THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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

Forum Benefits, LLC,

Appellant,

v.

Brian Bannon and Assured Partners, NL,

Respondents.

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

This appeal is of a directed verdict, yet Respondents' arguments ignore the legal standard for a directed verdict. The law regarding directed verdicts is not, as Respondents would seem to believe, a testing of the weight of the evidence or a measure of evidentiary persuasiveness. Instead, it is this: "When considering a motion for a directed verdict, the [trial] court must 'view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and [must] deny the motion when either the evidence yields more than one inference or its inference is in doubt.'" *Turner v. Med. Univ. of S.C.*, 430 S.C. 569, 582, 846 S.E.2d 1, 7 (Ct. App. 2020) (quoting *Estate of Carr ex rel. Bolton v. Circle S Enters., Inc.*, 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008)). "In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence." *Wright v. Craft*, 372 S.C. 1, 22, 640 S.E.2d 486, 498 (Ct. App. 2006) (citation omitted).

Respondents repeatedly discuss their view of the evidence to urge that the trial court's directed verdict Order, which was entirely written by Respondents and signed by the trial judge without a single revision, is correct. Respondents' Brief is infused with the argument, not that Appellant presented no evidence, but instead that Appellant's evidence "failed to prove" (used thirty times[1]) or "failed to establish" (used seven times[2]) a proposition or that testimony was "self-serving" (used seven times[3]) – arguments about the weight of evidence that Respondents themselves acknowledge was presented, acknowledged evidence the existence of which precluded a directed verdict.

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[1] Respondents' Brief, pp. 9, 12, 13 (three instances), 16 (three instances), 17 (two instances), 21, 24, 25, 26 (two instances), 28 (three instances), 29, 30 (three instances), 31, 33 (two instances), 36 (four instances), and 37.

[2] Respondents' Brief, pp. 9, 17, 19, 21, 31, and 32 (two instances).

[3] Respondents' Brief, pp. 11, 12 (three instances), 29, and 30 (two instances).

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

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

The trial court's directed verdict in favor of Bannon on the breach of contract claim is legally erroneous and improperly invaded the province of the jury.

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

David Wyatt ("Wyatt") testified that Brian Stritt engaged him in 2009 to prepare an employment agreement for a new employee that would be hired in Charleston. (R. pp. 968-974; 60-75; 90; 504-505). Stritt testified that Plaintiff's Exhibit 137 is a blank employment agreement prepared by Wyatt (R. pp. 968-974; 60-75; 90; 499-501); that Plaintiff's Exhibit 163 is a completed employment agreement signed by Bannon's co-employee Chris Whatley on May 18, 2009 (R. pp. 975-982; 497-499; 501-502); and that Plaintiff's Exhibit 163 is substantially identical to the completed employment agreement signed by Bannon (R. pp. 502-504). Stritt further testified that Bannon signed the employment agreement when Stritt delivered the first paycheck to Bannon on June 1, 2009 (R. pp. 505-507); that Stritt placed the signed employment agreement in Bannon's employment file (R. p.506); and that Stritt only discovered that the signed employment agreement was missing—along with Bannon's entire employment file—shortly after Stritt learned that Bannon had been hired by Assured Partners (R. pp. 506-507). The suspicious nature of Bannon's "lost" employment agreement—along with the entirety of his employment file—supports a reasonable inference that it was actually taken by, or at the direction of, Bannon.

Respondents argue that "Appellant failed to prove the existence of a signed contract." (Respondent's Brief, p. 9; see also Respondents' Brief, pp. 12 and 13). Proof, though, was not the legal standard by which the trial court's directed verdict should have been decided. And Respondents

admit to the existence of evidence that should have precluded directed verdict: "Mr. Stritt is the only witness that testified to allegedly witnessing Bannon's execution of the Employment Agreement." (Respondents' Brief, p. 11).

The evidence regarding the existence of a signed employment agreement created several factual disputes for the jury to resolve. Therefore, the factual dispute regarding whether Bannon signed an employment agreement with Forum Benefits should have been submitted to the jury.

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

Respondents address this issue only in a footnote, and provide no argument supporting the trial court's ruling. (Respondents' Brief, footnote 4, p. 13). Appellant stands on its arguments and the law recited in Appellant's Brief.

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

Paragraph 12 of the employment agreement signed by Bannon included covenants not to disclose Forum Benefits' trade secrets and confidential information; the trade secret covenant was unlimited in duration. (R. pp. 968-974; 60-75; 90). The clear and unambiguous language of the employment agreement prohibits Bannon from ever copying and sharing Forum Benefits' trade secrets without permission. The S.C. Trade Secrets Act provides that this obligation not to use or disclose tradesecrets "must not be considered void or unenforceable or against public policy for lack of a durational or geographical limitation." S.C. CODE ANN. § 39-8-30(D) (emphasis added). Therefore, Bannon's contractual obligations not to disclose or use Forum Benefits' trade secrets without Forum Benefits' consent are not limited in duration and are enforceable in accordance with ordinary principles of contract law.

Respondents complain that Paragraph 12 has "inconsistent provisions." (Respondents' Brief, p. 15). The provisions are not inconsistent. The header to Paragraph 12 is, "Covenant Not to Disclose Trade Secrets and Confidential Information." Thus, from the beginning, the agreement expressly differentiates the two. And the definition of "Trade Secret" in Paragraph 12(b) differs from the definition of "Confidential Information" in Paragraph 12(e). Not all Confidential Information under the agreement is a Trade Secret. That distinction is merely definitional. Such is the nature of the agreement, and there is no inconsistency.

To this point, Respondents resort to name-calling: the agreement is "incredibly negligent" and bemoan "Appellant negligence," concepts that have no place in the case at bar. (Respondent's Brief, p. 15).

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

Wyatt's testimony, Stritt's testimony, and Plaintiff's Exhibit 163 all provide corroborating evidence of the essential terms in the "offer" of employment by Forum Benefits to Bannon. (R. pp. 968-974; 975-982; 60-75; 90). One of the essential terms in the offer is the covenant not to disclose Forum Benefits' trade secrets, as described in Paragraph 12 of the employment agreement (R. pp. 969-970), and this covenant is unlimited in duration, as permitted by S.C. CODE ANN. § 39-8-30(D). Stritt's testimony that Bannon signed the employment agreement when Stritt delivered the first paycheck to Bannon on June 1, 2009, provides evidence that Bannon "accepted" the employment agreement and received "valuable consideration" for the employment agreement. (R. p. 496).

Respondents meet this issue by arguing that Appellant "failed to prove," which is not the applicable legal standard. (Respondents' Brief, pp. 16 and 17). Yet, Respondents implicitly admit that evidence of proximate causation of damages was introduced, by acknowledging, "While the trial court did not directly address the issue of whether Appellant present sufficient evidence to establish

proximate cause damages under the contract claim,…" – again, Respondents are urging the measure of evidence rather than the existence of that evidence.

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

The trial court's ruling ignored substantial evidence presented at trial about the confidential and fiduciary relationship that existed between Bannon and Forum Benefits from when Bannon was first hired by Forum Benefits in June 2009, until Bannon stopped representing Forum Benefits as a sales representative in November 2016. During the four (4) week overlap when Bannon was simultaneously employed by Assured Partners and represented Forum Benefits as a sales representative, Bannon secretly obtained and forwarded the Employee Navigator login credentials for Forum Benefits' clients to Assured Partners. (R. pp. 756-759; 181; 183-184; 188; 190-194; 247; 274-275). At the same time, Bannon downloaded approximately 2,000 files containing Forum Benefits' trade secrets from Forum Benefits' SharePoint server using the login credentials he had received years earlier when he was Forum Benefits' employee. (R. pp. 138-139; 195-196; 198). Bannon's actions to download and share Forum Benefits' trade secrets with a direct competitor demonstrate that he knew what he was doing was wrong and violated his fiduciary duty to Forum Benefits. The evidence showed that Bannon owed a fiduciary duty to Forum Benefits and knew that he breached this fiduciary duty. The trial court's ruling to the contrary constitutes an error of law.

To this point, Respondents argue one point for sure and may actually argue a second point. Firstly, Respondents argue that Appellant "failed to prove that Bannon, as an independent contractor, owed any fiduciary duty to Appellant" (Respondents' Brief, p. 17), that Appellant "failed to establish" the elements of a fiduciary duty claim (Respondents' Brief, p. 17), and that "Appellant wholly failed to establish a legal or factual basis for Bannon owing it a fiduciary duty" (Respondents' Brief, p. 19).

Again, Respondents miss the mark – they do not dispute the introduction of evidence on these points, they only argue its weight.

Secondly, Respondents, citing unpublished opinions, may be arguing that an independent contractor may never owe a fiduciary duty. That is not the law in South Carolina and, if it is to become the law, it must come from a court other than a Circuit Court judge. And it should not be the law, for at least the reasons and authorities cited in Appellant's Brief.

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

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

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

Forum Benefits designed the build-out of each Employee Navigator account, and Forum Benefits collected, organized, and compiled the employee census data and insurance plan information that populated each account. (R. pp. 176-177, 179; 354-355). Winston described Forum Benefits' proprietary design and build-out of Employee Navigator accounts for each client, as well as Forum Benefits' collection, organization, and compilation of employee census data and insurance plan information included in this proprietary database. (R. pp. 356-359; 378-386; 390-396). She also described in detail Forum Benefits' proprietary formulas included in the renewal spreadsheets for each client stored on Forum Benefits' SharePoint server. (R. pp. 378-386; 390-396). Forum Benefits' design and compilation of data in the Employee Navigator accounts and proprietary formulas in renewal spreadsheets stored on Forum Benefits' SharePoint server exactly match several of the forms

of "information" included in the definition for a "trade secret" provided by the S.C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(a).

Forum Benefits' trade secrets took substantial time and effort to collect, organize, and compile and provided Forum Benefits with a competitive advantage in administering benefits for clients and negotiating rates with insurance providers. (R. pp. 356-359; 378-386; 390-396). Assured Partners saved that time, by downloading, copying, and taking screenshots of Forum Benefits' trade secrets instead of having to design, build-out, collect, organize, and compile the same database of information. Competitive advantage and improved efficiency are precisely the types of economic value described in the S. C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(b).

Respondents correctly recite the elements of a trade secret in their Brief. (Respondents' Brief, p. 22). Appellant agrees with Respondents' recitation of such elements. And the foregoing evidence, introduced at trial, supported each of these elements and precluded a directed verdict.

Respondents argue, "There is no evidence anywhere in the record as to the independent economic value of Appellant's alleged trade secret." (Respondent's Brief, p. 22). The evidence in the Record (*e.g.*, Plaintiff's Exhibits 8, 10-12, and 45) provides evidence, overlooked by Respondents, of the value of Forum Benefits' trade secrets to Assured Partners. (R. pp. 749-750; 756-759; 760-765; 766-768; 817-823; 176-177; 186; 190-194; 444-447; 448-450). Respondents acted urgently to surreptitiously take Forum Benefits' trade secrets before Forum Benefits learned that Bannon was working for Assured Partners and terminated further access. (R. pp. 174-175; 247; 274-275). Brady even testified, consistent with his November 8, 2016 email, that he could not build an Employee Navigator account for a client without login credentials that would allow him to download, copy, and take screenshots of Forum Benefits' Employee Navigator account for that client. (R. pp. 760-765; 448-450). All of this evidence demonstrates the substantial economic value of Forum Benefits' trade secrets to Respondents.

Respondents argue, "The information in Employee Navigator was protected by a login and password created and maintained by the client…." There is no evidence in the record that this is true, and in fact is it false.

Respondents argue, "It is blackletter law that information that is readily ascertainable from other sources cannot qualify for trade secret protection." (Respondents' Brief, p. 23). The ingredients of Coca-Cola® soft drink can each and all be "readily ascertained" at a neighborhood grocery store, but nonetheless the identity, proportions, and blends of those ingredients qualifies as a trade secret. A "trade secret" may simply be a compilation of publicly available data because "[t]he collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure." S.C. CODE ANN. § 39-8-20(5).

Respondents argue, "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." (Respondents' Brief, p. 23). There is no evidence in the record to support Respondents' argument as to the Employee Navigator database.

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

Forum Benefits limited access to Forum Benefits' trade secrets to only authorized personnel with valid login credentials. (R. pp. 387-389; 397). Forum Benefits only provided login credentials to Forum Benefits' proprietary database of information in the Employee Navigator accounts to account managers assigned to those accounts and, on a case-by-case basis, a single client representative if a client requested the ability to generate reports from the Employee Navigator account associated with that client. (R. pp. 387-389). Forum Benefits did not provide sales people, like Mack Ward and Bannon, with any login credentials to any of Forum Benefits' Employee Navigator accounts. (R. pp. 387-389). Forum Benefits only provided login credentials to Forum Benefits' SharePoint server to

Forum Benefits' full-time employees. (R. pp. 138-139; 387-389; 397). When an individual ceased to be an employee of Forum Benefits, all access to these computer systems was cut off. (R. pp. 508-509).

Respondents' efforts to support the trial court's erroneous ruling on this point are refuted by the introduction during the trial of the evidence described in Section C(2) of Appellant's Brief.

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

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

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

To this point, Respondents resort again to their "failed to prove" argument (Respondents' Brief, pp. 25 and 26), which is inapplicable to a directed verdict evaluation.

Respondents' Brief is also unfaithful to the record. For example, Respondents write, "The evidence at trial established that Bannon was given unrestricted access to information relating to his clients – both by Appellant and the clients themselves." (Respondents' Brief, p. 25). There is nothing in the record to support this assertion as to the trade secrets and confidential information in Appellant's Employee Navigator database.

Respondents also write, "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." That was not the testimony. The testimony only was that no such claim was made. (R. p. 603, lines 7-10).

Third, Respondents write, "Mr. Scholz [sic] 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." (Respondents' Brief, p. 27). What we know from Mr. Scholz's testimony is that Bannon copied the information after October 15, 2016, when his employment with Respondent Assured Partners began. (R. pp. 837-956; 487-488).

And Respondents write, "Appellant presented absolutely no evidence at trial to show that any information was ever received, used or misappropriated by AssuredPartners." (Respondents' Brief, p. 27). The record is replete with such evidence, such as that outlined in Section I(B) of Appellant's Brief.

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

Respondents argue that Appellant failed to prove that damages were proximately caused by Respondents' misappropriation of Forum Benefits' trade secrets, urging "wholly failed to meet its burden of proof on this issue" (Respondents' Brief, p. 28), "does not prove" (Respondents' Brief, p. 28), "failed to prove" (Respondents' Brief, p. 30), and "self-serving testimony" (Respondents' Brief, pp. 28, 29, and 30) as grounds for affirmance.

It suffices for reversal of the trail court that:

- Respondents employ a wrong standard of review of the trial court's Order, and use of the proper standard requires reversal;
- multiple emails (*e.g.*, Plaintiff's Exhibits 8, 10-12, and 45) confirm that Assured Partners' acquisition of Forum Benefits' trade secrets from the Employee Navigator accounts was critical to convincing clients of a seamless transition from Forum Benefits to Assured Partners, (R. pp. 749-750; 756-759; 760-765; 766-768; 817-823; 186; 190-194; 444-447);

- a client testified that continuous access to Forum Benefits' trade secrets compiled in the Employee Navigator account was an important factor in her decision to transfer St. Andrews Public Service District's business from Forum Benefits to Assured Partners, (R. pp. 620-626); and
- the circumstantial evidence shows that, if a client used Employee Navigator and Respondents copied the Employee Navigator data, that client left Appellant for Respondents; if a client used Employee Navigator and Respondents did not copy its Employee Navigator data, the client stayed with Appellant. (R. pp. 281-282; 448-450; 569-572).

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

Respondents ignored this topic in their Brief, and Appellant stands on its arguments in Appellant's Brief.

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

Respondents ignored this topic in their Brief, and Appellant stands on its arguments in Appellant's Brief.

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

Respondents miscount that they had filed three separate motions seeking summary judgment on Forum Benefits' trade secret claims. (Respondents' Brief, p. 42).

- Motion for Summary Judgment, Filed March 8, 2018; Memo in Support of Motion for Summary Judgment, Filed March 8, 2018; Response to Motion for Summary Judgment, with 13 Exhibits, Filed March 30, 2018; Memo in Reply to Motion for Summary Judgment, with 1 Exhibit, Filed April 2, 2018 (R. pp. 1026-1027; 1028-1042; 1043-1242; 1243-1280);

- Motion for Summary Judgment, filed June 11, 2019 (which Respondents withdrew) (R. pp. 1281-1374; 1380-1381);
- Motion for Summary Judgment, with 8 Exhibits, filed April 20, 2020; Reply in Support of Motion for Summary Judgment, with 2 Exhibits, Filed June 9, 2020; Response to 4th Motion for Summary Judgment, with 14 Exhibits, filed June 7, 2020 (R. pp. 1382-1554; 1555-1849; 1850-1876).

Two different Circuit Court judges each conducted a full hearing that was fully briefed, and each judge denied Respondents' motion for summary judgment. (R. pp. 14-16; 17-19).

Consistent with the controlling authority of *Southeastern Site Prep, LLC v. Atl. Coast Builders& Contrs.*, LLC, 394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011), and *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997), Forum Benefits' trade secret claims were not frivolous as a matter of law. Accordingly, the Court's ruling that Forum Benefits pursued a trade secret claim in bad faith ignores controlling South Carolina authority and is wrong as a matter of law.

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

The trial court's February 1, 2022, Order was legally erroneous and its factual conclusions improperly invaded the province of the jury.

Respondents' attempts to defend that Order have two flaws. First, Respondents continue to rely on a "failure to prove" standard that is inapplicable to assessing a directed verdict that requires the nonexistence of evidence. *See* Respondents' Brief, pp. 30 – 32.

Second, Respondents assert that the S.C. Trade Secrets Act preempts a common law conversion claim. (Respondents' Brief, p. 30). By its express terms, the Act does no such thing.

> (A) Except as provided in subsections (B) and (C), this chapter displaces conflicting tort, restitutionary, and other law of this State providing civil remedies for misappropriation of a trade secret.
>
> * * *

> (C) Any and all other civil remedies that are not based upon misappropriation of a trade secret or upon protection against misappropriation of a trade secret are governed by the rules of procedure, rules of evidence, regulations, and the common law applicable to the administrative law tribunal or court where the action is filed.

S.C. Code An. § 39-8-110 (underlining emphasis added).

As if to accent their error, Respondents cite *Trevillyan v. APX Alarm Sec. Sys., Inc.*, 2011 WL 11611 (D.S.C. Jan. 3, 2011), to support their preemption argument. *Trevillyan* has nothing to do with the S.C. Trade Secrets Act.

The type of intangible property maintained on the desktop computer and copied by Bannon from the Employee Navigator accounts and from Forum Benefits' SharePoint server is indistinguishable from the files allegedly stolen in *Integrated Direct Marketing, LLC v. Drew May & Merkle, Inc.*, 2016 Ark. 281, 495 S.W.3d 73 (2016). All of the information stored on the desktop computer and copied from the Employee Navigator accounts and Forum Benefits' SharePoint server is the very type of intangible property contemplated by *Gignilliat v. Gignilliat, Savitz & Bettis, L.*, 385 S.C. 452, 465, 684 S.E.2d 756, 763 (2009), that is "merged in or identified with some document." *Id.* at 763.

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

II. The Trial Court Erred in Granting Attorneys' Fees and Costs to the Respondents.

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

A. If By Contract

Respondents start their argument by quoting the contract between Appellant and Respondent Bannon:

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

(R. pp. 969 ¶11; 43 ¶11) (underlining emphasis added). But Bannon had no attorneys' fees to "recover" because he had paid no attorneys' fees – Respondents admit on Page 38 of their Brief that "AssuredPartners, rather than Bannon, actually paid the attorneys' fees."

"Recover" means "to get back" or "regain":

> recover
> re·cov·er - ri-ˈkə-vər
> transitive verb
> 1: to get back : REGAIN

https://www.merriam-webster.com/dictionary/recover

Bannon had nothing to get back or regain because he had paid nothing. *Williamson v. Middleton*, 681 S.E. 2d 867 (S.C. 2009), is directly on point. Bannon cannot "recover" something he never paid or had to pay.

Respondents cite *Fici v. Koon*, 372 S.C. 341, 642 S.E.2d 602, 606 (2007). In *Fici*, the Supreme Court held that the contract existed but that the Statute of Frauds prevented conveyance of property that was insufficiently described. In the case at bar, by distinction, the trial court ruled that no contact existed.

Respondents also argue judicial estoppel but ignore the third element of the principle, that "the party taking the position must have been successful in maintaining that position and have received some benefit." (Respondents' Brief, p. 38, citing *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629, 631–32 (2004)). Respondents' judicial estoppel argument is that Appellant, having sued for breach of contract, is bound by the contract's terms, even though the trial court ruled that the contract does not exist. Respondents' argument fails because Appellant was not successful at trial in urging the existence of the contract and Appellant gained no benefit from having sued for breach of the contract. To the contrary, by successfully convincing the trial court that no employment contract existed, Respondents

are judicially estopped from changing their position to rely on a prevailing party fee clause of the same non-existent contract.

Respondents argue, "Bannon was sued as an employee of AssuredPartners." (Respondents' Brief, p. 40). No, he was not. He was sued for the actions he took while he represented Appellant.

It was irreconcilable for the trial court to rule as a matter of law that the contract does not exist and then enforce an attorneys' fees provision in the non-existent contract.

B. If By Statute

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

C. Whose Attorneys' Fees?

Respondents admit that "AssuredPartners, rather than Bannon, actually paid the attorneys' fees." (Respondents' Brief, p. 38). There is no evidence at all that Bannon had any attorneys' fees at all.

D. What Attorney Fees?

Respondents make no effort in their Brief to argue about the factors that are required to be considered before awarding attorneys' fees, probably because no evidence whatsoever was presented to the trial court regarding this issue. In South Carolina, a court should consider the following six

factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). Neither the trial court nor the Respondents addressed any of those factors.

III. The Denial of Forum Benefits' Motion to Recuse Prevented Forum Benefits from Receiving a Fair Trial.

Incumbent upon the trial court is Canon 3(E)(1), which states as follows:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudiceconcerning a party or a party's lawyer, …

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

Appellant stands on the analysis presented in its Brief regarding this issue. However, three points raised by Respondents warrant rebuttal.

First, Respondents recite, "Appellant even consented to the trial judge saying hello to Mr. Ward during the break." (Respondents' Brief, p. 45). There is nothing in the record to support this assertion.

Second, Respondents write:

> 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.

(Respondents' Brief, p. 46). This is misdirection. Forum Benefits' basis for recusal—that the trial judge displayed and revealed a personal bias toward Mack Ward, a Vice President of Assured Partners—squarely fits Canon 3(E)(1)(a). Moreover,the Commentary to Canon 3(E)(1) specifically states, "Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply." Given the trial judge's conduct, there was an appearance of bias, and it was reasonable to question his impartiality.

Third, Respondents curiously write, "Mr. Ward is not a party in this case and is not an officer, director, or trustee of a party in this case." (Respondents' Brief, p. 47). In the very next sentence, however, Respondents admit that Mack Ward was a Vice President of then-Defendant, now-Respondent Assured Partners.

In their opening statement at trial, Respondents identified Mack Ward as a trial witness. (R. p. 58, line 18 – p. 59, line 1). Mack Ward's name was cited repeatedly during examinations of multiple witnesses throughout the second day of trial,. (R. p. 257, lines 10-24; p. 274, line 28 – p. 275, line 11; p. 277, lines 3-14; p. 282, lines 5-11). The trial judge himself even mentioned his name. (R. p. 276, lines 5-10). Thereafter, on the afternoon of the second day of the trial, an unusually affectionate interaction between the trial judge and Mack Ward occurred, followed by the trial judge inviting Mack Ward into chambers without Appellant's counsel – the details of the trial judge's conduct, which was witnessed by principals of Appellant, are provided in Appellant's Brief. Forum Benefits' basis for recusal—that the trial judge displayed and revealed a personal bias toward Mack Ward, a Vice President of Assured Partners—squarely fits Canon 3(E)(1)(a). Appellant's motion to recuse was based on the reasonable appearance of bias, and Appellant's concerns about the appearance of bias are supported by a consistent string of inconsistent rulings that continually favored Respondents. The trial court's denial of Forum Benefits' motion to recuse prevented Forum Benefits from receiving a fair trial. Pursuant to Canon 3(E), the trial judge should have disqualified himself.

CONCLUSION

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

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