**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

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

**(FILED: January 11, 2016)**

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| **RHODE ISLAND RESOURCE RECOVERY CORPORATION** | : | |
| **V.** | : | **C.A. NO. PB 10-4502** |
| **RESTIVO MONACELLI, LLP** | : | |

## DECISION

**SILVERSTEIN, J.** The Rhode Island Resource Recovery Corporation (RIRRC) is a quasi-public entity through which the State of Rhode Island operates the Central Landfill in Johnston, Rhode Island. See G.L. 1956 § 23-19-2. Restivo Monacelli, LLP (Restivo) is a certified public accounting and business advising firm duly organized and existing under the laws of the State of Rhode Island.

## I

## Facts and Travel

On May 3, 2006, RIRRC issued an Invitation for Bids for Accounting and Auditing Services. Following a review of the submissions, Restivo was awarded the contract and entered into an agreement (the Agreement) with RIRRC. Under the terms of the Agreement, Restivo was to provide accounting and auditing services for the term of August 1, 2006 through June 30, 2009, inclusive of fiscal years 2006 and 2007.[1]

[1] RIRRC held an option to extend the Agreement through fiscal year 2008. RIRRC chose not to exercise its option, however, and Restivo's employment consequently terminated on June 30, 2008.

From August 1, 2006 until such time as the Agreement terminated, Restivo (1) audited RIRRC's financial statements and prepared reports for RIRRC concerning the fiscal years ending June 30, 2006 and June 30, 2007; (2) conducted semiannual reviews and prepared reports for RIRRC for the six months ending December 31, 2006 and December 31, 2007; (3) audited financial statements and prepared reports for RIRRC in connection with RIRRC's Money Purchase Pension Plan for the years ending December 31, 2006 and December 31, 2007; and (4) provided advice and direction to RIRRC's Board of Commissioners and other RIRRC managers and employees with respect to RIRRC's finances, fund and asset management, and other business-related matters.

On March 13, 2008, after conducting a preliminary forty-five day investigation, the Bureau of Audits (the Bureau) released a Summary of Findings which revealed evidence of corruption, mismanagement, and other wrongdoing at RIRRC.[2] On September 22, 2009, the Bureau issued an audit report (the Audit Report) highlighting numerous violations, breaches, and wrongful acts that involved RIRRC and occurred while Restivo was providing RIRRC with accounting and auditing services. On July 30, 2010, RIRRC filed a Complaint in this Court, alleging that Restivo had breached professional and contractual duties it owed to RIRRC in the following manner: (1) Restivo failed to report alleged inaccuracies or discrepancies in financial statements; (2) Restivo failed to properly perform audits and other financial services in accordance with generally accepted auditing and/or accounting principles and standards; (3) Restivo failed to provide a true portrayal of RIRRC's financial position during the relevant time periods; and (4) Restivo failed to notify State authorities after becoming aware of the alleged

[2] Former Rhode Island Governor Donald L. Carcieri ordered the investigation after receiving a letter from RIRRC Chief Executive Officer Michael J. O'Connell; the letter questioned certain practices of RIRRC from August 1, 2006 until such time as the Agreement terminated.

inappropriate and unlawful acts highlighted in the audit report. The Complaint further alleged that "[i]n the course of conducting each audit or review, and in the course of providing accounting advice, Restivo was bound by the accounting principles generally accepted in the United States (GAAP), [as well as] the generally accepted auditing standards (GAAS) established by the American Institute of Certified Public Accountants." Compl. ¶ 13. Restivo did not deny that it was bound by such principles, Answer at ¶ 13, but did deny that it breached its professional and contractual duties to RIRRC, id. at ¶ 18; see also R.I. Res. Recovery Corp. v. Restivo Monacelli, LLP, No. PB 10-4502 at 14 (R.I. Super. Feb. 23, 2015 (Silverstein, J.)) ("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) . . . What the parties seem to disagree upon, however, is what exactly is required under a 'Yellow Book audit'").

The parties proceeded to trial, at the end of which the jury found Restivo liable for a) $2,551,052 in losses related to RIRRC's trust fund investments; b) $83,500 in costs incurred by RIRRC under the breached Agreement; c) more than $207,000 in damages stemming from inappropriate charitable contributions made by RIRRC between August 1, 2006 and June 30, 2008; and d) $20,500 in harms sustained by RIRRC when it was forced to hire a replacement provider of accounting and auditing services.

Currently before the Court are three post-trial motions filed by Restivo: a Motion for Setoffs of Joint Tortfeasor Settlements and Insurance Payments, a renewed Motion for Judgment as a Matter of Law, and a Motion for New Trial. This Decision will assess the merits of each motion in turn, beginning with the Motion for Setoffs of Joint Tortfeasor Settlements and Insurance Payments (Motion for Setoffs).

## II

## Motion for Setoffs of Joint Tortfeasor Settlements and Insurance Payments

### Argument Summary

Restivo asks this Court to reduce the amount of the jury's verdict on the grounds that RIRRC previously settled other cases in which the damages sought were identical to those awarded here. Specifically, Restivo contends that RIRRC received payments under settlement agreements with Van Liew Trust Company (Van Liew) and Lefkowitz, Garfinkel, Champi and Derienzo (LGC&D), both of which were joint tortfeasors with Restivo. Defendant's Mot. for Setoffs at 2-3. Because "[a] release by the injured person of one joint tortfeasor . . . reduces the claim against the other tortfeasors in the amount of the consideration paid for the release," id. at 2, Restivo requests that the jury's verdict be reduced by the amount of the settlements against Van Liew and LGC&D. Restivo also contends that the settlement payments made by RSUI Indemnity Company (RSUI) and Travelers Casualty and Surety Company of America (Travelers) "are for effectively the same damages as RIRRC has alleged against Restivo," id. at 5, and that Restivo is entitled to a setoff for the amounts recovered by RIRRC from RSUI and Travelers, id. at 3-5. Restivo asserts that a denial of its Motion for Setoffs "would not only be contrary to the unequivocal language of § 10-6-7, but it would frustrate the rationale underlying the statute," which is to proscribe "double recovery" even where a breach of contract claim is raised. Defendant's Supplemental Mem. Regarding Applicability of Joint Tortfeasor Setoff at 5. In support of this contention, Restivo cites to Augustine v. Langlais, 121 R.I. 802, 804-05, 402 A.2d 1187, 1189 (1979), where our Supreme Court stated that "[t]he cases that have considered statutes identical to § 10-6-7 universally hold that amounts paid by settling defendants must be credited to the verdict amount returned against nonsettling joint tortfeasors."

In response, RIRRC contends that neither Van Liew nor LGC&D are joint tortfeasors with respect to Restivo, Plaintiff's Mem. of Law in Supp. of its Obj. to Defendant's Mot. for Setoffs at 8-12, and that the collateral source rule "bars settlements from a plaintiff's insurer from being held against plaintiff at setoff,"[3] id. at 12-14. Furthermore, RIRRC asserts that Restivo has failed to show what parts of the prior settlements are attributable to the award it seeks to offset. Id. at 6. Finally, RIRRC contends that any damages stemming from a non-tort claim would not be eligible for setoff, and that the Court must therefore deny the Motion, at least insofar as it relates to RIRRC's breach of contract claims. Id. at 8.

**Standard of Review**

Under G.L. 1956 § 10-6-7, "[a] release by the injured person of one joint tortfeasor, whether before or after judgment . . . reduces the claim against the other tortfeasors in the amount of the consideration paid for the release . . . ." Thus, a Court faced with a motion for setoff of joint tortfeasor settlements must determine whether the moving party has the status of a joint tortfeasor, and whether that status is shared by another tortfeasor who has been released by the injured person. In order for two parties to be considered joint tortfeasors, they must both be liable in tort, and they must have engaged in common wrongs resulting in the same injury. Wilson v. Krasnoff, 560 A.2d 335, 339 (R.I. 1989).[4]

[3] Restivo acknowledges that the collateral source rule "prevents a reduction in liability by payments made to injured parties by independent sources," Defendant's Mem. in Supp. of its Mot. for Setoffs at 4, but contends that the rule is inapplicable here because "[t]he settlement payments are for effectively the same damages as RIRRC has alleged against Restivo in this case," id. at 5.

[4] Restivo contends that the settlement payments made by RSUI and Travelers "are for effectively the same damages as RIRRC has alleged against Restivo." Defendant's Mem. in Supp. of its Mot. for Setoffs at 5. Because such an allegation essentially amounts to an assertion that Restivo, RSUI, and Travelers are joint tortfeasors, see Augustine, 121 R.I. at 805, 402 A.2d at 1189 (noting that § 10-6-7 "proscribes double recovery"), the standard of review applied to

## Analysis

Each settlement agreement reached by RIRRC with Van Liew, LGC&D, RSUI, and Travelers (the settling parties) states that upon receipt of payment, RIRRC "fully and completely releases" the settling parties "of and from any and all actions, suits, claims, duties, causes of action, demands, obligations, liabilities, rights, damages (including punitive or exemplary damages), or liability of any nature whatsoever." See, e.g., Defendant's Ex. DD at 2. Additionally, each agreement states that it "is intended to be a compromise among the Parties" and is not an admission of liability or coverage. See, e.g., id. at 3. Thus, it is unclear based on the settlement agreements reached with the settling parties not only what wrongs they may be said to have engaged in, but also whether these wrongs are the same wrongs as those engaged in by Restivo. Furthermore, it is unclear to what extent Restivo's liability should be offset by previous payments related to such wrongs, given that (a) no portion of the settlement payments made by any of the settling parties can be attributed to particular wrongs engaged in by such parties; and (b) it has not been proven by a preponderance of the evidence that the settling parties engaged in any wrongs whatever.[5]

Restivo cites Augustine in support of its argument that "[t]he purpose of § 10-6-7 would be frustrated if joint tortfeasor setoff is not applied in this case." Defendant's Supplemental Mem. Regarding Applicability of Joint Tortfeasor Setoff at 5. In Augustine, the plaintiffs

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Restivo's motion for setoff of insurance payments will be identical to that applied to Restivo's motion for setoff of joint tortfeasor settlements.

[5] Although § 10-6-7 implies that parties released before judgment can be deemed joint tortfeasors, the Rhode Island Supreme Court declared in Wilson that in order for two parties to be considered joint tortfeasors, they must have contributed to the same injury. See Wilson, 560 A.2d at 339. Here, the settlement agreements release the settling parties "from any and all actions," see, e.g., Defendant's Ex. DD at 2, and are not intended as admissions of liability, see, e.g., id. at 3. It is thus unclear whether the settling parties could be characterized as tortfeasors—let alone joint tortfeasors—under Rhode Island law.

brought an action against two drivers whose alleged negligence resulted in damages stemming from a multivehicle collision. Augustine, 121 R.I. at 803, 402 A.2d at 1188. Prior to trial, one of the defendants executed a release pursuant to § 10-6-1,[6] id., but remained in the case because of a cross-claim filed by his co-defendant, id. at. 803-04, 402 A.2d at 1188. The case proceeded to trial, and the jury found the released defendant 85% negligent for the plaintiffs' injuries. Id. at 804, 402 A.2d at 1188. Thus, in Augustine, the jury found that the co-defendants had engaged in common wrongs resulting in the same injury. See generally id.

Here, no findings have been made as to liability on any of the multiple claims brought against the settling parties. Thus, it may not be said—as it was in Augustine—that "two or more parties contributed to the [complained of] loss," Augustine, 121 R.I. at 805, 402 A.2d at 1189, and it therefore may not be said that Restivo and the settling parties are joint tortfeasors. Because Restivo and the settling parties are not joint tortfeasors, this Court must deny Restivo's Motion for Setoffs of Joint Tortfeasor Settlements and Insurance Payments.

**III**

**Renewed Motion for Judgment as a Matter of Law**

**Argument Summary**

Restivo bases its renewed Motion for Judgment as a Matter of Law on the following grounds: (1) RIRRC does not have a legal right to recover for direct investment losses to the Closure/Post-Closure Trust; and (2) there is no legally sufficient evidentiary basis for a reasonable jury to have found for RIRRC on any claim.[7] Defendant's Mem. in Supp. of its Renewed Mot. at 1. Restivo argues that RIRRC does not have a legal right to recover for direct

[6] Section 10-6-1 states that title 10, chapter 6 of Rhode Island's General Laws may be cited as the "Uniform Contribution Among Tortfeasors Act."

[7] Restivo previously moved for judgment as a matter of law at the close of RIRRC's case and also at the close of evidence.

investment losses because it is neither a trustee, id. at 5, nor a beneficiary of the trust, id. at 8; see also Defendant's Mem. in Supp. of its Renewed Mot. at 7 ("it is black letter Trust law that only a trustee has standing to sue a third party for damage to trust assets absent an exception"). Furthermore, Restivo contends that the evidence adduced at trial does not connect its own alleged failures with the damages claimed by RIRRC. Id. at 12-16. Restivo argues that, based on the testimony of RIRRC's expert witnesses, no reasonable jury could have found that there was a causal link between Restivo's alleged malpractice or breach and the investment losses suffered by RIRRC.[8] Id. Finally, and in the event that the Court denies its renewed Motion for Judgment as a Matter of Law, Restivo requests a remittitur of the damages awarded.[9] Id. at 17-18.

RIRRC argues that it did establish a legally sufficient evidentiary basis to support the jury's verdict, Plaintiff's Mem. in Supp. of its Obj. to Defendant's Mot. at 3, and that it was, in fact, a beneficiary of the trust assets, id. at 6. Although it does not deny that the trustee is ordinarily the proper party to bring suit on behalf of a trust, RIRRC asserts that under certain circumstances, "the beneficiary is better suited to protect its interest in the trust assets than the trustee." Id. RIRRC asserts that such circumstances are present where, as here, the current trustee "is 'unable . . . [or] . . . unsuitable . . . to protect the beneficiary's interest.'" Id. at 7. Furthermore, RIRRC contends that, even if it was not permitted to sue as a beneficiary, it was entitled to pursue claims against Restivo as an assignee of the current trustee, Washington

[8] In the alternative, Restivo requests a remittitur to either the amount of underperformance related to Real Estate Investment Trusts, or which would exclude all alleged Phase V damage.

[9] A trial justice is permitted to grant remittitur if the verdict rendered is found to be against the weight of the credible evidence. See Afflick v. Laurence, 67 R.I. 188, 21 A.2d 245, 247 (1941). Thus, for the same reasons that this Court must deny Restivo's Motion for Judgment as a Matter of Law, generally, it must deny Restivo's request for remittitur.

Trust.[10] Id. at 14. RIRRC asserts that "[i]t is undisputed that Washington Trust is the current trustee," id. at 15, and that the assignment of rights which occurred between Washington Trust and RIRRC was therefore valid. In addition, RIRRC requests that "to the extent that the Court determines that Washington Trust was a more appropriate party to advance these claims against Restivo," the Court apply the principle of "relation back" and allow substitution of RIRRC for Washington Trust. Id. at 16. RIRRC contends "the principle of 'relation back' of claims for statute of limitations purposes in circumstances where an inappropriate or improper plaintiff commenced the lawsuit is well established in Rhode Island," id., and that Restivo "could [not] claim any prejudice as a result of such a substitution," id. at 17.

**Standard of Review**

Where a motion for judgment as a matter of law is made at the close of evidence and is denied, the Court is said to have submitted the issues raised by the motion to the jury. Super. R. Civ. P. 50(b). However, if the moving party properly files a renewed motion for judgment as a matter of law after the jury has returned its verdict, the Court may either allow the judgment to stand or reopen the judgment. Id. If the Court chooses to reopen the judgment, it may order a new trial or direct the entry of judgment as a matter of law. Id.

When ruling on a motion for judgment as a matter of law, a trial justice is required to consider the evidence presented at trial in the light most favorable to the nonmoving party and is prohibited from weighing the evidence or evaluating the credibility of the witnesses. Almonte v.

[10] Restivo rejects this assertion, arguing that "[t]here is no evidence in the trial record regarding what rights, if any, Washington Trust possessed and was able to assign," Defendant's Mem. in Supp. of its renewed Mot. at 2, because "the trust documents in evidence do not show what Washington Trust had to assign," id. at 11. Furthermore, Restivo contends that it owed no duty to the trusts or the trustee, and thus Washington Trust had no claim to assign. Id. at 11. Finally, Restivo argues that any claim which the trustee might have had regarding the claimed losses ought to have been barred by the statute of limitations. Id. at 11-12.

Kurl, 46 A.3d 1, 17 (R.I. 2012). The trial justice must draw from the record all reasonable inferences that support the position of the nonmoving party, Children's Friend & Serv. v. St. Paul Fire & Marine Ins. Co., 893 A.2d 222, 226 (R.I. 2006), and may grant the motion only if "'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'" Almonte, 46 A.3d at 16 (quoting Black v. Vaiciulis, 934 A.2d 216, 219 (R.I. 2007); see also Super. R. Civ. P. 50.

**Analysis**

**Whether RIRRC has a Legal Right to Recover for Losses to the Trust**

A trustee is often the party best-suited to protect the interests of a trust. R.I. Res. Recovery Corp. v. Restivo Monacelli, LLP, No. PB 10-4502 at 10 (R.I. Super. Aug. 18, 2015 (Silverstein, J.)). Thus, a trustee is typically the proper party to bring suit on behalf of a trust. Id. There are at least three circumstances, however, under which a beneficiary—rather than a trustee—may be permitted to maintain an action related to the trust property: (a) when the beneficiary is in possession, or entitled to immediate distribution, of the trust property involved in the action; (b) when the trustee is unable or unavailable to protect the interests of the beneficiary; and/or (c) when the beneficiary suffers harm as a result of misfeasance relating to the trust property. 4 Restatement (Third) Trusts § 107(2), at 102 (2012); see also Am. Kennel Club Museum of the Dog v. Edwards & Angell, LLP, No. Civ. A. PB 00-2683, 2002 WL 1803923 (R.I. Super. July 26, 2002) (Silverstein, J.) (holding that a beneficiary has standing to recover from a third party for damages to trust property).

A plaintiff seeking to prove malpractice must evidence the defendant's duty in order to prevail. Macera Bros. of Cranston, Inc. v. Gelfuso & Lachut, Inc., 740 A.2d 1262, 1264 (R.I. 1999) ("[i]n order to prevail on a negligence-based legal malpractice claim, a plaintiff must

prove by a fair preponderance of the evidence . . . a defendant's duty of care"). This Court has previously concluded that Restivo did not owe an auditing duty to the trusts or the trustee. R.I. Res. Recovery Corp. v. Restivo Monacelli, LLP, No. PB 10-4502 at 12 (R.I. Super. Aug. 18, 2015 (Silverstein, J.)). The Court noted that "the Closure Trust Agreement specifically obviates any responsibility of the trustee to ensure RIRRC makes appropriate payments," id. at 13, and that "[t]he Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from [RIRRC], any payments necessary to discharge and liabilities of [RIRRC] established by DEM." Id.

Because Restivo did not owe an auditing duty to the trusts or the trustee, Washington Trust would have been unable to protect the interests of the beneficiary, RIRRC. Under Restatement (Third) Trusts, when the trustee is unable to protect the interests of the beneficiary, a beneficiary is permitted to maintain an action related to trust property. Furthermore, where, as here, a professional defendant owes a duty to act with reasonable care with respect to trust property, see R.I. Res. Recovery Corp. v. Restivo Monacelli, LLP, No. PB 10-4502 at 11-12 (R.I. Super. Aug. 18, 2015 (Silverstein, J.)), a beneficiary is permitted to recover for damages resulting from a failure to exercise such care. 4 Restatement (Third) Trusts § 107(2), at 102 (2012); see also Am. Kennel Club Museum of the Dog, No. Civ. A. PB 00-2683, 2002 WL 1803923. Thus, RIRRC has a legal right to recover for losses to the trust.

**Whether Restivo Caused the Damages Complained of by RIRRC**

To prove accounting malpractice, a plaintiff must be able to show, inter alia, that the defendant breached a duty it owed to the plaintiff in a manner which proximately caused the complained of injury. Medeiros v. Sitrin, 984 A.2d 620, 625 (R.I. 2009). Whether proximate cause has been established is typically a question reserved for the finder of fact. See Berman v.

Sitrin, 101 A.3d 1251, 1262 (R.I. 2014). Furthermore, Rhode Island courts are generally reluctant to resolve negligence actions as a matter of law. See, e.g., DeMaio v. Ciccone, 59 A.3d 125, 130 (R.I. 2013).

This Court has previously declined to say whether Restivo proximately caused the injury complained of by RIRRC. Rather, in a Decision dated February 23, 2015, the Court found that "because [the issues of causation and damages] are factual in nature, and based on the extensive expert testimony in the record of this case . . . the fact finder should resolve these issues." R.I. Res. Recovery Corp. v. Restivo Monacelli, LLP, No. PB 10-4502 at 25 (R.I. Super. Feb. 23, 2015 (Silverstein, J.)). Because determining whether Restivo proximately caused the injury complained of by RIRRC would require the trial justice to resolve questions of fact, this Court must deny Restivo's renewed Motion for Judgment as a Matter of Law.

**IV**

**Motion for New Trial**

**Argument Summary**

Restivo moves for a new trial on the grounds that the jury's verdict failed to do justice between the parties. Defendant's Mem. in Supp. of its Mot. for New Trial at 1. Restivo asserts that there was "no legally sufficient evidentiary basis for a reasonable jury to find for RIRRC," id. at 4, and further argues that it was unfairly prejudiced by the admission of certain evidence at trial, id. at 3. In particular, Restivo contends that the Bureau of Audits Reports (the Reports) were inadmissible, and that admission of the Reports was error of law requiring a new trial. Id. Finally, Restivo requests a new trial on the basis that the instructions given to the jury by the Court were erroneous. Id. at 2-3. Restivo cites four instructions which it asserts were given in error, including the Court's instruction on causation, which it says was a "'substantial factor'

instruction," rather than a "'but for' instruction required under Rhode Island law"; the Court's instruction regarding the presumption that a public official will perform his or her duties; and the Court's comparative negligence instruction, which "incorporated the 'audit interference rule.'" Id. at 2. Restivo also contends that the Court improperly refused to instruct the jury (a) that expert testimony is required to prove causation in a professional negligence case, id. at 2, and (b) regarding the affirmative defense of in pari delicto, id. at 3.

In response, RIRRC asserts that there was a legally sufficient evidentiary basis for a reasonable jury to find for RIRRC, Plaintiff's Mem. in Supp. of its Obj. to Defendant's Mot. for New Trial at 10, and that the outcome of the trial was consistent with both the Court's properly issued instructions and the facts of the case, id. RIRRC further contends that the Court's evidentiary rulings were not in error, id. at 8, and that its jury instructions were proper, id. at 2.

**Standard of Review**

Super. R. Civ. P. 59(a) states that "[a] new trial may be granted . . . for error of law occurring at the trial or for any of the reasons for which new trials have heretofore been granted . . . in the courts of this state." A trial justice's role when presented with a motion for a new trial is "'that of a superjuror, who must weigh the evidence and assess the credibility of the witnesses.'" Gomes v. Rosario, 79 A.3d 1262, 1265 (R.I. 2013) (quoting McGarry v. Pielech, 47 A.3d 271, 280 (R.I. 2012)). Proceeding under the presumption that the instructions provided to the jury were not erroneous, a trial justice may grant the motion for a new trial if the verdict rendered is contrary to the evidence and thereby fails to do justice between the parties. Blue Coast, Inc. v. Suarez Corp. Indus., 870 A.2d 997, 1008 (R.I. 2005). However, if the trial justice finds that reasonable minds could differ regarding whether or not the verdict was proper, he or she must uphold the jury's decision. Oliveira v. Jacobson, 846 A.2d 822, 826 (R.I. 2004).

## Analysis

### Whether There is a Legally Sufficient Evidentiary Basis

By reference, Restivo incorporates into its Motion for New Trial the argument that no causal link has been established connecting its own alleged failures and the damages claimed by RIRRC. Defendant's Mem. in Supp. of its Mot. for New Trial at 4; see also Defendant's Mem. in Supp. of its renewed Mot. for J. as a Matter of Law at 19-21.[11] Restivo contends that RIRRC must show causation in order to prove malpractice, and that the failure to do so is fatal to RIRRC's claims. See Defendant's Mem. in Supp. of its Mot. for J. as a Matter of Law at 2. For the reasons discussed below, infra at 21, the Court rejects Restivo's contention.

### Whether the Bureau of Audit Reports Were Admissible

Although evidence deemed relevant is ordinarily admissible, R.I. R. Evid. 402, it may be excluded if it constitutes hearsay, R.I. R. Evid. 802, or where its probative value is substantially outweighed by the likelihood that its presentation will lead to unfair prejudice, confusion of the issues, or undue delay, R.I. R. Evid. 403. Questions relating to admissibility are answered by the trial justice, R.I. R. Evid. 104, and are left within his or her sound discretion, Bourdon's, Inc. v. Ecin Indus., Inc., 704 A.2d 747, 758 (R.I. 1997).

Restivo claims that the Reports are inadmissible on the grounds that they are irrelevant, unduly prejudicial, and hearsay without an exception. See Defendant's Motion in Limine #1—Exclusion of Bureau of Audit Reports. During a hearing conducted on October 1, 2015, counsel

[11] In its Memorandum in Support of its Motion for Judgment as a Matter of Law, which is incorporated by reference into its Memorandum in Support of its Motion for New Trial, Restivo contends that "lay witness testimony in this case did not provide legally sufficient evidence for a jury to find for RIRRC on any claim." Defendant's Mem. in Supp. of its Mot. for J. as a Matter of Law at 20. In addition to finding that the lay witness testimony presented at trial did provide sufficient grounds for a jury to find for RIRRC, the Court notes that it found all witnesses presented at trial by Restivo and RIRRC to be credible.

for Restivo contended that the Reports were irrelevant and inadmissible because they neither mentioned Restivo, Tr. at 2, Oct. 1, 2015, nor "provide[d] any evidence or additional information regarding Restivo's involvement" in alleged wrongdoing, id. at 3. Additionally, counsel for Restivo argued that the Reports were unduly prejudicial—and therefore inadmissible—because "they're putting tons of information about corruption and mismanagement, including millions of dollars of losses, in front of a jury for things that – that have nothing to do with Restivo." Id. at 5. Finally, counsel for Restivo asserted that the Reports were prepared by a private company, and thus did not meet the standard for an exception to the hearsay rule under R.I. R. Evid. 803(8). Id. at 6-10.

In response, counsel for RIRRC argued that the Reports were relevant because they confirmed that wrongdoing occurred, and that said wrongdoing was the cause of the complained of loss. See id. at 14. Counsel for RIRRC further asserted that the Reports were not unduly prejudicial because "it [was] critical here to establish what the damages are for Resource Recovery." Id. at 15. Lastly, Counsel for RIRRC contended that the Reports constitute public records and thus meet the standard for an exception to the hearsay rule under R.I. R. Evid. 803(8). See id. at 16.

After hearing the above arguments, the Court concluded that the Reports were relevant. See Tr. at 25, Oct. 1 2015. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." R.I. R. Evid. 401; see also State v. Dennis, 893 A.2d 250, 265 n.22 (R.I. 2006). Here, RIRRC was required to prove that violations had occurred, and that it incurred losses as a result. As counsel for RIRRC argued, the Reports tended to show that RIRRC was damaged, and were "very, very important for

understanding the timeline, the actual chronology of how things occurred here." Tr. at 15-16, Oct. 1, 2015. Because the Reports tended to make it more probable that RIRRC would be able to show that violations had occurred, and that said violations resulted in the complained of damages, it was reasonable for the Court to deem the Reports relevant.

Similarly, it was reasonable for the Court to find that the Reports were not unduly prejudicial. Although all evidence is prejudicial, '"such evidence will be excluded only if its prejudicial effect outweighs the degree of its probative value."' State v. Arciliares, 108 A.3d 1040, 1050 (R.I. 2015) (quoting State v. Tavarozzi, 446 A.2d 1048, 1051 (R.I. 1982)). Furthermore, although the decision whether or not to exclude evidence under R.I. R. Evid. 403 rests within the discretion of the trial justice, such discretion '"must be exercised sparingly."' State v. Bishop, 68 A.3d 409, 417 (R.I. 2013) (quoting State v. Shelton, 990 A.2d 191, 202 (R.I. 2010)). As counsel for RIRRC contended, "it [was] critical here to establish what the damages are for Resource Recovery." Tr. at 15, Oct. 1, 2015. Because the Reports established damages, their prejudicial effect did not outweigh their probative value, and it thus may not be said that they were unduly prejudicial.

Finally, the Court was correct in concluding that the Reports are public records, admissible under R.I. R. Evid. 803(8). Under R.I. R. Evid. 803(8), "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . matters observed pursuant to duty imposed by law as to which matters there was a duty to report," are admissible, regardless of whether said records, reports, statements, or data compilations constitute hearsay. In State v. Manocchio, 497 A.2d 1, 6-7 (R.I. 1985), our Supreme Court held a report issued by a state office and containing the findings and conclusions of an unaffiliated third party to be admissible under R.I. R. Evid. 803(8). Here, although a

private company assisted the Bureau in preparing the Reports, the Reports were issued by the Bureau and endorsed by its Chief, H. Chris Der Vartanian. Tr. at 7, Oct. 1, 2015. Thus, the Reports may rightly be deemed public records, admissible under R.I. R. Evid. 803(8).

**Whether the Instructions Given to the Jury by the Court Were Erroneous**

The instructions provided by the Court to the jury must be applicable to the facts in evidence. Labrecque v. Branton Yachts Corp., 457 A.2d 617, 619 (R.I. 1983). Instructions tending to mislead the jury may be considered erroneous and constitute grounds for reversal of a decision. Anter v. Ambeault, 104 R.I. 496, 500, 245 A.2d 137, 139 (1968). However, reversal is unwarranted where the provision of erroneous instructions did not result in prejudice to the complaining party. Id. at 501, 245 A.2d at 139. A determination as to whether prejudice occurred ought to be based on an assessment of the charge in its entirety. Atl. Paint & Coatings, Inc. v. Conti, 119 R.I. 522, 532, 381 A.2d 1034, 1039 (1977).

The first of the four instructions which Restivo asserts was erroneous concerns causation, and states as follows:

> "Damages are proximately caused by an act, or failure to act, whenever it appears from the evidence that the act or omission played a substantial part in bringing about and actually causing the damage, and that the damage was either a direct result or a reasonably probable consequence of the act or omission." R.I. Res. Recovery Corp. v. Restivo Monacelli, LLP, No. PB 10-4502, Jury Instructions at 15; see also Defendant's Mem. in Supp. of its Mot. for New Trial at 2.

Restivo contends that the Court's instruction was erroneous because it is "a 'substantial factor' instruction, rather than the 'but for' instruction required under Rhode Island law." Defendant's Mem. in Supp. of its Mot. for New Trial at 2. However, the test for actual causation is whether the plaintiff has established that the harm would not have occurred but for the negligent conduct of the defendant. Salk v. Alpine Ski Shop, Inc., 115 R.I. 309, 314, 342 A.2d 622, 626 (1975).

Because the above instruction requires the jury to find that "the act or omission . . . actually caus[ed] the damage," it constitutes a "but-for" instruction, Jury Instructions at 15; see also Tr. at 101, Oct. 30, 2015, and was therefore not erroneous.

Restivo next asserts that the Court's instruction regarding the presumption that a public official will perform his or her duties was erroneous. Defendant's Mem. in Supp. of its Mot. for New Trial at 2. The instruction states that "there is a presumption under the law that public officials will perform their official duties properly and in accordance with the law." Jury Instructions at 17. The instruction constitutes a reasonable restatement of Rhode Island case law, see, e.g., Champlin's Realty Assocs. v. Tikoian, 989 A.2d 427, 452 (R.I. 2010) ('"in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties"') (quoting United States v. Chem. Found. Inc., 272 U.S. 1, 14-15 (1926)), and is therefore not erroneous. See Morinville v. Old Colony Co-op. Newport Nat'l Bank, 522 A.2d 1218, 1222 (R.I. 1987).

Third, Restivo contends that the Court's instruction regarding "other claims" was erroneous insofar as it did not permit the jury to consider claims by other parties on the issue of causation. Defendant's Mem. in Supp. of its Mot. for New Trial at 2. The instruction states in pertinent part as follows: "Do not concern yourselves with those other claims or the outcomes of those other claims . . . To the extent the outcomes of other claims made by [RIRRC] have any impact on this case, the Court alone will address that impact." Jury Instructions at 11. Restivo argues that the instruction is improper because "[w]e don't want the jury to think 'we can't think about other claims at all.'" Tr. at 134, Oct. 30, 2015. However, our Supreme Court has held that "the particular language suggested by any one of the litigants need not be adopted" so long as "a trial justice . . . 'reasonably set[s] forth all of the propositions of law that relate to material issues

of fact which the evidence tends to support."' Morinville, 522 A.2d at 1222 (quoting State v. Freeman, 473 A.2d 1149, 1152 (R.I. 1984)). The Court has previously determined that the latter portion of the instruction informs the jury only that "the outcome of the cases is not to impact them," Tr. at 135, Oct. 30, 2015, and here affirms that determination.

Finally, Restivo argues that the Court's instruction concerning comparative negligence improperly incorporated the "audit interference rule," which has never been adopted in Rhode Island. Defendant's Mem. in Supp. of its Mot. for New Trial at 2. The Court's comparative negligence instruction stated that the jury was only permitted to find RIRRC comparatively negligent if Restivo proved that RIRRC's conduct was "unreasonable under the circumstances and interfered with Restivo's ability to perform its duty." Jury Instructions at 22-23. The Court did not disagree with Restivo's contention that the audit interference rule is applied in a "small minority of jurisdictions," Tr. at 6, Nov. 2, 2015, but determined that it was a "sound rule under the circumstances," id. The Court thus refused to adopt Restivo's comparative negligence instruction (which did not incorporate the audit interference rule), and it affirms that decision here.

The audit interference rule prohibits the assertion of contributory negligence by an auditor when no evidence relating to interference by the client has been provided. 1 Am. Jur. 2d Accountants § 19. The rule has been applied in other jurisdictions under circumstances where auditors failed to detect inappropriate, high-risk investments, see Bd. of Trs. of Cmty. Coll. Dist. No. 508 v. Coopers & Lybrand, 803 N.E.2d 460 (Ill. 2003), and support for its application is also found in Section 7 of Restatement (Third) Torts, ("[p]laintiff's negligence . . . that is a legal cause of an indivisible injury to the plaintiff reduces the plaintiff's recovery in proportion to the share of responsibility the factfinder assigns to the plaintiff"). Because it is the trial justice's

duty to provide the jury with instructions applicable to the facts in evidence, Labrecque, 457 A.2d at 619, the Court's instruction concerning comparative negligence, generally, and the audit interference rule, in particular, was not improper.

**Whether the Court Improperly Refused to Give Certain Instructions to the Jury**

Restivo requests a new trial on the basis that the Court refused to instruct the jury that expert testimony was required to prove causation where claims of professional negligence are raised. Defendant's Mem. in Supp. of its Mot. for New Trial at 2. The Court has previously determined, however, that expert testimony is required to prove causation only in medical malpractice cases. Tr. at 3, Oct. 29, 2015. In Giron v. Bailey, 985 A.2d 1003 (R.I. 2009), our Supreme Court found that expert testimony '"is not necessary . . . if the jury is as capable of comprehending and understanding [the] facts and drawing correct conclusions from them as is the expert.'" Giron, 985 A.2d at 1010 (quoting Allen v. State, 420 A.2d 70, 73 (R.I. 1980)). Thus, expert testimony is not required where, as here, "there has been testimony produced by the plaintiff with respect to the standards to be applied," and from which correct conclusions were capable of being drawn. See Tr. at 3-4, Oct. 29, 2015.

Restivo further contends that a new trial should be ordered, however, due to the Court's refusal to provide the jury with an instruction concerning the affirmative defense of in pari delicto.[12] Defendant's Mem. in Supp. of its Mot. for New Trial at 3. Restivo asserts that RIRRC is the party primarily responsible for the damages awarded, and that it may not recover for Restivo's alleged wrongdoing. R.I. Res. Recovery Corp. v. Restivo Monacelli, LLP, No. PB 10-4502 at 27 (R.I. Super. Feb. 23, 2015 (Silverstein, J.)). However, as the Court previously found,

[12] The affirmative defense of in pari delicto is derived from the common law, and is based on the principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from that wrongdoing. R.I. Res. Recovery Corp. v. Restivo Monacelli, LLP, No. PB 10-4502 at 27 (R.I. Super. Feb. 23, 2015 (Silverstein, J.)).

the adverse interest exception would bar application of the in pari delicto doctrine here because "several individuals at RIRRC were acting in contravention to RIRRC's interests."[13] Id. at 29. For this reason and for those reasons discussed above, the Court denies Restivo's Motion for New Trial.

## V

## Conclusion

Counsel for RIRRC shall present an order consistent herewith upon due notice and an opportunity to be heard being provided to counsel for Restivo. Upon entry of such order, the clerk is directed to prepare and enter judgment herein forthwith.

[13] Under the adverse interest exception, "notice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter." R.I. Econ. Dev. Corp. v. Wells Fargo Sec., LLC, 2013 WL 4711306, at *19 (R.I. Super. Aug. 28, 2013) (Trial Order) (quoting Restatement (Third) Agency § 5.04).

**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:** | **January 11, 2016** |
| **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.** |