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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

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SC Court of Appeals

CASE NO. 2011-CP-21-941

Tracking Number: 2013-001764

Scient Partners, LLC .... Appellant,

v.

Pinnacle Network Solutions, Inc. and Cliff Smith .... Respondents.

BRIEF OF APPELLANT

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INDEX

Page

I. TABLE OF AUTHORITIES ii

II. STATEMENT OF ISSUES ON APPEAL 1

III. STATEMENT OF THE CASE 2

IV. STATEMENT OF THE FACTS 3

V. ARGUMENT 10

THE TRIAL COURT ERRED IN DIRECTING A VERDICT AS TO THE CONSPIRACY THEORY WHEN, VIEWED IN THE LIGHT MOST FAVORABLE TO APPELLANT, IT COULD HAVE BEEN PRESENTED AS AN ALTERNATIVE THEORY OF RECOVERY WITH ITS OWN PLEADED AND PROVEN SPECIAL DAMAGES.

VI. CONCLUSION 17

TABLE OF AUTHORITIES

Page

I. STATUTES AND COURT RULES

17 U.S.C. § 106 15

South Carolina Trade Secrets Act, S.C. Code § § 39-8-10 et. Seq. 2

S.C. Code § 39-8-40 14

S.C. Code § 39-8-110 15

II. CASES

Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc., 279 S.C. 468, 309 S.E.2d 763 (Ct. App. 1983) 16, 17

Callaway Golf Co. v. Dunlop Slazenger Group Americas, Inc., 295 F. Supp. 2d 430, 437 (D.Del. 2003) 15

Combined Metals of Chicago Ltd. P'ship v. Airtek, Inc., 985 F. Supp. 827, 830 (N.D. Ill. 1997) 16

Cowburn v. Leventis, 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005) 11

Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010) 12

Ellis v. Davidson,358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004) 11

Enhance-It, L.L.C., v. American Access Technologies, Inc., 413 F. Supp. 2d 626; (D.S.C. 2006) 16

Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996) 11

Goble v. American Ry. Express Co., 124 S.C. 19, 115 S.E. 900 (1923)) 12

Island Car Wash, Inc. v. Norris, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987) 11, 12

Kuznik v. Bees Ferry Associates, 342 S.C. 579; 538 S.E.2d 15 (Ct. App. 2000) 11

LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 370 S.E.2d 711 (1988) 11

Lee v. Chesterfield Gen. Hosp. Inc., 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986)...11, 12, 13,16

Lyon v. Sinclair Refining Co., 189 S.C. 136, 200 S.E. 78 (1938)...11

Minyard Enterprises, Inc. v. Southeastern Chemical & Solvent Co.,
184 F.3d 373, 381 (4th Cir. 1999) 16

Nucor Corporation v. Bell, 482 F. Supp. 2d 714 (2007) 15, 16

Peoples Federal Savings & Loan Ass'n of S. Carolina v. Resources Planning Corp.,
358 S.C. 460, 596 S.E.2d 51, (2004) 11

Pye v. Estate of Fox, 369 S.C. 555; 633 S.E.2d 505 (2006)...11

Robinson v. Metts, 86 F. Supp. 2d 557 (D.S.C. 1997) 11

Save Charleston Found. v. Murray, 286 S.C. 170, 333 S.E.2d 60 (1985)................................16

Servo Corp. of America v. General Elec. Co.,
393 F.2d 551, 555 (4th Cir. 1968) 15

Sorrell's Case [1925] A.C. 700, 712 12

Stone Castle Financial v. Friedman, Billings, Ramsey & Co.,
191 F. Supp. 2d 652, 658-659 (E.D.Va. 2002) 15

Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 278 S.E.2d 607 (1981)......................11

Trandes Corp. v. Guy F. Atkinson Co., 996 F.2d 655, 659 (4th Cir. 1993) 15

Vaught v. Waites, 300 S.C. 201, 387 S.E.2d 91 (Ct. App. 1989)...11

STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ERR IN DIRECTING A VERDICT AS TO THE CONSPIRACY THEORY WHEN, VIEWED IN THE LIGHT MOST FAVORABLE TO APPELLANT, IT SHOULD HAVE BEEN PRESENTED AS AN ALTERNATIVE THEORY OF RECOVERY WITH ITS OWN SPECIAL DAMAGES?

STATEMENT OF THE CASE

On April 11, 2011, Appellant Scient Partners, LLC ("HillSouth")[1] initiated this action against its former employee, Respondent Cliff Smith and Smith's new employer, Pinnacle Network Solutions, Inc. ("Pinnacle"). While the Complaint and Amended Complaint asserted a number of causes of action, the matter proceeded to trial on the causes of action for civil conspiracy and violation of the South Carolina Trade Secrets Act, S.C. Code § § 39-8-10 et. Seq. (hereinafter "TSA"). The matter was tried by a jury in Florence County Common Pleas Court from April 22nd to April 25th, 2013. At the close of the Appellant's case in chief, the trial court directed a verdict on the conspiracy cause of action. After deliberation, the jury returned a verdict for the Respondents finding that neither had violated the TSA. Appellant made post trial motions for a new trial and for judgment not withstanding the verdict – which were denied by the Court's written order filed July 3, 2013. Respondents made a post-trial motion for attorney fees under the TSA which was also denied by separate written order of that same date. Appellant filed Notice of Appeal to this Court on August 8, 2013.

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[1] Although incorporated as Scient Partners, LLC, the Appellant conducts business under the trade name HillSouth and that name was used consistently at the trial of this matter. HillSouth will also be used in this Brief for consistency.

STATEMENT OF THE FACTS

The Proprietary Investment By Appellant And Its Theft

This is a case of employee disloyalty and theft. The Respondent Smith, once an employee of the Appellant – a firm that provides individualized technology (computer) based solutions -- spent months working together with an entire team of Appellant's staff, including certified technology specialists,[2] and specialized partners, to put together an integrated technology solution to the complex retail management needs presented by the unique campus and tourist business known as South of the Border in Dillon, South Carolina (hereinafter "SOB"). SOB's campus includes some 300 acres including hotels, restaurants, gift shops, and gas stations. R. p. 64 line 25 – R. p. 65 line 10 (Testimony of Ryan Schafer). As described more

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[2] The Appellant has been repeatedly recognized for its expertise in the field of information technology. As summarized by Appellant's founder Robby Hill, R. p. 166 lines 6-18,

> I value my company's participation as being a leader in the technology industry, and we have been recognized at HillSouth with several awards. Last year we were honored with Industry Magazine. They named us one of the most innovative 250 technology companies in the country and that was this year end, the 250 Award. They also honored us with the fast growth 100 meaning we're one of the hundred best growing technology companies that they recognized. We were also honored to be ranked Number 994 on the Eight Magazine list of the 5,000 fastest growing companies in the United States, and for the past two years I've been recognized at the White House as one of the top 100 young entrepreneurs of the United States of America.

As Chief Technology Officer Andy Patel described, one of the certifications (CCNA) alone requires a two year training program at the technical college. Moreover, becoming a Premier partner with the network equipment vendor Cisco requires its own certifications, training, and testing (with significant corresponding fees and costs) – but results in an enhanced relationship and access to the vendor's own experts while working on projects like SOB. R. p. 156 line 16 through R. p. 158 line 3 (Patel Testimony).

completely below, the evidence in the record confirms that Appellant's SOB design work had value and was reasonably guarded.

The Respondent Smith was HillSouth's point of contact for the SOB project during the development period in the Fall of 2009 and Spring of 2010. Respondent Smith was well suited for this role since he and his wife were personal friends with SOB's director of information technology (Chris Bailey) and that director's spouse. , R. p. 108 lines 4-9 (Smith testimony); R. p. 169 line 19 to R. p. 170 line 1 (Hill testimony); and R. p. 213 lines 9-14 (Bailey testimony).

After developing a proposed solution for SOB's needs, the Appellant was poised to recoup its investment of time and expertise by contracting to provide the services and equipment literally and figuratively mapped out in the planning process.[3] Because his friend was posted on

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[3] The time (months) and expertise spent in the planning process was described by numerous witnesses: Ryan Schafer (see excerpt below), Robby Hill (see excerpt below), Andy Patel of HillSouth (R. p. 155 line 6 – R. p. 161 line 17), James Hart of BBCI (R. p. 207 line 18 – R. p. 209 line 2), and reluctantly Respondent Smith – who coyly was reluctant to acknowledge his former employer's work (R. p. 105 line 20 – R. p. 107 line 21) until confronted with a mountain of his former e-mails recovered by Appellant after his departure. R. p. 110 line 5 – R. p. 124 line 19.

Mr. Schafer described the HillSouth project investment at the South of The Border as follows:

> The pretty much made an inventory of all the shops, how many cash registers we needed where, where the backup servers would be in the offices, worked the cabling company [BBCI] to figure out a layout of the fiber optic cable that needed to be layed [sic] and where switches needed to be to take care of it.
> R. p. 66 lines 8-17.

CEO Hill of Appellant described the collaborative effort, in part, as follows:

> Q All right. And -- but the proposal that was made by HillSouth to south of the Border at the end of March 2010, it was in partnership with BBCI, was it not?
>
> A Absolutely. You know, the components that HillSouth was presenting were made to fit with the solution that BBCI was bringing to the table, and we were definitely partners in the efforts and my HillSouth employees, namely

the inside of the SOB technology department, the Respondent Smith knew when SOB would be ready to commit to a contract. Smith Testimony, R. p. 148 line 16 to R. p. 149 line 16 (Bailey advises Smith on July 9, 2010, that SOB is ready to start).

Thus, just before the Appellant could realize the recoupment of its investment, the Respondent Smith opportunistically resigned his employment with the Appellant (on Friday, July 23, 2010) , two weeks after Bailey signaled that SOB was ready to deal, and offered the Appellant's pain stakingly developed proposal to SOB through his new employer, the Appellant's competitor -- Respondent Pinnacle, two days later.[4]

Neither Respondent Smith or his close friend Chris Bailey informed SOB President Ryan Schafer that this new proposal was no longer coming from the known and trusted experts at HillSouth but rather from a misappropriating competitor-- one not favored by Schafer.[5] As Mr. Schafer explained, "I didn't have any idea that we were dealing with a company other than

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> Andy Patel, had spent many many hours and days and weeks consulting with them using his expertise.

Transcript, R. p. 168 lines 17-25.

Incredibly, Pinnacle's officer Brent Tiller suggested that "anybody could have" designed an appropriate integrated network for the 300 acre SOB campus with a little help from BBCI. Transcript, R. p. 85 lines 11-13.

[4] While pre-trial discovery from the Respondent Pinnacle (R. p. 226 (Plaintiff's Trial Exhibit 5); R. p. 77 line 25 – R. p.78 line 18 (Introduced at Trial)) allegedly prepared with available personnel records (Testimony of owner/officer Brent Tiller, R. p. 80 lines 12 – 19) stated that Smith's employment with Pinnacle began August 6, 2010, the Defendant Smith admitted at trial that his Pinnacle employment began Monday July 26, 2010. Smith Testimony, R. p. 129 lines 10-14. *Likewise, while Respondents confirmed by interrogatory response that they communicated by e-mail with SOB (R. p. 225 (Plaintiff's Trial Exhibit 3)), this technology company failed to find and produce any such e-mails.* Transcript, R. p. 81 lines 4-9. Despite this non-production, Respondents answered that such e-mails with SOB began on August 11, 2010, and not over the July 24, 2010 weekend as SOB e-mails later confirmed and Respondents were forced to admit at trial. R. p. 260 (Exhibit 17-A). Smith Testimony, R. p. 133 lines 13-22.

[5] See Schafer Testimony, R. p. 68 line 4 to R. p. 69 line 18.

HillSouth. I was never told hey, by the way, we're not dealing with HillSouth anymore." As Mr. Schafer further noted, it was HillSouth and BBCI – not Pinnacle that spent the time and the effort to meet with him, to participate in conference calls, to map out the SOB campus, and to design a system for SOB's specific needs. Transcript, R. p. 74 line 24 to R. p. 75 line 11 (explaining how Chris Bailey was not "straight" with him about the contractual switch to Pinnacle). Because the same two people (Respondent Smith and his friend Chris Bailey) came to the contract signing and controlled the flow of information about the project,[6] Schafer initially thought he had signed an agreement with HillSouth. Schafer Testimony, R. p. 72 line 25 – R. p. 73 line 9.

The Value of The Proprietary Work Product, Its Protection, And Smith's Awareness

The planning and development work done for SOB is the proprietary work product offered by firms such as HillSouth as the key element of their service-based business model where compensation for that investment ultimately recouped in the sale of equipment and follow-up service of the infrastructure created. As CEO Robby Hill of HillSouth explained,

> But one of the things that I've noticed in my industry is that you can go to HP or to Dell or to Microsoft and you can purchase a bunch of items directly from these companies. Well, the only value add that my company and Pinnacle or anybody in our industry has to offer is the -- our ability to take these HP, Dell, Microsoft products and assemble them into a solution that solves the problem for your company.
>
> Now, not only do we do that assembling, we also have to support it after it's installed and -- so, the only benefit of purchasing the solutions, as we're talking about in this case in my opinion, is to

[6] Schafer also testified that Bailey and Smith stopped copying him on e-mails about the project. Transcript, R. p. 76 lines 12-16, R. p.70 line 20 – R. p.71 line 5. Schafer also suggested that he thought SOB files had been purged of HillSouth e-mails. Transcript R. p. 75 line 17 – R. p. 76 line 11.

> afford the opportunity to have one vendor who is in charge of everything.
>
> You know, looking at the South Of The Border project and my familiarity with it, you know, the BBCI[7] solution that we will hear more about I'm sure, in conjunction with the Pinnacle solution, separately would mean nothing. But together, they form a problem solved for the customer, and so that's what my company does for a living.
>
> You know, people, our customers, the businesses, and they may pay a little bit more to use us, but they value that we're experts in what we do and they trust our credentials and trust us to take care of that -- this problem in a reliable manner using technology.

Hill testimony, R. p. 167 line 11 – R. p. 168 line 8.

Respondent Smith had full knowledge of the confidential and proprietary nature of HillSouth's development work. By the time he left, Smith had been with the firm some 3 years and had executed an employment handbook, [8] a non-compete agreement, [9] as well as used

[7] BBCI (James Hart) was the cabling design and sales firm who partnered on the SOB project with Appellant – and subsequently with Pinnacle.

[8] R. p. 227-247 (Plaintiff's Trial Exhibit 7). Employee Handbook signed by Respondent Smith ("Employees must carefully protect and must not disclose to any third party, confidential and proprietary information belonging to the company or its customers. Such information includes, but is not limited to… matters of a technical nature such as computer software, product sources, product research and design … methods, procedures, and analysis, and any other proprietary information, whether communicated orally or in documentary, computerized, or other hand-able form concerning the company or its customers, operations, and businesses."). See also R. p. 86 line 13 to R. p. 90 line 1 (Smith testimony). ***After reading these provisions, Smith later testified that he didn't know, he didn't understand, it was written by lawyers, but it must not relate to the claims of this case!*** R. p. 150 line 9 – R. p. 151 line 6 (Smith testimony).

[9] R. p. 248 (Plaintiff's Trial Exhibit 8). This non-compete agreement was redacted at trial and simply treated as a confidentiality agreement or confidentiality acknowledgement because it was presumed unenforceable as a non-compete agreement. Nevertheless the document was relevant under the TSA and the conspiracy cause of action to show Respondent Smith's awareness of trade secrets and other intellectual work product of Appellant.

confidentiality agreements on other projects.[10] Extensive testimony was developed at trial from both the Appellant's CEO Robby Hill (R. p. 170 line 8 to R. p. 175 line 24; and R. p. 248 (Exhibit 8)) and from the Respondent Smith (R. p. 86 line 10 to R. p. 93 line 1; R. pp. 227-247 (Exhibits 7); and R. p. 248 (Exhibit 8)) about the extensive measures undertaken with Smith (and other employees of Appellant) to protect confidential work.

Smith's awareness of the value of the proprietary work product represented by such planning and design was further demonstrated by his effort to protect that *very same* work product from theft *immediately after he himself took it from HillSouth* and presented it, as an employed agent of Respondent Pinnacle, to his friend on the inside at SOB stamped "confidential." Smith bragged that he *voluntarily* undertook to protect this misappropriated work for his new employer after *failing* to undertake such protections for Appellant *when obligated to do so.*[11]

Despite his own signed acknowledgement and commitment to protect the Appellant's confidences, secrets, and work product, at trial the Respondents took the unbelievable unmitigated position that they had not misappropriated any "trade secrets" because the written proposal of HillSouth summarizing that work product for the customer's (SOB) consideration was not stamped or marked confidential[12] – although it was the thief who put together the final

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[10] R. p. 249-250 (Plaintiff's Trial Exhibit 9); and R. p. 171 line 7 – R. p. 173 line 11 (Robby Hill testimony describing Respondent Smith's use of Exhibit 9).

[11] R. p. 125 line 1 to R. p. 126 line 24 (Smith testimony) ("I took the initiative to do it for this, for this document."). *In contrast*, with regard to the same work product when it left HillSouth, Respondent Smith remarked, "It was not marked confidential. ***I never told anybody that it was confidential, and I did not request that it be kept a secret.***" (emphasis added)). R. p. 152 line 23 to R. p. 153 line 11 (Smith testimony).

[12] See, e.g., R. p. 217 line 22 – p. 219 line 6 (Respondent's Closing Argument by Counsel).

written proposal[13] and had the obligation to protect it – whether by marking, stamping, sealing, or encrypting.

Admitted Taking of Appellant's Work Product

Respondent Smith took the SOB proposed solution with him to his new employer, Respondent Pinnacle and used it to earn himself a handsome bonus – a bonus equal to 10% of the new home mortgage loan closed by the Respondent Smith on the same day he resigned his employment with Appellant.[14] Specifically, Respondent Smith admitted that:

1) He sent a summary quote to SOB on behalf of Respondent Pinnacle using a Pinnacle provided e-mail address at 11 AM on Tuesday July 27, 2010 after resigning Appellant on Friday the 23rd; (R. p. 128 lines 14-25);

2) The summary quote was not based upon Mr. Smith's solo work during his two days at Pinnacle (the 26th and 27th) but rather was based upon work he was part of at HillSouth; (R. p. 130 lines 14-19); and

3) The summary quote made on behalf of Pinnacle from HillSouth's work was not based merely on Respondent Smith's memory of that work but *based upon documents he took from HillSouth*; (R. p. 130 line 20 – R. p. 131 line 10);

Causation and Damages

Ryan Schafer testified that SOB would have awarded the contract to HillSouth *but for* Respondent Smith's undetected departure and use of the misappropriated information.

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[13] See the personal pronoun used in the transcript quoted in the footnote above.

[14] R. p. 95 line 4 – R. p. 104 line 14 (Smith testimony and proffer). While the trial court ruled out jury consideration of any evidence related to this new home purchase and loan, Appellant contended that it was a relevant circumstance to show the Respondent Smith's planning and confidence for anticipated compensation to be derived from his departure from Appellant with work product in hand.

Specifically, Mr. Schafer testified that *he thought he had contracted with HillSouth* or some affiliated firm, R. p. 72 line 25 – R. p. 73 line 14, and that had he known it was Respondent Pinnacle, he "very seriously doubt" that he would have contracted with them. R. p. 68 lines 11-13. At trial, the Appellant offered evidence of direct damages of $97,203.67 – a sum equal to lost profit on the SOB project. R. p. 262 (Plaintiff's Exhibit 21); R. p. 176 line 1 – R. p. 180 line 24 (Robby Hill Testimony). In support of damages to Appellant's reputation and brand, Mr. Schafer further testified that he still thought it was HillSouth under contract when "questions about some things" arose in the performance of the contract and after judging the issues against HillSouth's brand and reputation, Chris Bailey subsequently confessed "Cliff had left HillSouth." R. p. 68 line 29 - R. p. 69 line 6.

ARGUMENT

THE TRIAL COURT ERRED IN DIRECTING A VERDICT AS TO THE CONSPIRACY THEORY WHEN, VIEWED IN THE LIGHT MOST FAVORABLE TO APPELLANT, IT COULD HAVE BEEN PRESENTED AS AN ALTERNATIVE THEORY OF RECOVERY WITH ITS OWN PLEADED AND PROVEN SPECIAL DAMAGES.

Appellant in this case proceeded to trial on two potentially inconsistent but viable theories of liability: civil conspiracy and violation of the South Carolina Trade Secrets Act (the "TSA"). The risk of inconsistency from the Appellant's trial theories essentially is recognized both in the TSA itself and in the case law requiring "special damages" for claims of civil conspiracy. The solution to such risk of inconsistency is to bifurcate determination of the issues or require appropriate election of remedies at the proper time. In this case, the TSA claim was rejected by the jury, but the jury was not allowed to consider the alternative theory of civil conspiracy because of the trial court's erroneous decision to direct a verdict on that cause of action prior to any jury consideration.

The Conspiracy Requirement of Special Damages

South Carolina case law consistently states, without much explanation, that a Plaintiff asserting a civil conspiracy claim must allege and prove "special" damages. Peoples Federal Savings & Loan Ass'n of S. Carolina v. Resources Planning Corp., 358 S.C. 460, 596 S.E.2d 51, (2004); Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996); LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 370 S.E.2d 711 (1988); Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 278 S.E.2d 607 (1981); Lyon v. Sinclair Refining Co., 189 S.C. 136, 200 S.E. 78 (1938); Cowburn v. Leventis, 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); Island Car Wash, Inc. v. Norris, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987); Lee v. Chesterfield Gen. Hosp. Inc., 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986).

While no case seems to define what "special damages" *are*, a few define what "special damages" *are not* – they are not the same as damages recoverable under other theories. See Pye v. Estate of Fox, 369 S.C. 555; 633 S.E.2d 505 (2006) (damages must go beyond that alleged in other causes of action); Kuznik v. Bees Ferry Associates, 342 S.C. 579; 538 S.E.2d 15 (Ct. App. 2000) (merely realleged the prior acts in other causes of action as conspiracy but damages verdict affirmed under breach of contract and breach of fiduciary duty); Vaught v. Waites, 300 S.C. 201, 387 S.E.2d 91 (Ct. App. 1989) (no "special damages" alleged separate and apart from those alleged in contract claim); see also Robinson v. Metts, 86 F. Supp. 2d 557 (D.S.C. 1997)(plaintiff's conspiracy cause of action failed to specify damages unique to that theory). Notably, while these 3 cases (and others) demand more unique details of conspiracy damages sought, presumably so they are not duplicative of other claims, all 3 cases *also* base their demurrer or dismissal on the plaintiff's failure to show evidence of conspiratorial conduct.

In contrast, in cases where a conspiracy claim is allowed to go forward, there is little or no discussion about the fact that the conspiracy damages may *not* be unique from those sought or available under other theories. See, e.g., Island Car Wash, Inc. v. Norris, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987) (noting that even where a plaintiff fails to prove concerted design, he may still recover damages for a tort alleged to be the object of the conspiracy--with the conspiracy allegations "considered as mere surplusage" (citing Goble v. American Ry. Express Co., 124 S.C. 19, 115 S.E. 900 (1923)). In Island Car Wash, the damages found hardly seem special or unique at all – as they could have been sought in other causes of action. The damages there consisted of allegedly unauthorized payments or compensation from a car wash business – damages that could be sought pursuant to a legal and equitable theories of fraud, conversion, unjust enrichment, etc.

Conspiracy Should Have Been Allowed As A Factual Alternative To TSA

In some cases, the overt acts of the conspiracy may themselves be legal such that the conspiracy theory is the only one that will reach the damaging conduct and provide a remedy. Such was the case in Lee v. Chesterfield Gen. Hosp. Inc., 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986), where the late Judge Randy Bell writing for the Court allowed a conspiracy claim to go forward quoting the early 20th Century English case of Sorrell's Case [1925] A.C. 700, 712 (per Lord Cave, L.C.)("A combination of two or more persons willfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable.").

In Chesterfield Gen. Hosp. , the Hospital and others allegedly conspired to exercise their *lawful* right to control privileges and practices at their medical facility. Similarly, in Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010), members of Horry

County government allegedly conspired to exercise their *lawful* right to review and approve proposed property developments.

After repeated argument that the Respondent Smith's own failure to meet his own obligation to protect confidentiality removed the Appellant's work product from the protections of the TSA,[15] the jury in this case concluded that there was no trade secret protected by the TSA – accordingly use of the alleged trade secrets was lawful – and not subject to TSA liability. However, the jury-declared lawful use of the information taken from the Appellant could *still* be an act in furtherance of an actionable conspiracy – just as the lawful act of forming an employment agreement between the Appellants.[16] Indeed, there was circumstantial evidence that the use of Appellant's work product in this case was precisely that – a concerted act in furtherance of an actionable conspiracy such that the trial court did not direct a verdict for lack of proof of a conspiratorial agreement.[17] And because the jury-declared lawful use of the Appellant's information clearly did damage Appellant in a manner not remedied by the TSA, then the law in Chesterfield Gen. Hosp., Cricket Cove, and Sorrell's Case, make it actionable as

[15] Notably, this self-serving defense allows personal misappropriation to totally circumscribe the public policy behind the enactment of the statutory scheme to protect trade secrets by allowing the bad actor to remove the intellectual product from the protection of the Act.

[16] Perhaps not appreciating that such lawful overt acts could be in furtherance of an actionable conspiracy, Respondent's counsel quipped at trial that he hoped all employment contracts were not conspiracies (R. p. 201 line 24 – R. p. 202 line 1) – when it fact they are (an agreement among parties to achieve a purpose) – though most are *hopefully* not actionable as a civil conspiracy. And if Respondents here were only involved in a simple employment agreement without a corresponding misappropriation, Appellant CEO Hill testified that he would not have had any objection. R. p. 184 line 23 – R. p. 185 line 6.

[17] Transcript R. p. 202 line 2 – R. p. 205 line 3. Pinnacle corporate officer Brent Tiller admitted hiring Respondent Smith with the expectation that he bring business with him and that he did bring SOB with him. R. p. 83 line 15 – R. p. 84 line 2. Perhaps in a slip, Tiller further suggested that Respondent Smith was ripe for the picking because Smith "felt that he was ready to leave" and "had just landed them their large contract ever with, with another company…." R. p. 82 lines 8-12.

an alternative to the TSA, either through bifurcation and/or election of remedies – a proposal suggested to the trial court and rejected.[18]

This may be a case of first impression in our state courts. The federal courts, however, seem well in tune with such a possibility. In the federal courts, the issue has arisen in the context of claims that the TSA preempts common law claims such as conspiracy.

Federal Bifurcated Consideration : No Trade Secrets, No Pre-emption

The TSA itself expressly provides that:

> (A) Except as provided in subsections (B) and (C), this chapter displaces con-flicting tort, restitutionary, and other law of this State providing civil remedies for misappropriation of a trade secret.
>
> . . .
>
> (C) Any and all other civil remedies that are not based upon misappropriation of a trade secret or upon protection against misappropriation of a trade secret are governed by the rules of procedure, rules of evidence, regulations, and the common law applicable to the administrative law tribunal or court where the action is filed.

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[18] Transcript, R. p. 165 lines 4-5. In the Court's Order of July 2013 denying a new trial or JNOV, the trial court acknowledged that the Appellant had repeatedly raised the possibility an election of remedies could be made because the damages not recoverable under the TSA would then be unique to the civil conspiracy theory. R. p. 5.

Of course, the Appellant did not rely only upon the possible election between theories to recover the *same* damages (in which case they would necessarily be mutually exclusive), the Appellant also argued that there was proof of conspiracy damages beyond those recoverable pursuant to S.C. Code § 39-8-40 (which suggests TSA damages are measured by the unjust enrichment to the misappropriator); specifically, Appellant argued that there was evidence that the Respondent's conduct had damaged Appellant's brand and reputation. R. p. 199 lines 4 – R. p. 200 line 20. That argument is not abandoned here.

In its July 2, 2013 order denying a new trial, the trial court also concluded that the Plaintiff "failed to provide evidentiary proof of special damages." R. p. 5. At the hearing on the directed verdict motion during trial, however, the court acknowledged that the testimony of customer Ryan Schafer (President of SOB) "was favorable for the Plaintiff" and demonstrated that "[h]e wanted to deal with HillSouth" and later determined "that he was dealing with Pinnacle…" Transcript, R. p. 204 lines 19-23. Nevertheless, the trial court found the evidence insufficient.

S.C. Code § 39-8-110.[19]

In the United States District Court case of Nucor Corporation v. Bell, 482 F. Supp. 2d 714 (2007), Judge Duffy recognized that the preemption called for by the statute is factually dependent upon the applicability of the Act. Judge Duffy noted that "The Act only displaces those claims that seek to protect through the common law or other state law a right "equivalent" to the exclusive rights reserved to the owner of a trade secret." Thus, to make a preemption determination, "the elements of the causes of action should be compared, not the facts pled to prove them." Id. (citing Trandes Corp. v. Guy F. Atkinson Co., 996 F.2d 655, 659 (4th Cir. 1993)(discussing preemption of state remedies by § 106 of the Copyright Act, 17 U.S.C. § 106)). Obviously, as Judge Duffy observes, "*The first deter-mination which must be made in a trade secrets case, therefore, is whether, in fact, there was a trade secret to be misappropriated.*"[20] (emphasis added). Until that determination is made, preemption cannot be said to apply. Id. (citing Stone Castle Financial v. Friedman, Billings, Ramsey & Co., 191 F. Supp. 2d 652, 658-659 (E.D.Va. 2002) (observing that Courts finding preemption on a motion to dismiss first determined the existence of trade secrets)(applying Virginia's version of the uniform TSA). See also Callaway Golf Co. v. Dunlop Slazenger Group Americas, Inc., 295 F. Supp. 2d 430, 437 (D.Del. 2003). Accordingly, Nucor Corporation was able to pursue its former employee Bell and

[19] The exclusions of Subparagraph (B) are not applicable here (contract claims and claims under the South Carolina Torts Claims Act).

[20] Citing Servo Corp. of America v. General Elec. Co., 393 F.2d 551, 555 (4th Cir. 1968).

his new employer under the ***alternative*** theories of theft of trade secrets and civil conspiracy (and others).[21]

Requiring an election of theories prior to the factual determination of whether trade secrets are involved denies a litigant the opportunity to fully seek redress for wrongs as suggested by the Election of Remedies case law of this State. "[W]hen an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both." Minyard Enterprises, Inc. v. Southeastern Chemical & Solvent Co., 184 F.3d 373, 381 (4th Cir. 1999). "This rule rests on the principle that the plaintiff should have a full opportunity to prove his claim to some form of relief, but he should not receive a double recovery." Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc., 279 S.C. 468, 309 S.E.2d 763 (Ct. App. 1983). "Generally, a party is not required to make an election of remedies until after the verdict is entered and prior to the entry of judgment." Enhance-It, L.L.C., v. American Access Technologies, Inc., 413 F. Supp. 2d 626; (D.S.C. 2006) (ironically also Judge Duffy) (also citing Save Charleston Found. v. Murray, 286 S.C. 170, 333 S.E.2d 60 (1985)).

Of course, the Court below did not force the Appellant to prematurely elect between remedies; the Court prematurely made such election by directing a verdict on the conspiracy cause of action without considering that it represented an alternative theory to recover damages clearly shown that the jury might find *lawful* under the TSA. The Court's decision was

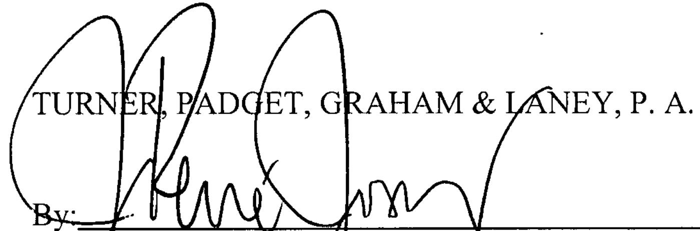
[21] Again from the Nucor decision, "It is possible that, in breach of his duties, Bell disclosed confidential information that does not qualify as a "trade secret" and is therefore not protected by the SCTSA. In such a case, causes of action for breach of duty of loyalty, tortious interference with relations, unfair trade practices, conspiracy, conversion, unjust enrichment, and imposition of constructive trust would provide remedies not available under the Act." 482 F. Supp. 2d at 726-27 (citing, e.g., Combined Metals of Chicago Ltd. P'ship v. Airtek, Inc., 985 F. Supp. 827, 830 (N.D. Ill. 1997) (breach of fiduciary duty claim not preempted where underlying information may not qualify as trade secrets).

erroneous and denied Appellant "a full opportunity to prove his claim to some form of relief." Baeza, *supra*.

CONCLUSION

Appellant was denied an appropriate opportunity to have its conspiracy claim considered by the jury as an alternative theory of liability. Thus, this Court should remand the matter to the trial court for a new trial on the theory of civil conspiracy.

January 29th, 2015



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In The Court Of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

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Tracking Number: 2013-001764

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v.

Pinnacle Network Solutions, Inc. and Cliff Smith ....Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the ***Brief of Appellant*** by depositing copies of the same in the United States mail, postage prepaid, on February 3rd, 2015, to all counsel of record at the following address:

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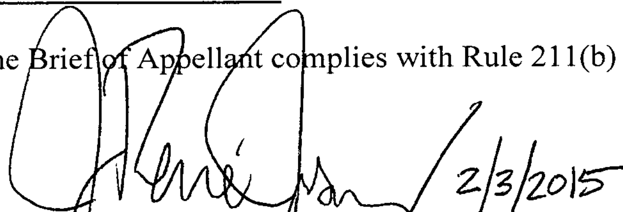
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.



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