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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. 2025-000436

Forum Benefits, LLC,

Appellant,

v.

Brian Bannon and Assured Partners, NL,

Respondents.

APPELLANT'S RETURN
TO THE
PETITION FOR A WRIT OF CERTIORARI

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Forum Benefits, LLC ("Appellant" or "Forum Benefits") submits the following Return to the Petition for Writ of Certiorari filed by Respondents Brian Bannon and Assured Partners, NL (collectively, "Respondents").

COUNTER-STATEMENT OF THE CASE

Forum Benefits was a provider of health, life, and disability insurance brokerage services. (R. p. 34, ¶ 2).

Forum Benefits utilized a proprietary design and build-out of a subscription software application named "Employee Navigator" to collect, organize, and compile employee census data and insurance plan information into a database for each client. (R. pp. 138-139; 179; 356-359; 378-386). Forum Benefits then applied this database of employee census data and insurance plan information to proprietary algorithms stored on its SharePoint server to provide Forum Benefits with a competitive advantage in administering benefits for clients and negotiating rates with insurance providers. (R. pp. 356-359; 390-396).

Forum Benefits restricted access to Employee Navigator and the SharePoint server to certain personnel via login credentials. (R. pp. 138-139; 387-389; 397).

Brian Bannon ("Bannon") began employment with Forum Benefits in 2009 as a full-time sales representative. (R. p. 968; 60-75; 90; 496). Bannon signed and delivered a written employment agreement with Forum Benefits that required, *inter alia*, that Bannon not use or disclose Forum Benefits' trade secrets for any reason or purpose whatsoever, except as an employee of Forum Benefits and with the consent of Forum Benefits. (R. pp. 968-972, ¶ 12; 505-507). In 2013, Bannon transitioned to an independent contractor role with Forum Benefits and continued to represent Forum Benefits as a sales representative to existing and prospective clients. (R. p. 106).

On October 15, 2016, Bannon commenced employment as a Senior Vice President at Assured Partners, NL ("Assured Partners"), a direct competitor of Forum Benefits. (R. pp. 169-170; 173; 218). Despite this, for the following four weeks, Bannon continued to present himself as a sales representative for Forum Benefits while concealing his employment with Assured Partners. (R. pp. 230-231). It is important to emphasize that during this period, Bannon simultaneously held positions at both Forum Benefits and its competitor, Assured Partners, engaging in a deceptive scheme that is rarely encountered.

During that four week overlap, Bannon secretly obtained and forwarded Employee Navigator login credentials for Forum Benefits' clients to Assured Partners. (R. pp. 756-759; 181; 183-184; 188; 190-194; 247; 274-275). Bannon forwarded those credentials to Assured Partners with his personal email account, an indication of his awareness of the dishonest nature of his actions. (R. p. 181). Bannon also illicitly downloaded approximately 2,000 files containing Forum Benefits' proprietary algorithms from Forum Benefits' SharePoint server using the login credentials he had received from Forum Benefits. (R. pp. 174-175; 195-196; 198). During that four week overlap, Assured Partners repeatedly urged its employees to expedite copying Forum Benefits' trade secrets before Forum Benefits discovered what they were doing. (R. p. 188).

Upon discovering this conduct, on December 1, 2016, Forum Benefits sued Respondents, alleging, among other things, misappropriation of trade secrets, breach of contract, conversion, and breach of fiduciary duty. (R. pp. 34-56).

Respondents filed three separate motions seeking summary judgment on Forum Benefits' trade secret claims. (R. pp. 1026-1027; 1028-1042; 1243-1280; 1281-1374; 1382-1554; 1850-1876). Respondents withdrew one of the motions (R. pp. 1380-1381), but Forum Benefits filed full responses to the other two motions. (R. pp. 1043-1242; 1555-1849). 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).

A jury trial commenced on October 11, 2021. (R. p. 57). Testimony and exhibits showed that continuous access to Forum Benefits' database of employee census data and insurance plan information compiled in the Employee Navigator accounts was an important factor in clients' decisions to move their business from Forum Benefits to Assured Partners. Nine clients were identified who were associated with Bannon that actively used Forum Benefits' Employee Navigator accounts. Bannon provided Employee Navigator client login credentials for three of those nine clients, and all three moved their business from Forum Benefits to Assured Partners. None of the other six clients—for whom Bannon provided no Employee Navigator client login credentials—transferred their business from Forum Benefits to Assured Partners. (R. pp. 281-282; 448-450; 569-572).

The annual commissions associated with each client that switched from Forum Benefits to Assured Partners would support a verdict in favor of Forum Benefits in excess of $1.5M. (R. pp. 771-816; 520-530; 534-560; 573-578).

During trial, Forum Benefits moved for the trial judge to recuse himself, based on his interactions in the courtroom during a trial break with Mack Ward, an Assured Partners principal. The motion was denied. (R. pp. 466-488). Instead, the trial judge granted an oral motion for directed verdict for Respondents on all causes of action. (R. pp. 686-687). Respondents then made two oral motions for attorneys' fees and costs, which the trial judge immediately granted before even hearing a response from Forum Benefits. (R. pp. 689-690).

On October 25, 2021, Forum Benefits filed a Motion for New Trial. (R. pp. 1877-1909). Respondents filed a Response in Opposition to Forum Benefits' Motion for a New Trial on

November 1, 2021. (R. pp. 1916-1945). On October 25, 2021, Forum Benefits also filed a Response to Respondents' oral motions for attorneys' fees. (R. pp. 1910-1915). Respondents replied on November 1, 2021. (R. pp. 1946-1971). On November 4, 2021, Respondents' counsel filed an affidavit regarding attorneys' fees. (R. pp. 1972-2171).

On November 9, 2021, Respondents emailed to chambers a proposed Order, which had not been requested by the trial court, to "confirm" the trial court's directed verdict and attorneys' fee rulings. (R. pp. 2172-2181). Forum Benefits objected to the unsolicited proposed Order as improper pursuant to Rule 8(c) of the Electronic Filing Policies and Guidelines and as an attempt to re-write the trial court's oral rulings.

On November 16, 2021, Forum Benefits filed a Reply in Support of Its Motion for a New Trial. (R. pp. 2182-2199). On December 29, 2021, Forum Benefits filed a Supplemental Response to Respondents' Motions for Attorneys' Fees. (R. pp. 2200-2204).

On January 4, 2022, the trial court conducted a hearing on Forum Benefits' Motion for a New Trial. Forum Benefits presented live testimony from Michelle Filler, Lisa Hollingsworth Stritt, and Appellant's President Brian Stritt ("Stritt"), describing their observations of the trial judge's extrajudicial conduct with Mack Ward in the courtroom. (R. pp. 698-727; 2205-2211).

On February 1, 2022, the trial court filed an Order granting a directed verdict against Forum Benefits on all causes of action, confirming an award of Respondents' attorneys' fees and costs, and entering judgment against Forum Benefits. (R. pp. 22-30). This February 1, 2022, Order is a verbatim copy of the unsolicited proposed Order that Respondents filed and sent to chambers on November 9, 2021. (R. pp. 2172-2181).

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

After holding oral argument, the Court of Appeals reversed the trial court, *per curiam*, by an opinion dated December 11, 2024.

Respondents petitioned the Court of Appeals for rehearing on January 9, 2025, which was denied by the Court of Appeals by Order filed February 7, 2025. Respondents petitioned this Court for writ of certiorari on March 7, 2025.

ARGUMENT

Appellant seeks to uphold the decision of the Court of Appeals, which reversed the trial court's directed verdict in favor of Respondents and grant of attorneys' fees. This brief will demonstrate that the Court of Appeals' reversal was correct based on the evidence and law.

Respondents, on the other hand, face the difficult task of defending a directed verdict Order that is chock-full of supposed findings that Appellant's evidence "failed to prove" (recited thirty times[1]) or "failed to establish" (recited seven times[2]), or that testimony was "self-serving" (recited seven times[3]). These are characterizations about the weight of evidence, evidence that Respondents themselves acknowledge was presented and evidence that prohibited a directed verdict. These are characterizations never seen in sustainable directed verdict orders.

The Court of Appeal's *per curiam* reversal was direct and to the point:

> As to whether the trial court erred in granting a directed verdict, we conclude that the trial court did err because the evidence presented at trial yields more than one reasonable inference. In particular, we note Forum adduced evidence subject to more than one reasonable inference as to the following: the nature of the trade secrets and measures in place to protect

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

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

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

> their secrecy; the existence of the employment agreement; and whether the trade secrets merged with a physical document.

The evidence and the law show that the Court of Appeals was indisputably correct.

It is well established that the discretionary review requested here should be granted only where there are exceptional circumstances and special and important reasons for such further review. Consequently, this Court should look for such exceptional circumstances, or special and important reasons, in the following factors: (1) a novel question of law; (2) the existence of a dissent in the decision of the Court of Appeals; (3) a conflict between the decision by the Court of Appeals and a prior decision by this Court; (4) the direct involvement of a substantial constitutional issues; and (5) the existence of a federal question and a conflict between the decision of the Court of Appeals and a prior decision by the United States Supreme Court.

Respondents' Petition fails to present any special or important reason for review by this Court, as required by Rule 242(b), SCACR. Without such reasons, the Petition should be denied.

Respondents merely seek a substitution of judgment for that of the Court of Appeals. However, the Court of Appeals correctly applied the law and relevant facts to the trial court's orders, thereby rectifying the trial court's errors.

As detailed below, reversal by the Court of Appeals was appropriate.

I. Breach of Contract Claim

Respondents try to skirt the trial court's error on the breach of contract cause of action by re-couching the issue to be about a "lost document exception" to the Statute of Frauds. But the trial court made no ruling about a "lost document exception," nor did the Court of Appeals. Thus, this case is not an appropriate vehicle for addressing the issue because it was neither raised nor developed in the proceedings below. As a result, the record lacks the necessary factual and legal foundation for meaningful appellate review.

Notwithstanding Respondents' current recharacterization, the trial court's directed verdict on the breach of contract claim was based on four grounds, each of which are quoted and refuted immediately below.

A. "Plaintiff failed to produce or prove the existence of a signed contract and, therefore, the alleged contract does not satisfy the Statute of Frauds" (R. p. 23).

This ruling by the trial court was simply wrong. The evidence provided at trial included at least the following on this point. Respondent Bannon began working for Forum Benefits in Charleston in 2009, (R. pp. 122, 133) and attorney David Wyatt ("Wyatt") testified that 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);
- Ex. 163 is a completed employment agreement signed by Bannon's co-employee Chris Whatley on May 18, 2009 (R. pp. 975-982; 497-502);
- Ex. 163 is substantially identical to the completed employment agreement signed by Bannon (R. pp. 502-504);
- Bannon signed the employment agreement when Stritt delivered the first paycheck to Bannon on June 1, 2009 (R. pp. 505-507);
- Stritt placed the signed employment agreement in Bannon's employment file (R. p. 506); and
- 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.

Thus, the trial court's ruling ignored substantial evidence that Bannon did, in fact, sign an employment agreement with Forum Benefits.

These are disputed questions of fact for the jury. By granting a directed verdict, the trial court wrongly made credibility decisions and weighed material evidence, a job to be performed by the jury.

Furthermore, evidence sufficient to satisfy the Statute of Frauds is not limited exclusively to production of a signed agreement. Courts in other jurisdictions have regularly allowed parol evidence to prove the existence of a signed agreement that complies with the Statute of Frauds. *See, e.g.*, *Alph C. Kaufman, Inc. v. Cornerstone Indus. Corp.*, 540 S.W.3d 803 (Ky. Ct. App. 2017); *see also Gipson v. Mattox*, No. 05-0601-WS-C, 2006 WL 3421244, at *9, (S.D. Ala. Nov. 27 2006); *McInnis v. Lind*, 108 P.3d 578, 582 n.2 (Or. App. 2005); *Latino Food Marketers, LLC v. Ole Mexican Foods, Inc.*, No. 03–C–0190–C, 2003 WL 23220142, *5 (W.D. Wis. Aug. 20, 2003); *Connecticut Bank & Trust Co. v. Wilcox*, 518 A.2d 928, 931 (Conn.1986). Comment (a) of § 137 of the *Restatement (Second) of Contracts* reiterates this line of authority, stating, "In cases of loss or destruction, the contents of a memorandum may be shown by an unsigned copy or by oral evidence." *See also Corbin on Contracts* § 23.10 (2006) ("If therequirements of the statute of frauds are satisfied by a signed contract or memorandum, the contract remains enforceable even though the writing is lost or destroyed. The contents of the writing can then be proved by parol testimony and the contract enforced.").

South Carolina courts also allow parol evidence to establish the existence of a written contract when the contract cannot be located. *See Yadkin Valley Bank &Tr. v. Oaktree Homes, Inc.*, No. 2014-UP-306, 2014 WL 3747342, *1-4 (Ct. App. July 30, 2014). In *Yadkin*, the court noted that to avoid a statute of frauds defense, a plaintiff would need to satisfy a heightened standard of "clear and convincing" proof that the signed document existed.

Unlike the plaintiff in *Yadkin*, Forum Benefits did not rely solely on self-serving, uncorroborated testimony and, instead, introduced clear and convincing evidence to establish the existence of the missing employment contract with Bannon.

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. Accordingly, the trial court erred in directing verdict in favor of Respondents. Fortunately, the Court of Appeals reversed this error.

B. "Plaintiff failed to prove that there was a meeting of the minds on the essential terms of the alleged contract" (R. p. 23).

This ruling by the trial court was so vacuous that, at the Court of Appeals, Respondents addressed it only in a footnote and provided no argument supporting it. (Respondents' Brief, footnote 4, p. 13).

The trial court's ruling disregarded substantial evidence that demonstrated factual disputes regarding Bannon's agreement to the essential terms of his employment contract, such as that described above in this brief in Section I(A) beginning on Page 7. It is evident from the evidence presented that Bannon signed the employment agreement, and the disappearance of the signed agreement along with his entire employment file raises reasonable inferences of misconduct.

This evidence created disputed questions of fact for the jury to decide, and the trial court's directed verdict ruling that Forum Benefits "failed to prove" these disputed questions of fact improperly invaded the province of the jury and constituted legal error.

Fortunately, the Court of Appeals rightly reversed the trial court's erroneous decision.

C. "Even assuming the alleged contract was signed as Plaintiff alleged, the restrictions relating to the disclosure of confidential information and solicitation of customers expired two years after the employment relationship. Therefore, these restrictions expired at the latest in May of 2015, which was prior to the alleged breaches in this case" (R. p. 23).

With this ruling, the trial court mistakenly jumbled two different provisions of the subject employment contract. The directed verdict ruling that the alleged breaches of contract occurred after the restrictive covenants had expired refers to particular contract "restrictions relating to the disclosure of confidential information and solicitation of customers," which had a two-year post-employment duration. (R. pp. 968-974; 630; 23). This ruling ignores that Forum Benefits introduced evidence that Bannon breached a different employment agreement provision that prohibited Bannon from disclosing Forum Benefits' trade secrets and confidential information—this restriction was unlimited in duration.

Wyatt and Stritt provided testimony, corroborated by Plaintiff's Exhibits 137 (R. pp. 968-974) and 163 (R. pp. 975-982), that paragraph 12 of the employment agreement signed by Bannon included covenants not to disclose Forum Benefits' trade secrets and confidential information and that these covenants were unlimited in duration. (R. pp. 968-974; 60-75; 90). By Paragraph 12(a) of the employment agreement, Bannon specifically acknowledged that Forum Benefits "has information that is confidential and constitutes trade secrets which [Forum Benefits] uses in its

business, and which is essential to its continued ability to compete and be successful in the industry." (R. p. 969, ¶ 12(a)). Paragraphs 12(b)-(c) incorporated the definition of "trade secrets" provided in S.C. CODE ANN. § 39-8-10, *et seq.* (R. pp. 969-970, ¶¶ 12(b),(c)). Paragraphs 12(d)-(e) provided specific examples of Forum Benefits' trade secrets, including many of the items Bannon downloaded and shared with Assured Partners. (R. p. 970, ¶¶ 12(d),(e)). Paragraph 12(f) specifically provided that:

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

(R. p. 970, ¶ 12(f)) (emphasis added).

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

The trial court erred in concluding as a matter of law that the alleged breaches of contract occurred after the restrictive covenants had expired. Fortunately, the Court of Appeals reversed this error.

D. "Plaintiff failed to establish the required elements of a restrictive covenant agreement which must be strictly construed against the employer under South Carolina law" (R. p. 23).

The trial court's proposition that "a restrictive covenant agreement … must be strictly construed against the employer under South Carolina law" is a misstatement of the law. Every agreement includes something that might be characterized as a "restrictive covenant" of one sort or another, but there is no precedent in South Carolina law that mandates every clause in an employment agreement be strictly construed against the employer.

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

Forum Benefits provided strong evidence that Bannon breached the restrictive covenant in his employment agreement by disclosing Forum Benefits' trade secrets. Testimony from Wyatt and Stritt, along with Plaintiff's Exhibit 163, confirmed the key terms of the employment offer to Bannon (R. pp. 968-974; 975-982; 60-75; 90). The terms include the covenant outlined in Paragraph 12 of the employment agreement that is quoted above in Section I(C) on Page 11 of this brief, prohibiting the disclosure of Forum Benefits' trade secrets, which is unlimited in duration as per S.C. Code Ann. § 39-8-30(D). Stritt's testimony that Bannon signed the employment

agreement upon receiving his first paycheck on June 1, 2009, provided evidence of Bannon's acceptance and the valuable consideration given for the agreement. (R. pp. 496-498).

This Court's ruling in *Milliken & Co. v. Morin* is instructive on the issue of restrictive covenants. Specifically, the Court held that "confidentiality and invention assignment clauses are not in restraint of trade and should not be strictly construed in favor of the employee." 399 S.C. 23, 39, 731 S.E.2d 288, 296 (2012). Instead, the scope of the restriction should be determined using ordinary principles of contract law. *Id.* at 32–33, 731 S.E.2d 293.

Forum Benefits presented substantial and corroborated evidence supporting the essential elements of an enforceable contract. The trial court's directed verdict decision, which found that Forum Benefits "failed to establish" these disputed questions of fact, improperly infringed upon the jury's role and constitutes a legal error. Additionally, the trial court's suggestion that additional elements are required or that the contract must be strictly construed against Forum Benefits is a misapplication of the law.

Fortunately, the Court of Appeals reversed this error.

II. Damages

Respondents complain that "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…." (Petition, p. 15).

Respondents fail to grasp two critical aspects. First, questioning the sufficiency of evidence is inappropriate for a directed verdict; the presence of credible evidence precludes such a directed verdict. Second, the Court of Appeals was not required to overlook any evidence that contradicts Respondents' preferred narrative. Fortunately, the Court of Appeals rightly considered not only Respondents' preferred narrative but also the evidence presented by the Appellant.

Stritt testified regarding Forum Benefits' damages. Respondents repeatedly objected to Stritt's testimony. (R. pp. 520-530; 534-560). The trial court at first sustained Respondents' objections. (R. pp. 520-530; 534-560). However, after consultation with an unnamed Business Court judge, the trial court overruled some of Respondents' objections and allowed Stritt to testify regarding Forum Benefits' damages. (R. pp. 560-569)

Adhering to the trial court's rulings, Stritt provided factual testimony of the dollar amount of annual commissions associated with each client that switched from Forum Benefits to Assured Partners. This testimony was based on Stritt's personal knowledge as Forum Benefits' owner and managing director. (R. pp. 771-816; 520-530; 534-560; 573-578).

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

Testimony and contemporaneous emails (e.g., Plaintiff's Exhibits 8, 10-12, and 45) (R. pp. 749-750; 756-759; 760-765; 766-768; and 817-823) provide compelling evidence of the urgent and covert operations carried out by Respondents to illicitly obtain Forum Benefits' trade secrets before Forum Benefits discovered Bannon's affiliation with Assured Partners and revoked access. The testimony of Jim Brady, associated with Assured Partners at the time, was consistent with his November 8, 2016 email that unequivocally stated that he was unable to create an

Employee Navigator account for a client without login credentials to download, copy, and take screenshots of Forum Benefits' Employee Navigator account for that client. (R. pp. 448-450).

Multiple witnesses corroborated the claim that Respondents' misappropriation of Forum Benefits' trade secrets directly caused significant damage to Forum Benefits. For instance, Christie Holderness, the District Manager for St. Andrews Public Service District, testified that ongoing access to Forum Benefits' trade secrets compiled in the Employee Navigator account was a decisive factor in her decision to transfer St. Andrews Public Service District's business from Forum Benefits to Assured Partners (R. pp. 620-626). Several contemporaneous 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 pivotal in convincing clients of a seamless transition from Forum Benefits to Assured Partners (R. pp. 749-750; 756-768; 817-823; 186; 190-194; 444-447). Misappropriating, downloading, copying, and taking screenshots of Forum Benefits' trade secrets saved Assured Partners substantial time and resources, which would otherwise have been spent designing, building, collecting, organizing, and compiling the same database of information (R. pp. 287-288).

Nine clients associated with Bannon actively utilized Forum Benefits' data stored in the respective Employee Navigator accounts (R. pp. 281-282; 448-450; 569-572). Bannon provided Employee Navigator client login credentials for three of those clients – Carolina Youth Development, Premier Logistics, and St. Andrews Public Service District (R. pp. 281-282; 448-450). All three transferred their business from Forum Benefits to Assured Partners, while none of the other six clients transferred their business (R. pp. 281-282; 448-450; 569-572). This 100% statistical correlation between Respondents' misappropriation of Forum Benefits' trade secrets and

the transfer of business to Assured Partners provided decisive evidence of the damages caused by Respondents' actions.

All of this uncontroverted evidence:

- supports the reasonable inference that damages were proximately caused by Respondents' misappropriation of Forum Benefits' trade secrets;
- shows that the trial court's directed verdict ruling that Forum Benefits' damages were speculative contradicts the trial court's own prior evidentiary rulings and ignores competent evidence and also improperly decided disputed factual questions;
- supports the reasonable inference that Bannon's conversion of Forum Benefits' trade secrets proximately caused damages to Forum Benefits that should have prevented the trial court's ruling; and
- shows that the trial court's ruling that Forum Benefits failed to prove that damages were proximately caused by Respondents' actions decided disputed questions of fact that should have been resolved by the jury, constituting legal error and prejudicing Forum Benefits.

Therefore, the court's ruling as a matter of law decided disputed questions of fact, constituting legal error and prejudicing Forum Benefits.

III. Fiduciary Duty

In the oral directed verdict ruling from the bench during trial, the trial court declared as a matter of law that an independent contractor cannot owe a fiduciary duty. (R. p. 687). In the February 1, 2022 Order (drafted by Respondents' counsel to try to salvage the wreckage of the trial court's ruling from the bench), the trial court completely abandoned this ruling and instead

ruled that "[Forum Benefits] failed to establish any evidence that [] Bannon's relationship to [Forum Benefits] as an independent contractor created any type of fiduciary duty to [Forum Benefits]." (R. pp. 23-24, emphasis added). But this ruling was manifestly wrong – there was such evidence and there was such a relationship.

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

Respondents argue, "an independent contractor relationship is also not sufficient to create a fiduciary duty." (Petition, pp. 21-22). But over thirty years ago the Court identified the following cases in which South Carolina courts held or affirmed that an independent contractor owed a fiduciary duty:

> *Loftis v. Eck*, 288 S.C. 154, 157, 341 S.E.2d 641, 642 (Ct. App. 1986) (holding that an agent owed a fiduciary duty to the principal as a matter of law);
>
> *Lengel v. Tom Jenkins Realty, Inc.*, 286 S.C. 515, 518, 334 S.E.2d 834, 836 (Ct. App. 1985) (affirming that a real estate broker breached a fiduciary duty to disclose all material facts to the client);
>
> *In re Moore*, 280 S.C. 178, 182, 312 S.E.2d 1, 3 (1984) (affirming that attorneys owe a fiduciary duty to clients);
>
> *Duncan v. Brookview House, Inc.*, 262 S.C. 449, 456, 205 S.E.2d 707, 710 (1974) (holding that promoters of a corporation owe a fiduciary duty of good faith to the corporation);
>
> *Rush v. South Carolina Nat'l Bank*, 288 S.C. 560, 343 S.E.2d 667 (Ct. App. 1986) (stating that a bank that advises a customer as part of the services the bank offers may owe a fiduciary duty to the customer); and
>
> *Steele v. Victory Sav. Bank*, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988) (stating fiduciary relationship may be created between a bank and a customer if the bank undertakes to advise the customer as a part of the services the bank offers).

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

Within that legal context, the following evidence was introduced during trial of the case at bar. Forum Benefits hired Bannon in 2009 as a full-time employee to serve as a sales representative. (R. pp. 968-974; 60-75; 496). Bannon represented Forum Benefits to both existing and potential clients from 2009 through 2016. (R. pp. 217; 507-508). As evidenced in Plaintiff's Exhibit 1 and confirmed by Bannon, he promised to keep growing the business for Forum Benefits. (R. pp. 747-748; 156; 507-508). This evidence shows that Bannon consistently acted as Forum Benefits' sales agent from 2009 to 2016, thereby owing a fiduciary duty not to compete with Forum Benefits in the scope of his agency.

During the four-week period when Bannon was simultaneously employed by Forum Benefits as a sales representative and secretly employed by Assured Partners, by his own admission Bannon covertly 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). Concurrently, 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). Employees of Assured Partners repeatedly urged everyone involved to expedite copying Forum Benefits' trade secrets before Forum Benefits discovered their actions . (R. pp. 749-750; 756-768; 817-823; 174-175; 186; 190-194; 444). Bannon's deliberate actions to download and share Forum

Benefits' trade secrets with a direct competitor demonstrate a clear violation of his fiduciary duty to Forum Benefits.

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

IV. Conversion

Respondents argue that the Court of Appeals erred in reversing the directed verdict on the conversion claim. However, the evidence showed that Bannon's actions constituted conversion by exercising unauthorized control over Forum Benefits' trade secrets and confidential information.

Conversion is "the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights." *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 465, 684 S.E.2d 756, 763 (2009). South Carolina courts have held that intangible rights are normally not the proper subject for a conversion claim. *Id.* The *Gignilliat* court explained, "[a]n action for conversion ordinarily lies only for personal property that is tangible, or to intangible property that is merged in, or identified with, some document." *Id.* (citation, emphasis and footnote omitted). This Court concluded that the tort of conversion as it relates to intangible property "should be limited to intangible property rights that are identified with some document." *Id.*

How does *Gignilliat* pertain to the case at bar? Other jurisdictions have analyzed such a situation. For example, in *Integrated Direct Marketing, LLC v. May*, the Arkansas Supreme Court was asked to answer a certified question from the District Court for the Eastern District of Virginia: "Under Arkansas's tort of conversion, can intangible property such as electronic data, standing

alone and not deemed a trade secret, be converted?" 2016 Ark. 281, 495 S.W.3d 73 (2016). The Arkansas Supreme Court answered in the affirmative. The court noted that the records in the case were electronically stored documents (consisting of over 300 files [far fewer than Bannon stole in the case at bar] that an employee had copied from his employer's computer to his personal hard drive) allegedly containing confidential and proprietary information. *Id.* at 74, 76. The court concluded, "There is simply no reasonable basis for allowing a claim for conversion of paper documents but not for their electronically stored counterparts. Thus, we conclude that, under Arkansas law, intangible property, such as electronic data, standing alone and not deemed a trade secret, can be converted if the actions of the defendant are in denial of or inconsistent with the rights of the owner or person entitle to possession." *Id.* at 76.

The decision in *Integrated Direct Marketing* provides a useful rationale, consistent with this Court's rationale in *Gignilliat*, to limit a conversion claim to actions involving intangible property "merged in or identified with some document." The type of intangible property maintained on the desktop computer is akin to the files allegedly stolen in *Integrated Direct Marketing*. Accordingly, Forum Benefits' conversion claim included the intangible property stored in the desktop computer-a combination of both tangible and intangible property. Specifically, Bannon retained Forum Benefits' desktop computer until ordered by the trial court to return it to Forum Benefits. (R. pp. 237-238). As with every computer, the desktop computer stored information in electronic form, such as formulas, compilations, processes, designs, and spreadsheets. In addition, Bannon copied Forum Benefits' trade secrets from the Employee Navigator accounts and Forum Benefits' SharePoint server. (R. pp. 138-139; 195-196; 198). The type of intangible property maintained on the desktop computer and copied from the Employee Navigator accounts and Forum Benefits' SharePoint server is indistinguishable from the files

allegedly stolen in *Integrated Direct Marketing*. All of the information stored on the desktop computer and copied from the Employee Navigator accounts and Forum Benefits' SharePoint server is the very type of intangible property contemplated by the Gignilliat court that is "merged in or identified with some document." 684 S.E.2d 763.

The S.C. Trade Secrets Act grants the owner of a trade secret the exclusive right to determine who is permitted to know, disclose, or use the trade secret (S.C. CODE ANN. § 39-8-20). Forum Benefits did not grant Bannon the authority to obtain its trade secrets from either the Employee Navigator accounts or the SharePoint server. Despite this, Bannon illicitly acquired and secretly forwarded the Employee Navigator client login credentials for Forum Benefits' clients to Assured Partners. Brady then used these login credentials to access, download, and copy Forum Benefits' trade secrets from the Employee Navigator accounts (R. pp. 756-759; 181; 183-184; 188; 190-194; 247; 274-275). Furthermore, Bannon himself admitted to downloading approximately 2,000 files containing Forum Benefits' trade secrets from the SharePoint server using the login credentials he had received as a Forum Benefits employee (R. pp. 195-196; 198).

The testimony from Bannon and Brady provides evidence for all of the elements of a conversion claim. Neither Bannon nor Brady had Forum Benefits' authority to copy Forum Benefits' trade secrets from the Employee Navigator accounts or Forum Benefits' SharePoint server, and Bannon destroyed Forum Benefits' exclusive right to control knowledge, disclosure, or use of Forum Benefits' trade secrets by copying Forum Benefits' trade secrets from the Employee Navigator accounts and Forum Benefits' SharePoint server. Bannon's actions unequivocally constituted conversion, as he exercised unauthorized control over valuable and confidential information. This deliberate and calculated conduct deprived Forum Benefits of its exclusive rights to control its trade secrets, thereby causing significant harm to the company.

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

V. Attorneys' Fees

Respondents give short shrift to the attorneys' fee issue–only six lines in their Petition–because the trial court's award of fees was improper, as Forum Benefits' claims were not pursued in bad faith.

Respondents moved for an award of attorneys' fees based on a prevailing party clause in Bannon's employment contract with Forum Benefits. (R. p. 689). However, the trial judge had already ruled as a matter of law that there was no contract – he had found there to be no meeting of the minds to support a contract. (R. p. 686). And the trial court's February 1, 2022 Order similarly ruled as a matter of law that Forum Benefits failed to prove a meeting of the minds on the essential terms of the alleged contract. (R. p. 23, ¶ A(2)). Thus, according to the trial court, no contract existed. It was irreconcilable for the trial court to rule as a matter of law that the contract does not exist and then enforce an attorneys' fees provision in that non-existent contract.

And as a matter of law Forum Benefits' trade secret claim was not bad faith. Respondents filed motions seeking summary judgment on Forum Benefits' trade secret claims. (R. pp. 1026-1027; 1028-1042; 1243-1280; 1281-1374; 1382-1554; 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). "[W]here a party survives a summary judgment motion, it is not subject to sanctions after a trial on the merits of the surviving claims." *Southeastern Site Prep, LLC v. Atlantic Coast Builders & Contractors, LLC*, 394 S.C. 97, 109,

713 S.E.2d 650. 656 (2011) (quoting *Hanahan v. Simpson*, 326 S.C. 140, 158, 485 S.E.2d 903, 913 (1997)). The facts, reasoning, and conclusion reached in Southeastern are indistinguishable from the present case. Two different judges heard summary judgment motions against Forum Benefits, and both judges denied the motions. Consistent with the controlling authority of *Southeastern* and *Hanahan*, as a matter of law Forum Benefits' trade secret claims were not in bad faith.

Furthermore, Respondents' confusing request for attorney fees to the trial court appeared to seek an award for both parties involved. (R. pp. 689-690). If this motion was intended for both Respondents, there is no evidence of any contract between Forum Benefits and Assured Partners and, on the other side of the ledger, there is no indication that Bannon incurred any attorney fees at all.

Additionally, the trial court did not consider, nor did Respondents provide, evidence for any of the factors that are required to be considered before awarding attorneys' fees. In South Carolina, a court should consider the following six factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). Neither the trial court nor the Respondents addressed any of those factors.

Finally, Respondents acknowledged that Bannon never incurred any fees and costs but nonetheless argue that Bannon should "recover" the fees and costs incurred by Assured Partners. (R. pp. 1949-1952). The attorneys' fee provision in the employment contract, which the trial court ruled does not exist, 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." (R. p. 969, ¶ 11). However, instead of providing any evidence that Bannon actually incurred any fees and costs, Respondents directed the trial court to authority from other states to argue that Bannon should be able to recover the fees and costs incurred by Assured Partners. (R. pp. 1950-1951).

Respondents' arguments ignore controlling authority directly on point from this Court. In *Williamson v. Middleton*, this Court addressed whether a party can recover attorneys' fees that were not actually incurred. In that case, an attorney represented an employee, who was also a personal friend, in a lawsuit for unpaid commissions. 383 S.C. 490, 493, 681 S.E.2d 867. 869 (2009). The attorney testified that he did not have a fee agreement with the employee, had never sent a bill for attorneys' fees to the employee, and that the employee had no obligation to pay any attorneys' fees. *Id.* at 495. After the jury returned a verdict for the employee, the trial court awarded the employee $35,000 in attorneys' fees. *Id.* at 493. The Court of Appeals *en banc* affirmed the attorneys' fee award, believing the employee might discuss a fee at the end of the case. *Id.* at 496. This Court reversed the award of attorneys' fees, finding "no competent evidence to support the finding that [employee] incurred attorney's fees." *Id.*

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

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As detailed above, the trial court's numerous errors have significantly prejudiced the Appellant. The Court of Appeals recognized that injustice and rectified those mistakes.

CONCLUSION

Based on the foregoing, the Court should DENY the Petition for a Writ of Certiorari.

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