hansen. (R. pp. 625-26). While Cobb and Finnegan admitted that all of Appellant's shareholders authorized Fields to sign the agreement with Greenbax to create Hickory Springs Water,

LLC (the entity that currently owns the water company), no evidence was presented that they had ratified or were even aware of Fields' conduct prior to the Appellant's formation. (R. p. 660). Indeed, Hansen's entire case hinges on a theory that, because Fields was a member of the Appellant, all of his pre-formation wrongdoings are imputed to the Appellant. (R. p. 69).

The Appellant argued at the close of Hansen's case that the trial court ought to direct a verdict, and repeated this argument at the close of all evidence. Once the jury returned its verdict, the Appellant moved for a judgment notwithstanding the verdict. The trial court denied each motion, and this appeal followed.

ARGUMENTS

I. THE TRIAL COURT SHOULD HAVE GRANTED A DIRECTED VERDICT IN FAVOR OF THE APPELLANT BECAUSE ALL OF THE ALLEGED WRONGS WERE COMMITTED PRIOR TO THE APPELLANT'S EXISTENCE, AND THERE IS NO EVIDENCE THAT THE APPELLANT HAD FULL KNOWLEDGE OF THESE FACTS AND CIRCUMSTANCES WHEN IT ALLEGEDLY "RATIFIED" THESE ACTS.

Hansen successfully convinced the trial court that, as a matter of law, the Appellant could be liable for all alleged causes of action because there was evidence the Appellant had "ratified" the acts of its promoter, Fields. Specifically, Hansen argued: "[T]his really is the theory of our case . . . that an LLC cannot ratify some pre-formation agreements and not ratify others." (R. p. 69). Hansen further argued that the Appellant, which was formed in July 2004, ratified all of the acts and representations Fields had made to Hansen since late 2003, when Hansen sought Fields out for financing. (R. p. 70, lines 16-19). The trial court found sufficient evidence was presented at trial to allow the causes of action to be decided by the jury. As explained in detail below, no evidence supports this ruling, and this Court should reverse.

A. Standard of Review

At the directed verdict and JNOV stages of the trial, the trial court views the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). When there is no evidence to support the trial court's ruling or when the ruling is controlled by an error of law, the appellate court will reverse. *Id.*

B. The Question of Whether a Later-Formed LLC Can Be Liable for the Pre-Formation Acts of Its Promoter Has Never Been Addressed in South Carolina.

After a thorough review of South Carolina jurisprudence, the issue of ratification has been addressed only as it relates to the law of agency. In that context, ratification has the following three elements: (1) acceptance by the principal of the benefits of the agent's acts; (2) full knowledge of the facts; and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements. *Lincoln v. Aetna Casualty & Surety Co.*, 300 S.C. 188, 386 S.E.2d 801 (Ct. App. 1989).

The Appellant urged the trial court to direct a verdict in its favor based on Hansen's failure to present evidence that the Appellant had full knowledge of the facts with regard to Fields' actions. Because the Appellant did not have any knowledge, much less full knowledge, it could not ratify the acts for which Hansen now seeks to hold it liable.

Hansen argued that the Appellant ratified Fields' acts based on the deposition testimony of Richard Gregg, one of the Appellant's minority members. This deposition was taken in another case, and in it, Gregg, who owned a mere 1.87% of the Appellant,

stated that the Appellant "ratified" Fields' closing of the transaction to buy the water company. (R. p. 501, lines 2-9; R. p. 573, lines 7-19). According to Hansen, this alone provides some evidence of ratification, and once a corporation ratifies one act of an agent, "[it] ratif[ies] all of his representations, his warranties, and whatever actions he took to induce the third party to enter into that transaction." (R. p. 573, lines 22-25).

The Appellant disputes that Fields was or could have been its agent at the time he made these "representations" and "warranties" for which Hansen is suing. The Appellant did not even exist until July 2004; without a principal, there can be no agency. *See, e.g., Clifton v. Tomb*, 21 F.2d 893, 900 (4th Cir. 1927) ('[A] corporation before its organization cannot have agents . . . ."). (R. p. 1052). Mere promoters are "in no sense identical with the corporation, nor do they represent it as agents . . . ." 18 Am. Jur. 2d Corporations § 123.

In South Carolina, a multi-member limited liability company is a legal entity distinct from its members. S.C. Code Ann. § 33-44-201. The Limited Liability Company Act does not address whether the company, once formed, can become liable for the contracts entered into by its promoters or for the wrongs committed by its promoters prior to the company's formation. Just as the Act does not address Hansen's theory of liability, neither does any appellate decision in South Carolina. Whether and under what circumstances a corporate entity may be held liable for the pre-formation acts of its promoter are open questions in South Carolina.

C. Even Assuming South Carolina Adopted a Concept Akin to "Ratification" to Impose Liability On a Later-Formed Corporate Entity, There Is No Evidence in the Record That the Appellant Had Knowledge of Fields' Acts, and, Therefore, the Appellant Did Not Ratify Those Acts.

The Appellant does not dispute that other jurisdictions have held that a corporation can become liable for a contract that a promoter enters into on the corporation's behalf. Nor does the Appellant dispute that Fields was one of its promoters—that is, a person who organized its corporate structure and helped bring about its existence. *See* Black's Law Dictionary (9th ed. 2009). However, just because Fields was a promoter of the Appellant does not mean all of Fields' alleged wrongs were imputed to the Appellant. Hansen argues that when a company ratifies a promoter's legitimate deals that were presented and disclosed to the company, the company ratifies every side deal that the promoter made acting on his own behalf. Under Hansen's theory, a company would "ratify" a promoter's secret embezzlement of millions of dollars simply because it earlier ratified his mileage expenses. This is not the law of South Carolina, nor should it be the law. If a corporation could be held liable for all of the secret, undisclosed contracts or actions of its promoters, few people—such as innocent investors like Cobb and Finnegan—would risk investing in a corporation's capital stock.

Instead, even in those states that have imposed liability on a corporation for the actions of its promoters, they only do so when the corporation expressly ratifies those actions or accepts the benefits of those actions ***with full knowledge of all the facts***. 18 Am. Jur. 2d Corporations § 131; *In re Vortex Fishing Systems, Inc.*, 277 F.3d 1057 (9th Cir. 2002); *French v. Gabriel*, 788 P2d 569 (Wash. App. Ct. 1990). Hansen argues that the Appellant had full knowledge of the facts because Fields' knowledge is imputed to

the Appellant. This argument has no merit. As the Fourth Circuit stated in *Clifton*, "[t]he knowledge of a mere promoter is not to be imputed to the corporation, as a general rule." *Clifton*, 21 F.2d at 901. *See also* 18 Am. Jur.2d Corporations §131 (stating the rule that knowledge of a promoter cannot be imputed to the corporation).[11]

In denying a directed verdict, the trial court stated there was some evidence the Appellant had full knowledge of all the facts:

> Based upon the fact that the Court feels that the testimony was sufficient and that there is existence of the testimony that the acts of Mr. Fields were ratified by the company that the jury could infer that from the testimony presented . . . .

(R. p. 581, lines 15-21).

The trial court, however, failed to identify the specific "acts of Mr. Fields" that were ratified. The trial court also failed to identify the specific testimony that supported ratification. The only testimony argued by Hansen was the deposition testimony of Gregg, which was given in a different case. This deposition testimony came into the record when Hansen called Finnegan, one of the Appellant's other members, and the following colloquy occurred:

---

[11] Hansen argues Section 33-44-102(e) of the LLC Act imputes Hansen's knowledge to the Appellant. (R. p. 572, lines 6-13). Like a corporation, LLCs necessarily require an agent to transact business, and because of this necessity, an entity generally has notice of a fact for purposes of a particular transaction "when the individual conducting the transaction for the entity, knows, has notice, or receives a notification of the fact." S.C. Code Ann. § 33-44-102(e). Such knowledge is not imputed, however, when an officer or agent of an entity gains the knowledge while dealing with "no official relation to the corporation" or "while dealing in his private capacity in his own behalf with third persons." *See Equitable Trust Co. of Columbia v. Columbia Nat. Bank*, 145 S.C. 91, 142 S.E. 811, 817 (1928) (quoting Fletcher, Cyclopedia Corporations § 2235 and "conceding the correctness of [those] propositions of law").

Q: Were you aware that Mr. Gregg gave sworn testimony in a deposition in another lawsuit in which your company was sued?

A: Yes.

Q: Okay. And did you know that Mr. Gregg testified under oath – I'd like to read this to you to make sure I get it just right. I don't want to misstate anything. Here it is: That it was an internal ratification that the corporation gave Mr. Fields authority to appear on its behalf at the closing and sign the closing documents for [the Appellant].

A: That's correct

Q: Okay. But yet – so you admit as Mr. Gregg did, that Robert Fields had full authority to appear on behalf of [the Appellant]?

A: To close the deal.

(R. p. 486, lines 1-19).

The mere use of the term "ratification" to describe Fields' authority to sign the water company deal on the Appellant's behalf does not provide any evidence that the Appellant ratified all of Fields' pre-formation acts. The only thing the Appellant may have ratified was "clos[ing] the deal." While the legal elements of ratification require that a principal have full knowledge, the dictionary definition of the term "ratify" simply means to approve or sanction. Merriam Webster Dictionary, http://www.merriam-webster.com/dictionary/ratify. From the context of Gregg's statement, it is clear that Gregg, a lay person, used the term "ratification" in its common sense: that the shareholders approved of Fields' signing the contract to purchase the water company on the Appellant's behalf. In no way does this testimony provide evidence that the Appellant had any knowledge let alone the full knowledge required to legally ratify

Fields' pre-formation acts, nor all the various "agreements" that Hansen alleged Fields entered on behalf of entities other than the Appellant. *Cf. State v. Commander*, 396 S.C. 254, 721 S.E.2d 413 (2011) (finding that an expert could opine that a death was by "homicide" without invading the province of the jury because that term "homicide" in the context of a medical expert means merely that a person was killed by another, even though the legal system categorizes homicides in varying degrees and there is a danger the term connotes criminality). Hansen was unable to present any testimony that the Appellant had knowledge of Fields' prior acts.

D. Hansen's Theory That Ratification of One Contract is Ratification of Every Pre-Formation Act of a Promoter Has Never Been Recognized in South Carolina or in Any Other State.

Even if the Appellant "ratified" Fields' execution of the closing documents of the water company, that particular ratification does not mean the Appellant ratified all of Fields' pre-formation acts. At trial, Hansen argued the law was clear that if a company ratifies one act of its promoter it ratifies them all. (R. p. 573, lines 20-22). Hansen cited to *Tulsa Tribune Co. v. Commissioner of Internal Revenue* in support of this proposition; however, this "ratify one, ratify all" is not the law of South Carolina, nor is it the holding in *Tulsa Tribune*, 58 F.2d 937 (10th Cir. 1932).[12] (R. p. 573, lines 7-19).

---

[12] Hansen also cited to *Southern Bell Telephone & Telegraph Co. v. WRNO*, 216 S.C. 533, 59 S.E.2d 146 (1950) at other points during the trial. The *Southern Bell* case addressed whether a corporation was liable for a contract its agent signed on its behalf. The contract provided for two different telephone lines, one of which the agent used personally. According to WRNO, this personal line was not authorized. After operating under this contract for eight months, WRNO refused to pay for this second line. The Supreme Court first found that the agent was authorized to sign the contract, even for the second, personal line. After so finding, it further stated, in dicta, that the corporation was not allowed to ratify one part of a contract that was advantageous to the corporation (i.e., the business's telephone line) and repudiate another part of the same contract (i.e., the agent's personal line). *Southern Bell* has little bearing on this appeal for several reasons:

Tulsa Tribune is a 2-1 opinion from the Tenth Circuit, in which the court reviewed a decision of the Board of Tax Appeals regarding the amount of taxes the Tulsa Tribune Company owed for the calendar year 1920. The issue before the Tenth Circuit was to determine at what point in time the tax assessor should value capital stock: when the property was acquired by the promoter of the corporation or when the property was transferred to the corporation after its organization. The case in no way addressed whether a corporation was liable to third parties for the pre-formation acts of its promoters, nor does it stand for the wide sweeping proposition that an LLC cannot ratify some pre-formation acts of its promoters and not others. Rather, in finding the stock should be valued at the date upon which it was acquired by the promoter, the Tenth Circuit merely reaffirms that a corporation can ratify a contract entered into by its promoter by "voluntarily accept[ing] the benefits accruing to it from the engagement of its promoters ***after full knowledge and having full liberty to decline the same . . . .***" *Id.* at 939. (citing 14 C.J. at 259) (emphasis added).

Like all the other legal authority on the subject of a corporation's liability for its promoters' pre-formation acts, the *Tulsa Tribune* case reiterates that if a corporation does not have full knowledge, it cannot be subject to ratification.

---

(1) it addressed a contract that was signed by WRNO's agent; here, Fields was merely a promoter, and not the Appellant's agent; (2) the language on which Hansen relies from the *Southern Bell* opinion is dicta; and (3) to the extent the dicta carries any precedential value, it stands for the proposition that a company cannot parse out the good components of a single contract from the bad components of the same contract; in no way does it state that once one contract is ratified, all other contracts and acts of an agent (much less, a promoter) are ratified.

The Appellant's lack of knowledge in this case is highlighted shortly after the colloquy excerpted above between Hansen's counsel and Finnegan, when Hansen's counsel asked questions in furtherance of his "you ratify one, you ratify all" argument:

> Q: You're aware that Mr. Fields signed the letter of intent, the agreement with George Milner to buy this water company?
>
> ...
>
> The letter of intent dated July 15, 2004, three days after your company was set up where [the Development Corporation] actually had the right to buy the water company.
>
> A: I am now.
>
> Q: Okay. And you're aware that Mr. Fields showed up at closing representing your company, [the Appellant], and closed the deal.
>
> A: I am.
>
> Q: So you like those two things that Mr. Fields did, but y'all don't want any part of his deals in April, May, and June when he was representing Mr. Hansen; is that right?
>
> A: I would say that – it's hard for me to say that I had any opinion on it because I didn't – you know, this is the first time I've ever seen a Mr. Hansen. I didn't know anything about him before then. I wasn't involved until May. What happened in April and January when all this other stuff that you've showed is irrelevant to me. I don't know anything, I can't speak about it, I wasn't involved in it.

(R. pp. 488-89).

Similarly, Hansen testified only as to what ***Fields*** had represented to him and done, and there was no evidence presented to indicate that the other members had full knowledge—let alone any knowledge—of Fields' actions. Just because Hansen claimed

he suffered damages at the hands of Fields does not mean he should recover against the Appellant, a company that had not yet been formed and which was largely funded by innocent investors who had no knowledge of Hansen.

Hansen had every opportunity to sue those entities and individuals that were in existence and that allegedly harmed him—the Advisory Group; the Development Group; Fields, LLC; and Fields, Byrd, and Gregg individually—and he did sue them. Originally, Hansen named Fields as a defendant but dismissed him in the amended complaint. Defendants Fields, LLC and Development Group, Inc. never answered the complaint and were in default, but Hansen chose not to pursue them. Several months before trial, Hansen settled his case against the Advisory Group, which is the entity that Hansen negotiated with in late 2003 and early 2004. Hansen also settled individually with Richard Gregg and Dennis Byrd.

This is not a situation where the equities weigh against the Appellant. Although Hansen claimed he was wronged, he was not without a remedy. The Appellant is not responsible for remedying those alleged wrongs, as it is a legal entity separate from Fields and it consists of innocent shareholders who were not fully aware of the circumstances. Hansen settled with the Advisory Group, Gregg, and Byrd, and could have obtained a default judgment against Fields, LLC. Hansen should not have a second bite at the apple. Accordingly, the trial court should have directed a verdict or entered a judgment notwithstanding the verdict on all causes of action alleged against the Appellant.

E. No Contract Exists That Could Be Ratified That Would Entitle Hansen to Owning a Percentage of the Water Company, So the Damages Awarded by the Jury Were Speculative.

As explained above, the Appellant is not responsible for damages caused to Hansen for the alleged wrongs that were committed prior to the Appellant's formation. Additionally, the Appellant notes that even viewing the evidence in the light most favorable to Hansen, no contract ever existed that would entitle Hansen to an ownership interest in the water company. At best, Hansen presented evidence that he signed a contract with Fields prior to Fields' trip to Texas to meet with David Hunt. Pursuant to this agreement, any deal with David Hunt would result in Hansen being a 25% owner of the water company. (R. pp. 180-83, 920-22). However, no deal was ever struck with David Hunt, and without satisfying this condition precedent, there was no obligation to satisfy the agreement's other terms. In other words, the Appellant had nothing to ratify that could entitle Hansen to own a percentage of the water company. Without a valid contract on which to base this percentage, the amount of damages awarded by the jury was left to conjecture, guess, and speculation. Thus, even if this Court were to affirm the trial court's denial of the Appellant's directed verdict and JNOV motions, it should remand for a new damages hearing because the amount awarded was based on Hansen owning 25% of the profits earned by the Appellant. *See Pope v. Heritage Comms., Inc.*, 395 S.C. 404, 434, 717 S.E.2d 765, 781 (Ct. App. 2011) ("The existence, causation, and amount of damages cannot be left to conjecture, guess, or speculation.").

F. If South Carolina Were to Adopt Hansen's Theory That an Entity is Liable for the Unknown, Pre-Formation Wrongdoings of Its Promoter, This New Rule Would Unleash a Universe of Unknown Risks for Innocent Investors and Would Wreak Havoc on Economic Development in South Carolina.

The Appellant is a limited liability company, and as such, it has an identity separate and distinct from its members. To allow Hansen to recover from the Appellant for the unknown, pre-formation wrongdoings of Fields would be to overlook the distinction between an LLC and its members. *See* S.C. Code Ann. § 33-44-201 ("A limited liability company is legally distinct from its members . . . ."). If Hansen's theory of the case became the law—and a newly formed corporate entity was liable for even the unknown acts of its promoters, including acts occurring several months before the entity's investors even knew about the potential business deal—then South Carolina would set itself apart as a state in which investment is uniquely and excessively risky. An overriding doctrine of corporate law is to limit the liability of investors in order to encourage investment in private entities. If corporations were saddled with all the undertakings of its promoters, innocent shareholders, who had no notice of a promoter's previous contracts or tortious acts, might lose their investment almost immediately and would be left with no return for their money. Exposing investors to such unlimited liability would chill enthusiasm for conducting business in South Carolina.

This risk has never before been borne by an investor. Instead, up until now, corporate entities have NOT been conceived as the alter-egos of their promoters, and likewise, a newly formed entity has never been held responsible for all of its promoters' liabilities. *See, e.g., Mid-South Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597, 649 S.E.2d 135, 140 (Ct. App. 2007) ("It is generally recognized that a corporation is an

entity that is separate and distinct from . . . its officers and stockholders."). To adopt Hansen's theory of the case would strike a devastating blow to economic development in South Carolina.

II. ABSENT A FINDING THAT THE APPELLANT RATIFIED THE ACTIONS OF FIELDS, ALL OF HANSEN'S CAUSES OF ACTION FAIL AS A MATTER OF LAW.

Hansen alleged six causes of action against the Appellant. All of them are based on alleged wrongs committed by Fields prior to the Appellant's formation. Accordingly, as explained below, all of Hansen's causes of action fail as a matter of law.

A. There Can be No Breach of Fiduciary Duty Because the Relationship Between the Appellant and Hansen Was Not Fiduciary in Nature.

A cause of action for breach of fiduciary duty is premised on the principle that "[o]ne 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." *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004). Here, the Appellant and Hansen had no relationship, let alone one that was fiduciary in nature.

Hansen argues the fiduciary relationship arose because the Appellant and Hansen were co-promoters. The Appellant, however, is the LLC that was ultimately being promoted; it was not a promoter of itself. Rather, individuals are promoters of corporations, so to the extent a fiduciary relationship existed, it would have existed between Fields and Hansen. *See Bivens v. Watkins*, 313 S.C. 228, 233 n.5, 437 S.E.2d 132, 135 n.5 (Ct. App. 1993) ("[P]ersons who plan or organize a corporation are "promoters.").

B. There Can be No Breach of Contract or Breach of Contract With Fraudulent Intent Because the Appellant and Hansen Never Entered Into a Contract With Each Other.

For a contract to exist there must be an offer, acceptance, and valuable consideration. Likewise, having a contract is a prerequisite to proving breach of contract accompanied by a fraudulent act. *Armstrong v. Collins*, 366 S.C. 204, 223, 621 S.E.2d 368, 377 (Ct. App. 2005). No contract was entered into between Hansen and the Appellant. When Hansen was asked whether he had any deal "whatsoever" with the Appellant, Hansen truthfully admitted he did not. (R. p. 333, lines 4-6).

C. There Can be No Negligent Misrepresentation because Hansen Does Not Allege Any False Representation Was Made by the Appellant.

To prove negligent misrepresentation a plaintiff must show:

> (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.

McLaughlin v. Williams, 379 S.C. 451, 456, 665 S.E.2d 667, 670 (Ct. App. 2008). The misrepresentation Hansen alleges was "that they would assist Mr. Hansen in financing and at one point even agree to finance themselves part of this deal." (R. p. 570). This alleged misrepresentation occurred prior to the Appellant's existence.

D. There Can be No Conversion Against the Appellant Because All of the Allegations Stem From Actions of Fields Committed Prior to the Appellant's Existence and a Promoter's Torts Cannot be Ratified by a Corporation.

Hansen argues that his due diligence report was converted by Fields when Fields

refused to provide him with a copy of it in the Spring of 2004. As explained above, the Appellant had no knowledge of this and therefore did not ratify Fields' actions. Furthermore, "[a] corporation is not liable for torts which its promoters committed before it came into existence." 1A Fletcher Cyclopedia Corporations § 218; *see also Arch Aluminum & Glass Co. v. Haney*, 964 So.2d 228, 234 (Fla. Ct. App. 2007) (rejecting plaintiff's contention that a corporation should be charged with its promoters' tortious conduct in misappropriating an allegedly confidential document, finding the plaintiff's theory of liability was contrary to the common law rule that a corporation is not liable for a tort which its promoters committed before it came into existence); *Fisk v. Leith*, 3 P.2d 535, 535 (Or. 1931) ("It is apparent that the corporation could not be held liable in damages for any act of [its promoter] prior to its organization."); *Burns v. Veritas Oil Co.*, 230 S.W. 440, 446 (Tex. Civ. App. 1921) (finding corporation was not liable for the tortious act of its promoters in inducing others to break a contract with a third person).

E. There Was No Intentional Interference With Prospective Contract Because the Appellant Did Not Have an Improper Purpose or Use Improper Methods When it Entered Into the Contract With Milner.

Hansen argues that because the Appellant ultimately purchased the water company, thereby foreclosing his ability to purchase it, the Appellant intentionally interfered with his prospective contractual relations. If this were enough to support a claim for intentional interference with prospective contractual relations, then anytime there were competing purchasers in the market, the purchaser who "won" the contract would be sued for this tort. Instead, this tort requires proof that the "winning" purchaser interfered with the other's prospective contract "for an improper purpose or by improper methods." *See Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 266, 395

S.E.2d 179, 180 (1990) (explaining the three elements for intentional interference with prospective contractual relations are "(1) the defendant intentionally interfered with the plaintiff's potential contractual relations; (2) for an improper purpose or by improper methods; (3) causing injury to the plaintiff."). Examples of improper methods include violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information, or breach of a fiduciary relationship. *Id.* (referring reader to *Duggin v. Adams*, 360 S.E.2d 832, 836 (Va. 1987) for this list of improper methods). Methods that are unethical, overreaching, or violate an established standard of trade have also been deemed "improper" for the purpose of this tort. *Id.*

As with the other causes of action, to the extent an "improper purpose" or "improper methods" are alleged, they are alleged against Fields, for actions he took prior to the Appellant's existence. The Appellant did not have full knowledge of these improper actions, and therefore did not ratify them. Additionally, "[a] corporation is not liable for torts which its promoters committed before it came into existence." 1A Fletcher Cyclopedia Corporations § 218; *see also Arch Aluminum & Glass Co.*, 964 So.2d at 234 (rejecting plaintiff's contention that a corporation should be charged with its promoters' tortious conduct in misappropriating an allegedly confidential document, finding the plaintiff's theory of liability was contrary to the common law rule that a corporation is not liable for a tort which its promoters committed before it came into existence); *Fisk*, 3 P.2d at 535 ("It is apparent that the corporation could not be held liable in damages for any act of [its promoter] prior to its organization."); *Burns*, 230 S.W. at 446 (Tex. Civ. App. 1921) (finding corporation was not liable for the tortious act

of its promoters in inducing others to break a contract with a third person).

Furthermore, allowing this particular tort to be imputed to a corporation based on the pre-formation actions of its promoter would result in a great blow to economic development in South Carolina. As Justice Littlejohn wrote in his dissenting opinion when the Supreme Court adopted this cause of action, allowing a party to sue for intentional interference with ***prospective*** contractual relations has the potential to "greatly hamper free competition in the marketplace" and our legal system should promote "freedom of negotiation and competition in the marketplace, which is a cornerstone of our democratic society." *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 269, 395 S.E.2d 179, 181-182 (1990). This Court should not expand liability on this cause of action by allowing a promoter's pre-formation actions to be imputed to the later-formed corporation. To do so would serve as a great disincentive for potential investors to invest in South Carolina.

CONCLUSION

All of the causes of action Hansen alleges against the Appellant are based on acts Fields or other entities committed prior to the Appellant's existence. The Appellant did not have full knowledge of these acts, and therefore did not ratify them. Hansen also settled or failed to pursue the very persons and companies that allegedly harmed him. Accordingly, the trial court should have directed a verdict or entered a judgment notwithstanding the verdict in favor of the Appellant, and this Court should reverse the trial court in *toto*. Furthermore, no contract existed that could have been ratified that would result in Hansen being an owner in the water company. If the trial court's denial of the directed verdict and JNOV motions is not reversed, this case should be remanded

for a new damages hearing.

In the event this Court were to adopt the Appellant's arguments only to the extent that the trial court should have directed a verdict or entered a judgment notwithstanding the verdict on the cause of action for intentional interference with prospective contractual relations, then this matter should be remanded to the trial court for a new damages hearing.

Respectfully submitted,

Val H. Stieglitz, SC Bar No. 5356
Manton M. Grier, Jr., SC Bar No. 70525
Tanya A. Gee, SC Bar No. 70191
NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Columbia, South Carolina 29201
803-771-8900
VStieglitz@nexsenpruet.com

Attorneys for Appellant

January 8, 2013

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2011-190886

Clifford C. Hansen.....Respondent/Appellant.

v.

Fields Company, LLC; Beechwood Advisory Group, Inc.;
Beechwood Development Group of South Carolina, LLC;
And Beechwood Development Group, Inc. .....Defendants,

Of Whom Beechwood Development Group
of South Carolina, LLC is the.....Appellant/Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief Of Appellant** complies with Rule 211(b), SCACR.

Val H. Stieglitz, SC Bar No. 5356
Manton M. Grier, Jr., SC Bar No. 70525
Tanya A. Gee, SC Bar No. 70191
NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Columbia, South Carolina 29201
(803) 771-8900
Attorneys for Appellant/Respondent Beechwood
Development Group of South Carolina, LLC

February 12, 2013

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington

Case No. 2008-CP-10-2513

Clifford C. Hansen,.....Respondent/Appellant,

v.

Fields Company, LLC; Beechwood Advisory Group, Inc.; Beechwood Development Group of South Carolina, LLC; and Beechwood Development Group, Inc., ... Defendants.

Of Whom Beechwood Development Group of South Carolina, LLC is the..... Appellant/Respondent.

PROOF OF SERVICE

The undersigned certifies that three copies of the **FINAL BRIEF OF APPELLANT** has been served upon counsel of record by depositing a copy of the same, first-class postage prepaid, in the United States Mail, on the 8th day of January, 2013, to the address shown below.

William E. Hopkins, Jr., Esquire
BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.
272 Commerce Street (36104)
Post Office Box 4160
Montgomery, Alabama 36103-4160
Attorneys for Respondent Clifford C. Hansen

NEXSEN PRUET, LLC

Columbia, South Carolina