

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
D. Garrison Hill, Circuit Court Judge

RECEIVED

MAR 29 2016

SC Court of Appeals

Appellate Case No. 2015-000476

David Wilson, individually and derivatively on behalf of Carolina Custom Converting, LLC, Plaintiff,

v.

John Gandis, Andrea Comeau-Shirley, ZOi Films, LLC, and Carolina Custom Converting, LLC, Defendants,

John Gandis and Andrea Comeau-Shirley, Third-Party Plaintiffs,

v.

Carolina Custom Converting, LLC, Third-Party Defendant and Counterclaim Plaintiff,

v.

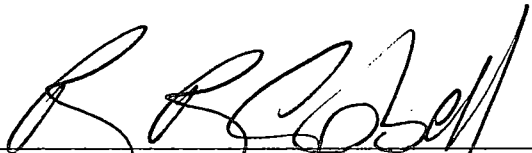
Dave Wilson, Steve Norvell, NeoLogic Distribution, Inc., and Fresh Water Systems, Inc.,

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, are the Appellants.

INITIAL BRIEF OF RESPONDENTS NEOLOGIC DISTRIBUTION, INC. AND
FRESH WATER SYSTEMS, INC.



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STATEMENT OF THE CASE

Respondents NeoLogic Distribution, Inc. and Fresh Water Systems, Inc. (“NeoLogic and Fresh Water”) adopt by reference the Statement of the Case contained in the Initial Brief of Appellant Carolina Custom Converting, LLC, as supplemented by the Statement of the Case contained in the Initial Brief of Respondent David Wilson filed February 22, 2016.

STATEMENT OF FACTS

NeoLogic and Fresh Water adopt by reference the Statement of the Facts set forth in the Initial Brief of Respondent David Wilson filed February 22, 2016.

STANDARD OF REVIEW

Appellant CCC's claim for misappropriation of trade secrets is an action at law. When considering the appeal of an action at law tried without a jury, an appellate court cannot disturb the trial court's findings of fact unless no evidence reasonably supports the judge's findings. *Jordan v. Judy*, 413 S.C. 341, 776 S.E.2d. 96 (2015). "In an action at law, the appellate court will correct any error of law, but it must affirm the special referee's factual findings unless there is no evidence that reasonably supports those findings." *Linda Mc Co. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010). Thus, the trial court's findings in an action at law action are the same as those of a jury. The credibility and weight of the evidence are questions exclusively for the trial judge. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975); *Sheek v. Crimestoppers Alarm Sys.*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989). "[An appellate court] may not consider the case based on our view of the preponderance of the evidence, but must construe the evidence presented to the [trial court] so as to support [its] decision wherever reasonably possible." *Id.*

ARGUMENT

I. THE TRIAL COURT'S DETERMINATION THAT CCC'S WITNESSES WERE NOT CREDIBLE IS ENTITLED TO SUBSTANTIAL DEFERENCE.

The Circuit Court's determination that no trade secrets were misappropriated by Wilson, NeoLogic or Fresh Water and that CCC failed to prove that it suffered any damages was a fact-driven endeavor. The Circuit Court heard the trial testimony, observed the demeanor of the witnesses, and came to the very stark conclusion that CCC's witnesses were not simply credible. In ruling on Appellant's Rule 59 Motion to Alter or Amend the judgment presently on appeal, the Circuit Court wrote:

“Mr. Wilson's testimony was credible on the key issues. Mr. Gandis' and Ms. Comeau-Shirley's testimony lacked credibility in most important respects.

“The evidence revealed that Mr. Gandis and Ms. Como Shirley deliberately collaborated to oppress Mr. Wilson. Their conduct was unconscionable. They purposely created a toxic business environment with the goal of driving Mr. Wilson out.

“Defendants tightly controlled cabal to oust Mr. Wilson could serve as a script for minority shareholder oppression. Their story even contains ample hubris, and an important irony: they forgot Mr. Wilson was the partner who had the skills and contacts necessary to make the business work.”

(Order denying Defendants' Rule 59 motion dated January 28, 2015).

Insofar as that this Court may not weigh the evidence, but rather must construe the evidence so as to uphold the Circuit Court's decision when reasonably possible, it is appropriate that this Court defer to the Circuit Court's credibility findings and view the Appellant's arguments with the credibility lens provided by the Circuit Court. This lens tarnishes CCC's arguments, particularly the factual assertions in its brief. Given that this Court must affirm the Circuit Court's factual findings “unless there is no evidence that reasonably

supports those findings," the Circuit Court's blunt finding that Gandis and Shirley lacked credibility on key issues should be dispositive of all factual arguments made by CCC. See *Linda Mc Co. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010).

II. THE CIRCUIT COURT APPLIED THE CORRECT LEGAL STANDARD OF THE SOUTH CAROLINA TRADE SECRETS ACT AND PROPERLY CONCLUDED THAT THE CCC DID NOT PROVE ANY TRADE SECRETS EXISTED.

CCC tacitly acknowledges its difficulty with the facts and its witnesses' credibility and takes aim instead at the legal standards under which the Circuit Court reached its conclusions. CCC's challenge in this regard falls short as the Circuit Court's Order evidences its application of the proper legal standards to facts of this case.

In reaching its conclusion that CCC did not meet its burden of proof that Wilson, NeoLogic, or Fresh Water misappropriated CCC's trade secrets, the Circuit Court relied on the plain language of the South Carolina Trade Secrets Act, which provides, in pertinent part:

"Trade secret" means information that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

S.C. Code Ann. § 39-8-20(5); January 9, 2015 Order, pp. 14, 17. The Circuit Court also noted that South Carolina law further defines a trade secret as:

information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that (a) 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 (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

S.C. Code Ann. § 39-8-20(5)(a); January 9, 2015 Order, p. 14. These are the same legal authorities that CCC argues the Circuit Court should have applied. (Appellant CCC's Initial Brief, p.14). The Circuit Court committed no legal error.

Citing testimony from multiple witnesses with extensive experience and knowledge of the film industry, the Circuit Court concluded that the information CCC claimed as trade secrets was instead "readily ascertainable by proper means by the public or any other person" through trade shows and journals, and online sources and therefore not a trade secrets. S.C. Code Ann. § 39-8-20(5)(a); Tr. 292, 16 - 293, 3; Tr. 303, 9-20; Tr. 302, 1 - 304, 17; 340, 13 - 343, 7; 344, 3 - 345, 1). Furthermore, insofar as the film market is a commodities market, pricing was also public knowledge. Manufacturers advertise the pricing of their films for sale and customers routinely provide their pricing information in an effort to buy at the best price. (Tr. 303 21-25 - 304 1-17; Tr. 388, 6-20). "In determining whether something is a trade secret, one must consider the extent to which the information is known outside of his business and the ease or difficulty with which the information could be properly acquired or duplicated by others." *Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 296, 471 S.E.2d 721, 724 (Ct. App. 1996). The record reflects that the information CCC claims as trade secrets is easily acquired through public means.

Wilson brought 20 years of experience and a wealth of industry knowledge with him when he joined Gandis in forming CCC. The customers Wilson sold to while at NeoLogic were his customers prior to joining CCC. (Tr. 445, 16 - 447, 17). Appellant CCC failed to produce sufficient evidence that any customer information was not known by Wilson or ascertainable by him through public sources.

The Circuit Court found that the information claimed to be a trade secret was either generally known, ascertainable by proper means, or known by Dave Wilson before the formation of CCC. Information that is available through other proper means is not protected as a trade secret. *Atwood Agency v. Black*, 374 S.C. 68, 646 S.E.2d 882 (2007). The Circuit Court based its findings upon statutory language and applicable case law, and properly applied the law to the facts. Its finding should therefore be affirmed.

III. THE CIRCUIT COURT APPLIED THE CORRECT LEGAL STANDARD OF THE SOUTH CAROLINA TRADE SECRETS ACT IN CONCLUDING THAT CCC DID NOT SAFEGUARD CONFIDENTIAL INFORMATION.

CCC again argues that the Circuit Court applied an improper legal standard, this time because the Circuit Court cited *Hill Holliday Connors Cosmopolos, Inc. v. Greenfield*, 433 Fed. Appx. 207 (4th Cir. 2011) with respect to the requirement that trade secrets be safeguarded. CCC posits that *Hill Holliday*, a case decided after the adoption of the South Carolina Trade Secrets Act, improperly relied upon *Lowndes Products Inc. v. Brower*, 259 S.C. 322, 191 S.E.2d 761 (1972), a case decided long before either the Uniform or South Carolina Trade Secrets Acts were adopted by the South Carolina Legislature. CCC's argument fails to acknowledge however that the component of the trade secret definition at issue here (whether reasonable steps to safeguard the alleged trade secret were taken) existed before the adoption of the South Carolina Trade Secrets Act. The *Lowndes* Court, quoting the Massachusetts Supreme Judicial Court, stated:

But if the person entitled to a trade secret wishes to have its exclusive use in his own business, he must not fail to take ***all proper and reasonable steps to keep it secret***. He cannot lie back and do nothing to preserve its essential secret quality, particularly when the subject matter of the process becomes known to a number of individuals involved in its use or is observed in the course of manufacture within plain view of others. One may not venture on liberties with his own secret, may not lightly or voluntarily hazard its leakage or escape, and at the same time hold others

to be completely obligated to observe it. As a naturally known member of the patent bar has written, one who claims that he has a trade secret must exercise *eternal vigilance*. This 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.

Id. at p. 33, quoting *J.T. Healy & Son, Inc. v. James A. Murphy & Son, Inc.*, 357 Mass. 728, 738, 260 N.E.2d 723, ___ (1970)(emphasis added)(internal quotation and citation omitted). With respect to safeguarding trade secrets, South Carolina law did not change with the adoption of the South Carolina Trade Secrets Act. As *Lowndes* demonstrates, this component has always been a prerequisite to trade secret protection in South Carolina. The Circuit Court's reference to *Hill Holiday*, which simply repeats *Lowndes's* reference to "reasonable steps" and "eternal vigilance," is not misplaced but rather is an accurate statement of South Carolina law.

The Circuit Court correctly ruled that in order for information to be a "trade secret," the information must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." S.C. Code Ann. § 39-8-20(5)(a)(ii); January 9, 2015 Order, p. 14. The Circuit Court also acknowledged that South Carolina law imposes an independent duty on employees to not use or disclose trade secrets, a duty separate from any written contract of employment or secrecy agreement. (January 9, 2015 Order, p. 7, citing S.C. Ann. §39-8-30(B)). In so doing the Circuit Court stated "[i]t is not required that a contract or secrecy agreement exist, and it is understandable that a very small company such as CCC did not have elaborate agreements in affect [sic]." (January 9, 2015 Order, p. 14). The Circuit Court was thus cognizant of (and applied) the same legal standard advocated by CCC.

One of the first documents discussed during the trial of the case was an organizational outline completed by Gandis. The outline summarized the terms of his deal

with Wilson and the formation of CCC. (Pl. Ex. 1). Among other things, this questionnaire asks whether the parties will be bound by non-competition and non-disclosure agreements. Gandis answers no, clearly documenting CCC's lack of interest in safeguarding any information that could potentially constitute a trade secret. (Pl. Ex 1; Tr. 35, 22 – 36, 13).

Moreover, although a written non-disclosure agreement is not required to impose a duty on an employee not to disclose trade secrets, it seems a reasonable step to take with employees if a company had trade secrets it wanted to protect. Yet, the record reveals that no CCC members or employees were ever asked to sign non-disclosure agreements before Wilson left CCC. (Tr. 179, 7-8; 175, 16-20; 434, 7-12). Bill Saw, a CCC customer service representative who worked from home and had possession of purchase orders and sales orders in his home that contained all of the information CCC now claims to be trade secrets, was not required to sign a non-disclosure agreement. (Tr. 318, 1-9; 320, 24 – 321, 1; 324, 18 – 325, 1). Likewise, Mike Myers, an independent sales representative that sold for CCC, was not asked to sign a non-disclosure agreement. (Tr. 304, 18-20). In fact, CCC presented no testimony of its effort to protect the secrecy of its alleged trade secrets other than a password for its QuickBooks software. (Tr. 883, 5-16).

CCC not only failed to safeguard its alleged trade secrets, Gandis and Shirley gave CCC company information and opportunities away. In July 2012, Gandis and Shirley secretly created ZOi Films, LLC to avoid having to “haggle” with Wilson over post-lock-out profits. (Tr. 186, 1-7, 713, 20-25, Pl. Exh. 106, 107). ZOi had two members: M-Tech, a company owned by Gandis, and Major Brainstorms, Inc., a Georgia company owned by Comeau-Shirley. (Tr. 187, 16 – 189, 21; Pl. Exh. 108, 133; see also Pl. Exh. 132, 134, 135, 139). CCC, through its manager Gandis, provided information to ZOi about CCC's more

profitable corporate opportunities. (Pl. Ex. 133; Tr. 184, 12 – 186, 22; 194, 19 – 196, 22). According to Bill Shaw, ZOi was “a new company that John [Gandis] and Andrea [Comeau-Shirley] were starting up.” (Tr. 325, 18-23). CCC paid Shaw to work on ZOi deals using CCC’s QuickBooks system to enter sales transactions and purchase orders. (Tr. 325, 5 – 327, 18). Accordingly, CCC’s pricing and customer information used by Shaw in performing his customer service duties on behalf of CCC were also being used by Shaw in performing purchasing and sales duties for ZOi Films. So not only did CCC fail to take reasonable steps to maintain the secrecy of its alleged trade secrets, it provided CCC’s information and business opportunities to a competing company.

CCC knew in March of 2012 that Wilson had left CCC’s offices with a Blackberry, business papers and two computers containing all of CCC’s customer information-- the same information CCC now is claiming as trade secrets. (Tr. 175, 2 – 176, 3; 252, 8-14). CCC also knew by July of 2012 that Wilson was “out there selling film again for his new employer.” (Exhibit 113). Nonetheless, CCC waited over two years to file its trade secret claims against NeoLogic and Fresh Water. The fact is that CCC’s trade secret claims were an afterthought, alleged late in this case for purposes of leverage in the litigation, rather than to protect any commercially sensitive information.

IV. THE CIRCUIT COURT APPLIED THE CORRECT LEGAL STANDARD OF THE SOUTH CAROLINA TRADE SECRETS ACT IN CONCLUDING THAT CCC WAS NOT ENTITLED TO DAMAGES UNDER ITS TRADE SECRET MISAPPROPRIATION CLAIM.

The Circuit Court ruled that CCC failed to prove that any of its alleged damages were proximately caused by a misappropriation of alleged trade secrets. The Circuit Court noted:

The evidence merely demonstrated that Wilson was able to conduct business with some of CCC's former customers after his ouster from CCC. There was very little, if any, evidence that possession of CCC's customer information by Wilson was the proximate cause of any lost revenue experience by CCC. (Order, p. 15).

The Circuit Court's finding is based on the proper application of South Carolina law to the facts of this case and should therefore be affirmed.

NeoLogic and Fresh Water adopt Wilson's arguments with respect to the alleged misappropriation. In summary, there is ample evidence in the record to support the Circuit Court's finding that CCC's alleged trade secrets were not misappropriated by Wilson. Wilson, a member of CCC, took his work computers with him as he was being locked out of his company by Gandis. He did so while in the presence of law enforcement and in order to preserve the evidence necessary to prove the oppression he experienced. (Tr. 442, 1 – 444, 1-8). Wilson returned his computer to CCC with all information intact. (Tr. 442, 1-3). Wilson, an owner of CCC, could hardly have taken CCC information by improper means—he had as much of a right to it as anyone else.

Although CCC represents that “Wilson left CCC, then took and used all of this confidential information at NeoLogic/FWS – the circuit court made that specific finding.” (App. Brief 20), there is no reference to such a finding by the Circuit Court. The Order makes no such finding. The Court, in ruling on the ancillary question of whether NeoLogic and Fresh Water were entitled to an award of attorney's fees under the South Carolina Trade Secrets Act, found that NeoLogic/Freshwater used CCC's confidential information (as opposed to trade secrets). This information was in the form of a spreadsheet Bill Shaw used while working at CCC. (Tr. 331, 3-21). Shaw testified that the spreadsheet was “a

very generic vendor cross-reference for my own purpose there at CCC.” (Tr. 331, 3-21; Def. Exh. 43). This information did not have customer information and there was no evidence this information was used in connection with any CCC customers. (Def. Exh. 43). All of the information was readily and publicly available or ascertainable, was not the subject of a non-disclosure agreement or non-competition agreement, and it was dated. The spreadsheet bore the date November 4, 2010, over year prior to when Wilson was locked out of CCC. (Tr. 331, 22 – 332 3; Def. Exh. 43).

Gandis’ testimony at trial about this spreadsheet was very limited, and there was no testimony that Bill Shaw’s use this spreadsheet resulted in any damage to CCC. To the contrary, there is substantial evidence in the record demonstrating that the few customers to which Wilson sold film in 2012 while at NeoLogic were Wilson’s customers prior to joining CCC. (Tr. 445, 16 – 447, 17). CCC argues that eleven of NeoLogic’s customers “were customers that CCC gained on its own.” (App. Brief 23). However, there was evidence that of these eleven, all but three were customers which Wilson had pre-existing relationships. Of those three, two had left CCC because of quality issues and one did not do business with NeoLogic until 2014. (Tr. 449, 13- 450, 113; 448, 7-16). The largest account initiated contact with Wilson in 2013, after he was locked out of CCC. (Tr. 451, 4-8). There is therefore ample evidence to support the Circuit Court’s determination that CCC failed to prove that Wilson’s post-CCC activity at NeoLogic constituted “anything but legitimate competition by one who had superior knowledge of and wide contacts in the film industry.” (Order p. 15).

CONCLUSION

The Circuit Court applied the correct legal standard when it determined that CCC failed to prove that Wilson, NeoLogic or Fresh Water misappropriated CCC's trade secrets. The Circuit Court also applied the correct legal standard when it determined that CCC failed to prove that it incurred any damages as a result of an alleged misappropriation of trade secrets. Moreover, the record supports the Circuit Court's credibility findings and its findings with respect to the public nature of CCC's alleged trade secrets, CCC's lack of effort to protect its alleged trade secrets, and the lack of evidence of damage to CCC. The Circuit Court's decision should therefore be affirmed.

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v.

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v.

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

John Gandis, Andrea Comeau-Shirley, and Carolina Custom Converting, LLC, are the
Appellants.

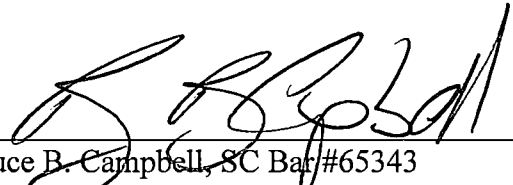
PROOF OF DELIVERY

I certify that I have served Respondents NeoLogic Distribution, Inc., and Fresh Water Systems, Inc.'s Initial Brief and Designation of Matter by depositing a copy of same in the United States Mail, postage prepaid, on March 24, 2016, addressed to the attorneys of record:

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SC Court of Appeals

Clerk of Court
SC Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: David Wilson v. John Gandis, et al
Appellate Case. No.: 2015-000476

Dear Sir or Madam:

In reference to the above, enclosed please find Respondent NeoLogic Distribution, Inc. and Fresh Water Systems, Inc.'s (1) Initial Brief, (2) Designation of Matter to be Included in the Record on Appeal, and (3) Proof of Delivery.

Sincerely,

HORTON, DRAWDY, WARD, MULLINAX
& FARRY, P.A.

Bruce B. Campbell

BBC/kt
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