THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Case No. 12-CP-02-01772

Coves Darden, LLC, ... Appellant,

v.

Francisco Jose Garcia Ibañez, Dori Derr and Half Moon Stables, LLC, ... Respondents.

INITIAL APPELLANT'S BRIEF

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III. **An employee is, by definition, an agent, and an agent, by definition, is a fiduciary. Ibañez was also a highly trained person of international renown and an important and trusted employee for Coves Darden, and he was a significant investment and worked at a high level where he owed fiduciary duties. Even if he had been an employee at will, an employee at-will still is in a contractual relationship with duties owed by both parties. An action lies for breaching duties in an employment-at-will relationship.** 26

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STATEMENT OF ISSUES ON APPEAL

1. When a defendant moves for summary judgment without filing any accompanying materials and without stating any grounds in the written motion, does the nonmoving party have a burden to come forward with details on every possible element and piece of evidence in the case in response to evolving briefs and materials thereafter filed by the moving party?

2. What is a "judicial admission," and does it conclusively establish a matter for purposes of summary judgment?

3. Was there a question of fact, precluding summary judgment, as to whether there was a written contract?

4. Was there a question of fact, precluding summary judgment, as to whether there was a reasonably detailed oral contract between the parties, notwithstanding any lack of a written contract?

5. If the contract was oral, was there a question of fact, precluding summary judgment, as to whether it was impossible to have been performed within one year?

6. Does the existence of remaining unresolved factual issues as to whether a contract is written or oral require entry of summary judgment that there was no contract at all?

7. Even if there had been neither a written contract nor an oral contract with specific agreed terms beyond a general employment-at-will contract, was it error to determine that a high-level, highly trusted employee brought over from another country to live on the premises of his employer owed no fiduciary duties?

8. Even if there had been no written contract, nor detailed oral contract, would a general employment-at-will contract support a claim for either tortious interference with contract or tortious interference with prospective advantage?

9. Was there evidence of interfering in the contract?

10. Was justification for the interference established as a matter of law?

11. Was a written contract or detailed oral contract a necessary element of a claim for violation of the South Carolina Unfair Trade Practices Act?

12. Would inducing the employee of another to both breach fiduciary duties to his employer and breach or end his employment with his employer by offering him an illegal compensation arrangement not offered by the present employer present "impact on trade or commerce" ("public impact") for purposes of a claim under the SCUTPA, either by presenting a conventional anticompetitive tort, a potential for repetition, or other type of public impact?

13. Does misleading advertising following tortiously interfering with a contract compound the violation of the SCUPTA?

SCOPE AND STANDARD OF REVIEW

In reviewing a South Carolina circuit judge's grant or denial of summary judgment, the appellate court applies, de novo, the same standard and scope of review required to be applied by the circuit judge considering the motion. Laurens Emergency Med. Specialists v. M. S. Bailey & Sons Bankers, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003); Stinney v. Sumter School Dist. 17, 382 S.C. 352, 675 S.E.2d 760 (Ct. App. 2009). It is the appellate court's duty to correct errors of law, with no particular deference to the court below. Samuel v. Mouzon, 282 S.C. 616, 320 S.E.2d 482 (Ct. App. 1984).

In a South Carolina state court, summary judgment is governed by state procedural law, rather than federal. Summary judgment shall not be granted unless, first, all issues of fact are resolved in favor of the nonmoving party, and all facts and all inferences from those facts are viewed in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36,

492 S.E.2d 55 (1997). Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is disagreement concerning the conclusions to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 672 (2000); Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003). Summary judgment is a "drastic remedy" which should be cautiously invoked, so no person will be improperly derived of a trial of the disputed factual issues. Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003); Schmidt. All it takes is a "scintilla" of evidence in favor of the nonmoving party to create a genuine dispute as to an issue of fact, requiring denial of summary judgment. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Rule 56, SCRCP delineates the materials to be considered in determining whether a moving party has made a showing of the absence of dispute of material fact; these do not include arguments, assertions or challenges in the moving party's brief. The grounds for the motion shall be stated with particularity in the written motion. Rule 7(b)(1), SCRCP. Affidavits in support of the motion shall be served with the motion. Rules 6(d) and 56(c), SCRCP. Once a moving party has made a sufficient showing, through use of the materials required by Rule 56, of the absence of a dispute as to any material fact, the nonmoving party cannot rest on the mere allegations or denials in the nonmoving party's pleadings in order to show a dispute as to any of those facts. Wogan v. Kunze, 366 S.C. 583, 591, 623 S.E.2d 107, 112 (Ct. App. 2005).

However, the burden of coming forward and demonstrating, in the first instance, the absence of dispute of material fact is entirely on the moving party. Yarborough v. Rogers, 306

S.C. 260, 411 S.E.2d 424 (1991); see also Fed. R. Civ. P. 56, Notes of Advisory Committee on Rules, 1963 Amendment ("Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented"); and see Adickes v. S.H. Kress, 398 U.S. 144, 159-60 (1970) (discussing procedure under similar federal Rule 56, where moving party must first demonstrate absence of evidence by showing specific discovery passages where evidence was sought and determined to be nonexistent). Absent such a showing, the nonmoving party has no duty to come forward with any materials or other opposition at all. Yarborough; and see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986)(federal standard).

STATEMENT OF THE CASE

This case arises from an international agreement with an equestrian trainer and showman. This appeal arises from a grant of summary judgment, dismissing the case.

On July 20, 2012, Coves Darden, LLC sued Francisco Jose Garcia Ibañez, Dori Derr, and Half Moon Stables, LLC in the Aiken County Court of Common Pleas, seeking injunction and damages in an unspecified amount. Coves Darden alleged, among other things, breach of fiduciary duties of loyalty, honesty and information by Ibañez, and breach of contractual duties of exclusivity, loyalty, and noncompetition by Ibañez, Coves Darden's former equestrian trainer.

Coves Darden alleged tortious interference with contract by Derr, and unfair trade practices by Derr and her company, Half Moon.

The defendants filed one answer, admitting or denying various allegations of the complaint, and raising no affirmative defenses. Among other things, the defendants specifically alleged in their answer that there was no written contract between Coves Darden and Ibañez, and

denied that any oral contract had ever been negotiated. (R. p.___.) The defendants also asserted that Ibañez did not agree to ride for Half Moon in upcoming events until after terminating his employment with Coves Darden. (Id.)

The defendants sent interrogatories early in the suit. In the interrogatories, the defendants did not make any inquiry at all about a written contract. (See Int., R. p.___.) They asked for the details of any oral contract between the parties. Coves Darden responded that the contract was not oral, that it was written, and described the written contract. (Pl. Resp. to Int., ¶6, R. p. ___.)

The three defendants moved for summary judgment, stating no grounds in either of the two written motions. (R. pp.___.) Briefs followed. Coves Darden moved at various times to compel various aspects of discovery. (See R.p. ____ (Dec. 6, 2012 mot.), p. _____ (Jan. 30, 2013 mot.), and p. ____ (Nov. 26, 2013 mot.).) Hearings or partial hearings were held on March 5, 2013, May 20, 2013, and October 15, 2013.

On March 5, 2013, the court ordered Ibañez to appear for a deposition within 30 days of March 5 and ordered responses to certain other discovery. In discovery which occurred, the prior oral agreement of the parties was explored at length. (E.g., Ibañez Depo., pp. 29, 32, 36-40, 47-49 and 50, R. pp.___.)

On July 11, 2013, the court advised the parties that it would hold ruling on summary judgment in abeyance while the parties conducted discovery for 90 days. After July 29, 2013, by consent, the defendants amended their answer to plead the statute of frauds. In other discovery, some deponents did not show up for their depositions and at the same time, counsel for the defendants did not appear. (Stanton Disc. Stat. Aff., ¶¶ 13-14, R. pp. ____.)

The Circuit Judge granted summary judgment in favor of the defendants, dismissing the case.

Coves Darden received written notice of entry of the December 5, 2013 order on December 20, 2013 and served a motion to reconsider under Rule 59(e) on December 29, 2013. Coves Darden received written notice of entry of the January 13, 2014 order denying reconsideration, not before January 13, 2014, and served notice of this appeal on February 12, 2014.

OTHER FACTS

It is uncontested that the evidentiary materials in the record, viewed in the light most favorable to the nonmoving party, contain the following facts.[1]

Beginning in 2010, Coves Darden, LLC, of the Aiken, S.C. area, explored reaching an agreement to employ Francisco Jose Garcia Ibañez ("Ibañez"), of Spain. (Coves Aff., ¶¶ 2 and 3, R. pp. ____.) Coves Darden explored an agreement which would include making arrangements to sponsor Ibañez's travel to the United States from his residence in Spain, and entry into the United States on a nonimmigrant visa issued by the United States. (Ibañez Depo., pp. 38-41, R. pp.___.)

Coves Darden sought Ibañez to act as an expert equestrian trainer, and to provide expert instruction and consultancy services in the equestrian arts for clients of Coves Darden. (Coves Aff. ¶6, R. p.___.) Under the U.S. immigration and nationality laws the parties were considering, Ibañez was required to work completely and exclusively for Coves Darden during the term of the visa while the agreement was in force. (Liberatore Aff. ¶¶4, 8, 11, 12, 14, and 16, R. pp.___.) This was also the proposed agreement of the parties. (Coves Aff. ¶ 7, R. p. ___.)

Coves Darden was run by a married couple, Miguel Coves and Dorothea Darden, who lived on the premises where Ibañez would do most of his work. (Ibañez Depo., pp. 29-32, R. pp.

[1]Under Rule 56, the facts in the record in favor of the nonmoving party are required to be accepted as true.

____, and see Coves Aff., ¶¶ 11 and 14, R. p. _____.) Coves Darden defrayed the costs of Ibañez's preliminary visits to the Aiken, South Carolina area for Ibañez to discuss and consider the job. (Ibañez Depo., pp. 29 and 32, R. pp. _____ (December, 2010 visit), and pp. 36-37, R. pp. _____ (January, 2011 visit, with wife).)

The parties reached agreement in January, 2011. (Ibañez Depo. p. 38, R. p. ____ (no differences between the two over the terms).)

They agreed on scope of duties (id. at 48-49, R. pp.___), rate of pay, fringe benefits such as a furnished house and car, covering or reimbursement of legal and travel expense, and -- as limited by any visa granted -- duration of the employment. (Id., p. 38, R. p. ____ ("expected" length of two years) and pp. 38-40, R. pp. ____ (contract was conditioned on visa); Coves Aff. ¶ 6, R. p. ____ (expected length of two years or more if supported by leave of absence, but determined by length of visa); Oct. 9, 2013 Pl. Supp. Resp. to Int., R. p. ____ (initial term was for whatever initial duration was granted for visa, up to three years if supported by leave of absence).) There were no further terms they needed in order to go forward with their agreement. (Ibañez Depo., p.38, R.p. _____.)

The basis for the nonimmigrant visa, known as an "O-1 visa," was Ibañez's international prominence and peculiar, extraordinary, and unique ability to train the particular breed of horses in question. (Liberatore Aff. ¶7, R. p.___.) These horses were generally known as "Spanish Horses," or "P.R.E." (Pura Raza Espanola). (Ibañez Depo., pp. 16-17, R. pp.___.) Coves Darden had a particular need for this level of expertise, because of the size of its operation, the particular breed in question, and the level of breeding and competition to which Coves Darden aspired. (Coves Aff. ¶15, R. p.___.) The expected length of an O-1 visa was three years (Coves Aff. ¶¶ 6, R. p. ____), but it was within the authority the immigration authorities, in spite of the

length requested, to grant the visa for any shorter period, including a month. (Oct. 9, 2013 Pl. Supp. Resp. to Interrogatories, R. p.___.)

After reaching an agreement, Ibañez visited Coves Darden Farm in the United States two more times before getting his visa. (Ibañez Depo., pp. 57-58, and 69-70, R. pp. _____ (visits in April-June, 2011, and September-December, 2011).) Coves Darden hosted his pre-employment visits for over 150 days. (Id., pp. 27, 28, 37, 58, 69, and 70, R.p. _____.)

Even before Ibañez moved to South Carolina and actually began his job, his expected station with Coves Darden was publicized, and at one or more events at Coves Darden's stable, Ibañez was introduced to Defendant Dori Derr, among others invited. (Coves Aff. ¶5, R. p.___.)

Coves Darden proceeded to arrange for, and pay for, the application for, and processing of, the nonimmigrant visa petition. (Coves Aff. ¶12, R. p.___.) They paid the legal expenses pertaining to this process. (Id.) They paid the travel expenses. (Id., ¶¶ 3, 7, 11, 12, 30, and 35, R. pp. _____.) During this process, Coves Darden was asked by the United States Citizenship and Immigration Services to submit a written employment contract of the parties. (Id.) A written contract was prepared, signed by Miguel Coves, and submitted to the processing authorities. (Id.)

Coves Darden's visa attorney went over the written contract on the phone in an international call with Ibañez, and informed him it would be in the consular file when Ibañez went to Madrid for the visa interview in Spain. (Liberatore Aff. ¶10, R. p.___.)

Ibañez obtained his visa in Madrid, entered the United States, and commenced work for Coves Darden in or around February 8, 2012.

Although for the first competition Ibañez entered, the training of the horses and other preparation began over a month earlier, Ibañez did not win. (Coves Aff. ¶18, R. p.___.) He

explained that he had studied the wrong test or set of rules or instructions for the competition. (Id.) Derr, who also owns a small number of the same breed of horses was present in the same competition, and did better than Ibañez. (Id.)

By June of 2012, preparations had long been underway for another competition in Georgia. (Coves Aff. ¶19, R. p.___.) The competition was on a Saturday, June 9, and entrance fees, lodging for people, and lodging for horses had to be arranged and committed in advance. (Id.) Departure from Aiken, with the horses, was scheduled for early the Friday before, June 8. (Id.) Ibañez assured Coves Darden in advance that he foresaw all of the logistics and needs for the competition. (Coves Aff. ¶20, R. p.___.) Ibañez did not appear for work on the Friday before the competition. (Id.) Later in the day, the plans had to be cancelled. (Id.)

When there was no appearance by, or word from, Ibañez on Saturday, Coves Darden discovered that his residence was abandoned, that his car was left at the residence, and that he had left a note in the residence that he had ended his employment. (Coves Aff. ¶21, R. p.___.)

Ibañez gave no advance notice to end his employment and did not give any of the advance warning required under the written contract. (Id.)

Coves Darden had also scheduled official entry and participation in a competition in Georgia for approximately one week later, which also required advance commitments of entry fees, lodging for people, and lodging for horses. (Coves Aff. ¶22, R. p.___.) This competition, too, had to be cancelled. (Id.) Both competitions were necessary in order to advance to further levels of competition. (Id.) Additionally, in the competitions themselves, success would enhance the value and reputation of the horses. (Coves Aff. ¶23, R. p.___.) In addition, in the first competition, prize money was available for certain levels of success, and in this instance a success would have been very probable. (Id.)

For many forms of competition, commitment to enter the competition, along with a commitment of entry fees, must be made two or more weeks in advance of the competition. (Coves Aff. ¶24, R. p.___.) For many forms of competition, a month or more of training of the horse is required. (Id.)

Shortly after finding Ibañez's note that he was breaking his employment agreement with Coves Darden, Coves Darden discovered that Ibañez had been registered to ride and show a horse for Derr and her stable, Defendant Half Moon Stables, in a shortly upcoming competition. (Id.)

Not known to Coves Darden until later, Derr and Half Moon promised Ibañez an employment arrangement at Half Moon, whereby, in addition to his direct pay from Half Moon, Ibañez could pursue side money from side jobs in his own right. (Coves Aff. ¶37, R. p. ___; Stanton Discovery Status Aff., ¶¶ 11 and 18, R. pp. _____.) Under the arrangement, Half Moon would facilitate these other endeavors of Ibañez in violation of U.S. immigration and nationality laws. (Id., and see Liberatore Aff., ¶¶4, 8, 11, 12, 14, and 16, R. pp.___(working for self is absolutely prohibited under the law).) Also not known precisely to Coves Darden until later, Derr and her husband had begun, at least as early as June 1, 2012, efforts to modify Ibañez's O-1 visa to substitute Half Moon as the exclusive employer of Ibañez. (Coves Aff. ¶54, R. p.___; Stanton Disc. Stat. Aff., ¶¶ 8, 9, and 10, R. pp. ____).) Not known precisely to Coves Darden until later in the litigation, Derr had registered Ibañez on June 2, 2012, while Ibañez was still employed by Coves Darden, to ride for Half Moon in an event to be held about 21 days later. (Stanton Disc. Stat. Aff., ¶¶ 2-6, R. pp. ____.) The materials revealing these matters were not produced by the defendants in response to an order compelling certain discovery and were at odds with Derr's deposition testimony. (Id.) These materials also contradicted Derr's affirmative

assertion in her answer to the complaint.

ARGUMENT

I. The Circuit Court did not apply the correct standard of decision in deciding the summary judgment motion; the Circuit Court is not free to disregard contradictory evidence, an early unsworn interrogatory response is not a judicial admission that conclusively establishes a matter, and an early unsworn interrogatory response is also not an affidavit which renders a subsequent affidavit a "sham." (Issues 1 and 2)

The Circuit Court erred in both stating and applying the standard by which to decide summary judgment. The Court erroneously held that that the court was "free to disregard" certain evidentiary materials of record in determining whether there was a genuine dispute of facts material to the motion.

In its order at 2 and 3, under a heading, "Undisputed Facts and Party Admissions," the court used and relied upon, but did not explain what it meant by, the term "judicial admission." Here, the court did not actually confine itself to facts which were undisputed, as required in determining a summary judgment motion.[2]

Rather, the court designated certain statements by a party to be "admissions," and then treated them as conclusively established, despite the presence of other material in the record throwing light on those statements, or contradicting the court's interpretation of them.

In a similar vein, but referencing distinctly different concepts, in its order at 4, the court misstated the "legal standard for summary judgment." Here, the court incorrectly stated and applied the holding of Coffey v. Jenkins, 117 S.C. 321, 109 S.E. 117 (1920), and the much later holding of Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004). The court accordingly proceeded to "freely disregard" any affidavits perceived by the court to be "conflicting" with

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[2]The correct standard is stated under "Scope and Standard of Review," above, and incorporated in this argument.

other evidentiary matter adduced by the same party -- and even disregard the sworn testimony of the opposing party. (Cf. Order at 4, R. p.___ (stating the court is "free" to ignore contradictory affidavits, citing 1920 case involving judicial estoppel when formal stipulation to testimony is given in order to avoid continuance).)

Under the foregoing predominant errors, the court was erroneously constrained in its analysis of whether there was a contract. Using the foregoing erroneous standard of decision, the court determined that there was no contract, basing its decision largely upon an early unsworn interrogatory response by Plaintiff to the effect that the contract at issue was written. Other materials indicated that the parties also had an oral contract, even if agreement to the written contract was denied.

The court interpreted the interrogatory response to state that the parties had never entered into an oral contract, not even prior to the written document the response referred to. This interpretation of the interrogatory response was contradicted by Defendant Ibañez's own deposition testimony and by the Affidavit of Miguel Coves. Further, counsel for Plaintiff explained the interrogatory answer and the interrogatory answer was amended.

No leave to amend an interrogatory answer is required.[3]

Yet the court treated the early interrogatory response as immutable, and referred to the court's interpretation of the response as a binding "judicial admission." Accordingly, the court ignored other material in the record and recited the interrogatory response as an established fact, for the purpose of granting summary judgment. (E.g., Order at 2, ¶6, R. p.___ ("Plaintiff has judicially admitted"), 3, ¶6 (Plaintiff "has not moved to withdraw the foregoing statement" and it "remains" a matter "of record" in the case) and 5 ("Plaintiff judicially admitted").) The Circuit

[3]In fact, amendment is sometimes required by Rule 26, SCRCP.

Court erroneously applied the term "judicial admission" and failed to look at the abundance of evidence establishing that the parties had a contract, be it one sort or another.

In the early interrogatory answer, Plaintiff forthrightly attempted to clarify that there was a written document in which the parties did write up some of the common terms of their contract to support the application made to immigration authorities, and that the contract was, thus, not just an "oral" contract. The early response stated that the agreement was "not oral. It was a written contract...." This response did not state that if Ibañez denied the existence of a written contract, there was no oral one. (See Transcript of March 5, 2013 proceedings, p. 8, L9 to p. 9, L10 ("if there is no written contract, there is a verbal contract where the parties fully understood the basis on which this man was going to work for them and even if one determined that the contract was an at-will relationship, the black letter law of South Carolina is that employment at-will is ... contractual").)

In the materials submitted by the defendants from time to time in support of their evolving summary judgment motion, Defendants never adduced a denial by Ibañez that he had entered into a contract of employment with Coves Darden.

The Circuit Court nevertheless misapprehended and misapplied, without citation of authority, the concept of a "judicial admission" to constrict the portions of the record the court considered in deciding to grant summary judgment. This amounted to the court deciding issues of fact, which is not allowed in ruling on summary judgment. The order employs this "judicial admission" device to deny the existence of any oral contract at all, and focus only on whether a written contract existed.

There was evidence of a written contract. There was also abundant evidence of an earlier oral contract. As discussed further below, the oral contract was also clearly not within the statute

of frauds.

An early interrogatory response in a case is sometimes admissible, but contrary to the court's holding, does not permanently bind a party to an application of the response in a manner which avoids the actual facts of the case for purposes of granting summary judgment.

The court itself states in its Order at 1, that the suit by Plaintiff is "for the alleged breach of an oral contract of employment." The court then misapprehends and misapplies caselaw pertaining to in-court stipulations, judicial estoppel, and sham affidavits submitted in contradiction of prior sworn affidavits, none of which are present here. As a result, the court granted summary judgment in contradiction of the facts and justice of the case.

Under the South Carolina Rules of Civil Procedure, specifically Rules 33 and 36(b), responses to interrogatories are distinguished from responses to requests for admissions. A written statement during discovery in response to an interrogatory is not conclusively established in the manner of an admission in response to a request to admit. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991); Wright v. Hiester Const. Co., Inc., 389 S.C. 504, 519, 698 S.E.2d 822, 830 (Ct. App. 2010).

In Wright, Hiester contracted with the Wrights to build a house for them. Hiester began building the home and hired D & O as a subcontractor to stain some woodwork in the house. After the D & O workers had spent several days in the house staining wood, a fire erupted, destroying the house.

In the suit, the Wrights contended that Hiester should have been found liable as a matter of law because of "admissions" by Steve Hiester, the president of Hiester, to the effect that D & O caused the fire, written "admissions" by Hiester Construction during discovery that the fire was caused by Hiester's subcontractors' leaving a box of oily rags in one of the rooms, and

provisions in the contract suggesting that Hiester was to be responsible for the acts of its subcontractors. Id., 389 S.C. at 518, 698 S.E.2d at 829.

The Court of Appeals observed, "The written admission during discovery was in response to interrogatories, rather than a request to admit." Id. at 519, 698 S.E. 2d. 830. Distinguishing interrogatory responses from admissions which conclusively establish a fact, the Court of Appeals affirmed the opinion of the lower court, stating that, as opposed to requests to admit, interrogatories are construed "as seeking current information as of the time the question is asked and answered." Id. The Court of Appeals also separately considered Heister's deposition testimony, which the opposing party also characterized as "admissions." The court held the testimony not to bind Heister to the point of excluding contrary facts, opinions, and inferences not in accord with the true facts. Id.

Under Rule 36 of the South Carolina Rules of Civil Procedure (pertaining to requests for admissions), any matter admitted under the rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Wright clearly distinguishes Rule 36, pertaining to the requests for admissions, from Rule 33, pertaining to interrogatories.

Some confusion can arise from multiple usages and meanings of the term "admission." A statement in an interrogatory response is a statement of a party, and thus is an "admission of a party" under Rule 801(d)(2), S.C.R.Evid., and thus is not hearsay, and is therefore not excluded from admissibility under the hearsay rule.

This sort of "judicial admission" is a statement which is attributable to a party, and which is, accordingly, nonhearsay for purposes of potential admissibility in evidence. However, this sort of "judicial admission" is not a statement that the party is bound to in the sense of conclusively establishing the matter.

In the sense that statements of a party in the course of litigation are "judicial admissions," they are not, qua statement, binding stipulations unless specified as such or unless declared to be so by specific rule. Judicial admissions of this sort are generally regarded as simply evidence which can be "used" in a second trial. Alex Sanders, Deborah Neese, and John S. Nichols, South Carolina Trial Handbook for South Carolina Lawyers §10:23 (p.10-19)(Law Co-op. 1996)("They are generally regarded as evidence of an admitted fact, so counsel should be careful in relying on them as excusing the need for other proof in the second trial").

Few statements of a party, even when unambiguous, are regarded as binding, unamendable, or irretractable, or as foreclosing introduction of other evidence. Even Rule 36(b), SCRCP, which relates to actual "rule" "admissions" made in response to a formal "request for admissions," allows a party to withdraw or amend a response under certain circumstances.

Thus, a party is not immutably bound to an adverse characterization of an early unsworn interrogatory answer which is not only readily susceptible to a very different meaning, but contrary to the other papers and evidence, including facts known to and admitted by the other party. The Circuit Court erred in holding to the contrary. The Circuit Court erred in using the early unsworn interrogatory response to conclusively establish that there was never any oral contract.

An additional dimension of this error was the court's ruling seeming to imply that Ibañez's deposition testimony should be disregarded because it was tantamount to a "sham affidavit," because it contradicted the early unsworn interrogatory response of Coves Darden. The interrogatory response that the court relied on was given in response to a set of interrogatories in which opposing counsel for the defendants had noticeably failed to inquire about the written agreement, and referred only to an oral agreement. The meaning of the

interrogatory response – clarifying that there was a written document – was later further clarified in later discovery and filings, including an amended interrogatory response.

The Circuit Court nevertheless ruled as if there were "sham affidavits" submitted in this case, contradicting some prior affidavit of the same party. The statement that the court relied on was in an early interrogatory response and not a sworn affidavit.

Even if a party says something in an actual affidavit and later contradicts it, the first statement is not necessarily regarded as a conclusively established fact for purposes of summary judgment. South Carolina law distinguishes between a "sham affidavit" and a correcting or clarifying affidavit. For guidance, a court first must look at whether an explanation is offered for the statements that contradict prior sworn statements. Cothran v. Brown, 357 S.C. 210, 218-19, 592 S.E.2d 629, 633 (2004). Here, the initial interrogatory response was not sworn, it was not an affidavit, and an explanation was offered -- that the interrogatory response was not intended to deny there had been an oral contract, and was intended to convey that Plaintiff thought Ibañez acceded to the later written contract.

Next, the court will look at how important the contradiction of fact is to the litigation. Id. Here, there was no contradiction, the facts were already within the knowledge of the defendants, and the fact of a prior oral contract was important.

The court must also look at the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact. Id. Here, the only sworn testimony on the subject was in the deposition of Ibañez and the affidavit of Coves. They are consistent on the issue of the oral contract. They are also consistent with the explanation offered for the initial unsworn interrogatory response.

The court may also consider when, in relation to summary judgment, the second affidavit is submitted. Id.; see also Pittman v. Atlantic Realty Co., 359 Md. 513, 535, 754 A.2d 1030, 1042 (2000)(An affidavit may only be disregarded as a sham when a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact.)

Here, there is no issue of a second "affidavit." There is an early unsworn interrogatory response. The record then shows the filing of a summary judgment motion with no stated grounds, and an objection by defendants to any further discovery. The record then shows deposition testimony supporting an oral contract, a sworn affidavit supporting an oral contract, and an amended interrogatory response supporting an oral contract.

In the instant case, abundant evidence of the existence of a detailed oral contract was already in the defendants' possession when they received the first interrogatory answer, and extensive evidence of the existence of the oral contract was in Defendant Ibañez's own sworn deposition testimony, obtained after the interrogatory response was given, after Ibañez was finally ordered by the court to appear for deposition. The rule allowing a court to disregard a second, competing, affidavit, is an exception to a general prohibition against a judge excluding a contradictory affidavit from consideration and is used only when the affidavit is an attempt to create a sham issue of material fact. Cothran.

It is clear Coves Darden had no intent to create a sham issue and the Circuit Court made no such finding. Indeed, it would be nearly impossible for a party to obtain summary judgment based on the assertion that his own deposition testimony was the sham. Throughout the proceedings, Coves Darden consistently made it clear that there was an oral contract preceding the written document and that the statement in the early interrogatory was not comprehensive and

was misused, if not misinterpreted and misapprehended. The court misapplied the sham affidavit rule, and should be reversed.

II. There was abundant material in the record creating at least a genuine dispute of material fact as to whether the parties had a written contract, and as to whether the parties had an oral contract of specified duration, not within the statute of frauds; if the parties proceeded with no specific duration term at all, they still would have had an at-will employment contract. (Issues 1, 3, 4, 5, and 6)

The extraordinary ruling of dismissing the entire lawsuit thus required a series of steps. The Circuit Judge first erroneously held there was no written contract because Ibañez allegedly had not "signed" one. Then, in further error, the Circuit Judge largely disregarded any evidence of a detailed oral contract, and the complete lack of an affidavit from Ibañez concerning the issue. The Circuit Judge then summarily characterized the relationship as "at-will employment." This then brought the court to erroneously characterize at-will employment as the absence of a contract. The court's factual finding that there could be no contract of any sort, then formed the basis, or part of the basis, for dismissing every count in the complaint.

There was a contract. It was therefore error to grant any aspect of summary judgment which depended on there being an absence of a contractual relationship. The Circuit Court erred when the court based the court's decision to grant summary judgment on the perception that there was "contradiction" in the record as to whether the contract was oral or written. (E.g., Order at 5, R.p. ____.) If there was contradiction, it is contradiction – requiring the resolution of factual issues – which generally requires the denial, rather than the granting, of summary judgment.

In its order at 5-6, the Circuit Court erroneously presented its decision as involving only two alternatives, both of which were incorrectly analyzed. On the one hand, the court held that the early unsworn interrogatory response and a written response to a request for production forced a conclusion that there was neither an oral contract, nor a written one. (Order at 5, R.p.

_____.) This was error because the response and the rest of the record forced neither conclusion. On the other hand, the court held that if "judicial admissions" did not foreclose evidence of an oral contract (such as Ibañez's own deposition testimony), an oral contract was impossible because of the statute of frauds. (Order at 5-6, R.pp. _____.) This was error because the oral contract of the parties was not impossible to be performed within one year. The court further erred in determining that in the event the parties had only an employment-at-will contract, the parties had no contract which would sustain an action for breach of contract. (Cf. Order at 6, R.p. ____ (ruling that termination of an at-will contract does not support an action for breach of contract, but wholly failing to consider other actions which may be a breach, such as lying, stealing, working against the employer while on the payroll, damaging the employer's goods, carelessly handling the employer's business, failing to do work already paid for, etc.).)

Summary judgment was required to be denied, because there was no showing by the defendants sufficient to negate any of the following:

1. A written contract, explained to, acknowledged by, and relied upon by Ibañez, regardless of whether he did or did not sign it;
2. A preceding, detailed oral contract including an understanding of exclusive employment, and a duration equal to the length of validity of the visa to be issued, up to the length of Ibañez's leave of absence, and extendable by the parties subject to support with a visa; and
3. A less specific employment-at-will contract.

General contract law provides that a contract exists when there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act. Prescott v. Farmer's Telephone Co-Op, Inc., 335 S.C. 330, 516 S.E.2d 923 (1999). A contract

may arise from oral or written words or by conduct. Id. In the employment context, a contract altering an at-will arrangement may arise, in part, from the oral statement of the employer. Id. The at-will status of an employee may be altered by an oral contract of definite employment. Id.

The required elements of a contract are an offer, acceptance, and valuable consideration. Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005). A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. Id. Valuable consideration may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Id. A benefit to the promisor or a detriment to the promisee may provide sufficient consideration for a contract. Id. All the elements of a contract were in the record.

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Prescott. The offer identifies the bargained for exchange and creates a power of acceptance in the offeree. Id. Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act amounts to an offer. Id. To be binding, an offer must be definite. In addition, it must be one which is intended of itself to create legal relations on acceptance. Id. Ibañez testified in his deposition that the terms of the offer were communicated to him in detail on his December, 2010 trip, that he continued to think about the offer, that he brought his wife back in January, 2011 to continue considering the offer, that he posited no change in the terms and did not need any additional terms, and that he accepted the offer on the January, 2011 trip.

The Circuit Court therefore erred when it granted summary judgment on the contract count against Ibañez based on a conclusion that there was no contract between Coves Darden and Ibañez. There was far more than the required "scintilla" of evidence of a written contract. Even in the absence of a written contract, there was ample evidence of an oral contract with specific terms as to exclusivity and duration. Absent such an oral contract, there would still have necessarily have been an employment-at-will contract, as it is indisputable that Ibañez actually began working for Coves Darden onsite for pay in February, 2012.

As discussed further hereinbelow, the court did not fully consider the issue of whether there was a contract because the court erroneously perceived the absence of a signature to conclusively vitiate the existence of a written contract. As discussed hereinabove, the court erroneously perceived one early interrogatory answer as limiting the development of the facts of the case, as to the earlier oral contract of the parties.

There was evidence in the record that the parties reached an oral agreement on the material terms of an employment contract, and that later, a modified version of that agreement was reduced to writing. The abbreviated and modified version of the oral contract was written out and signed by Coves Darden. A copy was also discussed with Ibañez over the phone and sent to the office that granted the visa to allow Ibañez to come to the Unites States for employment exclusively with Coves Darden pursuant to that written agreement. Ibañez relied on the terms of the written contract when he got his visa and came to the United States and worked for Coves Darden. He relied on the approximately $96,000 a year in pay specified in the contract.

There is thus evidence that the terms of a contract were written down, and discussed with Ibañez as being in written form. There is evidence that Ibañez was told the contract would be in

his file at his visa interview. There is evidence that the written contract was available to Ibañez upon his request once he arrived in the U.S. to commence his work.

A written contract does not have to be signed to be a contract. The absence of the signature of one party to a written agreement does not necessarily negate the fact that there is a written contract. Peddler, Inc. v. Rikard, 266 S.C. 28, 221 S.E.2d 115 (1975); Gladden v. Keistler, 141 S.C. 524, 140 S.E. 161 (1927); Jaffe v. Gibbons, 290 S.C. 468, 351 S.E.2d 343 (Ct. App. 1986). It was therefore error to grant summary judgment on the existence of a written contract.

Even if the written contract were not valid, a contract generally need not be in writing to be enforceable. Armstrong. If there is a meeting of the minds with regard to the essential elements of a contract, it is immaterial whether the contract is written or oral. Id. Contracts "within" the statute of frauds must be in writing to be enforceable, unless subject to an exception.

The only statute of frauds which might apply to an employment relationship is the prohibition on contracts which, by their terms, are impossible to be performed within one year. The statute of frauds would require that any such contract be in writing and be signed by the person to be charged. Weber v. Perry, 201 S.C. 8, 9, 21 S.E. 2d 193, 194 (1942) (oral contract of employment for fixed period longer than one year, or so long as other condition remains in place, not exceeding the fixed period, is not within the statute); McGehee v. South Carolina Power Co., 187 S.C. 79, 196 S.E. 538 (1938) (reviewing employment cases in which contingencies, including death or unsatisfactory performance, remove contracts – even for permanent employment – from the statute of frauds; Center State Farms v. Campbell Soup Company, 58 F.3d 1030 (4th Cir. 1995) (applying S.C. law).

This statute of frauds does not apply.

There is evidence that it was not impossible that the contract in question could be performed within one year.

The clear understanding was that the good faith effort of the parties would be to continue the relationship for at least two years, the expected length of Ibañez's leave of absence from his employer in Spain. This understanding was bolstered, corroborated, and protected by the fact that the O-1 visa was expected to be as long as three years, that the visa would basically allow Ibañez to work only for Coves Darden, and that when the relationship was over, Ibañez would be legally required to leave the country.

The parties reached their agreement in advance of Ibañez being issued a visa. Although the parties were in agreement on the length of the employment as supported by a visa, they were equally clear in agreeing that the actual length of employment would be determined by, and last for, the length of the visa, even if this length was less than one year. The petition for the visa was actually required to affirm this fact. This definition of the duration was satisfactory to Ibañez, as evidenced by the fact that he went right out and obtained his leave of absence from his employer in Spain before the visa could be applied for, and then required Coves Darden to support him in Spain while the application for the visa was pending. (See Coves Aff. ¶¶ 8-10, R. pp. ___.) The parties specifically contemplated and agreed for the employment to be for a minimum of the length of the visa, up to the length of Ibañez's expected two year leave of absence from his employer. (See Coves Aff., ¶ 6, R. p. ____, and Pl. Supp. Resp. To Int., R.p. ____.) The oral contract of the parties, which was reached in advance of getting the visa, was therefore not "within" the statute of frauds, and it was error to grant summary judgment on the absence of an oral contract.

Even if the agreement were "within" the statute of frauds, exceptions to the statute apply in various instances, and it could not be said that facts in the record foreclose the application of an exception to the late-pled defense. One exception, most frequently occurring in instances relating to oral sales of land and oral leases, is that the statute of frauds would not apply in instances in which there is an existing written memorandum of the agreement, and there is at least part-performance and reliance by one of the parties. See, e.g., Scurry v. Edwards, 232 S.C. 53, 100 S.E.2d 812 (1957). Clearly, there is both a written memorandum of the terms of the agreement, and heavy performance and reliance by Coves Darden, along with performance by Ibañez consistent with an affirmance of the agreement. That is, the visa application papers explain the agreement of the parties, and the parties proceeded with the employment.

Even in instances of employment of unspecified duration, which are therefore not "within" the statute of frauds, but which also ordinarily do not have a term as to length which can be enforced, South Carolina courts will, in a proper case, imply a term of reasonable duration sufficient for the nonterminating party to recover its investment or consideration. This occurs when there is independent consideration given in return for the establishment of the employment agreement. Weber; Center State Farms. In such a case, although usually for the benefit of the employee, the independent consideration converts a terminable at will contract to one for a reasonable period of time to enable the party making the investment to recoup the investment. Id.

As discussed further below, even if the parties had entered into an at-will employment arrangement of completely unspecified duration, they still would have had an at-will contract.

For the foregoing reasons, it was error to grant summary judgment on the absence of a contract between Coves Darden and Ibañez.

III. An employee is, by definition, an agent, and an agent, by definition, is a fiduciary. Ibañez was also a highly trained person of international renown and an important and trusted employee for Coves Darden, and he was a significant investment and worked at a high level where he owed fiduciary duties. Even if he had been an employee at will, an employee at-will still is in a contractual relationship with duties owed by both parties. An action lies for breaching duties in an employment-at-will relationship. (Issues 6 and 7)

Even if there had been no written contact and no oral contract with specific terms as to duration or termination, the Circuit Court further erred in dismissing the count against Ibañez for breach of fiduciary duties. The court further erred in this respect because the court confused an at-will employment contract with the absence of a contract. The Circuit Court held that because there was no detailed oral contract or written contract, the parties only had a relationship of employment at will and had no contract. (Order at 6, R. p. ___ (clarifying that court's ruling is as to "existence" of any sort of contract, and not as to existence or nonexistence of any particular term).) That is, the Circuit Court confused an at-will employment contract with the absence of any contact at all.

Employment at will is a contract. An at-will employment contract is still a contract; it is simply a contract in which one party agrees to work, in return for which the other party agrees to pay, and in which one of the terms is that the period of employment is terminable at will. Jones v. General Elec. Co., 331 S.C. 351, 503 S.E.2d 173 (Ct. App. 1998). If one party does terminate the relationship, the termination itself is generally not a breach and is not actionable. This does not mean there are no other terms susceptible to breach. The agreement is still contractual. Hudson v. Zenith Engraving Co., 273 S.C. 766, 259 S.E.2d 812 (1979).

In South Carolina, an "at-will" employment relationship is not the absence of a contract; it is the presence of a contract, one term of which is that the contract may be terminated at will.

Prescott v. Farmer's Telephone Co-Op, Inc., 335 S.C. 330, 516 S.E.2d 923 (1999). The relationship is contractual. Id.

Therefore, where the Circuit Court ruled Ibañez could not owe fiduciary duties to Coves Darden because Ibañez had no contract with Coves Darden (e.g., Order at 7, R.p. ___), the Circuit Court additionally erred. This error also misdirected the Circuit Court's ruling on counts against the other defendants, as discussed further in the separate arguments hereinbelow.

Aside from the Circuit Court's error regarding the contractual nature of Ibañez's employment, whether Ibañez was an employee for a term, or an employee-at-will, he still owed fiduciary duties to Coves Darden. It was therefore additional reversible error to grant summary judgment on the breach-of-fiduciary-duties count, regardless of the disposition of the breach-of-contract count.

Ibañez was not an ordinary employee. He was a highly trained expert equestrian trainer, and was hired to provide expert instruction and consultancy services in the equestrian arts. There was a great deal of trust and confidence reposed in Ibañez by Coves Darden when they agreed to pursue a complicated program to hire him, have him work where they lived, have him deal with rare horses, and have him identified with their brand. Ibañez was highly paid and heavily advertised by Coves Darden and his employment was a large investment for Coves Darden.

The Circuit Court based its ruling on lack of fiduciary duties in part on "the absence of a contract of employment." (Order at 7, R.p. ____.) The error of this basis is demonstrated in the discussion above. The court was further "persuaded" of the existence of what the court referred to as a "non-fiduciary employee." (Order at 7, R.p. ____.) According th the Circuit Court, these are "non-contractual" employees who are not "upper level managerial employees." (Id.) The

Circuit Court characterized Ibañez as a "non-managerial non-fiduciary employee," and on this basis, erroneously concluded Ibañez could not be found by a jury to owe fiduciary duties. (Id.)

It is undisputed that Ibañez became an employee of Coves Darden. In South Carolina, an employee per se owes fiduciary duties to an employer. The court's ruling to the contrary is erroneous. An employee, by definition, is an agent. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999); Restatement (Third) of Agency § 1.01 (2006); id., Official Comment G; and see id. § 7.07(3)(a)("an employee is an agent who ....").

An agent, under black-letter law, owes fiduciary duties to his principal. See, e.g., Restatement (Third) of Agency § 8.01 (2006)(stating the general fiduciary principle of loyalty before other sections on other duties). Even in a hypothetical, bare-bones "at-will" employment relationship, Ibañez owed to Coves Darden, fiduciary duties of loyalty and information. Restatement (Third) of Agency § 1.01 (2006).

It was therefore error for the Circuit Court to determine that only "managerial" employees owe fiduciary duties to their employers.

The Circuit Court supported its ruling only with a tautology derived from North Carolina caselaw, holding that, absent a fiduciary relationship, an at-will employee does not owe a duty of loyalty supporting an action in tort. The court's reasoning was to the effect that, absent a fiduciary relationship, a relationship is not fiduciary. Additionally, the Circuit Court remarked that the "law in other jurisdictions is in accord," but cited only California cases relating to the availability or tort remedies in contract cases, some having nothing to do with employment.

Agency is defined as a fiduciary relationship, and other relationships are traditionally recognized as imposing fiduciary duties. Even in the absence of these relationships, a fiduciary relationship can arise from other special circumstances, and it was additional error to rule, on

summary judgment, that no evidence existed from which to find such a special relationship.

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. Armstrong v. Collins, 366 S.C. 204, 621 S.E. 2d 368 (Ct. App. 2005); Moore v. Moore, 360 S.C. 241, 250-51, 599 S.E.2d 467, 472 (Ct. App. 2004); Ellis v. Davidson, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004); Regions Bank v. Schmauch, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 476, 581 S.E.2d 496, 505 (Ct. App. 2003); Island Car Wash v. Norris, 292 S.C. 595, 599, 358 S.E. 2d 150, 152 (Ct. App. 1987).

A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence. Moore v. Moore, 360 S.C. at 250-51, 599 S.E.2d at 472; Hendricks v. Clemson Univ., 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003); O'Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); 251 SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 794 (1990); Regions Bank, 354 S.C. at 670, 582 S.E.2d at 444; Steele v. Victory Sav. Bank, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988).

A relationship must be more than casual to equal a fiduciary relationship. Ellis, 358 S.C. at 519, 595 S.E.2d at 822; Regions Bank, 354 S.C. at 670, 582 S.E.2d at 444; Steele, 295 S.C. at 293, 368 S.E.2d at 93. It cannot be gainsaid that this was not a casual relationship.

As courts in Texas have similarly recognized, "certain relationships give rise to a 'fiduciary' duty as a matter of law." Crim Truck and Tractor v. Navistar Intern., 823 S.W. 2d 591 at 593 (Tex. 1992). Among these traditional formal legal relationships is that of principal and agent. Id.

Texas has also recognized that certain informal relationships may constitute confidential relationships that give rise to fiduciary duties, where one person comes to trust in and rely upon another, "whether the relation is a moral, social, domestic or merely personal one." Id. at 594. Generally, whether a confidential relationship gives rise to fiduciary duties is a question of fact for a jury, though it can be a question of law where no evidence exists to support a fiduciary relationship. Id. at 593 (distributor of heavy equipment not in fiduciary relationship with manufacturer). In general, once a fiduciary relationship has been established, the plaintiff may request a jury instruction that the nature of the relationship imposes a "duty to act with the highest degree of loyalty, trust and allegiance." FDIC v. Wheat, 970 F. 2d 124, 130 (5th Cir. 1992).

Ibañez was a very high level employee at Coves Darden. Coves Darden went to Spain to seek his expertise in his field. Ibañez and his family were guests in Mr. Coves and Ms. Darden's residence for extended visits preliminary to Ibañez's arrival for the consummation of the employment contract. Coves Darden introduced Ibañez to Coves Darden's friend and supplier in Spain, and arranged for accommodations for Ibañez there, and paid Ibañez for work in Spain. Coves Darden paid for all expenses to have Ibañez come work for Coves Darden Farm and went through the entire process of getting a visa for Ibañez to be able to work in the United States. Ibañez was bound to act in good faith and with due regard to the interests of Coves Darden who reposed confidence in Ibañez.

The relationship between Ibañez and Coves Darden was thus far from casual or lower echelon. This is all in addition to the fact that, contrary to the court's finding, Ibañez did have a contract with Coves Darden. It was a carefully planned and expensive process to bring Ibañez to the U.S. to work and necessarily required a high degree of trust. Ibañez abused that trust when he

secretly worked for Derr, neglected his work at Coves Darden, lied to Coves Darden, calculated his departure in a manner calculated to harm Coves Darden, and competed with Coves Darden.

Regardless of contract, the employment relationship is one of principal and agent, and includes fiduciary duties of the employee to the employer. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999). Even where the employment relationship is at-will, an action may be maintained for breach of the fiduciary duties inherent in that at-will employment relationship. Id.

It was error to hold that there is such thing as a "nonfiduciary employee," and it was error to hold that there were no issues of fact precluding a determination that Ibañez was a "non-fiduciary employee." The Circuit Court accordingly should be reversed.

IV. Secretly using the services of another's highly responsible employee in directly competing activities, encouraging the employee's violation of an agreement for exclusivity, and inducing the employee to quit by facilitating a violation of U.S. immigration laws will support a cause of action for tortious interference with contract; it was error for the Circuit Court to rule that there was no contract to support a cause of action, that there was no inducement, and that such activities are justified as fair competition. (Issue 8, 9, and 10)

The Circuit Court also erred in granting summary judgment on the count for tortious interference with contract. The court held that there was no contract. (Order at 9, R.p. _____). The court held that Derr did not procure the breach. (Id.) The court also held that there was a "qualified privilege" to interfere with the contract of an "at-will" employee. (Order at 10, R. p. ____.)

Under South Carolina law, a viable claim for tortious interference with contractual relations requires proof of (1) the existence of a contract, (2) the alleged wrongdoer's knowledge of the contract, (3) an intentional and unjustified interference resulting in a breach of the contract, and (4) damages. Eldeco, Inc. v. Charleston County Sch. Dist., 372 S.C. 470, 642 S.E.2d 726,

731 (2007); Camp v. Springs Mortgage Corp., 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993).

An action may be maintained for tortious interference with a contract terminable at will. Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc., 294 S.C. 169, 363 S.E.2d 390 (Ct.App. 1987); Todd v. South Carolina Farm Bureau Mutual Insurance Company, 283 S.C. 155, 321 S.E.2d 602 (Ct. App. 1984).

As already discussed above, the Circuit Court erred when it ruled that no contract existed between the parties. There clearly was a contract between Coves Darden and Ibañez, whether it was oral or written.[4] Ibañez coming to work for Coves Darden was greatly advertised. Ibañez was riding for Coves Darden when he met Derr of Half Moon Stables. Derr clearly knew his employment status with Coves Darden when she interfered with it. The law does not allow Derr to disaver knowledge that there was a contract by claiming not to know all its detailed terms; nor does the law allow Derr to disaver knowledge of a contract by cleverly ascertaining a basis on which Ibañez could claim never to have "signed" a contract. Bocook.

As the Court in Bocook stated:

> It is obvious Bocook had a contractual agreement **of some kind** with the various landowners because Bocook had constructed billboards on their properties. Summey was in the same business and **would know Bocook had an agreement** with the landowners. All Summey had to do was to see the billboards **to know or have reason to know of the existence of agreements.** It is true Summey probably **would not know the details** of the leases because they were oral.
>
> Unfortunately, the record does not contain much detail about the various leases and their terms. We do not know whether this is because no evidence was introduced or was introduced but the parties did not consider this information pertinent to the appeal. From what we do have, it appears most of the leases involved a payment by Bocook to the landowner with renewal accomplished by Bocook sending a check to the landowner.

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[4]Additionally, although, as already demonstrated above, the statute of frauds did not apply, the error of the Circuit Court in dismissing the tortious interference count is compounded by the fact that the statute of frauds is not an available defense for a third party to the contract, here, Derr and Half Moon. Bocook; Hatcher v. Harleysville Mut. Ins. Co., 266 S.C. 548, 225 S.E. 2d 181 (1976).

> James Bocook testified the leases ran until the landowner told him to remove the sign. In some situations, there was a thirty day notice period for the landlord to notify Bocook to remove the billboard. There is no information in the record as to what notice Bocook would give a landowner if it desired to remove the billboard for some reason. From the record, we construe these agreements to be contracts terminable at will. This Court previously held a contract terminable at will is a contract upon which an action for interference with contractual relations may be brought.

Bocook, 363 S.E.2d at 394 (emphases added).

Derr induced Ibañez to breach. Derr talked to Ibañez about coming to work for her when they were in direct competition. Derr hired Ibañez. Too shortly after, he was competing for Derr. Considering the time required for getting to know a horse and advance training for competitions, it is clear that Derr had Ibañez working for Derr, against the interest of Coves Darden, while Ibañez was still employed with Coves Darden. This created an issue of fact as to whether Derr, who worked in secret with Ibañez, who did not pay Coves Darden, who claims to be free to do what she did, and whose testimony has been shown to be incorrect, counseled and procured the breach. The Circuit Court erred.

When Ibañez left, he immediately went to Half Moon Stables. The process of hiring a non-American citizen takes time. Half Moon needed to modify Ibañez's visa before he could work for Half Moon. Derr and Half Moon would have to become familiar with the exclusive nature of that visa, and the papers submitted in support of it. Ibañez did not leave adequate notice of the termination of his employment and left at a time calculated to do damage, after lying by making forward-looking comments and promises. (Coves Aff. ¶54, R. p. ____.) Derr and Ibañez knew Ibañez would be breaching the contract Ibañez had with Coves Darden. The actions of Derr and Half Moon were more than a mere self-interested, unneighborly act. Ibañez had reassured Coves Darden that he would be competing for Coves Darden in an upcoming competition and that everything was ready. (Id.)

Justification for inducing a breach of contract may be viewed as an affirmative defense. Commerce Funding Corp. v. Worldwide Sec. Servs. Corp., 249 F.3d 204, 213 (4th Cir. 2001)(noting that under Virginia law, one must actually possess a financial interest in the business of a third person to justify interference with the business relationship of another and the third person, citing Restatement (Second) of Torts § 779); accord, Edelco (holding that where allegedly interfering party acted pursuant to its own absolute contractual rights under a contract already existing at the time of the alleged interference, any interference was with justification) and Southern Contracting, Inc. v. H.C. Brown Construction Company, Inc., 317 S.C. 95, ____, 450 S.E. 2d 602, 605 (Ct. App. 1994) (same – "it can be said a factual issue exists unless the actor is exercising an absolute right, equal or superior to the right invaded"). Thus, the Circuit Court erred in granting summary judgment on the justification element.

The Circuit Court addressed the defendants' justification defense in terms of a "qualified privilege" constructed from North Carolina caselaw and the law of other states. The fact remained, however, that as for being able to show any sort of justification, Defendants cannot do so. As they had no existing contractual relationship with Ibañez, they cannot show justification. Commerce Funding Corp. v. Worldwide Sec. Servs. Corp.

All the caselaw relied upon by the Circuit Court was conditioned on circumstances, not present here, in which the sole breach was the employee's merely leaving, in which the employee was presumably a U.S. worker whose pay and other working conditions are protected as against foreign workers by U.S. policy, in which the employee had no obligation to stay ("bound only by terminable at will contracts"), and the methods employed were not improper. (See Order at 10-11, R. pp. _____.) In other words, the justification constructed by the Circuit Court depended upon a fact-intensive situation involving "mere enticement" and hiring of an "at-will" U.S.

employee, in the absence of improper motive or methods. (See id.) None of this varied caselaw involved a special employment arrangement for a defined period, lying to the first employer and working for the competing employer while still employed by the first employer.

When the contract in question is "at-will," it is sufficient that there only be a reasonable expectation that, but for the interference, the contract would have continued. Santoro v. Schulthess, 384 S.C. 250, 681 S.E.2d 897 (Ct. App. 2009). The following, among other things, provided such a reasonable expectation: Ibañez had obtained a two year leave of absence, packed up his house and family, got a visa under an understanding he was going to work for Coves Darden for two years, moved to the U.S. from Spain, began a $96,000 a year job doing what he knew how to do, occupied a house owned by Coves Darden, drove a car owned by Coves Darden, had a family dog provided by Coves Darden, agreed not to work for anyone else, and had a visa only to work for Coves Darden.

Because, as discussed above, there was a contract, it was error for the Circuit Court to dismiss the tortious interference count of the complaint. This is so, even if the contract had been terminable at will. Bocook. It was also error to determine as a matter of law that Derr did not interfere, and that she was justified.

Even in the absence of a binding contract and in the absence of an at-will employment relationship, an action may also be maintained in South Carolina for intentional interference with prospective contractual relations. Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 395 S.E.2d 179 (1990).

The elements of such a cause of action are: (1) the intentional interference with the plaintiff's potential contractual relations; (2) for an improper purpose or by improper methods; and (3) causing injury to the plaintiff. Love v. Gamble, 316 S.C. 203, 214, 448 S.E.2d 876, 882

(Ct. App. 1994). As an alternative to establishing an improper purpose, the plaintiff may prove the defendant's method of interference was improper under the circumstances. Crandall, 302 S.C. at 266, 395 S.E.2d at 180.

In the instant case, Ibañez and Coves Darden did have a contractual relationship, so the "prospective advantage" prong of analysis is not needed. However, it should be noted that "[i]mproper methods," under Virginia law, "include a wide variety of conduct," including "[m]eans that are illegal or independently tortious, such as violations of statutes, regulations, or recognized common-law rules." Commerce Funding Corp. v. Worldwide Sec. Servs. Corp.; see also Skillstorm, Inc. v. Electronic Data Sys., LLC, 2009 WL 3316358, at *4 (E.D. Va. Oct. 9, 2009) (quoting Duggin v. Adams, 360 S.E.2d 832, 836 (Va. 1987)). In the instant case, it appears Derr was aided in her interference by violation of immigration laws, among other things.

Determining whether a defendant's methods are improper and whether a plaintiff has demonstrated the elements of tortious interference is ordinarily a matter for the jury and should not be decided in the context of either a motion to dismiss or a motion for summary judgment. Commerce Funding Corp. v. Worldwide Sec. Servs. Corp. (reversing summary judgment grant on the grounds that reasonable jury could find that elements of tortious interference have been met).

In its order, the Circuit Court does not present nor discuss a single alleged fact having a bearing on the "improper methods" element. It must be assumed the court found the actions of Derr in interfering with the Coves Darden contract were not improper, based solely on the erroneous determination that Coves Darden had no contract with Ibañez..

It should be reiterated that improper method of interference is not an element of tortious interference with an existing contract. In the instant case, there was an existing contractual relationship. Bocook; Camp.

However, as for additional impropriety which would supply a cause of action even if, as in the erroneous finding of the Circuit Court, Ibañez had never entered a contractual relationship with Coves Darden, Coves Darden offers the following.

The visa obtained for Ibañez allowed him only to work for Coves Darden. The O-1 visa, as Derr now well knew after having actually applied for one through a reputable Miami immigration lawyer, requires that the nonimmigrant work only for the permitted employer and not work gainfully any other way – even for himself as an entrepreneur. When the employment ends, he has to leave the country. One of the concerns of the United States immigration and labor laws regarding temporary visas tied to specific employers is that the nonimmigrant do the sort of work that was the basis for the visa, and work gainfully only for the permitted employer.

Accordingly, the immigration laws are very specific that the alien work gainfully and stay in the U.S. only within the parameters of the visa he receives. He cannot simply rely on a visa to get into the country and then set up his own shop, change jobs or type of work, or take on additional jobs.

In the instant case, the means of interference were clearly improper in that Defendants Half Moon and Derr appear to have persuaded Ibañez himself to break the United States immigration laws in order to induce him to work for less than Coves Darden was paying. This would make it difficult for Coves Darden to compete with Half Moon without breaking the law. In order to induce Ibañez with enough financial and personal incentive for it to be feasible for Ibañez to leave Coves Darden, Half Moon entered into an illegal agreement with Ibañez to

facilitate his violation of U.S. immigration laws by allowing him to freelance. This appears in part from the deposition of Derr and from the express terms of the written contract Half Moon eventually entered with Ibañez. This cooperation allowed Half Moon to steal Ibañez from Coves Darden and appropriate the fruit of what Coves Darden worked long and spent much money on.

In their brief of February 28, 2013 at 11 (R. p. ___), the defendants argued that Ibañez's employment was at-will and that the status allowed him to work gainfully for them after hours, while he was employed by Coves Darden. Id. ("simply holding two jobs is not a breach"; "there was nothing under South Carolina law prohibiting Mr. [Ibañez] from working for Half Moon in his off-hours before quitting Coves Darden".) This was a violation of the laws of the United States. This is also "public impact" under the UTPA, as discussed further below.

Post-termination, the defendants continued to violate the law. The illegal compensation deal that Derr used to entice Ibañez away from Coves Darden is remarkable. (See, e.g., Derr Depo. at 18, R. pp. ___ (describing Ibañez as a "free agent").) The side money aspect of the deal is patently illegal. Derr also testified in her deposition that she knew Coves Darden thought it had a "contract" with Ibañez, but that since Ibañez claimed not to have a "copy," she proceeded without concerning herself at all with what it said. (Derr Depo. at 88-89, R. pp. ___.)

For all the foregoing reasons, it was error to grant summary judgment on the tortious interference count, and the Circuit Court should be reversed.

V. Tortiously interfering with a contract by violating laws designed to protect U.S. workers is unfair competition and an unfair or deceptive act or practice in the conduct of trade or commerce; coupling the interference with advertisements having a tendency to mislead is an additional and related violation of SCUTPA. (Issues 11, 12, and 13)

As discussed in the foregoing argument, Derr used improper methods in interfering with the contract, including violating U.S. laws. Tortiously interfering with a contract by violating

laws designed to protect U.S. workers is an "unfair method of competition and an unfair or deceptive act or practice in the conduct of any trade or commerce" prohibited by S.C. Code Ann. § 39-5-20(a) ("SCUPTA"); coupling the interference with follow-up advertisements having a tendency to mislead is an additional and related violation of SCUTPA.

The complaint incorporates into the SCUTPA count, all the previous allegations of the complaint, including Derr's tortious interference with contract. Half Moon and Derr's false and misleading advertisement regarding Ibañez being based at Half Moon for "a teaching sabbatical" are allegations in the SCUTPA count in addition to those regarding the already stated common-law unfair competition. Yet the Circuit Court addressed these allegations as if they were the exclusive basis for the claim.

As discussed above, the Circuit Court erred in dismissing the tortious interference claim. For the same reasons, the Circuit Court erred in dismissing the SCUTPA claim. SCUTPA is not, as held by the Circuit Court in its order at 12 (R. p. ___), limited to redressing deceptive acts. If the violation complained of is a deceptive act, the damages sought must result from that act, but it does not follow that only deceptive acts are within the purview of SCUTPA.

SCUTPA creates new substantive rights by making unlawful, conduct which was not actionable under the common law. State ex rel. McLeod v. C & L Corp., Inc., 280 S.C. 519, 313 S.E.2d 334 (Ct.App. 1984)(discussing the fact that making out all the elements of an existing tort is not necessary to establish a violation of the SCUTPA). A fortiori, already existing common law torts of unfair competition, such as tortious interference with contract, are per se unfair competition or unfair or deceptive acts or practices in the conduct of trade or commerce, within the purview of SCUTPA and similar state "Little FTC Acts." See Restatement (3rd) of Unfair Competition §§ 1(a)(3) and (1)(b)(American Law Institute through 2009)(providing that other

conduct determined to be unfair competition, and other theories independently existing at common law remain actionable). Because it was error to dismiss the tortious interference count, it was error to dismiss the SCUTPA count. Contrary to the concerns of some of the caselaw cited by the Circuit Judge in his order at 13, this was not "an ordinary commercial dispute" unworthy, as a matter of law, of the protections of the Act.

A violation of SCUTPA basically is analyzed as follows:

> The South Carolina Unfair Trade Practices Act makes it unlawful to engage in "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C.Code Ann. § 39-5-20 (1985). "An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive; a practice is 'deceptive' when it has a tendency to deceive." S.C. Law of Torts at 372 (quoting Young v. Century Lincoln-Mercury, Inc., 302 S.C.320, 396 S.E.2d 105, 108 (Ct.App.1989) affirmed in part, reversed in part, on other grounds, 309 S.C. 263, 422 S.E.2d 103 (1992) (per curium)).

Johnson v. Collins Entertainment Company, Inc., 349 S.C. 613, ____, 564 S.E.2d 653, 665 (2002).

The Act is modeled on the FTC Act. The FTC Act was originally concerned only with acts having a harmful effect upon competitors, rather than harm to consumers. FTC v. Raladam Co., 283 U.S. 643 (1931). The Wheeler-Lea Act of 1938 changed this, and allowed the FTC to prevent not only "unfair methods of competition in commerce," but also "unfair or deceptive acts or practices in commerce," Wheeler-Lea Act of 1938, § 3, 15 U.S.C. §45 (a)(1) (1970); and see 83 Cong. Rec. 391-92 (1938) (remarks of Rep. Lea); see also H.R. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937). The alternative nature of the FTC Act, relating to both anticompetitive behavior and to consumer-harming behavior, is reflected in the South Carolina "Little FTC Act," the South Carolina Unfair Trade Practices Act. Chuck's Feed and Seed v. Ralston Purina, 810 F.2d 1289 (4th Cir. 1987). The FTC Act, §15, 15 U.S.C. §55 (1970), specifically includes in the realm

of "false" advertising of products, an advertisement which may include true statements, when taken separately, but which "fails to reveal facts material in the light of such representations."

This misleading advertising is itself actionable. See Restatement (3rd) of Unfair Competition §§ 2 and 3 (one who, in connection with the marketing of goods or services, makes a representation relating to the actor's own commercial activities that is likely to deceive or mislead prospective purchasers to the likely commercial detriment of another is subject to liability; a representation is to the likely commercial detriment of another if the representation is likely to affect the conduct of prospective purchasers and there is a reasonable basis for believing that the representation has caused or is likely to cause a diversion of trade from the other or harm to the other's reputation or good will.)

The advertisement of Half Moon contradicts the prior publicity of Ibañez' association with Coves Darden and implies that he is a semi-itinerant teacher who came to the United States to work and teach with Half Moon, rather than the fact that Coves Darden made a huge commitment to promote dressage and P.R.E. horses in the United States. The advertisement falsely leads one to believe that Half Moon is a place of prominence and established the connections and spent all the effort and money and somehow, by its prominence, attracted the teacher from across the ocean; the advertisement does not convey the truth that Ibañez' presence in the United States was procured over several years at great expense for a very large purpose by Coves Darden Farm.

The same secretive manner in which Half Moon and Derr coordinated Ibañez' departure from Coves Darden is perpetuated in Half Moon's misleading advertising. Rather than announce, in an above-board fashion which would acknowledge a businesslike and straight-forward change from one employer to another, that Ibañez has now become employed at Half

Moon Farm after a change from other engagements in the U.S., Half Moon misleadingly implies that the man is either on some grand, self-sustaining, independent, public-interest teaching tour and was drawn to Half Moon as a place to lodge himself, or that Half Moon itself arranged – and underwrote – the entire program. This was something it took Coves Darden a great period of time, multiple visits, and many thousands of dollars to do. Half Moon and Derr essentially stole that work.

The Circuit Court's order allows Derr and Half Moon refuge in the assertion that when their advertisements are taken separately and out of context, they are technically true under one understanding of the word "sabbatical," and in the further sense that Ibañez is now based at Half Moon, even though that was not why he came to the U.S.

It is the whole meaning which is deceptive. Further, from a legal standpoint, under SCUTPA, actual deception is not required. State ex rel. McLeod v. C & L Corp., Inc. It is a tendency to deceive, which constitutes a violation. Id.[5]

The only partially developed facts of the case, when viewed in the light most favorable to denying summary judgment, show: common law unfair competition in tortiously interfering with contract; improper means and methods violating the immigration laws and affecting the public

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[5]The Circuit Court states in its order at 13, R.p. ____, that "Plaintiff has not pointed the court to any case from any jurisdiction finding that a true statement of fact could be a deceptive act." Plaintiff submits that when the issue is deception, the issue is deception, not literal falsity or truth. Deception is the act of leading a person to believe a state of facts which is not true. Listerine created an impression that it prevented the common cold, in addition to bad breath. When it ceased to claim to prevent the common cold, but continued with true advertisements that it killed germs, it was still misleading. Just as with the tort of defamation, falsity can be accomplished with words which are true when taken separately or out of a context but which can mean something else when understood in the manner intended and complained of. Cf. Richardson v. The State-Record Co., Inc., 330 S.C. 562, 499 S.E. 2d 822 (Ct. App. 1998) (when defamatory words are subject to an interpretation which is true when taken separately and an interpretation which is false when the insinuation is understood, the defense of truth requires demonstrating the truth of both meanings).

interest; an interrupted undertaking and relationship which itself affected the public interest in regional and state recognition in horse competitions on an international scale; and misleading advertising which both had a tendency to confuse would-be consumers of Coves Darden's goods and services (P.R.E. dressage training, horse sales, stud services, etc.), and depreciated Coves Darden's investment in its brand. A SCUTPA claim has been fairly put forth.

CONCLUSION

For the reasons stated hereinabove, the Circuit Court should be reversed and the matter should be remanded to the Circuit Court.

Respectfully submitted,

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COVES DARDEN, LLC

Date: August 7, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Case No. 12-CP-02-01772

Coves Darden, LLC, ... Appellant,

v.

Francisco Jose Garcia Ibañez, Dori Derr and Half Moon Stables, LLC, ... Respondents.

CERTIFICATE OF SERVICE

I, M. Baron Stanton, do hereby certify that I have, on August 7, 2014, served the foregoing Appellant's Brief of Coves Darden, LLC upon the Respondents by causing a copy thereof to be mailed with proper postage to the address indicated below:

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August 7, 2014

The Honorable Jenny Abbott Kitchings
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P. O. Box 11629
Columbia, SC 29211

Re: **Coves Darden, LLC,** Appellant v. Francisco Jose Garcia Ibañez, Dori Derr and Half Moon Stables, LLC, Respondents
Aiken County Case No. 12-CP-02-01772
Court of Appeals Reference No. 2014-000339

Dear Ms. Kitchings:

We enclose the following:

1. Initial Appellant's Brief of Coves Darden, LLC (with certificate of service); and

2. Designation of Matter (with certificate of service).

Thank you for your assistance.

With kind regards,

Yours very truly,

M. Baron Stanton

MBS:aim
Enclosures
cc w/encl .: Thomas R. Young, Jr., Esquire

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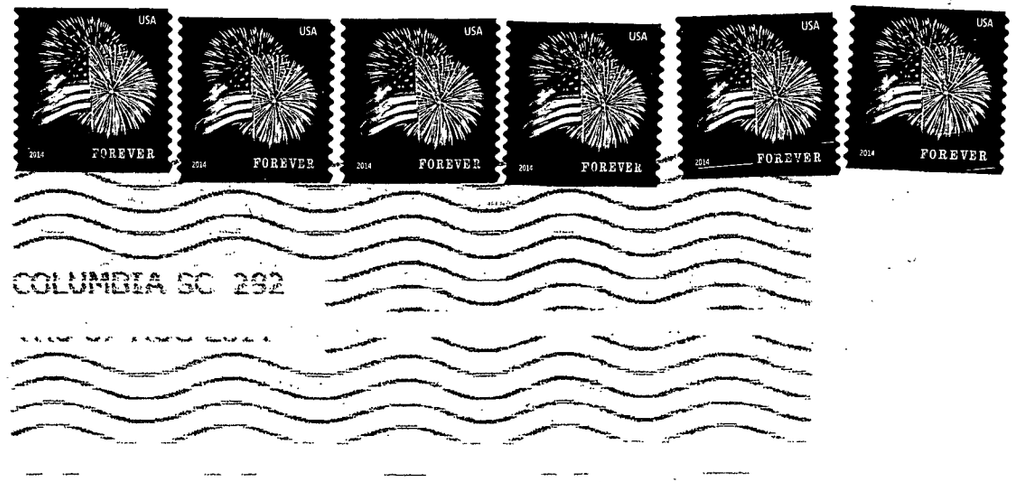

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