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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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,

Plaintiff-Appellant,

v.

Brian Bannon and Assured Partners, NL,

Defendants - Respondents.

PETITION FOR A WRIT OF CERTIORARI

March 7, 2025

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NOW COME Defendants-Respondents Brian Bannon ("Bannon") and AssuredPartners, NL, ("AssuredPartners") (collectively "Respondents"), by and through their undersigned counsel, hereby petitioning this Honorable Court for a writ of certiorari to appeal the Court of Appeals' unpublished opinion dated December 11, 2024 (the "Opinion"). Respondents submit that there are novel issues of law, inconsistent lower court rulings, and a ruling inconsistent with this Court's prior rulings warranting this Court's review.

I. CERTIFICATION OF COUNSEL

The Court of Appeals issued its unpublished Opinion in this case on December 11, 2024. *Forum Benefits, LLC v. Brian Bannon and Assured Partners, NL,* Unpublished Opinion No. 2024-UP-412 (S.C. Ct. App. dated December 11, 2024). After receiving an extension, on January 9, 2025, Respondents timely filed and served a Petition for Rehearing. The Court of Appeals denied the Petition for Rehearing by Order dated February 7, 2025. *Forum Benefits, LLC v. Brian Bannon and Assured Partners, NL*, Case No. 2022-000231 (S.C. Ct. App. dated Feb. 7, 2025). This Petition for a Writ of Certiorari is timely filed and served.

II. QUESTIONS PRESENTED

1. Whether the Court of Appeals' Opinion incorrectly reversed the trial court's granting of a directed verdict on Appellant's breach of contract claim where the Court of Appeals:

   A. adopted, as a matter of first impression, a lost document exception to the Statute of Frauds, despite the statute not providing a basis for any such exception; and

   B. failed to provide any guidance as to the proof required for the lost document exception to apply and how such proof was present in the instant case sufficient to create an issue for the jury to decide.

2. Whether the Court of Appeals' Opinion incorrectly reversed the trial court's granting of a directed verdict on all of Appellant's claims where the Court of Appeals failed to consider the lack of any evidence of proximately caused damages and failed to consider the impact of Appellant's admissions that it did not know why the clients at issue moved their business to Respondents?

3. Whether the Court of Appeals' Opinion incorrectly reversed the trial court's granting of a directed verdict on Appellant's breach of fiduciary duty claim where:

   A. Appellant admitted that Bannon was an independent contractor with no contract;

   B. there was no evidence presented to establish that Bannon owed Appellant a fiduciary duty; and

   C. this is an issue of law that was to be decided by the trial court, not the jury.

4. Whether the Court of Appeals' Opinion incorrectly reversed the trial court's granting of a directed verdict on the Appellant's conversion claim where the Opinion is contrary to prior rulings of this Court, where the alleged property in question was solely intangible, electronic information, and were Appellant was never deprived access to the same information.

5. Whether, if the answer the any of the above questions is "yes," the Court of Appeals erroneously reversed the trial court's award of attorney's fees.

III. STATEMENT OF THE CASE

A. Facts

Bannon began his employment with Plaintiff-Appellant Forum Benefits, LLC ("Appellant") in 2009 as an insurance broker/agent. (R. p. 106, lines 18-22). 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 that he believed Appellant intended Bannon and another employee to sign (the "Employment Agreement"). (R. p. 62, lines 10-24). Bannon has at all times denied ever seeing or signing the Employment Agreement or any agreement. (R. p. 145, line 11 - p. 146, line 7; R. p. 256, lines 11-16). The Employment Agreement Appellant claims Bannon signed was in template form, was not signed, and contained no specific information pertaining to Bannon. (R. p. 42-48).

Mr. Wyatt readily admitted he had no record of Bannon ever being sent, receiving, or signing the Employment Agreement. (R. p. 77, line 21; R. p. 78, line 9; R. p. 82, lines 3-22). 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 and 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). (R. p. 42-48). 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 inconsistent with the document being intended for Bannon who lived in Beaufort and who was hired to work in (and worked in) the Charleston, South Carolina area. (Id.; R. p. 78, line 10-p. 79, line 3). Notably, the other employee that Mr. Wyatt believed was to sign the Employment Agreement was Christopher Whatley and Appellant actually had a fully completed and signed contract for Mr. Whatley. (R. pp. 975-982.) The Whatley Employment Agreement shows that had Appellant actually drafted an Employment Agreement for Bannon, Appellant should have at least been able to produce a draft document with the information specific to Bannon typed into the document. Appellant was not able to produce any such draft because no such document exists.

In May of 2013, the relationship between Bannon and Appellant changed significantly. Bannon and Appellant agreed that Bannon would cease working as an employee for Appellant and would become an independent contractor. (R. p. 106, lines 18-22). Appellant admitted that, at that point, the employment relationship terminated, and a new independent contractor relationship began. (R. p. 591, lines 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. Appellant admitted that there was never any written agreement discussed, drafted, or signed that governed Bannon's independent contractor relationship with Appellant. (R. p. 593, lines 21-25).

During the time that Bannon was an independent contractor for Appellant, he sold and serviced employee benefits insurance for his business clients. (R. pp. 104-107, 126-127). The insurance was provided through various insurance carriers and Bannon placed his clients with Appellant for day-to-day employee 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, a system used by many brokers including AssuredPartners. Employee Navigator compiled employee census data and insurance plan information for the employees of each client company. (R. p. 117, lines 10-25). The Employee Navigator information is known and available to both the clients (whose employees the information is about) and the insurance carriers (who provides coverage for the individual policies selected by the employees), in addition to the insurance broker. (R. p. 447, lines 10-25). 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 their Employee Navigator username and password to other brokers. (R. pp. 175-176, 418-423, 459).

On October 16, 2016, Bannon began working with AssuredPartners as an insurance broker. (R. p. 218, lines 8-19). Because Bannon did not sign a restrictive covenant agreement with Appellant, and because the two-year non-solicitation restriction in the unsigned Employment Agreement would have expired anyway (Bannon's employment relationship with Appellant ended more than two years prior), Bannon was free to solicit his clients to move their business with him to AssuredPartners. (R. p. 42-48; R. p. 62, lines 10-24; R. p. 145, line 11; R. p. 146, line 7; R. p. 968). As a result of Bannon's longstanding relationship with his clients, many of Bannon's clients chose to move with him to AssuredPartners. (R. p. 247, lines 9-25.) Bannon did not use any of Appellant's information to solicit these clients. (Id.) Appellant could not claim that the identity of these clients was confidential or a trade secret because Appellant attached a list of the client names to its Complaint, thereby making it publicly available information. (R. pp. 50-52.) After these clients decided to move with Bannon to AssuredPartners, they 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. (R. pp. 175-176, 281-282, and 622-623).

Based on these clients' requests to follow Bannon and for him to continue to be their insurance agent, Bannon took steps to protect his clients' insurance plan data during the transition to AssuredPartners. (R. pp. 263-269; p. 274, line 19-p. 275,

line 8). He took these steps because he believed he had a legal duty as an independent contractor to maintain his client files pursuant 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 insured, premiums, and the person to whom issued of every policy or certificate of renewal"). (R. p. 262, line 2 to p. 269, line 8). He also took these steps because Appellant had a history of attempting to disrupt clients who decided to leave its agency and he did not want the same outcome for his clients. (R. p. 274, line 9 to p. 278 line 8). Bannon's concerns were grounded in fact: at trial, Appellant admitted to denying clients access to their own plan information in the past when the clients gave notice that they were leaving Appellant's agency, and Appellant also admitted that this could cause disruption to the clients. (R. p. 425, lines 9-13; p. 425 line 20 to p. 441, line 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. (R. p. 276, line 12 to p. 277, line 23).

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 of property, breach of fiduciary duty, and tortious interference with contract. (R. 34-52.)

Appellant's only claimed damages at trial was the loss of clients who moved with Bannon to AssuredPartners. (R. p. 573-579). However, Appellant failed to produce any evidence at trial to prove (or provide a reasonable basis for a jury to consider) that these clients moved based on Bannon violating a valid contract or based on Bannon retaining information related to their insurance accounts (something the clients themselves had access to, could have provided Bannon directly or through the carrier, did provide Bannon through providing their Employee Navigator login information, and consented to Bannon retaining and having access to this information). The only evidence at trial on this issue showed that the clients moved with Bannon because of their relationship with Bannon who had serviced their accounts for many years, not any allegedly misappropriated information. (R. p. 247, lines 9-25; R. pp. 619-624.) Appellant even admitted that Bannon had good relationships with his clients, that it never asked any of the clients why they left, and that it "had no idea" why the clients moved with Bannon to AssuredPartners. (R. p. 608, lines 9-11 and 18-24; R. p. 160, lines 6-12.) Appellant did not call any of these clients to testify at trial, thereby not presenting any evidence

to contradict Bannon's testimony about his conversations with these clients and the reasons they moved with him to AssuredPartners.

After Appellant rested its case, the parties consented to Respondents calling a client who was in court that day to testify prior to the trial court hearing Respondents' directed verdict motion. (R. 619-624.) This client corroborated Bannon's testimony and confirmed that it moved with Bannon based on their long-standing relationship and the quality of service he provided over the past several years. (Id.) The trial court subsequently granted Respondents' directed verdict motion.

B. Procedural History

On October 11, 2021, the jury trial in this matter commenced. (R. p. 57). On the third day of trial, Appellant rested its case. (R. p. 619, line 6). After Appellant rested its case, Respondents moved for directed verdict on all counts.[1] (R. p. 627, line 25-p. 683, line 25). The trial court took the issue of directed verdict under advisement overnight because it was the end of the day. (R. p. 683, line 25). The next day, day four of trial, the trial court granted Respondents' directed verdict motion. (R. pp. 684-687). 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, a decision

[1] Appellant voluntarily dismissed its tortious interference claim during the directed verdict arguments. (R. p. 673, line 24 to p. 674, line 2).

within the sound discretion of the trial court. (R. p. 689, line 10-p. 690, line 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 upon which Appellant sued. Id.

On February 25, 2022, Appellant filed an appeal from the trial court's judgment with the Court of Appeals. The Court heard oral argument on October 8, 2024. On December 11, 2024, the Court issued an unpublished per curium Opinion in which it reversed the direct verdicts rendered by the trial court. This Opinion simply states that there was evidence presented at trial that yields more than one reasonable inference. However, the opinion failed to specifically address the issues raised by the parties in this appeal. Respondents timely filed a Petition for Rehearing, and, on February 7, 2025, the Court denied Respondents' Petition for Rehearing. The instant Petition for a Writ of Certiorari follows.

IV. ARGUMENTS IN SUPPORT OF PETITION

1. THIS COURT SHOULD GRANT *CERTIORARI* AND REVIEW THE COURT OF APPEALS' OPINION REVERSING THE TRIAL COURT'S GRANTING OF A DIRECTED VERDICT BECAUSE, *INTER ALIA*, IT PRESENTS AN ISSUE OF FIRST IMPRESSION REGARDING A "LOST DOCUMENT EXCEPTION" TO THE STATUTE OF FRAUDS.

Directed verdict was proper on Appellant's contract claim based on the Statute of Frauds. The Court of Appeals' Opinion states that a directed verdict was not proper because there was evidence presented at trial that yields more than one

reasonable inference regarding the existence of the employment agreement. However, the Court of Appeal's Opinion does not address the critical issues of (a) whether the Court of Appeals was adopting a lost document exception to the Statute of Frauds, something no South Carolina court has adopted, (b) if so, what that exception requires in terms of proof, (c) if so, what standard applies to such exception (clear and convincing evidence or preponderance of the evidence), and (d) if so, what evidence would support the lost document rule actually applying in this case (or was the evidence presented based solely on the self-serving testimony of Appellant's owner, Brian Stritt). Answering all these issues will provide guidance to the bench and bar of whether this exception exists under South Carolina law, and how this exception should be applied, especially now that there is a Court of Appeals Opinion that has, by necessary implication, adopted and applied it.

There is no dispute that the Statute of Frauds applies in this case. Appellants admit that it has never produced and cannot produce a contract signed by Bannon. (R. p. 968). Bannon has at all times denied signing any contract. (R. p. 145, line 11-p. 146, line 7). Rather, the only document Appellant produced was an unsigned, blank form document that does not even include Bannon's name, or any specifics related to his employment (the form document contains many blanks). (R. p. 968). Appellant has also admitted this. (R. p. 77, line 21-p. 78, line 9; R. p. 82, lines 3-22). There is no factual dispute that the alleged contract could not be performed in

one year because it contained two-year restrictive covenants. (R. p. 44.) Appellant has also admitted this. (R. p. 91, lines 3-20.) Accordingly, there is no dispute that the Statute of Frauds applies to bar Appellant's contract claim.

Because of these undisputed facts, the only potential way this claim could have been submitted to a jury was the application of a lost document exception to the Statute of Frauds. The trial court refused to adopt such an exception and ***no South Carolina court has ever adopted such an exception.*** While the Court of Appeals has indirectly discussed the "potential" application of such a doctrine in Yadkin Valley Bank & Tr. v. Oaktree Homes, Inc., 2014 WL 3747342 (S.C. Ct. App. July 30, 2014), in that case the Court of Appeals ruled that it was not adopting the exception, but that even if it did adopt it, there was not sufficient evidence to satisfy such an exception in that case. The Yadkin Court ruled that even if a lost document exception were adopted in South Carolina, it would require the party seeking to establish the contract to provide more than self-serving or contradictory evidence and that such party must meet a clear and convincing evidence standard, not a preponderance of the evidence standard. Id.

A lost document exception to the Statute of Frauds is a matter of first impression for this Court. This Court should reject a judicially created exception to the Statute of Frauds based on a lost document argument. The Statute of Frauds is an important legal protection that has been applied in South Carolina for many years.

It is designed to protect individuals (like Bannon) from allegations of a breach of contract where no signed contract can be produced. It puts the burden on the party claiming a breach to maintain a signed copy of the contract.

Notably, the Statute of Frauds itself identifies some very limited exceptions, none of which open the door for a lost document exception. S.C. Code Ann. 36–2–201. In fact, one of the statutory exceptions contemplates the need for an opposing party's <u>admission</u> that a contract was made ("a contract which does not satisfy the requirements of [the Statute of Frauds] but which is valid in other respects is enforceable ... if a party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made . . . ."). S.C. Code Ann. 36–2–201(3)(b). This exception by its very nature requires an opposing party admission related to the existence of a contract, which is consistent with the intent and protections of the Statute of Frauds. However, the lost document exception apparently adopted by the Court of Appeals runs contrary to the intent of the Statute, any exception in the Statute, and the Court of Appeals applied the exception even where the party against whom enforcement is sought adamantly <u>denied</u> that a contract was ever made. The Legislature specifically considered exceptions to the Statute of Frauds and did not provide for (or open the door to) a judicially created lost document exception where the party against whom enforcement is sought denies the existence of any contract. Because there is no support in the Statute of Frauds

or in the legislative history for a lost document exception, this Court should reject such an exception and affirm the trial court on this issue. At a minimum, Supreme Court review is necessary and appropriate to clarify these important and novel legal issues.

Even if this Court were to adopt a lost document exception to the Statute of Frauds, it should require clear and convincing evidence that the contract was signed and not permit self-serving testimony of the party seeking enforcement to satisfy this standard. Such a ruling would be fatal to Appellant's claim. The indisputable evidence at trial proves that Appellant has failed to satisfy a clear and convincing evidence standard. (See Respondents' Final Brief, Section I.A.1). It is indisputable that Appellant solely relies on the self-serving testimony of Appellant's owner (Brian Stritt) to argue that the contract was signed then lost. (R. p. 583, lines 1-8; R p. 586, line 23 to p. 590, line 16.) This is the exact issue that caused the Yadkin Court to reject the "potential" application of a lost document exception and it should support the exact same result here. If it does not, and clear and convincing evidence is required, Respondents request that this Court clarify what evidence in the record could satisfy a clear and convincing standard sufficient to reverse the trial court's ruling on this issue. The Court of Appeals' Opinion does not provide any such analysis or clarity.

2. THIS COURT SHOULD GRANT *CERTIORARI* AND REVIEW THE COURT OF APPEALS' OPINION REVERSING THE TRIAL COURT'S GRANTING OF A DIRECTED VERDICT BECAUSE, *INTER ALIA*, THE COURT OF APPEALS DID NOT ADDRESS APPELLANT'S ADMISSIONS AND THE COMPLETE LACK OF EVIDENCE RELATED TO PROXIMATELY CAUSED DAMAGES.

Directed verdict was proper on all of Appellant's claims based on Appellant's failure to present evidence of proximately caused damages. The Court of Appeal's Opinion states that directed verdict was not proper because there was evidence presented at trial that yields more than one reasonable inference regarding the nature of the trade secrets and measures in place to protect their secrecy, the existence of the employment agreement, and whether the trade secrets merged with a physical document (presumably referring to the unsigned, blank form contract discussed in Section 1 above). However, the Court of Appeal's Opinion does not address the issue of whether Appellant submitted sufficient evidence to create an issue of fact related to its alleged proximately caused damages, one of the many reasons the trial court granted directed verdict. Because the Court of Appeals did not address this issue and because of the complete lack of evidence of proximately caused damages presented at trial (including Appellant's admissions that it "had no idea" why the clients followed Bannon to AssuredPartners), a review of these issues by this Court is warranted.

Significantly, Appellant only sought damages related to clients moving to Respondents. (R. p. 576-579). Thus, this single issue is fatal to all of Appellant's

claims. All of Appellant's claims required proof of damages proximately caused by an alleged breach or the alleged wrongful conduct. For example, 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) (emphasis added). Regarding a trade secret claim, this Court has required that the trade secret "owner **must** also prove its damages were **proximately caused** by misappropriation." Wilson v. Gandis, 844 S.E. 2d 631, FN 7 (S.C. 2020)(emphasis added). The South Carolina Trade Secrets Act also allows for an alternative damages analysis where actual damages cannot be proven by instead proving a "reasonable royalty" amount related to the value of the information in question. South Carolina Code Section 39–8–40(B) states, "In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret." Respondents asked Appellant in discovery if it was seeking a reasonable royalty, and it continually said it was not. Appellant never presented any evidence, arguments or allegations related to a reasonable royalty at trial. Thus, Appellant was required to prove that its alleged damages were proximately caused by Respondents' alleged unlawful actions. The trial court correctly ruled that Appellant failed to introduce any evidence proving a causal link

between Bannon's alleged retention of his client's insurance policy information and Appellant's alleged damages.

The simple fact that some clients moved when Bannon left Appellant does not provide evidence of causation. Insurance agents are generally hired and followed based on client relationships and based on a history of providing good service, and that was certainly the case with Bannon and the clients at issue here. It is not disputed that even if Bannon signed the Employment Agreement (which he denies), the restrictions in that document related to soliciting his clients expired long before he moved to AssuredPartners. There were no restrictions in place limiting Bannon from asking his clients to move with him to AssuredPartners, and that is exactly what he did. (R. p. 247, lines 9-25; R. p. 281, line 6 to p. 282, line 13.) Bannon even received an initial commitment from these clients to move before he ever asked them for approval to maintain their policy information and for them to provide him access to their Employee Navigator account. (Id.) This proves that the clients moved because Bannon was their long-time insurance agent and because they trusted him, not that they were somehow following him because he had already taken copies of their policy information.

The only client whose testimony is in the record was called by Respondents at trial and this client confirmed this fact.[2] Christie Holderness the decisionmaker for the St. Andrews Public Service District confirmed the reason she decided to move with Bannon to AssuredPartners:

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14        Q    At some point did Mr. Bannon talk to you about him
15   moving over to AssuredPartners?
16        A    Yes.
17        Q    Tell the Jury what you recall about that.
18        A    That he was looking to move to AssuredPartners
19   and wanted to know if we would like to switch.  And our
20   conversation was the same reason why I went with him the
21   first time, as long as they were able to provide our needs,
22   which they were.  We -- so I -- I solicited my Legal
23   Counsel to make sure, just because I don't know, I always
24   go to legal, and they assured me that there was nothing
25   wrong with that, and so we stayed with Brian.
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(R. 622, lines 14-25.)

Furthermore, this client confirmed that she approved and requested that Bannon continue to have access to St. Andrews insurance information and even took steps to provide him access to that information.

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[2] After Appellant rested its case, Appellant did not object (and thus consented) to Respondents calling Ms. Holderness (a client representative) to testify prior to Respondents' directed verdict motion and argument so that she did not have to return the following day. (R. 619).

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20        Q    Do you have any knowledge about whether Mr.
21   Bannon was given consent to use login -- the District's
22   login and password to obtain the District's information?
23        A    I authorized HR to provide that to him.
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(R. 623, lines. 20-23). Appellant did not produce any evidence to counter this testimony at trial and this is the only testimony from a client in the Record.

Because Appellant did not have any support for its damages claims from the clients, it had to turn to the **self-serving opinions** of Appellant's owner (Brian Stritt). This testimony was not only based on his biased and self-serving opinions, but it was also entirely based on improper speculation. See Carlyle v. Tuomey Hosp., 305 S.C. 187, 407 S.E.2d 630 (1991) (A jury's verdict cannot be left to conjecture, guess or speculation). Mr. Stritt's admissions at trial prove that Appellant presented no evidence upon which a jury could reasonably connect Bannon's retention of insurance information to the reason the clients followed Bannon to AssuredPartners.

Specifically, Mr. Stritt admitted that the clients were free to leave Appellant at any time and for any reason. (R. p. 607-608). Mr. Stritt admitted that Bannon had good relationships with his clients. (R. 608, lines 9-11.) The client names were not confidential or a trade secret and Appellant could not argue such because it attached a list of all client names to its Complaint, making it publicly available information. (R. p. 50-52.) Perhaps most significant to this issue is Mr. Stritt's admission that

Appellant had "**no idea**" why the clients left Appellant. (R. p. 608, lines 18-24). Specifically, Mr. Stritt testified as follows:

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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
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(R. p. 608, lines 18-21). This is exactly the critical point here – Appellant could only "speculate" about the reason the clients moved because it never asked them, and it never called any client to testify at trial about the reason. According to Mr. Stritt's own sworn testimony, "We haven't gone after them or **talked to them**" in referring to not asking clients why they left Appellant. (R. p. 610, lines 6-12) (emphasis added). Given these undisputed facts, there was no basis for the trial court to submit this issue to a jury to speculate on the issue of proximately caused damages.

These undisputed facts fully supported the trial court's granting of directed verdict. The Court of Appeal's Opinion does not address this critical issue or address what evidence could possibly support a reasonable inference that the alleged information retention caused the clients to move. Respondents specifically raised this issue in their Final Brief and in their Petition for Rehearing. The Court of Appeals did not rule on or address this issue. Respondents respectfully request that this Court grant certiorari, review this issue, and affirm the trial court's ruling that

Appellant's failed to present evidence of proximately caused damages sufficient to submit this issue to the jury.

3. THE COURT OF APPEALS SHOULD NOT HAVE REVERSED DIRECTED VERDICT ON THE BREACH OF FIDUCIARY DUTY CLAIM BECAUSE BANNON WAS AN INDEPENDENT CONTRACTOR WITH NO SUCH DUTY AND THIS WAS A QUESTION OF LAW FOR THE TRIAL COURT.

The Court of Appeal's Opinion does not specifically address Respondents' arguments and the trial court's ruling related to Appellant's fiduciary duty claim. This Court should address this issue because whether a fiduciary relationship exists is an equitable issue that must 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 the parties, and it correctly made this determination. As this Court has instructed, there must be a firm foundation for reposing the level of trust of a fiduciary on the other party. Burwell v. S.C. Nat. Bank, 288 S.C. 34, 340 S.E.2d 786, 790 (1986). Appellant failed to present any evidence to establish a firm foundation for imposing a fiduciary duty. The Court of Appeals has previously ruled that an 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). Thus, it logically follows that an independent contractor relationship is also not sufficient to

create a fiduciary duty. At a minimum there is a panel split on this issue that warrants Supreme Court review.

Finally, because this is an issue of law for the court to decide, not a jury, the Court of Appeals improperly remanded this issue back to the trial court without any direction. The Court of Appeals was required to either affirm the trial court's ruling that no fiduciary duty was proven to exist, or it was required to reverse the trial court and rule that a fiduciary duty did exist. This was not an issue for the jury and remanding for a re-trial on this issue was not proper. Respondents request that this Court review this issue of law and affirm the decision the trial court was required to make.

4. THE COURT OF APPEALS SHOULD NOT HAVE REVERSED DIRECTED VERDICT ON THE CONVERSION CLAIM BECAUSE THE PROPERTY IN QUESTION WAS INTANGIBLE, ELECTRONIC INFORMATION, AND THE ALLEGED OWNER WAS NOT DEPRIVED ACCESS.

The Court of Appeals did not specifically address Appellant's conversion claim. There are legal issues upon which the trial court relied that, if in error, should have been specifically addressed by the Court of Appeals.

It is undisputed that Bannon never exercised exclusive control over the information at issue in this case. Any information he had was intangible, electronic information and Appellant has never alleged that Bannon deleted any of the information from Appellant's systems. Thus, Appellant admittedly at all times had

access to the same information and was never excluded from accessing the information.

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) (emphasis added). This Court has previously ruled that "intangible rights are normally not the proper subject for a conversion claim." Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 465, 684 S.E.2d 756, 763 (2009). The Court of Appeals Opinion is inconsistent with this Court's prior rulings and the Opinion does not provide any explanation to justify this inconsistency. This Court should confirm its prior rulings that a conversion claim is not proper under South Carolina law when it involves intangible property, where there is no "exclusion," and where it is not disputed that Appellant maintained full and unrestricted access to the intangible, electronic information at issue.

5. THE COURT OF APPEALS SHOULD NOT HAVE REVERSED THE ATTORNEY'S FEES AWARD

Finally, Respondents note and preserve for this Court's review, that if any or all the above issues are ultimately decided in their favor, the attorney's fees award should be reinstated. These were issues within the sound discretion of the trial court 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).

V. CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court grant their Petition for a Writ of Certiorari, review the decision of the Court of Appeals, and affirm the trial court's granting of directed verdict. Any remaining issues that were not ruled upon by the Court of Appeals should either be sent back to the Court of Appeals for further consideration, or this Court should rule on those issues based on the parties' arguments outlined in their final briefs.

Respectfully submitted this 7th day of March, 2025.

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