**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**PROVIDENCE, SC.** **SUPERIOR COURT**

**(FILED: February 23, 2015)**

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| **RHODE ISLAND RESOURCE RECOVERY CORPORATION, Plaintiff,** | : | |
| **v.** | : | **C.A. No. PB 10-4502** |
| **RESTIVO MONACELLI, LLP, Defendant.** | : | |

**DECISION**

**SILVERSTEIN, J.** Before the Court for decision is Defendant Restivo Monacelli, LLP's (Restivo) Motion for Summary Judgment pursuant to Super. R. Civ. P. 56 as to Counts I and II of Plaintiff Rhode Island Resource Recovery Corporation's (RIRRC) More Definite Statement (MDS). In its initial Complaint, RIRRC had alleged five counts against Restivo; however, pursuant to an Order of the Court on March 6, 2014, Counts III, IV, and V of the Amended (Restated) Complaint were stricken.[1] Count I of the MDS alleges a cause of action for professional malpractice and Count II alleges breach of contract.

Additionally before the Court are several Motions to Strike filed by each party, respective to the following documents: RIRRC has moved to strike the Affidavit of Kevin Hundley (Hundley), eleven "unauthenticated documentary exhibits," and certain statements regarding RIRRC's engagement of Carlin, Charron & Rosen (CCR); Restivo has moved to strike the Affidavit of Jerry DeNigris and portions of the Affidavit of Joseph Centofanti.

[1] The Amended (Restated) Complaint and the MDS appear to be terms used interchangeably by the parties to refer to the most recent version of RIRRC's operative Complaint upon which Restivo's Motion is now based. For ease of reference, the Court will refer to this filing as the MDS.

## I

## Facts and Travel

The basic facts of this matter were previously recounted by this Court in a Decision filed on May 13, 2011 on Restivo's Motion to Dismiss, or in the alternative, Restivo's Motion for More Definite Statement.[2] Accordingly, the Court presents only those facts required for context and supplements those facts as necessary to decide the instant Motions.

RIRRC, formerly known as the Rhode Island Solid Waste Management Corporation (RISWMC), is a quasi-public corporation established by an enactment of the General Assembly in 1974 to operate and manage the Central Landfill in Johnston, Rhode Island.[3] See MDS ¶ 1. On March 13, 2008, the Rhode Island Bureau of Audits (Bureau) issued its Summary of Findings on RIRRC following the Bureau's preliminary forty-five day examination commenced as a result of RIRRC's Chief Executive Officer Michael J. OConnell's (OConnell) letter to Governor Donald L. Carcieri questioning RIRRC's past and present practices with respect to several areas of concern. See Steven P. Wright Aff. Ex. L, Nov. 14, 2014. The Summary of Findings indicated that certain irregularities and appearances of impropriety existed as to the current and former Commissioners and employees of RIRRC and with respect to certain charitable contributions, real estate transactions, and trust fund issues. See id. On September 22, 2009, the Bureau released a more comprehensive report based on a forensic examination of RIRRC concluding that RIRRC, during the relevant time period, engaged in, inter alia, numerous instances of wrongful conduct. See Wright Aff. Ex. M.

[2] See R.I. Res. Recovery Corp. v. Restivo Monacelli, LLP, No. PB 10-4502, 2011 WL 1936010 (R.I. Super. May 13, 2011) (granting Restivo's Motion for More Definite Statement under Super. R. Civ. P. 12(e)).

[3] RIRRC gleans its authority from the Rhode Island Resource Recovery Corporation Act, G.L. 1956 §§ 23-19-1, et seq.

In response to the Bureau's findings, RIRRC commenced several lawsuits encompassing a variety of allegations against different entities, including the instant matter against Restivo. Specifically, RIRRC alleges that Restivo breached its professional and contractual duties to RIRRC by failing to, among other allegations, uncover and report RIRRC's alleged violations and other wrongdoing pertaining to three main areas: (a) continued engagement of the Van Liew Trust Company (Van Liew); (b) multiple real estate purchase transactions; and (c) charitable contributions made by RIRRC.

**A**

**RIRRC's Agreement with Restivo**

According to RIRRC, Restivo, a Rhode Island certified public accounting and business advising firm, was retained to perform the following:

> "(1) audit[] the financial statements and prepare[] reports for the fiscal years ending June 30, 2006 and June 30, 2007; (2) conduct[] semiannual reviews and prepare[] reports for the six months ending December 31, 2006 and December 31, 2007; (3) audit[] financial statements and prepare[] reports in connection with RIRRC's Money Purchase Pension Plan for the years ending December 31, 2006 and December 31, 2007; and (4) provide[] advice, direction, and encouragement to RIRRC's Board of Commissioners and other RIRRC managers and employees with respect to all aspects of RIRRC's finances, internal control, fund and asset management, and business directions." Restivo, 2011 WL 1936010, at *1; see also Hundley Aff. ¶ 2, Oct. 9, 2014.

In August 2006, RIRRC and Restivo entered into a written agreement (Agreement) for Restivo to provide accounting and auditing services to RIRRC for the term of August 1, 2006 to June 30, 2009. See Wright Aff. Ex. S. The Agreement contemplated financial statement audits for fiscal years 2006 and 2007, as well as 2008 at the option of RIRRC; however, Restivo's engagement was terminated on June 24, 2008. See Hundley Aff. ¶ 2; OConnell Aff. Ex. C, Nov. 14, 2014. The Agreement expressly incorporated by reference nine specific documents (collectively, Procurement Documents), which included the initial Invitation for Bids for

Accounting and Auditing Services (IFB No. 741) dated May 3, 2006. (Wright Aff. Ex. S at 1). Included within IFB No. 741 was the requirement that the audit be conducted "in accordance with the standards for financial audits contained in 'Government Auditing Standards' issued by the Comptroller General of the United States." Id. at 10. Moreover, the scope of the audit mandated:

> "The annual audit of the Agency [to] be conducted in accordance with generally accepted auditing standards [GAAS], as established by the American Institute of Certified Public Accountants [AICPA] and with the standards applicable to financial audits contained in Government Auditing Standards, issued by the Comptroller General of the United States. Additionally, the semiannual reviews shall be performed in accordance with Statements on Standards for Accounting and Review Services issued by the [AICPA]." Id. at 11 (emphasis in original).

In correspondence from Restivo to RIRRC, Restivo further stated that it is "familiar with generally accepted accounting principles [GAAP] for state and local government units and with the [GAAS] promulgated by the [AICPA] . . . and will conduct the audit and will report in accordance with those standards." Id. at 120. The correspondence also indicated that Restivo will notify the Auditor General and Director of Administration if it becomes aware of "fraud, abuse, or illegal acts or indications of such acts affecting the agency." Id.

Once retained, Restivo proceeded to provide its auditing and accounting services to RIRRC, including delivering to RIRRC its financial statement audits for the fiscal years 2006 and 2007, each entitled Independent Auditors' Report. See Wright Aff. Exs. T, V. In its reports, Restivo again noted its compliance with the auditing standards generally accepted in the United States and those standards applicable to financial audits in Government Auditing Standards. Id. Exs. T, V. As noted above, Restivo was terminated prior to issuing a financial statement audit report for fiscal year 2008, which was subsequently performed by CCR. See OConnell Aff. ¶ 7, Ex. C.

As explained, there were three main areas of alleged abuses occurring at RIRRC for which Restivo is alleged to be liable based on certain failures. The Court will describe each of those areas in turn.

**B**

**RIRRC's Engagement of Van Liew**

Van Liew is a Rhode Island corporation that is authorized by the Rhode Island Board of Bank Incorporation to engage in the business of a trust company. See R.I. Res. Recovery Corp. v. Van Liew Trust Co., No. PC-10-4503, 2011 WL 1936011, at *1 (R.I. Super. May 13, 2011) (Silverstein, J.). Van Liew was retained by RIRRC as its investment manager for its trust funds—the Central Landfill Remediation Trust Fund (EPA Trust Fund) and EPA Closure Trust Fund (Closure Trust Fund)—as well as to serve as the pension fund manager for the Money Purchase Pension Plan (Pension Plan).[4] See id. During Van Liew's retention, it was ultimately discovered that John St. Sauveur (St. Sauveur), a member of RIRRC's Board of Commissioners, was also a member of the Board of Directors of Van Liew, thus presenting an improper conflict of interest.[5] See id.; see also Jerome Williams Dep. 53:10-54:18, July 19, 2012. Ultimately, Van

[4] As noted at the hearing on the Motion, RIRRC is no longer claiming damages with respect to the Pension Plan. (Tr. 31:11-15, Dec. 10, 2014).

[5] Pursuant to an Order of this Court on March 6, 2014, the Court denied Lefkowitz, Garfinkel, Champi, & DeRienzo, P.C.'s (Lefkowitz) motion to strike RIRRC's Supplemental Responses to Restivo's Interrogatories regarding Jerry DeNigris' (DeNigris) expected expert testimony on the compliance testing of the five trust funds established by a consent decree entered into between RIRRC and the United States Environmental Protection Agency (EPA) (the EPA Consent Decree), and related trust documents. See R.I. Res. Recovery Corp. v. Restivo Monacelli, LLP, No. PB 10-4502 (R.I. Super. Mar. 6, 2014); see also Second Am. Supplemental Resp. to Def. Restivo's Interrog. No. 6 at 6 (hereinafter Expert Disclosures). The matter involving Lefkowitz was consolidated with the instant matter for pretrial purposes, and it is important to note that Restivo joined in Lefkowitz's motion to strike on June 26, 2013. See Restivo's Ex. T. The Court, however, did grant the motion to strike with respect to any expert testimony regarding Restivo's alleged failures regarding the discovery of St. Sauveur's conflict of interest. See Restivo, No. PB 10-4502 (Order).

Liew was terminated by RIRRC from its roles with the Pension Plan in December 2007 and the EPA Trust Fund in January 2008. See Van Liew Trust Co., 2011 WL 1936011, at *2-4.

According to RIRRC, as set forth in its Second Amended Supplemental Responses to Defendant Restivo's Interrogatory No. 6, Joseph Centofanti (Centofanti), a Certified Public Accountant (CPA) and Forensic Certified Public Accountant (FCPA), is expected to testify regarding Restivo's alleged failures in testing compliance with respect to the management of certain trust funds. See Expert Disclosures 6; see also Centofanti Aff. ¶ 21, Nov. 14, 2014 ("Restivo should have treated RIRRC's compliance with the closure/post-closure trust fund agreements and the investment policy(ies) governing those trusts. Material non-compliance with these audit areas could have had a direct and material effect on the RIRRC's financial statements."). Moreover, RIRRC alleges "[t]esting for compliance with the EPA Consent Decree should have included a review of the trust funds and the related investment requirements, including those contained in RIRRC's investment policies . . . ." (Expert Disclosures 6). Accordingly, OConnell, through affidavit, opined that "[h]ad Restivo informed me of the scope and nature of Van Liew's departure from RIRRC's investment policy, I would have addressed and ultimately ameliorated this non-compliance sooner, thereby preventing further losses." (OConnell Aff. ¶ 12). On the other hand, Hundley, a CPA and a partner in Restivo, averred that Restivo was not engaged to audit the trust funds to conform with EPA Consent Decrees; however, as part of its financial statement audits, did confirm that the EPA Trust Funds were invested in accordance with RIRRC's investment policy in effect during that time. See Hundley Aff. ¶ 7.

RIRRC also contends Restivo was not in possession of any documentation relating to any investment policy, i.e., the Investment Policy – Trust Funds (the Investment Policy) dated June 29, 1999. Centofanti Aff. ¶¶ 22-23; see also OConnell Aff. Ex. D. The Investment Policy

allegedly in effect in 2006, as RIRRC notes, required prior approval by the Board of Commissioners to purchase individually selected equity securities, a fact that RIRRC argues should have prompted Restivo to inquire further into Van Liew's engagement. See Centofanti Aff. ¶¶ 24-26. DeNigris stated that, based on a series of contested calculations to be discussed below, Van Liew's allegedly improper departure from RIRRC's investment policy resulted in a loss of $2,551,052. See DeNigris Aff. ¶¶ 1-2. But see David Truesdell Aff. ¶¶ 4-5, 11, Oct. 8, 2014 (negating any actual losses caused by Restivo with respect to continued engagement of Van Liew based on alternate theory of calculations of DeNigris' data).

**C**

**Land Purchase Transactions**

Among the host of issues brought to light in the Bureau's reports regarding RIRRC's alleged improper activity, the Bureau found that RIRRC had purchased several properties at highly inflated prices, over their market values, which led to significant costs associated with the environmental remediation efforts for those properties. See MDS ¶¶ 47-48; see also Wright Aff. Exs. L, M (noting, of the ten properties highlighted in the report, six were purchased at "prices exceeding market comparable statistics," and the other four required remediation or had questionable appraisal values, which led to those purchase prices being effectively rendered above market comparable statistics). All of these land purchases occurred prior to Restivo's engagement by RIRRC. See OConnell Dep. 142:6-9, May 23, 2012 (hereinafter OConnell Dep. III). In addition, the Bureau discovered, inter alia, several instances of transactional issues regarding conflicts of interest. See Wright Aff. Ex. M at 4, 31-39.

RIRRC, in its Expert Disclosures, alleges "Restivo failed to appropriately test and report the value of the land held for development by RIRRC." (Expert Disclosures 4). According to Centofanti, "[l]and is classified depending on whether it is: (a) used in operations; (b) held for

development; or (c) held for sale. This classification, in turn, dictates how the value of the land is reported in the financial statements. The classification also controls the type of audit procedures to be used in testing the carry value of the land reported." (Centofanti Aff. ¶ 28). Accordingly, Centofanti concludes that the land owned by RIRRC was misclassified as land held for development as opposed to land held for sale. See id. ¶¶ 29, 33. This misstatement and misclassification of approximately seventy acres of land, as RIRRC states, resulted in an overstatement of its total assets and net assets. See RIRRC's Obj. and Resp. to Restivo's First Set of Interrog. No. 2 at 16. As stated in CCR's financial statement audit for fiscal year 2008, "[t]he reclassification . . . of land from 'held for development' to 'held for sale' should have been made in FY07, and therefore [RIRRC] has restated and reduced its June 30, 2007 net assets by almost $14 million to reflect the write-down of the land from its cost basis to its net realizable value." (OConnell Aff. Ex. E at 5).

Based on this conclusion, however, Martin W. Terpstra (Terpstra), a CPA and Certified Fraud Examiner, avers that "[a] restatement of land values does not constitute a realized loss." (Terpstra Aff. ¶ 8). Moreover, Terpstra explains that it is the responsibility of management to value the land whereas it is the auditor's responsibility to determine whether that valuation is fairly presented in the financial statements. Id. at ¶ 7. Restivo asserts that such a change in value could have been caused by either changes in market conditions or any other plausible factor.

**D**

**Charitable Contributions**

As set forth in the MDS, RIRRC, over the course of several years, made a series of charitable contributions that totaled at least $2,100,000, of which approximately $585,000 was donated during Restivo's tenure. (MDS ¶ 23). According to James M. Walsh (Walsh), Controller at RIRRC, in October 2007, OConnell tasked Walsh with a special project to track

RIRRC's donations made by the Agency for the past five years. See Walsh Dep. 24:22-25:19, Aug. 28, 2012. Pursuant to that assignment, Walsh recorded all charitable donations and recycling grants made by RIRRC onto a spreadsheet. See id. at 26:2-24; see also Restivo's Ex. Q (listing contributions, donations, and sponsorships made by RIRRC from April 2, 2002 to June 30, 2007). OConnell testified that several prior charitable contributions raised his concern, including contributions for golf outings. See OConnell Dep. 144:20-145:17, Mar. 14, 2012 (hereinafter OConnell Dep. I).

RIRRC's approved budget for advertising and public relations services amounted to at least $1 million per year. See Restivo's Ex. F. According to Hundley:

> "All charitable contributions made by RIRRC were approved by the Board of Commissioners in open meetings or RIRRC management or by authorized RIRRC financial personnel in the ordinary course. Each was allocated to internal accounts ordinarily used by RIRRC in the ordinary course of its business and disclosed to its auditors. Charitable contributions approved by the Board in open meetings are transactions in the ordinary course of business and are not signs or indicators of fraud or abuse or illegality." Hundley Aff. ¶ 4. But see Centofanti Aff. ¶ 38 (stating approval by Board of Commissioners does not make charitable contributions permissible).

Restivo only tested transactions involving amounts above a level of materiality, and because it believed none of the individual charitable contributions rose to such a level during fiscal years 2006 or 2007, Restivo claims it was not required to give those contributions further scrutiny or report the contributions as part of its audits. (Hundley Aff. ¶ 4). Furthermore, Hundley explained "[n]o charitable gifts or other transactions were identified during the audit testing which caused Restivo to suspect fraud or other illegal acts or abuse had occurred or which constituted signs of fraud or abuse." Id. Be that as it may, OConnell asserts that had "Restivo informed [him] of this abuse during Restivo's tenure at RIRRC, [he] would have acted more swiftly to implement a change in policy to curtail this practice." (OConnell Aff. ¶ 11). Even

more, Centofanti states that the pattern of using public funds to "support non-mission related activities" would not be considered appropriate and, at the very least, was an indication of abuse. See Centofanti Aff. ¶ 37.

RIRRC filed its original Complaint against Restivo on July 30, 2010. Following substantial and voluminous discovery in this case, the instant Motion for Summary Judgment was filed on October 15, 2014. RIRRC filed its objection on November 14, 2014. Prior to the hearing on the Motion, a series of Motions to Strike were filed with the Court and are presently before it for decision. Of course, such motions are not without their respective objections. A hearing on the Motion was held on December 10, 2014, during which the Court permitted counsel for both RIRRC and Restivo to provide supplemental memoranda as to the issues raised at oral argument no later than December 17, 2014.[6]

**II**

**Standard of Review**

As our Supreme Court has often advised, "[s]ummary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the court determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law." Delta Airlines, Inc. v. Neary, 785 A.2d 1123, 1126 (R.I. 2001). In reviewing a motion for summary judgment, a trial justice "must review the pleadings, affidavits, admissions, answers to interrogatories, and other appropriate evidence from a perspective most favorable to the party opposing the motion." Estate of Giuliano v. Giuliano, 949 A.2d 386, 391 (R.I. 2008); see also Harold W. Merrill Post No. 16 Am. Legion v. Heirs-at-Law, Next-of-Kin & Devisees of Smith, 116 R.I. 646, 647, 360 A.2d

[6] While the Court notes Restivo's objection to RIRRC's filing of its supplemental memorandum through a Motion for Leave on December 23, 2014, the Court will, nonetheless, consider RIRRC's memorandum and its arguments set forth therein.

110, 111 (1976) ("On a motion for summary judgment we look first to the pleadings to ascertain the issues, and then to the affidavits, admissions, answers to interrogatories and other similar matters to determine whether there are any genuine issues of material fact. Only if there are none, do we then decide whether applicable law dictates the entry of summary judgment."). However, the Court is mindful that Super. R. Civ. P. 56 (Rule 56) does not permit "trial by affidavits;" indeed, it is not for the Court to resolve issues presented by competing affidavits. O'Connor v. McKanna, 116 R.I. 627, 633, 359 A.2d 350, 353 (1976); see Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962) ("[t]rial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"). With these rules in mind, the Court will proceed to review the voluminous and factually-intensive record now before it.

**III**

**Discussion**

In moving for summary judgment as to Counts I and II, Restivo's main argument centers on the nature of its duty to RIRRC as its auditor and accounting firm and whether the alleged damages incurred by RIRRC are, in any part, attributable to Restivo's alleged failures or omissions to detect and report the abuses then occurring at RIRRC during the course of performing its audits. Specifically, Restivo disputes each of the essential elements of RIRRC's claims for accounting malpractice and breach of contract with respect to each subject area of RIRRC's alleged failures (i.e., the Van Liew engagement, land transactions, charitable contributions, and internal controls). In opposition, RIRRC quite simply claims that there are too many factual issues to be decided in this case and thus summary judgment cannot enter at this juncture. With that said, RIRRC provided the Court with several affidavits and other evidentiary materials to support its contention that its causes of actions against Restivo should be left to a jury.

In order to best address each of the parties' arguments set forth in the papers, the Court will discuss the facts and legal principles of the accounting malpractice and breach of contract claims ad seriatim as to each of the main subject matters in this case. Finally, the Court then will discuss the several Motions to Strike which deal with matters largely contested for summary judgment purposes.

**A**

**Count I: Accounting Malpractice**

The MDS essentially alleges that Restivo committed malpractice during the course of its audits of RIRRC's financial statements and that, as a result of that malpractice, the wrongful conduct occurring at RIRRC was not properly discovered and reported, and RIRRC suffered more damages than it would have if Restivo performed its audits in accordance with the applicable accounting and auditing industry standards. Restivo's Motion papers, however, contend that all of RIRRC's allegations in the MDS are based on Restivo's purported "errors of omission and non-detection, as opposed to written errors in reports or miscalculation, inaccuracies in regard to data, or misstatement of data." (Restivo's Mot. Summ. J. 20). In support, Restivo alleges there is simply no evidence to indicate any violation of specific audit standards or procedures. Rather, Restivo contends that it had no general duty (and furthermore did not violate such duty) to identify any abuses or fraud then occurring at RIRRC. Restivo sets forth numerous exhibits and affidavits negating the allegations of a duty arising with respect to identifying these abuses

An action for accounting malpractice as defined in this jurisdiction subsumes those actions for negligence against professional defendants challenging "the quality, effectiveness, nature, or propriety of the professional services rendered . . . ." Bowen Court Assocs. v. Ernst & Young, LLP, 818 A.2d 721, 727 (R.I. 2003). "A civil malpractice claim is, in essence, a

negligence claim." Macera Bros. of Cranston, Inc. v. Gelfuso & Lachut, Inc., 740 A.2d 1262, 1264 (R.I. 1999); see Przygoda v. Clifford J. Deck, CPA, Inc., No. PB 09-1336, 2010 WL 1956239, at *3 (R.I. Super. May 12, 2010) (Silverstein, J.) (citing 57A Laura Hunter Dietz et al., Am. Jur. Negligence § 177 (2014)) ("The elements which govern ordinary negligence actions are also applicable in actions for professional negligence."). Accordingly, in order to prevail on a professional malpractice claim based on negligence, "a plaintiff must prove by a fair preponderance of the evidence not only a defendant's duty of care, but also a breach thereof and the damages actually or proximately resulting therefrom to the plaintiff." Richmond Square Capital Corp. v. Mittleman, 773 A.2d 882, 886 (R.I. 2001) (internal quotation marks omitted) (defining professional negligence standard in context of legal malpractice claim). A party who fails to prove those essential three elements will be denied recovery. Id. (citing Vallinoto v. DiSandro, 688 A.2d 830, 836 (R.I. 1997).

**1**

**Applicable Standard of Care and Breach of Duty**

As an action for accounting malpractice must be proved through the elements of ordinary negligence, RIRRC must allege against Restivo: (1) a legally cognizable duty owed to RIRRC; (2) a breach of that duty; (3) the conduct proximately caused RIRRC's injury; and (4) actual loss or damage. Medeiros v. Sitrin, 984 A.2d 620, 625 (R.I. 2009) (citing Santana v. Rainbow Cleaners, Inc., 969 A.2d 653, 658 (R.I. 2009)); see also Georgetti v. United Hosp. Med. Ctr., 611 N.Y.S.2d 583, 584 (N.Y. App. Div. 1994) ("A claim of professional negligence requires proof that there was a departure from the accepted standards of practice and that the departure was a proximate cause of the injury."). In asserting a cause of action for professional negligence, a plaintiff carries the burden to "'establish a standard of care and prove, by a preponderance of the evidence, that the defendant deviated from that standard of care.'" Medeiros, 984 A.2d at 625

(quoting Riley v. Stone, 900 A.2d 1087, 1095 (R.I. 2006)). As this Court explained in Przygoda, "[t]he standard of care applicable in professional negligence action is the degree of care which a reasonably prudent person, with the special knowledge or skills the defendant possesses, would have exercised under the same or similar circumstances." Przygoda, 2010 WL 1956239, at *3 (citing Dietz et al., supra, at § 177).

At the outset, and as RIRRC and Restivo both seem to agree, the current industry standards for auditors include GAAS and GAAP, as well as the Government Auditing Standards (also referred to as the Yellow Book).[7] See, e.g., Sharp Int'l Corp. v. KPMG LLP (In re Sharp Int'l Corp.), 278 B.R. 28, 33 (Bankr. E.D.N.Y. 2002) (citing United States v. Arthur Young & Co., 465 U.S. 805, 811 (1984) ("[GAAS], promulgated by the [AICPA], are the accepted standards of practice for auditors."). What the parties seem to disagree upon, however, is what exactly is required under a "Yellow Book audit," specifically with respect to whether such standards mandated a "heightened duty" being conferred upon Restivo. Indeed, Restivo maintains, throughout its memorandum, that it cannot be held liable for a breach of a duty owed to RIRRC for any alleged failures or omissions to detect fraud or abuses because it was under no such duty as defined in the applicable auditing standards and procedures.

An auditor undertakes to use the same skill and professional care that a reasonably skillful and prudent auditor would use under the same or similar circumstances while conducting its audits in accordance with GAAS and professional guidelines. Mishkin v. Peat, Marwick, Mitchell & Co., 744 F. Supp. 531, 538 (S.D.N.Y. 1990). Furthermore, "[a]ccounting malpractice or professional negligence contemplates a failure to exercise due care and proof of a material deviation from the recognized and accepted professional standards for accountants and auditors,

[7] As one federal circuit court has held, an accountant's good faith compliance with GAAP and GAAS satisfies the accountant's requirement to act with reasonable care. See Monroe v. Hughes, 31 F.3d 772, 774 (9th Cir. 1994).

generally measured by GAAP and GAAS promulgated by the [AICPA], which proximately causes damage to plaintiff." Cumis Ins. Soc'y Inc. v. Tooke, 739 N.Y.S.2d 489, 493 (N.Y. App. Div. 2002). However, compliance with those standards does not end the Court's inquiry; as the Court of Appeals of Oregon has explained:

> "[the AICPA standards] are principles and procedures developed by the accounting profession itself, not by the courts or the legislature. They may be useful to a jury in determining the standard of care for an auditor, but they are not controlling. The amount of care, skill and diligence required to be used by defendant in conducting an audit is a question of fact for the jury, just as it is in other fields for other professionals." Maduff Mortg. Corp. v. Deloitte Haskins & Sells, 779 P.2d 1083, 1086 (Or. App. 1989).

Beyond the fact that the degree to which an accounting firm complied with those standards are questions of fact for the jury, an inquiry into establishing whether Restivo breached its duty to RIRRC also depends on what was agreed to in its initial contract. See Russell L. Wald, Accountant's Malpractice Liability to Client, 92 A.L.R.3d 396, at § 2[a] (originally published in 1979) ("Since an accountant's obligation to his client may be largely controlled by his employment contract, a frequently recurring factor influencing the courts' decisions whether such liability was established or supportable has been the specific terms of the contract, or the court's construction of the parties' agreement."); cf. Grant Thornton, LLP v. F.D.I.C., 535 F. Supp. 2d 676, 709 (S.D.W. Va. 2007) ("Accountants long have recognized that generally accepted accounting principles are far from being a canonical set of rules that will ensure identical accounting treatment of identical transactions in all cases."), rev'd sub nom., Ellis v. Grant Thornton LLP, 530 F.3d 280 (4th Cir. 2008).

The facts of this case present the occasion for the Court to briefly differentiate among the minute subtleties relating to Restivo's duty of care owed to RIRRC and the appropriate standard of care. First, while it is a well-established principle that "[t]he existence of a legal duty is

purely a question of law, and the court alone is required to make this determination," Kuzniar v. Keach, 709 A.2d 1050, 1055 (R.I. 1998), it is not the role of the Court to opine as to the amount of care required by Restivo in its audits. See Cumis, 739 N.Y.S.2d at 492-94 (concluding issue of fact existed on whether accounting firm departed from requisite standard of care in performing its audits when failing to discover irregularities, errors and defalcations in company's financial statements). As the Rhode Island Supreme Court discussed in Kuzniar, "the trial justice should determine whether the law imposes a legal duty upon the defendant in the particular factual circumstances presented in any given case . . . however, the trial justice may require assistance from the trier of fact if the duty-triggering facts are disputed and the evidence shows that a reasonable jury could reach different conclusions on this issue."[8] Kuzniar, 709 A.2d at 1055. Yet, the Court would be incorrect, and its reliance on Kuzniar misplaced, if it were to hold that there is a question of material fact as to any "duty-triggering facts." This case is not one where the facts give rise to a dispute on whether a legal duty existed between Restivo and RIRRC to detect and report fraud or abuse; this case is one where the facts give rise to a dispute on whether any failure by Restivo to detect and report fraud or abuse constituted a departure from the accepted professional standard of care.[9]

[8] The Kuzniar Court elaborated on this issue in an important footnote relevant to the Court's inquiry in this matter. The Court explained the duty analysis as follows:

> "'[I]t is often said that the court decides whether the defendant owed to plaintiff any duty to use due care at all * * *. Yet the general rule has too often been stated without enough critical appraisal. The duty issue, like any other, can be broken down into (a) rules and (b) the application of those rules to the concrete facts of a given case. Here as elsewhere the court lays down the rules. But the application of those rules to particular facts should be, and in fact usually is, committed to the jury on the duty issue as upon any other.'" Id. at 1056 n.10 (quoting F. Harper et al., The Law of Torts § 18.8, at 743 (2d ed. 1986)).

[9] As the Arizona Supreme Court has previously explained:

In other words, it is without question here that Restivo, in fact, owed a duty to RIRRC in performing its audits—a duty to use the skill and care as that of a reasonably prudent auditor under the circumstances. That is not disputed. Rather, at issue is whether Restivo complied with the proper standard of care in the performance of its audits of RIRRC's financial statements. On that point, there is a fundamental divide between the parties as to the degree of care required under the Yellow Book and under the other applicable industry standards, as well as Restivo's contract with RIRRC. Indeed, what troubles the Court—and ultimately leads the Court to deny summary judgment—is the fact that both of the parties' evidence suggests varying amounts of care, skill, and diligence required by Restivo to determine if it breached its duty to audit as a reasonably prudent auditor under like circumstances. See Maduff, 779 P.2d at 1086; Cumis, 739 N.Y.S.2d at 494 (noting question of fact as to accounting firm's breach of contract and professional obligations to audited company).

Specifically, RIRRC contends that Restivo was bound by additional, "heightened" audit and reporting responsibilities set forth in the Yellow Book, beyond what shall be termed non-

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> "The existence of a duty of care is a distinct issue from whether the standard of care has been met in a particular case. As a legal matter, the issue of duty involves generalizations about categories of cases. Duty is defined as an obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. The standard of care is defined as [w]hat the defendant must do, or must not do . . . to satisfy the duty. Whether the defendant has met the standard of care—that is, whether there has been a breach of duty—is an issue of fact that turns on the specifics of the individual case." Gipson v. Kasey, 150 P.3d 228, 230 (Ariz. 2007) (internal citations and quotation marks omitted); accord 57A Laura Hunter Dietz et al., Am. Jur. 2d Negligence § 77 (2d ed. 2015) ("The existence of a duty is not to be confused with details of the applicable standard of conduct. Duty is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; what the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty.").

Yellow Book audits. See Centofanti Aff. ¶¶ 11-12. Contrary to RIRRC's assertions regarding Centofanti's conclusions about the applicable Yellow Book standards and whether Restivo performed in accordance with those provisions, Restivo (in its supplemental memorandum) makes clear that it disagrees with the principle that the Yellow Book requires Restivo to have identified and reported the various abuses then occurring at RIRRC. This disagreement essentially involves a question of fact as to the establishing of the proper standard of care, rather than a question as to the establishment of a legal duty.

Even though Restivo maintains that there is no disagreement between the expert witnesses regarding the standard of care applicable, the Court disagrees. Essentially, the dispute of the Yellow Book and the corresponding arguments set forth in the papers and affidavits is directly related to the amount of care required by Restivo in its professional obligations to RIRRC. As the Maduff court concluded, compliance with the AICPA standards is not controlling on issues of how much care was appropriate in conducting an audit and do not serve as the only measure for evaluating an auditor's alleged inadequacy. See Maduff, 779 P.2d at 1086. Importantly, any interpretation of those standards as to the level of skill or diligence required by an auditor should be a task for the jury and not one for the Court on summary judgment. It is abundantly clear to the Court that if the Court were to weigh in on this dispute regarding the standard of care, and any deviation thereof, relative to the main subject areas of this case, it would run counter to this jurisdiction's long-established rules relative to the role of a trial justice on a motion for summary judgment. See O'Connor, 116 R.I. at 633, 359 A.2d at 353 (noting trial justice's role on summary judgment is issue finding, not issue determination).

What the Court is basically presented with here is a factual dispute between the parties' respective experts on the second prong of establishing a cause of action for professional negligence. As indicated, RIRRC's expert witness, Centofanti, cites to the Agreement for the

proposition that Restivo was under a higher level of responsibility for detecting fraud or abuses of RIRRC. See Centofanti Aff. ¶¶ 10-12 (noting, among other opinions, Restivo was obligated to report indications of fraud or abuse without regard for materiality). Alternatively, Restivo's expert witness, Terpstra, offers different conclusions, avering an auditor may rely on representations made by a company's management with respect to financial statements being audited and that "in the absence of any knowledge of alleged breaches of fiduciary duty at RIRRC, Restivo had no duty as a financial statement auditor to stop these alleged practices."[10] Terpstra Aff. ¶¶ 3, 5. While these are only some of the many examples of conflicting conclusions in the evidentiary materials proffered by Restivo and RIRRC, it is evident that it is not the Court's role in the instant matter to determine the existence of the predicate facts establishing the standard of care and the degree to which Restivo was required to abide by it. See Fisherman's Wharf Assocs. II v. Verrill & Dana, 645 A.2d 1133, 1136 (Me. 1994) (quoting Levesque v. Chan, 569 A.2d 600, 602 (Me. 1990)) ("[W]hether the expert's testimony accurately reflects the standard of care applicable to the circumstances of the case is 'a question of fact to be resolved by the trier of fact.'").

On this issue, a further determination must be made as to whether Restivo knew or should have known about the abuse occurring at the RIRRC during the course of its audit. This determination would require the Court to opine on the credibility of the parties' proffered expert testimony on issues of the standard of care and, arguably, for the Court to determine what evidence ultimately is more persuasive. See O'Connor, 116 R.I. at 633, 359 A.2d at 353 ("[I]n passing upon a motion under this rule the court will not resolve issues posed by competing oaffidavits [sic]."); Fisherman's Wharf, 645 A.2d at 1136. Again, as several courts have

[10] While the parties may use the terms duty and standard of care interchangeably at times in their filings, the Court finds that there is no issue of fact relative to the duty prong of this professional negligence action. As explained, the issues of fact pertain to the standard of care as to whether a breach of Restivo's duty occurred.

indicated, such a determination should be left for a jury. See, e.g., Rodriguez v. City of New York, 72 F.3d 1051, 1064 (2d Cir. 1995) ("[I]t [is] beyond the province of the court on a motion for summary judgment to decide between the experts' competing testimony on the question of what were the generally accepted standards in the medical community as to the circumstances that warrant a physician's order of emergency involuntary commitment."); Gilmore v. Vill. Green Mgmt. Co., 897 N.E.2d 1142, 1148 (Ohio App. 2008) ("Given that both parties offer competing expert testimony as to the cause of the fire that destroyed the plaintiffs' belongings, we find that summary judgment was improperly granted."); Saliba v. State of Indiana, 475 N.E.2d 1181, 1189 (Ind. Ct. App. 1985) ("It is not the trial court's function to dispute the validity of an opinion rendered by a competent and qualified expert. Once the basis for an expert's opinion is established, in the instant case the foundational testimony for admission of the poll, the effect of objections or competing expert testimony is restricted to the weight attributed to the opinion by the fact-finder."). As the Court finds genuine issues of material fact relative to the standard of care applicable in this case, the Court finds that summary judgment is inappropriate.

However, even assuming the Court could rule on the standard of care, the Court notes several other similar questions of fact riddled throughout the parties' arguments on the element of breach of Restivo's duty regarding four main areas. Specifically, RIRRC asserts in its memorandum opposing the Motion the following broad categories of failures as evidence of Restivo's violation of its standard of care: "(1) Restivo failed to test RIRRC's compliance with laws and regulations, as well as its own investment policies; (2) Restivo failed to properly classify and test the value of land held by RIRRC; (3) Restivo failed to identify and report the abusive pattern of unjustified 'charitable contributions'; and (4) Restivo failed to identify and report internal control deficiencies that plagued RIRRC." (RIRRC's Mem. in Supp. of Obj. Mot. Summ. J. 2). The Court will briefly review the factual questions presented as to each category.

First, Restivo moves for summary judgment as to its alleged violation of its audit duties regarding several land purchase transactions, arguing it was under no duty to independently appraise the values of the land purchased during the fiscal years during which Restivo audited the financial statements. See Terpstra Aff. ¶¶ 7-8. Moreover, Restivo maintains it is entitled to judgment as a matter of law because there was no duty to retroactively value the land prior to Restivo's engagement by RIRRC. See id.; Hundley Aff. ¶ 5. To counter, RIRRC submits expert opinion stating that relying on past values of land is inappropriate and that certain classifications of land were misstated. See Centofanti Aff. ¶¶ 29-33. As a result, the Court is not in a position to determine which expert proffers the correct interpretation of the Yellow Book as to the underlying facts of this case, as reviewed above. See Rodriguez, 72 F.3d at 1064. As to the issues involving Restivo's alleged failures regarding land purchase transactions, summary judgment is denied.

Second, Restivo moves for summary judgment as to the engagement of Van Liew and the EPA Trust Funds, alleging there can be no breach because there was no general duty to audit the EPA Trust Funds and, moreover, all EPA Trust Funds were in accordance with RIRRC's investment policies. See Hundley Aff. ¶ 7. RIRRC's expert, Centofanti, found, in his opinion, that there was no compliance testing of public procurement statutes, rules and regulations, the EPA Consent Decree, and RIRRC's enabling legislation, as required under the provisions of the Yellow Book. See Centofanti Aff. ¶¶ 16-18. Additionally, RIRRC presents that Restivo breached its audit duties because it failed to engage in the required compliance testing of the EPA Trust Funds with RIRRC's investment policies. See id. ¶ 24. As to the disputed factual issues regarding the scope of the engagement of Van Liew and Restivo's alleged breaches, summary judgment must be denied.

Third, Restivo moves for summary judgment on the issue of breach of duty relative to alleged inadequate internal controls. Restivo maintains there were no material deficiencies in its internal controls noted during the course of its audits. See Terpstra Aff. ¶ 10. RIRRC succeeds in presenting genuine issues of material fact as to this subject area based on Centofanti's interpretation of the Yellow Book standards requiring a report on internal controls without regard to materiality. See Centofanti Aff. ¶¶ 41-43. As RIRRC contends, Restivo breached its duty when it failed to report the deficiencies in its management letters for the 2006 and 2007 audits even though they were indeed identified in Restivo's workpapers. See id. at ¶¶ 44-45. The dispute as to whether Restivo was under a duty to report internal control deficiencies appears to center on a disagreement between experts and, accordingly, summary judgment is denied. See Fisherman's Wharf, 645 A.2d at 1136.

Fourth and last, Restivo moves for summary judgment on the issue of charitable contributions on the basis that not only did the contributions predate Restivo's engagement by RIRRC but that Restivo was under no duty to question expenses recorded in the ordinary course of business. See Terpstra Aff. ¶¶ 6, 11. Moreover, Restivo argues any harm caused by RIRRC's practice of charitable contributions was solely the fault of RIRRC and not the result of any accounting audit malpractice. Again, RIRRC directly counters Terpstra's opinions in asserting that in performing its audit, Restivo should have questioned certain contributions made by RIRRC based on a review of Restivo's overall mission, regardless of whether the contributions were Board approved. See Centofanti Aff. ¶¶ 34-38. Centofanti's conclusions that these contributions should have raised a "red flag" necessarily require the Court to opine as to whether a reasonable auditor, in accordance with its required standard of care, would have questioned such contributions as proper in understanding RIRRC's general purpose. See id. at ¶ 37. As it is the duty of the fact finder—and not the Court—to resolve such issues, summary judgment as to

this fourth subject area must fail. See Estate of Giuliano, 949 A.2d at 391 (noting purpose of summary judgment procedure is to find the issues, not to determine them).

**2**

**Causation and Damages**

The Court's above findings relative to the issues of the standard of care applicable in this case justify a denial of summary judgment; however, the Court notes similar findings are warranted with respect to the elements of causation and damages. Accordingly, the Court need not spend time repeating those arguments relative to these issues that were already addressed above. For purposes of a claim for professional malpractice, "[i]t is well settled that in order to gain recovery in a negligence action, a plaintiff must establish . . . proximate causation between the conduct and the resulting injury, and the actual loss or damage." English v. Green, 787 A.2d 1146, 1151 (R.I. 2001) (internal quotation marks omitted). Indeed, "'[p]roximate cause is established by showing that but for the negligence of the tortfeasor, injury to the plaintiff would not have occurred.'" Id. (quoting Skaling v. Aetna Ins. Co., 742 A.2d 282, 288 (R.I. 1999).

As RIRRC correctly explains, fact questions again preclude a finding of summary judgment in favor of Restivo on these two elements of RIRRC's professional negligence count. Restivo's arguments relative to causation appear to set forth (for each of the main subject areas of RIRRC's claims) that it cannot be the proximate and actual cause of RIRRC's losses because there was no duty for Restivo to monitor such activity. Restivo first denies liability with respect to charitable contributions based on the assertion that it was not charged with monitoring the day-to-day expenses of RIRRC. As Restivo maintains, RIRRC is not alleging that it violated any accounting audit standard relative to charitable gifts. In fact, Restivo contends that the improper contributions would have continued despite whether Restivo noted such curious spending patterns. Similarly, Restivo next argues that it had no duty to independently value land that was

purchased prior to their retention. Such arguments on causation largely mirror the arguments presented above. With respect to Van Liew, Restivo again argues there is no duty to inquire into the specifics of Van Liew's retention, and, as a result, RIRRC fails to show any causation as to how, if Restivo acted, Van Liew would have been terminated sooner than was actually done.

In response, RIRRC relies on its overarching contention that issues of causation and damages are best left to a jury, and that arguments surrounding what RIRRC would have done if Restivo brought the various "abuses" to its attention are also best left to the same.[11] More specifically, RIRRC argues that if the appropriate standard of care was followed by Restivo during the course of its audits, then RIRRC could have ended its abusive practices sooner and avoided its claimed damages. As both parties submit expert testimony to support their respective arguments, the Court cannot say as a matter of law whether Restivo actually or proximately caused RIRRC's claimed damages. See Seide v. State, 875 A.2d 1259, 1270 (R.I. 2005) ("The issue of proximate cause was a determination for the jury."). But see Geloso v. Kenny, 812 A.2d 814, 818 (R.I. 2002) ("[A]lthough a jury could have found proximate cause, the trial justice correctly kept the case from the jury because defendants had no duty to provide a handrail."). Indeed, the Court is mindful of the general reluctance of courts in Rhode Island to decide issues of negligence on summary judgment. See, e.g., DeMaio v. Ciccone, 59 A.3d 125, 130 (R.I. 2013) (internal quotation marks omitted) ("The motion justice may treat the issue of negligence as a matter of law only if the facts suggest only one reasonable inference."); Gliottone v. Ethier, 870 A.2d 1022, 1028 (R.I. 2005) (quoting Rogers v. Peabody Coal Co., 342 F.2d 749, 751 (6th Cir.1965) ("[W]e note that it has been widely recognized that 'issues of negligence are ordinarily

[11] RIRRC here cites to this Court's previous decision in Anjoorian v. Arnold Kilberg & Co., No. PB-97-1013, 2006 WL 3436051, at *10 (R.I. Super. Nov. 27, 2006) (Silverstein, J.), for the proposition that a party *is* entitled to prove what it would have done in a certain case. In that case, summary judgment was declined to allow the plaintiff the opportunity to prove whether he would have liquidated his shares if certain loan loss reserve figures had been included in the defendant's financial statements. See id.

not susceptible of summary adjudication, but should be resolved by trial in the ordinary manner.'"); DeNardo v. Fairmount Foundries Cranston, Inc., 121 R.I. 440, 448, 399 A.2d 1229, 1234 (1979) ("In Rhode Island the general rule is that negligence is a question for the jury unless the facts warrant only one conclusion.").

As stated above, the dispositive findings in this case appear to hinge on whether Restivo abided by the appropriate standard of care and thus could proximately and actually be held liable for RIRRC's resulting damages. The issues of causation and damages inherently flow therefrom and, in essence, reassert the same line of reasoning relative to the issue of breach of duty (i.e., if Restivo is not required to affirmatively investigate for past fraud or ongoing abuses then Restivo is not the cause of—and therefore not liable for—RIRRC's alleged damages). Indeed, many of Restivo's arguments on these issues, as well as other miscellaneous arguments peppered throughout its voluminous Motion, point to the fact that RIRRC does not allege that there were any miscalculations or errors in their reports, but rather it failed to recognize certain abuses. In fact, Restivo disputes whether RIRRC even suffered any losses with respect to the main subject areas of this claim. Simply put, the Court cannot say as a matter of law that only one reasonable inference results from these facts. See DeMaio, 59 A.3d at 130. Essentially, because these issues are factual in nature, and based on the extensive expert testimony in the record of this case—including the competing expert testimony on the issues of breach of duty—the fact finder should resolve these issues. See Berman v. Sitrin, 101 A.3d 1251, 1267 (R.I. 2014) (internal quotation marks omitted) ("It is well established that, in a negligence action, whether a particular duty has been breached and whether proximate cause [exists] are . . . questions for the factfinder."). But see Boccasile v. Cajun Music Ltd., 694 A.2d 686, 690 (R.I. 1997) (holding summary judgment appropriate in medical malpractice action when plaintiff failed to provide

expert affidavits or other evidence on the applicable standard of care, any deviations therefrom, and as to proximate cause).

Accordingly, the Court need not dwell on the same arguments relative to the standard of care on which the Court has already ruled and thus holds that summary judgment as to the four main subject areas relative to causation and damages is denied.

**B**

**Count II: Breach of Contract**

In Count II of the MDS, RIRRC alleges a claim for breach of contract, arguing Restivo failed to conform with the terms of the Agreement by violating the applicable auditing standards, as set forth above. See MDS ¶¶ 72-75. Additionally, the MDS alleges various other breaches of the Agreement that allegedly required Restivo to, inter alia, identify and report on the violations or wrongdoing at RIRRC to ensure that the financial statement audits are free of material misstatements. See id. ¶¶ 76-81. As to this count, Restivo has moved for summary judgment.

In order to prevail on a claim for breach of contract, a plaintiff "must not only prove both the existence and breach of a contract, he also must prove that the defendant's breach thereof caused him damages." Petrarca v. Fid. & Cas. Ins. Co., 884 A.2d 406, 410 (R.I. 2005). The plaintiff in a breach of contract action has the burden of proof to show that the defendant indeed breached the contract. Gorman v. St. Raphael Acad., 853 A.2d 28, 37 (R.I. 2004). As our Supreme Court has noted, a claim for breach of contract consists of finding an offer, acceptance, consideration, a breach thereof, and damages resulting therefrom. See id. at 33; cf. Smith v. Boyd, 553 A.2d 131, 133 (R.I. 1989) (outlining applicable principles of contract formation).

In the instant case, the Court need look no further than the issue of whether Restivo performed its financial statement audits in accordance with the Yellow Book, GAAS, and/or GAAP in order to find a genuine issue of material fact to justify a denial of summary judgment

as to this count. See Multi-State Restoration, Inc. v. DWS Props., LLC, 61 A.3d 414, 418 (R.I. 2013) (finding summary judgment inappropriate where issues of material fact existed as to establishing a breach of the parties' contract). While the parties here do not specifically address the respective elements of a breach of contract action in their Motion papers, the competing conclusions drawn from the experts' affidavits regarding, for example, conformity with the standard of care as to the accounting malpractice cause of action, are equally applicable to this count and serve as ample support for the Court to conclude that summary judgment is inappropriate. Establishing whether Restivo performed according to the accepted industry standards during the course of its audits (as Restivo specifically so contracted to do in the Agreement) is unquestionably best left to be resolved by a fact finder. See id. This same conclusion is also warranted as to all factual issues of causation and damages. Accordingly, summary judgment must be denied as to Count II.

**C**

**In Pari Delicto Doctrine**

Restivo also presents the in pari delicto doctrine[12] in support of its argument that RIRRC's claims against it (Count I and Count II) are barred because RIRRC was the "primary wrongdoer" during the years of its engagement and thus cannot be liable to RIRRC for RIRRC's own wrongdoing. In support of this theory, Restivo cites to the Delaware Chancellery Court's decision in Am. Int'l Grp., Inc. v. Greenberg, 965 A.2d 763 (Del. Ch. 2009), aff'd sub nom. Teachers' Ret. Sys. of Louisiana v. PricewaterhouseCoopers LLP, 11 A.3d 228 (Del. 2011), for the proposition that an accounting firm cannot be held liable for alleged negligent auditing of a corporation where that corporation's directors, officers, and employees used that negligent

[12] The common-law defense of in pari delicto (from the full legal maxim in pari delicto potior est conditio defendentis) is defined to mean "[t]he principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." Black's Law Dictionary 911 (10th ed. 2014) (defining "in pari delicto doctrine").

performance to carry out unlawful schemes that resulted in material misstatements of the corporation's books and records, even if the auditor could have detected that fraud through the use of proper audit procedures. Moreover, Restivo asserts the "adverse interest" exception does not apply here because there is no evidence which definitively shows that internal corruption indeed occurred at RIRRC. See Restivo's Mem. in Supp. of Mot. Summ. J. 54 (citing to Walsh deposition for proposition that no internal corruption occurred at RIRRC); see also Walsh Dep. 22:10-24:6. As a result, Restivo argues that the wrongdoing can be imputed to RIRRC and, thus, the doctrine (and the greater wrong committed by RIRRC) bars any claims against Restivo.

On this point of contention, RIRRC sets forth five arguments countering Restivo's affirmative defense. RIRRC contends the following: (1) the doctrine does not apply under the narrow application in Rhode Island in unlawful or fraudulent contract cases; (2) the doctrine does not apply where the wrongdoer is not a party to the action where the defense is asserted (as the "adverse insiders" at the RIRRC are no longer in control); (3) the adverse interest exception applies because the former actions by RIRRC personnel cannot be imputed to RIRRC; (4) public policy prevents the doctrine's application in this case to a public corporation; and (5) genuine issues of material fact remain to defeat the defense.

In Rhode Island, the doctrine of in pari delicto is applied where both parties have committed some wrongdoing and, as a result, both parties will be prevented from recovering. See, e.g., Sullivan v. Hergan, 17 R.I. 109, 20 A. 232, 233 (1890) ("Both parties are in pari delicto, and the law will, for that reason, not aid either party to enforce the contract, but leaves them where it finds them. . . . [B]oth parties are to be regarded as equally in fault, and the law will lend its aid to neither."); see also R. I. Econ. Dev. Corp. v. Wells Fargo Sec., LLC, No. PB-12-5616, 2013 WL 4711306, at *27 (R.I. Super. Aug. 28, 2013) (Silverstein, J.) (internal citations omitted) (quoting Baena v. KPMG LLP, 453 F.3d 1 (1st Cir. 2006)) ("In pari delicto

literally means 'in equal fault.' It 'is a doctrine commonly applied in tort cases to prevent a deliberate wrongdoer from recovering from a coconspirator or accomplice.'"). Moreover, the "adverse interest" exception to the doctrine generally provides "a wrongdoer's fraudulent acts will not be imputed to a corporation when the wrongdoer is acting contrary to the corporation's present interests." Nisselson v. Lernout, 469 F.3d 143, 156 (1st Cir. 2006).

As RIRRC contends here, the "adverse interest" exception should apply to bar application of the in pari delicto doctrine because several individuals at RIRRC were acting in contravention to RIRRC's interests. However, Restivo disagrees, primarily arguing the exception cannot apply because no internal fraud conclusively was found to have occurred at RIRRC after Restivo was retained in August 2006. Compare Walsh Dep. 28:16-33:25 (denying any personal knowledge of wrongdoing occurring at RIRRC after January 1, 2006) with Wright Aff. Ex. AA (noting Michael Salvadore's, member of the Board, objection in email correspondence to OConnell's questioning of certain charitable contributions) Thus, when Restivo was engaged by RIRRC, the wrongful conduct occurring prior to that time cannot be attributed to Restivo because it was, at best, the "secondary accomplice" in continuing that wrongdoing. Relying on Greenberg, Restivo maintains any negligence or breach of contract as to the wrongdoing occurring prior to Restivo's engagement in 2006 was not the "greater wrong" in comparison to RIRRC's intentional wrongdoing. See Greenberg, 965 A.2d 763.

Assuming the Court were to even find that the doctrine is applicable here—without getting to the issues of the alleged narrowness of the doctrine in Rhode Island or RIRRC's raised public policy concerns—whether the adverse interest exception applies presently begs the Court to improperly weigh in on factual questions. On this central dispute, RIRRC's argument carries the day. There are, at the very least, disputed issues of fact which prevent the Court from

conclusively saying the adverse interest exception applies or not because the Court cannot say, as a matter of law, that RIRRC's misconduct was greater than Restivo's alleged malpractice.[13]

First, the court in Greenberg explained that "New York courts have consistently applied the in pari delicto doctrine to bar claims against auditors in situations where the auditors failed to detect or expose fraud committed by top corporate managers." Greenberg, 965 A.2d at 825 (noting New York courts' reliance on the decision of Cenco Inc. v. Seidman & Seidman, 686 F.2d 449 (7th Cir. 1982) for the proposition that immunizing auditors from malpractice claims is good public policy). In concluding that the malpractice and breach of contract claims against the accounting firm should be dismissed on a Super. R. Civ. P. 12(b)(6) (Rule 12(b)(6)) basis—per the application of the doctrine—the court in Greenberg declined to apply the adverse interest exception based on the lack of facts pled in the complaint.[14] See id. at 826-28. Specifically, the court explained:

> "As indicated, [the adverse interest] exception only applies when the corporate insiders have acted entirely for their own benefit and without any intention to benefit the corporation. That is not the situation that existed here. The pled facts do not support any inference except that Greenberg and his subordinates wanted AIG to benefit in the first instance from the misconduct, and that they would derive their gains from those reaped by AIG, in the form of

[13] In support of this argument, RIRRC directs the Court to Zimmerman v. Brown, 306 P.3d 306, 314-15 (Kan. App. 2013). In that case, the court provided the following relevant discussion:

> "We *do not* find that the defense of in pari delicto will be inapplicable after the disputes of material fact in this particular case are resolved by a jury. We merely find that the plaintiffs have satisfied their burden to provide evidence sufficient to create a factual dispute regarding the parties' relative appreciation of the wrongfulness of their actions and that this factual dispute is material to the outcome of this case because its resolution bears directly on whether the in pari delicto doctrine applies to prohibit the plaintiffs from recovering damages from the defendants for legal malpractice." Id. (emphasis in original).

[14] It is important to note that the Greenberg court analyzed the doctrine through the lens of a Rule 12(b)(6) motion, whereas here, the Court is faced with a Rule 56 motion, requiring the Court to apply a very different standard of review.

> higher actual revenues, higher reported earnings, and a higher stock price. . . . [T]he Complaint does not support any conclusion other than that AIG's directors and officers acted, at least in part, to benefit AIG." Id. at 827.

Simply put, the Court is not in a position based on the disputed facts in the record to follow Greenberg, and the other cited New York case law, suggesting that summary judgment dismissing the claims here against Restivo should be granted because the claims are barred by the doctrine of in pari delicto.

In support for Greenberg's conclusion, the court made express reference to the fact that there was no triable issue as to whether the corporation or the accounting firm was more culpable. See id. at 831 n.245. In spite of that conclusion, and because this Court is presented with a motion for summary judgment, this Court is faced with a dissimilar situation. RIRRC has set forth ample evidence that "adverse insiders" indeed may have been acting in contravention to RIRRC's benefit. See generally, e.g., Wright Aff. Ex. L (providing preliminary report of Bureau outlining numerous instances of misconduct allegedly occurring at RIRRC); RIRRC's Obj. and Resp. to Restivo's First Set of Interrog. No. 2 (reviewing instances of misconduct occurring at RIRRC by "adverse insiders"). Consequently, and unlike Greenberg, where the court contemplated the corporation and the accounting firm would be, under New York law, equally at fault, a determination here as to which party is more at fault is factual in nature. See Greenberg, 965 A.2d at 831 n.245. Moreover, and importantly, as that court noted, a conclusion that no triable issue existed to warrant dismissal under Rule 12(b)(6) was indicative of New York law and not necessarily guided by its established Delaware law. Id. at 827-28. In a lengthy footnote, the court opined that:

> "[It] would be chary about following the New York approach. . . . Without simplifying the issue or *in any way* suggesting that auditors can reliably detect high-level financial fraud, one can confidently say that auditors are as well, or arguably even better, positioned than independent directors to do so. Indeed, although

> auditors give no warranty that they can detect fraud, the requirement for public companies to employ auditors is in large measure inspired by the recognition that corporate insiders have more than rarely been known to engage in financial shenanigans." Id. at 828 n.246.

The court there noted its reservations about applying the doctrine as to which entity was more or less responsible for the alleged wrongdoing. See id. Here, without any Rhode Island case law guiding this Court's analysis, the Court simply holds that a jury is in the better position to determine who, if either, is the "greater wrongdoer" in this case and whether any wrongdoing by "adverse insiders" can be imputed to RIRRC. See Baena, 453 F.3d at 7 (reviewing adverse interest exception under Massachusetts law).

Furthermore, there are additional factual issues as to whether any fraudulent conduct indeed occurred during the contested timeframe. For example, RIRRC recommends a finding of the applicability of the in pari delicto doctrine be denied on summary judgment because RIRRC sets forth evidence questioning whether fraud occurred after Restivo's retention in 2006. See RIRRC's Obj. and Resp. to Restivo's First Set of Interrog. No. 2. However, as Restivo claims, Walsh (the Controller at RIRRC) testified in his deposition that he had no knowledge of corruption at RIRRC from 1999-2012; where RIRRC maintains RIRRC "was riddled with commissioners and employees acting adversely to RIRRC's interests." See RIRRC's Mem. in Supp. of Obj. Mot. Summ. J. 41. Such factual disputes prevent the Court at this juncture from finding whether the doctrine should be applied more expansively in this instance or whether RIRRC's purported public policy analysis should be engaged. As a result, summary judgment as to the defense of in pari delicto is denied.

**D**

**Remaining Arguments Presented in Restivo's Motion**

Through its supporting memorandum, Restivo requests the Court narrow a host of issues in anticipation of trial and to grant partial summary judgment as to these claims. See Restivo's Mem. in Supp. of Mot. Summ. J. 55-58. The Court declines the opportunity to grant partial summary judgment as to these issues. In part, this conclusion is based on RIRRC's contention that, of these nine topics, those related to the questions of fact already addressed require a denial of summary judgment, and, of those other topics (i.e., the Pension Plan and RIRRC's Tipping Facility), RIRRC has indicated it has declined to currently pursue those claims.

Additionally, Restivo argues that, as a matter of law and as "the law of the case," it cannot be liable for RIRRC's damages inherently caused by other parties as to the four major subject areas in this case as originally suggested in Counts III, IV, and V of the MDS. This conclusion is apparently drawn from RIRRC's own voluntary dismissal of those three counts from the MDS. Under this part of its Motion, Restivo notes that in order for it to be liable, RIRRC must prove that Restivo alone was the cause of RIRRC's losses which it is unable to now do because those claims and counts were stricken from the MDS by RIRRC in the Court's March 6, 2014 Order. In reviewing the MDS, it is clear that the claims remaining against Restivo under Counts I and II are independent of those claims set forth in the three counts dismissed pursuant to the Court's March 6, 2014 Order. Accordingly, it simply does not follow that RIRRC's voluntary dismissal of claims under Counts III, IV, and V equated to conceding its entire case against Restivo under Counts I and II. Those counts independently incorporated all claims relevant to those causes of action in the MDS.

Lastly, Restivo moves for summary judgment as to its alleged liability for $987,000 relating to certain fees paid to the forensic auditors employed by the Bureau as part of its

investigation into RIRRC's wrongdoing. See MDS ¶ 61. Restivo argues this claim must fail because the reports issued by the Bureau do not specifically reference Restivo nor does RIRRC set forth any evidence to justify why Restivo should be held liable for fees incurred for a subsequent forensic audit. In addition, Restivo argues there is no evidence of causation (i.e. proximate causation as to foreseeable damages) proffered in any expert affidavit to require Restivo to be liable for the forensic auditor's fees. Moreover, Restivo argues it was not engaged to perform a forensic audit and could not have "detected" the topics contained in the Bureau's report. Indeed, Restivo asserts that it had no duty to detect corruption within RIRRC either prior to or during Restivo's engagement.

At the risk of sounding like a broken record, the Court has already dealt with Restivo's issues as to what duty it was under when it was engaged to conduct the financial statement audits by the RIRRC. While Restivo seeks to argue what it may deem a novel issue on damages, the Court today will not determine the main factual issue that has permeated this entire dispute, to wit, whether Restivo performed its audits in accordance with the applicable industry standards. Any damages that flow therefrom, including whether it was necessary to engage a forensic auditor when Restivo may or may not have failed in reporting certain abuses, is an issue for another day.

In sum, summary judgment is denied as to all issues raised in Restivo's Motion for Summary Judgment. Accordingly, the fact finder shall be the final arbiter as to Restivo's liability, if any, for RIRRC's damages.

**E**

**Restivo and RIRRC's Respective Motions to Strike**

In addition to the Motion for Summary Judgment, presently before the Court are three Motions to Strike—one filed by RIRRC and two filed by Restivo. After reviewing the filings

submitted by RIRRC and Restivo as to the Motions to Strike, the Court denies each of the Motions in full, except as to RIRRC's Motion to Strike the Hundley Affidavit and certain statements regarding CCR. The Court now briefly indicates the grounds upon which each Motion is decided.

**1**

**RIRRC's Motion to Strike**

RIRRC seeks to strike: (1) the affidavit of Hundley as improper expert testimony; (2) eleven unauthenticated exhibits attached to Restivo's Motion for Summary Judgment; and (3) certain statements regarding CCR. As to the Hundley Affidavit, RIRRC seeks to strike it based on the contention that Hundley was not disclosed as an expert witness for Restivo within the time frame provided by the Court's pretrial scheduling order. In response, Restivo argues that Hundley, a partner at Restivo, will not provide expert opinion testimony but rather provide testimony based on his personal knowledge about Restivo's practices during its audits.

In reviewing the parties' papers on this matter, it is evident to the Court that Restivo is seeking to introduce improper expert witness testimony in the form of opinion testimony by way of affidavit, rather than supplying purely factual testimony. To the extent the Hundley Affidavit provides improper opinion testimony, the Court will grant RIRRC's Motion to Strike.[15]

As to the eleven "unauthenticated" documents attached as exhibits to Restivo's Motion for Summary Judgment, the Affidavit of Robert C. Shindell (Shindell), counsel for Restivo, attests to the authenticity of all of the relevant exhibits. See generally Shindell Aff, Dec. 2, 2014. This affidavit satisfies the R.I. R. Evid. 901 standard which states "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence

[15] In presenting an order to the Court following this Decision, the parties are directed to meet and confer in an attempt to agree as to which portions of the Hundley Affidavit rise to the level of improper opinion testimony. Accordingly, those portions will be stricken.

sufficient to support a finding that the matter in question is what its proponent claims." R.I. R. Evid. 901(a). Accordingly, RIRRC's Motion to Strike as to the eleven exhibits is denied.

As to precluding all statements that describe CCR (Restivo's successor at RIRRC) as "specially" or "specifically" retained by RIRRC to report deficiencies as to internal controls and values of land held by RIRRC, the only evidence before the Court are the agreements of Restivo and CCR which set forth similar terms and conditions. Without any supporting evidence to hold otherwise, to the extent the Motion for Summary Judgment characterizes CCR as "specifically" or "specially" retained to report deficiencies in RIRRC's internal controls or restatement of land values, the Motion to Strike is hereby granted and those words shall be stricken.

**2**

**Restivo's Motions to Strike**

Restivo moves this Court to strike the Affidavit of DeNigris. Restivo's Motion focuses largely on the alleged "unintelligible" and inaccurate information contained therein. Additionally, Restivo argues the DeNigris Affidavit must be stricken because it is impermissibly late. In support of its contentions, Restivo submits the Second Affidavit of David Truesdell analyzing the data relied on by DeNigris. Among other conclusions, Truesdell states that he is "not able after diligent professional inquiry and efforts to understand or evaluate the 2014 DeNigris Affidavit and exhibits as to whether it is reliable." Second Aff. of David Truesdell ¶ 4, Nov. 25, 2014.

As our Supreme Court recently stated in Morabit v. Hoag, "'[t]he purpose of expert testimony is to aid in the search for the truth.'" 80 A.3d 1, 11 (R.I. 2013) (quoting Morra v. Harrop, 791 A.2d 472, 477 (R.I. 2002)). Rule 702 of the Rhode Island Rules of Evidence establishes "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion." Indeed, it is well established that the determination of the admissibility of an expert witness's testimony is within the discretion of the trial justice. See State v. Capalbo, 433 A.2d 242, 246 (R.I. 1981). "In determining whether the information upon which the expert proposes to testify is truly scientific knowledge pursuant to Rule 702, the trial justice must determine 'whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether the reasoning or methodology properly can be applied to the facts in issue.'" Owens v. Silvia, 838 A.2d 881, 892 (R.I. 2003) (quoting DiPetrillo v. Dow Chem. Co., 729 A.2d 677, 687 (R.I. 1999)). Such an inquiry is usually followed by the court's "gatekeeping" function in determining whether the testimony about novel or technically complex theories or procedures possesses scientific validity. See DiPetrillo, 729 A.2d at 689.

However, the dispute here does not hinge on whether DeNigris may even be qualified as an expert in this case, but rather focuses on a dispute as to the calculation methodology in reaching the two experts' varying conclusions. As the United States Court of Appeals for the Eighth Circuit has aptly suggested, "[w]hile other methods for calculating damages may be available, so long as the methods employed are scientifically valid, [a party's] mere disagreement with the assumptions and methodology used does not warrant exclusion of expert testimony." Synergetics, Inc. v. Hurst, 477 F.3d 949, 956 (8th Cir. 2007) (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1993)); cf. Owens, 838 A.2d at 892 (quoting Daubert, 509 U.S. at 596) ("'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'"). Indeed, as the Owens court noted, the foundation for the admissibility of the proffered expert witness testimony may be laid by the proponent without the need for an evidentiary hearing. Based on the supplemental affidavit provided by DeNigris in

response to Restivo's Motion to Strike, in which DeNigris lays out what data he relied on in his original affidavit, the Court denies Restivo's Motion. See DeNigris Aff. ¶¶ 3-4, Dec. 9, 2014.

Lastly, Restivo seeks to strike portions of the Affidavit of Centofanti as failing to meet the requirements under Rule 56(e) as the statements are argumentative, speculative, hypothetical, unduly vague, and not competent and/or relevant to RIRRC's claims. In support of its Motion, Restivo takes issue with several paragraphs of Centofanti's Affidavit, arguing that they are not only conclusory, but also based on mere conjecture and are simply irrelevant.

Generally, an affidavit submitted in opposition to summary judgment will be more liberally construed than an affidavit submitted by the moving party; however, such affidavit to raise real issues of fact must still set forth facts based on personal knowledge rather than just general denials or conclusions. Minuto v. Metro. Life Ins. Co., 55 R.I. 201, 179 A. 713, 715 (1935); see Mills v. State Sales, Inc., 824 A.2d 461, 468 (R.I. 2003) (quoting Paradis v. Zarrella, 683 A.2d 1337, 1339 (R.I. 1996) ("a party opposing a motion for summary judgment 'cannot rest upon mere allegations or denials.'"); accord, e.g., Aguilera v. Mount Sinai Hosp. Med. Ctr., 691 N.E.2d 1, 6 (Ill. App. Ct. 1997) ("When there is no factual support for an expert's conclusions, the conclusions alone do not create a question of fact."); Francis C. Amendola et al., 49 C.J.S. Judgments § 333 (2014) (explaining expert's opinion affidavit in opposition to summary judgment motion must set forth facts to support competency of expert's opinion).

Here, in reviewing all of the arguments contained in Restivo's Motion to Strike, the Court concludes that Centofanti has properly based his opinion upon a review of relevant facts, documents, evidentiary material and other data in the record. It is quite evident from Centofanti's Affidavit that he is not only qualified to opine on such matters contained within his Affidavit but that he has come to his disputed conclusions based specifically on his review of the relevant documents and evidentiary materials in this case. While Restivo may take issue with

some of the ultimate conclusions drawn by Centofanti in his Affidavit, those conclusions unquestionably go towards the central factual issues in this case and, accordingly, Restivo's Motion to Strike portions of Centofanti's Affidavit must fail. Of course, these conclusions may or may not be accepted by the trier of fact.

## IV

## Conclusion

After due consideration of all the arguments advanced by counsel at the Motion hearing, as well as the arguments presented in the parties' papers, and taking into account the affidavits and other evidence presented, this Court hereby denies Restivo's Motion for Summary Judgment as to Counts I and II of RIRRC's MDS. RIRRC—as the nonmoving party on summary judgment—has met its burden of countering Restivo's evidence with its own affidavits and other evidentiary materials adequately demonstrating that questions of material fact exist to warrant a denial of Restivo's Motion on all points, as required under our Rule 56. Additionally, RIRRC's Motions to Strike as to the eleven unauthenticated exhibits is denied; however, as to those portions of the Hundley Affidavit providing improper expert opinion testimony and the statements regarding CCR, the Motion to Strike is granted. Furthermore, as set forth above, Restivo's Motions to Strike the Affidavits of DeNigris and Centofanti are hereby denied.

Prevailing counsel shall present an order consistent herewith which shall be settled after due notice to counsel of record.

**RHODE ISLAND SUPERIOR COURT**
***Decision Addendum Sheet***

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| **TITLE OF CASE:** | **Rhode Island Resource Recovery Corporation v. Restivo Monacelli, LLP** |
| **CASE NO:** | **PB 10-4502** |
| **COURT:** | **Providence County Superior Court** |
| **DATE DECISION FILED:** | **February 23, 2015** |
| **JUSTICE/MAGISTRATE:** | **Silverstein, J.** |
| **ATTORNEYS:** | |
| **For Plaintiff:** | **Thomas F. Holt, Esq.**<br>**Joseph J. Rodio, Esq.**<br>**Christopher J. Valente, Esq.** |
| **For Defendant:** | **Robert C. Shindell, Esq.**<br>**Derek M. Gillis, Esq.**<br>**Stephen Adams, Esq.** |