

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM AIKEN COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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 REPLY BRIEF

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TABLE OF CONTENTS

Table of Cases, Statutes and Other Authorities	iii
I. Overview.	1
II. Unaddressed issues presented for review on certiorari.	1
III. There was evidence of a written contract and it was error	3
to grant summary judgment on the basis that there was not. This second, later, contract -- the written one -- stated terms that were materially similar to and adapted for the circumstances from the first, earlier contract – the oral one -- and stated other customary terms. Any difference in the oral contract and the written contract makes no difference in whether the written contract was formed.	
IV. The preponderance-of-the-evidence burden of proof at trial applies	7
to claims that a written or oral contract exists and that it was broken. The clear-and-convincing burden of proof at trial does not apply to the question of applicability of the statute of frauds – only, in a proper case – to the question of whether further facts constituting an avoidance or exception are present. The record facts show the statute does not apply. The scintilla standard for denying summary judgment applies and was disregarded and the two courts below should be reversed.	
A. The scintilla standard applies.	7
B. The statute of frauds does not apply.	10
V. In order to unnecessarily shield Ibanez from liability for his breaches	12
by applying the statute of frauds, the Court of Appeals incorrectly determined that the oral agreement was not capable of being performed within one year – and in order to do so, the Court of Appeals had to engage in extraordinary impermissible fact-finding.	
VI. The Court of Appeals erred in not considering the signed, unsworn	15
interrogatory answers, regardless of the reason.	
VII. The Circuit Court and the Court of Appeals both were incorrect in	20
finding that, as a matter of law, there was no fiduciary relationship between the parties.	

VIII. Because there was a contract that was breached, it was error to rule 22
that for lack of a contract, there could be no claim of tortious interference
with contract.

IX. Both the Circuit Court and the Court of Appeals were incorrect in 23
determining, as a matter of law, there was no violation of the
Unfair Trade Practices Act.

X. Conclusion. 25

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES

<u>Abebe v. Carter</u> , No. 5:11-cv-2750-RMG-KDW, 2013 WL 625588, at *2 (D. S.C. Nov. 19, 2013)	17
<u>Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc.</u> , 294 S.C. 169, 363 S.E.2d 390 (Ct.App. 1987)	22
<u>Futch v. McAlister Towing of Georgetown, Inc.</u> , 335 S.C. 598, 518 S.E.2d 591 (1999)	22
<u>Hancock v. Mid-South Mgmt. Co.</u> , 381 S.C. 326, 673 S.E.2d 801 (2009)	9, 17
<u>Hatcher v. Harleysville Mut. Ins. Co.</u> , 266 S.C. 548, 225 S.E. 2d 181 (1976)	22
<u>Improvement Co. v. Munson</u> , 14 Wall. 442, 448 (1872)	17
<u>Ion , LLC v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000)	9
<u>Peddler, Inc. v. Rikard</u> , 266 S.C. 28, 221 S.E.2d 115 (1975)	3, 6
<u>Prescott v. Farmer’s Telephone Co-op. Inc.</u> , 335 S.C. 330, 576 S.E.2d 923 (1999)	21
<u>Roberts v. Gaskins</u> , 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997)	11
<u>Satcher v. Satcher</u> , 351 S.C. 477, 570 S.E.2d 535 (Ct. App. 2002)	9, 10
<u>State Farm Fire & Cas. Co. V. S.S.</u> , 858 S.W.2d 374 (Tex. 1993)	9
<u>Todd v. S.C. Farm Bureau Mut. Ins. Co.</u> , 283 S.C.155, 321 S.E.2d 602 (Ct.App.1984), quashed on other grounds,	22

Todd v. S.C. Farm Bureau Mut. Ins. Co.,
287 S.C. 190, 336 S.E.2d 472 (1985)

Weber v. Perry, 2
201 S.C.8, 21 S.E. 2d 193 (1942)

STATUTES AND REGULATIONS

8 U.S.C. §1324(a)(10)(A)(iv) 25
8 C.F.R. §274a.1(a) 24
8 C.F.R. §274a.1(f) and (g) 24
8 C.F.R. §274a.1(h) 24
8 C.F.R. § 274a.12 24
USCIS Policy Manual 24

RULES OF CIVIL PROCEDURE

Rule 11, SCRCP 16
Rule 26(g), SCRCP 16
Rule 33, SCRCP 18
Rules 33(b)(1),(6) and (7) 19
Rule 56, SCRCP 19
Rule 56(e), SCRCP 18, 19
Rule 56(e), SCRCP, Official Reporter’s Note 20
Fed.R.Civ. P. 56(c)(1) and (2) 19

RULES OF APPELLATE PROCEDURE

Rule 208(b)(1)(C), SCACR 4
Rule 208(b)(2), SCACR 4
Rule 208(b)(4), SCACR 4
Rule 209(b), SCACR 4

Rule 210(c), SCACR 4

Rule 210(h), SCACR 4

Rule 220(c), SCACR 9

OTHER

John Edward Murray, Jr., Murray on Contracts: 13, 14
A Revision of Grismore on Contracts (Bobbs-Merrill Company, Inc. 1974) §312

Adam N. Steinman, “The Irrepressible Myth of Celotex: 19
 Reconsidering Summary Judgment Burdens Twenty Years After the
 Trilogy,” 63 Wash. & Lee L. Rev. 81, 130 (2006)

Thomas Adkins Street, The Foundations of Legal Liability: 14, 15, 23
A Presentation of the Theory and Development of the Common Law, Volume II:
History and Theory of English Contract Law (Edward Thompson Company,
 Northport, Long Island, N.Y. 1906) Ch. XIX

Eric K. Yamamoto, Katherine G. Leonard, and Shawna J. Sodersten “Summary 18
 Judgment at the Crossroads: The Impact of the Celotex Trilogy,”
University of Hawaii Law Review Vol. 12:1

I. Overview.

Respondents Ibanez, Derr and Half Moon now abandon the central basis for the Circuit Court's erroneous grant of summary judgment. Respondents offer no argument in support of the Circuit Court's "judicial admissions" and "sham affidavits" reasoning appealed by Covese Darden.

Respondents argue three new propositions. These propositions were not identified as anything relied upon by the Circuit Court or the Court of Appeals for their decisions: (1) that this case requires a higher burden of proof at trial, and that the scintilla standard does not apply on summary judgment for that reason; (2) that answers to interrogatories which are not sworn are not answers to interrogatories, and that the interrogatory responses which the Circuit Court and Court of Appeals ignored were therefore "inadmissible" for purposes of opposing a motion for summary judgment; and (3) that there is no evidence of illegality of the compensation agreement offered and provided by Derr to Ibanez to induce him to breach his duties to Covese Darden and leave its employ. Respondents do respond to some of the other issues presented for review, but not all. Petitioner Covese Darden will address the points made and not made by Respondents, not necessarily in the order presented.

II. Unaddressed issues presented for review on certiorari.

Respondents state that 4 (Resp. Brf. at 2), or 5 (*id.* at 1 and 2), or 3 (*id.* at 7) issues are on appeal before this Court. To the contrary, this Court granted certiorari on issues 6-19 of Covese Darden's petition for certiorari. (Order dated May 3, 2017 (granting as to argument IV, sections (C)(1)-(3) of petition).) In the following respects, Respondents fail to address in any cogent manner, the following numbered issues presented for review on certiorari and argued in

Petitioner's Brief, and in Appellants' Brief and Appellants' Reply Brief before the Court of

Appeals:

Issue 7: Respondents fail entirely to address, and apparently do now concede, the error of the Circuit Court's central basis for granting summary judgment -- reliance on judicial admissions and sham affidavits. The Circuit Court should be reversed.

Issue 8: Respondents solely address "admissibility" and absence of verifications of interrogatory responses. These issues were never identified as the basis of the Court of Appeals' decision, or the Circuit Court's. Respondents fail to offer any defense of Court of Appeals' merely offering innuendo and inclusive remarks about material in the Record without ruling on whether the Court of Appeals was formally disregarding, or just impermissibly weighing, that material.

Issue 9: Respondents fail to address Weber v. Perry, 201 S.C.8, 21 S.E. 2d 193 (1942), controlling South Carolina law on the inapplicability of the statute of frauds to this case. Respondents fail to explain why Massachusetts law or general treatise materials should be preferred.

Issue 10: Respondents fail to dispute that the Court of Appeals' misunderstood the actual sequence of events or the relevance of the sequence of events, or both. The Court of Appeals' apparent confusion and misplaced focus on the effect of a shortening or termination of the visa after it was issued, was left untouched.

Issue 12: Respondents fail to address the fact that employment at will is a contract. This fact vitiates the Circuit Court's reasoning in granting summary judgment even if there had been a basis for all its rulings on disregarding materials in the record or the applicability of the statute of frauds.

Issue 14: Respondents fail to address, other than in a passing comment that there is no issue of "standing," the fact that the statute of frauds is not a defense for a nonparty to a contract. This fact independently requires reversal of summary judgment on the tort and UTPA claims against Derr and Half Moon.

Issue 15: Respondents fail to address, other than solely with respect to inducements to leave employment, that a contract terminable at will can support a claim for tortious interference with either contract or prospective contract. (With respect to inducements to leave employment, Respondents do not respond to the South Carolina precedents cited by Covens Darden, other than with North Carolina law.)

Issue 16: Respondents fail to address the significance to the tortious interference claim, of Derr offering or facilitating an illegal compensation agreement when interfering with Covens

Darden's contract with Ibanez,. Respondents only argue there is no evidence of illegality of the admitted compensation agreement. Impliedly, if there is such evidence and law, it is relevant to denying summary judgment on the tortious interference claim. There is.

Issue 17: Respondents fail to address the significance to the UTAP claim, of Derr offering or facilitating an illegal compensation agreement when interfering with Covese Darden's contract with Ibanez. Respondents only argue there is no evidence of illegality of the admitted compensation agreement. Impliedly, if there is such evidence and law, it is relevant to denying summary judgment on the UTPA claim. There is.

Issue 18: Respondents completely fail to address the fact that the UTPA also applies to traditionally proscribed anticompetitive behavior, e.g., tortious interference with contract, as opposed to only behavior with a tendency to deceive consumers.

III. There was evidence of a written contract and it was error to grant summary judgment on the basis that there was not. This second, later, contract -- the written one -- stated terms that were materially similar to and adapted for the circumstances from the first, earlier contract -- the oral one -- and stated other customary terms. Any difference in the oral contract and the written contract makes no difference in whether the written contract was formed.

Respondents state three times that Miguel Covese admits that the written contract (the second contract) only contained "some of the terms" of the agreement. Respondents mention this once in Respondents' Brief at 8 and twice at 10. The only apparent point of these references is perhaps to argue that Ibanez's and Covese Darden's actions thereafter in proceeding with the employment did not evince an intention to accept the written contract, as opposed to proceeding under the prior oral one. If this is not the point, the significance of this statement is nil.

In a factual setting in which there was first one contract and then later, another contract, whether the second one is identical in all particulars with the first one is not itself determinative of the validity of either. Under South Carolina law, the question as to the formation of the second, written, contract is whether there is evidence that Ibanez knew of the written agreement and its terms, and assented to it by his actions and proceeding under it. Peddler, Inc. v. Rikard,

266 S.C. 28, 221 S.E.2d 115 (1975).

As is made clear in the Record, the parties reached an oral agreement in January of 2011 on all material terms of a contract for Ibanez to work for Coves Darden.¹ These terms included the term repetitively omitted by Respondents in their brief -- that the parties were taking a chance on the length of time for which the visa would actually be issued.² It was agreed that the length

¹See Petitioner's Brief at 6-7, n.1.

²This being an appeal about evidence in the Record, Coves Darden provided a particularly detailed and comprehensive Statement of the Case in its Appellant's Brief to the Court of Appeals. Coves Darden there cited the Record at virtually every juncture for virtually every matter stated to be contained in the Record. In their Respondents' Brief to the Court of Appeals, Respondents made no counterstatement. They were, and are, thus bound by the Appellant's Statement of the Case before the Court of Appeals. Rule 208(b)(2), SCACR.

Respondents now make a counterstatement of the case. While this may be permitted for clarification or redirection, it would make no sense to allow Respondents in this Court to contradict an earlier established statement to which Respondents were bound when Respondents and Coves Darden argued to the intermediate appellate court whose resulting decision is under review by this Court.

In any event, when before this Court, Respondents are still prohibited from making a statement of the case which contains contested matters, Rule 208(b)(1)(C), SCACR, and are also prohibited from referring to matters that are neither included in the Record, nor allowed to be included in the Record. See Rules 208(b)(4), 209(b), 210(c), and 210(h), SCACR.

Respondents now state in their counterstatement in their Brief at 5, that Ibanez did not register to ride in a horse competition in North Carolina for Derr until after he quit Coves Darden. This is incorrect, and, therefore, at minimum, is an example of a "contested matter" which should not have appeared in Respondent's counterstatement of the case in this Court. See Stanton Discovery Status Affidavit ¶ 5, R.p.312 (registered while working for Coves Darden (referencing attached registration materials)); Coves Aff. ¶ 24, R.p. 284 (same); and Appellant's Brief at 10 (same); and see Petitioner's Brief at 7 (secretly agreed to compete for Derr in upcoming horse competitions).

Respondents also state in their counterstatement at 3, and again in their Brief at 13, n.12, that Ibanez "worked" for Coves Darden in the US "from April 2011 to June 2011." This is controverted in Miguel Coves' affidavit in ¶ 8 in the Record at 281, where Coves recounts that, despite Ibanez's eagerness to quickly perform the contract and start getting his money, Coves Darden had to explain to Ibanez that he could not work gainfully in the US until he had the visa. Respondents then incorporated their inaccurate statement into their argument in their Brief at 15, stating (insignificantly to the statute of frauds, it turns out), "Significantly, Ibanez started work a year before the visa was issued and Coves Darden paid him for that work."

of the visa, when issued, would constrain the length of the contract to the length of time the visa was in effect.

This was the first contract. It was formed then. It was admitted by Ibanez in his deposition, and was described by Miguel Coves in his affidavit, and was described in a supplemental interrogatory answer, and was described in papers submitted to the USCIS. This is the contract Ibanez's lawyers incorrectly argue is unenforceable as being within the statute of frauds, and as failing to satisfy the statute:

Pursuant to this oral contract of the parties, Coves Darden later submitted (and paid for) the visa application. Therein, they explained simply in a letter to the USCIS that the compensation agreement was not of fixed duration in that the employment obviously would be for however long the visa was issued for. (R. p. 229 ("or for such period as is authorized").)

The USCIS, after the visa application was submitted, apparently asked for a written employment agreement. So a written agreement was prepared. (See written later agreement, R. pp. 220-225.) It stated that it was a written offer of employment, and that it would be effective as of the date when Ibanez entered the US on an O-1 visa. It stated that employment would be for as long as the visa was issued for, and additionally would end whenever the visa ended for any reason. It also stated that it was terminable on thirty days' notice by either party, that Ibanez would devote all of his business time to the employer and no one else (a requirement of the O-1 visa itself), that Ibanez would refrain from certain types of competition during and after employment, and that disputes would be settled by arbitration, and also stated other terms.

Respondents' repetitive statements that at the time the oral contract was reached, the agreement was for a minimum of two years with no qualification as to the effect of the length of the visa is contrary to the Record, and, at a minimum, controverted.

(Agreement, R. pp.220-225.)

This second, later, contract – the written one – is the one Respondents argue was never formed. Yet, the contract was explained on the phone to Ibanez and Ibanez did thereafter enter the US on an O-1 visa. Although Covese Darden produced a copy which was signed by Miguel Covese and which was submitted to USCIS and in the file when Ibanez went for his visa interview, Respondents argue that because but Covese Darden cannot find a copy signed by Ibanez, this second contract was never agreed to by Ibanez. Respondents argue that for this reason, this second contract was never formed.

Of course the factual setting of this case also includes the fact that Ibanez did enter the US on an O-1 visa, and did go to work for Covese Darden and they did pay him and provide him other things consistent with both the now disputed oral contract and the now disputed later written contract.

Ibanez's knowledge of the existence and contents of the written contract and acceptance of its benefits in a manner indicating assent was agreement to the written contract. Peddler, Inc. v. Rikard.

Respondents' main argument is to state in their brief at 10 that there is "no evidence that Ibanez consented to the specific terms of the draft written contract." Yet this evidence is set forth in Petitioner's Brief at 35-36. The immigration lawyer "discussed point by point, each part of the [written] employment agreement with Ibanez." (Affidavit of Liberatore ¶ 4, R. p. 275.) The points in the written agreement include the point that the agreement is made and effective the date that Ibanez enters the US on an O-1 visa. (Agreement, Introduction, R. p. 220, and §1.2(b), R. p. 221.) He did so enter, making the contract effective.

Although the written contract would become effective once an O-1 visa was granted and Ibanez entered the US with the visa, the written contract was not definite in duration in that the contract's duration would be thereafter dependent on the time the O-1 visa remained in effect. The written contract was also terminable on thirty days' notice by either party. The written contract was therefore also not within the statute of frauds.

IV. The preponderance-of-the-evidence burden of proof at trial applies to claims that a written or oral contract exists and that it was broken. The clear-and-convincing burden of proof at trial does not apply to the question of applicability of the statute of frauds – only, in a proper case – to the question of whether further facts constituting an avoidance or exception are present. The record facts show the statute does not apply. The scintilla standard for denying summary judgment applies and was disregarded and the two courts below should be reversed.

A. The scintilla standard applies.

There was evidence in the Record that, up to the time the written contract was drafted, presented to the USCIS, and accepted by Ibanez, the parties had an oral contract. Both the majority and the minority of the Court of Appeals panel found definitive evidence of an oral contract.

This prior oral contract was along the same lines as the later written contract, but, having been entered before a visa could actually be issued, was – at the time the oral contract was entered – of a duration dependent upon the length of visa which would actually be granted in the future. The duration was additionally dependent upon the actual time the visa, once granted, thereafter remained in effect. The oral contract was not within the statute of frauds.

There was more than a mere scintilla of the foregoing facts in the Record. They were clear if not inescapable.

It must be remembered that the facts in this case are not the trial facts. They are summary

facts. The decision was whether to dispense with the right to trial by jury otherwise required by the state constitution. Not all the facts of the case were needed to assess and deny such a request. To mandate denial of such a request, all that was needed was a scintilla -- an assurance that there may be some tiny facts or more, but not none, to support those parts of the case that were duly challenged.

In their brief at 10, Respondents argue that granting summary judgment in the face of record facts which otherwise mandated denial was not improper because “where there Statute of Frauds is a defense,” the scintilla standard does not apply as to a breach of contract claim. As a necessary part of this argument, in their brief at 11, Respondents assert that South Carolina does require clear and convincing evidence at trial – not a preponderance of the evidence – “in cases involving” the Statute of Frauds.

Neither of these assertions is correct. It might be argued that where the statute of frauds applies, i.e., where the subject contract is “within” the statute of frauds, the burden of proving, at trial, certain types of exceptions to the enforcement of the statute is elevated to a “clear and convincing” standard. However, here, Respondents’ argument presupposes that the statute applies, when it does not.

Accordingly, there can be no valid argument that a heightened burden of proof at trial also changes the “scintilla” standard for denying summary judgment in the instant case.

Respondents’ argument that the scintilla standard did not apply on summary judgment because of an argued higher burden of proof at trial is a proposition relied on by neither the

Circuit Court nor the Court of Appeals for its decision and not briefed to either.³ In Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009), the Court held that “where the federal standard applies or where a heightened burden of proof is required, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment.”

Citing Satcher v. Satcher, 351 S.C. 477, 570 S.E.2d 535 (Ct. App. 2002), Respondents now state that this Court has previously recognized that cases “involving” the applicability of the state of frauds require a heightened burden of proof at trial. This is incorrect.

Satcher did not involve a burden of proof imposed by the application of the statute of frauds. Satcher ruled that a “clear and convincing” burden was required for (1) a contract to make a will (regardless if whether within the statute), (2) establishment of an oral gift (not within the statute), and (3) promissory estoppel to deny an obligation to convey or devise where real

³ While an appellate court can in instances affirm a lower court on grounds not used by the lower court, see Rule 220(c), SCACR, the Court has observed, even as a general matter, that it is often not very fair, and frequently not prudent, to do so. See I'on, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 420-421, 526 S.E.2d 716, __-__ (2000)(analyzing, in general, the likelihood of an appellate court to ignore additional grounds when “unfair or unwise,” such as when never mentioned by the respondent prior to appeal, or when “abandoned” by the respondent not including them as stated issues when the matter first rises on appeal).

In the more specific context of appeal of a grant of summary judgment, the imprudence and unfairness is multiplied. A circuit court is often required to deny summary judgment and even when it is not required to do so, it retains the irreversible discretion to do so. Abuse of discretion is defined to include making a discretionary decision while guided by an error of law. If erroneous reasoning influenced the decision not to deny summary judgment and the grant were affirmed on grounds not relied on by the lower court, the nonmoving party would be denied any court’s discretion to deny the motion at the appellate level, the appellate court would be deprived of a lower court record which would otherwise have been developed and directed to the alternate issues, and the nonmoving party would be deprived of the benefit of the exercise of the discretion of the circuit court. See State Farm Fire & Cas. Co. V. S.S., 858 S.W.2d 374 (Tex. 1993)(providing extensive discussion of why, despite ordinary ability to affirm on additional sustaining grounds, a court should not, and will not, affirm a grant of summary judgment other than on the ground specified in the trial court’s judgment).

property is concerned (not within the statute of frauds because not sounding in the contract).

In Satcher, the court explains that “a contract and promissory estoppel are two separate and distinct legal theories. They are two different creatures of the law; they are not legally synonymous; the birth of one does not spawn the other.” The Court further explains, “unlike a contract which requires a meeting of the minds and consideration, promissory estoppel looks at a promise, its subsequent effect on the promisee, and in certain cases bars the promisor from making an inconsistent disposition of property.”

Respondents do not cite one single case applying a “clear and convincing” burden of proof to an oral employment contract or to any contract alleged to be impossible of performance within one year of the making thereof.

Ibanez and Coves Darden had a meeting of the minds and there was sufficient consideration to establish an oral contract. The scintilla standard applied to denying summary judgment and both the Circuit Court and Court of Appeals erred in ignoring and not applying the standard.

B. The statute of frauds does not apply.

In their brief at 12, Respondents, state that if there was a contract, it was an oral contract with a definite duration of two years which violates the statute of frauds.

Respondents claim, “The evidence clearly shows that both Ibanez and Coves Darden viewed the duration of Ibanez’s employment under any oral contract to be at least two years.” This is repetition of a factually incorrect statement insofar as the presence of materials in the Record goes. An examination of the other contents of the Record, and the actual contents of the Record, will avoid misperception which may occur with ellipsis, excerpting, misquoting,

inaccurately paraphrasing, or disregarding of context. Summary judgment on the statute of frauds should have been denied.

Both the majority and the minority of the Court of Appeals panel found definitive evidence of an oral contract. The majority simply then made their own impermissible factual finding that the contract was longer than two years. As explained numerous times, this error infected the logic which led the court to conclude that the statute of frauds applied and that every claim against all defendants should fail. The Court of Appeals should have reversed the grant of summary judgment, because it was built on a foundation of erroneous, unfounded conclusions.

As the dissent properly acknowledged, 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 UCIS, and could be for more than, or less than, a year. (Supplemental Interrogatory Response, R. p. 453.) Therefore, the statute of frauds did not apply. 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, 486 S.E.2d 771 (Ct. App. 1997). “The fact that performance within a year is highly improbable or not expected by the parties does not bring a contract within the scope of this clause.” Id.

At the time the oral contract was entered, it was not impossible to perform within a year. This was because, at that point, even if unlikely, a visa application could be made, a visa could be granted for a shorter period than requested or expected, and Ibanez could come to South Carolina and train horses – all in less than one year. What actually happened after the contract was entered and what was eminently more likely at the time the contract was entered are completely irrelevant to the questions of applicability of the statute as a matter of black letter

law.

- V. **In order to unnecessarily shield Ibanez from liability for his breaches by applying the statute of frauds, the Court of Appeals incorrectly determined that the oral agreement was not capable of being performed within one year – and in order to do so, the Court of Appeals had to engage in extraordinary impermissible fact-finding.**

Viewed in the light most favorable to Coves Darden, the nonmoving party on summary judgment, the Record in this matter presents a case in which Ibanez, aided and urged by Derr and Half Moon, took complete advantage of the people who agreed to hire him, then was disloyal to them, withheld information they needed, lied to them, and began to compete with them and sabotage them while in their employ. There is nothing harsh or “draconian” (cf. Resp. Brf. at 15) about refusing to shield Ibanez and the other Respondents with an obsolete, arcane and highly technical statute firmly interpreted by South Carolina Courts as inapplicable to the contract of the parties.

In sounding alarms, Respondents’ arguments put forth a completely backwards perspective of the current state of decisional law and the history of the statute of frauds. It is an obsolete statute. The original purposes for it disappeared centuries ago. It appears that the Circuit Court and Court of Appeals similarly misapprehended the history of the statute, and the current state of winnowing of cases that fall within it.

The statute of frauds is not a sacred, ubiquitous protective device. Settled South Carolina and multi-jurisdictional precedent restrict its application. There is no need for a wronged party to make, like a football player, an “end run” (Resp. Brf. at 9) around the statute when the statute already does not apply and is not an obstacle. The statute does not beg for modern judicial reform which would expand the application of the statute by ignoring the controlling law and

resorting to out of state authorities or selected treatise passages.

The South Carolina Statute of Frauds⁴ is not common law. It is generally a copy of certain sections of the Statute of Frauds enacted by the English Parliament during the reign of Charles II in 1677. John Edward Murray, Jr., Murray on Contracts: A Revision of Grismore on Contracts (Bobbs-Merrill Company, Inc. 1974) §312 at 640 (“Murray”). In 1677, essentially medieval trial by jury prohibited a party to a contract from testifying on his own behalf. Murray, id. at 641. That is, a party alleged to have entered into a contract could not take the stand and testify that he did not enter the contract, or that it contained different terms. Additionally, jurors were free to decide the facts on their own knowledge, disregarding the evidence presented. Id. These circumstances no longer exist. By the Law Reform Act of 1954, England repealed the Statute of Frauds, with the exception of two sections, neither of which involve the subject of this action. Id.

Murray observes: “It would appear doubtful, however, that a similar step will be taken in this country in the foreseeable future. One reason for this forecast is that it would require decisions by fifty separate jurisdictions. It is more likely that American courts will continue to interpret the language of the Statute in a fashion that will continually narrow its scope.” Id. at 641-642. “In the past this has been done by resolving all ambiguities in the phraseology of the Statute in such a way as to exclude as many cases as possible from its operation. In addition, other cases are excluded which are within the language of the Statute on the ground that they are not within the purpose and spirit of the Statute. Id. at 642.

⁴It is not otherwise capitalized herein, to distinguish it from the now-repealed English statute it repeats.

One portion of the Statute receiving such treatment is the section receiving attention in this case, applying to agreements not to be performed within one year of the making thereof. Courts “have apparently paid scant attention to the purpose sought to be accomplished by the Statute, but have been concerned chiefly with construing it in such a way as to narrow its scope as much as possible.” Id. § 319 at 658.

“[I]t has been universally agreed that it includes only those contracts whose terms are such that performance cannot be completed within a year from the time they are made.” Id. “This is so, even though performance in fact extends beyond the year, and even though this likelihood was contemplated at the time the contract was made.” Id. “It has been held, for example, that an agreement to work for, or to employ another, or to support another for life is not within the Statute.” Id. (footnotes omitted). It would make no difference if the loss of life, completing the performance of the contract, were from old age, or from a lightning strike as referenced in Respondents’ brief at 15.⁵ “In fact, any contract, under the terms of which the duty of performance will end upon the happening of a contingency which may possibly occur within one year from the making of the contract, is not within the Statute.”⁶ Id. at 658-659.

⁵ Some scholars of the Statute might further analyze the conclusion if the term were not “for life,” but rather, not for employment of a natural person, and “for five years.” In the instant case, however, Ibanez’s contract with Coves Darden was for “as long as the visa was granted for,” which was an unknown period at the time of the making of the contract, and thus, possibly, although not likely, a period of less than a year from the time of the making of the contract.

⁶Speaking of the English Statute, Street observes that “the method of reaching the evil aimed at was very indirect and ran curiously counter to the previous development of English contract law.” Thomas Adkins Street, The Foundations of Legal Liability: A Presentation of the Theory and Development of the Common Law, Volume II: History and Theory of English Contract Law (Edward Thompson Company, Northport, Long Island, N.Y. 1906) Ch. XIX at 170 (“Street”)(available as a “Google Book”). “The almost infinite amount of litigation which has resulted from the enactment known as the Statute of Frauds shows that it was poorly drafted and

At the time of the making of the oral contract, it was not impossible for the USCIS to have granted the O-1 visa for only two months, and for Ibanez to have then worked for two months and completed the contract. The statute of frauds did not apply.

VI. The Court of Appeals erred in not considering the signed, unsworn interrogatory answers, regardless of the reason.

Not a single interrogatory response in the case was sworn, certainly not the one which

altogether failed to pursue natural lines of cleavage in our law.” Street at 170.

“Time and again have judges lamented the lack of skill exhibited in framing the statute and the looseness of the language used in describing the different contracts intended to be brought within it.” Street at 170.

“But notwithstanding all the difficulties of interpretation which the statute has presented, and notwithstanding the oblique and wholly unscientific way in which the statute cuts into the symmetry of our contract law, it is safe to say that no enactment has ever received more universal commendation. It may be conceded that much of the encomium showered upon it has been misplaced and in many cases perfunctory; since the courts have been most eulogistic when compelled to apologize for the gross injustice which the application of the statute has sometimes occasioned.” Street at 170-171.

“As was natural, the judges were at first disposed to a liberal interpretation, and applied it to cases obviously within its meaning regardless of the ultimate result. The statute was remedial and ought, it was said, to be favorably construed in order to further the object and intention of the legislature. Its words were not to be strained so as to take particular cases out of the operation of the statute.” Street at 174-175. However, due to changes in legal temperament and to the supposed exigencies of justice, various courts took a different view. Street at 174-175.

“On the whole, the decisions seem to evince a disposition on the part of the courts to construe the statute strictly and thus limit its application to as few cases as possible, a feature possibly more characteristic of the later decisions, but not confined to them.” Street at 175.

“The disposition to construe the statute closely is strikingly manifest in the interpretation placed upon the fifth clause, which embraces contracts not to be performed within one year. It is now settled that agreements to be performed on contingent events which may happen within a year are not within the statute. Thus a verbal promise to pay on the return of a ship is good though the ship does not return for two years.” Street at 176.

“The observations just made will serve to warn the reader how very cautious one should be in pronouncing an opinion upon any part of the statute.” Street at 176.

“The clause is necessarily prospective. ‘Not to be performed within one year’ is the criterion by which the necessity of a writing is to be judged. The court must consequently determine the validity of the contract at the time of the making of it and cannot suffer its validity to depend upon an uncertain or contingent event thereafter to happen.” Street at 193.

was the Circuit Court's primary basis for granting summary judgment.

Respondents' brand new argument – that unsworn interrogatory answers⁷ are not eligible to serve as materials to be considered in determining to deny summary judgment – is simply unsupported by any authority applying the South Carolina Rules of Civil Procedure.

As previously noted, Respondents' new argument was not the basis of the decision of the Circuit Court or the Court of Appeals. The Circuit Court's grant of summary judgment was based on misplaced reliance on the concept of "judicial admissions" and the doctrine of "sham affidavits." The Court of Appeals never ruled on the "judicial omissions" or "sham affidavits" rulings of the Circuit Court.

In their brief at 17, Respondents assert, "Courts generally do not consider unsigned, unsworn responses to interrogatories when ruling on a summary judgment motion." "Thus," argue Respondents, "the three unsigned and unsworn interrogatory responses cannot be relied on to create the contested factual issue needed to defeat summary judgment." (Id. at 18.)

First, Respondents are wrong about the interrogatory responses not being signed. All interrogatory responses in the case were signed.⁸ None were sworn.⁹

Secondly, Respondents' assertions about what "courts generally do not consider" are not supported by citations to South Carolina cases or any cases applying South Carolina procedural

⁷Here, there were not only interrogatory answers for the court to consider but affidavits from the nonmoving party, the inculpatory deposition of one of the moving parties (obtained under order of compulsion), materials submitted to the USCIS, and a logistical circumstance which on its own made it virtually impossible to be absolutely sure in advance of the issuance of the visa, how long, or short, the oral contract would run from the time of its making.

⁸ Signing has meaning under Rules 11 and 26(g), SCRCP.

⁹ All the affidavits were sworn. All the depositions were sworn.

law. Respondents cite exclusively federal cases. The Federal Rules are different in their terms.

Respondents now assert that “answers to interrogatories” as listed in Rule 56(e), SCRCF does not include unsigned and unsworn answers to interrogatories, such that these items would not even constitute a scintilla, smudge or whit of material which could suggest the existence of an issue of fact.¹⁰ Respondents also assert in either the same or a related vein, that Coves Darden relied on “inadmissible” evidence, but that “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.” (Resp. Brief at 18.)

South Carolina has followed the scintilla standard for more than just a few decades and follows it today. Hancock v. Mid-South Mgmt. Co. The standards of the federal courts, often cited by Respondents instead of state procedural law, are interesting and in some cases instructive on some aspects of summary judgment.

However, it is South Carolina procedural law which applies, not federal. The federal courts, for example, have not followed the “scintilla” standard since 1872, so what they currently have to say about whether the scintilla standard applies or how to apply it is of very little effect. Improvement Co. v. Munson, 14 Wall. 442, 448 (1872)(discussing the no longer followed scintilla rule in federal courts)(cited in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)).

Thus, unlike the state court rule, in federal courts, “a mere scintilla of evidence’ in support of an essential element [of a claim] will not forestall summary judgment.” Abebe v. Carter, No. 5:11-cv-2750-RMG-KDW, 2013 WL 625588, at *2 (D. S.C. Nov. 19, 2013).

¹⁰At the urging of Respondents, the Circuit Court relied strongly on an early unsworn interrogatory answer in granting summary judgment.

Other states diverge greatly from federal standards. See, e.g., Eric K. Yamamoto, Katherine G. Leonard, and Shawna J. Sodersten “Summary Judgment at the Crossroads: The Impact of the Celotex Trilogy,” University of Hawaii Law Review Vol. 12:1 (noting divergence from Anderson v. Liberty Lobby infusion of summary judgment standard with burden of proof at trial).

As an adjunct to their argument of the federal treatment of interrogatory answers, Respondents now argue, through means of a single italicized word to cue a thereafter unstated analysis, that there is no “*admissible*” evidence (Resp. Brf. at 18) of an oral contract whose exact duration could not be determined at the time of its making.

Respondents never discuss where the putative “admissibility” requirements are in the South Carolina rules governing summary judgment.¹¹ The standard interrogatories built into Rule 33, SCRPC, for example, essentially inquire who the witnesses are and what the responding

¹¹Rule 56(e), SCRPC contains a requirement applicable only to affidavits. The rule requires that the facts set forth in affidavits be such as “would be” admissible in evidence. Rule 56(e), even as to affidavits, is silent on whether it is simply the underlying facts themselves which must not be inherently inadmissible under any circumstances, or whether it is the manner in which the facts are referenced which must meet admissibility requirements.

There are no such rules stated for facts appearing in other materials of record, such as depositions and discovery responses.

Respondents do not discuss the extensive sworn deposition testimony of Defendant Ibanez himself, describing the detailed oral contract he entered with the Plaintiff. (Cf. Appellant’s Brief at 5 (citing defendant’s testimony to the existence of a contract).) Ibanez entered this contract after visiting in Coves and Darden’s house for several extended international visits at Coves Darden’s expense. Respondents do not argue that Ibanez’s own deposition is not “admissible.” They previously argued, however, that his sworn testimony cannot be used to “contradict” their particular gloss of an early unsworn interrogatory response in the case.

The fictitious burden Respondents urge is all the more rare when one considers that Respondents did not meet their own burden, in the first place, of stating grounds for their motion at the time of filing it, and submitting supporting materials at the time of filing it, so that opposition to the motion could be handled in an orderly manner. See, e.g., Stanton Discovery Status Aff., R.pp. 311-332 (detailing fragmented and thwarted discovery).

party thinks they will say. See Rules 33(b)(1),(6) and (7). No South Carolina rule requires the response to be in admissible form.

In contrast, the federal rule governing summary judgment actually does include a concept of “capability of admissibility,” albeit an unclear one. See Fed.R.Civ. P. 56(c)(1) and (2). However, also in contrast, the federal rule in turn includes an explicit procedure for making a formal “capability of admissibility” objection during the summary judgment proceedings. State and federal rules of civil procedure and standards governing summary judgment are different. The overarching error in the Circuit Court’s order, and in the arguments of Respondents, is a failure to analyze the case against the controlling standard for decision of a summary judgment motion, in state court, in South Carolina, in the proper procedural context.

A literal reading of Rule 56, SCRCF mandates a denial of summary judgment in this case.

Rule 56(e), SCRCF only states an admissibility requirement with regard to affidavits, if any,¹² adduced in supporting or opposing summary judgment. And this requirement, stated only with respect to affidavits, refers to “such facts as would be admissible in evidence,” without ever further defining the subjunctive condition referred to.¹³

¹²Some of the differences among affidavits, interrogatory responses, deposition testimony and responses to Rule 36 requests for admissions are discussed in Appellant’s Brief at 11-19 and Petitioner’s Brief at 26-35.

¹³Scholars considering the different, federal, standard, have concluded that the federal reference to summary judgment “admissibility” as a precise basis for importing trial evidentiary standards at the summary judgment phase is unclear, and that a plaintiff’s response to even a properly supported “no-evidence” motion for summary judgment is sufficient if the nonmoving party’s materials are “reducible to admissible evidence.” Adam N. Steinman, The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy, 63 Wash. & Lee L. Rev. 81, 130 (2006).

The Official Reporter's Note actually remarks that the second sentence of Rule 56(e), SCRCF (now the third sentence) is different from the federal rule and was added because it was needed. South Carolina courts do not, and cannot, simultaneously deny summary judgment on the basis of a "scintilla," and require a nonmoving party to provide full-blown, testamentary, evidentiary exposition in advance of trial, in response to a bare assertion that the moving party would like to see all the evidence and develop arguments about it.

Yet, even if indulged, the approach apparently now urged by Respondents is nearly impossible to apply and analyze. Respondents' motion for summary judgment was fatally flawed, procedurally, from the beginning. Rules governing submissions opposing summary judgment depend upon a number of things. These include the submissions supporting the motion, what grounds are stated for the motion, when the motion is filed, when the motion is heard, which materials are submitted for purposes of being included in the motion, and the timeliness of the submissions to be included in the motion.

Respondents filed a motion for summary judgment twice, and both times stated no grounds whatsoever for the motion. No accompanying materials were included with the motion. No affidavit in any sort of evidentiary form was submitted with the motion by the proponent of summary judgment. The motion should have been denied at the inception, saving judicial resources.

VII. The Circuit Court and the Court of Appeals both were incorrect in finding that, as a matter of law, there was no fiduciary relationship between the parties.

In their brief at 19, Respondents assert that "mere existence of an employer-employee relationship, standing alone, does not give rise to fiduciary obligations." This is incorrect for the

reasons cited in Petitioner's Brief at 41-42.

As a separate issue, Respondents further contend that "a fiduciary relationship cannot be created by the unilateral action of only one party." (Resp. Brief. at 20.) This is an irrelevant argument because (1) as clarified in Petitioner's Brief at 41-42, traditional fiduciary relationships, such as between principal and agent (e.g., between employer and employee) are fiduciary simply if the relationship exists, and (2) the additional special relationship in the instant case was invited by Ibanez (see, e.g., R.p. 280), the godfather of Coves and Darden's children, not unilaterally imposed. Ibanez was not Coves Darden's mere banker.

Even if there had been facts calling for the application of the Statute of Frauds, or even if the parties had not had any agreement on the parameters of duration at all, they still would have had an employment contract. 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., 335 S.C. 330, 576 S.E.2d 923 (1999). Further, Ibanez would still owe a fiduciary duty to Coves Darden as a result of their employer-employee relationship, regardless of how characterized from a contractual standpoint.

Respondents' example of a building contractor and his employee is telling. Respondents state only that the employee is not a fiduciary "for all purposes." The fact is that the employee is indeed a fiduciary for purposes of the matters which are the subject of the employment and the matters in his charge.¹⁴

¹⁴Respondents misapprehend this fact. Respondents similarly misstate Coves Darden's argument in their Brief at 19, and proceed to refute the wrong argument. Coves Darden does not argue that a night janitor owes her employer the "exact same" duty of loyalty as the highest levels of management do, as the scope and manner of application of the duty varies with the differences in scope and nature of the subject of the employment and the matters in the employee's charge; a

VIII. Because there was a contract that was breached, it was error to rule that for lack of a contract, there could be no claim of tortious interference with contract.

There was evidence of the following:

1. A written contract, and Derr's interference with it. "Breach" is not limited to quitting. It also includes lying, nondisclosure, stealing, working against the interest of the employer and many possible other things, in addition to, or other than, quitting.¹⁵
2. If there was no written contract, an oral one with detailed terms, and Derr's interference with it. Quitting was, again, not the only way to "breach."
3. If there was no oral contract with any detailed terms, a bare-bones, at-will contract, and Derr's interference with it. Quitting was, again, not the only way to "breach."

Additionally, a nonparty to a contract cannot raise the statute of frauds as a defense to a claim of tortious interference with the contract. Hatcher v. Harleysville Mut. Ins. Co., 266 S.C.

duty of loyalty – exactly a duty of loyalty – does nevertheless exist in both cases. Futch v. McAlister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999). Depending on the facts, a nonexclusive janitor paid by the hour who cleaned a building across town after agreed hours were over, would not likely be disloyal if the respective owners were not in a cleaning contest.

¹⁵For example, contrary to what is incorrectly stated in Respondents' counterstatement of the case in their Brief at 5, Ibanez, on June 2, 2011, while still in the employment of Coves Darden, was registered to ride for Derr in an upcoming horse competition in North Carolina. (See Stanton Disc. Stat. Aff. ¶ 5, R.p. 312.) This and other instances of disloyalty, nondisclosure, and lying, while still employed, would be "breaches" of his contractual and normal fiduciary duties, even if he never quit. The materials revealing this matter were not produced by Respondents in response to an order compelling certain discovery and were at odds with Derr's deposition testimony, (Stanton Disc. Stat. Aff. ¶¶ 2-6, R. pp. 311-312.), and the affirmative assertion made by Derr in the Answer to the Complaint.

As for quitting, if the terms of a contract prohibit doing it under the circumstances under which it is done, it is a breach. Further, for purposes of tortious interference, even inducement of a party to a contract terminable at will to terminate the contract can be actionable under South Carolina law, North Carolina law notwithstanding. Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc., 294 S.C. 169, 363 S.E.2d 390 (Ct.App. 1987); Todd v. S.C. Farm Bureau Mut. Ins. Co., 283 S.C.155 at ___, 321 S.E.2d 602 at 607 (Ct.App.1984), quashed on other grounds, Todd v. S.C. Farm Bureau Mut. Ins. Co., 287 S.C. 190, 336 S.E.2d 472 (1985). This is consistent with South Carolina law also recognizing a tort of tortious interference with prospective advantage.

548, 225 S.E. 2d 181 (1976); accord, Street at 177-178. It is settled law. This is a matter of substantive rights, defenses, and liabilities, not, as Respondents imply in their Brief at 23, “standing” for purposes of justiciability as a case or controversy.

IX. Both the Circuit Court and the Court of Appeals were incorrect in determining, as a matter of law, there was no violation of the Unfair Trade Practices Act.

First, the existence of tortious interference, without accompanying illegality of means, required denial of summary judgment as to the UTPA violation, as discussed in Appellant’s Brief at 39-41.

Further, 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. Derr undisputedly agreed to facilitate Ibanez making extra money as a “free agent” and doing outside work which would affect his compensation from Derr.

Respondents now characterize Coves Darden’s longstanding insistence on the significance of this illegality to the UTPA claim as a “Hail Mary”¹⁶ argument. Respondents disregard the matter as simply an argument by Coves Darden “that the separate contractual arrangement Half Moon Stables had with Ibanez violated some unspecified federal law.” (Resp. Brief at.24.) The Record contains evidence of illegality. The affidavit of a lawyer working in the

¹⁶ If Respondents are referring to the argument in the sense of a prayer to the Virgin Mary that consists of salutations and a plea for her intercession, then the argument and this entire appeal could rightly be characterized as a plea to any and all higher authority for intercession and help. However, if Respondents are likening the argument to a long forward pass in the American game of football, thrown into or near the end zone in a last-ditch attempt to score, Respondents have ignored Appellant’s Brief, pages 31-43, and Appellant’s Reply Brief, pages 24-25, mostly never ruled on by the Court of Appeals, which are respectfully incorporated herein.

field of immigration law states:

11. The visa did not allow Ibañez to work for other people while he was working for Coves Darden. The visa obtained for Ibanez allowed him only to work for Coves Darden. The O-1 visa requires that the nonimmigrant work only for the permitted employer and not work in any other way – even for himself as an entrepreneur. When the employment ends, the visa holder must leave the country, or apply for a change of status BEFORE THE EMPLOYMENT TERMINATES. One of the concerns of the United States immigration and labor laws regarding temporary visas based on work positions is that the public impact of the nonimmigrant working gainfully be minimized by restricting when the nonimmigrant can work, what kind of work he is allowed to do, and how much he must be paid.

12. Accordingly, the immigration laws are very specific that the alien work gainfully and stay in the U.S. only within the parameters of the visa he receives. He cannot simply rely on a visa to get into the country and then set up his own shop, change jobs or type of work, or take on additional jobs.

13. When it became clear that Ibañez might remain in the United States after leaving Coves Darden and had entered some other employment or self-employment situation, I advised USCIS that the O-1 employment between Coves Darden and Ibañez had ended, and requested immediate cancellation of Ibañez' O-1 nonimmigrant status.

14. Under immigration law, Ibañez was prohibited from working for anyone other than petitioner company Coves Darden. There were no exceptions to the rule.

15. Ibañez' status did not allow him to work for another employer after hours, during the time he was employed by Coves Darden.

16. The O-1 visa does not allow the nonimmigrant to make side money from another employer or on his own while employed by the petitioning employer. The nonimmigrant is not allowed to freelance.

(Liberatore Aff. ¶¶ 11-16, R. pp. 277-278.)

The USCIS defines employment in 8 C.F.R. §274a.1(h), employee and employer in 8 C.F.R. §274a.1(f) and (g), and unauthorized employment in the USCIS Policy Manual. The term unauthorized alien, with respect to employment of an alien, is defined in 8 C.F.R. §274a.1(a). 8 C.F.R. § 274a.12 provides that aliens authorized for employment with a specific employer incident to an O-1 visa are authorized to be employed in the US by the specific employer and subject to any restrictions in the chapter indicated as a condition of their admission in the O-1 classification. 8 C.F.R. §274a.12 further provides that an alien in O-1 status may be

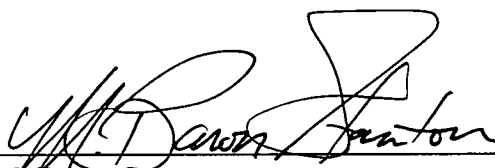
employed only by the petitioner through whom status was obtained.¹⁷ For crimes, see, e.g., 8 U.S.C. §1324 (a)(1)(A)(iv).

The Affidavit of Liberatore repeatedly makes it crystal clear that Ibanez was prohibited from setting up his own clinic business on the side or being employed on the side with training house calls or away trips. The law, if not common knowledge, is also publicly available. Yet, Derr's Deposition indicates that she offered an agreement in which she only had to pay Ibanez based on the amount of side work he got or did not get. She was a sponsor of the violation of his visa and his unauthorized side employment. This made the competition additionally unfair and compounded the UTPA violation with public impact as well, even though the violation was primarily under the anticompetitive leg of the UTPA requiring no separate "public impact" element in order to be in the course of trade or commerce.

X. Conclusion

For all the foregoing reasons, the Circuit Court and the Court of Appeals should be reversed.

Respectfully submitted,


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¹⁷As recounted in Appellant's Brief at 10, not known by Covés Darden until after Ibanez quit without advance notice, Derr had begun, while Ibanez was still employed by Covés Darden, efforts to modify Ibanez's O-1 visa to substitute Half Moon as the exclusive employer.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

AUG 06 2018

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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)

Covès 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 August 6, 2018,
served the foregoing Petitioner's Reply Brief upon the Respondents by causing a copy thereof to
be mailed with proper postage to the address indicated below:

Thomas R. Young, Jr., Esquire
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