

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
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.

APPENDIX

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S.C. SUPREME COURT

July 3, 2025

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Respondents.

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE TRIAL COURT ERRED GRANTING DIRECTED VERDICT TO RESPONDENTS.**
 - A. DID THE TRIAL COURT’S DIRECTED VERDICT ON APPELLANT’S CONTRACT CLAIM RELY ON LEGAL ERROR AND DISPUTED FACTS?**
 - B. DID THE TRIAL COURT’S DIRECTED VERDICT OF NO FIDUCIARY DUTY BY RESPONDENT BANNON RELY ON LEGAL ERROR?**
 - C. DID THE TRIAL COURT’S DIRECTED VERDICT ON APPELLANT’S TRADE SECRET CLAIM RELY ON LEGAL ERROR AND DISPUTED FACTS?**
 - D. DID THE TRIAL COURT’S DIRECTED VERDICT ON APPELLANT’S CONVERSION CLAIM RELY ON LEGAL ERROR AND DISPUTED FACTS?**
- II. WHETHER THE TRIAL COURT ERRED IN AWARDING ATTORNEYS FEES AND COSTS TO RESPONDENTS.**
- III. WHETHER THE TRIAL COURT ERRED IN NOT RECUSING ITSELF FOR EXTRAJUDICIAL BIAS FAVORING A RESPONDENT.**

STATEMENT OF THE CASE

Forum Benefits, LLC (“Forum Benefits”) is an insurance broker of health, life, and disability insurance policies. (R. ____). Forum Benefits utilizes 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. ____). Forum Benefits then applies 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. ____). Forum Benefits restricted access to Employee Navigator and the SharePoint server to certain personnel via login credentials. (R. ____).

Brian Bannon (“Bannon”) began employment with Forum Benefits in 2009 as a full-time sales representative. (R. ____). Bannon signed and delivered a written employment agreement with Forum Benefits that required, among other things, 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. ____). 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. ____).

On October 15, 2016, Bannon began employment as a Senior Vice President of Assured Partners, NL (“Assured Partners”), another insurance broker and direct competitor of Forum Benefits. (R. ____). Yet for four weeks following that date he continued to hold himself out as Forum Benefits’ sales representative, hiding his employment with Assured Partners from Forum Benefits. (R. ____). During that four (4) week overlap, Bannon secretly obtained and forwarded Employee Navigator login credentials for Forum Benefits’ clients to Assured Partners. (R. ____). Evidently knowing his actions were wrong, Bannon forwarded those credentials to Assured

Partners with his personal email account. (R. ____). Bannon also 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. ____). During that four (4) week overlap, Assured Partners repeatedly urged its employees to expedite copying Forum Benefits' trade secrets before Forum Benefits discovered what they were doing. (R. ____).

On December 1, 2016, Forum Benefits sued Bannon and Assured Partners (collectively, "Respondents"), alleging among other things misappropriation of trade secrets, breach of contract, conversion, and breach of fiduciary duty. (R. ____). A jury trial commenced on October 11, 2021. (R. ____).

Testimony and exhibits were provided that 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 clients, and all three of those clients 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. ____).

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. ____).

During trial, Forum Benefits moved for the trial judge to recuse himself, based on conduct by the trial judge with Mack Ward, an Assured Partners' principal, in the courtroom during a break. The motion was denied. (R. ____). Instead, the trial judge granted an oral motion for directed verdict

for Respondents on all causes of action. (R. ____). 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. ____).

On October 25, 2021, Forum Benefits filed a Motion for New Trial. (R. ____). Respondents filed a Response in Opposition to Forum Benefits' Motion for a New Trial on November 1, 2021. (R. ____).

On October 25, 2021, Forum Benefits filed a Response to Respondents' oral motions for attorneys' fees. Respondents replied on November 1, 2021. (R. ____). On November 4, 2021, Respondents' counsel filed an affidavit regarding attorneys' fees. (R. ____).

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. ____). 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. (R. ____).

On November 16, 2021, Forum Benefits filed a Reply in Support of Its Motion for a New Trial. (R. ____).

On December 29, 2021, Forum Benefits filed a Supplemental Response to Respondents' Motions for Attorneys' Fees. (R. ____).

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 Brian Stritt ("Stritt"), describing their observations of the trial judge's extrajudicial conduct with Mack Ward in the courtroom. (R. ____).

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. ____). This February 1, 2022, Order is a verbatim copy of the unsolicited proposed Order that Respondents had filed and sent to chambers on November 9, 2021. (R. ____).

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

STANDARD OF REVIEW

A. Directed Verdict

When reviewing the trial court's decision on a motion for directed verdict, the Court applies the same standard of review as the trial court. "When considering a motion for a directed verdict, the [trial] court must 'view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and [must] deny the motion when either the evidence yields more than one inference or its inference is in doubt.'" *Turner v. Med. Univ. of S.C.*, 430 S.C. 569, 582, 846 S.E.2d 1, 7 (Ct. App. 2020) (quoting *Estate of Carr ex rel. Bolton v. Circle S Enters., Inc.*, 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008)). "In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence." *Wright v. Craft*, 372 S.C. 1, 22, 640 S.E.2d 486, 498 (Ct. App. 2006) (citation omitted). When reviewing an order granting a directed verdict motion the Court does not have the "authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Id.* An order granting a directed verdict must be reversed "when there is no evidence to support the ruling or when the ruling is controlled by an error of law." *Estate of Carr*, 379 S.C. at 39, 664 S.E.2d at 86.

B. Award of Attorneys' Fees

Under South Carolina law, an award of attorneys' fees must be reversed if the circuit court abused its discretion in issuing the award. *EFCO Corp. v. Renaissance on Charleston Harbor*,

LLC, 370 S.C. 612, 621, 635 S.E.2d 922, 926 (Ct. App. 2006). The trial court abuses its discretion in awarding attorneys' fees when the award 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, 598 (1997).

C. Disqualification of the Trial Judge

Under Canon 3(E)(1)(a) of Rule 501, SCACR, a trial judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. *See Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004); *Davis v. Parkview Apartments*, 409 S.C. 266, 284, 762 S.E.2d 535, 545 (2014). A party seeking disqualification must show some evidence of bias or prejudice. *See Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996). If there is evidence of judicial bias or prejudice, a trial judge's failure to disqualify himself should be reversed on appeal. *See Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 433 S.E.2d 856 (1993).

ARGUMENTS

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

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

The February 1, 2022 Order directed a verdict in favor of Bannon on Forum Benefits' breach of contract claim, ruling as a matter of law, *inter alia*, that (1) Forum Benefits failed to prove the existence of a signed contract to satisfy the Statute of Frauds and (2) Forum Benefits failed to prove that there was a meeting of the minds on the essential terms of the alleged contract. (R. __). The rulings are legally erroneous and improperly invaded the province of the jury.

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

Respondents argued, and the trial court agreed, that Forum Benefits' failure to produce a signed employment agreement prevented Forum Benefits from satisfying the Statute of Frauds as

a matter of law. (R. ____). This ruling incorrectly applies the Statute of Frauds by ignoring substantial, corroborating evidence that Bannon did, in fact, sign an employment agreement with Forum Benefits.

Evidence sufficient to satisfy the Statute of Frauds is not limited exclusively to production of a signed agreement. Courts in other jurisdictions have regularly recognized the lost memorandum exception to the Statute of Frauds and 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); *Gipson v. Mattox*, 2006 U.S. Dist. LEXIS 86207 (S.D. Ala. 2006). In *Kaufman*, the court explained that the “clear and convincing” standard “does not mean that it must be established beyond a reasonable doubt, but that the evidence must not be vague, ambiguous, or contradictory, and must come from a credible source. It does not have to be undisputed or uncontradicted.” *Kaufman*, 540 S.W.3d at 813.

In *Gipson*, the court recognized, “That no written agreement has been produced today does not require a conclusion that no such document ever existed. If a written agreement previously existed, but was lost, destroyed or purloined, then defendant can introduce evidence to that effect in order to satisfy the Statute of Frauds.” *Gipson*, at *37; *see, also, McInnis v. Lind*, 108 P.3d 578, 582 n.2 (Or. App. 2005) (observing many exceptions to the statute of frauds’ prohibition on parol evidence to support an agreement, including where a writing is lost or is in the possession of an adverse party); *Latino Food Marketers, LLC v. Ole Mexican Foods, Inc.*, 2003 WL 23220142, *5 (W.D. Wis. Aug. 20, 2003) (“if the parties did indeed form a contract that met the requirements of the statutes of frauds, the contract is enforceable even if the writing is lost or destroyed”); *Connecticut Bank & Trust Co. v. Wilcox*, 518 A.2d 928, 931 (Conn.1986) (“the loss or destruction of a memorandum does not deprive it of effect under the Statute of Frauds,” where the writing can

be proven by secondary evidence).

Comment (a) of section 137 of the *Restatement (Second) of Contracts* echoes 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 the requirements 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 S.C. App. Unpub. LEXIS 395, *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. Bannon began working for Forum Benefits in Charleston in 2009, (R. __), and David Wyatt (“Wyatt”) testified that Brian Stritt engaged him in 2009 to prepare an employment agreement for a new employee that would be hired in Charleston. (R. __). Stritt testified that Ex. 137 is a blank employment agreement prepared by Wyatt, (R. __); that Ex. 163 is a completed employment agreement signed by Bannon’s co-employee Chris Whatley on May 18, 2009, (R. __); and that Ex. 163 is substantially identical to the completed employment agreement signed by Bannon. (R. __). Stritt further testified that Bannon signed the employment agreement when Stritt delivered the first paycheck to Bannon on June 1, 2009, (R. __); that Stritt placed the signed employment agreement in Bannon’s

employment file, (R. __); and that Stritt only discovered that the signed employment agreement was missing—along with Bannon’s entire employment file—shortly after Stritt learned that Bannon had been hired by Assured Partners. (R. __). 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. These are not matters of law for the trial court to decide, but instead are disputed questions of fact for the jury. By granting a directed verdict based on the Statute of Frauds, the trial court made credibility decisions and weighed material evidence, a job to be performed by the jury.

The evidence regarding the existence of a signed employment agreement created several factual disputes for the jury to resolve. *Kumpf v. United Tel. Co. of the Carolinas*, 311 S.C. 533, 429 S.E.2d 869 (Ct. App. 1993) (holding that “a trial court should submit to the jury the issue of the existence of a contract when its existence is questioned and the evidence is either conflicting or admits of more than one inference.”). 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.

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

The February 1, 2022, Order asserts that as a matter of law “[Forum Benefits] failed to prove that there was a meeting of the minds on the essential terms of the alleged contract.” (R. __). This ruling ignores the evidence introduced at trial that created disputed facts for the jury to decide regarding the essential terms in Bannon’s employment agreement and his agreement to those terms.

The evidence noted above, such as that in Section I(A)(1), shows that the trial court erred. This evidence created disputed questions of fact for the jury to decide, and the trial court’s

determination that Forum Benefits “failed to prove” these disputed questions of fact improperly invaded the province of the jury and constitutes legal error.

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

The directed verdict ruling that the alleged breaches of contract occurred after the restrictive covenants had expired refers to the contract “restrictions relating to the disclosure of confidential information and solicitation of customers,” which had a two-year post-employment duration. (R. __). 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. (R. __).

David Wyatt and Brian Stritt provided testimony, corroborated by Exhibits 137 (R. __) and 163 (R. __), 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. __). Paragraph 12(a) of the employment agreement specifically acknowledges 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. __). Paragraphs 12(b)-(c) incorporate the definition of “trade secrets” provided in the S.C. CODE ANN. § 39-8-10, *et seq.* (R. __). Paragraphs 12(d)-(e) provide specific examples of Forum Benefits’ trade secrets, including many of the items Bannon downloaded and shared with Assured Partners. (R. __). 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. __) (emphasis added).

The clear and unambiguous language of the employment agreement prohibits 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 is not limited in duration and are 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.

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

The directed verdict ruling that "Forum Benefits failed to establish the required elements of a restrictive covenant agreement which must be strictly construed against the employer under South Carolina law" misstates the law and impermissibly decides disputed questions of fact. (R. __).

The proposition that "a restrictive covenant agreement ... must be strictly construed against the employer under South Carolina law" is a jumbled misstatement of the law. Every agreement includes "restrictive covenants" of one sort or another, but there is no jurisprudence in South

Carolina, or elsewhere, holding that every provision of every agreement with an employer must be strictly construed against the employer.

Instead, as stated in *Rental Uniform Service of Florence, Inc. v. Dudley*, “Restrictive 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, the Supreme Court enumerated the required elements for a restrictive covenant not to compete—these required elements only apply to restrictive covenants not to compete. *Id.*

Contracts require an offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Valuable consideration may consist of “some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.” *Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998). Forum Benefits introduced evidence that Bannon breached the restrictive covenant in the employment agreement that prohibited Bannon from disclosing Forum Benefits’ trade secrets. Wyatt’s testimony, Stritt’s testimony, and Exhibit 163 all provide corroborating evidence of the essential terms in the “offer” of employment by Forum Benefits to Bannon. (R. ____). One of the essential terms in the offer is the covenant not to disclose Forum Benefits’ trade secrets, as described in paragraph 12 of the employment agreement (R. ____), and quoted above in Section I(A)(3), and this covenant is unlimited in duration, as permitted by S.C. CODE ANN. § 39-8-30(D). Stritt’s testimony that Bannon signed the employment agreement when Stritt delivered the first paycheck to Bannon on

June 1, 2009, provides evidence that Bannon “accepted” the employment agreement and received “valuable consideration” for the employment agreement. (R. ____).

The holding in *Milliken & Co. v. Morin*, 399 S.C. 23, 39, 731 S.E.2d 288, 296 (2012) is instructive on this issue. The South Carolina Supreme 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.” *Id.* at 39, 731 S.E.2d 296. “[T]he scope of the restriction is determined using ordinary principles of contract law.” *Id.* at 32–33, 731 S.E.2d at 293.

Forum Benefits provided substantial, corroborated evidence of the required elements of an enforceable contract. To the extent Respondents disputed this evidence, disputed questions of fact are for the jury to decide, and the trial court’s determination that Forum Benefits “failed to establish” these disputed questions of fact improperly invaded the province of the jury and constitutes legal error. Moreover, the trial court’s suggestion that additional elements are required or that the contract is to be strictly construed against Forum Benefits is error as a matter of law.

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

The February 1, 2022 Order directed a verdict in favor of Bannon on Forum Benefits’ breach of fiduciary duty claim. (R. ____). In the oral directed verdict ruling, the trial court declared as a matter of law that an independent contractor cannot owe a fiduciary duty. (R. ____). The February 1, 2022 Order 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. ____). This ruling ignored substantial evidence presented at trial of the confidential and fiduciary relationship that existed between Bannon and Forum Benefits from when Bannon was first hired by Forum Benefits in June 2009, until Bannon stopped representing Forum Benefits as a sales representative in November

2016.

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) (citation omitted); *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987).

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).

Steele v. Victory Sav. Bank, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988).

Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency. *See Berry v. Goodyear Tire and 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.

Forum Benefits hired Bannon in 2009 as a full-time employee to represent Forum Benefits

as a sales representative to prospective clients. (R. ____). When Bannon decided to pursue a career as a fireman in 2013, Bannon transitioned to an independent contractor and continued to represent Forum Benefits as a sale representative to existing and prospective clients. (R. ____). As shown in Exhibit 1 and acknowledged by Bannon, Bannon profusely thanked Stritt for allowing him to continue to represent Forum Benefits as an independent contractor, and Bannon assured Stritt that he would continue to grow the business for Forum Benefits. (R. ____). The preceding evidence establishes that Bannon continuously served as Forum Benefits' sales agent from 2009 until 2016 and, therefore, owed Forum Benefits a fiduciary duty not to compete with Forum Benefits concerning the subject matter of his agency.

During the four (4) week overlap when Bannon was simultaneously employed by Assured Partners and represented Forum Benefits as a sales representative, Bannon admitted that he secretly obtained and forwarded the Employee Navigator login credentials for Forum Benefits' clients to Assured Partners. (R. ____). At the same time, Bannon downloaded approximately 2,000 files containing Forum Benefits' trade secrets from Forum Benefits' SharePoint server using the login credentials he had received years earlier when he was Forum Benefits' employee. (R. ____). As shown in Exhibits 8, 10-12, and 45, employees of Assured Partners repeatedly exhorted everyone involved to expedite copying Forum Benefits' trade secrets before Forum Benefits discovered what they were doing. (R. ____). Bannon's actions to download and share Forum Benefits' trade secrets with a direct competitor demonstrate that he knew what he was doing was wrong and violated his fiduciary duty to Forum Benefits.

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

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

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

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

A “trade secret” is any information that has value and is not readily publicly available. S.C. CODE ANN. § 39-8-20(5). The information may exist in any form, including as a formula, a compilation, a method of doing business, a technique, a product, a system, a process, a procedure, or a programming code. *Id.* The information does not have to be complicated, technical, or difficult to understand, and may merely be “a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy.” *Id.* Moreover, the information may simply be a compilation of publicly available data because “[t]he collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.” *Id.*

Forum Benefits designed the build-out of each Employee Navigator account, and Forum Benefits collected, organized, and compiled the employee census data and insurance plan information that populated each account. (R. ____). Winston described in detail the information contained each Employee Navigator account and Forum Benefits’ Sharepoint server. (R. ____). Specifically, she described Forum Benefits’ proprietary design and build-out of Employee Navigator accounts for each client, as well as Forum Benefits’ collection, organization, and

compilation of employee census data and insurance plan information included in this proprietary database. (R. ____). She also described in detail Forum Benefits' proprietary formulas included in the renewal spreadsheets for each client stored on Forum Benefits' SharePoint server. (R. ____). Forum Benefits' design and compilation of data in the Employee Navigator accounts and proprietary formulas in renewal spreadsheets stored on Forum Benefits' SharePoint server exactly match several of the forms of "information" included in the definition for a "trade secret" provided by the S.C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(a).

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

The evidence in the Record (*e.g.*, Forum Benefits' Exhibits 8, 10-12, and 45) provides additional, uncontroverted evidence of the value of Forum Benefits' trade secrets to Assured Partners. (R. ____). Respondents acted urgently to surreptitiously take Forum Benefits' trade secrets before Forum Benefits learned that Bannon was working for Assured Partners and terminated further access. (R. ____). Brady even testified, consistent with his November 8, 2016 email, that he could not build an Employee Navigator account for a client without login credentials that would allow him to download, copy, and take screenshots of Forum Benefits' Employee Navigator account for that client. (R. ____). All of this uncontroverted evidence demonstrates the substantial economic value of Forum Benefits' trade secrets to Respondents.

Forum Benefits’ compilation of data in the Employee Navigator accounts is not excluded from trade secret protection merely because the compiled data comprises seemingly simple facts collected from clients or insurance providers. S.C. CODE ANN. § 39-8-20(5). Forum Benefits designed the build-out of each Employee Navigator account, and that Forum Benefits collected, organized, and compiled the employee census data and insurance plan information that populated each account. (R. ____). A trade secret may be a “compilation” of information—“a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy.” *Id.* While clients and insurance providers certainly had knowledge of individual items in Forum Benefits’ compilation, “[t]he collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.” *Id.*

The February 1, 2022 Order fails to address, distinguish, or even acknowledge any of the preceding evidence that demonstrates Forum Benefits’ proprietary data compilations and formulas constitute protectible trade secrets as defined by the S.C. Trade Secrets Act. “When ruling on a motion for a directed verdict, the trial court must view all evidence and all reasonable inferences in the light most favorable to the nonmoving party, and if the evidence is susceptible of more than one reasonable inference, the trial court should submit the case to the jury.” *Roddey v. Wal-Mart Stores East, LP*, 415 S.C. 580, 588, 784 S.E.2d 670, 675 (2016) (citation omitted). By ignoring all of this evidence, the trial court both ignored the clear language of the S.C. Trade Secrets Act and imposed its own view of the evidence, each of which constitutes error to the Forum Benefits’ prejudice.

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

The directed verdict ruling that Forum Benefits failed to prove reasonable efforts to protect Forum Benefits' trade secrets ignores substantial evidence of the proven effectiveness of Forum Benefits' protective efforts and impermissibly decides disputed questions of fact.

The S.C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(a)(ii), limits a "trade secret" to information that "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Forum Benefits not only introduced evidence of reasonable efforts to protect Forum Benefits' trade secrets, but the evidence also established that Forum Benefits' protective efforts had proven effective at preventing Mack Ward from misappropriating Forum Benefits' trade secrets several months earlier. (R. __).

Forum Benefits limited access to Forum Benefits' trade secrets to only authorized personnel with valid login credentials. (R. __). Forum Benefits only provided login credentials to Forum Benefits' proprietary database of information in the Employee Navigator accounts to account managers assigned to those accounts and, on a case-by-case basis, a single client representative if a client requested the ability to generate reports from the Employee Navigator account associated with that client. (R. __). Forum Benefits did not provide sales people, like Mack Ward and Bannon, with any login credentials to any of Forum Benefits' Employee Navigator accounts. (R. __). Forum Benefits only provided login credentials to Forum Benefits' SharePoint server to Forum Benefits' full-time employees. (R. __). When an individual ceases to be an employee of Forum Benefits, all access to these computer systems is cut off. (R. __).

Forum Benefits' protective efforts had proven effective at protecting Forum Benefits' trade secrets several months earlier in 2016. For several years prior, Forum Benefits had been providing benefits administration services to clients of AssureSouth, owned by Ben Taylor and Mack Ward.

In February 2016, Ben Taylor and Mack Ward notified Forum Benefits that they were selling their AssureSouth business to Assured Partners. (R. ____). Forum Benefits agreed to continue providing services to clients of AssureSouth during a two-month transition period. (R. ____). However, as shown in Forum Benefits' Exhibit 550, Forum Benefits also notified Ben Taylor and Mack Ward that Forum Benefits would not allow third-party access to Forum Benefits' proprietary systems. (R. ____). Forum Benefits then terminated all client access to any Employee Navigator accounts. (R. ____). As a result, only Forum Benefits' employees and account managers continued to have active login credentials to any of Forum Benefits' proprietary systems, and Forum Benefits' protective efforts proved effective at preventing Mack Ward and/or Assured Partners from misappropriating Forum Benefits' trade secrets. (R. ____).

From this experience, Assured Partners and Mack Ward discovered a loophole that would avoid Forum Benefits' protective efforts and allow access to Forum Benefits' proprietary systems without Forum Benefits' knowledge—use a client's login credentials to access Forum Benefits' proprietary systems to download, copy, and take screenshots of the Employee Navigator accounts for those clients. Assured Partners hired Bannon on October 15, 2016, and as shown in Forum Benefits' Exhibits 8, 10-12, and 45, Bannon immediately exploited this loophole by obtaining and forwarding client login credentials to Assured Partners. (R. ____).

Bannon hid his new employment status from Forum Benefits, allowing Assured Partners to surreptitiously download, copy, and take screenshots of the Employee Navigator accounts for those clients without Forum Benefits' knowledge. (R. ____). During the same time, Bannon downloaded approximately 2,000 files from Forum Benefits' SharePoint server using the login credentials he had received when he was Forum Benefits' employee. (R. ____).

Forum Benefits' protective efforts had previously proven effective at preventing Assured

Partners and Mack Ward from accessing Forum Benefits' trade secrets, and their subsequent discovery of a loophole around those protections does not change that. Respondents in fact exploited a loophole in Forum Benefits' protections, but the law requires "efforts that are reasonable under the circumstances," not foolproof measures.

Forum Benefits provided substantial evidence of protective efforts and the demonstrated effectiveness of those protective efforts at preventing unauthorized access to Forum Benefits' trade secrets. "The trial court must deny a motion for a directed verdict . . . if the evidence yields more than one reasonable inference or its inference is in doubt." *RFT Mgmt. Co., LLC v. Tinsley & Adams LLP*, 399 S.C. 322, 333, 732 S.E.2d 166, 171 (2012). The trial court erred by ignoring the evidence and adopting Respondents' view of the evidence, to Forum Benefits' prejudice.

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

The directed verdict ruling that Forum Benefits failed to prove that Respondents obtained Forum Benefits' trade secrets by improper means ignored the law and uncontroverted evidence presented at trial and impermissibly decided disputed questions of fact.

The S.C. Trade Secrets Act defines "improper means" to include, *inter alia*, theft, breach or inducement of a breach of a duty imposed by contract, and espionage through electronic or other means. S.C. CODE ANN. § 39-8-20(1). The evidence admitted at trial demonstrates that Respondents committed several of the enumerated actions that fall within the definition of "improper means" to obtain Forum Benefits' trade secrets.

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

The February 1, 2022 Order fails to address, distinguish, or even acknowledge any of the preceding evidence that demonstrates that Respondents committed several of the enumerated actions that fall within the definition of “improper means” to obtain Forum Benefits’ trade secrets. By ignoring all of this evidence, the trial court ignored the clear language of the S.C. Trade Secrets Act and imposed its own view of the evidence, each of which constitutes error to the Forum Benefits’ prejudice.

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

The directed verdict ruling that Forum Benefits failed to prove that Respondents misappropriated, wrongfully disclosed, or wrongfully used Forum Benefits’ trade secrets ignores the law and uncontroverted evidence presented at trial and impermissibly decides disputed questions of fact.

The S.C. Trade Secrets Act defines “misappropriation” of a trade secret as:

- (a) acquisition of a trade secret of another by a person by improper means;
- (b) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (c) disclosure or use of a trade secret of another without express or implied consent by a person who:
 - (i) used improper means to acquire knowledge of the trade secret.

S.C. CODE ANN. § 39-8-20(2).

The evidence admitted at trial and described herein—such as that in Section I(B)—demonstrates that Respondents committed several of the enumerated actions that fall within the definition of “improper means.” Those included theft, breach, or inducement of a breach of a duty

imposed by contract, and espionage through electronic or other means to obtain Forum Benefits' trade secrets. S.C. CODE ANN. § 39-8-20(1). As a result, Respondents' actions constitute a "misappropriation" of Forum Benefits' trade secrets under section 39-8-20(2)(a)—*i.e.*, Respondents acquired Forum Benefits' trade secrets by improper means.

No evidence exists that Forum Benefits ever expressly or impliedly consented to Respondents' disclosure or use of Forum Benefits' trade secrets. Therefore, Respondents' disclosure and use of Forum Benefits' trade secrets was "wrongful," and Respondents' actions also constitute a misappropriation of Forum Benefits' trade secrets under S.C. CODE ANN. § 39-8-20(2)(c)(i)—*i.e.*, Respondents used improper means to acquire knowledge of Forum Benefits' trade secrets and then disclosed and used Forum Benefits' trade secrets without Forum Benefits' express or implied consent.

By concluding that Forum Benefits failed to prove that Respondents misappropriated, wrongfully disclosed, or wrongfully used Forum Benefits' trade secrets, the trial court ignored the clear language of the S.C. Trade Secrets Act and imposed its own view of the evidence, each of which constitutes error to Forum Benefits' prejudice.

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

The directed verdict ruling that Forum Benefits failed to prove that damages were proximately caused by Respondents' misappropriation of Forum Benefits' trade secrets ignores substantial evidence and impermissibly decides disputed questions of fact.

Multiple witnesses provided testimony that supports the reasonable inference that Respondents' misappropriation of Forum Benefits' trade secrets proximately caused damages to Forum Benefits. Multiple contemporaneously generated emails (*e.g.*, Forum Benefits' Exhibits 8, 10-12, and 45, (R. ___)) confirm that Assured Partners' acquisition of Forum Benefits' trade secrets

from the Employee Navigator accounts was critical to convincing clients of a seamless transition from Forum Benefits to Assured Partners. (R. ____).

Christie Holderness, the District Manager for St. Andrews Public Service District, testified that continuous access to Forum Benefits' trade secrets compiled in the Employee Navigator account was an important factor in her decision to transfer St. Andrews Public Service District's business from Forum Benefits to Assured Partners. (R. ____).

Nine clients associated with Bannon actively used Forum Benefits' compilation of data stored in the respective Employee Navigator accounts. (R. ____). Assured Partners saved substantial time by being able to download, copy, and take screenshots of Forum Benefits' trade secrets instead of having to design, build-out, collect, organize, and compile the same database of information. (R. ____).

Bannon provided Employee Navigator client login credentials for three of those clients—Carolina Youth Development, Premier Logistics, and St. Andrews Public Service District. (R. ____). All three of those clients transferred their business from Forum Benefits to Assured Partners. None of the other six clients that actively used Forum Benefits' compilation of data stored in the respective Employee Navigator accounts transferred their business to Assured Partners. (R. ____). This 100% statistical correlation between Respondents' misappropriation of Forum Benefits' trade secrets and transfer of business to Assured Partners provides probative evidence of damages proximately caused by Respondents' actions.

Testimony and contemporaneous emails (*e.g.*, Forum Benefits' Exhibits 8, 10-12, and 45, (R. ____)) provide uncontroverted evidence of the urgent efforts Respondents exercised to surreptitiously obtain Forum Benefits' trade secrets before Forum Benefits learned that Bannon was working for Assured Partners and terminated further access. (R. ____). Brady even testified,

consistent with his November 8, 2016 email, that he could not build an Employee Navigator account for a client without login credentials that would allow him to download, copy, and take screenshots of Forum Benefits' Employee Navigator account for that client. (R. ____).

All of this uncontroverted evidence supports the reasonable inference that damages were proximately caused by Respondents' misappropriation of Forum Benefits' trade secrets. As a result, the trial court's ruling as a matter of law that Forum Benefits failed to prove that damages were proximately caused by Respondents' actions impermissibly decided disputed questions of fact for the jury to resolve and constitutes legal error that prejudiced Forum Benefits.

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

The directed verdict ruling that Forum Benefits' damages were speculative directly contradicts the trial court's evidentiary rulings, ignores competent evidence of Forum Benefits' damages, and impermissibly decides disputed questions of fact.

Brian Stritt testified regarding Forum Benefits' damages. Respondents repeatedly objected to Stritt's testimony as being opinion testimony and speculative. (R. ____). The trial court at first sustained Respondents' objections. *Id.* 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. ____).

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' former owner and current managing director. (R. ____).

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.

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

The directed verdict ruling that Forum Benefits introduced no evidence showing Assured Partners ever had access to or used any of Forum Benefits' trade secrets ignores substantial evidence presented at trial by Respondents' own employees and constitutes reversible error.

The evidence admitted at trial—such as that described herein in Section I(B), Section I(C), and Section I(C)(5)—demonstrates that Assured Partners obtained client log-in credentials and copied and used Forum Benefits' trade secrets resident in the Employee Navigator accounts for several clients. (R. __).

Furthermore, Forum Benefits presented testimony from Nolan Zielinski, who conducted a forensic analysis of Forum Benefits' SharePoint server. (R. __). Forum Benefits' Exhibit 16 is a Log File Report generated by Zielinski that lists 2,107 files stored on Forum Benefits' SharePoint server that were accessed using Bannon's SharePoint user account with Forum Benefits. (R. __). As shown in the Log File Report, Bannon accessed 979 files from Forum Benefits' SharePoint server after October 15, 2016, when he was a Senior V.P. of Assured Partners. (R. __).

Forum Benefits also presented expert testimony from Michael Scholz who forensically examined Forum Benefits' desktop computer that was used by Bannon in 2016. (R. __). Scholz

testified that the desktop computer included a “Palmetto Benefits Management” folder.¹ (R. ____). Forum Benefits’ Exhibit 77 is a printout generated by Scholz that lists each file included in the Palmetto Benefits Management folder, and as shown in Forum Benefits’ Exhibit 77, this folder included approximately 1,000 files having the same file names as files stored on Forum Benefits’ SharePoint server and included in the Log File Report generated by Zielinski. (R. ____). Scholz also generated a LNK File Report, (R. ____), and Scholz testified that the LNK File Report indicates that on October 30, 2016, an identical Palmetto Benefits Management folder was accessed on an external storage device connected to the desktop. (R. ____).

The testimony of Zielinski and Scholz, combined with Bannon’s testimony, provides evidence that Bannon did indeed copy and then transfer a substantial number of files from Forum Benefits’ SharePoint sever to an external storage device—all while Bannon was a Senior V.P. of Assured Partners. (R. ____).

Bannon’s own testimony provides additional evidence that he intentionally tried to transfer files from Forum Benefits’ SharePoint server to Assured Partners. Specifically, as shown in Forum Benefits’ Exhibit 64, on November 18, 2016, Michelle Fralix,² an account manager for Assured Partners assigned to Bannon, asked Bannon for a medical plan summary for Premier Logistics—one of Forum Benefits’ clients that Bannon was recruiting to switch to Assured Partners. (R. ____). Bannon responded, “I’ve scoured my files but I wasn’t able to pull what I wanted off Forum’s website.” (R. ____). On November 30, 2016, Bannon notified Fralix that Bannon could no longer access Forum Benefits’ proprietary renewal algorithms for Alpha Genesis—another client that Bannon was recruiting to switch to Assured Partners—stating, “My hard drive broke an [sic] I no

¹“Palmetto Benefits Management” was Forum Benefits’ previous corporate name. (R. ____).

² Michelle Fralix also went by the name Amy Fralix and testified at trial as Michelle Coffield. (R. ____).

longer have renewal info. for these guys.” (R. __).

The trial court’s ruling that Forum Benefits introduced no evidence that Assured Partners obtained and used Forum Benefits’ trade secrets directly contradicts and cannot be reconciled with the undisputed testimony and documents provided by two separate forensic experts and Respondents’ own employees. This erroneous factual conclusion, clothed as a legal ruling, invaded the province of the jury and constitutes prejudicial error to Forum Benefits.

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

The words “bad” or “faith” appear nowhere in any of Respondents’ directed verdict arguments or cited authorities, nor in any of the trial court’s oral directed verdict rulings. Nonetheless, the February 1, 2022 Order—authored entirely by Respondents—concludes as a matter of law that Forum Benefits pursued a trade secret claim in bad faith. This ruling contradicts controlling precedent and constitutes legal error. (R. __).

Respondents filed three separate motions seeking summary judgment on Forum Benefits’ trade secret claims. (R. __). Respondents withdrew one of the motions, but Forum Benefits filed full responses to the other two motions. (R. __). Two different Circuit Court judges each conducted a full hearing that was fully briefed, and each judge denied Respondents’ motion for summary judgment. (R. __).

The trial commenced October 11, 2021, and Forum Benefits rested its case after three days of testimony. After the trial court granted Respondents a directed verdict on Forum Benefits’ trade secret claims, Respondents moved for an award of attorneys’ fees based on alleged bad faith litigation. (R. __).

“[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. Atl. Coast Builders*

& Contrs., LLC, 394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011) (citation omitted). In *Southeastern*, as in the present case, two different judges denied the defendants’ motion for summary judgment. As in the present case, the trial judge granted a directed verdict in favor of the defendants after the plaintiffs had presented their case and rested. As in the present case, the defendants sought an award of attorneys’ fees for frivolous litigation. Following the Supreme Court’s controlling authority in *Hanahan*, the Court of Appeals affirmed the denial of attorneys’ fees because the plaintiffs’ claims had survived summary judgment.

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*, Forum Benefits’ trade secret claims were not frivolous as a matter of law. Accordingly, the Court’s ruling that Forum Benefits pursued a trade secret claim in bad faith ignores controlling South Carolina authority and is wrong as a matter of law.

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

The trial court’s February 1, 2022 Order includes multiple rulings pertinent to Forum Benefits’ conversion claim that are legally erroneous, and its factual conclusions improperly invaded the province of the jury.

1. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits could not prove the elements of a conversion against Bannon

The directed verdict ruling that Forum Benefits could not prove the elements of conversion against Bannon incorrectly applies the law to uncontroverted evidence presented at trial to decide disputed questions of fact.

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., 385 S.C. 452, 465, 684 S.E.2d 756, 763 (2009). The S.C. Trade Secrets Act provides the owner of a trade secret with the exclusive right to determine who can know, disclose, or use the trade secret. S.C. CODE ANN. § 39-8-20. Forum Benefits did not authorize Bannon to obtain Forum Benefits' trade secrets from the Employee Navigator accounts or from Forum Benefits' SharePoint server. Nonetheless, Bannon secretly obtained and forwarded the Employee Navigator client login credentials for Forum Benefits' clients to Assured Partners, and Jim Brady used those login credentials to access, download, and copy Forum Benefits' trade secrets from the Employee Navigator accounts. (R. ____). Bannon himself testified that he downloaded approximately 2,000 files containing Forum Benefits' trade secrets from Forum Benefits' SharePoint server using the login credentials he had received as a Forum Benefits' employee. (R. ____).

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.

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

2. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits Failed to Prove that Bannon Converted Any Property of Forum Benefits to the Exclusion of Forum Benefits' Rights as Forum Benefits Always Retained Access and Rights to the Information at Issue

The directed verdict ruling that Forum Benefits failed to prove that Bannon converted any property of Forum Benefits to the exclusion of Forum Benefits' rights as Forum Benefits always

retained access and rights to the information at issue incorrectly applies the law to uncontroverted evidence presented at trial to decide disputed questions of fact.

The S.C. Trade Secrets Act provides the owner of a trade secret with the exclusive right to determine who can know, disclose, or use the trade secret. S.C. CODE ANN. § 39-8-20. 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. Accordingly, the Court's directed verdict ruling is legally wrong and impermissibly decides disputed questions of fact.

3. The Trial Court Erred in Determining as a Matter of Law that Intangible Property Cannot Form the Basis for a Conversion Claim

The directed verdict ruling that intangible property cannot form the basis for a conversion claim is wrong as a matter of law.

Conversion is the “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, supra*. South Carolina courts have held that intangible rights are normally not the proper subject for a conversion claim. *Id.* The *Gignilliat* court explained, “An 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 omitted) (emphasis added) (footnote omitted)). Ultimately, the South Carolina Supreme 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.*

In *Integrated Direct Marketing, LLC v. Drew May & Merkle, Inc.*, 2016 Ark. 281, 495 S.W.3d 73 (2016), 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?” *Id.* 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* is persuasive authority, consistent with the South Carolina Supreme 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 indistinguishable from 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. ____). 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. ____). 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." *Id.* at 763.

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.

4. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits Failed to Prove Damages were Proximately Caused by Bannon's Conversion of Forum Benefits' Trade Secrets

The directed verdict ruling that Forum Benefits failed to prove that damages were proximately caused by Bannon's conversion of Forum Benefits' trade secrets ignores substantial evidence and impermissibly decides disputed questions of fact.

The evidence noted above, such as that in Section I(C)(1), supports the reasonable inference that Bannon's conversion of Forum Benefits' trade secrets proximately caused damages to Forum Benefits. Likewise, the "9-client/100% statistical correlation" evidence described in detail hereinabove in Section I(C)(5) likewise demonstrates the factual questions that should have prevented the trial court's ruling on this issue.

The evidence discussed above supports the reasonable inference that damages were proximately caused by Bannon's misappropriation of Forum Benefits' trade secrets. As a result, the Court's ruling as a matter of law that Forum Benefits failed to prove that damages were proximately caused by Bannon's actions impermissibly decided disputed questions of fact for the jury to resolve and constitutes legal error that prejudiced Forum Benefits.

II. The Trial Court erred in granting attorneys' fees and costs to the Respondents.

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

Respondents' first motion for attorneys' fees consisted of an oral motion—a single sentence in open court referencing the employment contract between Forum Benefits and Bannon—that the trial court granted before Respondents' attorney even finished vocalizing that single sentence.³ (R. ____).

Respondents' second motion for attorneys' fees, based the S.C. Trade Secrets Act, was four sentences, again enunciated in open court, again did not include any evidence for any of the factors (identified below) that a trial court is required to consider before awarding attorneys' fees, and again was instantaneously granted by the Court. (R. ____).

The trial court failed to require the provision of basic information needed to support an award of attorneys' fees, including which Respondent is seeking fees, the legal authority for the fee request, the amount of the fee request, and the six categories of information our jurisprudence identifies as needed to determine a reasonable fee award.

A. If By Contract

Respondents moved for an award of attorneys' fees based on a prevailing party clause in Bannon's employment contract with Forum Benefits. (R. ____). However, the trial judge had already ruled as a matter of law that there was no meeting of the minds to support a contract. (R. ____). And the trial court's February 1, 2022 Order similarly ruled as a matter of law that Forum

³The Court's instantaneous responses to Respondents' motions is significant and supportive of Forum Benefits' position that the trial judge should have recused himself for bias favoring Respondents.

Benefits failed to prove a meeting of the minds on the essential terms of the alleged contract. (R. ____). 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 the non-existent contract.

B. If By Statute

Forum Benefits' trade secret claim was not bad faith as a matter of law. As articulated above in Section I(C)(8), "[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*, 394 S.C. at 713 S.E.2d at 650 (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.

C. Whose Attorneys' Fees?

Respondents' muddled attorney fee request seems to have sought an award of attorneys' fees for both Respondents. (R. ____). If Respondents' motion was as to both Respondents, there is no evidence that Forum Benefits had any contract with Assured Partners. And there is no evidence that Bannon ever incurred any attorneys' fees whatsoever.

D. What Attorney Fees?

Respondents acknowledge that Bannon never incurred any fees and costs but nonetheless argue that Bannon should "recover" the fees and costs incurred by Assured Partners. (R. ____).

The attorneys' fee provision in the employment contract, which the trial court ruled does not exist, provides, "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. ____). However,

rather than providing any evidence that Bannon actually incurred any fees and costs, Respondents instead 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. ____). Respondents' arguments ignore controlling authority directly on point from the South Carolina Supreme Court.

In *Williamson v. Middleton*, 383 S.C. 490, 681 S.E.2d 867 (2009), the South Carolina Supreme Court answered the question of 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. *Id.* at 493. 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, finding that the employee might discuss a fee at the end of the case. *Id.* at 496. The Supreme 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.

E. Additional Deficiencies

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.

III. The denial of Forum Benefits’ motion to recuse prevented Forum Benefits from receiving a fair trial.

The trial judge (Judge Price) erred in refusing to disqualify himself pursuant to Canon 3(E)(1).

Canon 3(E)(1) states as follows:

- (1) A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where:
 - (a) the judge has a personal bias or prejudice concerning a party or a party’s lawyer, ...

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

While the trial judge’s assurance of his own impartiality is accorded great weight, “a judge’s impartiality might reasonably be questioned when his factual findings are not supported by the record.” *Ellis*, 315 S.C. at 285, 433 S.E.2d at 857. Given particular events with the trial judge that occurred during trial, there were multiple, legitimate, *bona fide* reasons to question the trial judge’s impartiality, and he should have recused himself.

The trial commenced on October 11, 2021. In their opening statement, Respondents identified an individual named Mack Ward—a Vice President of Assured Partners—as a trial witness. (R. ____). Mack Ward’s name was cited repeatedly during examinations of multiple witnesses throughout the second day of trial, all prior to the recess described in the next paragraph of this brief. (R. ____). The trial judge himself even mentioned his name. (R. ____).

On the afternoon of the second day of the trial, off the record during a recess with the jury not present, the trial judge entered the courtroom and asked counsel for both parties if he could

greet a person in the courtroom. The person whom the trial judge then proceeded to greet turned out to be Mack Ward—a Vice President of Assured Partners. Mack Ward had not been in the courtroom before that time. The interaction between the trial judge and Mack Ward was substantially more boisterous and affectionate than would be expected between mere acquaintances—the two engaged in mutual hugging, back slapping, and generally rowdy laughter. After this public display, the trial judge immediately went to the front of the bench, into the court reporter’s station, and announced to all present in the courtroom—which included Forum Benefits’ managing partner Brian Stritt—that he and Mack Ward knew each other from their days attending college at Wofford together and, if cell phones had existed then, neither would be in the position they are in now. (R. ____).

At no time then or thereafter did the trial judge offer any opportunity to the parties to address concern they might have as a result of this in-court display of relationship and affection between the trial judge and a principal for Assured Partners and/or questions they might have as to bias of the trial judge from that relationship and affection.

Before trial resumed on October 13, 2021, Forum Benefits made an oral motion for the trial judge to recuse himself from further participation in the trial based on the trial judge’s public displays of bias the previous day. (R. ____). The trial judge confirmed the comment about cell phones as being “my comment ... intended to be a self-deprecating joke about myself.” (R. ____). As reflected in the transcript of the proceedings, the trial judge said, “I had no idea why he would be here,” (R. ____), notwithstanding Respondents indicating in their opening statement that Mack Ward would be a witness, (R. ____), and Mr. Ward’s name being recited repeatedly during earlier testimony. (R. ____). The trial judge seemed to indicate during argument of the motion that at some

point the trial judge and Mack Ward went back into chambers to continue their reunion⁴, an event of which Forum Benefits was then-previously unaware, which the trial judge confirmed at the January 4, 2022 hearing on post-trial motions. (R. ____).

The trial judge also provided the unsolicited statements, “I don’t do Facebook” and “there’s nothing on Facebook that says I’m a judge.” (R. ____). A quick examination of Facebook® seems to contradict both of these statements. Specifically, someone named Bentley Price maintains a personal Facebook® account, is currently Facebook® friends with someone named Michelle Ward, which is the name of Mack Ward’s wife, and received and responded to Facebook® messages on October 19, 2021, that included photos of someone who appears to be the trial judge in a black robe and stating, “Happy birthday Judge. We love you!” This posting indicates that Facebook® users posted 19 comments, including a reply by a Facebook® account holder named Bentley Price of “Thank you everyone!!” (R. ____).

These Facebook® postings are significant because they directly contradict unsolicited statements made on the record by the trial judge six days earlier in response to Forum Benefits’ recusal motion – not only does the trial judge “do” Facebook® with his own Facebook® account, but also, less than a week after making those unsolicited statements, the trial judge received and responded to Facebook® postings that clearly identify him as a judge.

On October 25, 2021, Forum Benefits separately filed a Motion for a New Trial pursuant to Rule 59(a), SCRCp. (R. ____). Forum Benefits asserted that the trial judge’s reasonable appearance of bias, combined with multiple inconsistent rulings that consistently favored Respondents, demonstrated actual bias by the trial judge that prevented Forum Benefits from

⁴“And we went back and talked and discussed -- and I -- I’ll put on the record what we talked about.” (R. ____).

receiving a fair trial.

On January 4, 2022, the trial judge conducted a hearing on Forum Benefits’ Motion for a New Trial. Forum Benefits presented live testimony from Michelle Filler, Lisa Stritt, and Brian Stritt describing the trial judge’s extrajudicial conduct with Mack Ward in the courtroom that created a reasonable appearance of bias.⁵ (R. ____). After receiving arguments from all parties, the trial judge *sua sponte* described his relationship with Mack Ward for the record. (R. ____). However, the trial judge’s recollection of events differed from the record and omitted significant details. Specifically, the trial judge confirmed that he was college friends with Mack Ward and again did not dispute or refute the witnesses’ testimony describing his lively interaction with Mack Ward in the courtroom. However, the trial judge pointedly denied making the statement about cell phones and instead recalled, not that the statement was his own self-deprecating joke about himself as he had asserted on October 13th, but that he had merely repeated a remark that Mack Ward had said to him. (R. ____). The trial judge also did not mention that he had also met alone privately with Mack Ward in chambers without anyone from the Forum Benefits being present, until asked to confirm that this *ex parte* meeting actually took place. (R. ____).

A. The Court’s Actions Created an Appearance of Bias

Forum Benefits’ basis for recusal—that the trial judge displayed and revealed a personal bias toward Mack Ward, a Vice President of Assured Partners—squarely fits Canon 3(E)(1)(a). Moreover, the Commentary to Canon 3(E)(1) specifically states, “Under this rule, a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply.”

⁵ Prior to the hearing, Forum Benefits also filed declarations from Michelle Filler, Lisa Stritt, and Brian Stritt regarding their personal observations of the trial judge’s extrajudicial conduct with Mack Ward during trial. (R. ____).

Our jurisprudence requires evidence of judicial prejudice and of the existence of the judge's impartiality. As described above, the trial judge's public displays of bias directed toward Mack Ward provide concrete evidence by which "the judge's impartiality might reasonably be questioned."

Although not expressly addressed by the South Carolina Supreme Court, there is suggestion elsewhere that the bias that disqualifies a trial judge "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *See, e.g., Duplan Corp. v. Deering Milliken, Inc.*, 400 F.Supp. 497, 522 (D.S.C. 1975) (citation and internal quotation marks omitted). But, even under that narrower standard, the trial judge in the case at bar should have disqualified himself—his bias stemmed from his relationship with Mack Ward, a relationship that was extrajudicial.

Pursuant to Canon 3(E), the trial judge should have disqualified himself.

B. The Court's Inconsistent Rulings Provide Evidence of Actual Bias

Forum Benefits' concerns about the appearance of bias are bolstered by the trial court's multiple rulings that were inconsistent in rationale but consistently in Respondents' favor.

For example, and as discussed above, the trial court granted a directed verdict for Bannon on the contract claim, stating, "There was, obviously, no meeting of the minds. (R. ____). Despite ruling as a matter of law, in disregard of the evidence, that no contract existed to be breached, the trial court nonetheless granted Respondents' motion for an award of attorneys' fees based on a clause in what the trial court had deemed to be a non-existent contract. (R. ____). Moreover, the trial court erroneously ruled that it would award Bannon his attorneys' fees before hearing any response from Forum Benefits opposing the motion. (R. ____). The attorneys' fees awarded by the trial court go toward Assured Partners—of whom Mack Ward is a Vice President. The rulings were inconsistent, but both rulings were consistent to this extent: they favored Respondents.

For another example, during Forum Benefits' direct examination of Bannon, Forum Benefits authenticated and offered into evidence Exhibit 9—Bannon's Responses to Requests for Admission under Rule 36. (R. ____). This exhibit was particularly relevant to impeaching Bannon because Bannon had just provided testimony based on documents admitted into evidence that directly refuted many of the admission requests that Bannon had denied. (R. ____). Respondents objected to the admissibility of Bannon's Responses to Admission Requests (Forum Benefits' Exhibit 9) as being a pleading: "Your Honor, I object, it's a pleading." (R. ____). The trial court sustained the objection: "I'm – I'm not going to allow it in. He's correct, it's a pleading." (R. ____).

Responses to Requests for Admission are not pleadings. Rule 7(a), SCRCF, identifies the documents that constitute pleadings (*i.e.*, a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, and a third-party answer), and responses to Requests for Admission are not one of the identified documents.

During Respondents' cross-examination of Brian Stritt, Respondents sought to introduce Exhibit C to the Verified Complaint as an exhibit. (R. ____). Forum Benefits objected to the exhibit as a pleading pursuant to Rule 43. (R. ____). *See* Rule 43(g), SCRCF ("The pleadings shall not be submitted to the jury for its deliberations."). The trial judge overruled Forum Benefits' objection: "I'll allow it." (R. ____). The trial court's ruling that Bannon's Responses to Admission Requests are inadmissible pleadings, when they are not even pleadings, cannot be reconciled with the Court's subsequent improper ruling allowing Respondents to admit into evidence what is indisputably a pleading, but the two rulings together are further probative evidence of the Court's bias.

Another inconsistent ruling by the trial court involved direct evidence of Forum Benefits' damages. Forum Benefits sought to elicit factual testimony from Brian Stritt based on his own

personal knowledge of the dollar amount of annual commissions associated with clients that switched from Forum Benefits to Assured Partners and the resulting damages to Forum Benefits. (R. ____). At the time of the events giving rise to this litigation, Stritt was the sole owner of Forum Benefits and had been negotiating with a buyer for over a year to purchase Stritt's company. After learning that Bannon had left Forum Benefits, the buyer required Stritt to identify the precise dollar amount of annual commissions associated with clients for whom Bannon had been the sales person, and the buyer then reduced the previously negotiated purchase price by \$1.5M based on the information that Stritt provided to the buyer. (R. ____).

Respondents objected to this factual testimony from Brian Stritt, along with the contemporaneously-generated exhibits that documented both the annual commissions and the \$1.5M reduction in the purchase price negotiated in an arms-length transaction. (R. ____). In initially sustaining Respondents' objections, the trial court ruled that Stritt's testimony lacked foundation and, although Stritt's testimony was based on and entirely consistent with the information that Stritt had provided to the buyer in 2016, the trial court reasoned that allowing Stritt to testify regarding commissions would enable Stritt to provide false evidence of Forum Benefits' damages. (R. ____). According to the trial court, Forum Benefits could only provide evidence of damages through a financial expert. (R. ____).

After a lunch break, the trial judge announced that, after consultation with an unidentified Business Court judge, he would allow Stritt to testify about the precise dollar amount of annual commissions associated with clients that switched from Forum Benefits to Assured Partners. (R. ____). However, the trial court would not allow into evidence any contemporaneously-generated exhibits to corroborate Stritt's testimony, nor would the trial court allow Stritt to testify about the \$1.5M reduction in the purchase price that had been based solely on the anticipated lost

commissions associated with clients taken from Forum Benefits by Assured Partners. (R. ____). The trial court's rulings that Stritt could provide first-hand, factual testimony about annual commissions, while excluding first-hand, factual testimony about the negotiated \$1.5M decrease in the purchase price, were contrary to Rules 601-603 of the South Carolina Rules of Evidence, prejudiced Forum Benefits, and constitute errors as a matter of law.

Forum Benefits respectfully asserts that the motion to recuse was based on the reasonable appearance of bias, and Forum Benefits' concerns about the appearance of bias are supported by a consistent string of inconsistent rulings that continually favored Respondents. The trial court's denial of Forum Benefits' motion to recuse prevented Forum Benefits from receiving a fair trial.

CONCLUSION

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

s/Timothy D. St. Clair

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2022-000231

Forum Benefits, LLC,

Appellant,

v.

Brian Bannon and Assured Partners, NL,

Respondents.

PROOF OF SERVICE

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Court of Common Pleas

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Aug 26 2022

SC Court of Appeals

Forum Benefits, LLC,

Appellant,

v.

Brian Bannon and Assured Partners, NL,

Respondents.

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE TRIAL COURT ERRED GRANTING DIRECTED VERDICT TO RESPONDENTS.**
 - A. DID THE TRIAL COURT’S DIRECTED VERDICT ON APPELLANT’S CONTRACT CLAIM RELY ON LEGAL ERROR AND DISPUTED FACTS?**
 - B. DID THE TRIAL COURT’S DIRECTED VERDICT OF NO FIDUCIARY DUTY BY RESPONDENT BANNON RELY ON LEGAL ERROR?**
 - C. DID THE TRIAL COURT’S DIRECTED VERDICT ON APPELLANT’S TRADE SECRET CLAIM RELY ON LEGAL ERROR AND DISPUTED FACTS?**
 - D. DID THE TRIAL COURT’S DIRECTED VERDICT ON APPELLANT’S CONVERSION CLAIM RELY ON LEGAL ERROR AND DISPUTED FACTS?**
- II. WHETHER THE TRIAL COURT ERRED IN AWARDING ATTORNEYS FEES AND COSTS TO RESPONDENTS.**
- III. WHETHER THE TRIAL COURT ERRED IN NOT RECUSING ITSELF FOR EXTRAJUDICIAL BIAS FAVORING A RESPONDENT.**

STATEMENT OF THE CASE

Forum Benefits, LLC (“Forum Benefits”) is an insurance broker of health, life, and disability insurance policies. (Verified Complaint, ¶ 2). Forum Benefits utilizes 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. (Trial Transcript, pp. 96-97; 158; 338-341; 338-341; 360-368). Forum Benefits then applies 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. (Trial Transcript, pp. 338-341; 372-378). Forum Benefits restricted access to Employee Navigator and the SharePoint server to certain personnel via login credentials. (Trial Transcript, pp. 117-118; 369-371; 379).

Brian Bannon (“Bannon”) began employment with Forum Benefits in 2009 as a full-time sales representative. (Plaintiff’s Exhibit 137; Trial Transcript, pp. 39-54, 69; 479). Bannon signed and delivered a written employment agreement with Forum Benefits that required, among other things, 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. (Plaintiff’s Exhibit 137, pp. 2 -3 ¶ 12; Trial Transcript, pp 488-490). 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. (Trial Transcript, p. 199).

On October 15, 2016, Bannon began employment as a Senior Vice President of Assured Partners, NL (“Assured Partners”), another insurance broker and direct competitor of Forum Benefits. (Trial Transcript, pp. 152; 200). Yet for four weeks following that date he continued to hold himself out as Forum Benefits’ sales representative, hiding his employment with Assured

Partners from Forum Benefits. (Trial Transcript, pp. 212-213). During that four (4) week overlap, Bannon secretly obtained and forwarded Employee Navigator login credentials for Forum Benefits' clients to Assured Partners. (Plaintiff's Exhibit 10; Trial Transcript p. 160, 165-166; 170; 172-176; 229; 256-257). Evidently knowing his actions were wrong, Bannon forwarded those credentials to Assured Partners with his personal email account. (Trial Transcript, p. 160). Bannon also 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. (Trial Transcript, pp. 153-154; 177-178; 180). During that four (4) week overlap, Assured Partners repeatedly urged its employees to expedite copying Forum Benefits' trade secrets before Forum Benefits discovered what they were doing. (Trial Transcript, p. 170).

On December 1, 2016, Forum Benefits sued Bannon and Assured Partners (collectively, "Respondents"), alleging among other things misappropriation of trade secrets, breach of contract, conversion, and breach of fiduciary duty. (Verified Complaint). A jury trial commenced on October 11, 2021. (Trial Transcript, p. 1).

Testimony and exhibits were provided that 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 clients, and all three of those clients 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. (Trial Transcript, pp. 263-264; 430-432; 552-

555).

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. (Plaintiff's Exhibit 16; Trial Transcript, pp. 503-513; 517-543; 556-561).

During trial, Forum Benefits moved for the trial judge to recuse himself, based on conduct by the trial judge with Mack Ward, an Assured Partners' principal, in the courtroom during a break. The motion was denied. (Trial Transcript, p. 451, lines 4-6). Instead, the trial judge granted an oral motion for directed verdict for Respondents on all causes of action. (Trial Transcript, pp. 677-678). 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. (Trial Transcript, pp. 680-681).

On October 25, 2021, Forum Benefits filed a Motion for New Trial. (Plaintiff's Motion for New Trial). Respondents filed a Response in Opposition to Forum Benefits' Motion for a New Trial on November 1, 2021. (Defendants' Response in Opposition to Plaintiff's Motion for a New Trial).

On October 25, 2021, Forum Benefits filed a Response to Respondents' oral motions for attorneys' fees. (Plaintiff's Response to Defendants' Motions for Attorneys' Fees). Respondents replied on November 1, 2021. (Defendants' Reply in Support of Its Motion for Attorneys' Fees/Costs and the Court's Award of Fees/Costs). On November 4, 2021, Respondents' counsel filed an affidavit regarding attorneys' fees. (Affidavit of Jeffrey Lehrer for Attorneys' Fees and Costs).

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. (Proposed Order for Attorneys' Fees, Filed November 9, 2021). 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. (Plaintiff's Reply in Support of Motion for a New Trial).

On December 29, 2021, Forum Benefits filed a Supplemental Response to Respondents' Motions for Attorneys' Fees. (Plaintiff's Supplemental Response to Defendants' Motions for Attorneys' Fees).

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 Brian Stritt ("Stritt"), describing their observations of the trial judge's extrajudicial conduct with Mack Ward in the courtroom. (Hearing Transcript of January 4, 2022, pp. 6-35; Declaration of Brian Stritt, filed December 29, 2021; Declaration of Lisa Hollingsworth-Stritt, filed December 29, 2021; Declaration of Michelle Filler, filed December 29, 2021).

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. (Order Granting Defendants' Motion for Directed Verdict and Awarding Prevailing Party Attorneys' Fees and Costs to Defendants). This February 1, 2022, Order is a verbatim copy of the unsolicited proposed Order that Respondents had filed and sent to chambers on November 9, 2021. (Proposed Order for Attorneys' Fees, Filed November 9, 2021).

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

STANDARD OF REVIEW

A. Directed Verdict

When reviewing the trial court's decision on a motion for directed verdict, the Court applies the same standard of review as the trial court. "When considering a motion for a directed verdict, the [trial] court must 'view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and [must] deny the motion when either the evidence yields more than one inference or its inference is in doubt.'" *Turner v. Med. Univ. of S.C.*, 430 S.C. 569, 582, 846 S.E.2d 1, 7 (Ct. App. 2020) (quoting *Estate of Carr ex rel. Bolton v. Circle S Enters., Inc.*, 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008)). "In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence." *Wright v. Craft*, 372 S.C. 1, 22, 640 S.E.2d 486, 498 (Ct. App. 2006) (citation omitted). When reviewing an order granting a directed verdict motion the Court does not have the "authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Id.* An order granting a directed verdict must be reversed "when there is no evidence to support the ruling or when the ruling is controlled by an error of law." *Estate of Carr*, 379 S.C. at 39, 664 S.E.2d at 86.

B. Award of Attorneys' Fees

Under South Carolina law, an award of attorneys' fees must be reversed if the circuit court abused its discretion in issuing the award. *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 621, 635 S.E.2d 922, 926 (Ct. App. 2006). The trial court abuses its discretion in awarding attorneys' fees when the award 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, 598 (1997).

C. Disqualification of the Trial Judge

Under Canon 3(E)(1)(a) of Rule 501, SCACR, a trial judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. *See Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004); *Davis v. Parkview Apartments*, 409 S.C. 266, 284, 762 S.E.2d 535, 545 (2014). A party seeking disqualification must show some evidence of bias or prejudice. *See Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996). If there is evidence of judicial bias or prejudice, a trial judge's failure to disqualify himself should be reversed on appeal. *See Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 433 S.E.2d 856 (1993).

ARGUMENTS

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

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

The February 1, 2022 Order directed a verdict in favor of Bannon on Forum Benefits' breach of contract claim, ruling as a matter of law, *inter alia*, that (1) Forum Benefits failed to prove the existence of a signed contract to satisfy the Statute of Frauds and (2) Forum Benefits failed to prove that there was a meeting of the minds on the essential terms of the alleged contract. (Order Granting Defendants' Motion for Directed Verdict and Awarding Prevailing Party Attorneys' Fees and Costs to Defendants, p. 2). The rulings are legally erroneous and improperly invaded the province of the jury.

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

Respondents argued, and the trial court agreed, that Forum Benefits' failure to produce a signed employment agreement prevented Forum Benefits from satisfying the Statute of Frauds as a matter of law. (Trial Transcript, pp. 618-619; 626; 677; February 1, 2022 Order, p. 2, ¶ A(1)).

This ruling incorrectly applies the Statute of Frauds by ignoring substantial, corroborating evidence that Bannon did, in fact, sign an employment agreement with Forum Benefits.

Evidence sufficient to satisfy the Statute of Frauds is not limited exclusively to production of a signed agreement. Courts in other jurisdictions have regularly recognized the lost memorandum exception to the Statute of Frauds and 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); *Gipson v. Mattox*, 2006 U.S. Dist. LEXIS 86207 (S.D. Ala. 2006). In *Kaufman*, the court explained that the “clear and convincing” standard “does not mean that it must be established beyond a reasonable doubt, but that the evidence must not be vague, ambiguous, or contradictory, and must come from a credible source. It does not have to be undisputed or uncontradicted.” *Kaufman*, 540 S.W.3d at 813.

In *Gipson*, the court recognized, “That no written agreement has been produced today does not require a conclusion that no such document ever existed. If a written agreement previously existed, but was lost, destroyed or purloined, then defendant can introduce evidence to that effect in order to satisfy the Statute of Frauds.” *Gipson*, at *37; *see, also, McInnis v. Lind*, 108 P.3d 578, 582 n.2 (Or. App. 2005) (observing many exceptions to the statute of frauds’ prohibition on parol evidence to support an agreement, including where a writing is lost or is in the possession of an adverse party); *Latino Food Marketers, LLC v. Ole Mexican Foods, Inc.*, 2003 WL 23220142, *5 (W.D. Wis. Aug. 20, 2003) (“if the parties did indeed form a contract that met the requirements of the statutes of frauds, the contract is enforceable even if the writing is lost or destroyed”); *Connecticut Bank & Trust Co. v. Wilcox*, 518 A.2d 928, 931 (Conn.1986) (“the loss or destruction of a memorandum does not deprive it of effect under the Statute of Frauds,” where the writing can be proven by secondary evidence).

Comment (a) of section 137 of the *Restatement (Second) of Contracts* echoes 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 the requirements 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 S.C. App. Unpub. LEXIS 395, *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. Bannon began working for Forum Benefits in Charleston in 2009, (Trial Transcript, pp. 101, 112), and David Wyatt (“Wyatt”) testified that Brian Stritt engaged him in 2009 to prepare an employment agreement for a new employee that would be hired in Charleston. (Plaintiff’s Exhibit 137; Trial Transcript, pp. 39-54, 69; 487-488). Stritt testified that Ex. 137 is a blank employment agreement prepared by Wyatt (Plaintiff’s Exhibit 137; Trial Transcript, pp. 39-54, 69, 482-484); that Ex. 163 is a completed employment agreement signed by Bannon’s co-employee Chris Whatley on May 18, 2009 (Plaintiff’s Exhibit 163; Trial Transcript, pp. 480-482, 484-485); and that Ex. 163 is substantially identical to the completed employment agreement signed by Bannon (Trial Transcript, p. 485-487). Stritt further testified that Bannon signed the employment agreement when Stritt delivered

the first paycheck to Bannon on June 1, 2009 (Trial Transcript, pp. 488-490); that Stritt placed the signed employment agreement in Bannon’s employment file (Trial Transcript, pp. 489); and that Stritt only discovered that the signed employment agreement was missing—along with Bannon’s entire employment file—shortly after Stritt learned that Bannon had been hired by Assured Partners (Trial Transcript, pp. 489-490). 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. These are not matters of law for the trial court to decide, but instead are disputed questions of fact for the jury. By granting a directed verdict based on the Statute of Frauds, the trial court made credibility decisions and weighed material evidence, a job to be performed by the jury.

The evidence regarding the existence of a signed employment agreement created several factual disputes for the jury to resolve. *Kumpf v. United Tel. Co. of the Carolinas*, 311 S.C. 533, 429 S.E.2d 869 (Ct. App. 1993) (holding that “a trial court should submit to the jury the issue of the existence of a contract when its existence is questioned and the evidence is either conflicting or admits of more than one inference.”). 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.

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

The February 1, 2022, Order asserts that as a matter of law “[Forum Benefits] failed to prove that there was a meeting of the minds on the essential terms of the alleged contract.” (Order Granting Defendants’ Motion for Directed Verdict and Awarding Prevailing Party Attorneys’ Fees and Costs to Defendants, p. 2). This ruling ignores the evidence introduced at trial that created disputed facts for the jury to decide regarding the essential terms in Bannon’s employment

agreement and his agreement to those terms.

The evidence noted above, such as that in Section I(A)(1), shows that the trial court erred. This evidence created disputed questions of fact for the jury to decide, and the trial court's determination that Forum Benefits "failed to prove" these disputed questions of fact improperly invaded the province of the jury and constitutes legal error.

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

The directed verdict ruling that the alleged breaches of contract occurred after the restrictive covenants had expired refers to the contract "restrictions relating to the disclosure of confidential information and solicitation of customers," which had a two-year post-employment duration. (Plaintiff's Exhibit 137; Trial Transcript, p. 620; February 2, 2022 Order, p. 2). 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.

David Wyatt and Brian Stritt provided testimony, corroborated by Plaintiff's Exhibits 137 (Plaintiff's Exhibit 137) and 163 (Plaintiff's Exhibit 163), 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. (Plaintiff's Exhibit 137; Trial Transcript, pp. 39-54, 69). Paragraph 12(a) of the employment agreement specifically acknowledges 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." (Plaintiff's Exhibit 137, p. 2, ¶ 12(a)). Paragraphs 12(b)-(c) incorporate the definition of "trade secrets" provided in the S.C. CODE ANN. § 39-8-10, *et seq.* (Plaintiff's Exhibit 137, pp. 2-3, ¶¶ 12(b),(c)). Paragraphs 12(d)-(e) provide specific

examples of Forum Benefits' trade secrets, including many of the items Bannon downloaded and shared with Assured Partners. (Plaintiff's Exhibit 137, p. 3, ¶¶ 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].

(Plaintiff's Exhibit 137, p. 3, ¶ 12(f)) (emphasis added).

The clear and unambiguous language of the employment agreement prohibits 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 is not limited in duration and are 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.

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

The directed verdict ruling that "Forum Benefits failed to establish the required elements of a restrictive covenant agreement which must be strictly construed against the employer under

South Carolina law” misstates the law and impermissibly decides disputed questions of fact. (February 1, 2022 Order, p. 2).

The proposition that “a restrictive covenant agreement ... must be strictly construed against the employer under South Carolina law” is a jumbled misstatement of the law. Every agreement includes “restrictive covenants” of one sort or another, but there is no jurisprudence in South Carolina, or elsewhere, holding that every provision of every agreement with an employer must be strictly construed against the employer.

Instead, as stated in *Rental Uniform Service of Florence, Inc. v. Dudley*, “Restrictive 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, the Supreme Court enumerated the required elements for a restrictive covenant not to compete—these required elements only apply to restrictive covenants not to compete. *Id.*

Contracts require an offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Valuable consideration may consist of “some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.” *Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998). Forum Benefits introduced evidence that Bannon breached the restrictive covenant in the employment agreement that prohibited Bannon from disclosing Forum Benefits’ trade secrets. Wyatt’s testimony, Stritt’s testimony, and Plaintiff’s Exhibit 163 all provide corroborating evidence of the essential terms in

the “offer” of employment by Forum Benefits to Bannon. (Plaintiff’s Exhibits 137 and 163; Trial Transcript, pp. 39-54, 69). One of the essential terms in the offer is the covenant not to disclose Forum Benefits’ trade secrets, as described in paragraph 12 of the employment agreement (Plaintiff’s Exhibit 137, pp. 2-3), and quoted above in Section I(A)(3), and this covenant is unlimited in duration, as permitted by S.C. CODE ANN. § 39-8-30(D). Stritt’s testimony that Bannon signed the employment agreement when Stritt delivered the first paycheck to Bannon on June 1, 2009, provides evidence that Bannon “accepted” the employment agreement and received “valuable consideration” for the employment agreement. (Trial Transcript, p. 479).

The holding in *Milliken & Co. v. Morin*, 399 S.C. 23, 39, 731 S.E.2d 288, 296 (2012) is instructive on this issue. The South Carolina Supreme 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.” *Id.* at 39, 731 S.E.2d 296. “[T]he scope of the restriction is determined using ordinary principles of contract law.” *Id.* at 32–33, 731 S.E.2d at 293.

Forum Benefits provided substantial, corroborated evidence of the required elements of an enforceable contract. To the extent Respondents disputed this evidence, disputed questions of fact are for the jury to decide, and the trial court’s determination that Forum Benefits “failed to establish” these disputed questions of fact improperly invaded the province of the jury and constitutes legal error. Moreover, the trial court’s suggestion that additional elements are required or that the contract is to be strictly construed against Forum Benefits is error as a matter of law.

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

The February 1, 2022 Order directed a verdict in favor of Bannon on Forum Benefits’ breach of fiduciary duty claim. (February 1, 2022 Order, pp. 2-3). In the oral directed verdict ruling, the trial court declared as a matter of law that an independent contractor cannot owe a

fiduciary duty. (Trial Transcript, pp. 678). In the February 1, 2022 Order 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.” (February 1, 2022 Order, pp. 2-3). This ruling ignored substantial evidence presented at trial of the confidential and fiduciary relationship that existed between Bannon and Forum Benefits from when Bannon was first hired by Forum Benefits in June 2009, until Bannon stopped representing Forum Benefits as a sales representative in November 2016.

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) (citation omitted); *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987).

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).

Steele v. Victory Sav. Bank, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988).

Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency. *See Berry v. Goodyear Tire and 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.

Forum Benefits hired Bannon in 2009 as a full-time employee to represent Forum Benefits as a sales representative to prospective clients. (Plaintiff's Exhibit 137; Trial Transcript, pp. 39-54, 69; 479). When Bannon decided to pursue a career as a fireman in 2013, Bannon transitioned to an independent contractor and continued to represent Forum Benefits as a sale representative to existing and prospective clients. (Trial Transcript, pp. 199; 490-491). As shown in Plaintiff's Exhibit 1 and acknowledged by Bannon, Bannon profusely thanked Stritt for allowing him to continue to represent Forum Benefits as an independent contractor, and Bannon assured Stritt that he would continue to grow the business for Forum Benefits. (Plaintiff's Exhibit 1; Trial Transcript, p. 135; 490-491). The preceding evidence establishes that Bannon continuously served as Forum Benefits' sales agent from 2009 until 2016 and, therefore, owed Forum Benefits a fiduciary duty not to compete with Forum Benefits concerning the subject matter of his agency.

During the four (4) week overlap when Bannon was simultaneously employed by Assured Partners and represented Forum Benefits as a sales representative, Bannon admitted that he secretly obtained and forwarded the Employee Navigator login credentials for Forum Benefits' clients to Assured Partners. (Plaintiff's Exhibit 10; Trial Transcript p. 160, 165-166; 170; 172-176; 229; 256-257). At the same time, Bannon downloaded approximately 2,000 files containing Forum Benefits' trade secrets from Forum Benefits' SharePoint server using the login credentials he had received years earlier when he was Forum Benefits' employee. (Trial Transcript, pp. 117-

118; 177-178; 180). As shown in Plaintiff's Exhibits 8, 10-12, and 45, employees of Assured Partners repeatedly exhorted everyone involved to expedite copying Forum Benefits' trade secrets before Forum Benefits discovered what they were doing. (Trial Transcript, pp. 153-154; 168; 172-176; 426). Bannon's actions to download and share Forum Benefits' trade secrets with a direct competitor demonstrate that he knew what he was doing was wrong and violated his fiduciary duty to Forum Benefits.

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

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

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

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

A "trade secret" is any information that has value and is not readily publicly available. S.C. CODE ANN. § 39-8-20(5). The information may exist in any form, including as a formula, a compilation, a method of doing business, a technique, a product, a system, a process, a procedure, or a programming code. *Id.* The information does not have to be complicated, technical, or difficult to understand, and may merely be "a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy." *Id.*

Moreover, the information may simply be a compilation of publicly available data because “[t]he collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.” *Id.*

Forum Benefits designed the build-out of each Employee Navigator account, and Forum Benefits collected, organized, and compiled the employee census data and insurance plan information that populated each account. (Trial Transcript, pp. 155-156, 158; 336-337). Winston described in detail the information contained each Employee Navigator account and Forum Benefits’ Sharepoint server. Specifically, she described Forum Benefits’ proprietary design and build-out of Employee Navigator accounts for each client, as well as Forum Benefits’ collection, organization, and compilation of employee census data and insurance plan information included in this proprietary database. (Trial Transcript, pp. 338-341; 360-368; 372-378). She also described in detail Forum Benefits’ proprietary formulas included in the renewal spreadsheets for each client stored on Forum Benefits’ SharePoint server. (Trial Transcript, pp. 360-368; 372-378). Forum Benefits’ design and compilation of data in the Employee Navigator accounts and proprietary formulas in renewal spreadsheets stored on Forum Benefits’ SharePoint server exactly match several of the forms of “information” included in the definition for a “trade secret” provided by the S.C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(a).

Forum Benefits’ trade secrets took substantial time and effort to collect, organize, and compile and provided Forum Benefits with a competitive advantage in administering benefits for clients and negotiating rates with insurance providers. (Trial Transcript, pp. 338-341; 360-368; 372-378). Assured Partners saved that time, by downloading, copying, and taking screenshots of Forum Benefits’ trade secrets instead of having to design, build-out, collect, organize, and compile the same database of information. Competitive advantage and improved efficiency are precisely

the types of economic value described in the S. C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(b).

The evidence in the Record (*e.g.*, Plaintiff's Exhibits 8, 10-12, and 45) provides additional, uncontroverted evidence of the value of Forum Benefits' trade secrets to Assured Partners. (Trial Transcript, pp. 155-156; 168; 172-176; 426-429; 430-432). Respondents acted urgently to surreptitiously take Forum Benefits' trade secrets before Forum Benefits learned that Bannon was working for Assured Partners and terminated further access. (Trial Transcript, pp. 153-154; 229; 256-257). Brady even testified, consistent with his November 8, 2016 email, that he could not build an Employee Navigator account for a client without login credentials that would allow him to download, copy, and take screenshots of Forum Benefits' Employee Navigator account for that client. (Plaintiff's Exhibit 11; Trial Transcript, pp. 430-432). All of this uncontroverted evidence demonstrates the substantial economic value of Forum Benefits' trade secrets to Respondents.

Forum Benefits' compilation of data in the Employee Navigator accounts is not excluded from trade secret protection merely because the compiled data comprises seemingly simple facts collected from clients or insurance providers. S.C. CODE ANN. § 39-8-20(5). Forum Benefits designed the build-out of each Employee Navigator account, and that Forum Benefits collected, organized, and compiled the employee census data and insurance plan information that populated each account. (Trial Transcript, pp. 153-154, 158; 338-341; 360-368; 372-378). A trade secret may be a "compilation" of information—"a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy." *Id.* While clients and insurance providers certainly had knowledge of individual items in Forum Benefits'

compilation, “[t]he collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.” *Id.*

The February 1, 2022 Order fails to address, distinguish, or even acknowledge any of the preceding evidence that demonstrates Forum Benefits’ proprietary data compilations and formulas constitute protectible trade secrets as defined by the S.C. Trade Secrets Act. “When ruling on a motion for a directed verdict, the trial court must view all evidence and all reasonable inferences in the light most favorable to the nonmoving party, and if the evidence is susceptible of more than one reasonable inference, the trial court should submit the case to the jury.” *Roddey v. Wal-Mart Stores East, LP*, 415 S.C. 580, 588, 784 S.E.2d 670, 675 (2016) (citation omitted). By ignoring all of this evidence, the trial court both ignored the clear language of the S.C. Trade Secrets Act and imposed its own view of the evidence, each of which constitutes error to the Forum Benefits’ prejudice.

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

The directed verdict ruling that Forum Benefits failed to prove reasonable efforts to protect Forum Benefits’ trade secrets ignores substantial evidence of the proven effectiveness of Forum Benefits’ protective efforts and impermissibly decides disputed questions of fact.

The S.C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(a)(ii), limits a “trade secret” to information that “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Forum Benefits not only introduced evidence of reasonable efforts to protect Forum Benefits’ trade secrets, but the evidence also established that Forum Benefits’ protective efforts had proven effective at preventing Mack Ward from misappropriating Forum Benefits’ trade secrets several months earlier. (Trial Transcript, pp. 491-498; Plaintiff’s Exhibit 550).

Forum Benefits limited access to Forum Benefits' trade secrets to only authorized personnel with valid login credentials. (Trial Transcript, pp. 369-371; 379). Forum Benefits only provided login credentials to Forum Benefits' proprietary database of information in the Employee Navigator accounts to account managers assigned to those accounts and, on a case-by-case basis, a single client representative if a client requested the ability to generate reports from the Employee Navigator account associated with that client. (Trial Transcript, pp. 369-371). Forum Benefits did not provide sales people, like Mack Ward and Bannon, with any login credentials to any of Forum Benefits' Employee Navigator accounts. (Trial Transcript, pp. 369-371). Forum Benefits only provided login credentials to Forum Benefits' SharePoint server to Forum Benefits' full-time employees. (Trial Transcript, pp. 117-118; 369-371; 379). When an individual ceases to be an employee of Forum Benefits, all access to these computer systems is cut off. (Trial Transcript, pp. 491-492).

Forum Benefits' protective efforts had proven effective at protecting Forum Benefits' trade secrets several months earlier in 2016. For several years prior, Forum Benefits had been providing benefits administration services to clients of AssureSouth, owned by Ben Taylor and Mack Ward. In February 2016, Ben Taylor and Mack Ward notified Forum Benefits that they were selling their AssureSouth business to Assured Partners. (Trial Transcript, pp. 492-494). Forum Benefits agreed to continue providing services to clients of AssureSouth during a two-month transition period. (Plaintiff's Exhibit 550; Trial Transcript pp. 494-498). However, as shown in Forum Benefits' Exhibit 550, Forum Benefits also notified Ben Taylor and Mack Ward that Forum Benefits would not allow third-party access to Forum Benefits' proprietary systems. (Plaintiff's Exhibit 550; Trial Transcript pp. 494-498). Forum Benefits then terminated all client access to any Employee Navigator accounts. (Trial Transcript, pp. 491-492). As a result, only Forum Benefits' employees

and account managers continued to have active login credentials to any of Forum Benefits' proprietary systems, and Forum Benefits' protective efforts proved effective at preventing Mack Ward and/or Assured Partners from misappropriating Forum Benefits' trade secrets. (Trial Transcript, pp. 492-494).

From this experience, Assured Partners and Mack Ward discovered a loophole that would avoid Forum Benefits' protective efforts and allow access to Forum Benefits' proprietary systems without Forum Benefits' knowledge—use a client's login credentials to access Forum Benefits' proprietary systems to download, copy, and take screenshots of the Employee Navigator accounts for those clients. Assured Partners hired Bannon on October 15, 2016, and as shown in Forum Benefits' Exhibits 8, 10-12, and 45, Bannon immediately exploited this loophole by obtaining and forwarding client login credentials to Assured Partners. (Plaintiff's Exhibits 8, 10-12, and 45; Trial Transcript, p. 75, lines 9-11; pp. 152-153; 168; 172-176; 200; 256-257).

Bannon hid his new employment status from Forum Benefits, allowing Assured Partners to surreptitiously download, copy, and take screenshots of the Employee Navigator accounts for those clients without Forum Benefits' knowledge. (Trial Transcript, p. 152). During the same time, Bannon downloaded approximately 2,000 files from Forum Benefits' SharePoint server using the login credentials he had received when he was Forum Benefits' employee. (Trial Transcript, pp. 177-178; 180).

Forum Benefits' protective efforts had previously proven effective at preventing Assured Partners and Mack Ward from accessing Forum Benefits' trade secrets, and their subsequent discovery of a loophole around those protections does not change that. Respondents in fact exploited a loophole in Forum Benefits' protections, but the law requires “efforts that are reasonable under the circumstances,” not foolproof measures.

Forum Benefits provided substantial evidence of protective efforts and the demonstrated effectiveness of those protective efforts at preventing unauthorized access to Forum Benefits' trade secrets. "The trial court must deny a motion for a directed verdict . . . if the evidence yields more than one reasonable inference or its inference is in doubt." *RFT Mgmt. Co., LLC v. Tinsley & Adams LLP*, 399 S.C. 322, 333, 732 S.E.2d 166, 171 (2012). The trial court erred by ignoring the evidence and adopting Respondents' view of the evidence, to Forum Benefits' prejudice.

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

The directed verdict ruling that Forum Benefits failed to prove that Respondents obtained Forum Benefits' trade secrets by improper means ignored the law and uncontroverted evidence presented at trial and impermissibly decided disputed questions of fact.

The S.C. Trade Secrets Act defines "improper means" to include, *inter alia*, theft, breach or inducement of a breach of a duty imposed by contract, and espionage through electronic or other means. S.C. CODE ANN. § 39-8-20(1). The evidence admitted at trial demonstrates that Respondents committed several of the enumerated actions that fall within the definition of "improper means" to obtain Forum Benefits' trade secrets.

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

The February 1, 2022 Order fails to address, distinguish, or even acknowledge any of the preceding evidence that demonstrates that Respondents committed several of the enumerated actions that fall within the definition of "improper means" to obtain Forum Benefits' trade secrets. By ignoring all of this evidence, the trial court ignored the clear language of the S.C. Trade Secrets

Act and imposed its own view of the evidence, each of which constitutes error to the Forum Benefits' prejudice.

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

The directed verdict ruling that Forum Benefits failed to prove that Respondents misappropriated, wrongfully disclosed, or wrongfully used Forum Benefits' trade secrets ignores the law and uncontroverted evidence presented at trial and impermissibly decides disputed questions of fact.

The S.C. Trade Secrets Act defines "misappropriation" of a trade secret as:

- (a) acquisition of a trade secret of another by a person by improper means;
- (b) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (c) disclosure or use of a trade secret of another without express or implied consent by a person who:
 - (i) used improper means to acquire knowledge of the trade secret.

S.C. CODE ANN. § 39-8-20(2).

The evidence admitted at trial and described herein—such as that in Section I(B)—demonstrates that Respondents committed several of the enumerated actions that fall within the definition of "improper means." Those included theft, breach, or inducement of a breach of a duty imposed by contract, and espionage through electronic or other means to obtain Forum Benefits' trade secrets. S.C. CODE ANN. § 39-8-20(1). As a result, Respondents' actions constitute a "misappropriation" of Forum Benefits' trade secrets under section 39-8-20(2)(a)—i.e., Respondents acquired Forum Benefits' trade secrets by improper means.

No evidence exists that Forum Benefits ever expressly or impliedly consented to Respondents' disclosure or use of Forum Benefits' trade secrets. Therefore, Respondents' disclosure and use of Forum Benefits' trade secrets was "wrongful," and Respondents' actions also constitute a misappropriation of Forum Benefits' trade secrets under S.C. CODE ANN. § 39-8-20(2)(c)(i)—*i.e.*, Respondents used improper means to acquire knowledge of Forum Benefits' trade secrets and then disclosed and used Forum Benefits' trade secrets without Forum Benefits' express or implied consent.

By concluding that Forum Benefits failed to prove that Respondents misappropriated, wrongfully disclosed, or wrongfully used Forum Benefits' trade secrets, the trial court ignored the clear language of the S.C. Trade Secrets Act and imposed its own view of the evidence, each of which constitutes error to Forum Benefits' prejudice.

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

The directed verdict ruling that Forum Benefits failed to prove that damages were proximately caused by Respondents' misappropriation of Forum Benefits' trade secrets ignores substantial evidence and impermissibly decides disputed questions of fact.

Multiple witnesses provided testimony that supports the reasonable inference that Respondents' misappropriation of Forum Benefits' trade secrets proximately caused damages to Forum Benefits. Multiple contemporaneously generated emails (*e.g.*, Forum Benefits' Exhibits 8, 10-12, and 45, (Plaintiff's Exhibits 8, 10-12, and 45)) confirm that Assured Partners' acquisition of Forum Benefits' trade secrets from the Employee Navigator accounts was critical to convincing clients of a seamless transition from Forum Benefits to Assured Partners. (Plaintiff's Exhibits 8, 10, 11, 12, and 45; Trial Transcript, pp. 168; 172-176; 426-429).

Christie Holderness, the District Manager for St. Andrews Public Service District, testified

that continuous access to Forum Benefits' trade secrets compiled in the Employee Navigator account was an important factor in her decision to transfer St. Andrews Public Service District's business from Forum Benefits to Assured Partners. (Trial Transcript, pp. 610-616).

Nine clients associated with Bannon actively used Forum Benefits' compilation of data stored in the respective Employee Navigator accounts. (Trial Transcript, pp. 263-264; 430-432; 552-555). Assured Partners saved substantial time by being able to download, copy, and take screenshots of Forum Benefits' trade secrets instead of having to design, build-out, collect, organize, and compile the same database of information. (Trial Transcript, pp. 269-270).

Bannon provided Employee Navigator client login credentials for three of those clients – Carolina Youth Development, Premier Logistics, and St. Andrews Public Service District. (Trial Transcript, pp. 263-264; 430-432). All three of those clients transferred their business from Forum Benefits to Assured Partners. None of the other six clients that actively used Forum Benefits' compilation of data stored in the respective Employee Navigator accounts transferred their business to Assured Partners. (Trial Transcript, pp. 263-264; 430-432; 552-555). This 100% statistical correlation between Respondents' misappropriation of Forum Benefits' trade secrets and transfer of business to Assured Partners provides probative evidence of damages proximately caused by Respondents' actions.

Testimony and contemporaneous emails (*e.g.*, Forum Benefits' Exhibits 8, 10-12, and 45) provide uncontroverted evidence of the urgent efforts Respondents exercised to surreptitiously obtain Forum Benefits' trade secrets before Forum Benefits learned that Bannon was working for Assured Partners and terminated further access. (Plaintiff's Exhibits 8, 10, 11, 12, and 45; Trial Transcript, pp. 153-156; 168; 172-176; 256-257). Brady even testified, consistent with his November 8, 2016 email, that he could not build an Employee Navigator account for a client

without login credentials that would allow him to download, copy, and take screenshots of Forum Benefits' Employee Navigator account for that client. (Trial Transcript, pp. 430-432).

All of this uncontroverted evidence supports the reasonable inference that damages were proximately caused by Respondents' misappropriation of Forum Benefits' trade secrets. As a result, the trial court's ruling as a matter of law that Forum Benefits failed to prove that damages were proximately caused by Respondents' actions impermissibly decided disputed questions of fact for the jury to resolve and constitutes legal error that prejudiced Forum Benefits.

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

The directed verdict ruling that Forum Benefits' damages were speculative directly contradicts the trial court's evidentiary rulings, ignores competent evidence of Forum Benefits' damages, and impermissibly decides disputed questions of fact.

Brian Stritt testified regarding Forum Benefits' damages. Respondents repeatedly objected to Stritt's testimony as being opinion testimony and speculative. (Trial Transcript, pp. 503-513; 517-543). The trial court at first sustained Respondents' objections. (Trial Transcript, pp. 503-513; 517-543). 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. (Trial Transcript, pp. 543-552)

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' former owner and current managing director. (Plaintiff's Exhibit 16; Trial Transcript, pp. 503-513; 517-543; 556-561).

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.

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

The directed verdict ruling that Forum Benefits introduced no evidence showing Assured Partners ever had access to or used any of Forum Benefits' trade secrets ignores substantial evidence presented at trial by Respondents' own employees and constitutes reversible error.

The evidence admitted at trial—such as that described herein in Sections I(B) and I(C)(5)—demonstrates that Assured Partners obtained client log-in credentials and copied and used Forum Benefits' trade secrets resident in the Employee Navigator accounts for several clients. (Plaintiff's Exhibits 8, 10-12, and 45; Trial Transcript, pp. 75; 117-118; 152-156; 160, 165-166; 168; 170; 172-178; 180; 200; 229; 256-257; 263-264; 269-270; 426-432; 552-555; 610-616).

Furthermore, Forum Benefits presented testimony from Nolan Zielinski, who conducted a forensic analysis of Forum Benefits' SharePoint server. (Trial Transcript, pp. 300-309). Forum Benefits' Exhibit 16 is a Log File Report generated by Zielinski that lists 2,107 files stored on Forum Benefits' SharePoint server that were accessed using Bannon's SharePoint user account with Forum Benefits. (Plaintiff's Exhibit 16; Trial Transcript pp. 304; 498-501; 514-517). As shown in the Log File Report, Bannon accessed 979 files from Forum Benefits' SharePoint server after October 15, 2016, when he was a Senior V.P. of Assured Partners. (Plaintiff's Exhibit 16; Trial Transcript pp. 200; 304; 498-501; 514-517).

Forum Benefits also presented expert testimony from Michael Scholz who forensically examined Forum Benefits' desktop computer that was used by Bannon in 2016. (Plaintiff's Exhibits 69, 70; Trial Transcript pp. 464, 466-468). Scholz testified that the desktop computer included a "Palmetto Benefits Management" folder.¹ (Trial Transcript p. 468). Forum Benefits' Exhibit 77 is a printout generated by Scholz that lists each file included in the Palmetto Benefits Management folder, and as shown in Forum Benefits' Exhibit 77, this folder included approximately 1,000 files having the same file names as files stored on Forum Benefits' SharePoint server and included in the Log File Report generated by Zielinski. (Plaintiff's Exhibits 16, 77; Trial Transcript p. 468-469; 498-501; 514-516). Scholz also generated a LNK File Report, Forum Benefits' Exhibit 72 (Plaintiff's Exhibit 72), and Scholz testified that the LNK File Report indicates that on October 30, 2016, an identical Palmetto Benefits Management folder was accessed on an external storage device connected to the desktop. (Plaintiff's Exhibit 72; Trial Transcript pp. 469-472).

The testimony of Zielinski and Scholz, combined with Bannon's testimony, provides evidence that Bannon did indeed copy and then transfer a substantial number of files from Forum Benefits' SharePoint sever to an external storage device—all while Bannon was a Senior V.P. of Assured Partners.

Bannon's own testimony provides additional evidence that he intentionally tried to transfer files from Forum Benefits' SharePoint server to Assured Partners. Specifically, as shown in Forum Benefits' Exhibit 64, on November 18, 2016, Michelle Fralix,² an account manager for Assured

¹"Palmetto Benefits Management" was Forum Benefits' previous corporate name. (Trial Transcript, pp. 101-102)

² Michelle Fralix also went by the name Amy Fralix and testified at trial as Michelle Coffield. (Trial Transcript, p. 281).

Partners assigned to Bannon, asked Bannon for a medical plan summary for Premier Logistics—one of Forum Benefits’ clients that Bannon was recruiting to switch to Assured Partners. (Plaintiff’s Exhibit 64; Trial Transcript, pp. 214-215). Bannon responded, “I’ve scoured my files but I wasn’t able to pull what I wanted off Forum’s website.” (Plaintiff’s Exhibit 64; Trial Transcript, pp. 215-216). On November 30, 2016, Bannon notified Fralix that Bannon could no longer access Forum Benefits’ proprietary renewal algorithms for Alpha Genesis—another client that Bannon was recruiting to switch to Assured Partners—stating, “My hard drive broke an [sic] I no longer have renewal info. for these guys.” (Plaintiff’s Exhibit 13; Trial Transcript, pp. 216-217).

The trial court’s ruling that Forum Benefits introduced no evidence that Assured Partners obtained and used Forum Benefits’ trade secrets directly contradicts and cannot be reconciled with the undisputed testimony and documents provided by two separate forensic experts and Respondents’ own employees. This erroneous factual conclusion, clothed as a legal ruling, invaded the province of the jury and constitutes prejudicial error to Forum Benefits.

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

The words “bad” or “faith” appear nowhere in any of Respondents’ directed verdict arguments or cited authorities, nor in any of the trial court’s oral directed verdict rulings. Nonetheless, the February 1, 2022 Order—authored entirely by Respondents—concludes as a matter of law that Forum Benefits pursued a trade secret claim in bad faith. (Order Granting Defendants’ Motion for Directed Verdict and Awarding Prevailing Party Attorneys’ Fees and Costs to Defendants, p. 4, ¶ C(8); p. 6, ¶ F). This ruling contradicts controlling precedent and constitutes legal error.

Respondents filed three separate motions seeking summary judgment on Forum Benefits’

trade secret claims. (Motion for Summary Judgment, Filed March 8, 2018; Memo in Support of Motion for Summary Judgment, Filed March 8, 2018; Memo in Reply to Motion for Summary Judgment, with 1 Exhibit, Filed April 2, 2018; Motion for Summary Judgment, filed June 11, 2019; Motion for Summary Judgment, with 8 Exhibits, filed April 20, 2020; Reply in Support of Motion for Summary Judgment, with 2 Exhibits, Filed June 9, 2020). Respondents withdrew one of the motions, but Forum Benefits filed full responses to the other two motions. (Response to Motion for Summary Judgment, with 13 Exhibits, Filed March 30, 2018; Response to 4th Motion for Summary Judgment, with 14 Exhibits, filed June 7, 2020). Two different Circuit Court judges each conducted a full hearing that was fully briefed, and each judge denied Respondents' motion for summary judgment. (Order Denying Defendants' Motion for Summary Judgment, Filed June 22, 2018; Order Form 4 Denying Motion for Summary Judgment, Filed October 14, 2020).

The trial commenced October 11, 2021, and Forum Benefits rested its case after three days of testimony. After the trial court granted Respondents a directed verdict on Forum Benefits' trade secret claims, Respondents moved for an award of attorneys' fees based on alleged bad faith litigation. (Trial Transcript, pp. 680-681).

“[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. Atl. Coast Builders & Contrs., LLC*, 394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011) (citation omitted). In *Southeastern*, as in the present case, two different judges denied the defendants' motion for summary judgment. As in the present case, the trial judge granted a directed verdict in favor of the defendants after the plaintiffs had presented their case and rested. As in the present case, the defendants sought an award of attorneys' fees for frivolous litigation. Following the Supreme Court's controlling authority in *Hanahan*, the Court of Appeals affirmed the denial of attorneys' fees because the

plaintiffs' claims had survived summary judgment.

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*, Forum Benefits' trade secret claims were not frivolous as a matter of law. Accordingly, the Court's ruling that Forum Benefits pursued a trade secret claim in bad faith ignores controlling South Carolina authority and is wrong as a matter of law.

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

The trial court's February 1, 2022 Order includes multiple rulings pertinent to Forum Benefits' conversion claim that are legally erroneous, and its factual conclusions improperly invaded the province of the jury.

1. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits could not prove the elements of a conversion against Bannon

The directed verdict ruling that Forum Benefits could not prove the elements of conversion against Bannon incorrectly applies the law to uncontroverted evidence presented attrial to decide disputed questions of fact.

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.*, 385 S.C. 452, 465, 684 S.E.2d 756, 763 (2009). The S.C. Trade Secrets Act provides the owner of a trade secret with the exclusive right to determine who can know, disclose, or use the trade secret. S.C. CODE ANN. § 39-8-20. Forum Benefits did not authorize Bannon to obtain Forum Benefits' trade secrets from the Employee Navigator accounts or from Forum Benefits' SharePoint server. Nonetheless, Bannon secretly obtained and forwarded the Employee Navigator client login credentials for Forum Benefits' clients to Assured Partners,

and Jim Brady used those login credentials to access, download, and copy Forum Benefits' trade secrets from the Employee Navigator accounts. (Plaintiff's Exhibit 10; Trial Transcript pp. 160, 165-166; 170; 172-176; 229; 256-257). Bannon himself testified that he downloaded approximately 2,000 files containing Forum Benefits' trade secrets from Forum Benefits' SharePoint server using the login credentials he had received as a Forum Benefits' employee. (Trial Transcript, pp. 177-178; 180).

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.

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

2. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits Failed to Prove that Bannon Converted Any Property of Forum Benefits to the Exclusion of Forum Benefits' Rights as Forum Benefits Always Retained Access and Rights to the Information at Issue

The directed verdict ruling that Forum Benefits failed to prove that Bannon converted any property of Forum Benefits to the exclusion of Forum Benefits' rights as Forum Benefits always retained access and rights to the information at issue incorrectly applies the law to uncontroverted evidence presented at trial to decide disputed questions of fact.

The S.C. Trade Secrets Act provides the owner of a trade secret with the exclusive right to determine who can know, disclose, or use the trade secret. S.C. CODE ANN. § 39-8-20. 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. Accordingly, the Court's directed verdict ruling is legally wrong and impermissibly decides disputed questions of fact.

3. The Trial Court Erred in Determining as a Matter of Law that Intangible Property Cannot Form the Basis for a Conversion Claim

The directed verdict ruling that intangible property cannot form the basis for a conversion claim is wrong as a matter of law.

Conversion is the “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, supra*. South Carolina courts have held that intangible rights are normally not the proper subject for a conversion claim. *Id.* The *Gignilliat* court explained, “An 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 omitted) (emphasis added) (footnote omitted)). Ultimately, the South Carolina Supreme 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.*

In *Integrated Direct Marketing, LLC v. Drew May & Merkle, Inc.*, 2016 Ark. 281, 495 S.W.3d 73 (2016), 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?” *Id.* 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 entitled to possession.” *Id.* at 76.

The decision in *Integrated Direct Marketing* is persuasive authority, consistent with the South Carolina Supreme 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 indistinguishable from 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. (Trial Transcript, pp. 219-220). 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. (Trial Transcript, pp. 117-118; 177-178; 180). 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.” *Id.* at 763.

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.

4. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits Failed to Prove Damages were Proximately Caused by Bannon's Conversion of Forum Benefits' Trade Secrets

The directed verdict ruling that Forum Benefits failed to prove that damages were proximately caused by Bannon's conversion of Forum Benefits' trade secrets ignores substantial evidence and impermissibly decides disputed questions of fact.

The evidence noted above, such as that in Section I(C)(1), supports the reasonable inference that Bannon's conversion of Forum Benefits' trade secrets proximately caused damages to Forum Benefits. Likewise, the "9-client/100% statistical correlation" evidence described in detail hereinabove in Section I(C)(5) likewise demonstrates the factual questions that should have prevented the trial court's ruling on this issue.

The evidence discussed above supports the reasonable inference that damages were proximately caused by Bannon's misappropriation of Forum Benefits' trade secrets. As a result, the Court's ruling as a matter of law that Forum Benefits failed to prove that damages were proximately caused by Bannon's actions impermissibly decided disputed questions of fact for the jury to resolve and constitutes legal error that prejudiced Forum Benefits.

II. The Trial Court erred in granting attorneys' fees and costs to the Respondents.

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

Respondents' first motion for attorneys' fees consisted of an oral motion—a single

sentence in open court referencing the employment contract between Forum Benefits and Bannon—that the trial court granted before Respondents’ attorney even finished vocalizing that single sentence.³ (Trial Transcript, p. 680).

Respondents’ second motion for attorneys’ fees, based the S.C. Trade Secrets Act, was four sentences, again enunciated in open court, again did not include any evidence for any of the factors (identified below) that a trial court is required to consider before awarding attorneys’ fees, and again was instantaneously granted by the Court. (Trial Transcript, pp. 680-681).

The trial court failed to require the provision of basic information needed to support an award of attorneys’ fees, including which Respondent is seeking fees, the legal authority for the fee request, the amount of the fee request, and the six categories of information our jurisprudence identifies as needed to determine a reasonable fee award.

A. If By Contract

Respondents moved for an award of attorneys’ fees based on a prevailing party clause in Bannon’s employment contract with Forum Benefits. (Trial Transcript, p. 680). However, the trial judge had already ruled as a matter of law that there was no meeting of the minds to support a contract. (Trial Transcript, p. 677). 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. (Order Granting Defendants’ Motion for Directed Verdict and Awarding Prevailing Party Attorneys’ Fees and Costs to Defendants, p. 2, ¶ 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

³The Court’s instantaneous responses to Respondents’ motions is significant and supportive of Forum Benefits’ position that the trial judge should have recused himself for bias favoring Respondents.

exist and then enforce an attorneys' fees provision in the non-existent contract.

B. If By Statute

Forum Benefits' trade secret claim was not bad faith as a matter of law. As articulated above in Section I(C)(8), "[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*, 394 S.C. at 713 S.E.2d at 650 (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.

C. Whose Attorneys' Fees?

Respondents' muddled attorney fee request seems to have sought an award of attorneys' fees for both Respondents. (Trial Transcript, p. 680-681). If Respondents' motion was as to both Respondents, there is no evidence that Forum Benefits had any contract with Assured Partners. And there is no evidence that Bannon ever incurred any attorneys' fees whatsoever.

D. What Attorney Fees?

Respondents acknowledge that Bannon never incurred any fees and costs but nonetheless argue that Bannon should "recover" the fees and costs incurred by Assured Partners. (Defendants' Reply in Support of Its Motion for Attorneys' Fees/Costs and the Court's Award of Fees/Costs, pp. 4-7).

The attorneys' fee provision in the employment contract, which the trial court ruled does not exist, provides, "In any litigation between the parties related to this Agreement, the prevailing party shall be entitled to recover all reasonable costs and attorneys' fees." (Plaintiff's Exhibit 137, p. 2, ¶ 11). However, rather than providing any evidence that Bannon actually incurred any fees

and costs, Respondents instead directed the trial court to authority from other states to argue that Bannon should be able recover the fees and costs incurred by Assured Partners. (Defendants' Response in Opposition to Plaintiff's Motion for a New Trial, pp. 4-7). Respondents' arguments ignore controlling authority directly on point from the South Carolina Supreme Court.

In *Williamson v. Middleton*, 383 S.C. 490, 681 S.E.2d 867 (2009), the South Carolina Supreme Court answered the question of 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. *Id.* at 493. 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, finding that the employee might discuss a fee at the end of the case. *Id.* at 496. The Supreme 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.

E. Additional Deficiencies

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.

III. The denial of Forum Benefits’ motion to recuse prevented Forum Benefits from receiving a fair trial.

The trial judge (Judge Price) erred in refusing to disqualify himself pursuant to Canon 3(E)(1).

Canon 3(E)(1) states as follows:

- (1) A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where:
 - (a) the judge has a personal bias or prejudice concerning a party or a party’s lawyer, ...

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

While the trial judge’s assurance of his own impartiality is accorded great weight, “a judge’s impartiality might reasonably be questioned when his factual findings are not supported by the record.” *Ellis*, 315 S.C. at 285, 433 S.E.2d at 857. Given particular events with the trial judge that occurred during trial, there were multiple, legitimate, *bona fide* reasons to question the trial judge’s impartiality, and he should have recused himself.

The trial commenced on October 11, 2021. In their opening statement, Respondents identified an individual named Mack Ward—a Vice President of Assured Partners—as a trial witness. (Trial Transcript, p. 34). Mack Ward’s name was cited repeatedly during examinations of multiple witnesses throughout the second day of trial, all prior to the recess described in the next paragraph of this brief. (Trial Transcript, pp. 239, 257, 259, 282). The trial judge himself even mentioned his name. (Trial Transcript, p. 258).

On the afternoon of the second day of the trial, off the record during a recess with the jury

not present, the trial judge entered the courtroom and asked counsel for both parties if he could greet a person in the courtroom. The person whom the trial judge then proceeded to greet turned out to be Mack Ward—a Vice President of Assured Partners. Mack Ward had not been in the courtroom before that time. The interaction between the trial judge and Mack Ward was substantially more boisterous and affectionate than would be expected between mere acquaintances—the two engaged in mutual hugging, back slapping, and generally rowdy laughter. After this public display, the trial judge immediately went to the front of the bench, into the court reporter’s station, and announced to all present in the courtroom—which included Forum Benefits’ managing partner Brian Stritt—that he and Mack Ward knew each other from their days attending college at Wofford together and, if cell phones had existed then, neither would be in the position they are in now. (December 29, 2021 Declarations of Brian Stritt, Lisa Hollingsworth-Stritt, and Michelle Filler).

At no time then or thereafter did the trial judge offer any opportunity to the parties to address concern they might have as a result of this in-court display of relationship and affection between the trial judge and a principal for Assured Partners and/or questions they might have as to bias of the trial judge from that relationship and affection.

Before trial resumed on October 13, 2021, Forum Benefits made an oral motion for the trial judge to recuse himself from further participation in the trial based on the trial judge’s public displays of bias the previous day. (Trial Transcript, p. 451, lines 4-6). The trial judge confirmed the comment about cell phones as being “my comment ... intended to be a self-deprecating joke about myself.” (Trial Transcript, p. 455, lines 12, 18-19).

As reflected in the transcript of the proceedings, the trial judge said, “I had no idea why he would be here,” (Trial Transcript, p. 454, lines 21-22), notwithstanding Respondents indicating in

their opening statement that Mack Ward would be a witness (Trial Transcript, p. 34) and Mr. Ward's name being recited repeatedly during earlier testimony (Trial Transcript, pp. 239, 257, 259, 282). The trial judge seemed to indicate during argument of the motion that at some point the trial judge and Mack Ward went back into chambers to continue their reunion⁴, an event of which Forum Benefits was then-previously unaware, which the trial judge confirmed at the January 4, 2022 hearing on post-trial motions. (January 4, 2022 Hearing Transcript, p. 53).

The trial judge also provided the unsolicited statements, "I don't do Facebook" and "there's nothing on Facebook that says I'm a judge." (Trial Transcript, p. 452, lines 17-20). A quick examination of Facebook® seems to contradict both of these statements. Specifically, someone named Bentley Price maintains a personal Facebook® account, is currently Facebook® friends with someone named Michelle Ward, which is the name of Mack Ward's wife, and received and responded to Facebook® messages on October 19, 2021, that included photos of someone who appears to be the trial judge in a black robe and stating, "Happy birthday Judge. We love you!" This posting indicates that Facebook® users posted 19 comments, including a reply by a Facebook® account holder named Bentley Price of "Thank you everyone!!" (Plaintiff's Exhibits 601, 602, and 603; January 4, 2022 Hearing Transcript, pp. 50-53).

These Facebook® postings are significant because they directly contradict unsolicited statements made on the record by the trial judge six days earlier in response to Forum Benefits' recusal motion – not only does the trial judge "do" Facebook® with his own Facebook® account, but also, less than a week after making those unsolicited statements, the trial judge received and responded to Facebook® postings that clearly identify him as a judge.

⁴"And we went back and talked and discussed -- and I -- I'll put on the record what we talked about." (Trial Transcript, p. 452, lines 7-8)

On October 25, 2021, Forum Benefits separately filed a Motion for a New Trial pursuant to Rule 59(a), SCRCP. (Plaintiff's Motion for New Trial). Forum Benefits asserted that the trial judge's reasonable appearance of bias, combined with multiple inconsistent rulings that consistently favored Respondents, demonstrated actual bias by the trial judge that prevented Forum Benefits from receiving a fair trial.

On January 4, 2022, the trial judge conducted a hearing on Forum Benefits' Motion for a New Trial. Forum Benefits presented live testimony from Michelle Filler, Lisa Stritt, and Brian Stritt describing the trial judge's extrajudicial conduct with Mack Ward in the courtroom that created a reasonable appearance of bias.⁵ (January 4, 2022 Hearing Transcript, pp. 6-36). After receiving arguments from all parties, the trial judge *sua sponte* described his relationship with Mack Ward for the record. (January 4, 2022 Hearing Transcript, pp. 50-53). However, the trial judge's recollection of events differed from the record and omitted significant details. Specifically, the trial judge confirmed that he was college friends with Mack Ward and again did not dispute or refute the witnesses' testimony describing his lively interaction with Mack Ward in the courtroom. However, the trial judge pointedly denied making the statement about cell phones and instead recalled, not that the statement was his own self-deprecating joke about himself as he had asserted on October 13th, but that he had merely repeated a remark that Mack Ward had said to him. (January 4, 2022 Hearing Transcript, p. 51, lines 15-20). The trial judge also did not mention that he had also met alone privately with Mack Ward in chambers without anyone from the Forum Benefits being present, until asked to confirm that this *ex parte* meeting actually took place.

⁵ Prior to the hearing, Forum Benefits also filed declarations from Michelle Filler, Lisa Stritt, and Brian Stritt regarding their personal observations of the trial judge's extrajudicial conduct with Mack Ward during trial. (Declaration of Brian Stritt, filed December 29, 2021; Declaration of Lisa Hollingsworth-Stritt, filed December 29, 2021; Declaration of Michelle Filler, filed December 29, 2021).

(January 4, 2022 Hearing Transcript, p. 53)

A. The Court's Actions Created an Appearance of Bias

Forum Benefits' basis for recusal—that the trial judge displayed and revealed a personal bias toward Mack Ward, a Vice President of Assured Partners—squarely fits Canon 3(E)(1)(a). Moreover, the Commentary to Canon 3(E)(1) specifically states, “Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply.”

Our jurisprudence requires evidence of judicial prejudice and of the existence of the judge's impartiality. As described above, the trial judge's public displays of bias directed toward Mack Ward provide concrete evidence by which “the judge's impartiality might reasonably be questioned.”

Although not expressly addressed by the South Carolina Supreme Court, there is suggestion elsewhere that the bias that disqualifies a trial judge “must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.” *See, e.g., Duplan Corp. v. Deering Milliken, Inc.*, 400 F.Supp. 497, 522 (D.S.C. 1975) (citation and internal quotation marks omitted). But, even under that narrower standard, the trial judge in the case at bar should have disqualified himself—his bias stemmed from his relationship with Mack Ward, a relationship that was extrajudicial.

Pursuant to Canon 3(E), the trial judge should have disqualified himself.

B. The Court's Inconsistent Rulings Provide Evidence of Actual Bias

Forum Benefits' concerns about the appearance of bias are bolstered by the trial court's multiple rulings that were inconsistent in rationale but consistently in Respondents' favor.

For example, and as discussed above, the trial court granted a directed verdict for Bannon on the contract claim, stating, “There was, obviously, no meeting of the minds.” (Trial Transcript,

p. 677). Despite ruling as a matter of law, in disregard of the evidence, that no contract existed to be breached, the trial court nonetheless granted Respondents' motion for an award of attorneys' fees based on a clause in what the trial court had deemed to be a non-existent contract. (Trial Transcript, pp. 680-681). Moreover, the trial court erroneously ruled that it would award Bannon his attorneys' fees before hearing any response from Forum Benefits opposing the motion. (Trial Transcript, pp. 680-681) The attorneys' fees awarded by the trial court go toward Assured Partners—of whom Mack Ward is a Vice President. The rulings were inconsistent, but both rulings were consistent to this extent: they favored Respondents.

For another example, during Forum Benefits' direct examination of Bannon, Forum Benefits authenticated and offered into evidence Plaintiff's Exhibit 9—Bannon's Responses to Requests for Admission under Rule 36. (Plaintiff's Exhibit 9; Trial Transcript, pp. 192-193). This exhibit was particularly relevant to impeaching Bannon because Bannon had just provided testimony based on documents admitted into evidence that directly refuted many of the admission requests that Bannon had denied. (Trial Transcript, pp. 185-192). Respondents objected to the admissibility of Bannon's Responses to Admission Requests (Plaintiff's Exhibit 9) as being a pleading: "Your Honor, I object, it's a pleading." (Plaintiff's Exhibit 9; Trial Transcript, p. 193). The trial court sustained the objection: "I'm – I'm not going to allow it in. He's correct, it's a pleading." (Trial Transcript, p. 193).

Responses to Requests for Admission are not pleadings. Rule 7(a), SCRCP, identifies the documents that constitute pleadings (*i.e.*, a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, and a third-party answer), and responses to Requests for Admission are not one of the identified documents.

During Respondents' cross-examination of Brian Stritt, Respondents sought to introduce

Exhibit C to the Verified Complaint as an exhibit. (Trial Transcript, p. 573). Forum Benefits objected to the exhibit as a pleading pursuant to Rule 43. (*Id.*). See Rule 43(g), SCRCF (“The pleadings shall not be submitted to the jury for its deliberations.”). The trial judge overruled Forum Benefits’ objection: “I’ll allow it.” (Trial Transcript, p. 574). The trial court’s ruling that Bannon’s Responses to Admission Requests are inadmissible pleadings, when they are not even pleadings, cannot be reconciled with the Court’s subsequent improper ruling allowing Respondents to admit into evidence what is indisputably a pleading, but the two rulings together are further probative evidence of the Court’s bias.

Another inconsistent ruling by the trial court involved direct evidence of Forum Benefits’ damages. Forum Benefits sought to elicit factual testimony from Brian Stritt based on his own personal knowledge of the dollar amount of annual commissions associated with clients that switched from Forum Benefits to Assured Partners and the resulting damages to Forum Benefits. (Plaintiff’s Exhibit 16; Trial Transcript, pp. 503-513; 517-543; 556-561). At the time of the events giving rise to this litigation, Stritt was the sole owner of Forum Benefits and had been negotiating with a buyer for over a year to purchase Stritt’s company. After learning that Bannon had left Forum Benefits, the buyer required Stritt to identify the precise dollar amount of annual commissions associated with clients for whom Bannon had been the sales person, and the buyer then reduced the previously negotiated purchase price by \$1.5M based on the information that Stritt provided to the buyer. (Plaintiff’s Exhibit 16; Trial Transcript, pp. 503-513; 517-543; 556-561).

Respondents objected to this factual testimony from Brian Stritt, along with the contemporaneously-generated exhibits that documented both the annual commissions and the \$1.5M reduction in the purchase price negotiated in an arms-length transaction. (Trial Transcript,

pp. 503-513; 517-543). In initially sustaining Respondents' objections, the trial court ruled that Stritt's testimony lacked foundation and, although Stritt's testimony was based on and entirely consistent with the information that Stritt had provided to the buyer in 2016, the trial court reasoned that allowing Stritt to testify regarding commissions would enable Stritt to provide false evidence of Forum Benefits' damages. (Trial Transcript, pp. 503-513; 517-543). According to the trial court, Forum Benefits could only provide evidence of damages through a financial expert. (Trial Transcript, pp. 503-513; 517-543).

After a lunch break, the trial judge announced that, after consultation with an unidentified Business Court judge, he would allow Stritt to testify about the precise dollar amount of annual commissions associated with clients that switched from Forum Benefits to Assured Partners. (Trial Transcript, pp. 543-552). However, the trial court would not allow into evidence any contemporaneously-generated exhibits to corroborate Stritt's testimony, nor would the trial court allow Stritt to testify about the \$1.5M reduction in the purchase price that had been based solely on the anticipated lost commissions associated with clients taken from Forum Benefits by Assured Partners. (Trial Transcript, pp. 543-552). The trial court's rulings that Stritt could provide first-hand, factual testimony about annual commissions, while excluding first-hand, factual testimony about the negotiated \$1.5M decrease in the purchase price, were contrary to Rules 601-603 of the South Carolina Rules of Evidence, prejudiced Forum Benefits, and constitute errors as a matter of law.

Forum Benefits respectfully asserts that the motion to recuse was based on the reasonable appearance of bias, and Forum Benefits' concerns about the appearance of bias are supported by a consistent string of inconsistent rulings that continually favored Respondents. The trial court's denial of Forum Benefits' motion to recuse prevented Forum Benefits from receiving a fair trial.

CONCLUSION

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

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August 26, 2022

RECEIVED

Aug 26 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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

Forum Benefits, LLC,

Appellant,

v.

Brian Bannon and Assured Partners, NL,

Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on August 26, 2022, copies of Forum Benefits, LLC's **Amended Initial Brief** and **Motion to Exceed Page Limit** were served on all counsel of record via emails containing the above referenced document to counsels' individual AIS email addresses:

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE TRIAL COURT ERRED GRANTING DIRECTED VERDICT TO RESPONDENTS.**
 - A. DID THE TRIAL COURT’S DIRECTED VERDICT ON APPELLANT’S CONTRACT CLAIM RELY ON LEGAL ERROR AND DISPUTED FACTS?**
 - B. DID THE TRIAL COURT’S DIRECTED VERDICT OF NO FIDUCIARY DUTY BY RESPONDENT BANNON RELY ON LEGAL ERROR?**
 - C. DID THE TRIAL COURT’S DIRECTED VERDICT ON APPELLANT’S TRADE SECRET CLAIM RELY ON LEGAL ERROR AND DISPUTED FACTS?**
 - D. DID THE TRIAL COURT’S DIRECTED VERDICT ON APPELLANT’S CONVERSION CLAIM RELY ON LEGAL ERROR AND DISPUTED FACTS?**
- II. WHETHER THE TRIAL COURT ERRED IN AWARDING ATTORNEYS FEES AND COSTS TO RESPONDENTS.**
- III. WHETHER THE TRIAL COURT ERRED IN NOT RECUSING ITSELF FOR EXTRAJUDICIAL BIAS FAVORING A RESPONDENT.**

STATEMENT OF THE CASE

Forum Benefits, LLC (“Forum Benefits”) is an insurance broker of health, life, and disability insurance policies. (Verified Complaint, ¶ 2). Forum Benefits utilizes 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. (Trial Transcript [hereinafter “Trial Tr.”], pp. 96-97; 158; 338-341; 338-341; 360-368). Forum Benefits then applies 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. (Trial Tr., pp. 338-341; 372-378). Forum Benefits restricted access to Employee Navigator and the SharePoint server to certain personnel via login credentials. (Trial Tr., pp. 117-118; 369-371; 379).

Brian Bannon (“Bannon”) began employment with Forum Benefits in 2009 as a full-time sales representative. (Plaintiff’s Exhibit [hereinafter “Pl.’s Ex.”] 137; Trial Tr., pp. 39-54, 69; 479). Bannon signed and delivered a written employment agreement with Forum Benefits that required, among other things, 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. (Pl.’s Ex. 137, pp. 2 -3 ¶ 12; Trial Tr., pp 488-490). 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. (Trial Tr., p. 199).

On October 15, 2016, Bannon began employment as a Senior Vice President of Assured Partners, NL (“Assured Partners”), another insurance broker and direct competitor of Forum Benefits. (Trial Tr., pp. 152; 200). Yet for four weeks following that date he continued to hold himself out as Forum Benefits’ sales representative, hiding his employment with Assured Partners from Forum Benefits. (Trial Tr., pp. 212-213). During that four (4) week overlap, Bannon secretly obtained and

forwarded Employee Navigator login credentials for Forum Benefits' clients to Assured Partners. (Pl.'s Ex. 10; Trial Tr. p. 160, 165-166; 170; 172-176; 229; 256-257). Evidently knowing his actions were wrong, Bannon forwarded those credentials to Assured Partners with his personal email account. (Trial Tr., p. 160). Bannon also 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. (Trial Tr., pp. 153-154; 177-178; 180). During that four (4) week overlap, Assured Partners repeatedly urged its employees to expedite copying Forum Benefits' trade secrets before Forum Benefits discovered what they were doing. (Trial Tr., p. 170).

On December 1, 2016, Forum Benefits sued Bannon and Assured Partners (collectively, "Respondents"), alleging among other things misappropriation of trade secrets, breach of contract, conversion, and breach of fiduciary duty. (Verified Complaint). A jury trial commenced on October 11, 2021. (Trial Tr., p. 1).

Testimony and exhibits were provided that 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 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. (Trial Tr., pp. 263-264; 430-432; 552-555).

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. (Pl.'s Ex. 16; Trial Tr., pp. 503-513; 517-543; 556-561).

During trial, Forum Benefits moved for the trial judge to recuse himself, based on conduct by the trial judge with Mack Ward, an Assured Partners' principal, in the courtroom during a break. The motion was denied. (Trial Tr., p. 451, lines 4-6). Instead, the trial judge granted an oral motion for directed verdict for Respondents on all causes of action. (Trial Tr., pp. 677-678). 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. (Trial Tr., pp. 680-681).

On October 25, 2021, Forum Benefits filed a Motion for New Trial. (Plaintiff's Motion for New Trial). Respondents filed a Response in Opposition to Forum Benefits' Motion for a New Trial on November 1, 2021. (Defendants' Response in Opposition to Plaintiff's Motion for a New Trial).

On October 25, 2021, Forum Benefits filed a Response to Respondents' oral motions for attorneys' fees. (Plaintiff's Response to Defendants' Motions for Attorneys' Fees). Respondents replied on November 1, 2021. (Defendants' Reply in Support of Its Motion for Attorneys' Fees/Costs and the Court's Award of Fees/Costs). On November 4, 2021, Respondents' counsel filed an affidavit regarding attorneys' fees. (Affidavit of Jeffrey Lehrer for Attorneys' Fees and Costs).

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. (Proposed Order for Attorneys' Fees, Filed November 9, 2021). 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. (Plaintiff's Reply in Support of Motion for a New Trial).

On December 29, 2021, Forum Benefits filed a Supplemental Response to Respondents' Motions for Attorneys' Fees. (Plaintiff's Supplemental Response to Defendants' Motions for Attorneys' Fees).

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 Brian Stritt (“Stritt”), describing their observations of the trial judge’s extrajudicial conduct with Mack Ward in the courtroom. (Hearing Transcript of January 4, 2002, pp. 6-35; Declaration of Brian Stritt, filed December 29, 2021; Declaration of Lisa Hollingsworth-Stritt, filed December 29, 2021; Declaration of Michelle Filler, filed December 29, 2021).

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. (Order Granting Defendants’ Motion for Directed Verdict and Awarding Prevailing Party Attorneys’ Fees and Costs to Defendants). This February 1, 2022, Order is a verbatim copy of the unsolicited proposed Order that Respondents had filed and sent to chambers on November 9, 2021. (Proposed Order for Attorneys’ Fees, Filed November 9, 2021).

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

STANDARD OF REVIEW

A. Directed Verdict

When reviewing the trial court’s decision on a motion for directed verdict, the Court applies the same standard of review as the trial court. “When considering a motion for a directed verdict, the [trial] court must ‘view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and [must] deny the motion when either the evidence yields more than one inference or its inference is in doubt.’” *Turner v. Med. Univ. of S.C.*, 430 S.C. 569, 582, 846 S.E.2d 1, 7 (Ct. App. 2020) (quoting *Estate of Carr ex rel. Bolton v. Circle S Enters., Inc.*, 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008)). “In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence.” *Wright v. Craft*, 372 S.C. 1, 22, 640 S.E.2d 486, 498 (Ct. App. 2006) (citation omitted).

When reviewing an order granting a directed verdict motion the Court does not have the “authority to decide credibility issues or to resolve conflicts in the testimony or evidence.” *Id.*

B. Award of Attorneys’ Fees

Under South Carolina law, an award of attorneys’ fees must be reversed if the circuit court abused its discretion in issuing the award. *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 621, 635 S.E.2d 922, 926 (Ct. App. 2006). The trial court abuses its discretion in awarding attorneys’ fees when the award 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, 598 (1997).

C. Disqualification of the Trial Judge

Under Canon 3(E)(1)(a) of Rule 501, SCACR, a trial judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. *See Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004); *Davis v. Parkview Apartments*, 409 S.C. 266, 284, 762 S.E.2d 535, 545 (2014). A party seeking disqualification must show some evidence of bias or prejudice. *See Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996). If there is evidence of judicial bias or prejudice, a trial judge’s failure to disqualify himself should be reversed on appeal. *See Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 433 S.E.2d 856 (1993).

ARGUMENTS

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

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

The February 1, 2022 Order directed a verdict in favor of Bannon on Forum Benefits’ breach of contract claim, ruling as a matter of law, *inter alia*, that (1) Forum Benefits failed to prove the existence of a signed contract to satisfy the Statute of Frauds and (2) Forum Benefits failed to prove that there was a meeting of the minds on the essential terms of the alleged contract. (Order Granting Defendants’ Motion for Directed Verdict and Awarding Prevailing Party Attorneys’ Fees and Costs

to Defendants, p. 2). The rulings are legally erroneous and improperly invaded the province of the jury.

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

Respondents argued, and the trial court agreed, that Forum Benefits' failure to produce a signed employment agreement prevented Forum Benefits from satisfying the Statute of Frauds as a matter of law. (Trial Tr., pp. 618-619; 626; 677; February 1, 2022 Order, p. 2, ¶ A(1)). This ruling incorrectly applies the Statute of Frauds by ignoring substantial, corroborating evidence that Bannon did, in fact, sign an employment agreement with Forum Benefits.

Evidence sufficient to satisfy the Statute of Frauds is not limited exclusively to production of a signed agreement. Courts in other jurisdictions have regularly recognized the lost memorandum exception to the Statute of Frauds and 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); *Gipson v. Mattox*, 2006 U.S. Dist. LEXIS 86207 (S.D. Ala. 2006). In *Gipson*, the court recognized, "That no written agreement has been produced today does not require a conclusion that no such document ever existed. If a written agreement previously existed, but was lost, destroyed or purloined, then defendant can introduce evidence to that effect in order to satisfy the Statute of Frauds." *Gipson*, at *37; *see, also, McInnis v. Lind*, 108 P.3d 578, 582 n.2 (Or. App. 2005) (observing many exceptions to the statute of frauds' prohibition on parol evidence to support an agreement, including where a writing is lost or is in the possession of an adverse party); *Latino Food Marketers, LLC v. Ole Mexican Foods, Inc.*, 2003 WL 23220142, *5 (W.D. Wis. Aug. 20, 2003) ("if the parties did indeed form a contract that met the requirements of the statutes of frauds, the contract is enforceable even if the writing is lost or destroyed"); *Connecticut Bank & Trust Co. v. Wilcox*, 518 A.2d 928, 931 (Conn.1986) ("the loss or destruction of a memorandum does not deprive it of

effect under the Statute of Frauds,” where the writing can be proven by secondary evidence).

Comment (a) of section 137 of the *Restatement (Second) of Contracts* echoes 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 the requirements 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 S.C. App. Unpub. LEXIS 395, *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. Bannon began working for Forum Benefits in Charleston in 2009, (Trial Tr., pp. 101, 112), and David Wyatt (“Wyatt”) testified that Brian Stritt engaged him in 2009 to prepare an employment agreement for a new employee that would be hired in Charleston. (Pl.’s Ex. 137; Trial Tr., pp. 39-54, 69; 487-488). Stritt testified that Plaintiff’s Exhibit 137 is a blank employment agreement prepared by Wyatt (Pl.’s Ex. 137; Trial Tr., pp. 39-54, 69, 482-484); that Ex. 163 is a completed employment agreement signed by Bannon’s co-employee Chris Whatley on May 18, 2009 (Pl.’s Ex. 163; Trial Tr., pp. 480-482, 484-485); and that Ex. 163 is substantially identical to the completed employment agreement signed by Bannon (Trial Tr., p. 485-487). Stritt further testified that Bannon signed the employment agreement when Stritt delivered the first paycheck to Bannon on June 1, 2009 (Trial Tr., pp. 488-490); that Stritt placed the signed

employment agreement in Bannon's employment file (Trial Tr., pp. 489); and that Stritt only discovered that the signed employment agreement was missing—along with Bannon's entire employment file—shortly after Stritt learned that Bannon had been hired by Assured Partners (Trial Tr., pp. 489-490). 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. These are not matters of law for the trial court to decide, but instead are disputed questions of fact for the jury. By granting a directed verdict based on the Statute of Frauds, the trial court made credibility decisions and weighed material evidence, a job to be performed by the jury.

The evidence regarding the existence of a signed employment agreement created several factual disputes for the jury to resolve. *Kumpf v. United Tel. Co. of the Carolinas*, 311 S.C. 533, 429 S.E.2d 869 (Ct. App. 1993) (holding that "a trial court should submit to the jury the issue of the existence of a contract when its existence is questioned and the evidence is either conflicting or admits of more than one inference."). 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.

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

The February 1, 2022, Order asserts that as a matter of law "[Forum Benefits] failed to prove that there was a meeting of the minds on the essential terms of the alleged contract." (Order Granting Defendants' Motion for Directed Verdict and Awarding Prevailing Party Attorneys' Fees and Costs to Defendants, p. 2). This ruling ignores the evidence introduced at trial that created disputed facts for the jury to decide regarding the essential terms in Bannon's employment agreement and his agreement to those terms.

The evidence noted above, such as that in Section I(A)(1), shows that the trial court erred. This evidence created disputed questions of fact for the jury to decide, and the trial court's determination that Forum Benefits "failed to prove" these disputed questions of fact improperly invaded the province of the jury and constitutes legal error.

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

The directed verdict ruling that the alleged breaches of contract occurred after the restrictive covenants had expired refers to the contract "restrictions relating to the disclosure of confidential information and solicitation of customers," which had a two-year post-employment duration. (Pl.'s Ex. 137; Trial Tr., p. 620; February 2, 2022 Order, p. 2). 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.

David Wyatt and Brian Stritt provided testimony, corroborated by Plaintiff's Exhibits 137 (Pl.'s Ex. 137) and 163 (Pl.'s Ex. 163), 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. (Pl.'s Ex. 137; Trial Tr., pp. 39-54, 69). Paragraph 12(a) of the employment agreement specifically acknowledges 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." (Pl.'s Ex. 137, p. 2, ¶ 12(a)). Paragraphs 12(b)-(c) incorporate the definition of "trade secrets" provided in S.C. CODE ANN. § 39-8-10, *et seq.* (Pl.'s Ex. 137, pp. 2-3, ¶¶ 12(b),(c)). Paragraphs 12(d)-(e) provide specific examples of Forum Benefits' trade secrets, including many of the items Bannon downloaded and shared with Assured Partners. (Pl.'s Ex. 137, p. 3, ¶¶ 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].

(Pl.'s Ex. 137, p. 3, ¶ 12(f)) (emphasis added).

The clear and unambiguous language of the employment agreement prohibits 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 tradesecrets "must not be considered void or unenforceable or against public policy for lack of a durational or geographical limitation." S.C. CODE ANN. § 39-8-30(D) (emphasis added). Therefore, Bannon's contractual obligations not to disclose or use Forum Benefits' trade secrets and confidential information without Forum Benefits' consent are not limited in duration and are 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.

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

The directed verdict ruling that "Forum Benefits failed to establish the required elements of a restrictive covenant agreement which must be strictly construed against the employer under South Carolina law" misstates the law and impermissibly decides disputed questions of fact. (February 1, 2022 Order, p. 2).

The proposition that "a restrictive covenant agreement ... must be strictly construed against

the employer under South Carolina law” is a jumbled misstatement of the law. Every agreement includes “restrictive covenants” of one sort or another, but there is no jurisprudence in South Carolina, or elsewhere, holding that every provision of every agreement with an employer must be strictly construed against the employer.

Instead, as stated in *Rental Uniform Service of Florence, Inc. v. Dudley*, “Restrictive 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, the Supreme 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 introduced evidence that Bannon breached the restrictive covenant in the employment agreement that prohibited Bannon from disclosing Forum Benefits’ trade secrets. Wyatt’s testimony, Stritt’s testimony, and Plaintiff’s Exhibit 163 all provide corroborating evidence of the essential terms in the “offer” of employment by Forum Benefits to Bannon. (Pl.’s Exs. 137 and 163; Trial Tr., pp. 39-54, 69). One of the essential terms in the offer is the covenant not to disclose Forum Benefits’ trade secrets, as described in Paragraph 12 of the employment agreement (Pl.’s Ex. 137, pp. 2-3), and quoted above in Section I(A)(3), and this covenant is unlimited in duration, as permitted by S.C. CODE ANN. § 39-8-30(D). Stritt’s testimony that Bannon signed the employment agreement when Stritt delivered the first paycheck to Bannon on June 1, 2009, provides evidence that Bannon “accepted” the employment agreement and received “valuable consideration” for the employment agreement. (Trial Tr., p. 479).

The holding in *Milliken & Co. v. Morin*, 399 S.C. 23, 39, 731 S.E.2d 288, 296 (2012) is instructive on this issue. The South Carolina Supreme 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.” *Id.* at 39, 731 S.E.2d 296. “[T]he scope of the restriction is determined using ordinary principles of contract law.” *Id.* at 32–33, 731 S.E.2d at 293.

Forum Benefits provided substantial, corroborated evidence of the required elements of an enforceable contract. To the extent Respondents disputed this evidence, disputed questions of fact are for the jury to decide, and the trial court’s determination that Forum Benefits “failed to establish” these disputed questions of fact improperly invaded the province of the jury and constitutes legal error. Moreover, the trial court’s suggestion that additional elements are required or that the contract is to be strictly construed against Forum Benefits is error as a matter of law.

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

The February 1, 2022 Order directed a verdict in favor of Bannon on Forum Benefits’ breach of fiduciary duty claim. (February 1, 2022 Order, pp. 2-3). In the oral directed verdict ruling, the trial court declared as a matter of law that an independent contractor cannot owe a fiduciary duty. (Trial Tr., pp. 678). In the February 1, 2022 Order, 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.” (February 1, 2022 Order, pp. 2-3). This ruling ignored substantial evidence presented at trial of the confidential and fiduciary relationship that existed between Bannon and Forum Benefits from when Bannon was first hired by Forum Benefits in June 2009, until Bannon stopped representing Forum Benefits as a sales representative in November 2016.

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) (citation omitted); *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358

S.E.2d 150, 152 (Ct. App. 1987).

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).

Steele v. Victory Sav. Bank, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988).

Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency. See *Berry v. Goodyear Tire and 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.

Forum Benefits hired Bannon in 2009 as a full-time employee to represent Forum Benefits as a sales representative to prospective clients. (Pl.'s Ex. 137; Trial Tr., pp. 39-54, 69; 479). When he decided to pursue a career as a fireman in 2013, Bannon transitioned to an independent contractor and continued to represent Forum Benefits as a sales representative to existing and prospective clients. (Trial Tr., pp. 199; 490-491). As shown in Pl.'s Ex. 1 and acknowledged by Bannon, Bannon profusely thanked Stritt for allowing him to continue to represent Forum Benefits as an independent contractor, and Bannon assured Stritt that he would continue to grow the business for Forum Benefits. (Pl.'s Ex.

1; Trial Tr., p. 135; 490-491). The preceding evidence establishes that Bannon continuously served as Forum Benefits' sales agent from 2009 until 2016 and, therefore, owed Forum Benefits a fiduciary duty not to compete with Forum Benefits concerning the subject matter of his agency.

During the four (4) week overlap when Bannon was simultaneously employed by Assured Partners and represented Forum Benefits as a sales representative, Bannon admitted that he secretly obtained and forwarded the Employee Navigator login credentials for Forum Benefits' clients to Assured Partners. (Pl.'s Ex. 10; Trial Tr. p. 160, 165-166; 170; 172-176; 229; 256-257). At the same time, Bannon downloaded approximately 2,000 files containing Forum Benefits' trade secrets from Forum Benefits' SharePoint server using the login credentials he had received years earlier when he was Forum Benefits' employee. (Trial Tr., pp. 117-118; 177-178; 180). Employees of Assured Partners repeatedly exhorted everyone involved to expedite copying Forum Benefits' trade secrets before Forum Benefits discovered what they were doing. (Pl.'s Exs. 8, 10-12, and 45; Trial Tr., pp. 153-154; 168; 172-176; 426). Bannon's actions to download and share Forum Benefits' trade secrets with a direct competitor demonstrate that he knew what he was doing was wrong and violated his fiduciary duty to Forum Benefits.

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

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

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

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

A “trade secret” is any information that has value and is not readily publicly available. S.C. CODE ANN. § 39-8-20(5). The information may exist in any form, including as a formula, a compilation, a method of doing business, a technique, a product, a system, a process, a procedure, or a programming code. *Id.* The information does not have to be complicated, technical, or difficult to understand, and may merely be “a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy.” *Id.* Moreover, the information may simply be a compilation of publicly available data because “[t]he collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.” *Id.*

Forum Benefits designed the build-out of each Employee Navigator account, and Forum Benefits collected, organized, and compiled the employee census data and insurance plan information that populated each account. (Trial Tr., pp. 155-156, 158; 336-337). Winston described in detail the information contained each Employee Navigator account and Forum Benefits’ Sharepoint server. Specifically, she described Forum Benefits’ proprietary design and build-out of Employee Navigator accounts for each client, as well as Forum Benefits’ collection, organization, and compilation of employee census data and insurance plan information included in this proprietary database. (Trial Tr., pp. 338-341; 360-368; 372-378). She also described in detail Forum Benefits’ proprietary formulas included in the renewal spreadsheets for each client stored on Forum Benefits’ SharePoint server. (Trial Tr., pp. 360-368; 372-378). Forum Benefits’ design and compilation of data in the Employee Navigator accounts and proprietary formulas in renewal spreadsheets stored on Forum Benefits’ SharePoint server exactly match several of the forms of “information” included in the definition for a “trade secret” provided by the S.C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(a).

Forum Benefits' trade secrets took substantial time and effort to collect, organize, and compile and provided Forum Benefits with a competitive advantage in administering benefits for clients and negotiating rates with insurance providers. (Trial Tr., pp. 338-341; 360-368; 372-378). Assured Partners saved that time, by downloading, copying, and taking screenshots of Forum Benefits' trade secrets instead of having to design, build-out, collect, organize, and compile the same database of information. Competitive advantage and improved efficiency are precisely the types of economic value described in the S. C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(b).

The evidence in the Record (*e.g.*, Pl.'s Exs. 8, 10-12, and 45) provides additional, uncontroverted evidence of the value of Forum Benefits' trade secrets to Assured Partners. (Trial Tr., pp. 155-156; 168; 172-176; 426-429; 430-432). Respondents acted urgently to surreptitiously take Forum Benefits' trade secrets before Forum Benefits learned that Bannon was working for Assured Partners and terminated further access. (Trial Tr., pp. 153-154; 229; 256-257). Brady even testified, consistent with his November 8, 2016 email, that he could not build an Employee Navigator account for a client without login credentials that would allow him to download, copy, and take screenshots of Forum Benefits' Employee Navigator account for that client. (Pl.'s Ex. 11; Trial Tr., pp. 430-432). All of this uncontroverted evidence demonstrates the substantial economic value of Forum Benefits' trade secrets to Respondents.

Forum Benefits' compilation of data in the Employee Navigator accounts is not excluded from trade secret protection merely because the compiled data comprises seemingly simple facts collected from clients or insurance providers. S.C. CODE ANN. § 39-8-20(5). Forum Benefits designed the build-out of each Employee Navigator account, and Forum Benefits collected, organized, and compiled the employee census data and insurance plan information that populated each account. (Trial Tr., pp. 153-154, 158; 338-341; 360-368; 372-378). A trade secret may be a "compilation" of information—"a simple fact, item, or procedure, or a series or sequence of items or procedures which,

although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy.” *Id.* While clients and insurance providers certainly had knowledge of individual items in Forum Benefits’ compilation, “[t]he collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.” *Id.*

The February 1, 2022 Order fails to address, distinguish, or even acknowledge any of this evidence. “When ruling on a motion for a directed verdict, the trial court must view all evidence and all reasonable inferences in the light most favorable to the nonmoving party, and if the evidence is susceptible of more than one reasonable inference, the trial court should submit the case to the jury.” *Roddey v. Wal-Mart Stores East, LP*, 415 S.C. 580, 588, 784 S.E.2d 670, 675 (2016) (citation omitted). By ignoring all of this evidence, the trial court both ignored the clear language of the S.C. Trade Secrets Act and imposed its own view of the evidence, each of which constitutes error.

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

The directed verdict ruling that Forum Benefits failed to prove reasonable efforts to protect Forum Benefits’ trade secrets ignores substantial evidence of the proven effectiveness of Forum Benefits’ protective efforts and impermissibly decides disputed questions of fact.

The S.C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(a)(ii), limits a “trade secret” to information that “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Forum Benefits not only introduced evidence of reasonable efforts to protect Forum Benefits’ trade secrets, but the evidence also established that Forum Benefits’ protective efforts had proven effective at preventing Mack Ward from misappropriating Forum Benefits’ trade secrets several months earlier. (Trial Tr., pp. 491-498; Pl.’s Ex. 550).

Forum Benefits limited access to Forum Benefits' trade secrets to only authorized personnel with valid login credentials. (Trial Tr., pp. 369-371; 379). Forum Benefits only provided login credentials to Forum Benefits' proprietary database of information in the Employee Navigator accounts to account managers assigned to those accounts and, on a case-by-case basis, a single client representative if a client requested the ability to generate reports from the Employee Navigator account associated with that client. (Trial Tr., pp. 369-371). Forum Benefits did not provide sales people, like Mack Ward and Bannon, with any login credentials to any of Forum Benefits' Employee Navigator accounts. (Trial Tr., pp. 369-371). Forum Benefits only provided login credentials to Forum Benefits' SharePoint server to Forum Benefits' full-time employees. (Trial Tr., pp. 117-118; 369-371; 379). When an individual ceased to be an employee of Forum Benefits, all access to these computer systems was cut off. (Trial Tr., pp. 491-492).

Forum Benefits' protective efforts had proven effective at protecting Forum Benefits' trade secrets several months earlier in 2016. For several years prior, Forum Benefits had been providing benefits administration services to former clients of AssureSouth, owned by Ben Taylor and Mack Ward. In February 2016, Ben Taylor and Mack Ward notified Forum Benefits that they were moving to Assured Partners. (Trial Tr., pp. 492-494). Forum Benefits agreed to continue providing services to certain clients during a two-month transition period. (Pl.'s Ex. 550; Trial Tr. pp. 494-498). However, as shown in Plaintiff's Exhibit 550, Forum Benefits also notified Ben Taylor and Mack Ward that Forum Benefits would not allow third-party access to Forum Benefits' proprietary systems. (Pl.'s Ex. 550; Trial Tr. pp. 494-498). Forum Benefits then terminated all client access to any Employee Navigator accounts. (Trial Tr., pp. 491-492). As a result, only Forum Benefits' employees and account managers continued to have active login credentials to any of Forum Benefits' proprietary systems, and Forum Benefits' protective efforts proved effective at preventing Mack Ward and/or Assured Partners from misappropriating Forum Benefits' trade secrets. (Trial Tr., pp. 492-494).

From this experience, Assured Partners and Mack Ward discovered a loophole that would avoid Forum Benefits' protective efforts and allow access to Forum Benefits' proprietary systems without Forum Benefits' knowledge—use a client's login credentials to access Forum Benefits' proprietary systems to download, copy, and take screenshots of the Employee Navigator accounts for those clients. Assured Partners hired Bannon on October 15, 2016, and as shown in Plaintiff's Exhibits 8, 10-12, and 45, Bannon immediately exploited this loophole by obtaining and forwarding client login credentials to Assured Partners. (Pl.'s Exs. 8, 10-12, and 45; Trial Tr., p. 75, lines 9-11; pp. 152-153; 168; 172-176; 200; 256-257).

Bannon hid his new employment status from Forum Benefits, allowing Assured Partners to surreptitiously download, copy, and take screenshots of the Employee Navigator accounts for those clients without Forum Benefits' knowledge. (Trial Tr., p. 152). During the same time, Bannon downloaded approximately 2,000 files from Forum Benefits' SharePoint server using the login credentials he had received when he was Forum Benefits' employee. (Trial Tr., pp. 177-178; 180).

Forum Benefits' protective efforts had previously proven effective at preventing Assured Partners and Mack Ward from accessing Forum Benefits' trade secrets, and their subsequent discovery of a loophole around those protections does not change that. Respondents in fact exploited a loophole in Forum Benefits' protections, but the law requires “efforts that are reasonable under the circumstances,” not foolproof measures.

Forum Benefits provided substantial evidence of protective efforts and the demonstrated effectiveness of those protective efforts at preventing unauthorized access to Forum Benefits' trade secrets. “The trial court must deny a motion for a directed verdict . . . if the evidence yields more than one reasonable inference or its inference is in doubt.” *RFT Mgmt. Co., LLC v. Tinsley & Adams LLP*, 399 S.C. 322, 333, 732 S.E.2d 166, 171 (2012). The trial court erred by ignoring the evidence and adopting Respondents' view of the evidence, to Forum Benefits' prejudice.

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

The directed verdict ruling that Forum Benefits failed to prove that Respondents obtained Forum Benefits' trade secrets by improper means ignored the law and uncontroverted evidence presented at trial and impermissibly decided disputed questions of fact.

The S.C. Trade Secrets Act defines "improper means" to include, *inter alia*, theft, breach or inducement of a breach of a duty imposed by contract, and espionage through electronic or other means. S.C. CODE ANN. § 39-8-20(1). The evidence admitted at trial demonstrates that Respondents committed several of the enumerated actions that fall within the definition of "improper means" to obtain Forum Benefits' trade secrets.

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

The February 1, 2022 Order fails to address, distinguish, or even acknowledge any of the preceding evidence that demonstrates that Respondents committed several of the enumerated actions that fall within the definition of "improper means" to obtain Forum Benefits' trade secrets. By ignoring all of this evidence, the trial court ignored the clear language of the S.C. Trade Secrets Act and imposed its own view of the evidence, each of which constitutes error to the Forum Benefits' prejudice.

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

The directed verdict ruling that Forum Benefits failed to prove that Respondents misappropriated, wrongfully disclosed, or wrongfully used Forum Benefits' trade secrets ignores the

law and uncontroverted evidence presented at trial and impermissibly decides disputed questions of fact.

The S.C. Trade Secrets Act defines “misappropriation” of a trade secret as:

- (a) acquisition of a trade secret of another by a person by improper means;
- (b) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (c) disclosure or use of a trade secret of another without express or implied consent by a person who:
 - (i) used improper means to acquire knowledge of the tradeseecret.

S.C. CODE ANN. § 39-8-20(2).

The evidence admitted at trial and described herein—such as that in Section I(B)—demonstrates that Respondents committed several of the enumerated actions that fall within the definition of “improper means.” Those included theft, breach, or inducement of a breach of a duty imposed by contract, and espionage through electronic or other means to obtain Forum Benefits’ trade secrets. S.C. CODE ANN. § 39-8-20(1). As a result, Respondents’ actions constitute a “misappropriation” of Forum Benefits’ trade secrets under section 39-8-20(2)(a)—*i.e.*, Respondents acquired Forum Benefits’ trade secrets by improper means.

No evidence exists that Forum Benefits ever expressly or impliedly consented to Respondents’ disclosure or use of Forum Benefits’ trade secrets. Therefore, Respondents’ disclosure and use of Forum Benefits’ trade secrets was “wrongful,” and Respondents’ actions also constitute a misappropriation of Forum Benefits’ trade secrets under S.C. CODE ANN. § 39-8-20(2)(c)(i)—*i.e.*, Respondents used improper means to acquire knowledge of Forum Benefits’ trade secrets and then disclosed and used Forum Benefits’ trade secrets without Forum Benefits’ express or implied consent.

By concluding that Forum Benefits failed to prove that Respondents misappropriated,

wrongfully disclosed, or wrongfully used Forum Benefits' trade secrets, the trial court ignored the clear language of the S.C. Trade Secrets Act and imposed its own view of the evidence, each of which constitutes error to Forum Benefits' prejudice.

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

The directed verdict ruling that Forum Benefits failed to prove that damages were proximately caused by Respondents' misappropriation of Forum Benefits' trade secrets ignores substantial evidence and impermissibly decides disputed questions of fact.

Multiple witnesses provided testimony that supports the reasonable inference that Respondents' misappropriation of Forum Benefits' trade secrets proximately caused damages to Forum Benefits. Multiple contemporaneously generated emails (*e.g.*, Plaintiff's Exhibits 8, 10-12, and 45, (Pl.'s Exs. 8, 10-12, and 45)) confirm that Assured Partners' acquisition of Forum Benefits' trade secrets from the Employee Navigator accounts was critical to convincing clients of a seamless transition from Forum Benefits to Assured Partners. (Pl.'s Exs. 8, 10, 11, 12, and 45; Trial Tr., pp. 168; 172-176; 426-429).

Christie Holderness, the District Manager for St. Andrews Public Service District, testified that continuous access to Forum Benefits' trade secrets compiled in the Employee Navigator account was an important factor in her decision to transfer St. Andrews Public Service District's business from Forum Benefits to Assured Partners. (Trial Tr., pp. 610-616).

Nine clients associated with Bannon actively used Forum Benefits' compilation of data stored in the respective Employee Navigator accounts. (Trial Tr., pp. 263-264; 430-432; 552-555). Assured Partners saved substantial time by being able to download, copy, and take screenshots of Forum Benefits' trade secrets instead of having to design, build-out, collect, organize, and compile the same database of information. (Trial Tr., pp. 269-270). Bannon provided Employee Navigator client login

credentials for three of those clients – Carolina Youth Development, Premier Logistics, and St. Andrews Public Service District. (Trial Tr., pp. 263-264; 430-432). All three of those clients transferred their business from Forum Benefits to Assured Partners. None of the other six clients transferred their business to Assured Partners. (Trial Tr., pp. 263-264; 430-432; 552-555). This 100% statistical correlation between Respondents' misappropriation of Forum Benefits' trade secrets and transfer of business to Assured Partners provides probative evidence of damages proximately caused by Respondents' actions.

Testimony and contemporaneous emails (*e.g.*, Plaintiff's Exhibits 8, 10-12, and 45) provide uncontroverted evidence of the urgent efforts Respondents exercised to surreptitiously obtain Forum Benefits' trade secrets before Forum Benefits learned that Bannon was working for Assured Partners and terminated further access. (Pl.'s Exs. 8, 10, 11, 12, and 45; Trial Tr., pp. 153-156; 168; 172-176; 256-257). Brady even testified, consistent with his November 8, 2016 email, that he could not build an Employee Navigator account for a client without login credentials that would allow him to download, copy, and take screenshots of Forum Benefits' Employee Navigator account for that client. (Trial Tr., pp. 430-432).

All of this uncontroverted evidence supports the reasonable inference that damages were proximately caused by Respondents' misappropriation of Forum Benefits' trade secrets. As a result, the trial court's ruling as a matter of law that Forum Benefits failed to prove that damages were proximately caused by Respondents' actions impermissibly decided disputed questions of fact for the jury to resolve and constitutes legal error that prejudiced Forum Benefits.

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

The directed verdict ruling that Forum Benefits' damages were speculative directly contradicts the trial court's evidentiary rulings, ignores competent evidence of Forum Benefits' damages, and impermissibly decides disputed questions of fact.

Brian Stritt testified regarding Forum Benefits' damages. Respondents repeatedly objected to Stritt's testimony as being opinion testimony and speculative. (Trial Tr., pp. 503-513; 517-543). The trial court at first sustained Respondents' objections. (Trial Tr., pp. 503-513; 517-543). 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. (Trial Tr., pp. 543-552)

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' former owner and current managing director. (Pl.'s Ex. 16; Trial Tr., pp. 503-513; 517-543; 556-561).

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.

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

The directed verdict ruling that Forum Benefits introduced no evidence showing Assured Partners ever had access to or used any of Forum Benefits' trade secrets ignores substantial evidence presented at trial by Respondents' own employees and constitutes reversible error.

The evidence admitted at trial—such as that described herein in Sections I(B) and I(C)(5)—demonstrates that Assured Partners obtained client log-in credentials and copied and used Forum

Benefits' trade secrets resident in the Employee Navigator accounts for several clients. (Pl.'s Exs. 8, 10-12, and 45; Trial Tr., pp. 75; 117-118; 152-156; 160, 165-166; 168; 170; 172-178; 180; 200; 229; 256-257; 263-264; 269-270; 426-432; 552-555; 610-616).

Furthermore, Forum Benefits presented testimony from Nolan Zielinski, who conducted a forensic analysis of Forum Benefits' SharePoint server. (Trial Tr., pp. 300-309). Plaintiff's Exhibit 16 is a Log File Report generated by Zielinski that lists 2,107 files stored on Forum Benefits' SharePoint server that were accessed using Bannon's SharePoint user account with Forum Benefits. (Pl.'s Ex. 16; Trial Tr. pp. 304; 498-501; 514-517). As shown in the Log File Report, Bannon accessed 979 files from Forum Benefits' SharePoint server after October 15, 2016, when he was a Senior V.P. of Assured Partners. (Pl.'s Ex. 16; Trial Tr. pp. 200; 304; 498-501; 514-517).

Forum Benefits also presented expert testimony from Michael Scholz who forensically examined Forum Benefits' desktop computer that was used by Bannon in 2016. (Pl.'s Exs. 69, 70; Trial Tr. pp. 464, 466-468). Scholz testified that the desktop computer included a "Palmetto Benefits Management" folder.¹ (Trial Tr. p. 468). Plaintiff's Exhibit 77 is a printout generated by Scholz that lists each file included in the Palmetto Benefits Management folder, and as shown, this folder included approximately 1,000 files having the same file names as files stored on Forum Benefits' SharePoint server and included in the Log File Report generated by Zielinski. (Pl.'s Exs. 16, 77; Trial Tr. p. 468-469; 498-501; 514-516). Scholz also generated a LNK File Report, Plaintiff's Exhibit 72 (Pl.'s Ex. 72), and Scholz testified that the LNK File Report indicates that on October 30, 2016, an identical Palmetto Benefits Management folder was accessed on an external storage device connected to the desktop. (Pl.'s Ex. 72; Trial Tr. pp. 469-472).

The testimony of Zielinski and Scholz, combined with Bannon's testimony, provides evidence

¹"Palmetto Benefits Management" was Forum Benefits' previous corporate name. (Trial Tr., pp. 101-102)

that Bannon did indeed copy and then transfer a substantial number of files from Forum Benefits' SharePoint sever to an external storage device—all while Bannon was a Senior V.P. of Assured Partners.

Bannon's own testimony provides additional evidence that he intentionally tried to transfer files from Forum Benefits' SharePoint server to Assured Partners. Specifically, Michelle Fralix², an account manager for Assured Partners assigned to Bannon, asked Bannon for a medical plan summary for Premier Logistics—one of Forum Benefits' clients that Bannon was recruiting to switch to Assured Partners. (Pl.'s Ex. 64; Trial Tr., pp. 214-215). Bannon responded, "I've scoured my files but I wasn't able to pull what I wanted off Forum's website." (Pl.'s Ex. 64; Trial Tr., pp. 215-216). On November 30, 2016, Bannon notified Fralix that Bannon could no longer access Forum Benefits' proprietary renewal algorithms for Alpha Genesis—another client that Bannon was recruiting to switch to Assured Partners—stating, "My hard drive broke an [sic] I no longer have renewal info. for these guys." (Pl.'s Ex. 13; Trial Tr., pp. 216-217).

The trial court's ruling that Forum Benefits introduced no evidence that Assured Partners obtained and used Forum Benefits' trade secrets directly contradicts and cannot be reconciled with the undisputed testimony and documents provided by two separate forensic experts and Respondents' own employees. This erroneous factual conclusion, clothed as a legal ruling, invaded the province of the jury and constitutes prejudicial error to Forum Benefits.

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

The words "bad" or "faith" appear nowhere in any of Respondents' directed verdict arguments or cited authorities, nor in any of the trial court's oral directed verdict rulings. Nonetheless, the February 1, 2022 Order—authored entirely by Respondents—concludes as a matter of law that

² Michelle Fralix also went by the name Amy Fralix and testified at trial as Michelle Coffield. (Trial Tr., p. 281).

Forum Benefits pursued a trade secret claim in bad faith. (Order Granting Defendants’ Motion for Directed Verdict and Awarding Prevailing Party Attorneys’ Fees and Costs to Defendants, p. 4, ¶ C(8); p. 6, ¶ F). This ruling contradicts controlling precedent and constitutes legal error.

Respondents filed three separate motions seeking summary judgment on Forum Benefits’ trade secret claims. (Motion for Summary Judgment, Filed March 8, 2018; Memo in Support of Motion for Summary Judgment, Filed March 8, 2018; Memo in Reply to Motion for Summary Judgment, with 1 Exhibit, Filed April 2, 2018; Motion for Summary Judgment, filed June 11, 2019; Motion for Summary Judgment, with 8 Exhibits, filed April 20, 2020; Reply in Support of Motion for Summary Judgment, with 2 Exhibits, Filed June 9, 2020). Respondents withdrew one of the motions, but Forum Benefits filed full responses to the other two motions. (Response to Motion for Summary Judgment, with 13 Exhibits, Filed March 30, 2018; Response to 4th Motion for Summary Judgment, with 14 Exhibits, filed June 7, 2020). Two different Circuit Court judges each conducted a full hearing that was fully briefed, and each judge denied Respondents’ motion for summary judgment. (Order Denying Defendants’ Motion for Summary Judgment, Filed June 22, 2018; Order Form 4 Denying Motion for Summary Judgment, Filed October 14, 2020).

The trial commenced October 11, 2021, and Forum Benefits rested its case after three days of testimony. After the trial court granted Respondents a directed verdict on Forum Benefits’ trade secret claims, Respondents moved for an award of attorneys’ fees based on alleged bad faith litigation. (Trial Tr., pp. 680-681).

“[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. Atl. Coast Builders& Contrs., LLC*, 394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011) (citation omitted). In *Southeastern*, as in the present case, two different judges denied the defendants’ motion for summary judgment. As in the present case, the trial judge granted a directed verdict in favor of the defendants after the plaintiffs had

presented their case and rested. As in the present case, the defendants sought an award of attorneys' fees for frivolous litigation. Following the Supreme Court's controlling authority in *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997), the Court of Appeals affirmed the denial of attorneys' fees because the plaintiffs' claims had survived summary judgment.

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*, Forum Benefits' trade secret claims were not frivolous as a matter of law. Accordingly, the Court's ruling that Forum Benefits pursued a trade secret claim in bad faith ignores controlling South Carolina authority and is wrong as a matter of law.

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

The trial court's February 1, 2022 Order includes multiple rulings pertinent to Forum Benefits' conversion claim that are legally erroneous, and its factual conclusions improperly invaded the province of the jury.

1. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits could not prove the elements of a conversion against Bannon

The directed verdict ruling that Forum Benefits could not prove the elements of conversion against Bannon incorrectly applies the law to uncontroverted evidence presented attrial to decide disputed questions of fact.

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.*, 385 S.C. 452, 465, 684 S.E.2d 756, 763 (2009). The S.C. Trade Secrets Act provides the owner of a trade secret with the exclusive right to determine who can know, disclose, or use the trade secret. S.C. CODE ANN. § 39-8-20. Forum Benefits did not authorize Bannon to

obtain Forum Benefits' trade secrets from the Employee Navigator accounts or from Forum Benefits' SharePoint server. Nonetheless, Bannon secretly obtained and forwarded the Employee Navigator client login credentials for Forum Benefits' clients to Assured Partners, and Jim Brady used those login credentials to access, download, and copy Forum Benefits' trade secrets from the Employee Navigator accounts. (Pl.'s Ex. 10; Trial Tr. pp. 160, 165-166; 170; 172-176; 229; 256-257). Bannon himself testified that he downloaded approximately 2,000 files containing Forum Benefits' trade secrets from Forum Benefits' SharePoint server using the login credentials he had received as a Forum Benefits' employee. (Trial Tr., pp. 177-178; 180).

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.

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

2. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits Failed to Prove that Bannon Converted Any Property of Forum Benefits to the Exclusion of Forum Benefits' Rights as Forum Benefits Always Retained Access and Rights to the Information at Issue

The directed verdict ruling that Forum Benefits failed to prove that Bannon converted any property of Forum Benefits to the exclusion of Forum Benefits' rights as Forum Benefits always retained access and rights to the information at issue incorrectly applies the law to uncontroverted evidence presented at trial to decide disputed questions of fact.

The S.C. Trade Secrets Act provides the owner of a trade secret with the exclusive right to determine who can know, disclose, or use the trade secret. S.C. CODE ANN. § 39-8-20. 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. Accordingly, the Court's directed verdict ruling is legally wrong and impermissibly decides disputed questions of fact.

3. The Trial Court Erred in Determining as a Matter of Law that Intangible Property Cannot Form the Basis for a Conversion Claim

The directed verdict ruling that intangible property cannot form the basis for a conversion claim is wrong as a matter of law.

Conversion is the “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, supra*. South Carolina courts have held that intangible rights are normally not the proper subject for a conversion claim. *Id.* The *Gignilliat* court explained, “An 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 omitted) (emphasis added) (footnote omitted)). Ultimately, the South Carolina Supreme 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.*

In *Integrated Direct Marketing, LLC v. Drew May & Merkle, Inc.*, 2016 Ark. 281, 495 S.W.3d 73 (2016), 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?” *Id.* 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* is persuasive authority, consistent with the South Carolina Supreme 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 indistinguishable from 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. (Trial Tr., pp. 219-220). 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. (Trial Tr., pp. 117-118; 177-178; 180). 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.” *Id.* at 763.

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.

4. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits Failed to Prove Damages were Proximately Caused by Bannon's Conversion of Forum Benefits' Trade Secrets

The directed verdict ruling that Forum Benefits failed to prove that damages were proximately caused by Bannon's conversion of Forum Benefits' trade secrets ignores substantial evidence and impermissibly decides disputed questions of fact.

The evidence noted above, such as that in Section I(C)(1), supports the reasonable inference that Bannon's conversion of Forum Benefits' trade secrets proximately caused damages to Forum Benefits. Likewise, the "9-client/100% statistical correlation" evidence described in detail hereinabove in Section I(C)(5) likewise demonstrates the factual questions that should have prevented the trial court's ruling on this issue.

The evidence discussed above supports the reasonable inference that damages were proximately caused by Bannon's misappropriation of Forum Benefits' trade secrets. As a result, the Court's ruling as a matter of law that Forum Benefits failed to prove that damages were proximately caused by Bannon's actions impermissibly decided disputed questions of fact for the jury to resolve and constitutes legal error that prejudiced Forum Benefits.

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

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

Respondents' first motion for attorneys' fees consisted of an oral motion—a single sentence in open court referencing the employment contract between Forum Benefits and Bannon—that the

trial court granted before Respondents' attorney even finished vocalizing that single sentence.³ (Trial Tr., p. 680).

Respondents' second motion for attorneys' fees, based the S.C. Trade Secrets Act, was four sentences, again enunciated in open court, again did not include any evidence for any of the factors (identified below) that a trial court is required to consider before awarding attorneys' fees, and again was instantaneously granted by the Court. (Trial Tr., pp. 680-681).

The trial court failed to require the provision of basic information needed to support an award of attorneys' fees, including which Respondent is seeking fees, the legal authority for the fee request, the amount of the fee request, and the six categories of information our jurisprudence identifies as needed to determine a reasonable fee award.

A. If By Contract

Respondents moved for an award of attorneys' fees based on a prevailing party clause in Bannon's employment contract with Forum Benefits. (Trial Tr., p. 680). However, the trial judge had already ruled as a matter of law that there was no meeting of the minds to support a contract. (Trial Tr., p. 677). 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. (Order Granting Defendants' Motion for Directed Verdict and Awarding Prevailing Party Attorneys' Fees and Costs to Defendants, p. 2, ¶ 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 the non-existent contract.

B. If By Statute

Forum Benefits' trade secret claim was not bad faith as a matter of law. As articulated above

³The Court's instantaneous responses to Respondents' motions is significant and supportive of Forum Benefits' position that the trial judge should have recused himself for bias favoring Respondents.

in Section I(C)(8), “[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*, 394 S.C. at 713, S.E.2d at 650 (quoting *Hanahan*, 326 S.C. at 158, 485 S.E.2d at 913). The facts, reasoning, and conclusion reached in *Southeastern* are indistinguishable from the present case. Two different judges heard summary judgment motions against Forum Benefits, and both judges denied the motions. Consistent with the controlling authority of *Southeastern* and *Hanahan*, as a matter of law, Forum Benefits’ trade secret claims were not in bad faith.

C. Whose Attorneys’ Fees?

Respondents’ muddled attorney fee request seems to have sought an award of attorneys’ fees for both Respondents. (Trial Tr., p. 680-681). If Respondents’ motion was as to both Respondents, there is no evidence that Forum Benefits had any contract with Assured Partners. And there is no evidence that Bannon ever incurred any attorneys’ fees whatsoever.

D. What Attorney Fees?

Respondents acknowledge that Bannon never incurred any fees and costs but nonetheless argue that Bannon should “recover” the fees and costs incurred by Assured Partners. (Defendants’ Reply in Support of Its Motion for Attorneys’ Fees/Costs and the Court’s Award of Fees/Costs, pp. 4-7).

The attorneys’ fee provision in the employment contract, which the trial court ruled does not exist, provides, “In any litigation between the parties related to this Agreement, the prevailing party shall be entitled to recover all reasonable costs and attorneys’ fees.” (Pl.’s Ex. 137, p. 2, ¶ 11). However, rather than providing any evidence that Bannon actually incurred any fees and costs, Respondents instead 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. (Defendants’ Response in Opposition to Plaintiff’s Motion for a New Trial, pp. 4-7). Respondents’ arguments ignore controlling authority

directly on point from the South Carolina Supreme Court.

In *Williamson v. Middleton*, 383 S.C. 490, 681 S.E.2d 867 (2009), the South Carolina Supreme Court answered the question of 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. *Id.* at 493. 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, finding that the employee might discuss a fee at the end of the case. *Id.* at 496. The Supreme 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.

E. Additional Deficiencies

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.

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

The trial judge (Judge Price) erred in refusing to disqualify himself pursuant to Cannon 3(E)(1).

Canon 3(E)(1) states as follows:

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

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

While the trial judge's assurance of his own impartiality is accorded great weight, "a judge's impartiality might reasonably be questioned when his factual findings are not supported by the record." *Ellis*, 315 S.C. at 285, 433 S.E.2d at 857. Given particular events with the trial judge that occurred during trial, there were multiple, legitimate, *bona fide* reasons to question the trial judge's impartiality, and he should have recused himself.

The trial commenced on October 11, 2021. In their opening statement, Respondents identified an individual named Mack Ward—a Vice President of Assured Partners—as a trial witness. (Trial Tr., p. 34). Mack Ward's name was cited repeatedly during examinations of multiple witnesses throughout the second day of trial, all prior to the recess described in the next paragraph of this brief. (Trial Tr., pp. 239, 257, 259, 282). The trial judge himself even mentioned his name. (Trial Tr., p. 258).

On the afternoon of the second day of the trial, off the record during a recess with the jury not present, the trial judge entered the courtroom and asked counsel for both parties if he could greet a person in the courtroom. The person whom the trial judge then proceeded to greet turned out to be Mack Ward—a Vice President of Assured Partners. Mack Ward had not been in the courtroom before that time. The interaction between the trial judge and Mack Ward was substantially more boisterous and affectionate than would be expected between mere acquaintances—the two engaged in mutual hugging, back slapping, and generally rowdy laughter. After this public display, the trial

judge immediately went to the front of the bench, into the court reporter's station, and announced to all present in the courtroom—which included Forum Benefits' managing partner Brian Stritt—that he and Mack Ward knew each other from their days attending college at Wofford together and, if cell phones had existed then, neither would be in the position they are in now. (December 29, 2021 Declarations of Brian Stritt, Lisa Hollingsworth-Stritt, and Michelle Filler).

At no time then or thereafter did the trial judge offer any opportunity to the parties to address concern they might have as a result of this in-court display of relationship and affection between the trial judge and a principal for Assured Partners and/or questions they might have as to bias of the trial judge from that relationship and affection.

Before trial resumed on October 13, 2021, Forum Benefits made an oral motion for the trial judge to recuse himself from further participation in the trial based on the trial judge's public displays of bias the previous day. (Trial Tr., p. 451, lines 4-6). The trial judge confirmed the comment about cell phones as being "my comment ... intended to be a self-deprecating joke about myself." (Trial Tr., p. 455, lines 12, 18-19).

As reflected in the transcript of the proceedings, the trial judge said, "I had no idea why he would be here," (Trial Tr., p. 454, lines 21-22), notwithstanding Respondents indicating in their opening statement that Mack Ward would be a witness (Trial Tr., p. 34) and Mr. Ward's name being recited repeatedly during earlier testimony (Trial Tr., pp. 239, 257, 259, 282). The trial judge seemed to indicate during argument of the motion that at some point the trial judge and Mack Ward went back into chambers to continue their reunion⁴, an event of which Forum Benefits was then-previously unaware, which the trial judge confirmed at the January 4, 2022 hearing on post-trial motions. (January 4, 2022 Hearing Transcript, p. 53).

⁴“And we went back and talked and discussed -- and I -- I'll put on the record what we talked about.” (Trial Tr., p. 452, lines 7-8)

The trial judge also provided the unsolicited statements, “I don’t do Facebook” and “there’s nothing on Facebook that says I’m a judge.” (Trial Tr., p. 452, lines 17-20). A quick examination of Facebook® seems to contradict both of these statements. Specifically, someone named Bentley Price maintains a personal Facebook® account, is currently Facebook® friends with someone named Michelle Ward, which is the name of Mack Ward’s wife, and received and responded to Facebook® messages on October 19, 2021, that included photos of someone who appears to be the trial judge in a black robe and stating, “Happy birthday Judge. We love you!” This posting indicates that Facebook® users posted 19 comments, including a reply by a Facebook® account holder named Bentley Price of “Thank you everyone!!” (Pl.’s Exs. 601, 602, and 603; January 4, 2022 Hearing Transcript, pp. 50-53).

These Facebook® postings are significant because they directly contradict unsolicited statements made on the record by the trial judge six days earlier in response to Forum Benefits’ recusal motion – not only does the trial judge “do” Facebook® with his own Facebook® account, but also, less than a week after making those unsolicited statements, the trial judge received and responded to Facebook® postings that clearly identify him as a judge.

On October 25, 2021, Forum Benefits separately filed a Motion for a New Trial pursuant to Rule 59(a), SCRCF. (Plaintiff’s Motion for New Trial). Forum Benefits asserted that the trial judge’s reasonable appearance of bias, combined with multiple inconsistent rulings that consistently favored Respondents, demonstrated actual bias by the trial judge that prevented Forum Benefits from receiving a fair trial.

On January 4, 2022, the trial judge conducted a hearing on Forum Benefits’ Motion for a New Trial. Forum Benefits presented live testimony from Michelle Filler, Lisa Stritt, and Brian Stritt describing the trial judge’s extrajudicial conduct with Mack Ward in the courtroom that created a

reasonable appearance of bias.⁵ (January 4, 2022 Hearing Transcript, pp. 6-36). After receiving arguments from all parties, the trial judge *sua sponte* described his relationship with Mack Ward for the record. (January 4, 2022 Hearing Transcript, pp. 50-53). However, the trial judge’s recollection of events differed from the record and omitted significant details. Specifically, the trial judge confirmed that he was college friends with Mack Ward and again did not dispute or refute the witnesses’ testimony describing his lively interaction with Mack Ward in the courtroom. However, the trial judge pointedly denied making the statement about cell phones and instead recalled, not that the statement was his own self-deprecating joke about himself as he had asserted on October 13th, but that he had merely repeated a remark that Mack Ward had said to him. (January 4, 2022 Hearing Transcript, p. 51, lines 15-20). The trial judge also did not mention that he had also met alone privately with Mack Ward in chambers without anyone from the Forum Benefits being present, until asked to confirm that this *ex parte* meeting actually took place. (January 4, 2022 Hearing Transcript, p. 53)

A. The Court’s Actions Created an Appearance of Bias

Forum Benefits’ basis for recusal—that the trial judge displayed and revealed a personal bias toward Mack Ward, a Vice President of Assured Partners—squarely fits Canon 3(E)(1)(a). Moreover, the Commentary to Canon 3(E)(1) specifically states, “Under this rule, a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply.”

Our jurisprudence requires evidence of judicial prejudice and of the existence of the judge’s impartiality. As described above, the trial judge’s public displays of bias directed toward Mack Ward

⁵ Prior to the hearing, Forum Benefits also filed declarations from Michelle Filler, Lisa Stritt, and Brian Stritt regarding their personal observations of the trial judge’s extrajudicial conduct with Mack Ward during trial. (Declaration of Brian Stritt, filed December 29, 2021; Declaration of Lisa Hollingsworth-Stritt, filed December 29, 2021; Declaration of Michelle Filler, filed December 29, 2021).

provide concrete evidence by which “the judge’s impartiality might reasonably be questioned.”

Although not expressly addressed by the South Carolina Supreme Court, there is suggestion elsewhere that the bias that disqualifies a trial judge “must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.” *See, e.g., Duplan Corp. v. Deering Milliken, Inc.*, 400 F.Supp. 497, 522 (D.S.C. 1975) (citation and internal quotation marks omitted). But, even under that narrower standard, the trial judge in the case at bar should have disqualified himself—his bias stemmed from his relationship with Mack Ward, a relationship that was extrajudicial.

Pursuant to Canon 3(E), the trial judge should have disqualified himself.

B. The Court’s Inconsistent Rulings Provide Evidence of Actual Bias

Forum Benefits’ concerns about the appearance of bias are bolstered by the trial court’s multiple rulings that were inconsistent in rationale but consistently in Respondents’ favor.

For example, and as discussed above, the trial court granted a directed verdict for Bannon on the contract claim, stating, “There was, obviously, no meeting of the minds.” (Trial Tr., p. 677). Despite ruling as a matter of law, in disregard of the evidence, that no contract existed to be breached, the trial court nonetheless granted Respondents’ motion for an award of attorneys’ fees based on a clause in what the trial court had deemed to be a non-existent contract. (Trial Tr., pp. 680-681). Moreover, the trial court erroneously ruled that it would award Bannon his attorneys’ fees before hearing any response from Forum Benefits opposing the motion. (Trial Tr., pp. 680-681). The attorneys’ fees awarded by the trial court go toward Assured Partners—of whom Mack Ward is a Vice President. The rulings were inconsistent, but both rulings were consistent to this extent: they favored Respondents.

For another example, during Forum Benefits’ direct examination of Bannon, Forum Benefits authenticated and offered into evidence Pl.’s Ex. 9—Bannon’s Responses to Requests for Admission

under Rule 36. (Pl.'s Ex. 9; Trial Tr., pp. 192-193). This exhibit was particularly relevant to impeaching Bannon because Bannon had just provided testimony based on documents admitted into evidence that directly refuted many of the admission requests that Bannon had denied. (Trial Tr., pp. 185-192). Respondents objected to the admissibility of Bannon's Responses to Admission Requests (Pl.'s Ex. 9) as being a pleading: "Your Honor, I object, it's a pleading." (Pl.'s Ex. 9; Trial Tr., p. 193). The trial court sustained the objection: "I'm – I'm not going to allow it in. He's correct, it's a pleading." (Trial Tr., p. 193).

Responses to Requests for Admission are not pleadings. Rule 7(a), SCRCP, identifies the documents that constitute pleadings (*i.e.*, a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, and a third-party answer), and responses to Requests for Admission are not one of the identified documents.

During Respondents' cross-examination of Brian Stritt, Respondents sought to introduce Exhibit C to the Verified Complaint as an exhibit. (Trial Tr., p. 573). Forum Benefits objected to the exhibit as a pleading pursuant to Rule 43. (*Id.*). See Rule 43(g), SCRCP ("The pleadings shall not be submitted to the jury for its deliberations."). The trial judge overruled Forum Benefits' objection: "I'll allow it." (Trial Tr., p. 574). The trial court's ruling that Bannon's Responses to Admission Requests are inadmissible pleadings, when they are not even pleadings, cannot be reconciled with the Court's subsequent improper ruling allowing Respondents to admit into evidence what is indisputably a pleading, but the two rulings together are further probative evidence of the Court's bias.

Another inconsistent ruling by the trial court involved direct evidence of Forum Benefits' damages. Forum Benefits sought to elicit factual testimony from Brian Stritt based on his own personal knowledge of the dollar amount of annual commissions associated with clients that switched from Forum Benefits to Assured Partners and the resulting damages to Forum Benefits. (Pl.'s Ex. 16; Trial Tr., pp. 503-513; 517-543; 556-561). At the time of the events giving rise to this litigation, Stritt

was the sole owner of Forum Benefits and had been negotiating with a buyer for over a year to purchase Stritt's company. After learning that Bannon had left Forum Benefits, the buyer required Stritt to identify the precise dollar amount of annual commissions associated with clients for whom Bannon had been the sales person, and the buyer then reduced the previously negotiated purchase price by \$1.5M based on the information that Stritt provided to the buyer. (Pl.'s Ex. 16; Trial Tr., pp. 503-513; 517-543; 556-561).

Respondents objected to this factual testimony from Brian Stritt, along with the contemporaneously-generated exhibits that documented both the annual commissions and the \$1.5M reduction in the purchase price negotiated in an arms-length transaction. (Trial Tr., pp. 503-513; 517-543). In initially sustaining Respondents' objections, the trial court ruled that Stritt's testimony lacked foundation and, although Stritt's testimony was based on and entirely consistent with the information that Stritt had provided to the buyer in 2016, the trial court reasoned that allowing Stritt to testify regarding commissions would enable Stritt to provide false evidence of Forum Benefits' damages. (Trial Tr., pp. 503-513; 517-543). According to the trial court, Forum Benefits could only provide evidence of damages through a financial expert. (Trial Tr., pp. 503-513; 517-543).

After a lunch break, the trial judge announced that, after consultation with an unidentified Business Court judge, he would allow Stritt to testify about the precise dollar amount of annual commissions associated with clients that switched from Forum Benefits to Assured Partners. (Trial Tr., pp. 543-552). However, the trial court would not allow into evidence any contemporaneously-generated exhibits to corroborate Stritt's testimony, nor would the trial court allow Stritt to testify about the \$1.5M reduction in the purchase price that had been based solely on the anticipated lost commissions associated with clients taken from Forum Benefits by Assured Partners. (Trial Tr., pp. 543-552). The trial court's rulings that Stritt could provide first-hand, factual testimony about annual commissions, while excluding first-hand, factual testimony about the negotiated \$1.5M decrease in the

purchase price, were contrary to Rules 601-603 of the South Carolina Rules of Evidence, prejudiced Forum Benefits, and constitute errors as a matter of law.

Forum Benefits respectfully asserts that the motion to recuse was based on the reasonable appearance of bias, and Forum Benefits' concerns about the appearance of bias are supported by a consistent string of inconsistent rulings that continually favored Respondents. The trial court's denial of Forum Benefits' motion to recuse prevented Forum Benefits from receiving a fair trial.

CONCLUSION

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

November 16, 2022

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Nov 16 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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

Forum Benefits, LLC,

Appellant,

v.

Brian Bannon and Assured Partners, NL,

Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on November 16, 2022, copies of Forum Benefits, LLC's **Amended Initial Brief** were served on all counsel of record via emails containing the above referenced document to counsels' individual AIS email addresses:

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STATEMENT OF THE CASE¹

Respondent Brian Bannon (“Respondent Bannon”) began his employment with Appellant Forum Benefits, LLC (“Appellant”) in 2009 as an insurance broker. T. 85:18-22.² Appellant’s first witness at trial was its attorney, David Wyatt (“Mr. Wyatt”), who testified that, at the request of Appellant, he prepared a form employment agreement in 2009 that he believed Appellant intended Respondent Bannon and another employee to sign (the “Employment Agreement”). T. 41:10-24. Respondent Bannon denied ever seeing or signing the Employment Agreement. T. 124:11-125:7. The Employment Agreement was in template form, was not signed, and contained no specific information pertaining to Respondent Bannon. Pl. Ex. 137.

Mr. Wyatt readily admitted he had no record of Respondent Bannon ever being sent, receiving or signing the document. T. 69:6-15. The Employment Agreement attached to the Complaint and marked as an exhibit at trial was missing at least the following material information: (1) Respondent Bannon’s name or any identifying information; (2) Respondent Bannon’s compensation, which was left blank; (3) the parties’ signatures; (4) Respondent Bannon’s duties (which were to be listed in Exhibit A to the Employment Agreement but never were); and (5) the explanation of benefits (which were to be listed in Exhibit B to the Employment Agreement but never were). Pl. Ex. 137. The Employment Agreement also contains a signature line for a parent or guardian even though Respondent Bannon was older than the age of majority when he began his employment with Appellant. *Id.* The only employee-specific information that was contained in

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

² The Trial Transcript will be cited herein as “T.” followed by the applicable page and line references.

the Employment Agreement is a reference that the unnamed employee would work for Appellant in Greenville, South Carolina – which was clearly not intended for Respondent Bannon who lived in Beaufort and who was hired to work in and actually worked in the Charleston, South Carolina area. Id., T. 57:10-58:3.

In addition to not being able to provide any evidence or testimony to remotely suggest that Respondent Bannon actually signed the Employment Agreement, Appellant's own attorney and first witness at trial admitted that Appellant's contract claim was barred by the Statute of Frauds. At trial, Mr. Wyatt admitted that, based on the face of the Employment Agreement he drafted, the obligations in the Employment Agreement could not possibly be completed within one year, thus triggering the Statute of Frauds. T. 70:3-20.

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

During the time period that Respondent Bannon was an independent contractor for Appellant, he sold employee benefits insurance to business clients. T. 82-83, 106, 229, 238-239. The insurance was provided through various insurance carriers and Respondent Bannon placed his clients with Appellant for day to day benefits administration and servicing needs. Id. Some of Respondent Bannon's clients used a third-party web based software product called Employee

Navigator for benefits administration. Employee Navigator compiled employee census data and insurance plan information for the employees of each client company. T. 96:10-25. The insurance broker or client inputted the client's/employees' information into the program and the program served as a resource for the clients/employees/brokers with respect to viewing and modifying the clients'/employees' census data and/or plan information. Id. The Employee Navigator information is known and available to both the client (whose employees the information is about) and the insurance carrier (who provides coverage for the individual policies selected by the employees), in addition to the insurance broker. T. 429:4-25. Further, the username and password for clients/employees to access their Employee Navigator account belonged to the clients/employees and Appellant did not in any way restrict the clients/employees with respect to said login information, nor did Appellant in any way restrict the clients from using or providing the Employee Navigator username and password to other brokers, such as Respondent Bannon. T. 154, 400-405, 441.

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

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

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

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

judge, Judge Deadra L. Jefferson, denied Respondents' motion with a Form 4 Order and provided no explanation for the denial other than citing the summary judgment standard and stating generally that material issues of fact exist. Id., see Form 4 Order denying motion for summary judgment filed October 14, 2020.

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

Later that third day, Appellant rested its case. T. 602:6. After Appellant rested its case, Respondents moved for directed verdict on all counts.³ T. 617:25-673:25. After hearing Appellant's case in chief and the parties' directed verdict arguments, the trial court took the issue of directed verdict under advisement since it was the end of the day. T. 673:25. The next day, day four of trial, the trial court granted Respondents' directed verdict motion on the remaining four counts. T. 675-684. The trial court also found that Appellant brought its misappropriation of trade secrets claim in bad faith and awarded Respondents' attorneys' fees and costs under the South Carolina Trade Secrets Act. T. 680:10-681:5. As an additional basis for awarding Respondent Bannon his attorneys' fees and costs, the trial court further found that Respondent Bannon was the prevailing party under the language in the alleged contract. *Id.* The trial court's ruling on directed verdict and attorneys' fees was placed on the record at trial. T. 677-681.

After the trial concluded, the parties filed multiple post-trial motions, responses, replies and affidavits. On January 4, 2022, the trial court held a hearing on these pending motions and post-trial issues. On February 1, 2022, the trial court entered its Judgment and formal written Order Granting Defendants' Motion for Directed Verdict and Awarding Prevailing Party Attorneys' Fees and Costs to Defendants. See Order Granting Defendants' Motion for Directed Verdict and Awarding Prevailing Party Attorneys' Fees and Costs to Defendants (the "Order"). On February 11, 2022, Appellant filed a motion to alter or amend the judgment. On February 16, 2022, the trial court denied Appellant's motion to alter or amend the judgment. Appellant filed its Notice of Appeal on February 25, 2022.

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

ARGUMENT

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

The trial court correctly granted Respondents' motion for directed verdict on all four counts. Appellant failed to prove the required elements of its breach of contract claim because it was barred by the Statute of Frauds, the Employment Agreement's obligations expired well before Respondent Bannon's alleged breaches, the Employment Agreement was missing numerous material terms, and because Appellant failed to prove any damages that were proximately caused by any alleged breach. Appellant's breach of fiduciary duty claim failed as a matter of law because Appellant failed to prove any basis for Respondent Bannon, as an independent contractor, to owe a fiduciary duty to Appellant. Appellant's trade secret claim failed as a matter of law because Appellant failed to prove the existence of a trade secret, failed to show any misappropriation of a trade secret, and failed to show any damages causally related to the alleged trade secret misappropriation. The trial court also properly ruled that Appellant brought its trade secret claim in bad faith and awarded attorneys' fees to Respondents. Appellant's conversion claim failed as a matter of law because Appellant failed to prove that Respondents exercised dominion over Appellant's property to Appellant's exclusion and because the intangible property that was the subject of Appellant's conversion claim is not the proper subject of a conversion claim under South Carolina law.

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

To prove a breach of contract claim, a plaintiff must prove by a preponderance of the evidence "the existence of a contract, its breach, and damages caused by such breach." S. Glass &

Plastics Co. v. Kemper, 399 S.C. 483, 732 S.E.2d 205, 209 (Ct. App. 2012). Appellant failed to establish any of these elements at trial.

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

First, Appellant failed to prove the existence of a signed contract. The Employment Agreement was an unsigned template document that Appellant's attorney, Mr. Wyatt, created in 2009. Neither Respondent Bannon nor Appellant executed the form Employment Agreement Appellant attached to its Complaint and introduced at trial. Pl. Ex. 137.

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

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

Appellant attempts to overcome the Statute of Frauds by arguing for the application of a new rule or exception to South Carolina law. Notably, the exception it seeks is not in any way

contained in the applicable South Carolina statute. S.C. Code Ann. § 32-3-10. Appellant argues that courts *in other jurisdictions* have recognized a rule called the lost memorandum exception, which permits a party to utilize parol evidence to prove the existence of a signed agreement when the signed agreement is not obtainable. Appellant's Brief p. 7. South Carolina, however, has never expressly adopted the lost memorandum exception. Yadkin Valley Bank & Tr. v. Oaktree Homes, Inc., 2014 WL 3747342 (S.C. Ct. App. July 30, 2014). Rather, when considering the potential of this exception, the Yadkin court noted that, "[j]urisdictions that allow a party to submit parol or extrinsic evidence to establish proof of a lost memorandum in order to 'avoid' the requirements set forth in the general statute of frauds require that evidence to be clear and convincing." Yadkin, 2014 WL at *1 (citing Weinsier v. Soffer, 358 So. 2d 61, 63 (Fla. Dist. Ct. App. 1978)). The Yadkin court ruled that even if it adopted the lost memorandum exception, which it did not, the party seeking to establish the contract must provide more than self-serving or contradictory evidence to satisfy the clear and convincing standard. Id.; see also Weinsier, 358 So. 2d at 63 ("The very purpose of the [s]tatute of [f]rauds is defeated where the sole proof of the existence and contents of a document relied upon to avoid the [s]tatute is the testimony of the plaintiff."); Zander v. Ogihara Corp., 213 Mich. App. 438, 540 N.W.2d 702, 706 (1995) the trial court's denial of defendant's motion for directed verdict and judgment notwithstanding the verdict, and explaining it would not "permit plaintiffs to defeat the purpose and intent of this statute solely on the basis of their own self-serving testimony").

Appellant contends that it presented clear and convincing evidence to establish a contract with Respondent Bannon. It did not. To attempt to support its position, Appellant relies on Mr. Wyatt's testimony. Specifically, in support of its argument, Appellant merely contends that Mr. Stritt (Appellant's owner) engaged Mr. Wyatt to draft a form Employment Agreement in 2009. T.

40-41. However, at no point during Mr. Wyatt's testimony did he contend that he used Respondent Bannon's specific information to prepare the unsigned contract, nor did Mr. Wyatt send Respondent Bannon a copy of the Employment Agreement, and nor did he witness Respondent Bannon sign the contract. To the contrary, Mr. Wyatt actually admitted that he never received or viewed a signed copy of the alleged contract. T. 69:6-15. Mr. Wyatt's testimony does not help Appellant to establish there was ever a signed written contract by any form of circumstantial evidence, but especially not by clear and convincing evidence. See Weinsier, 358 So. 2d at 62-63 (requiring that proof be clear, strong, and unequivocal).

Appellant next points to Mr. Stritt's testimony to try to establish its allegations that there was a signed contract. Appellant's Brief p. 8-9. Mr. Stritt is the only witness that testified to allegedly witnessing Respondent Bannon's execution of the Employment Agreement. Other than Mr. Stritt, no other witness testified to having seen a completed or signed version of the alleged contract, let alone observe Respondent Bannon execute the document. Mr. Stritt's testimony is biased and self-serving, considering he is the President of Appellant and was the sole owner at the time. T. 423:9-14. Mr. Stritt's singular, self-serving testimony is precisely the type of testimony the Statute of Frauds is designed to protect against. As discussed above, courts do not permit plaintiffs to use self-interested, self-serving testimony to establish the existence of an allegedly lost agreement. See Zander, 540 N.W.2d at 706. To hold otherwise would obliterate the protections afforded by the Statute of Frauds.

The testimony of Mr. Wyatt and Mr. Stritt are wholly inadequate to satisfy any clear and convincing standard of proof. But more importantly, this testimony cannot overcome the fact that Respondent Bannon denies ever seeing or signing the Employment Agreement and that the unsigned, template contract was missing at least the following material terms: (1) Respondent

Bannon's name as well as any other information pertaining to Respondent Bannon; (2) Respondent Bannon's compensation; (3) the parties' signatures; (4) Respondent Bannon's duties; (5) Respondent Bannon's explanation of benefits; (6) Respondent Bannon's address; and (7) Respondent Bannon's social security number. Pl. Ex. 137, Introduction ¶, ¶2, ¶5, ¶6, Exhibit A and Exhibit B attached thereto. Appellant did not prove the existence of a completed contract, no less an actual signed contract.

Furthermore, the evidence at trial established that the Employment Agreement was clearly not drafted for Respondent Bannon. The Employment Agreement inexplicably contemplates a parent's or guardian's signature. Pl. Ex. 137, p. 5. It is undisputed that at all material times Respondent 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 Respondent Bannon as Appellant alleged. Even more damaging to Appellant's position is the fact that the only employee-specific information contained in the Employment Agreement was that the employee would work in "Greenville, South Carolina." Plaintiff Ex. 137, ¶3; T. 57:19-58:3. Tellingly, however, Appellant admitted that it did not hire Respondent Bannon to work for Appellant in Greenville, South Carolina, but hired him to work in the Charleston area. *Id.* During the entirety of Respondent Bannon's employment with Appellant, he lived in Beaufort and worked in the Beaufort and Charleston area, not Appellant's Greenville office. T. 115:19-116:5. There was no reasonable basis to put a reference to working in Greenville in the template document if it was truly drafted for Respondent Bannon as Appellant falsely alleged.

These undisputed facts lead to the inescapable conclusion that Appellant wholly failed to prove the elements of its contract claim. There is no evidence to support Appellant's position and even if the court were to adopt a new lost document exception to the Statute of Frauds, Appellant

did not remotely meet a clear and convincing standard of proof. Accordingly, the trial court's directed verdict ruling on Appellant's breach of contract claim should be upheld.⁴

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

Second, Appellant failed to prove any breach of the Employment Agreement. The trial court correctly ruled as a matter of law that the Employment Agreement's covenants expired in May 2015 and, thus, Respondent Bannon could not have breached them thereafter. The Employment Agreement's restrictive covenants specifically state that they only apply for two years after the employment relationship ends. Plaintiff's Exhibit 137, ¶12(g), ¶13, and ¶14. Appellant admitted that Respondent Bannon's employment relationship with Appellant terminated in May of 2013. T. 64, 265, 575, 577:1-12. Respondent Bannon thereafter became an independent contractor. *Id.* Once Respondent Bannon transitioned to an independent contractor, the Employment Agreement was no longer applicable and terminated. *Id.* Given that Respondent Bannon became an independent contractor in May 2013, the Employment Agreement's two year, post-employment restrictive covenants expired in May 2015. Appellant admitted at trial that it was not aware of any evidence that Respondent Bannon breached any portion of the Employment Agreement prior to May of 2015. T. 577:13-16.

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

In an attempt to get around the glaring timing issue of the alleged breach, Appellant argues that the trial court's ruling, "ignores that Forum Benefits introduced evidence that Bannon breached a different Employment Agreement provision that prohibited Bannon from disclosing Forum Benefits' trade secrets and confidential information – this restriction was unlimited in duration." Appellant's Brief p. 10. Appellant's argument misinterprets the Employment Agreement's language and fails to acknowledge critical aspects of the trial court's ruling.

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

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

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

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

Appellant seeks to ignore its own definition of Confidential Information and have this Court rely solely on a separate paragraph of the Employment Agreement that it contends refers to

trade secrets not being used without any time limit. Appellant's Brief p. 10. However, Appellant cannot rely on inconsistent provisions in its own agreement to establish its claims. All ambiguities must be and were properly construed against Appellant. See Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 698 S.E.2d 773, 778 (2010).

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

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

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

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

Third, Appellant failed to prove damages proximately caused by any alleged breach of the Employment Agreement. As discussed in Section I.A.2. above, Appellant has completely relied on the trade secret issue to support its claim that Respondent Bannon breached the Employment Agreement. Appellant cannot and does not argue against the fact that the non-solicitation and non-disclosure restrictions in the Employment Agreement expired long before any alleged breach by Respondent Bannon. While the trial court did not directly address the issue of whether Appellant presented sufficient evidence to establish proximate cause damages under the contract claim, it did so under Appellant's trade secrets claim. Because Appellant's contract claim is entirely based on its trade secrets allegations, the same reasoning applies here to bar Appellant's contract claim based on a failure to prove any damages proximately caused by the alleged breach. See Section I.C. below.

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

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

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

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

"A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence." Davis v. Greenwood Sch. Dist., 620, S.E.2d 65, 68 (S.C. 2005). "The imposition of a fiduciary duty upon a party constitutes a high standard of responsibility and should not be done lightly." Wired Fox Technologies, Inc. v. Estep, 2017 WL 1135288, at * 10 (D.S.C. March 27, 2017) (citing Fisher v. Shipyard Vill. Council of

Co-Owners, Inc., 409 S.C. 164, 760 S.E.2d 121, 128 n.2 (Ct. App. 2014), aff'd as modified, 415 S.C. 256, 781 S.E.2d 903 (2016)). As the Supreme Court of South Carolina has explained there must be a firm foundation for reposing the level of trust of a fiduciary on the other third party. Burwell v. S.C. Nat. Bank, 288 S.C. 34, 340 S.E.2d 786, 790 (1986). A fiduciary duty generally cannot be unilaterally imposed by one party; rather, “[t]he evidence must show the entrusted party actually accepted or induced the confidence placed in him.” Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817, 822 (Ct. App. 2004).

Significantly, South Carolina courts have made clear that a mere employer-employee relationship is not sufficient to create a fiduciary duty. See Covese 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.”); In re Hunnicutt, 466 B.R. 797, 801 (Bankr. D.S.C. 2011). “The unilateral actions of an employer do not create a fiduciary duty [on] its employees.” Covese Darden, LLC v. Ibanez, No. 2014-000339, 2016 WL 4379419, at *5 (S.C. Ct. App. Aug. 17, 2016) citing Burwell v. S.C. Nat. Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986). 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 (“Defendants convincingly argue that if a traditional employer/employee relationship alone is not sufficient to give rise to a fiduciary duty, an independent contractor relationship can hardly be sufficient in that score.”)

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

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

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

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

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

Contrary to the facts at bar, in virtually all of the cases Appellant cites, the alleged independent contractors are entrusted with the financial or personal well-being of their clients. See Loftis v. Eck, 288 S.C. 154 (S.C. Ct. App. 1986) (holding that agent acting for client *pursuant to a power of attorney* owed a fiduciary duty to the client)⁵; Lengel v. Tom Jenkins Realty, Inc., 286 S.C. 515, 334 S.E.2d 834 (Ct. App. 1985) (holding that real estate brokers were bound to act in compliance with client’s instructions and in conformity with authority conferred); Matter of Moore, 280 S.C. 178, 312 S.E.2d 1 (1984), reinstatement granted, 298 S.C. 13, 377 S.E.2d 922 (1989) (holding that attorney owed fiduciary duty to client). All of these cases exemplify the type of special relationship required to establish a fiduciary duty and fit within the current state of South Carolina law. See Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711, 716 (2003) (“Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters.”).

None of these cases stand for the proposition that an independent contractor owes a fiduciary duty to the companies to whom it provides its services. Appellant’s argument ignores the reality that independent contractors run their own business and by the nature of their “independent” status, routinely provide services to competing companies. In fact, the ability to compete is one of the control factors considered under the Fair Labor Standards Act for properly classifying someone as an independent contractor instead of an employee. See McFeeley v. Jackson St. Ent., LLC, 825 F.3d 235, 241 (4th Cir. 2016); Herman v. Express Sixty-Minutes Delivery Service, Inc., 161 F.3d 299, 303 (5th Cir. 1998).

⁵ Notably, Appellant omitted the emphasized part of the court’s holding.

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

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

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

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

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

A “trade secret” is defined as information, including a compilation, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. S.C. Code Ann. § 39-8-20(5). Appellant argues that Respondent Bannon’s clients’ census data and insurance plan information housed on a third-party’s website called Employee Navigator somehow constitutes trade secret information. Appellant’s Brief p. 16. While a compilation of information can, under certain specific circumstances, constitute a trade secret, the information must: (1) derive independent economic value, (2) not be generally known or readily ascertainable by proper means, and (3) be kept secret using reasonable efforts under the circumstances. S.C. Code Ann. § 39-8-20(5). Appellant did not satisfy any of these three elements.

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

Appellant's director of account management and the person who is, according to Appellant, "very knowledgeable" about Appellant's use of Employee Navigator testified,

13	Q	So meaning if -- if somebody was gonna rebuild
14		the exact same thing, they could go to the carrier and the
15		client and the payroll company and take all the same
16		information to -- to build the Navigator database?
17	A	Correct.

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

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

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

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

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

Additionally, Appellant failed to take any steps to restrict the clients' use of the information in question. The clients themselves had their own unrestricted login and password to their

employees' information and voluntarily shared this information with Respondent Bannon. T. 263:1-264:13, 401:13-17, 390:6-391:11. There were no written restrictions or agreements between Appellant and the clients that in any way restricted the clients' ability to use, disclose or share the information within Employee Navigator. Transcript p. 401:13-17.

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

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

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

The evidence at trial established that Respondent Bannon was given unrestricted access to information relating to his clients – both by Appellant and the clients themselves. T. 581:25-582:4. That unrestricted access didn't stop when Respondent Bannon ceased to be an employee of Appellant in May 2013. Even then, Appellant made no effort to restrict Respondent Bannon's

access to information at any point thereafter. T. 576:21-25; p. 577:9-12. Appellant did not establish or provide any policies that restricted Respondent Bannon's ability to access information about his clients and never identified to Respondent Bannon the information it believed to be confidential or a trade secret. T. 254:17-256:5. Appellant did not in any way restrict Respondent Bannon's clients from providing him access to information. T. 401:13-19. There was absolutely no evidence presented at trial to counter Respondent Bannon's testimony that he had access to his client's information by proper means.

Appellant asserts that Respondent Bannon, "surreptitiously accessed, downloaded, and copied Forum Benefits' trade secrets and demonstrates acts of theft and espionage through electronic or other means." Appellant's Brief p. 21. Appellant ignores the fact that it gave Respondent Bannon unrestricted access to the information in question. Not only does Appellant ignore these facts, it also fails to cite any record evidence to support its assertions to the contrary. Instead, the undisputed evidence shows that Respondent Bannon's clients asked him to obtain their information from Employee Navigator and provided him with their login information. T. 262:22-264:13.

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

Moreover, Appellant admitted that the clients did not violate the Act by giving Respondent Bannon access to the information in Employee Navigator. T. 586:7-10. This was a fatal admission. If the client did not violate the Act by giving Respondent access to the information, Respondent Bannon could not have violated the Act by using that approved access. Obtaining the information

through alternative proper means (here the clients) is fatal to a finding that the information was misappropriated. See S.C. Code Ann. 39-8-30(A) (“A trade secret endures and is protectable and enforceable until it is disclosed or discovered by proper means.”).

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

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

The evidence at trial established that Respondent Bannon’s computer broke in December of 2016 and that he never transferred any of his client information to Respondent AssuredPartners.

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

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

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

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

actions proximately caused the alleged damages. Appellant wholly failed to meet its burden of proof on this issue.

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

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

T. 591:18-21. Mr. Stritt was also impeached with his own deposition testimony where he confirmed in reference to Respondent Bannon's clients, “We haven't gone after them or talked to them.” T. 593:6-12 (emphasis added). Mr. Stritt even admitted that Respondent Bannon had good relationships with some of his clients. T. 591:9-11. Appellant provided no testimony at trial that in any way proves that the clients left with Respondent Bannon for any reason other than the fact

that they had a good relationship with him.⁶ Appellant provided absolutely no evidence that in any way connected any alleged misappropriation of its information and the reason clients followed Respondent Bannon to Respondent AssuredPartners.

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

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

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

Accordingly, the trial court correctly granted Respondents' directed verdict motion and this ruling should be upheld.

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

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

First, it should be noted that conversion is a common law tort claim. The Act preempts any such claims. S.C. Code Ann. § 39-8-110; see Trevillyan v. APX Alarm Sec. Sys., Inc., No. 2:10-cv-01387, 2011 WL 11611, at *10-11 (D.S.C. Jan. 3, 2011); Indus. Packaging Supplies, Inc. v. Davidson, No. CV 6:18-0651-TMC, 2018 WL 10456201, at *8 (D.S.C. June 22, 2018). Appellant is again relying on information being a trade secret to support this claim. Appellant's Brief p. 30-31. Thus, this claim was preempted and should have been dismissed for this additional reason. To the extent Appellant was not relying on alleged trade secret information to support this claim, Appellant's own Employment Agreement's restriction on the use of Confidential Information had expired so there were no restrictions on Respondent Bannon's use of any other information. See Section I.A.2. above.

Second, Appellant failed to prove the required elements of a conversion claim. Under South Carolina law, conversion is defined as, "the unauthorized assumption in the exercise of the right of the ownership over goods or personal chattels belonging to another *to the exclusion of the owner's rights.*" Am. Credit Sumter, Inc. v. Nationwide Mut. Ins. Co., 663 S.E. 2d 492, 295 (S.C.

2008). “To establish the tort of conversion, the plaintiff must establish either title to or right to the possession of the personal property.” Moseley v. Oswald, 656 S.E. 2d 380, 382 (S.C. 2008). Ordinarily, an action for conversion lies only for personal property that is tangible, which permits identification of ownership interest. South Carolina will only permit a claim for conversion based on intangible property where the intangible property rights are identifiable by some document. Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 684 S.E. 2d 756, 763 (S.C. 2009).

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

Appellant also failed to establish that Respondents’ converted Appellant’s alleged property to the exclusion of Appellant’s rights. In fact, Appellant’s own argument belies Appellant’s conversion claim. For instance, Appellant argues that, “Bannon secretly obtained and forwarded the Employee Navigator client login credentials for Forum Benefits’ clients to AssuredPartners, and Jim Brady used those login credentials to access, download, and copy Forum Benefits’ trade

secrets from the Employee Navigator accounts.” Appellant’s Brief p. 30. Even assuming all of this is true, Appellant failed to establish Respondents’ conduct resulted in Appellant’s inability to access and utilize the information. In other words, there was no evidence showing Appellant lost access to or the ability to utilize the information or “property” that it claims Respondents converted.⁷ Thus, as the trial court ruled, Appellant’s conversion claim failed as a matter of law.

Rather than cite to South Carolina case law on this conversion issue, Appellant travels to Arkansas in an attempt to find support for its appellate legal position. Appellant relies on this foreign jurisdiction’s law to argue that intangible property can be the subject of a conversion claim. Appellant’s Brief p. 31-32. Arkansas defines conversion in a materially different manner than South Carolina. Under Arkansas law, conversion is defined as, “the exercise of dominion over property in violation of the rights of the owner or person entitled to possession. Stated another way, conversion is a common-law tort action for the wrongful possession or disposition of another’s property; to establish liability for the tort of conversion, a plaintiff must prove that the defendant wrongfully committed a distinct act of dominion over the property of another, which is a denial of, or inconsistent with, the owner’s rights.” Integrated Direct Marketing, LLC v. May, 495 S.W. 3d 73, 75 (Ark. 2016) (internal citations omitted). Arkansas’s conversion law, unlike South Carolina’s, does not require the assumption of property rights to the exclusion of the owner’s rights. Rather, in Arkansas, possession of the subject property suffices to establish the claim, even if the possession is a mere copy of the property and the owner otherwise maintains his or her rights

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

in the property. As such, Arkansas's conversion law conflicts with South Carolina law and is inapplicable to Appellant's South Carolina conversion claim.

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

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

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

Appellant challenges the trial court's decision to award attorneys' fees to Respondents. During Appellant's case in chief, Appellant failed to put on evidence establishing the elements of any of its claims and, at the conclusion of its case, abandoned its tortious interference claim. The trial court awarded Respondents' attorneys' fees based on language in the document Appellant pursued in its breach of contract claim and based on the bad faith language in the Act. Order p. 5-6. During this case's substantial life span, Appellant at all times pursued its breach of contract

claim and trade secrets claim and advised that it intended to seek attorneys' fees if it prevailed. Pl. Ex. 137, ¶¶21-24, Prayer for Relief ¶2. Now, after the Appellant has lost and after the trial court has awarded attorneys' fees to Respondent based on the prevailing party fee provisions, Appellant, in the most duplicitous of fashions, contends that the trial court erred. The trial court entered the Order after hearing both an oral motion at the trial and then again after reviewing Appellant's written response to Respondents' motion as well as Respondents' reply in support of their motion. The trial court was fully informed of the arguments and was well within its discretion to award attorneys' fees to Respondents.

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

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

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

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

(Pl. Ex. 137, ¶11; Complaint Ex. A, ¶11) (emphasis added). This language on its face contemplates mandatory prevailing party attorney's fees in any action that is in any way related to this document.

Significantly, Appellant's first witness at trial was its attorney, David Wyatt, who drafted this document. Mr. Wyatt clearly testified that the intent of the document was for the prevailing party to be awarded attorneys' fees and costs. Appellant's own attorney who was called as a witness and waived the attorney-client privilege admitted that if Respondent Bannon prevailed related to Appellant's contract claim that he should be awarded his fees and costs. T. 66:19-25. Specifically, Mr. Wyatt testified to the following in response to being shown the attorneys' fees provision in the document he drafted:

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

T. 66:19-25.

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

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

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

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

Furthermore, Appellant must be judicially estopped from now arguing that no contract existed and that there can be no prevailing party fees awarded. Appellant claimed for almost five years that Respondent Bannon signed the contract and breached the contract. Pl. Ex. 137, ¶¶ 6-8, ¶¶ 21-24. Appellant sought its attorney's fees as a remedy from the initiation of the lawsuit through the trial of this case. Pl. Ex. 137, Prayer for Relief ¶2. Mr. Stritt testified as Appellant's Rule 30

corporate representative in discovery and confirmed that he was “absolutely seeking his fees” against the Defendants in this case. See Defendants Reply in Support of Motion for Attorneys’ Fees, p. 4 and Exhibit A attached thereto, Rule 30 Dep. 113-115. Appellant put Respondent Bannon through the hardships of litigation during this entire time period forcing him to defend himself, to prove he did not sign the alleged contract and to prove he did not breach the alleged contract. Appellant must be estopped from so dramatically shifting its position on attorneys’ fees after it lost on this claim at trial, and then attempting to claim that no contract existed for the purposes of prevailing party attorneys’ fees.

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

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

Order Granting Ex Parte Motion for TRO dated 12/1/2016, and Plaintiff's responses to Defendants' motions for summary judgment.

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

Appellant also mistakenly contends that the trial court should not have awarded Respondent Bannon his attorneys' fees because Respondent AssuredPartners, rather than Respondent Bannon, actually paid the attorneys' fees Respondents incurred in the defense of this case. Once again, Appellant's position is simply wrong and directly contrary to the position it took previously in this case.

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

Middleton's counsel was deposed on the issue of attorney's fees. He acknowledged that he and Middleton were personal friends, that he had handled other legal matters for Middleton in the past without taking a fee, and that Middleton was never sent any statements of

attorney's fees incurred. Furthermore, Middleton's counsel answered in the negative when specifically asked if Middleton incurred any attorney's fee."

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

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

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

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

408 (2011); Developers Diversified of Tennessee, Inc. v. Tokio Marine & Fire Ins. Co., 2019 WL 1861322, at *8 (M.D. Tenn. Apr. 25, 2019).

Further, the prevailing party attorneys' fees provision in the Employment Agreement does not require the prevailing party to actually incur or pay their own attorneys' fees and costs to recover them. Pl. Ex. 137, ¶11. Appellant could have easily added language in the document related to fees the party "directly incurred" or "directly paid" and chose not to do so. Even to the extent Appellant could argue an ambiguity related to its own document, the trial court would have correctly construed any doubts against the drafter, which was indisputably Appellant. See Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 698 S.E.2d 773, 778 (2010).

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

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

T. 569:17-22.

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

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

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

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

Second, Appellant improperly relies on Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC, 713 S.E.2d 650 (S.C. Ct. App. 2011) for the proposition that bad faith cannot be found following the denial of a summary judgment motion. Appellant is again mistaken in its analysis. The analysis in Southeastern pertained to frivolity sanctions under Rule 11, not bad faith under the Act. Id. 654. Further, even if the standard in Southeastern applied here (which it does not), the procedural posture of the case at bar differs substantially from Southeastern. Here, the judge that heard Respondents’ motion for summary judgment retired before ruling on said motion. T. 541-542. Thereafter, a second judge denied Respondents’ motion and provided no explanation for the denial. Id. A third judge, Judge Bentley Price, presided over the trial in this case. As such, in the case at bar, no pre-trial findings or rulings were made that precluded the trial court’s finding that Appellant pursued this claim in bad faith.

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

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

Significantly, the clear legislative intent of the Act was to provide the trial court with the discretion to make a bad faith determination, similar to the determination the trial court would have been required to make if Appellant had prevailed and sought exemplary damages under the Act. "The SCTSA provides that 'the court may award reasonable attorney's fees to the prevailing party' if '(1) a claim of misappropriation is made in bad faith, (2) a motion to terminate an injunction is made or resisted in bad faith, or (3) willful misappropriation exists.'" Uhlig, LLC v. Shirley, 895 F. Supp. 2d 707, 710 (D.S.C. 2012) citing S.C. Code Ann. § 39-8-80. These are determinations to be made by the trial court after hearing the evidence "deduced at trial." Id. The trial court is vested with the authority to make a bad faith finding and award attorneys' fees. S.C. Code Ann. § 39-8-80.

"South Carolina courts have not addressed the standard for determining whether a claim under the SCTSA was brought in bad faith warranting attorney's fees." Uhlig LLC v. Shirley, 2012 WL 3062659, at *2 (D.S.C. July 26, 2012). "However, the United States District Court for the

District of Maryland has discussed the bad faith standard under the Maryland Uniform Trade Secrets Act, which includes an attorney's fee provision identical to SCTSA. Id. (citing Contract Materials Processing, Inc. v. Kataleuna GmbH Catalysts, 222 F. Supp. 2d 733, 744 (D. Md. 2002)). "In evaluating the defendants' fee request, the district court for the District of Maryland noted that a finding of bad faith required 'clear evidence that the action [was] entirely without color and taken for other improper purposes.'" Id. The court further commented that "knowing persistence in an invalid claim demonstrates subjective bad faith" and is sufficient to warrant an award of attorneys' fees under the statute. Id.

The trial court's finding of bad faith was supported by the evidence (or Appellant's complete lack thereof) and was not an abuse of discretion. Appellant litigated this case for approximately five years. During that time, Appellant never produced any valid evidence of proximately caused damages, never identified information that could possibly rise to the level of a trade secret, never established that its information was "misappropriated" as defined in the Act, and shockingly never asked even one client why they moved with Respondent Bannon to Respondent AssuredPartners. T. 593:6-10 (Mr. Stritt testified with regard to Respondent Bannon's clients, "We haven't gone after them or talked to them"). Tellingly, not one client for which Appellant was seeking damages was called as a witness in Appellant's case at trial. There was absolutely no evidence presented to suggest that Respondent Bannon ever had possession of or misappropriated any of Appellant's alleged trade secrets, but even more egregious was Appellant's pursuit of this claim against Respondent AssuredPartners, which never received any of Appellant's alleged trade secret information. See Section I.C.2. above. Appellant wasted the trial court's time, Respondents' time, and caused Respondents to incur hundreds of thousands of dollars litigating a completely baseless trade secrets claim.

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

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

The morning of the third day of trial, following two full days of trial testimony, when Appellant knew its case was going terribly, Appellant moved to recuse the trial judge. T. 448-461. There was no valid basis for this motion. The entire substance of Appellant's argument was and is that the trial judge should have recused himself after two days of trial testimony because the trial judge realized he knew a "potential" witnesses when the witness showed up to the courtroom. At that time, the Judge realized he knew the potential witness (Mack Ward) from over 17 years prior when they were in college at Wofford together. The trial judge immediately announced the relationship to all counsel and the case continued on – no objection being made (and thus waived). Appellant even consented to the trial judge saying hello to Mr. Ward during the break. It wasn't until the following day that Appellant complained.

Importantly, Mr. Ward was not a material witness at trial. Indeed, although Appellant subpoenaed Mr. Ward to appear at trial, Appellant never actually called Mr. Ward to testify, and

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

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

Appellant apparently understood that its failure to ever call Mr. Ward as a witness was fatal to its claim that he was a material witness in the case. So, in making its motion for recusal the following day, Appellant’s counsel claimed that he did not call Mr. Ward to testify after learning that the trial judge knew him from college. T. 458:5-19. Appellant cannot be permitted to choose not to call Mr. Ward on this alleged basis, call other witnesses and see how their testimony goes, and then wait until the following day to make its motion for recusal. This was not remotely timely and definitely not the “first opportunity.” Duplan Corp, 400 F. Supp at 510. If Appellant had time to consider whether to call Mr. Ward the second day of trial, it had time to consider a motion to recuse the judge at that time and failed to do so.

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

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

The evidence in this case did not remotely satisfy the requirements of this judicial canon. 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 canon are relevant considering this first element was not met, but the other elements were also not remotely satisfied as discussed below.

With regard to the party or the officer, director, or trustee of a party element, Mr. Ward is not a party in this case and is not an officer, director, or trustee of a party in this case. Appellant

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

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

None of the judicial cannons for disqualification were met and Appellant has failed to provide any evidence to justify a recusal. The law is clear that “The party seeking disqualification must do more than merely allege bias on the judge's behalf; the party must present some evidence of judicial prejudice or bias.” Simpson v. Simpson, 377 S.C. 519, 524, 660 S.E.2d 274, 277 (Ct. App. 2008) (internal citations omitted). “In applying Canon 3 [(E)](1), the South Carolina Supreme Court has stated that the movant or petitioner must show some evidence of the bias or prejudice of the judge.” Lyvers v. Lyvers, 280 S.C. 361, 367, 312 S.E.2d 590, 594 (Ct. App. 1984) (internal quotations and citations omitted). “When an appellant offers no evidence to support his claim of

partiality, the trial judge is correct to deny a Motion for Recusal.” Simpson, 660 S.E.2d at 277, citing Christensen v. Mikell, 324 S.C. 70, 74, 476 S.E.2d 692, 694 (1996) the Motion to Recuse.”). “When disqualification is not required, the Code states, “A judge shall hear and decide matters assigned to the judge....” Id., citing Canon 3B(1) of the Code of Judicial Conduct, Rule 501, SCACR.

“Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal.” Patel v. Patel, 359 S.C. 515, 599 S.E.2d 114, 118 (2004) (citation omitted); Simpson, 660 S.E.2d at 276. “Appellate courts ‘accord great weight to the trial judge's assurance of his own impartiality.’” Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535, 545 (2014), citing Ellis v. Procter & Gamble Distrib. Co., 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993).

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

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

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

Similarly, in Rogers v. Wilkins, 275 S.C. 28, 267 S.E.2d 86, 87 (1980), the Supreme Court affirmed the trial court's decision to deny a motion for recusal where one of the parties had previously sued the trial judge and other members of the South Carolina judiciary and bar in federal district court. Even there, the Supreme Court ruled that there was no valid basis for recusal. Id.; see also State v. Cabiness, 273 S.C. 56, 254 S.E.2d 291 (1979), (no recusal where defendant had appeared before judge on at least three previous occasions and had been sentenced by him).

When analyzed against the requirements of the judicial canons and the cases cited above, Appellant's position becomes wholly absurd.⁹ Adopting Appellant's position in this case would not only change the law and the judicial canons, 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. T. 451-453. The reality is that Appellant completely

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

failed to establish its claims and, as its case was going down in flames, attempted to use its recusal motion as an ejection button. The trial court correctly denied Appellant's motion for recusal and motion for a new trial. Respondents request that this Court affirm the trial court's decisions.

CONCLUSION

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

Respectfully submitted,

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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

Forum Benefits, LLC, ...Appellant

v.

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

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

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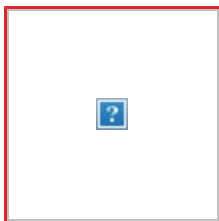
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Subject: Forum Benefits v. Brian Bannon and AssuredPartners, NL - Appellate Case No. 2022-000231 - Respondents Initial Brief and Proof of Service
Attachments: [Forum v. Bannon - Appellate Case No. 2022-000231 - Cover letter to Clerk of Court re Respondents' Initial Brief and Proof of Service \(Filed 12-6-22\).PDF](#)
[Forum v. Bannon - Appellate Case No. 2022-000231 - Proof of Service for Respondents' Initial Brief Filed 12-6-22.PDF](#)
[Forum v. Bannon - Appellate Case No. 2022-000231 - Respondents' Initial Brief \(Dated 12-6-22\).PDF](#)

Good Afternoon,

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

Thank you,



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December 6, 2022

VIA: E-FILE (ctappfilings@sccourts.org)

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals

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

Dear Ms. Kitchings:

Please find attached Respondents' Initial Brief, along with the Proof of Service thereof.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With highest regards, I remain

Very truly yours,

FORD & HARRISON LLP



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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

Forum Benefits, LLC, Appellant,

v.

Brian Bannon and Assured Partners, NL, Respondents.

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STATEMENT OF THE CASE¹

Respondent Brian Bannon (“Bannon”) began his employment with Appellant Forum Benefits, LLC (“Appellant”) in 2009 as an insurance broker. T. 85:18-22.² Appellant’s first witness at trial was its attorney, David Wyatt (“Mr. Wyatt”), who testified that, at the request of Appellant, he prepared a form employment agreement in 2009 that he believed Appellant intended Bannon and another employee to sign (the “Employment Agreement”). T. 41:10-24. Bannon denied ever seeing or signing the Employment Agreement. T. 124:11-125:7. The Employment Agreement was in template form, was not signed, and contained no specific information pertaining to Bannon. Pl. Ex. 137.

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

² The Trial Transcript will be cited herein as “T.” followed by the applicable page and line references.

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In an attempt to get around the glaring timing issue of the alleged breach, Appellant argues that the trial court's ruling, "ignores that Forum Benefits introduced evidence that Bannon breached a different Employment Agreement provision that prohibited Bannon from disclosing Forum Benefits' trade secrets and confidential information – this restriction was unlimited in duration." Appellant's Brief p. 10. Appellant's argument misinterprets the Employment Agreement's language and fails to acknowledge critical aspects of the trial court's ruling.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due

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

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

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

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

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

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

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

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

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

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

⁵ Notably, Appellant omitted the emphasized part of the court’s holding.

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

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

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

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

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

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

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

13	Q So meaning if -- if somebody was gonna rebuild
14	the exact same thing, they could go to the carrier and the
15	client and the payroll company and take all the same
16	information to -- to build the Navigator database?
17	A Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

T. 66:19-25.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

T. 569:17-22.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

/s/Jeffrey A. Lehrer

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Dec 13 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2022-000231

Forum Benefits, LLC, ...Appellant

v.

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

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

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Dated: December 13, 2022

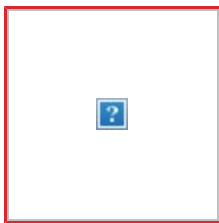
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Subject: Forum Benefits v. Brian Bannon and AssuredPartners, NL - Appellate Case No. 2022-000231 - Respondents AMENDED Initial Brief and Proof of Service
Attachments: [Cover letter to Clerk of Court.pdf](#)
[Proof of Service.pdf](#)
[Respondents" Amended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

Good Afternoon,

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

Thank you,



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

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December 13, 2022

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Dec 13 2022

SC Court of Appeals

VIA: E-FILE (ctappfilings@sccourts.org)

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals

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

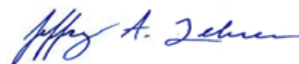
Dear Ms. Kitchings:

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

With highest regards, I remain

Very truly yours,

FORD & HARRISON LLP



JEFFREY A. LEHRER

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Jan 03 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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

Forum Benefits, LLC,

Appellant,

v.

Brian Bannon and Assured Partners, NL,

Respondents.

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ARGUMENT

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

Respondents repeatedly discuss their view of the evidence to urge that the trial court’s directed verdict Order, which was entirely written by Respondents and signed by the trial judge without a single revision, is correct. Respondents’ Brief is infused with the argument, not that Appellant presented no evidence, but instead that Appellant’s evidence “failed to prove” (used thirty times¹) or “failed to establish” (used seven times²) a proposition or that testimony was “self-serving” (used seven times³) – arguments about the weight of evidence that Respondents themselves acknowledge was presented, acknowledged evidence the existence of which precluded a directed verdict.

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

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

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

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

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

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

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

David Wyatt ("Wyatt") testified that Brian Stritt engaged him in 2009 to prepare an employment agreement for a new employee that would be hired in Charleston. (Pl.'s Ex. 137; Trial Tr., pp. 39-54, 69; 487-488). Stritt testified that Plaintiff's Exhibit 137 is a blank employment agreement prepared by Wyatt (Pl.'s Ex. 137; Trial Tr., pp. 39-54, 69, 482-484); that Ex. 163 is a completed employment agreement signed by Bannon's co-employee Chris Whatley on May 18, 2009 (Pl.'s Ex. 163; Trial Tr., pp. 480-482, 484-485); and that Ex. 163 is substantially identical to the completed employment agreement signed by Bannon (Trial Tr., p. 485-487). Stritt further testified that Bannon signed the employment agreement when Stritt delivered the first paycheck to Bannon on June 1, 2009 (Trial Tr., pp. 488-490); that Stritt placed the signed employment agreement in Bannon's employment file (Trial Tr., pp. 489); and that Stritt only discovered that the signed employment agreement was missing—along with Bannon's entire employment file—shortly after Stritt learned that Bannon had been hired by Assured Partners (Trial Tr., pp. 489-490). The suspicious nature of Bannon's "lost" employment agreement—along with the entirety of his employment file—supports a reasonable inference that it was actually taken by, or at the direction of, Bannon.

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

witness that testified to allegedly witnessing Bannon's execution of the Employment Agreement.” (Respondents' Brief, p. 11).

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

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

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

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

Paragraph 12 of the employment agreement signed by Bannon included covenants not to disclose Forum Benefits' trade secrets and confidential information; the trade secret covenant was unlimited in duration. (Pl.'s Ex. 137; Trial Tr., pp. 39-54, 69). The clear and unambiguous language of the employment agreement prohibits Bannon from ever copying and sharing Forum Benefits' trade secrets without permission. The S.C. Trade Secrets Act provides that this obligation not to use or disclose tradesecrets “must not be considered void or unenforceable or against public policy for lack of a durational or geographical limitation.” S.C. CODE ANN. § 39-8-30(D) (emphasis added). Therefore, Bannon's contractual obligations not to disclose or use Forum Benefits' trade secrets without Forum Benefits' consent are not limited in duration and are enforceable in accordance with ordinary principles of contract law.

Respondents complain that Paragraph 12 has “inconsistent provisions.” (Respondents' Brief, p. 15). The provisions are not inconsistent. The header to Paragraph 12 is, “Covenant Not to Disclose

Trade Secrets and Confidential Information.” Thus, from the beginning, the agreement expressly differentiates the two. And the definition of “Trade Secret” in Paragraph 12(b) differs from the definition of “Confidential Information” in Paragraph 12(e). Not all Confidential Information under the agreement is a Trade Secret. That distinction is merely definitional. Such is the nature of the agreement, and there is no inconsistency.

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

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

Wyatt’s testimony, Stritt’s testimony, and Plaintiff’s Exhibit 163 all provide corroborating evidence of the essential terms in the “offer” of employment by Forum Benefits to Bannon. (Pl.’s Exs. 137 and 163; Trial Tr., pp. 39-54, 69). One of the essential terms in the offer is the covenant not to disclose Forum Benefits’ trade secrets, as described in Paragraph 12 of the employment agreement (Pl.’s Ex. 137, pp. 2-3), and this covenant is unlimited in duration, as permitted by S.C. CODE ANN. § 39-8-30(D). Stritt’s testimony that Bannon signed the employment agreement when Stritt delivered the first paycheck to Bannon on June 1, 2009, provides evidence that Bannon “accepted” the employment agreement and received “valuable consideration” for the employment agreement. (Trial Tr., p. 479).

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

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

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

The trial court’s ruling ignored substantial evidence presented at trial about the confidential and fiduciary relationship that existed between Bannon and Forum Benefits from when Bannon was first hired by Forum Benefits in June 2009, until Bannon stopped representing Forum Benefits as a sales representative in November 2016. During the four (4) week overlap when Bannon was simultaneously employed by Assured Partners and represented Forum Benefits as a sales representative, Bannon secretly obtained and forwarded the Employee Navigator login credentials for Forum Benefits’ clients to Assured Partners. (Pl.’s Ex. 10; Trial Tr. p. 160, 165-166; 170; 172-176; 229; 256-257). At the same time, Bannon downloaded approximately 2,000 files containing Forum Benefits’ trade secrets from Forum Benefits’ SharePoint server using the login credentials he had received years earlier when he was Forum Benefits’ employee. (Trial Tr., pp. 117-118; 177-178; 180). Bannon’s actions to download and share Forum Benefits’ trade secrets with a direct competitor demonstrate that he knew what he was doing was wrong and violated his fiduciary duty to Forum Benefits. The evidence showed that Bannon owed a fiduciary duty to Forum Benefits and knew that he breached this fiduciary duty. The trial court’s ruling to the contrary constitutes an error of law.

To this point, Respondents argue one point for sure and may actually argue a second point. Firstly, Respondents argue that Appellant “failed to prove that Bannon, as an independent contractor, owed any fiduciary duty to Appellant” (Respondents’ Brief, p. 17), that Appellant “failed to establish” the elements of a fiduciary duty claim (Respondents’ Brief, p. 17), and that “Appellant wholly failed to establish a legal or factual basis for Bannon owing it a fiduciary duty” (Respondents’ Brief, p. 19). Again, Respondents miss the mark – they do not dispute the introduction of evidence on these points, they only argue its weight.

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

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

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

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

Forum Benefits designed the build-out of each Employee Navigator account, and Forum Benefits collected, organized, and compiled the employee census data and insurance plan information that populated each account. (Trial Tr., pp. 155-156, 158; 336-337). Winston described Forum Benefits' proprietary design and build-out of Employee Navigator accounts for each client, as well as Forum Benefits' collection, organization, and compilation of employee census data and insurance plan information included in this proprietary database. (Trial Tr., pp. 338-341; 360-368; 372-378). She also described in detail Forum Benefits' proprietary formulas included in the renewal spreadsheets for each client stored on Forum Benefits' SharePoint server. (Trial Tr., pp. 360-368; 372-378). Forum Benefits' design and compilation of data in the Employee Navigator accounts and proprietary formulas in renewal spreadsheets stored on Forum Benefits' SharePoint server exactly match several of the forms of "information" included in the definition for a "trade secret" provided by the S.C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(a).

Forum Benefits' trade secrets took substantial time and effort to collect, organize, and compile and provided Forum Benefits with a competitive advantage in administering benefits for clients and

negotiating rates with insurance providers. (Trial Tr., pp. 338-341; 360-368; 372-378). Assured Partners saved that time, by downloading, copying, and taking screenshots of Forum Benefits' trade secrets instead of having to design, build-out, collect, organize, and compile the same database of information. Competitive advantage and improved efficiency are precisely the types of economic value described in the S. C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(b).

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

Respondents argue, "There is no evidence anywhere in the record as to the independent economic value of Appellant's alleged trade secret." (Respondent's Brief, p. 22). The evidence in the Record (*e.g.*, Pl.'s Exs. 8, 10-12, and 45) provides evidence, overlooked by Respondents, of the value of Forum Benefits' trade secrets to Assured Partners. (Trial Tr., pp. 155-156; 168; 172-176; 426-429; 430-432). Respondents acted urgently to surreptitiously take Forum Benefits' trade secrets before Forum Benefits learned that Bannon was working for Assured Partners and terminated further access. (Trial Tr., pp. 153-154; 229; 256-257). Brady even testified, consistent with his November 8, 2016 email, that he could not build an Employee Navigator account for a client without login credentials that would allow him to download, copy, and take screenshots of Forum Benefits' Employee Navigator account for that client. (Pl.'s Ex. 11; Trial Tr., pp. 430-432). All of this evidence demonstrates the substantial economic value of Forum Benefits' trade secrets to Respondents.

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

Respondents argue, "It is blackletter law that information that is readily ascertainable from other sources cannot qualify for trade secret protection." (Respondents' Brief, p. 23). The ingredients

of Coca-Cola® soft drink can each and all be “readily ascertained” at a neighborhood grocery store, but nonetheless the identity, proportions, and blends of those ingredients qualifies as a trade secret. A “trade secret” may simply be a compilation of publicly available data because “[t]he collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.” S.C. CODE ANN. § 39-8-20(5).

Respondents argue, “Appellant had the ability in its system to add heightened levels of protection to certain files it claimed to be a trade secret, but Appellant did not employ this feature to limit Bannon’s (or anyone else’s) access to information.” (Respondents’ Brief, p. 23). There is no evidence in the record to support Respondents’ argument as to the Employee Navigator database.

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

Forum Benefits limited access to Forum Benefits’ trade secrets to only authorized personnel with valid login credentials. (Trial Tr., pp. 369-371; 379). Forum Benefits only provided login credentials to Forum Benefits’ proprietary database of information in the Employee Navigator accounts to account managers assigned to those accounts and, on a case-by-case basis, a single client representative if a client requested the ability to generate reports from the Employee Navigator account associated with that client. (Trial Tr., pp. 369-371). Forum Benefits did not provide sales people, like Mack Ward and Bannon, with any login credentials to any of Forum Benefits’ Employee Navigator accounts. (Trial Tr., pp. 369-371). Forum Benefits only provided login credentials to Forum Benefits’ SharePoint server to Forum Benefits’ full-time employees. (Trial Tr., pp. 117-118; 369-371; 379). When an individual ceased to be an employee of Forum Benefits, all access to these computer systems was cut off. (Trial Tr., pp. 491-492).

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

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

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

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

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

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

Respondents also write, "Moreover, Appellant admitted that the clients did not violate the Act by giving Bannon access to the information in Employee Navigator. T. 586:7-10." That was not the testimony. The testimony only was that no such claim was made. (Trial Tr., p. 586, lines 7-10).

Third, Respondents write, "Mr. Scholz [sic] readily admitted he could not distinguish between information that Bannon accessed during his relationship with Appellant versus information that Bannon allegedly downloaded or transferred to an external device once his relationship with Appellant had ended." (Respondents' Brief, p. 27). What we know from Mr. Scholz's testimony is that Bannon

copied the information after October 15, 2016, when his employment with Respondent Assured Partners began. (Pl.'s Ex. 72; Trial Tr., pp. 470-471;).

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

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

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

It suffices for reversal of the trial court that:

- Respondents employ a wrong standard of review of the trial court’s Order, and use of the proper standard requires reversal;
- multiple emails (*e.g.*, Plaintiff’s Exhibits 8, 10-12, and 45) confirm that Assured Partners’ acquisition of Forum Benefits’ trade secrets from the Employee Navigator accounts was critical to convincing clients of a seamless transition from Forum Benefits to Assured Partners, (Pl.’s Exs. 8, 10, 11, 12, and 45; Trial Tr., pp. 168; 172-176; 426-429);
- a client testified that continuous access to Forum Benefits’ trade secrets compiled in the Employee Navigator account was an important factor in her decision to transfer St. Andrews Public Service District’s business from Forum Benefits to Assured Partners, (Trial Tr., pp. 610-616); and
- the circumstantial evidence shows that, if a client used Employee Navigator and Respondents copied the Employee Navigator data, that client left Appellant for

Respondents; if a client used Employee Navigator and Respondents did not copy its Employee Navigator data, the client stayed with Appellant. (Trial Tr., pp. 263-264; 430-432; 552-555).

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

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

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

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

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

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

- Motion for Summary Judgment, Filed March 8, 2018; Memo in Support of Motion for Summary Judgment, Filed March 8, 2018; Response to Motion for Summary Judgment, with 13 Exhibits, Filed March 30, 2018; Memo in Reply to Motion for Summary Judgment, with 1 Exhibit, Filed April 2, 2018;
- Motion for Summary Judgment, filed June 11, 2019 (which Respondents withdrew);
- Motion for Summary Judgment, with 8 Exhibits, filed April 20, 2020; Reply in Support of Motion for Summary Judgment, with 2 Exhibits, Filed June 9, 2020; Response to 4th Motion for Summary Judgment, with 14 Exhibits, filed June 7, 2020.

Two different Circuit Court judges each conducted a full hearing that was fully briefed, and each judge denied Respondents' motion for summary judgment. (Order Denying Defendants' Motion for Summary Judgment, Filed June 22, 2018; Order Form 4 Denying Motion for Summary Judgment, Filed October 14, 2020).

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

A. If By Contract

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

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

(Pl. Ex. 137, ¶11; Complaint Ex. A, ¶11) (underlining emphasis added). But Bannon had no attorneys' fees to "recover" because he had paid no attorneys' fees – Respondents admit on Page 38 of their Brief that "AssuredPartners, rather than Bannon, actually paid the attorneys' fees."

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

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

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

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

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

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

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

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

B. If By Statute

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

C. Whose Attorneys' Fees?

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

D. What Attorney Fees?

Respondents make no effort in their Brief to argue about the factors that are required to be considered before awarding attorneys' fees, probably because no evidence whatsoever was presented to the trial court regarding this issue. In South Carolina, a court should consider the following six factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). Neither the trial court, nor the Respondents addressed any of those factors.

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

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

- (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

- (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, ...

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

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

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

Second, Respondents write:

The only circumstance described in the judicial canons that Appellant has alleged in this case is that the judge or his spouse or a person within the third degree of relationship to them is either a party or the officer, director, or trustee of a party, is a lawyer in the case, is known to have more than a *de minimus* interest that could be substantially affected by the litigation, or, to the judge’s knowledge, is likely to be a material witness in the proceeding.

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

Third, Respondents curiously write, “Mr. Ward is not a party in this case and is not an officer, director, or trustee of a party in this case.” (Respondents’ Brief, p. 47). In the very next sentence,

however, Respondents admit that Mack Ward was a Vice President of then-Defendant, now-Respondent Assured Partners.

In their opening statement at trial, Respondents identified Mack Ward as a trial witness. (Trial Tr., p. 34). Mack Ward's name was cited repeatedly during examinations of multiple witnesses throughout the second day of trial. (Trial Tr., pp. 239, 257, 259, 282). The trial judge himself even mentioned his name. (Trial Tr., p. 258). Thereafter, on the afternoon of the second day of the trial, an unusually affectionate interaction between the trial judge and Mack Ward occurred, followed by the trial judge inviting Mack Ward into chambers without Appellant's counsel – the details of the trial judge's conduct, which was witnessed by principals of Appellant, are provided in Appellant's Brief. Forum Benefits' basis for recusal—that the trial judge displayed and revealed a personal bias toward Mack Ward, a Vice President of Assured Partners—squarely fits Canon 3(E)(1)(a). Appellant's motion to recuse was based on the reasonable appearance of bias, and Appellant's concerns about the appearance of bias are supported by a consistent string of inconsistent rulings that continually favored Respondents. The trial court's denial of Forum Benefits' motion to recuse prevented Forum Benefits from receiving a fair trial. Pursuant to Canon 3(E), the trial judge should have disqualified himself.

CONCLUSION

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

January 3, 2023

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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

Forum Benefits, LLC,

Appellant,

v.

Brian Bannon and Assured Partners, NL,

Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on January 3, 2023, copies of Forum Benefits, LLC's **Initial Reply Brief** and **Second Designation of Matter to be Included in the Record on Appeal** were served on all counsel of record via emails containing the above referenced document to counsels' individual AIS email addresses:

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SC Court of Appeals

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STATEMENT OF THE CASE¹

Respondent Brian Bannon (“Bannon”) began his employment with Appellant Forum Benefits, LLC (“Appellant”) in 2009 as an insurance broker. (R. p. 106, lines 18-22). Appellant’s first witness at trial was its attorney, David Wyatt (“Mr. Wyatt”), who testified that, at the request of Appellant, he prepared a form employment agreement in 2009 that he believed Appellant 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).

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

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 Appellant in Greenville, South Carolina – which was clearly not intended for Bannon who lived in Beaufort and who was hired to work in and actually worked in the Charleston, South Carolina area. Id.; (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, Appellant's own attorney and first witness at trial admitted that Appellant's contract claim was barred by the Statute of Frauds. (R. p. 91, lines 3-20).

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

During the time period that Bannon was an independent contractor for Appellant, 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 Appellant for day to day benefits administration and servicing needs. Id. Some of Bannon's clients used a third-party web based software product called Employee Navigator for benefits administration. Employee Navigator compiled employee census data and insurance plan information for the employees of each client company. (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 Appellant did not in any way restrict the clients with respect to said login information, nor did Appellant in any way restrict the clients from using or providing the Employee Navigator username and password to other brokers, such as Bannon. (R. pp. 175-176, 418-423, 459).

On October 16, 2016 Bannon began working with Respondent 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 Appellant had a history of attempting to disrupt clients who attempted to leave its agency and did not want the same outcome for his clients. (R. p. 274, line 9-p. 278 line 8). Bannon's concerns were grounded in fact: Appellant admitted to denying clients access to their own plan information in the past when they gave notice that they were leaving Appellant's agency, and Appellant also admitted that this could cause disruption to the clients. (R. p. 425, lines 9-13; p. 425 line 20-p. 441, line 14). Bannon also directly heard Appellant's President and owner Brian Stritt make statements that he wanted departing clients to be disrupted as they attempted to separate from Appellant. (R. p. 276, line 12-p. 277, line 23).

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

Throughout the course of almost five years of litigation, Respondents filed multiple motions for summary judgment, fully explaining the legal and factual inadequacies of Appellant's claims. Despite this detailed notice of the extensive shortcomings of its claims, these motions never prompted Appellant to ensure it had the necessary factual or legal basis to prove its claims at trial. The first summary judgment motions were heard by the Master-In-Equity, Marvin H. Dukes, III. The last motion for summary judgment Respondents filed was heard by Judge Perry Buckner. However, Judge Buckner retired before ruling on said motion. (R. pp. 558-559). Thereafter, a

second judge, Judge Deadra L. Jefferson, denied Respondents' motion with a Form 4 Order and provided no explanation for the denial other than citing the summary judgment standard and stating generally that material issues of fact exist. Id., see Form 4 Order of October 14, 2020.

On October 11, 2021, the jury trial in this matter commenced. (R. p. 57). At the beginning of the third day of trial, Appellant asked the trial judge to recuse himself claiming that the trial judge was biased based on the fact that he knew a "potential" witness from college over 17 years prior. (R. pp. 465-479). This "potential" witness had been subpoenaed by Appellant to testify on day two of trial, was never called by Appellant to testify, and this "potential" witness was excused by Appellant from the subpoena the day before Appellant's motion for recusal. (R. p. 474, line 14-p. 475, line 4; p. 478, lines 20-25). Appellant did not raise this issue when it first learned that the trial judge went to college with this "potential" witness and instead consented to the trial court saying hello to the "potential" witness during a break. After knowing this tenuous college connection, Appellant proceeded to call witnesses in its case in chief. Notably, the witnesses Appellant called later that day ultimately provided very damaging testimony related to Appellant's claim. After finishing the second day of testimony and realizing that its case was going down in flames, Appellant decided to attempt to recuse the trial judge the next day. The trial judge did not have any reason to know how the "potential" witness was related to the case or the relevancy of any potential testimony from this "potential" witness. (R. p. 469, lines 15-25). At the time of Appellant's motion for recusal, it was clear that the "potential" witness was not going to be called as a witness in Appellant's case because he had already been excused from the subpoena. (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, Appellant rested its case. (R. p. 619, line 6). After Appellant rested its case, Respondents moved for directed verdict on all counts.² (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 Respondents' directed verdict motion. (R. pp. 684-687). The trial court also found that Appellant brought its misappropriation of trade secrets claim in bad faith and awarded Respondents' attorneys' fees and costs under the South Carolina Trade Secrets Act. (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.

ARGUMENT

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

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

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

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

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

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

2009. Neither Bannon nor Appellant executed the form Employment Agreement Appellant attached to its Complaint and introduced at trial. Pl. Ex. 137; (R. pp. 968-974).

The trial court correctly ruled as a matter of law that Appellant's contract claim was barred by the Statute of Frauds. The Statute of Frauds requires that a contract that cannot be performed within one year be in writing and signed by the party to be charged. Davis v. Greenwood Sch. Dist. 50, 365 S.C. 629, 620 S.E.2d 65, 67 (2005); S.C. Code Ann. § 32-3-10(5). Appellant's own attorney and first witness at trial, Mr. Wyatt, admitted that the Employment Agreement could not possibly be performed within one year and admitted that Appellant's contract claim was barred by the Statute of Frauds. (R. pp. 91-92). The bad faith in which Appellant pursued this contract claim for almost five years without ever being able to produce a signed or completed document was clearly exposed from the get-go.

Appellant cannot and did not dispute the fact that the restrictive covenants in the Employment Agreement applied for two years from the end of the employment relationship. Pl. Ex. 137, ¶12(g), ¶13, and ¶14; (R. p. 970). Thus, the contract could not possibly be performed within one year. Accordingly, the Statute of Frauds applies and Appellant's breach of contract claim fails as a matter of law.

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

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

Appellant contends that it presented clear and convincing evidence to establish a contract with Bannon. It did not. To attempt to support its position, Appellant relies on Mr. Wyatt’s testimony. Specifically, in support of its argument, Appellant merely contends that Mr. Stritt (Appellant’s owner) engaged Mr. Wyatt to draft a form Employment Agreement in 2009. (R. pp. 61-62). However, at no point during Mr. Wyatt’s testimony did he contend that he used Bannon’s specific information to prepare the unsigned contract, nor did Mr. Wyatt send Bannon a copy of the Employment Agreement, and nor did he witness Bannon sign the contract. To the contrary, Mr. Wyatt actually admitted that he never received or viewed a signed copy of the alleged contract. (R. p. 90, lines 6-15). Mr. Wyatt’s testimony does not help Appellant to establish there was ever a signed written contract by any form of circumstantial evidence, but especially not by clear and convincing evidence.

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

alone observe Bannon execute the document. Mr. Stritt's testimony is biased and self-serving, considering he is the President of Appellant and was the sole owner at the time. (R. p. 441, lines 9-14). Mr. Stritt's singular, self-serving testimony is precisely the type of testimony the Statute of Frauds is designed to protect against. As explained in Yadkin, courts in other jurisdictions that have adopted a lost memorandum exception have not permitted plaintiffs to use self-interested, self-serving testimony to establish the existence of an allegedly lost agreement. 2014 WL 3747342 at *1. To hold otherwise would obliterate the protections afforded by the Statute of Frauds.

The testimony of Mr. Wyatt and Mr. Stritt are wholly inadequate to satisfy any clear and convincing standard of proof. But more importantly, this testimony cannot overcome the fact that Bannon denies ever seeing or signing the Employment Agreement and that the unsigned, template contract was missing at least the following material terms: (1) Bannon's name as well as any other information pertaining to Bannon; (2) Bannon's compensation; (3) the parties' signatures; (4) Bannon's duties; (5) Bannon's explanation of benefits; (6) Bannon's address; and (7) Bannon's social security number. Pl. Ex. 137, Introduction ¶, ¶2, ¶5, ¶6, Exhibit A and Exhibit B attached thereto; (R. pp. 968-969; 973-974). Appellant did not prove the existence of a completed contract, no less an actual signed contract.

Furthermore, the evidence at trial established that the Employment Agreement was clearly not drafted for Bannon. The Employment Agreement inexplicably contemplates a parent's or guardian's signature. Pl. Ex. 137, p. 5; (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 Appellant alleged. Even more damaging to Appellant's position is the fact that the only employee-specific information contained in the Employment Agreement was that the employee would work in

“Greenville, South Carolina.” Plaintiff Ex. 137, ¶3; (R. p. 968; R. p. 78, line 19-p. 79, line 3). Tellingly, however, Appellant admitted that it did not hire Bannon to work for Appellant in Greenville, South Carolina, but hired him to work in the Charleston area. Id. During the entirety of Bannon’s employment with Appellant, he lived in Beaufort and worked in the Beaufort and Charleston area, not Appellant’s Greenville office. (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 Appellant falsely alleged.

These undisputed facts lead to the inescapable conclusion that Appellant wholly failed to prove the elements of its contract claim. There is no evidence to support Appellant’s position and even if the court were to adopt a new lost document exception to the Statute of Frauds, Appellant did not remotely meet a clear and convincing standard of proof. Accordingly, the trial court’s directed verdict ruling on Appellant’s breach of contract claim should be upheld.³

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

Appellant failed to prove any breach of the Employment Agreement. The trial court correctly ruled as a matter of law that the Employment Agreement’s covenants expired in May 2015 and, thus, Bannon could not have breached them thereafter. The Employment Agreement’s restrictive covenants specifically state that they only apply for two years after the employment

³ Appellant’s Initial Brief only superficially addresses the trial court’s correct additional finding that Appellant failed to prove a meeting of the minds as to all of the terms of the alleged contract. Appellant’s Brief p. 9-10. “South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.” Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). As described in detail above, many essential terms were left blank and the contract contained no reference to Bannon. Thus, the trial court properly held as an alternative basis for directed verdict that Appellant failed to meet its burden of proof to establish a meeting of the minds as to all of the essential terms of the alleged contract.

relationship ends. Plaintiff's Exhibit 137, ¶12(g), ¶13, and ¶14. (R. p. 970). Appellant admitted that Bannon's employment relationship with Appellant terminated in May of 2013. (R. pp. 85, 283, 592, 594, lines 1-12). Bannon thereafter became an independent contractor. *Id.* Once Bannon transitioned to an independent contractor, the Employment Agreement was no longer applicable and terminated. *Id.* Given that Bannon became an independent contractor in May 2013, the Employment Agreement's two year, post-employment restrictive covenants expired in May 2015. Appellant admitted at trial that it was not aware of any evidence that Bannon breached any portion of the Employment Agreement prior to May of 2015. (R. p. 594, lines 13-16).

In an attempt to get around the glaring timing issue of the alleged breach, Appellant argues that the trial court's ruling, "ignores that Forum Benefits introduced evidence that Bannon breached a different Employment Agreement provision that prohibited Bannon from disclosing Forum Benefits' trade secrets and confidential information – this restriction was unlimited in duration." Appellant's Brief p. 10. Appellant's argument misinterprets the Employment Agreement's language and fails to acknowledge critical aspects of the trial court's ruling.

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

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

Pl. Ex. 137, ¶12(e)(emphasis added); (R. p. 970). Appellant included trade secrets in the definition of Confidential Information.

Appellant's own definition of Confidential Information is fatal to its claim because the Employment Agreement only prohibits the use or disclosure of "Confidential Information" for "a period of two (2) years following the termination of Employee's employment relationship with the Company." Pl. Ex. 137, ¶ 12(g); (R. p. 970). Given that Bannon's employment with Appellant ended in May 2013, Bannon's confidentiality obligations and therefore any contractual trade secret obligation expired in May 2015. (R. p. 594, lines 1-16).

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

Furthermore, Appellant never attempted to explain these ambiguities and inconsistencies to its employees or independent contractors. It never identified or explained to these individuals the information it considered to be a trade secret as opposed to simply confidential information. (R. p. 598, line 25-p. 599, line 4). This is incredibly negligent given that Appellant defines Confidential Information to include any information it "considers to be confidential or proprietary." Pl. Ex. 137, ¶12(e); (R. p. 970). Bannon confirmed that Appellant never provided him any policies or training and never had any discussions with him explaining the difference between its confidential information and trade secrets. (R. p. 273, line 3-p. 274, line 8). There were no prompts or pop ups in Appellant's system that identified any of its information as confidential, proprietary or a trade secret. (R. p. 412, lines 4-12).

Appellant's negligence in failing to clarify these issues becomes even more egregious given the fact that South Carolina law requires insurance producers (like Bannon) to maintain information related to their clients. According to S.C. Code Ann. §38-43-250, "All producers shall make and keep a full and correct record of the business done by them, showing the number, date, term, amount of insured premiums, and the persons to whom issued every policy or certificate of renewal." The trial court properly took judicial notice of the requirements of this statute. (R. p. 268). Thus, not only was there no basis to prevent Bannon from maintaining Appellant's alleged Confidential Information two years after his employment relationship ended, but there was a legal basis for him to believe he was required to do so.

Finally, the Employment Agreement adopts the definition of trade secrets from the South Carolina Trade Secrets Act. Pl. Ex. 137, ¶12(c); (R. p. 970). Even assuming arguendo that Appellant could have overcome the ambiguities and inconsistencies in its own Employment Agreement, the trial court correctly found that Appellant provided no evidence that Bannon took any information or documents that rose to the level of trade secrets. See Section I.C. below. An individual cannot breach a contractual trade secret provision where the company does not in fact have or prove the existence of any trade secrets. See Belimed, Inc. v. Bleecker, 2022 WL 939819 at *10 (D.S.C. March 29, 2022). Accordingly, the trial court correctly ruled that Appellant failed to prove any breach of the Employment Agreement as a matter of law and granted Respondents' motion for directed verdict. Respondents request that this Court affirm the trial court's ruling.

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

Third, Appellant failed to prove damages proximately caused by any alleged breach of the Employment Agreement. As discussed in Section I.A.2. above, Appellant has completely relied on the trade secret issue to support its claim that Bannon breached the Employment Agreement.

Appellant cannot and does not argue against the fact that the non-solicitation and non-disclosure restrictions in the Employment Agreement expired long before any alleged breach by Bannon. While the trial court did not directly address the issue of whether Appellant presented sufficient evidence to establish proximate cause damages under the contract claim, it did so under Appellant's trade secrets claim. Because Appellant's contract claim is entirely based on its trade secrets allegations, the same reasoning applies here to bar Appellant's contract claim based on a failure to prove any damages proximately caused by the alleged breach. See Section I.C. below.

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

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

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

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

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

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

This case law is fatal to Appellant’s claim. Here, Appellant is attempting to do exactly what the law prevents, reposing trust on Bannon with no such communication with Bannon and no

foundation for this belief. Appellant seeks to unilaterally impose a fiduciary duty on Bannon after the fact when there was absolutely no communication or agreement to establish such a duty during the term of the relationship.

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

When Appellant terminated Bannon’s employment relationship and established an independent contractor relationship with him, Appellant admits there was no written contract that governed the terms of that independent contractor relationship. (R. p. 593, lines 21-25). Significantly, there was no evidence presented at trial that Appellant ever had even one communication with Bannon about establishing any alleged fiduciary duty as part of the employment or independent contractor relationship. Thus, if the prior employee/employer relationship was insufficient to establish a fiduciary duty, which it was as a matter of law, the change to an independent contractor relationship cannot in and of itself create a new fiduciary duty. To create such a new legal duty would have required an express agreement between the parties. The indisputable evidence at trial was that this never happened. Accordingly, Appellant wholly failed to establish a legal or factual basis for Bannon owing it a fiduciary duty.

Appellant cites to several cases that it contends support the existence of a fiduciary duty for independent contractors. However, none of Appellant’s cited cases bear any resemblance to the facts of this case and virtually all deal with the agent’s (not necessarily an independent

contractor's) obligations to their clients, not to the principal entity for which the agent is working. Contrary to the facts at bar, in virtually all of the cases Appellant cites, the alleged independent contractors are entrusted with the financial or personal well-being of their clients. See Loftis v. Eck, 288 S.C. 154 (S.C. Ct. App. 1986) (power of attorney)⁴; Lengel v. Tom Jenkins Realty, Inc., 286 S.C. 515, 334 S.E.2d 834 (Ct. App. 1985) (real estate brokers duty to act in compliance with client's instructions). All of these cases exemplify the type of special relationship required to establish a fiduciary duty and fit within the current state of South Carolina law. See Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711, 716 (2003) ("Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters.").

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

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

⁴ Notably, Appellant omitted the emphasized part of the court's holding.

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

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

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

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

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

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

There is no evidence anywhere in the record as to the independent economic value of Appellant's alleged trade secret information. Appellant offered no such evidence at trial. Even setting this fact aside, the evidence showed that the information at issue was not owned by Appellant, that it was readily accessible by proper means, and that Appellant did not take reasonable measures to protect the information. The "information" at issue is census data and insurance plan information for Bannon's clients. This information was housed using a third-party tool called Employee Navigator. (R. pp. 356-358). The information in Employee Navigator was protected by a login and password created and maintained by the client, which was also in Appellant's possession. (R. p. 423). Appellant's primary witness on its use of Employee Navigator clearly confirmed that all of the information Appellant contends is trade secret can be recreated through alternative, publicly-accessible means. Specifically, Laurie Winston, Appellant's director of account management and the person who is, according to Appellant, "very knowledgeable" about Appellant's use of Employee Navigator testified,

13	Q So meaning if -- if somebody was gonna rebuild
14	the exact same thing, they could go to the carrier and the
15	client and the payroll company and take all the same
16	information to -- to build the Navigator database?
17	A Correct.

(R. p. 423, lines 13-17 and R. p. 355, lines 3-8). It is blackletter law that information that is readily ascertainable from other sources cannot qualify for trade secret protection. Atwood Agency v. Black, 374 S.C. 68, 646 S.E.2d 882, 884 (2007). This admission by Ms. Winston was fatal to Appellant's claim.

Moreover, the trial court correctly ruled that Appellant did not present sufficient evidence to prove that it employed reasonable measures to protect the alleged trade secret information. After Bannon transitioned from an employee to an independent contractor in 2015, Appellant continued to provide him with unfettered access to information. (R. p. 409, line 20-p. 411, line 2). Appellant never asked Bannon to sign any document that restricted his ability to obtain or disclose the information. (R. p. 593, lines 21-25). As discussed in Section I.A.2. above, there was nothing in Appellant's system or otherwise identifying the alleged information as confidential or a trade secret. Significantly, Appellant had the ability in its system to add heightened levels of protection to certain files it claimed to be a trade secret, but Appellant did not employ this feature to limit Bannon's (or anyone else's) access to information. (R. pp. 412-413). Again, Ms. Winston's testimony on this issue is instructive,

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

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

(R. p. 412, line 21-p. 413, line 20). Amazingly, Appellant easily had the ability to identify and restrict any alleged trade secret information within its system and chose not to do so.

Additionally, Appellant failed to take any steps to restrict the clients' use of the information in question. The clients themselves had their own unrestricted login and password to their employees' information and voluntarily shared this information with Bannon. (R. p. 281, line 1-p. 282, line 13). There were no written restrictions or agreements between Appellant and the clients that in any way restricted the clients' ability to use, disclose or share the information within Employee Navigator. (R. p. 419, lines 13-19).

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

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

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

The evidence at trial established that Bannon was given unrestricted access to information relating to his clients – both by Appellant and the clients themselves. (R. p. 281, line 1-p. 282, line 13; p. 419, lines 13-19). That unrestricted access didn't stop when Bannon ceased to be an employee of Appellant in May 2013. Even then, Appellant made no effort to restrict Bannon's access to information at any point thereafter. (R. p. 593, lines 21-25; p. 594, lines 9-12). Appellant did not establish or provide any policies that restricted Bannon's ability to access information about his clients and never identified to Bannon the information it believed to be confidential or a trade secret. (R. p. 272, line 17-p. 274 line 5). Appellant did not in any way restrict Bannon's clients from providing him access to information. (R. p. 419, lines 13-19). There was absolutely no evidence presented at trial to counter Bannon's testimony that he had access to his client's information by proper means.

Appellant asserts that Bannon, “surreptitiously accessed, downloaded, and copied Forum Benefits’ trade secrets and demonstrates acts of theft and espionage through electronic or other means.” Appellant’s Brief p. 21. Appellant ignores the fact that it gave Bannon unrestricted access to the information in question. Not only does Appellant ignore these facts, it also fails to cite any record evidence to support its assertions to the contrary. Instead, the undisputed evidence shows that Bannon’s clients asked him to obtain their information from Employee Navigator and provided him with their login information. (R. p. 280, line 22-p. 282, line 13).

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

Moreover, Appellant admitted that the clients did not violate the Act by giving Bannon access to the information in Employee Navigator. (R. p. 603, lines 7-10). This was a fatal admission. If the client did not violate the Act by giving Respondent access to the information, Bannon could not have violated the Act by using that approved access. Obtaining the information through alternative proper means (here the clients) is fatal to a finding that the information was misappropriated. See S.C. Code Ann. § 39-8-30(A) (“A trade secret endures and is protectable and enforceable until it is disclosed or discovered by proper means.”).

In addition to failing to prove that Bannon accessed information by improper means, Appellant also failed to prove that Bannon actually stole or used any of its information. During its case in chief, Appellant called two separate computer forensic experts. The first expert, Nolan Zielinski, testified that Bannon accessed 2,107 files, but Mr. Zielinski could not state when said files were accessed, nor what the files contained. (R. p. 328, lines 1-22; pp. 330-331). Mr. Zielinski

stated that he could only determine that Bannon downloaded four files and that all four files related to one of Bannon's clients. (R. pp. 330-331). However, Mr. Zielinski could not identify what information was in the files, if Bannon ever utilized the files, whether AssuredPartners ever accessed the files, or whether the information in the files constituted a trade secret. Id.

Appellant also retained and called Mr. Sholz, a Digital Forensic Examiner, who conducted a forensic analysis of Bannon's computer. (R. p. 480; p. 490). Mr. Sholz readily admitted he could not distinguish between information that Bannon accessed during his relationship with Appellant versus information that Bannon allegedly downloaded or transferred to an external device once his relationship with Appellant had ended. (R. pp. 492-493). Like Mr. Zielinski, Mr. Sholz could not testify as to the content of any files Bannon accessed. Id. Critically, Mr. Sholz admitted that, after months of work, he could not confirm whether Bannon took anything from his desktop or from Appellant at all. (R. p. 494; p. 495, lines 17-20).

The evidence at trial established that Bannon's computer broke in December of 2016 and that he never transferred any of his client information to AssuredPartners. (R. p. 234, line 18-p. 235, line 22). This was not only confirmed by Bannon, but also by a former employee of AssuredPartners, Michelle Coffield. Ms. Coffield confirmed that Bannon never provided her any information about his clients and that, instead, she had to undertake the daunting task of building their files manually by gathering information from the clients and the insurance carriers directly. (R. p. 307, line 13-p. 317, line 15). Appellant presented absolutely no evidence at trial to show that any information was ever received, used or misappropriated by AssuredPartners.

Appellant introduced no evidence of misappropriation. Rather, the evidence proved that Bannon had the consent of his clients to maintain their information and that AssuredPartners never

received or used any of Appellant's alleged trade secret information. Accordingly, the trial court correctly granted Respondents' directed verdict motion and this ruling should be upheld.

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

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

Appellant attempted to introduce evidence related to its alleged damages solely through the self-serving testimony of its President and owner during the relevant time period, Mr. Stritt. Mr. Stritt attempted to testify about the amount of commissions that Appellant received from the clients that moved from Appellant to AssuredPartners. (R. p. 576-579). But the fact that these clients moved does not prove causation. Mr. Stritt admitted that the clients were free to leave Appellant at any time and for any reason. (R. p. 607-608). The "reason" the clients left is what matters, not the fact that they left and followed Bannon to AssuredPartners. This is a requirement Appellant never attempted to prove because the evidence would not have supported the inference

Appellant wanted. Unbelievably, Mr. Stritt admitted that he had no idea why the clients left Appellant. (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 with his own 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 even admitted that Bannon had good relationships with some of his clients. (R. p. 608, lines 9-11). Appellant provided no testimony at trial that in any way proves that the clients left with Bannon for any reason other than the fact that they had a good relationship with him.⁵ Appellant provided absolutely no evidence that in any way connected any alleged misappropriation of its information and the reason clients followed Bannon to AssuredPartners.

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

⁵ Notably, Appellant, subpoenaed multiple of Bannon's clients for trial and they were available to testify, but Appellant chose not to call any of them. The parties consented to Respondents calling two of these clients to testify between the end of Appellant's case and Respondents' directed verdict argument based on the fact that they were in the courtroom and in an effort to be respectful of the jury's time. (Note: Pages 603 – 609 are missing from the Record on Appeal. These pages are where the discussion referenced above can be found). The directed verdict argument then occurred at the end of the day after the jury was excused. (R. p. 617-674).

Employee Navigator accounts moved to AssuredPartners, and that clients with and without Employee Navigator accounts stayed with Appellant. (R. pp. 569-571). As such, Mr. Stritt's opinion completely failed to prove any causal relationship between the clients' use of Employee Navigator and their decision to move their business to AssuredPartners.

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

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

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

First, it should be noted that conversion is a common law tort claim. The Act preempts any such claims. S.C. Code Ann. § 39-8-110; see Trevillyan v. APX Alarm Sec. Sys., Inc., No. 2:10-cv-01387, 2011 WL 11611, at *10-11 (D.S.C. Jan. 3, 2011). Appellant is again relying on information being a trade secret to support this claim. Appellant's Brief p. 30-31. Thus, this claim

was preempted and should have been dismissed for this additional reason. To the extent Appellant was not relying on alleged trade secret information to support this claim, Appellant's own Employment Agreement's restriction on the use of Confidential Information had expired so there were no restrictions on Bannon's use of any other information. See Section I.A.2 above.

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

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

property at issue and because Appellant failed to establish its ownership interest in any of the property allegedly converted, Appellant's claim failed as a matter of law and the trial court correctly directed a verdict in Respondents' favor on this claim.

Appellant also failed to establish that Respondents' converted Appellant's alleged property to the exclusion of Appellant's rights. In fact, Appellant's own argument belies Appellant's conversion claim. For instance, Appellant argues that, "Bannon secretly obtained and forwarded the Employee Navigator client login credentials for Forum Benefits' clients to AssuredPartners, and Jim Brady used those login credentials to access, download, and copy Forum Benefits' trade secrets from the Employee Navigator accounts." Appellant's Brief p. 30. Even assuming all of this is true, Appellant failed to establish Respondents' conduct resulted in Appellant's inability to access and utilize the information. In other words, there was no evidence showing Appellant lost access to or the ability to utilize the information or "property" that it claims Respondents converted.⁶ Thus, as the trial court ruled, Appellant's conversion claim failed as a matter of law.

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

⁶ Again, this entire legal argument is illogical given that the information belonged to the clients. Had Appellant lost its ability to access the information, it would have only been because the client(s) changed their login credentials. Without the basic element of ownership, what remains of Appellant's premise falls apart.

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

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

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

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

Appellant challenges the trial court's decision to award attorneys' fees to Respondents. During Appellant's case in chief, Appellant failed to put on evidence establishing the elements of any of its claims and, at the conclusion of its case, abandoned its tortious interference claim. The trial court awarded Respondents' attorneys' fees based on language in the document Appellant pursued in its breach of contract claim and based on the bad faith language in the Act. (R. p. 22). During this case's substantial life span, Appellant at all times pursued its breach of contract claim and trade secrets claim and advised that it intended to seek attorneys' fees if it prevailed. (R. p. 40; p. 970). Now, after the Appellant has lost and after the trial court has awarded attorneys' fees to Respondent based on the prevailing party fee provisions, Appellant, in the most duplicitous of fashions, contends that the trial court erred. The trial court entered the Order after hearing both an oral motion at the trial and then again after reviewing Appellant's written response to Respondents' motion as well as Respondents' reply in support of their motion. The trial court was fully informed of the arguments and was well within its discretion to award attorneys' fees to Respondents.

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

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

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

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

(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, Appellant's first witness at trial was its attorney, David Wyatt, who drafted this document. Mr. Wyatt clearly testified that the intent of the document was for the prevailing party to be awarded attorneys' fees and costs. Appellant's own attorney who was called as a witness and waived the attorney-client privilege admitted that if Bannon prevailed related to Appellant's contract claim that he should be awarded his fees and costs. (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 Appellant failed to prove the required elements of its breach of contract claim, the trial court properly ruled that Bannon was the prevailing party on this claim and properly awarded Bannon his attorneys' fees and costs. The (R. p. 22).

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

It is important to note that Appellant failed to meet its burden of proof on the contract claim on multiple grounds, most significantly because the claim was barred by the Statute of Frauds, as its own attorney witness admitted at trial. See Sections I.A.1 above. In South Carolina, the law is clear that where a party prevails based on a Statute of Frauds defense, the prevailing party is entitled to an award of attorneys' fees under the challenged contract. Fici v. Koon, 372 S.C. 341, 642 S.E.2d 602, 606 (2007) ("The Statute of Frauds does not affect the validity of the attorneys' fee provision but is simply a defense to conveyance. The Statute of Frauds is an affirmative defense. As with any affirmative defense, the party successfully asserting it is a prevailing party and therefore entitled to attorneys' fees where provided by contract."). Bannon was successful on his Statute of Frauds defense (among others) and, as such, the trial court correctly awarded Bannon's attorneys' fees and costs. (R. p. 23).

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

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

Furthermore, Appellant must be judicially estopped from now arguing that no contract existed and that there can be no prevailing party fees awarded. Appellant claimed for almost five years that Bannon signed the contract and breached the contract. Appellant 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 Appellant's Rule 30 corporate representative in discovery and confirmed that he was "absolutely seeking his fees" against the Defendants in this case. (R. p. 1950). Appellant put Bannon through the hardships of litigation during this entire time period forcing him to defend himself, to prove he did not sign the alleged contract and to prove he did not breach the alleged contract. Appellant must be estopped from so dramatically shifting its position on attorneys' fees after it lost on this claim at trial, and then attempting to claim that no contract existed for the purposes of prevailing party attorneys' fees.

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

have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. Id. Here all the factors of judicial estoppel are present.

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

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

Appellant also mistakenly contends that the trial court should not have awarded Bannon his attorneys' fees because AssuredPartners, rather than Bannon, actually paid the attorneys' fees Respondents incurred in the defense of this case. Once again, Appellant's position is simply wrong and directly contrary to the position it took previously in this case.

In an attempt to support its position, Appellant misapplies the Supreme Court's reasoning in Williamson v. Middleton, 681 S.E. 2d 867 (S.C. 2009), and contends that its holding prohibited the trial court from awarding attorneys' fees to Bannon if he did not pay the attorneys' fees himself.

Appellant's Brief p. 36. Appellant's reliance on Williamson misses the mark as the attorney in that case did not charge his client a fee for his services, but was acting in a gratuitous pro bono capacity.

Williamson, 681 S.E.2d at 870. Specifically, the Williamson Court found,

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

Id. The Williamson Court, however, did not hold that a party must personally pay for attorneys' fees to receive an attorneys' fee award as the prevailing party in a breach of contract case.⁷

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

Whether Bannon personally paid attorneys' fees and costs has no bearing on the trial court's ability to award attorneys' fees to Bannon as the prevailing party on the breach of contract claim. Bannon was sued as an employee of AssuredPartners. It is common in this situation for the then current employer to pay for its fees along with the fees of its employee who was also sued

⁷ The parties briefed these issues before the trial court entered the Order. Appellant's brief, like its argument to the trial court, cites no case law to support its position in this regard and Respondents submit that Appellant has not accurately represented to this Court the information submitted to the trial court before the trial court entered its Order.

individually. This payment for the benefit of the employee does not in any way limit the recovery of those fees. Many jurisdictions agree with South Carolina law on this precise analysis. See Rogers v. Vulcan Mfg. Co., 93 So. 3d 1058, 1060 (Fla. Dist. Ct. App. 2012); Weichert Co. of Maryland v. Faust, 419 Md. 306, 19 A.3d 393, 408 (2011); Developers Diversified of Tennessee, Inc. v. Tokio Marine & Fire Ins. Co., 2019 WL 1861322, at *8 (M.D. Tenn. Apr. 25, 2019).

Further, the prevailing party attorneys' fees provision in the Employment Agreement does not require the prevailing party to actually incur or pay their own attorneys' fees and costs to recover them. (R. p. 969). Appellant could have easily added language in the document related to fees the party "directly incurred" or "directly paid" and chose not to do so. Even to the extent Appellant could argue an ambiguity related to its own document, the trial court would have correctly construed any doubts against the drafter, which was indisputably Appellant. See Mathis, 698 S.E.2d at 778.

Finally, this argument by Appellant is another bad faith argument that is barred by estoppel and equity. As discussed above, Appellant sought to recover its own attorneys' fees in the event it prevailed on its contract claim. Significantly, Appellant has admitted that its fees were paid personally by Mr. Stritt rather than Appellant. (R. p. 586, lines 17-22). Specifically, Mr. Stritt testified at trial to the following:

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

(R. p. 586, lines 17-22).

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

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

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

Appellant first attempts to challenge the trial court's ruling by claiming that the words "bad" or "faith" do not appear in the directed verdict arguments or in the trial court's directed verdict ruling. Appellant's Brief p. 27-28. However, Appellant ignores the fact that the issue of bad faith was not specifically before the trial court until after the trade secret claim was dismissed and Respondents moved for attorney's fees under the Act. Respondents directly raised the issue of bad faith under the Act after the trial court granted a directed verdict. (R. pp. 689, line 21-p. 690, line 4). Accordingly, Appellant's first argument is without any merit.

Second, Appellant improperly relies on Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC, 713 S.E.2d 650 (S.C. Ct. App. 2011) for the proposition that bad faith cannot be found following the denial of a summary judgment motion. Appellant is again mistaken in its analysis. The analysis in Southeastern pertained to frivolity sanctions under Rule 11, not bad faith under the Act. Id. 654. Further, even if the standard in Southeastern applied here (which it does not), the procedural posture of the case at bar differs substantially from Southeastern. Here, the judge that heard Respondents' motion for summary judgment retired

before ruling on said motion. (R. 558-559). Thereafter, a second judge denied Respondents' motion and provided no explanation for the denial. *Id.* A third judge, Judge Bentley Price, presided over the trial in this case. As such, in the case at bar, no pre-trial findings or rulings were made that precluded the trial court's finding that Appellant pursued this claim in bad faith.

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

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

Significantly, the clear legislative intent of the Act was to provide the trial court with the discretion to make a bad faith determination, similar to the determination the trial court would have been required to make if Appellant had prevailed and sought exemplary damages under the Act. "The SCTSA provides that 'the court may award reasonable attorney's fees to the prevailing party' if '(1) a claim of misappropriation is made in bad faith, (2) a motion to terminate an injunction is made or resisted in bad faith, or (3) willful misappropriation exists.'" Uhlig, LLC v. Shirley, 895 F. Supp. 2d 707, 710 (D.S.C. 2012) (citing S.C. Code Ann. § 39-8-80). These are determinations to be made by the trial court after hearing the evidence "deduced at trial." *Id.* The

trial court is vested with the authority to make a bad faith finding and award attorneys' fees. S.C. Code Ann. § 39-8-80.

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

The trial court's finding of bad faith was supported by the evidence (or Appellant's complete lack thereof) and was not an abuse of discretion. Appellant litigated this case for approximately five years. During that time, Appellant never produced any valid evidence of proximately caused damages, never identified information that could possibly rise to the level of a trade secret, never established that its information was "misappropriated" as defined in the Act, and shockingly never asked even one client why they moved with Bannon to AssuredPartners. (R. p. 610, line 6-p. 611 line 22). (Mr. Stritt testified with regard to Bannon's clients, "We haven't gone after them or talked to them"). Tellingly, not one client for which Appellant was seeking damages was called as a witness in Appellant's case at trial. There was absolutely no evidence presented to suggest that Bannon ever had possession of or misappropriated any of Appellant's alleged trade secrets, but even more egregious was Appellant's pursuit of this claim against

AssuredPartners, which never received any of Appellant's alleged trade secret information. See Section I.C.2 above. Appellant wasted the trial court's time, Respondents' time, and caused Respondents to incur hundreds of thousands of dollars litigating a completely baseless trade secrets claim.

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

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

The morning of the third day of trial, following two full days of trial testimony, when Appellant knew its case was going terribly, Appellant moved to recuse the trial judge. (R. pp. 465-478). There was no valid basis for this motion. The entire substance of Appellant's argument was and is that the trial judge should have recused himself after two days of trial testimony because the trial judge realized he knew a "potential" witnesses when the witness showed up to the courtroom. At that time, the Judge realized he knew the potential witness (Mack Ward) from over 17 years prior when they were in college at Wofford together. The trial judge immediately announced the relationship to all counsel and the case continued on – no objection being made (and thus waived).

Appellant even consented to the trial judge saying hello to Mr. Ward during the break. It wasn't until the following day that Appellant complained.

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

Appellant's motion was flawed for multiple reasons. First, Appellant waived its motion for recusal by agreeing to the trial judge saying hello to Mr. Ward (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.").

Appellant apparently understood that its failure to ever call Mr. Ward as a witness was fatal to its claim that he was a material witness in the case. So, in making its motion for recusal the following day, Appellant's counsel claimed that he did not call Mr. Ward to testify after learning that the trial judge knew him from college. (R. p. 475, lines 5-19). Appellant cannot be permitted to choose not to call Mr. Ward on this alleged basis, call other witnesses and see how their testimony goes, and then wait until the following day to make its motion for recusal. This was not

remotely timely and definitely not the “first opportunity.” Duplan Corp., 400 F. Supp at 510. If Appellant had time to consider whether to call Mr. Ward the second day of trial, it had time to consider a motion to recuse the judge at that time and failed to do so.

Notably, Laurie Winston testified at the end of day two of trial and her fatal admissions discussed above essentially destroyed Appellant’s ability to prove its claims. (R. pp. 407-441); see Section I.C.1. above. This damaging testimony was more likely than not the reason Appellant decided to proceed with the motion for recusal the next day. But its true reasons are not relevant given that the motion was untimely.

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

The evidence in this case did not remotely satisfy the requirements of this judicial canon. With regard to the third degree of relationship element, attending college together and not seeing someone for over 17 years is not a “third degree of relationship.” See § 10.2-2.11 Rule 2.11, Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.11 (2021-2022 ed.) (“Third degree of relationship includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece.”). None of the other elements of this

cannon are relevant considering this first element was not met, but the other elements were also not remotely satisfied as discussed below.

With regard to the party or the officer, director, or trustee of a party element, Mr. Ward is not a party in this case and is not an officer, director, or trustee of a party in this case. Appellant attempts to contend that Mr. Ward is a “Vice President” at AssuredPartners and that this title should carry some significance. The evidence at trial clearly established that most insurance producers, like Mr. Ward, carry the title “Vice President,” but that this title does not carry with it any corporate authority. (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 Appellant’s post-trial motions, Mr. Ward and his wife Michelle provided affidavits to the trial court disputing many of Appellant’s post trial claims and explaining that Mr. Ward is a commission based employee in AssuredPartners’ Greenville, South Carolina office and that he is not an officer, manager, trustee, or director of AssuredPartners. (R. p. 1933). But none of this information was before the trial court when Appellant’s made their initial motion because Mr. Ward was never called to testify.

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

None of the judicial cannons for disqualification were met and Appellant has failed to provide any evidence to justify a recusal. The law is clear that “The party seeking disqualification must do more than merely allege bias on the judge's behalf; the party must present some evidence of judicial prejudice or bias.” Simpson v. Simpson, 377 S.C. 519, 524, 660 S.E.2d 274, 277 (Ct. App. 2008) (internal citations omitted). “In applying Canon 3 [(E)](1), the South Carolina Supreme

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

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

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

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

annual white tie dance for approximately ten years, and in 2009, Johnston was invited to join the club.

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

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

When analyzed against the requirements of the judicial canons and the cases cited above, Appellant's position becomes wholly absurd.⁸ Adopting Appellant's position in this case would not only change the law and the judicial canons, 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 Appellant completely failed to establish its claims and, as its case was going down in flames, attempted to

⁸ Adding to the absurdity of Appellant's position, during its motion for recusal to the trial judge, Appellant attacked the integrity of the judiciary and compared the judge's limited connection to an old college acquaintance to the allegations of judicial misconduct in the "Murdaugh Case." (R. p. 473, lines 6-23). The trial court noted the complete frivolity of this comparison and properly admonished Appellant's counsel on the record after the conclusion of the trial for making this comment. (R. pp. 688-689).

use its recusal motion as an ejection button. The trial court correctly denied Appellant's motion for recusal and motion for a new trial. Respondents request that this Court affirm the trial court's decisions.

CONCLUSION

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

Respectfully submitted,

/s/Jeffrey A. Lehrer

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2022-000231

Forum Benefits, LLC, ...Appellant

v.

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

RULE 211, SCACR Certification

I hereby certify that this Final Brief of Respondents, Brian Bannon and Assured Partners, NL, complies with Rule 211(b) SCACR.

Date: March 14, 2023



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Mar 14 2023

SC Court of Appeals

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

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Cc: [Jeffrey Lehrer](#)
Subject: Forum Benefits v. Brian Bannon and AssuredPartners, NL - Appellate Case No. 2022-000231 - Respondents Final Brief
Attachments: [Respondents Final Brief.pdf](#)
[Proof of Service.pdf](#)
[Rule 211 Certification of Counsel.pdf](#)
[Cover Letter to Clerk of SC Court of Appeals Dated 3-14-23.pdf](#)

Good Afternoon,

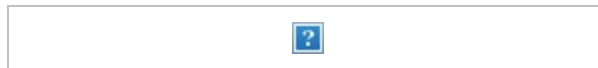
On behalf of Jeffrey Lehrer, attached please find a service copy of Respondents Final Brief along with the Proof of Service, Certification of Counsel, and cover letter to the Clerk in the above-referenced matter which has been filed with the Court today.

Thank you,



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March 14, 2023

**VIA: E-FILE (ctappfilings@sccourts.org)
AND OVERNIGHT DELIVERY**

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
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FedEx Tracking # 3957 2797 2247

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

Dear Ms. Kitchings:

Enclosed please find the Final Brief of Respondents, along with the Proof of Service and Certification of Counsel pursuant to Rule 211 SCACR thereof, for filing in the above-referenced case.

Fifteen copies, including one unbound copy, of the Final Brief of Respondents have been sent via Federal Express to the address provided by the court in its December 7, 2022 letter to counsel.

By copy of this letter, all counsel for Appellant have been served pursuant to Rule 262.

Please do not hesitate to contact me if you have any questions.

Sincerely,



JEFFREY A. LEHRER

JAL/hmr
Enclosures

cc: Steven R. LeBlanc, Esq.
Timothy David St. Clair, Esq.
Katon Edwards Dawson, Jr., Esq.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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

Forum Benefits, LLC,

Appellant,

v.

Brian Bannon and Assured Partners, NL,

Respondents.

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE TRIAL COURT ERRED GRANTING DIRECTED VERDICT TO RESPONDENTS.**
 - A. DID THE TRIAL COURT’S DIRECTED VERDICT ON APPELLANT’S CONTRACT CLAIM RELY ON LEGAL ERROR AND DISPUTED FACTS?**
 - B. DID THE TRIAL COURT’S DIRECTED VERDICT OF NO FIDUCIARY DUTY BY RESPONDENT BANNON RELY ON LEGAL ERROR?**
 - C. DID THE TRIAL COURT’S DIRECTED VERDICT ON APPELLANT’S TRADE SECRET CLAIM RELY ON LEGAL ERROR AND DISPUTED FACTS?**
 - D. DID THE TRIAL COURT’S DIRECTED VERDICT ON APPELLANT’S CONVERSION CLAIM RELY ON LEGAL ERROR AND DISPUTED FACTS?**
- II. WHETHER THE TRIAL COURT ERRED IN AWARDING ATTORNEYS FEES AND COSTS TO RESPONDENTS.**
- III. WHETHER THE TRIAL COURT ERRED IN NOT RECUSING ITSELF FOR EXTRAJUDICIAL BIAS FAVORING A RESPONDENT.**

STATEMENT OF THE CASE

Forum Benefits, LLC (“Forum Benefits”) is an insurance broker of health, life, and disability insurance policies. (R. p. 34, ¶ 2). Forum Benefits utilizes 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 applies 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, among other things, 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. 966-970, ¶ 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. 208).

On October 15, 2016, Bannon began employment as a Senior Vice President of Assured Partners, NL (“Assured Partners”), another insurance broker and direct competitor of Forum Benefits. (R. p. 173; 218). Yet for four weeks following that date he continued to hold himself out as Forum Benefits’ sales representative, hiding his employment with Assured Partners from Forum Benefits. (R. pp. 230-231). During that four (4) 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). Evidently knowing his actions were wrong, Bannon forwarded those credentials to Assured Partners with his personal email account. (R. p. 181). Bannon also 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 (4) 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).

On December 1, 2016, Forum Benefits sued Bannon and Assured Partners (collectively, "Respondents"), alleging among other things misappropriation of trade secrets, breach of contract, conversion, and breach of fiduciary duty. (R. pp. 34-56). A jury trial commenced on October 11, 2021. (R. p. 57).

Testimony and exhibits were provided that 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 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 conduct by the trial judge with Mack Ward, an Assured Partners' principal, in the courtroom during a break. The motion was denied. (R. p. 468, lines 4-6, lines 4-6). 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 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

Brian Stritt (“Stritt”), describing their observations of the trial judge’s extrajudicial conduct with Mack Ward in the courtroom. (R. pp. 698-727; 2205-2207; 2208-2209; 2210-2211).

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 had 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.

STANDARD OF REVIEW

A. Directed Verdict

When reviewing the trial court’s decision on a motion for directed verdict, the Court applies the same standard of review as the trial court. “When considering a motion for a directed verdict, the [trial] court must ‘view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and [must] deny the motion when either the evidence yields more than one inference or its inference is in doubt.’” *Turner v. Med. Univ. of S.C.*, 430 S.C. 569, 582, 846 S.E.2d 1, 7 (Ct. App. 2020) (quoting *Estate of Carr ex rel. Bolton v. Circle S Enters., Inc.*, 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008)). “In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence.” *Wright v. Craft*, 372 S.C. 1, 22, 640 S.E.2d 486, 498 (Ct. App. 2006) (citation omitted). When reviewing an order granting a directed verdict motion the Court does not have the “authority to decide credibility issues or to resolve conflicts in the testimony or evidence.” *Id.*

B. Award of Attorneys’ Fees

Under South Carolina law, an award of attorneys’ fees must be reversed if the circuit court abused its discretion in issuing the award. *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370

S.C. 612, 621, 635 S.E.2d 922, 926 (Ct. App. 2006). The trial court abuses its discretion in awarding attorneys' fees when the award 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, 598 (1997).

C. Disqualification of the Trial Judge

Under Canon 3(E)(1)(a) of Rule 501, SCACR, a trial judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. *See Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004); *Davis v. Parkview Apartments*, 409 S.C. 266, 284, 762 S.E.2d 535, 545 (2014). A party seeking disqualification must show some evidence of bias or prejudice. *See Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996). If there is evidence of judicial bias or prejudice, a trial judge's failure to disqualify himself should be reversed on appeal. *See Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 433 S.E.2d 856 (1993).

ARGUMENTS

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

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

The February 1, 2022 Order directed a verdict in favor of Bannon on Forum Benefits' breach of contract claim, ruling as a matter of law, *inter alia*, that (1) Forum Benefits failed to prove the existence of a signed contract to satisfy the Statute of Frauds and (2) Forum Benefits failed to prove that there was a meeting of the minds on the essential terms of the alleged contract. (R. p. 23). The rulings are legally erroneous and improperly invaded the province of the jury.

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

Respondents argued, and the trial court agreed, that Forum Benefits' failure to produce a signed employment agreement prevented Forum Benefits from satisfying the Statute of Frauds as a matter of law. (R. pp. 628-629; 636; 686; 23 at ¶ A(1)). This ruling incorrectly applies the Statute of

Frauds by ignoring substantial, corroborating evidence that Bannon did, in fact, sign an employment agreement with Forum Benefits.

Evidence sufficient to satisfy the Statute of Frauds is not limited exclusively to production of a signed agreement. Courts in other jurisdictions have regularly recognized the lost memorandum exception to the Statute of Frauds and 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); *Gipson v. Mattox*, 2006 U.S. Dist. LEXIS 86207 (S.D. Ala. 2006). In *Gipson*, the court recognized, “That no written agreement has been produced today does not require a conclusion that no such document ever existed. If a written agreement previously existed, but was lost, destroyed or purloined, then defendant can introduce evidence to that effect in order to satisfy the Statute of Frauds.” *Gipson*, at *37; *see, also, McInnis v. Lind*, 108 P.3d 578, 582 n.2 (Or. App. 2005) (observing many exceptions to the statute of frauds’ prohibition on parol evidence to support an agreement, including where a writing is lost or is in the possession of an adverse party); *Latino Food Marketers, LLC v. Ole Mexican Foods, Inc.*, 2003 WL 23220142, *5 (W.D. Wis. Aug. 20, 2003) (“if the parties did indeed form a contract that met the requirements of the statutes of frauds, the contract is enforceable even if the writing is lost or destroyed”); *Connecticut Bank & Trust Co. v. Wilcox*, 518 A.2d 928, 931 (Conn.1986) (“the loss or destruction of a memorandum does not deprive it of effect under the Statute of Frauds,” where the writing can be proven by secondary evidence).

Comment (a) of section 137 of the *Restatement (Second) of Contracts* echoes 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 the requirements 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 S.C. App. Unpub. LEXIS 395, *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. Bannon began working for Forum Benefits in Charleston in 2009, (R. pp. 122, 133), and David Wyatt (“Wyatt”) testified that Brian Stritt engaged him in 2009 to prepare an employment agreement for a new employee that would be hired in Charleston. (R. pp. 968-974; 60-75, 90; 504-505). Stritt testified that Plaintiff’s Exhibit 137 is a blank employment agreement prepared by Wyatt (R. pp. 968-974; 60-75, 90; 499-501); that Ex. 163 is a completed employment agreement signed by Bannon’s co-employee Chris Whatley on May 18, 2009 (R. pp. 975-982; 497-499, 501-502); and that Ex. 163 is substantially identical to the completed employment agreement signed by Bannon (R. pp. 502-504). Stritt further testified that Bannon signed the employment agreement when Stritt delivered the first paycheck to Bannon on June 1, 2009 (R. pp. 505-507); that Stritt placed the signed employment agreement in Bannon’s employment file (R. p. 506); and that Stritt only discovered that the signed employment agreement was missing—along with Bannon’s entire employment file—shortly after Stritt learned that Bannon had been hired by Assured Partners (R. pp. 506-507). The suspicious nature of Bannon’s “lost” employment agreement—along with the entirety of his employment file—supports a reasonable inference that it was actually taken by, or at the direction of, Bannon. These are not matters of law for the trial court to decide, but instead are disputed questions of fact for the jury. By granting a directed verdict based on the Statute of Frauds, the trial court made credibility decisions and weighed material evidence, a

job to be performed by the jury.

The evidence regarding the existence of a signed employment agreement created several factual disputes for the jury to resolve. *Kumpf v. United Tel. Co. of the Carolinas*, 311 S.C. 533, 429 S.E.2d 869 (Ct. App. 1993) (holding that “a trial court should submit to the jury the issue of the existence of a contract when its existence is questioned and the evidence is either conflicting or admits of more than one inference.”). 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.

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

The February 1, 2022, Order asserts that as a matter of law “[Forum Benefits] failed to prove that there was a meeting of the minds on the essential terms of the alleged contract.” (R. p. 23). This ruling ignores the evidence introduced at trial that created disputed facts for the jury to decide regarding the essential terms in Bannon’s employment agreement and his agreement to those terms.

The evidence noted above, such as that in Section I(A)(1), shows that the trial court erred. This evidence created disputed questions of fact for the jury to decide, and the trial court’s determination that Forum Benefits “failed to prove” these disputed questions of fact improperly invaded the province of the jury and constitutes legal error.

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

The directed verdict ruling that the alleged breaches of contract occurred after the restrictive covenants had expired refers to the 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.

David Wyatt and Brian 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). Paragraph 12(a) of the employment agreement specifically acknowledges 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) incorporate 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) provide 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 prohibits 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 tradesecrets "must not be considered void or unenforceable or against public policy for lack of a durational or geographical limitation." S.C. CODE ANN. § 39-8-30(D) (emphasis added). Therefore, Bannon's

contractual obligations not to disclose or use Forum Benefits' trade secrets and confidential information without Forum Benefits' consent are not limited in duration and are 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.

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

The directed verdict ruling that “Forum Benefits failed to establish the required elements of a restrictive covenant agreement which must be strictly construed against the employer under South Carolina law” misstates the law and impermissibly decides disputed questions of fact. (R. p. 23).

The proposition that “a restrictive covenant agreement ... must be strictly construed against the employer under South Carolina law” is a jumbled misstatement of the law. Every agreement includes “restrictive covenants” of one sort or another, but there is no jurisprudence in South Carolina, or elsewhere, holding that every provision of every agreement with an employer must be strictly construed against the employer.

Instead, as stated in *Rental Uniform Service of Florence, Inc. v. Dudley*, “Restrictive 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, the Supreme 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 introduced evidence that Bannon breached the restrictive covenant in the employment agreement that prohibited Bannon from disclosing Forum Benefits' trade secrets.

Wyatt’s testimony, Stritt’s testimony, and Plaintiff’s Exhibit 163 all provide corroborating evidence of the essential terms in the “offer” of employment by Forum Benefits to Bannon. (R. pp. 968-974; 975-982; 60-75; 90). One of the essential terms in the offer is the covenant not to disclose Forum Benefits’ trade secrets, as described in Paragraph 12 of the employment agreement (R. pp. 969-970), and quoted above in Section I(A)(3), and this covenant is unlimited in duration, as permitted by S.C. CODE ANN. § 39-8-30(D). Stritt’s testimony that Bannon signed the employment agreement when Stritt delivered the first paycheck to Bannon on June 1, 2009, provides evidence that Bannon “accepted” the employment agreement and received “valuable consideration” for the employment agreement. (R. p. 496).

The holding in *Milliken & Co. v. Morin*, 399 S.C. 23, 39, 731 S.E.2d 288, 296 (2012) is instructive on this issue. The South Carolina Supreme 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.” *Id.* at 39, 731 S.E.2d 296. “[T]he scope of the restriction is determined using ordinary principles of contract law.” *Id.* at 32–33, 731 S.E.2d at 293.

Forum Benefits provided substantial, corroborated evidence of the required elements of an enforceable contract. To the extent Respondents disputed this evidence, disputed questions of fact are for the jury to decide, and the trial court’s determination that Forum Benefits “failed to establish” these disputed questions of fact improperly invaded the province of the jury and constitutes legal error. Moreover, the trial court’s suggestion that additional elements are required or that the contract is to be strictly construed against Forum Benefits is error as a matter of law.

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

The February 1, 2022 Order directed a verdict in favor of Bannon on Forum Benefits’ breach of fiduciary duty claim. (R. pp. 23-24). In the oral directed verdict ruling, the trial court declared as a matter of law that an independent contractor cannot owe a fiduciary duty. (R. p. 687, lines 2-12). In

the February 1, 2022 Order, 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). This ruling ignored substantial evidence presented at trial of the confidential and fiduciary relationship that existed between Bannon and Forum Benefits from when Bannon was first hired by Forum Benefits in June 2009, until Bannon stopped representing Forum Benefits as a sales representative in November 2016.

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) (citation omitted); *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987).

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).

Steele v. Victory Sav. Bank, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988).

Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency. *See Berry v. Goodyear Tire and 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.

Forum Benefits hired Bannon in 2009 as a full-time employee to represent Forum Benefits as a sales representative to prospective clients. (R. pp. 968-974; 60-75; 90; 496). When he decided to pursue a career as a fireman in 2013, Bannon transitioned to an independent contractor and continued to represent Forum Benefits as a sales representative to existing and prospective clients. (R. pp. 217; 507-508). As shown in Pl.'s Ex. 1 and acknowledged by Bannon, Bannon profusely thanked Stritt for allowing him to continue to represent Forum Benefits as an independent contractor, and Bannon assured Stritt that he would continue to grow the business for Forum Benefits. (R. pp. 747-748; 156; 507-508). The preceding evidence establishes that Bannon continuously served as Forum Benefits' sales agent from 2009 until 2016 and, therefore, owed Forum Benefits a fiduciary duty not to compete with Forum Benefits concerning the subject matter of his agency.

During the four (4) week overlap when Bannon was simultaneously employed by Assured Partners and represented Forum Benefits as a sales representative, Bannon admitted that he secretly obtained and forwarded the Employee Navigator login credentials for Forum Benefits' clients to Assured Partners. (R. pp. 756-759; 181, 183-184; 188; 190-194; 247; 274-275). At the same time, Bannon downloaded approximately 2,000 files containing Forum Benefits' trade secrets from Forum Benefits' SharePoint server using the login credentials he had received years earlier when he was Forum Benefits' employee. (R. pp. 138-139; 195-196; 198). Employees of Assured Partners repeatedly exhorted everyone involved to expedite copying Forum Benefits' trade secrets before Forum Benefits discovered what they were doing. (R. pp. 749-750; 756-768; 817-823; 174-175; 186; 190-194; 444).

Bannon's actions to download and share Forum Benefits' trade secrets with a direct competitor demonstrate that he knew what he was doing was wrong and violated his fiduciary duty to Forum Benefits.

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

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

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

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

A "trade secret" is any information that has value and is not readily publicly available. S.C. CODE ANN. § 39-8-20(5). The information may exist in any form, including as a formula, a compilation, a method of doing business, a technique, a product, a system, a process, a procedure, or a programming code. *Id.* The information does not have to be complicated, technical, or difficult to understand, and may merely be "a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy." *Id.* Moreover, the information may simply be a compilation of publicly available data because "[t]he collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure." *Id.*

Forum Benefits designed the build-out of each Employee Navigator account, and Forum Benefits collected, organized, and compiled the employee census data and insurance plan information that populated each account. (R. pp. 176-177, 179; 354-355). Winston described in detail the information contained each Employee Navigator account and Forum Benefits' Sharepoint server. Specifically, she described Forum Benefits' proprietary design and build-out of Employee Navigator accounts for each client, as well as Forum Benefits' collection, organization, and compilation of employee census data and insurance plan information included in this proprietary database. (R. pp. 356-359; 378-386; 390-396). She also described in detail Forum Benefits' proprietary formulas included in the renewal spreadsheets for each client stored on Forum Benefits' SharePoint server. (R. pp. 378-386; 390-396). Forum Benefits' design and compilation of data in the Employee Navigator accounts and proprietary formulas in renewal spreadsheets stored on Forum Benefits' SharePoint server exactly match several of the forms of "information" included in the definition for a "trade secret" provided by the S.C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(a).

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

The evidence in the Record (*e.g.*, Plaintiff's Exhibits 8, 10-12, and 45) provides additional, uncontroverted evidence of the value of Forum Benefits' trade secrets to Assured Partners. (R. pp. 176-177; 186; 190-194; 444-447; 448-450; 749-750; 751-755; 756-759; 760-765; 766-768; 817-823). Respondents acted urgently to surreptitiously take Forum Benefits' trade secrets before Forum

Benefits learned that Bannon was working for Assured Partners and terminated further access. (R. pp. 174-175; 247; 274-275). Brady even testified, consistent with his November 8, 2016 email, that he could not build an Employee Navigator account for a client without login credentials that would allow him to download, copy, and take screenshots of Forum Benefits' Employee Navigator account for that client. (R. pp. 760-765; 448-450). All of this uncontroverted evidence demonstrates the substantial economic value of Forum Benefits' trade secrets to Respondents.

Forum Benefits' compilation of data in the Employee Navigator accounts is not excluded from trade secret protection merely because the compiled data comprises seemingly simple facts collected from clients or insurance providers. S.C. CODE ANN. § 39-8-20(5). Forum Benefits designed the build-out of each Employee Navigator account, and Forum Benefits collected, organized, and compiled the employee census data and insurance plan information that populated each account. (R. pp. 174-175, 179; 356-359; 378-386; 390-396). A trade secret may be a "compilation" of information—"a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy." *Id.* While clients and insurance providers certainly had knowledge of individual items in Forum Benefits' compilation, "[t]he collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure." *Id.*

The February 1, 2022 Order fails to address, distinguish, or even acknowledge any of this evidence. "When ruling on a motion for a directed verdict, the trial court must view all evidence and all reasonable inferences in the light most favorable to the nonmoving party, and if the evidence is susceptible of more than one reasonable inference, the trial court should submit the case to the jury." *Roddey v. Wal-Mart Stores East, LP*, 415 S.C. 580, 588, 784 S.E.2d 670, 675 (2016) (citation omitted).

By ignoring all of this evidence, the trial court both ignored the clear language of the S.C. Trade Secrets Act and imposed its own view of the evidence, each of which constitutes error.

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

The directed verdict ruling that Forum Benefits failed to prove reasonable efforts to protect Forum Benefits' trade secrets ignores substantial evidence of the proven effectiveness of Forum Benefits' protective efforts and impermissibly decides disputed questions of fact.

The S.C. Trade Secrets Act, S.C. CODE ANN. § 39-8-20(5)(a)(ii), limits a "trade secret" to information that "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Forum Benefits not only introduced evidence of reasonable efforts to protect Forum Benefits' trade secrets, but the evidence also established that Forum Benefits' protective efforts had proven effective at preventing Mack Ward from misappropriating Forum Benefits' trade secrets several months earlier. (R. pp. 508-515; 983-987).

Forum Benefits limited access to Forum Benefits' trade secrets to only authorized personnel with valid login credentials. (R. pp. 387-389; 397). Forum Benefits only provided login credentials to Forum Benefits' proprietary database of information in the Employee Navigator accounts to account managers assigned to those accounts and, on a case-by-case basis, a single client representative if a client requested the ability to generate reports from the Employee Navigator account associated with that client. (R. pp. 387-389). Forum Benefits did not provide sales people, like Mack Ward and Bannon, with any login credentials to any of Forum Benefits' Employee Navigator accounts. (R. pp. 387-389). Forum Benefits only provided login credentials to Forum Benefits' SharePoint server to Forum Benefits' full-time employees. (R. pp. 138-139; 387-389; 397). When an individual ceased to be an employee of Forum Benefits, all access to these computer systems was cut off. (R. pp. 508-509).

Forum Benefits' protective efforts had proven effective at protecting Forum Benefits' trade secrets several months earlier in 2016. For several years prior, Forum Benefits had been providing benefits administration services to former clients of AssureSouth, owned by Ben Taylor and Mack Ward. In February 2016, Ben Taylor and Mack Ward notified Forum Benefits that they were moving to Assured Partners. (R. pp. 492-494). Forum Benefits agreed to continue providing services to certain clients during a two-month transition period. (R. pp. 983-987; 511-515). However, as shown in Plaintiff's Exhibit 550, Forum Benefits also notified Ben Taylor and Mack Ward that Forum Benefits would not allow third-party access to Forum Benefits' proprietary systems. (R. pp. 983-987; 511-515). Forum Benefits then terminated all client access to any Employee Navigator accounts. (R. pp. 508-509). As a result, only Forum Benefits' employees and account managers continued to have active login credentials to any of Forum Benefits' proprietary systems, and Forum Benefits' protective efforts proved effective at preventing Mack Ward and/or Assured Partners from misappropriating Forum Benefits' trade secrets. (R. pp. 511-515).

From this experience, Assured Partners and Mack Ward discovered a loophole that would avoid Forum Benefits' protective efforts and allow access to Forum Benefits' proprietary systems without Forum Benefits' knowledge—use a client's login credentials to access Forum Benefits' proprietary systems to download, copy, and take screenshots of the Employee Navigator accounts for those clients. Assured Partners hired Bannon on October 15, 2016, and as shown in Plaintiff's Exhibits 8, 10-12, and 45, Bannon immediately exploited this loophole by obtaining and forwarding client login credentials to Assured Partners. (R. pp. 749-750; 756-768; 817-823; 96, lines 9-11; 173-174; 186; 190-194; 218; 274-275).

Bannon hid his new employment status from Forum Benefits, allowing Assured Partners to surreptitiously download, copy, and take screenshots of the Employee Navigator accounts for those clients without Forum Benefits' knowledge. (R. p. 173, lines 3-17). During the same time, Bannon

downloaded approximately 2,000 files from Forum Benefits' SharePoint server using the login credentials he had received when he was Forum Benefits' employee. (R. pp. 195-196; 198).

Forum Benefits' protective efforts had previously proven effective at preventing Assured Partners and Mack Ward from accessing Forum Benefits' trade secrets, and their subsequent discovery of a loophole around those protections does not change that. Respondents in fact exploited a loophole in Forum Benefits' protections, but the law requires "efforts that are reasonable under the circumstances," not foolproof measures.

Forum Benefits provided substantial evidence of protective efforts and the demonstrated effectiveness of those protective efforts at preventing unauthorized access to Forum Benefits' trade secrets. "The trial court must deny a motion for a directed verdict . . . if the evidence yields more than one reasonable inference or its inference is in doubt." *RFT Mgmt. Co., LLC v. Tinsley & Adams LLP*, 399 S.C. 322, 333, 732 S.E.2d 166, 171 (2012). The trial court erred by ignoring the evidence and adopting Respondents' view of the evidence, to Forum Benefits' prejudice.

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

The directed verdict ruling that Forum Benefits failed to prove that Respondents obtained Forum Benefits' trade secrets by improper means ignored the law and uncontroverted evidence presented at trial and impermissibly decided disputed questions of fact.

The S.C. Trade Secrets Act defines "improper means" to include, *inter alia*, theft, breach or inducement of a breach of a duty imposed by contract, and espionage through electronic or other means. S.C. CODE ANN. § 39-8-20(1). The evidence admitted at trial demonstrates that Respondents committed several of the enumerated actions that fall within the definition of "improper means" to obtain Forum Benefits' trade secrets.

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

The February 1, 2022 Order (R. pp. 22-30) fails to address, distinguish, or even acknowledge any of the preceding evidence that demonstrates that Respondents committed several of the enumerated actions that fall within the definition of "improper means" to obtain Forum Benefits' trade secrets. By ignoring all of this evidence, the trial court ignored the clear language of the S.C. Trade Secrets Act and imposed its own view of the evidence, each of which constitutes error to the Forum Benefits' prejudice.

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

The directed verdict ruling that Forum Benefits failed to prove that Respondents misappropriated, wrongfully disclosed, or wrongfully used Forum Benefits' trade secrets ignores the law and uncontroverted evidence presented at trial and impermissibly decides disputed questions of fact.

The S.C. Trade Secrets Act defines "misappropriation" of a trade secret as:

- (a) acquisition of a trade secret of another by a person by improper means;
- (b) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (c) disclosure or use of a trade secret of another without express or implied consent by a person who:
 - (i) used improper means to acquire knowledge of the trade secret.

S.C. CODE ANN. § 39-8-20(2).

The evidence admitted at trial and described herein—such as that in Section I(B)—demonstrates that Respondents committed several of the enumerated actions that fall within the definition of “improper means.” Those included theft, breach, or inducement of a breach of a duty imposed by contract, and espionage through electronic or other means to obtain Forum Benefits’ trade secrets. S.C. CODE ANN. § 39-8-20(1). As a result, Respondents’ actions constitute a “misappropriation” of Forum Benefits’ trade secrets under section 39-8-20(2)(a)—*i.e.*, Respondents acquired Forum Benefits’ trade secrets by improper means.

No evidence exists that Forum Benefits ever expressly or impliedly consented to Respondents’ disclosure or use of Forum Benefits’ trade secrets. Therefore, Respondents’ disclosure and use of Forum Benefits’ trade secrets was “wrongful,” and Respondents’ actions also constitute a misappropriation of Forum Benefits’ trade secrets under S.C. CODE ANN. § 39-8-20(2)(c)(i)—*i.e.*, Respondents used improper means to acquire knowledge of Forum Benefits’ trade secrets and then disclosed and used Forum Benefits’ trade secrets without Forum Benefits’ express or implied consent.

By concluding that Forum Benefits failed to prove that Respondents misappropriated, wrongfully disclosed, or wrongfully used Forum Benefits’ trade secrets, the trial court ignored the clear language of the S.C. Trade Secrets Act and imposed its own view of the evidence, each of which constitutes error to Forum Benefits’ prejudice.

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

The directed verdict ruling that Forum Benefits failed to prove that damages were proximately caused by Respondents’ misappropriation of Forum Benefits’ trade secrets ignores substantial evidence and impermissibly decides disputed questions of fact.

Multiple witnesses provided testimony that supports the reasonable inference that Respondents’ misappropriation of Forum Benefits’ trade secrets proximately caused damages to

Forum Benefits. Multiple contemporaneously generated emails (*e.g.*, Plaintiff's Exhibits 8, 10-12, and 45) confirm that Assured Partners' acquisition of Forum Benefits' trade secrets from the Employee Navigator accounts was critical to convincing clients of a seamless transition from Forum Benefits to Assured Partners. (R. pp. 749-750; 756-768; 817-823; 186; 190-194; 444-447).

Christie Holderness, the District Manager for St. Andrews Public Service District, testified that continuous access to Forum Benefits' trade secrets compiled in the Employee Navigator account was an important factor in her decision to transfer St. Andrews Public Service District's business from Forum Benefits to Assured Partners. (R. pp. 620-626).

Nine clients associated with Bannon actively used Forum Benefits' compilation of data stored in the respective Employee Navigator accounts. (R. pp. 281-282; 448-450; 569-572). Assured Partners saved substantial time by being able to download, copy, and take screenshots of Forum Benefits' trade secrets instead of having to design, build-out, collect, organize, and compile the same database of information. (R. pp. 287-288). 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 of those clients transferred their business from Forum Benefits to Assured Partners. None of the other six clients transferred their business to Assured Partners. (R. pp. 281-282; 448-450; 569-572). This 100% statistical correlation between Respondents' misappropriation of Forum Benefits' trade secrets and transfer of business to Assured Partners provides probative evidence of damages proximately caused by Respondents' actions.

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 uncontroverted evidence of the urgent efforts Respondents exercised to surreptitiously obtain Forum Benefits' trade secrets before Forum Benefits learned that Bannon was working for Assured Partners and terminated further access. (R. pp. 749-750; 756-768; 817-823; 174-177; 186; 190-194; 274-275). Brady even testified, consistent with his

November 8, 2016 email, that he could not build an Employee Navigator account for a client without login credentials that would allow him to download, copy, and take screenshots of Forum Benefits' Employee Navigator account for that client. (R. pp. 448-450).

All of this uncontroverted evidence supports the reasonable inference that damages were proximately caused by Respondents' misappropriation of Forum Benefits' trade secrets. As a result, the trial court's ruling as a matter of law that Forum Benefits failed to prove that damages were proximately caused by Respondents' actions impermissibly decided disputed questions of fact for the jury to resolve and constitutes legal error that prejudiced Forum Benefits.

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

The directed verdict ruling that Forum Benefits' damages were speculative directly contradicts the trial court's evidentiary rulings, ignores competent evidence of Forum Benefits' damages, and impermissibly decides disputed questions of fact.

Brian Stritt testified regarding Forum Benefits' damages. Respondents repeatedly objected to Stritt's testimony as being opinion testimony and speculative. (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' former owner and current 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.

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

The directed verdict ruling that Forum Benefits introduced no evidence showing Assured Partners ever had access to or used any of Forum Benefits' trade secrets ignores substantial evidence presented at trial by Respondents' own employees and constitutes reversible error.

The evidence admitted at trial—such as that described herein in Sections I(B) and I(C)(5)—demonstrates that Assured Partners obtained client log-in credentials and copied and used Forum Benefits' trade secrets resident in the Employee Navigator accounts for several clients. (R. pp. 749-750; 756-759; 760-765; 766-769; 817-823; 96; 138-139; 173-177; 181, 183-184; 186; 188; 190-196; 198; 218; 247; 274-275; 281-282; 287-288; 444-450; 569-572; 620-626).

Furthermore, Forum Benefits presented testimony from Nolan Zielinski, who conducted a forensic analysis of Forum Benefits' SharePoint server. (R. pp. 300-309). Plaintiff's Exhibit 16 is a Log File Report generated by Zielinski that lists 2,107 files stored on Forum Benefits' SharePoint server that were accessed using Bannon's SharePoint user account with Forum Benefits. (R. pp. 771-816; 322; 515-518; 531-534). As shown in the Log File Report, Bannon accessed 979 files from Forum Benefits' SharePoint server after October 15, 2016, when he was a Senior V.P. of Assured Partners. (R. pp. 771-816; 218; 322; 515-518; 531-534).

Forum Benefits also presented expert testimony from Michael Scholz who forensically examined Forum Benefits' desktop computer that was used by Bannon in 2016. (R. pp. 826-828; 829-836; 481; 483-485). Scholz testified that the desktop computer included a "Palmetto Benefits

Management” folder.¹ (R. p. 485). Plaintiff’s Exhibit 77 is a printout generated by Scholz that lists each file included in the Palmetto Benefits Management folder, and as shown, this folder included approximately 1,000 files having the same file names as files stored on Forum Benefits’ SharePoint server and included in the Log File Report generated by Zielinski. (R. pp. 771-816; 957-966; 485-486; 515-518; 531-533). Scholz also generated a LNK File Report, Plaintiff’s Exhibit 72 (R. pp. 837-956), and Scholz testified that the LNK File Report indicates that on October 30, 2016, an identical Palmetto Benefits Management folder was accessed on an external storage device connected to the desktop. (R. pp. 837-956; 486-489).

The testimony of Zielinski and Scholz, combined with Bannon’s testimony, provides evidence that Bannon did indeed copy and then transfer a substantial number of files from Forum Benefits’ SharePoint sever to an external storage device—all while Bannon was a Senior V.P. of Assured Partners.

Bannon’s own testimony provides additional evidence that he intentionally tried to transfer files from Forum Benefits’ SharePoint server to Assured Partners. Specifically, Michelle Fralix², an account manager for Assured Partners assigned to Bannon, asked Bannon for a medical plan summary for Premier Logistics—one of Forum Benefits’ clients that Bannon was recruiting to switch to Assured Partners. (R. pp. 824-825; 232-233). Bannon responded, “I’ve scoured my files but I wasn’t able to pull what I wanted off Forum’s website.” (R. pp. 824-825; 233-234). On November 30, 2016, Bannon notified Fralix that Bannon could no longer access Forum Benefits’ proprietary renewal algorithms for Alpha Genesis—another client that Bannon was recruiting to switch to Assured Partners—stating, “My hard drive broke an [sic] I no longer have renewal info. for these guys.” (R. pp. 769-770; 234-235).

¹“Palmetto Benefits Management” was Forum Benefits’ previous corporate name. (R. pp. 122-123)

² Michelle Fralix also went by the name Amy Fralix and testified at trial as Michelle Coffield. (R. p. 299).

The trial court’s ruling that Forum Benefits introduced no evidence that Assured Partners obtained and used Forum Benefits’ trade secrets directly contradicts and cannot be reconciled with the undisputed testimony and documents provided by two separate forensic experts and Respondents’ own employees. This erroneous factual conclusion, clothed as a legal ruling, invaded the province of the jury and constitutes prejudicial error to Forum Benefits.

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

The words “bad” or “faith” appear nowhere in any of Respondents’ directed verdict arguments or cited authorities, nor in any of the trial court’s oral directed verdict rulings. Nonetheless, the February 1, 2022 Order—authored entirely by Respondents—concludes as a matter of law that Forum Benefits pursued a trade secret claim in bad faith. (R. p. 25, ¶ C(8); p. 26, ¶ F). This ruling contradicts controlling precedent and constitutes legal error.

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).

The trial commenced October 11, 2021, and Forum Benefits rested its case after three days of testimony. After the trial court granted Respondents a directed verdict on Forum Benefits’ trade secret claims, Respondents moved for an award of attorneys’ fees based on alleged bad faith litigation. (R. pp. 689-690).

“[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. Atl. Coast Builders& Contrs., LLC*, 394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011) (citation omitted). In *Southeastern*, as in the present

case, two different judges denied the defendants' motion for summary judgment. As in the present case, the trial judge granted a directed verdict in favor of the defendants after the plaintiffs had presented their case and rested. As in the present case, the defendants sought an award of attorneys' fees for frivolous litigation. Following the Supreme Court's controlling authority in *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997), the Court of Appeals affirmed the denial of attorneys' fees because the plaintiffs' claims had survived summary judgment.

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*, Forum Benefits' trade secret claims were not frivolous as a matter of law. Accordingly, the Court's ruling that Forum Benefits pursued a trade secret claim in bad faith ignores controlling South Carolina authority and is wrong as a matter of law.

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

The trial court's February 1, 2022 Order includes multiple rulings pertinent to Forum Benefits' conversion claim that are legally erroneous, and its factual conclusions improperly invaded the province of the jury.

1. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits could not prove the elements of a conversion against Bannon

The directed verdict ruling that Forum Benefits could not prove the elements of conversion against Bannon incorrectly applies the law to uncontroverted evidence presented at trial to decide disputed questions of fact.

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.*, 385 S.C. 452, 465, 684 S.E.2d 756, 763 (2009). The S.C. Trade Secrets

Act provides the owner of a trade secret with the exclusive right to determine who can know, disclose, or use the trade secret. S.C. CODE ANN. § 39-8-20. Forum Benefits did not authorize Bannon to obtain Forum Benefits' trade secrets from the Employee Navigator accounts or from Forum Benefits' SharePoint server. Nonetheless, Bannon secretly obtained and forwarded the Employee Navigator client login credentials for Forum Benefits' clients to Assured Partners, and Jim Brady used those 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). Bannon himself testified that he downloaded approximately 2,000 files containing Forum Benefits' trade secrets from Forum Benefits' 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.

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

2. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits Failed to Prove that Bannon Converted Any Property of Forum Benefits to the Exclusion of Forum Benefits' Rights as Forum Benefits Always Retained Access and Rights to the Information at Issue

The directed verdict ruling that Forum Benefits failed to prove that Bannon converted any property of Forum Benefits to the exclusion of Forum Benefits' rights as Forum Benefits always retained access and rights to the information at issue incorrectly applies the law to uncontroverted evidence presented at trial to decide disputed questions of fact.

The S.C. Trade Secrets Act provides the owner of a trade secret with the exclusive right to determine who can know, disclose, or use the trade secret. S.C. CODE ANN. § 39-8-20. 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. Accordingly, the Court’s directed verdict ruling is legally wrong and impermissibly decides disputed questions of fact.

3. The Trial Court Erred in Determining as a Matter of Law that Intangible Property Cannot Form the Basis for a Conversion Claim

The directed verdict ruling that intangible property cannot form the basis for a conversion claim is wrong as a matter of law.

Conversion is the “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, supra*. South Carolina courts have held that intangible rights are normally not the proper subject for a conversion claim. *Id.* The *Gignilliat* court explained, “An 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 omitted) (emphasis added) (footnote omitted)). Ultimately, the South Carolina Supreme 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.*

In *Integrated Direct Marketing, LLC v. Drew May & Merkle, Inc.*, 2016 Ark. 281, 495 S.W.3d 73 (2016), 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?” *Id.* 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* is persuasive authority, consistent with the South Carolina Supreme 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 indistinguishable from 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.” *Id.* at 763.

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.

4. The Trial Court Erred in Determining as a Matter of Law that Forum Benefits Failed to Prove Damages were Proximately Caused by Bannon's Conversion of Forum Benefits' Trade Secrets

The directed verdict ruling that Forum Benefits failed to prove that damages were proximately caused by Bannon's conversion of Forum Benefits' trade secrets ignores substantial evidence and impermissibly decides disputed questions of fact.

The evidence noted above, such as that in Section I(C)(1), supports the reasonable inference that Bannon's conversion of Forum Benefits' trade secrets proximately caused damages to Forum Benefits. Likewise, the "9-client/100% statistical correlation" evidence described in detail hereinabove in Section I(C)(5) likewise demonstrates the factual questions that should have prevented the trial court's ruling on this issue.

The evidence discussed above supports the reasonable inference that damages were proximately caused by Bannon's misappropriation of Forum Benefits' trade secrets. As a result, the Court's ruling as a matter of law that Forum Benefits failed to prove that damages were proximately caused by Bannon's actions impermissibly decided disputed questions of fact for the jury to resolve and constitutes legal error that prejudiced Forum Benefits.

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

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

Respondents' first motion for attorneys' fees consisted of an oral motion—a single sentence in open court referencing the employment contract between Forum Benefits and Bannon—that the

trial court granted before Respondents' attorney even finished vocalizing that single sentence.³ (R. p. 689).

Respondents' second motion for attorneys' fees, based the S.C. Trade Secrets Act, was four sentences, again enunciated in open court, again did not include any evidence for any of the factors (identified below) that a trial court is required to consider before awarding attorneys' fees, and again was instantaneously granted by the Court. (R. pp. 689-690).

The trial court failed to require the provision of basic information needed to support an award of attorneys' fees, including which Respondent is seeking fees, the legal authority for the fee request, the amount of the fee request, and the six categories of information our jurisprudence identifies as needed to determine a reasonable fee award.

A. If By Contract

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 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 the non-existent contract.

B. If By Statute

Forum Benefits' trade secret claim was not bad faith as a matter of law. As articulated above in Section I(C)(8), "[W]here a party survives a summary judgment motion, it is not subject to sanctions

³The Court's instantaneous responses to Respondents' motions is significant and supportive of Forum Benefits' position that the trial judge should have recused himself for bias favoring Respondents.

after a trial on the merits of the surviving claims.” *Southeastern*, 394 S.C. at 713, S.E.2d at 650 (quoting *Hanahan*, 326 S.C. at 158, 485 S.E.2d at 913). The facts, reasoning, and conclusion reached in *Southeastern* are indistinguishable from the present case. Two different judges heard summary judgment motions against Forum Benefits, and both judges denied the motions. Consistent with the controlling authority of *Southeastern* and *Hanahan*, as a matter of law, Forum Benefits’ trade secret claims were not in bad faith.

C. Whose Attorneys’ Fees?

Respondents’ muddled attorney fee request seems to have sought an award of attorneys’ fees for both Respondents. (R. pp. 689-690). If Respondents’ motion was as to both Respondents, there is no evidence that Forum Benefits had any contract with Assured Partners. And there is no evidence that Bannon ever incurred any attorneys’ fees whatsoever.

D. What Attorney Fees?

Respondents acknowledge 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, provides, “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, rather than providing any evidence that Bannon actually incurred any fees and costs, Respondents instead 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 the South Carolina Supreme Court.

In *Williamson v. Middleton*, 383 S.C. 490, 681 S.E.2d 867 (2009), the South Carolina Supreme Court answered the question of 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. *Id.* at 493. 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, finding that the employee might discuss a fee at the end of the case. *Id.* at 496. The Supreme 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.

E. Additional Deficiencies

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.

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

The trial judge (Judge Price) erred in refusing to disqualify himself pursuant to Canon 3(E)(1).

Canon 3(E)(1) states as follows:

- (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

- (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, ...

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

While the trial judge's assurance of his own impartiality is accorded great weight, "a judge's impartiality might reasonably be questioned when his factual findings are not supported by the record." *Ellis*, 315 S.C. at 285, 433 S.E.2d at 857. Given particular events with the trial judge that occurred during trial, there were multiple, legitimate, *bona fide* reasons to question the trial judge's impartiality, and he should have recused himself.

The trial commenced on October 11, 2021. In their opening statement, Respondents identified an individual named Mack Ward—a Vice President of Assured Partners—as a trial witness. (R. p. 58). Mack Ward's name was cited repeatedly during examinations of multiple witnesses throughout the second day of trial, all prior to the recess described in the next paragraph of this brief. (R. pp. 257; 275; 277; 300). The trial judge himself even mentioned his name. (R. p. 276).

On the afternoon of the second day of the trial, off the record during a recess with the jury not present, the trial judge entered the courtroom and asked counsel for both parties if he could greet a person in the courtroom. The person whom the trial judge then proceeded to greet turned out to be Mack Ward—a Vice President of Assured Partners. Mack Ward had not been in the courtroom before that time. The interaction between the trial judge and Mack Ward was substantially more boisterous and affectionate than would be expected between mere acquaintances—the two engaged in mutual hugging, back slapping, and generally rowdy laughter. After this public display, the trial judge immediately went to the front of the bench, into the court reporter's station, and announced to all present in the courtroom—which included Forum Benefits' managing partner Brian Stritt—that he and Mack Ward knew each other from their days attending college at Wofford together and, if cell phones had existed then, neither would be in the position they are in now. (R. pp. 2205-2207; 2208-

2209; 2210-2211).

At no time then or thereafter did the trial judge offer any opportunity to the parties to address concern they might have as a result of this in-court display of relationship and affection between the trial judge and a principal for Assured Partners and/or questions they might have as to bias of the trial judge from that relationship and affection.

Before trial resumed on October 13, 2021, Forum Benefits made an oral motion for the trial judge to recuse himself from further participation in the trial based on the trial judge's public displays of bias the previous day. (R. p. 468, lines 4-6). The trial judge confirmed the comment about cell phones as being "my comment ... intended to be a self-deprecating joke about myself." (R. p. 472, lines 12, 18-19).

As reflected in the transcript of the proceedings, the trial judge said, "I had no idea why he would be here," (R. p. 471, lines 21-22), notwithstanding Respondents indicating in their opening statement that Mack Ward would be a witness (R. p. 58, line 18 – p. 59, line 1) and Mr. Ward's name being recited repeatedly during earlier testimony (R. p. 257, line 10; p. 275, line 1; p. 277, lines 3-14; p. 300, lines 9-11). The trial judge seemed to indicate during argument of the motion that at some point the trial judge and Mack Ward went back into chambers to continue their reunion⁴, an event of which Forum Benefits was then-previously unaware, which the trial judge confirmed at the January 4, 2022 hearing on post-trial motions. (R. p. 745, lines 1-15).

The trial judge also provided the unsolicited statements, "I don't do Facebook" and "there's nothing on Facebook that says I'm a judge." (R. p. 469, lines 17-20). A quick examination of Facebook® seems to contradict both of these statements. Specifically, someone named Bentley Price maintains a personal Facebook® account, is currently Facebook® friends with someone named

⁴“And we went back and talked and discussed -- and I -- I'll put on the record what we talked about.” (R. p. 469, lines 7-9)

Michelle Ward, which is the name of Mack Ward’s wife, and received and responded to Facebook® messages on October 19, 2021, that included photos of someone who appears to be the trial judge in a black robe and stating, “Happy birthday Judge. We love you!” This posting indicates that Facebook® users posted 19 comments, including a reply by a Facebook® account holder named Bentley Price of “Thank you everyone!!” (R. pp. 988; 989; 990; 742-745).

These Facebook® postings are significant because they directly contradict unsolicited statements made on the record by the trial judge six days earlier in response to Forum Benefits’ recusal motion – not only does the trial judge “do” Facebook® with his own Facebook® account, but also, less than a week after making those unsolicited statements, the trial judge received and responded to Facebook® postings that clearly identify him as a judge.

On October 25, 2021, Forum Benefits separately filed a Motion for a New Trial pursuant to Rule 59(a), SCRCP. (R. pp. 1877-1909). Forum Benefits asserted that the trial judge’s reasonable appearance of bias, combined with multiple inconsistent rulings that consistently favored Respondents, demonstrated actual bias by the trial judge that prevented Forum Benefits from receiving a fair trial.

On January 4, 2022, the trial judge conducted a hearing on Forum Benefits’ Motion for a New Trial. Forum Benefits presented live testimony from Michelle Filler, Lisa Stritt, and Brian Stritt describing the trial judge’s extrajudicial conduct with Mack Ward in the courtroom that created a reasonable appearance of bias.⁵ (R. pp. 698-728). After receiving arguments from all parties, the trial judge *sua sponte* described his relationship with Mack Ward for the record. (R. pp. 742-745). However, the trial judge’s recollection of events differed from the record and omitted significant details.

⁵ Prior to the hearing, Forum Benefits also filed declarations from Michelle Filler, Lisa Stritt, and Brian Stritt regarding their personal observations of the trial judge’s extrajudicial conduct with Mack Ward during trial. (R. pp. 2205-2207; 2208-2209; 2210-2211).

Specifically, the trial judge confirmed that he was college friends with Mack Ward and again did not dispute or refute the witnesses' testimony describing his lively interaction with Mack Ward in the courtroom. However, the trial judge pointedly denied making the statement about cell phones and instead recalled, not that the statement was his own self-deprecating joke about himself as he had asserted on October 13th, but that he had merely repeated a remark that Mack Ward had said to him. (R. p. 743, lines 15-20). The trial judge also did not mention that he had also met alone privately with Mack Ward in chambers without anyone from the Forum Benefits being present, until asked to confirm that this *ex parte* meeting actually took place. (R. p. 745)

A. The Court's Actions Created an Appearance of Bias

Forum Benefits' basis for recusal—that the trial judge displayed and revealed a personal bias toward Mack Ward, a Vice President of Assured Partners—squarely fits Canon 3(E)(1)(a). Moreover, the Commentary to Canon 3(E)(1) specifically states, “Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply.”

Our jurisprudence requires evidence of judicial prejudice and of the existence of the judge's impartiality. As described above, the trial judge's public displays of bias directed toward Mack Ward provide concrete evidence by which “the judge's impartiality might reasonably be questioned.”

Although not expressly addressed by the South Carolina Supreme Court, there is suggestion elsewhere that the bias that disqualifies a trial judge “must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.” *See, e.g., Duplan Corp. v. Deering Milliken, Inc.*, 400 F.Supp. 497, 522 (D.S.C. 1975) (citation and internal quotation marks omitted). But, even under that narrower standard, the trial judge in the case at bar should have disqualified himself—his bias stemmed from his relationship with Mack Ward, a relationship that was extrajudicial.

Pursuant to Canon 3(E), the trial judge should have disqualified himself.

B. The Court's Inconsistent Rulings Provide Evidence of Actual Bias

Forum Benefits' concerns about the appearance of bias are bolstered by the trial court's multiple rulings that were inconsistent in rationale but consistently in Respondents' favor.

For example, and as discussed above, the trial court granted a directed verdict for Bannon on the contract claim, stating, "There was, obviously, no meeting of the minds." (R. p. 686). Despite ruling as a matter of law, in disregard of the evidence, that no contract existed to be breached, the trial court nonetheless granted Respondents' motion for an award of attorneys' fees based on a clause in what the trial court had deemed to be a non-existent contract. (R. pp. 689-690). Moreover, the trial court erroneously ruled that it would award Bannon his attorneys' fees before hearing any response from Forum Benefits opposing the motion. (R. pp. 689-690). The attorneys' fees awarded by the trial court go toward Assured Partners—of whom Mack Ward is a Vice President. The rulings were inconsistent, but both rulings were consistent to this extent: they favored Respondents.

For another example, during Forum Benefits' direct examination of Bannon, Forum Benefits authenticated and offered into evidence Pl.'s Ex. 9—Bannon's Responses to Requests for Admission under Rule 36. (R. pp. 751-755; 210-211). This exhibit was particularly relevant to impeaching Bannon because Bannon had just provided testimony based on documents admitted into evidence that directly refuted many of the admission requests that Bannon had denied. (R. pp. 203-210). Respondents objected to the admissibility of Bannon's Responses to Admission Requests (R. pp. 751-755) as being a pleading: "Your Honor, I object, it's a pleading." (R. pp. 751-755; 211). The trial court sustained the objection: "I'm – I'm not going to allow it in. He's correct, it's a pleading." (R. p. 211, lines 4-6).

Responses to Requests for Admission are not pleadings. Rule 7(a), SCRCP, identifies the documents that constitute pleadings (*i.e.*, a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, and a third-party answer), and responses to Requests for

Admission are not one of the identified documents.

During Respondents' cross-examination of Brian Stritt, Respondents sought to introduce Exhibit C to the Verified Complaint as an exhibit. (R. p. 590). Forum Benefits objected to the exhibit as a pleading pursuant to Rule 43. (R. p. 590). *See* Rule 43(g), SCRCP ("The pleadings shall not be submitted to the jury for its deliberations."). The trial judge overruled Forum Benefits' objection: "I'll allow it." (R. p. 591, line 3). The trial court's ruling that Bannon's Responses to Admission Requests are inadmissible pleadings, when they are not even pleadings, cannot be reconciled with the Court's subsequent improper ruling allowing Respondents to admit into evidence what is indisputably a pleading, but the two rulings together are further probative evidence of the Court's bias.

Another inconsistent ruling by the trial court involved direct evidence of Forum Benefits' damages. Forum Benefits sought to elicit factual testimony from Brian Stritt based on his own personal knowledge of the dollar amount of annual commissions associated with clients that switched from Forum Benefits to Assured Partners and the resulting damages to Forum Benefits. (R. pp. 771-816; 520-530; 534-560; 573-578). At the time of the events giving rise to this litigation, Stritt was the sole owner of Forum Benefits and had been negotiating with a buyer for over a year to purchase Stritt's company. After learning that Bannon had left Forum Benefits, the buyer required Stritt to identify the precise dollar amount of annual commissions associated with clients for whom Bannon had been the sales person, and the buyer then reduced the previously negotiated purchase price by \$1.5M based on the information that Stritt provided to the buyer. (R. pp. 771-816; 520-530; 534-560; 573-578).

Respondents objected to this factual testimony from Brian Stritt, along with the contemporaneously-generated exhibits that documented both the annual commissions and the \$1.5M reduction in the purchase price negotiated in an arms-length transaction. (R. pp. 520-530; 534-560). In initially sustaining Respondents' objections, the trial court ruled that Stritt's testimony lacked

foundation and, although Stritt's testimony was based on and entirely consistent with the information that Stritt had provided to the buyer in 2016, the trial court reasoned that allowing Stritt to testify regarding commissions would enable Stritt to provide false evidence of Forum Benefits' damages. (R. pp. 520-530; 534-560). According to the trial court, Forum Benefits could only provide evidence of damages through a financial expert. (R. pp. 520-530; 534-560).

After a lunch break, the trial judge announced that, after consultation with an unidentified Business Court judge, he would allow Stritt to testify about the precise dollar amount of annual commissions associated with clients that switched from Forum Benefits to Assured Partners. (R. pp. 560-569). However, the trial court would not allow into evidence any contemporaneously-generated exhibits to corroborate Stritt's testimony, nor would the trial court allow Stritt to testify about the \$1.5M reduction in the purchase price that had been based solely on the anticipated lost commissions associated with clients taken from Forum Benefits by Assured Partners. (R. pp. 560-569). The trial court's rulings that Stritt could provide first-hand, factual testimony about annual commissions, while excluding first-hand, factual testimony about the negotiated \$1.5M decrease in the purchase price, were contrary to Rules 601-603 of the South Carolina Rules of Evidence, prejudiced Forum Benefits, and constitute errors as a matter of law.

Forum Benefits respectfully asserts that the motion to recuse was based on the reasonable appearance of bias, and Forum Benefits' concerns about the appearance of bias are supported by a consistent string of inconsistent rulings that continually favored Respondents. The trial court's denial of Forum Benefits' motion to recuse prevented Forum Benefits from receiving a fair trial.

CONCLUSION

For the foregoing reasons, the trial court erred in granting directed verdict to Respondents in the face of disputed issues of fact, erred in awarding attorneys' fees and costs to Respondents in the absence of legal and factual foundations for such an award, and erred in not recusing itself from the

case. Accordingly, Forum Benefits respectfully requests the Court issue an order reversing the trial court.

March 16, 2023

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Mar 16 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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

Forum Benefits, LLC,

Appellant,

v.

Brian Bannon and Assured Partners, NL,

Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on March 16, 2023, copies of the **Appellant's Final Brief** and **Appellant's Final Reply Brief** were served on Respondents' counsel of record via email containing the above referenced document to counsels' individual AIS email addresses as follows:

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ARGUMENT

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

Respondents repeatedly discuss their view of the evidence to urge that the trial court’s directed verdict Order, which was entirely written by Respondents and signed by the trial judge without a single revision, is correct. Respondents’ Brief is infused with the argument, not that Appellant presented no evidence, but instead that Appellant’s evidence “failed to prove” (used thirty times¹) or “failed to establish” (used seven times²) a proposition or that testimony was “self-serving” (used seven times³) – arguments about the weight of evidence that Respondents themselves acknowledge was presented, acknowledged evidence the existence of which precluded a directed verdict.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respondents argue, “Appellant had the ability in its system to add heightened levels of protection to certain files it claimed to be a trade secret, but Appellant did not employ this feature to limit Bannon’s (or anyone else’s) access to information.” (Respondents’ Brief, p. 23). There is no evidence in the record to support Respondents’ argument as to the Employee Navigator database.

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

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

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

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

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

--- and ---

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

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

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

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

Respondents also write, "Moreover, Appellant admitted that the clients did not violate the Act by giving Bannon access to the information in Employee Navigator. T. 586:7-10." That was not the testimony. The testimony only was that no such claim was made. (R. p. 603, lines 7-10).

Third, Respondents write, “Mr. Scholz [sic] readily admitted he could not distinguish between information that Bannon accessed during his relationship with Appellant versus information that Bannon allegedly downloaded or transferred to an external device once his relationship with Appellant had ended.” (Respondents’ Brief, p. 27). What we know from Mr. Scholz’s testimony is that Bannon copied the information after October 15, 2016, when his employment with Respondent Assured Partners began. (R. pp. 837-956; 487-488).

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

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

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

It suffices for reversal of the trial court that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

A. If By Contract

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

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

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

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

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

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

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

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

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

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

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

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

B. If By Statute

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

C. Whose Attorneys’ Fees?

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

D. What Attorney Fees?

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

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

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

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

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, ...

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

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

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

Second, Respondents write:

The only circumstance described in the judicial canons that Appellant has alleged in this case is that the judge or his spouse or a person within the third degree of relationship to them is either a party or the officer, director, or trustee of a party, is a lawyer in the case, is known to have more than a *de minimus* interest that could be substantially affected by the litigation, or, to the judge's knowledge, is likely to be a material witness in the proceeding.

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

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

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

CONCLUSION

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

March 16, 2023

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Mar 16 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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

Forum Benefits, LLC,

Appellant,

v.

Brian Bannon and Assured Partners, NL,

Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on March 16, 2023, copies of the **Appellant's Final Brief** and **Appellant's Final Reply Brief** were served on Respondents' counsel of record via email containing the above referenced document to counsels' individual AIS email addresses as follows:

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March 16, 2023

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Forum Benefits, LLC, Appellant,

v.

Brian Bannon and Assured Partners, NL, Respondents.

Appellate Case No. 2022-000231

Appeal from Beaufort County
Bentley Price, Circuit Court Judge

Unpublished Opinion No. 2024-UP-412
Heard October 8, 2024 – Filed December 11, 2024

REVERSED AND REMANDED

William Weston Jones Newton, of Jones Simpson &
Newton, PA, of Bluffton; Katon Edwards Dawson, Jr.
and Timothy David St. Clair, both of Parker Poe Adams
& Bernstein, LLP, of Greenville; and Steven R. LeBlanc,
of Steve LeBlanc, LLC, of Greenville, for Appellant.

William B. Harvey, III, of Harvey & Battey, PA, of
Beaufort; and Jeffrey Andrew Lehrer and Matthew J.
Gilley, both of Ford & Harrison, LLP, of Spartanburg,
for Respondents.

PER CURIAM: Appellant Forum Benefits, LLC (Forum) commenced the underlying action against Respondents Brian Bannon and Assured Partners, NL, alleging violation of the South Carolina Trade Secrets Act (SCTSA) and interference with a contractual relationship. Against Bannon, individually, Forum alleged breach of contract, conversion, and breach of fiduciary duty. The trial court granted a directed verdict in favor of Respondents. Forum argues the trial court erred in (1) granting a directed verdict, (2) awarding attorney's fees to Respondents, and (3) denying Forum's motion to recuse, resulting in Forum not receiving a fair trial. We reverse and remand.

1. 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 their secrecy; the existence of the employment agreement; and whether the trade secrets merged with a physical document. *See All Saints Par. Waccamaw v. Protestant Episcopal Church in the Diocese of S.C.*, 385 S.C. 428, 442, 685 S.E.2d 163, 170 (2009) ("In ruling on a motion for a directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion."); *Kunst v. Loree*, 424 S.C. 24, 38, 817 S.E.2d 295, 302 (Ct. App. 2018) ("If the evidence at trial yields more than one reasonable inference or its inference is in doubt, the [trial] court must deny the motion for directed verdict . . ."); *Est. of Carr ex rel. Bolton v. Circle S Enters., Inc.*, 379 S.C. 31, 39, 664 S.E.2d 83, 86 (Ct. App. 2008) ("When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence."); *Newbern v. Ford Motor Co.*, 428 S.C. 310, 314–15, 833 S.E.2d 861, 864 (Ct. App. 2019) ("The appellate court applies the same standard in reviewing the trial court's grant or denial of a motion for directed verdict."); *Chalfant v. Carolinas Dermatology Grp., P.A.*, 439 S.C. 372, 384, 887 S.E.2d 1, 7 (Ct. App. 2023) ("This court will reverse the circuit court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law." (quoting *Turner v. Med. Univ. of S.C.*, 430 S.C. 569, 582, 846 S.E.2d 1, 7 (Ct. App. 2020))); *Graves v. Horry-Georgetown Tech. Coll.*, 391 S.C. 1, 7, 704 S.E.2d 350, 354 (Ct. App. 2010) ("An appellate court will reverse the trial court's grant of a directed verdict when any evidence supports the party opposing the directed verdict.").

2. As to whether the attorney's fees were proper, we hold that Respondents are no longer prevailing parties based on our decision to reverse the trial court's grant of

a directed verdict in their favor. *See Richland County v. Kaiser*, 351 S.C. 89, 97, 567 S.E.2d 260, 264 (Ct. App. 2002) (reversing the award of attorney's fees because based on this court's reversal of the trial court's findings, the respondents were no longer the prevailing parties); *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) ("The general rule is that attorney's fees are not recoverable unless authorized by contract or statute."); *see also* S.C. Code Ann. § 39-8-80 (2023) ("If . . . a claim of misappropriation is made in bad faith . . . , the court may award reasonable attorney's fees to the prevailing party.").

3. As to the whether the trial judge erred in denying the motion to recuse, we need not reach this question because our resolution of the above questions is dispositive.¹ *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding it is not necessary for an appellate court to address the remaining issues when its decision on a prior issue is dispositive). However, we are compelled to note that the trial judge's behavior, particularly in taking a party's witness to his chambers without any counsel present, raised at a minimum the appearance of impropriety. We do not condone the trial judge's behavior.

For the reasons stated above, the trial court's order is

REVERSED AND REMANDED.

KONDUROS, GEATHERS, and VINSON, JJ., concur.

¹ The presiding judge is no longer a sitting judge in this state; thus, there is no risk of the same judge presiding over the new trial.

RECEIVED

Jan 09 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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

Forum Benefits, LLC,

Appellant,

v.

Brian Bannon and Assured Partners, NL,

Respondents.

RESPONDENTS' PETITION FOR REHEARING

January 9, 2025

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NOW COME Respondents, Brian Bannon (“Mr. Bannon”) and Assured Partners, NL, (“AssuredPartners”)(collectively “Respondents”), by and through their undersigned counsel, hereby petitioning this Honorable Court for rehearing of this matter. This Court decided this appeal by unpublished opinion dated December 11, 2024 (“Opinion”).

MATERIAL POINTS
OVERLOOKED OR MISAPPREHENDED

Respondents respectfully submit the following material points overlooked or misapprehended by the Court.

1. Directed Verdict Was Proper On Appellant’s Contract Claim Based On The Statute Of Frauds.

The Court’s Opinion states that directed verdict was not proper because there was evidence presented at trial that yields more than one reasonable inference regarding the existence of the employment agreement. However, the Court’s Opinion does not address the critical issues of (a) whether the Court is adopting a lost document exception to the Statute of Frauds, something no South Carolina court has adopted, (b) if so, what that exception requires in terms of proof, (c) if so, what standard applies to such exception (clear and convincing evidence or preponderance of the evidence), and (d) if so, what evidence would support the lost document rule actually applying in this case (or was the evidence presented based solely on the self-serving testimony of Appellant’s owner, Brian Stritt). Respondents contend that

answering all these issues will support affirmation of directed verdict related to the contract claim or will provide necessary guidance to the potential second trial court, and Respondents request reconsideration and a rehearing related to these specific issues as discussed further below.

There is no dispute related to the fact that Appellant has never produced and cannot produce a contract signed by Mr. Bannon. Appellant has admitted this (R. p. 968), and Mr. Bannon has at all times denied signing any contract (R. p. 145, line 11-p. 146, line 7). Rather, the only document produced was an unsigned, blank form document that does not even include Mr. Bannon's name, or any specifics related to his employment (the form document contains many blanks). (R. p. 968). Appellant has also admitted this. (R. p. 77, line 21-p. 78, line 9; R. p. 82, lines 3-22). There is no factual dispute that the alleged contract could not be performed in one year because it contained two-year restrictive covenants. Appellant has also admitted this. Accordingly, there is no dispute that the Statute of Frauds applies to bar Appellant's contract claim, something Appellant's attorney (Mr. Wyatt) and first witness at trial also admitted. (R. p. 91, lines 3-20).

Because of these undisputed facts, the only potential way this claim could have been submitted to a jury was the application of a lost document exception to the Statute of Frauds. The trial court refused to adopt such an exception and no South Carolina court has ever adopted such an exception. While this Court has

indirectly discussed this issue in Yadkin Valley Bank & Tr. v. Oaktree Homes, Inc., 2014 WL 3747342 (S.C. Ct. App. July 30, 2014), in that case this Court 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. This 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.

Because this Court did not actually adopt a lost document exception in Yadkin (and has never done so), it is important for this Court to reassess and clarify this important and novel legal issue in this case prior to reversing the trial court's ruling. *Is the Court officially adopting an exception to the Statute of Frauds for a lost document? Does this exception require proof by clear and convincing evidence? If so, was there sufficient evidence presented at trial to satisfy a clear and convincing evidence standard and, if so, what was it?* These critical questions are not answered in this Court's Opinion.

The Statute of Frauds is an extremely important and long-standing legal protection in South Carolina. It is designed to protect individuals (like Mr. Bannon) from allegations of a breach where no signed contract can be produced. It puts the burden on the party claiming a breach to maintain a signed copy of the contract, a

burden Appellant clearly failed to satisfy. Adopting a broad exception to this important and long-standing protection requires specific clarity from our appellate courts and this Court's Opinion does not provide that clarity.

As Respondents argued in their Final Brief, even if this Court officially adopts a lost document exception to the Statute of Frauds, Appellant has completely failed to present evidence to satisfy a clear and convincing evidence standard. (See Respondents' Final Brief, Section I.A.1). It is indisputable that Appellant solely relies on the self-serving testimony of Appellant's owner (Brian Stritt) to argue that the contract was signed then lost. This is the exact issue that caused this Court to reject the "potential" application of a lost document exception in Yadkin and it should support the exact same result here. If it does not, Respondents request that this Court provide clarity on this novel legal issue, the specific standard that must be met to apply this exception under South Carolina law, why the application is different here than in Yadkin, and the specific evidence presented at trial that could support Appellant meeting a clear and convincing evidence standard sufficient to submit the issue to a jury.

2. Directed Verdict Was Proper On All Of Appellant's Claims Based On The Appellant's Failure To Present Evidence Of Proximately Caused Damages.

This Court's Opinion states that directed verdict was not proper because there was evidence presented at trial that yields more than one reasonable inference

regarding the nature of the trade secrets and measures in place to protect their secrecy, and whether the trade secrets merged with a physical document (presumably referring to the unsigned, blank form contract discussed in Section 1 above). However, the Court's Opinion does not specifically address the issue of whether Appellant submitted sufficient evidence to create an issue of fact related to its alleged damages. The indisputable evidence shows that Appellant did not submit any evidence for a reasonable fact finder to find that Respondents' alleged conduct proximately resulted in the damages Appellant has asserted it incurred -- the loss of clients.

All of Appellant's claims required proof of damages proximately caused by an alleged breach or alleged misconduct. Thus, this issue would be dispositive for all of Appellant's claims. For example, to prove a breach of contract claim, a plaintiff must prove by a preponderance of the evidence "the existence of a contract, its breach, and **damages caused by such breach.**" S. Glass & Plastics Co. v. Kemper, 399 S.C. 483, 732 S.E.2d 205, 209 (Ct. App. 2012) (emphasis added). Regarding a trade secret claim, according to the South Carolina Supreme Court, "The owner **must** also prove its damages were **proximately caused** by misappropriation." Wilson v. Gandis, 844 S.E. 2d 631, FN 7 (S.C. 2020). The South Carolina Trade Secrets Act also allows for an alternative damages analysis where actual damages cannot be proven by instead proving a "reasonable royalty" amount

related to the value of the information in question. South Carolina Code Section 39–8–40(B) states, “In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.” Respondents asked Appellant in discovery if it was seeking a reasonable royalty, and it continually said it was not. Appellant never presented any evidence, arguments or allegations related to a reasonable royalty at trial. Thus, it was required to prove that its alleged damages were proximately caused by Respondents’ alleged unlawful actions.

The trial court correctly ruled that Appellant failed to introduce any evidence proving a causal link between Mr. Bannon’s alleged retention of information and Appellant’s alleged damages. Appellant’s only claimed damages at trial related to the loss of clients who moved their business from Appellant to Respondents. (R. p. 576-579). But the fact that these clients moved when Mr. Bannon left Appellant does not prove causation. Insurance agents are generally hired based on client relationships, and that was certainly the case with Mr. Bannon and the clients at issue here. The only alleged testimony attempting to link Mr. Bannon’s retention of his clients’ information to Appellant’s loss of clients was the **self-serving opinions** of Appellant’s owner (Brian Stritt). Appellant did not call **any** client to attempt to support this element of its claim, not even one. This is telling because if any client

moved because Mr. Bannon had access to their information, Appellant would have certainly presented that evidence. The reason that Appellant did not call any client to testify at trial was because the **only** reason the clients moved with Mr. Bannon was because of his relationships with the clients.

Notably, after Appellant rested its case, Appellant did not object (and thus consented) to Respondents calling two clients who appeared for trial that day to testify prior to Respondents' directed verdict motion and argument. (R. 619, and Supp. R. 2259-2260¹). These clients clearly and unequivocally testified that it was their **relationship** with Mr. Bannon that was the **only** reason they moved their business to Respondents and that they expressly "authorized" Mr. Bannon to have access to all their client information. (See testimony of Paula Gant with the client Alpha Genesis, Supp. R. 2260-2265, and testimony of Christie Holderness with the St. Andrews Public Service District, R. 620 to 627).

¹ The Trial Transcript pages 603 – 609 are missing from the Record on Appeal. Respondents cited these transcript pages in their Initial Brief (footnote 6) and Final Brief (footnote 5) and noted these pages were not included in the official Record on Appeal in their Final Brief (footnote 5). By citing these pages in their Initial Brief, Respondents clearly intended these pages to be included in the Record on Appeal. Respondents assumed this was a copying error or an unintentional oversight in the original designations. Respondents have submitted a letter to the Court notifying it of this issue and providing these pages as a supplement to the Record on Appeal. These pages are bates marked 2259 to 2265 and cited herein as "Supp. R." followed by the relevant page number(s). Respondents request that the Court consider these seven pages and include them in the Record on Appeal, but regardless, the fact remains that Appellant did not present any evidence related to why any clients moved with Bannon to AssuredPartners.

Specifically, Ms. Gant testified as to the only reason she moved with Mr. Bannon to AssuredPartners as follows:

8	Q	At some point, did Mr. Bannon tell you that he
9		was moving to AssuredPartners?
10	A	Yes.
11	Q	Tell the Jury what you recall about that.
12	A	Not every word, of course, but I just remember
13		him -- a conversation that he mentioned that he was in the
14		process of, you know, possibly thinking about moving to a
15		different company.
16	Q	Did he give you the option to -- to move with
17		him?
18	A	Yes, he, you know, he said we could stay where we
19		were or have the choice of moving over.
20	Q	Did he -- did he use any type of specific
21		information, confidential-looking information to solicit
22		you to move?
23	A	No.
24	Q	What was your decision on moving with Mr. Bannon
25		to AssuredPartners?

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1	A	Definitely decided to move, because, as I stated
2		before, up until then, our needs hadn't been met, and it
3		was Brian, in my opinion, that, basically, provided what I
4		needed, so if Brian was moving to a different company, I,
5		of course, was going to follow.

(Supp. R. 2263-2264).

Ms. Gant clearly confirmed that “if Brian was moving to a different company, I, of course, was going to follow him.” This is a normal response in this industry because it is a relationship driven industry. This testimony unequivocally confirms that the client’s decision to move did not have **anything** to do with Mr. Bannon

taking or retaining any of Appellant's (really the client's) information. Rather, it was based solely on his relationship with the client. But it was not Respondents' burden to prove this, it was Appellant's burden to prove that the clients moved because Mr. Bannon allegedly had access to their information.

Similarly, Ms. Holderness confirmed the reason she decided to move with Mr. Bannon to AssuredPartners:

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

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Furthermore, these clients both confirmed that they approved and requested that Mr. Bannon continue to have access to all their insurance information and even provided him access to that information.

1	Q	Was there ever a time in -- in that -- those two
2		years that you didn't think Mr. Bannon was your agent?
3	A	No.
4	Q	Did you at all times during those two years
5		authorize Mr. Bannon to have access to Alpha Genesis' plan
6		information?
7	A	Yes.

(Supp. R. 2263).

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

(R. 623, lines. 20-23).

The only evidence at trial regarding the reason clients moved with Mr. Bannon to AssuredPartners was his relationship with the clients (something Mr. Bannon also confirmed), not related to any access to alleged confidential or trade secret information of Appellant. It is not disputed that even if Mr. Bannon signed the alleged contract at issue in this case, which he did not, any restriction related to him soliciting his clients had long expired when he decided to move to AssuredPartners. (See Section I.A.2 of the Respondents' Final Brief.) Thus, it is not disputed that Mr. Bannon had the right to solicit his clients to move with him to AssuredPartners.

Furthermore, Appellant's owner's testimony supports the fact that clients moved their business to Respondents based on their relationship with Mr. Bannon.

Mr. Stritt admitted that the clients were free to leave Appellant at any time and for any reason. (R. p. 607-608). Mr. Stritt admitted that Mr. Bannon had good relationships with his clients. (R. 608, lines 9-11.) Unbelievably, Mr. Stritt admitted that he had “**no idea**” why the clients left Appellant. (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). This is exactly the critical point here – Appellant could not speculate about the reason the clients moved because it never asked them, and it never called any client to testify at trial about the reason. According to Mr. Stritt's own sworn testimony, “We haven't gone after them or **talked to them**” in referring to not asking clients why they left Appellant. (R. p. 610, lines 6-12) (emphasis added). Appellant provided absolutely no testimony at trial that in any way supports that **any** clients moved with Mr. Bannon for any reason other than the fact that they had a good relationship with him. Appellant provided absolutely no evidence that in any way connected any alleged retention or misappropriation of its information to the reason clients followed Mr. Bannon to AssuredPartners.

The complete lack of evidence on this issue was exposed by Appellant's meager attempt to create an inference of causation through Mr. Stritt's self-serving

testimony claiming that clients with Employee Navigator accounts were, **in his opinion**, more likely to not move to AssuredPartners. In addition to this testimony being completely speculative, Mr. Stritt's **opinions** are not supported by any actual evidence. Here, the testimony at trial confirmed that clients with and without Employee Navigator accounts moved to AssuredPartners, and that clients with and without Employee Navigator accounts stayed with Appellant. (R. pp. 569-571). As such, Mr. Stritt's "**opinion**" completely failed to prove any causal relationship between the clients' use of Employee Navigator and their decision to move their business to AssuredPartners. Regardless, as confirmed by the clients' quotes above and Mr. Bannon's undisputed testimony, the clients approved Mr. Bannon having this information and provided him their log in information for Employee Navigator, something they were free to do.

The record is devoid of any evidence or reasonable inferences of proximately caused damages related to Mr. Bannon's access to Appellant's alleged confidential or trade secret information. Rather, the undisputed evidence proved the opposite. Appellant only sought damages related to the clients moving to Respondents, so this is fatal to all of Appellant's claims. This Court's Opinion does not address these critical issues or address what evidence could possibly support a reasonable inference that the alleged information at issue caused the clients to move. Respondents respectfully request that the Court reconsider this specific element of

Appellant's claims, grant rehearing on this issue, specifically address and provide clarity on this issue, and affirm the trial court's ruling related to the complete lack of evidence of proximately caused damages.

3. The Trial Court Was Required To Rule On Whether A Fiduciary Relationship Existed Because This Is An Equitable Issue For The Court To Decide.

The Court's Opinion does not specifically address Respondent's arguments and the trial court's ruling related to Appellant's fiduciary duty claim. The Court should re-assess this issue because whether a fiduciary relationship exists is an equitable issue that must be made by the court. Cowburn v. Leventis, 366 S.C. 20, 619 S.E.2d 437, 451 (Ct. App. 2005). Thus, the trial court was specifically required to determine whether a fiduciary duty existed between the parties, and it correctly made this determination. The Court must rule whether there was sufficient evidence to warrant the trial court's ruling that no fiduciary relationship existed because of Mr. Bannon's undisputed independent contractor relationship, or rule that a fiduciary relationship did exist and provide the basis for such a finding.

It is not disputed that Mr. Bannon and Appellant never entered into any contract related to his independent contractor relationship. (R. p. 593, lines 21-25). There is no basis for finding a fiduciary relationship exists between a company and an independent contractor in this case. As the South Carolina Supreme Court has

instructed, there must be a firm foundation for reposing the level of trust of a fiduciary on the other party. Burwell v. S.C. Nat. Bank, 288 S.C. 34, 340 S.E.2d 786, 790 (1986). Appellant failed to present any evidence to establish a firm foundation for imposing a fiduciary duty. Because this Court has ruled that an employer-employee relationship is not sufficient to create a fiduciary duty, it logically follows that an independent contractor relationship is also 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).

Respondents respectfully request that the Court specifically address this equitable issue and rule on whether a fiduciary relationship existed, and, if so, identify the firm foundation upon which it was based. Accordingly, Respondents respectfully request a rehearing and a specific ruling on this issue.

4. There Are Important Issues Of Law That Should Be Determined Related To Appellant's Conversion Claim.

The Court did not specifically address Appellant's conversion claim. There are legal issues upon which the trial court relied that, if in error, should be clarified by this Court. The primary legal issue this Court should address is whether there can be a conversion of property related to retaining copies of electronic information. It is undisputed that Mr. Bannon never exercised exclusive control over the information at issue in this case. Any information he had was electronic and

Appellant has never alleged that Mr. Bannon deleted any of the information from Appellant's systems. Thus, Appellant admittedly at all times had access to the same information and was never excluded from accessing the information. This Court should address whether a claim for conversion can exist related to copies of electronic information where the alleged owner still has complete access to all the information in question. Under South Carolina law, conversion is defined as, "the unauthorized assumption in the exercise of the right of the ownership over goods or personal chattels belonging to another **to the exclusion of the owner's rights.**" Am. Credit Sumter, Inc. v. Nationwide Mut. Ins. Co., 663 S.E. 2d 492, 295 (S.C. 2008) (emphasis added). The Court should address how it is possible to maintain a conversion claim when it is not disputed that Appellant maintained full and unrestricted access to the electronic information at issue. Accordingly, Respondents respectfully request a rehearing and a specific ruling on this issue.

5. Appellant Waived Its Recusal Argument And The Facts Did Not Require Recusal.

While the Court did not rule on the recusal issue, it did state that it does not condone the trial judge's behavior. While it is understandable that judges may disagree on whether the trial judge's action was preferable, this is not an issue the Court needs to decide if it affirms the trial court on the legal issues discussed above. First and foremost, Appellant waived its right to move to recuse the trial judge by

waiting to see how the testimony proceeded the remainder of the morning and the entire afternoon of the second day of trial. Respondents request that the Court review the transcript of the testimony from the afternoon **after** Appellant was fully aware of all the circumstances that it claims supports its recusal motion. (See R. 292-462). The trial judge's interaction with Mack Ward occurred the morning of the second day of trial. The trial judge asked for the parties' consent to speak to Mr. Ward and all agreed. The trial judge noted the record on these events as follows:

1	the record's clear, Mr. Ward came to Court, I think it was
2	yesterday, I can't recall, and I -- again, I went to
3	Wofford with Mr. Ward. We just agreed we haven't seen each
4	other in 17 years. I came to y'all and I said, "Is it okay
5	if I say hello to Mr. Ward, he's a -- I understand he's a
6	witness in this case?" And y'all said, "Yes." I said,
7	"Hello," to Mr. Ward, "how've you been?" And we went back
8	and talked and discussed -- and I -- I'll put on the record
9	what we talked about. He said, "How are your kids?" I
10	said, "They're doing great." I said, "How are the twins?"
11	He said, "They're doing great." And I said, "How's your
12	wife, I haven't seen her in forever," she went to Wofford
13	with us, as well. He said, "Everyone's doing great." He
14	said, "The guys will be excited to hear about you becoming
15	a judge." To be honest with you, I don't think Mack had
16	any clue before I walked out yesterday that I was a circuit
17	court judge. We haven't spoken in 17 years. I don't do

(R. 469.) Then, after the morning break and for the entire afternoon, Appellant decided to call **four** witnesses to testify prior to raising any recusal issue: Amy

Michelle Coffield, Nolan Zielinski, Robert Labin, and Laurie Winston. (Id.) Respondents specifically direct the Court's attention to the cross-examination of Appellant's Director of Account Management, Laurie Winston, which was extremely damaging to Appellant's case that afternoon. (R. 407-441). Then, the evening after that day's testimony, and knowing how bad the testimony went for Appellant that afternoon, it decided to it would move to recuse the trial judge the next day. (See R. 466 for the start of Appellant's recusal motion). Parties do not get to see if the testimony goes their way after the event in question occurred and then, when it does not, revert to complaining about something that happened the morning of the prior day. Make no mistake, Appellant was fully aware of the Judge's interaction with Mr. Ward when it occurred that morning. Appellant did not learn of any additional facts after this interaction to support its recusal motion, because nothing else occurred (other than Appellant deciding to release Mr. Ward from the subpoena).

Second, the recusal standard is much higher than a judge getting permission from the parties to greet someone he knew in college and had not seen for over 17 years, and then having a private conversation about how their families have been over the past 17 years. This is no different than a trial judge running into witness outside the courthouse and having the exact same conversation. It does not show any bias or prejudice to simply ask about someone's family and comment on college

days long ago. Furthermore, this was a witness that was subpoenaed by Appellant but never called. This is an extremely important fact in this analysis. This witness was only in the courtroom because Appellant subpoenaed him, then Appellant consented to the judge speaking to him that morning, and then Appellant determined the witness was not relevant enough of a witness to call to testify. (See R. 403 to 404 where Appellant released the remaining witnesses from their subpoena.) This is simply not grounds for recusal or reversing a denied motion for recusal. This Court does not need to agree with the trial court's action and is free to not condone it, but it only needs to rule that Appellant's motion was waived and/or that the action and limited relationship with a witness who was never called to testify was not sufficient to "require" recusal.

6. Mr. Bannon's Request Related To The Attorney's Fees Issue.

Finally, Mr. Bannon would like to make a specific request to this Court regarding the attorneys' fees issue. Mr. Bannon would like start by noting that this case has had a tremendous negative impact on him and his family, just as any eight years of litigation would have on an individual party defendant. Mr. Bannon has been out of the insurance brokerage business for many years. He has never had the financial resources to fight a multi-million-dollar company like Forum Benefits. He is relying on the generosity of his former employer to assist him with this fight. Mr. Bannon was sued personally and for more than eight years he has been fighting with

Appellant about a contract he never signed, something the Statute of Frauds is specifically designed to prevent. He cannot afford to continue this fight financially or emotionally. If he is required to, he will respect the Court's decision and do so. However, he respectfully asks the Court for clarity on the issue of his potential to be awarded attorney's fees for this extensive and costly defense over the last eight plus years and ongoing.

The trial court ruled that Mr. Bannon was entitled to prevailing party attorney's fees under the alleged contract that Appellant has been improperly and aggressively pursuing against him. Appellant has admitted that it is pursuing its attorneys' fees under this alleged contract against Mr. Bannon. This must cut both ways. It is not reasonable or fair for a big corporation like Appellant to be able to pursue its extensive attorneys' fees under an alleged contract it cannot produce if it prevails at trial (something that would bankrupt Mr. Bannon), and then, also argue that Mr. Bannon cannot be awarded his attorneys' fees if he prevails again at trial. South Carolina law fully supports Mr. Bannon being able to recover his attorneys' fees if he is the prevailing party on the contract claim. See 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.”). Mr. Bannon respectfully requests that this Court give Appellant a warning and the second trial court some direction that if Mr. Bannon is successful the second time around regarding Appellant’s contract claim, that the second trial court will have the authority to award him attorneys’ fees and costs as the prevailing party.

CONCLUSION

Respondents primarily rely on the arguments above to support their Petition for Rehearing because these are the strongest issues warranting a rehearing and warranting affirming the trial court. However, Appellant also requests a rehearing on the other issues argued in their Final Brief and related to issues that have been previously argued that may become more relevant if the Court affirms the trial court on some or all these issues (such as the attorney’s fees issues). Respondents specifically incorporate their prior arguments in their Final Brief herein to preserve those issues for rehearing and for any further appellate review.

For the foregoing reasons, Respondents respectfully request that this Court grant Respondents’ Petition for Rehearing, substitute the Opinion with an opinion addressing these specific issues, and affirm the trial court’s directed verdict ruling.

Respectfully submitted this 9th day of January, 2025.

s/ Jeffrey A. Lehrer

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Attorney for Respondents

Jan 09 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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

Forum Benefits, LLC, Appellant,

v.

Brian Bannon and Assured Partners, NL, Respondents.

PROOF OF SERVICE

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

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Dated: January 9, 2025

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January 9, 2025

VIA E-FILE AND FIRST CLASS MAIL
ctappfilings@sccourts.org

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
Jan 09 2025
SC Court of Appeals

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

Dear Ms. Kitchings:

Please find attached Respondents' Petition for Rehearing along with the Proof of Service. Also enclosed is Check No. 1239 in the amount of \$50.00 for the filing fee of this Petition.

The Trial Transcript pages 603 – 609 are missing from the Record on Appeal. Respondents cited these transcript pages in their Initial Brief (footnote 6) and Final Brief (footnote 5) and noted these pages were not included in the official Record on Appeal in their Final Brief (footnote 5). By citing these pages in their Initial Brief, Respondents clearly intended these pages to be included in the Record on Appeal. Respondents assumed this was a copying error (something Appellant has now disputed) or a unintentional oversight in the original designations. Respondents have submitted a letter to the Court notifying it of this issue and providing these pages as a supplement to the Record on Appeal. These pages are bates marked 2259 to 2265 and cited herein as "Supp. R." followed by the relevant page number(s). Respondents request that the Court consider these seven pages and include them in the Record on Appeal.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

Sincerely,

FORD & HARRISON LLP



JEFFREY A. LEHRER

JAL/aat
Enclosures

cc: Via Email To:
Steven R. LeBlanc, Esq.
Timothy David St. Clair, Esq.
Katon Edwards Dawson, Jr., Esq.

The South Carolina Court of Appeals

Forum Benefits, LLC, Appellant,

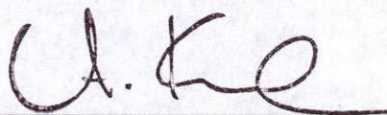
v.

Brian Bannon and Assured Partners, NL, Respondents.

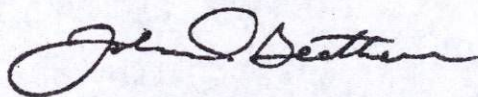
Appellate Case No. 2022-000231

ORDER

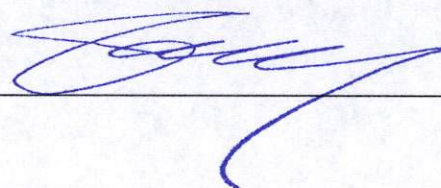
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Timothy David St. Clair, Esquire

Steven R. LeBlanc, Esquire

William Weston Jones Newton, Esquire

Jeffrey Andrew Lehrer, Esquire

Matthew J. Gilley, Esquire

FILED
Feb 07 2025

William B. Harvey, III, Esquire
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