THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

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

Case No. 12-CP-02-01772

Coves Darden, LLC, ... Appellant,

v.

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

PETITION FOR REHEARING
(With Suggestion for Rehearing En Banc)

Appellant Coves Darden moves, pursuant to Rule 221(a), SCACR, that the court rehear the case, grant oral argument, vacate the unpublished opinion (No. 2016-UP-402, filed August 17, 2016), and issue a published opinion reversing the Circuit Court's order granting Defendants-Respondents' motion for summary judgment. Coves Darden respectfully suggests rehearing en banc, pursuant to Rule 219, SCACR.

The grounds for this motion, respectfully submitted, are that the Court overlooked the evidence in the record, possibly misapprehended some facts it did examine, and was guided in doing so by overlooking some of the law on point and some of the thirteen issues in the appeal.

To wit:

1. The Court overlooked or erroneously disregarded the Supplemental Interrogatory Response dated October 9, 2013 in the Record at 453;
2. The Court overlooked or failed to apply the summary judgment standard, including the "scintilla" rule and the prohibition on the court taking its own view of the facts;
3. The Court misunderstood or incorrectly considered the time sequence of formation of the contract, determining the actual length of validity of the visa, and commencement of work;
4. The Court applied out-of-state or generalized treatise propositions in lieu of South Carolina authority to the contrary;
5. The Court appears to propose a change in the general and South Carolina law of agency;
6. The Court failed to rule on the Circuit Court's errors in applying concepts of judicial admission and sham affidavit, and additionally did not rule on the underlying factual or legal issues in the arguments on those issues, such as the genuineness of disputes presented, and the reasonableness of any inferences urged;
7. The Court failed to recognize or rule upon the presented issue of whether an agreement between an employer and an employee for employment at will is still a contract, breach of which is still actionable, although termination alone is not a breach and is not actionable;

8. The Court failed to rule upon the presented issue of whether the statute of frauds can be raised as a defense by a third party, who is not a party to the contract, in an action against that party for tortious interference with contract;

9. The court failed to rule upon the presented issue of whether a contract terminable at will can support a claim for tortious interference with contract or tortious interference with prospective advantage;

10. The Court failed to rule on the issue of the significance to claims of tortious interference with prospective advantage and violation of the Unfair Trade Practices Act, of inducing another's employee to breach his contract by offering him an illegal compensation agreement or facilitating the same;

11. The Court failed to rule on the presented issue of whether the UTPA applies to traditionally proscribed anticompetitive behavior; and

12. For compound reasons, the Court incorrectly affirmed summary judgment on the breach of contract, breach of fiduciary duty, tortious interference, and UTPA counts of the complaint.

Coves-Darden also respectfully submits that the form of the opinion does not comply with the South Carolina Appellate Court Rules. It is possible that this is the reason why some of the issues and law were overlooked. While the opinion addresses some of the larger issues, it does not discretely identify and decide all the thirteen issues presented and actually argued in the briefs. While not explicitly required by appellate court rule, the opinion also does not recite the facts of the case in the light most favorable to the party opposing summary judgment, which would seem necessary to view the issues in the context fairly arising upon the record of the court.

Finally, the opinion should not be designated as unpublished and without precedential

value because it does not meet any of the requirements of statutes passed by the General Assembly pursuant to constitutional authority to prescribe laws pertaining to the issuance and publication of decisions. The opinion also does not meet the requirements of Rule 220, SCACR.

MEMORANDUM OF ARGUMENT FOR REHEARING, WITH CITATION OF AUTHORITY

1. Recap of Portions of Nature and Background of the Case

This appeal presents an instance in which the defendants filed two motions for summary judgment in which no grounds whatsoever were stated. No supporting affidavits or depositions were filed. Three hearings were held while Plaintiff Coves Darden, the nonmoving party on summary judgment, moved to compel discovery from the moving party. The Circuit Court granted summary judgment on all counts of the complaint, and dismissed the entire case. Coves Darden appealed the grant of summary judgment. This Court affirmed in a twenty-page opinion consisting of roughly 10 pages of majority opinion and 10 pages of mostly dissenting opinion, all designated as "unpublished."

The case in Circuit Court arose as follows. Defendant Ibanez, who lived and worked in Spain, agreed to temporary employment in which he would train and show the horses of Coves Darden, which is located in the United States. This employment required Coves Darden to first secure a work visa for Ibanez allowing him to enter and temporarily remain[1] in the U.S. for that purpose. The employment required Ibanez to temporarily move from Spain to Springfield, S.C., near Aiken.

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[1] It is not clear that on appeal, this Court understood the visa process and the effect of the visa. The nonimmigrant visa is not simply permission to work while in the U.S., it is permission to enter and be in the U.S. The nonimmigrant alien cannot come into the U.S. for the purpose of the work without getting the visa first. When the visa expires, the visa holder does not simply have to quit working. The visa holder has to leave.

After numerous expenditures by Coves Darden, trips by Ibanez as a visitor to Coves Darden's farm, and other events, Ibanez came to the U.S. for the employment and commenced work.

A few months after moving to Coves Darden's farm, Ibanez, who was employed by Coves Darden at about $96,000 a year plus perks, began clandestine visits to Half Moon Stables, a competitor run by Dori Derr. He rode her horse, collected no money for Coves Darden, and secretly agreed to compete for her in upcoming horse competitions. Unbeknownst to Coves Darden, around this time, she agreed to a future employment arrangement with him in which she would facilitate his making extra money from other activities in violation of his visa status.

About four months after commencing work for Coves Darden, on the eve of a horse competition which had been planned for weeks or months,[2] and on which resources had been committed and money had been spent, Ibanez disappeared from Coves Darden's farm. He left a note in the house which had been provided by Coves Darden for him and his family, that he was quitting with no notice. The day before, he had expressly assured Coves Darden that everything was in order for the competition.

After discovering the circumstances, Coves Darden sued Ibanez for breach of contract and breach of the fiduciary duties of (1) loyalty, (2) honesty, and (3) information, sued Derr for tortious interference with contract, and sued Derr and Half Moon for unfair methods of competition or unfair or deceptive acts or practices in the conduct of trade or commerce.

The aforesdescribed summary judgment proceedings, Circuit Court order granting

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[2]The majority opinion erroneously states that the event was planned four months after Ibanez started work, when to the contrary, like most such competitions, it had been planned much earlier. This may be the effect of unintended syntax of the majority opinion's sentence, but it is difficult to tell.

summary judgment, and appeal followed.

This Court held oral argument and issued a twenty-page opinion including a ten-page dissent. The opinion bears the heading, "THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR."

Coves Darden's appellate briefs to this Court presented the background and procedural facts, the scope and standard of review, the facts viewed in the light most favorable to the nonmoving party on summary judgment, at least fifty-nine cases, four or more treatises or secondary resources, and numerous statutes, rules or other authorities.

Coves Darden discussed at length, in the form of thirteen issues presented on appeal, the burdens on the moving party in summary judgment, the true nature of judicial admissions, the evidence in the record, the South Carolina law applicable to the statute of frauds defense, the true contractual nature of employment at-will, the scope of defenses to the claim of tortious interference with contract and prospective contract, the scope of the Unfair Trade Practices Act and its 1930s prototype, illegal compensation agreements under the U.S. immigration and nationality laws, and the definition of deceptive advertising.

These issues were distinctly stated as follows:

1. When a defendant moves for summary judgment without filing any accompanying materials and without stating any grounds in the written motion, does the nonmoving party have a burden to come forward with details on every possible element and piece of evidence in the case in response to evolving briefs and materials thereafter filed by the moving party?
2. What is a "judicial admission," and does it conclusively establish a matter for purposes of summary judgment?
3. Was there a question of fact, precluding summary judgment, as to whether there was a written contract?
4. Was there a question of fact, precluding summary judgment, as to whether there was a reasonably detailed oral contract between the parties, notwithstanding any lack of a written contract?
5. If the contract was oral, was there a question of fact, precluding summary

judgment, as to whether it was impossible to have been performed within one year?

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

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

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

9. Was there evidence of interfering in the contract?

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

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

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

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

(Appellant's Brief, "Statement of Issues on Appeal," at 1-2.)

2. Introduction to Argument and Discussion

"In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case." Rule 220 (b), SCACR. This Court did not decide every point necessary to decision. This is discussed further below.

To reduce some repetition, Coves Darden's forty-three page Appellant's Brief and Reply Brief are respectfully incorporated herein, without full re-briefing, as an argument on the thirteen points distinctly stated in the case and asked to be re-decided now on rehearing.

It is respectfully submitted that the overarching, but not exclusive, oversight in the opinion is that the majority opinion somehow overlooked, and never cited, the standing

"scintilla" standard in South Carolina for deciding summary judgment.

This confirmed standard is certainly at odds with the majority's opinion.

It is respectfully submitted that the majority also overlooked the manner in which to apply that standard to the materials in the record, including the materials submitted in opposition to the motion. The opposition materials which were seemingly disregarded or misunderstood were all allowed by rule to be submitted, particularly where, as here, the moving party fails in its own burden to submit them.

The opposition materials are required by the rule of law to be considered, and are required by the constitutional right to jury trial, to be considered. Summary judgment is a decision only of law, not of facts, and is issued only when it is believed there are no facts to decide. The materials which were disregarded included the 10-9-13 Supplemental Interrogatory Response in the Record at page 453. And there was more.[3]

3. <u>Introduction to the Primary Significance of the Errors on the Statute of Frauds Issue</u>

In one of the most significant instances of disregarding the "scintilla" rule and other aspects of the established summary judgment standard, the majority opinion viewed the facts in the record in the light most favorable to granting, rather than denying, summary judgment on the pivotal statute of frauds issue. The court is supposed to do just the opposite, view all facts in the light most hostile to granting summary judgment. It is a devil's advocate standard.

The statute of frauds issue was pivotal in that denial of summary judgment on the statute of frauds issue would have prevented summary judgment on all the other issues. This does not mean that if it were correct to grant summary judgment on the statute of frauds issue, is would be

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[3]There was more, including, but not limited to, the 4-24-13 Affidavit of Miguel Coves (R.p. 280) and the 5-20-13 Supplemental Interrogatory Response (R.p. 396.)

correct to grant summary judgment on all the other issues. The rough outline of the majority's progressions of dismissal is as follows. The majority first determined there was no written contract, but found there was definitely evidence of an oral contract. The majority then determined that the statute of frauds rendered the oral contract unenforceable. The majority then equated the unenforceability of the oral contract with nonexistence of an oral contract. In turn, the majority found Ibanez owed no fiduciary duties to his employer, in part because he was "noncontractual." Similarly, the majority ruled that because there could be "no breach of contract," the tortious interference count fell. Finally, the majority ruled that because the tortious interference count fell, the UTPA count fell as well.

4. Variations on the Circuit Court's Digressions from the Summary Judgment Standard

The majority opinion indulged in all inferences from the facts that would favor the party moving for summary judgment, rather than favor the nonmoving party. This was error. The majority opinion did not confine itself to inquiry into whether, on things that made a difference under the law, there were factual issues in the record or competing views or inferences to be drawn from facts in the record. When there are, this finding mandates denial of summary judgment, simpliciter.

The majority did not address at all, the Circuit Court's clearly erroneous extensive reliance on devices denominated as "judicial admissions" and "sham affidavits."

These errors of the Circuit Court were distinctly stated as issues and discussed at length in the Appellant's Brief. These devices were subjects confusing or unclear enough to the Circuit Court to result in an erroneous exclusion of evidence. However, the Circuit Court's insistent use of these devices was not ruled upon by the Court of Appeals for the benefit of possible further review by the Supreme Court or edification of the bench, bar, and citizenry.

Yet, it appears that, to the same erroneous effect, the majority made inconclusive remarks about any opposition materials which were mentioned, and then drifted into weighing the evidence and the inferences preferred by the majority and picking the defendants as the winner by making factual findings. The majority did so despite contrary evidence in the record, and despite other views of the facts. It is respectfully submitted that this oversight was plain error and should be corrected.

This approach was heralded by the majority's partial statement of the summary judgment standard. The majority correctly states and cites portions of the standard, but omits the "scintilla" rule confirmed again in Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). (Cf. Op. at 4.) The full standard is set out in Appellant's Brief at 2-4.

The majority adds to its partial recitation of the summary judgment standard, "'[I]t is not sufficient for a party to create an inference that is not reasonable or an issue of fact which is not genuine.'" (Op. at 4.)

The majority thereafter never specifically ruled on or identified a single unreasonable inference urged or ungenuine issue of fact proffered.

This principle of disregarding shams still does not permit the Circuit Court or the reviewing court, upon reciting the principle, to proceed to weigh or resolve issues of fact which are for the jury, nor choose between competing inferences from the facts, or otherwise disregard the summary judgment standard and the province of the jury. This is particularly so when the court makes no specific findings at all satisfying the stated elements of the principle.

The majority never makes a single ruling or finding that any inference proffered by Coves Darden is unreasonable or that any issue of fact pointed up by Coves Darden is not genuine. Yet, to the contrary, the ten-page dissent saw reasons for inferences proffered by Coves Darden, and

saw plainly, issues of fact mandating denial of summary judgment. The dissent was at least as reasonable as a reasonable juror. This confirms that granting summary judgment was manifest error.

The majority's decision affirmed the Circuit Court's extraordinary decision determining that there were no facts in the record which could support recovery on any legal theory. This, the majority did, even though Ibanez agreed to an employment arrangement, milked thousands and thousands of dollars from Coves Darden, engaged Coves Darden's trust sufficiently to get Coves Darden to sponsor him and underwrite all of his nonimmigrant visa expenses and international travel, moved onto their farm and took charge of millions of dollars' worth of purebred inventory, worked against Coves Darden's interests while on the payroll, lied to Coves Darden, failed to inform Coves Darden of important matters in his charge in a gross dereliction of duty, gave no notice of his departure, and timed his departure in a manner calculated to cause financial and other damage.

5. <u>The Existence of a Contract</u>

As noted above, the majority's opinion granting summary judgment on all four counts of the complaint hinged almost entirely on a factual "finding"[4] by the majority that the oral contract between Coves Darden and Ibanez violated the statute of frauds. However, the majority first found that there could be no written contract.

6. <u>The Existence of a Written Contract</u>

The majority determined that there was no written contract because Coves Darden was unable to produce one with Ibanez's signature on it, and offered no testimony that Ibanez had ever definitely placed his signature on the written contract.

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[4] "We find that the oral contract violated the statute of frauds." (Op. at 7.)

However, as recognized by both the majority and the dissent, under South Carolina law, the absence of a party's signature is not determinative of the existence of a written contract between parties. A written contract may still be recognized as the contract between the parties if there is evidence that the nonsigning party accepted and acted upon it. The error of the majority was that the majority found as a fact that Ibanez had not "agreed" to the written contract (Op. at 5) because an affidavit failed to "state" that Ibanez "agreed to or accepted" the terms of the written agreement. Compare the 5-23-13 Supplemental Interrogatory Response: "Upon information and belief, the written document was presented to and acknowledged by Ibanez in or before the time of his visa interview in February of 2012." (R.p. 397.)

The majority's conclusion was legal error because the following matters appear in the record and indicate that Ibanez accepted the contract through his behavior:

1. He was advised by international phone call that there was a written contract in the file he would likely be questioned about at the visa interview at the consular section of the U.S. embassy in Madrid, Spain, where he had to make application for his visa. He would have to be issued the visa before being allowed to come to the U.S. and commence work pursuant to the contract.
2. He had the contract explained and discussed with him by the bilingual Miami immigration lawyer who called him to go over the visa interview process.
3. He received the visa in Madrid, before crossing the Atlantic to begin work, based on the statements in the visa application and the written contract.
4. He moved from Spain.
5. He and his family lived in the house provided for him by Coves Darden.
6. He used the car provided for him by Coves Darden.

7. He actually commenced work.

8. He performed in a competition for Coves Darden.

9. He actually received Coves Darden's money and the benefits of all they did for him and his family.

It was therefore error to affirm summary judgment finding that no written contract existed.[5]

7. The Existence of the Oral Contract and the Nonapplicability of the Statute of Frauds

The majority first does acknowledge that "[t]here is evidence in the record supporting Coves Darden's claim" that "the parties entered into an oral contract." (Op. at 5.)

However, the majority concludes that the contract entered into by the parties was intended by the parties to be impossible to perform within one year and that the statute of frauds therefore rendered the contract unenforceable. This is oversight, and incorrect.

The oral contract defined the length of the employment contract as whatever length visa was granted, even if less than a year. The majority, on the other hand, defined the length of the oral employment contract as unequivocally longer than a year. This simply was not the fact and undermines the majority's entire opinion.

The majority seems to misunderstand the sequence of events including the formation of the contract and the point at which a visa is issued or not. The oral contract, which the majority recognizes was entered into,[6] was formed before the visa was issued, with an agreed duration

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[5]The dissent astutely points out at least the possibility of a statute of frauds issue which would remain, even if the Court recognized that the parties had entered into the written contract despite the absence of a signature by Ibanez.

[6]The statute of frauds does not so much negate the existence of an oral contract that is within the statute, as make the contract, at the option of the person resisting it, unenforceable against the party who has standing to raise the statute and who successfully does so. It is for this

defined by the length of the visa granted. (Supplemental Interrogatory Response, R.p.453.)

It was possible for the visa to be granted for less than a year. The statute of frauds therefore did not apply and it was error to grant summary judgment holding that the statute of frauds applied.

The visa was contemplated to be granted, and was granted, on the front end of Ibanez going to work. It was not granted, as seems to be implied by the majority opinion at 8, subsequently to Ibanez commencing work. It was not granted, as seemingly implied by the majority, as something subsequently terminating or truncating a contracted period of performance. It defined the period of performance. This misapprehension may have played into the majority's error of law and application of law to fact, discussed further hereinbelow.

As discussed in the dissenting opinion, even if the visa had been granted after Ibanez commenced work, this fact would not have changed the status of the contract, under South Carolina law, as one which, when made, was not impossible of performance within one year. Weber v. Perry, 201 S.C. 8, 9, 21 S.E. 2d 193, 194 (1942) (oral contract of employment for fixed period longer than one year, or so long as other condition remains in place, not exceeding the

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reason, for example, that a third party, such as one sued for tortious interference with contract, cannot raise the statute of frauds in an attempt to negate the existence of a contract and defeat the claim for tortious interference. Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc., 294 S.C. 169, 363 S.E.2d 390 (Ct.App. 1987); Hatcher v. Harleysville Mut. Ins. Co., 266 S.C. 548, 225 S.E. 2d 181 (1976). This principle precluded summary judgment on the tortious interference claim against Derr, but was overlooked and not addressed by the majority opinion affirming summary judgment on that count.

This principle is also the reason that the statute of frauds is an affirmative defense, which must be pled by the party resisting the contract and proved by the party resisting the contract. The burden of proof and production is on the party raising the defense. Here, the defendants had not pled the defense at the time of filing either of their two motions for summary judgment. The defense was not a legitimate subject of either motion. As already noted, neither motion contained any grounds, and neither was accompanied by affidavit or deposition. This fact is important when regarding the majority's inconclusive remarks about materials in the record which require denial of summary judgment.

fixed period, is not within the statute). See also McGehee v. South Carolina Power Co., 187 S.C. 79, 196 S.E. 538 (1938) (reviewing employment cases in which contingencies, including death or unsatisfactory performance, remove contracts – even for permanent employment – from the statute of frauds; Center State Farms v. Campbell Soup Company, 58 F.3d 1030 (4th Cir. 1995) (applying S.C. law). And see Roberts v. Gaskins, 327 S.C. 478, 484, 486 S.E. 2d 771, 774 (Ct. App. 1997)(a contract having a contingency which may occur within a year is not within the statute); 37 C.J.S. Frauds, Statute of § 52 (2008)(oral agreement of employment whose terms contain a contingency which may happen within one year and on the happening of which, the employment is to cease, is not within the statute); McKinney v. Nat'l Dairy Council, 491 F. Supp. 1108, 1114 (D. Mass 1980)(express or implied-in-fact contingencies in an oral contract, which contingencies could occur within one year, make the contract one under which the full performance contemplated by the contract could have been rendered within one year of the making of the contract).

The majority overlooks available South Carolina law on this subject of contracts whose duration is can be affected by conditions, events or contingencies.

Instead, the majority bases its analysis, erroneously, on a general and inapt proposition of what "most cases hold," from a general treatise on contracts, Williston on Contracts (4th ed. 2011). (Op. at 8 (citing Williston §24:9 ("'[M]ost cases ...hold a contract to render service for more than a year to be within the intention of the statute [of frauds], notwithstanding one or both of the parties may have the option of ending it by notice in a year.'").)

The existence of South Carolina authority on the point precludes reliance on a secondary source's characterization of what most cases hold. The duration of the contract is set by the length of the visa, which could be shorter that one year. When the visa expires, by law, the work

must stop, and Ibanez must leave the country. That is the case unless other measures are successfully undertaken. These facts in the record, even if disputed, made it error to affirm the Circuit Court.

The difference in the conclusion reached by the majority and the conclusion reached by the dissent can largely be explained by the fact that the majority made an impermissible factual finding, and then built its analysis on an impermissible set of facts.

In order to reach its conclusion, the majority made an outright finding of fact, that "the parties' agreement as to the term of the contract was that the term would be a minimum of two years." (Op. at 6.) This is contrary to the record, is disputed in the record, and is a finding which violates the summary judgment standard.

It certainly is error under the summary judgment standard, regardless of whether couched as a factual finding or as viewing the motion opposition materials and all other evidence in the light most favorable to Coves Darden.

As the dissent properly acknowledged, viewing the motion opposition material in the light most favorable to Coves Darden, the term of the contract was the duration of the validity of the work visa, which, at the time of entering into the contract, was yet to be issued by USCIS, and could be for more than, or less than, a year. (Supplemental Interrogatory Response, R.p.453.) ("[T]he length of the initial term of the special employment contract was for whatever initial duration the O-1 visa was granted and remained in good standing. This was agreed to be up to three years ... and could also end earlier.")

Other materials in the record also support the agreed duration of employment being co-terminous with the length of validity of the yet-to-be-issued visa, e.g., the visa application itself, discussed by the dissent in the Opinion at 15. However, the above cited Supplemental

Interrogatory Response alone precluded the majority from taking its own view of the facts on summary judgment, and finding an agreed term of employment consonant with a dismissal on the basis of the statute of frauds.

The majority makes no express ruling whatsoever on the sufficiency of the interrogatory response to raise an issue of material fact precluding summary judgment. The majority makes passing remarks, but no rulings, about the interrogatory response, and eventually proceeds simply to find contrary to what the interrogatory response quite plainly says.

The majority merely references the interrogatory response, and describes it as "argument." It is not mere argument. It is a discovery response on file with the court and not a brief. It is one of the materials specifically mentioned by Rule 56(c), SCRCP. See Rule 56(c) (specifically referencing "answers to interrogatories" as materials to be considered in determining whether there is absence of genuine dispute as to any material facts). The discovery response was squarely before the Court for consideration. The Circuit Judge ruled on how he would treat it. The majority did not.

As if to lighten the weight of the discovery response, the majority also remarks that the interrogatory response was filed "less than a week before the third summary judgment hearing," but never states any significance or consequence of this fact. It is not for the Court to weigh the interrogatory response because of its timing. Matters of weight are for the jury, not for the court on summary judgment. The majority also omits from its unexplained aside, and likely overlooked again, the fact that the issue to which the interrogatory response was addressed was not pled in the case at the times both the first and the second summary judgment motions were filed by the defendants, and was not raised in either filed motion, and was not raised in any affidavit filed by the defendants as moving parties. The issue was not mentioned until the second

hearing, and then, only verbally, at the hearing, and not in a brief. So, although the timing of the filing was irrelevant to deciding or discussing summary judgment, the timing of the filing was quite prompt. This is contrary to the perception and implication of the Court.

As if to further diminish the weight of the discovery response, the majority also notes in a footnote, as another observation not followed by any ruling as to significance or consequence, that the interrogatory response is not sworn. (Op. at 7, n.2.) Not only does the majority not state the significance or necessity of this observation to deciding whether the Circuit Court was wrong to have granted summary judgment, but the majority omits from its observation that the moving parties filed no affidavits on any material facts whatsoever, and took no depositions. Not a single interrogatory response in the case was sworn. Including the one on which the Circuit Court relied in granting summary judgment. If the form of the discovery response was regarded by the majority as preventing the response from being a discovery response, or as preventing the response from being a "scintilla" as referred to by Hancock, there should be a ruling on the issue. Any oblique or possible argument in this regard was discussed with citation of authority in Appellant's Reply Brief at 5-8, especially footnote 8.

It was error to ignore the Supplemental Interrogatory Response in determining the agreed duration of the contract, and was error to grant summary judgment.

The contract was in place before the visa was granted and Coves Darden began spending money on it and began performing their side of it before the visa was granted. However, the part of Ibanez's performance which consisted of actually reporting to work and performing horse training services did not, and could not, begin until Ibanez was issued a visa. The visa is issued before Ibanez can enter the U.S. for purposes of gainful work. It was issued in Madrid, Spain, before he crossed the Atlantic.

Yet, the majority seems to discuss the issuance of the visa as if it were an event occurring subsequent to Ibanez commencing rendition of services. In doing so, the majority overlooks Weber and other South Carolina law, and instead cites an excerpt from a general treatise. If the majority's intention is to propose a change to South Carolina law, it is respectfully submitted that the opinion affirming summary judgment should at least be published in accordance with Rule 220(a), so that all South Carolinians may be subject to the same law and govern their affairs in light of it.

It was error to conclude there was no oral contract after finding evidence of an oral contract. It was also error to find that the statute of frauds rendered the contract unenforceable when one clear view of the facts presented a contract whose terms were not "impossible of performance" within one year.

8. Fiduciary Duty

On the issue of fiduciary duty, the majority decides, based on the fact that it "can find no South Carolina authority," (Op. at 9.) to adopt a new rule declaring that an employee is not per se an agent of the employee's employer, and that agents are not per se fiduciaries of their principals with respect to matters within the subject matter of the employment. In doing so, the majority overlooks the authorities which were cited in Appellant's Brief at 28 and Reply Brief at 21. The majority does not cite them, or discuss their application to this issue, or reject them. The majority's ruling is error. If the law on this important point is proposed to be changed or distinguished for Coves Darden, it should be changed or distinguished for everyone, and the opinion should be published.

As also noted hereinabove, the majority also agreed with the Circuit Court that fiduciary duties were not owed by "noncontractual" employees, a term not defined by the Court or the law.

Respectfully this ruling was erroneous in at least two respects: (1) As highlighted in Issue on Appeal No. 8 and argued in Appellant's Brief at 26-28, an agreement to employment at will is contractual, and (2) Assuming "noncontractual" refers to the absence of a contract for a specific duration, there was such a contract. For this additional reason, the majority opinion is in error and should be reconsidered.

The majority also characterizes Coves Darden's trust in Ibanez as "unilateral." To the contrary, the Affidavit of Miguel Coves says that Ibanez "invited" the trust. (R.p. 280.)

9. Tortious Interference

The majority reasoned that because Coves Darden could not "demonstrate a breach of contract," the tortious interference claimed failed. (Op. At 10.) Because the majority erred in determining there was no oral contract based on the duration of the visa, the majority erred in this ruling as well.

Additionally, as pointed out in a preceding footnote, the statute of frauds is not available to a defendant in a tortious interference case.

Additionally, Coves Darden argued that even a bare-bones "at will" employment contract was a "contract." The majority erroneously failed to rule on this issue, presumably because the majority overlooked the fact that ending one's employment is not the only way one can breach an employment contract. "Breach" does not mean termination or quitting. "Breach" means break a part of the agreement, express or implied. For example, an employer who does not pay an employee as agreed breaches the employment contract (even an at-will employment contract), notwithstanding the employer does not fire the employee.

For these and the reasons in Coves Darden's appellate briefs, it was error to grant summary judgment on the tortious interference claim.

10. UTPA

As noted, the majority largely based its affirmance of the dismissal of the UTPA claim on the absence of a tortious interference tort, which the majority erroneously based on the absence of a contract. Correcting, among other errors, the majority's error about the existence of a contract, reverses this syllogism, and renders dismissal of the UTPA claim an error as well.

Additionally, the majority does not address in its discussion of the UTPA claim or anywhere in its opinion, the significance of the illegal employment facilitated by Derr as an inducement for Ibanez to work for Half Moon. This facet compounded the public impact and the unfair competition manifest in the actions of Derr and Half Moon. As already briefed, improper means in interfering with a commercial relationship is also a factor in some tortious interference theories.

For these and the reasons in Coves Darden's appellate briefs, it was error to grant summary judgment on the UTPA claim.

10. Form, Publishing and Precedential Effect

This case presents profound and highly relevant issues concerning commercial and employment law in South Carolina, as well as procedural law. The unpublished opinion issued on appeal does not discuss or decide all the issues presented on appeal. The unpublished decision adversarially and impermissibly crafts the account of the facts to conduce to the result which is reached. The unpublished decision does not reveal on the face of the decision, the true or proper context of some of the facts, or the Court's remarks about them, or all the issues which were presented to the Court.

In addition to submitting that the opinion should be reconsidered en banc and that the Circuit Court be reversed, Coves Darden respectfully submits that further shielding such an

opinion from public exposure by designating it unpublished and "without precedential effect" perpetuates the likelihood of similar mistakes, and should not be allowed to lessen the prospects of further judicial review.[7]

Any use of such a procedure would allow the error of appellate opinions to be obscured by lack of detail of what happened in the underlying case and lack of detail of the issues that were actually presented on appeal. Use of such a procedure would also prevent required reliance on these opinions in other cases, and thus avoid further public criticism, analysis and review.

In the instant case, the form of the opinion (skipping issues) and the designation of the opinion as "unpublished" would tend to prevent public criticism, analysis and review of what would be a significant change in established contract law, agency law, and commercial tort law in South Carolina. The procedure dampens the actual development and life of the common law. The practice of not publishing some decisions is for the purpose of not making public, decisions that are already of little or no precedential value because they do not decide any controversial issues. The practice is not for the purpose of keeping controversial decisions from being public in order to deprive them of any precedential value.

The requirements of Rule 220(b), SCACR derive from statutes passed by the South Carolina legislature, and the statutes, in turn, are based on authority in the South Carolina Constitution. See S.C. Const. (1895) Art. V, § 9 (1985 Act No. 9), S.C. Const. Art. V, § 25, S.C. Code Ann. § 14-8-250, and S.C. Code Ann. § 18-9-280.

Under Rule 220, in order for an opinion not to be published it must meet three requirements:

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[7]This is reminiscent of the problems with and exceptions to the "mootness" doctrine, in which appellate courts are concerned with matters "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911).

1. That the opinion be an opinion of "the Supreme Court"; and

2. That the opinion meet all requirements for issuance of a memorandum decision, including unanimous decision of "the Supreme Court" (not panel) that publishing the decision would have no precedential value, and that it meets at least one of four specific sets of circumstances; and

3. That the opinion be a memorandum decision.

The decision here should meet all of the above requirements in order to be unpublished, but does not meet any.

Rules 220 (b)(1) and 220 (b)(2) provide exceptions to the requirement that the appellate court address each of the issues presented on appeal. Rule 220 (b)(1) provides one exception, which is for use of the "Supreme Court," rather than for the intermediate Court of Appeals. Rule 220(b)(1) requires two unanimous determinations by "the Supreme Court" – one, that a published opinion would have no precedential value to the judiciary, the bar, or the rest of the citizenry, and the other, that at least one of four sets of circumstances are present.

While not doing so pursuant to rulemaking authority and procedure, and not doing so as a result of a case or controversy before it, the Supreme Court issued an order in 1993, In re Memorandum Decisions by Court of Appeals, 471 S.E.2d 456 (S.C. 1993). There, the Supreme Court allowed to the Court of Appeals to issue opinions in the form of memorandum opinions. However, it can hardly be presumed that the Supreme Court intended the Court of Appeals to be exempt from the parts of the rule which still pertain to the Supreme Court.

The reference in Rule 220(b)(1) to precedential value, or lack thereof, does not refer to a decision that should not be precedent because bad or unreliable. The term also does not refer to lack of precedential value established by the fiat of declaring the opinion to have no precedential

weight. The term refers to whether the decision, good or bad, makes some ruling affecting, changing, developing, refining, affirming, clarifying or illuminating existing common law and precedent. It is unknown whether the Court of Appeals determined unanimously that the opinion would have no precedential value if published. It is clear that the Supreme Court did not do so.

None of the four sets of circumstances of Rule 220(b)(1) are present here. It would not be beyond some to argue that Rule 220(b)(1)(D) applies – "that no error of law appears." However, the majority did not rule upon some issues presented. Further, the presence of a dissent finding error in both the Circuit Court's ruling and the majority opinion precludes a unanimous decision that no error of law appears.

Rule 220 (b)(2) provides the one exception available to the Court of Appeals in declining to address issues, but it does not provide any basis for not publishing. The Court need not address for "a point which is manifestly without merit." Rule 220 (b) (2), SCACR. None of the thirteen distinct points presented are manifestly without merit – they all present instances of clear and pertinent error by the Circuit Court, supported by authority.

11. Conclusion

Accordingly, Coves Darden requests that the appeal be reheard en banc and that the Circuit Court's order granting the defendants summary judgment be reversed and the matter should be remanded to the Circuit Court. The decision in the case should also be published, whether it be reversal or affirmance.

Respectfully submitted,

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Date: September 1, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

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

Case No. 12-CP-02-01772

Coves Darden, LLC, ... Appellant,

v.

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

CERTIFICATE OF SERVICE

I, M. Baron Stanton, do hereby certify that I have, on September 1, 2016, served the foregoing Appellant's Petition for Rehearing upon the Respondents by causing a copy thereof to be mailed with proper postage to the address indicated below:

Thomas R. Young, Jr., Esquire
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P.O. Box 651
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M. Baron Stanton