THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

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

Opinion No. 2016-UP-402 (S.C. Ct. App. filed Aug. 17, 2016)
(Common Pleas Case No. 12-CP-02-01772)

Coves Darden, LLC, ... Petitioner,

v.

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

PETITION FOR A WRIT OF CERTIORARI AND FOR A WRIT OF MANDAMUS

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I. Certification by Counsel for Petitioner that a Petition for Rehearing was Made and Finally Ruled Upon by the Court of Appeals

By his signature below, counsel so certifies; to wit, it was made September 1, 2016 and ruled upon November 28, 2016.

II. The Questions Presented for Review, Expressed in the Terms and Circumstances of the Case, but Without Unnecessary Detail

1. Did the intermediate appellate court err in declaring its decision to be unpublished, without precedential value, and uncitable, when the case had thirteen (13) issues on appeal and the opinion was twenty (20) pages with a ten (10) page dissent?

2. Did the Court of Appeals act contrary to basic requirements for public confidence in the judicial system and the judicial branch of South Carolina government by issuing an unpublished uncitable opinion?

3. Did the Court of Appeals violate South Carolina Code Ann.§§ 14-3-810, 14-3-820, and 14-3-830 by issuing an unpublished decision?

4. Did the Court of Appeals violate Rule 220 of the South Carolina Appellate Court Rules or order of the Supreme Court by issuing an unpublished decision?

5. Did the Court of Appeals err in refusing to issue an opinion stating every point distinctly stated in the case which was necessary for decision, along with the reason for the Court of Appeals' decision?

6. Did the Court of Appeals err in refusing to apply the summary judgment standard established by the Supreme Court, including the "scintilla" rule and the prohibition on the court taking its own view of the facts, and consequently err in finding facts on (a) the existence of a written contract, (b) the existence of an oral contract, (c) the applicability of the statute of frauds, (d) the existence of fiduciary duties, (e) the existence of tortious interference with contract, and (f) the existence of a violation of the South Carolina Unfair Trade practices Act?

7. Did the Court of Appeals err in tacitly relying on, but refusing to rule on, the Circuit Court's use of concepts of judicial admission and sham affidavit, and additionally err in not ruling 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?

8. Did the Court of Appeals err in basing its disregard of evidence in the record on innuendo rather than case law or court rule – specifically did the Court of Appeals state any basis at

all for disregarding the Supplemental Interrogatory Response dated October 9, 2013 in the Record at 453?

9. Did the Court of Appeals err in applying out-of-state or generalized treatise propositions on the law of the statute of frauds in lieu of applying controlling South Carolina authority to the contrary?

10. Did the Court of Appeals err in misunderstanding the sequence of events of the formation of the contract, the later determination of the actual length of validity of the O-1 visa, and the still later commencement of work?

11. Even if there had not been evidence in the record refuting the application of the statute of frauds to the oral contract of the parties, would it still have been error to grant summary judgment on the claims of breach of contract, breach of fiduciary duty, tortious interference with contract, and violation of the UTPA?

12. Did the Court of Appeals err in refusing to rule upon the material presented issue of whether an agreement between an employer and an employee for employment at will is a contract?

13. Did the Court of Appeals err in abrogating the general and South Carolina law of agency by holding that an employee is not an agent of his principal and that an agent does not owe fiduciary duties to his principal?

14. Did the Court of Appeals err in refusing to rule upon the material 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?

15. Did the Court of Appeals err in refusing to rule upon the material presented issue of whether a contract terminable at will can support a claim for tortious interference with contract or for tortious interference with prospective advantage?

16. Did the Court of Appeals err in refusing to rule on the material issue of whether inducing another's employee to breach his contract by offering him an illegal compensation agreement or facilitating the same is relevant to the "justification" or "improper means" elements of tortious interference with contract or relevant to claims of tortious interference with prospective advantage?

17. Did the Court of Appeals err in refusing to rule on the material issue of whether inducing another's employee to breach his contract by offering him an illegal compensation agreement or facilitating the same is relevant to the "unfairness" and "public impact/conduct-of-trade-or-commerce" elements of a claim for violation of the South Carolina Unfair Trade Practices Act?

18. Did the Court of Appeals err in refusing to rule on the material presented issue of whether the UTPA applies to traditionally proscribed anticompetitive behavior?

19. Did the Court of Appeals err, for compound reasons, in affirming summary judgment on the breach of contract, breach of fiduciary duty, tortious interference, and UTPA counts of the complaint?

III. Concise Statement of Case, Containing the Facts Material to the Consideration of the Questions Presented

A. Brief Procedural Overview

This is a breach-of-contract and business-tort case. In the Circuit Court, the defendants filed two motions for summary judgment in which no grounds whatsoever were stated. No supporting affidavits or depositions were filed by the defendants.

Three hearings were held while Plaintiff Coves Darden, the nonmoving party on summary judgment, moved to compel discovery from the moving parties. During the second hearing, the defendants orally raised the statute of frauds. 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. The Court of Appeals 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" and uncitable.

B. Other Material Facts

Coves Darden was continuing to build a horse breeding and training facility in South Carolina for Pura Raza Española horses. Coves Darden had Olympic dressage aspirations and became acquainted with Defendant Ibanez because of his international renown. Ibanez, who lived and worked in Spain, agreed to temporary employment by Coves Darden in the United States, in which Ibanez would train and show Coves Darden's horses. This employment required

Coves Darden to first secure an extraordinary O-1 work visa for Ibanez, allowing him to enter the U.S. for the purpose of the particular employment, to work only in the job described, and to remain in the U.S. only for the length of the authorized employment and length of the visa. The employment required Ibanez to temporarily move from Spain to Springfield, S.C., near Aiken. The parties agreed on all the essential terms of the employment.

After numerous expenditures by Coves Darden, trips by Ibanez as a visitor – at Coves Darden's expense – to Coves Darden's farm, and other events, Ibanez came to the U.S. for the employment and commenced work for Coves Darden at Coves Darden's farm. Ibanez lived on Coves Darden's farm in a house provided for him and his family by Coves Darden, drove a car provided by Coves Darden, had a dog provided by Coves Darden, and was employed by Coves Darden at about $96,000 a year plus perks.

A few months after moving to Coves Darden's farm, Ibanez began clandestine visits to Half Moon Stables, a competitor run by Dori Derr. He rode Derr's horse, collected no money for Coves Darden for doing so, and secretly agreed to compete for Derr in upcoming horse competitions. Unbeknownst to Coves Darden, around this time, Derr agreed to a future employment arrangement with Ibanez in which Derr would facilitate Ibanez's making extra money from other activities in violation of his visa status.

About four months after Ibanez commenced work for Coves Darden, a horse competition had been planned for weeks or months,[1] and resources and money had been committed for the competition. Two days before this competition, Ibanez expressly assured Coves Darden that

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[1]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.

everything was in order for the competition. On the eve of this competition, Ibanez disappeared from Coves Darden's farm. He left a note in the house. The note stated that he was quitting with no notice.

After discovering the circumstances, Coves Darden sued Ibanez for breach of contract and breach of the employee's fiduciary duties of (1) loyalty, (2) honesty, and (3) information. Coves Darden also 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 aforedescribed summary judgment proceedings, the aforedescribed Circuit Court order granting summary judgment, and the aforedescribed appeal followed. Coves Darden distinctly stated thirteen (13) issues on appeal and discussed them with citation of authority, 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.)

The Court of Appeals 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 petitioned for rehearing with oral argument and suggested rehearing en banc. In the petition, Coves Darden raised new issues presented for the first time by the Court of Appeals' decision: (1) that in not identifying and deciding particular issues presented to the court, the decision violated state constitutional convention (political custom), applicable statute, and Rule 220, SCACR; (2) that the Court of Appeals was not allowed to issue "memorandum" opinions, that the decision was not a "memorandum" decision and could not qualify to be a "memorandum" decision, and that the decision was therefore not eligible to be unpublished even if the Court of Appeals were allowed to issue "memorandum" opinions; (3) that important public policy issues are raised when an intermediate appellate court, whose opinions are largely only

amenable to discretionary review on certiorari, issues a decision which is unpublished, lacks sufficient detail on the issues actually presented for meaningful public use and scrutiny, and is sheltered from precedential effect.

Rehearing was denied without addressing the new issues. Two judges voted to deny. One stated, "I would grant the petition for rehearing." Coves Darden now petitions for certiorari from this Court. To the extent required procedurally for correction of the Court of Appeals' nondecision of certain issues and designations of nonpublication and uncitability, Coves Darden also requests a writ of mandamus or other appropriate writ.

IV. Direct and Concise Argument in Support of Granting Certiorari

A. Four traditional reasons for granting certiorari are present.

"The Supreme Court, or any two (2) justices thereof, may in its discretion, on motion of any party to the case or on its own motion, issue a writ of certiorari to review a final decision of the Court of Appeals." Rule 242 (a), SCACR.

A writ of certiorari "will be granted only where there are special and important reasons." Rule 242 (b), SCACR. The reasons which will be considered include the following: (1) That "there are novel questions of law"; (2) That "there is a dissent in the decision of the Court of Appeals"; (3) That "the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court"; and (4) That "substantial constitutional issues are directly involved." Rule 242 (b), SCACR.

Here, there are novel questions of law, there is a dissent, the Court of Appeals' decision conflicts with prior decisions of the Supreme Court, and there are either substantial constitutional issues directly involved, or issues important to the transparent and orderly functioning of a

responsible government.

The form and designation of decisions of the Court of Appeals are governed by statute and appellate court rule. The statutes were enacted by the General Assembly pursuant to the State Constitution. No case by Supreme Court has addressed the ability of the Court of Appeals to issue unpublished uncitable opinions.

In order to dismiss all four counts of the complaint, the Court of Appeals ignores, and therefore abrogates, the "scintilla" rule of the Supreme Court in Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009), which is part of the South Carolina summary judgment standard. The Court of Appeals ignores, and therefore abrogates, Weber v. Perry, 201 S.C. 8, 21 S.E.2d 193 (1942) and other South Carolina cases pertaining to the statute of frauds for contracts impossible of performance within one year.

In ignoring materials in the record, the Court of Appeals did not clarify or rule on the doctrines of "sham affidavit" as applied in Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004), and "judicial admission" as discussed by the Supreme Court in Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991) and later by the Court of Appeals itself in Wright v. Hiester Const. Co., Inc., 389 S.C. 504, 698 S.E.2d 822 (Ct. App. 2010). Instead of ruling on these issues, the Court of Appeals made "remarks" conveying erroneous innuendo about the timing and form of the opposition materials.

The Court of Appeals contradicts, by ignoring, the Supreme Court's holding in Hatcher v. Harleysville Mut. Ins. Co., 266 S.C. 548, 225 S.E.2d 181 (1976) that a nonparty to a contract cannot raise the statute of frauds as a defense to a claim of tortious interference. The Court of Appeals flat out contradicts, by ignoring, the Supreme Court's holding in Prescott v. Farmer's

Telephone Co-op. Inc., 335 S.C. 330, 516 S.E.2d 923 (1999) and Hudson v. Zenith Engraving Co., 273 S.C. 766, 259 S.E.2d 812 (1979), that employment at will is contractual. In error, the court affirmatively characterized employment at will as "non-contractual." (Op. at 9.)

Contrary to the Restatement of Agency and settled agency law across the country, the Court of Appeals erroneously rules that an employee is not an agent of his employer. The foregoing are some, but not all, of the novel, contradictory, and important issues represented by the decision of the Court of Appeals. The sweeping sequence of errors on distinct and important legal principles presents an acute need for a prohibition against designating such opinions as "unpublished." Certiorari should be granted.

B. The intermediate appellate court's issuing a twenty-page, unpublished non-memorandum decision with a dissent, in a case with thirteen (13) issues on appeal, and thus commanding that the decision be uncitable and without precedential value, was unconstitutional or contrary to the basic requirements for public confidence in the judicial system and in the judicial branch of South Carolina government, and violated statutes enacted by the General Assembly, and violated the South Carolina Appellate Court Rules and violated an order of the Supreme Court. (Questions 1-5)

1. <u>It was error for the Court of Appeals to designate the opinion as unpublished and uncitable.</u>

Providing for the publication of Supreme Court and Court of Appeals decisions is vested by the state constitution in the General Assembly. S.C. Const. (1895) Art. V, § 25.

By statute, South Carolina adopted and continued "in full force and effect," "[a]ll, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State" in the same manner as before this adoption. S.C. Code Ann. §14-1-50 (1976). Stare decisis ("letting the decision stand," and following it as precedent in future cases) has clearly been part of the English common law for centuries. See,

e.g., Bradley Stewart Chilton, "Star Trek" and Stare Decisis: Legal Reasoning and Information Technology, 8(1) Journal of Criminal Justice and Popular Culture, 25-36 (2001).

Stare decisis is not merely part of the common law: rather, stare decisis is the cause and the mother of the common law. It was stare decisis which built, reconciled and recorded the common law and distinguished the common law from Roman codes and civil law starting after the Norman Conquest in 1066.

The South Carolina Constitution and political custom recognize legal and judicial tradition based on precedent, equal application of laws, and limits on judicial lawmaking or abrogation of law. The Constitution specifically contemplates the publication of the decisions of the Supreme Court and Court of Appeals. See S.C. Const. (1895) Art. V, § 9 (1985 Act No. 9), S.C. Const. Art. I, § 3, S.C. Const. Art. I, § 23, id., Art. I, § 9, id., Art. I, § 8, id., Art. I, § 7, and id., Art. V, § 25.

Pursuant to the Constitution, the General Assembly prescribed laws pertaining to the issuance and publication of decisions, and pertaining to rulemaking and lawmaking by the Supreme Court. See S.C. Code Ann. § 14-3-810 (implying presumption of General Assembly that all opinions will be published), S.C. Code Ann. § 14-3-820 (same), S.C. Code Ann. § 14-3-830 (same), S.C. Code Ann. § 14-3-940 (manner of establishing court rules with approval of General Assembly), S.C. Code Ann. § 14-3-950 (same), S.C. Code Ann. § 14-8-250 (points stated in the case to be stated in opinion and decided with reasons being stated), and S.C. Code Ann. § 18-9-280 (points stated in the case to be stated in the appellate opinion and decided with reasoning stated; memorandum decisions allowed only when and certain determinations are unanimously made).

Rule 220, SCACR was established pursuant to the procedure of S.C. Code §§ 14-3-940 and 14-3-950. Rule 220 is partly repetitive of state statutes, S.C. Code §§ 14-8-250 and 18-9-280. Neither statute has been repealed.

Only memorandum opinions can be unpublished opinions. Rule 220(a), SCACR.[2] Only unpublished opinions are declared by rule to be without precedential value. Rule 220(b)(1), SCACR; Rule 268(d)(2), SCACR. Therefore, only memorandum opinions can be declared to be without precedential value. Only unpublished opinions are declared by rule to be uncitable – that is, forbidden to be cited or argued by counsel. Rule 268(d)(2), SCACR. Therefore, only memorandum decisions are uncitable.

A "memorandum opinion" is defined by Rule 220(b)(1). It is defined as a decision that qualifies under Rule 220(b)(1) for exception to the rule that the decision state in writing, and decide, and state the reason for, "every point distinctly stated in the case" by the appellant. Rule 220(b), SCACR.

The opinion in the instant case was not a memorandum opinion.[3] It was therefore error

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[2]"The appellate court shall make its decisions in writing by published opinions or memorandum opinions." Rule 220(a) (emphasis added). An "unpublished" decision can be defined as a memorandum decision which, while possibly available on the internet, is not published in "the Official Reports" or designated for inclusion in a hard-bound volume. See Rule 220(a), SCACR, and S.C. Code Ann.§§ 14-3-810, 820 and 830.

Rule 220(a), SCACR uses the term "memorandum opinion" in literal contradistinction from the term "published opinion," making clear that all opinions are published decisions unless they are memorandum decisions.

[3]The Court of Appeals was not allowed to issue a memorandum decision pursuant to Rule 220(b)(1). In South Carolina, only the Supreme Court can issue memorandum decisions. Rule 220(b)(1), SCACR. By its own convention, in 1993, the Supreme Court issued memorandum decisions only sparingly, even in the limited instances in which it was authorized to do so. In Re Memorandum Decisions by Court of Appeals (S.C. Sup. Ct. dated Dec. 18, 1993). The Court of Appeals defended its issuance of unpublished decisions in Lanham v. Blue Cross and Blue

for the Court of Appeals to designate the opinion as unpublished and uncitable. Not only should the error be corrected by appropriate order, but the opinion should be regarded as precedent in other cases and should be ordered published.

2. It was error for the Court of Appeals to not identify and decide all the issues distinctly numbered and presented.

"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; S.C. Code Ann. §18-9-280 (1985); id., §14-8-250 (Supp. 1992).

The Court of Appeals' opinion did not identify for its readers, all of the several points involved. The Court of Appeals failed to identify and decide, among other things, the issues on appeal numbered "1" (standards for summary judgment, including the "scintilla" rule), "2" (judicial admission and sham affidavit), "7" (special relationship), "8" (employment at will as ex contractu), "9" (evidence of interference), "10" (justification), "11" (requirement of contract for UTPA claim), "12" (illegal compensation as public impact), and "13" (deceptive advertising).

The Supreme Court and the Court of Appeals are treated differently under Rules 220(b) and (c), SCACR and under analogous statutes. This difference is vital to the orderly functioning of the "Unified Judicial System" of Art. V. § 1 of the 1895 Constitution of the State, and is essential to meaningful opportunity for review of erroneous decisions by the Court of Appeals.

Shield, 338 S.C. 343, 526 S.E.2d 253 (Ct. App. 2000), on the basis, stated in a footnote, that it had been issuing unpublished decisions.

The Court of Appeals' decision violates Rule 220(b) in all three particulars – it does not disclose all the issues raised on appeal, it does not decide the skipped issues, and it obviously does not provide reasoning on the skipped issues. In this manner, the opinion tends to further evade review.

Rules 220(b)(1) and 220(b)(2) provide limited exceptions to this requirement that the appellate court address each of the issues presented on appeal, rather than file a "memorandum opinion." Rule 220(b)(1) provides four exceptions, which require unanimity, and which are not for the intermediate Court of Appeals.[4] Rule 220 and the applicable statute therefore required that the Court of Appeals state its reasoning on each issue.[5]

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[4] In 1993, the Supreme Court of South Carolina issued an order regarding issuance of memorandum decisions by the Court of Appeals. See In Re Memoradum Decisions by Court of Appeals (S.C. Sup. Ct. dated Dec. 18, 1993). However, the order did not arise from an advocated appeal. Nor was the order listed in the Court Register pursuant to S.C. Code Ann. § 14-3-940(a), nor was the order submitted to the legislature pursuant to S.C. Code Ann. §§ 14-3-940(b) and 14-3-950. In the order, the Court advised of its opinion as to what level of detail was sufficient to prevent a Court of Appeals decision from constituting a "memorandum opinion" disallowed by both statute and rule. In Re Memorandum Decisions by Court of Appeals. The order required at least an identification of all the issues by number, and required reasoning allocated to each issue. In the instant case, the opinion of the Court of Appeals did not even purport to be a memorandum decision, as it discussed some issues at length. As to the issues not discussed, however, the opinion did not meet the standards set out in the Supreme Court's order.

Even if the Court of Appeals were unwisely to be considered eligible to invoke the Rule 220(b)(1) exceptions to the requirement of issuing a "published opinion," none of the four stated exceptions would apply in this case, and a "published opinion" would still be required. The exceptions pertain to findings of fact in a bench trial, JNOV, findings of fact of administrative agencies, and complete absence of error of law. Rule 220(b)(1), SCACR; S.C. Code Ann. §18-9-280 (1985). The requirement of unanimity, which the dissent proves did not exist on the panel, also made it impossible to apply any of the exceptions.

[5]Both Rule 220(b)(2) and the applicable statute provide one exception which is available to the Court of Appeals. The limited exception is made for "a point which is manifestly without merit." Rule 220(b)(2), SCACR; S.C. Code Ann. § 14-8-250 (Supp. 1992). None of the thirteen distinct points presented by Coves Darden to the Court of Appeals were identified by the Court of Appeals in its decision as manifestly without merit – they all presented precedent and

3. **Even if constitutionally enabled statutes and written rules of appellate procedure did not prohibit the Court of Appeals from issuing an unpublished uncitable decision and refusing to identify and decide issues distinctly stated in the case on appeal, the subject practices are erroneous as bad public policy.**

Depriving an appellate decision of publication and precedential effect by judicial fiat is outright destruction of stare decisis. South Carolina's constitutionally and statutorily recognized judicial tradition of written appellate decisions, followed for all people as legal precedents, was already in the vanguard of governmental transparency and responsibleness before fairly recent measures taken by the United States Supreme Court with related issues in the federal appellate judicial system.[6]

Neither the South Carolina Constitution, nor the statutes enacted pursuant to it, nor the rules of appellate procedure established pursuant to statutory rule-making procedure, authorize as an expedient, bulk intermediate appellate resolution by unpublished fiat.

Objections to uncitability and deprivation of precedential value in other jurisdictions have been based on First Amendment grounds, due process grounds, violation of Article III powers,

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arguments of error by the Circuit Court.

[6]See Federal Rule of Appellate Procedure 32.1 (abolishing, in the wake of over a decade of protest, the uncitability of unpublished decisions from 2007 forward). Quick references, with links, for the background and status of Fed. R. App. P. 32.1 are currently available at the URL, http://www.nonpublication.com/32.1.HTML . Protest over the practice of allowing obscure or oblique staff-generated summary opinions, and not requiring them to be published, not allowing citation of them, and not regarding them as law applicable to others has generated more writing than can be conveniently cited, including over 150 presentations, law review articles and journal articles. These include 155 resources, which even in a readable footnote, would require about twelve pages to list; these can be directly accessed by links found at the URL, www.nonpublication.com/ARTICLES.HTML .

pure logic, public policy, and loud outcry.[7]

Designating an erroneous opinion as unpublished and "without precedential effect" perpetuates the errors by shielding the opinion from examination and correction. This effect is heightened if the opinion also does not identify all the issues which were raised on appeal. Such a measure should not be allowed to lessen the prospects of further judicial review on the grounds that, as an unpublished decision, the opinion is unlikely to do much further harm. For all the foregoing reasons, it was wrong for the Court of Appeals to issue a partial decision, issue a clearly erroneous decision, and designate it as unpublished, and its act of doing so should be reviewed.

C. The Court of Appeals erred in refusing to follow the "scintilla" standard established by the South Carolina Supreme Court as part of the standard for deciding summary judgment motions, and erred in disregarding interrogatory responses and affidavits which mandated denial of summary judgment, and erred in simultaneously not addressing the"judicial admission" and "sham affidavit" issues raised on appeal, and substituting unconcluded and erroneous innuendo about the opposition materials; the court also erred on related issues of law regardless of its improper factual findings. (Questions 6-10 and 11-19)

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[7] One citizen formed his own organization, Committee for the Rule of Law, and commented as follows:

> Having experienced a huge loss of property pursuant to an appellate decision containing 12 obvious misstatements of law, the correction of any one of which would have required a different result, I can tell this committee that I would have found the decision much easier to accept had the idiocy of the opinion been law for all. Then I could have been certain that those who depend on the contract law of California would have stood for me. Because of no-citation rules, no one cared. No one else should ever again stand so alone before an American judiciary.
>
> FRAP 32.1 is essential to preserve the integrity of not only our judicial system, but our entire system of government.

Kenneth J. Schmier's comment on Proposed Fed. R. App.P. 32.1 to the Appellate Rules Committee. (Available currently by link in http://www.nonpublication.com/32.1.HTML.)

1. **The majority's disregard of the scintilla standard and unauthorized disregard of affidavits and interrogatory answers require reversal of its decision on all four counts of the complaint, and regardless of this overall error, reversal is also required because, inter alia, an employee is an agent and an agent is a fiduciary, because a nonparty to a contract cannot raise the statute of frauds as a defense to a tortious interference claim, because employment at will is contractual, because a contract of employment at will can be tortiously interfered with, and because there was evidence of public impact and improper means of interference.**

The overarching, but not exclusive, oversight in the majority opinion of the Court of Appeals is that the majority refused to apply, and never cited, the standing "scintilla" standard established by the Supreme Court in South Carolina for deciding summary judgment. This confirmed standard requires denial of summary judgment if there is even a spark, jot, atom or whit of evidence of dispute of a material fact. When there is even a speck or whit of such evidence, this finding mandates denial of summary judgment, simpliciter.

The majority overlooked the materials in the record, specifically the materials submitted in opposition to the motion for summary judgment. These materials included the 10-9-13 Supplemental Interrogatory Response in the Record at page 453. And 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).

The 10-9-13 Supplemental Interrogatory response, as well as other materials, established that the performance period of the contract was agreed to be no longer than the duration for which the O-1 visa was granted, that at the time of making the contract, the visa had not been granted, that the visa could possibly be granted for less than a year, and that, therefore, the statute of frauds did not apply. This response alone renders the entire Court of Appeals decision erroneous. The opposition materials that were disregarded were all allowed by express rule of

civil procedure to be submitted. It was actually the moving party's burden to submit them. The opposition materials are required by rule of law to be considered, and are required by the constitutional right to jury trial, to be considered.

One of the most significant instances of disregarding the "scintilla" rule and other aspects of the established summary judgment standard occurs where the majority opinion took its own view of the facts on the pivotal statute of frauds issue. Denial of summary judgment on the statute of frauds issue would have prevented summary judgment on all the other issues.[8]

The majority's successive dismissals, based on ignoring scintillas and surfeits, were as follows. The majority first erroneously determined there was no written contract, but found there was definitely evidence of an oral contract. The majority then erroneously determined that the statute of frauds rendered the oral contract unenforceable. The majority then incorrectly equated the unenforceability of the oral contract with nonexistence of an oral contract. In turn, the majority erroneously found Ibanez owed no fiduciary duties to his employer, in part because he was "noncontractual."[9] Similarly, the majority ruled that because there could be "no breach of

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[8]Summary judgment on the statute of frauds issue should have been denied. However, even if it had been correct to grant summary judgment on the statute of frauds issue, other principles still would have precluded summary judgment on the breach of contract, breach of fiduciary duty, tortious interference, and UTPA counts of the complaint. Page limits on this combined petition for certiorari and mandamus will not allow them all to be re-briefed until certiorari is actually granted.

[9]On the issue of fiduciary duty, the majority also states that it "can find no South Carolina authority" that an employee is an agent who owes certain fiduciary duties to his employer. (Op. at 9.) 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 principles of agency proffered by Appellant are reflected in the Court of Appeals' own opinion in Futch v. McAllister Towing of Georgetown, Inc., 328 S.C. 312, 491 S.E.2d 577 (Ct. App. 1997), rev'd, Futch v. McAllister, 335 S.C. 598, 518 S.E.2d 591 (1999) (rejecting "bright-line" total disgorgement remedy for employee's breach of per se fiduciary duty

contract," the tortious interference count fell.[10] Finally, the majority ruled that because the tortious interference count fell, the UTPA count fell as well.[11] Thus, the majority affirmed dismissal of the entire case by illegally ignoring materials in the record. The details of this error

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of loyalty). There, the Court of Appeals, citing previous Supreme Court cases, used at length, interchangeably, the terms "employee" and "agent." The Court of Appeals itself there described the standing fiduciary duties in any employment relationship, just as had the Supreme Court in the earlier case of Young v. McKelvey, 286 S.C. 119, 333 S.E.2d 566 (1985) (Littlejohn, C.J.): "It is implicit in any contract for employment that the employee shall remain faithful to the employer's interest throughout the term of employment. An employee has a duty of fidelity to his employer." Young, 286 S.C. at 286 (internal quotation marks missing in original; citations omitted here). In Futch (1999), the Supreme Court stated that the terms "employee" and "agent" were both "types of agency relationships" and that the Court of Appeals correctly recognized that Futch was an agent of his employer. Futch, 335 S.C. at 613 n.1. There is therefore no lack of Supreme Court authority that an employee is an agent. Ignoring the special relationship of the parties, the majority also characterizes Coves Darden's trust in Ibanez as "unilateral." To the contrary, the Affidavit of Miguel Coves, in the record, says that Ibanez "invited" the trust. (R.p. 280.)

[10]The statute of frauds is not available to a defendant in a tortious interference case. Hatcher v. Harleysville Mut. Inc. Co., 266 S.C. 548, 225 S.E.2d 181 (1976). The Court of Appeals failed to rule on this issue.

Additionally, the Court of Appeals erred in determining that a bare-bones "at will" employment contract was not a "contract," susceptible to a claim of tortious interference. Prescott v. Farmer's Telephone Co-op. Inc., 335 S.C. 330, 259 S.E.2d 812 (1979). The Court of Appeals failed to rule on this direct issue, but elsewhere erroneously described Ibanez as "non-contractual." The majority also erroneously conceived of ending one's employment as the only way one can breach an employment contract. There are other ways to breach an employment contract, that do not consist of merely quitting. See Futch (1997) and Young. "Breach" does not mean only termination or quitting.

[11]The majority largely based its affirmance of the dismissal of the UTPA claim on the absence of a tortious interference tort, which absence 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 also briefed to the Court of Appeals, improper means in interfering with a commercial relationship is also a factor in some tortious interference theories. (Appellant's Brief at 32-36; Appellant's Reply Brief at 24.)

in the context of the law of the statute of frauds, and in the context of the further facts of the case, are discussed in an additional section of this petition below.

As briefed explicitly on appeal, the Circuit Court reached its decision to dismiss the entire case through confused reliance on devices denominated as "judicial admissions" and "sham affidavits." The majority of the Court of Appeals did not address the issues presented. The majority of the Court of Appeals panel merely made inconclusive remarks about any opposition materials which were mentioned, and then drifted into weighing the evidence without mentioning "sham affidavits," "judicial admissions," or other doctrines.[12] In this way, the majority made its

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[12]The majority makes no express ruling whatsoever on the sufficiency of the 10-9-13 Supplemental Interrogatory Response in the Record at 453 to raise an issue of material fact precluding summary judgment. This was a sub-issue suggested by Respondent's arguments. 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 is 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.

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. The majority omits from its unexplained aside, 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.

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.

own incredible factual finding that the contract was for longer than two years, despite the length of the visa and in spite of whether Ibanez could be present and work in the United States for more than two years. Based upon this impermissible factual finding, the majority erroneously concluded that the statute of frauds applied, and that every claim against every defendant failed.

The majority correctly states and cites portions of the summary judgment standard, but omits the "scintilla" rule confirmed again by the Supreme Court 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.)

This recitation remains stark, as the majority thereafter never specifically ruled on or identified a single unreasonable inference urged or ungenuine issue of fact proffered. The majority also never made a single ruling that any affidavit or interrogatory response adduced by Coves Darden was in improper form to be considered as a speck or spark of evidence.

Neither the principle of disregarding shams nor the principle of disregarding "unreasonable inferences" allows the Circuit Court or the reviewing court simply 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

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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, it was an issue, and 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. No mention of the principles or authorities there, was made by the Court of Appeals majority.

jury. Recital of a principle changes nothing when the reviewing court makes no specific findings at all satisfying the stated elements of the principle the court recites. See Cothran (explaining the considerations required and the need for findings before disregarding an affidavit), Baughman (explaining considerations in deeming matters admitted under Rule 36, rather than Rule 33), and Wright (distinguishing Rule 33 from Rule 36 and explaining that interrogatory responses under Rule 33 are not binding admissions).

The ten-page dissent saw reasons for inferences proffered by Coves Darden. The dissent saw plainly, issues of fact which Coves Darden was entitled to have a jury decide and which mandated denial of summary judgment. The dissent was at least as reasonable as a reasonable juror. This confirms that granting summary judgment was manifest error.

2. There was evidence of a written contract.

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

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. Peddler, Inc. v. Rikard, 266 S.C. 28, 221 S.E.2d 115 (1975).

The majority made its own impermissible finding 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. The 5-23-13 Supplemental Interrogatory Response

states: "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 that there could be no written contract was legal error because the following matters appear in the record and indicate that Ibanez accepted the contract through his behavior, and such behavior is legally sufficient to establish a written contract:

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 based on the written contract in that application.
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.

3. <u>There was evidence of an oral contract to which the statute of frauds was not applicable.</u>

The majority 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 incorrect, and error.

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 limited to 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.

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 simply was not a fact the majority was allowed to determine and undermines the majority's entire opinion.

The majority misapprehended the sequence of events, including the point of 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,[13] was formed before the visa was issued, with an agreed duration

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[13]The statute of frauds does not negate the existence of an oral contract that is within the statute. The statute makes the contract, at the option of the person resisting it, unenforceable if the person resisting the contract has standing to raise the statute and successfully does so. It is for this reason 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

defined by the length of the visa granted. (Supplemental Interrogatory Response, R.p.453.) Even though not probable, it was possible for the visa to be granted for less than a year. That was clear in the record. The statute of frauds therefore did not apply.

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. The contract was one which, when made, was not impossible of performance within one year. It was therefore outside the statute of frauds. Weber v. Perry, 201 S.C. 8, 9, 21 S.E. 2d 193, 194 (1942) (oral contract of employment for fixed period longer than one year, or so long as other condition remains in place, not exceeding the fixed period, is not within the statute).[14] It was error to ignore the Supplemental Interrogatory Response in determining the

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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. It 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 and incorrect innuendo about materials in the record which require denial of summary judgment.

[14]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

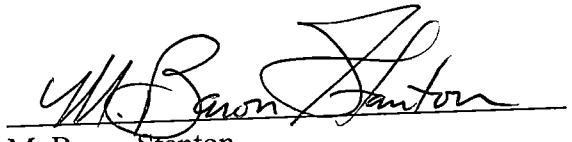
agreed duration of the contract, and was error to grant summary judgment.

V. Conclusion

This case presents special and important issues concerning commercial law, employment law, and procedural law in South Carolina. The unpublished opinion does not qualify under existing law to be unpublished or uncitable. The opinion illegally omits issues presented on appeal. The opinion impermissibly crafts the account of the facts to conduce to the result which is reached. The opinion is full of errors on the issues it does identify and decide, contrary to Supreme Court precedent. There was a dissent as long as the majority opinion.

Accordingly, Coves Darden requests that the Court of Appeals be reversed, that the Circuit Court's order granting the defendants summary judgment be reversed, and that the matter be remanded to the Circuit Court for discovery and trial. The decision of the Court of Appeals should be published and the decision of this Court should also be published, whether it be reversal or affirmance. To the extent procedurally required, a writ of mandamus or other appropriate writ should be issued to the Court of Appeals requiring compliance with Rule 220, SCACR.

Respectfully submitted,



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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 STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
DEC 28 2016
S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

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

Opinion No. 2016-UP-402 (S.C. Ct. App. filed Aug. 17, 2016)
(Common Pleas Case No. 12-CP-02-01772)

Coves Darden, LLC, ... Petitioner,

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 December 28, 2016, served the foregoing Appellant's Petition for a Writ of Certiorari upon the Respondents by causing a copy thereof to be mailed with proper postage to the address indicated below:

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