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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY COURT OF COMMON PLEAS
Bentley D. Price, Circuit Court Judge

Circuit Court 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,

Respondent,

v.

Brian Bannon and Assured Partners, NL,

Petitioners.

BRIEF OF RESPONDENT

Timothy D. St.Clair (SC Bar # 5297)
Parker Poe Adams & Bernstein LLP
110 East Court Street, Suite 200
Greenville, SC 29601

Tasneem A. Dharamsi (SC Bar # 104868)
Parker Poe Adams & Bernstein LLP 301
Fayetteville Street, Suite 1400
Raleigh, NC 27601

Attorneys for Respondent Forum Benefits, LLC

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STATEMENT OF THE CASE

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

Respondent utilized a proprietary design and an individualized 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). Respondent then applied this database of employee census data and insurance plan information to proprietary algorithms stored on its SharePoint server to provide Respondent with a competitive advantage in administering benefits for clients and negotiating rates with insurance providers. (R. pp. 356-359; 390-396).

Respondent protected the contents of Employee Navigator and the SharePoint server by assigning login credentials to certain personnel and requiring the login credentials be used to access that proprietary information. (R. pp. 138-139; 387-389; 397).

Brian Bannon ("Bannon") began employment with Respondent in 2009 as a full-time sales representative. (R. p. 968-974; 60-75). Bannon signed and delivered a written employment agreement with Respondent that required, *inter alia*, that Bannon not use or disclose Respondent's trade secrets for any reason or purpose whatsoever, except as an employee of Respondent and with the consent of Respondent. (R. pp. 968-974, ¶ 12; 505-507). In 2013, Bannon transitioned to an independent contractor role with Respondent and continued to represent Respondent as a sales representative to existing and prospective clients. (R. p. 106).

On October 15, 2016, Bannon commenced employment as a Senior Vice President at Assured Partners, NL ("Assured Partners"), a direct competitor of Respondent. (R. pp. 169-170; 173; 218). Despite this, for the following four weeks, Bannon continued to present himself as a

sales representative for Respondent while concealing his employment with Assured Partners. (R. pp. 230-231).

It is important to recognize that during this period, Bannon simultaneously held positions at both Respondent and its competitor, Assured Partners, engaging in a deceptive scheme that has rarely met its equal. During that four-week overlap, Bannon secretly obtained and forwarded Employee Navigator login credentials for Respondent's clients to Assured Partners, effectively stealing Respondent's proprietary information for his own use at a direct competitor as well as use by that competitor. (R. pp. 756-759; 181; 183-184; 188; 190-194; 247; 274-275). Bannon forwarded those credentials to Assured Partners by using his personal email account, which shows his awareness of the dishonesty of his actions. (R. p. 181; 756-759). Bannon also illicitly downloaded approximately 2,000 files containing Respondent's proprietary algorithms from Respondent's SharePoint server using the login credentials he had been granted by Respondent. (R. pp. 174-175; 195-196; 198). Fully aware of the impropriety of these actions, during that four-week overlap, Assured Partners repeatedly urged its employees to expedite copying Respondent's trade secrets before Respondent discovered what they were doing. (R. p. 188).

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

Petitioners filed three separate motions seeking summary judgment on Respondent's 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 Respondent filed full responses to the other two motions. (R. pp. 1043-1242; 1555-1849). Two different Circuit Court judges

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

A jury trial commenced on October 11, 2021. (R. p. 57). Testimony and exhibits showed that continuous access to Respondent's 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 Respondent to Assured Partners. (R. pp. 749-750; 756-768; 817-823; 186; 190-194; 444-447; Plaintiff's Exhibits 8, 10-12, and 45). Nine clients were identified who were associated with Bannon that actively used Respondent's Employee Navigator accounts. Bannon provided Employee Navigator client login credentials for three of those nine clients, and all three moved their business from Respondent to Assured Partners. None of the other six clients—for whom Bannon provided no Employee Navigator client login credentials—transferred their business from Respondent to Assured Partners. (R. pp. 281-282; 448-450; 569-572).

The annual commissions associated with each client that switched from Respondent to Assured Partners would support a verdict in favor of Respondent in excess of $1.5M. (R. pp. 771-816; 520-530; 533-560; 573-578).

During trial, Respondent moved for the trial judge to recuse himself, based on his interactions in the courtroom during a trial break with Mack Ward, an Assured Partners principal. The motion was denied. (R. pp. 466-479). Instead, the trial judge granted an oral motion for directed verdict for Respondents on all causes of action. (R. pp. 627-687). Petitioners then made two oral motions for attorneys' fees and costs, which the trial judge immediately granted before even hearing a response from Respondent. (R. pp. 689-690).

On October 25, 2021, Respondent filed a Motion for New Trial. (R. pp. 1877-1909). Petitioners 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, Respondent also filed a Response to Petitioners' oral motions for attorneys' fees, to which Petitioners replied on November 1, 2021. (R. pp. 1910-1915; 1946-1971). On November 4, 2021, Petitioners' counsel filed an affidavit regarding attorneys' fees. (R. pp. 1972-2171).

On November 9, 2021, Petitioners 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). Respondent 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, Respondent filed a Reply in Support of Its Motion for a New Trial. (R. pp. 2182-2199). On December 29, 2021, Respondent filed a Supplemental Response to Petitioners' Motions for Attorneys' Fees. (R. pp. 2200-2204).

On January 4, 2022, the trial court conducted a hearing on Respondent's Motion for a New Trial. Respondent presented live testimony from Michelle Filler, Lisa Hollingsworth Stritt, and Appellant's President Brian Stritt ("Stritt"), describing their observations of the trial judge's

extrajudicial conduct with Mack Ward in the courtroom. (R. pp. 698-727; 2205-2211). During the hearing, Respondent learned for the first time that the trial judge had engaged in *ex parte* communications with Mack Ward. (R. p. 468, line 25 – p. 469, line 9; p. 745)

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

Respondent served Petitioners with its Notice of Appeal on February 25, 2022.

After holding oral argument, the Court of Appeals reversed the trial court, *per curiam*, by an opinion dated December 11, 2024. (R. pp. 2689-2691)

Petitioners petitioned the Court of Appeals for rehearing on January 9, 2025 (R. pp. 2692-2715), which was denied by the Court of Appeals by Order filed February 7, 2025 (R. p. 2717)

Petitioners filed a Petition for a Writ of Certiorari on March 7, 2025. Respondent filed a Return to Petitioners' Petition on April 3, 2025. Petitioners filed a Reply to Respondent's Return on April 14, 2025. This Court granted Petitioners' Petition on June 3, 2025.

STANDARDS 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 Apartment*s, 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

Like the mess made of this case by the trial court, Petitioners' brief is filled with blunders:

- They leave unchallenged a key ruling by the Court of Appeals decision;
- They argue about a statute of frauds, but point to the wrong statute;
- They argue about the trial court's refusal to recuse, but never raised that issue in their Petition to this Court for writ of certiorari; and
- They otherwise fail to present any special or important reason for review by this Court, continue to argue about the weight of evidence, and demonstrate repeatedly that they have learned nothing from the earlier extensive briefing in this action.

These, and other aspects of the case, will be addressed individually below.

At the end, the Court of Appeals' decision should be affirmed.

I. Trade Secrets

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

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

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

A. The Ruling is Unchallenged

Nothing in Petitioners' brief challenges this ruling by the Court of Appeals or offers any basis for a reversal. Petitioners even admit that they have not challenged this finding, nor did they include this finding in their Request for Rehearing at the Court of Appeals. (Petitioners' Brief, p. 25, footnote 4; R. pp. 2692-2715); *see* Rule 242(d)(1) SCACR ("Only those questions raised in the Court of Appeals and in the Petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court."); *see also Mazloom v. Mazloom*, 392 S.C. 403, 403, 709 S.E.2d 661 (2011) (an issue not raised in a petition for rehearing is the law of the case). At Petitioners' own hand, it is not up for review by this Court.

Accordingly, for this reason alone, the Court of Appeals' reversal of the trial court should be sustained and the case remanded.

B. The Court of Appeals' Ruling is Correct

The trial court's 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 Respondent's trade secrets and impermissibly decides disputed questions of fact.

1. Respondent designed the build-out of each Employee Navigator account, collecting, organizing, and compiling employee census data and insurance plan information that populated each account.

Laurie Winston, Respondent's Director of Account Management, described in detail Respondent's proprietary design and build-out of Employee Navigator accounts for each client, as well as Respondent's 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 Respondent's proprietary formulas included in the renewal spreadsheets for each client stored on Respondent's SharePoint server. (R. pp. 378-386; 390-396). Respondent's proprietary information, taking the form of "a design," "a compilation," and "formulas," are explicitly enumerated in the definition for a "trade secret" provided by the S.C. Trade Secrets Act and are therefore *de facto* trade secrets. *See* S.C. CODE ANN. § 39-8-20(5)(a)..

Winston testified that Respondent's trade secrets took substantial time and effort to collect, organize, and compile and provided Respondent with a competitive advantage and improved efficiency in administering benefits for clients and negotiating rates with insurance providers. (R. pp. 356-359; 378-386; 390-396). The S. C. Trade Secrets Act specifies that even "simple fact[s], item[s], or procedure[s]," when they confer competitive advantage and improved efficiency, are

the types of economic value that are protected. *See* S.C. CODE ANN. § 39-8-20(5)(b). And Assured Partners gained that economic value and saved that time, by downloading, copying, and taking screenshots of Respondent's trade secrets instead of having to tediously design, build-out, collect, organize, and compile the same database of information.

A compilation of information can constitute a trade secret if the information (1) "derives independent economic value;" (2) is not "generally known" or "readily ascertainable by proper means;" and (3) is kept secret using reasonable efforts under the circumstances. S.C. CODE ANN. § 39-8-20(5). 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." *Id*. The foregoing evidence, introduced at trial, supported each of these elements and precluded a directed verdict.

2. The evidence of record provides evidence of the value of Respondent's trade secrets to Assured Partners.

Respondents acted rapidly, urgently, and surreptitiously to take Respondent's trade secrets before Respondent learned that Bannon was working for Assured Partners and terminated further access. (R. pp. 174-175; 247; 274-275). James Brady, former Director of BeneSolve, a wholly owned subsidiary of AssuredPartners, 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 Respondent's Employee Navigator account for that client. (R. pp. 760-765; 448-450). Multiple emails (e.g., Plaintiff's Exhibits 8, 10-12, and 45) confirm that Assured Partners' acquisition of Respondent's trade secrets from the Employee Navigator accounts was critical to convincing clients that the transition from Forum Benefits to Assured Partners would be seamless, and ultimately, convincing them to make the

move, (R. pp. 749-750; 756-759; 760-765; 766-768; 817-823; 186; 190-194; 444-447). All this evidence demonstrates the substantial economic value of Respondent's trade secrets to Respondents.

3. Respondent granted access to its trade secrets to only authorized personnel with valid login credentials.

Respondent only provided login credentials to its 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). Respondent did not provide sales people, like Mack Ward and Bannon, with any login credentials to any of its Employee Navigator accounts. (R. pp. 387-389). Respondent only provided login credentials to Respondent's SharePoint server to nine full-time employees. (R. pp. 138-139; 387-389; 397). When an individual ceased to be a Respondent employee, all access to these computer systems was promptly cut off. (R. pp. 508- 509).

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

II. Statute of Frauds

Petitioners' focus on the breach of contract cause of action centers on their argument about the statute of frauds. Indeed, Petitioners' "Statement of the Case" revolves around the statute of frauds.

Petitioners then spend seven pages of the real estate of their brief (Petitioners' Brief, pp. 13 – 19) arguing about the statute of frauds, but point to the wrong statute.

Petitioners cite to S.C. CODE ANN. § 36–2–201(3)(b). (Petitioners' Brief, p. 14). That is a statute of frauds, alright. No doubt about it. No one can dispute that. Maybe there is brilliance

here by Petitioners that is lost on Respondent but, if not, the code section cited by Petitioners is a statute of frauds in the UCC dealing with the sale of goods that has no bearing on this case.

The applicable statute of frauds, S.C. CODE ANN. § 32-3-10, (a) is never cited by Petitioners and (b) does not support reversal of the Court of Appeals, for the following reasons.

A. The Statute of Frauds Issue Need Not Be Reached

Petitioners' sole challenge to any issue even remotely bearing on the substantive merits of the trade secret issue is its argument regarding Respondent's breach of contract cause of action, which was the Fourth Cause of Action asserted in the Complaint. (R. p. 38).

But Petitioners raise no argument about Respondent's Third Cause of Action – Violation of South Carolina Trade Secrets Act.

Petitioners' attack on the breach of contract claim presumably is caused by the contract's restrictive covenant against disclosing trade secrets. But Respondent's trade secret cause of action is not dependent on the existence or not of the contract. More specifically, it is sufficient that Petitioners' duty not to misappropriate Respondent's trade secrets arose from statute,

> "(B) Every employee who is informed of or should reasonably have known from the circumstances of the existence of any employer's trade secret has a duty to refrain from using or disclosing the trade secret without the employer's permission independently of and in addition to any written contract of employment, secrecy agreement, noncompete agreement, nondisclosure agreement, or other agreement between the employer and the employee."

S.C. CODE ANN. § 39-8-30 (double underlining emphasis added).

Petitioners have not addressed this point in the least. The Court of Appeals having reversed the trial court on it, at least that much of Respondent's case should be remanded, with no need to reach Petitioners' Statute of Frauds argument.

B. S.C. CODE ANN. § 32-3-10 Does Not Apply to this Case

The Statute of Frauds that should have been cited by Petitioners, S.C. CODE ANN. § 32-3-10 (2024), provides: "No action shall be brought whereby … (5) To charge any person upon any agreement that is not to be performed within the space of one year from the making thereof; …" (underlining emphasis added).

Our courts have aided our understanding of this statute:

- "[T]he Statute of Frauds applies only to contracts which are impossible of performance within one year."[1]

- "The South Carolina Supreme Court has long espoused the understanding that whether a contract is capable of full performance within a year is dictated *solely* by the terms of the agreement itself and not outside circumstances, whether they be expectations, projections, or reality. *See, e.g.*, *Joseph v. Sears Roebuck & Co.*, 224 S.C. 105, 112, 77 S.E.2d 583, 586 (1953) (recognizing the long-standing principle that the "clause of the statute extends only to such promises where, *by the express appointment of the part[ies]*, the thing is not to be performed within a year" and "a note in writing is not necessary, unless it appears *from the agreement* that it was to be performed after the year").[2]

- "The fact that performance within a year is highly improbable or not expected by the parties does not bring a contract within the scope of this clause." [3]

- "The critical question when determining whether the Statute of Frauds applies is not what the probable, or expected, or actual performance of the contract was, but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year."[4]

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[1] *Roberts v. Gaskins*, 486 S.E.2d 771, 774, 327 S.C. 478, 484 (S.C. Ct. App. 1997) (double underlining emphasis added), *citing Joseph v. Sears Roebuck & Co.*, 224 S.C. 105, 77 S.E.2d 583 (1953); *Floyd v. City of Spartanburg*, No. 7:20-cv-02558-TMC, 2022 WL 796819 (D.S.C. Mar. 16, 2022).

[2] *Floyd*, *supra* at *4 (italicized emphasis in original).

[3] *Joseph*, *supra*, 224 S.C. at 111, 77 S.E.2d at 586.

[4] *Floyd v. City of Spartanburg*, 2022 WL 796819, at *4 (D.S.C. Mar. 16, 2022) (double underlining emphasis added).

- "If there is a possibility of performance within a year, the contract is not barred by the Statute of Frauds."[5]

Measured by these standards, the question for this Court is this: Have Petitioners shown, to a legal certainty on directed verdict, that Brian Bannon's employment contract, dictated solely by the agreement itself and as required by its terms, was not just improbable or unexpected but was *impossible*[6] to perform within one year?

The answer to this question is, "no," and the contract itself, presented in the Appendix at R. pp. 968 – 974, shows that Petitioners' position fails. The agreement contained no set term, much less a term greater than one year. Provisions pertinent to this appeal were Paragraphs 4 and 7.

> Paragraph 4 – "Term: This agreement ... shall continue until the Employee quits or is removed in accordance with this Agreement."
>
> Paragraph 7 – "Termination. The Employee is an employee at will and the Company may terminate this agreement and the Employee's employment for any reason or for no reason at any time. Concomitantly, the Employee may resign from employment at any time, for any reason or for no reason.... Termination by either party does not affect Employee's obligations in Paragraphs 12 [Covenant Not to Disclose Trade Secrets and Confidential Information], 13 [Covenant Not to Solicit Customers], and 14 [Covenant Not to Solicit Employees] below."

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[5] *Roberts*, 486 S.E.2d at 774, 327 S.C. at 484 (double underlining emphasis added).

[6] Borrowing from other parts of contract law, impossibility and impracticability have specific meanings as defenses to non-performance. As to impossibility, "[a] party to a contract cannot be excused from performance on the theory of impossibility of performance unless it is made to appear that the thing to be done cannot by any means be accomplished, for if it is only improbable or out of the power of the obligor, it is not deemed in law impossible." *Buck Invs., LLC v. ROA, LLC*, No. 2018-001729, 2023 WL 4105398, at *4 (S.C. Ct. App. June 21, 2023) (internal quotations and citations omitted). The defense of impracticability, which has been held in other jurisdictions to excuse performance when "strict performance would be abjectly unfair or unreasonable," has not been accepted by South Carolina. *Morin v. Innegrity*, LLC, 424 S.C. 559, 569, 819 S.E.2d 131, 137 (Ct. App. 2018). Here, it may have been unplanned that Bannon's employment would end within a year, but it was by no means impossible.

Thus Bannon's employment contract did not require he work beyond a year, a month, or even one day. Nothing in the terms of the agreement made it improbable or unexpected either that he would leave within a year or be fired within a year, much less that his work was impossible to perform within a year.

Petitioners argue, "There is no factual dispute that the alleged contract could not be performed in one year because it contained two-year restrictive covenants." (Petitioners' Brief, p. 13).[7] But such an interpretation is inconsistent with the existing jurisprudence construing S.C. CODE ANN. § 32-3-10. This Statute of Frauds has been understood in South Carolina for decades to apply only to contracts that are impossible of performance within one year. And it is not a legal impossibility for Brian Bannon to have complied with this restrictive covenant within a year: he might have died within that first year. However unexpected or improbable his death might have been, it was not impossible, and having died within the first year of the agreement there would have been nothing left for him to do under the agreement and nothing upon which his failure to act that would support a lawsuit.

Urging such an understanding of the Statute of Frauds is not opportunistic argument by Respondent – it appears to be the prevailing view in other jurisdictions that, like South Carolina, narrowly apply the Statute. See Restatement (Second) of Contracts § 130 (1981), Comment b: "Discharge by death of the promisor may be the equivalent of performance in case of a promise to forbear, such as a contract not to compete." See also *Id*., illustration 9:

> "A sells his grocery business to B, who pays part of the price and promises to pay the balance in a month, A agreeing orally not to engage in the grocery business in

[7] In addition to all of their other blunders, Petitioners get even this point wrong. In point of fact, 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 Respondent's trade secrets and confidential information and that these covenants were unlimited in duration. (R. pp. 968-974; 60-75).

> the same town for five years. The contract is not within the one-year provision of the Statute, since A's death within one year will give B the equivalent of full performance."

The analyses of courts in other jurisdictions regarding the application of the Statute of Frauds to restrictive covenants might also be instructive:

> "An agreement therefore which will be completely performed according to its terms and intention if either party should die within the year is not within the statute."

Doyle v. Dixon, 97 Mass. 208, 211 (1867).

> "So if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. It has accordingly been repeatedly held by this court that an agreement not hereafter to carry on a certain business at a particular place was not within the statute, because, being only a personal engagement to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his legal representatives, it would be fully performed if he died within the year."

Doyle, 97 Mass. at 212.

> "A contract not to again engage in publishing a newspaper in a given place is a personal contract not to do so during the life of the party so contracting; and, if his death ensue without his having done so, the contract is fully performed. Such a contract does not fix in terms a time certain for its performance, and hence it cannot be said that it fixes the time for performance beyond a year. The time is left open by the parties, and, if death may fulfill it or effect its performance within a year, the contract is not within the statute."

Dickey v. Dickinson, 105 Ky. 748, 49 S.W. 761 (1899)

> "While it appears to be a question of first impression in Alaska, it is well settled elsewhere that a promise to forebear or not to compete for an indefinite period of time is not within the statute of frauds. See, e.g., Restatement (Second) of Contracts § 130, cmt. b. and illus. 9 (1981) (taking position that even promise to forebear for specific number of years is not within statute of frauds); Arthur L. Corbin, 2 Corbin on Contracts § 453, at 568 (1950); Walter H.E. Jaeger, 3 Williston On Contracts § 495, at 581 (3d ed. 1960); 72 Am.Jur.2d Statute of Frauds § 30 (1974); Hall v. Solomon, 23 A. 876, 878 (Conn.1892); Frantz v. Parke, 111 Idaho 1005, 1008, 729 P.2d 1068, 1071 (App.1986); Hampton v. Caldwell, 95 Ark. 387, 129 S.W. 816, 816 (1910); Barash v. Robinson, 142 Wash. 118, 252 P. 680, 683 (1927). The rationale for this rule is that if the promisor were to die within a year, the promise not to compete would be fully performed. Corbin, supra at 569. A promise to

> forebear from competition is distinguished from an affirmative promise, where the contract might well be terminated by death, but the performance would still be incomplete."

So, too, in South Carolina, a jurisdiction that for many years has taken a conservative view of this Statute of Frauds that limits consideration of its one-year threshold to be dictated solely by its express terms to be impossible to perform within one year, a more-than-one-year restrictive covenant not to disclose trade secrets and confidential information should not place that agreement within the Statute of Frauds.

C. The Trial Should Have Ended With the Trial Judge's Recusal, Before Petitioners' Motion for Directed Verdict on the Breach of Contract Cause of Action

As explained below in Section VII, the trial judge should have recused himself on Respondent's motion to do so long before consideration of Petitioners' motion for directed verdict on the contract claim. After his refusal to do so, every decision he made was poisoned and should be reversed, including his directed verdict on the breach of contract cause of action.

D. A "Lost Document Exception" to the Statute of Frauds Does Not Apply to this Action

The trial court made no ruling about a "lost document exception," nor did the Court of Appeals. The words "lost document" do not even appear in the Court of Appeals' decision, nor does any citation to the Statute of Frauds. Thus, this case is not a good candidate for addressing the issue because it was neither raised nor developed in the proceedings below.

The Statute of Frauds is a 17th century carryover English doctrine for the purposes of (1) reducing perjury and subornation of perjury and (2) encouraging juries to decide cases on the evidence rather than on their own personal interpretation of the facts. *See* § 21:1. Purpose and

history of the Statute of Frauds, 9 Williston on Contracts § 21:1 (4th ed.).[8] Courts have limited the application of the statute, describing it as not serving "any purpose very well," except to "arbitrarily to forestall the adjudication of possibly meritorious claims." *C.R. Klewin, Inc. v. Flagship Props., Inc.*, 220 Conn. 569, 577, 600 A.2d 772, 776 (1991). Indeed, one commentator has noted that "many of the cases arise from attempts to enforce honestly made contracts against dishonest parties who choose to renege on their agreements by hiding behind a statute that was originally designed to prevent 'Frauds and Perjuries' and that, over the years, has become warped and twisted by misconception and misapplication." § 21:2. Construction of Statute; policy of courts, 9 Williston on Contracts § 21:2 (4th ed.)

Neither of the purposes (1) or (2) above would seem to be a problem in the case at bar. The Record contains the form used to create Bannon's written employment agreement (R. pp. 968-974, ¶ 12; 505-507), including corroborating testimony by the drafter of that very agreement, (R. pp. 60-75). Furthermore, there is no dispute that Bannon was actually employed by Forum Benefits – the disagreement is limited only to the restrictive covenant. The parties are boxed in by this record, so there is very little room for perjury or for jurors to use their own personal understanding of the facts to decide the case however they choose.

The only material portion of the contract at issue is the restrictive covenant prohibiting disclosure of trade secrets and confidentiality, the exact terms of which are included in that trial exhibit. Respondent was not relying on parol evidence for the metes and bounds of that covenant – there was a writing and that writing was admitted into evidence. Moreover, we have performance by Bannon under that contract. *Conner v. City of Forest Acres*, 363 S.C. 460, 474, 611 S.E.2d

[8] Interestingly, in the mid-20th century the British Parliament repealed most of the statute. *Id*.

905, 912 (2005) ("A contract may arise from actual agreement of the parties manifested by words, oral or written, or *by conduct*.") (emphasis in original). Thus, none of the "mischief" described in *Jackson v. Watts* is at risk.

> "The object of the Statute was (as it professes) to prevent frauds and perjuries. The mischief to be apprehended was that incohate *[sic]* and imperfect contracts might be established on loose declarations against the real intention of the party to be made liable. It therefore requires some unequivocal act of consummation to be done which cannot be mistaken. The Recorder The object of the Statute was (as it professes) to prevent frauds and perjuries. The mischief to be apprehended was that incohate *[sic]* and imperfect contracts might be established on loose declarations against the real intention of the party to be made liable. It therefore requires some unequivocal act of consummation to be done which cannot be mistaken."

Jackson v. Watts, 12 S.C.L. 288, 1 McCord 288 (1821) (parentheticals in original; double underlining emphasis added).

Additionally, there is no dispute that Bannon worked for Respondent for years. And we have an implicit acknowledgement of that contract in an e-mail from Brian Bannon. In 2013, Bannon transitioned to an independent contractor role with Respondent. He wrote an e-mail on April 21, 2013 to Brian Stritt in which he detailed changes in the fine details of his employment – "In lieu of a salary, we're moving forward with a 60/40 PBM/ Bannon commission split, 1099 employment status, no benefits, and no office expense reimbursement" (R. p. 747)[9] – if not from the disputed written contract, from what were those detailed changes made?

Furthermore, Bannon's April 21, 2013 e-mail (R. p. 747), which was "signed" by Brian Bannon, creates an issue of fact in the following regards: South Carolina's Uniform Electronic Transactions Act provides that "[a]n electronic signature satisfies a law requiring a signature."

[9] This e-mail refutes Petitioners' assertion, "There was never any agreement discussed, drafted or signed that governed Bannon's independent contractor relationship with Forum." (Petitioners' Brief, p. 8). This e-mail goes against Petitioners' narrative so, true to form, they ignore it.

S.C. CODE ANN. § 26-6-70; *accord*, *LA Aviation, LLC v. Skytech, Inc.*, 2020 WL 13490486, at *5 (D.S.C. Sept. 16, 2020) (noting that this Act approved the use of email communications as a valid writing and electronic signatures as valid signatures for, *inter alia*, the statute of frauds). And this Court has held "the form of the writing is not material, and may be shown entirely by written correspondence, ... provided, all of the essential terms of the contract can gathered from the correspondence or some other writing to which it refers, without resort to parol testimony." *See Barr v. Lyle*, 211 S.E.2d 232, 234 (S.C. 1975) (internal citations omitted). Accordingly, it was an issue of fact, preventing directed verdict, whether the contract form (R. pp. 968 – 974) together with Bannon's April 21, 2013 e-mail (R. p. 747) "provided, all of the essential terms of the contract can gathered from the correspondence or some other writing to which it refers, without resort to parol testimony." *Id.*; *see also Gaskins v. Blue Cross-Blue Shield of S.C.,* 271 S.C. 101, 107, 245 S.E.2d 598, 601 (1978) (holding that a letter, confirming a business relationship between the parties, along with corroborating affidavits and deposition testimony, evidence a written agreement).

Therefore, it is not clear from this record, nor have Petitioners sufficiently demonstrated that there is no issue of fact regarding the matter, that a "lost document exception" must be recognized (or rejected), especially considering that neither the trial court nor the Court of Appeals made a ruling addressing it.

E. Petitioners Are Estoppel Estopped From Asserting the Statute of Frauds

While Brian Bannon was employed by Respondent, Respondent provided to him access to its proprietary design and an individualized build-out of the Employee Navigator" software application and to the proprietary algorithms stored on its SharePoint server. These were trade secrets and confidential information. Like the bell that cannot be un-rung or the toothpaste squirted from the tube, Respondent suffered a definite, substantial, and detrimental change of position in

reliance on the contract with Bannon, relying on Bannon to not misappropriate Respondent's proprietary design and algorithms or disclose the data contained in its individualized build-out of the "Employee Navigator" software application.

The law in these regards favors Respondent:

> "'[T]he doctrine of estoppel may be invoked to prevent a party from asserting the statute of frauds." *Collins Music Co. v. Cook*, 316 S.E.2d 418, 420 (S.C. Ct. App. 1984) (*citing Florence Printing Co. v. Parnell*, 182 S.E. 313, 316 (S.C. 1935)). "The party asserting estoppel 'must show that he has suffered a definite, substantial, detrimental change of position in reliance on the contract, and that no remedy except enforcement of the bargain is adequate to restore his former position.' " *Springob*, 757 S.E.2d at 388 (*quoting Collins Music Co.*, 316 S.E.2d at 420). "It is not sufficient to show merely that he has lost an expected benefit under the contract." *Id*. "Before the estoppel doctrine can be invoked, however, there must be competent proof of the existence of the oral contract." *Id*. (*quoting Atl. Wholesale Co. v. Solondz*, 320 S.E.2d 720, 723 (S.C. Ct. App. 1984))."

Beaumont v. Branch, No. No. 2:23-cv-03546-DCN, 2023 WL 7075101 (D.S.C. Oct. 26, 2023) (parentheticals in original).

Clearly, under this law and with the evidence presented, whether Petitioners should be estopped from relying on the Statute of Frauds defense was at least an issue of fact that should have prevented directed verdict.

Petitioners might contend that Respondent did not raise the estoppel argument below. But the trial never got to that stage: the Statute of Frauds is an affirmative defense for Petitioners and estoppel is an avoidance for Respondent to that defense. *Id.*; *see also Pike v. S.C. Dep't of Transp.,* 540 S.E.2d 87, 91 (S.C. 2000) ("…application of the Statute of Frauds is an affirmative defense. Fed. R. Civ. P. 8(c)(1). As such, "[t]he party pleading an affirmative defense has the burden of proving it"). But the trial court granted directed verdict at the end of Plaintiff's case in chief – the trial never got the Petitioners' defense case and thus the trial ended before estoppel could be raised in avoidance.

F. If the Issue Must Be Reached in This Case, a Narrow "Lost Document Exception" to the Statute of Frauds Should Be Recognized

If none of the preceding five grounds (A) – (E) is sufficient to the Court to refute Petitioners' argument about the Statute of Frauds, Respondent urges the Court to recognize and adopt a "lost document exception" to S.C. CODE ANN. § 32-3-10, on the following grounds.

First, recognizing such and exception would not be without precedent, inasmuch as exceptions and qualifications to this statute have already been recognized in South Carolina jurisprudence:

- "[T]he Statute of Frauds applies only to contracts which are impossible of performance within one year." *Roberts, supra.* The statute itself contains no such qualification.

- "An oral contract within the Statute of Frauds may be taken out by performance where one party does some act essential to performance of the agreement resulting in loss to himself and benefit to the other." *Graham v. Prince*, 293 S.C. 77, 81, 358 S.E.2d 714, 717 (Ct.App.1987). The statute itself makes no mention of such a scenario.

- Where the parties fully perform the contract, the Statute of Frauds no longer applies. *See DeWitt v. Kelly*, 256 S .C. 224, 182 S.E.2d 65 (1971). The statute itself contains no such proviso.

- The statute may not apply where there has been partial performance. *Settlemeyer v. McCluney*, 359 S.C. 317, 596 S.E.2d 514 (Ct.App.2004). Factors such as possession of the land, payments made, and improvements undertaken are considered in determining the sufficiency of partial performance. *Stackhouse v. Cook*, 271 S.C. 518, 248 S.E.2d 482 (1978). Partial performance is a court-created qualification to the statute.

- Parol evidence is admissible to prove contract existence where the terms are containing within a writing signed by one of the parties, and the other party "writes an acceptance or recognition of a contract, but not in such terms as to identify it." *Woodruff Oil & Fertilizer Co. v. Portsmouth Cotton Oil Ref. Corp*., 246 F. 375, 378 (4th Cir. 1917) (citing *Beckwith v. Talbot*, 95 U.S. 289, 24 L.Ed. 496 (1877) & *Ryan v. United States*, 136 U.S. 68, 10 S. Ct. 913, 914, 34 L. Ed. 447 (1890)).

Second, a "lost document exception" would be a logical extension of South Carolina law, which has construed S.C. CODE ANN. § 32-3-10 narrowly (as illustrated in the preceding bulleted list).

Third, 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.").

And fourth, the totality of the evidence in this case demands a fair opportunity to the Respondent for the jury to consider this "lost document." Respondent 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 Respondent 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; 504-505). Stritt testified that Plaintiff's Exhibit 137 is a blank employment agreement prepared by Wyatt (R. pp. 968-974; 60-75; 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; 497-502); 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.

For at least the foregoing reasons, even if strictly limited to the facts of the case at bar, Respondent urges the Court to recognize and adopt a "lost document exception" to S.C. CODE ANN. § 32-3-10.

III. Damages

Respondents argue that "Directed verdict was proper on all of Forum's claims based on Forum's failure to present evidence of proximately caused damages." (Petitioners' Brief, p. 20).

Throughout this long course of this action, and including with this brief, Petitioners seem only to have been listening to their own rhetoric rather than acknowledging the admitted evidence. An example is their argument, "The Employment Agreement's restrictive covenants specifically state that they only apply for two years after the employment relationship ends." (Petitioners' Brief, p. 20). This is patently false. Paragraph 12(f) expressly provides that provides that Bannon agreed not to use Respondent's trade secrets "during Employee's employment and at all times thereafter." (R. p. 970 - Plaintiff's Exhibit 137, ¶12(f),) (double underlining emphasis added). Petitioners only begrudgingly and later admit that the trade secret restriction "arguably" extended beyond that two year limit. (Petitioners' Brief, p. 21).

Another example is Petitioners' assertion, "Forum admitted at trial that it had 'no idea' why clients followed Bannon to Petitioner AssuredPartners. (R. p. 608, lines 18 – 21)." (Petitioners' Brief, p. 20) (the parenthetical reference to the record is in Petitioners' Brief). Petitioners count on the reader not checking to see if what Petitioners asserted is, in fact, faithful to the record. It is not. What Stritt testified is that he has "no idea what he [Bannon] told them."

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
22	know what has been said in the past from AssuredPartners,
23	but I don't know what Brian Bannon told those specific
24	groups, that's correct.

(R. p. 608, lines 18 – 21). If the record supported Petitioners' arguments, they would not have to falsify it.

Equally false is Petitioners' assertion of "failure to present evidence." What follows is only some of that evidence, but in any case, enough to fully refute Petitioners' argument.

Stritt testified regarding Respondent's damages. Petitioners repeatedly objected to Stritt's testimony. (R. pp. 520-530; 533-560). The trial court at first sustained Petitioners' objections. (R. pp. 520-530; 533-560). However, after consultation with an unnamed Business Court judge, the trial court overruled some of Petitioners' objections and allowed Stritt to testify regarding Respondent's 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 Respondent to Assured Partners. This testimony was based on Stritt's personal knowledge as Respondent's owner and managing director. (R. pp. 771-816; 520-530; 533-560; 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 Respondent's damages were speculative contradicts the trial court's own rulings and ignores competent evidence of Respondent's damages. As a result, the trial court's ruling as a matter of law that Respondent's damages were speculative impermissibly decided disputed questions of fact for the jury to resolve and constitutes legal error that prejudiced Respondent.

Testimony and contemporaneous emails (e.g., Plaintiff's Exhibits 8, 10-12, and 45) (R. pp. 749-750; 756-759; 760-765; 766-768; and 817-823) provide compelling evidence of the urgent and covert operations carried out by Petitioners to illicitly obtain Respondent's trade secrets

before Respondent discovered Bannon's affiliation with Assured Partners and revoked access. The testimony of Jim Brady, associated with Assured Partners at the time, was consistent with his November 8, 2016 email that unequivocally stated that he was unable to create an Employee Navigator account for a client without login credentials to download, copy, and take screenshots of Respondent's Employee Navigator account for that client. (R. pp. 448-450).

Multiple witnesses corroborated the claim that Petitioners' misappropriation of Respondent's trade secrets directly caused significant damage to Respondent. For instance, Christie Holderness, the District Manager for St. Andrews Public Service District, testified that ongoing access to Respondent's trade secrets compiled in the Employee Navigator account was a decisive factor in her decision to transfer St. Andrews Public Service District's business from Respondent to Assured Partners (R. pp. 620-626). Several contemporaneous emails (e.g., Plaintiff's Exhibits 8, 10-12, and 45) confirm that Assured Partners' acquisition of Respondent's trade secrets from the Employee Navigator accounts was pivotal in convincing clients of a seamless transition from Respondent to Assured Partners (R. pp. 749-750; 756-768; 817-823; 186; 190-194; 444-447). Misappropriating, downloading, copying, and taking screenshots of Respondent's trade secrets saved Assured Partners substantial time and resources, which would otherwise have been spent designing, building, collecting, organizing, and compiling the same database of information (R. pp. 287-288).

Nine clients associated with Bannon actively utilized Respondent's data stored in the respective Employee Navigator accounts (R. pp. 281-282; 448-450; 569-572). Bannon provided Employee Navigator client login credentials for three of those clients – Carolina Youth Development, Premier Logistics, and St. Andrews Public Service District (R. pp. 281-282; 448-450). All three transferred their business from Respondent to Assured Partners, while none of the

other six clients transferred their business (R. pp. 281-282; 448-450; 569-572). This 100% statistical correlation between Petitioners' misappropriation of Respondent's trade secrets and the transfer of business to Assured Partners provided decisive evidence of the damages caused by Petitioners' actions.

It should be noted also that this action started not with a Complaint but with a Verified Complaint. The Verified Complaint constituted evidence because of the very fact that it was verified. For example, among other attested assertions in the Verified Complaint were those of Paragraph 10, attesting to proximately caused damage:

> 10. Prior to October 19, 2016, upon information and belief, Bannon utilized Plaintiff's confidential and proprietary information to contact Alpha Genesis, Incorporated, a client of Plaintiff, and was successful in procuring a Change of Broker letter from Alpha Genesis to the detriment of Plaintiff. The letter is attached as Exhibit B. Both Defendants are copied on the letter. On information and belief, it is only through access of Plaintiff's Records by Bannon that the Defendants identified that Alpha Genesis was a client of Plaintiff. This lost customer alone has cost Plaintiff a loss in revenue of $24,974.00. To date, at least six (6) other of Plaintiff's clients have, on information and belief, been contacted by Defendants and transferred their business to Assured as Broker of Record, causing a loss of $86,684.00.

(R. p. 36).

All of this uncontroverted evidence:

- supports the reasonable inference that damages were proximately caused by Petitioners' misappropriation of Respondent's trade secrets;
- shows that the trial court's directed verdict ruling that Respondent's damages were speculative contradicts the trial court's own prior evidentiary rulings and ignores competent evidence and also improperly decided disputed factual questions;
- supports the reasonable inference that Bannon's conversion of Respondent's trade secrets proximately caused damages to Respondent that should have prevented the trial court's ruling; and
- shows that the trial court's ruling that Respondent failed to prove that damages were proximately caused by Petitioners' actions decided disputed questions of fact that

should have been resolved by the jury, constituting legal error and prejudicing Respondent.

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

The record is so robust and so fully against Petitioners' position in this regard that the Court of Appeals did not even address the damages issue in its ruling.

IV. Independent Contractor and Fiduciary Duty

Petitioners argue that Bannon could not have had a fiduciary duty to Respondent because he was an independent contractor.

The duty not to misappropriate trade secrets does not depend on the existence of a fiduciary duty. Bannon's duty arose under both contract and statute, and Assured Partners' duty arose under statute.

The trial court's February 1, 2022 Order directed a verdict in favor of Bannon on Respondent's breach of fiduciary duty claim. (R. pp. 23-24). In the oral directed verdict ruling in the court room during trial, the trial court, evidently knowing no better, 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 (which was written wholly by Petitioners' attorney who even himself evidently recognized the trial court's manifest error), the trial court completely abandoned this fallacious ruling and instead wrote 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 (a) what Respondent had pled in its Verified Complaint about the nature and scope of that fiduciary relationship and (b) substantial evidence presented at trial supporting the Complaint's allegations from when Bannon was first hired in June

2009 until Bannon stopped representing Respondent as a sales representative in November 2016 (which was a month after he started employment with Assured Partners).

What Respondent pled in its Complaint was not an all-encompassing, blanket-the-earth, magical-powers-included fiduciary relationship. To the contrary, the allegations were quite simple:

> 31. The disclosure and providing access of the confidential and proprietary Records to Bannon by Plaintiff placed Bannon in a fiduciary relationship with Plaintiff reposing special confidence in Bannon and requiring the due regard to the interests of Plaintiff by Bannon.

(R. p. 39).

One might suppose from the exhortations in Petitioners' brief that this thing the law calls a "fiduciary duty" is so exalted that it also even comes with both the nation's nuclear launch codes and access to secret manuscripts in vaults at the Vatican.

But what the law says about fiduciary relationships is, like Respondent's allegations in its Complaint, quite simple. 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 imposingthe 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).

Applying that law to Respondent's breach of fiduciary duty cause of action, Respondent has asserted that Bannon was required by the law to act in good faith and with due regard to Respondent's interests in the proprietary design and an individualized build-out of the "Employee Navigator" software application and the proprietary algorithms stored on its SharePoint server.

And Respondent supported those allegations with the evidence presented at trial.

What the trial court ruled, and what Petitioners now want this Court to hold as a matter of law, is that despite the special confidence placed in Bannon by Respondent with its trade secrets and confidential information, Bannon owed Respondent no duty of good faith and due regard to Respondent's interests.

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.

Respondent hired Bannon in 2009 as a full-time employee to represent Respondent as a sales representative to prospective clients. (R. pp. 968-974; 60-75). When he decided to pursue a

career as a fireman in 2013, Bannon transitioned to an independent contractor and continued to represent Respondent as a sale 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 Respondent as an independent contractor, and Bannon assured Stritt that he would continue to grow the business for Respondent. (R. pp. 747-748; 156; 507-508). This evidence establishes that Bannon continuously served as Respondent's sales agent from 2009 until 2016 and, therefore, owed Respondent a duty to act in good faith and with due regard to Respondent's interests in the proprietary design and an individualized build-out of the "Employee Navigator" software application and the proprietary algorithms stored on its SharePoint server.. And the agreed-upon change in employment status and modifications to compensation and schedule, as a result of taking on the duties of firefighting, constituted additional consideration given to Bannon.

Notwithstanding all of the foregoing, during the four (4) week overlap when Bannon was simultaneously secretly employed by Assured Partners and represented Respondent as a sales representative, Bannon admitted that he secretly obtained and forwarded the Employee Navigator login credentials for Respondent's 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 Respondent's trade secrets from Respondent's SharePoint server using the login credentials he had received years earlier when he was Respondent's employee. (R. pp. 138-139; 195-196; 198). Employees of Assured Partners repeatedly exhorted everyone involved to expedite copying Respondent's trade secrets before Respondent discovered what they were doing. (R. pp. 749-750; 756-768; 817-823; 174-175; 186; 190-194; 444-447). Bannon's actions to download and

share Respondent's trade secrets with a direct competitor demonstrate that he knew what he was doing was wrong and violated his fiduciary duty to Respondent.

Evaluated from the opposite perspective, Petitioners argue that because Bannon became an independent contractor, he owed no duty to Respondents. Why then did Bannon hide from Respondent his dual employment with Assured Partners? Why did Bannon secretly download 2,000 files from Respondent – if he had no duty and everything was on the up-and-up, could he not have just asked Respondent for those 2,000 files? If what Petitioners now argue was true at the time, why did Assured Partners sprint to download as much as it could before Respondent could discover their actions and cut off further access? These questions answer themselves – Petitioners knew at the time that they were in the wrong. They fight now against a label of "fiduciary duty," but they knew at the time that they were in the wrong.

The uncontroverted evidence establishes that Bannon, in equity and good conscience, was bound to act in good faith and with due regard to Respondent's interests. That is the duty alleged in Respondent's Complaint and that is the duty *Davis* describes as fiduciary.

The trial court's ruling to the contrary constitutes an error of law.

V. Conversion

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

Conversion is "the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights." *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 465, 684 S.E.2d 756, 763 (2009). South Carolina courts have held that intangible rights are normally not the proper subject for a conversion

claim. *Id.* The *Gignilliat* court explained, "[a]n action for conversion ordinarily lies only for personal property that is tangible, or to intangible property that is merged in, or identified with, some document." *Id.* (citation, emphasis and footnote omitted). This Court concluded that the tort of conversion as it relates to intangible property "should be limited to intangible property rights that are identified with some document." *Id.*

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

The decision in *Integrated Direct Marketing* provides a useful rationale, consistent with this Court's rationale in *Gignilliat*, to limit a conversion claim to actions involving intangible property "merged in or identified with some document." The type of intangible property maintained on the desktop computer is akin to the files allegedly stolen in *Integrated Direct*

Marketing. Accordingly, Respondent's conversion claim included the intangible property stored in the desktop computer-a combination of both tangible and intangible property. Specifically, Bannon retained Respondent's desktop computer until ordered by the trial court to return it to Respondent. (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 Respondent's trade secrets from the Employee Navigator accounts and Respondent's 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 Respondent's 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 Respondent's SharePoint server is the very type of intangible property contemplated by the Gignilliat court that is "merged in or identified with some document." 684 S.E.2d 763.

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

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

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

VI. Attorneys' Fees

The trial court's award of fees was improper, as Respondent's claims were not pursued in bad faith.

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 moved for an award of attorneys' fees based on a prevailing party clause in Bannon's employment contract with Respondent. (R. p. 689, lines 10-18). However, the trial judge had already ruled as a matter of law that there was no contract – he had found there to be no meeting of the minds to support a contract. (R. p. 686). And the trial court's February 1, 2022

Order similarly ruled as a matter of law that Respondent failed to prove a meeting of the minds on the essential terms of the alleged contract. (R. p. 23, ¶ A(2)). Thus, according to the trial court, no contract existed. It was irreconcilable for the trial court to rule as a matter of law that the contract does not exist and then enforce an attorneys' fees provision in that non-existent contract.

And as a matter of law, Respondent's trade secret claim was not bad faith. Respondents filed motions seeking summary judgment on Respondent's trade secret claims. (R. pp. 1026-1027; 1028-1042; 1243-1280; 1281-1374; 1382-1554; 1850-1876). Two different Circuit Court judges each conducted a full hearing that was fully briefed, and each judge denied Respondents' motion for summary judgment. (R. pp. 14-16; 17-19). "[W]here a party survives a summary judgment motion, it is not subject to sanctions after a trial on the merits of the surviving claims." *Southeastern Site Prep, LLC v. Atlantic Coast Builders & Contractors, LLC*, 394 S.C. 97, 109, 713 S.E.2d 650. 656 (2011) (quoting *Hanahan v. Simpson*, 326 S.C. 140, 158, 485 S.E.2d 903, 913 (1997)). The facts, reasoning, and conclusion reached in Southeastern are indistinguishable from the present case. Two different judges heard summary judgment motions against Respondent, and both judges denied the motions. Consistent with the controlling authority of *Southeastern* and *Hanahan*, as a matter of law Respondent's trade secret claims were not in bad faith.

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

Petitioners cite *Fici v. Koon*, 372 S.C. 341, 642 S.E.2d 602, 606 (2007), claiming the case supports their argument. But *Fici* involved a different scenario: this Court held that the contract

existed but that the Statute of Frauds prevented conveyance of property that was insufficiently described. In the case at bar, by distinction, the trial court ruled that no contact existed.

Petitioners also argue judicial estoppel. This is nonsense. Petitioners 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." (Petitioners' Brief, pp. 33 – 35, citing *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629, 631–32 (2004)). Petitioners' judicial estoppel argument is that Respondent, 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. Petitioners' argument fails because Respondent was not successful at trial in urging the existence of the contract and Respondent 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, Petitioners are judicially estopped from changing their position to rely on a prevailing party fee clause of the same non-existent contract.

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

Finally, Respondents acknowledged that Bannon never incurred any fees and costs but nonetheless argue that Bannon should "recover" the fees and costs incurred by Assured Partners.

(R. pp. 1949-1952). The attorneys' fee provision in the employment contract, which the trial court ruled does not exist, states, "In any litigation between the parties related to this Agreement, the prevailing party shall be entitled to recover all reasonable costs and attorneys' fees." (R. p. 969, ¶ 11) (double underlining emphasis added). However, instead of providing any evidence that Bannon actually incurred any fees and costs, Respondents directed the trial court to authority from other states to argue that Bannon should be able to recover the fees and costs incurred by Assured Partners. (R. pp. 1950-1951).

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

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

VII. Failure to Recuse by the Trial Judge

Petitioners argue the trial judge properly refused to recuse himself on motion of Respondent.

The argument is wrong, for at least two reasons.

A. The Issue Was Not Raised in the Petition for Certiorari

Petitioners did not include this issue in their Petition for Certiorari.

The trial judge in this matter ignored law and evidence throughout the trial, and the trial devolved into anything-goes, dog-eat-dog chaos.

Petitioners evidently want the same thing before this Court. They should fail.

B. The Trial Judge Should Have Recused Himself

Though the Court of Appeals held that it did not need to reach the recusal issue, it stated, "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." (R. p. 2691.) The trial judge (Judge Bentley 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, 433S.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, Petitioners identified an individual named Mack Ward—a Vice President of Assured Partners—as a trial witness. (R. p. 58, line 18). 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, line 10; 275, line 1; 277, line 5; 300, line 10). The trial judge himself even mentioned his name. (R. p. 276, line 7).[10]

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 Respondent' 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).

[10] All of which completely refutes Petitioners' supposed "Statement of the Case" that, "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." (Petitioners' Brief, p. 11).

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.

Petitioners assert that Respondent consented to the trial judge saying "hello" to Mack Ward. (Petitioners' Brief, pp. 10, 39, and 40). There is nothing in the record to support this assertion. Further, any "consent" would not operate as a waiver for the behavior that followed, nor does making the recusal motion the following morning.[11]

Petitioners point out repeatedly that Respondent had subpoenaed Mack Ward to trial, but did not call him as a witness and instead release him from the subpoena. Those facts are true. It is also true that, having witnessed the tongue bath provided by the trial judge to Mack Ward in the well of the courtroom, Respondent could not take a chance putting him on the witness stand in front of this judge and risk further damage to their case at the hand of this judge; Respondent therefore had to forego calling Ward as a witness, because of the bias displayed by this judge.

Before trial resumed on October 13, 2021, Respondent 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

[11]Petitioners cite *Duplan Corp. v. Milliken* in support of its waiver-for-delay argument. 400 F.Supp. 497, 510 (D.S.C. 1975). In that case, "[t]he delay between the date of discovery of the disqualifying facts and the date of the properly submitted affidavit [in support of a recusal motion] was one hundred forty-five (145) days," *id.*, orders of magnitude higher than the accused "delay" in the case at bar. Surely, this Court should look favorably upon an officer of the court both conferring with his client beforehand and giving serious consideration before moving in the middle of trial for recusal of a sitting trial judge.

the transcript of the proceedings, the trial judge said, "I had no idea why he would be here," (R. p. 469, lines 21-22), notwithstanding Petitioners 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 admit during argument of the motion that at some point the trial judge and Mack Ward went back into chambers to continue their reunion[12], an event of which Respondent 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 then-maintained a personal Facebook® account, was then-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 indicated 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).

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 Respondent's recusal motion – not only does the trial judge "do" Facebook® with his own Facebook® account,

[12]"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)

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, Respondent separately filed a Motion for a New Trial pursuant to Rule 59(a), SCRCP. (R. pp. 1877-1909). Respondent asserted that the trial judge's reasonable appearance of bias, combined with multiple inconsistent rulings that consistently favored Petitioners, demonstrated actual bias by the trial judge that prevented Respondent from receiving a fair trial.

On January 4, 2022, the trial judge conducted a hearing on Respondent' Motion for a New Trial. Respondent 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.[13] (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 what is shown in 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 described it on October 13th, but instead that he had merely repeated a remark that Mack Ward had said to him. (R. p. 743, lines15-20). The trial judge also did not mention that he had also met alone privately with Mack Ward in chambers without

[13] Prior to the hearing, Respondent 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).

anyone from the Respondent being present (or any lawyer for anyone, actually), 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

Respondent' 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 this 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, and his bias exacerbated by a courtroom interaction longingly and fondly recalling days of yore.

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

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

Respondent's concerns about the appearance of bias are bolstered by the trial court's multiple rulings that were inconsistent in rationale but consistently in Petitioners' 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 Petitioners' 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 Respondent 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 Petitioners.

For another example, during Respondent' direct examination of Bannon, Respondent 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). Petitioners 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; 210-211). 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.

Conversely, during Petitioners' cross-examination of Brian Stritt, Petitioners sought to introduce Exhibit C to the Verified Complaint as an exhibit. (R. p. 590). Respondent 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 Respondent' 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 Petitioners 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 Respondent's damages. Respondent 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 Respondent to Assured Partners and the resulting damages to Respondent. (R. pp. 771-816; 520-530; 533-560; 573-578). At the time of the events giving rise to this litigation, Stritt was the sole owner of Respondent and had been negotiating with a buyer for over a year to purchase Stritt's company. After learning that Bannon had left Respondent, 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; 533-560; 573-578).

Petitioners 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; 533-560). In initially sustaining Petitioners' 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 Respondent' damages. (R. pp. 520-530; 533-560). According to the trial court, Respondent could only provide evidence of damages through a financial expert. (R. pp. 520-530; 533-560).

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 Respondent 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 Respondent 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 Respondent, and constitute errors as a matter of law.

Respondent respectfully asserts that the motion to recuse was based on the reasonable appearance of bias, and Respondent' concerns about the appearance of bias are supported by a

consistent string of inconsistent rulings that continually favored Petitioners. The trial court's denial of Respondent' motion to recuse prevented Respondent from receiving a fair trial.

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

CONCLUSION

For at least the foregoing reasons, the Court should affirm the Court of Appeals' decision and remand the case.

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s/Timothy D. St. Clair
Timothy D. St.Clair (SC Bar # 5297)
PARKER POE ADAMS & BERNSTEIN LLP
110 East Court Street, Suite 200
Greenville, SC 29601
(864) 577–6371

Tasneem A. Dharamsi (SC Bar # 104868)
PARKER POE ADAMS & BERNSTEIN LLP
301 Fayetteville Street, Suite 1400
Raleigh, NC 27601
(919) 835–4570

Attorneys for Appellant Forum Benefits, LLC