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S.C. SUPREME COURT

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

Appellate Case No. 2016-002542

Coves Darden, LLC, ... Petitioner,

v.

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

RESPONDENT'S BRIEF

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RESPONDENT'S COUNTER-STATEMENT OF THE CASE[1]

This is an appeal in an employment contract case. This Court granted certiorari on four issues: (1) whether there was a written contract of employment; (2) whether there was an oral contract of employment to which the statute of frauds does not apply; (3) whether a fiduciary duty arises in an employment at will relationship; (4) whether a cause of action for tortious interference of contract applies to an employment at will relationship; and (5) whether true statements of fact support an unfair trade practice claim.

Coves Darden, LLC owns and operates a horse farm in Aiken County. (R. p. 227, ¶ 3.) In 2010, Coves Darden contacted Francisco Garcia Ibañez[2] regarding working for Coves Darden in the United States. (R. p. 256, ll. 5-10.) At the time, Ibañez trained horses in Spain. (R. p. 252, ll. 12-16.) In January 2011, Coves Darden and Ibañez reached an agreement on an oral contract of employment with an expected length of "at least two years." (R. pp. 262, ll. 22-25; 281, ¶ 6.) That agreement included paying Ibañez about $8,000.00 per month; furnishing him a house; paying for his transportation to work; and paying for his travel to the United States on his first entry under the visa. (R. pp. 256, ll.

[1] Appellant's Statement of the Case contains many extraneous facts, subjective characterization - or mis-characterization - of evidence before the Court, arguments never raised in either Court below, and sheer speculation regarding Respondents' state of mind and motives --- none of which have any relevance to the issues before this Court. The following Counter-Statement of the Case contains statements of matters set out in the Record on Appeal in affidavits filed on behalf of Appellants and a document filed with the Immigration and Naturalization Service of the United States Government by Appellant that are referenced in that affidavit. They are the only items of *admissible* evidence needed for this Court to affirm the Circuit Court and the Court of Appeals.

[2] In Spain, a person's given name is followed by the father's last name, and that is followed by the mother's last name. When referring to a person by their last name, it is the father's last name that is used. Therefore, Respondent is properly referred to as Mr. Garcia. However, the Court of Appeals and Appellant have both referred to him as Ibañez. To prevent confusion, Respondents will do the same.

16-25; 281, ¶ 7.) The agreement also included paying for Ibañez's travel to and from the United States before the visa was approved. (R. p. 265, ll. 1-6.) Both Ibañez and Coves Darden understood that the duration of the employment contract would be two years. (R. pp. 262, ll. 22-25; 281, ¶ 6.) Coves Darden expected the minimum period of employment to be "at least two years" with the "probable expected initial length of the visa" to be "three years." (R. p. 281, ¶ 6.)

Soon after the oral agreement was entered in January 2011, Ibañez left the horse training academy and started to work for Coves Darden in Spain. (R. pp. 281-282; ¶¶ 8-11.) Coves Darden paid Ibañez for that work. (*Id.*; R. 276, ¶ 10.) Ibañez understood that those payments were part of the oral agreement. (R. 265, ll. 15-19.) While working in Spain for Coves Darden, Ibañez also came to the United States and worked for Coves Darden including a two month period from April 2011 to June 2011. (R. pp. 272, ll. 15-25.)

In August 2011, Coves Darden filed the visa application with the Immigration and Naturalization Service. (R. p. 227.) Coves Darden hired an immigration lawyer to assist with that visa application. (R. p. 276, ¶ 10.) With the visa application, Coves Darden submitted a draft written employment contract. (R. p. 276, ¶ 10.) Miguel Coves – principal of Coves Darden – signed that draft contract, but Ibañez did not. (R. pp. 220-225.) Coves said that the draft written contract contained "*some* common aspects of the agreement" . . . as the "terms which would govern the employment if the visa was granted." (R. p. 282, ¶ 13.)(emphasis added.) The draft written contract was captioned "Agreement Between Coves Darden, LLC and Francisco Garcia Ibañez" and contained

the following:[3]

> *"THIS AGREEMENT is made effective as of the date that Mr. Francisco Garcia Ibañez (the 'Employee') enters the United States of America with a valid 0-1 nonimmigrant visa enabling him to work for Coves Damon LLC* (the 'Employer') . . . ."
>
> "WHEREAS, the parties now wish to memorialize the terms and conditions of the employment in order to confirm that *an employer-employee relationship will in fact exist between the parties following the date that an 0-1 nonimmigrant work petition is approved by the Department of Homeland Security, and an 0-1 visa is issued to Mr. Garcia Ibañez* . . . ." (emphasis added)
>
> "WHEREAS, this Agreement is intended to serve as *evidence of an offer of employment*, in satisfaction of the requirements of the 0-1 nonimmigrant worker petition that Employer has filed for Employee . . . ." (emphasis added)
>
> **§ 1.2 Term of Employment**
>
> (a) This Agreement is intended to serve as evidence of an *offer of employment*, in satisfaction of the requirements of the 0-I nonimmigrant worker petition that Employer has filed for Employee.
>
> (b) *This Agreement shall only be deemed to have validity and legal effect on the date Employee first enters the U.S. on an 0-1 non-immigrant visa, and shall remain in effect only for so long as the Employee has appropriate 0-1 work or employment authorization from the U.S. government.*
>
> (c) Either party may send a written notice of intent to rescind this Agreement (hereafter, 'Rescission Notice') to the other's notice address as defined herein, at least thirty calendar days before the intended date of the termination of employment, on which date the employment relationship shall end, and by which date Employer shall complete the payment of all compensation due to Employee under this and no additional compensation shall be payable to Employee, and all rights and obligations of the parties under this agreement shall cease to exist.[4]

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[3] The draft contract also contained a mandatory arbitration clause.

[4] Significantly, the written agreement does not list any addresses for either party to give notice to the other. Miguel Coves admits that Ibañez left written notice of his termination at the residence provided by Appellant. (R. p. 284, ¶ 21.)

Ibañez did not sign the draft written employment contract. (R. p. 225.) Coves Darden's immigration lawyer discussed the draft written employment agreement with Ibañez by phone as part of Ibañez's preparation for his visa interview with immigration authorities. (R. pp. 276-277; ¶ 10.) The immigration lawyer did not obtain Ibañez's signature to the contract. (R. pp. 275-278.) Further, the immigration lawyer did not state that Ibañez agreed to or accepted the terms of the proposed written contract. (*Id.*)

In January 2012, the visa was issued. (R. p. 276, ¶ 9.) After obtaining the visa, Ibañez moved to the United States to work at Coves Darden's farm in South Carolina in February 2012. (R. p. 283, ¶ 17.)

In June 2012, Ibañez quit work by leaving a notice with Coves Darden one day before a scheduled horse competition in Georgia. (R. p. 284, ¶ ¶ 20-21.) Later that same month, Ibañez registered to enter a horse competition in North Carolina for Half Moon Stables ("Half Moon"). (R. p. 285, ¶ 25.)

On July 19, 2012, Coves Darden sued Ibañez, Half Moon Stables, and Dori Derr ("Derr") – principal of Half Moon Stables -- asserting claims of breach of contract and breach of fiduciary duty as to Ibañez, tortious interference with contract as to Derr, and violations of the South Carolina Unfair Trade Practices Act as to Derr and Half Moon. (R. pp. 31-39.) Coves Darden alleged in Paragraph 7 of the Complaint that "Plaintiff entered into an agreement to employ Ibañez as an expert equestrian trainer, and to provide expert instruction and consultancy services in the equine arts for clients of Plaintiff." (R. pp. 31-32, ¶ 7.) The Complaint was silent as to whether the agreement was oral or written

and silent as to the duration of the employment. (R. pp. 31-39.)

In written discovery, Coves Darden initially denied the existence of an oral contract and relied solely on a written contract of employment. (R. p. 195.)[5] In response to Defendants' request to produce the signed written contract, Coves Darden responded that one could not be found.[6]

Respondents moved for summary judgment as to all claims. (R. pp 105; 160.) The Circuit Court held three hearings on that motion over the course of seven months and ten days. (R. pp 46-103.) At the second hearing on May 20, 2013, Coves Darden's counsel told the court that the contract was an oral one. (R. p. 74, ll. 15-17.)[7] That reliance on an oral contract was further stated in the last hearing on October 15, 2013. (R. p. 96, ll. 10-12.)

The Circuit Court granted summary judgment holding that no matter whether there was a written contract or an oral contract, they both led to the inevitable end that there can be no recovery and Ibañez's employment was at will. (R. pp. 10-26.) Coves Darden filed a Motion to Reconsider on December 29, 2013. That was denied on January

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[5] Interrogatory 6 from Defendants asked Plaintiff to identify the terms of any alleged oral agreement with Mr. Garcia. In response, Plaintiff stated: "The agreement was not oral. It was a written contract presented to and acknowledged by Ibañez in (sic) or before January of 2012, after August of 2011." (R. p. 214, ¶ 6.) This response was amended in part on May 20, 2013 to state that "Between December of 2010 and January 2012, Plaintiff entered into an agreement for employment with Ibañez on certain terms . . ." (R. p. 397.)

[6] In responding to a request to produce the written contract, Plaintiff stated: "For Defendants' information, Defendant [sic, Plaintiff] believes there are none currently responsive to Request 1 (if requesting one with Ibañez's signature.)" (R. p. 196.) Further, in response to a question from the trial court about the existence of the written contract, Coves Darden's lawyer stated that "We looked and couldn't find a countersigned copy signed by Mr. Ibañez." (R. p. 76, ll. 21-22.)

[7] After the May 20, 2013 hearing, Coves Darden prepared and served an amended response to its earlier interrogatory response as to the existence of a written contract stating that "the parties reduced the common terms of the agreement to writing. The written document may or may not have been countersigned by Ibañez. . . . Upon information and belief, the written was presented to and acknowledged by Ibañez in or before the time of his visa interview in February of 2012." (R. p. 397.)

13, 2014.

On February 12, 2014, Coves Darden filed its Notice of Appeal to the Court of Appeals. On August 17, 2016, the Court of Appeals affirmed holding that there was no evidence in the record that Ibañez entered into a written contract with Coves Darden. (Op. at 1-20.) Further, the Court of Appeals ruled that if there was an oral contract, it was barred by the statute of frauds because the contract could not be performed within one year since the term of the contract was to be a minimum of two years. At best, the Court of Appeals held there was only an employment at will agreement which was terminable by either party. As to whether a viable claim for tortious interference with contract exists where there is an employment at will relationship, the Court of Appeals held that there must be a contract for a wrongdoer to intentionally procure the breach thereof. Without such a contract, there can be no breach and, as such, no claim for tortious interference with contract.

On September 1, 2016, Coves Darden filed a Motion for Rehearing. On November 28, 2016, that Motion was denied. On December 28, 2016, Coves Darden petitioned this Court for a writ of certiorari and a writ of mandamus. By its Order of May 3, 2018, this Court granted the writ of certiorari on three issues and denied all other requested relief.

ARGUMENT

I. BOTH THE CIRCUIT COURT AND THE COURT OF APPEALS CORRECTLY CONCLUDED THAT APPELLANT FAILED TO DEMONSTRATE AN ISSUE OF FACT REGARDING THE EXISTENCE OF A WRITTEN CONTRACT.

The Court of Appeals correctly concluded that the Appellant failed to produce evidence of a written contract to which Ibañez agreed. To establish the existence of a factual issue (whether by a scintilla or otherwise) on that issue, it was necessary for Appellant to establish a) the existence of a written contract containing all of the terms to which the parties agreed, and b) Ibañez's acceptance of that agreement. Appellant did neither.

First, Miguel Coves stated in his sworn affidavit that the proposed written contract submitted to the INS was not the complete agreement between the parties:

> "In the course of applying for the visa, *some common aspects of the agreement* were reduced to writing and submitted to the immigration authorities as the terms which would govern the employment if the visa was granted." (R. p. 282, ¶ 13)(emphasis added).

Thus, the document submitted to INS was not the full agreement of the parties, but only "some common aspects of the agreement."

Second and more importantly, that document itself clearly provides that it is nothing more than an "offer of employment." Offers require acceptance in order to form a contract and, as the Court of Appeals found, there was "no evidence in the record that Ibañez entered into a written contract." (Op. at 4.) The Court acknowledged that, while the Affidavit of Michael Liberatore stated that he had explained the terms of the document submitted to the INS, "The affidavit did not state Ibañez agreed to or accepted

the terms of the written agreement." (Op. at 5.)

Third, there is no evidence that Ibañez accepted the proposed written contract. As the Court of Appeals found, the record does not establish acceptance of the proposed written contract. Rather, at best, the record shows an oral agreement with a minimum duration of two years.

Appellant's argument that Ibañez accepted the unsigned draft contract by retaining the benefits of it is nothing more than an attempt to do an end run around the statute of frauds. Appellant's argument is really that by accepting the benefits of an oral agreement which also has a piece of paper setting out some – but not all -- of the terms of that agreement, the piece of paper is suddenly transformed into a written contract between the parties. That makes no sense.

Further, Appellant's reliance on *Peddler, Inc. v. Rikard*, 266 S.C. 28, 221 S.E.2d 115 (1975) is misplaced. In *Peddler*, Rikard wanted to open a "Peddler" restaurant in Santee, South Carolina. *Id.* at 31. Morgan had the franchise. *Id.* They agreed to terms, and Morgan said he would bring the written franchise agreement with him to the restaurant's grand opening. *Id.* At the grand opening, Morgan gave Rikard the signed franchise agreement. *Id.* Rikard said he did not have time to sign it because he was busy with the grand opening. *Id.* However, Rikard retained a copy of the contract; named his restaurant "The Peddler Steak House"; and accepted Morgan's providing both Peddler equipment and beef for the restaurant consistent with a franchise relationship. *Id.* Also, there were letters and correspondence showing the operation of the restaurant as a franchise consistent with the terms of the written agreement that Rikard kept but did not

sign. *Id.* The Supreme Court held that there was a written contract even though Rikard did not sign it because the evidence established that Rikard accepted the contract by assenting to its terms through his opening the Peddler restaurant franchise, establishing signage, and buying the meat and equipment from Morgan as required by the contract. *Id.*

This case is not the same as *Peddler*. Here, there is no evidence that Ibañez consented to the specific terms of the draft written contract. Importantly, Miguel Coves' affidavit states that the draft written contract only contained "some of the terms" and Coves Darden's immigration lawyer's testimony did not establish that Ibañez ever accepted or agreed to the terms of the draft written contract.

While it may be argued that Ibañez "testified he had an agreement with Coves Darden, and he acted on it by moving to South Carolina, working at Coves Darden, and competing on its behalf,"[8] any agreement that Ibañez had with Coves Darden was an oral agreement with a minimum duration of two years and was different in scope and terms than the alleged written contract which Miguel Coves admits only contained "some of the terms" of the agreement between the parties.

In sum, the Court of Appeals did not err in holding that there was no evidence of a meeting of the minds as to a written contract.[9]

II. THERE WAS NO ENFORCEABLE ORAL CONTRACT BETWEEN COVES DARDEN AND IBAÑEZ

A. Where the Statute of Frauds is a defense, the "scintilla" standard does not apply as to Appellant's breach of contract claim.

Appellant argues that the lower courts erred in not applying the "scintilla"

[8] See dissent in *Coves Darden, LLC v. Ibañez* (Op. at 17).

[9] Notably, if there was, then there is a binding arbitration clause. (R. p. 24, § 3.7.)

standard when finding that no enforceable contract existed between Coves Darden and Ibañez. That is incorrect because South Carolina requires clear and convincing evidence – not a preponderance of the evidence – to avoid the application of the Statute of Frauds.[10]

In *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 673 S.E.2d 801 (2009), this Court held:

> [W]e hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. However, in cases requiring a heightened burden of proof or in cases applying federal law, we hold that the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment.

Also, in *Satcher v. Satcher*, 351 S.C. 477, 570 S.E.2d 535 (Ct. App. 2002), the Court of Appeals recognized that this Court had previously recognized that cases involving the applicability of the statute of frauds required just such a heightened burden of proof:

> To prevail under any of these theories and avoid the application of the Statute of Frauds, Chip must prove each element by clear, cogent, and convincing evidence. South Carolina case law provides a requirement of clear and convincing evidence for proving a parole gift of land and a contract to devise. See *Brown v. Graham*, 242 S.C. 491, 493, 131 S.E.2d 421, 422 (1963) (holding contracts to make a will "are regarded with suspicion and will not be sustained unless established by definite, clear, cogent and convincing evidence"); *Knight v. Stroud*, 214 S.C. 437, 441, 53 S.E.2d 72, 73 (1949) (giving burden of proof required to establish oral gift). *Satcher* at 483.

The *Satcher* court continued:

> Clear and convincing evidence is that 'degree of proof which will produce in the [fact finder] a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable

[10] The statute of frauds is codified in South Carolina at S.C. Code Ann. § 32-3-10.

doubt; it does not mean clear and unequivocal.'" *Anonymous v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 374 n.2, 496 S.E.2d 17, 18 n.2 (1998). *Satcher* at 483.

Thus, where the statute of frauds is a defense, a mere scintilla of evidence will not suffice to avoid summary judgment as to a breach of contract cause of action.[11]

B. If there was a contract, it was an oral contract with a definite duration of two years which violates the Statute of Frauds.

The parties' oral contract violates the Statute of Frauds and is unenforceable. To state a claim for breach of contract, plaintiff must allege the existence of a valid and enforceable contract upon which such a claim can be based. "[T]he Statute of Frauds requires that a contract that cannot be performed within one year be in writing and signed by the parties." *Davis v. Greenwood Sch. Dist. 50,* 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005) (citing S.C. Code § 32-3-10 (1991)). If there is a possibility that a contract might be performed within one year, the Statute of Frauds does not bar enforcement of the contract. *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 the year need not be supported by a written document. *Joseph v. Sears Roebuck & Co.,* 224 S.C. 105, 111, 77 S.E.2d 583, 586 (1953). To void an oral contract, it must be apparent that it was the understanding of the parties that it was not to be performed within a year from the time it was made. *Cline v. Southern Railway Co.*, 110 S.C. 534, 95 S.E. 532, 538 (1918). A contract to employ another "for an indefinite period (of time) so long as plaintiff's work was satisfactory" was not within the Statute of Frauds. *Id.* An agreement to employ another "for the rest

[11] This is also true as to the claim for tortious interference with contract, and any other cause of action that requires establishing the existence of a valid contract as one of its elements.

of his natural life as long as he did his work in a satisfactory manner" is not within the Statute of Frauds. *McGehee v. South Carolina Power Co.*, 187 S.C. 79, 196 S.E. 538, 541 (1938). "Contracts for service for more than a year [terminable] at the election of a party upon the happening of some event, or even at the mere will of a party, have generally been held to be within the statute. The contemplated performance would occupy more than a year. If the contract should be terminated within the year, the result would not be an alternative form of performance, but excusable nonperformance." *Marble v. Town of Clinton*, 298 Mass. 87, 9 N.E.2d 522, 524 (1937).

Coves Darden argues that the possibility that the O-1 visa would be issued for less than one year was a contingency to the oral agreement such that it was capable of being performed within one year. This argument is flawed.[12] The evidence clearly shows that the both Ibañez and Coves Darden viewed the duration of Ibañez's employment under any oral contract to be at least two years. (R. pp. 262, ll. 22-25; 281, ¶ 6.) In his Affidavit, Miguel Coves admits:

> We entered into an agreement to employ Ibañez . . . 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. (R. p. 281, ¶ 6)(emphasis added).

If the visa was issued for less than one year, then Ibañez would have had to leave the United States without completing his full two year obligation under the agreement. This would be excusable nonperformance of the contract and not a contingency

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[12] Another flaw is that Ibanez started work for Coves Darden in Spain in January 2011. (R. pp. 281-282; ¶¶ 8-11.) He also worked in the U.S. for Coves Darden from April 2011 to June 2011. (R. pp. 272, ll. 15-25.) The visa was issued in January 2012. (R. p. 276, ¶ 9.) Ibanez moved to the U.S. to

contemplated by the contract.[13]

C. The Court of Appeals correctly determined that the oral agreement was not capable of being performed within one year.

The Court of Appeals was correct that the oral agreement was not capable of being performed within one year. The Court of Appeals analyzed all of the evidence regarding the expected duration of the alleged oral contract and found that it was for a minimum of two years:

> As to the duration of the contract, Miguel Coves stated in his affidavit, 'We both acknowledged and expected the relationship to continue for at least two years. The probable expected length of the visa was three years, and his likely initial leave of absence from his prior employment relationship was to be two years.' Moreover, Ibañez testified during his deposition, 'We talked about if we were able to reach an agreement that I would take a two year sabbatical. And then depending on how things moved along, well, it could be extended or not.' Ibañez testified he accepted the offer, and Coves Darden's lawyer asked him, 'So at this time, you reached an agreement in which you would work for an expected length of two years, which might possibly be extended?' Ibañez answered, 'Yes.' Viewing this and all other evidence in the light most favorable to Coves Darden, the parties' agreement as to the term of the contract was that the term would be a minimum of two years. (Op. at 6.)

Contrary to Appellant's assertion, the Court of Appeals did not engage in impermissible fact-finding in making this statement. Rather, the Court examined the *admissible* evidence which consists of the Miguel Coves' Affidavit and Ibañez's deposition testimony, and found that both parties agreed that the period of employment would be for a minimum of two years. Thus, far from deciding between two conflicting versions of the facts, the Court of Appeals performed the judicial function of determining

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continue work in February 2012. (R. p. 283, ¶ 17.) He quit work in June 2012. (R. p. 284, ¶ ¶ 20-21.)

[13]Both Coves Darden and the dissent in the Court of Appeals' opinion hinge their argument on the basis that the employment contract "would only last as long as the visa term." (Op. at 15.) That basis is not sound. The record is clear that the oral employment contract was for a definite term of two years and there is no

that there was no factual dispute between the parties with respect to that issue.

It is also important to note that the draft written agreement provided to INS provided that it did not take effect until *after* the O-1 visa was issued. Thus, if that draft agreement was valid, all parties would have been aware of the actual length of the visa *before* any employer-employee relationship was created. Significantly, Ibañez started work one year before the visa was issued and Coves Darden paid him for that work.

Appellant also faults the Court of Appeals for not applying an inflexible and absolutely literal definition of the term "impossible to perform within one year." Under the version of "impossibility" urged by Appellant, the Statute of Frauds should not bar a multi-year oral contract of employment because the employee could be struck by lightning some time during the first year of the contract. However, the Statute of Frauds is not that draconian.

The Court of Appeals applied the rule correctly:

> Contrary to Coves Darden's argument, the contract would not be removed from the statute of frauds even if the visa was granted for less than one year. For a contract to be exempt from the statute of frauds, it must be possible that the contract as agreed to can be performed within a year. *Id; see also Roberts v. Gaskins*, 327 S.C. 478, 484, 486 S.E.2d 771, 774 (Ct. App. 1997) ('It is ... well established that the Statute of Frauds applies only to contracts which are impossible of performance within one year."'. It is not enough that the parties realize the contract may have to be terminated early for reasons beyond their control-such as the denial of a sufficiently lengthy work visa in this case. See 9 WILLISTON ON CONTRACTS § 24:9 (4th ed. 2011) ('[M]ost cases ... hold a contract to render service for more than a year to be within the intention and force of the statute [of frauds], notwithstanding one or both of the parties may have the option of ending it by notice in a year, because full performance cannot be rendered in a year consistently with the understanding of the parties.' (first and second alteration in original) (footnote omitted)). (Op. at 7-8.)

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evidence that the parties had a meeting of the minds that the term was contingent on the length of the visa.

The possibility that a contract may be terminated within a year because of the occurrence of some event is not sufficient to avoid the Statute of Frauds. The foregoing citation from *Williston on Contracts* in the Court of Appeals' opinion makes it clear that one or both of the parties has the option of terminating the agreement within one year. It is also consistent with the Restatement (Second) of Contracts § 130 comment b, which provides:

> Any contract may be discharged by a subsequent agreement of the parties, and performance of many contracts may be excused by supervening events *or by the exercise of a power to cancel granted by the contract.* The possibility that such a discharge or excuse may occur within a year is not a possibility that the contract will be 'performed' within a year. *This is so even though the excuse is articulated in the agreement."* (emphasis added).

In sum, the argument that the Statute of Frauds should not apply because the contract was capable of being performed within one year should fail because the possibility that the contract could be ended within one year is not the same as performance within one year.

D. The Court of Appeals did not err in not considering the unsigned, unsworn answers to interrogatories.

Appellant faults the Court of Appeals for not considering certain answers and supplemental answers to interrogatories filed by Coves Darden as creating the level of evidence needed to avoid summary judgment.[14] Respectfully, Appellant is wrong. Unsigned and unsworn answers to interrogatories are not the "answers to interrogatories" contemplated by SCRP 56(e) and the court may not consider those in determining the

[14] As discussed herein at Section II-A, the level of proof is clear and convincing – not a mere scintilla.

propriety of summary judgment. See, e.g., *Piper v. United States,* 392 F.2d 462 (5th Cir. 1968); *Jones v. Menard,* 559 F.2d 1282, 1285 n. 5 (5th Cir. 1977). They certainly cannot be used to create the triable issue of fact needed to avoid summary judgment.[15]

SCRCP Rule 56(e) permits a court to consider "answers to interrogatories" both in support of and in opposition to a motion for summary judgment. With respect to interrogatory responses, SCRCP Rule 33(a) provides in pertinent part:

> "Each interrogatory shall be answered separately and fully in writing under oath,. . . . The answers are to be signed by the person making them . . . ."

In its brief before this Court, Appellant admits that "Not a single interrogatory response in the case was sworn." (Appellant's Brief at 23, *Coves Darden, LLC v. Ibañez* (No. 2016-002542)). Not only were the responses not sworn, they were not signed by an authorized member or manager of Coves Darden.

Courts generally do not consider usigned, unsworn responses to interrogatories when ruling on a summary judgment motion. In *Villareal v. El Chile, Inc.*, 266 F.R.D. 207 (N.D. Ill. 2010), the district court noted as follows:

> Under Rule 33, answers to interrogatories must be verified and must be signed by the person answering the interrogatory, not only by the party's attorney. *Hindmon v. Natl.-Ben Franklin Life Ins. Corp.*, 677 F.2d 617, 619 (7th Cir. 1982) (observing that interrogatory answers signed by attorney and not party violated 'the clear mandate of Federal Rule of Civil Procedure 33(a)'); accord *Overton v. City of Harvey*, 29 F. Supp. 2d 894, 901 (N.D. Ill. 1998) (striking as summary judgment exhibit plaintiff's unverified answers to interrogatories signed only by attorney); *McDougall v. Dunn,* 468 F.2d 468, 472-73, 476 (4th Cir. 1972) (finding error in sustaining interrogatory responses signed under oath only by counsel) .

[15] They would also be insufficient even under the scintilla of evidence standard argued by Appellant.

Requiring a party to sign interrogatory responses under oath serves the critical purpose of ensuring that the responding party attests to the truth of the responses. *Knights Armament Co. v. Optical Sys. Tech., Inc.,* 254 F.R.D. 463, 467 (M.D. Fla. 2008).

The Court of Appeals noted Appellant's supplemental interrogatory response filed less than one week before the third summary judgment hearing as attempting to create an issue of fact. However, the Court noted in footnote 2 of the majority opinion:

> "The interrogatory answer is not verified. See Rule 33(a), SCRCP ('Each interrogatory shall be answered separately and fully in writing under oath .... ')." (Op. at 7.)

In addition to the reasoning cited in the Court of Appeals' footnote, Coves Darden's response was inadequate to create an issue of fact because it attempted to summarize potential testimony of witnesses but that unsworn summary was not in the form of affidavits as required by SCRCP Rule 56.

Thus, the three unsigned and unsworn interrogatory responses cannot be relied on to create the contested factual issue needed to defeat summary judgment. On the other hand, Respondents relied on properly admissible evidence including Miguel Coves' Affidavit and Coves Darden's own document presented to the federal government as a part of the visa application process. The Court of Appeals also properly considered Ibañez's sworn deposition concerning the expected length of the oral contract of employment. (Op. at 6.) All of that *admissible* evidence uniformly supported the conclusion that the term of the oral agreement was for a minimum of two years.

III. THE CIRCUIT COURT AND THE COURT OF APPEALS BOTH CORRECTLY FOUND THAT, AS A MATTER OF LAW, THERE WAS NO FIDUCIARY RELATIONSHIP BETWEEN THE PARTIES.

Appellant argues that every employee, from the janitor who cleans offices at night to the highest levels of management, is a fiduciary of the employer and that each owes exactly the same duty of loyalty to the employer. Essentially, Appellant equates the existence of an employer-employee relationship with the existence of a fiduciary relationship. Beyond that, Appellant argues that this fiduciary relationship can be unilaterally created merely by the employer's placement of trust in the employee. Appellant's position should fail.

In rejecting those arguments, the Court of Appeals cited with approval the following statement from this Court in *Burwell v. S. C. Nat'l. Bank*, 288 S.C. 34, 340 S.E.2d 786 (1986):

> The term fiduciary implies that one party is in a superior position to the other and that such a position enables him to exercise influence over one who reposes special trust and confidence in him. 36A C.J.S. Fiduciary (1961). As a general rule, mere respect for another's judgment or trust in his character is usually not sufficient to establish such a relationship. The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party. 36A C.J.S. Fiduciary (1961).

Based on that statement, the Court of Appeals concluded that "The unilateral actions of an employer do not create a fiduciary duty in its employees." (Op. at 9.)

The mere existence of an employer-employee relationship, standing alone, does

not give rise to fiduciary obligations. *See Smalls v. Imperial Servs. Group,* 2011 U.S. Dist. LEXIS 140302 (D.S.C. 2011) ("An employer/employee relationship is not a fiduciary relationship upon which a fraudulent concealment action could spring.") Additionally, and most importantly, a fiduciary relationship cannot be created by the unilateral action of only one party. *See*, e.g. *Steele v. Victory Sav. Bank*, 295 S.C. 290, 368 S.E.2d 91 (Ct. App. 1988) ("[A]s a general rule, a fiduciary relationship cannot be established by the unilateral action of one party."); *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) (same); *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) ("The other party must have actually accepted or induced the confidence placed in him."). The evidence must show that the entrusted party actually accepted or induced the confidence. *Regions Bank, supra; Brown v. Pearson*, 326 S.C. 409, 483 S.E.2d 477 (1997); *Arnold v. Erkmann*, 934 S.W.2d 621, 630 (Mo. Ct. App. 1996) ("A fiduciary duty is not created by a unilateral decision to repose trust and confidence; it derives from the conduct or undertaking of the purported fiduciary." (citation omitted)); *Furr's Inc. v. United Specialty Adver. Co.*, 385 S.W.2d 456, 459-60 (Tex. Civ. App. 1964) (finding no confidential relationship existed where buyer failed to present evidence seller was aware of confidence buyer claimed to have reposed in him since a "confidential relationship is a two-way street").

To illustrate this point, consider the following: A building contractor may have the need for a highly trained and competent employee to operate a complex piece of equipment. However, that fact, standing alone, does not make the employee a fiduciary for all purposes - it merely demonstrates that the contractor had a need for a highly

trained employee to perform services for him.

IV. BECAUSE THERE WAS NO CONTRACT THAT WAS BREACHED, THERE CAN BE NO CLAIM OF TORTIOUS INTERFERENCE WITH CONTRACT.

Appellant also argues that, even if there was no valid oral or written contract, and even if Ibañez was only an at-will employee, the relationship was still contractual and, therefore, Dori Derr and Half Moon Stables could still be liable for tortious interference with contract. This argument is wrong for several reasons.

First, as correctly noted by the Court of Appeals, this Court has previously held that "Where there is no breach of the contract, there can be no recovery." In making this statement, the Court cited to *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 642 S.E.2d 726 (2007), where this Court stated the following:

> An essential element to the cause of action for tortious interference with contractual relations requires the intentional procurement of the contract's breach. *Kinard,* 315 S.C. at 240, 433 S.E.2d at 837. Where there is no breach of the contract, there can be no recovery. *First Union Mortg. Corp. v. Thomas*, 317 S.C. 63, 73, 451 S.E.2d 907, 913 (Ct. App. 1994).

As an at-will employee, Ibañez was free to leave Coves Darden at any time and for any reason or for no reason at all. There can be no breach by simply inducing him to leave when he can leave at any time because of his status as an at-will employee.

Second, there is no cause of action for inducing an at-will employee to leave his or her employment. The Circuit Court relied on a North Carolina case, *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 367 S.E.2d 647 (1988), and the numerous authorities it cited from courts around the United States, for the proposition that there is a qualified privilege for competitors making better job offers to at-will employees. In a

passage that deserves to be quoted at length, the North Carolina Supreme Court stated:

> "[W]e recognize and apply the general principle that interference may be justified when the plaintiff and the defendant are competitors. *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176. *See also, Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W. 2d 892 (1965); *Schonwald v. Ragains*, 32 Okla. 223, 122 P. 203 (1912); *Philadelphia Dairy Prod. v. Quaker City Ice Cream Co.*, 306 Pa. 164, 159 A. 3 (1932); *Thacker Coal & Coke Co. v. Burke*, 59 W.Va. 253, 53 S.E. 161 (1906). *Contra Moye v. Eure*, 21 N.C. App. 261, 205 S.E. 2d 221 (1974); *Overall Corp. v. Linen Supply, Inc.*, 8 N.C. App. 528, 174 S.E. 2d 659 (1970). Further, we find the well-reasoned opinion of Judge Learned Hand in *Triangle Film Corp. v. Artcraft Pictures Corp.*, 250 F. 981 (2d Cir. 1918) to be persuasive. Judge Hand, writing for the majority in that case, stated that public policy demands that absent some monopolistic purpose everyone has the right to offer better terms to another's employee, so long as the latter is free to leave. *Id.* A contrary result would be intolerable, both to the new employer who could use the employee more effectively and to the employee who might receive added pay. *Id.* To hold otherwise would unduly limit lawful competition. *Id.*"Later cases adopt the rationale of *Triangle Film*. The free enterprise system demands that competing employers be allowed to vie for the services of the 'best and brightest' employees without fear of subsequent litigation for tortious interference. *See McCluer v. Super Maid Cook-Ware Corp.*, 62 F. 2d 426 (10th Cir. 1932); *Vincent Horwitz Co. v. Cooper*, 352 Pa. 7, 41 A. 2d 870 (1945); *Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 67 Cal. Rptr. 19 (1968); *Coleman & Morris v. Pisciotta*, 107 N.Y.S. 2d 715, 279 A.D. 656 (1951). To restrict an employer's right to entice employees, bound only by terminable at will contracts, from their positions with a competitor or to restrict where those employees may be put to work once they accept new employment savors strongly of oppression.
>
> 'Competition . . . is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival, and attracting it to himself, is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business . . . . To hold such an act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of a class of which fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants . . . are instances.'
>
> *Macauley Bros. v. Tierney*, 19 R.I. 255, 256, 33 A. 1, 2 (1895), cited with

approval in C. S. Smith Metro. *Mkt. v. Lyons*, 16 Cal. 2d 389, 106 P. 2d 414 (1940); *Kingstron Trap Rock Co. v. International Union of Operating Engineers*, 129 N.J. Eq. 570, 19 A. 2d 661 (1941).

Third, Appellant also claims that Dori Derr lacked standing to challenge the validity of the contract. However, this ignores the fact that Ibañez was a party to the agreement and unquestionably has standing to challenge the validity and enforceability of the contract. Standing is simply not an issue.

In sum, both the Circuit Court and the Court of Appeals correctly concluded that, as a matter of law, there could be no claim for tortious interference with contract.

V. BOTH THE CIRCUIT COURT AND THE COURT OF APPEALS CORRECTLY DETERMINED THAT, AS A MATTER OF LAW, THERE WAS NO VIOLATION OF THE UNFAIR TRADE PRACTICES ACT.

Appellant also argues that both courts below erroneously held that summary judgment was improper on the claim of violation of the South Carolina Unfair Trade Practices Act (SCUTPA). This claim was based on two alleged misstatements made by Half Moon: a) that Ibañez was working at Half Moon Stables, and b) that Ibañez was on a sabbatical from his work in Spain. As the Court of Appeals noted, "in its memorandum opposing summary judgment, Coves Darden conceded the statements were 'technically true.'" Both the Circuit Court and the Court of Appeals correctly held that making a true statement of fact cannot be a violation of the SCUTPA.

To prevail on a claim arising under SCUTPA, "the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered

monetary or property loss as a result of the defendant's unfair or deceptive act(s)"). *Woodson v. DLI Props. LLC,* 406 S.C. 517, 753 S.E.2d 428 (2014); *See Noack Enterprises, Inc. v. Country Corner Interiors, Inc.,* 290 S.C. 475, 351 S.E.2d 347 (1986). Moreover, "An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace."

While admitting the "technical" truth of the statements, Appellant never offered the slightest hint of any alternative understanding that members of the public might possibly have about the statements. Not only was the statement that Mr. Garcia was employed by Half Moon technically and factually true, it was his employment by Half Moon that gave rise to the claim of tortious interference in the first place.

In fact, Respondents have been unable to find a single case in any jurisdiction holding that true statements of fact, standing alone, are sufficient to establish the existence of a deceptive trade practice.

Finally, in what truly appears to be a "Hail Mary" argument, Appellant argues that the separate contractual arrangement Half Moon Stables had with Ibañez violated some unspecified federal law. This is a completely new argument that is being raised for the first time before this Court. It was never raised with either the Circuit Court or the Court of Appeals and has certainly been waived.[16] Moreover, it fails to identify the federal statute that was allegedly violated, so it is impossible for Respondents to even address the issue. Beyond that, the contract between Half Moon Stables and Ibañez is not part of the

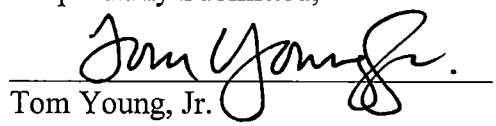
[16] Indeed, it does not even appear in the Complaint which only referenced the two above statements.

record, so there is nothing before this Court other than counsel's unsworn, unsupported statement that appears for the first time in its brief.

CONCLUSION

At best, there was an oral contract between Ibañez and Coves Darden with a minimum duration of two years. Therefore, it violates the Statute of Frauds and is unenforceable. Also, there is no evidence of a valid written contract between the parties. Because there was no enforceable contract, Ibañez was an at will employee and there can be no claim for tortious interference where there is no contract to breach. Further, in an employment at will relationship, no fiduciary duty arises based solely on the employer's unilateral action to trust the employee. Finally, even Appellant has admitted that the two statements that form the basis of the claimed violation of SCUTPA were "technically true." No reported case appears to hold that true statements of fact can form the basis for a violation of SCUTPA. The judgment of the Court of Appeals should be affirmed.

Respectfully Submitted,



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Dated: July 16, 2018

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

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S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-002542

Coves Darden, LLC, ... Petitioner,

v.

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

CERTIFICATE OF SERVICE

I, Tom Young, Jr., do hereby certify that I have, on July 16, 2018, served the foregoing **Respondent's Brief** upon Petitioner or attorney(s) for the Petitioner by causing a copy thereof to be mailed with proper postage to the address indicated below and do further certify that the brief complies with Rule 240(d):

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