THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas



The Honorable D. Garrison Hill
Circuit Court Judge

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App. Case No. 2015-000476

Lower Case No. 2012-CP-23-02887

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DAVID WILSON, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF CAROLINA CUSTOM CONVERTING, LLC,..... Plaintiff,

vs.

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, ZOI FILMS, LLC, AND CAROLINA CUSTOM CONVERTING, LLC,..... Defendants,

JOHN GANDIS AND ANDREA COMEAU-SHIRLEY, ..... Third-Party Plaintiffs,

vs.

CAROLINA CUSTOM CONVERTING, LLC,
..... Third-Party Defendant and Counterclaim Plaintiff,

vs.

DAVE WILSON, STEVE NORVELL, NEOLOGIC DISTRIBUTION, INC. AND FRESH WATER SYSTEMS, INC.,

Of Whom David Wilson, Neologic Distribution, Inc., and Fresh Water Systems, Inc., are the ..... Respondents,

and

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, AND CAROLINA CUSTOM CONVERTING, LLC, ..... Appellants.

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# INITIAL BRIEF OF APPELLANT CAROLINA CUSTOM CONVERTING, LLC

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**OPENING STATEMENT:**

This appeal presents the reason why the General Assembly enacted the South Carolina Trade Secret Act a mere five years after enacting the Uniform Trade Secret Act. The General Assembly added a provision that placed an affirmative obligation upon a South Carolina employee not to misappropriate his employer's trade secrets even if he did not sign a confidentiality or non-compete agreement. This is just such a case.

Counterclaim Defendant David Wilson ("Wilson") admitted that he stole Carolina Custom Converting, LLC's ("CCC") supplier list, pricing list, customer list, prospective customer list, electronic vendor reference program, and inventory reference program ("confidential information"). Contemporaneous e-mails showed that Wilson stole this information with the specific intent to take it to a competitor and use the confidential information to compete. The evidence showed that the initial competitor did not hire Wilson. Instead, he used his family connections to start a brand new company that did the same thing as CCC, and with the use of CCC's confidential information.

As the fourth day of the *bench* trial neared an end, counsel for CCC proposed a customary post-trial briefing schedule, which would set forth the law with citations to the voluminous record. The circuit court declined the invitation. Hours after closing argument on the fifth day of trial, the circuit court ruled that CCC did not prove its trade secret claim. In a subsequent written order, the circuit court based its reasoning on a manifest misunderstanding and misapplication of the South Carolina Trade Secret Act.

The legal errors committed by the circuit court are significant and require reversal.

## STATEMENT OF ISSUE ON APPEAL:

**I.** Whether the Circuit Court Erred By Failing to Apply the Correct Legal Standard of the South Carolina Trade Secret Act and Thereby Erred in Concluding that the Company Did Not Prove a Trade Secret Existed.

**II.** Whether the Circuit Court Erred By Failing to Apply the Correct Legal Standard of the South Carolina Trade Secret Act and Thereby Erred in Concluding that the Company Did Not Sufficiently Safeguard its Confidential Information.

**III.** Whether the Circuit Court Erred By Failing to Apply the Correct Legal Standard of the South Carolina Trade Secret Act and Thereby Erred in Concluding the Company Was Not Entitled to Damages Under its Trade Secret Misappropriation Claim.

**IV.** Whether the Circuit Court Erred by Applying the Wrong Legal Standard When it Judged the Breach of Fiduciary Duty and Usurpation of Corporate Opportunity Claim, and Therefore Committed Legal Error in its Application of Fiduciary Duty Law and its Application of the Statute of Limitations.

## I. STATEMENT OF THE CASE

This is an appeal from a complex business litigation matter in the Greenville County Court of Common Pleas. On April 27, 2012, Wilson filed a complaint against John Gandis ("Gandis") and Andrea Comeau-Shirley ("Comeau-Shirley"). On July 3, 2012, Gandis and Comeau-Shirley answered the complaint and filed counterclaims. On October 10, 2012, Wilson filed an amended complaint against Gandis and Comeau-Shirley. On October 26, 2012, Gandis and Comeau-Shirley filed an answer to the amended complaint and again filed counterclaims against Wilson. On April 16, 2013, this case was designated complex and assigned to the Honorable D. Garrison Hill. On September 20, 2013, Wilson filed a second amended complaint against Gandis, Comeau-Shirley, and CCC. On November 15, 2013, CCC answered the second amended complaint and filed counterclaims. Also on November, 15, 2013, Comeau-Shirley answered the second amended complaint and filed counterclaims. Also on November 15, 2013, Gandis answered the second amended complaint and filed counterclaims.

Relevant to this appeal, Wilson's final and second amended complaint alleged claims for (1) dissolution against all defendants, and (2) breach of fiduciary duty against Gandis and Comeau-Shirley. All defendants' asserted counterclaims for breach of fiduciary duty against Wilson. CCC also asserted a counterclaim for violation of the South Carolina Trade Secret Act against Wilson, Neologic Distribution, Inc, and Fresh Water Systems, Inc.

This case was tried non-jury before the Honorable D. Garrison Hill, with the trial including four full days of testimony and one morning of closing argument. On the afternoon following oral argument, the circuit court issued a letter outlining its ruling. The letter ruling found for Wilson on the dissolution claim and against the counter-claim

defendants on their claims. The circuit court's letter ruling further instructed Wilson to submit a proposed order.

Wilson submitted a proposed order, and on January 9, 2015, the circuit court entered its order in this case. On January 20, 2015, Defendants' timely filed a Rule 59, SCRCP, motion to alter or amend. On January 28, 2015, the circuit court denied Defendants' Rule 59 motion. On February 2, 2015, CCC received written notice of the denial of the Rule 59 motion. On February 26, 2015, CCC filed its notice of appeal.

## II. STATEMENT OF FACTS AND EVIDENCE

The pleadings, documentary evidence, and testimony established the following undisputed facts as follows:

### A. Description of CCC

CCC distributes plastic films throughout the United States, Mexico, and Canada. The plastic films that CCC distributes are used in a variety of applications, including the food industry for packaging and product labeling purposes. (Tr. 21, ln. 81-23). CCC also distributes metallized plastic films, and these films are used in the flexible duct industry (i.e., the heating and air industry). (*See* Tr. 875, 3-6). CCC also distributes specialized films into niche markets, such as white board manufacturers. (Tr. 870, 2-17). CCC's base of operations and headquarters is in Anderson, South Carolina.

CCC primarily operates as an intermediary in the market place, connecting film suppliers with film customers. (Tr. 876. 4-12). It has a stable of customers with long-term supply relationships. In this category of customers, CCC has gone through a thorough qualifying process whereby it first understands the customer's technical needs, and then works to select a specific film suitable to meet those needs. (E.g., Tr. 871, 20-25). The qualifying process, which is done at the customer's plant, is undertaken to test the film

(or multiple films) in a number of different capacities to ensure suitability for the customer's end product. (*See* Tr. 911, 3-10). A qualifying process can take a number of months or even longer. (*E.g.*, Tr. 307, 7-20). Once a film is qualified, CCC can serve as that customer's film supplier.

CCC supports other customers on an as needed basis. For these customers, a request for supply is generated in the regular course of business, and CCC competes to meet that customer's requirements as soon as possible. (Tr. 879, 11-17). CCC developed an electronic vendor reference guide, and an inventory reference program to make this process significantly more efficient. (Tr. 877, 3 – 881, 4). CCC seeks to fill these requests for supply from its own film stocks, and other times it must enter the open market to purchase these films. In both instances, CCC makes use of the electronic vendor reference program and the inventory reference program, in addition to its employee's experience. (Id.) Finally, when a customer needs a film tailored to a specific width, CCC has the machine assets to convert the film down to the required width and length—that is, it has machines that can trim a 60 inch wide roll of film down to 35 inches. (See Tr. 24, 2-4).

B. Formation of CCC

Wilson and Gandis first met in the early 2000s while Wilson was working as a consultant for Gandis at VyTech Industries (VyTech). (Tr. 20, ln. 24 – 21, ln. 7). VyTech was headquartered in Anderson, South Carolina and was in the business of manufacturing and selling vinyl films. (Tr. 18, ln. 11-13). When Wilson met Gandis, VyTech was seeking to develop new sources for film used by VyTech in the manufacturing process. (Tr. 20, ln. 25 – 21, ln. 7).

Wilson graduated from Furman University in 1999, and has worked as a salesman for the better part of his adult life. He first became acquainted with the plastic film industry when he took a job during college working as a machine operator at company in the Greenville, South Carolina area. (Tr. 360, ln. 2-24). After a few years with that company, Wilson joined another film company where he worked for about three years. (Tr. 361, ln. 7-22). That company found itself "on some rocky times," (Tr. 361, ln. 22-23), and Wilson left to start and manage his own business, Palmetto Custom Films, which was started with outside investors. (Tr. 362, 2- - 363, 10). After a few years, Wilson was forced out of Palmetto Custom Films due to strained financial relations with his investors regarding the company's debt load. (Tr. 363, ln. 15- ; 364, ln. 5). After leaving Palmetto Custom Films, in 2005 Wilson started Eastern Films Solutions, LLC ("EFS"). EFS was a one man operation, where Wilson worked as a film sales broker. (Tr. 364, 10-19).

Gandis earned a mechanical engineering degree from North Carolina State University in 1992, and has worked as a product development engineer for a large portion of his adult career. (Tr. 17, ln. 8-12; 18, 3-10). Following graduation, he began working for Milliken Company at its Thompson, Georgia plant. (Tr. 17, 15-19). After two years with Milliken, Gandis left to join VyTech. (Tr. 17, 15-19). Gandis' first role at VyTech was to oversee the installation of a textile line. Gandis later become the plant manager of VyTech. (Tr. 18, ln. 1-6). Gandis was later promoted to serve as VyTech's diretor of new product development. (Tr. 18, ln. 8-10). Gandis remained employed by VyTech until the company went out of business in 2006. (Tr. 19, ln. 14-20).

After VyTech, Gandis decided to focus on creating a new business with his father and running an existing business he owned that was doing sheet metal fabrication. (Tr.

19, ln. 21 – 20, ln. 9). It was at this time that Wilson approached Gandis about restarting some projects that the two had worked on at VyTech. (Tr. 20, ln. 10-13). Gandis' machine business was located in Anderson, and he and Wilson believed that a portion of this facility could serve as a hub of operation for a future business in the film industry. (Tr. 22, ln. 9 – 23, ln. 9). At this point in time, CCC had not been established as an entity.

The first business plan Wilson and Gandis tried was the manufacturing of a breathable vapor barrier for metal buildings. (Tr. 22, ln. 17-24). Before going out of business, VyTech had tried to develop the product but was unsuccessful. (Tr. 22, ln. 17-24). Their idea was to create a machine that would roll the film through its tooling and perforate the film during that process. (Tr. 22, ln. 9 – 23, ln. 9). To that end, Gandis built a machine at his warehouse that could be used for this purpose. (Tr. 23, ln. 6-9). The venture never got off the ground. (Tr. 23, 10-12). Although the perforation services business failed, it provided a helpful asset: a machine that could be used for slitting film. (Tr., 23, 15-22).

During this time, Wilson operated EFS. As noted above, EFS was a one-man film sales company. In his work at EFS, Wilson contracted out the services of a film slitting company in order to meet customer demand. (See Tr. 23, 15-22). For example, if an EFS customer needed a certain type of film that was 45 inches wide, and the roll was currently 60 inches wide, EFS would contract with a film slitter to slit 15 inches from the side of the roll.

Wilson and Gandis decided to use the machine created for perforation and see whether they could operate it in a manner that would allow it to slit film. (Tr. 23, ln. 13 – 24, ln. 4). Film slitting was not a new idea in the market, but it was something they

thought that they could turn into a profitable venture. In or around March of 2007, Gandis rebuilt the perforation machine into a slitting machine. Over the course of the year Gandis and Wilson endeavored to see whether they could make a go of this new business venture by slitting film for EFS. (Tr. 24, ln. 9- 25. Ln. 21).

By November of 2007, the men apparently believed this venture had a future; thus, CCC was formed and registered with the Secretary of State as an LLC. At its formation, it had two members: Wilson and Gandis as 50-50 partners. (Tr. 54, ln. 5-9). Carolina Custom Converting was formed to operate solely as a film slitting company—that is, *custom converting*. (Tr. 25, ln. 16-21). Gandis was in charge of CCC operations and worked from its Anderson headquarters. As the months passed, however, Gandis came to the conclusion that slitting film was taking a large portion of his time but was not really creating a lasting company. (Tr. 37, 1-2; 37, 19-20). Soon thereafter, though, Wilson and Gandis began discussing the idea of folding EFS into CCC—that is, creating a full service film company. (Tr. 37, 3-5) Wilson and Gandis ultimately did combine the operations of these two companies starting in July of 2008. (Exs. 10, 31).[1]

C. CCC Becomes Operational

The combined company emerged strong and made a profit for its owners quickly. CCC made a profit in each of its first three years: 2008-2010. (Tr. 586, 3-5). In 2010, however, it posted a banner profit of over $1 million. It did so as a result of a world-wide film shortage. CCC was able to capitalize on the film shortage because it was able to purchase large amounts of film inventory. (Tr. 651, 11-25). With inventory on-hand,

[1] Comeau-Shirley later joined CCC as a 10% member; she had a tax accounting and consulting background and agreed to receive a 10% ownership stake in return for providing consulting services. (Tr., 619, 4-14; 621, 13-22; 633, 13-22).

CCC was able to service a large number of customers that it did not previously service in 2008-09. (See Tr. 653, 23- 654, 1). During its successful start-up years, CCC grew to a company of roughly 24 employees. (Tr. 39, 2-24). In 2009, CCC opened an office in Greenville, South Carolina. By the second half of 2011, Wilson was primarily supporting CCC's sales force from Greenville, and was not interacting with the customers on a regular basis. (Tr. 415, 1-12).[2]

D. Wilson Prepares to Leave CCC and Take its Trade Secrets with Him

In January of 2012, Wilson began finalizing plans to leave CCC and join a film sales company in Tennessee named FilmTech, Inc. (Tr. 496,12 - 499, 18; Ex. 72-76). On January 9, 2012, Wilson entered CCC's secure server, (Tr. 883, 5-9), and downloaded all of CCC's customer and contact information. (Tr. 868, 10-, 869, 3; Ex. 117). The next day, he ate dinner with FilmTech's owner, a gentleman named Mark McGarel.[3] (Ex. 72).

On January 16, 2012, at 12:11 pm, Wilson sent an e-mail to McGarel regarding his plans:

> Hi Mark,
>
> I look forward to the opportunity to join your organization. . . . Here are the points of discussion for our agreement.
>
> . . . .
>
> 4. Full time employee with draw or salary of $8k per month for a period of time until my commission reaches a level that supports my needs. ***My goal will be to move as much of the***

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[2] In 2011, CCC's profitability ended and it posted a substantial loss that year. (Tr. 586, 3-5). Specifically, CCC posted a loss of $456,000 in 2011. (Tr. 245, 8-15). The financial health of the company led to strife regarding the internal affairs of CCC and ultimately Wilson seeking employment elsewhere.

[3] Initially Wilson approached McGarel to determine whether FilmTech would be interested in acquiring CCC. To that end, Wilson had McGarel sign a non-disclosure agreement. The conversation, however, quickly turned to Wilson joining FilmTech. (Tr. 496, 15-18).

***business I manage at CCC to Filmtech as quickly as possible. In addition, I will work to bring prospective business that CCC has been working on our qualifying over the past 3 to 6 months.***

(Ex. 74; Tr. 496, 19 – 497, 22) (emphasis added).

Later that day, at 5:34 pm, Wilson sent a follow-up email to McGarel. (Ex. 76). In that e-mail, Wilson went line-by-line through CCC's current markets and customers. He also attached CCC's 2012 budget forecast, which included CCC's projected customer sales and the prospects that CCC was working to secure. (*Id.*; Tr. 498, 17 – 499, 14). Wilson testified that it was his plan to take all of the confidential information and use it at FilmTech. (Id.).

A week later, Wilson received a return e-mail from McGarel. (Ex. 78). By that time, McGarel had been able to analyze the 2012 budget forecast Wilson sent him. McGarel noted the costs of the products he was currently purchasing versus the costs that CCC was paying for the film. (Id.; Tr., 502, 8 – 13). For some of these films, CCC's acquisition prices were more competitive. (Tr., 503, 1-17). Ultimately, McGarel passed on Wilson's proposal to join FilmTech. During their discussions McGarel had inquired about potential legal ramifications. (Ex. 75, p.3). Presumably, those concerns or a lack of synergies won out.

As discussed below, instead of joining FilmTech, Wilson took everything he had planned to bring to FilmTech, and instead took it to NeoLogic Distribution Inc. and Fresh Water Systems, Inc. There is no question that Wilson took all of CCC's confidential information with him. (Tr. 506, 1-18).

E. Wilson Leaves and Destroys Evidence

During the first part of January, when Wilson was attempting to move over to FilmTech, he concurrently sought to negotiate the purchase of his equity interest by CCC,

or purchase the other members' interest. At this time all parties had retained legal counsel. (Tr. 499, 18- 500, 2). At some point during the negotiations, Wilson's counsel led Gandis' counsel to believe that Wilson was leaving CCC. (Tr. 163, 2-17; 435, 22-436, 13). As a result, Gandis had CCC's information technology consultant disconnect the Greenville office from CCC's server. (*See Id.*) Gandis took this action to prevent Wilson from being able to download CCC's confidential information from the server and take it with him. On the afternoon of the next day (January 17), Gandis travelled to the Greenville office to remove Wilson from that office and prevent him from taking any of CCC's property. (Tr. 164, 18 – 165, 8). Gandis brought along a member of law enforcement to help him with this goal. (Id.). Wilson did leave the Greenville office that day, but he took CCC property and computers with him (Id.). Wilson testified that he took two computers and a Blackberry phone. (Tr. 500, 10-16).

On January 19, CCC's labor lawyer sent a letter (via facsimile) to Wilson's counsel. (Ex. 77). The letter notified Wilson, via counsel, that he had taken company property, which included "proprietary information, trade secrets, and other intellectual property," and instructed him "not to destroy, copy, sell or use any of this property, including the computer data." (Id.). After receiving this warning, Wilson then erased all of the data on both computers and the Blackberry." (Tr. 500, 25 – 501, 2; see also 899, 23-901,2). Wilson admitted that he erased this information after receiving notice not to do so. (Tr. 501, 3-6). As an explanation for his actions, Wilson claimed that he transferred CCC's data from these devices prior to erasing them. (Tr. 500, 24 – 501, 24).

F. Wilson Joins FreshWater Systems, Inc. and Neologic Distribution, Inc.

Gone from CCC, and ignoring the warning of CCC's labor lawyer's letter, Wilson began to siphon off CCC's customers. (Tr. 503, 20- 504, 25). He first began doing so

with the financial backing of Fresh Water Systems, Inc. ("FWS") (Id.; Ex. 81, fourth sentence ("What's your proposal on the profit allocation to FWS?"). FWS is a business owned by Wilson's brother-in-law, Mr. Norvell. (Tr. 728, 18 – 729, 2). Soon thereafter, he began siphoning off customers through a company named Neologic Distribution, Inc. ("Neologic"). (Tr. 729, 3-5; Ex. 82). Neologic was a "sister" company to FWS.[4] (Id.) When Wilson began working for Neologic it created a film division. (Tr. 729, 12-23). Prior to Wilson joining Neologic, it was not in the film business. (Id.).

In its first year of existence, Neologic conducted over $135,000 worth of business with CCC customers. (Ex. 132). In 2013, Neologic conducted over $580,000 worth of business with CCC customers. (Id.). By the time of trial, Neologic had conducted over $980,000 worth of business with CCC customers. (Id.).

G. Trial Court's Ruling

The circuit court concluded that CCC did not prove its trade secret claims. (Order, p. 13-15). The court concluded that because the confidential information was accessible by the public, and Wilson had experience working in the industry, then the confidential information did not qualify as a trade secret. (Id.). The circuit court further concluded that CCC did not sufficiently safeguard its confidential information. (Id.). Finally, the circuit court concluded that CCC was not entitled to damages. (Id. at 15). The circuit court further found that the "evidence merely demonstrated that Wilson was able to conduct

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[4] These two companies were essentially the same entity. The Neologic balance sheet showed that all monies used by it flowed from FWS, and that FWS employees worked for Neologic. (Tr. 736, 3 – 737, 3; Ex. 134). Although later disputed at trial, during a Rule 30(b)(6), SCRCP, discovery deposition of Neologic, that company (Neologic) testified that it paid for Wilson's attorney fees and treated the payment as an "overhead expense." (Neologic Rule 30(b)(6) Deposition, pp. 14, 23 -15, 14; 18, 1-15; Tr. 733, 1- 735, 25).

business with some of CCC's former customers after his ouster[5] from CCC." (Id.). Importantly, in denying FWS and Neologic's counterclaim that the trade secret claim was brought in bad faith, the circuit court correctly acknowledged that "[e]vidence shown at trial demonstrated that Neologic/[FWS] used CCC's confidential information and that CCC was justified in bringing the trade secrets claim." (Id. at 17).

## III. STANDARD OF REVIEW

A claim for misappropriation of a trade secret is an action at law. When an action at law is tried to a judge, this court is tasked with correcting all errors of law. *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012). "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." *Bell v. Progressive Direct Inc. Co.*, 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014). (citation omitted). However, an appellate court may make its own determinations concerning questions of law and need not defer to the trial court's rulings. *Id.* at 576, 757 S.E.2d at 404-05.

## IV. TRADE SECRET VIOLATIONS

### A. Legal Standard

South Carolina adopted the Uniform Trade Secret Protection Act in 1992. Within five years, apparently concluding that the Uniform Act was insufficient, the General Assembly enacted the South Carolina Trade Secret Act. *Employees Beware: Employer Rights Under the South Carolina Trade Secret Act*, Kirk T. Bradley, Note, 49 S.C. L. Rev. 597, 597-98 (Spring 1998) (hereinafter "Employees Beware"). The article posits

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5 The circuit court's choice of the word "ouster" indicates the erroneous lens through which it must have viewed this claim. Whether Wilson was ousted from CCC, or not, had no bearing on the question whether he and Neologic/FWS misappropriated CCC's trade secrets.

that the South Carolina Act "arguably establishes the most comprehensive compilation of trade secret laws in the United States." *Id.* One of the grounds for this statement is the presence of S.C. Code Ann. § 39-8-30(B) (1997), which is not found in the Uniform Act, and provides as follows:

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

§ 39-8-30(B) (emphasis added). Accordingly, the General Assembly has created an obligation upon all employees in South Carolina, notwithstanding the absence of a written agreement, to refrain from using their employer's trade secrets.

Under South Carolina law, a trade secret means the following:

> (a) information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that:
>
> > (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and
> >
> > (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
>
> (b) ***A trade secret may consist of a simple fact***, item, or procedure, or a series or sequence of items or procedures which, ***although individually could be perceived as relatively minor or simple, collectively*** can make a substantial difference in the efficiency of a process or the production of a product, or ***may be the basis of a*** marketing or ***commercial strategy. The collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.***

§ 39-8-20(5) (1997) (emphasis added).

Under South Carolina law, misappropriation means:

> (a) acquisition of a trade secret of another by a person by improper means;
>
> (b) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;

§ 39-8-20(2)(a-b) (1997). South Carolina law provides that "[i]mproper means" includes "theft." § 39-8-20(1) (1997).

Finally, under South Carolina law, "[a] complainant is entitled to recover actual damages for misappropriation of trade secrets." S.C. Code Ann. § 39-8-40(A) (1997). The damages available to a plaintiff "include both the actual loss caused by misappropriation or the unjust enrichment caused by misappropriation." S.C. Code Ann. § 39-8-40(B) (1997). Accordingly, once a plaintiff proves that his trade secret has been misappropriated by a defendant, a plaintiff is entitled to damages. If the facts of a case show that a full award would be "inequitable," then a court has the authority to "reduce[] monetary recovery." S.C. Code Ann. § 39-8-40(A) (1997).

B. The Circuit Court Erred by Concluding No Trade Secrets Existed

1. The Confidential Information is a Trade Secret

Wilson took all of CCC's customer lists, supplier lists, pricing information, prospective customer lists, its electronic vendor reference program, and its inventory reference program. (Tr. 506, 1-18). CCC spent significant corporate resources and time building this body of information. (Tr. 870, 10-18; 871, 20 – 872, 1-17; 873, 24 – 874, 1-5; 875, 3-14; 876, 1-17; 877, 8 – 881, 4, 12-24).[6]

The confidential information was comprised of "simple fact[s] . . . [that] although

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[6] CCC also presented testimony that Wilson and Neologic/FWS were improperly conducting business based on information gained through the discovery process. (Tr. 876, 18 – 877, 7; 882, 4 – 883, 4; Ex. 174).

individually could be perceived as . . . minor or simple, collectively . . . [were] the basis for [CCC's] commercial strategy." § 39-8-20(5)(b). The plain language of the South Carolina Trade Secret Act makes clear that this information is a trade secret. *See also Williams v. Riedman*, 339 S.C. 251, 284, 529 S.E.2d 28, 45 (Ct. App. 2000) (Goolsby, J. concurring) (concurring in the opinion and clarifying that "I do not construe it to hold that a customer list cannot be a trade secret"). Further, Courts have concluded that this type of information is a trade secret. *See, e.g., Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1018-19 (8th Cir. 2008) (noting that public information gained "only after, extensive, time-consuming research [is] information entitled to protection"); *N. Atlantic Instruments, Inc. v. Haber*, 188 F.3d 38, 46 (2d Cir. 1999) (collecting cases and noting same); *see also* S.C. JUR. INTELLECTUAL PROPERTY § 77 & n.1 (noting that "customer lists and other sales and marketing information can be trade secrets"). The circuit court committed legal error by failing to apply the plain language of the South Carolina Trade Secret Act.

The circuit court also failed to acknowledge that the efforts involved in locating the correct film for a customer required significant intellectual input by CCC. (Tr. 870, 5-17). It likewise erred in failing to acknowledge the complexity of the supplier market, and the resources CCC utilized in navigating that market in order to locate the correct film for a customer. (Tr. 872, ln 7-10).

The circuit court also failed to acknowledge the electronic vendor reference program and inventory reference program that CCC created and Wilson took. (Tr. 877, 8 – 881, 4; Ex. 43). During the discovery process, Neologic/FWS produced a printed out copy of the electronic vendor reference program. (Ex. 43). The program operates using

the Excel program. (Tr. 877, 24-25). Gandis testified that it was developed over time with the input of a number of CCC employees and Comeau-Shirley. (Tr. 878, 6-10).

Gandis testified about the operation of the program. CCC compiled into the program all of the different manufacturers of film, specific films types, and manufacturer codes. (Tr. 878, 1-4). Gandis testified that some of the codes are not publicly available. (Tr. 878, 14-20). He testified that when a customer calls with a description of what they need, he can put those specifications into the program and it will generate a result that provides you with every manufacturer that makes that film. (Tr. 879, 4-8).

Gandis also testified about the inventory reference program. That program was developed to provide a searchable system that immediately showed what inventory CCC had in its inventory at any given time. (Tr. 879, 18 – 880, 7). Gandis testified the development of this program increased CCC's efficiencies and gave it a competitive advantage. (Tr. 879, 9-17; *see also* Ex. 67, p.6, first two sentences of "Company strengths," (Wilson noting the competitive advantage of CCC in its ability "turn an order faster than our competition")).

Both of these programs are a trade secret. They are a "program . . . [that] derives independent economic value . . . from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use." § 39-8-20(5)(a)(i). They are also a "procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process" § 39-8-20(5)(b).

2. The Circuit Court Committed Legal Error by Relying Upon Improper Legal Authority

The circuit court erred in concluding that CCC's confidential information did not constitute a trade secret. Against the backdrop of the confidential information detailed in Part III.B.1., *supra*, and at issue in this case, the circuit court committed legal error by relying upon *Atwood Agency v. Black*, 374 S.C. 68, 646 S.E.2d 882 (2007) for the proposition that CCC's confidential information did not constitute a trade secret. *Atwood* did not hold that the confidential information at issue in this case is not a trade secret.

*Atwood* addressed a rental home business located in Edisto Beach. One of Atwood's employees left to join a competing company, and Atwood brought a claim for misappropriation of its trade secrets against the former employee and her current employer. *Id.* at 70-71, 646 S.E.2d at 883. The trade secrets alleged in *Atwood* constituted the "homeowners list" and the "renters list." *Id.* at 71, 646 S.E.2d at 883. In a split decision[7], the *Atwood* court concluded that these lists did not constitute trade secrets.

The *Atwood* court based this finding on the "undisputed fact that a list of all the homeowners in Edisto Beach and their contact information is a matter of public record available at Town Hall." *Id.* at 72, 646 S.E.2d at 884. The Court also based this finding on the fact that the former employee was "contacted directly by Atwood renters after Atwood sent out an announcement of her departure." *Id.* at 72, 646 S.E.2d at 884.

The facts of *Atwood* are significantly different from this case. CCC's business involves working with customers to qualify a film before entering into long-term supply relationships. (E.g., Tr. 886, 11-15). The qualifying process can take months. Wilson's

[7] Two Supreme Court justices concluded that the "renters list" qualified as a trade secret. *Atwood*, 374 S.C. at 74, 646 S.E.2d at 884.

own witness confirmed this fact. (Tr. 307, 7-20). During the qualifying process, many times a CCC employee was required to travel to the customer's plant for trial runs. (*Eg.*, Tr. 911, 3-10).

Qualifying the right film also requires CCC to first find the right film at the right price—both for CCC and the customer. (E.g., Tr. 874, 12 – 875, 14; 876, 1-17). That process involves expending employee time and resources to locate the correct film, and the most suitable supplier of that film. Indeed, locating the most suitable supplier of film is often the most valuable information, for it provides the competitive pricing advantage. (*E.g.*, Tr. 871, 7 – 873, 3). *See Elm City Cheese Co. v. Federico*, 752 A.2d 1037, 1040-41, 1053 (Conn. 1999) (noting that cheese company's commercial strategy of locating "return milk" for use in its processes was a trade secret as it allowed the cheese company to purchase its raw goods at a much lower cost); *see also Sigma Chemical Co. v. Harris*, 794 F.2d 371, 373 (8th Cir. 1986) (noting that "which suppliers supplied chemicals at the requisite quality and price was not in public domain" and protected as a trade secret). The circuit court failed to appreciate the significant amount of time and energy that CCC devoted to creating its confidential information. This confidential information was not merely sitting at a "Town Hall" for anyone to simply review.

Unlike *Atwood*, documentary evidence showed that Wilson contacted the customers himself after he left. (E.g., Ex. 81 (noting that "[w]hen I told them I had left CCC weeks ago"); Ex. 147 (stating "Hi Trip, Good catching up with you today. As discussed, my new company is Neologic Distribution."; Ex. 149 (stating "I hope you are well. As you may have heard, I left [CCC] in January. I am still very much in the film business . . . .").

*Atwood* also did not involve competitive pricing. The price that a rental company charges is expressly advertised. CCC does not advertise the price that its customers pay for their film because its competitor could then underbid the company. The testimony at trial showed that Wilson and Neologic/FWS were underbidding CCC's customers based upon their possession of CCC's confidential information. (Tr. 870, 18 – 871, 2; 873, 2-20; 874, 6-11; Ex. 157 (stating "these prices are very attractive"; Ex. 168 (showing $400 profit on roughly $80,000 sale).

The circuit court also improperly relied upon *Carolina Chemical Equipment Co. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996), for the proposition that Wilson's previous work in the industry precluded the confidential information from becoming a trade secret. In *Muckenfuss*, the company did not claim that the employee "took actual customer lists, pricing lists, or formula cards with him." *Id.* at 297, 471 S.E.2d at 725. Rather, the company alleged the misappropriation occurred from the employee's use of "knowledge he acquired during the 17 years he was employed" by the company. *Id.* at 297, 471 S.E.2d at 725. In this case, CCC expressly claimed, and Wilson was forced to admit, that he did take all of the confidential information. (Tr. 506, 1-18). And, CCC based its claim for relief upon the fact that Wilson took this confidential information with him to Neologic/FWS where he ***started a film company***.

CCC devoted employee resources, time, and money into developing its confidential information. Wilson left CCC, then took and used all of this confidential information at Neologic/FWS—the circuit court made that specific finding. (Order, p.17). The circuit court's conclusion, however, that this confidential information was not a trade secret constituted an error of law. This court should reverse that legal conclusion, and

remand for a new trial.

C. The Circuit Court Erred by Applying an Incorrect Legal Standard When it Concluded that CCC Did Not Sufficiently Safeguard its Confidential Information

The undisputed testimony at trial established the following:

- Only three people had access to all of the confidential information: Wilson, Gandis, and Comeau-Shirley (Tr. 883, 5-16);
- The confidential information was located on a password protected server (Id.);
- When CCC was led to believe that Wilson was going to leave, his access to the server was disabled (Tr. 163, 2-17; 435, 22-436, 13);
- When Gandis met Wilson to get him to leave the Greenville office, he brought along a member of law enforcement in order to prevent Wilson from taking CCC property with him (Tr. 164, 5-14).

South Carolina law provides that the owner of a trade secret must employ "efforts that are reasonable under the circumstances to maintain its secrecy." S.C. Code Ann. § 39-8-20(5)(b) (1997). At the time Wilson left CCC, it had 24 employees, (Tr. 39, 22-24), yet only the three owners had access to all of the confidential information. (Tr. 883, 5-16). When the threat of a misappropriation occurred, CCC acted to maintain the secrecy of its confidential information. (*See also* Ex. 69 (learning that Wilson was sharing confidential information with potential suitors and asking him to protect the secrecy of the information)).

The circuit court did not apply the reasonable under the circumstances legal standard. Instead, the circuit court applied a different legal standard. The circuit court incorrectly stated that a "party claiming a trade secret violation must exercise 'eternal vigilance,' which calls for constant warnings to all persons to whom the trade secret has become known and obtaining from each an agreement, preferably in writing,

acknowledging its secrecy and promising to respect it.'" (Order, at p.14). South Carolina law, however, does not include these requirements. S.C. Code Ann. § 39-8-30(B) (1997).

The incorrect legal standard cited by the circuit court came from an unpublished decision by the United States Court of Appeals for the Fourth Circuit. *Hill Holliday Connors Cosmopulos, Inc. v. Greenfield*, 433 Fed. Appx. 207 (4th Cir. 2011). That unpublished decision based its reasoning upon the South Carolina Supreme Court's ***1972*** decision in *Lowndes Products, Inc. v. Brower*, 259 S.C. 322, 191 S.E.2d 761 (1972). Following the enactment of the South Carolina Trade Secret Act ***in 1997***—which "arguably establishe[d] the most comprehensive compilation of trade secret laws in the United States"[8]—*Lowndes* is no longer controlling law.

The circuit court's reliance on the unpublished Fourth Circuit decision constituted legal error. This court should reverse that decision, and remand for a new trial.

D. The Circuit Court Erred by Concluding that CCC Was Not Entitled to Damages

The circuit court's conclusion that CCC was not entitled to damages resulted from a legally incorrect application of the South Carolina Trade Secret Act. Section 39-8-20 provides that "misappropriation means . . . acquisition of a trade secret of another by a person by improper means"; or "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means." S.C. Code Ann. § 39-8-20(2)(a)-(b) (1997). In turn, § 39-8-40(A) provides that a "complainant is entitled to recover actual damages for misappropriation of trade secrets." S.C. Code Ann. § 39-8-40(A) (1997). Because CCC's trade secrets were misappropriated, it was entitled to damages as a matter of law.

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8 *Employees Beware*, 49 S.C. L. Rev. at 597-98.

Wilson admitted that he took all of CCC's confidential information. (Tr. 506, 1-18). Wilson admitted that at the time he left CCC he was primarily running the sales force, and not interacting with customers. (Tr. 415, 1-12). E-mails were stipulated into evidence, and presented at trial, showing that Wilson and Neologic/FWS were using CCC's confidential information. (*E.g.*, Exs. 43, 117, 151, 153, 157, 160, 166, 169, 172, 173, 174, 179). Neologic/FWS produced financial information showing that they were conducting business with CCC's customers. (Ex. 132). Trial testimony showed that 23 of 27 Neologic customers were CCC customers.[9] (Tr. 883, 17-24). But even setting aside Wilson's pre-CCC customers, the trial testimony showed that 11 of Neologic/FWS's customers were customers that CCC gained on its own. (Tr. 883, 23 – 885, 25). As a matter of law, CCC was entitled to an award of damages.[10] S.C. Code Ann. § 39-8-40(A).

The circuit court's conclusion that the "evidence merely demonstrated that Wilson was able to conduct business with some of CCC's former customers after his ouster[11] from CCC" is legal error. It is based upon a legally erroneous application of the South Carolina Trade Secret Act.[12]

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9 The circuit court apparently overlooked the fact that the agreement to create the combined company called for Wilson to provide all of his customers to CCC. (Exs. 10, 31).

10 With all due respect to the circuit court, the absence of routine post-trial briefing apparently limited the circuit court's ability to properly judge this case. (Tr. 866, 2 – 867, 18). It is important to point out that when counsel for CCC proposed a post-trial briefing schedule to set forth the law and its application to the evidence, counsel for the respondents objected. (Id.).

11 *See* n.5, *supra*.

12 In the alternative, and against the backdrop of the confidential information misappropriated in this case, the circuit court's legal conclusion is not reasonably supported by the evidence. *Bell*, 407 S.C. at 576, 757 S.E.2d at 404.

In *Williams v. Riedman*, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 200), this Court addressed whether the facts of that case provided for a trade secret claim. This court concluded that it did not, and did so based upon the following factors:

- No evidence that employee took any tangible customer information. *Id.* at 281, 529 S.E.2d at 43.
- No evidence that employee actively solicited the customers. *Id.* at 281, 529 S.E.2d at 43.
- Employee denied she had a plan to solicit the customers after termination. *Id.* at 280, 529 S.E.2d at 43.
- Every client employee had at the new company was a client from the company that she sold to her former employer.[13] *Id.* at 281, 529 S.E.2d at 44.

Each one of these factors points in in the opposite direction in this case.

The circuit court committed legal error by failing to properly interpret and apply the South Carolina Trade Secret Act.

## V. BREACH OF FIDUCIARY DUTY

The Circuit Court committed legal error by applying the wrong legal standard when it judged the breach of fiduciary duty and usurpation of corporate opportunity claim. Therefore, the circuit court committed legal error in its application of fiduciary duty law and its application of the statute of limitations. The arguments and law presented by Appellants' Gandis and Comeau-Shirley in their appellate brief are hereby adopted by CCC and incorporated herein.

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[13] The analogue here would be customers that Wilson had previously sold film to at EFS.

## VI. CONCLUSION

The circuit court did not follow the South Carolina Trade Secrets Act when it judged this case. The text of the order and the legal authority cited in the order makes this legal conclusion inescapable. CCC respectfully requests that this Court issue an opinion reversing that portion of the order addressing the trade secret claims, and remand this claim for a new trial.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable D. Garrison Hill
Circuit Court Judge



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App. Case No. 2015-000476

Lower Case No. 2012-CP-23-02887

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DAVID WILSON, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF CAROLINA CUSTOM CONVERTING, LLC,..... Plaintiff,

vs.

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, ZOI FILMS, LLC, AND CAROLINA CUSTOM CONVERTING, LLC,..... Defendants,

JOHN GANDIS AND ANDREA COMEAU-SHIRLEY, ..... Third-Party Plaintiffs,

vs.

CAROLINA CUSTOM CONVERTING, LLC,
..... Third-Party Defendant and Counterclaim Plaintiff,

vs.

DAVE WILSON, STEVE NORVELL, NEOLOGIC DISTRIBUTION, INC. AND FRESH WATER SYSTEMS, INC.,

Of Whom David Wilson, Neologic Distribution, Inc., and Fresh Water Systems, Inc., are the ..... Respondents,

and

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, AND CAROLINA CUSTOM CONVERTING, LLC,..... Appellants.

## PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and the Designation of Matter, on the below named parties by depositing a copy of the same in the United States Mail, postage prepaid, on December 9, 2015, addressed to counsel of record as follows.

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December 9, 2015

NEXSEN|PRUET

**Burl F. Williams**
Associate

December 9, 2015



The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: *David Wilson, etc. v. John Gandis, et al.*
App. Case No. 2015-000476
Lower Case No. 2012CP2302887

Dear Ms. Kitchings:

Please find enclosed INITIAL BRIEF OF APPELLANT plus one copy. In addition, enclosed is the DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL plus one copy, in the above-referenced case.

Please file the originals and return file-stamped copies in the enclosed self-addressed postage paid envelope.

Sincerely,

Burl F. Williams

BFW/vgp
Enclosures

cc: Counsel of Record



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