THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT



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APPEAL FROM AIKEN COUNTY
Court of Common Pleas

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

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

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Coves Darden, LLC, ..... Petitioner,

v.

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

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**PETITIONER'S REPLY TO THE RETURN OF THE RESPONDENTS**

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CONTENTS

**The Petition Does Not Misrepresent the Facts or Issues.**

In their Return, the respondents characterize the factual and legal arguments made by Petitioner Coves Darden as mischaracterizations, omissions, misstatements, or misrepresentations. (Cf. Ret. at 1, 3, 4, 7, 14 and 15.)

Every single fact recited in the Petition for Certiorari is correct. Every description is accurate. Every citation to the record will show the fact for which it is cited. Every case or other authority cited is germane to the point for which it is cited. Every case cited stands for the proposition for which it is cited. The procedural history of the case set forth by Petitioner is accurate. The Petition for Certiorari arises, not from unhappiness, as Respondents argue, but from a profound need for correction.

**The Main Points of the Petition Remain Unchanged by Respondents' Return.**

The main points which this court should recognize remain. This appeal arose from the granting of summary judgment on a multi-count complaint, when the motion neither set forth the grounds for the motion, nor was accompanied by any affidavit or testimony under oath from the moving party. (Cf. Rules 6 and 56, SCRCP, requiring grounds and supporting materials at time of filing and serving.) It only later was disclosed that the motion was based upon the moving party's proffered interpretation of an early unsworn interrogatory response.

The motion was made while Plaintiff, the non-moving party, actively pursued discovery, and was seeking to compel the movant to comply with discovery which had been refused.

The Circuit Court eventually granted summary judgment based upon an affirmative defense which had not even been pled at the time the motion for summary judgment had been filed. This affirmative defense, the statute of frauds, had not even been pled at the time the

motion for summary judgment was first heard. The Circuit Court, in disregarding factual material in the record which contradicted the statute-of-frauds arguments of the defendants-respondents and defeated summary judgment, expressly relied on a mixture of two doctrines, referred to as "judicial admissions," and "sham affidavit."

However, the Circuit Court did not make any findings on factors required for consideration of those doctrines, and misunderstood the actual law under those doctrines.

Further, although the Circuit Court indicated it was relying on the "sham affidavit" doctrine, the factual finding that the statute of frauds applied, erroneously made by the Circuit Court, was not based upon an affidavit, nor upon the disregard of a later affidavit. The impermissible factual finding of the Circuit Court was based upon an early unsworn interrogatory response, and the disregard of (1) a later, supplemental interrogatory response, (2) materials submitted to immigration authorities when applying for a visa, and (3) an affidavit of Miguel Coves.

There were counts of the complaint which did not depend upon the viability of a statute-of-frauds defense. Yet, the Circuit Court dismissed all four counts of the complaint. The Circuit Court did so based upon a finding that the statute of frauds applied, and that the statute of frauds negated the existence of any contract between the parties. Thus, the Circuit Court's error on the statute of frauds issue – which error was guided and controlled by misplaced reliance on the "sham affidavit" doctrine – permeated the entire decision of the Circuit Court.

Additionally, a viable statute-of-frauds defense did not obviate any of the following: (1) the existence of a contract for employment at will; (2) the existence of fiduciary duties of an employee to his principal; (3) a claim for breach of those fiduciary duties; (4) the existence of

fiduciary duties arising from a special relationship; (5) a claim for breach of those duties; (6) a claim against a third party for tortiously interfering with the contract or prospective contract between the parties even if the contract was an oral contract for a definite period of time; (7) a claim for tortious interference with contract or prospective contract even if the contract was for at-will employment; or (8) a claim against a third party for violation of the Unfair Trade Practices Act, based upon the commission of a traditional anti-competitive tort, exacerbated by, among other things, an illegal compensation agreement offered to the party whose performance was interfered with.

The Court of Appeals directed that its decision not be published or cited, and affirmed the Circuit Court. Dispositive issues were not addressed. The Court of Appeals directed the opinion not to be published, despite the fact that approximately one-half of the opinion was a dissent. In affirming, the Court of Appeals did not address the discretely raised error of the Circuit Court in misapprehending and misapplying the doctrines of "judicial admissions" and "sham affidavit." The opinion of the Court of Appeals therefore did not address the Circuit Court's complete lack of findings on the factors required to be considered when making determinations of these issues. The "judicial admissions" and "sham affidavit" doctrines were inapposite to begin with. The Court of Appeals did not address numerous other discretely presented issues on appeal, which were dispositive of other parts of the appeal.

In petitioning for Certiorari, Coves Darden has argued that errors of the Circuit Court and the Court of Appeals on serious principles of business torts and commercial law, proper application of the summary judgment standard, and proper understanding of the doctrines of "judicial admissions" and "sham affidavit" need correction. Coves Darden has also argued that,

under the plain language of Appellate Court Rule and statute, the Court of Appeals is required to address the issues brought before it, where they are dispositive issues, and publish its decision.

Petitioner Coves Darden maintains these arguments, despite Respondents' statement in their Return at 5, that these plain requirements of both rule and statute are "dubious propositions."

The Court of Appeals is required by Appellate Court Rule to publish its opinion. In their Return at 5, Respondents state that they do not oppose publication of the opinion of the Court of Appeals. The opinion should be published. However, the decision should also be reversed by this Court, also in a published decision. If the opinion of the Court of Appeals is published and not reversed, the erroneous decision will inevitably create a disruption and confusion in the jurisprudence of South Carolina, even while not revealing all issues on appeal.

**The Discovery Response Alluded to by Respondents Does Not Say What Respondents Say It Says.**

The linchpin of the error of the Court of Appeals, and of the Circuit Court, and of the Return recently filed by the respondents, is a misstatement of fact in the respondents' Return at 2. There, the respondents state: "Petitioner admitted in discovery responses that the parties contemplated a term of employment of two or three years with a possible extension at that time." This is a false statement, in the respect that it omits material contents of the discovery response referred to, and thus misstates the information conveyed by the discovery response. The response, rather, required denial of summary judgment.

Respondents do not identify the discovery response they refer to. Key facts requiring denial of summary judgment appear in the same discovery response, without dispute. According

to the response, at the time the contract was entered into by the parties, there was risk by both parties on the actual terms on which the visa would be granted, and the length of employment contemplated by the parties could only be described in terms of probability and expectation until the visa was granted:

> In and before January of 2012, we made arrangements to sponsor Ibañez's travel to the United States from Spain, and entry into the United States on a nonimmigrant visa issued by the United States, so that he could work exclusively for us. It involved expenditure of much time and money on our part, risk by both parties as to whether and on what terms the visa would be granted, development of a trusting personal relationship with Ibañez, and a decision to expressly repose our trust and confidence in him. He invited and accepted this trust.
>
> ***
>
> We entered into an agreement to employ Ibañez to act as an expert equestrian trainer, and to provide expert instruction and consultancy services in the equestrian arts for clients of Coves Darden Farm. We both acknowledged we expected the relationship to continue for at least two years. The probable expected initial length of the visa was three years, and his likely initial leave of absence from his prior employment relationship was to be two years.

(Coves Aff.¶¶2 and 6, R.pp.280-281 (emphases added).) Other materials in the record were consistent with, and explanatory of, this fact:

> In addition to the subjects in his affidavit on file, Michael J. ("Mike") Liberatore (immigration lawyer in Miami), 1000 Brickell Avenue, Suite 400, Miami, Florida 33131, Tel (305) 374-0306, Fax (786) 272-0652, may testify that a nonimmigrant visa such as the one at issue here is always subject to being granted for a shorter time than requested and a shorter time than is typical or authorized and that in fact, this does occur, and may result in grants of periods for shorter than one year; further, that he always bears this in mind in assisting clients, and did in the instant matter, in explaining the agreement of the parties.

(Pl. Suppl. Resp. to Interrog. ¶1, R.p.453 (emphasis added).)

It was undisputed that it was possible that the visa could be granted for less than one year. This fact renders the Circuit Court's entire order erroneous, and renders the opinion of the Court of Appeals erroneous as well.

This fact alone requires reversal of the Court of Appeals and reversal of the Circuit Court, although there are numerous other issues which also require reversal, even in the absence of this one.

**The Court of Appeals Erred on a Large Number of Dispositive Issues and Some Are Unprecedented.**

The respondents admit in their Return at 3, that the Petition includes a large number of issues, nineteen. Each is addressed with brevity. In their Return at 3, the respondents also admit that at least one of the issues is "unprecedented." Some of the issues are unprecedented in the sense of lack of South Carolina decisional law on these issues. The arguments on the issues, however, are supported with citations to South Carolina Appellate Court Rules, South Carolina statutes, the South Carolina Constitution, and other authorities. Novel issues are precisely the type of issues explicitly recognized as meriting consideration on certiorari.

**The Petitioner Does Not Argue Primarily that Rule 268 is Unconstitutional.**

The arguments of Petitioner Coves Darden pertaining to the form and lack of publication of the opinion of the Court of Appeals are not based primarily on "the constitutionality of SCACR 268(d)(2)," as suggested in the Return of Respondents at 4. It is the disregard of Rule 220, SCACR, as written, which is primary error, and which also may be against the conventions of the state constitution. As argued by Petitioner Coves Darden, it certainly is bad policy.

Uncitability under Rule 268(d)(2) requires an unpublished decision. Nonpublishability is governed by Rule 220. Rule 220 was not complied with. It was a violation of the rules to declare the opinion uncitable. The arguments of Coves Darden on these issues are, first, based on a straightforward reading of the English language which appears in the published rule of

appellate procedure, and based on fundamental logic.

The respondents' statement in their Return at 4, that a plain English reading of a rule or statute and application of the most basic logic "appears to border on the frivolous" is itself unaccompanied by a different proffered lexicon and syntactical system, and unaccompanied by explanation of any perceived fallacy. Respondents do not appear to actually have an argument on the points made.

**The Statutes Cited by Coves Darden Do Not Apply Only to the Supreme Court.**

In their Return at 4, the respondents argue that a few statutes cited by Coves Darden as indicating the intent of the legislature and the constitution of this state apply only to the Supreme Court and not to the Court of Appeals. The statutes, constitutional provisions, and appellate court rules cited all show the intent of the legislature, that decisions be published, unless they are infrequent summary opinions allowed only under explicitly prescribed circumstances.

> The Supreme Court reporter shall report the opinions and decisions of the Court of Appeals in all respects as he is now or hereafter may be required by law to report the decisions and opinions of the Supreme Court. An assistant reporter for the Court of Appeals may be appointed by the judges of such Court to aid the reporter in his duties.

S.C. Code Ann. §14-8-100. Other statutes further clarify that unless a contrary rule is promulgated by the Supreme Court (under the procedure requiring submission to the legislature), the publication of opinions by the Court of Appeals shall follow the requirements and manner of publication of opinions of the Supreme Court.

> Editing, publishing, and distributing of the opinions and decisions of the Court shall be done in accordance with the procedures followed by the Supreme Court with respect to the editing, publishing, and distributing of its opinions and decisions.

S.C. Code Ann. Sec. 14-8-120.

> Editing, publishing and distribution of the opinions and decisions of the Court shall be done in accordance with the procedures followed by the Supreme Court with respect to the editing, publishing and distribution of its opinions and decisions.

S.C. Code Ann. Sec. 14-8-500.

> Pursuant to the provisions of Sections 14-3-940 and 14-3-950, the Supreme Court may establish and promulgate such rules as may be necessary to carry into effect the provisions of this article and to facilitate the work of the Court of Appeals.

S.C. Code Ann. Sec. 14-8-430. Respondents are wrong.

**The Appellate Court is Not Allowed to Disregard Dispositive or Partially Dispositive Issues Presented.**

The respondents also incorrectly assert, in their Return at 5, that Petitioner Coves Darden has misread Rule 220(b), SCACR, and that the rule allows the appellate court to disregard certain legal issues presented by an appellant on appeal. Again, plain logic reveals the error in the argument of the respondents. If an issue of law in an appeal would affect the outcome of the appeal, it is necessary to decide the issue of law in order to decide the appeal. It is necessary to state an issue of law in order to decide it. Ergo, it is necessary to state and address all issues of law which would affect the outcome of the appeal.

Petitioner Coves Darden raised in the appeal, issues which would affect the outcome. However, these issues were not decided by the Court of Appeals. While an appellate court may choose not to address an issue when another issue is dispositive of the appeal, the appellate court may not choose to not address an issue which prevents the decided issue from being dispositive of the appeal. To hold to the contrary, as the respondents urge, would be to allow disregard of any issue presented on appeal, as long as the entire appeal is decided, even if decided on the basis of issues which are not truly dispositive of the appeal.

**The Court of Appeals Did Not Apply the Scintilla Rule.**

In their Return at 6, the respondents argue that the Court of Appeals properly applied the "scintilla" standard even though the Court of Appeals did not mention or recite the standard, because the Court of Appeals stated that it was reviewing all the evidence in the light most favorable to Petitioner Coves Darden. The threshold error of the argument is that the Court of Appeals did not actually view all of the evidence in the light most favorable to Petitioner Coves Darden, despite any bare recitation to that effect. Already discussed above, for example, is the fact that the Court of Appeals ignored or misread several items in the record which required denial of summary judgment.

In the Petition for Certiorari, Coves Darden has pointed out the parts of the record which were completely ignored or discounted. The respondents argue that unreasonable inferences or issues that are not genuine do not constitute a "scintilla" defeating summary judgment. However, the respondents do not address the error of the Court of Appeals in utterly failing to identify any issue at all which was perceived to be not reasonable or genuine. This failure of the opinion of the Court of Appeals renders the decision a simple instance of unpermitted fact finding and judicial fiat, done while omitting other issues which still would have required reversal.

**Petitioner Does Not Argue that an Interrogatory Response Cannot Constitute an Admission.**

Contrary to the arguments of the respondents in their Return at 6, Petitioner Coves Darden does not argue that an interrogatory response cannot constitute an admission. Petitioner argues that the type of admission an interrogatory response constitutes was misunderstood by the Circuit Court as a matter of law. This legal flaw, material to the Circuit Court's decision, was

not even discussed by the Court of Appeals.

**The Court of Appeals Did Not Consider the Arguments Actually Presented on the Issue of Fiduciary Duty Based on Special Relationship.**

In their Return at 7, the respondents argue that the Court of Appeals did actually consider whether Ibanez owed fiduciary duties based on a special relationship, regardless of the existence of an employment relationship. Here, the respondents quote a portion of the Court of Appeals decision ruling out a special relationship based only upon a pat description of "specialized skills and a close, familial relationship." These were not the only factors urged by Coves Darden as creating a special relationship. Accordingly, the Court of Appeals did not rule upon the issues and arguments presented, but, rather, upon a recast, erroneously truncated argument. Again, this amounts to a prohibited finding of fact by the Court of Appeals, on an issue which was reserved for the jury. As Coves Darden has clearly previously submitted, Coves Darden was required to proceed on faith, in spending large amounts of time and money on Ibanez before he ever came to work. Ibanez was placed in a high employment position requiring judgment and discretion, was placed in a highly paid position involving the mental grooming of millions of dollars' worth of live inventory (pure-bred horses), and was placed in a frills-added employment arrangement which by its very nature required a high degree of trust, and Ibanez invited that trust. In addition, he lived and worked in close proximity to the family principals of Coves Darden, resided on the same gated premises in a house owned by Coves Darden's principals, drove their car, and took custody of their dog. The existence of the special relationship, giving rise to fiduciary duties, was a question of fact, requiring denial of summary judgment.

**Employment At Will Is Contractual.**

In their Return at 7, the respondents continue to argue, contrary to black-letter South Carolina law, that employment at will is not contractual, and that the Court of Appeals did not err.

In Prescott v. Farmer's Telephone Co-Op, Inc., 335 S.C. 330, 516 S.E.2d 923 (1999), this Court defines an agreement for employment at will: "a contract for permanent employment, so long as it is satisfactorily performed which is not supported by any consideration other than the obligation or service to be performed on the one hand and wages to be paid on the other, is terminable at the pleasure of either party." Ibidem, 335 S.C. at 334 (emphasis added). The Court of Appeals itself has clearly held:

> Having considered the appellants' arguments to the contrary, nevertheless we hold that a contract terminable at will is a contract upon which an action for intentional interference may be brought. We conclude, along with a majority of jurisdictions, that where a third party induces an employer to discharge an employee who is working under a contract terminable at will, but which employment would have continued indefinitely except for such interference, a cause of action arises in favor of the employee against the third person.

Todd v. S.C. Farm Bureau Mut. Ins. Co., 283 S.C.155 at ___, 321 S.E.2d 602 at 607 (Ct.App.1984)(emphases added), quashed on other grounds, Todd v. S.C. Farm Bureau Mut. Ins. Co., 287 S.C. 190, 336 S.E.2d 472 (1985). In the instant case, the Court of Appeals erred.

**The Question is Whether an Employment Contract for a Definite Period of Time is a Requirement for a Tortious Interference Claim.**

In their Return at 8, the respondents characterize one of Coves Darden's issues as "whether the existence of a contract was a requirement for a claim of breach of tortious interference [with contract]." Respondents then proceed to refute the "layup" issue so framed.

This was not the argument. The argument was that the existence of a contract for a definite period of time is not a requirement for a claim of tortious interference with contract. That is, where a contract of employment is not for a definite period of time, and is thus, at-will, it is still a contract. Such an at-will contract will support a claim of tortious interference with contract. South Carolina law on the point was cited by Coves Darden. The Court of Appeals ignored this. And erred. Also, tortious interference with prospective advantage does not require a contract.

**The Court of Appeals Did Not Address the Significance of the Illegal Compensation Agreement Offered by Derr and Half Moon.**

In their Return at 9, the respondents argue that the Court of Appeals did address the significance of the illegal compensation agreement offered to Ibanez, as that fact bears on the "improper means" factor in tortious interference torts and the "public impact" element of a claim for violation of the UTPA. However, the respondents are unable to point up, and never do point up, a single instance of this issue being addressed by the Court of Appeals. Instead, the respondents recite an example of the Court of Appeals considering the issue of false advertising The Court of Appeals did not address the issue.

**Partial Performance Has Nothing to Do With the Argument on Ignoring Factual Material in the Record Establishing a Written Contract.**

Petitioner Coves Darden does not argue, as asserted by the respondents in their Return at 10, that in determining whether a written contract existed, the Court of Appeals erred in not considering the issue of "partial performance." Partial performance is an exception to the statute of frauds. The existence of a written contract is a separate question. In determining that a written contract did not exist, the Court of Appeals erred by ignoring facts in the record which indicated that Ibanez knew of the written contract, and by his actions, accepted it. This is a

different issue from the issue of partial performance. Therefore, the citation by the respondents of passages from their own earlier appellate brief on the question of partial performance is nowhere near the point.

**The Affidavit of Miguel Coves Does Not Establish a Contract Term of a Minimum of Two or Three Years.**

In their Return at 11, the respondents make the same error earlier pointed out. They assert that the affidavit of Miguel Coves establishes a contract term of two or three years. The respondents again ignore the other contents of the affidavit, and other materials in the record, which establish that the two or three year period "contemplated" or "expected," or considered "likely" was constrained by the duration for which the O-1 visa might actually be granted.

**The Court of Appeals Never Ruled on the "Sham Affidavit" Doctrine, Nor on Any of the Findings the Respondents Now Incorrectly Urge.**

The Court of Appeals never ruled on the "sham affidavits" rulings of the Circuit Court. The Court of Appeals never discussed the doctrine. The court never applied the doctrine by name. The court never made any findings required for consideration of that doctrine. That fact presents precisely the reason why this Court should rule on the misapplication and misunderstanding of that doctrine. In their Return at 13-14, the respondents offer to supply the findings which neither the Circuit Court nor the Court of Appeals made. Aside from the fact that the proffered findings of the respondents are incorrect, no such considerations or findings were made by the Circuit Court or Court of Appeals, and for this reason, certiorari should be granted to correct the error, and clarify the misunderstanding of the doctrine. The errors in the proffered findings of the respondents include the fact that the discovery response the Circuit Court and the Court of Appeals ignored was not an affidavit. Further, it was not contradictory of an earlier

affidavit. It was consistent with other discovery. It was explanatory of an early, unsworn interrogatory response which had conveyed information then available. While the later non-affidavit discovery response did not contradict an earlier affidavit or even an earlier discovery response, an explanation was provided for the early unsworn discovery response. The explanation was never considered, examined, ruled upon, or mentioned. None of the factors of the "sham affidavit" doctrine support a disregard of material in the record which mandated denial of summary judgment.

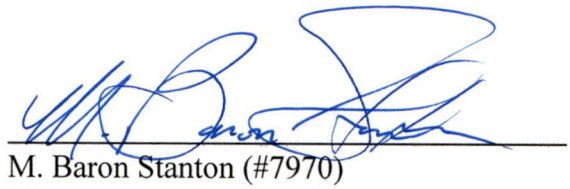
**The Centerpiece of Reasoning of the Respondents' Return and of the Court of Appeals Decision is Flawed.**

The centerpiece of the respondents' Return, recapped in their conclusion at 14, is wrong. The respondents state: "[Coves Darden] filed the affidavit of its principal, Miguel Coves, attesting that the oral contract was for a term of two to three years." This is a false premise. The affidavit does not state that "the oral contract was for a term of two to three years." The affidavit and other materials in the record indicate that the length of the employment would be constrained by the duration of the visa.

For the foregoing reasons, and all of those cited in the opening Petition, certiorari should be granted, and the Court of Appeals and Circuit Court should be reversed. If the issues of form and publication of the decision of the Court of Appeals cannot be adequately addressed on certiorari, a writ of mandamus should be issued to the Court of Appeals, requiring adherence to

the Appellate Court Rules, as articulated in the Petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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I, M. Baron Stanton, do hereby certify that I have, on February 6, 2017, served the foregoing Petitioner's Reply to Return of Respondents upon the Respondents by causing a copy thereof to be mailed with proper postage to the address indicated below:

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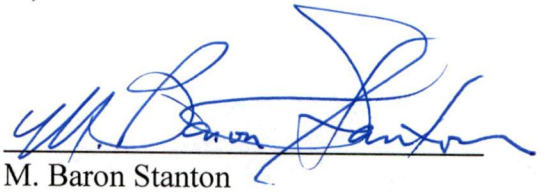

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