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 Ibanez, Dori Derr and Half Moon Stables, LLC, ... Respondents.

RESPONDENTS' INITIAL BRIEF

James M. Derr, *pro hac vice*
P.O. Box 664
St. Thomas, VI 00804
(340) 244-2566
jimderrlaw@gmail.com

Tom Young, Jr.
Law Offices of Tom Young, Jr., PC
P.O. Box 651
Aiken, SC
29802 (803)
649-0000
tyoung@tomyounglaw.com

Attorneys for Respondents

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INTRODUCTION

This appeal involves a Plaintiff below - and an Appellant before this Court - who cannot make up its mind about the alleged contract giving rise to its claims. Initially, Appellant denied the existence of an oral contract and relied solely on a written contract of employment.[1] However, Appellant admitted that it did not have a fully executed copy of that document.[2] Indeed, although it was allowed to engage in extensive discovery, Appellant was never able to produce a fully executed copy of the contract.

Later, Appellant did an about face and relied solely on a purported oral contract of employment.[3] Even then, it could not clearly articulate exactly what the terms of the oral agreement were.[4] On still other occasions Appellant asserted the existence of *both* an oral *and* a written agreement.[5] Appellant subsequently admitted, however, that only *some* of the terms

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[1] Plaintiff's Response to Interrogatory 6 (R, p.): Interrogatory 6 from Defendants asked Plaintiff to identify the terms of any alleged oral agreement with Mr. Garcia. In response, Plaintiff stated: "The agreement was not oral. It was a written contract presented to and acknowledged by Ibanez in (sic) or before January of 2012, after August of 2011." Although it was supplemented, this admission has never been withdrawn.

[2] In responding to a request to produce the written contract (R, p.), Plaintiff stated: "For Defendants' information, Defendant [sic, Plaintiff] believes there are none currently responsive to Request 1 (if requesting one with Ibanez's signature.)"

[3] At one hearing Appellant's counsel stated: "Was there a contract? The affidavit of Miguel Coves says yes there was. It was an oral agreement that the parties worked on over lengthy meetings, visits from Spain where the man and his family were hosted in the United States, much expense, multiple visits." (R, p.). See footnotes 6, 7, 8 and 9 below for various other versions of the terms of the purported oral agreement.

[4] Affidavit of Miguel Coves (R, p.) ¶ 7:"Under the terms of the agreement, we agreed to pay Ibañez 6000 Euros per month (a little less than $8,000 U.S.), furnish him a house, and pay for his transportation to work. Ibañez agreed to work completely and exclusively for us during the term of the agreement. We also agreed to pay for his individual travel to the U.S. on the first entry under the visa."

[5] In his Affidavit (R, p.) at ¶ 33, Miguel Coves stated: "Ibanez breached his contract with us. He breached the written agreement which he knew existed, and he breached the underlying agreement we had clearly reached before the contract was even written up."

allegedly agreed to by the parties were reduced to writing.[6] Appellant has also claimed that the terms of an O-1 visa (terms that were never disclosed during the course of discovery) were incorporated into the agreement.[7] Finally, Appellant offered the affidavit of its then-attorney, who stated that he reviewed the terms of the written agreement (which only contained *some* of the terms of the oral agreement) with Mr. Garcia[8] and further stated that Mr. Garcia orally agreed with those terms.[9] However, this supposed written contract, which only contained *some* of the terms of the purported oral agreement, also had material terms not contained in any of the ever- changing versions of the oral agreement.[10]

After postponing hearings on Defendants' motion for summary judgment to give Appellant sufficient time to propound written discovery and take depositions, the Circuit

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[6] Affidavit of Miguel Coves (R, p.), ¶ 13: "In the course of applying for the visa, *some* common aspects of the agreement were reduced to writing and submitted to the immigration authorities as the terms which would govern the employment if the visa was granted." (emphasis added).

[7] Affidavit of Miguel Coves (R, p.), ¶ 16: "The O-1 visa itself, incorporated into the contract, required that Ibañez work exclusively for us as a trainer."

[8] In documents filed in the court below, and in its brief before this Court , Appellant refers to the Defendant as Mr. Ibañez. In Spain, the patronymic (father's last name) is followed by the matrynomic (mother's last name). In Hispanic countries an individual's legal name is the patronymic. Thus, Francisco Jose Garcia Ibañez is more properly referred to as Mr. Garcia. That convention will be followed throughout this brief, although the names are used interchangeably as the context requires.

[9] Affidavit of Michael Liberatore, ¶ (R, p.).

[10] This document, which is captioned "Confirmation of Terms of Oral Employment Agreement." contains additional material terms not set out in any of the other versions of the alleged oral agreement. (R, p.). For example, it contains a thirty-day termination provision, a provision requiring written notice to Immigration and Naturalization Service, representations regarding Mr. Garcia's domicile and intent to return to Spain, assumption of personal liability by Mr. Garcia, salary terms that are materially different, a non-compete clause regarding employment after termination, and a clause requiring arbitration of disputes. None of these appear in any of the various versions of the oral agreement.

Court granted summary judgment, finding that Appellant had failed to come forward with any evidence demonstrating the existence of triable issues of fact, regardless of whether the contract was oral or written.

As discussed in detail below, the Circuit Court correctly granted summary judgment and dismissed the complaint, and that Order should be affirmed in all respects.

I. THE ALLEGED ORAL AGREEMENT FALLS WITHIN THE STATUTE OF FRAUDS AND IS UNENFORCEABLE

A. Oral Contracts of Employment for More than One Year Fall Within the Statute of Frauds and are Unenforceable., Absent Some Exception

The South Carolina Supreme Court has long recognized the applicability of the Statute of Frauds to oral employment contracts. *See Mendelsohn v. Banov*, 57 S.C. 147 (S.C. S.Ct. 1900); *McGehee v. South Carolina Power Co.*, 187 S.C. 79 (S.C. S.Ct. 1938). The common law version of the Statute of Frauds has been statutorily adopted in South Carolina for well over one hundred years, and provides in pertinent part that "No action shall be brought whereby . . . to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof . . ." (S.C. Code Ann. § 32-3-10 (1991)).

The alleged oral contract of employment in this case falls squarely within the scope of the statute and - to the extent it even exists because of the failure to have a meeting of the minds on essential terms of the agreement - is unenforceable unless one of the limited exceptions to the rule apply. One exception to the statute is for contracts where there is some possibility of performance within one year; another is where there has been partial performance of the contract by the party to be charged.

Yet a third exception is where there is independent consideration to support the agreement. Appellant argues *for the first time* on this appeal that all three of these exceptions apply in this case and that the Circuit Court erred in finding any oral agreement within the Statute of Frauds. However, as discussed below, Appellant failed to argue any of these exceptions to the Circuit Court and, therefore, has waived any right to assert them on appeal. Regardless, none of the three exceptions are applicable in this case.

B. Appellant has Waived any Claim that an Exception to the Statute of Frauds Applies in This Case

In *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406 (S.C. S.Ct. 2000), the South Carolina Supreme Court stated:

> "The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. *E.g., Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995) (appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court); *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991)
> (same); *Sumter Building & Loan Ass'n v. Winn*, 45 S.C. 381, 23 S.E. 29 (1895) (same)."

And in *Herron v. Century BMW*, 395 S.C. 461 (S.C.S.Ct. 2011), the Supreme Court noted that "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76 (S.C. S.Ct.1998)." It is "axiomatic that an issue cannot be raised for the first time on appeal." *Id.* "To hold otherwise would mean that an appellate court would be exercising original jurisdiction rather than serving as a reviewing court." *State v.*

McCrary, 242 S.C. 506, (S.C. S.Ct. 1963).

1. Appellant Failed to Preserve the Argument that the Oral Agreement Could Possibly be Performed Within One Year

The issue regarding the possibility that the alleged oral contract could be performed within one year was only mentioned in passing in the Motion for Reconsideration. (R, p.) by reference to Supplemental Responses to Interrogatories. However, those Supplemental Responses were wholly insufficient to raise - let alone preserve - any issue regarding the possibility of performance within one year:

> "Michael J. ('Mike') Liberatore (immigration lawyer in Miami), 1000 Brickell Avenue, Suite 400, Miami, Florida 33131, Tel (305) 374-0306, Fax (786) 272- 0652, *may testify* that a nonimmigrant visa such as the one at issue here is always subject to being granted for a shorter time than requested and a shorter time than is typical or authorized and that in fact, this does occur, and may result in grants of periods for shorter than one year . . . ." (R, p. ; emphasis added)

Of course, a trial court does not rule on an issue based on what someone *may* say about it. Rather, the court is obligated to rule only on issues that are properly presented and supported by admissible evidence.[11] An attorney's unsworn statement as to what a witness *may* testify to at some unknown time in the future carries no weight whatsoever. It is certainly not sufficient to raise, much less preserve, an issue for appeal.

2. Coves Darden Never Raised the Issue of Part Performance with the Circuit Court and Cannot Raise It for the First Time on Appeal

Coves Darden never raised, even in passing, the issue of part performance as

[11] SCRCP 56(e) provides in pertinent part that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

an exception to the Statute of Frauds. The issue was never raised in any briefs filed by Coves Darden; it was never asserted during oral argument during the several hearings on the motion for summary judgment; and it was never mentioned in the Motion for Reconsideration. Rather, it appeared for the first time in Appellant's Initial Brief. Thus, the issue has been waived and should not be considered by this Court.

3. Coves Darden Never Raised the Issue of Independent Consideration as an Exception to the Statute of Frauds and Has Waived the Claim

Appellant's Initial Brief (p. 25) is also the first time that Coves Darden has raised the issue of independent consideration as an exception to the Statute of Frauds and the issue has been waived. However, even if this Court were to consider the argument for the first time, it is clear that Coves Darden has failed to raise a triable issue of material fact in that regard. (see discussion below).

C. Judicial Admissions by Coves Darden Establish that the Alleged Oral Contract Was for a Period of Over One Year

In his Affidavit (R., p.), Mr. Coves outlined what he contended were the terms of an oral agreement to employ Mr. Garcia, and then stated:

> "We entered into an agreement to employ [Garcia] to act as an expert equestrian trainer, and to provide expert instruction and consultancy services in the equestrian arts for clients of Coves Darden Farm. *We both acknowledged we expected the relationship to continue for at least two years. The probable expected initial length of the visa was three years, and his likely initial leave of absence from his prior employment relationship was to be two years.*") Affidavit of Miguel Coves, ¶ 6 (R., p.) (emphasis added).

Appellant's brief also acknowledges that fact. At page 24, Appellant states:

"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 Ibanez' s leave of absence from his employer in Spain. This understanding was bolstered, corroborated, and protected (sic) by the fact *that the 0-1 visa was expected to be as long as three years* . . . ." (emphasis added).

Thus, there simply is no question that the version of the alleged oral contract claimed by Mr. Coves contemplated employment for a period of time between two and three years.

D. Regardless, There Was No Evidence Creating a Triable Issue of Material Fact Regarding the Possibility That the Alleged Oral Contract Could be Performed Within One Year

There is no question that an oral agreement does not fall within the Statute of Frauds so long as it contains a condition or event that might possibly occur within one year of the making of the agreement. *Weber v. Perry*, 201 S.C. 8 (S.C. C.t. 1942) ("There can be no dispute as to the well-established principle that the statute applies only to those contracts which are impossible of performance within a year and that a contract on a contingency which may occur within the year need not be supported by a writing.")

The only contingency that Appellant put forward was the possibility that the Immigration and Naturalization Service might grant Mr. Garcia an O-1 visa for a period of less than one year. However, this is sheer speculation, and Appellant never presented any *admissible* evidence to create a triable issue of material fact regarding the issue. The only "evidence" supporting the claim that the visa might have been issued for a period of less than one year is the statement of Coves Darden's attorney as to what Mr. Liberatore *might* testify to. If a Rule 56 motion is to be denied on the basis of such flimsy, hearsay conjecture, then the Rule would cease to have any

effect at all.

On the other hand, the Affidavit of Miguel Coves (R, p.) clearly stated that the agreement was to be for a *minimum* of two years, with a possible extension for another year or more ("We both acknowledged we expected the relationship to continue for at least two years. The probable expected initial length of the visa was three years, and his likely initial leave of absence from his prior employment relationship was to be two years.").

Appellant's argument badly confuses the issue of *discharge* of a contract from *performance* of that contract. In this regard, Restatement of the Law, Second, Contracts, § 130, comment b. states in pertinent part:

> "Any contract may be discharged by a subsequent agreement of the parties, and performance of many contracts may be excused by supervening events or by the exercise of a power to cancel granted by the contract. The possibility that such a discharge or excuse may occur within a year is not a possibility that the contract will be 'performed' within a year. This is so even though the excuse is articulated in the agreement."

The Restatement then gives the following example:

> "A orally promises to work for B, and B promises to employ A for five years at a stated salary. The promises are within the Statute of Frauds. Though the duties of both parties will be discharged if A dies within a year, the duties cannot be 'performed' within a year. This conclusion is not affected by a term in the oral agreement that the employment shall terminate on A's death."

In summary, to the extent the argument has not been waived, Coves Darden has not offered any evidence whatsoever to create a triable issue of material fact regarding the possibility of performance within one year.

E. The Doctrine of Part Performance Does Not Apply to Personal Service Contracts Like the Alleged Contract at Issue Here

As discussed in detail above, Coves Darden has not raised this issue below, nor has it properly preserved the issue for review by this Court. However, even if the Court were to consider the issue, the law is clear in virtually all jurisdictions that the doctrine of part performance does not apply to actions at law seeking money damages based on personal service contracts.

1. The Doctrine of Part Performance Does Not Apply to Actions at Law Seeking Money Damages

It is important to note that the doctrine of part performance is universally held to apply only with respect to equitable remedies, but not to remedies at law, such as the instant case, which sought only money damages. *See Parr v. Parr*, 268 S.C. 58 (S.C. S.Ct. 1977) ("Sufficient part performance of a parol contract to convey or devise real estate will, *in equity*, remove the agreement from the operation of Section 11-101." (emphasis added)); *Hosp. Corp. of Am. v. Assocs. in Adolescent Psychiatry*, 605 So. 2d 556 (Fl. App. 1992) ("[T]he doctrine of part performance does not remove the bar of the statute of frauds from actions for damages based upon the breach of oral contracts."). *Doltz v. Harris & Assocs.*, 280 F. Supp. 2d 377 (E.D. Pa. 2003) ("Although the doctrine of partial performance may be used to remove a contract from the statute of frauds for the purpose of granting specific performance or other equitable relief, the doctrine of partial performance is not available in any action solely for damages at law."); *Dwight v. Tobin*, 947 F.2d 455, 459 (11th Cir. 1991) (same).

Since the instant action seeks only money damages the doctrine is not applicable.

2. The Doctrine of Part Performance Does Not Apply to Personal Service Contracts

There is an even more fundamental reason for finding the doctrine of part performance inapplicable: the doctrine does not apply with respect to personal service contracts. In *French v. Sabey Corp.*, 951 P.2d 260 (Wn. S.Ct. 1998), the Washington Supreme Court stated:

> "The general rule, almost universally adhered to, is that a contract for personal services which by its terms is not to be performed within a year must be in writing. *See Building Serv. Employees Int'l Union Lodge 6 v. Seattle Hosp. Council*, 18 Wn.2d 186, 138 P.2d 891 (1943); Cope v. School Dist. 122, 149 Wash. 76, 270 P. 120 (1928); *Union Sav. & Trust Co. of Seattle v. Krumm*, 88 Wash. 20, 152 P. 681 (1915); 49 Am. Jur. Statute of Frauds § 52, at 410 (1943); 3 Williston, Contracts § 495, at 585 (3d ed. 1960).

Courts have routinely held the part performance doctrine does not to apply to contracts for personal services. *Food Fair Stores, Inc. v. Vanguard Inv. Co. LTD.*, 298 So.2d 515, 517 (Fla. App. 1974); *Johnson v. Edwards*, 569 So.2d 928, 929 (Fla. 1st DCA 1990) (It is "well established that partial performance of a contract for personal services is not an exception to the provisions of the Statute of Frauds."); *Miller Constr. Co. v. First Indus. Tech. Corp.*, 576 So.2d 748, 751 (Fla. App 1991) (same). *Miller* is instructive in that it held that the rule was particularly applicable to personal service contracts involving "artistic and unique abilities," which is exactly the situation here, given Appellant's repeated claims that Mr. Garcia was hired because of his exceptional and unique equestrian abilities.

F. There is No Admissible Evidence Demonstrating the Existence of a Triable Issue of Material Fact Regarding Independent Consideration as an exception to the Statute of Frauds.

Once again, Appellant seeks to raise on appeal an issue that was never presented to or ruled on by the Circuit Court. However, even if this Court were to consider the issue, there is simply no issue of material fact, and the judgment below should be affirmed. The case relied on by Appellant, *Center State Farms v. Campbell Soup Company*, 58 F.3d 1030 (4th Cir. 1995), involved an agreement by State Farms to raise turkeys for Campbell Soup. This was done pursuant to an oral agreement with no set duration. Applying South Carolina law, the Fourth Circuit held that because Center State had made a considerable capital investment in the equipment to be used in the operation, the contract would be terminable only after a reasonable period of time to allow Center State to recoup its investment.

Here, the Affidavit of Miguel Coves (R, p.) admitted that the term of the alleged oral contract of employment was not indefinite, but was for a term of at least two years, with a possible extension to three years. Additionally, Appellant failed to establish the existence of any type of independent consideration. According to Mr. Coves, the agreement was simple: Mr. Garcia would train and show their horses and Coves Darden would pay his salary and provide him with a place to live. There simply is no evidence of any type of independent consideration of the type relied on in *Center State Farms, supra.*

II. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THERE WAS NO EVIDENCE OF THE EXISTENCE OF A FIDUCIARY RELATIONSHIP AND NO BREACH OF ANY CLAIMED DUTY OF LOYALTY

A. Appellant Misstates the Law Regarding an Employee's Duty of Loyalty

The duty of loyalty is not as black and white as Appellant argues. At Appellant's Brief, p. 28, Coves Darden states: "In South Carolina, an employee *per se* owes fiduciary duties to an employer." (emphasis added). Note that Appellant cites no authority for this proposition. That is not surprising because no South Carolina court has gone so far as to make such a sweeping pronouncement.

According to Appellant, all employees, from the janitor to the chief operating officer, are fiduciaries and have an equal duty of loyalty. That is simply not the case. Some courts have held that the duty of loyalty extends only to employees acting in a fiduciary capacity. South Carolina courts, in accord with most other jurisdictions, recognize the duty of loyalty only when a fiduciary relationship exists between the employer and the employee. Published opinions in South Carolina involving claimed breach of the duty of loyalty have all involved upper level managerial employees. *Loundes Products, Inc. v. Brower*, 259 S.C. 322 (S.C. S.Ct. 1972) (key employees meeting with investors and current customers of employer while starting competing business liable for breach of duty of loyalty.); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598 (S.C. S.Ct. 1999) (Manager of Operations); *Young v. McKelvey,* 286 S.C. 119 (S.C. S.Ct. 1985) (Vice-President of Sales).

The law in other jurisdictions is generally in accord. *See Dalton v. Camp*, 353 N.C. 647 (2001) (Outside the context of a fiduciary relationship, "there is no basis for recognizing an independent tort claim for a breach of a duty of loyalty. . . ." *Id* at 652.).

The recently promulgated Restatement of the Law Third, Employment Law

(approved May 21, 2014) takes a slightly different approach to the issue. Restatement § 8.01(a) provides:

> "Employees in a position of trust and confidence with their employer owe a fiduciary duty of loyalty to the employer in all matters related to their employment. Other employees may, depending on the nature of the employment position, owe an implied contractual duty of loyalty to the employer in matters related to their employment."

The Restatement makes it clear that the duty of loyalty varies depending on the nature of the employer-employee relationship. Additionally, the Restatement makes it clear that the remedies available depend upon the nature of the relationship. Comment a. to the foregoing section provides in pertinent part:

> "All employees in a relationship of trust and confidence with their employer owe a fiduciary duty of loyalty to the employer and are subject to special remedies for breach of fiduciary duty, including, in appropriate circumstances, forfeiture of compensation and disgorgement of profits. Even if not generally in a relationship of trust and confidence, employees owe a fiduciary duty for limited purposes if they come into possession of their employer's trade secrets. Other employees, depending on the nature and circumstances of their employment, may owe an implied contractual duty of loyalty to their employer; such employees are subject only to contract remedies for breach."

Restatement § 8.01(b) makes it clear that an employee breaches the duty of loyalty when the employee a) discloses or uses trade secrets, b) competes with the employer while still employed[12], or c) misappropriates the employer's property or engages in self-dealing through the use of the employee's position with the employer.

The Reporters' Note to the foregoing provides:

> "The precise contours of the duty of loyalty imposed on a given employee vary according to the scope of responsibilities with which the employee is entrusted and other circumstances of his employment.

[12] This is subject to certain exceptions discussed below.

> Although all employees may in some sense owe a duty of loyalty to their employer, the specific implications vary with the position the employee occupies, the nature of the employer's assets to which the employee has access, and the degree of discretion that the employee's work requires." (citation and internal quotes omitted).

Thus, Appellant is simply wrong when it asserts that all employees are fiduciaries of the employer. Moreover, as discussed below, Appellant failed to demonstrate the existence of a triable issue of material fact with respect to the existence of a fiduciary relationship, and it failed to show any issue regarding the breach of *any* duty of loyalty on the part of Mr. Garcia.

B. Appellant Failed to Produce Any Admissible Evidence From Which a Trier of Fact Could Conclude that a Fiduciary Relationship Existed

As noted above, the mere existence of an employer-employee relationship, standing alone, does not give rise to fiduciary obligations. *See Smalls v. Imperial Servs. Group,* 2011 U.S. Dist. LEXIS 140302 (D.S.C. 2011) ("An employer/employee relationship is not a fiduciary relationship upon which a fraudulent concealment action could spring.") Additionally, and most importantly, a fiduciary relationship cannot be created by the unilateral action of only one party. *Steele v. Victory Sav. Bank*, 368 S.E.2d 91 (S.C. App. 1988) ("[A]s a general rule, a fiduciary relationship cannot be established by the unilateral action of one party."); *Moore v. Moore*, 360 S.C. 241 (S.C. App. 2004) (same); *Regions Bank v. Schmauch*, 354 S.C. 648 (S.C. App. 2003) ("The other party must have actually accepted or induced the confidence placed in him."). The evidence must show that the entrusted party actually accepted or induced the confidence. *Regions Bank, supra; Brown v. Pearson*, 326 S.C. 409 (S.C. S.Ct. 2003). *Arnold v. Erkmann*, 934 S.W.2d 621, 630 (Mo. Ct. App. 1996) ("A

fiduciary duty is not created by a unilateral decision to repose trust and confidence; it derives from the conduct or undertaking of the purported fiduciary." (citation omitted)); *Furr's Inc. v. United Specialty Adver. Co.*, 385 S.W.2d 456, 459-60 (Tex. Civ. App. 1964) (finding no confidential relationship existed where buyer failed to present evidence seller was aware of confidence buyer claimed to have reposed in him since a "confidential relationship is a two-way street").

Judged by the foregoing standards it is clear that Coves Darden completely failed to carry its burden of demonstrating by admissible evidence the existence of a confidential or fiduciary relationship. The Complaint (R, p.) does contain an allegation that "[a]s an employee of Plaintiff, and particularly as a special employee of Plaintiff under a specialized agreement, and as an employee in which Plaintiff specifically reposed trust and confidence (as evidenced by Plaintiff's expenditures for, and accommodation of, Ibañez) Ibañez, as agent, owed fiduciary duties of loyalty, honesty and information to Plaintiff, as principal." However, in responding to a Motion for Summary Judgment, reliance on a pleading is insufficient. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." SCRCP 56(e).

The only evidence offered on the issue by Coves Darden - the Affidavit of Miguel Coves (R, p.) - attests to the fact that Coves Darden visited with Mr. Garcia in Spain, negotiated payment terms, and allegedly hired him to come to the United

States and train horses. However, it contains no *facts* from which a trier of fact could find a fiduciary relationship. More importantly, it only sets out facts demonstrating unilateral actions and reliance on the part of Coves Darden. It is entirely devoid of any *facts* demonstrating what was special about the claimed relationship, or any facts that Mr. Garcia knowingly and willingly assumed any fiduciary obligations, or that he induced Coves Darden to enter into the relationship in the first place. Such unilateral actions by Coves Darden are insufficient to create an issue of fact regarding the existence of a fiduciary relationship. *Regions Bank, supra.*

In Appellant's brief, at page 27, counsel engages in wishful thinking about the state of the record with respect to the "facts" giving rise to the claimed fiduciary relationship:

> "Ibanez was not an ordinary employee. * * * There was a great deal of trust and confidence reposed in Ibanez 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. Ibanez was highly paid and heavily advertised by Coves Darden and his employment was a large investment for Coves Darden."

The problem with this statement is that there is not one single shred of admissible evidence in the record to support them and the arguments of counsel in an appellate brief without citation to any part of the record are just that: arguments. Making up facts is no substitute for demonstrating the existence of triable issues of fact by pointing out where they appear in the record. However, even if these fanciful statements were to be considered, they would be insufficient to establish the existence of a fiduciary relationship because they all deal with unilateral actions on the part of Coves Darden, and those unilateral actions are simply not enough

to create a triable issue of fact. *Steele v. Victory Sav. Bank*, 368 S.E.2d 91 (S.C. App. 1988) ("[A]s a general rule, a fiduciary relationship cannot be established by the unilateral action of one party.").

To illustrate this point, consider the following: A building contractor may have the need for a highly trained and competent employee to operate a complex crane. However, that fact, standing alone, does not make the employee a fiduciary for all purposes - it merely demonstrates that the contractor had a need for a highly trained employee to perform services for him.

In summary, there was absolutely no evidence tending to show the existence of a confidential or fiduciary relationship between Coves Darden and Mr. Garcia, and the Circuit Court properly granted summary judgment.

C. An Employee Does Not Breach a Duty of Loyalty by "Moonlighting" for a Competitor or by Making Preparations to Compete After Terminating the At-Will Relationship

The sole allegations of alleged breach of the duty of loyalty are that a) Mr. Garcia was secretly planning to leave his employment with Coves Darden (Coves Affidavit, ¶ 25 (R, p.)), and b) that he had "secretly" been riding horses for Half Moon (*Id.*, ¶ 36).[13] Summary judgment was properly granted with respect to those claims.

Secretly planning to leave one's employment is not a tort in South Carolina, or in any other jurisdiction in the United States for that matter. In fact, as an at-will employee, Mr. Garcia's relationship with Coves Darden was terminable by either party at any time, for any reason or for no reason at all. *Todd v. South*

[13] Paragraph 36 of the Affidavit does contain the further claim that Mr. Garcia intentionally compromised his performance and duties in order to develop business contacts. However, this claim is solely based on "information and belief" and does not meet the personal knowledge requirement of Rule 56(e).

Carolina Farm Bureau Mut. Ins. Co., 276 S.C. 284 (S.C. S.Ct.1981), *appeal after remand*, 283 S.C. 155, *writ granted in part*, 285 S.C. 84, *quashed*, 287 S.C. 190; *Culler v. Blue Ridge Elec. Coop. Inc.*, 309 S.C. 243, 245 (S.C. S.Ct.1992)." It makes no difference whether the employee keeps his intention to leave secret until the day of departure or whether he makes his intentions known to the employer well in advance of departure. One's secret intention is simply not a tort.

It is also clear that merely "moonlighting" for a competitor is not a breach of the duty of loyalty. Restatement of Employment Law, § 8.04(c) dealing with competition with the current employer by an employee provides:

> "Absent agreement with the employer to the contrary, an employee not subject to a fiduciary duty of loyalty to their first employer under § 8.01(a) may work for a competitor of the first employer as long as the work is not done during time committed to the first employer, does not involve the use or disclosure of the first employer's trade secrets, and does not injure the employer to any greater extent than would any other individual working for the competitor."

South Carolina law is on point. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (applying North Carolina and South Carolina law) ("An employee does not commit a tort simply by holding two jobs or by performing a second job inadequately. For example, a second employer has no tort action for breach of the duty of loyalty when its employee fails to devote adequate attention or effort to her second (night shift) job because she is tired.").

Once again, summary judgment was properly granted.

III. THE CIRCUIT COURT PROPERLY CONSIDERED APPELLANT'S RESPONSES TO INTERROGATORIES AND REQUESTS FOR PRODUCTION

Appellant faults the Circuit Court for basing its grant of summary judgment, in

part, on Coves Darden's response to an interrogatory and a request for production in which Coves Darden admitted that there was no oral agreement between the parties and that it did not have a copy of the purported written agreement signed by Mr. Garcia.

Interrogatory 6 from Defendants asked Plaintiff to identify the terms of any alleged oral agreement with Mr. Garcia. (R. p.). In response, Plaintiff stated:

> "The agreement was not oral. It was a written contract presented to and acknowledged by Ibañez in (sic) or before January of 2012, after August of 2011." (R. p.).

In response to a request to produce a fully executed copy of any employment contract, Plaintiff stated:

> "For Defendants' information, Defendant [sic, Plaintiff] believes there are none currently responsive to Request 1 (if requesting one with Ibanez's signature.)" (R. p.).

During discovery Plaintiff produced a copy of a document it claims is the contract of employment between Coves Darden and Mr. Garcia. (R. p.). Significantly, while the document was signed by Miguel Coves on behalf of Coves Darden, LLC, it was not signed by Mr. Garcia. (R, p.). Thus, in its discovery responses Coves Darden denied the existence of an oral contract of employment and admitted that there was no executed written contract of employment.

Appellant seeks to get around these inconvenient facts in several ways. First, Appellant argues that it had the right to answer an interrogatory denying the existence of an oral contract and asserting the existence of a written contract, and then subsequently do a complete flip flop and assert that the agreement was oral. (Compare R, p. and R, p.). Appellant also seeks to avoid the admission in the interrogatory by

claiming that the response was never verified (Appellant's Brief, p. 18). Appellant is wrong on all counts.

This contradictory state of affairs, created wholly by the Appellant in inconsistent discovery responses and during oral argument, is not grounds for reversal. First and most importantly, the Circuit Court acknowledged the changing positions taken by Appellant and, out of an abundance of caution, conducted an alternative analysis that examined the law under either scenario:

> "In this case, Plaintiff, both directly and through its counsel, has made several contradictory statements regarding the nature of the relationship between Coves Darden and Defendant Garcia. In responding to Interrogatories, Plaintiff judicially admitted that there was no oral contract of employment, but only a written agreement that was allegedly "acknowledged" by Defendant Garcia. However, in responding to a Request to Produce Plaintiff further admitted that it had no written agreement signed by Defendant Garcia. At a hearing in this matter on May 5, 2013, Plaintiff's counsel contradicted his client's interrogatory responses and asserted that the agreement between the parties was, in fact, an oral agreement. On April 24, 2013, Miguel Coves, a principal of Plaintiff, filed an Affidavit in which he alleged that the agreement between the parties was an oral agreement of employment for between two and three years. At a final hearing on the Motion for Summary Judgment on October 15, 2013, Plaintiff's counsel reiterated the contention that the agreement was, in fact, an oral agreement."

The Circuit Court neatly resolved this conflict - a conflict created by Appellant itself – by analyzing the law under *both* scenarios:

> "Nevertheless, regardless of which version the Court accepts, the end result is the same. If the Court accepts Plaintiff's responses to an Interrogatory and a Request to Produce, then the Court is left with the conclusion that there was: a) no oral agreement between the parties, and b) no written agreement signed by the party to be charged, Defendant Garcia. On the other hand, if the Court ignores these earlier party admissions and accepts the belated contention of Plaintiff that there was no written contract of employment, but only an alleged oral agreement for employment between two and three years

> duration, the Court is again left with the fact that there is no writing signed by the party to be charged, Defendant Garcia, and, therefore, the alleged oral agreement violates the Statute of Frauds and is unenforceable."

Since the Circuit Court conducted its analysis under either of the scenarios argued by Appellant, there simply is no reversible error. Coves Darden offered no other alternative for consideration by the Circuit Court.

IV. SUMMARY JUDGMENT WAS PROPERLY GRANTED WITH RESPECT TO THE CLAIM FOR TORTIOUS INTERFERENCE WITH CONTRACT

A. Elements of a Cause of Action for Tortious Interference

The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517 (S.C. S,Ct.1993).

An essential element to the cause of action for tortious interference with contractual relations is the intentional procurement of the contract's breach. *Kinard v. Crosby*, 315 S.C. 237 (S.C. S.Ct. 1993). Further, a tortious interference claim "presupposes the existence of a valid, enforceable contract." *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272 (S.C. Ct. App. 1993). Where there is no breach of the contract, there can be no recovery. *First Union Mortg. Corp. v. Thomas*, 317 S.C. 63, 73 (S.C. Ct. App.1994).

Additionally, where the claim is that a third party induced an at-will employee to leave his employment, Plaintiff must plead and prove that the employment would have continued indefinitely but for such interference. *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 283 S.C. 155 (S.C. App. 1984).

B. Appellant Failed to Establish a Triable Issue of Material Fact With Respect to Each Element of Its Cause of Action

1. No Proof of a Valid Oral or Written Contract

As discussed in detail above, there was no proof of a valid oral or written contract between Mr. Garcia and Coves Darden. Therefore, Appellant was required to establish all of the elements of a cause of action for intentional interference with an at-will relationship. *Todd, supra.*

2. No Proof of Actual Knowledge of the Existence of the Contact

In opposing the Motion for Summary Judgment it was incumbent upon Appellant to demonstrate some facts demonstrating Defendant Derr's actual knowledge of the existence of the at-will relationship. *Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc.*, 363 S.E.2d 390 (S.C. App. 1987), a case relied on heavily by Coves Darden, cannot supply the missing actual, or even inferential knowledge requirement. First, *Bocook* was overruled - albeit it on other grounds - by the Supreme Court in *O'Neal v. Bowles*, 314 S.C. 525 (S.C. S.Ct.). *Bocook* involved the placement of advertising signs that were open and obvious and gave at least inquiry notice of a relationship with the landowners. By way of contrast, the only "evidence" adduced by Appellant is that Dori Derr participated at an equestrian event at which Mr. Garcia also participated. *Bocook* cannot be stretched to the point that watching someone ride a horse at an equestrian event creates the slightest inference that Mrs. Derr was aware of the fact that Mr. Garcia was an employee of Coves Darden. This Court should not supply the missing proof with respect to Appellant's cause of action by, in effect, imposing an affirmative duty on the part of a competitor to ascertain the

status of Mr. Garcia's employment.

3. No Proof of Intentional Procurement

Not only is the record devoid of any evidence of intentional procurement, Appellant's principal, Miguel Coves actually attested to the contrary. Mr. Coves' affidavit asserts that it was Mr. Garcia who was looking for other employment and other ways to "feather his nest." Mr. Coves attested to the following in Paragraph 30 of his Affidavit (R, p.):

> "In hindsight, it appears Ibañez began feathering his own nest right away, and planning his deceptions, rather than trying to advance the interests of our farm. It appears he escalated his desire to work against our interests, to the end of advancing his own and the interests of others, after he received: accommodations, introductions and payments from us in Spain; the benefit of several U.S. vacations largely at our expense; introductions and publicity in the U.S. and particularly in the Aiken area; the fruits of our efforts to assemble the documentation for his unusual if not extraordinary visa; the benefits of our expenditure of legal fees on Miami immigration counsel; a visa to the U.S. allowing work in his field; acclimatization in the U.S. in a house we furnished; and a comfortably supported opportunity to obtain a social security number, driving credentials, school enrollment for his daughter, banking facilities, etc."

Thus, not only is there a lack of any admissible evidence of intentional procurement by Defendant Derr, but Appellant's own affidavit establishes that it was Mr. Garcia looking to leave his employment, and not Mrs. Derr attempting to lure him away.

4. No Proof That Employment Would Have Continued But For the Alleged Interference

The Supreme Court in *Todd, supra*, while recognizing a cause of action for tortious interference with respect to at-will employment, added the additional requirement of "but for" causation - that the at-will employment would have

continued indefinitely but for the tortious interference. Appellant put on no evidence whatsoever regarding this element. Indeed, as the foregoing quote from the affidavit of Miguel Coves makes clear, Appellant's contention was that Mr. Garcia began "feathering his own nest" virtually from day one and was looking out for his own interests rather than the interests of Coves Darden.

In its brief, Appellant argues that "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)." (Appellant's Brief, p. 35). The problem with that statement is that it completely mis-quotes *Santoro*. In *Santoro*, the Court stated that "to maintain a cause of action for interference with a contract that is terminable at will, the plaintiff must show that, *but for* the interference, the contractual relationship would have continued." (emphasis added). In fact, the words "reasonable expectation" do not appear anywhere in the opinion.

In short, not only was there a complete lack of admissible evidence from which a trier of fact could conclude that Mr. Garcia's employment would have continued, but Appellant's own statements claim that it was Mr. Garcia himself who was looking around for other business opportunities.

C. The Circuit Court Correctly Recognized the Exception For Job Offers by Competitors

The Circuit Court relied on a North Carolina case, *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216 (N.C. 1988), and the numerous authorities it cited from courts around the United States, for the proposition that there is a qualified

privilege for competitors making better job offers to at-will employees. In a passage that deserves to be quoted at length, the North Carolina Supreme Court stated:

> "[W]e recognize and apply the general principle that interference may be justified when the plaintiff and the defendant are competitors. *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176. *See also, Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W. 2d 892 (1965); *Schonwald v. Ragains*, 32 Okla. 223, 122 P. 203 (1912); *Philadelphia Dairy Prod. v. Quaker City Ice Cream Co.*, 306 Pa. 164, 159 A. 3 (1932); *Thacker Coal & Coke Co. v. Burke*, 59 W.Va. 253, 53 S.E. 161 (1906). *Contra Moye v. Eure*, 21 N.C. App. 261, 205 S.E. 2d 221 (1974); *Overall Corp. v. Linen Supply, Inc.*, 8 N.C. App. 528, 174 S.E. 2d 659 (1970). Further, we find the well-reasoned opinion of Judge Learned Hand in *Triangle Film Corp. v. Artcraft Pictures Corp.*, 250 F. 981 (2d Cir. 1918) to be persuasive. Judge Hand, writing for the majority in that case, stated that public policy demands that absent some monopolistic purpose everyone has the right to offer better terms to another's employee, so long as the latter is free to leave. *Id.* A contrary result would be intolerable, both to the new employer who could use the employee more effectively and to the employee who might receive added pay. *Id.* To hold otherwise would unduly limit lawful competition. *Id.*"Later cases adopt the rationale of *Triangle Film*. The free enterprise system demands that competing employers be allowed to vie for the services of the 'best and brightest' employees without fear of subsequent litigation for tortious interference. *See McCluer v. Super Maid Cook-Ware Corp.*, 62 F. 2d 426 (10th Cir. 1932); *Vincent Horwitz Co. v. Cooper*, 352 Pa. 7, 41 A. 2d 870 (1945); *Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 67 Cal. Rptr. 19 (1968); *Coleman & Morris v. Pisciotta*, 107 N.Y.S. 2d 715, 279 A.D. 656 (1951). To restrict an employer's right to entice employees, bound only by terminable at will contracts, from their positions with a competitor or to restrict where those employees may be put to work once they accept new employment savors strongly of oppression.
>
> > 'Competition . . . is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival, and attracting it to himself, is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business . . . . To hold such an act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of a class of which fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants . . . are instances.'

> *"Macauley Bros. v. Tierney*, 19 R.I. 255, 256, 33 A. 1, 2 (1895), cited with approval in C. S. Smith Metro. *Mkt. v. Lyons*, 16 Cal. 2d 389, 106 P. 2d 414 (1940); *Kingstron Trap Rock Co. v. International Union of Operating Engineers*, 129 N.J. Eq. 570, 19 A. 2d 661 (1941)."

In an attempt to discredit this clear statement of the majority rule around the United States, Appellant cites *Commerce Funding Com. v. Worldwide Sec. Servs. Corp.*, 249 F.3d 204, 213 (4th Cir. 2001), for the proposition 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. (Appellant's Brief, p. 34). Appellant then asserts that "As they had no existing contractual relationship with Ibañez, they cannot show justification." *Id.* Once again, Appellant badly mis-cites the authority on which it relies. *Commerce Funding* actually recognized five separate grounds for assertion of a privilege: "*legitimate business competition*, financial interest, responsibility for the welfare of another, directing business policy, and the giving of requested advice." *Commerce Funding, supra* (emphasis added). Thus, even Appellant's authorities provide support for the proposition - and for the Circuit Court's decision - that legitimate business competition is not actionable.

Appellant offered no admissible evidence of any improper purpose in the hiring of Mr. Garcia. Although Appellant engaged in lengthy speculation about alleged improper motives in its brief below, and in its brief before this Court, speculation and conjecture are no substitutes for admissible evidence in opposing a Motion for Summary Judgment, and the Order granting summary judgment should be affirmed.

V. THE CIRCUIT COURT CORRECTLY FOUND THAT THE SOUTH CAROLINA UNFAIR TRADES PRACTICES ACT DID NOT APPLY

A. Elements of a Cause of Action for Violation of the South Carolina Unfair Trade Practices Act

To prevail on a claim arising under the South Carolina Unfair Trade Practices Act ("SCUTPA"), "the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)"). *Woodson v. DLI Props. LLC,* 406 S.C. 517 (S.C. S.Ct. 2014); *See Noack Enterprises, Inc. v. Country Corner Interiors, Inc.,* 290 S.C. 475 (S.C. S.Ct. 1986). Moreover, "An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace . . . ." *Noack, supra.*

As to damages, "the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." *Woodson, supra.*

B. Appellant Failed to Offer Admissible Evidence That the Advertising Was Unfair or Deceptive

Appellant claimed that Defendants Derr and Half Moon made two statements that allegedly violated SCUPTA: a) that Defendant Garcia was in the United States on an extended teaching sabbatical, and b) that Defendant Garcia was based at Half Moon Stables. (Complaint, ¶ 45; R.).[15] However, in its Opposition to Defendants' Motion for Summary Judgment, Plaintiff conceded that "[The statements] are

technically true under one understanding of the word 'sabbatical,' and in the further sense that Ibañez is now based at HalfMoon . . . ." (Plaintiff's Opposition to Motion for Summary Judgment, p. 48; R, p. ; emphasis in original). Significantly Opposition never elaborated on what other possible "understandings" there could be of the two statements. And Appellant conceded that the two statements are "technically true." While admitting the "technical" truth of the statements, Appellant never offered the slightest hint of any alternative understanding that members of the public might possibly have with respect to the statements. Not only was the statement that Mr. Garcia was employed by Half Moon technically and factually true, it was his employment by Half Moon that gave rise to the claim of tortious interference in the first place.

The same thing is true with respect to the statement that Mr. Garcia was in the United States on an extended teaching sabbatical. (Complaint, ¶ 45; R, p.). The Affidavit of Miguel Coves (R, p.) ¶ 8 states that "Ibanez was quick to commit us to the matter, so much so, that he commenced his leave of absence from his former employer in Spain (The Royal School) before we could apply for a visa for him." So, Appellant conceded that Mr. Garcia was going to be on a leave of absence from his employment as a trainer and instructor with the Royal School for a period of between two and three years.

The term "sabbatical" means "a period of time during which someone does not work at his or her regular job and is able to rest, travel, do research, etc.". http://www.merriam-webster.com/dictionary/sabbatical. With respect to the use of the term "extended" in the statement, Mr. Coves stated in his affidavit that "We both

acknowledged we expected the relationship to continue for at least two years. The probable expected initial length of the visa was three years, and his likely initial leave of absence from his prior employment relationship was to be two years." (R,p.). While one can quibble over whether a presence in the United States for a period of between two and three years is an "extended" stay, it is sufficient to note that the record does not establish the existence of a triable issue of fact.

In short, simply asserting that the statements were "misleading" without showing how or why they could possibly be misinterpreted by members of the public is not enough. The Circuit Court correctly found that Appellant had come forward with no evidence to support a claim that the statements were false or misleading.

C. Appellants Failed to Come Forward With Any Admissible Evidence Showing Any Possible Impact on the Public Interest

Appellant's filings in the Circuit Court and its Initial Brief before this Court are totally devoid of any *facts* from which a trier of fact could conclude that the two statements at issue here had any actual - or even potential - impact on the public interest. The best that Appellant could do was make vague references to "an interrupted undertaking and relationship which itself affected the public interest in regional and state recognition in horse competitions," "misleading advertising which both had a tendency to confuse would-be consumers of Coves Darden's goods and services," and "depreciat[ing] Coves Darden's investment in its brand." (Appellant's Initial Brief, pp. 42 - 43). Conclusory statements unsupported by any reference to specific facts cannot replace the requirement for presentation of admissible evidence sufficient to establish the elements of Appellant's *prima facie* case and there was

absolutely no evidence proffered by Appellant to support any of those conclusory statements.

D. The Appellant Failed to Demonstrate the Existence of Any Damages Allegedly Suffered as a Result of the Alleged Unfair Practices

Finally, Appellant failed to offer any evidence whatsoever of the damages it allegedly suffered as a result of the publication of the two allegedly unfair or deceptive statements. With respect to damages, "the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." *Woodson, supra.* Appellant failed to demonstrate any damages suffered as a result of the allegedly unfair or deceptive statements. The best that Appellant was able to do was argue that the allegedly unfair and deceptive statements "depreciated Coves Darden's investment in its brand." (Appellant's Initial Brief, p. 43). In *Woodson*, the Supreme Court found as insufficient a plaintiff's claim to have suffered $3,000 in damages, without offering any evidence to establish the existence of a triable issue of fact and therefore, affirmed the grant of summary judgment. In this case, Appellant's unsupported claim that it suffered "depreciation" of its brand does not even come close to the damages allegation found insufficient in *Woodson.*

CONCLUSION

In summary, the Circuit Court properly granted summary judgment on Appellant's contradictory, unsupported, and speculative claims. Appellant was given several opportunities by the Circuit Court to propound interrogatories, to seek the

production of documents, and to take depositions in order to support its claims. The Circuit Court granted summary judgment only after that discovery took place, after Appellant admitted it needed no more discovery to address the motion for summary judgment, and after three hearings on the motion. Despite all those opportunities, Appellant was unable to discover the existence of any facts supporting its various claims. The Circuit Court granted summary judgment after giving full consideration to Appellant's arguments.

For the foregoing reasons, and each of them, Appellees respectfully request that the Order of the Circuit Court granting summary judgment and dismissing the complaint be affirmed in all respects.

DATED: 9/5/14

Respectfully Submitted,

James M. Derr/TY

James M. Derr, *pro hac vice*
P.O. Box 664
St. Thomas, VI
00804 (340)
244-2566
jimderrlaw@gmail.com

DATED: 9/5/14

Respectfully Submitted

Tom Young, Jr.

Tom Young, Jr.
Law Offices of Tom Young, Jr., PC
P.O. Box
651 Aiken,
SC 29802
(803) 649-
0000
tyoung@tomyounglaw.com

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. 2012-CP-02-01772

Coves Darden, LLC

Appellants

vs

Francisco Jose Garcia Ibanez, Dori Derr, and Half Moon Stables, LLC

Respondents

CERTIFICATE OF SERVICE

I, Tom Young, Jr., do hereby certify that I have, on September 5, 2014, serviced the foregoing **Respondent's Initial Brief** upon Appellant or attorney(s) for the Appellant by causing a copy thereof to be mailed with proper postage to the address indicated below:

M. Baron Stanton, Esquire
Attorney for Appellant
P.O. Box 245
Columbia, SC 29202

Tom Young, Jr.

Date: 9/5/14

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SC Court of Appeals

LAW OFFICES OF TOM YOUNG, JR., PC

TOM YOUNG, JR.
ANDREW WALDEN

POST OFFICE BOX 651
409 PARK AVENUE SW
AIKEN, SC 29802
OFFICE: (803) 649-0000
FAX: (803) 649-7005

WWW.TOMYOUNGLAW.COM

September 5, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeal
Post Office Box 11629
Columbia, South Carolina 29211

In re: Coves Darden, LLC, Appellant v Francisco Ibanez, Dori Derr and Half Moon Stables, LLC, Respondents
Appellate Case No. 2014-000339

Dear Ms. Kitchings:

Please find enclosed the **Respondents' Initial Brief** in the above referenced matter along with our proof of service.

If you have any questions, please do not hesitate to contact our office at (803) 649-0000. Thank you for your assistance in this matter.

Very truly yours,

Tom Young, Jr.

TY:esh
Enclosures

c: M. Baron Stanton, Esquire
James M. Derr, Esquire

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