THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

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

S.C.S.Ct. Appellate Case No. 2016-002542
Opinion No. 2016-UP-402 (S.C. Ct. App. filed Aug. 17, 2016)

Coves Darden, LLC, ... Petitioner,

v.

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

PETITIONER'S BRIEF

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I. The Questions Presented for Review

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2. 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?

3. 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?

4. 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?

5. 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?

6. 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?

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8. 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?

9. 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?

10. 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?

11. 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?

12. 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?

13. 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?

14. 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?

II. Scope and Standard of Review

In reviewing a South Carolina circuit judge's grant or denial of summary judgment, the appellate court applies, de novo, the same standard and scope of review required to be applied by the circuit judge considering the motion. Laurens Emergency Med. Specialists v. M. S. Bailey & Sons Bankers, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003); Stinney v. Sumter School Dist. 17, 382 S.C. 352, 675 S.E.2d 760 (Ct. App. 2009). It is the appellate court's duty to correct errors of law, with no particular deference to the court below. Samuel v. Mouzon, 282 S.C. 616, 320 S.E.2d 482 (Ct. App. 1984).

In a South Carolina state court, summary judgment is governed by state procedural law,

rather than federal. Summary judgment shall not be granted unless, first, all issues of fact are resolved in favor of the nonmoving party, and all facts and all inferences from those facts are viewed in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is disagreement concerning the conclusions to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 672 (2000); Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003). Summary judgment is a "drastic remedy" which should be cautiously invoked, so no person will be improperly deprived of a trial of the disputed factual issues. Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003); Schmidt.

All it takes is a "scintilla" of evidence in favor of the nonmoving party to create a genuine dispute as to an issue of fact, requiring denial of summary judgment. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Rule 56, SCRCP delineates the materials to be considered in determining whether a moving party has made a showing of the absence of dispute of material fact. These materials do not include arguments, assertions, or mere challenges in the moving party's brief. Cf. Rule 56(c) (referencing "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any"). The grounds for the motion shall be stated with particularity in the written motion. Rule 7(b)(1), SCRCP. Affidavits, if any, in support of the motion shall be served with the motion. Rules 6(d) and 56(c), SCRCP.

Once a moving party has made a sufficient showing, through use of the materials required by Rule 56, of the absence of a dispute as to any material fact, the nonmoving party cannot rest on the mere allegations or denials in the nonmoving party's pleadings in order to show a dispute as to any of those facts. Wogan v. Kunze, 366 S.C. 583, 591, 623 S.E.2d 107, 112 (Ct. App. 2005).

However, the burden of coming forward and demonstrating, in the first instance, the absence of dispute of material fact is entirely on the moving party. Yarborough v. Rogers, 306 S.C. 260, 411 S.E.2d 424 (1991); see also Fed. R. Civ. P. 56, Notes of Advisory Committee on Rules, 1963 Amendment ("Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented"); and see Adickes v. S.H. Kress, 398 U.S. 144, 159-60 (1970) (discussing procedure under similar federal Rule 56, where moving party must first demonstrate absence of evidence by showing specific discovery passages where evidence was sought and determined to be nonexistent).

Absent such a showing, the nonmoving party has no duty to come forward with any materials or other opposition at all. Yarborough; and see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986)(federal standard).

III. Statement of the Case

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. Each time the motion was filed, 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 of the three hearings, the defendants orally argued that the affirmative defense of the Statute of Frauds established that the parties had no contract. After the third hearing, the Circuit Court found that no contract existed and granted summary judgment on all counts of the complaint, and dismissed the entire case.

Coves Darden appealed the grant of summary judgment. A three-judge panel of 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. Coves Darden moved for rehearing, moved for rehearing by the whole Court of Appeals, moved for publication of the opinion, and moved for decision of issues presented but not addressed. The motion was denied.

Coves Darden petitioned this Court for a writ of certiorari and writ of mandamus to the Court of Appeals. Coves Darden petitioned this Court to review and correct by appropriate order or writ, the Court of Appeals' actions in not addressing all issues presented on appeal, and in not publishing its opinion. Coves Darden also asked this Court to review the Court of Appeals' decision on the initially presented issues the Court of Appeals decided, and asked this Court to decide the initially presented issues the Court of Appeals did not decide.

This Court granted certiorari on the initially presented issues decided and not decided by the Court of Appeals, as enumerated in the petition.

B. Other Material Facts

By not including their own Statement of the Case in briefing the Court of Appeals, Respondents are bound by the statement of the case in Appellant's Brief to the Court of Appeals. Rule 208(b)(2), SCACR. Under the scope and standard of review for summary judgment set out earlier in this brief, all the facts in the record in favor of Petitioner Coves Darden are taken as true, undisputed, as are all the favorable inferences that can be made from them.

Coves Darden had established and was continuing to develop a horse breeding and training facility in South Carolina for Pura Raza Española horses. Coves Darden aspired to have its horses continue to win dressage competitions and to compete in the Olympics. Coves Darden became acquainted with Defendant Ibañez because of his international renown.

Ibañez, who lived and worked in Spain, agreed to temporary employment by Coves Darden in the United States, in which Ibañez would train and show Coves Darden's horses.

This employment required Coves Darden to first secure an extraordinary O-1 work visa for Ibañez, 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 Ibañez to temporarily move from Spain to Springfield, S.C., near Aiken. The parties agreed on all the essential terms of the employment before the visa was issued to Ibañez and before he commenced employment.[1]

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[1] Coves Darden was run by a married couple, Miguel Coves and Dorothea Darden, who lived on the premises where Ibañez would do most of his work. (Ibañez Depo., pp. 29-32, R. pp. 256-259, and see Coves Aff., ¶¶ 11 and 14, R. p. 282.) Coves Darden defrayed the costs of Ibañez's preliminary visits to the Aiken, South Carolina area for Ibañez to discuss and consider the job. (Ibañez Depo., pp. 29 and 32, R. pp. 256 and 259 (December 2010 visit), and pp. 36-37, R. pp. 260-261 (January 2011 visit, with wife).)

The parties reached agreement in January 2011. (Ibañez Depo. p. 38, R. p. 262 (no

Coves Darden made numerous expenditures. Ibañez made trips as a visitor – at Coves Darden's expense – to Coves Darden's farm. Other events and interactions occurred, and eventually, Ibañez got the visa, came to the U.S. for the employment, and commenced work for Coves Darden at Coves Darden's farm.

Ibañez lived on Coves Darden's farm in a house provided for him and his family by Coves Darden. He drove a car provided by Coves Darden. He had a dog provided by Coves Darden. He was employed by Coves Darden at about $96,000 a year plus perks.

A few months after moving to Coves Darden's farm, Ibañez 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

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differences between the two over the terms).)

They agreed on scope of duties (id. at 48-49, R. pp. 267-268), rate of pay, fringe benefits such as a furnished house and car, covering or reimbursement of legal and travel expense, and -- as limited by any visa granted -- duration of the employment. (Id., p. 38, R. p. 262 ("expected" length of two years) and pp. 38-40, R. pp. 262-264 (contract was conditioned on visa); Coves Aff. ¶ 6, R. p. 281 (expected length of two years or more if supported by leave of absence, but determined by length of visa); Oct. 9, 2013 Pl. Supp. Resp. to Int., R. pp. 453-454 (initial term was for whatever initial duration was granted for visa, up to three years if supported by leave of absence).) There were no further terms they needed in order to go forward with their agreement. (Ibañez Depo., p. 38, R. p. 262.)

The basis for the nonimmigrant visa, known as an "O-1 visa," was Ibañez's international prominence and peculiar, extraordinary, and unique ability to train the particular breed of horses in question. (Liberatore Aff. ¶ 7, R. p. 276.) These horses were generally known as "Spanish Horses," or "P.R.E." (Pura Raza Española). (Ibañez Depo., pp. 16-17, R. pp. 252-253.) Coves Darden had a particular need for this level of expertise, because of the size of its operation, the particular breed in question, and the level of breeding and competition to which Coves Darden aspired. (Coves Aff. ¶ 15, R. p. 283.) When the parties came to their agreement, the expected length of an O-1 visa was three years (Coves Aff. ¶¶ 6, R. p. 281), but it was within the authority of the immigration authorities, in spite of the length requested, to grant the visa for any shorter period, including a month. (Oct. 9, 2013 Pl. Supp. Resp. to Interrogatories, R. pp. 453-454.)

employment arrangement with Ibañez in which Derr would facilitate Ibanez's making extra money from other activities in violation of his visa status.

About four months after Ibañez commenced work for Coves Darden, a horse competition had been planned for weeks or months,[2] and resources and money had been committed for the competition. Two days before this competition, Ibañez expressly assured Coves Darden that everything was in order for the competition. On the eve of this competition, Ibañez 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 Ibañez for damages and injunctive relief 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 damages and injunctive relief for tortious interference with contract. Coves Darden sued Derr and Half Moon for damages and injunctive relief for unfair methods of competition or unfair or deceptive acts or practices in the conduct of trade or commerce, in violation of the South Carolina Unfair Trade Practices Act.

The aforedescribed summary judgment proceedings, the aforedescribed Circuit Court order granting summary judgment, and the aforedescribed appeal followed. The Circuit Court based its finding of no contract on a conclusion that the Circuit Court was allowed to "freely disregard" material in the record other than an early unsworn interrogatory answer and an early

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[2]The majority opinion of the Court of Appeals erroneously states that the event was planned four months after Ibañez started work, when to the contrary, the event occurred about four months after Ibañez started work. Like most such competitions, it had been planned much earlier.

response to a request for production made while discovery was still underway.

The two early discovery responses referred to the contract as being written, and the response to request for production indicated Coves Darden had been unable to locate a signed copy.

The Circuit Court based its finding of no written contract, not upon an affidavit or discovery response of Ibañez denying the agreement, but upon the stated inability of Coves Darden to locate a signed copy.

The Circuit Court based its finding of no oral contract either upon the same conclusion that the Circuit Court could "freely disregard" other materials in the record, or upon a finding that other materials in the record conclusively established that any oral contract was for more than a year, and was unenforceable under the Statute of Frauds.

Coves Darden distinctly stated thirteen (13) issues on appeal to the Court of Appeals 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 to Court of Appeals, "Statement of Issues on Appeal," at 1-2.)

The three-judge panel of the Court of Appeals held oral argument and issued a twenty-page opinion including a ten-page dissent. The majority affirmed the Circuit Court's dismissal of every count of the lawsuit. 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.**" (Capitals and bold in original.)

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 which do not decide the issues presented with points and authorities, that nevertheless

the decision was not a "memorandum" decision and could not have qualified 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; and (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 it declares to be unpublished, which lacks sufficient detail on the issues actually presented for meaningful public use and scrutiny, and which is deliberately 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 then petitioned for certiorari from this Court, and, 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 requested a writ of mandamus or other appropriate writ.

This Court granted certiorari to review the Court of Appeals' decision of the issues pertaining to the grant of summary judgment, but denied review and writ of mandamus on the issues of the lack of completeness of the Court of Appeals' decision, nonpublication of the decision, and uncitability of the decision.

IV. Argument for Reversing the Court of Appeals

A. The Court of Appeals erred in refusing to cite or 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. (Issue 1, and parts of 2-14)

The Circuit Court decided to dismiss every count and legal theory in the complaint. The

basis of its decision, in each instance, was one or more improper factual findings for which there was evidence in the record creating a genuine issue, and mandating denial of summary judgment. While, regardless of these findings, additional errors of law required reversal, correction of the impermissible fact-finding by itself requires reversal of the whole decision.

The Circuit Court granted summary judgment based upon the conclusion that the relationship of the parties was not contractual. I.e., the Circuit Court held that the parties had no contract of any type.[3]

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[3] This Court is familiar with basic principles of contract law, and the various forms and species of contracts, such as written, oral, fixed term, at-will, etc.

General contract law provides that a contract exists when there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act. Prescott v. Farmer's Telephone Co-Op, Inc., 335 S.C. 330, 516 S.E.2d 923 (1999). A contract may arise from oral or written words or by conduct. Id. In the employment context, a contract altering an at-will arrangement may arise, in part, from the oral statement of the employer. Id. The at-will status of an employee may be altered by an oral contract of definite employment. Id.

The required elements of a contract are an offer, acceptance, and valuable consideration. Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005). A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. Id. Valuable consideration may consist of some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other. Id. A benefit to the promisor or a detriment to the promisee may provide sufficient consideration for a contract. Id. All the elements of a contract were in the record.

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Prescott. The offer identifies the bargained-for exchange and creates a power of acceptance in the offeree. Id. Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act amounts to an offer. Id. To be binding, an offer must be definite. In addition, it must be one which is intended of itself to create legal relations on acceptance. Id. Ibañez testified in his deposition that the terms of the offer were communicated to him in detail on his December, 2010 trip, that he continued to think about the offer, that he brought his wife back in January, 2011 to continue considering the offer, that he posited no change in the terms and did not need any additional terms, and that he accepted the offer on the January, 2011 trip.

A written contract does not have to be signed to be a contract. The absence of the signature of one party to a written agreement does not necessarily negate the fact that there is a

written contract. Peddler, Inc. v. Rikard, 266 S.C. 28, 221 S.E.2d 115 (1975); Gladden v. Keistler, 141 S.C. 524, 140 S.E. 161 (1927); Jaffe v. Gibbons, 290 S.C. 468, 351 S.E.2d 343 (Ct. App. 1986).

A contract generally need not be in writing to be enforceable. Armstrong. If there is a meeting of the minds with regard to the essential elements of a contract, it is immaterial whether the contract is written or oral. Id. However, contracts "within" the Statute of Frauds must be in writing to be enforceable, unless subject to an exception.

One Statute of Frauds which might apply to an employment relationship is the Statute of Frauds requiring a signed writing for contracts which, by their terms, are impossible to be performed within one year. This Statute of Frauds would require that for any such contract to be enforceable, it be in writing and be signed by the person to be charged. 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 because not impossible of performance within one year); 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 because not impossible of performance within one year; Center State Farms v. Campbell Soup Company, 58 F.3d 1030 (4th Cir. 1995) (applying S.C. law).

Even if an agreement were "within" the Statute of Frauds, exceptions to the statute apply in various instances. One exception, most frequently occurring in instances relating to oral sales of land and oral leases, is that the Statute of Frauds would not apply in instances in which there is an existing written memorandum of the agreement, and there is at least part-performance and reliance by one of the parties. See, e.g., Scurry v. Edwards, 232 S.C. 53, 100 S.E.2d 812 (1957).

In instances of employment of unspecified duration, which are therefore not "within" the Statute of Frauds, but which also ordinarily do not have a term as to length which can be enforced, South Carolina courts will, in a proper case, imply a term of reasonable duration sufficient for the nonterminating party to recover its investment or consideration. This occurs when there is independent consideration given in return for the establishment of the employment agreement. Weber; Center State Farms. In such a case, although usually for the benefit of the employee, the independent consideration converts a terminable at will contract to one for a reasonable period of time to enable the party making the investment to recoup the investment. Id.

If parties have entered into an at-will employment arrangement of completely unspecified duration, they still would have an at-will contract.

Employment at will is a contract. An at-will employment contract is still a contract; it is simply a contract in which one party agrees to work, in return for which the other party agrees to pay, and in which one of the terms is that the period of employment is terminable at will. Jones v. General Elec. Co., 331 S.C. 351, 503 S.E.2d 173 (Ct. App. 1998). If one party does terminate the relationship, the termination itself is generally not a breach and is not actionable. This does not mean there are no other terms susceptible to breach. The agreement is still contractual. Hudson v. Zenith Engraving Co., 273 S.C. 766, 259 S.E.2d 812 (1979).

The Circuit Court reached this erroneous conclusion based predominantly on one early unsworn interrogatory answer and one early response to a request for production. The interrogatory answer stated that the parties had a written contract. The response to the request for production stated that at that time, Coves Darden was unable to locate a signed copy of the written contract.

The Circuit Court disregarded other materials in the record indicating that Ibañez knew of and had been provided the written contract, and had proceeded while knowing both parties' reliance on it. The Circuit Court also stated that it could refuse to consider other materials in the record indicating that the parties had a preceding oral contract, and that the terms of the oral contract did not make it impossible of performance within one year. The Circuit Court also attributed no significance to the fact that, rather than never show up, Ibañez actually did go to work for Coves Darden as Coves Darden's employee, for pay, and was so employed at the time of the events complained of.

The various materials the Circuit Court indicated it was either excluding, or allowed to exclude, included (1) supplemental discovery responses, (2) the deposition of Ibañez himself, (3) materials submitted to immigration authorities when applying for the visa, and (4) the affidavit of Miguel Coves, as further discussed herein.

In South Carolina, an "at-will" employment relationship is not the absence of a contract; it is the presence of a contract, one term of which is that the contract may be terminated at will. Prescott v. Farmer's Telephone Co-Op, Inc., 335 S.C. 330, 516 S.E.2d 923 (1999). The relationship is contractual. Id.

Having stated its ability to "freely disregard" certain materials in the record, the Circuit Court nevertheless proceeded to analyze the case as a false syllogism in which Coves Darden could have had either an oral contract or a written one, but not one and then the other. The Circuit Court reasoned that, disregarding all materials in the record except the two early discovery responses, the contract was, if anything, written, not oral, and that it was not signed, and therefore was not a written contract.

The Circuit Court further reasoned that if the contract was oral, it was unenforceable under the late-pled, late-argued affirmative defense of the Statute of Frauds, because the contract was absolutely for two or three years, and thus not possible of performance in one year.

The majority of the panel of Court of Appeals affirmed the Circuit Court on finding that the oral contract was unenforceable because it was absolutely for two or three years, but never explicitly addressed the Circuit Court's ability to disregard evidence in the record to the contrary. Although it made various unexplained comments about the evidence, the majority of the panel also never explicitly asserted the appellate court's own ability to ignore the evidence. There was much more than a "scintilla" of evidence in the record indicating that there was an oral contract, that it was not absolutely for two to three years, and that it was not unenforceable under the Statute of Frauds.

There were also counts of the complaint whose viability did not depend upon the inapplicability of the Statute of Frauds. That is, even if there had been grounds on which to conclude that the Statute of Frauds had applied to make the oral contract unenforceable, it would still have been error to dismiss these counts.

Yet, the Circuit Court dismissed all four counts of the complaint. The Circuit Court's

error on the Statute of Frauds issue permeated the entire decision of the Circuit Court.[4]

The majority of the panel of Court of Appeals affirmed these successive dismissals, based on continuing to ignore scintillas and surfeits, as follows. The majority first erroneously determined there was no written contract, but found there was definitely evidence of an oral contract. (Op. at 5.) 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 Ibañez owed no fiduciary duties to his employer, in part because he was "noncontractual." Similarly, the majority erroneously ruled that because there was no "breach of contract," the tortious interference count fell. Finally, the majority erroneously ruled that because the tortious interference count fell, the UTPA count fell as well.

In affirming, the Court of Appeals did not address the discretely raised error of the Circuit Court in disregarding the "scintilla" standard established by the Supreme Court in South Carolina for deciding summary judgment. The majority also did not address the directly raised error of the Circuit Court in misapprehending and misapplying the doctrines of "judicial admissions" and

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[4] Other errors of the Circuit Court, independently requiring reversal, will be addressed at more length elsewhere herein. 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.

"sham affidavit." The majority opinion of the Court of Appeals also 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 majority did not even mention these issues when the majority made its own unexplained and inconclusive comments about the evidence ignored.

The standing "scintilla" standard requires denial of summary judgment if there is even a spark, jot, atom or whit of evidence of dispute of a material fact.[5] When there is even a speck or whit of such evidence, this finding mandates denial of summary judgment, simpliciter.

There was far more than a speck of evidence that the parties had an unsigned written agreement. There was evidence Ibañez had knowledge of it, and by his behavior, acceded to it. There was also evidence that the preceding oral agreement of the parties was "not impossible of performance within one year."

The majority overlooked 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, the 4-24-13 Affidavit of Miguel Coves (R.p. 280), and the 5-20-13 Supplemental Interrogatory Response (R.p. 396).

According to the Affidavit of Miguel Coves, 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 therefore, the period of performance of the contract would be limited by the later terms of the

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[5] A "scintilla" is commonly known as a tiny trace or spark of a specified quality or feeling. "Scintilla" is from the Latin, "scintilla," meaning "spark," or "trace." Merriam-Webster's Collegiate Dictionary, 11th ed., 2012. It first emerged in the English language as an English word, directly from Latin, in 1661. Id. It is thus generally synonymous with a particle, iota, jot, whit, atom, speck, bit, ounce, shred, crumb, fragment, grain, drop, spot, hint, touch, suggestion, whisper, suspicion, smidgen, or tad.

visa. At the time the contract was entered into by the parties, 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 thus undisputed that it was possible that the visa could be granted for less than one year, making the period for performance of the contract 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. Contracts which are not impossible of performance within one year are not within the Statute of Frauds. Weber v. Perry.

This fact requires reversal of the Court of Appeals and reversal of the Circuit Court, although, as noted above and discussed more fully below, there are numerous other issues which also require reversal, even in the absence of this one.

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 shows the entire Court of Appeals decision to be erroneous.

The majority of the panel of the Court of Appeals erroneously avoided or lost track of the fact that the contract was formed first. The period of employment under the contract could not start until the visa was later granted and the length of authorized stay under the visa was something that was to be determined when the visa was granted -- not later, after the visa was granted, or after employment had started.

In any event, the majority was simply incorrect in its strained reasoning that "expiration of his visa in less that one year would not constitute performance of the contract," but, rather, would constitute "excusable nonperformance of Ibanez's obligation." (Op. at 8 (citing general treatise, rather than South Carolina case law).) The court is supposed to take a view and draw all inferences unfavorable to summary judgment, not invert logic in order to affirm it.

If nonperformance of a conditional obligation is "excused" by the terms of the same

contract imposing the obligation, the obligation is not an obligation under all possible performances of the contract, and it is therefore possible to perform the contract under a different obligation. In this case, it literally was possible to perform the contract within one year. "Excusable nonperformance of obligation" in this instance is actually an extraordinarily inflected term confirming a finding that it was not impossible for the contract to have been performed within one year. The majority erred in analyzing the possible issuance of the visa for a shorter period than requested as if the issuance of the visa could be an after-the-fact change in circumstances, affecting the ability of a party to perform, rather than as an event controlling the period for performance of an already formed contract.

The opposition materials that were disregarded were all allowed by express rule of civil procedure to be submitted. See Rule 56(c) (referencing "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," not referencing responses to requests for production) and Rule 56(e) (referencing "depositions, answers to interrogatories, or further affidavits"). It was actually the moving party's burden to submit them and show how they presented no dispute of the facts, rather than file a motion stating no grounds. 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. There is no statement anywhere in any section of Rule 56 which allows a court, when reviewing for the presence of scintillas, to ignore answers to interrogatories.

Respondents may argue, as they did in Respondents' Return at 2, that "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." (Lack of reference to record in original.) This

is simply a false statement, in the respect that it omits material contents of the discovery response alluded to, and thus misstates the information conveyed by the discovery response. As explained above, the actual response, rather, required denial of summary judgment.

Respondents may argue, as they did in their Return at 6, 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 error of this argument is that, as explained above, the Court of Appeals simply did not actually view all of the evidence in the light most favorable to Petitioner Coves Darden, despite any bare recitation to that effect.

As briefed explicitly on appeal, in order to reach a decision to dismiss the case, the Circuit Court essentially acknowledged that it needed to disregard some materials. These were materials which otherwise would have precluded summary judgment. The Circuit Court did so through confused and unsupported reliance on devices denominated as "judicial admissions" and "sham affidavits." These issues will be discussed further in another section of this brief. The majority of the panel of the Court of Appeals did not address these issues. As an apparent substitute, the majority of the Court of Appeals panel, without mentioning a doctrine or legal principle, merely made various passing inconclusive remarks about any opposition materials which were mentioned, then ignored the materials, and then drifted into impermissibly weighing the evidence.

The Court of Appeals thus weighed the evidence without explicitly relying on "sham affidavits," "judicial admissions," or other doctrines, the applicability of which was directly challenged on appeal. The majority of the panel also makes no express ruling whatsoever on the

sufficiency of the 10-9-13 Supplemental Interrogatory Response in the Record at 453 to be considered as an item raising an issue 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." This is error. The answer to interrogatories is not mere argument. It is a discovery response on file with the court. It is one of the materials specifically mentioned by Rule 56(c), and Rule 56(e), SCRCP. See Rules 56(c) and (e) (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 even pled in the case at the times both the first and the second summary judgment motions were filed by the defendant. It also 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 or other sworn materials on any material facts whatsoever, and took no depositions.

Not a single interrogatory response in the case was sworn. Including the one on which the Circuit Court relied in granting summary judgment.

If the form of the discovery response was regarded by the majority of the panel of the Court of Appeals 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 to the Court of Appeals at 5-8, especially footnote 8. The Court of Appeals majority made no mention of the principles or authorities briefed.

In the way described above, the majority of the panel made its own incredible factual finding that at the time of making the contract, the contract was for longer than two years, despite the possible shorter length of the non-yet-issued visa and in spite of whether Ibañez could be prohibited from being present and working in the United States for more than one year. Based upon this impermissible fact finding, the majority erroneously concluded that the Statute of Frauds applied, and that every claim against every defendant failed.

The majority does correctly state and cite portions of the summary judgment standard.

However, the majority 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 this Brief in the section on scope and standard of review. The majority does add 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 additional recitation remains stark and unexplained, unless it is innuendo of a conclusion to be drawn from the aforedescribed passing remarks of the majority of the panel about some opposition materials. The majority thereafter never specifically ruled on or identified a single unreasonable inference urged by Coves Darden or ungenuine issue of fact proffered by Coves Darden. 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. The unpublished opinion of the majority of the panel of Court of Appeals thus remains a simple instance of unpermitted fact finding and judicial fiat, done while omitting other issues which still would have required reversal.

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 to resolve issues of fact that are for the jury, nor to choose between competing inferences from the facts, or to otherwise disregard the summary judgment standard and the province of the jury. Otherwise, there would never really be a reliable right to jury trial, or even a full bench trial, in South Carolina.

Mere 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, the recital means nothing. See Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004) (explaining the considerations required and the need for findings before disregarding an affidavit), Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991) (explaining considerations in deeming matters admitted under Rule 36, rather than Rule 33), and Wright v. Hiester Const. Co., Inc., 389 S.C. 504, 519, 698 S.E.2d 822, 830 (Ct. App. 2010) (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.

B. As part of erroneously disregarding the "scintilla" standard, the Court of Appeals also 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. (Issue 2, and parts of 1 and 3-14)

Contrary to any argument Respondents make, Coves Darden does not argue that an interrogatory response cannot constitute an admission. Coves Darden 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 addressed by the Court of Appeals.

The Circuit Court erroneously held that that the court was free to disregard certain evidentiary materials of record in determining whether there was a genuine dispute of facts material to a summary judgment motion.

The Court of Appeals never ruled on the "judicial omissions" or "sham affidavits" rulings

of the Circuit Court. The majority of the Court of Appeals never discussed them. The majority of the Court of Appeals never applied either by name. Neither the Circuit Court nor the Court of Appeals ever made any findings required for consideration of these doctrines. This Court should rule on the Circuit Court's, and perhaps the Court of Appeals', misapplication and misunderstanding of the doctrines.

1. The Circuit Court misunderstood and misapplied the concept of a "judicial admission."

In its order at 2 and 3, under a heading, "Undisputed Facts and Party Admissions," the Circuit Court used and relied upon, but did not explain what it meant by, the term "judicial admission." Here, the Circuit Court did not actually confine itself to facts which were undisputed, as required in determining a summary judgment motion.[6]

Rather, the Circuit Court designated certain statements by a party to be "admissions," and then treated them as conclusively established, despite the presence of other material in the record throwing light on the interpretation and circumstances of those statements, or contradicting the Circuit Court's interpretation of them.

In a similar vein, but referencing distinctly different concepts, in its order at 4, the Circuit Court misstated the "legal standard for summary judgment." Here, the Circuit Court incorrectly stated and applied the holding of Coffey v. Jenkins, 117 S.C. 321, 109 S.E. 117 (1920), and the much later holding of Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004). The Circuit Court accordingly proceeded to "freely disregard" any "affidavits" perceived by the Circuit Court to be "conflicting" with other evidentiary matter adduced by the same party -- and even to

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[6]The correct standard is stated under "Scope and Standard of Review," above, and is incorporated in this argument.

disregard the sworn testimony of the opposing party. (Cf. Order at 4, R. p. 14 (stating the court is "free" to ignore contradictory affidavits, citing 1920 case which actually involved judicial estoppel when formal stipulation to testimony is given in order to avoid continuance).)

The Circuit Court was thenceforth erroneously constrained in its analysis of whether there was a contract. Using the foregoing erroneous standard of decision, the Circuit Court determined that there was no contract. The Circuit Court based this determination largely upon an early unsworn interrogatory response by Plaintiff to the effect that the contract at issue was written. Other materials of record indicated that the parties also had an oral contract, even if agreement to the written contract was denied.

The Circuit Court interpreted the interrogatory response to state that the parties had never entered into an oral contract, not even prior to the written document the response referred to. This interpretation of the interrogatory response was contradicted by Defendant Ibañez's own deposition testimony. This interpretation was also contradicted by the Affidavit of Miguel Coves. Further, counsel for Plaintiff explained the interrogatory answer. The interrogatory answer was also amended.

No leave to amend an interrogatory answer is required.[7]

Yet the Circuit Court treated the early interrogatory response as immutable, and referred to the Circuit Court's interpretation of the response as a binding "judicial admission." Taking this approach, the Circuit Court incorrectly ignored other material in the record and recited its interpretation of the interrogatory response as an established fact, for the purpose of granting summary judgment. (E.g., Order at 2, ¶ 6, R. p. 12 ("Plaintiff has judicially admitted"), 3, ¶ 6, R.

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[7]In fact, amendment is sometimes required by Rule 26, SCRCP.

p. 13 (Plaintiff "has not moved to withdraw the foregoing statement" and it "remains" a matter "of record" in the case) and 5, R. p. 15 ("Plaintiff judicially admitted").) The Circuit Court misunderstood and erroneously applied the term "judicial admission" and failed to look at the abundance of evidence establishing that the parties had a contract, be it one sort or another.

The lawyer sending the initial interrogatories represented a foreign-language-speaking party, and the entire set of interrogatories that was sent failed to make any inquiry about a written contract. In the early interrogatory answer, Plaintiff forthrightly attempted to clarify and disclose that there was a written document in which the parties did write up some of the common terms of their contract to support the application made to immigration authorities, and that the contract was, thus, not just an "oral" contract. The early response stated that the agreement was "not oral. It was a written contract...." This response did not state that if Ibañez denied the existence of a written contract, there was no oral one. (See Transcript of March 5, 2013 proceedings, p. 8, L9 to p. 9, L10, R. pp. 54-55 ("if there is no written contract, there is a verbal contract where the parties fully understood the basis on which this man was going to work for them and even if one determined that the contract was an at-will relationship, the black letter law of South Carolina is that employment at-will is ... contractual").)

Significantly, in the materials submitted by the defendants from time to time in support of their evolving summary judgment motion, Defendants never adduced a denial by Ibañez that he had entered into a contract of employment with Coves Darden.

The Circuit Court nevertheless misapprehended and misapplied, without citation of authority, the concept of a "judicial admission" to constrict the portions of the record the court considered in deciding to grant summary judgment. This amounted to the court deciding issues

of fact, which, under the aforerecited summary judgment standard, is not allowed in ruling on summary judgment. The order employs this "judicial admission" device to deny the existence of any oral contract at all, and focus only on whether a written contract existed.

There was evidence of a written contract. There was also abundant evidence of an earlier oral contract. As discussed above and further below, the oral contract was also clearly not within the Statute of Frauds.

An interrogatory response in a case is sometimes admissible. However, contrary to the Circuit Court's holding, an interrogatory response does not per se permanently bind a party to an application of the response in a manner which avoids the actual facts of the case for purposes of granting summary judgment.

The Circuit Court itself states in its Order at 1, R. p. 11, that the suit by Plaintiff is "for the alleged breach of an oral contract of employment." The Circuit Court then misapprehends and misapplies caselaw pertaining to in-court stipulations, judicial estoppel, and sham affidavits submitted in contradiction of prior sworn affidavits, when no prior sworn affidavits are present here. As a result, the Circuit Court granted summary judgment in contradiction of the facts and justice of the case.

Under the South Carolina Rules of Civil Procedure, specifically Rules 33 and 36(b), responses to Rule 33 interrogatories are distinguished from responses to Rule 36 requests for admissions. A written statement during discovery in response to a Rule 33 interrogatory is not conclusively established in the manner of an admission in response to a Rule 36 request to admit. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991); Wright v. Hiester Const. Co., Inc., 389 S.C. 504, 519, 698 S.E.2d 822, 830 (Ct. App. 2010).

In Wright, Hiester contracted with the Wrights to build a house for them. Hiester began building the home and hired D & O as a subcontractor to stain some woodwork in the house. After the D & O workers had spent several days in the house staining wood, a fire erupted, destroying the house.

In the suit, the Wrights contended that Hiester should have been found liable as a matter of law because of "admissions" by Steve Hiester, the president of Hiester, to the effect that D & O caused the fire, written "admissions" by Hiester Construction during discovery that the fire was caused by Hiester's subcontractors' leaving a box of oily rags in one of the rooms, and provisions in the contract suggesting that Hiester was to be responsible for the acts of its subcontractors. Id., 389 S.C. at 518, 698 S.E.2d at 829.

The Court of Appeals observed, "The written admission during discovery was in response to interrogatories, rather than a request to admit." Id. at 519, 698 S.E. 2d. 830. Distinguishing interrogatory responses from admissions which conclusively establish a fact, the Court of Appeals affirmed the opinion of the lower court, stating that, as opposed to requests to admit, interrogatories are construed "as seeking current information as of the time the question is asked and answered." Id. The Court of Appeals also separately considered Heister's deposition testimony, which the opposing party also characterized as "admissions." The court held the testimony not to bind Heister to the point of excluding contrary facts, opinions, and inferences not in accord with the true facts. Id.

Under Rule 36 of the South Carolina Rules of Civil Procedure (pertaining to requests for admissions), any matter admitted under the rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Wright clearly distinguishes Rule

36, pertaining to the requests for admissions, from Rule 33, pertaining to interrogatories.

Some confusion can arise from multiple usages and meanings of the term "admission." A statement in an interrogatory response is a statement of a party, and thus is an "admission of a party" under Rule 801(d)(2), S.C.R.Evid., and thus is not hearsay, and is therefore not excluded from admissibility under the hearsay rule.

This sort of "judicial admission" is a statement which is attributable to a party, and which is, accordingly, nonhearsay for purposes of potential admissibility in evidence. However, this sort of "judicial admission" is not a statement that the party is bound to in the sense of conclusively establishing the matter.

In the sense that statements of a party in the course of litigation are "judicial admissions," they are not, qua statement, binding stipulations unless specified as such or unless declared to be so by specific rule. Judicial admissions of this sort are generally regarded as simply evidence which can be "used" in a second trial. Alex Sanders, Deborah Neese, and John S. Nichols, South Carolina Trial Handbook for South Carolina Lawyers §10:23 (p.10-19)(Law Co-op. 1996)("They are generally regarded as evidence of an admitted fact, so counsel should be careful in relying on them as excusing the need for other proof in the second trial").

Few statements of a party, even when unambiguous, are regarded as binding, unamendable, or irretractable, or as foreclosing introduction of other evidence. Even Rule 36(b), SCRCP, which relates to actual "rule" "admissions" made in response to a formal "request for admissions," allows a party to withdraw or amend a response under certain circumstances.

Thus, a party is not immutably bound to an adverse characterization of an early unsworn interrogatory answer which is not only readily susceptible to a very different meaning, but

contrary to the other papers and evidence, including facts known to and admitted by the other party. The Circuit Court erred in holding to the contrary. The Circuit Court erred in using the early unsworn interrogatory response to conclusively establish that there was never any oral contract. The Court of Appeals should have reversed.

2. The Circuit Court misunderstood and misapplied the "sham affidavit" doctrine.

An additional dimension of this error was the Circuit Court's ruling seeming to imply that the deposition testimony of the adverse party, Ibañez, should be disregarded because it was tantamount to a "sham affidavit," because it contradicted the early unsworn interrogatory response of Coves Darden. The interrogatory response that the court relied on was given in response to a set of interrogatories in which opposing counsel for the defendants had noticeably failed to inquire about any written agreement, and referred only to an oral agreement. The meaning of the interrogatory response – clarifying that there was a written document – was later further clarified in later discovery and filings, including an amended interrogatory response.

The Circuit Court nevertheless ruled as if there were "sham affidavits" submitted in this case, contradicting some prior affidavit of the same party. The statement that the court relied on was in an early interrogatory response and not a sworn affidavit.

Even if a party says something in an actual affidavit and later contradicts it, the first statement is not necessarily regarded as a conclusively established fact for purposes of summary judgment. South Carolina law distinguishes between a "sham affidavit" and a correcting or clarifying affidavit. For guidance, a court first must look at whether an explanation is offered for the statements that contradict prior sworn statements. Cothran v. Brown, 357 S.C. 210, 218-19, 592 S.E.2d 629, 633 (2004). Here, the initial interrogatory response was not sworn, it was not an

affidavit, and an explanation was offered -- that the interrogatory response was not intended to deny there had been an oral contract, and was intended to convey that Plaintiff thought Ibañez acceded to the later written contract.

Next, the court will look at how important the contradiction of fact is to the litigation. Id. Here, there was no contradiction, the facts were already within the knowledge of the defendants, and the fact of a prior oral contract was important.

The court must also look at the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact. Id. There was no previous sworn testimony. Here, the only sworn testimony on the subject was in the deposition of Ibañez and the affidavit of Coves. They are consistent on the issue of the oral contract. They are also consistent with the explanation offered for the initial unsworn interrogatory response.

The court may also consider when, in relation to summary judgment, the second affidavit is submitted. Id.; see also Pittman v. Atlantic Realty Co., 359 Md. 513, 535, 754 A.2d 1030, 1042 (2000)(An affidavit may only be disregarded as a sham when a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact.)

Here, there is no issue of a second "affidavit." There is an early unsworn interrogatory response. The record then shows the filing of a summary judgment motion with no stated grounds, and an objection by defendants to any further discovery. The record then shows deposition testimony by the moving party supporting an oral contract, a sworn affidavit supporting an oral contract, and an amended interrogatory response supporting an oral contract.

In the instant case, abundant evidence of the existence of a detailed oral contract was already in the defendants' possession when they received the first interrogatory answer. Extensive evidence of the existence of the oral contract was in Defendant Ibañez's own sworn deposition testimony, obtained after the interrogatory response was given, after Ibañez was finally ordered by the court to appear for deposition. The rule allowing a court to disregard a second, competing, affidavit, is an exception to a general prohibition against a judge excluding a contradictory affidavit from consideration and is used only when the affidavit is an attempt to create a sham issue of material fact. Cothran.

As they did in their Return at 13-14, Respondents may offer to supply the findings which neither the Circuit Court nor the Court of Appeals made. Aside from the inevitable incorrectness of any such proffered findings from Respondents, no such considerations or findings were made by the Circuit Court or Court of Appeals. 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. Not only did the later non-affidavit discovery response not contradict an earlier affidavit or even an earlier discovery response, but an explanation was also 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.

It is clear Coves Darden had no intent to create a sham issue and the Circuit Court made no such finding. Indeed, it would be nearly impossible for a party to obtain summary judgment

based on the assertion that his own deposition testimony, which was unfavorable to summary judgment, was a sham. Throughout the proceedings, Coves Darden consistently made it clear that there was an oral contract preceding the written document and that the statement in the early interrogatory was not comprehensive and was misused, if not misinterpreted and misapprehended. The Circuit Court misapplied the sham affidavit rule, and should be reversed.

C. There was evidence of a written contract. (Issues 1-3, and 6)

The majority of the panel of the Court of Appeals 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 Ibañez had ever definitely placed his signature on the written contract.[8]

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 Ibañez had not "agreed" to the written contract (Op. at 5) because an affidavit failed to "state" that Ibañez "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 Ibañez in or before the time of his visa interview in February of 2012." (R.p. 397.)

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[8] Contrary to the majority's summary, there is no statement in the record by Ibañez or Coves Darden that "Ibañez did not sign the agreement." (Cf. Op. at 4.)

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 Ibañez 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.

In determining that a written contract did not exist, the Court of Appeals erred by ignoring facts in the record which indicated that (1) Ibañez knew of the written contract, and (2) by his actions, accepted it. It was therefore error to affirm summary judgment finding that no written contract existed.

D. There was evidence of an oral contract to which the Statute of Frauds was not applicable. (Issues 1-6, and 9)

The majority of the panel of the Court of Appeals 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. As partially discussed above, 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 when reviewing a motion for summary disposition of a case, and undermines the majority's entire opinion.

The majority apparently 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,[9] was formed before the visa was issued, with an agreed duration defined by the length of the visa to be 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 Ibañez 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

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[9]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 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.

statute).[10] It was error to ignore the Supplemental Interrogatory Response in determining the agreed duration of the contract, and was error to grant summary judgment.

E. Even if the Statute of Frauds had applied or even if the parties had not had any agreement on specific duration at all, they still would have had an employment contract. (Issues 6-8, and 10)

As pointed out above, the majority incorrectly equated the unenforceability of an oral contract for a specific period of time with nonexistence of an oral contract. The contract would still exist. In a slightly different vein, the majority also incorrectly equated the lack of an agreement to a specific period of performance with lack of a contract. There still would be a contract. That is, on the one hand, the majority erroneously treated a contract within the Statute of Frauds as nonexistent, and on the other, erroneously treated a contract at will as nonexistent.

In turn, the majority erroneously found Ibañez owed no fiduciary duties to his employer, whom he actually worked for, in part because he was "noncontractual," and went on to also erroneously find that there was no contract with which Derr could have interfered.

The majority of the panel of the Court of Appeals erred in determining that a bare-bones "at will" employment contract was not a "contract." Prescott v. Farmer's Telephone Co-op. Inc.,

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

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 Ibañez 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 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) and Young v. McKelvey, 286 S.C. 119, 333 S.E.2d 566 (1985). "Breach" does not mean only termination or quitting.

Respondents may argue, as they did in their Return at 7, 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, and should have reversed the Circuit Court's dismissal of the breach of fiduciary duty count, the tortious interference count, and the UTPA count, even if there had been grounds to conclude that the Statute of Frauds applied.

F. An employee is, by definition, an agent, and an agent, by definition, is a fiduciary. Ibañez was also a highly trained person of international renown and an important and trusted employee for Coves Darden, and he was a significant investment and worked at a high level where he owed fiduciary duties. Even if he had been an employee at will, an employee at will still is in a contractual relationship with duties owed by both parties. An action lies for breaching duties in an employment-at-will relationship. (Issue 8, and part of 1)

On the issue of fiduciary duty, the majority also states in its unpublished decision 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 Coves Darden 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 of loyalty). In Futch (1997), the Court of Appeals, citing previous Supreme Court cases, used at length, interchangeably, the terms "employee" and "agent." If an employee were not an agent, this would be improper. 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). See also Restatement (Third) of Agency § 1.01 (2006); id., Official Comment G; and see id. § 7.07(3)(a)("an employee is an agent who ....").

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.

An agent is defined as a fiduciary. See, e.g., Restatement (Third) of Agency § 8.01 (2006) (stating the general fiduciary principle of loyalty before other sections on other duties). Even in a hypothetical, bare-bones "at-will" employment relationship, Ibañez owed to Coves Darden, fiduciary duties of loyalty and information. Restatement (Third) of Agency § 1.01 (2006). An employee is in a traditional fiduciary status with respect to his employer.

Fiduciary duties may also arise in special relationships which are not traditional fiduciary relationships. A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. Armstrong v. Collins, 366 S.C. 204, 621 S.E. 2d 368 (Ct. App. 2005); Moore v. Moore, 360 S.C. 241, 250-51, 599 S.E.2d 467, 472 (Ct. App. 2004); Ellis v. Davidson, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004); Regions Bank v. Schmauch, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003); Redwend Ltd.

P'ship v. Edwards, 354 S.C. 459, 476, 581 S.E.2d 496, 505 (Ct. App. 2003); Island Car Wash v. Norris, 292 S.C. 595, 599, 358 S.E. 2d 150, 152 (Ct. App. 1987).

A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence. Moore v. Moore, 360 S.C. at 250-51, 599 S.E.2d at 472; Hendricks v. Clemson Univ., 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003); O'Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); 251 SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 794 (1990); Regions Bank, 354 S.C. at 670, 582 S.E.2d at 444; Steele v. Victory Sav. Bank, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988).

A relationship must be more than casual to equal a fiduciary relationship. Ellis, 358 S.C. at 519, 595 S.E.2d at 822; Regions Bank, 354 S.C. at 670, 582 S.E.2d at 444; Steele, 295 S.C. at 293, 368 S.E.2d at 93. It cannot be gainsaid that this was not a casual relationship.

As courts in Texas have similarly recognized, "certain relationships give rise to a 'fiduciary' duty as a matter of law." Crim Truck and Tractor v. Navistar Intern., 823 S.W. 2d 591 at 593 (Tex. 1992). Among these traditional formal legal relationships is that of principal and agent. Id.

Texas has also recognized that certain informal relationships may constitute confidential relationships that give rise to fiduciary duties, where one person comes to trust in and rely upon another, "whether the relation is a moral, social, domestic or merely personal one." Id. at 594. Generally, whether a confidential relationship gives rise to fiduciary duties is a question of fact for a jury, though it can be a question of law where no evidence exists to support a fiduciary relationship. Id. at 593 (distributor of heavy equipment not in fiduciary relationship with

manufacturer). In general, once a fiduciary relationship has been established, the plaintiff may request a jury instruction that the nature of the relationship imposes a "duty to act with the highest degree of loyalty, trust and allegiance." FDIC v. Wheat, 970 F. 2d 124, 130 (5th Cir. 1992).

Ignoring the special relationship of the parties, the majority also characterizes Coves Darden's trust in Ibañez as "unilateral." To the contrary, the Affidavit of Miguel Coves, in the record, says that Ibañez "invited" the trust. (R.p. 280.)

Respondents may argue, as they did in their Return at 7, that the Court of Appeals did actually consider whether Ibañez owed fiduciary duties based on a special relationship, regardless of the existence of an employment relationship. The Court of Appeals decision included a legally erroneous characterization of Ibañez as "noncontractual" and ruled 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 Ibañez before he ever came to work. Ibañez 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 Ibañez

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.

Ibañez owed fiduciary duties by virtue of being an employee and it was error to rule that he did not. But even if he had not been an employee and had worked for free, the existence of the special relationship, giving rise to fiduciary duties, was a question of fact, requiring denial of summary judgment. The Court of Appeals should have reversed.

G. Secretly using the services of another's highly responsible employee in directly competing activities, encouraging the employee's violation of an agreement for exclusivity, and inducing the employee to quit by facilitating a violation of U.S. immigration laws will support a cause of action for tortious interference with contract; it was error for the Circuit Court to rule that there was no contract to support a cause of action, that there was no inducement, and that such activities are justified as fair competition. (Issues 6-11)

The majority ruled that because there could be "no breach of contract," the tortious interference count fell. The majority's ruling that there could be no breach of contract was based on the majority's erroneous application of the Statute of Frauds, as discussed above. Therefore, the majority erred in affirming the dismissal of the tortious interference count.

Even if there had been grounds to conclude the Statute of Frauds applied, 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. This was additional error in dismissing the tortious interference count.

Further, an action for tortious interference with contract will lie when the contract at issue is terminable at will. Todd; Bocook. This was a third independent error of the Court of Appeals in affirming dismissal of the tortious interference count.

This latter issue is not, as Respondents characterized it in their Return at 8, "whether the existence of a contract was a requirement for a claim of breach of tortious interference [with contract]." That was not the issue argued. 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 this point was cited by Coves Darden to the Court of Appeals. See Todd and Bocook. The Court of Appeals ignored this. And erred.

Also, tortious interference with prospective advantage does not require a contract. Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 395 S.E.2d 179 (1990). This is a fourth independent error in affirming dismissal. Any other errors of the Circuit Court on aspects of the tort were apparently satisfactorily briefed to the Court of Appeals in Appellant's Brief at 30-37, respectfully incorporated herein, if necessary.

The Court of Appeals should have reversed.

H. Tortiously interfering with a contract by violating laws designed to protect U.S. workers is unfair competition and an unfair or deceptive act or practice in the conduct of trade or commerce; coupling the interference with advertisements having a tendency to mislead is an additional and related violation of SCUTPA. (Issues 11-13).

Finally, the majority of the Court of Appeals panel ruled that because the tortious interference count fell, the UTPA count fell as well. The majority of the Court of Appeals largely based its affirmance of the dismissal of the UTPA claim on the absence of a tortious interference tort, which absence, as discussed above, the majority erroneously based on the absence of a contract. Even before correcting other errors, correcting 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, as independent error, 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 Ibañez to work for Half Moon.

The employment Derr agreed to facilitate was a violation of federal law, the purpose of which is to address the effect of the employment and gainful activities of noncitizens on the employment and wages of U.S. citizens. 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.)

The issue was fully briefed, but most people would accept at face value, and certainly for purposes of the scintilla required for denying summary judgment, that an employer who uses an illegal inducement to encourage breaches of an employee's duties to another employer who does not offer such an illegal inducement, puts the offering employer at an unfair competitive advantage. This is "unfair competition," whether deceptive or not.

Respondents may argue, as they did in their Return at 9, that the Court of Appeals did address the significance of the illegal compensation agreement offered to Ibañez, 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, there is not a single instance of this issue being addressed by the Court of Appeals. Instead, the Court of Appeals considered the

issue of false advertising alone.[11] The Court of Appeals did not address the issue of the illegal compensation agreement. It was error to affirm dismissal of the UTPA count.

V. Conclusion

This case presents special and important issues concerning commercial law, employment law, and procedural law in South Carolina. The unpublished opinion of the Court of Appeals omits issues presented on appeal and errs on the issues it does identify and decide, usually contrary to Supreme Court precedent.

Accordingly, the Court of Appeals should be reversed, the Circuit Court's order granting the defendants summary judgment should be reversed in its entirety, and the matter should be remanded to the Circuit Court for discovery and trial.

Respectfully submitted,

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[11] This issue, too, was briefed in Appellant's Brief at 38-42, and Appellant's Reply Brief at 25, and is still germane to the UTPA count, not as the sole basis of the count, but as a compounding and supplementing factor.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

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

S.C.S.Ct. Appellate Case No. 2016-002542
Opinion No. 2016-UP-402 (S.C. Ct. App. filed Aug. 17, 2016)

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 the date below, served the foregoing Petitioner's Brief upon the Respondents by causing a copy thereof to be mailed with proper postage to the address indicated below:

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Date: May 29, 2018

M. Baron Stanton