THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS



---

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

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

---

Case No. 12-CP-02-01772

---

Coves Darden, LLC, ..... Appellant,

v.

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

---

# APPELLANT'S REPLY BRIEF

---

M. Baron Stanton
STANTON LAW OFFICES, P.A.
1728 Main Street
P. O. Box 245
Columbia, SC 29202
803-929-1484

ATTORNEY FOR APPELLANT
COVES DARDEN, LLC

## TABLE OF CONTENTS

## TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

### CASES



### STATUTES AND CONSTITUTIONS



### RULES OF CIVIL AND APPELLATE PROCEDURE



### OTHER

## I. Discussion and Refutation of Significant Points, Characterizations, and Recurring Themes in Respondents' Arguments.

### A. Clarification of Some Aspects of the Facts and the Procedural Posture of the Case.

#### 1. What was pled, what was not pled, what was not timely raised, what was raised immediately, what was asserted, what was not disclosed, what was discovered, and what was false.

By not including their own Statement of the Case, the Respondents – defendants below – Ibanez, Derr, and Half Moon, are bound by Coves Darden's Statement of the Case in Appellant's Brief. Rule 208(b)(2), SCACR.

Coves Darden sued for both legal and equitable[1] relief. (Statement of the Case, App. Brf. at 4.) Coves Darden sought damages and injunction. (Id.) The Answer of Respondents did not raise the Statute of Frauds or any other affirmative defenses. (Stmt. of the Case, App. Brf. at 4.)

Respondents set forth no grounds whatsoever in either their December 4, 2012 motion for summary judgment (R. p. 106) or their January 28, 2013 motion for summary judgment (R. p. 161). Respondents filed no accompanying materials whatsoever at the time of filing their summary judgment motions.

Respondents asserted in their Answer that Ibanez did not agree to ride for Half Moon in upcoming events until after terminating his employment with Coves Darden. (Statement of the Case, id. at 5.) Coves Darden moved for and received an order compelling discovery. (Id.) Materials revealing Respondents' assertion in their answer to be squarely false were not produced by Respondents in response to the order compelling discovery explicitly directed to that issue. (Stanton Disc. Aff., ¶¶ 2-6, R. pp. 311-312.) Yet, Coves Darden obtained, from third

---

[1]Compare Respondents' argument in their brief at 9, that the doctrine of part performance is inapplicable to actions seeking only money damages, and incorrectly asserting that "the instant action seeks only money damages." Also compare Respondents' argument in their brief at 30, that Coves Darden failed to "prove" the amount of damages resulting from the unfair methods of competition and unfair and deceptive acts or practices in the conduct of trade or commerce.

parties, materials revealing Respondents' assertion in their answer to be squarely false. (Id.)

The materials not produced by Respondents were also at odds with the sworn deposition testimony of Respondent Derr. (Id.)

So Respondents did not timely plead nor otherwise raise, the matters they argue Coves Darden did not "raise" timely counterarguments to. Material things they have asserted are untrue. They have attempted to prevent discovery of the full dimension of the facts. Therefore, Respondents' arguments regarding both evidence and the procedural posture of the case are unpersuasive in a motion for summary judgment. A permissible inference from the record is that Respondents have not disclosed nor told the truth about, clandestine or as yet undiscovered matters, and are not in a position to tell the whole truth about matters which actually have come out.[2]

2. The contract between Ibanez and Coves Darden.

It cannot be denied that, as admitted in the sworn deposition of Respondent Ibanez, Ibanez and Coves Darden had detailed discussions of a contract of employment which concluded in an agreement of the parties on the terms. (Ibanez Dep. at 29, 32, 36-40, and 47-50, R. pp. 256, 259, 260-264, and 266-269.) When the parties then proceeded under the oral contract they reached, and Coves Darden began pursuing the visa, the immigration authorities asked Coves Darden to submit a written agreement. (Coves Aff. ¶¶ 3, 7, 11, 12, 30, and 35, R. pp. 280-282 and 285-286.) Coves Darden prepared and submitted a written agreement, and had a lawyer discuss the written agreement with Ibanez. (Libertore Aff. ¶ 10, R. pp. 276-277.) Ibanez then

[2]Respondent Derr did eventually state in her deposition that she knew Coves Darden thought it had a "contract" with Ibanez, but that since Ibanez claimed not to have a "copy," she proceeded without concerning herself at all with what it said. (Derr Dep. at 88-89, R. pp. 136-137.) In their brief at 22, Respondents obliquely argue, incorrectly, that Derr had lack of knowledge of the existence of a contract. They in fact suggest that she was not even "aware that [Ibanez] was an employee of Coves Darden."

continued to proceed with the deal, obtaining his visa and entering the exclusive employment of Coves Darden.

Early in the suit, Respondents sent first interrogatories to Coves Darden, in which Respondents strangely made no inquiry whatsoever about a written contract. (Statement of the Case, App. Brf. at 5.) Instead, they asked for the details of any oral contract between Coves Darden and Ibanez. (Id.) Coves Darden responded that the contract was not oral, that it was written, and described the written contract that had been submitted to the immigration authorities as a condition of Ibanez's visa. (Statement of the Case, App. Brf. at 5.) Given the fact that Ibanez was being represented by the same counsel as Derr and Half Moon, and the possibility that Ibanez, a Spanish speaking person, had not fully described his contract with Coves Darden, this response was not only forthright disclosure of the written agreement, but a courtesy to Respondents' counsel.

When it became apparent that Ibanez might[3] deny the validity of the written contract, Coves Darden immediately pursued discovery[4] and promptly clarified that if there was no written contract superseding the preceding oral contract, the preceding oral contract remained.

The oral contract was reached prior to any application to the immigration authorities. As

---

[3]Respondents never filed an affidavit of Ibanez denying the existence of a written contract, denying knowledge of the contents of the written contract, denying having a copy of the contract, or denying signing the contract. They filed a motion for summary judgment stating no grounds, and not accompanied at the time of filing, by any affidavits or other supporting materials. When the motion was scheduled for hearing, Respondents argued that a written contract did not exist solely because Coves Darden responded to a request for production by noting that Coves Darden was unable to find in Coves Darden's possession, a fully executed copy.

[4]Respondents opposed discovery on the basis that they had filed a "motion for summary judgment." (See, e.g., Dec. 6, 2012 Mot. to Compel, R. pp. 108-126, Jan. 30, 2013 Mot. to Compel, R. pp. 164-176, Feb. 26, 2013 Rule 56(f) affidavit, R. pp. 186-189, May 14, 2013 discovery status affidavit, R. pp. 311-332, and Nov. 26, 2013 Mot. to Compel, R. pp. 456-482.) As noted, Respondents did not state any grounds in their motion for summary judgment.

Miguel Coves stated in Paragraph 2 of his affidavit, the contract involved "risk by both parties as to whether and on what terms the visa would be granted." (R. p. 280.) The oral contract was expected to have a duration of two years or the length of Ibanez's leave of absence, but was limited by whatever initial term was granted for the visa. (Coves Aff. ¶ 6, R. p. 281; Oct. 9, 2013 Supp. Resp. to Int., R. pp. 453-454; and see Ibanez Dep. pp. 38-40, R. pp. 262-264 (contract conditioned on visa).) It was thus possible, even if not likely or expected, that the contract could be performed within one year. Put differently, the parties did not agree that the contract could not under any circumstances be performed within one year.

B. Admissions, Admissibility, and Other Insidious Intrusions Into the Summary Judgment Standard.

In the "Introduction" of their brief at 1, Respondents mirror the same errors made in the Circuit Court's order. For one, as demonstrated in Appellant's Brief at 11-19, the Circuit Court erred in neither defining which sort of "judicial admissions" the court was referring to, nor stating the attributes of the so-called "admissions," nor setting forth valid authority for the assumed attributes of the so-called "admissions." The court did not properly regard the matters the court labeled as "admissions," and erroneously treated them as conclusively established facts when interpreted in the light most unfavorable to the nonmoving party.

In the same vein, Respondents use the word "admission" or "admit" in their brief over 10 times, without ever confronting the authorities discussed by Coves Darden in Appellant's Brief at 11-19, or citing any other authority supporting their usage. Rather than address the Circuit Court's misunderstanding and consequent material misapplication of the terms "admission" and "judicial admission," Respondents simply quote the Circuit Court itself at length, in which quote

the Circuit Court misunderstands and misuses the terms. (Resp. Brf. at 20-21.[5])

Respondents assert, without authority, that a species of "judicial admission" foreclosed examination of various evidentiary materials in the record when determining a summary judgment motion. These arguments are simply incorrect under controlling authority. (See Appellant's Brief at 11-19.)

Respondents, reminiscent of the Circuit Court's order, further contrive conflicts among the facts adduced by Coves Darden, rather than view the facts as consistent. For example, Respondents, like the Circuit Court, recount the situation as if there could only have been an oral contract or a written one, when one in fact succeeded the other. Respondents, like the Circuit Court, recount the matter as if Coves Darden stated no oral contract had ever existed, rather than that Coves Darden disclosed its then belief that the written contract was in effect. If there is truly a conflict among facts, or an argument to be made concerning facts, those conflicts and arguments historically mandate denial of summary judgment. (See App. Brf. at 2-4.)

Respondents never address Coves Darden's argument that Respondents never properly supported their motion for summary judgment by demonstrating, as opposed to "invoking," the absence of dispute as to any material fact. Instead, in general, Respondents defend the Circuit Court's order by impermissibly presenting and arguing disputed factual inferences and making

---

[5]In their brief at 18-21, Respondents purport to address the Circuit Court's error in relying on so-called "judicial admissions," and the rules pertaining to sham affidavits. However, in these pages, Respondents, in essence, simply use the word, "admit" or "admissions" six more times and quote the Circuit Court's order at length. Respondents also persist in the mischaracterization that "Coves Darden denied the existence of an oral contract of employment, and admitted that there was no executed written contract of employment." (Resp. Brf. at 19.) As repeatedly clarified both to the Circuit Court and to this Court, Coves Darden did not intend to deny the existence of an oral contract, but rather, to point up the existence of a written one, when Respondents had failed to inquire about a written one in their question. As further repetitively clarified by Coves Darden, there was no admission that there was no executed contract. There was only a disclosure that Coves Darden was unable to locate a fully executed copy in Coves Darden's possession.

occasional unsupported passing assertions regarding lack of "evidence." Where acknowledging the presence of evidence is unavoidable, Respondents add the unsubstantiated qualifier, with no statement of authority, that there is no "admissible" evidence.

Respondents use the word "admissible" in their brief over 14 times, and with the exception of one oblique[6] footnote, never discuss the role of "admissibility" in the South Carolina rules governing summary judgment.

Our courts do not have a choice of one standard for summary judgment in cases in which they wish to grant summary judgment, and a different standard for summary judgment for cases in which they do not. (See App. Brf. at 2-4 (setting forth summary judgment standard).) This is where the Circuit Court erred in not denying summary judgment.

Because there is evidence that Respondents cannot characterize any other way, Respondents argue that some of the evidence is not "admissible" evidence. (See, e.g., Resp. Brf. at i-iii, 5, 7, 11, 14-16, 24, 26, 27, and 29.) This argument is not accompanied by a direct citation to an applicable portion of Rule 56, SCRCP, nor by any citation of controlling case law. The reference by Respondents to lack of "admissible evidence" is so persistent, however, that the creeping references imply the existence of a rule which does not exist, much the same as repeated

---

[6]Footnote 11 of Respondent's brief recites the requirement, applicable only to affidavits, 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 the 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. Respondents have cited no rules pertaining to facts appearing in other materials of record, such as depositions and discovery responses. Respondents nevertheless frequently couch their arguments in terms of Coves Darden's purported "burden of demonstrating by admissible evidence," the existence of a selected fact. (See, e.g., Resp. Brf. at 15.) This fictitious burden is all the more rare when one considers that Respondents did not meet their own burden of making a competent summary judgment showing in the first place.

perfunctory reference to the variable term "judicial admission."[7]

The federal rule governing summary judgment does include an unclear concept of admissibility, along with procedural protections of the nonmoving party in the event there is an objection. State and federal rules of civil procedure governing summary judgment are different. The rules are different. The judicial interpretations of those rules 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, SCRCP mandates a denial of summary judgment in this case. It is nonsensical that Respondents adduce an early interrogatory response by Coves Darden as a valid basis for granting summary judgment on one supposed issue, but argue that other interrogatory responses are not valid for purposes of denying summary judgment.

Nowhere in Rule 56, SCRCP is there a requirement that the materials adduced in opposition to a motion for summary judgment be in admissible evidentiary form.

Rule 56(e), SCRCP only states an admissibility requirement with regard to affidavits, if any, 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.[8]

---

[7]Respondents never quote or address 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 argue that his sworn testimony cannot be used to "contradict" their particular gloss of an early interrogatory response in the case.

[8]Scholars considering the different, federal, standard, have concluded that the federal reference to summary judgment "admissibility" as a precise basis for importing trial evidentiary

The Official Reporter's Note actually remarks that the second sentence of Rule 56(e), SCRCP (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.

Respondents apparently urge allowing a completely meandering laxity on the part of the proponent of summary disposition, while requiring highly technical and hair splitting precision on the part of the nonmoving party. It is astounding how perceptions can change. Historically, and constitutionally, the presumption and the allocation of burden has been in favor of trial, and against summary disposition. The proponent of summary disposition was held to an exacting standard, and the opponent was allowed great leeway in showing the existence of a genuine issue of fact. The highly technical and hair splitting precision urged by Respondents is not required in federal court, much less in South Carolina state court.

Yet, even if indulged, the elusive and illusory approach 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 the submissions supporting it, including what grounds are stated for the motion, when the motion is filed, when the motion is heard, which materials are submitted for

---

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 current version of the federal rule has a provision governing timely objection on the still murky notion of federal rule summary judgment admissibility, and provisions for cure by the proponent of material objected to.

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 by the proponent of summary judgment. The motion should have been denied at the inception, saving judicial resources.

Thus began a wading into a standardless attempt to try the entire case on discovery materials while Respondents were simultaneously resisting any efforts at ordinary and open discovery. This was a feature of the situation the Court of Appeals found "extremely troubling" in Schmidt v. Courtney, 357 S.C. 310, ____, 592 S.E. 2d 326, 331 (Ct. App. 2003).

Three different hearings were held, March 5, 2013, May 20, 2013 and October 15, 2013.

Coves Darden submits that there was no motion, that there were no grounds, and that there were no materials properly submitted by the moving parties. Coves Darden submits that there was no burden to submit any opposition.

As the motion evolved and Respondents simultaneously resisted discovery on the facts of the case, Respondents limited all of their grounds to the assertion that no contract of any sort existed. Namely, in resisting discovery on all aspects of the case, Respondents asserted that no discovery was relevant because all other claims in the case stood or fell on the question of whether or not a "contract" existed. (See discussion in May 16, 2013 Mem. at 5-37, R. pp. 338-370.)

As amply demonstrated in Coves Darden's Appellant's Brief, evidence of the existence of a contract was abundant, there was no sham inconsistency in any of Coves Darden's positions, and general trial discovery is far from complete.

## II. Errors and Inaccuracies in the Introduction to Respondents' Brief.

Ibanez's able counsel now contends that because Coves Darden cannot produce a copy of a written contract countersigned by Ibanez; there must not be one. Ibanez's able counsel further contends that this assumed lack of a countersigned version of the written document means that the written contract is invalid. However, Respondents never adduced any testimonial material, nor any discovery responses of any sort by any defendant, which denied the existence of a countersigned copy of the written contract or denied the validity of the written contract.[9]

If there was no valid written modification of the detailed, confirmed oral employment agreement reached by the parties, then the oral agreement is the contract. It was therefore error to grant summary judgment, declaring that there is no scintilla of fact in the record from which a reasonable jury could conclude that a contract between the parties existed.[10]

In their brief at page 1, Respondents incorrectly assert that Coves Darden "denied" the existence of an oral contract and relied solely on a written contract of employment. This repeated misstatement of Coves Darden's position, and the facts in the record, has already been

---

[9]In the instant case, it remains to be seen whether Defendant Ibanez will one day step up and claim to possess a countersigned copy of the written contract, in order to take advantage of the arbitration clause in it or attempt to avoid some other pitfall in the case. Even absent a countersigned copy of the written contract by Ibanez, factual issues remain as to whether the written contract is valid, based upon Ibanez's knowledge of it, and acceptance of the benefits of the contract, with that knowledge. (See Appellant's Brief at 22-23.)

[10]In their brief at page 1, Respondents assert that Coves Darden cannot "make up its mind" about the alleged contract giving rise to its claims. As pointed out above, Coves Darden is not required to do so on summary judgment. Coves Darden is required only to show a scintilla of fact in the record from which a reasonable jury could see an issue as to whether there was a contract. Additionally, Coves Darden is only required to do this in response to a properly supported motion for summary judgment, which was absent in instant case.

Similarly, Respondents incorrectly assert that Coves Darden did an "about face" in relying on the oral contract of employment. There was no 180 degree change in position. The parties had a binding agreement. Then they were asked to put it in writing. One of them then implied through counsel – but has never stated – that he never signed what was written up. There was still an oral agreement before the written agreement.

thoroughly addressed in Appellant's Brief at 11-19. The early interrogatory response on which Respondents base this centerpiece of their entire motion was served before any substantial discovery in a case in which the Respondents thereafter resisted all discovery.

In this same vein, Respondents continue to argue that Coves Darden "admitted" that it did not have a fully executed copy of the written contract. Coves Darden did indeed inform the defendants in response to a request for production, that upon looking, Coves Darden was unable to locate a fully executed copy of the contract. Coves Darden never stated, however, that there was not a fully executed copy of the contract in existence.[11]

Because of the patience of the circuit judge, the Respondents were able to engage in an evolving, multi-month challenge that Coves Darden prove up every element of its case without ever having had a clear delineation of the particular grounds for summary judgment. Indeed, in the course of resisting discovery, while the groundless motion for summary judgment was pending, the Respondents asserted that the sole relevant issue in the case was the existence or nonexistence of a contract. (See, e.g., Jan. 30, 2012 Motion to Compel at 2-5, R. pp. 165-168, and see detailed discussion in May 14, 2013 brief of Coves Darden opposing renewed summary judgment motion at 5-37, R. pp. 338-370.)

In their brief, Respondents argue, with no support, that Coves Darden "could not clearly articulate exactly what the terms of the oral agreement were." Providing only a footnote as authority for this proposition, Respondents recount only an excerpt of one affidavit, and there is

---

[11]In their brief at page1, Respondents also assert that Coves Darden was "allowed" to engage in "extensive" discovery and was never able to produce a fully executed copy of the contract. It is correct that Coves Darden was never able to produce a fully executed copy of the written contract. However, the record of the case, as discussed in Appellant's Brief, demonstrates that Coves Darden had to pull "eye teeth" to do general, not extensive, discovery, in which assertions of the defendants continued to turn up false, and in which documents were discovered which the defendants had failed to timely produce.

nothing unclear in the footnote. (Resp. Brf. at page 1, n.4.)

In further arguments which are irrelevant under the applicable summary judgment standard, Respondents assert that only "some" of the terms agreed to by the parties were reduced to writing. Under basic contract law, the lack of a "completely integrated agreement" has never been fatal to the existence of a contract.

Respondents also argue in their brief at page 2, that the terms of the O-1 visa "were never disclosed during the course of discovery." This statement is incorrect. The general terms applicable to all O-1 visas are part of federal law, and these and any specific terms are also often stated when the visa is granted. All the immigration papers processed and received by Coves Darden were produced to the Respondents during discovery, and any unsupported implication to the contrary is incorrect. Respondents themselves attached a portion of what was furnished to them, as Exhibit C to their Feb. 28, 2013 Memorandum. (R. pp. 226-229.) Further, the record amply demonstrates that Respondents themselves applied for an O-1 visa (changing Ibanez's employer from Coves Darden to Half Moon Stables without Coves Darden's knowledge), and employed Miami immigration counsel to handle the matter. According to deposition testimony, dealings with Miami immigration counsel were coordinated by the legally trained husband of Defendant Dori Derr, owner of Half Moon Stables. It is a term of all O-1 visas, that the employee who is granted the visa for purposes of working with the employer who applies for the visa is allowed to work only for the employer for which the visa is granted. (See Libertore affidavit ¶¶ 4, 8, 11, 12, 14, and 16, R. pp 275-278.)

As a variant of the foregoing arguments, Respondents further contend in their brief at page 2, that the written contract contained some terms which were terms in addition to those the parties had orally agreed upon. In the footnote explaining this contention, Respondents complain

that the written contract included a "provision requiring written notice to immigration and naturalization service, [and] representations regarding Mr. Garcia's domicile and intent to return to Spain." Again, these are legal requirements of not only an O-1 visa, but any employer-sponsored nonimmigrant visa issued.[12]

In the footnote (Resp. Brf. at 2, n.10), Respondents also complain that the written contract contained a 30-day termination provision, a noncompete clause, and an arbitration clause. Respondents did not identify anything that is contrary to the oral agreement of the parties, except for the 30-day termination provision. The other terms are not unusual in written employment contracts, but are fairly unusual to find written in strictly oral contracts.

Given the fact that it was possible for events to occur which would cause the contract to be completed in well under the length of time the parties clearly contemplated and conditionally agreed to, and given the fact that immigration authorities had the province to grant the visa for a period much shorter than the "ordinary" maximum, it was likely prudent not to risk denial of the visa by stating a length which might exceed the length the official could be of a mind to grant. The 30-day termination provision was not a drastic change from the parties' oral contract. This is particularly so in light of the close family friendship, multiple visits, extensive discussions, and high degree of trust reposed in Ibanez by Coves Darden in proceeding with such a substantial and expensive endeavor. (See Coves Aff., ¶ 2, R. p. 280.)

In keeping with the arguments maintained on and off by Respondents throughout the case, the Introduction of Respondents' brief focuses solely on the question of whether there was evidence of a contract or not. As pointed out in Appellant's Brief at 26-27, 31 and 35, other

---

[12]A nonimmigrant visa is issued upon the condition of nonimmigration, that is, upon the assurance that the alien does not intend to immigrate, that is, that the alien maintains a residence abroad to which he intends to return and he does not intend to attempt to stay permanently in the United States.

counts of the complaint – which were also dismissed by the circuit judge on summary judgment – did not depend on the existence of a written contract or a detailed oral contract. A detailed contract certainly bolsters these claims, but the absence of such a contract is not fatal to any.

## III. Roughly Seriatim Replies to Other Arguments in Respondents' Brief.

In their brief at 3-11, Respondents argue, despite failure to timely and properly raise the issue, and despite multiple issues of fact, that the oral contract entered into between Ibanez and Coves Darden falls within the Statute of Frauds and is therefore unenforceable. As discussed thoroughly in Appellant's Brief at 23-25, factual issues preclude summary judgment ruling that as a matter of law, the Statute of Frauds applies. Most simply put, the Respondents did not present to the Circuit Court, material showing that there was no genuine issue as to the fact of whether the oral contract was impossible to have been performed within one year.

Witness Michael Libertore, an immigration lawyer, could clarify that it was always possible for the visa to have been granted for a period of less than a year. (Coves Darden's supplemental responses to interrogatories, dated October 9, 2013 (R. pp. 453-454).) The presence of such a witness, whom Respondents did not depose, forecloses any possibility of summary judgment on the issue.

The Statute of Frauds was not stated as among the particular grounds for the Respondents' summary judgment motion, nor was it stated in any brief until after the motion had been heard twice. With consent of Coves Darden, Respondents amended their Answer to the Complaint while their summary judgment motion was still pending, to add the Statute of Frauds as a defense. Respondents engaged in no discovery whatsoever on the issue of the Statute of Frauds, and made no Rule 56 showing with respect to it.

Yet, Respondents argue that the supplemental responses to interrogatories, in which Mr.

Libertore's available testimony is disclosed, are "wholly insufficient" to "raise an issue" about the Statute of Frauds defense, which was not even an issue in the summary judgment motion.[13]

Under Rule 56(c), SCRCP, summary judgment shall only be rendered if, among other things, any "answers to interrogatories" on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party's burden is to show that, taking into account all of the described materials, there is no genuine issue as to any material fact. Respondents failed.

For decades, and as recently as 2009, South Carolina has adhered to the rule that even a "scintilla" of evidence in favor of the nonmoving party requires denial of summary judgment on that issue. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

There is no statement anywhere in any section of Rule 56 which allows a court, looking for that scintilla[14], to ignore answers to interrogatories.

And there is no requirement anywhere in Rule 56 that interrogatory answers set forth "evidence" in admissible form or in any other required form.

As previously discussed, Rule 56(e) specifically permits other relevant materials to be considered by the court, as follows: "The court may permit affidavits to be supplemented or

---

[13] In support of their assertion, Respondents cite only Rule 56(e), SCRCP, which relates solely to the required contents and qualifications of affidavits, whereas the discovery response in question is not an affidavit, and is not submitted in opposition to an affidavit.

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

opposed by depositions, answers to interrogatories, or further affidavits."[15] The Official Reporter's Note to Rule 56 describes this provision as a "needed addition."

It is the moving party's burden, in the first instance, to (1) state at the outset, with particularity, the grounds for its motion, (2) file at the outset, any supporting material, and (3) demonstrate, i.e., not simply make a bald claim regarding, the absence of evidence creating a genuine issue as to every fact material to the motion. Respondents, however, argue in their brief at 5, with no authority, "Of course, a trial court does not rule on an issue based on what someone may say about it." (Emphasis in original.) Yes it does. On a motion for summary judgment, the trial court frequently does exactly this, and denies summary judgment when the moving party has not met its burden.

Respondents' esteemed counsel's argument that an exception to the Statute of Frauds was not "raised or preserved" by Coves Darden is simply incorrect on all counts. Respondents overlooked the fact that Respondents did not themselves raise the affirmative defense of the Statute of Frauds until after Respondents had already filed two summary judgment motions. The Circuit Court had held a hearing and received various briefings with no mention of the issue before the Respondents ever raised the issue.

From the very earliest time that the Statute of Frauds was brought up as an issue, Coves Darden responded to it, noting that the issue was not properly before the court. In open court in the second hearing when Respondents first argued the issue, Coves Darden's counsel responded as follows:

> First, they haven't pled the statute of frauds, which is an affirmative defense, which if not pled, doesn't apply. Second of all, the statute of frauds, there are exceptions to the statute

---

[15]In the instant case, Respondents never even filed affidavits in order to attempt to make a prima facie summary judgment showing; indeed, they never even stated grounds at the time of filing their motion.

of frauds.

* * *

Now, under the statute of frauds, Your Honor, there are a number of exceptions, and one is, that the statute of frauds only applies if it was impossible, impossible to perform this agreement within the space of one year.

* * *

The statute of frauds is a whole 'nother issue, as they say, and it hasn't been raised --

THE COURT: .... And does it say impossible or does it say impractical?

MR. STANTON: My recollection is that it has to be impossible to be performed within the space of one year.

THE COURT: I don't think that is right.

MR. STANTON: And there are other exceptions as Your Honor knows, too. My main point is, that hasn't been raised, it hasn't been briefed, it hasn't been argued. They have not raised it as an affirmative defense, so it's not even on the table.

(Trans. of May 20, 2013 Hrg., 8:22 to 10:11 (excerpted), R. pp. 71-73.)

The nonapplicability of the Statute of Frauds, with objection that the Statute of Frauds was not before the court, appeared in every brief or submission made by Coves Darden to the court thereafter.

Exceptions to the Statute of Frauds are not elements of a claim and are not affirmative defenses which must be pled. To the converse, the Statute of Frauds is a defense which must be pled, and if it is to be the subject of a motion for summary judgment, affirmatively establishing the defense, the burden is upon the moving party to establish the applicability of the defense, and negate the exceptions to it. In this, Respondents failed.

Nevertheless, in their brief at 6, Respondents also argue that an excerpt of the affidavit of Miguel Coves establishes that the "contemplated" employment under the oral contract was a time between two and three years. This argument establishes nothing. The parties did contemplate that the relationship would be between two and three years. However, the parties agreed and recognized that what they contemplated would not be definitive if the immigration authorities only allowed something different. (See Coves Aff. ¶ 2, R. p. 280.)

In their brief at 7, Respondents initially admit controlling law already cited by Coves

Darden regarding instances in which the Statute of Frauds does not apply. However, Respondents' argument against the application of the controlling law is an assertion contrary to the controlling law itself. That is, where the controlling law provides that a contract is only "within" the statute in instances in which it is "impossible" for the agreement to have been performed within one year, Respondents argue that mere possibilities do not take the agreement outside the purview of the statute. Respondents dismiss as "sheer speculation," the possibility that the immigration and naturalization service might grant a visa for a period of less than one year. Sheer speculation is an historically valid basis on which oral contracts have been held to be outside the Statute of Frauds. The South Carolina authorities cited in Coves Darden's May 24, 2013 Mem. at 7 (R. p. 410) clarify that "[t]he fact that performance within a year is highly improbable or not expected by the parties does not bring the contract within the scope of this clause."

In the instant case, the evidence is more than sheer speculation. Mr. Libertore, an experienced immigration attorney, is prepared to testify that, not only do the immigration authorities have the power to grant visas for less than the expected duration, but he has also personally seen it happen. Respondents repeat their now-familiar last-ditch claim that the evidence creating the triable issue of fact must be "admissible." Not only is this argument incorrect under South Carolina law, as discussed above, but when he is called to testify, Mr. Libertore's testimony would be admissible. Further, Respondents made no timely objection to the admissibility of the supplemental interrogatory response or to the underlying expected testimony of Mr. Libertore.

Finally, Respondents attempt to distinguish the possibility of performance within one year from the possibility of discharge within one year. Here, in their brief at 8, Respondents cite

sections of the Restatement (2nd) of Contracts, which may be at odds with the controlling South Carolina case law they agree with on the page before. Arguments and inferences as to whether the facts can be viewed as establishing a "condition or contingency which may occur within one year," on the one hand, or as an "excusing or supervening event," on the other, are best left to a fuller development of the facts and a determination by jury.[16]

In their memorandum at 9, Respondents argue that the doctrine of part performance, as an exception to the Statute of Frauds, does not apply in actions solely for damages at law. The instant action was for damages and injunction.

Respondents also argue that Coves Darden did not raise the particular exception of part performance in the court below. Coves Darden did immediately deny the applicability of the late-raised Statute of Frauds in the action below and stated there were numerous exceptions. The Statute of Frauds issue, itself, was not raised by Respondents in either their December 4, 2012 motion for summary judgment, or their January 28, 2013 motion for summary judgment, or in any brief until after the motion was heard twice.

Simply bringing up an issue in the course of oral argument, the second time a matter has been heard, does not constitute a Rule 56 showing by the moving party. Further, there were ample facts in the record showing not only the payment of consideration, but also far more than partial performance on the part of Coves Darden. Ibanez's own application for a leave of absence from his employer in Spain, the visa application paperwork submitted to immigration authorities, pay stubs, and Ibanez's physical occupation of a home provided for him, all were

---

[16]South Carolina case law clearly holds, for example, that employment of a person for life during his satisfactory performance, does not describe a contract within the Statute of Frauds, although unsatisfactory performance could be viewed as a power to cancel and a death could be viewed as an event discharging a duty to further perform. Again, examination of exception to a last-minute affirmative defense, which was not included among the grounds for summary judgment at the time of filing the motion, should not be necessary.

confirmatory of the existence of a contract.[17]

In their brief at 11, Respondents argue that a particularized statement of the South Carolina doctrine of independent consideration was not "raised" by Coves Darden in the court below. As previously discussed, Coves Darden immediately pointed out that the Statute of Frauds did not apply in this case, even if the Statute of Frauds, which was raised too late to be before the court on summary judgment, were to be considered an issue in the case.

Additionally, Respondents argue that the record contains no evidence of independent consideration. Here, Respondents characterize the sole consideration to Mr. Ibanez as "payment of his salary and providing him with a place to live." If Respondents' characterization is to be accepted, then other investment and expenditure by Coves Darden would be independent. These expenditures would include paying the man's travel expenses before there was ever a contract, paying the man to work in Spain while waiting on the visa, then paying all the legal expense of the visa application, paying for further travel of Ibanez, paying Ibanez's cable bill, providing Ibanez's car, providing Ibanez a family dog, etc.

In their brief at 12, Respondents now retreat from the ruling of the Circuit Court that Ibanez categorically could not be considered under any state of facts to owe a "duty of loyalty" to Coves Darden. Ibanez was not sued only for breaching his fiduciary duty of loyalty, but also for violating his fiduciary duties of honesty and information and his contractual duties of exclusivity,

---

[17]In their brief at 10, Respondents further argue that the equitable doctrine of part performance does not apply to personal service contracts. Although, as acknowledged in Appellant's Brief, the doctrine arises most often in instances of contracts concerning the conveyance of real estate, Respondents have cited no South Carolina case supporting their argument. The only authority provided by Respondents is an assertion that the "courts" have "routinely" held as Respondents now argue, accompanied by citation of only three Florida intermediate appellate court cases. No other courts. Even the Florida cases, when read for their "roots," lead to a rule that is far from categorical. The South Carolina law of equity, particularly South Carolina law pertaining to the related doctrine of independent consideration, suggests that the law in South Carolina differs.

loyalty, and noncompetition. (Statement of the Case, App. Brf. at 4.)

In their brief at 12-18, regarding fiduciary duties of employees, Respondents finally recognize that employees do owe their employers fiduciary duties, and that the dimensions of those fiduciary duties are describable by reference to the particular employment situation, the duties and station of the employee, and the employee's relationship with the employer.[18] Respondents admit that the issue of fiduciary duties "is not black and white." (Respondents' Brief at 12.) A complicated and only partially developed factual record pertaining to a matter which is not black and white, is not a record on which summary judgment may be granted.

Respondents state that Coves Darden cites no authority for the proposition that an employee per se owes fiduciary duties to an employer. He does. Futch v. McAlister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999). Coves Darden also cited definitions from the Restatement (3rd) of Agency.

Respondents make various arguments to the effect that fiduciary duties are not owed in

---

[18]Respondents imply that a janitor and a chief operating officer do not have equal fiduciary duties, and incorrectly characterize Coves Darden's arguments to be to the contrary. They do both owe fiduciary duties. However, if a janitor does not have high-level interactions with the customers of his employer and engage in competitions on behalf of his employer which are designed to enhance the value of his employer's goods, and serve as a public relations measure on behalf of his employer, it serves very little purpose to observe that the janitor has a fiduciary duty not to do these things for a direct competitor in a manner which is a direct detriment to his employer.

In their brief at 13, Respondents discuss various sections of the Restatement (3rd) of Employment Law, which actually serve to confirm the error of any holding that an employee does not owe any duties to his employer. Respondents have gone from arguing that there was no fiduciary duty, to arguing for the existence of a "varying" fiduciary duty. The authorities cited by Respondents distinguish between whether a remedy should be in tort or in contract. They do not hold that there is a lack of duty, or a lack of remedy. The discussion provided by Respondents illustrates the error of granting summary judgment. In their brief at 14, Respondents vacillate from this discussion, stating, "As noted above, the mere existence of an employer-employee relationship, standing alone does not give rise to fiduciary obligations." This was not the proposition "noted above." Further, the facts of the instant case do not involve a "mere" employer-employee relationship standing alone."

nonfiduciary relationships. This protracted argument begs the question before this Court, which is whether the relationhip in question was a fiduciary relationship.

Respondents also claim that the abundant evidence of Ibanez's special station and relationship is somehow "inadmissible."[19] This Court can consider all of the circumstances of the relationship, including the fact that Ibanez agreed to be the godfather of Coves and Darden's children, the fact that Coves Darden trusted Ibanez enough to pay him in Spain to work on the premises of a special supplier before Ibanez ever started stateside employment, and that they asked him to stay for weeks in their house on their farm in the Aiken area and watch over it while they traveled to Spain to attend to other business.[20]

In their brief at 17, Respondents assert that secretly planning to leave exclusive employment with Coves Darden and secretly performing services for Half Moon, a direct competitor, do not constitute a duty of the breach of loyalty.[21] Respondents ignore Coves Darden's informed suspicion that Ibanez intentionally compromised his performance and duties

---

[19]In their brief at 15, Respondents recite the familiar standard of Rule 56(e), SCRCP, which applies "when a motion for summary judgment is made and supported as provided in this rule." However, nowhere in any of the 31 pages of Respondents' brief do they ever demonstrate that they made and supported a motion for summary judgment as provided in Rule 56.

[20]Similarly, in their brief at 16, Respondents characterize as "wishful thinking," and as matters not supported by a shred of "admissible" evidence, certain matters recounted in Appellant's Brief. The record undeniably reveals that Coves Darden agreed to pursue a complicated program to hire Ibanez, that Coves Darden agreed to have Ibanez work where Coves and Darden lived, that Coves Darden agreed to have Ibanez deal with rare horses, that Coves Darden agreed to have Ibanez identified with their brand, that Ibanez was highly paid, that Ibanez was heavily advertised by Coves Darden, and that Ibanez's employment was a large investment for Coves Darden.

In the same vein, Respondents' calling Coves Darden's trust in Ibanez "unilateral" does not eliminate a genuine question of fact as to whether it was unilateral. In his affidavit, Miguel Coves stated Ibanez "invited and accepted" the trust. (R. p. 280.)

[21]Respondents continue to ignore the breach of duties of honesty and information, and the breach of contractual duties.

in order to develop business contacts. Respondents also ignore evidence in the record indicating that Ibanez pursued various "clinics" and other out-of-house teaching or riding engagements only after leaving Coves Darden. Respondents assert that "secretly planning to leave one's employment is not a tort in South Carolina."

Ibanez's plan involves doing harm to the employer while still employed, and lying about matters in the employee's charge and duty while still in the employ of the employer, and working for a direct competitor in violation of an agreement for exclusivity, while still in the employ of the employer.

In their brief at 18, Respondents submit that an employee may work for a competitor of the first employer if five conditions are present.[22] Ibanez fails on all counts. He had an exclusivity agreement with the employer, he was in a special relationship of trust and confidence, all of his horsework time was committed to Coves Darden, and his very reason for being in the United States was that he was a more high-profile and more experienced trainer of PRE horses than could be obtained in the general market in the United States.[23]

---

[22]In their brief at 24-26, Respondents similarly argue for the existence of a qualified privilege exception in instances of job offers by competitors. The word "qualified" should sound the summary judgment denial alarm. Respondents cite one North Carolina case to establish the soi-disant "privilege." A simple reading of the lengthy quoted passage reveals that Ibanez would not qualify. In the instant case, there is no basis for a determination as a matter of law that Ibanez was a bare at-will employee; the facts in the record indicate that there was an agreement for exclusivity; the facts in the record indicate Derr represented to Ibanez that she would agree to break the law concerning a prohibition on outside compensation for earnings; and the facts of the record indicate Ibanez's departure was calculated to harm Coves Darden by leaving it with no rider for two planned competitions in the same dressage community in which both Coves Darden and Half Moon Stables competed. Efforts to delineate the inapplicable "qualified privilege" therefore serve no end in the instant case.

[23]This was not a case of a grocery store worker showing up too tired for work because she had been holding down a shift on another job at a cardboard box factory or even another grocery store. Ibanez was taking time from Coves Darden specifically to improve a competitor's standing, when he was supposed to be preparing for two planned competitions for Coves Darden which he secretly planned to abandon at the last minute.

In their brief at 22, Respondents argue that there could be no tortious interference with contract because there was no proof of an oral or written contract. There is evidence in the record of both. Tortious interference with contract is a claim directed, not to Ibanez, but to Respondent Derr. The Statute of Frauds is not an available defense for a third party to the contract, here, Derr. Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc., 294 S.C. 169, 363 S.E.2d 390 (Ct. App. 1987); Hatcher v. Harleysville Mut. Ins. Co., 266 S.C. 548, 225 S.E.2d 181 (1976).

In their brief at 23, Respondents argue there is no "proof" of intentional procurement. "The requisite level of intent also exists if the interferor knows that the interference is certain or substantially certain to occur as a result of his [or her] actions." Commerce Funding Corp. v. Worldwide Sec. Servs. Corp., 249 F.3d 204 at 212 (4th Cir. 2001).[24]

In their brief at 26, Respondents assert that Coves Darden mis-cites Commerce Funding. A closer reading of Commerce Funding indicates that justification based on "legitimate business competition" depends upon the interferor either having his or her own competing contract concerning the third person (i.e., a financial interest), or the contract in question being one that is terminable at will. Respondents imply that the question with respect to contracts terminable at will is one of "improper purpose." It is improper methods or means.

In their brief at 27-30, just as did the Circuit Court, Respondents fail to recognize that the

---

[24]Derr had Ibanez ride her horses, she encouraged him to leave Coves Darden, she agreed to handle getting his visa switched and to begin doing so before he quit Coves Darden. She signed him up to ride in competition for her while he was still Coves Darden's exclusive employee. Statements both in Derr's answer and in her deposition have been shown to be materially incorrect. Any claim by Derr that a jury should infer that she did not know her actions would cause Ibanez to lie, defer his duties, leave when shows known to her were planned, and quit without any notice, should be presented to a jury.

UTPA is designed to address both anticompetitive behavior and behavior injurious to consumers. Just as did the Circuit Court, Respondents overlook the fact that the anticompetitive act of tortiously interfering with the contract between Coves Darden and Ibanez is a component of the unfair trade practices claim. The Respondents' flawed analysis has been refuted by Coves Darden in Appellant's Brief at 40-42. Among other things, the literal truth of misleading advertising is not a refuge for the advertiser engaging in it, and it is still false advertising.

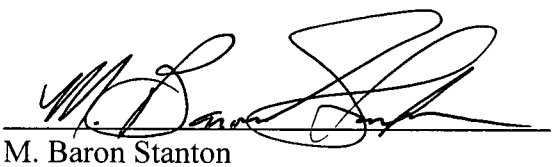
As moving parties, Respondents never pointed to any materials of record which had any bearing on the issue of damages under the unfair trade practices count.[25]

Respondents also wholly fail to address the fact that Coves Darden additionally prayed for injunctive relief against Respondents.

## IV. Conclusion.

For all the reasons set forth in Appellant's Brief, it is respectfully submitted that the Circuit Court erred in granting summary judgment and in dismissing the case. The Circuit Court should be reversed, and the matter should be remanded for unimpeded discovery and for trial.

Respectfully submitted,



M. Baron Stanton
STANTON LAW OFFICES, P.A.
1728 Main Street
P. O. Box 245
Columbia, South Carolina 29202

---

[25]Damages from false advertising are generally viewed by courts very flexibly, because of the inherent difficulty in quantification. Under the Lanham Act, for example, several forms of monetary relief are possible, including the amount of profits lost as a result of the defendant's false advertising, or the defendant's profits gained as a result of the false advertising. 15 U.S.C. §1117(a). There is even a doctrine allowing the plaintiff to use the defendant's advertising costs as a measure of the profits of the defendant, on the basis that a party would not spend advertising dollars unless the party determined that the profits flowing from the advertising would more than justify the expense of the advertising. See U-Haul Int'l Inc. v. Jartran Inc., 793 F.2d 1034, 1042 (9th Cir., 1986).

803-929-1484
ATTORNEY FOR APPELLANT
COVES DARDEN, LLC

Date: November 18, 2014