

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2016-CP-07-2541
Appellate Case No. 2022-000231

Forum Benefits, LLC,

Appellant,

v.

Brian Bannon and Assured Partners, NL,

Respondents.

APPELLANT'S AMENDED INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE TRIAL COURT ERRED GRANTING DIRECTED VERDICT TO RESPONDENTS.**
 - A. DID THE TRIAL COURT’S DIRECTED VERDICT ON APPELLANT’S CONTRACT CLAIM RELY ON LEGAL ERROR AND DISPUTED FACTS?**
 - B. DID THE TRIAL COURT’S DIRECTED VERDICT OF NO FIDUCIARY DUTY BY RESPONDENT BANNON RELY ON LEGAL ERROR?**
 - C. DID THE TRIAL COURT’S DIRECTED VERDICT ON APPELLANT’S TRADE SECRET CLAIM RELY ON LEGAL ERROR AND DISPUTED FACTS?**
 - D. DID THE TRIAL COURT’S DIRECTED VERDICT ON APPELLANT’S CONVERSION CLAIM RELY ON LEGAL ERROR AND DISPUTED FACTS?**
- II. WHETHER THE TRIAL COURT ERRED IN AWARDING ATTORNEYS FEES AND COSTS TO RESPONDENTS.**
- III. WHETHER THE TRIAL COURT ERRED IN NOT RECUSING ITSELF FOR EXTRAJUDICIAL BIAS FAVORING A RESPONDENT.**

STATEMENT OF THE CASE

Forum Benefits, LLC (“Forum Benefits”) is an insurance broker of health, life, and disability insurance policies. (Verified Complaint, ¶ 2). Forum Benefits utilizes a proprietary design and build-out of a subscription software application named “Employee Navigator” to collect, organize, and compile employee census data and insurance plan information into a database for each client. (Trial Transcript, pp. 96-97; 158; 338-341; 338-341; 360-368). Forum Benefits then applies this database of employee census data and insurance plan information to proprietary algorithms stored on its SharePoint server to provide Forum Benefits with a competitive advantage in administering benefits for clients and negotiating rates with insurance providers. (Trial Transcript, pp. 338-341; 372-378). Forum Benefits restricted access to Employee Navigator and the SharePoint server to certain personnel via login credentials. (Trial Transcript, pp. 117-118; 369-371; 379).

Brian Bannon (“Bannon”) began employment with Forum Benefits in 2009 as a full-time sales representative. (Plaintiff’s Exhibit 137; Trial Transcript, pp. 39-54, 69; 479). Bannon signed and delivered a written employment agreement with Forum Benefits that required, among other things, that Bannon not use or disclose Forum Benefits’ trade secrets for any reason or purpose whatsoever, except as an employee of Forum Benefits and with the consent of Forum Benefits. (Plaintiff’s Exhibit 137, pp. 2 -3 ¶ 12; Trial Transcript, pp 488-490). In 2013, Bannon transitioned to an independent contractor role with Forum Benefits and continued to represent Forum Benefits as a sales representative to existing and prospective clients. (Trial Transcript, p. 199).

On October 15, 2016, Bannon began employment as a Senior Vice President of Assured Partners, NL (“Assured Partners”), another insurance broker and direct competitor of Forum Benefits. (Trial Transcript, pp. 152; 200). Yet for four weeks following that date he continued to hold himself out as Forum Benefits’ sales representative, hiding his employment with Assured

Partners from Forum Benefits. (Trial Transcript, pp. 212-213). During that four (4) week overlap, Bannon secretly obtained and forwarded Employee Navigator login credentials for Forum Benefits' clients to Assured Partners. (Plaintiff's Exhibit 10; Trial Transcript p. 160, 165-166; 170; 172-176; 229; 256-257). Evidently knowing his actions were wrong, Bannon forwarded those credentials to Assured Partners with his personal email account. (Trial Transcript, p. 160). Bannon also downloaded approximately 2,000 files containing Forum Benefits' proprietary algorithms from Forum Benefits' SharePoint server using the login credentials he had received from Forum Benefits. (Trial Transcript, pp. 153-154; 177-178; 180). During that four (4) week overlap, Assured Partners repeatedly urged its employees to expedite copying Forum Benefits' trade secrets before Forum Benefits discovered what they were doing. (Trial Transcript, p. 170).

On December 1, 2016, Forum Benefits sued Bannon and Assured Partners (collectively, "Respondents"), alleging among other things misappropriation of trade secrets, breach of contract, conversion, and breach of fiduciary duty. (Verified Complaint). A jury trial commenced on October 11, 2021. (Trial Transcript, p. 1).

Testimony and exhibits were provided that showed that continuous access to Forum Benefits' database of employee census data and insurance plan information compiled in the Employee Navigator accounts was an important factor in clients' decisions to move their business from Forum Benefits to Assured Partners. Nine clients were identified who were associated with Bannon that actively used Forum Benefits' Employee Navigator accounts. Bannon provided Employee Navigator client login credentials for three of those clients, and all three of those clients moved their business from Forum Benefits to Assured Partners. None of the other six clients—for whom Bannon provided no Employee Navigator client login credentials—transferred their business from Forum Benefits to Assured Partners. (Trial Transcript, pp. 263-264; 430-432; 552-

555).

The annual commissions associated with each client that switched from Forum Benefits to Assured Partners would support a verdict in favor of Forum Benefits in excess of \$1.5M. (Plaintiff's Exhibit 16; Trial Transcript, pp. 503-513; 517-543; 556-561).

During trial, Forum Benefits moved for the trial judge to recuse himself, based on conduct by the trial judge with Mack Ward, an Assured Partners' principal, in the courtroom during a break. The motion was denied. (Trial Transcript, p. 451, lines 4-6). Instead, the trial judge granted an oral motion for directed verdict for Respondents on all causes of action. (Trial Transcript, pp. 677-678). Respondents then made two oral motions for attorneys' fees and costs, which the trial judge immediately granted before even hearing a response from Forum Benefits. (Trial Transcript, pp. 680-681).

On October 25, 2021, Forum Benefits filed a Motion for New Trial. (Plaintiff's Motion for New Trial). Respondents filed a Response in Opposition to Forum Benefits' Motion for a New Trial on November 1, 2021. (Defendants' Response in Opposition to Plaintiff's Motion for a New Trial).

On October 25, 2021, Forum Benefits filed a Response to Respondents' oral motions for attorneys' fees. (Plaintiff's Response to Defendants' Motions for Attorneys' Fees). Respondents replied on November 1, 2021. (Defendants' Reply in Support of Its Motion for Attorneys' Fees/Costs and the Court's Award of Fees/Costs). On November 4, 2021, Respondents' counsel filed an affidavit regarding attorneys' fees. (Affidavit of Jeffrey Lehrer for Attorneys' Fees and Costs).

On November 9, 2021, Respondents emailed to chambers a proposed Order, which had not been requested by the trial court, to "confirm" the trial court's directed verdict and attorneys' fee

rulings. (Proposed Order for Attorneys' Fees, Filed November 9, 2021). Forum Benefits objected to the unsolicited proposed Order as improper pursuant to Rule 8(c) of the Electronic Filing Policies and Guidelines and as an attempt to re-write the trial court's oral rulings.

On November 16, 2021, Forum Benefits filed a Reply in Support of Its Motion for a New Trial. (Plaintiff's Reply in Support of Motion for a New Trial).

On December 29, 2021, Forum Benefits filed a Supplemental Response to Respondents' Motions for Attorneys' Fees. (Plaintiff's Supplemental Response to Defendants' Motions for Attorneys' Fees).

On January 4, 2022, the trial court conducted a hearing on Forum Benefits' Motion for a New Trial. Forum Benefits presented live testimony from Michelle Filler, Lisa Hollingsworth Stritt, and Brian Stritt ("Stritt"), describing their observations of the trial judge's extrajudicial conduct with Mack Ward in the courtroom. (Hearing Transcript of January 4, 2022, pp. 6-35; Declaration of Brian Stritt, filed December 29, 2021; Declaration of Lisa Hollingsworth-Stritt, filed December 29, 2021; Declaration of Michelle Filler, filed December 29, 2021).

On February 1, 2022, the trial court filed an Order granting a directed verdict against Forum Benefits on all causes of action, confirming an award of Respondents' attorneys' fees and costs, and entering judgment against Forum Benefits. (Order Granting Defendants' Motion for Directed Verdict and Awarding Prevailing Party Attorneys' Fees and Costs to Defendants). This February 1, 2022, Order is a verbatim copy of the unsolicited proposed Order that Respondents had filed and sent to chambers on November 9, 2021. (Proposed Order for Attorneys' Fees, Filed November 9, 2021).

Forum Benefits served Respondents with its Notice of Appeal on February 25, 2022.

STANDARD OF REVIEW

A. Directed Verdict

When reviewing the trial court's decision on a motion for directed verdict, the Court applies the same standard of review as the trial court. "When considering a motion for a directed verdict, the [trial] court must 'view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and [must] deny the motion when either the evidence yields more than one inference or its inference is in doubt.'" *Turner v. Med. Univ. of S.C.*, 430 S.C. 569, 582, 846 S.E.2d 1, 7 (Ct. App. 2020) (quoting *Estate of Carr ex rel. Bolton v. Circle S Enters., Inc.*, 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008)). "In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence." *Wright v. Craft*, 372 S.C. 1, 22, 640 S.E.2d 486, 498 (Ct. App. 2006) (citation omitted). When reviewing an order granting a directed verdict motion the Court does not have the "authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Id.* An order granting a directed verdict must be reversed "when there is no evidence to support the ruling or when the ruling is controlled by an error of law." *Estate of Carr*, 379 S.C. at 39, 664 S.E.2d at 86.

B. Award of Attorneys' Fees

Under South Carolina law, an award of attorneys' fees must be reversed if the circuit court abused its discretion in issuing the award. *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 621, 635 S.E.2d 922, 926 (Ct. App. 2006). The trial court abuses its discretion in awarding attorneys' fees when the award is based on an error of law or is without any evidentiary support. *See Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997).

C. Disqualification of the Trial Judge

Under Canon 3(E)(1)(a) of Rule 501, SCACR, a trial judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. *See Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004); *Davis v. Parkview Apartments*, 409 S.C. 266, 284, 762 S.E.2d 535, 545 (2014). A party seeking disqualification must show some evidence of bias or prejudice. *See Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996). If there is evidence of judicial bias or prejudice, a trial judge’s failure to disqualify himself should be reversed on appeal. *See Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 433 S.E.2d 856 (1993).

ARGUMENTS

I. The Trial Court Erred in Granting Directed Verdict in favor of the Respondents.

A. The Directed Verdict on Forum Benefits’ Contract Claim Relies on a Combination of Legal Errors and Disputed Facts for the Jury to Decide

The February 1, 2022 Order directed a verdict in favor of Bannon on Forum Benefits’ breach of contract claim, ruling as a matter of law, *inter alia*, that (1) Forum Benefits failed to prove the existence of a signed contract to satisfy the Statute of Frauds and (2) Forum Benefits failed to prove that there was a meeting of the minds on the essential terms of the alleged contract. (Order Granting Defendants’ Motion for Directed Verdict and Awarding Prevailing Party Attorneys’ Fees and Costs to Defendants, p. 2). The rulings are legally erroneous and improperly invaded the province of the jury.

1. The Trial Court Erred in Concluding as a Matter of Law that Forum Benefits Failed to Prove the Existence of a Signed Employment Agreement to Satisfy the Statute of Frauds

Respondents argued, and the trial court agreed, that Forum Benefits’ failure to produce a signed employment agreement prevented Forum Benefits from satisfying the Statute of Frauds as a matter of law. (Trial Transcript, pp. 618-619; 626; 677; February 1, 2022 Order, p. 2, ¶ A(1)).

This ruling incorrectly applies the Statute of Frauds by ignoring substantial, corroborating evidence that Bannon did, in fact, sign an employment agreement with Forum Benefits.

Evidence sufficient to satisfy the Statute of Frauds is not limited exclusively to production of a signed agreement. Courts in other jurisdictions have regularly recognized the lost memorandum exception to the Statute of Frauds and allowed parol evidence to prove the existence of a signed agreement that complies with the Statute of Frauds. *See, e.g., Alph C. Kaufman, Inc. v. Cornerstone Indus. Corp.*, 540 S.W.3d 803 (Ky. Ct. App. 2017); *Gipson v. Mattox*, 2006 U.S. Dist. LEXIS 86207 (S.D. Ala. 2006). In *Kaufman*, the court explained that the “clear and convincing” standard “does not mean that it must be established beyond a reasonable doubt, but that the evidence must not be vague, ambiguous, or contradictory, and must come from a credible source. It does not have to be undisputed or uncontradicted.” *Kaufman*, 540 S.W.3d at 813.

In *Gipson*, the court recognized, “That no written agreement has been produced today does not require a conclusion that no such document ever existed. If a written agreement previously existed, but was lost, destroyed or purloined, then defendant can introduce evidence to that effect in order to satisfy the Statute of Frauds.” *Gipson*, at *37; *see, also, McInnis v. Lind*, 108 P.3d 578, 582 n.2 (Or. App. 2005) (observing many exceptions to the statute of frauds’ prohibition on parol evidence to support an agreement, including where a writing is lost or is in the possession of an adverse party); *Latino Food Marketers, LLC v. Ole Mexican Foods, Inc.*, 2003 WL 23220142, *5 (W.D. Wis. Aug. 20, 2003) (“if the parties did indeed form a contract that met the requirements of the statutes of frauds, the contract is enforceable even if the writing is lost or destroyed”); *Connecticut Bank & Trust Co. v. Wilcox*, 518 A.2d 928, 931 (Conn.1986) (“the loss or destruction of a memorandum does not deprive it of effect under the Statute of Frauds,” where the writing can be proven by secondary evidence).

Comment (a) of section 137 of the *Restatement (Second) of Contracts* echoes this line of authority, stating, “In cases of loss or destruction, the contents of a memorandum may be shown by an unsigned copy or by oral evidence.” *See also Corbin on Contracts* § 23.10 (2006) (“If the requirements of the statute of frauds are satisfied by a signed contract or memorandum, the contract remains enforceable even though the writing is lost or destroyed. The contents of the writing can then be proved by parol testimony and the contract enforced.”).

South Carolina courts also allow parol evidence to establish the existence of a written contract when the contract cannot be located. *See Yadkin Valley Bank & Tr. v. Oaktree Homes, Inc.*, No. 2014-UP-306, 2014 S.C. App. Unpub. LEXIS 395, *1-4 (Ct. App. July 30, 2014). In *Yadkin*, the court noted that to avoid a statute of frauds defense, a plaintiff would need to satisfy a heightened standard of “clear and convincing” proof that the signed document existed.

Unlike the plaintiff in *Yadkin*, Forum Benefits did not rely solely on self-serving, uncorroborated testimony and, instead, introduced clear and convincing evidence to establish the existence of the missing employment contract with Bannon. Bannon began working for Forum Benefits in Charleston in 2009, (Trial Transcript, pp. 101, 112), and David Wyatt (“Wyatt”) testified that Brian Stritt engaged him in 2009 to prepare an employment agreement for a new employee that would be hired in Charleston. (Plaintiff’s Exhibit 137; Trial Transcript, pp. 39-54, 69; 487-488). Stritt testified that Ex. 137 is a blank employment agreement prepared by Wyatt (Plaintiff’s Exhibit 137; Trial Transcript, pp. 39-54, 69, 482-484); that Ex. 163 is a completed employment agreement signed by Bannon’s co-employee Chris Whatley on May 18, 2009 (Plaintiff’s Exhibit 163; Trial Transcript, pp. 480-482, 484-485); and that Ex. 163 is substantially identical to the completed employment agreement signed by Bannon (Trial Transcript, p. 485-487). Stritt further testified that Bannon signed the employment agreement when Stritt delivered

the first paycheck to Bannon on June 1, 2009 (Trial Transcript, pp. 488-490); that Stritt placed the signed employment agreement in Bannon’s employment file (Trial Transcript, pp. 489); and that Stritt only discovered that the signed employment agreement was missing—along with Bannon’s entire employment file—shortly after Stritt learned that Bannon had been hired by Assured Partners (Trial Transcript, pp. 489-490). The suspicious nature of Bannon’s “lost” employment agreement—along with the entirety of his employment file—supports a reasonable inference that it was actually taken by, or at the direction of, Bannon. These are not matters of law for the trial court to decide, but instead are disputed questions of fact for the jury. By granting a directed verdict based on the Statute of Frauds, the trial court made credibility decisions and weighed material evidence, a job to be performed by the jury.

The evidence regarding the existence of a signed employment agreement created several factual disputes for the jury to resolve. *Kumpf v. United Tel. Co. of the Carolinas*, 311 S.C. 533, 429 S.E.2d 869 (Ct. App. 1993) (holding that “a trial court should submit to the jury the issue of the existence of a contract when its existence is questioned and the evidence is either conflicting or admits of more than one inference.”). Therefore, the factual dispute regarding whether Bannon signed an employment agreement with Forum Benefits should have been submitted to the jury. Accordingly, the trial court erred in directing verdict in favor of Respondents.

2. The Trial Court Erred in Concluding as a Matter of Law that Forum Benefits Failed to Prove a Meeting of the Minds on the Essential Terms of Bannon’s Employment Agreement

The February 1, 2022, Order asserts that as a matter of law “[Forum Benefits] failed to prove that there was a meeting of the minds on the essential terms of the alleged contract.” (Order Granting Defendants’ Motion for Directed Verdict and Awarding Prevailing Party Attorneys’ Fees and Costs to Defendants, p. 2). This ruling ignores the evidence introduced at trial that created disputed facts for the jury to decide regarding the essential terms in Bannon’s employment

agreement and his agreement to those terms.

The evidence noted above, such as that in Section I(A)(1), shows that the trial court erred. This evidence created disputed questions of fact for the jury to decide, and the trial court's determination that Forum Benefits "failed to prove" these disputed questions of fact improperly invaded the province of the jury and constitutes legal error.

3. The Trial Court Erred in Concluding as a Matter of Law that the Alleged Breaches of Contract Occurred After the Restrictive Covenants had Expired

The directed verdict ruling that the alleged breaches of contract occurred after the restrictive covenants had expired refers to the contract "restrictions relating to the disclosure of confidential information and solicitation of customers," which had a two-year post-employment duration. (Plaintiff's Exhibit 137; Trial Transcript, p. 620; February 2, 2022 Order, p. 2). This ruling ignores that Forum Benefits introduced evidence that Bannon breached a different employment agreement provision that prohibited Bannon from disclosing Forum Benefits' trade secrets and confidential information—this restriction was unlimited in duration.

David Wyatt and Brian Stritt provided testimony, corroborated by Plaintiff's Exhibits 137 (Plaintiff's Exhibit 137) and 163 (Plaintiff's Exhibit 163), that paragraph 12 of the employment agreement signed by Bannon included covenants not to disclose Forum Benefits' trade secrets and confidential information and that these covenants were unlimited in duration. (Plaintiff's Exhibit 137; Trial Transcript, pp. 39-54, 69). Paragraph 12(a) of the employment agreement specifically acknowledges that Forum Benefits "has information that is confidential and constitutes trade secrets which [Forum Benefits] uses in its business, and which is essential to its continued ability to compete and be successful in the industry." (Plaintiff's Exhibit 137, p. 2, ¶ 12(a)). Paragraphs 12(b)-(c) incorporate the definition of "trade secrets" provided in the S.C. CODE ANN. § 39-8-10, *et seq.* (Plaintiff's Exhibit 137, pp. 2-3, ¶¶ 12(b),(c)). Paragraphs 12(d)-(e) provide specific

examples of Forum Benefits' trade secrets, including many of the items Bannon downloaded and shared with Assured Partners. (Plaintiff's Exhibit 137, p. 3, ¶¶ 12(d),(e)). Paragraph 12(f) specifically provided that

Employee [Bannon] covenants and agrees that during Employee's [Bannon's] employment and at all times thereafter, Employee [Bannon] shall not use any Trade Secrets of the Company [Forum Benefits], except as an employee of the Company [Forum Benefits] with the consent of the Company [Forum Benefits]. Employee [Bannon] further covenants and agrees that during Employee's [Bannon's] employment and at all times thereafter, Employee [Bannon] shall not use or disclose any Trade Secrets of the Company [Forum Benefits] to any firm, company, corporation, association or other entity, for any reason or purpose whatsoever, except as an employee of the Company [Forum Benefits] with the consent of the Company [Forum Benefits].

(Plaintiff's Exhibit 137, p. 3, ¶ 12(f)) (emphasis added).

The clear and unambiguous language of the employment agreement prohibits Bannon from ever copying and sharing Forum Benefits' trade secrets and confidential information without permission. The S.C. Trade Secrets Act provides that this obligation not to use or disclose trade secrets "must not be considered void or unenforceable or against public policy for lack of a durational or geographical limitation." S.C. CODE ANN. § 39-8-30(D) (emphasis added). Therefore, Bannon's contractual obligations not to disclose or use Forum Benefits' trade secrets and confidential information without Forum Benefits' consent is not limited in duration and are enforceable in accordance with ordinary principles of contract law.

The trial court erred in concluding as a matter of law that the alleged breaches of contract occurred after the restrictive covenants had expired.

4. The Trial Court Erred in Concluding as a Matter of Law that Forum Benefits Failed to Establish the Required Elements of a Restrictive Covenant Agreement

The directed verdict ruling that "Forum Benefits failed to establish the required elements of a restrictive covenant agreement which must be strictly construed against the employer under

South Carolina law” misstates the law and impermissibly decides disputed questions of fact. (February 1, 2022 Order, p. 2).

The proposition that “a restrictive covenant agreement . . . must be strictly construed against the employer under South Carolina law” is a jumbled misstatement of the law. Every agreement includes “restrictive covenants” of one sort or another, but there is no jurisprudence in South Carolina, or elsewhere, holding that every provision of every agreement with an employer must be strictly construed against the employer.

Instead, as stated in *Rental Uniform Service of Florence, Inc. v. Dudley*, “Restrictive covenants not to compete are generally disfavored and will be strictly construed against the employer.” 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983) (emphasis added). As this quote makes clear, this principle of construction does not apply to every restrictive covenant or to every agreement containing a restrictive covenant; it only applies to “restrictive covenants not to compete.” Immediately following this quote, the Supreme Court enumerated the required elements for a restrictive covenant not to compete—these required elements only apply to restrictive covenants not to compete. *Id.*

Contracts require an offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Valuable consideration may consist of “some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.” *Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998). Forum Benefits introduced evidence that Bannon breached the restrictive covenant in the employment agreement that prohibited Bannon from disclosing Forum Benefits’ trade secrets. Wyatt’s testimony, Stritt’s testimony, and Plaintiff’s Exhibit 163 all provide corroborating evidence of the essential terms in

the “offer” of employment by Forum Benefits to Bannon. (Plaintiff’s Exhibits 137 and 163; Trial Transcript, pp. 39-54, 69). One of the essential terms in the offer is the covenant not to disclose Forum Benefits’ trade secrets, as described in paragraph 12 of the employment agreement (Plaintiff’s Exhibit 137, pp. 2-3), and quoted above in Section I(A)(3), and this covenant is unlimited in duration, as permitted by S.C. CODE ANN. § 39-8-30(D). Stritt’s testimony that Bannon signed the employment agreement when Stritt delivered the first paycheck to Bannon on June 1, 2009, provides evidence that Bannon “accepted” the employment agreement and received “valuable consideration” for the employment agreement. (Trial Transcript, p. 479).

The holding in *Milliken & Co. v. Morin*, 399 S.C. 23, 39, 731 S.E.2d 288, 296 (2012) is instructive on this issue. The South Carolina Supreme Court held that “confidentiality and invention assignment clauses are not in restraint of trade and should not be strictly construed in favor of the employee.” *Id.* at 39, 731 S.E.2d 296. “[T]he scope of the restriction is determined using ordinary principles of contract law.” *Id.* at 32–33, 731 S.E.2d at 293.

Forum Benefits provided substantial, corroborated evidence of the required elements of an enforceable contract. To the extent Respondents disputed this evidence, disputed questions of fact are for the jury to decide, and the trial court’s determination that Forum Benefits “failed to establish” these disputed questions of fact improperly invaded the province of the jury and constitutes legal error. Moreover, the trial court’s suggestion that additional elements are required or that the contract is to be strictly construed against Forum Benefits is error as a matter of law.

B. The Directed Verdict Ruling that Bannon Did Not Owe a Fiduciary Duty to Forum Benefits is Legal Error

The February 1, 2022 Order directed a verdict in favor of Bannon on Forum Benefits’ breach of fiduciary duty claim. (February 1, 2022 Order, pp. 2-3). In the oral directed verdict ruling, the trial court declared as a matter of law that an independent contractor cannot owe a

fiduciary duty. (Trial Transcript, pp. 678). In the February 1, 2022 Order completely abandoned this ruling and instead ruled that “Forum Benefits failed to establish any evidence that Bannon’s relationship to Forum Benefits as an independent contractor created any type of fiduciary duty to Forum Benefits.” (February 1, 2022 Order, pp. 2-3). This ruling ignored substantial evidence presented at trial of the confidential and fiduciary relationship that existed between Bannon and Forum Benefits from when Bannon was first hired by Forum Benefits in June 2009, until Bannon stopped representing Forum Benefits as a sales representative in November 2016.

A “confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence.” *Davis v. Greenwood Sch. Dist.* 50, 365 S.C. 629, 620 S.E.2d 65, 68 (2005) (citation omitted); *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987).

Over thirty years ago the Court identified the following cases in which South Carolina courts held or affirmed that an independent contractor owed a fiduciary duty:

Loftis v. Eck, 288 S.C. 154, 157, 341 S.E.2d 641, 642 (Ct. App. 1986) (holding that an agent owed a fiduciary duty to the principal as a matter of law);

Lengel v. Tom Jenkins Realty, Inc., 286 S.C. 515, 518, 334 S.E.2d 834, 836 (Ct. App. 1985) (affirming that a real estate broker breached a fiduciary duty to disclose all material facts to the client);

In re Moore, 280 S.C. 178, 182, 312 S.E.2d 1, 3 (1984) (affirming that attorneys owe a fiduciary duty to clients);

Duncan v. Brookview House, Inc., 262 S.C. 449, 456, 205 S.E.2d 707, 710 (1974) (holding that promoters of a corporation owe a fiduciary duty of good faith to the corporation);

Rush v. South Carolina Nat’l Bank, 288 S.C. 560, 343 S.E.2d 667 (Ct. App. 1986) (stating that a bank that advises a customer as part of the services the bank offers may owe a fiduciary duty to the customer).

Steele v. Victory Sav. Bank, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988).

Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency. *See Berry v. Goodyear Tire and Rubber Co.*, 270 S.C. 489, 242 S.E.2d 551 (1978); Restatement (Second) of Agency § 393; Restatement (Second) of Agency § 393 comment e; Restatement (Second) of Agency § 396; Restatement (Second) of Agency § 396 comments c and d; Restatement (Second) of Agency § 401.

Forum Benefits hired Bannon in 2009 as a full-time employee to represent Forum Benefits as a sales representative to prospective clients. (Plaintiff's Exhibit 137; Trial Transcript, pp. 39-54, 69; 479). When Bannon decided to pursue a career as a fireman in 2013, Bannon transitioned to an independent contractor and continued to represent Forum Benefits as a sale representative to existing and prospective clients. (Trial Transcript, pp. 199; 490-491). As shown in Plaintiff's Exhibit 1 and acknowledged by Bannon, Bannon profusely thanked Stritt for allowing him to continue to represent Forum Benefits as an independent contractor, and Bannon assured Stritt that he would continue to grow the business for Forum Benefits. (Plaintiff's Exhibit 1; Trial Transcript, p. 135; 490-491). The preceding evidence establishes that Bannon continuously served as Forum Benefits' sales agent from 2009 until 2016 and, therefore, owed Forum Benefits a fiduciary duty not to compete with Forum Benefits concerning the subject matter of his agency.

During the four (4) week overlap when Bannon was simultaneously employed by Assured Partners and represented Forum Benefits as a sales representative, Bannon admitted that he secretly obtained and forwarded the Employee Navigator login credentials for Forum Benefits' clients to Assured Partners. (Plaintiff's Exhibit 10; Trial Transcript p. 160, 165-166; 170; 172-176; 229; 256-257). At the same time, Bannon downloaded approximately 2,000 files containing Forum Benefits' trade secrets from Forum Benefits' SharePoint server using the login credentials he had received years earlier when he was Forum Benefits' employee. (Trial Transcript, pp. 117-

118; 177-178; 180). As shown in Plaintiff's Exhibits 8, 10-12, and 45, employees of Assured Partners repeatedly exhorted everyone involved to expedite copying Forum Benefits' trade secrets before Forum Benefits discovered what they were doing. (Trial Transcript, pp. 153-154; 168; 172-176; 426). Bannon's actions to download and share Forum Benefits' trade secrets with a direct competitor demonstrate that he knew what he was doing was wrong and violated his fiduciary duty to Forum Benefits.

The uncontroverted evidence establishes that Bannon owed a fiduciary duty to Forum Benefits and knew that he breached this fiduciary duty. The trial court's ruling to the contrary constitutes an error of law.

C. The Directed Verdict on Forum Benefits' Misappropriation of Trade Secrets Claim Relies on a Combination of Legal Errors and Disputed Facts for the jury to Decide

1. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits Failed to Prove the Existence of Any Trade Secrets

The directed verdict ruling that "Forum Benefits wholly and completely failed to prove the existence of any trade secret information" ignores substantial evidence of the form, value, and availability of Forum Benefits' trade secrets and impermissibly decides disputed questions of fact.

A "trade secret" is any information that has value and is not readily publicly available. S.C. CODE ANN. § 39-8-20(5). The information may exist in any form, including as a formula, a compilation, a method of doing business, a technique, a product, a system, a process, a procedure, or a programming code. *Id.* The information does not have to be complicated, technical, or difficult to understand, and may merely be "a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy." *Id.*

Moreover, the information may simply be a compilation of publicly available data because “[t]he collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.” *Id.*

Forum Benefits designed the build-out of each Employee Navigator account, and Forum Benefits collected, organized, and compiled the employee census data and insurance plan information that populated each account. (Trial Transcript, pp. 155-156, 158; 336-337). Winston described in detail the information contained each Employee Navigator account and Forum Benefits’ Sharepoint server. Specifically, she described Forum Benefits’ proprietary design and build-out of Employee Navigator accounts for each client, as well as Forum Benefits’ collection, organization, and compilation of employee census data and insurance plan information included in this proprietary database. (Trial Transcript, pp. 338-341; 360-368; 372-378). She also described in detail Forum Benefits’ proprietary formulas included in the renewal spreadsheets for each client stored on Forum Benefits’ SharePoint server. (Trial Transcript, pp. 360-368; 372-378). Forum Benefits’ design and compilation of data in the Employee Navigator accounts and proprietary formulas in renewal spreadsheets stored on Forum Benefits’ SharePoint server exactly match several of the forms of “information” included in the definition for a “trade secret” provided by the S.C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(a).

Forum Benefits’ trade secrets took substantial time and effort to collect, organize, and compile and provided Forum Benefits with a competitive advantage in administering benefits for clients and negotiating rates with insurance providers. (Trial Transcript, pp. 338-341; 360-368; 372-378). Assured Partners saved that time, by downloading, copying, and taking screenshots of Forum Benefits’ trade secrets instead of having to design, build-out, collect, organize, and compile the same database of information. Competitive advantage and improved efficiency are precisely

the types of economic value described in the S. C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(b).

The evidence in the Record (*e.g.*, Plaintiff's Exhibits 8, 10-12, and 45) provides additional, uncontroverted evidence of the value of Forum Benefits' trade secrets to Assured Partners. (Trial Transcript, pp. 155-156; 168; 172-176; 426-429; 430-432). Respondents acted urgently to surreptitiously take Forum Benefits' trade secrets before Forum Benefits learned that Bannon was working for Assured Partners and terminated further access. (Trial Transcript, pp. 153-154; 229; 256-257). Brady even testified, consistent with his November 8, 2016 email, that he could not build an Employee Navigator account for a client without login credentials that would allow him to download, copy, and take screenshots of Forum Benefits' Employee Navigator account for that client. (Plaintiff's Exhibit 11; Trial Transcript, pp. 430-432). All of this uncontroverted evidence demonstrates the substantial economic value of Forum Benefits' trade secrets to Respondents.

Forum Benefits' compilation of data in the Employee Navigator accounts is not excluded from trade secret protection merely because the compiled data comprises seemingly simple facts collected from clients or insurance providers. S.C. CODE ANN. § 39-8-20(5). Forum Benefits designed the build-out of each Employee Navigator account, and that Forum Benefits collected, organized, and compiled the employee census data and insurance plan information that populated each account. (Trial Transcript, pp. 153-154, 158; 338-341; 360-368; 372-378). A trade secret may be a "compilation" of information—"a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy." *Id.* While clients and insurance providers certainly had knowledge of individual items in Forum Benefits'

compilation, “[t]he collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.” *Id.*

The February 1, 2022 Order fails to address, distinguish, or even acknowledge any of the preceding evidence that demonstrates Forum Benefits’ proprietary data compilations and formulas constitute protectible trade secrets as defined by the S.C. Trade Secrets Act. “When ruling on a motion for a directed verdict, the trial court must view all evidence and all reasonable inferences in the light most favorable to the nonmoving party, and if the evidence is susceptible of more than one reasonable inference, the trial court should submit the case to the jury.” *Roddey v. Wal-Mart Stores East, LP*, 415 S.C. 580, 588, 784 S.E.2d 670, 675 (2016) (citation omitted). By ignoring all of this evidence, the trial court both ignored the clear language of the S.C. Trade Secrets Act and imposed its own view of the evidence, each of which constitutes error to the Forum Benefits’ prejudice.

2. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits Failed to Prove Reasonable Efforts to Protect Forum Benefits’ Trade Secrets

The directed verdict ruling that Forum Benefits failed to prove reasonable efforts to protect Forum Benefits’ trade secrets ignores substantial evidence of the proven effectiveness of Forum Benefits’ protective efforts and impermissibly decides disputed questions of fact.

The S.C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(a)(ii), limits a “trade secret” to information that “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Forum Benefits not only introduced evidence of reasonable efforts to protect Forum Benefits’ trade secrets, but the evidence also established that Forum Benefits’ protective efforts had proven effective at preventing Mack Ward from misappropriating Forum Benefits’ trade secrets several months earlier. (Trial Transcript, pp. 491-498; Plaintiff’s Exhibit 550).

Forum Benefits limited access to Forum Benefits' trade secrets to only authorized personnel with valid login credentials. (Trial Transcript, pp. 369-371; 379). Forum Benefits only provided login credentials to Forum Benefits' proprietary database of information in the Employee Navigator accounts to account managers assigned to those accounts and, on a case-by-case basis, a single client representative if a client requested the ability to generate reports from the Employee Navigator account associated with that client. (Trial Transcript, pp. 369-371). Forum Benefits did not provide sales people, like Mack Ward and Bannon, with any login credentials to any of Forum Benefits' Employee Navigator accounts. (Trial Transcript, pp. 369-371). Forum Benefits only provided login credentials to Forum Benefits' SharePoint server to Forum Benefits' full-time employees. (Trial Transcript, pp. 117-118; 369-371; 379). When an individual ceases to be an employee of Forum Benefits, all access to these computer systems is cut off. (Trial Transcript, pp. 491-492).

Forum Benefits' protective efforts had proven effective at protecting Forum Benefits' trade secrets several months earlier in 2016. For several years prior, Forum Benefits had been providing benefits administration services to clients of AssureSouth, owned by Ben Taylor and Mack Ward. In February 2016, Ben Taylor and Mack Ward notified Forum Benefits that they were selling their AssureSouth business to Assured Partners. (Trial Transcript, pp. 492-494). Forum Benefits agreed to continue providing services to clients of AssureSouth during a two-month transition period. (Plaintiff's Exhibit 550; Trial Transcript pp. 494-498). However, as shown in Forum Benefits' Exhibit 550, Forum Benefits also notified Ben Taylor and Mack Ward that Forum Benefits would not allow third-party access to Forum Benefits' proprietary systems. (Plaintiff's Exhibit 550; Trial Transcript pp. 494-498). Forum Benefits then terminated all client access to any Employee Navigator accounts. (Trial Transcript, pp. 491-492). As a result, only Forum Benefits' employees

and account managers continued to have active login credentials to any of Forum Benefits' proprietary systems, and Forum Benefits' protective efforts proved effective at preventing Mack Ward and/or Assured Partners from misappropriating Forum Benefits' trade secrets. (Trial Transcript, pp. 492-494).

From this experience, Assured Partners and Mack Ward discovered a loophole that would avoid Forum Benefits' protective efforts and allow access to Forum Benefits' proprietary systems without Forum Benefits' knowledge—use a client's login credentials to access Forum Benefits' proprietary systems to download, copy, and take screenshots of the Employee Navigator accounts for those clients. Assured Partners hired Bannon on October 15, 2016, and as shown in Forum Benefits' Exhibits 8, 10-12, and 45, Bannon immediately exploited this loophole by obtaining and forwarding client login credentials to Assured Partners. (Plaintiff's Exhibits 8, 10-12, and 45; Trial Transcript, p. 75, lines 9-11; pp. 152-153; 168; 172-176; 200; 256-257).

Bannon hid his new employment status from Forum Benefits, allowing Assured Partners to surreptitiously download, copy, and take screenshots of the Employee Navigator accounts for those clients without Forum Benefits' knowledge. (Trial Transcript, p. 152). During the same time, Bannon downloaded approximately 2,000 files from Forum Benefits' SharePoint server using the login credentials he had received when he was Forum Benefits' employee. (Trial Transcript, pp. 177-178; 180).

Forum Benefits' protective efforts had previously proven effective at preventing Assured Partners and Mack Ward from accessing Forum Benefits' trade secrets, and their subsequent discovery of a loophole around those protections does not change that. Respondents in fact exploited a loophole in Forum Benefits' protections, but the law requires “efforts that are reasonable under the circumstances,” not foolproof measures.

Forum Benefits provided substantial evidence of protective efforts and the demonstrated effectiveness of those protective efforts at preventing unauthorized access to Forum Benefits' trade secrets. "The trial court must deny a motion for a directed verdict . . . if the evidence yields more than one reasonable inference or its inference is in doubt." *RFT Mgmt. Co., LLC v. Tinsley & Adams LLP*, 399 S.C. 322, 333, 732 S.E.2d 166, 171 (2012). The trial court erred by ignoring the evidence and adopting Respondents' view of the evidence, to Forum Benefits' prejudice.

3. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits Failed to Prove that Respondents Obtained Forum Benefits' Trade Secrets by Improper Means

The directed verdict ruling that Forum Benefits failed to prove that Respondents obtained Forum Benefits' trade secrets by improper means ignored the law and uncontroverted evidence presented at trial and impermissibly decided disputed questions of fact.

The S.C. Trade Secrets Act defines "improper means" to include, *inter alia*, theft, breach or inducement of a breach of a duty imposed by contract, and espionage through electronic or other means. S.C. CODE ANN. § 39-8-20(1). The evidence admitted at trial demonstrates that Respondents committed several of the enumerated actions that fall within the definition of "improper means" to obtain Forum Benefits' trade secrets.

The evidence noted above, such as that in Section I(B), shows that Respondents surreptitiously accessed, downloaded, and copied Forum Benefits' trade secrets and demonstrates acts of theft and espionage through electronic or other means, each of which constitutes "improper means" as defined by the S.C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(1).

The February 1, 2022 Order fails to address, distinguish, or even acknowledge any of the preceding evidence that demonstrates that Respondents committed several of the enumerated actions that fall within the definition of "improper means" to obtain Forum Benefits' trade secrets. By ignoring all of this evidence, the trial court ignored the clear language of the S.C. Trade Secrets

Act and imposed its own view of the evidence, each of which constitutes error to the Forum Benefits' prejudice.

4. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits Failed to Prove that Respondents Misappropriated, Wrongfully Disclosed, or Wrongfully Used Forum Benefits' Trade Secrets

The directed verdict ruling that Forum Benefits failed to prove that Respondents misappropriated, wrongfully disclosed, or wrongfully used Forum Benefits' trade secrets ignores the law and uncontroverted evidence presented at trial and impermissibly decides disputed questions of fact.

The S.C. Trade Secrets Act defines "misappropriation" of a trade secret as:

- (a) acquisition of a trade secret of another by a person by improper means;
- (b) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (c) disclosure or use of a trade secret of another without express or implied consent by a person who:
 - (i) used improper means to acquire knowledge of the trade secret.

S.C. CODE ANN. § 39-8-20(2).

The evidence admitted at trial and described herein—such as that in Section I(B)—demonstrates that Respondents committed several of the enumerated actions that fall within the definition of "improper means." Those included theft, breach, or inducement of a breach of a duty imposed by contract, and espionage through electronic or other means to obtain Forum Benefits' trade secrets. S.C. CODE ANN. § 39-8-20(1). As a result, Respondents' actions constitute a "misappropriation" of Forum Benefits' trade secrets under section 39-8-20(2)(a)—*i.e.*, Respondents acquired Forum Benefits' trade secrets by improper means.

No evidence exists that Forum Benefits ever expressly or impliedly consented to Respondents' disclosure or use of Forum Benefits' trade secrets. Therefore, Respondents' disclosure and use of Forum Benefits' trade secrets was "wrongful," and Respondents' actions also constitute a misappropriation of Forum Benefits' trade secrets under S.C. CODE ANN. § 39-8-20(2)(c)(i)—*i.e.*, Respondents used improper means to acquire knowledge of Forum Benefits' trade secrets and then disclosed and used Forum Benefits' trade secrets without Forum Benefits' express or implied consent.

By concluding that Forum Benefits failed to prove that Respondents misappropriated, wrongfully disclosed, or wrongfully used Forum Benefits' trade secrets, the trial court ignored the clear language of the S.C. Trade Secrets Act and imposed its own view of the evidence, each of which constitutes error to Forum Benefits' prejudice.

5. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits Failed to Prove that Damages were Proximately Caused by Respondents' Misappropriation of Forum Benefits' Trade Secrets

The directed verdict ruling that Forum Benefits failed to prove that damages were proximately caused by Respondents' misappropriation of Forum Benefits' trade secrets ignores substantial evidence and impermissibly decides disputed questions of fact.

Multiple witnesses provided testimony that supports the reasonable inference that Respondents' misappropriation of Forum Benefits' trade secrets proximately caused damages to Forum Benefits. Multiple contemporaneously generated emails (*e.g.*, Forum Benefits' Exhibits 8, 10-12, and 45, (Plaintiff's Exhibits 8, 10-12, and 45)) confirm that Assured Partners' acquisition of Forum Benefits' trade secrets from the Employee Navigator accounts was critical to convincing clients of a seamless transition from Forum Benefits to Assured Partners. (Plaintiff's Exhibits 8, 10, 11, 12, and 45; Trial Transcript, pp. 168; 172-176; 426-429).

Christie Holderness, the District Manager for St. Andrews Public Service District, testified

that continuous access to Forum Benefits' trade secrets compiled in the Employee Navigator account was an important factor in her decision to transfer St. Andrews Public Service District's business from Forum Benefits to Assured Partners. (Trial Transcript, pp. 610-616).

Nine clients associated with Bannon actively used Forum Benefits' compilation of data stored in the respective Employee Navigator accounts. (Trial Transcript, pp. 263-264; 430-432; 552-555). Assured Partners saved substantial time by being able to download, copy, and take screenshots of Forum Benefits' trade secrets instead of having to design, build-out, collect, organize, and compile the same database of information. (Trial Transcript, pp. 269-270).

Bannon provided Employee Navigator client login credentials for three of those clients – Carolina Youth Development, Premier Logistics, and St. Andrews Public Service District. (Trial Transcript, pp. 263-264; 430-432). All three of those clients transferred their business from Forum Benefits to Assured Partners. None of the other six clients that actively used Forum Benefits' compilation of data stored in the respective Employee Navigator accounts transferred their business to Assured Partners. (Trial Transcript, pp. 263-264; 430-432; 552-555). This 100% statistical correlation between Respondents' misappropriation of Forum Benefits' trade secrets and transfer of business to Assured Partners provides probative evidence of damages proximately caused by Respondents' actions.

Testimony and contemporaneous emails (*e.g.*, Forum Benefits' Exhibits 8, 10-12, and 45) provide uncontroverted evidence of the urgent efforts Respondents exercised to surreptitiously obtain Forum Benefits' trade secrets before Forum Benefits learned that Bannon was working for Assured Partners and terminated further access. (Plaintiff's Exhibits 8, 10, 11, 12, and 45; Trial Transcript, pp. 153-156; 168; 172-176; 256-257). Brady even testified, consistent with his November 8, 2016 email, that he could not build an Employee Navigator account for a client

without login credentials that would allow him to download, copy, and take screenshots of Forum Benefits' Employee Navigator account for that client. (Trial Transcript, pp. 430-432).

All of this uncontroverted evidence supports the reasonable inference that damages were proximately caused by Respondents' misappropriation of Forum Benefits' trade secrets. As a result, the trial court's ruling as a matter of law that Forum Benefits failed to prove that damages were proximately caused by Respondents' actions impermissibly decided disputed questions of fact for the jury to resolve and constitutes legal error that prejudiced Forum Benefits.

6. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits' Damages were Speculative

The directed verdict ruling that Forum Benefits' damages were speculative directly contradicts the trial court's evidentiary rulings, ignores competent evidence of Forum Benefits' damages, and impermissibly decides disputed questions of fact.

Brian Stritt testified regarding Forum Benefits' damages. Respondents repeatedly objected to Stritt's testimony as being opinion testimony and speculative. (Trial Transcript, pp. 503-513; 517-543). The trial court at first sustained Respondents' objections. (Trial Transcript, pp. 503-513; 517-543). However, after consultation with an unnamed Business Court judge, the trial court overruled some of Respondents' objections and allowed Stritt to testify regarding Forum Benefits' damages. (Trial Transcript, pp. 543-552)

Adhering to the trial court's rulings, Stritt provided factual testimony of the dollar amount of annual commissions associated with each client that switched from Forum Benefits to Assured Partners. This testimony was based on Stritt's personal knowledge as Forum Benefits' former owner and current managing director. (Plaintiff's Exhibit 16; Trial Transcript, pp. 503-513; 517-543; 556-561).

The trial court only allowed Stritt to testify regarding damages after determining during the

trial that the testimony was neither opinion testimony nor speculative. Therefore, the trial court's directed verdict ruling that Forum Benefits' damages were speculative contradicts the trial court's own rulings and ignores competent evidence of Forum Benefits' damages. As a result, the trial court's ruling as a matter of law that Forum Benefits' damages were speculative impermissibly decided disputed questions of fact for the jury to resolve and constitutes legal error that prejudiced Forum Benefits.

7. The Trial Court Erred in Determining as Matter of Law that Forum Benefits Introduced No Evidence Showing Assured Partners Ever Had Access to or Used Any of Forum Benefits' Trade Secrets

The directed verdict ruling that Forum Benefits introduced no evidence showing Assured Partners ever had access to or used any of Forum Benefits' trade secrets ignores substantial evidence presented at trial by Respondents' own employees and constitutes reversible error.

The evidence admitted at trial—such as that described herein in Sections I(B) and I(C)(5)—demonstrates that Assured Partners obtained client log-in credentials and copied and used Forum Benefits' trade secrets resident in the Employee Navigator accounts for several clients. (Plaintiff's Exhibits 8, 10-12, and 45; Trial Transcript, pp. 75; 117-118; 152-156; 160, 165-166; 168; 170; 172-178; 180; 200; 229; 256-257; 263-264; 269-270; 426-432; 552-555; 610-616).

Furthermore, Forum Benefits presented testimony from Nolan Zielinski, who conducted a forensic analysis of Forum Benefits' SharePoint server. (Trial Transcript, pp. 300-309). Forum Benefits' Exhibit 16 is a Log File Report generated by Zielinski that lists 2,107 files stored on Forum Benefits' SharePoint server that were accessed using Bannon's SharePoint user account with Forum Benefits. (Plaintiff's Exhibit 16; Trial Transcript pp. 304; 498-501; 514-517). As shown in the Log File Report, Bannon accessed 979 files from Forum Benefits' SharePoint server after October 15, 2016, when he was a Senior V.P. of Assured Partners. (Plaintiff's Exhibit 16; Trial Transcript pp. 200; 304; 498-501; 514-517).

Forum Benefits also presented expert testimony from Michael Scholz who forensically examined Forum Benefits' desktop computer that was used by Bannon in 2016. (Plaintiff's Exhibits 69, 70; Trial Transcript pp. 464, 466-468). Scholz testified that the desktop computer included a "Palmetto Benefits Management" folder.¹ (Trial Transcript p. 468). Forum Benefits' Exhibit 77 is a printout generated by Scholz that lists each file included in the Palmetto Benefits Management folder, and as shown in Forum Benefits' Exhibit 77, this folder included approximately 1,000 files having the same file names as files stored on Forum Benefits' SharePoint server and included in the Log File Report generated by Zielinski. (Plaintiff's Exhibits 16, 77; Trial Transcript p. 468-469; 498-501; 514-516). Scholz also generated a LNK File Report, Forum Benefits' Exhibit 72 (Plaintiff's Exhibit 72), and Scholz testified that the LNK File Report indicates that on October 30, 2016, an identical Palmetto Benefits Management folder was accessed on an external storage device connected to the desktop. (Plaintiff's Exhibit 72; Trial Transcript pp. 469-472).

The testimony of Zielinski and Scholz, combined with Bannon's testimony, provides evidence that Bannon did indeed copy and then transfer a substantial number of files from Forum Benefits' SharePoint sever to an external storage device—all while Bannon was a Senior V.P. of Assured Partners.

Bannon's own testimony provides additional evidence that he intentionally tried to transfer files from Forum Benefits' SharePoint server to Assured Partners. Specifically, as shown in Forum Benefits' Exhibit 64, on November 18, 2016, Michelle Fralix,² an account manager for Assured

¹"Palmetto Benefits Management" was Forum Benefits' previous corporate name. (Trial Transcript, pp. 101-102)

² Michelle Fralix also went by the name Amy Fralix and testified at trial as Michelle Coffield. (Trial Transcript, p. 281).

Partners assigned to Bannon, asked Bannon for a medical plan summary for Premier Logistics—one of Forum Benefits’ clients that Bannon was recruiting to switch to Assured Partners. (Plaintiff’s Exhibit 64; Trial Transcript, pp. 214-215). Bannon responded, “I’ve scoured my files but I wasn’t able to pull what I wanted off Forum’s website.” (Plaintiff’s Exhibit 64; Trial Transcript, pp. 215-216). On November 30, 2016, Bannon notified Fralix that Bannon could no longer access Forum Benefits’ proprietary renewal algorithms for Alpha Genesis—another client that Bannon was recruiting to switch to Assured Partners—stating, “My hard drive broke an [sic] I no longer have renewal info. for these guys.” (Plaintiff’s Exhibit 13; Trial Transcript, pp. 216-217).

The trial court’s ruling that Forum Benefits introduced no evidence that Assured Partners obtained and used Forum Benefits’ trade secrets directly contradicts and cannot be reconciled with the undisputed testimony and documents provided by two separate forensic experts and Respondents’ own employees. This erroneous factual conclusion, clothed as a legal ruling, invaded the province of the jury and constitutes prejudicial error to Forum Benefits.

8. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits Pursued a Trade Secret Claim in Bad Faith

The words “bad” or “faith” appear nowhere in any of Respondents’ directed verdict arguments or cited authorities, nor in any of the trial court’s oral directed verdict rulings. Nonetheless, the February 1, 2022 Order—authored entirely by Respondents—concludes as a matter of law that Forum Benefits pursued a trade secret claim in bad faith. (Order Granting Defendants’ Motion for Directed Verdict and Awarding Prevailing Party Attorneys’ Fees and Costs to Defendants, p. 4, ¶ C(8); p. 6, ¶ F). This ruling contradicts controlling precedent and constitutes legal error.

Respondents filed three separate motions seeking summary judgment on Forum Benefits’

trade secret claims. (Motion for Summary Judgment, Filed March 8, 2018; Memo in Support of Motion for Summary Judgment, Filed March 8, 2018; Memo in Reply to Motion for Summary Judgment, with 1 Exhibit, Filed April 2, 2018; Motion for Summary Judgment, filed June 11, 2019; Motion for Summary Judgment, with 8 Exhibits, filed April 20, 2020; Reply in Support of Motion for Summary Judgment, with 2 Exhibits, Filed June 9, 2020). Respondents withdrew one of the motions, but Forum Benefits filed full responses to the other two motions. (Response to Motion for Summary Judgment, with 13 Exhibits, Filed March 30, 2018; Response to 4th Motion for Summary Judgment, with 14 Exhibits, filed June 7, 2020). Two different Circuit Court judges each conducted a full hearing that was fully briefed, and each judge denied Respondents' motion for summary judgment. (Order Denying Defendants' Motion for Summary Judgment, Filed June 22, 2018; Order Form 4 Denying Motion for Summary Judgment, Filed October 14, 2020).

The trial commenced October 11, 2021, and Forum Benefits rested its case after three days of testimony. After the trial court granted Respondents a directed verdict on Forum Benefits' trade secret claims, Respondents moved for an award of attorneys' fees based on alleged bad faith litigation. (Trial Transcript, pp. 680-681).

“[W]here a party survives a summary judgment motion, it is not subject to sanctions after a trial on the merits of the surviving claims.” *Southeastern Site Prep, LLC v. Atl. Coast Builders & Contrs., LLC*, 394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011) (citation omitted). In *Southeastern*, as in the present case, two different judges denied the defendants' motion for summary judgment. As in the present case, the trial judge granted a directed verdict in favor of the defendants after the plaintiffs had presented their case and rested. As in the present case, the defendants sought an award of attorneys' fees for frivolous litigation. Following the Supreme Court's controlling authority in *Hanahan*, the Court of Appeals affirmed the denial of attorneys' fees because the

plaintiffs' claims had survived summary judgment.

The facts, reasoning, and conclusion reached in *Southeastern* are indistinguishable from the present case. Two different judges heard summary judgment motions against Forum Benefits, and both judges denied the motions. Consistent with the controlling authority of *Southeastern* and *Hanahan*, Forum Benefits' trade secret claims were not frivolous as a matter of law. Accordingly, the Court's ruling that Forum Benefits pursued a trade secret claim in bad faith ignores controlling South Carolina authority and is wrong as a matter of law.

D. The Directed Verdict on Forum Benefits' Conversion Claim Relies on a Combination of Legal Errors and Disputed Facts for the jury to Decide

The trial court's February 1, 2022 Order includes multiple rulings pertinent to Forum Benefits' conversion claim that are legally erroneous, and its factual conclusions improperly invaded the province of the jury.

1. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits could not prove the elements of a conversion against Bannon

The directed verdict ruling that Forum Benefits could not prove the elements of conversion against Bannon incorrectly applies the law to uncontroverted evidence presented at trial to decide disputed questions of fact.

Conversion is "the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights." *Gignilliat v. Gignilliat, Savitz & Bettis, L.*, 385 S.C. 452, 465, 684 S.E.2d 756, 763 (2009). The S.C. Trade Secrets Act provides the owner of a trade secret with the exclusive right to determine who can know, disclose, or use the trade secret. S.C. CODE ANN. § 39-8-20. Forum Benefits did not authorize Bannon to obtain Forum Benefits' trade secrets from the Employee Navigator accounts or from Forum Benefits' SharePoint server. Nonetheless, Bannon secretly obtained and forwarded the Employee Navigator client login credentials for Forum Benefits' clients to Assured Partners,

and Jim Brady used those login credentials to access, download, and copy Forum Benefits' trade secrets from the Employee Navigator accounts. (Plaintiff's Exhibit 10; Trial Transcript pp. 160, 165-166; 170; 172-176; 229; 256-257). Bannon himself testified that he downloaded approximately 2,000 files containing Forum Benefits' trade secrets from Forum Benefits' SharePoint server using the login credentials he had received as a Forum Benefits' employee. (Trial Transcript, pp. 177-178; 180).

The testimony from Bannon and Brady provides evidence for all of the elements of a conversion claim. Neither Bannon, nor Brady had Forum Benefits' authority to copy Forum Benefits' trade secrets from the Employee Navigator accounts or Forum Benefits' SharePoint server, and Bannon destroyed Forum Benefits' exclusive right to control knowledge, disclosure, or use of Forum Benefits' trade secrets by copying Forum Benefits' trade secrets from the Employee Navigator accounts and Forum Benefits' SharePoint server.

Accordingly, the Court's directed verdict ruling is legally wrong and impermissibly decides disputed questions of fact.

2. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits Failed to Prove that Bannon Converted Any Property of Forum Benefits to the Exclusion of Forum Benefits' Rights as Forum Benefits Always Retained Access and Rights to the Information at Issue

The directed verdict ruling that Forum Benefits failed to prove that Bannon converted any property of Forum Benefits to the exclusion of Forum Benefits' rights as Forum Benefits always retained access and rights to the information at issue incorrectly applies the law to uncontroverted evidence presented at trial to decide disputed questions of fact.

The S.C. Trade Secrets Act provides the owner of a trade secret with the exclusive right to determine who can know, disclose, or use the trade secret. S.C. CODE ANN. § 39-8-20. Bannon destroyed Forum Benefits' exclusive right to control knowledge, disclosure, or use of Forum

Benefits' trade secrets by copying Forum Benefits' trade secrets from the Employee Navigator accounts and Forum Benefits' SharePoint server. Accordingly, the Court's directed verdict ruling is legally wrong and impermissibly decides disputed questions of fact.

3. The Trial Court Erred in Determining as a Matter of Law that Intangible Property Cannot Form the Basis for a Conversion Claim

The directed verdict ruling that intangible property cannot form the basis for a conversion claim is wrong as a matter of law.

Conversion is the “the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner’s rights.” *Gignilliat, supra*. South Carolina courts have held that intangible rights are normally not the proper subject for a conversion claim. *Id.* The *Gignilliat* court explained, “An action for conversion ordinarily lies only for personal property that is tangible, or to intangible property that is merged in, or identified with, some document.” *Id.* (citation omitted) (emphasis added) (footnote omitted)). Ultimately, the South Carolina Supreme Court concluded that the tort of conversion as it relates to intangible property “should be limited to intangible property rights that are identified with some document.” *Id.*

In *Integrated Direct Marketing, LLC v. Drew May & Merkle, Inc.*, 2016 Ark. 281, 495 S.W.3d 73 (2016), the Arkansas Supreme Court was asked to answer a certified question from the District Court for the Eastern District of Virginia: “Under Arkansas’s tort of conversion, can intangible property such as electronic data, standing alone and not deemed a trade secret, be converted?” *Id.* The Arkansas Supreme Court answered in the affirmative. The court noted that the records in the case were electronically stored documents (consisting of over 300 files [far fewer than Bannon stole in the case at bar] that an employee had copied from his employer’s computer to his personal hard drive) allegedly containing confidential and proprietary information. *Id.* at

74, 76. The court concluded, “There is simply no reasonable basis for allowing a claim for conversion of paper documents but not for their electronically stored counterparts. Thus, we conclude that, under Arkansas law, intangible property, such as electronic data, standing alone and not deemed a trade secret, can be converted if the actions of the defendant are in denial of or inconsistent with the rights of the owner or person entitled to possession.” *Id.* at 76.

The decision in *Integrated Direct Marketing* is persuasive authority, consistent with the South Carolina Supreme Court’s rationale in *Gignilliat*, to limit a conversion claim to actions involving intangible property “merged in or identified with some document.” The type of intangible property maintained on the desktop computer is indistinguishable from the files allegedly stolen in *Integrated Direct Marketing*. Accordingly, Forum Benefits’ conversion claim included the intangible property stored in the desktop computer—a combination of both tangible and intangible property. Specifically, Bannon retained Forum Benefits’ desktop computer until ordered by the trial court to return it to Forum Benefits. (Trial Transcript, pp. 219-220). As with every computer, the desktop computer stored information in electronic form, such as formulas, compilations, processes, designs, and spreadsheets. In addition, Bannon copied Forum Benefits’ trade secrets from the Employee Navigator accounts and Forum Benefits’ SharePoint server. (Trial Transcript, pp. 117-118; 177-178; 180). The type of intangible property maintained on the desktop computer and copied from the Employee Navigator accounts and Forum Benefits’ SharePoint server is indistinguishable from the files allegedly stolen in *Integrated Direct Marketing*. All of the information stored on the desktop computer and copied from the Employee Navigator accounts and Forum Benefits’ SharePoint server is the very type of intangible property contemplated by the *Gignilliat* court that is “merged in or identified with some document.” *Id.* at 763.

Accordingly, Forum Benefits' conversion claim included the intangible property stored in the desktop computer and copied from the Employee Navigator accounts and Forum Benefits' SharePoint server. The Court's conclusion that intangible property cannot form the basis for a conversion claim is wrong as a matter of law.

4. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits Failed to Prove Damages were Proximately Caused by Bannon's Conversion of Forum Benefits' Trade Secrets

The directed verdict ruling that Forum Benefits failed to prove that damages were proximately caused by Bannon's conversion of Forum Benefits' trade secrets ignores substantial evidence and impermissibly decides disputed questions of fact.

The evidence noted above, such as that in Section I(C)(1), supports the reasonable inference that Bannon's conversion of Forum Benefits' trade secrets proximately caused damages to Forum Benefits. Likewise, the "9-client/100% statistical correlation" evidence described in detail hereinabove in Section I(C)(5) likewise demonstrates the factual questions that should have prevented the trial court's ruling on this issue.

The evidence discussed above supports the reasonable inference that damages were proximately caused by Bannon's misappropriation of Forum Benefits' trade secrets. As a result, the Court's ruling as a matter of law that Forum Benefits failed to prove that damages were proximately caused by Bannon's actions impermissibly decided disputed questions of fact for the jury to resolve and constitutes legal error that prejudiced Forum Benefits.

II. The Trial Court erred in granting attorneys' fees and costs to the Respondents.

In South Carolina, attorneys' fees are not recoverable absent authorization by contract or by statute. *Duke Power Co. v. S.C. Pub. Serv. Comm.*, 284 S.C. 81, 100, 326 S.E.2d 395, 406 (1985); *Maybank v. BB&T Corp.*, 416 S.C. 541, 580, 787 S.E.2d 498, 518 (2016).

Respondents' first motion for attorneys' fees consisted of an oral motion—a single

sentence in open court referencing the employment contract between Forum Benefits and Bannon—that the trial court granted before Respondents’ attorney even finished vocalizing that single sentence.³ (Trial Transcript, p. 680).

Respondents’ second motion for attorneys’ fees, based the S.C. Trade Secrets Act, was four sentences, again enunciated in open court, again did not include any evidence for any of the factors (identified below) that a trial court is required to consider before awarding attorneys’ fees, and again was instantaneously granted by the Court. (Trial Transcript, pp. 680-681).

The trial court failed to require the provision of basic information needed to support an award of attorneys’ fees, including which Respondent is seeking fees, the legal authority for the fee request, the amount of the fee request, and the six categories of information our jurisprudence identifies as needed to determine a reasonable fee award.

A. If By Contract

Respondents moved for an award of attorneys’ fees based on a prevailing party clause in Bannon’s employment contract with Forum Benefits. (Trial Transcript, p. 680). However, the trial judge had already ruled as a matter of law that there was no meeting of the minds to support a contract. (Trial Transcript, p. 677). And the trial court’s February 1, 2022 Order similarly ruled as a matter of law that Forum Benefits failed to prove a meeting of the minds on the essential terms of the alleged contract. (Order Granting Defendants’ Motion for Directed Verdict and Awarding Prevailing Party Attorneys’ Fees and Costs to Defendants, p. 2, ¶ A(2)). Thus, according to the trial court, no contract existed.

It was irreconcilable for the trial court to rule as a matter of law that the contract does not

³The Court’s instantaneous responses to Respondents’ motions is significant and supportive of Forum Benefits’ position that the trial judge should have recused himself for bias favoring Respondents.

exist and then enforce an attorneys' fees provision in the non-existent contract.

B. If By Statute

Forum Benefits' trade secret claim was not bad faith as a matter of law. As articulated above in Section I(C)(8), "[W]here a party survives a summary judgment motion, it is not subject to sanctions *after* trial on the merits of the surviving claims." *Southeastern*, 394 S.C. at 713 S.E.2d at 650 (quoting *Hanahan v. Simpson*, 326 S.C. 140, 158, 485 S.E.2d 903, 913 (1997)). The facts, reasoning, and conclusion reached in *Southeastern* are indistinguishable from the present case. Two different judges heard summary judgment motions against Forum Benefits, and both judges denied the motions. Consistent with the controlling authority of *Southeastern* and *Hanahan*, as a matter of law, Forum Benefits' trade secret claims were not in bad faith.

C. Whose Attorneys' Fees?

Respondents' muddled attorney fee request seems to have sought an award of attorneys' fees for both Respondents. (Trial Transcript, p. 680-681). If Respondents' motion was as to both Respondents, there is no evidence that Forum Benefits had any contract with Assured Partners. And there is no evidence that Bannon ever incurred any attorneys' fees whatsoever.

D. What Attorney Fees?

Respondents acknowledge that Bannon never incurred any fees and costs but nonetheless argue that Bannon should "recover" the fees and costs incurred by Assured Partners. (Defendants' Reply in Support of Its Motion for Attorneys' Fees/Costs and the Court's Award of Fees/Costs, pp. 4-7).

The attorneys' fee provision in the employment contract, which the trial court ruled does not exist, provides, "In any litigation between the parties related to this Agreement, the prevailing party shall be entitled to recover all reasonable costs and attorneys' fees." (Plaintiff's Exhibit 137, p. 2, ¶ 11). However, rather than providing any evidence that Bannon actually incurred any fees

and costs, Respondents instead directed the trial court to authority from other states to argue that Bannon should be able recover the fees and costs incurred by Assured Partners. (Defendants' Response in Opposition to Plaintiff's Motion for a New Trial, pp. 4-7). Respondents' arguments ignore controlling authority directly on point from the South Carolina Supreme Court.

In *Williamson v. Middleton*, 383 S.C. 490, 681 S.E.2d 867 (2009), the South Carolina Supreme Court answered the question of whether a party can recover attorneys' fees that were not actually incurred. In that case, an attorney represented an employee, who was also a personal friend, in a lawsuit for unpaid commissions. *Id.* at 493. The attorney testified that he did not have a fee agreement with the employee, had never sent a bill for attorneys' fees to the employee, and that the employee had no obligation to pay any attorneys' fees. *Id.* at 495. After the jury returned a verdict for the employee, the trial court awarded the employee \$35,000 in attorneys' fees. *Id.* at 493. The Court of Appeals *en banc* affirmed the attorneys' fee award, finding that the employee might discuss a fee at the end of the case. *Id.* at 496. The Supreme Court reversed the award of attorneys' fees, finding "no competent evidence to support the finding that [employee] incurred attorney's fees." *Id.*

As in *Williamson*, Respondents have provided no evidence that Bannon ever incurred any attorneys' fees or costs. Therefore, Bannon had no attorneys' fees and costs to recover, and the controlling authority of *Williamson* required denial of Respondents' request for attorneys' fees.

E. Additional Deficiencies

The trial court did not consider, nor did Respondents provide, evidence for any of the factors that are required to be considered before awarding attorneys' fees. In South Carolina, a court should consider the following six factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained;

and (6) customary legal fees for similar services. *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). Neither the trial court, nor the Respondents addressed any of those factors.

III. The denial of Forum Benefits’ motion to recuse prevented Forum Benefits from receiving a fair trial.

The trial judge (Judge Price) erred in refusing to disqualify himself pursuant to Canon 3(E)(1).

Canon 3(E)(1) states as follows:

- (1) A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where:
 - (a) the judge has a personal bias or prejudice concerning a party or a party’s lawyer, ...

(emphasis added); *Ellis v. Procter & Gamble Distrib. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993); *State v. Jackson*, 353 S.C. 625, 627, 578 S.E.2d 744, 745 (Ct. App. 2003).

While the trial judge’s assurance of his own impartiality is accorded great weight, “a judge’s impartiality might reasonably be questioned when his factual findings are not supported by the record.” *Ellis*, 315 S.C. at 285, 433 S.E.2d at 857. Given particular events with the trial judge that occurred during trial, there were multiple, legitimate, *bona fide* reasons to question the trial judge’s impartiality, and he should have recused himself.

The trial commenced on October 11, 2021. In their opening statement, Respondents identified an individual named Mack Ward—a Vice President of Assured Partners—as a trial witness. (Trial Transcript, p. 34). Mack Ward’s name was cited repeatedly during examinations of multiple witnesses throughout the second day of trial, all prior to the recess described in the next paragraph of this brief. (Trial Transcript, pp. 239, 257, 259, 282). The trial judge himself even mentioned his name. (Trial Transcript, p. 258).

On the afternoon of the second day of the trial, off the record during a recess with the jury

not present, the trial judge entered the courtroom and asked counsel for both parties if he could greet a person in the courtroom. The person whom the trial judge then proceeded to greet turned out to be Mack Ward—a Vice President of Assured Partners. Mack Ward had not been in the courtroom before that time. The interaction between the trial judge and Mack Ward was substantially more boisterous and affectionate than would be expected between mere acquaintances—the two engaged in mutual hugging, back slapping, and generally rowdy laughter. After this public display, the trial judge immediately went to the front of the bench, into the court reporter’s station, and announced to all present in the courtroom—which included Forum Benefits’ managing partner Brian Stritt—that he and Mack Ward knew each other from their days attending college at Wofford together and, if cell phones had existed then, neither would be in the position they are in now. (December 29, 2021 Declarations of Brian Stritt, Lisa Hollingsworth-Stritt, and Michelle Filler).

At no time then or thereafter did the trial judge offer any opportunity to the parties to address concern they might have as a result of this in-court display of relationship and affection between the trial judge and a principal for Assured Partners and/or questions they might have as to bias of the trial judge from that relationship and affection.

Before trial resumed on October 13, 2021, Forum Benefits made an oral motion for the trial judge to recuse himself from further participation in the trial based on the trial judge’s public displays of bias the previous day. (Trial Transcript, p. 451, lines 4-6). The trial judge confirmed the comment about cell phones as being “my comment ... intended to be a self-deprecating joke about myself.” (Trial Transcript, p. 455, lines 12, 18-19).

As reflected in the transcript of the proceedings, the trial judge said, “I had no idea why he would be here,” (Trial Transcript, p. 454, lines 21-22), notwithstanding Respondents indicating in

their opening statement that Mack Ward would be a witness (Trial Transcript, p. 34) and Mr. Ward's name being recited repeatedly during earlier testimony (Trial Transcript, pp. 239, 257, 259, 282). The trial judge seemed to indicate during argument of the motion that at some point the trial judge and Mack Ward went back into chambers to continue their reunion⁴, an event of which Forum Benefits was then-previously unaware, which the trial judge confirmed at the January 4, 2022 hearing on post-trial motions. (January 4, 2022 Hearing Transcript, p. 53).

The trial judge also provided the unsolicited statements, "I don't do Facebook" and "there's nothing on Facebook that says I'm a judge." (Trial Transcript, p. 452, lines 17-20). A quick examination of Facebook® seems to contradict both of these statements. Specifically, someone named Bentley Price maintains a personal Facebook® account, is currently Facebook® friends with someone named Michelle Ward, which is the name of Mack Ward's wife, and received and responded to Facebook® messages on October 19, 2021, that included photos of someone who appears to be the trial judge in a black robe and stating, "Happy birthday Judge. We love you!" This posting indicates that Facebook® users posted 19 comments, including a reply by a Facebook® account holder named Bentley Price of "Thank you everyone!!" (Plaintiff's Exhibits 601, 602, and 603; January 4, 2022 Hearing Transcript, pp. 50-53).

These Facebook® postings are significant because they directly contradict unsolicited statements made on the record by the trial judge six days earlier in response to Forum Benefits' recusal motion – not only does the trial judge "do" Facebook® with his own Facebook® account, but also, less than a week after making those unsolicited statements, the trial judge received and responded to Facebook® postings that clearly identify him as a judge.

⁴"And we went back and talked and discussed -- and I -- I'll put on the record what we talked about." (Trial Transcript, p. 452, lines 7-8)

On October 25, 2021, Forum Benefits separately filed a Motion for a New Trial pursuant to Rule 59(a), SCRCP. (Plaintiff's Motion for New Trial). Forum Benefits asserted that the trial judge's reasonable appearance of bias, combined with multiple inconsistent rulings that consistently favored Respondents, demonstrated actual bias by the trial judge that prevented Forum Benefits from receiving a fair trial.

On January 4, 2022, the trial judge conducted a hearing on Forum Benefits' Motion for a New Trial. Forum Benefits presented live testimony from Michelle Filler, Lisa Stritt, and Brian Stritt describing the trial judge's extrajudicial conduct with Mack Ward in the courtroom that created a reasonable appearance of bias.⁵ (January 4, 2022 Hearing Transcript, pp. 6-36). After receiving arguments from all parties, the trial judge *sua sponte* described his relationship with Mack Ward for the record. (January 4, 2022 Hearing Transcript, pp. 50-53). However, the trial judge's recollection of events differed from the record and omitted significant details. Specifically, the trial judge confirmed that he was college friends with Mack Ward and again did not dispute or refute the witnesses' testimony describing his lively interaction with Mack Ward in the courtroom. However, the trial judge pointedly denied making the statement about cell phones and instead recalled, not that the statement was his own self-deprecating joke about himself as he had asserted on October 13th, but that he had merely repeated a remark that Mack Ward had said to him. (January 4, 2022 Hearing Transcript, p. 51, lines 15-20). The trial judge also did not mention that he had also met alone privately with Mack Ward in chambers without anyone from the Forum Benefits being present, until asked to confirm that this *ex parte* meeting actually took place.

⁵ Prior to the hearing, Forum Benefits also filed declarations from Michelle Filler, Lisa Stritt, and Brian Stritt regarding their personal observations of the trial judge's extrajudicial conduct with Mack Ward during trial. (Declaration of Brian Stritt, filed December 29, 2021; Declaration of Lisa Hollingsworth-Stritt, filed December 29, 2021; Declaration of Michelle Filler, filed December 29, 2021).

(January 4, 2022 Hearing Transcript, p. 53)

A. The Court’s Actions Created an Appearance of Bias

Forum Benefits’ basis for recusal—that the trial judge displayed and revealed a personal bias toward Mack Ward, a Vice President of Assured Partners—squarely fits Canon 3(E)(1)(a). Moreover, the Commentary to Canon 3(E)(1) specifically states, “Under this rule, a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply.”

Our jurisprudence requires evidence of judicial prejudice and of the existence of the judge’s impartiality. As described above, the trial judge’s public displays of bias directed toward Mack Ward provide concrete evidence by which “the judge’s impartiality might reasonably be questioned.”

Although not expressly addressed by the South Carolina Supreme Court, there is suggestion elsewhere that the bias that disqualifies a trial judge “must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.” *See, e.g., Duplan Corp. v. Deering Milliken, Inc.*, 400 F.Supp. 497, 522 (D.S.C. 1975) (citation and internal quotation marks omitted). But, even under that narrower standard, the trial judge in the case at bar should have disqualified himself—his bias stemmed from his relationship with Mack Ward, a relationship that was extrajudicial.

Pursuant to Canon 3(E), the trial judge should have disqualified himself.

B. The Court’s Inconsistent Rulings Provide Evidence of Actual Bias

Forum Benefits’ concerns about the appearance of bias are bolstered by the trial court’s multiple rulings that were inconsistent in rationale but consistently in Respondents’ favor.

For example, and as discussed above, the trial court granted a directed verdict for Bannon on the contract claim, stating, “There was, obviously, no meeting of the minds.” (Trial Transcript,

p. 677). Despite ruling as a matter of law, in disregard of the evidence, that no contract existed to be breached, the trial court nonetheless granted Respondents' motion for an award of attorneys' fees based on a clause in what the trial court had deemed to be a non-existent contract. (Trial Transcript, pp. 680-681). Moreover, the trial court erroneously ruled that it would award Bannon his attorneys' fees before hearing any response from Forum Benefits opposing the motion. (Trial Transcript, pp. 680-681) The attorneys' fees awarded by the trial court go toward Assured Partners—of whom Mack Ward is a Vice President. The rulings were inconsistent, but both rulings were consistent to this extent: they favored Respondents.

For another example, during Forum Benefits' direct examination of Bannon, Forum Benefits authenticated and offered into evidence Plaintiff's Exhibit 9—Bannon's Responses to Requests for Admission under Rule 36. (Plaintiff's Exhibit 9; Trial Transcript, pp. 192-193). This exhibit was particularly relevant to impeaching Bannon because Bannon had just provided testimony based on documents admitted into evidence that directly refuted many of the admission requests that Bannon had denied. (Trial Transcript, pp. 185-192). Respondents objected to the admissibility of Bannon's Responses to Admission Requests (Plaintiff's Exhibit 9) as being a pleading: "Your Honor, I object, it's a pleading." (Plaintiff's Exhibit 9; Trial Transcript, p. 193). The trial court sustained the objection: "I'm – I'm not going to allow it in. He's correct, it's a pleading." (Trial Transcript, p. 193).

Responses to Requests for Admission are not pleadings. Rule 7(a), SCRCF, identifies the documents that constitute pleadings (*i.e.*, a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, and a third-party answer), and responses to Requests for Admission are not one of the identified documents.

During Respondents' cross-examination of Brian Stritt, Respondents sought to introduce

Exhibit C to the Verified Complaint as an exhibit. (Trial Transcript, p. 573). Forum Benefits objected to the exhibit as a pleading pursuant to Rule 43. (*Id.*) See Rule 43(g), SCRCP (“The pleadings shall not be submitted to the jury for its deliberations.”). The trial judge overruled Forum Benefits’ objection: “I’ll allow it.” (Trial Transcript, p. 574). The trial court’s ruling that Bannon’s Responses to Admission Requests are inadmissible pleadings, when they are not even pleadings, cannot be reconciled with the Court’s subsequent improper ruling allowing Respondents to admit into evidence what is indisputably a pleading, but the two rulings together are further probative evidence of the Court’s bias.

Another inconsistent ruling by the trial court involved direct evidence of Forum Benefits’ damages. Forum Benefits sought to elicit factual testimony from Brian Stritt based on his own personal knowledge of the dollar amount of annual commissions associated with clients that switched from Forum Benefits to Assured Partners and the resulting damages to Forum Benefits. (Plaintiff’s Exhibit 16; Trial Transcript, pp. 503-513; 517-543; 556-561). At the time of the events giving rise to this litigation, Stritt was the sole owner of Forum Benefits and had been negotiating with a buyer for over a year to purchase Stritt’s company. After learning that Bannon had left Forum Benefits, the buyer required Stritt to identify the precise dollar amount of annual commissions associated with clients for whom Bannon had been the sales person, and the buyer then reduced the previously negotiated purchase price by \$1.5M based on the information that Stritt provided to the buyer. (Plaintiff’s Exhibit 16; Trial Transcript, pp. 503-513; 517-543; 556-561).

Respondents objected to this factual testimony from Brian Stritt, along with the contemporaneously-generated exhibits that documented both the annual commissions and the \$1.5M reduction in the purchase price negotiated in an arms-length transaction. (Trial Transcript,

pp. 503-513; 517-543). In initially sustaining Respondents' objections, the trial court ruled that Stritt's testimony lacked foundation and, although Stritt's testimony was based on and entirely consistent with the information that Stritt had provided to the buyer in 2016, the trial court reasoned that allowing Stritt to testify regarding commissions would enable Stritt to provide false evidence of Forum Benefits' damages. (Trial Transcript, pp. 503-513; 517-543). According to the trial court, Forum Benefits could only provide evidence of damages through a financial expert. (Trial Transcript, pp. 503-513; 517-543).

After a lunch break, the trial judge announced that, after consultation with an unidentified Business Court judge, he would allow Stritt to testify about the precise dollar amount of annual commissions associated with clients that switched from Forum Benefits to Assured Partners. (Trial Transcript, pp. 543-552). However, the trial court would not allow into evidence any contemporaneously-generated exhibits to corroborate Stritt's testimony, nor would the trial court allow Stritt to testify about the \$1.5M reduction in the purchase price that had been based solely on the anticipated lost commissions associated with clients taken from Forum Benefits by Assured Partners. (Trial Transcript, pp. 543-552). The trial court's rulings that Stritt could provide first-hand, factual testimony about annual commissions, while excluding first-hand, factual testimony about the negotiated \$1.5M decrease in the purchase price, were contrary to Rules 601-603 of the South Carolina Rules of Evidence, prejudiced Forum Benefits, and constitute errors as a matter of law.

Forum Benefits respectfully asserts that the motion to recuse was based on the reasonable appearance of bias, and Forum Benefits' concerns about the appearance of bias are supported by a consistent string of inconsistent rulings that continually favored Respondents. The trial court's denial of Forum Benefits' motion to recuse prevented Forum Benefits from receiving a fair trial.

CONCLUSION

For the foregoing reasons, the trial court erred in granting directed verdict to Respondents in the face of disputed issues of fact, erred in awarding attorneys' fees and costs to Respondents in the absence of legal and factual foundations for such an award, and erred in not recusing itself from the case. Accordingly, Forum Benefits respectfully requests the Court issue an order reversing the trial court.

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