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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable D. Garrison Hill
Circuit Court Judge

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SC Court of Appeals

App. Case No. 2015-000476

Lower Case No. 2012-CP-23-02887

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

v.

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

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

v.

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

v.

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

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

and

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

PETITION FOR REHEARING

Appellant Carolina Custom Converting, LLC (“CCC”), by and through undersigned counsel and pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, hereby files this petition for rehearing (“Petition”). The grounds for this Petition are that the Panel’s opinion in this matter overlooked or misapprehended several matters of fact and law.

In Unpublished Opinion No. 2018-UP-078, filed February 7, 2018, a Panel of this Court adopted and affirmed the circuit court’s order finding CCC did not prove its trade secret misappropriation claims against Neologic Distribution, Inc., Freshwater Systems, Inc., and David Wilson, and its breach of fiduciary duty claim against David Wilson. By adopting the circuit court’s order, the Panel overlooked or misapprehended several matters of law and fact in the opinion. The Panel should rehear this matter and issue a published opinion that addresses these issues.

First, the Panel improperly concluded that no trade secret existed under the South Carolina Trade Secret Act. Second, the Panel improperly concluded that CCC did not sufficiently safeguard its confidential information. Third, the Panel improperly concluded that CCC was not entitled to damages for trade secret misappropriation. Fourth, the Panel improperly affirmed the trial court’s misapplication of fiduciary duty law and the statute of limitations to the claims of breach of fiduciary duty and usurpation of corporate opportunity. Accordingly, CCC respectfully submits that rehearing is warranted.

ARGUMENT

I. The Panel Erred In Concluding That No Trade Secret Existed Under The South Carolina Trade Secret Act.

In adopting the circuit court’s order, the Panel found that no trade secret existed

under the South Carolina Trade Secret Act. Because the Panel's holding is based on a misapprehension of law, rehearing is warranted.

A. Legal Standard

South Carolina adopted the Uniform Trade Secret Protection Act in 1992. Within five years, apparently concluding that the Uniform Act was insufficient, the General Assembly enacted the South Carolina Trade Secret Act. *Employees Beware: Employer Rights Under the South Carolina Trade Secret Act*, Kirk T. Bradley, Note, 49 S.C. L. Rev. 597, 597-98 (Spring 1998) (hereinafter "Employees Beware"). The article posits that the South Carolina Act "arguably establishes the most comprehensive compilation of trade secret laws in the United States." *Id.* One of the grounds for this statement is the presence of S.C. Code Ann. § 39-8-30(B) (1997), which is not found in the Uniform Act, and provides as follows:

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

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

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

(a) information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain

economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(b) A trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy. The collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.

S.C. Code Ann. § 39-8-20(5) (1997) (emphasis added).

Under South Carolina law, misappropriation means:

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

S.C. Code Ann. § 39-8-20(2)(a-b) (1997). South Carolina law provides that “[i]mproper means” includes “theft.” S.C. Code Ann. § 39-8-20(1) (1997).

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

B. Trade Secrets Existed

1. *The Confidential Information is a Trade Secret*

Wilson took all of CCC’s customer lists, supplier lists, pricing information,

prospective customer lists, its electronic vendor reference program, and its inventory reference program. (R. p. 506, lines 1-18). CCC spent significant corporate resources and time building this body of information. (R. p. 870, lines 10-18; R. p. 871, line 20-p. 872, lines 1-17; R. p. 873, line 24-p. 874, lines 1-5; R. p. 875, lines 3-14; R. p. 876, lines 1-17; R. p. 877, line 8-p. 881, lines 4, and 12-24).¹

The confidential information was comprised of “simple fact[s] . . . [that] although individually could be perceived as . . . minor or simple, collectively . . . [were] the basis for [CCC’s] commercial strategy.” S.C. Code Ann. § 39-8-20(5)(b) (1997). The plain language of the South Carolina Trade Secret Act makes clear that this information is a trade secret. *See also Williams v. Riedman*, 339 S.C. 251, 284, 529 S.E.2d 28, 45 (Ct. App. 2000) (Goolsby, J. concurring) (concurring in the opinion and clarifying that “I do not construe it to hold that a customer list cannot be a trade secret”). Further, courts have concluded that this type of information is a trade secret. *See, e.g., Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1018-19 (8th Cir. 2008) (noting that public information gained “only after, extensive, time-consuming research [is] information entitled to protection”); *N. Atlantic Instruments, Inc. v. Haber*, 188 F.3d 38, 46 (2d Cir. 1999) (collecting cases and noting same); *see also* S.C. JUR. INTELLECTUAL PROPERTY § 77 & n.1 (noting that “customer lists and other sales and marketing information can be trade secrets”). The circuit court committed legal error by failing to apply the plain language of the South Carolina Trade Secret Act.

The circuit court also failed to acknowledge that the efforts involved in locating

¹ CCC also presented testimony that Wilson and Neologic/FWS were improperly conducting business based on information gained through the discovery process. (R. p. 876, line 18-p. 877, line 7; R. p. 882, line 4-p. 883, line 4; R. pp. 1394-1400).

the correct film for a customer required significant intellectual input by CCC. (R. p. 870, lines 5-17). It likewise erred in failing to acknowledge the complexity of the supplier market, and the resources CCC utilized in navigating that market in order to locate the correct film for a customer. (R. p. 872, lines 7-10).

The circuit court also failed to acknowledge the electronic vendor reference program and inventory reference program that CCC created and Wilson took. (R. p. 877, line 8-p. 881, line 4; R. pp. 1534-1587). During the discovery process, Neologic/FWS produced a printed out copy of the electronic vendor reference program. (*Id.*). The program operates using the Excel program. (R. p. 877, lines 24-25). Gandis testified that it was developed over time with the input of a number of CCC employees and Comeau-Shirley. (R. p. 878, lines 6-10).

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

Gandis also testified about the inventory reference program. That program was developed to provide a searchable system that immediately showed what inventory CCC had in its inventory at any given time. (R. p. 879, lines 18-p. 880, line 7). Gandis testified the development of this program increased CCC's efficiencies and gave it a competitive advantage. (R. p. 879, lines 9-17; *see also* R. p. 1661, first two sentences of "Company strengths," (*Wilson* noting the competitive advantage of CCC in its ability

“turn an order faster than our competition”)).

Both of these programs are a trade secret. They are a “program . . . [that] derives independent economic value . . . from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use.” S.C. Code Ann. § 39-8-20(5)(a)(i) (1997). They are also a “procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process” S.C. Code Ann. § 39-8-20(5)(b) (1997).

2. *Reliance Upon Atwood v. Black was Improper*

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

Atwood addressed a rental home business located in Edisto Beach. One of Atwood’s employees left to join a competing company, and Atwood brought a claim for misappropriation of its trade secrets against the former employee and her current employer. *Id.* at 70-71, 646 S.E.2d at 883. The trade secrets alleged in *Atwood* constituted the “homeowners list” and the “renters list.” *Id.* at 71, 646 S.E.2d at 883. In a split decision², the *Atwood* court concluded that these lists did not constitute trade

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

secrets.

The *Atwood* court based this finding on the “undisputed fact that a list of all the homeowners in Edisto Beach and their contact information is a matter of public record available at Town Hall.” *Id.* at 72, 546 S.E.2d at 884. The Court also based this finding on the fact that the former employee was “contacted directly by Atwood renters after Atwood sent out an announcement of her departure.” *Id.* at 72, 646 S.E.2d at 884.

The facts of *Atwood* are significantly different from this case. CCC’s business involves working with customers to qualify a film before entering into long-term supply relationships. (R. p. 886, lines 11-15). The qualifying process can take months. Wilson’s own witness confirmed this fact. (R. p. 301, lines 7-20). During the qualifying process, many times a CCC employee was required to travel to the customer’s plant for trial runs. (e.g., R. p. 911, lines 3-10).

Qualifying the right film also requires CCC to first find the right film at the right price—both for CCC and the customer. (E.g., R. p. 874, line 12-p. 875, line 14; R. p. 876, lines 1-17). That process involves expending employee time and resources to locate the correct film, and the most suitable supplier of that film. Indeed, locating the most suitable supplier of film is often the most valuable information, for it provides the competitive pricing advantage. (E.g., R. p. 871, line 7-p. 873, line 8). See *Elm City Cheese Co. v. Federico*, 752 A.2d 1037, 1040-41, 1053 (Conn. 1999) (noting that cheese company’s commercial strategy of locating “return milk” for use in its processes was a trade secret as it allowed the cheese company to purchase its raw goods at a much lower cost); see also *Sigma Chemical Co. v. Harris*, 794 F.2d 371, 373 (8th Cir. 1986) (noting that “which suppliers supplied chemicals at the requisite quality and price was not in public

domain” and protected as a trade secret). The circuit court failed to appreciate the significant amount of time and energy that CCC devoted to creating its confidential information. This confidential information was not merely sitting at a “Town Hall” for anyone to simply review.

Unlike *Atwood*, documentary evidence showed that Wilson contacted the customers himself after he left. (E.g., R. pp. 1757-1759 (noting that “[w]hen I told them I had left CCC weeks ago”); R. p. 1336 (stating “Hi Trip, Good catching up with you today. As discussed, my new company is Neologic Distribution.”); R. p. 1337 (stating “I hope you are well. As you may have heard, I left [CCC] in January. I am still very much in the film business”)).

Atwood also did not involve competitive pricing. The price that a rental company charges is expressly advertised. CCC does not advertise the price that its customers pay for their film because its competitor could then underbid the company. The testimony at trial showed that Wilson and Neologic/FWS were underbidding CCC’s customers based upon their possession of CCC’s confidential information. (R. p. 870, line 18-p. 871, line 2; R. p. 873, lines 2-20; R. p. 874, lines 6-11; R. pp. 1342-1343 (stating “these prices are very attractive”); R. p. 1384 (showing \$400 profit on roughly \$80,000 sale)).

The circuit court also improperly relied upon *Carolina Chemical Equipment Co. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996), for the proposition that Wilson’s previous work in the industry precluded the confidential information from becoming a trade secret. In *Muckenfuss*, the company did not claim that the employee “took actual customer lists, pricing lists, or formula cards with him.” *Id.* at 297, 471 S.E.2d at 725. Rather, the company alleged the misappropriation occurred from the

employee's use of "knowledge he acquired during the 17 years he was employed" by the company. *Id.* at 297, 471 S.E.2d at 725. In this case, CCC expressly claimed, and Wilson was forced to admit, that he did take all of the confidential information. (R. p. 506, lines 1-18). And, CCC based its claim for relief upon the fact that Wilson took this confidential information with him to Neologic/FWS where he *started a film company*.

CCC devoted employee resources, time, and money into developing its confidential information. Wilson left CCC, then took and used all of this confidential information at Neologic/FWS—the circuit court made that specific finding. (R. p. 1788). The circuit court's conclusion, however, that this confidential information was not a trade secret constituted an error of law.

II. The Panel Erred In Concluding That CCC Did Not Sufficiently Safeguard Its Confidential Information.

In adopting the circuit court's order, the Panel found that CCC did not sufficiently safeguard its confidential information. In so holding, the Panel misapprehended the law and failed to apply the correct legal standard to the instant matter.

The undisputed testimony at trial established the following:

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

South Carolina law provides that the owner of a trade secret must employ "efforts that are reasonable under the circumstances to maintain its secrecy." S.C. Code Ann. § 39-8-

20(5)(b) (1997). At the time Wilson left CCC, it had 24 employees, (R. p. 39, lines 22-24), yet only the three owners had access to all of the confidential information. (R. p. 883, lines 5-16). When the threat of a misappropriation occurred, CCC acted to maintain the secrecy of its confidential information. (*See also* R. pp. 1673-1675 (learning that Wilson was sharing confidential information with potential suitors and asking him to protect the secrecy of the information)).

The circuit court did not apply the reasonable under the circumstances legal standard. Instead, the circuit court applied a different legal standard. The circuit court incorrectly stated that a “party claiming a trade secret violation must exercise ‘eternal vigilance,’ which calls for constant warnings to all persons to whom the trade secret has become known and obtaining from each an agreement, preferably in writing, acknowledging its secrecy and promising to respect it.” (R. p. 1785). South Carolina law, however, does not include these requirements. S.C. Code Ann. § 39-8-30(B) (1997).

The incorrect legal standard cited by the circuit court came from an unpublished decision by the United States Court of Appeals for the Fourth Circuit. *Hill Holliday Connors Cosmopolos, Inc. v. Greenfield*, 433 Fed. Appx. 207 (4th Cir. 2011). That unpublished decision based its reasoning upon the South Carolina Supreme Court’s 1972 decision in *Lowndes Products, Inc. v. Brower*, 259 S.C. 322, 191 S.E.2d 761 (1972). Following the enactment of the South Carolina Trade Secret Act *in 1997*—which “arguably establishe[d] the most comprehensive compilation of trade secret laws in the United States”³—*Lowndes* is no longer controlling law. Thus, the circuit court’s reliance on the unpublished Fourth Circuit decision constituted legal error.

³ *Employees Beware*, 49 S.C. L. Rev. at 597-98.

III. The Panel Erred In Concluding That CCC Was Not Entitled To Damages For Trade Secret Misappropriation.

By adopting the circuit court's order, the Panel found that CCC was not entitled to damages for trade secret misappropriation. Because this conclusion resulted from a legally incorrect application of the South Carolina Trade Secret Act, the Panel misapprehended the law in adopting it.

Section 39-8-20 provides that "misappropriation means . . . acquisition of a trade secret of another by a person by improper means"; or "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means." S.C. Code Ann. § 39-8-20(2)(a)-(b) (1997). In turn, § 39-8-40(A) provides that a "complainant is entitled to recover actual damages for misappropriation of trade secrets." S.C. Code Ann. § 39-8-40(A) (1997). Because CCC's trade secrets were misappropriated, it was entitled to damages as a matter of law.

Wilson admitted that he took all of CCC's confidential information. (R. p. 506, lines 1-18). Wilson admitted that at the time he left CCC he was primarily running the sales force, and not interacting with customers. (R. p. 415, lines 1-12). E-mails were stipulated into evidence, and presented at trial, showing that Wilson and Neologic/FWS were using CCC's confidential information. (E.g., R. pp. 1534-1587; R. p. 1313; R. p. 1338; R. p. 1339; R. pp. 1342-1343 ; R. p. 1368; R. pp. 1369-1383; R. pp. 1385-1386; R. pp. 1387-1389; R. pp. 1390-1393; R. pp. 1394-1400; R. pp. 1401-1427). Neologic/FWS produced financial information showing that they were conducting business with CCC's customers. (R. p. 1329). Trial testimony showed that 23 of 27 Neologic customers were

CCC customers.⁴ (R. p. 883, lines 17-24). But even setting aside Wilson's pre-CCC customers, the trial testimony showed that 11 of Neologic/FWS's customers were customers that CCC gained on its own. (R. p. 883, line 23-p. 885, line 25). As a matter of law, CCC was entitled to an award of damages.⁵ S.C. Code Ann. § 39-8-40(A) (1997).

The circuit court's conclusion that the "evidence merely demonstrated that Wilson was able to conduct business with some of CCC's former customers after his ouster^[6] from CCC" is legal error. It is based upon a legally erroneous application of the South Carolina Trade Secret Act.⁷

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

- No evidence that employee took any tangible customer information. *Id.* at 281, 529 S.E.2d at 43.
- No evidence that employee actively solicited the customers. *Id.* at 281, 529 S.E.2d at 43.

⁴ The circuit court apparently overlooked the fact that the agreement to create the combined company called for Wilson to provide all of his customers to CCC. (R. pp. 1285-1286; R. p. 1529).

⁵ With all due respect to the circuit court, the absence of routine post-trial briefing apparently limited the circuit court's ability to properly judge this case. (R. p. 866, line 2-p. 867, line 18). It is important to point out that when counsel for CCC proposed a post-trial briefing schedule to set forth the law and its application to the evidence, counsel for the respondents objected. (*Id.*).

⁶ The circuit court's choice of the word "ouster" indicates the erroneous lens through which it must have viewed this claim. Whether Wilson was ousted from CCC, or not, had no bearing on the question whether he and Neologic/FWS misappropriated CCC's trade secrets.

⁷ In the alternative, and against the backdrop of the confidential information misappropriated in this case, the circuit court's legal conclusion is not reasonably supported by the evidence. *Bell v. Progressive Di. Co.*, 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014).

- Employee denied she had a plan to solicit the customers after termination. *Id.* at 280, 529 S.E.2d at 43.
- Every client employee had at the new company was a client from the company that she sold to her former employer.⁸ *Id.* at 281, 529 S.E.2d at 44.

Each one of these factors points in the opposite direction in this case. Accordingly, the circuit court committed legal error by failing to properly interpret and apply the South Carolina Trade Secret Act.

IV. The Panel Erred In Affirming The Trial Court’s Misapplication Of Fiduciary Duty Law And The Statute Of Limitations To The Claims Of Breach Of Fiduciary Duty And Usurpation Of Corporate Opportunity.

In adopting the circuit court’s order, the Panel affirmed the misapplication of fiduciary duty law and the statute of limitations to the claims of breach of fiduciary duty and usurpation of corporate opportunity. The Panel misapprehended the law in adopting both conclusions.

A. The Circuit Court Applied the Wrong Burden of Proof

Our courts have long recognized that the duty of a partner to exercise the utmost good faith, fairness and loyalty is required both by statute and by common law. *Anthony v. Padmar, Inc.*, 320 S.C. 436, 448-49, 465 S.E.2d 436, 752 (Ct. App. 1995) (internal citations omitted). “Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud.” *Id.* at 449, 465 S.E.2d at 752 (internal citations omitted). Moreover, this Court has stated that a fiduciary’s duty of disclosure imposes an “obligation of *refraining from taking any advantage of one another by the slightest*

⁸ The analogue here would be customers that Wilson had previously sold film to at EFS.

misrepresentations or concealment.” Moore v. Moore, 360 S.C. 241, 252, 599 S.E.2d 467, 473 (Ct. App. 2004) (emphasis in original).

Accordingly, as a partner and later co-manager of CCC, Wilson owed a fiduciary duty to the company and his fellow members to disclose all known information that was significant and material. As a result of that fiduciary duty, it was Wilson’s burden to prove that he disclosed all significant and material information relating to the corporate opportunities that he took from the company and fellow members. *See Meinhard v. Salmon*, 164 N.E. 545, 546-49 (N.Y. 1928). The circuit court committed reversible error by placing the burden of proof upon the non-violating party, CCC.

B. Wilson Breached His Fiduciary Duty to CCC

Wilson breached his fiduciary obligations to refrain from competing with CCC before dissolution.

The South Carolina Limited Liability Act provides:

(a) The only fiduciary duties a member owes to a member-managed company and its other members are the duty of loyalty and the duty of care imposed by subsections (b) and (c).

(b) A member’s duty of loyalty to a member-managed company and its other members is limited to the following:

(1) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company’s business or derived from a use by the member of the company’s property, including the appropriation of a company’s opportunity;

(2) to refrain from dealing with the company in the conduct or winding up of the company’s business as or on behalf of a party having an interest adverse to the company; and

(3) to refrain from competing with the company in the conduct of the company’s business before the dissolution of the company.

(c) A member’s duty of care to a member-managed company and its other

members in the conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A member shall discharge the duties to a member-managed company and its other members under this chapter or under the operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

S.C. Code Ann. § 33-44-409 (1996). Specifically, Subsection (b)(3) expressly states that a member's fiduciary duty of loyalty to a member-managed company requires that he refrain from competing with the company before dissolution.

As detailed above, CCC was incorporated as an LLC with Wilson and Gandis as its sole members. Their shared membership and interest in CCC carried with it a fiduciary relationship. As such, Wilson owed CCC fiduciary duties, including that of refraining from competing with the company before dissolution, which he indisputably breached. The circuit court erred by disregarding this duty and instead evaluating whether the evidence established that Wilson agreed to transfer three import accounts to CCC in 2008. This evaluation was more akin to a contract claim than a breach of fiduciary duty claim. The appropriate inquiry is whether the evidence showed that Wilson fulfilled his fiduciary duties to CCC by acting in good faith and refraining from competing with CCC before its dissolution.

Wilson clearly breached his fiduciary duty to "refrain from competing with [CCC] in the conduct of [CCC's] business before the dissolution of [CCC]." S.C. Code Ann. § 33-44-409(b)(3) (1996). Wilson unequivocally admitted that he engaged in side deals through EFS while CCC was operating, including during the times he was receiving \$8,000 per month from CCC. He argued that this was allowed because his agreement with Gandis carved out three accounts. (R. p. 378, line 25 – p. 379, line 18). The

testimony and evidence at trial showed that the agreement between Gandis and Wilson was for EFS to roll all of its business into CCC and for Wilson to receive \$8,000 per month from CCC in exchange. (R. p. 78, lines 8-14). Gandis later discovered that unbeknownst to him, Wilson continued to engage in side deals with EFS after all of its customers were supposed to be transitioned to CCC. (R. p. 211, lines 18-22; R. p. 216, lines 14-18; R. p. 217, lines 20-22). In fact, Wilson continued to engage in side deals through EFS even after he began receiving the \$8,000 per month from CCC. (R. pp. 1318-27). By engaging in such conduct, Wilson clearly breached his fiduciary duty to refrain from competing with CCC before dissolution.

Moreover, after leaving CCC, Wilson immediately set out to compete with CCC by utilizing CCC's confidential information. The Reporter Comments to § 33-44-409 make clear that competitive activity constitutes a breach of a member's fiduciary duty to the company. *See* Comment to S.C. Code Ann. § 33-44-409 (“[T]he duty to not compete terminates upon dissociation However, a dissociated member is not free to use confidential company information after dissociation.”). The circuit court expressly found that Neologic/Freshwater used CCC's confidential information. (R. p. 1788) (“Evidence shown at trial demonstrated that Neologic/Freshwater used CCC's confidential information and that CCC was justified in bringing its trade secrets claim.”). Because Wilson provided this confidential information to Neologic, he breached his fiduciary duty to CCC.

B. CCC's Breach of Fiduciary Duty Claim Was Not Time Barred

Generally, in South Carolina, a plaintiff has three years from the time he knew or should have known he had a cause of action to file suit. S.C. Code Ann. § 15-3-530; *see also Maher v. Tietex Corp.*, 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998). A cause of

action should be discovered through exercise of reasonable diligence when the facts and circumstances would put a person of common knowledge and experience on notice that some right has been invaded or a claim against another party might exist. *Benton v. Roger C. Peace Hosp.*, 313 S.C. 520, 524, 443 S.E.2d 537, 539 (1994). The statute begins to run from this point – the date upon which a plaintiff discovers the injury – and not when a plaintiff learns the identity of all the alleged wrongdoers. *Tollison v. B&J Machinery Co., Inc.*, 812 F. Supp. 618, 619-20 (D.S.C. 1993).

The circuit court concluded that Appellants received notice of Wilson's side dealing activities in July 2009, and because they failed to engage in a reasonable inquiry after receiving notice that Wilson had engaged in such conduct, their counterclaims for breach of fiduciary duty were time-barred. (R. pp. 1783-84). In reaching this conclusion, the circuit court failed to specifically cite any evidence or trial testimony in support of its conclusion, and likewise failed to take into account the totality of the record.

Furthermore, “[d]eliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations.” *Doe v. Bishop of Charleston*, 407 S.C. 128, 140, 754 S.E.2d 494, 500-01 (2014). As noted above, the agreement between Gandis and Wilson was for EFS to roll all of its business into CCC and for Wilson to receive \$8,000 per month from CCC in exchange. (R. p. 78, lines 8-14). Gandis later discovered that unbeknownst to him, Wilson continued to engage in side deals with EFS after all of its customers were supposed to be transitioned to CCC. (R. p. 211, lines 18-22, R. p. 216, lines 14-18; R. p. 217, lines 20-22; R. pp. 1318-27).

Notably, Gandis testified that he only learned of these side deals “by accident,”

and that when he confronted Wilson about them, Wilson denied engaging in such conduct. (R. p. 215, lines 6-14; R. p. 217, lines 3-22). The evidence and testimony at trial showed that Wilson took active steps to conceal his side dealings. Specifically, Wilson only used his EFS email address – rather than his CCC email address – while engaging in side deals. (R. p. 215, lines 6-14). He never copied Gandis or CCC on the side deal correspondence, and never informed them that he was conducting business outside of CCC for his sole benefit. (R. p. 215, lines 6-14). When Gandis confronted Wilson about his side deals, Wilson denied engaging in such conduct except for an admission in late 2010, when he attempted to justify his conduct by saying, “it’s Christmas.” (R. p. 215, lines 6-14; R. p. 1528). Until this admission in late 2010, Wilson deceived CCC and concealed his illicit activities. As such, the statute was tolled until at least when Wilson offered his paltry “Christmas” excuse in late 2010.

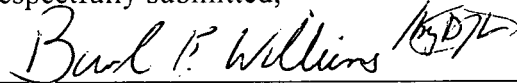
At trial, Wilson submitted email correspondence from June 17, 2009 and October 30, 2009 regarding EFS sales to West Carrolton. (R. pp. 1006-08). That email correspondence did not provide Appellants sufficient notice of the scope of Wilson’s illicit activities. Moreover, it could have related to deals Wilson maintained were precluded as an import deal that predated CCC. In any event, Appellants’ claim for breach of fiduciary duty was not time barred because it related back to Wilson’s initial filing on April 27, 2012. *See* SCRCP 15(c). When CCC was added to the case via Wilson’s Second Amended Complaint, it timely counterclaimed for breach of fiduciary duty. Therefore, pursuant to Rule 15(c), SCRCP, Appellants’ breach of fiduciary duty claims against Wilson related back to the original April 27, 2012 filing.

CONCLUSION

This Court should grant CCC's Petition because the Panel overlooked or misapprehended several matters of fact and law when it:

1. Improperly concluded that no trade secret existed under the South Carolina Trade Secret Act;
2. Improperly concluded that CCC did not sufficiently safeguard its confidential information;
3. Improperly concluded that CCC was not entitled to damages for trade secret misappropriation; and
4. Improperly affirmed the trial court's misapplication of fiduciary duty law and the statute of limitations to the claims of breach of fiduciary duty and usurpation of corporate opportunity.

Respectfully submitted,



Burl F. Williams (SC Bar No. 77901)

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February 22, 2018
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable D. Garrison Hill
Circuit Court Judge

RECEIVED
FEB 22 2018
SC Court of Appeals

App. Case No. 2015-000476

Lower Case No. 2012-CP-23-02887

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

v.

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

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

v.

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

v.

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

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

and

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

PROOF OF SERVICE

This is to certify that this 22nd day of February, 2018, a copy of the foregoing Petition for Rehearing has been served upon the following counsel of record by placing the same in the United States mail, first class, postage prepaid, addressed to the following as shown below.

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NEXSEN PRUET, LLC

NEXSEN|PRUET

Burl F. Williams
Member

February 22, 2018

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FEB 22 2018


VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings, Clerk of Court SC Court of Appeals
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *David Wilson v. John Gandis / C/A No.: 2015-000476*

Dear Ms. Kitchings:

Enclosed please find the Petition for Rehearing. If you have any questions or concerns, please don't hesitate to contact me.

Sincerely, *Burl F. Williams* 

Burl F. Williams

BFW/hjr
Enclosure

cc w/encl.: D. Randle Moody, II, Esquire
Joseph Owen Smith, Esquire
W. Andrew Arnold, Esquire
Bruce Bellinger Campbell, Esquire

- Charleston
- Charlotte
- Columbia**
- Greensboro
- Greenville
- Hilton Head
- Myrtle Beach
- Raleigh