THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2016-CP-07-2541
Court of Appeals Appellate Case No. 2022-000231
Supreme Court of South Carolina Appellate Case No. 2025-000436

Forum Benefits, LLC,

Plaintiff-Respondent,

v.

Brian Bannon and Assured Partners, NL,

Defendants – Petitioners.

BRIEF OF PETITIONERS

July 3, 2025

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   A. appears to have 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 Respondent'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 Respondent's admissions that it did not know why the clients at issue moved their business to Petitioners?

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

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

   B. there was no evidence presented to establish that Bannon owed Respondent 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 Respondent'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 where Respondent was never deprived access to the same information.

5. Whether the trial court properly applied its discretion in awarding prevailing party attorney's fees under the contract claim and awarding statutory fees under the Trade Secrets Act claim.

6. Whether the trial court properly applied its discretion in denying Respondent's motion for recusal and whether this issue needs to be addressed based on this Court's answers to the questions above.

STATEMENT OF THE CASE

Petitioner Brian Bannon ("Bannon") began his employment with Respondent Forum Benefits, LLC ("Forum") in 2009 as an insurance broker. (R. p. 106, lines 18-22). Forum's first witness at trial was its attorney, David Wyatt ("Mr. Wyatt"), who testified that, at the request of Forum, he prepared a form employment agreement in 2009 that he believed Forum intended Bannon and another employee to sign (the "Employment Agreement"). (R. p. 62, lines 10-24). Bannon denied ever seeing or signing the Employment Agreement. (R. p. 145, line 11-p. 146, line 7). The Employment Agreement was in template form, was not signed, and contained no specific information pertaining to Bannon. Pl. Ex. 137; (R. p. 968).

Mr. Wyatt readily admitted he had no record of Bannon ever being sent, receiving or signing the document. (R. p. 77, line 21-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 or any identifying information; (2) Bannon's compensation, which was left blank; (3) the parties' signatures; (4) Bannon's duties (which were to be listed in Exhibit A to the Employment Agreement but never were); and (5) the explanation of benefits (which were to be listed in Exhibit B to the Employment Agreement but never were). (R. p. 968). The only employee-specific information that was contained in the Employment Agreement is a reference that the unnamed employee would work for Forum in Greenville, South Carolina – which was clearly not intended for Bannon who lived in Beaufort and who was hired to work in and actually worked in the Charleston, South Carolina area. Id.; (R. p. 78, line 10-p. 79, line 3). In addition to not being able to provide any evidence or testimony to remotely suggest that Bannon actually signed the Employment Agreement, Forum's own attorney and first witness at trial admitted that Forum's contract claim was barred by the Statute of Frauds. (R. p. 91, lines 3-20).

In May 2013, the relationship between Bannon and Forum changed significantly. Bannon ceased working as an employee for Forum and became an independent contractor for Forum. (R. p. 106, lines 18-22). Forum admitted at trial 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 Forum employees. Id. There was never any agreement discussed, drafted or signed that governed Bannon's independent contractor relationship with Forum. (R. p. 593, lines 21-25).

During the time period that Bannon was an independent contractor for Forum, he sold employee benefits insurance to business clients. (R. pp. 104-107, 126-127). The insurance was provided through various insurance carriers and Bannon placed his clients with Forum for day to day benefits administration and servicing needs. (Id.) Some of Bannon's clients used a third-party web based software product called Employee Navigator for benefits administration. Employee Navigator compiled employee census data and insurance plan information for the employees of each client company. (R. p. 117, lines 10-25). The Employee Navigator information is known and available to both the client (whose employees the information is about) and the insurance carrier (who provides coverage for the individual policies selected by the employees), in addition to the insurance broker. (R. p. 447, lines 10-25). Further, the username and password for clients to access their Employee Navigator account belonged to the clients and Forum did not in any way restrict the clients with respect to said login information, nor did Forum in any way restrict the clients from using or providing the Employee Navigator username and password to other brokers, such as Bannon. (R. pp. 175-176, 418-423, 459).

On October 16, 2016 Bannon began working with Petitioner Assured Partners NL ("AssuredPartners") as an insurance broker. (R. p. 218, lines 8-19). Many of Bannon's clients chose to move with him to AssuredPartners. As a result, these clients consented to Bannon maintaining their insurance plan information, provided Bannon with their Employee Navigator login information, and requested that Bannon obtain copies of their census data and plan information to ensure continuity of representation and coverage. (R. pp. 175-176; pp. 281-282). Based on these clients' requests to follow Bannon and for him to continue to be their insurance agent, Bannon took steps to protect his client's insurance plan data during the transition to AssuredPartners. (R. pp. 263-269; p. 274, line 19-p. 275, line 8). He took these steps because he believed he had a legal duty to maintain his client files pursuant to S.C. Code Ann. §38-43-250. (R. p. 262, line 2-p. 269, line 8). He also took these steps because he had specific information that Forum had a history of attempting to disrupt clients who attempted to leave its agency and did not want the same outcome for his clients. (R. p. 274, line 9-p. 278 line 8). Bannon's concerns were grounded in fact: Forum admitted to denying clients access to their own plan information in the past when they gave notice that they were leaving Forum's agency, and Forum also admitted that this could cause disruption to the clients. (R. p. 425, lines 9-13; p. 425 line 20-p. 441, line 14). Bannon also directly heard Forum's President and owner Brian Stritt make statements that he wanted departing clients to be disrupted as they attempted to separate from Forum. (R. p. 276, line 12-p. 277, line 23).

Forum retaliated against Bannon when it learned that Bannon had taken steps to prevent Forum from disrupting the clients and from holding their information hostage to try to prevent them from leaving Forum's agency. Despite not having any signed Employment Agreement with Bannon and despite Bannon not being an employee of Forum for over three years, on December

1, 2016, Forum sued Petitioners alleging a breach of contract, misappropriation of trade secrets, conversion, breach of fiduciary duty, and tortious interference.

Throughout the course of almost five years of litigation, Petitioners filed multiple motions for summary judgment, fully explaining the legal and factual inadequacies of Forum's claims. Despite this detailed notice of the extensive shortcomings of its claims, these motions never prompted Forum to ensure it had the necessary factual or legal basis to prove its claims at trial. The first summary judgment motions were heard by the Master-In-Equity, Marvin H. Dukes, III. The last motion for summary judgment Petitioners filed was heard by Judge Perry Buckner. However, Judge Buckner retired after hearing oral arguments on the motion, but before ruling on said motion. (R. pp. 558-559). Thereafter, a second judge, Judge Deadra L. Jefferson, denied Petitioners' motion with a Form 4 Order and provided no explanation for the denial other than citing the summary judgment standard and stating generally that material issues of fact exist. Id., see Form 4 Order of October 14, 2020.

On October 11, 2021, the jury trial in this matter commenced. (R. p. 57). At the beginning of the third day of trial, Forum asked the trial judge to recuse himself claiming that the trial judge was biased based on the fact that he knew a "potential" witness from college over 17 years prior. (R. pp. 465-479). This "potential" witness had been subpoenaed by Forum to testify on day two of trial, was never called by Forum to testify, and this "potential" witness was excused by Forum from the subpoena the day before Forum's motion for recusal. (R. p. 474, line 14-p. 475, line 4; p. 478, lines 20-25). Forum did not raise this issue when it first learned that the trial judge went to college with this "potential" witness and instead consented to the trial court saying hello to the "potential" witness during a break. After knowing this tenuous college connection, Forum proceeded to call witnesses in its case in chief. Notably, the witnesses Forum called later that day

ultimately provided very damaging testimony related to Forum's claim. After finishing the second day of testimony and realizing that its case was going down in flames, Forum decided to attempt to recuse the trial judge the next day. The trial judge did not have any reason to know how the "potential" witness was related to the case or the relevancy of any potential testimony from this "potential" witness. (R. p. 469, lines 15-25). At the time of Forum's motion for recusal, it was clear that the "potential" witness was not going to be called as a witness in Forum's case because he had already been excused from the subpoena. (R. p. 474, line 14-p. 475, line 4; p. 478, lines 20-25). The trial judge properly denied the motion.

Later that third day, Forum rested its case. (R. p. 619, line 6). After Forum rested its case, Petitioners 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 since it was the end of the day. (R. p. 683, line 25). The next day, day four of trial, the trial court granted Petitioners' directed verdict motion. (R. pp. 684-687). The trial court also found that Forum brought its misappropriation of trade secrets claim in bad faith and awarded Petitioners' attorneys' fees and costs under the South Carolina Trade Secrets Act. (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. Id.

Forum appealed the trial court's rulings to the Court of Appeals of South Carolina. 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). Petitioners timely filed and served a Petition for Rehearing. The Court of Appeals denied the Petition for Rehearing by Order dated February 7,

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

2025. Forum Benefits, LLC v. Brian Bannon and Assured Partners, NL, Case No. 2022-000231 (S.C. Ct. App. dated Feb. 7, 2025). Petitioners filed a Petition for a Writ of Certiorari on March 7, 2025. Forum filed a Return to Forums' Petition on April 3, 2025. Petitioners filed a Reply to Forum's Return on April 14, 2025. This Court granted Petitioners' Petition on June 3, 2025. This Brief of Petitioner timely follows.

STANDARD OF REVIEW

For issues 1, 2, 3, and 4, this Court should apply the same standard as the trial court. Gadson ex rel. Gadson v. ECO Services of South Carolina, Inc., 374 S.C. 171, 175, 648 S.E.2d 585, 588 (2007). The Court views the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. Hurd v. Williamsburg County, 363 S.C. 421, 426, 611 S.E.2d 488, 491 (2005). Where the trial court must determine issues as a matter of law, such as whether a legal duty exists, this Court should review questions of law under a *de novo* standard. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

For issue 5 and 6, related to the award of attorneys' fees and denial of motion for recusal, this Court should apply an abuse of discretion standard. See e.g. Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659 (1993) (finding that a trial judge's decision to award attorneys' fees will not be reversed on appeal absent an abuse of discretion). The appellate courts should not reverse the trial court unless it is based on an error of law or is without any evidentiary support. See Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596 (1997).

ARGUMENT

1. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S GRANTING OF A DIRECTED VERDICT ON FORUM'S BREACH OF CONTRACT CLAIM BECAUSE, *INTER ALIA*, THIS CLAIM IS BARRED BY THE STATUTE OF FRAUDS.

Directed verdict was proper on Forum's breach of contract claim based on the Statute of Frauds. 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). Forum failed to present evidence to establish any of these elements. However, the most glaring failure of evidence was Forum's inability to overcome the legal impact of the Statute of Frauds. This is because no signed contract exists in the instant case and the form document Forum produced has blanks which do not include all the material terms. Thus, there are only two possible outcomes here: (1) the Statute of Frauds bars Forum's contract claim as the trial court ruled, or (2) this Court should for the first time address the issue of a lost document exception to the Statute of Frauds and how such an exception could apply to the instant case.

There is no dispute that the Statute of Frauds applies in this case. Forums 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 Forum 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). Forum 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.) Forum has also admitted this. (R. p. 91, lines 3-20.) Accordingly, there is no dispute that the Statute of Frauds applies to bar Forum's contract claim. There is also no exception to the Statute of Frauds contained within the statute itself that would apply to the facts of this case.

Because of these undisputed facts, the only potential way this claim could have been submitted to a jury was a judicially created 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.*** The Court of Appeals in the instant case may have adopted this exception in reversing the trial court, but its Opinion does not clearly address this issue or provide any analysis of the exception or how it applied to this case. 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.

This Court should not adopt a lost document to the Statute of Frauds. Nothing in the statute allows for such an exception. In fact, the Legislative intent related to the Statute of Frauds is contrary to a lost document exception. The Legislature considered exceptions to the Statute of Frauds when adopting the statute. In doing so, the Legislature adopted some very limited exceptions, none of which open the door for a lost document exception. One of the statutory exceptions contemplates the need for an opposing party's admission 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 of the Statute of Frauds. However, this is not present here as Bannon has consistently denied signing an Agreement. (R. p. 145, line 11-p. 146, line 7). 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, and because a lost document exception is not consistent with other exceptions in the statute, this Court should reject such an exception, reverse the Court of Appeals, and affirm the trial court on this issue.

Even if this Court decides to officially adopt a lost document exception to the Statute of Frauds, it should at a minimum require clear and convincing evidence to support the exception and not permit self-serving testimony from an individual (who has a financial interest in the outcome of the case) to support the exception. If such clear and convincing evidence is required to establish the exception, then the trial court was correct in ruling that Forum did not present sufficient evidence to meet this standard.

It is undeniable that the only person who alleges that Bannon signed an employment agreement is Brian Stritt. (R. pp. 502-5007). Mr. Stritt's testimony is biased and self-serving, considering he was the President of Forum and was the sole owner at the relevant time. (R. p. 441, lines 9-14). He is also funding the litigation for Forum and is the only person responsible for paying Petitioner's legal fees awarded by the trial court. (R. 586.)

Mr. Stritt's singular, self-serving testimony is precisely the type of testimony the Statute of Frauds is designed to protect against. Mr. Stritt testified that Bannon allegedly signed an employment agreement when Mr. Stritt delivered Bannon his first paycheck, and that Mr. Stritt

placed this alleged signed document in Bannon's personnel file. (R. pp. 505-507). However, Mr. Stritt has a direct financial interest in the outcome of this matter as he is funding the litigation for Forum. (R. 586.) As explained in Yadkin, courts in other jurisdictions that have adopted a lost memorandum exception have not permitted plaintiffs to use self-interested, self-serving testimony to establish the existence of an allegedly lost agreement. 2014 WL 3747342 at *1. To hold otherwise would obliterate the protections afforded by the Statute of Frauds.

Mr. Stritt's testimony is further weakened by the fact that the contract he alleges Bannon signed is substantially incomplete, missing at least the following material terms: (1) Bannon's name as well as any other information pertaining to Bannon; (2) Bannon's compensation; (3) the parties' signatures; (4) Bannon's duties; (5) Bannon's explanation of benefits; (6) Bannon's address; and (7) Bannon's social security number. Pl. Ex. 137, Introduction ¶, ¶2, ¶5, ¶6, Exhibit A and Exhibit B attached thereto; (R. pp. 968-969; 973-974). Forum did not prove the existence of a completed contract, no less an actual signed contract.

Furthermore, the evidence at trial established that the Employment Agreement was clearly not drafted for Bannon. The Employment Agreement inexplicably contemplates a parent's or guardian's signature. Pl. Ex. 137, p. 5; (R. p. 972). It is undisputed that at all material times Bannon exceeded the age of majority and was competent to execute the contract. There was no reasonable basis to include this language if the template document was truly drafted for Bannon as Forum alleged. Even more damaging to Forum's position is the fact that the only employee-specific information contained in the Employment Agreement was that the employee would work in "Greenville, South Carolina." Plaintiff Ex. 137, ¶3; (R. p. 968; R. p. 78, line 19-p. 79, line 3). Tellingly, however, Forum admitted that it did not hire Bannon to work for Forum in Greenville, South Carolina, but hired him to work in the Charleston area. Id. During the entirety of Bannon's

employment with Forum, he lived in Beaufort and worked in the Beaufort and Charleston area, not Forum's Greenville office. (R. p. 136, line 19-p. 137, line 5; p. 138, lines 13-17). There was no reasonable basis to put a reference to working in Greenville in the template document if it was truly drafted for Bannon as Forum falsely alleged.

Because there is not South Carolina support for Forum's position, it has resorted to relying on cases from other jurisdictions. However, the cases relied upon by Forum in previous briefs are also unpersuasive because they involved facts that are not present here, such as the following:

- Alph C. Kaufman Inc. v. Cornerstone Indus. Corp., 540 S.W.3d 803, 813 (Ky. Ct. App. 2017), there was substantial evidence of a company practice that all employees in field sales were required to sign non-compete agreements, there was a letter to employees confirming this requirement, and there was evidence that all other field sales employees had historically signed the agreement;
- Gipson v. Mattox, No. CIV A 05-0601-WS-C, 2006 WL 3421244, at *9 (S.D. Ala. Nov. 27, 2006), a secretary who had no vested interest in the outcome of the case confirmed seeing a signed agreement;
- McInnis v. Lind, 198 Or. App. 139, 147–48, 108 P.3d 578, 584 (2005), the court ruled that a compromise letter signed by the defendant satisfied the statute because it indicated the defendant's willingness to enter into an agreement on certain terms and thereby provided some evidence that the parties in fact did enter into such an agreement. In addition to the letter's opening line, indicating the "wish to confirm our settlement," there was also a stipulated judgment in an ejectment action that stated the parties had reached a settlement. Accordingly, the court ruled that "the compromise letter may be viewed as a memorandum of an existing agreement and,

as such, sufficiently demonstrates the existence of the alleged oral agreement to satisfy the evidentiary requirement of the statute of frauds."

In the instant matter, there is no evidence of Forum having an established practice of utilizing similar agreements with all other employees. Rather, the evidence proved that Forum did not normally utilize such agreements. (R. p. 62, lines 10-24.) There is no corroborating witness to support Mr. Stritt's testimony that he saw Bannon sign the agreement. The fact that Mr. Wyatt drafted a template agreement that was in no way customized for Bannon in no way corroborates Mr. Stritt's testimony. Mr. Wyatt had no communication with Bannon and never interacted with Bannon. There is no other document or letter referencing an agreement between Forum and Bannon. This is especially relevant here given the fact that Bannon lived in Charleston and Mr. Stritt lived in Greenville. (See R. p. 42-48, 78, line 10-p. 79, line 3). There would likely have been emails or text messages referencing the agreement or the need for Bannon to sign one as part of his employment. Why wouldn't Mr. Stritt email Bannon a draft for him to review before allegedly "springing" the agreement on him when he brought Bannon his first paycheck. At a minimum, there should be a completed Word document saved on Forum's computers or systems that included Bannon's name and filling in the blanks specific to his employment. No such evidence exists, further confirming the agreement was never prepared for or presented to Bannon.

Therefore, the cases relied upon by Forum from other jurisdictions are not relevant or persuasive to the issues in this case. However, cases cited by the Court of Appeals in Yadkin support the conclusion that Forum did not provide clear and convincing evidence in the instant case. See Yadkin Valley Bank & Tr. v. Oaktree Homes, Inc., No. 2014-UP-306, 2014 WL 3747342, at *1 (S.C. Ct. App. July 30, 2014). Specifically, in Zander v. Ogihara Corp., 213 Mich. App. 438, 444, 540 N.W.2d 702, 705 (1995) the court dismissed the contract claim and ruled that

"the only evidence that plaintiffs presented at trial with respect to this issue was plaintiff Zander's testimony that she saw a faxed copy." Similarly, in Weinsier v. Soffer, 358 So.2d 61, 62–63 (Fla.App., 1978), the Florida Court of Appeals reversed the trial court's decision for the plaintiff, whose testimony provided the only proof that the defendants had signed an investment agreement that was subsequently destroyed in a fire. These cases are like the instant case where Forum relies solely on the testimony of Mr. Stritt, the owner and financer of this litigation who is desperate for a return on his investment. It is also important to note that Mr. Stritt's credibility was destroyed at trial. He routinely testified inconsistent with his own sworn depositions and was impeached thereon. (R. 584 to 618.) Not only are Mr. Stritt's allegations self-serving, but his testimony at trial was not remotely credible, something the trial court witnessed first-hand.

In addition to the Statute of Frauds barring Forum's contract claim, this claim also fails for lack of consideration. Mr. Stritt alleges that he physically took the agreement to Bannon for him to sign after he started working and when Mr. Stritt delivered Bannon his first paycheck. (Return to Cert. Petition p. 7, third bullet point.) There was no evidence presented at trial that this agreement was provided to Bannon prior to the initiation of his employment, an element Forum was required to establish. Consideration is a required element of Forum's contract claim. This Court has ruled that continued at-will employment is not sufficient to support a restrictive covenant agreement. Poole v. Incentives Unlimited, Inc., 345 S.C. 378, 382, 548 S.E.2d 207, 209 (2001). Even accepting Mr. Stritt's disputed testimony on this issue, Mr. Stritt's allegations show that Bannon was not presented with the agreement on or before his first date of employment/work for Forum. Forum had the burden to show that the agreement was supported by consideration and completely failed to do so.

For these reasons, the trial court correctly granted Petitioners' motion for directed verdict and the Court of Appeals erred in reversing the trial court's ruling.

2. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S GRANTING OF A DIRECTED VERDICT BECAUSE FORUM FAILED TO PRESENT EVIDENCE OF PROXIMATELY CAUSED DAMAGES AND, INSTEAD, ITS ADMISSIONS PROVE NO SUCH DAMAGES WERE PROXIMATELY CAUSED BY ANY UNLAWFUL CONDUCT BY PETITIONERS.

Directed verdict was proper on all of Forum's claims based on Forum's failure to present evidence of proximately caused damages. All of Forum's claims required proof of damages proximately caused by an alleged breach of contract or the alleged unlawful conduct. Forum only sought damages related to clients' moving from Forum to Petitioners. (R. p. 576-579). However, Forum admitted at trial that it had "no idea" why clients followed Bannon to Petitioner AssuredPartners. (R. p. 608, lines 18-21). This one issue is fatal to all of Forum's claims.

In analyzing the causation element, it is important to note that Forum cannot rely on the non-solicitation of customers restriction or the non-disclosure of confidential information restriction in the alleged Employment Agreement to support the causation element. Even assuming Bannon signed the Employment Agreement, which is denied, the restrictive covenants related to soliciting customers and using confidential information expired prior to the events of this case. The Employment Agreement's restrictive covenants specifically state that they only apply for two years after the employment relationship ends. (R. p. 970 - Plaintiff's Exhibit 137, ¶12(g), ¶13, and ¶14.). Forum admitted that Bannon's employment relationship terminated in May of 2013. (R. pp. 85, 283, 592, 594:1-12). Bannon thereafter became an independent contractor. Id. Once Bannon transitioned to an independent contractor, the Employment Agreement was no longer applicable and terminated. Id. Given that Bannon became an independent contractor in May 2013, the Employment Agreement's two-year, post-employment restrictive covenants expired in

May of 2015. Forum admitted at trial that it was not aware of any evidence that Bannon breached any portion of the Employment Agreement prior to May of 2015. (R. p. 594, lines 13-16). The only restriction in the alleged Employment Agreement that arguably extended beyond this two-year period is the restriction on using Forum's trade secrets.[2]

Accordingly, Forum cannot claim that Bannon's mere solicitation of clients, use of his long-standing relationships with clients to request that they move with him to AssuredPartners, or any use of "confidential information" was a breach that proximately caused Forum damages. Instead, Forum must prove that Bannon somehow improperly used Forum's trade secret information to convince clients to move to AssuredPartners, something it failed to do at trial, providing absolutely no evidence to support such a conclusion.

While evidence of proximately caused damages is required for all of Forum's claims, it is most significantly lacking as it applies to Forum's breach of contract claim and trade secrets claim. 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

[2] There is a strong argument that even the trade secrets portion of the agreement only lasted for two years post-employment because the definition of Confidential Information specifically states it includes trade secrets and then also states that the restriction on Confidential Information only lasted for two years. (R. p. 970, Pl. Ex. 137, ¶12(g)). At a minimum, Forum created an ambiguity in the agreement that should have been construed against the drafter – Forum – related to whether any restriction on trade secrets lasted beyond the two-year period.

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." Petitioners asked Forum in discovery if it was seeking a reasonable royalty, and it continually said it was not. Forum never presented any evidence, arguments or allegations related to a reasonable royalty at trial. Thus, Forum was required to prove that its alleged damages were proximately caused by Petitioners' somehow misusing Forum's trade secrets.

In other words, Forum had to prove that Bannon used Forum's trade secret information to convince the clients to move with him and that the clients did not move because of Bannon's history of servicing their insurance needs or his long-standing relationship with the clients. The simple fact that some clients moved when Bannon left Forum does not provide evidence of causation. Significantly, Forum did not call any client to testify on this issue, making no effort to prove this causation element. In fact, the only client whose testimony is in the record was called by Petitioners and supports Petitioners' arguments here.[3] Christie Holderness, the decisionmaker for the St. Andrews Public Service District, confirmed that the only reason she decided to move with Bannon to AssuredPartners was her longstanding relationship with Bannon and her confidence in his ability to continue to service the account:

[3] Because of the time of day when Forum rested its case in chief, the Parties consented to Petitioners calling witnesses to finish out the day with the jury prior to the trial court hearing directed verdict arguments at the end of the day after the jury was excused.

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

(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.

Q Do you have any knowledge about whether Mr. Bannon was given consent to use login -- the District's login and password to obtain the District's information?
A I authorized HR to provide that to him.

(R. 623, lines. 20-23). Forum did not produce any evidence to counter this testimony at trial and this is the only testimony from a client in the Record.

Because Forum did not have any support for its damages claims from the clients (which is why it did not call any clients to testify), it had to turn to the **self-serving opinions** of Forum's owner (Brian Stritt), just like it attempted to do with alleging Bannon signed the Employment Agreement. However, Mr. Stritt's own testimony on causation was extremely damaging to Forum's case. Mr. Stritt admitted that the clients were free to leave Forum at any time and for any reason. (R. p. 607-608). Notably, the "reason" the clients left is what matters, not the fact that they

left and followed Bannon to AssuredPartners. Unbelievably, Mr. Stritt admitted that he had "no idea" why the clients left Forum. (R. p. 608, lines 18-24). Specifically, Mr. Stritt testified as follows:

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

(R. p. 608, lines 18-21). Mr. Stritt was also impeached at trial with his deposition testimony where he confirmed in reference to Bannon's clients, "We haven't gone after them or talked to them." (R. p. 610, lines 6-12) (emphasis added). Mr. Stritt realized that this deposition admission was very damaging so he tried to take the opposite position at trial. However, Forum cannot rely on inconsistent testimony to prove its claims.

Mr. Stritt even admitted that Bannon had good relationships with some of his clients, further supporting Petitioners position that clients moved because of the relationship with Bannon as their insurance agent, not because he somehow used trade secret information to solicit them. (R. p. 608, lines 9-11). The glaring problem with Mr. Stritt's testimony is that he was Forum's only witness on the issue of causation. Forum retained no damages expert. Forum provided no testimony at trial that in any way suggests (no less would give a jury a reasonable basis to find) that the clients left with Bannon for any reason other than the fact that they had a good relationship with him, he asked them to move, and they said yes. Forum provided absolutely no evidence that

in any way connected any alleged misappropriation of its trade secret information[4] and the reason clients followed Bannon to AssuredPartners.

These undisputed facts fully supported the trial court's granting of directed verdict. The trial court correctly ruled that Forum failed to introduce any evidence proving a causal link between any alleged retention of trade secret information and Forum's alleged damages sufficient to submit this claim to the jury. Accordingly, the Court of Appeals erred in reversing the trial court on this issue.

3. THE COURT OF APPEALS ERRED IN REVERSING 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 trial court properly granted directed verdict in Petitioners' favor because Bannon was an independent contractor and did not owe a fiduciary duty to Forum. This is a question of law and was to be decided by the trial court, not the jury. Cowburn v. Leventis, 366 S.C. 20, 619 S.E.2d 437, 451 (Ct. App. 2005). Thus, the trial court was specifically required to determine whether a fiduciary duty existed between these parties, and it correctly made this determination. The Court of Appeals erred in reversing the trial court without specifically addressing this issue.

To succeed on a breach of fiduciary duty claim, a plaintiff must show the existence of a fiduciary duty owed by the defendant to the plaintiff, a breach of that duty, and damages proximately resulting from the breach. See RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 732 S.E.2d 166, 173 (2012). Similar to all of its claims, Forum failed to establish any of these elements. As detailed in Section 2 above, Forum never submitted evidence sufficient to create an

[4] The trial court also ruled that Forum failed to submit evidence sufficient to submit the issue of whether the information allegedly retained by Bannon was a trade secret to the jury. Petitioner argued this as an additional ground to affirm the trial court in its briefs to the Court of Appeals. However, Petitioners have attempted to narrow the issues before this Court and it is not necessary to analyze this issue given the glaring lack of evidence related to proximately caused damages.

issue of fact related to the causation element. However, the trial court only needed to analyze the first element to grant directed verdict as a matter of law.

"A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence." Davis v. Greenwood Sch. Dist., 620 S.E.2d 65, 68 (S.C. 2005). "The imposition of a fiduciary duty upon a party constitutes a high standard of responsibility and should not be done lightly." Wired Fox Technologies, Inc. v. Estep, 2017 WL 1135288, at * 10 (D.S.C. March 27, 2017) (internal citations omitted). As this Court has explained there must be a firm foundation for reposing the level of trust of a fiduciary on the other third party. Burwell v. S.C. Nat. Bank, 288 S.C. 34, 340 S.E.2d 786, 790 (1986). A fiduciary duty generally cannot be unilaterally imposed by one party; rather, "[t]he evidence must show the entrusted party actually accepted or induced the confidence placed in him." Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817, 822 (Ct. App. 2004), overruled on other grounds by State v. Wallace, 440 S.C. 537 (2023).

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

independent contractor relationship cannot be sufficient to create a fiduciary duty. Wired Fox Technologies, Inc., 2017 WL 1135288, at *11.

South Carolina case law is fatal to Forum's fiduciary duty claim. Here, Forum is attempting to do exactly what the law prevents, reposing trust on Bannon with no such communication with Bannon and no foundation for this belief. Forum seeks to unilaterally impose a fiduciary duty on Bannon after the independent contractor relationship ended, where Bannon never accepted such a duty during the relationship, never engaged in any action that would evidence him accepting a fiduciary duty, and no duty was ever mentioned by Forum or discussed between the parties.

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

When Forum terminated Bannon's employment relationship and established an independent contractor relationship with him, Forum admits there was no written contract that governed the terms of that independent contractor relationship. (R. p. 593, lines 21-25). Significantly, there was no evidence presented at trial that Forum ever had even one communication with Bannon about establishing any alleged fiduciary duty as part of the employment or independent contractor relationship. Thus, if the prior employee/employer relationship was insufficient to establish a fiduciary duty, which it was as a matter of law, the change to an independent contractor relationship cannot in and of itself create a new fiduciary duty. To create such a new legal duty would have required an express agreement between the

parties. The indisputable evidence at trial was that this never happened. Accordingly, Forum wholly failed to establish a legal or factual basis for Bannon owing it a fiduciary duty.

Forum has previously cited to several cases that it contends support the existence of a fiduciary duty for independent contractors. However, none of Forum's cited cases bear any resemblance to the facts of this case and virtually all deal with the agent's (not necessarily an independent contractor's) obligations to their clients, not to the principal entity for which the agent is working. Contrary to the facts at bar, in virtually all the cases Forum cites, the alleged independent contractors are entrusted with the financial or personal well-being of their clients. See Loftis v. Eck, 288 S.C. 154 (S.C. Ct. App. 1986) (power of attorney); Lengel v. Tom Jenkins Realty, Inc., 286 S.C. 515, 334 S.E.2d 834 (Ct. App. 1985) (real estate brokers duty to act in compliance with client's instructions). All these cases exemplify the type of special relationship required to establish a fiduciary duty and fit within the current state of South Carolina law. See Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711, 716 (2003) ("Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters.").

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

Bannon, as an independent contractor working without any contract and without any restrictive covenants, was free to place clients through Forum or through any other insurance agency he saw fit. The trial court was specifically charged with determining whether Forum established that Bannon owed it a fiduciary duty. The trial court correctly granted Petitioners' directed verdict motion on this claim. The Court of Appeals erred in reversing the trial court, in generally ruling that issues of fact existed warranting denial of directed verdict, and in not specifically addressing whether a fiduciary duty exists under these circumstances.

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

The trial court properly ruled that Forum failed to produce the requisite evidence to support any of the elements of its conversion claim. First, the evidence at trial proved that the information in question was not owned by Forum. Forum's own witness, a representative from the insurance carrier (Mr. Robert Labin from Blue Cross Blue Shield), confirmed that the client owned all the information about their policy and the services provided by the broker. (R. 349-350.) Specifically, Mr. Labin confirmed:

> A Client owns -- ultimately owns their information, yes, sir.
> Q Okay, and the client is free to do with that information as it wishes, right?
> A Correct.
> Q Okay. They can disclose that information to whomever they would like, correct?
> A The client? Yes.
> Q The -- the client. So that -- that -- that information, whether the policy information, the census information, that doesn't belong to the agency or the agent, it belongs to the client in your view, correct?
> A The information belongs to the client.

(R. 350.)

The information at issue in this case is and has always been the "client's information" to do with it as it pleases. Even Mr. Stritt's own sworn testimony confirmed that the clients can do "whatever they want" with their information. (R. 605.) This is exactly what happened in this case – the clients authorized Bannon to retain and maintain their insurance information so that their policy information would not be wrongfully withheld by Forum (something it had a history of doing in retaliation for clients attempting to leave – R. 431 to 441). Mr. Labin also confirmed that once Bannon was identified as the client's agent, he would properly have access to all the client's insurance information. (R. 349.)

Second, the indisputable evidence at trial proved that Bannon never exercised exclusive control over the electronic information at issue in this case. None of the electronic information in question was ever deleted from Forum's systems. Thus, Forum at all times had access to and use of the information at issue. Under South Carolina law, conversion is defined as, "the unauthorized assumption in the exercise of the right of the ownership over goods or personal chattels belonging to another *to the exclusion of the owner's rights*." Am. Credit Sumter, Inc. v. Nationwide Mut. Ins. Co., 663 S.E. 2d 492, 295 (S.C. 2008). "To establish the tort of conversion, the plaintiff must establish either title to or right to the possession of the personal property." Moseley v. Oswald, 656 S.E. 2d 380, 382 (S.C. 2008). Ordinarily, an action for conversion lies only for personal property that is tangible, which permits identification of ownership interest. South Carolina will only permit a claim for conversion based on intangible property where the intangible property rights are identifiable by some document. Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 684 S.E. 2d 756, 763 (S.C. 2009).

Forum failed to establish evidence sufficient to submit this claim to a jury because Petitioners did not convert Forum's alleged property to the exclusion of Forum's rights. In other

words, there was no evidence showing Forum lost access to or the ability to utilize the information or "property" that it claims Petitioners converted. Thus, the trial court correctly granted Petitioners' directed verdict motion. The Court of Appeals erred in reversing this ruling and in not specifically addressing these undisputed facts and issues of law related to this issue.

5. THE TRIAL COURT'S PROPERLY APPLIED ITS DISCRETION IN AWARDING ATTORNEY'S FEES.

The Court of Appeals did not specifically address the issue of attorney's fees because it reversed the trial court's ruling on directed verdict. However, if this Court reverses the Court of Appeals Opinion, the trial court's award of attorneys' fees should be reinstated or this issue should be sent back to the Court of Appeals to address.

As noted above, this issue should be reviewed on an abuse of discretion standard. The trial court was in the best position to determine whether Forum brought and pursued its trade secrets claim in bad faith, and the trial court was in the best position to make discretionary decisions related to who was the prevailing party under the contract claim. There are no errors of law that need to be corrected on these issues. These are discretionary decisions for the trial courts and the trial court's decisions on these issues should be affirmed and reinstated.

A. Bannon Was The Prevailing Party Under Forum's Contract Claim.

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

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

(R. p. 970; R. p. 43) (emphasis added). This language on its face contemplates mandatory prevailing party attorney's fees in any action that is in any way related to this document. Significantly, Forum's first witness at trial was its attorney, David Wyatt, who drafted this document. Mr. Wyatt clearly testified that the intent of the document was for the prevailing party to be awarded attorneys' fees and costs. Forum's own attorney (who was called as a witness and waived the attorney-client privilege) admitted that if Bannon prevailed related to Forum's contract claim that he should be awarded his fees and costs. (R. p. 87, lines 14-25). Specifically, Mr. Wyatt testified to the following in response to being shown the attorneys' fees provision in the document he drafted:

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

(R. p. 87, lines 19-25).

Because the trial court entered a directed verdict ruling that Forum failed to establish sufficient evidence of the required elements of its breach of contract claim, the trial court properly ruled that Bannon was the prevailing party on this claim and properly awarded Bannon his attorneys' fees and costs. (R. p. 22).

It is important to note that Forum failed to meet its burden of proof on the contract claim on multiple grounds, most significantly because the claim was barred by the Statute of Frauds, as its own attorney witness admitted at trial. In South Carolina, the law is clear that where a party

prevails based on a Statute of Frauds defense, the prevailing party is entitled to an award of attorneys' fees under the challenged contract. Fici v. Koon, 372 S.C. 341, 642 S.E.2d 602, 606 (2007) ("The Statute of Frauds does not affect the validity of the attorneys' fee provision but is simply a defense to conveyance. The Statute of Frauds is an affirmative defense. As with any affirmative defense, the party successfully asserting it is a prevailing party and therefore entitled to attorneys' fees where provided by contract."). Bannon was successful on his Statute of Frauds defense (among others) and, as such, the trial court correctly awarded Bannon's attorneys' fees and costs. (R. p. 23).

Significantly, the trial court also ruled that even assuming the parties signed the Employment Agreement, something Forum adamantly contended, Forum failed to prove that Bannon actually breached the contract because (as explained in Section 2 above) the restricted periods in the contract expired long before the alleged misconduct occurred. Thus, under this basis for directed verdict, the trial court ruled that even if Bannon signed the Employment Agreement, Forum still failed to prove any breach of that Agreement. In addition, as explained in Section 2 above, the trial court correctly ruled that Forum failed to prove the causation element of its contract claim. These were independent reasons supporting directed verdict and the issuance of prevailing party attorney's fees to Bannon.

Furthermore, Forum must be judicially estopped from now arguing that no contract existed and that there can be no prevailing party fees awarded. Forum claimed for almost five years that Bannon signed the contract and breached the contract. Forum sought its attorney's fees as a remedy from the initiation of the lawsuit through the trial of this case. (R. p. 40). Mr. Stritt testified as Forum's Rule 30 corporate representative in discovery and confirmed that he was "absolutely seeking his fees" against Petitioners in this case. (R. p. 1950). Forum put Bannon through the

hardships of litigation during this entire time period forcing him to defend himself, to prove he did not sign the alleged contract and to prove he did not breach the alleged contract. Forum must be estopped from so dramatically shifting its position on attorneys' fees after it lost on this claim at trial, and then attempting to claim that no contract existed for the purposes of prevailing party attorneys' fees.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." See Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629, 631–32 (2004). The following elements are relevant in determining whether judicial estoppel applies: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. Id. Here all the factors of judicial estoppel are present.

The first two elements of judicial estoppel are clearly established as discussed above. Regarding the third element, Forum has been successful in advancing this contract claim by being permitted to pursue this claim against Bannon for almost five years. Forum used the Employment Agreement to obtain an *ex parte* temporary restraining order and to defeat motions for summary judgment. (R. p. 4; 34-40, 991-995; 1043).

Regarding the fourth element, Forum clearly attempted to mislead the trial court and the Court of Appeals to avoid the repercussions of the mandatory prevailing party fee provision in its own document. Forum took a position that is contrary to the testimony of its own attorney and first

witness at trial, David Wyatt, who clearly confirmed that Bannon would be entitled to his fees under the language of the document Mr. Wyatt drafted.

Finally, regarding the fifth element, Forum's positions are totally inconsistent – its Verified Complaint says there is a contract and it is seeking fees under that contract. Now, after losing at trial, Forum contends there was no meeting of the minds and no contract. Therefore, judicial estoppel applies in this case and Forum's arguments are barred.

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

B. The Trial Court Had Discretion To Rule And Properly Ruled That Forum Pursued Its Trade Secret Claim In Bad Faith.

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

Forum has previously attempted to challenge the trial court's ruling by claiming that the words "bad" or "faith" do not appear in the directed verdict arguments or in the trial court's directed verdict ruling. However, Forum has ignored the fact that the issue of bad faith was not specifically before the trial court until after the trade secret claim was dismissed and Petitioners moved for attorney's fees under the Act. Petitioners directly raised the issue of bad faith under the

Act after the trial court granted a directed verdict. (R. pp. 689, line 21-p. 690, line 4). Accordingly, Forum's prior argument is without any merit.

Second, Forum has improperly relied on Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC, 713 S.E.2d 650 (S.C. Ct. App. 2011) for the proposition that bad faith cannot be found following the denial of a summary judgment motion. Forum is again mistaken in its analysis. The analysis in Southeastern pertained to frivolity sanctions under Rule 11, not bad faith under the Act. Id. 654. Further, even if the standard in Southeastern applied here (which it does not), the procedural posture of the case at bar differs substantially from Southeastern. Here, the judge that heard Petitioners' motion for summary judgment retired before ruling on said motion. (R. 558-559). Thereafter, a second judge denied Petitioners' motion and provided no explanation for the denial. Id. A third judge, Judge Bentley Price, presided over the trial in this case. As such, in the case at bar, no pre-trial findings or rulings were made that precluded the trial court's finding that Forum pursued this claim in bad faith.

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

Significantly, the clear legislative intent of the Act was to provide the trial court (not the judges hearing motions well before trial and before the close of discovery) with the discretion to make a bad faith determination, similar to the determination the trial court would have been required to make if Forum had prevailed and sought exemplary damages under the Act. "The SCTSA provides that 'the court may award reasonable attorney's fees to the prevailing party' if '(1) a claim of misappropriation is made in bad faith, (2) a motion to terminate an injunction is

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

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

The trial court's finding of bad faith was supported by the evidence (or Forum's complete lack thereof) and was not an abuse of discretion. Forum litigated this case for approximately five years. During that time, Forum never produced any valid evidence of proximately caused damages, never identified information that could possibly rise to the level of a trade secret, never established that its information was "misappropriated" as defined in the Act, and shockingly never asked even one client why they moved with Bannon to AssuredPartners. (R. p. 610, line 6-p. 611 line 22). Tellingly, not one client for which Forum was seeking damages was called as a witness in Forum's case in chief at trial. There was absolutely no evidence presented to suggest that

Bannon ever had possession of or misappropriated any of Forum's alleged trade secrets, but even more egregious was Forum's pursuit of this claim against AssuredPartners, which never received any of Forum's alleged trade secret information. Forum's own witness at trial, Mr. Labin, confirmed Forum's bad faith by testifying that the clients owned the information in question, not Forum. Forum wasted the trial court's time, Petitioners' time, and caused Petitioners to incur hundreds of thousands of dollars litigating a completely baseless trade secrets claim.

The trial court correctly ruled against Forum on every conceivable issue with respect to its trade secret claim. (R. p. 22). It is hard to envision circumstances that would present a more-clear case of bad faith under the Act than this case. Forum's willfully persisted in the prosecution of this invalid claim and made no reasonable attempt to prove the elements of its claim because none existed. The overwhelming evidence at trial showed that Forum's pursuit of this claim was entirely baseless and without color. To reverse the trial court's ruling under these facts would essentially destroy the legislative intent designed to give the trial court discretion to award the defendant attorneys' fees and to deter the pursuit of these claims in bad faith. Therefore, the trial court's ruling that Forum pursued its claim under the Act in bad faith was within its discretion to make and should be upheld or this issue should be remanded to the Court of Appeals to specifically address.

6. THE TRIAL COURT PROPERLY APPLIED ITS DISCRETION AND DENIED FORUM'S MOTION FOR RECUSAL.

The trial court properly denied the motion for recusal Forum made after two full days of trial. The Court of Appeals did not specifically address whether the trial court properly denied this motion in the Opinion. As explained above, this issue should be reviewed on an abuse of discretion standard. "Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." Patel v. Patel, 359 S.C. 515, 599 S.E.2d 114,

118 (2004) (citation omitted); Simpson v. Simpson, 377 S.C. 519, 524, 660 S.E.2d 274, 276 (Ct. App. 2008). Appellate courts are to "accord great weight" to the trial court's "assurance of his own impartiality." Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535, 545 (2014). Petitioners request that this Court address this issue to the extent it deems necessary or remand this issue back to the Court of Appeals.

Forum moved to recuse the trial court on the morning of the third day of trial, following two full days of trial testimony, when Forum knew its case was going terribly. (R. pp. 465-478). There was no valid basis for this motion. The entire substance of Forum's argument was and is that the trial judge should have recused himself after two days of trial testimony because the trial judge realized he knew a "potential" witnesses when the witness showed up to the courtroom, pursuant to Forum's subpoena. At that time, the Judge realized he knew the potential witness (Mack Ward) from over 17 years prior when they were in college at Wofford together. The trial judge immediately announced the relationship to all counsel and the case continued on – no objection being made (and thus waived). Forum even consented to the trial judge saying hello to Mr. Ward during the break. It wasn't until the following day that Forum complained.

Importantly, Mr. Ward was not a material witness at trial. Indeed, although Forum subpoenaed Mr. Ward to appear at trial, Forum never actually called Mr. Ward to testify, and instead released him from his subpoena during the second day of trial and ***prior*** to its motion for recusal the following day. (R. p. 474, line 14-p. 475, line 4; p. 478, lines 20-25). Forum did not and has not presented any evidence to remotely suggest that the trial court was biased because he went to college with a "potential" witness who was never called to testify at trial. The trial court properly denied Forum's motion and its ruling should be affirmed.

Forum's motion was flawed for multiple reasons. First, Forum waived its motion for recusal by agreeing to the trial judge saying hello to Mr. Ward (R. p. 469, lines 4-6), releasing Mr. Ward from his subpoena prior to calling him as a witness (R. p. 474, line 14-p. 475 line 4), calling other witnesses after the college relationship became known (Id), and then waiting until the following day, the third day of trial, to make its motion for recusal (R. p. 466). See Duplan Corp v. Milliken, 400 F. Supp 497, 510 (D.S.C. 1975) ("Timeliness is essential to any recusal motion. To be timely, a recusal motion must be made at counsel's first opportunity after discovery of the disqualifying facts.").

Forum apparently understood that its failure to ever call Mr. Ward as a witness was fatal to its claim that he was a material witness in the case. So, in making its motion for recusal the following day, Forum's counsel claimed that he did not call Mr. Ward to testify after learning that the trial judge knew him from college. (R. p. 475, lines 5-19). Forum cannot be permitted to choose not to call Mr. Ward on this alleged basis, call other witnesses and see how their testimony goes, and then wait until the following day to make its motion for recusal. This was not remotely timely and definitely not the "first opportunity." Duplan Corp, 400 F. Supp at 510. If Forum had time to consider whether to call Mr. Ward the second day of trial, it had time to consider a motion to recuse the judge at that time and failed to do so.

Notably, Laurie Winston testified at the end of day two of trial and made several admissions that were fatal to Forum's claims, primarily related to Forum's ability to easily put extra protections on information in its systems that it considered to be a trade secret but that were never utilized, the availability of the information in question through sources outside of Forum (such as the insurance carrier), and related to Forum taking steps to disrupt the clients access to their insurance information in retaliation for the clients deciding to change agents. (R. pp. 407-441).

This damaging testimony was more likely than not the reason Forum decided to proceed with the motion for recusal the next day, which was the third day of trial. But its true reasons are not relevant given that the motion was untimely.[5]

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

The evidence in this case did not remotely satisfy the requirements of this judicial cannon. With regard to the third degree of relationship element, attending college together and not seeing someone for over 17 years is not a "third degree of relationship." See § 10.2-2.11 Rule 2.11, Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.11 (2021-2022 ed.)("Third degree of relationship includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece."). None of the other elements of this cannon are relevant considering this first element was not met, but the other elements were also not remotely satisfied as discussed below.

[5] Forum's desperation and improper motives were further exposed in its arguments to the trial court. During its motion for recusal to the trial judge, Forum attacked the integrity of the judiciary and compared the judge's limited connection to an old college acquaintance to the allegations of judicial misconduct in the "Murdaugh Case." (R. p. 473, lines 6-23). The trial court noted the complete frivolity of this comparison and properly admonished Forum's counsel on the record after the conclusion of the trial for making this comment. (R. pp. 688-689).

Regarding the party or the officer, director, or trustee of a party element, Mr. Ward is not a party in this case and is not an officer, director, or trustee of a party in this case. Forum has attempted to contend that Mr. Ward is a "Vice President" at AssuredPartners and that this title should carry some significance. The evidence at trial clearly established that most insurance producers, like Mr. Ward, carry the title "Vice President," but that this title does not carry with it any corporate authority. (R. pp. 261-262). Rather this title is provided to insurance producers in recognition of their experience in the industry and for marketing purposes. Id. In response to Forum's post-trial motions, Mr. Ward and his wife Michelle provided affidavits to the trial court disputing many of Forum's post trial claims and explaining that Mr. Ward is a commission based employee in AssuredPartners' Greenville, South Carolina office and that he is not an officer, manager, trustee, or director of AssuredPartners. (R. p. 1933). But none of this information was before the trial court when Forum's made their initial motion because Mr. Ward was never called to testify.

Regarding the individual being a material witness in the proceeding, that element was not met given that Mr. Ward was never called by Forum to testify and was released from his subpoena the day before Forum's motion for recusal. Forum clearly did not consider Mr. Ward to be a material witness by choosing not to call him to testify.

None of the judicial cannons for disqualification were met and Forum failed to provide any evidence to justify a recusal. The law is clear that "The party seeking disqualification must do more than merely allege bias on the judge's behalf; the party must present some evidence of judicial prejudice or bias." Simpson v. Simpson, 377 S.C. at 524, 660 S.E.2d at 277 (internal citations omitted). In applying Canon 3 (E)(1), this Court has stated that the movant or petitioner "must show some evidence of the bias or prejudice of the judge." Lyvers v. Lyvers, 280 S.C. 361, 367,

312 S.E.2d 590, 594 (Ct. App. 1984) (internal quotations and citations omitted). "When an appellant offers no evidence to support his claim of partiality, the trial judge is correct to deny a Motion for Recusal." Simpson, 660 S.E.2d at 277 (internal citations omitted). "When disqualification is not required, the Code states, "A judge shall hear and decide matters assigned to the judge...." Id., citing Canon 3B(1) of the Code of Judicial Conduct, Rule 501, SCACR.

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

> Johnston's wife's ex-husband was a fraternity brother of the judge 40 years ago; Infinger spent the night at the judge's lake house 30 years ago after both attended the wedding of another Haynsworth shareholder who is not affiliated with this case; the judge's son and Johnston's son were fraternity brothers in college 14 years ago, went to Europe together 13 years ago, and stayed in contact thereafter; the judge and his son accepted an invitation to go fishing with Johnston's brother; the judge officiated at Rosen's wedding in 2007, and the Rosen family provided him with accommodations at Fripp Island for the wedding; Rosen's father, a surgeon, performed a medical procedure on the judge; Rosen's parents once lived in Bamberg, South Carolina, but the judge did not see them socially; and the judge has been a member of a social club that holds an annual white tie dance for approximately ten years, and in 2009, Johnston was invited to join the club.

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

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

When analyzed against the requirements of the judicial cannons and the cases cited above, Forum's position becomes clearly baseless. Adopting Forum's position in this case would not only change the law and the judicial cannons, but would effectively grind the judicial system to a halt, particularly in smaller communities where the judges, attorneys, and litigants frequently know one another and given the likelihood that a judge may have a "potential" witness in a trial that he or she knew from some period in his or her history of education. There is no evidence anywhere in this record of either bias or improper rulings and the trial judge's assurances to the contrary should be given significant weight. (R. pp. 468-470). The reality is that Forum completely failed to establish its claims and, as its case was going down in flames, attempted to use its recusal motion as an ejection button. The trial court correctly denied Forum's motion for recusal and motion for a new trial. There was also no evidence of prejudice to Forum related to the denial of this motion given the clear fact that it failed to submit sufficient evidence to establish several elements of its claims. Accordingly, Petitioners respectfully request that this Court affirm the trial court or remand this issue to be specifically addressed by the Court of Appeals.

CONCLUSION

Forum's claims were properly dismissed by the trial court at directed verdict. The Court of Appeals erred in reversing the trial court and in failing to address other important issues in this case. Accordingly, Petitioners respectfully request that this Court reverse the Court of Appeals and affirm the trial court. Petitioners request that this Court address the other issues not addressed by the Court of Appeals, or to the extent this Court deems necessary, remand those issues back to the Court of Appeals for further ruling.

Respectfully Submitted,

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