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.

RESPONDENTS' AMENDED INITIAL BRIEF

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STATEMENT OF THE CASE[1]

Respondent Brian Bannon ("Bannon") began his employment with Appellant Forum Benefits, LLC ("Appellant") in 2009 as an insurance broker. T. 85:18-22.[2] Appellant's first witness at trial was its attorney, David Wyatt ("Mr. Wyatt"), who testified that, at the request of Appellant, he prepared a form employment agreement in 2009 that he believed Appellant intended Bannon and another employee to sign (the "Employment Agreement"). T. 41:10-24. Bannon denied ever seeing or signing the Employment Agreement. T. 124:11-125:7. The Employment Agreement was in template form, was not signed, and contained no specific information pertaining to Bannon. Pl. Ex. 137.

[1] Appellant's Statement of the Case violates Rule 208(b) SCACR, in that it includes contested matters and goes well beyond a concise history of the proceedings. Accordingly, Respondents submit their Statement of the Case in response to many of the allegations in Appellant's Statement of the Case.

[2] The Trial Transcript will be cited herein as "T." followed by the applicable page and line references.

Mr. Wyatt readily admitted he had no record of Bannon ever being sent, receiving or signing the document. T. 69:6-15. The Employment Agreement attached to the Complaint and marked as an exhibit at trial was missing at least the following material information: (1) Bannon's name or any identifying information; (2) Bannon's compensation, which was left blank; (3) the parties' signatures; (4) Bannon's duties (which were to be listed in Exhibit A to the Employment Agreement but never were); and (5) the explanation of benefits (which were to be listed in Exhibit B to the Employment Agreement but never were). Pl. Ex. 137. The only employee-specific information that was contained in the Employment Agreement is a reference that the unnamed employee would work for Appellant in Greenville, South Carolina – which was clearly not intended for Bannon who lived in Beaufort and who was hired to work in and actually worked in the Charleston, South Carolina area. Id., T. 57:10-58:3. In addition to not being able to provide any evidence or testimony to remotely suggest that Bannon actually signed the Employment Agreement, Appellant's own attorney and first witness at trial admitted that Appellant's contract claim was barred by the Statute of Frauds. T. 70:3-20.

In May 2013, the relationship between Bannon and Appellant changed significantly. Bannon ceased working as an employee for Appellant and became an independent contractor for Appellant. T. 85:18-22. Appellant admitted at trial that at that point, the employment relationship terminated and a new independent contractor relationship began. T. 574:16-19. When this change in the relationship occurred, Bannon lost his access to employment benefits and equipment that were afforded to him previously and to other Appellant employees. Id. There was never any agreement discussed, drafted or signed that governed Bannon's independent contractor relationship with Appellant. T. 576:21-25.

During the time period that Bannon was an independent contractor for Appellant, he sold employee benefits insurance to business clients. T. 82-83, 106, 229, 238-239. The insurance was provided through various insurance carriers and Bannon placed his clients with Appellant for day to day benefits administration and servicing needs. Id. Some of Bannon's clients used a third-party web based software product called Employee Navigator for benefits administration. Employee Navigator compiled employee census data and insurance plan information for the employees of each client company. T. 96:10-25. The Employee Navigator information is known and available to both the client (whose employees the information is about) and the insurance carrier (who provides coverage for the individual policies selected by the employees), in addition to the insurance broker. T. 429:4-25. Further, the username and password for clients to access their Employee Navigator account belonged to the clients and Appellant did not in any way restrict the clients with respect to said login information, nor did Appellant in any way restrict the clients from using or providing the Employee Navigator username and password to other brokers, such as Bannon. T. 154, 400-405, 441.

On October 16, 2015, Bannon began working with Respondent Assured Partners NL ("AssuredPartners") as an insurance broker. T. 200:12-19. Many of Bannon's clients chose to move with him to AssuredPartners. As a result, these clients consented to Bannon maintaining their insurance plan information, provided Bannon with their Employee Navigator login information, and requested that Bannon obtain copies of their census data and plan information to ensure continuity of representation and coverage. T. 154, 263-64. Based on these clients' requests to follow Bannon and for him to continue to be their insurance agent, Bannon took steps to protect his client's insurance plan data during the transition to AssuredPartners. T. 245-251, 256:9-260:8. He took these steps because he believed he had a legal duty to maintain his client files pursuant to

S.C. Code Ann. §38-43-250. T. 244:2-251:8. He also took these steps because he had specific information that Appellant had a history of attempting to disrupt clients who attempted to leave its agency and did not want the same outcome for his clients. T. 256:9-260:8. Bannon's concerns were grounded in fact: Appellant admitted to denying clients access to their own plan information in the past when they gave notice that they were leaving Appellant's agency, and Appellant also admitted that this could cause disruption to the clients. T. 407:9-13, 407:20-423:14. Bannon also directly heard Appellant's President and owner Brian Stritt make statements that he wanted departing clients to be disrupted as they attempted to separate from Appellant. T. 258:12-259:17.

Appellant retaliated against Bannon when it learned that Bannon had taken steps to prevent Appellant from disrupting the clients and from holding their information hostage to try to prevent them from leaving Appellant's agency. Despite not having any signed Employment Agreement with Bannon and despite Bannon not being an employee of Appellant for over three years, on December 1, 2016, Appellant sued Respondents alleging a breach of contract, misappropriation of trade secrets, conversion, breach of fiduciary duty, and tortious interference. See Complaint.

Throughout the course of almost five years of litigation, Respondents filed multiple motions for summary judgment, fully explaining the legal and factual inadequacies of Appellant's claims. Despite this detailed notice of the extensive shortcomings of its claims, these motions never prompted Appellant to ensure it had the necessary factual or legal basis to prove its claims at trial. The first summary judgment motions were heard by the Master-In-Equity, Marvin H. Dukes, III. The last motion for summary judgment Respondents filed was heard by Judge Perry Buckner. However, Judge Buckner retired before ruling on said motion. T. 541-542. Thereafter, a second judge, Judge Deadra L. Jefferson, denied Respondents' motion with a Form 4 Order and provided

no explanation for the denial other than citing the summary judgment standard and stating generally that material issues of fact exist. Id., see Form 4 Order of October 14, 2020.

On October 11, 2021, the jury trial in this matter commenced. T. 1. At the beginning of the third day of trial, Appellant asked the trial judge to recuse himself claiming that the trial judge was biased based on the fact that he knew a "potential" witness from college over 17 years prior. T. 448-462. This "potential" witness had been subpoenaed by Appellant to testify on day two of trial, was never called by Appellant to testify, and this "potential" witness was excused by Appellant from the subpoena the day before Appellant's motion for recusal. T. 457:14-458:4, 461:20-25. Appellant did not raise this issue when it first learned that the trial judge went to college with this "potential" witness and instead consented to the trial court saying hello to the "potential" witness during a break. After knowing this tenuous college connection, Appellant proceeded to call witnesses in its case in chief. Notably, the witnesses Appellant called later that day ultimately provided very damaging testimony related to Appellant's claim. After finishing the second day of testimony and realizing that its case was going down in flames, Appellant decided to attempt to recuse the trial judge the next day. The trial judge did not have any reason to know how the "potential" witness was related to the case or the relevancy of any potential testimony from this "potential" witness. T. 452:15-25. At the time of Appellant's motion for recusal, it was clear that the "potential" witness was not going to be called as a witness in Appellant's case because he had already been excused from the subpoena. T. 457:14-458:4, 461:20-25. The trial judge properly denied the motion.

Later that third day, Appellant rested its case. T. 602:6. After Appellant rested its case, Respondents moved for directed verdict on all counts.[3] T. 617:25-673:25. The trial court took the issue of directed verdict under advisement since it was the end of the day. T. 673:25. The next day, day four of trial, the trial court granted Respondents' directed verdict motion. T. 675-684. The trial court also found that Appellant brought its misappropriation of trade secrets claim in bad faith and awarded Respondents' attorneys' fees and costs under the South Carolina Trade Secrets Act. T. 680:10-681:5. As an additional basis for awarding attorneys' fees and costs, the trial court further found that Bannon was the prevailing party under the language in the alleged contract. Id.

ARGUMENT

I. The Trial Court Properly Granted Respondents' Motion For Directed Verdict.

A. The Trial Court Correctly Granted Respondents' Motion For Directed Verdict On Appellant's Breach Of Contract Claim Because It Did Not Establish The Existence Of A Signed Contract, A Breach, Or Proximately Caused Damages.

To prove a breach of contract claim, a plaintiff must prove by a preponderance of the evidence "the existence of a contract, its breach, and damages caused by such breach." S. Glass & Plastics Co. v. Kemper, 399 S.C. 483, 732 S.E.2d 205, 209 (Ct. App. 2012). Appellant failed to establish any of these elements at trial.

1. Appellant failed to produce a signed Employment Agreement and failed to provide evidence sufficient to overcome the Statute of Frauds.

First, Appellant failed to prove the existence of a signed contract. The Employment Agreement was an unsigned template document that Appellant's attorney, Mr. Wyatt, created in

[3] Appellant voluntarily dismissed its tortious interference claim during the directed verdict arguments. T. 663:24-664:2.

2009. Neither Bannon nor Appellant executed the form Employment Agreement Appellant attached to its Complaint and introduced at trial. Pl. Ex. 137.

The trial court correctly ruled as a matter of law that Appellant's contract claim was barred by the Statute of Frauds. The Statute of Frauds requires that a contract that cannot be performed within one year be in writing and signed by the party to be charged. Davis v. Greenwood Sch. Dist. 50, 365 S.C. 629, 620 S.E.2d 65, 67 (2005); S.C. Code Ann. § 32-3-10(5). Appellant's own attorney and first witness at trial, Mr. Wyatt, admitted that the Employment Agreement could not possibly be performed within one year and admitted that Appellant's contract claim was barred by the Statute of Frauds. T. 70-71. The bad faith in which Appellant pursued this contract claim for almost five years without ever being able to produce a signed or completed document was clearly exposed from the get-go.

Appellant cannot and did not dispute the fact that the restrictive covenants in the Employment Agreement applied for two years from the end of the employment relationship. Pl. Ex. 137, ¶12(g), ¶13, and ¶14. Thus, the contract could not possibly be performed within one year. Accordingly, the Statute of Frauds applies and Appellant's breach of contract claim fails as a matter of law.

Appellant attempts to overcome the Statute of Frauds by arguing for the application of a new rule or exception to South Carolina law. Notably, the exception it seeks is not in any way contained in the applicable South Carolina statute. S.C. Code Ann. § 32-3-10. Appellant argues that courts *in other jurisdictions* have recognized a rule called the lost memorandum exception, which permits a party to utilize parol evidence to prove the existence of a signed agreement when the signed agreement is not obtainable. Appellant's Brief p. 7. South Carolina, however, has never expressly adopted the lost memorandum exception. Yadkin Valley Bank & Tr. v. Oaktree Homes,

Inc., 2014 WL 3747342 (S.C. Ct. App. July 30, 2014). Rather, when considering the potential of this exception, the Yadkin court noted that, "[j]urisdictions that allow a party to submit parol or extrinsic evidence to establish proof of a lost memorandum in order to 'avoid' the requirements set forth in the general statute of frauds require that evidence to be clear and convincing." Yadkin, 2014 WL 3747342 at *1 (internal citations omitted). The Yadkin court ruled that even if it adopted the lost memorandum exception, which it did not, the party seeking to establish the contract must provide more than self-serving or contradictory evidence to satisfy the clear and convincing standard. Id.

Appellant contends that it presented clear and convincing evidence to establish a contract with Bannon. It did not. To attempt to support its position, Appellant relies on Mr. Wyatt's testimony. Specifically, in support of its argument, Appellant merely contends that Mr. Stritt (Appellant's owner) engaged Mr. Wyatt to draft a form Employment Agreement in 2009. T. 40-41. However, at no point during Mr. Wyatt's testimony did he contend that he used Bannon's specific information to prepare the unsigned contract, nor did Mr. Wyatt send Bannon a copy of the Employment Agreement, and nor did he witness Bannon sign the contract. To the contrary, Mr. Wyatt actually admitted that he never received or viewed a signed copy of the alleged contract. T. 69:6-15. Mr. Wyatt's testimony does not help Appellant to establish there was ever a signed written contract by any form of circumstantial evidence, but especially not by clear and convincing evidence.

Appellant next points to Mr. Stritt's testimony to try to establish its allegations that there was a signed contract. Appellant's Brief p. 8-9. Mr. Stritt is the only witness that testified to allegedly witnessing Bannon's execution of the Employment Agreement. Other than Mr. Stritt, no other witness testified to having seen a completed or signed version of the alleged contract, let

alone observe Bannon execute the document. Mr. Stritt's testimony is biased and self-serving, considering he is the President of Appellant and was the sole owner at the time. T. 423:9-14. Mr. Stritt's singular, self-serving testimony is precisely the type of testimony the Statute of Frauds is designed to protect against. As explained in Yadkin, courts in other jurisdictions that have adopted a lost memorandum exception have not permitted plaintiffs to use self-interested, self-serving testimony to establish the existence of an allegedly lost agreement. 2014 WL 3747342 at *1. To hold otherwise would obliterate the protections afforded by the Statute of Frauds.

The testimony of Mr. Wyatt and Mr. Stritt are wholly inadequate to satisfy any clear and convincing standard of proof. But more importantly, this testimony cannot overcome the fact that Bannon denies ever seeing or signing the Employment Agreement and that the unsigned, template contract was missing at least the following material terms: (1) Bannon's name as well as any other information pertaining to Bannon; (2) Bannon's compensation; (3) the parties' signatures; (4) Bannon's duties; (5) Bannon's explanation of benefits; (6) Bannon's address; and (7) Bannon's social security number. Pl. Ex. 137, Introduction ¶, ¶2, ¶5, ¶6, Exhibit A and Exhibit B attached thereto. Appellant did not prove the existence of a completed contract, no less an actual signed contract.

Furthermore, the evidence at trial established that the Employment Agreement was clearly not drafted for Bannon. The Employment Agreement inexplicably contemplates a parent's or guardian's signature. Pl. Ex. 137, p. 5. It is undisputed that at all material times Bannon exceeded the age of majority and was competent to execute the contract. There was no reasonable basis to include this language if the template document was truly drafted for Bannon as Appellant alleged. Even more damaging to Appellant's position is the fact that the only employee-specific information contained in the Employment Agreement was that the employee would work in

"Greenville, South Carolina." Plaintiff Ex. 137, ¶3; T. 57:19-58:3. Tellingly, however, Appellant admitted that it did not hire Bannon to work for Appellant in Greenville, South Carolina, but hired him to work in the Charleston area. Id. During the entirety of Bannon's employment with Appellant, he lived in Beaufort and worked in the Beaufort and Charleston area, not Appellant's Greenville office. T. 115:19-116:5. There was no reasonable basis to put a reference to working in Greenville in the template document if it was truly drafted for Bannon as Appellant falsely alleged.

These undisputed facts lead to the inescapable conclusion that Appellant wholly failed to prove the elements of its contract claim. There is no evidence to support Appellant's position and even if the court were to adopt a new lost document exception to the Statute of Frauds, Appellant did not remotely meet a clear and convincing standard of proof. Accordingly, the trial court's directed verdict ruling on Appellant's breach of contract claim should be upheld.[4]

2. Because the Employment Agreement's restrictive covenants expired years before Bannon's alleged breach, the trial court properly held that they could not have been breached.

Appellant failed to prove any breach of the Employment Agreement. The trial court correctly ruled as a matter of law that the Employment Agreement's covenants expired in May 2015 and, thus, Bannon could not have breached them thereafter. The Employment Agreement's restrictive covenants specifically state that they only apply for two years after the employment relationship ends. Plaintiff's Exhibit 137, ¶12(g), ¶13, and ¶14. Appellant admitted that Bannon's

[4] Appellant's Initial Brief only superficially addresses the trial court's correct additional finding that Appellant failed to prove a meeting of the minds as to all of the terms of the alleged contract. Appellant's Brief p. 9-10. "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). As described in detail above, many essential terms were left blank and the contract contained no reference to Bannon. Thus, the trial court properly held as an alternative basis for directed verdict that Appellant failed to meet its burden of proof to establish a meeting of the minds as to all of the essential terms of the alleged contract.

employment relationship with Appellant terminated in May of 2013. T. 64, 265, 575, 577:1-12. Bannon thereafter became an independent contractor. Id. Once Bannon transitioned to an independent contractor, the Employment Agreement was no longer applicable and terminated. Id. Given that Bannon became an independent contractor in May 2013, the Employment Agreement's two year, post-employment restrictive covenants expired in May 2015. Appellant admitted at trial that it was not aware of any evidence that Bannon breached any portion of the Employment Agreement prior to May of 2015. T. 577:13-16.

In an attempt to get around the glaring timing issue of the alleged breach, Appellant argues that the trial court's 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." Appellant's Brief p. 10. Appellant's argument misinterprets the Employment Agreement's language and fails to acknowledge critical aspects of the trial court's ruling.

As a threshold matter, Appellant's definition of "Confidential Information" is broader than and includes the term "Trade Secret" and, as such, the term "Trade Secret" is subsumed by and is a part of "Confidential Information." Specifically, the Employment Agreement defines "Confidential Information" as follows:

> The term "Confidential Information", as such term is used herein, shall mean any information which the Company uses in its business, which is not generally known in the insurance industry and which the Company considers to be confidential or proprietary, whether or not such information rises to the level of a Trade Secret.

Pl. Ex. 137, ¶12(e)(emphasis added). Appellant included trade secrets in the definition of Confidential Information.

Appellant's own definition Confidential Information is fatal to its claim because the Employment Agreement only prohibits the use or disclosure of "Confidential Information" for "a period of two (2) years following the termination of Employee's employment relationship with the Company." Pl. Ex. 137, ¶ 12(g). Given that Bannon's employment with Appellant ended in May 2013, Bannon's confidentiality obligations and therefore any contractual trade secret obligation expired in May 2015. T. 577:1-16.

Appellant seeks to ignore its own definition of Confidential Information and have this Court rely solely on a separate paragraph of the Employment Agreement that it contends refers to trade secrets not being used without any time limit. Appellant's Brief p. 10. However, Appellant cannot rely on inconsistent provisions in its own agreement to establish its claims. All ambiguities must be and were properly construed against Appellant. See Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 698 S.E.2d 773, 778 (2010).

Furthermore, Appellant never attempted to explain these ambiguities and inconsistencies to its employees or independent contractors. It never identified or explained to these individuals the information it considered to be a trade secret as opposed to simply confidential information. T. 581:25-582:4. This is incredibly negligent given that Appellant defines Confidential Information to include any information it "considers to be confidential or proprietary." Pl. Ex. 137, ¶12(e). Bannon confirmed that Appellant never provided him any policies or training and never had any discussions with him explaining the difference between its confidential information and trade secrets. T. 255:3-256:8. There were no prompts or pop ups in Appellant's system that identified any of its information as confidential, proprietary or a trade secret. T. 394:4-12.

Appellant's negligence in failing to clarify these issues becomes even more egregious given the fact that South Carolina law requires insurance producers (like Bannon) to maintain

information related to their clients. According to S.C. Code Ann. §38-43-250, "All producers shall make and keep a full and correct record of the business done by them, showing the number, date, term, amount of insured premiums, and the persons to whom issued every policy or certificate of renewal." The trial court properly took judicial notice of the requirements of this statute. T. 250. Thus, not only was there no basis to prevent Bannon from maintaining Appellant's alleged Confidential Information two years after his employment relationship ended, but there was a legal basis for him to believe he was required to do so.

Finally, the Employment Agreement adopts the definition of trade secrets from the South Carolina Trade Secrets Act. Pl. Ex. 137, ¶12(c). Even assuming arguendo that Appellant could have overcome the ambiguities and inconsistencies in its own Employment Agreement, the trial court correctly found that Appellant's provided no evidence that Bannon took any information or documents that rose to the level of trade secrets. See Section I.C. below. An individual cannot breach a contractual trade secret provision where the company does not in fact have or prove the existence of any trade secrets. See Belimed, Inc. v. Bleecker, 2022 WL 939819 at *10 (D.S.C. March 29, 2022). Accordingly, the trial court correctly ruled that Appellant failed to prove any breach of the Employment Agreement as a matter of law and granted Respondents' motion for directed verdict. Respondents request that this Court affirm the trial court's ruling.

3. Appellant Failed to Prove Damages Proximately Caused by Any Breach of the Employment Agreement.

Third, Appellant failed to prove damages proximately caused by any alleged breach of the Employment Agreement. As discussed in Section I.A.2. above, Appellant has completely relied on the trade secret issue to support its claim that Bannon breached the Employment Agreement. Appellant cannot and does not argue against the fact that the non-solicitation and non-disclosure restrictions in the Employment Agreement expired long before any alleged breach by Bannon.

While the trial court did not directly address the issue of whether Appellant presented sufficient evidence to establish proximate cause damages under the contract claim, it did so under Appellant's trade secrets claim. Because Appellant's contract claim is entirely based on its trade secrets allegations, the same reasoning applies here to bar Appellant's contract claim based on a failure to prove any damages proximately caused by the alleged breach. See Section I.C. below.

B. The Trial Court Correctly Granted Respondents' Motion For Directed Verdict On Appellant's Breach Of Fiduciary Duty Claim Because Bannon, As An Independent Contractor, Owed No Fiduciary Duty To Appellant.

The trial court correctly found as a matter of law that Appellant failed to prove that Bannon, as an independent contractor, owed any fiduciary duty to Appellant. The trial court's ruling finds substantial support in the relevant case law and Appellant provides no supporting facts or case law to warrant reversal of the trial court's decision.

In order to succeed on a breach of fiduciary duty claim, a plaintiff must show the existence of a fiduciary duty owed by the defendant to the plaintiff, a breach of that duty, and damages proximately resulting from the breach. See RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 732 S.E.2d 166, 173 (2012). Similar to all of its claims, Appellant failed to establish any of these elements. However, the trial court only needed to analyze the first element to grant directed verdict as a matter of law.

The determination regarding the equitable issue of whether a fiduciary relationship exists is to be made by the Court. Cowburn v. Leventis, 366 S.C. 20, 619 S.E.2d 437, 451 (Ct. App. 2005). Thus, the trial court was specifically required to determine whether a fiduciary duty existed between these parties and it correctly made this determination.

"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., 620, S.E.2d 65, 68 (S.C. 2005). "The imposition of a fiduciary duty upon a party constitutes a high standard of responsibility and should not be done lightly." Wired Fox Technologies, Inc. v. Estep, 2017 WL 1135288, at * 10 (D.S.C. March 27, 2017) (internal citations omitted). As the Supreme Court of South Carolina has explained there must be a firm foundation for reposing the level of trust of a fiduciary on the other third party. Burwell v. S.C. Nat. Bank, 288 S.C. 34, 340 S.E.2d 786, 790 (1986). A fiduciary duty generally cannot be unilaterally imposed by one party; rather, "[t]he evidence must show the entrusted party actually accepted or induced the confidence placed in him." Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817, 822 (Ct. App. 2004).

Significantly, South Carolina courts have made clear that a mere employer-employee relationship is not sufficient to create a fiduciary duty. See Coves Darden, LLC v. Ibanez, No. 2014-000339, 2016 WL 4379419, at *5 (S.C. Ct. App. Aug. 17, 2016)("We can find no South Carolina authority providing all employees are agents of their employers and owe their employers fiduciary duties."). "The unilateral actions of an employer do not create a fiduciary duty [on] its employees." Coves Darden, LLC v. Ibanez, No. 2014-000339, 2016 WL 4379419, at *5 (S.C. Ct. App. Aug. 17, 2016). At least one South Carolina court has expressly stated that, if an employee/employer relationship cannot create a fiduciary duty, then as a matter of law an independent contractor relationship cannot be sufficient to create a fiduciary duty. Wired Fox Technologies, Inc., 2017 WL 1135288, at *11.

This case law is fatal to Appellant's claim. Here, Appellant is attempting to do exactly what the law prevents, reposing trust on Bannon with no such communication with Bannon and no foundation for this belief. Appellant seeks to unilaterally impose a fiduciary duty on Bannon after

the fact when there was absolutely no communication or agreement to establish such a duty during the term of the relationship.

Appellant argues without any factual or legal basis that because Bannon "continuously served as Forum Benefits' sales agent from 2009 until 2016," he "therefore, owed Forum Benefits a fiduciary duty not to compete with Forum Benefits concerning the subject matter of his agency." Appellant's Brief at p. 15. This argument defies logic. If Bannon did not owe a fiduciary duty to Appellant as an employee, there is also no basis for creating a fiduciary duty when he became an independent contractor.

When Appellant terminated Bannon's employment relationship and established an independent contractor relationship with him, Appellant admits there was no written contract that governed the terms of that independent contractor relationship. T. 576:21-25. Significantly, there was no evidence presented at trial that Appellant ever had even one communication with Bannon about establishing any alleged fiduciary duty as part of the employment or independent contractor relationship. Thus, if the prior employee/employer relationship was insufficient to establish a fiduciary duty, which it was as a matter of law, the change to an independent contractor relationship cannot in and of itself create a new fiduciary duty. To create such a new legal duty would have required an express agreement between the parties. The indisputable evidence at trial was that this never happened. Accordingly, Appellant wholly failed to establish a legal or factual basis for Bannon owing it a fiduciary duty.

Appellant cites to several cases that it contends support the existence of a fiduciary duty for independent contractors. However, none of Appellant's cited cases bear any resemblance to the facts of this case and virtually all deal with the agent's (not necessarily an independent contractor's) obligations to their clients, not to the principal entity for which the agent is working.

Contrary to the facts at bar, in virtually all of the cases Appellant cites, the alleged independent contractors are entrusted with the financial or personal well-being of their clients. See Loftis v. Eck, 288 S.C. 154 (S.C. Ct. App. 1986) (power of attorney)[5]; Lengel v. Tom Jenkins Realty, Inc., 286 S.C. 515, 334 S.E.2d 834 (Ct. App. 1985) (real estate brokers duty to act in compliance with client's instructions). All of these cases exemplify the type of special relationship required to establish a fiduciary duty and fit within the current state of South Carolina law. See Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711, 716 (2003) ("Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters.").

None of these cases stand for the proposition that an independent contractor owes a fiduciary duty to the companies to whom it provides its services. Appellant's argument ignores the reality that independent contractors run their own business and by the nature of their "independent" status, routinely provide services to competing companies. In fact, the ability to compete is one of the control factors considered under the Fair Labor Standards Act for properly classifying someone as an independent contractor instead of an employee. See McFeeley v. Jackson St. Ent., LLC, 825 F.3d 235, 241 (4th Cir. 2016).

Bannon, as an independent contractor working without any contract and without any restrictive covenants, was free to place clients through Appellant or through any other insurance agency he saw fit. The trial court was specifically charged with determining whether Appellant established that Bannon owed it a fiduciary duty. It correctly granted Respondents' directed verdict motion on this claim. Accordingly, the trial court's ruling should be upheld.

[5] Notably, Appellant omitted the emphasized part of the court's holding.

C. The Trial Court Correctly Granted Respondents' Motion For Directed Verdict On Appellant's Trade Secrets Claim Because Appellant Failed As A Matter Of Law To Prove The Existence Or Misappropriation Of Any Trade Secret.

The trial correctly granted Respondents' motion for directed verdict on Appellant's trade secrets claim. As evidenced by the trial court's Order granting Respondents' motion for directed verdict, under the South Carolina Trade Secrets Act ("SCTSA" or "the Act"), Appellant failed to establish every single element of its trade secrets claim. Any one of Appellant's failures is sufficient to uphold the trial court's directed verdict ruling related to this claim.

1. Appellant failed to present evidence to show that any of the information at issue in this case is a trade secret.

"The first issue to be determined in every trade secret case is . . . whether, in fact, there was a trade secret to be misappropriated." Lowndes Prod., Inc. v. Brower, 259 S.C. 322, 191 S.E.2d 761 (1972). In order to prove a violation of the Act, there must be information at issue that constitutes a "trade secret" as defined under the Act. Appellant contends that the trial court committed reversible error when it determined that Appellant, "wholly and completely failed to prove the existence of any trade secret information." Appellant's argument is premised on its mistaken belief that alleged transposition of data turns ordinary, public information into a trade secret. See Appellant's Brief p. 16.

A "trade secret" is defined as information, including a compilation, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. S.C. Code Ann. § 39-8-20(5). Appellant argues that Bannon's clients' census data and insurance plan information housed on a third-party's website

called Employee Navigator somehow constitutes trade secret information. Appellant's Brief p. 16. While a compilation of information can, under certain specific circumstances, constitute a trade secret, the information must: (1) derive independent economic value, (2) not be generally known or readily ascertainable by proper means, and (3) be kept secret using reasonable efforts under the circumstances. S.C. Code Ann. § 39-8-20(5). Appellant did not satisfy any of these three elements.

There is no evidence anywhere in the record as to the independent economic value of Appellant's alleged trade secret information. Appellant offered no such evidence at trial. Even setting this fact aside, the evidence showed that the information at issue was not owned by Appellant, that it was readily accessible by proper means, and that Appellant did not take reasonable measures to protect the information. The "information" at issue is census data and insurance plan information for Bannon's clients. This information was housed using a third-party tool called Employee Navigator. T. 338-339. The information in Employee Navigator was protected by a login and password created and maintained by the client, which was also in Appellant's possession. T. 405. Appellant's primary witness on its use of Employee Navigator clearly confirmed that all of the information Appellant contends is trade secret can be recreated through alternative, publicly-accessible means. T. 341:1-5. Specifically, Laurie Winston, Appellant's director of account management and the person who is, according to Appellant, "very knowledgeable" about Appellant's use of Employee Navigator testified,

Q So meaning if -- if somebody was gonna rebuild the exact same thing, they could go to the carrier and the client and the payroll company and take all the same information to -- to build the Navigator database?

A Correct.

T. 405:13-17 and T. 337:3-8. It is blackletter law that information that is readily ascertainable from other sources cannot qualify for trade secret protection. Atwood Agency v. Black, 374 S.C. 68, 646 S.E.2d 882, 884 (2007). This admission by Ms. Winston was fatal to Appellant's claim.

Moreover, the trial court correctly ruled that Appellant did not present sufficient evidence to prove that it employed reasonable measures to protect the alleged trade secret information. After Bannon transitioned from an employee to an independent contractor in 2015, Appellant continued to provide him with unfettered access to information. T. 391:20-392:2. Appellant never asked Bannon to sign any document that restricted his ability to obtain or disclose the information. T. 576:21-25. As discussed in Section I.A.2. above, there was nothing in Appellant's system or otherwise identifying the alleged information as confidential or a trade secret. Significantly, Appellant had the ability in its system to add heightened levels of protection to certain files it claimed to be a trade secret, but Appellant did not employ this feature to limit Bannon's (or anyone else's) access to information. T. 394-395. Again, Ms. Winston's testimony on this issue is instructive,

21	Q Okay. So SharePoint -- the SharePoint system has
22	the ability to narrow down access?
23	A I would assume.
24	Q Yeah.
25	A Yes.

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Q And so if there's any secret sauce -- super secret sauce, that should be in that more narrow access, correct?
A I would assume.
Q And so all of this access we -- that you've just gone over, you're gone through all this list of hundreds of -- of things that Mr. Bannon's alleged to have accessed, this was not put in the super secret sauce category, was it?
A We don't have a folder with that, but, yeah -- but --
Q It wasn't put in there, was it?
A There's no restrictions on that.
Q Right. I mean it could -- if there was something in here that is a trade secret, that is the secret formula that Forum Benefit's using, and nobody else is using, it could have been put in the super secret category on SharePoint, and Mr. Bannon would have never had access, correct?
A I'm assuming so.

T. 394:21-395:20. Amazingly, Appellant easily had the ability to identify and restrict any alleged trade secret information within its system and chose not to do so.

Additionally, Appellant failed to take any steps to restrict the clients' use of the information in question. The clients themselves had their own unrestricted login and password to their employees' information and voluntarily shared this information with Bannon. T. 263:1-264:13, 401:13-17, 390:6-391:11. There were no written restrictions or agreements between Appellant and the clients that in any way restricted the clients' ability to use, disclose or share the information within Employee Navigator. T. 401:13-17.

Given the accessibility of the information at issue and the fact that Appellant did essentially nothing to protect said information, the trial court correctly held that Appellant "wholly and completely failed to prove the existence of any trade secret information."

2. Respondents' alleged conduct did not constitute misappropriation under the Act.

Even assuming *arguendo* Appellant could have proven information qualified as a trade secret, the trial court correctly ruled that Appellant failed to prove that Respondents: (1) obtained access to trade secrets by improper means; and (2) misappropriated, disclosed, or used Appellant's alleged trade secrets. Under South Carolina law, it is unlawful to misappropriate trade secrets belonging to another. S.C. Code Ann. § 39-8-30. Misappropriation is defined as, among other things, "acquisition of a trade secret of another by a person by improper means." S.C. Code Ann. § 39-8-20(2). Notably, "improper means" is defined as including "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, duties imposed by the common law, statute, contract, license, protective order, or other court or administrative order, or espionage through electronic or other means." S.C. Code Ann. § 39-8-20(1).

The evidence at trial established that Bannon was given unrestricted access to information relating to his clients – both by Appellant and the clients themselves. T. 581:25-582:4. That unrestricted access didn't stop when Bannon ceased to be an employee of Appellant in May 2013. Even then, Appellant made no effort to restrict Bannon's access to information at any point thereafter. T. 576:21-25; p. 577:9-12. Appellant did not establish or provide any policies that restricted Bannon's ability to access information about his clients and never identified to Bannon the information it believed to be confidential or a trade secret. T. 254:17-256:5. Appellant did not in any way restrict Bannon's clients from providing him access to information. T. 401:13-19. There was absolutely no evidence presented at trial to counter Bannon's testimony that he had access to his client's information by proper means.

Appellant asserts that Bannon, "surreptitiously accessed, downloaded, and copied Forum Benefits' trade secrets and demonstrates acts of theft and espionage through electronic or other

means." Appellant's Brief p. 21. Appellant ignores the fact that it gave Bannon unrestricted access to the information in question. Not only does Appellant ignore these facts, it also fails to cite any record evidence to support its assertions to the contrary. Instead, the undisputed evidence shows that Bannon's clients asked him to obtain their information from Employee Navigator and provided him with their login information. T. 262:22-264:13.

Everything Bannon did was at his clients' request and with his clients' consent. Appellant provided no testimony to the contrary at trial. Notably, Appellant did not call a single client to testify at trial. That is because Appellant knew the clients would confirm they wanted Bannon to have continuous access to their insurance information.

Moreover, Appellant admitted that the clients did not violate the Act by giving Bannon access to the information in Employee Navigator. T. 586:7-10. This was a fatal admission. If the client did not violate the Act by giving Respondent access to the information, Bannon could not have violated the Act by using that approved access. Obtaining the information through alternative proper means (here the clients) is fatal to a finding that the information was misappropriated. See S.C. Code Ann. § 39-8-30(A) ("A trade secret endures and is protectable and enforceable until it is disclosed or discovered by proper means.").

In addition to failing to prove that Bannon accessed information by improper means, Appellant also failed to prove that Bannon actually stole or used any of its information. During its case in chief, Appellant called two separate computer forensic experts. The first expert, Nolan Zielinski, testified that Bannon accessed 2,107 files, but Mr. Zielinski could not state when said files were accessed, nor what the files contained. T. 310:1-22. Mr. Zielinski stated that he could only determine that Bannon downloaded four files and that all four files related to one of Bannon's clients. T. 312-13. However, Mr. Zielinski could not identify what information was in the files, if

Bannon ever utilized the files, whether AssuredPartners ever accessed the files, or whether the information in the files constituted a trade secret. Id.

Appellant also retained and called Mr. Sholz, a Digital Forensic Examiner, who conducted a forensic analysis of Bannon's computer. T. 473. Mr. Sholz readily admitted he could not distinguish between information that Bannon accessed during his relationship with Appellant versus information that Bannon allegedly downloaded or transferred to an external device once his relationship with Appellant had ended. T. 475–76. Like Mr. Zielinski, Mr. Sholz could not testify as to the content of any files Bannon accessed. Id. Critically, Mr. Sholz admitted that, after months of work, he could not confirm whether Bannon took anything from his desktop or from Appellant at all. T. 477.

The evidence at trial established that Bannon's computer broke in December of 2016 and that he never transferred any of his client information to AssuredPartners. T. 216:18-217:22. This was not only confirmed by Bannon, but also by a former employee of AssuredPartners, Michelle Coffield. Ms. Coffield confirmed that Bannon never provided her any information about his clients and that, instead, she had to undertake the daunting task of building their files manually by gathering information from the clients and the insurance carriers directly. T. 289:13-299:15. Appellant presented absolutely no evidence at trial to show that any information was ever received, used or misappropriated by AssuredPartners.

Appellant introduced no evidence of misappropriation. Rather, the evidence proved that Bannon had the consent of his clients to maintain their information and that AssuredPartners never received or used any of Appellant's alleged trade secret information. Accordingly, the trial court correctly granted Respondents' directed verdict motion and this ruling should be upheld.

3. The trial court correctly ruled that Appellant failed to prove a causal link between Respondents' alleged misappropriation and Appellant's alleged damages.

The trial court correctly ruled that Appellant failed to introduce any evidence proving a causal link between Respondents' alleged misappropriation and Appellant's alleged damages. Even assuming arguendo that Appellant could have established a trade secret misappropriation, Appellant was still required to prove that it suffered "actual damages" as a proximate result. S.C. Code Ann. § 39-8-40(A). "Damages may include both the actual loss caused by misappropriation or the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss." S.C. Code Ann. § 39-8-40(B). Appellant was required to prove that its damages were proximately caused by the misappropriation. Wilson v. Gandis, 844 S.E. 2d 631, FN 7 (S.C. 2020). Thus, Appellant not only had to identify its alleged damages, but it had to show Respondents' actions proximately caused the alleged damages. Appellant wholly failed to meet its burden of proof on this issue.

Appellant attempted to introduce evidence related to its alleged damages solely through the self-serving testimony of its President and owner during the relevant time period, Mr. Stritt. Mr. Stritt attempted to testify about the amount of commissions that Appellant received from the clients that moved from Appellant to AssuredPartners. T. 559-62. But the fact that these clients moved does not prove causation. Mr. Stritt admitted that the clients were free to leave Appellant at any time and for any reason. T. 590-91. The "reason" the clients left is what matters, not the fact that they left and followed Bannon to AssuredPartners. This is a requirement Appellant never attempted to prove because the evidence would not have supported the inference Appellant wanted. Unbelievably, Mr. Stritt admitted that he had no idea why the clients left Appellant. T. 591:18-24. Specifically, Mr. Stritt testified as follows:

18	Q And isn't it true that you do not know why Mr.
19	Bannon's clients left with him to AssuredPartners?
20	A I was not present for any of those conversations,
21	so I have no idea what he told them. I can speculate. I

T. 591:18-21. Mr. Stritt was also impeached with his own deposition testimony where he confirmed in reference to Bannon's clients, "We haven't gone after them or talked to them." T. 593:6-12 (emphasis added). Mr. Stritt even admitted that Bannon had good relationships with some of his clients. T. 591:9-11. Appellant provided no testimony at trial that in any way proves that the clients left with Bannon for any reason other than the fact that they had a good relationship with him.[6] Appellant provided absolutely no evidence that in any way connected any alleged misappropriation of its information and the reason clients followed Bannon to AssuredPartners.

The complete lack of evidence on this issue was exposed by Appellant's meager attempt to create an inference of causation through Mr. Stritt's self-serving testimony claiming that clients with Employee Navigator accounts were, in his opinion, more likely to not move to AssuredPartners. In addition to this testimony being completely speculative, Mr. Stritt's opinions are not supported by any evidence. Here, the testimony confirmed that clients with and without Employee Navigator accounts moved to AssuredPartners, and that clients with and without Employee Navigator accounts stayed with Appellant. T. 552-54. As such, Mr. Stritt's opinion

[6] Notably, Appellant, subpoenaed multiple of Bannon's clients for trial and they were available to testify, but Appellant chose not to call any of them. The parties consented to Respondents calling two of these clients to testify between the end of Appellant's case and Respondents' directed verdict argument based on the fact that they were in the courtroom and in an effort to be respectful of the jury's time. T. 604-617. The directed verdict argument then occurred at the end of the day after the jury was excused. T. 617-674.

completely failed to prove any causal relationship between the clients' use of Employee Navigator and their decision to move their business to AssuredPartners.

There is no inference of proximately caused damages, reasonable or otherwise, that can be drawn from Mr. Stritt's self-serving testimony and this testimony was wholly inadequate to satisfy Appellant's burden of proof on this element of its trade secrets claim. Appellant had the duty of proof by a preponderance of the evidence. Its attempted inferences and the self-serving testimony of its President/owner was wholly insufficient to meet this burden. Appellant introduced no evidence showing that the clients left because of Respondents' alleged misappropriation. Accordingly, the trial court correctly granted Respondents' directed verdict motion and this ruling should be upheld.

D. The Trial Court Correctly Granted Respondents' Motion For Directed Verdict On Appellant's Conversion Claim Because Appellant Failed To Prove Any Of The Required Elements For A Conversion Claim.

The trial court properly found that Appellant failed to prove any of the elements of its conversion claim. Appellant, without any legal support, contends that the trial court erred because Respondents allegedly took from Appellant the "exclusive right" to determine who can know or use its alleged trade secret. In making its argument, Appellant simply ignores the long established elements of conversion.

First, it should be noted that conversion is a common law tort claim. The Act preempts any such claims. S.C. Code Ann. § 39-8-110; see Trevillyan v. APX Alarm Sec. Sys., Inc., No. 2:10-cv-01387, 2011 WL 11611, at *10-11 (D.S.C. Jan. 3, 2011). Appellant is again relying on information being a trade secret to support this claim. Appellant's Brief p. 30-31. Thus, this claim was preempted and should have been dismissed for this additional reason. To the extent Appellant was not relying on alleged trade secret information to support this claim, Appellant's own

Employment Agreement's restriction on the use of Confidential Information had expired so there were no restrictions on Bannon's use of any other information. See Section I.A.2. above.

Second, Appellant failed to prove the required elements of a conversion claim. Under South Carolina law, conversion is defined as, "the unauthorized assumption in the exercise of the right of the ownership over goods or personal chattels belonging to another *to the exclusion of the owner's rights*." Am. Credit Sumter, Inc. v. Nationwide Mut. Ins. Co., 663 S.E. 2d 492, 295 (S.C. 2008). "To establish the tort of conversion, the plaintiff must establish either title to or right to the possession of the personal property." Moseley v. Oswald, 656 S.E. 2d 380, 382 (S.C. 2008). Ordinarily, an action for conversion lies only for personal property that is tangible, which permits identification of ownership interest. South Carolina will only permit a claim for conversion based on intangible property where the intangible property rights are identifiable by some document. Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 684 S.E. 2d 756, 763 (S.C. 2009).

Here, it is undisputed that Appellant's conversion claim pertains to electronic information, not personal property. As such, intangible property is at issue in this case. Despite the requirements of the case law cited above, Appellant produced no document showing that it owns the intangible property at issue, (*i.e.*, the intangible data found in Employee Navigator and SharePoint). To the contrary, the evidence established that the information at issue in Appellant's conversion count was owned by the clients, not Appellant. Appellant produced no document that substantiated its ownership claim to this information. Indeed, with respect to Employee Navigator, the clients maintained a log-in and password that permitted them to access and copy the data at their leisure. Because the tort of conversion requires the property owner to prove that they actually own the property at issue and because Appellant failed to establish its ownership interest in any of the

property allegedly converted, Appellant's claim failed as a matter of law and the trial court correctly directed a verdict in Respondents' favor on this claim.

Appellant also failed to establish that Respondents' converted Appellant's alleged property to the exclusion of Appellant's rights. In fact, Appellant's own argument belies Appellant's conversion claim. For instance, Appellant argues that, "Bannon secretly obtained and forwarded the Employee Navigator client login credentials for Forum Benefits' clients to AssuredPartners, and Jim Brady used those login credentials to access, download, and copy Forum Benefits' trade secrets from the Employee Navigator accounts." Appellant's Brief p. 30. Even assuming all of this is true, Appellant failed to establish Respondents' conduct resulted in Appellant's inability to access and utilize the information. In other words, there was no evidence showing Appellant lost access to or the ability to utilize the information or "property" that it claims Respondents converted.[7] Thus, as the trial court ruled, Appellant's conversion claim failed as a matter of law.

Rather than cite to South Carolina case law on this conversion issue, Appellant travels to Arkansas in an attempt to find support for its appellate legal position. Appellant relies on this foreign jurisdiction's law to argue that intangible property can be the subject of a conversion claim. Appellant's Brief p. 31-32. Arkansas defines conversion in a materially different manner than South Carolina. Under Arkansas law, conversion is defined as, "the exercise of dominion over property in violation of the rights of the owner or person entitled to possession. Stated another way, conversion is a common-law tort action for the wrongful possession or disposition of another's property; to establish liability for the tort of conversion, a plaintiff must prove that the

[7] Again, this entire legal argument is illogical given that the information belonged to the clients. Had Appellant lost its ability to access the information, it would have only been because the client(s) changed their login credentials. Without the basic element of ownership, what remains of Appellant's premise falls apart.

defendant wrongfully committed a distinct act of dominion over the property of another, which is a denial of, or inconsistent with, the owner's rights." Integrated Direct Marketing, LLC v. May, 495 S.W. 3d 73, 75 (Ark. 2016) (internal citations omitted). Arkansas's conversion law, unlike South Carolina's, does not require the assumption of property rights to the exclusion of the owner's rights. Rather, in Arkansas, possession of the subject property suffices to establish the claim, even if the possession is a mere copy of the property and the owner otherwise maintains his or her rights in the property. As such, Arkansas's conversion law conflicts with South Carolina law and is inapplicable to Appellant's South Carolina conversion claim.

Finally, Appellant attempts to create a new conversion standard based on language found in the Act. Appellant argues that: (1) the Act provides the owner of a trade secret with the exclusive right to determine who can know, disclose, or use the trade secret; and (2) Respondents interfered with that exclusive right by obtaining Appellant's information without permission. Appellant's Brief p. 30-31. The Act, however, does contain the word "exclusive." This is something Appellant has tried to read into the Act. Thus, Respondents are at a loss to understand how Appellant's can conflate their trade secret claim under the Act with their common law conversion claim. Appellant is not permitted to rely on the Act's legal standard to rewrite existing and well established South Carolina conversion law.

Appellant's conversion claim failed as a matter of law because: (1) Appellant failed to prove that it owns the property at issue; (2) Appellant failed to prove that Respondents' exercised dominion over the property to Appellant's exclusion; and (3) Appellant failed to show that the intangible property at issue was properly the subject of a conversion claim. Thus, the trial court correctly granted Respondents' directed verdict motion and its ruling should be upheld.

II. The Trial Court Properly Awarded Respondents' Attorneys' fees.

Appellant challenges the trial court's decision to award attorneys' fees to Respondents. During Appellant's case in chief, Appellant failed to put on evidence establishing the elements of any of its claims and, at the conclusion of its case, abandoned its tortious interference claim. The trial court awarded Respondents' attorneys' fees based on language in the document Appellant pursued in its breach of contract claim and based on the bad faith language in the Act. Order p. 5-6. During this case's substantial life span, Appellant at all times pursued its breach of contract claim and trade secrets claim and advised that it intended to seek attorneys' fees if it prevailed. Pl. Ex. 137, ¶¶21-24, Prayer for Relief ¶2. Now, after the Appellant has lost and after the trial court has awarded attorneys' fees to Respondent based on the prevailing party fee provisions, Appellant, in the most duplicitous of fashions, contends that the trial court erred. The trial court entered the Order after hearing both an oral motion at the trial and then again after reviewing Appellant's written response to Respondents' motion as well as Respondents' reply in support of their motion. The trial court was fully informed of the arguments and was well within its discretion to award attorneys' fees to Respondents.

An award of attorneys' fees is left to the trial judge's discretion and will not be disturbed on appeal unless an abuse of discretion is shown. Am. Fed. Bank, FSB v. Number One Main Joint Venture, 467 S.E. 2d 439 (1996). In order for an abuse of discretion to occur, the trial court's decision must be unsupported by the evidence or the trial court must have made an error of law. State v. King, 810 S.E.2d 18 (2017). Neither of those conditions are present here.

A. The Trial Court Correctly Ruled That Appellant, As The Prevailing Party Related To Appellant's Contract Claim, Was Entitled To Recover His Attorneys' Fees And Costs.

The trial court's Order properly ruled that the Employment Agreement upon which Appellant based its breach of contract claim contained a mandatory prevailing party attorneys' fees and costs provision. Specifically, the language in the alleged contract Appellant pursued against Bannon for almost five years states:

> In any litigation between the parties related to this Agreement, the prevailing party **shall** be entitled to recover all reasonable costs and attorneys' fees.

(Pl. Ex. 137, ¶11; Complaint Ex. A, ¶11) (emphasis added). This language on its face contemplates mandatory prevailing party attorney's fees in any action that is in any way related to this document. Significantly, Appellant's first witness at trial was its attorney, David Wyatt, who drafted this document. Mr. Wyatt clearly testified that the intent of the document was for the prevailing party to be awarded attorneys' fees and costs. Appellant's own attorney who was called as a witness and waived the attorney-client privilege admitted that if Bannon prevailed related to Appellant's contract claim that he should be awarded his fees and costs. T. 66:19-25. Specifically, Mr. Wyatt testified to the following in response to being shown the attorneys' fees provision in the document he drafted:

19	Q And that's -- that's what we lawyers call a
20	prevailing party attorney's fees provision, correct?
21	A Sure.
22	Q So the winner on this contract should get their
23	attorney's fees, shouldn't they?
24	A Yes. Subject, obviously, to His Honor's
25	approval.

T. 66:19-25.

Because the trial court entered a directed verdict ruling that Appellant failed to prove the required elements of its breach of contract claim, the trial court properly ruled that Bannon was the prevailing party on this claim and properly awarded Bannon his attorneys' fees and costs. The Order p. 5-6.

Appellant argues that, because the trial court ruled that Appellant failed to prove a meeting of the minds on all essential terms of the contract, that no contract existed, and that the prevailing party attorneys' fee provision cannot be the basis for an attorneys' fee award. Appellant's Brief p. 34. Under clear South Carolina law, Appellant's position is simply wrong, and it is also directly contradictory to the position it advanced for almost five years.

It is important to note that Appellant failed to meet its burden of proof on the contract claim on multiple grounds, most significantly because the claim was barred by the Statute of Frauds, as its own attorney witness admitted at trial. See Sections I.A.1. above. In South Carolina, the law is clear that where a party prevails based on a Statute of Frauds defense, the prevailing party is entitled to an award of attorneys' fees under the challenged contract. Fici v. Koon, 372 S.C. 341, 642 S.E.2d 602, 606 (2007) ("The Statute of Frauds does not affect the validity of the attorneys' fee provision but is simply a defense to conveyance. The Statute of Frauds is an affirmative defense. As with any affirmative defense, the party successfully asserting it is a prevailing party and therefore entitled to attorneys' fees where provided by contract."). Bannon was successful on his Statute of Frauds defense (among others) and, as such, the trial court correctly awarded Bannon's attorneys' fees and costs. The Order p. 2.

Significantly, the trial court also ruled that even assuming the parties actually signed the Employment Agreement, something Appellant adamantly contended, Appellant failed to prove

that Bannon actually breached the contract because the restricted periods in the contract expired long before the alleged misconduct occurred. See Section I.A.2. above. Thus, under this basis for directed verdict, the trial court assumed the contract was signed and valid, but ruled that Appellant still failed to prove any breach. This independent basis for directed verdict also required the award of prevailing party attorney's fees to Bannon.

Furthermore, Appellant must be judicially estopped from now arguing that no contract existed and that there can be no prevailing party fees awarded. Appellant claimed for almost five years that Bannon signed the contract and breached the contract. Pl. Ex. 137, ¶¶ 6-8, ¶¶ 21-24. Appellant sought its attorney's fees as a remedy from the initiation of the lawsuit through the trial of this case. Pl. Ex. 137, Prayer for Relief ¶2. Mr. Stritt testified as Appellant's Rule 30 corporate representative in discovery and confirmed that he was "absolutely seeking his fees" against the Defendants in this case. See Defendants Reply in Support of Motion for Attorneys' Fees, p. 4 and Exhibit A attached thereto, Rule 30 Dep. 113-115. Appellant put Bannon through the hardships of litigation during this entire time period forcing him to defend himself, to prove he did not sign the alleged contract and to prove he did not breach the alleged contract. Appellant must be estopped from so dramatically shifting its position on attorneys' fees after it lost on this claim at trial, and then attempting to claim that no contract existed for the purposes of prevailing party attorneys' fees.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." See Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629, 631–32 (2004). The following elements are relevant in determining whether judicial estoppel applies: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be

taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. Id. Here all the factors of judicial estoppel are present.

The first two elements of judicial estoppel are clearly established as discussed above. With regard to the third element, Appellant has been successful in advancing this contract claim by being permitted to pursue this claim against Bannon for almost five years. Appellant used the Employment Agreement to obtain an *ex parte* temporary restraining order and to defeat multiple motions for summary judgment. See Verified Complaint; Ex Parte Motion for TRO; Order Granting Ex Parte Motion for TRO dated 12/1/2016, and Plaintiff's responses to Defendants' motions for summary judgment.

With regard to the fourth element, Appellant is clearly attempting to mislead the Court to avoid the repercussions of the mandatory prevailing party fee provision in its own document. Appellant is now taking a position that is contrary to the testimony of its own attorney and first witness at trial, David Wyatt, who clearly confirmed that Bannon would be entitled to his fees under the language of the document he drafted. Finally, Appellant's positions are totally inconsistent – its Verified Complaint says there is a contract and it is seeking fees under that contract. Now, after losing at trial, Appellant contends there was no meeting of the minds and no contract. Therefore, judicial estoppel applies in this case and Appellant's arguments are barred.

Appellant also mistakenly contends that the trial court should not have awarded Bannon his attorneys' fees because AssuredPartners, rather than Bannon, actually paid the attorneys' fees

Respondents incurred in the defense of this case. Once again, Appellant's position is simply wrong and directly contrary to the position it took previously in this case.

In an attempt to support its position, Appellant misapplies the Supreme Court's reasoning in Williamson v. Middleton, 681 S.E. 2d 867 (S.C. 2009), and contends that its holding prohibited the trial court from awarding attorneys' fees to Bannon if he did not pay the attorneys' fees himself. Appellant's Brief p. 36. Appellant's reliance on Williamson misses the mark as the attorney in that case did not charge his client a fee for his services, but was acting in a gratuitous pro bono capacity. Williamson, 681 S.E.2d at 870. Specifically, the Williamson Court found,

> Middleton's counsel was deposed on the issue of attorney's fees. He acknowledged that he and Middleton were personal friends, that he had handled other legal matters for Middleton in the past without taking a fee, and that Middleton was never sent any statements of attorney's fees incurred. Furthermore, Middleton's counsel answered in the negative when specifically asked if Middleton incurred any attorney's fee."

Id. The Williamson Court, however, did not hold that a party must personally pay for attorneys' fees to receive an attorneys' fee award as the prevailing party in a breach of contract case.[8]

Contrary to Appellant's argument, South Carolina law does not require that Bannon personally pay his attorneys' fees to recover his attorneys' fees as the prevailing party. See Maddux Supply Co. v. Safhi, Inc., 450 S.E.2d 101, 106 (S.C. Ct. App. 1994) ("Clearly, Benchmark's costs and attorneys' fees were incurred in this matter for the benefit and in the interest of Safhi . . . Thus, we concur in the master's ruling that 'as the prevailing party, Safhi (for the benefit of Benchmark

[8] The parties briefed these issues before the trial court entered the Order. Appellant's brief, like its argument to the trial court, cites no case law to support its position in this regard and Respondents submit that Appellant has not accurately represented to this Court the information submitted to the trial court before the trial court entered its Order.

. . . and as the party to which Safhi tendered the defense of this matter) is entitled to an award of costs and attorneys' fees.").

Whether Bannon personally paid attorneys' fees and costs has no bearing on the trial court's ability to award attorneys' fees to Bannon as the prevailing party on the breach of contract claim. Bannon was sued as an employee of AssuredPartners. It is common in this situation for the then current employer to pay for its fees along with the fees of its employee who was also sued individually. This payment for the benefit of the employee does not in any way limit the recovery of those fees. Many jurisdictions agree with South Carolina law on this precise analysis. See Rogers v. Vulcan Mfg. Co., 93 So. 3d 1058, 1060 (Fla. Dist. Ct. App. 2012); Weichert Co. of Maryland v. Faust, 419 Md. 306, 19 A.3d 393, 408 (2011); Developers Diversified of Tennessee, Inc. v. Tokio Marine & Fire Ins. Co., 2019 WL 1861322, at *8 (M.D. Tenn. Apr. 25, 2019).

Further, the prevailing party attorneys' fees provision in the Employment Agreement does not require the prevailing party to actually incur or pay their own attorneys' fees and costs to recover them. Pl. Ex. 137, ¶11. Appellant could have easily added language in the document related to fees the party "directly incurred" or "directly paid" and chose not to do so. Even to the extent Appellant could argue an ambiguity related to its own document, the trial court would have correctly construed any doubts against the drafter, which was indisputably Appellant. See Mathis, 698 S.E.2d at 778.

Finally, this argument by Appellant is another bad faith argument that is barred by estoppel and equity. As discussed above, Appellant sought to recover its own attorneys' fees in the event it prevailed on its contract claim. Significantly, Appellant has admitted that its fees were paid personally by Mr. Stritt rather than Appellant. T. 569:17-22. Specifically, Mr. Stritt testified at trial to the following:

17	Q And isn't it true that you are personally paying
18	for this lawsuit out of your personal funds?
19	A That is correct.
20	Q And Forum Benefits, LLC, hasn't paid a dime in --
21	for this case, have they?
22	A That is correct.

T. 569:17-22.

Appellant should not be permitted to seek to avoid an obligation it specifically pursued for its own benefit for close to five years of litigation. The trial court did not abuse its discretion in awarding Bannon his attorneys' fees as the prevailing party on Appellant's contract claim and the trial court's ruling should be upheld.

B. The Trial Court Correctly Awarded Respondents' Their Attorneys' Fees And Costs Under The Act Because It Properly Determined Within Its Discretion That Appellant Pursued Its Trade Secret Claim In Bad Faith.

The Act provides that, "[i]f (1) a claim of misappropriation is made in bad faith . . . the court may award reasonable attorney's fees to the prevailing party. S.C. Code Ann. § 39-8-80. This is clearly a decision the legislature left to the trial court's discretion.

Appellant first attempts to challenge the trial court's ruling by claiming that the words "bad" or "faith" do not appear in the directed verdict arguments or in the trial court's directed verdict ruling. Appellant's Brief p. 27-28. However, Appellant ignores the fact that the issue of bad faith was not specifically before the trial court until after the trade secret claim was dismissed and Respondents moved for attorney's fees under the Act. Respondents directly raised the issue of bad faith under the Act after the trial court granted a directed verdict. T. 680:21-681:4. Accordingly, Appellant's first argument is without any merit.

Second, Appellant improperly relies on Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC, 713 S.E.2d 650 (S.C. Ct. App. 2011) for the proposition that bad

faith cannot be found following the denial of a summary judgment motion. Appellant is again mistaken in its analysis. The analysis in Southeastern pertained to frivolity sanctions under Rule 11, not bad faith under the Act. Id. 654. Further, even if the standard in Southeastern applied here (which it does not), the procedural posture of the case at bar differs substantially from Southeastern. Here, the judge that heard Respondents' motion for summary judgment retired before ruling on said motion. T. 541-542. Thereafter, a second judge denied Respondents' motion and provided no explanation for the denial. Id. A third judge, Judge Bentley Price, presided over the trial in this case. As such, in the case at bar, no pre-trial findings or rulings were made that precluded the trial court's finding that Appellant pursued this claim in bad faith.

The trial court heard all of Appellant's evidence and witnesses, and then determined that Appellant's evidence (or, more importantly, ***complete lack thereof***) supported a finding of bad faith. The trial court's bad faith finding was warranted and within its discretion given the complete lack of evidence Appellant provided on every element of this claim. See Section I.C. above.

Most significant to this issue on appeal is the fact that the trial court's attorneys' fee award is governed by an abuse of discretion standard. See e.g. Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659 (1993) (finding that a trial judge's decision to award attorneys' fees will not be reversed on appeal absent an abuse of discretion). The appellate court should not reverse a fee award unless it 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 (1997).

Significantly, the clear legislative intent of the Act was to provide the trial court with the discretion to make a bad faith determination, similar to the determination the trial court would have been required to make if Appellant had prevailed and sought exemplary damages under the Act. "The SCTSA provides that 'the court may award reasonable attorney's fees to the prevailing

party' if '(1) a claim of misappropriation is made in bad faith, (2) a motion to terminate an injunction is made or resisted in bad faith, or (3) willful misappropriation exists.'" Uhlig, LLC v. Shirley, 895 F. Supp. 2d 707, 710 (D.S.C. 2012) citing S.C. Code Ann. § 39–8–80. These are determinations to be made by the trial court after hearing the evidence "deduced at trial." Id. The trial court is vested with the authority to make a bad faith finding and award attorneys' fees. S.C. Code Ann. § 39-8-80.

"South Carolina courts have not addressed the standard for determining whether a claim under the SCTSA was brought in bad faith warranting attorney's fees." Uhlig LLC v. Shirley, 2012 WL 3062659, at *2 (D.S.C. July 26, 2012). "However, the United States District Court for the District of Maryland has discussed the bad faith standard under the Maryland Uniform Trade Secrets Act, which includes an attorney's fee provision identical to SCTSA. Id. (internal citations omitted). "In evaluating the defendants' fee request, the district court for the District of Maryland noted that a finding of bad faith required 'clear evidence that the action [was] entirely without color and taken for other improper purposes.'" Id. The court further commented that "knowing persistence in an invalid claim demonstrates subjective bad faith" and is sufficient to warrant an award of attorneys' fees under the statute. Id.

The trial court's finding of bad faith was supported by the evidence (or Appellant's complete lack thereof) and was not an abuse of discretion. Appellant litigated this case for approximately five years. During that time, Appellant never produced any valid evidence of proximately caused damages, never identified information that could possibly rise to the level of a trade secret, never established that its information was "misappropriated" as defined in the Act, and shockingly never asked even one client why they moved with Bannon to AssuredPartners. T. 593:6-10 (Mr. Stritt testified with regard to Bannon's clients, "We haven't gone after them or

talked to them"). Tellingly, not one client for which Appellant was seeking damages was called as a witness in Appellant's case at trial. There was absolutely no evidence presented to suggest that Bannon ever had possession of or misappropriated any of Appellant's alleged trade secrets, but even more egregious was Appellant's pursuit of this claim against AssuredPartners, which never received any of Appellant's alleged trade secret information. See Section I.C.2. above. Appellant wasted the trial court's time, Respondents' time, and caused Respondents to incur hundreds of thousands of dollars litigating a completely baseless trade secrets claim.

The trial court correctly ruled against Appellant on every conceivable issue with respect to its trade secret claim. See Section I.C. above and The Order. It is hard to envision circumstances that would present a more-clear case of bad faith under the Act than this case. Appellant's willfully persisted in the prosecution of this invalid claim and made no reasonable attempt to prove the elements of its claim because none existed. The overwhelming evidence at trial showed that Appellant's pursuit of this claim was entirely baseless and without color. To reverse the trial court's ruling under these facts would essentially destroy the legislative intent designed to give the trial court discretion to award the defendant attorneys' fees and to deter the pursuit of these claims in bad faith. Therefore, the trial court's ruling that Appellant pursued its claim under the Act in bad faith was within its discretion to make and should be upheld.

III. Appellant's Did Not Have A Valid Basis To Recuse The Trial Judge And There Is No Basis For A New Trial.

The morning of the third day of trial, following two full days of trial testimony, when Appellant knew its case was going terribly, Appellant moved to recuse the trial judge. T. 448-461. There was no valid basis for this motion. The entire substance of Appellant's argument was and is that the trial judge should have recused himself after two days of trial testimony because the trial judge realized he knew a "potential" witnesses when the witness showed up to the courtroom. At

that time, the Judge realized he knew the potential witness (Mack Ward) from over 17 years prior when they were in college at Wofford together. The trial judge immediately announced the relationship to all counsel and the case continued on – no objection being made (and thus waived). Appellant even consented to the trial judge saying hello to Mr. Ward during the break. It wasn't until the following day that Appellant complained.

Importantly, Mr. Ward was not a material witness at trial. Indeed, although Appellant subpoenaed Mr. Ward to appear at trial, Appellant never actually called Mr. Ward to testify, and instead released him from his subpoena during the second day of trial and ***prior*** to its motion for recusal the following day. T. 457:14-458:4, 461:20-25. Appellant did not and has not presented any evidence to remotely suggest that the trial court was biased because he went to college with a "potential" witness who was never called to testify at trial. The trial court properly denied Appellant's motion and its ruling should be affirmed.

Appellant's motion was flawed for multiple reasons. First, Appellant waived its motion for recusal by agreeing to the trial judge saying hello to Mr. Ward (T. 452:4-6), releasing Mr. Ward from his subpoena prior to calling him as a witness (T. 457:14-458:4), calling other witnesses after the college relationship became known (Id), and then waiting until the following day, the third day of trial, to make its motion for recusal (T. 449). See Duplan Corp v. Milliken, 400 F. Supp 497, 510 (D.S.C. 1975) ("Timeliness is essential to any recusal motion. To be timely, a recusal motion must be made at counsel's first opportunity after discovery of the disqualifying facts.").

Appellant apparently understood that its failure to ever call Mr. Ward as a witness was fatal to its claim that he was a material witness in the case. So, in making its motion for recusal the following day, Appellant's counsel claimed that he did not call Mr. Ward to testify after learning that the trial judge knew him from college. T. 458:5-19. Appellant cannot be permitted to choose

not to call Mr. Ward on this alleged basis, call other witnesses and see how their testimony goes, and then wait until the following day to make its motion for recusal. This was not remotely timely and definitely not the "first opportunity." Duplan Corp, 400 F. Supp at 510. If Appellant had time to consider whether to call Mr. Ward the second day of trial, it had time to consider a motion to recuse the judge at that time and failed to do so.

Notably, Laurie Winston testified at the end of day two of trial and her fatal admissions discussed above essentially destroyed Appellant's ability to prove its claims. T. 389-423; see Section I.C.1. above. This damaging testimony was more likely than not the reason Appellant decided to proceed with the motion for recusal the next day. But its true reasons are not relevant given that the motion was untimely.

Second, Appellant's motion had absolutely no support in law or fact. The judicial canons provide that disqualification may be appropriate under certain extremely specific circumstances. See Canon 3(E)(1)(a)-(d). The only circumstance described in the judicial cannons that Appellant has alleged in this case is that the judge or his spouse or a person within the third degree of relationship to them is either a party or the officer, director, or trustee of a party, is a lawyer in the case, is known to have more than a *de minimus* interest that could be substantially affected by the litigation, or, to the judge's knowledge, is likely to be a material witness in the proceeding. Canon 3(E)(1)(d); see also Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535, 545 (2014).

The evidence in this case did not remotely satisfy the requirements of this judicial cannon. With regard to the third degree of relationship element, attending college together and not seeing someone for over 17 years is not a "third degree of relationship." See § 10.2-2.11 Rule 2.11, Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.11 (2021-2022 ed.)("Third degree of relationship includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister,

child, grandchild, great-grandchild, nephew, and niece."). None of the other elements of this cannon are relevant considering this first element was not met, but the other elements were also not remotely satisfied as discussed below.

With regard to the party or the officer, director, or trustee of a party element, Mr. Ward is not a party in this case and is not an officer, director, or trustee of a party in this case. Appellant attempts to contend that Mr. Ward is a "Vice President" at AssuredPartners and that this title should carry some significance. The evidence at trial clearly established that most insurance producers, like Mr. Ward, carry the title "Vice President," but that this title does not carry with it any corporate authority. T. 243:5-244:22. Rather this title is provided to insurance producers in recognition of their experience in the industry and for marketing purposes. Id. In response to Appellant's post-trial motions, Mr. Ward and his wife Michelle provided affidavits to the trial court disputing many of Appellant's post trial claims and explaining that Mr. Ward is a commission based employee in AssuredPartners' Greenville, South Carolina office and that he is not an officer, manager, trustee, or director of AssuredPartners. See Affidavit of Mack Ward attached to Defendants' Response in Opposition to Plaintiff's Motion for a New Trial. But none of this information was before the trial court when Appellant's made their initial motion because Mr. Ward was never called to testify.

With regard to the individual being a material witness in the proceeding, that element was not met given that Mr. Ward was never called by Appellant to testify and was released from his subpoena the day before Appellant's motion for recusal.

None of the judicial cannons for disqualification were met and Appellant has failed to provide any evidence to justify a recusal. The law is clear that "The party seeking disqualification must do more than merely allege bias on the judge's behalf; the party must present some evidence

of judicial prejudice or bias." Simpson v. Simpson, 377 S.C. 519, 524, 660 S.E.2d 274, 277 (Ct. App. 2008) (internal citations omitted). "In applying Canon 3 [(E)](1), the South Carolina Supreme Court has stated that the movant or petitioner must show some evidence of the bias or prejudice of the judge." Lyvers v. Lyvers, 280 S.C. 361, 367, 312 S.E.2d 590, 594 (Ct. App. 1984) (internal quotations and citations omitted). "When an appellant offers no evidence to support his claim of partiality, the trial judge is correct to deny a Motion for Recusal." Simpson, 660 S.E.2d at 277 (internal citations omitted). "When disqualification is not required, the Code states, "A judge shall hear and decide matters assigned to the judge...." Id., citing Canon 3B(1) of the Code of Judicial Conduct, Rule 501, SCACR.

"Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." Patel v. Patel, 359 S.C. 515, 599 S.E.2d 114, 118 (2004) (citation omitted); Simpson, 660 S.E.2d at 276. "Appellate courts 'accord great weight to the trial judge's assurance of his own impartiality.'" Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535, 545 (2014)(internal citations omitted).

Significantly, the Supreme Court, in a case where the presiding trial judge actually had ties to the parties well beyond simply being college acquaintances, held that recusal was not proper. In Davis, 762 S.E.2d at 545, the Supreme Court ruled that the trial judge's relationship with a party's counsel was not sufficient to warrant recusal where:

> Johnston's wife's ex-husband was a fraternity brother of the judge 40 years ago; Infinger spent the night at the judge's lake house 30 years ago after both attended the wedding of another Haynsworth shareholder who is not affiliated with this case; the judge's son and Johnston's son were fraternity brothers in college 14 years ago, went to Europe together 13 years ago, and stayed in contact thereafter; the judge and his son accepted an invitation to go fishing with Johnston's brother; the judge officiated at Rosen's wedding in 2007, and the Rosen family provided him with accommodations at Fripp Island for the wedding; Rosen's father, a surgeon, performed a

> medical procedure on the judge; Rosen's parents once lived in Bamberg, South Carolina, but the judge did not see them socially; and the judge has been a member of a social club that holds an annual white tie dance for approximately ten years, and in 2009, Johnston was invited to join the club.

Davis, 762 S.E.2d at 545. Even with the facts above, the Supreme Court ruled that there was no basis for disqualification under Canon 3(E) and that the trial judge properly denied the recusal motion. Significantly, there were no allegations in the instant case that Mr. Ward and the trial judge were even fraternity brothers. Rather, they simply knew each other from attending the same college over 17 years prior.

Similarly, in Rogers v. Wilkins, 275 S.C. 28, 267 S.E.2d 86, 87 (1980), the Supreme Court affirmed the trial court's decision to deny a motion for recusal where one of the parties had previously sued the trial judge and other members of the South Carolina judiciary and bar in federal district court. Even there, the Supreme Court ruled that there was no valid basis for recusal. Id.

When analyzed against the requirements of the judicial cannons and the cases cited above, Appellant's position becomes wholly absurd. [9] Adopting Appellant's position in this case would not only change the law and the judicial cannons, but would effectively grind the judicial system to a halt, particularly in smaller communities where the judges, attorneys, and litigants frequently know one another and given the likelihood that a judge may have a "potential" witness in a trial that he or she knew from some period in his or her history of education. There is no evidence anywhere in this record of either bias or improper rulings and the trial judge's assurances to the

[9] Adding to the absurdity of Appellant's position, during its motion for recusal to the trial judge, Appellant attacked the integrity of the judiciary and compared the judge's limited connection to an old college acquaintance to the allegations of judicial misconduct in the "Murdaugh Case." T. 456:6-23. The trial court noted the complete frivolity of this comparison and properly admonished Appellant's counsel on the record after the conclusion of the trial for making this comment. T. 679-680.

contrary should be given significant weight. T. 451-453. The reality is that Appellant completely failed to establish its claims and, as its case was going down in flames, attempted to use its recusal motion as an ejection button. The trial court correctly denied Appellant's motion for recusal and motion for a new trial. Respondents request that this Court affirm the trial court's decisions.

CONCLUSION

For all of the foregoing reasons, Respondents request that this Court uphold the trial court's decisions: (1) granting Respondents' directed verdict motion; (2) awarding Respondents their attorneys' fees and costs; and (3) denying Appellant's motion for a new trial.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2022-000231

Forum Benefits, LLC, ...Appellant

v.

Brian Bannon and Assured Partners, NL, ...Respondents

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I, Jeffrey A. Lehrer, of FordHarrison, LLP, counsel for Brian Bannon and Assured Partners, NL, hereby certify that the foregoing **RESPONDENTS' AMENDED INITIAL BRIEF** by Brian Bannon and Assured Partners, NL has been served upon opposing counsel, pursuant to the Supreme Court's Order 'Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules,' (as amended May 6, 2022), by e-mailing a copy to counsel at their AIS e-mail address, as reflected below:

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Subject:	Forum Benefits v. Brian Bannon and AssuredPartners, NL - Appellate Case No. 2022-000231 - Respondents AMENDED Initial Brief and Proof of Service
Attachments:	Cover letter to Clerk of Court.pdf Proof of Service.pdf Respondents" Amended Initial Brief (FINAL for filing 12-13-22).pdf

Good Afternoon,

On behalf of Jeffrey Lehrer, attached please find a service copy of Respondents' Amended Initial Brief along with the cover letter and Proof of Service in the above-referenced matter which has been filed with the Court today.

Thank you,

Heather M. Ratliff - ***Legal Assistant to Jeffrey Lehrer***

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December 13, 2022

VIA: E-FILE (ctappfilings@sccourts.org)
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals

Re: Forum Benefits, LLC v. Brian Bannon and Assured Partners, NL
Appellate Case No. 2022-000231

Dear Ms. Kitchings:

Respondents are filing the attached amended initial brief in response to Appellant's notice of non-compliance. Appellant contends that Respondents' brief exceeded 50 pages. Respondents did not include the Table of Authorities or Table of Contents in calculating the page limit, as that has never been counsel's practice and counsel is aware of other cases where these are routinely not counted toward the page limit. The applicable rule does not specifically address this issue. However, Respondents do recognize that Appellant moved to exceed the page limit because of this issue and that the request to exceed the page limit was denied. Respondents state that it was not necessary for Appellants to file their previous motion to exceed the page limit and Respondents did not oppose that motion. However, recognizing the Court's prior ruling on Appellant's motion, Respondents are filing an amended initial brief to avoid any issues, to avoid the need for the Court to further address this matter, and to prevent further delays in the filing of the briefs in this case.

With highest regards, I remain

Very truly yours,

FORD & HARRISON LLP

JEFFREY A. LEHRER

JAL/hmr

Attachments
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