

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

D. Garrison Hill, Circuit Court Judge

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Opinion No. 2018-UP-078 (S.C. Ct. App. Filed Feb. 7, 2018)

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DAVID WILSON, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF CAROLINA  
CUSTOM CONVERTING, LLC,.....Plaintiff,

v.

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, ZOI FILMS, LLC, AND CAROLINA  
CUSTOM CONVERTING, LLC,.....Defendants,

JOHN GANDIS AND ANDREA COMEAU-SHIRLEY, .....Third-Party Plaintiffs,

v.

CAROLINA CUSTOM CONVERTING, LLC,.....Third-Party Defendant  
and Counterclaim Plaintiff,

v.

DAVE WILSON, STEVE NORVELL, NEOLOGIC DISTRIBUTION, INC. AND FRESH  
WATER SYSTEMS, INC.,

Of Whom David Wilson, Neologic Distribution, Inc., and Fresh Water Systems,  
Inc., are the .....Respondents,

And

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, AND CAROLINA CUSTOM  
CONVERTING, LLC, are the .....Petitioners.

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**BRIEF OF RESPONDENT DAVID WILSON IN REPLY TO  
BRIEF OF PETITIONER CAROLINA CUSTOM CONVERTING, LLC**

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W. ANDREW ARNOLD  
SC Bar # 65311  
Horton Law Firm, P.A.  
307 Pettigru St.  
Greenville, SC 29601  
(864) 233-4351  
aarnold@hortonlawfirm.net  
*Attorney for Respondent David Wilson*

Other Counsel of Record:

Bruce B. Campbell  
Horton Law Firm, P.A.  
307 Pettigru St.  
Greenville, SC 29601  
*Counsel for Norvell and Neologic  
Distribution, Inc.*

Burl F. Williams  
Nexsen Pruet, LLC  
P.O. Box 10648  
Greenville, SC 29603  
*Counsel for Carolina Custom Converting, LLC*

D. Randle Moody, III  
John W. Sulau  
Jackson Lewis, P.C.  
15 S. Main St., Suite 700  
Greenville, SC 29601  
*Counsel for Petitioners John Gandis and  
Andrea Comeau-Shirley*

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## I. STATEMENT OF THE CASE

Respondent David Wilson (“Wilson”) agrees generally with Petitioner CCC’s outline of the procedural history of the case in its Statement of Claim, although there are a few omissions from the procedural history that would be helpful for the Court to know in understanding the progress of this case. First, on April 27, 2012 Wilson filed a complaint against John Gandis (“Gandis”) and Andrea Comeau-Shirley (“Comeau-Shirley”) alleging oppression and seeking dissolution and/or a buyout of his membership interest in Carolina Custom Converting, LLC (“CCC”). Gandis and Comeau-Shirley answered and counterclaimed on July 3, 2012. On October 10, 2012, Wilson filed a motion to compel the production of electronically stored financial information in its Quickbooks’ files. Per order of the court dated November 26, 2012, CCC produced uncondensed electronic QuickBooks’ files for 2011 and 2012.

On May 20, 2013, Wilson filed a motion seeking to compel the production of discovery and hard drives of Comeau-Shirely based upon the affidavit of expert witness, Catherine Stoddard, who found alterations and manipulations of Quickbooks’ electronic data produced pursuant to the court’s November 26, 2012 order. On October 28, 2013, the court ordered Comeau-Shirley to produce her hard drives for imaging and searching after determining she failed to produce emails and she altered electronically stored information in Quickbooks, including back dating transactions, deleting hundreds of thousands of dollars in inventory, and inserting accounts payable to her accounting firm. More than a thousand of previously unproduced emails were harvested from Comeau-Shirley’s hard drive over a period of six months as the parties conducted searches pursuant to the protocol set out in the court’s order. These emails were critical, and make up most of the documentary evidence introduced by Plaintiff at trial.

In addition, after a status conference on August 26, 2013, the court determined that an accounting of the financial books were in order. On October 22, 2013, the court ordered a full accounting of the financial records of Carolina Custom Converting, LLC and ZOi Films, LLC. The order appointed Del Bradshaw, Certified Public Accountant (CPA), to carry out the execution of the exhaustive review of books. The process took over nine months and cost approximately \$150,000 because the financial records needed to be normalized and in some instances reconstructed. This report was admitted into evidence in this case, and Del Bradshaw testified about his findings.

It was not until June 2013 and after a trial date had been set that CCC filed claims alleging misappropriation of trade secrets, these claims would not be served on all parties until months later. There were no motions for injunctions and protective orders, and CCC conducted no forensic examination of Wilson's computer or any Neologic computer. The filing of the trade secret claims (and many others) would delay trial another twelve months.

In September/October 2014, the parties presented evidence during a bench trial on the merits. After a four day trial on the merits and a three hour oral argument on the 5<sup>th</sup> day of the proceeding, the Court ruled quickly after having sat eyewitness to the testimony of CCC's three members (as well as Plaintiff's other witnesses and the damning testimony of court appointed accounting expert, Del Bradshaw). With instructions from the trial judge, Wilson drafted a proposed order as well as requested rulings on matters not addressed in the directions of Judge Garrison Hill. This proposed order was submitted on October 20, 2014, and the opposing parties were provided an opportunity to comment. The court took the matter under advisement and issued its own final order on January 9<sup>th</sup>, 2015, rejecting Wilson's request for prejudgment interest and attorneys fees. Wilson initially appealed several aspects of the order but decided to

abandon those grounds, and simply seek a ruling affirming the trial court's decision to finally end this litigation. CCC appealed the trial court's decision regarding CCC's trade secrets claim.

## **II. STATEMENT OF FACTS**

Carolina Custom Converting, LLC ("CCC") was organized as a manager-managed limited liability company, and John Gandis ("Gandis") was the managing member. (R. p. 38 lines 8-19; pages 976-979). Gandis held forty-five percent ownership interest. Respondent David Wilson ("Wilson") was also a forty-five percent owner of CCC; Andrea Comeau Shirley ("Shirley") held a ten percent distributional interest. After a year long attempt to force Wilson to sell his ownership interest, Gandis called law enforcement to accompany him to CCC's Greenville office to remove Wilson from his own business; once Wilson had left the premises, Gandis had the locks changed.<sup>1</sup> Wilson has never been permitted to return to his former office or to participate in the business of CCC again. Four years after his ouster and hundreds of thousands of dollars later, Wilson has still not been paid for any of his membership interest.

### **A. Dave Wilson's 20 Years of Experience in the Plastic Film Industry**

After serving active duty in the Navy during Desert Storm and while attending Furman University, Wilson became employed by working nights for Interfilm as polyester film machine operator as well as working in the warehouse with the film inventory. (R. p. 360 lines 19-p. 361 line 6). Much of this film is used as packaging: food packaging, air packaging, and flex packaging. After a year or two with Interfilm, Wilson was then recruited by another film

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<sup>1</sup> The detailed factual description of the "squeeze out" is described in detail in Respondent Wilson's brief related to the appeal of Petitioners Gandis and Shirley. These facts are helpful in understanding context especially in light of the court's ruling "Mr. Gandis and Ms. Comeau-Shirley's testimony lacked credibility in most important respects." (R. pages 1794-1795) Because there is so much disputed testimony, credibility was a critical determinant in the outcome of this trial. Examination of the emails between Gandis and Shirley makes this determination a foregone conclusion.

company, where he became employed as a film metalizer, which involved taking clear films and applying aluminum to the surface to give a better barrier. (R. p. 361, lines 7-17). After a stint at another film company, Wilson started his own film business, Palmetto Custom Films, Inc. (PCFI) in 2003 with two partners. (R. p. 362, lines 1-11). Wilson later formed his own film brokerage, Eastern Films Solutions (EFS), in 2005. (R. p. 364, lines 11-21).

By the time he formed EFS, Wilson had approximately 15 years of experience in the film business and his focus had been (and continued to be) polyester film (R. p. 365, lines 20-21; p. 366, lines 1-12). During his years in the film business, Wilson had made significant number of vendor and customer contacts as well as partnered with other film businesses and brokers for various transactions. (R. p. 365, lines 1-18; p. 366 lines 3-8). Before and while operating EFS, Wilson was a member of the various trade associations related to the film and packaging businesses, and further developed contacts and customers through these memberships as well. (R. p. 365, lines 18-25). It was through EFS that Wilson met Gandis in 2007, when EFS sold some product to VyTech, a business owned by Gandis' father before it went bankrupt. (R. p. 367, line 15-p. 368, line 11).

When Gandis and Wilson decided to form CCC, EFS customers were gradually serviced through CCC; Wilson had all the product knowledge, all the vendor/supplier contacts (and there are very few domestic manufacturers of polyester film), and all the customer contacts. Significantly, Dave Wilson had developed a relationship with Minova through EFS, and made the decision to turn this account over to CCC at its formation. This resulted in \$775,000 in revenue for CCC from that one account alone in 2008, which helped fund its start-up operations. (R. p. 63, lines 4-16). Gandis had zero accounts and no real industry contacts other than Wilson.

(R. p. 53, lines 6-12). However, Gandis offered that he had access to capital as well as a building which could be used to operate CCC. (R. p. 376, line 22-p. 377, line 8).

**B. Wilson Looks for Buyer for CCC to Remedy Squeeze Out Attempt**

Beginning in early 2011, Gandis and Shirley began an effort to force Wilson out of CCC, and after threatening to stop paying him his “guaranteed” monthly draw, buy-out negotiations began. (R. pages 1770-1789). So, in December 2011 and January 2012, Wilson began looking for a buyer for CCC with the knowledge and permission of the other two members.<sup>2</sup> (R. p. 430, line 3-p. 431, line 19). Gandis indicated he and Shirley were open to selling their interests. (*Id.*) Wilson approached various possible purchasers, including his brother-in-law Steve Norvel (Wilson’s brother-in-law who owns Neologic) as well as Filmtech, which was owned by Mark McGarel. (R. p. 430, line 19-p. 431, line 11). Filmtech was both a competitor and a supplier and a potential customer. (*Id.*)

Wilson sent McGarel CCC’s financials and received a non-disclosure from him. (R. p. 431, line 23-p. 432, line 6). Customer names were removed from the financial disclosures, and thereby providing only revenue figures necessary to compute a potential purchase price. (*Id.*) Wilson obtained a non-disclosure agreement from all the persons with whom he discussed a possible sale of CCC. (R. p. 432, lines 4-6). McGarel decided he was not interested in buying CCC, and Wilson and McGarel explored the idea of Wilson coming to work for McGarel. (R. p.

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<sup>2</sup> Despite claims to the contrary made in Petitioner’s CCC brief on page 12-13, Wilson did not enter CCC’s secure server and download all of CCC’s customer contact information on January 9, 2012, but was still employed and actively working on the business that remains to this day forty-five percent his company. Petitioner CCC makes the opposite claim with a citation to the record that indicates merely that Wilson modified a couple of files on January 9<sup>th</sup>, 2012. The fact that Wilson merely accessed information related to his activities on behalf of CCC does not support the much more damning statement made in Petitioner’s brief on page 12-13 which is simply not supported by any facts in the record.

432, line 7-p. 434, line 12). Wilson did not have a non-compete, and had already been advised he had received his last paycheck for a while. (*Id*). However, nothing ever came of these discussions with McGarel.<sup>3</sup>

It is important to note that months earlier in 2011, Gandis and Shirley had IT contractors access Wilson's computer and program it to forward all of his emails, personal and business, to Gandis so he could monitor Wilson's emails. (R. p. 119, line 6-p. 120, line 10; pages 1018-1022; p. 700, line 15-p. 701, line 1). Gandis read emails between Wilson and his accountant, Wilson and his lawyer, and Wilson and his wife, and would forward to Comeau-Shirley so they could strategize how to use the information in its attempt to force Wilson out of the business. (R. p. 121, line 21-p. 122, line 6; *see e.g.*, pages 1045-1046). Gandis also read the emails from Wilson and Mark McGarel, and received them in real time just as McGarel would have received these emails (and the CCC financials as attachments). (R. p. 163, lines 14-17; p. 555, lines 15-17). However, there were no actions taken to protect what CCC now claims was a disclosure of trade secrets. During litigation, the trade secret claim was not raised for years until Petitioner CCC (under the control of Gandis and Comeau-Shirley) filed Amended Third-Party claim a month before the original trial date to gain leverage; there was never a motion for injunctive relief sought related to any information now the subject to claims of "theft" of trade secrets.<sup>4</sup>

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<sup>3</sup> Plaintiff's Exhibit 116 is an email in which CCC sent an email to McGarel containing the very information it alleges was disclosed by Wilson. It seems as if the email might have been sent inadvertently, but it appears the disclosure was of no consequence since McGarel's business sales higher grade film to a different set of customers than CCC. It took no steps to obtain the return of this information. The Wilson-McGarel discussions were a deflection of Gandis-Shirley's creation of ZOi Films, which was used to siphon off CCC's best opportunities.(R. pages 1138-1143).

<sup>4</sup> The spying and testimony related to it are additional evidence that certainly would be relevant to credibility; emails contradicting Gandis' and Shirley's stories about the scheme to spy on Wilson, looking for incriminating information to take away his interest, and obtaining

### **C. Gandis Locks Wilson Out of CCC**

So, on January 17, 2012, Gandis showed up unannounced with law enforcement and made the claim that Wilson had resigned. This was the plan hatched in an email exchange between Gandis and Comeau-Shirley. (R. p. 1110-1112). Since Wilson had never resigned, Wilson denied his resignation and at first refused to leave. (R. p. 321, line 12-p. 323, line 4.) Gandis persisted. Wilson became concerned about (1) leaving his personal information on his computer in Gandis and Shirley's possession and (2) he needed "information about CCC to prove what had happened, to prove what I had done for the company...." (R. p. 321, line 12-p. 323, line 4; p. 441, lines 3-17). So, Wilson took his laptop with him when he vacated, and later migrated the electronic information to another hard-drive, erased the personal information contained on his laptop, added CCC files and emails back to the CCC laptop, and returned the computer. (R. p. 442, line 1-p. 444, line 8).

In fact, the forensic search, paid for by Petitioner, of the computer revealed that there were 40,000 emails on the computer when it was returned despite claims it was wiped clean. (R. p. 443, line 9-p. 444, line 2). Wilson testified the information he had copied was stored on the same hard drive on which it was originally copied, and had never been used to compete. (R. p. 444, lines 4-8). Petitioner did not seek access to the hard drive or retain an expert to determine whether any of the information was actually opened and used. (Some of the information was eventually presented as evidence to prove Wilson's case.) Wilson testified that he did not use any of CCC information in his possession "to call on, solicit or obtain business...." (R. p. 445, lines

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information to be used to squeeze Wilson out of the business he co-founded. (*See e.g.*, R. pages 1045-1046; page 700, line 15-p. 701, line 12).

6-9).<sup>5</sup> The identity of those customers he did call upon while at Neologic corroborates this testimony; Petitioners presented no evidence to the contrary.

**D. Making a Living: Customers**

In the remaining 11 months of 2012 following his ouster, Wilson needed to provide for his family. (R. p. 505, lines 13-16). Through Neologic, Wilson sold only a \$132,000 worth of film to customers who had done business with CCC compared to the \$5.2 million in reported sales CCC did in Wilson's last year with the company (2011). (R. p. 445, lines 10-15). However, the \$132,000 in sales were all to customers that Wilson either sold to previously through PCFI or EFS and/or customers and contacts with whom he had some pre-existing relationship. (R. p. 1334; p. 444, line 17-p. 445, line 15). The \$132,000 in revenue in 2012 came from 7 accounts, most of them small accounts:<sup>6</sup>

1. American Sales Group was a customer of Wilson's while at PCFI. (R. p. 445, lines 16-25).
2. Flexease was an Interfilm account, EFS account, and a PCFI account going back 20 years. (R. p. 446, lines 2-6).
3. Griff Paper and Film, which was a distributor and not a customer of CCC. (R. p. 446, lines 7-12).
4. Horizon Energy was an PCFI customer and an EFS customer. (R. p. 446, lines 6-20).
5. Imperial Manufacturing Group, Inc., a duct manufacturer in Canada, that Wilson had called on while at EFS. And EFS had sold film to a company

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<sup>5</sup> Gandis claimed Wilson had resigned, when in fact emails between he and Shirley plotted out the manner of termination and the words Gandis should use when terminating Wilson. (R. pages 1110-1111; p. 167, line 20-p. 169, line 15). Shaw corroborated Wilson's testimony that Wilson did not resign. (R. p. 321, line 12-p. 323, line 4). Shaw's testimony is consistent with the plans devised in the email exchange between Gandis and Shirley. Once again, more evidence that impeaches the credibility of Gandis and Shirley.

<sup>6</sup> Imperial Manufacturing Group, Inc. is an exception.

called Bowflex which was eventually bought by Imperial Manufacturing. (R. p. 446, line 21-p. 447, line 6).

6. Industrias Vermont is a flex duct account in Mexico sold to initially through EFS. (R. p 447, lines 7-12).
7. Valencia Specialty Films is Bruce Hotmer's company. (Hotmer was a witness presented by Plaintiff, and his relationship with Hotmer dates back more than a decade.) (R. p. 447, lines 13-17; p. 340, line 1-p. 342, line 25).

It is undisputed that every singled account that Wilson sold to in 2012 were customers of his prior to the formation of CCC. (R. p. 447, lines 15-18). And he sold to these accounts in 2013 and some in 2014. (R. p. 1334). But, at the inception of CCC, Gandis and Wilson had agreed not to have non-compete agreements.

With three exceptions from 2012-2014, every account sold at any time by Neologic had been some combination of former EFS, PCFI or InterFilm customer (R. p. 451, lines 11-15). No trade secrets were needed to make sales to these accounts. One of the three such accounts was Plastic Packing Technologies, but Neologic did not solicit or sell any film to Plastic Packing until 2014, which was two years after Wilson was locked out of his office.<sup>7</sup> (R. p. 449, lines 13-20). Another of the three accounts was Filtrosmallas. Wilson had no prior relationship with Filtrosmallas prior to joining Neologic, but Filstrosmallas had quit doing business with CCC due to quality issues before Neologic made its first contact. (R. p. 448, lines 7-16). Finally, Supply One became a customer of Neologic, and Wilson had no prior relationship. (R. p. 449, line 21-p. 450, line 13). However, Supply One initiated the contact with Wilson in 2013 (R. p. 451, lines 4-

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<sup>7</sup> Any of CCC's pricing information would have become obsolete by the next year, 2013. (R. p. 447, lines 19-23).

8). There was not one shred of evidence that Wilson used CCC's alleged trade secrets to solicit these accounts; the weight of the evidence established just the opposite.<sup>8</sup>

**E. Gandis and Shirley Secretly Create a Competing Business: ZOi Films LLC**

As Respondent CCC admits, CCC was a manager-managed LLC and Gandis was the manager. Shirley was his sole advisor after Wilson was locked out. Quite simply, Gandis and Shirley began plotting on March 15, 2012 to create a competing entity, so they did not want "to haggle with Dave W about how much of the new stuff was his." (R. pages 1130-1133; p. 713, lines 20-25). Just months later, ZOi Films, LLC was created by Gandis and Shirley to handle the most profitable business and let CCC die on the vine; ZOi used the server with all the alleged trade secrets, sold to CCC customers, had access to pricing, customers, products, and anything else it alleges that Wilson took. (R. p. 184, line 12-p. 186, line 22; pages 1130-1143).

Gandis and Shirley created an entity and submitted corporate resolutions with the bank indicating that it was owned by two LLCs owned by Gandis and Shirley while under oath maintaining that they had intended to create a wholly-owned subsidiary of CCC. (R. p. 190, line 11-p. 191, line 25; pages 1198-1200). More significantly, tax documents signed under the penalty of perjury confirmed that ZOi had not been organized as a wholly-owned subsidiary of CCC. (R. pages 1201-1205) but still, the documentary evidence did not stand in the way of Gandis and Comeau-Shirley maintaining their cover story. So, "trade secrets" claimed to have been taken by Wilson to Neologic were given to ZOi by Gandis and Shirley beginning in July

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<sup>8</sup> It should also be noted that CCC claimed that Wilson interfered with its relationship with JBF RAC, a supplier of CCC. However, emails that came to light late in discovery demonstrate that Gandis had accused JBF of trying to steal 3M, a CCC customer for which JBF was to provide product. (R. p. 1226; p. 914, line 16-p. 917, line 23). Just another instance where Gandis' credibility took a hit.

2012, before Wilson began working through Neologic. (Thus any claim that CCC information was “secret” crumbles beginning July 2012.)

Former customer service manager, Bill Shaw testified that he was told by Gandis and Comeau-Shirley that ZOi Films was “a new company that John [Gandis] and Andrea [Comeau-Shirley] were starting up.” (R. p. 325, lines 18-23). Shaw further testified that while he was being paid by CCC, he was in reality working on ZOi Film deals, before Gandis and Shirley became secretive about ZOi’s business. (R. p. 325, line 5-p. 327, line 18). ZOi Film business was being conducted at CCC and using its Quickbooks system to enter sales transactions and purchase orders to make it appear that ZOi was buying film from CCC. (R. p. 326, lines 1-8). Accordingly, CCC’s pricing and customer information used by Shaw in performing his customer service duties on behalf of CCC were being used by Shaw in performing purchasing and sales for ZOi Films.

**F. Testifying Witness Bill Shaw**

Bill Shaw was hired by CCC to create and establish a customer service department as well as assisting with purchasing film. (R. p. 318, lines 1-9). He also created purchase orders and sent those to customers. (*Id.*). When he was hired by CCC, Shaw was not asked to sign a non-disclosure agreement nor a non-compete. (R. p. 318, lines 21-25). His description of the typical film purchasing process shows the lack of reliance on any trade secrets to do his job:

When Dave was still there and he and I were in the Greenville office, you know, the decisions were made if we had a customer -- specific customer need, we'd go out. We'd look at three or four different vendors, find the film that we needed. If it was available, then, you know, the decision to purchase it was made.

(R. p. 320, lines 8-15).

Despite Petitioner's (apparent) claims that every sale was subject to a qualification process, it was the exception that a qualification process took place.<sup>9</sup> In connection with these transactions, purchase orders were generated. (R. p. 320, line 24-p. 321, line 1). After Wilson was ousted, Shaw handled all the purchasing decisions, reported to Gandis and worked from his home office three days a week. (R. p. 323, lines 18-p. 324, lines 1-8). Critically, at his home Shaw generated copies of purchase orders and sales orders; the information was stored electronically, but each transaction generate paper containing customer information, product information, and pricing information. (R. p. 324, line 18-p. 325, line 1). Gandis nor any other person with CCC ever inquired about the retention or storage or protection of this information which was not returned to CCC upon Shaw's termination. (R. p. 325, lines 2-4).

As mentioned above, Shaw also was involved in making purchases for ZOi Films, a separate film company selling plastic film established by Gandis and Shirley to siphon off profits from CCC without Wilson even knowing. (R. p. 325, lines 7-22). Shaw performed the purchasing function for this competing entity, ZOi, before Gandis and Shirley began acting more secretive. (R. p. 325, line 24-p. 327, line 14). In the fall of 2012, Shaw received a subpoena from Wilson's counsel seeking production of documents, electronic information and emails in his possession. (R. p. 327, lines 23-25). Within an hour of receiving the subpoena, Shaw received a call to bring his laptop to CCC so the "IT guys" could upgrade software. (R. p. 328, line 13). When he showed up, Gandis fired Shaw and kept his laptop. (R. p. 328, line 14-p. 329, line 3). However, no mention was made of all of the CCC business information in his home office, and

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<sup>9</sup> On the one hand Petitioner claims that the process of making a sell involves a long qualification process; on the other, Gandis in support of his attempt to claim the spreadsheet was a trade secret testified that the spreadsheet allowed CCC to make a sale in "two minutes." (R. p. 879, lines 4-17).

so, Shaw had (and later produced to Wilson's counsel without objection) a box full of information about all of CCC's customers, purchases, and prices. (R. p. 329, lines 12-21). There was no misappropriation of use, but neither was there any attempt by CCC to protect these "trade secrets."

Importantly, Shaw testified as to what is now being called "electronic vendor reference program" and "inventory reference program." However these terms were never used at trial and are simply made up terms to describe a simple Excel spreadsheet created by Bill Shaw to help him keep information he received from manufacturers organized, which he described as "a very generic vendor cross-reference for my own purpose there at CCC." (R. p. 331, lines 3-21; Def. p. 1534). This information did not have customer information and there was no evidence this information was used in connection with any CCC customers. (R. p. 1534). When Shaw was terminated, no attempt was made to obtain this document or any other document. (R. p. 329, lines 12-21). Shaw came to work for Neologic without objection after he was terminated from CCC. (R. p. 329, line 22-p. 330, line 7). This is the single piece of information from his time at CCC that was used while at Neologic. (R. p. 331, line 22-p. 332, line 3).<sup>10</sup>

**G. Testifying Witness Mike Myers**

However, even though Wilson possessed a substantial amount knowledge and experience in the film industry, Mike Myers ("Myers"), independent film broker, testified there is more than enough information about plastic film users, sellers, and manufacturers which can be gathered from mere searches on the internet to obtain leads and generate revenue. (R. p. 282, line 2; p.

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<sup>10</sup> On page 16-17 of Petitioner CCC's initial brief, Petitioner makes reference to the spreadsheet as a "program." Of course, anyone who knows what an Excel spreadsheet is knows it is not a "program." This language was used to match the language of the Act but not once during trial did Gandis or any other witness refer to the spreadsheet created by Bill Shaw as a "program."

292, lines 12-24; p. 302, lines 3-15). Myers also testified that a simple internet search would reveal all the domestic manufacturers of polyester film; he also testified that as for potential customers, the internet is a good source of publicly known market information that Petitioner CCC claims to be “trade secrets.” (R. p. 302, line 23-p. 303, line 9).

Myers also testified that supplier and customer information could be obtained through trade associations and its databases, which were all available to the public. (R. p. 303, lines 9-20). Moreover, pricing was public knowledge. The largest manufacturers send out weekly emails with the pricing for their films for sale and because the customers routinely would provide you with pricing information in an effort to negotiate a lower price. (R. p. 303, line 21-p. 304, line 17). Customers do not sign non-disclosure agreements. Myers sold film for CCC but was never asked to sign a non-disclosure agreement protecting any the customer, vendor or pricing information.<sup>11</sup> (R. p. 304, lines 18-20).

#### **H. Testifying Witness Bruce Hotmer**

Bruce Hotmer (“Hotmer”) owns Valencia Specialty Films and is a film broker, who began selling polyester film over 40 years ago. (R. p. 340, line 13-p. 341, line 25). Hotmer’s background is both in the domestic market and the international market, having ran Jindal America, a subsidiary of a multinational company based in India that sold polyester film. (R. p. 341, lines 6-12).

Hotmer testified that the film market (including polyester film) functioned as a commodities market. (R. p. 349, lines 15-18). Purchasers of film do not sign non-disclosure agreements; customers are the primary source of information of the price they are paying for

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<sup>11</sup> Myers also testified that based upon his experience with Gandis, “he’s a crook.” (R. p. 307, line 17; p. 304, line 22-p. 305, line 22).

film. (R. p. 348, lines 5-17). Customers who are looking for a better price (and which one is not?) will simply inform competitors' sales persons of the current price they are paying for film from their current distributor. (R. p. 348, line 11-p. 349, line 12). In a commodities market, manufacturers prices are publicly reported.

Hotmer testified that in the market of polyester film much of the information about potential customers and distributors was available through a public source, The Thomas Registry, which includes contacts and phone numbers of film buyers and sellers. (R. p. 344, line 3-p. 345, line 1). Moreover, because polyester film is used in several market segments, all of which have trade associations with customer and distributor information, films sellers attend these trade shows, including customer information, contacts and obtain printed membership lists distributed at the trade show. (R. p. 345, lines 10-25). And, it is common knowledge for those in the industry to know what type of film is used by the various market segments. Hotmer testified by way of example of food packaging uses primary half mill film, and it is a product that everyone in the market sells. (R. p. 345, line 18-p. 346, line 16).<sup>12</sup>

#### **I. Sales: CCC and Neologic**

As a basis of comparison, when Wilson and Gandis formed CCC, Wilson had pre-existing customer relationships that generated \$1.6 million in revenue for CCC in its first year of selling film. (R. p. 376, lines 12-18). During its 3 years of existence, EFS had sold \$5.8 million in film; by 2007, CCC did \$7 million in sales, and \$3.5 million with former EFS customers. (R. p. 383, line 16-p. 385, line 19). CCC gross receipts in 2011 was over \$5 million. (R. pages 1207-

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<sup>12</sup> When reviewing information provided to Mark McGarel by Dave Wilson by email in Pl. Exhibit 76, Hotmer testified the email contained information that everyone in the film market would have access to. (R. p. 346, line 17-p. 34, line 3).

1215). In 2012, CCC had a gross revenue of \$3.5 million compared to Neologic's gross sales of \$132,000 (and as stated above, all of these were customers of Wilson's prior to the formation of CCC). (R. pages 1206-1215). CCC refused to produce any revenue information for 2014. Over three years of operation, Neologic had total gross sales of \$985,276.18. (R. p. 1206).

### III. ARGUMENT

#### A. STANDARD OF REVIEW

Civil claims seeking money damages are legal in nature. *See Ross v. Bernhard*, 396 U.S. 531, 543 (1970); *see also Sapp v. Wheeler*, 402 S.C. 502, 507, 741 S.E.2d 565, 568 (Ct. App. 2013), *citing Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 590, 658 S.E.2d 539, 541-42 (Ct. App. 2008). Petitioner CCC's claim for the misappropriation of trade secrets is an action at law. When considering the appeal of an action at law tried without a jury, an appellate court cannot "disturb the trial court's findings of fact unless no evidence reasonably supports [the trial judge's] findings." *Jordan v. Judy*, 413 S.C. 341, 348, 776 S.E.2d. 96, 100 (2015). "In an action at law, the appellate court will correct any error of law, but it must affirm the special referee's factual findings unless there is no evidence that reasonably supports those findings." *Linda Mc Co. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010). Thus, the trial court's findings in an action at law action are the same as a jury's findings: the credibility and the weight of the evidence are questions exclusively for the trial judge. *See Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975). "[An appellate court] may not consider the case based on our view of the preponderance of the evidence, but must construe the evidence presented to the [trial court] so as to support [its] decision wherever reasonably possible." *Sheek v. Crimestoppers Alarm Sys.*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989). "[The Court] must look at

the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary.” *Id.*

**B. CCC’S TRADE SECRETS CLAIM**

**1. The Circuit Court Applied the Correct Legal Standard In Concluding that Petitioner CCC Failed To Establish that Information Claimed to be Trade Secrets was Not Generally Known to Others and Not Readily Ascertainable by Proper Means.**

“Trade secret” means information that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

S.C. Code Ann. §39-8-20(5). This is the definition applied by the trial court. (R. p.1785, p. 1788). The court simply made findings of fact that the information CCC claimed to be a trade secret was either generally known, ascertainable by proper means, or known by Dave Wilson before of the formation of CCC. (R. pages 1785-1786). Each of these categories is the standard for evaluating whether a trade secret exists and is directly based upon statutory language.<sup>13</sup> There is no error of law as Petitioner claims.

Respondent Wilson did not misappropriate trade secrets or confidential information, however, there was testimony that Bill Shaw used Excel spreadsheet created by Bill Shaw to help him cross-reference different vendor products numbers (R. p. 331, lines 3-21; Def. p. 1534). This is akin of going through a phone book and assembling a spreadsheet with needed phone numbers so that the employee does not have to look up the phone number in the phone book each

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<sup>13</sup> In addition, the court made a finding of fact that CCC did not reasonably safeguard its information. This is discussed in more detail below.

time he makes a call. Certainly, such a spreadsheet is helpful, but it has no independent economic value – whether it is secret or not. In this case, the vendor spreadsheet was created simply to make Shaw’s job a little easier.

Despite all the citations to cases involving customer lists and pricing information, the vendor spreadsheet did not have customer information or pricing information contained in it: None. (R. p. 1534). Each of the cases discussed by Petitioner on pages 14-15 of their brief have zero application to the present set of facts, and it is misleading to claim these cases “treat this information as a trade secret. Finally, it must be reiterated anytime Petitioner cites testimony of Gandis or Shirley to support an argument that these two messengers were found to be without credibility. In denying Petitioners’ Rule 59 motion the court was clear: “Mr. Gandis and Ms. Comeau-Shirley’s testimony lacked credibility in most important respects.” (R. p. 1794).

**a. CCC’s Information Was Not “Secret.”**

“The threshold issue in any trade secrets case is not whether there was a confidential relationship or a breach of contract or some other kind of misappropriation, but whether, there was a trade secret to be misappropriated.” *Williams v. Riedman*, 339 S.C. 251, 284, 529 S.E.2d 28, 45 (Ct. App. 2000), *quoting Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 191 S.E.2d 761 (1972).<sup>14</sup> “A trade secret must be secret.” *Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 296, 471 S.E.2d 721, 724 (Ct. App. 1996). The trial court concluded that information claimed by CCC to be trade secrets was known and/or ascertainable, and therefore not secret. (R. pages 1784-1785).

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<sup>14</sup> CCC takes the trial judge to task for citing a case (*Hill Holiday*) that based its reasoning on *Lowndes Products*, which remains good law. The SCTSA only displaces common law that contradicts the Act.

The conclusion by the trial court is supported by sufficient facts in the record. First and foremost, the evidence showed that Dave Wilson had been in the industry for over 20 years (R. p. 360, lines 17-25), had been a principal in two separate film businesses previously (R. p. 361, line 21-p. 362, line 11; p. 364, line 20-p. 365, line 4), developed substantial contacts in the polyester film industry, joined trade associations, attended trade shows and expositions (R. p. 365, lines 8-23), had relationships with the polyester films manufacturers in the U.S. (R. p. 366, lines 1-15), and built a customer base that generated approximately \$5.8 million in revenues for EFS before joining CCC. (R. p. 383, lines 16-19). In fact, every single customer to which Wilson sold film while at Neologic was a customer he had sold to prior to coming to CCC. (R. p. 447, lines 15-18; p. 445, lines 16-25; p. 446, lines 2-6; p. 446, lines 7-12; p. 446, lines 16-20; p. 446, line 21-p. 447, line 6; p. 447, lines 7-12; p. 447, lines 13-17). *See Williams v. Riedman*, 339 S.C. at 279, 529 S.E.2d at 42-43 (“According to Williams, the eleven clients she serviced at Web-Kor were from her original 148 accounts. She further testified that while employed with Riedman, she did not gain any additional or ‘secret information’ about these customers.”)<sup>15</sup> Petitioner CCC failed to produce any evidence that any customer information for a customer sold to by Neologic was not known by Wilson prior to forming CCC or not ascertainable by him through public sources.

Mike Myers and Bruce Hotmer, both film brokers who have been engaged in the film industry for decades, corroborated Wilson’s testimony regarding the availability of information relating to vendors/suppliers and customers/potential customers, specifically stating that such information could be obtained through trade journals, at trade shows, or in other publicly

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<sup>15</sup> Any pricing known by Wilson (which was publicly available in any event from the manufacturers and customers) would have become obsolete by the next year, 2013. (R. p. 447, lines 19-23).

available sources like the Thomas Register (R. p. 292, line 16-p. 293, line 3; p. 340, line 13-p. 343, line 7; p. 303, lines 9-20; p. 302, line 23-p. 303, line 9; p. 344, line 3-p. 345, line 1). Each testified that the sort of information being claimed by CCC as trade secrets was publicly available through trade associations and its databases (R. p. 303, lines 9-20; p. 302, line 23-p. 303, line 9; p. 344, lines 3-25; p. 345, line 1). Moreover, pricing was public knowledge because the largest manufacturers send out weekly emails with the pricing for their films for sale and because the customers routinely would provide dealers/sellers with pricing information in an effort to negotiate a lower price. (R. p. 303, line 21-p. 304, lines 17). *See Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 296, 471 S.E.2d 721, 724 (Ct. App. 1996) (“In determining whether something is a trade secret, one must consider the extent to which the information is known outside of his business and the ease or difficulty with which the information could be properly acquired or duplicated by others.”).

At trial, CCC offered no evidence to establish the existence of trade secrets other than Gandis’ own conclusory testimony. (See, e.g., R. p. 904, lines 11-15; p. 908, lines 7-14). As this Court has noted elsewhere, “[w]e acknowledge the superior position of the trial judge to assess witness credibility. We would not, even under de novo review, lightly disregard a trial judge's credibility determinations.” *Cedar Cove Homeowners Ass'n v. DiPietro*, 368 S.C. 254, 259, 628 S.E.2d 284, 286 (Ct. App. 2006). As the trial court said in denying Defendants’ Rule 59 motion, “Mr. Gandis’ and Ms. Comeau-Shirley’s testimony lack credibility in most important respects.” CCC presented no credible evidence to establish that any information claimed to be trade secrets was in fact secret or to counter the testimony of Dave Wilson, Bill Shaw, Bruce Hotmer, and Mike Myers.

However, one fact not taken into account by the trial court is the simple fact that in July 2012, Gandis and Shirley began using CCC customer and product information on behalf of its secret entity (ZOi Films) to siphon off “silver transactions” while telling vendors and customers that CCC had no money to purchase inventory. (R. pages 1138-1143). This issue is discussed in more detail in section B.2 below. It is characteristically brazened for Petitioners to continue to pursue a trade secrets claim against Wilson (and Neologic) while at the same time having been caught using this same information in their competitive activities of ZOi Films.

Additionally, CCC presented no testimony by its computer forensics examiner as to the specific information that was contained on Wilson’s hard drive or as to whether any of it was used or opened after he was forced out of CCC. There was no testimony from any employees involved in purchasing, sales, inventory, or customer service regarding whether this information was secret or otherwise a trade secret. There was no testimony by any individuals familiar or engaged in the film business to establish any of the elements of trade secrets, particularly the element of secrecy. Accordingly, the trial court applied the correct legal standard contained in S.C. Code Ann. §39-8-20(5), and its factual finding that information was readily available from public sources or that Wilson knew the information even before CCC was formed has more than ample support in the record. (R. p. 1778, pages 1784-1785).

**b. Evidence Established a Complete Lack of Reasonable Attempts to Maintain Secrecy of Alleged Trade Secrets.**

As stated above, the trial court clearly stated that for information to be a “trade secret,” the information must be “the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” S.C. Code Ann. §39-8-20(5)(a)(ii). This is the statutory definition of “trade secrets,” and it was the one cited to and applied by the court. Petitioner CCC attempts to divert

attention from the lack of evidence of trade secrets by declaring that the trial judge applied the wrong legal standard by its citation to *Hill Holiday Connors Cosmopolous, Inc. v. Greenfield*, 433 Fed. Appx. 207, 214 (4th Cir. 2011) (relying on *Lowndes Prods. v. Brower*, 259 S.C. 322, 331, 191 S.E.2d 761, 766 (S.C. 1972)). However, Petitioner ignores the fact that the trial court first cited South Carolina Code §39-8-20(5) for the meaning of trade secret (R. p. 1785), and that *Hill Holiday*'s warning to be "vigilant" is certainly one supported by the reasonable efforts prong of the trade secrets definition.

Importantly, the warning of "eternal vigilance" stems from the South Carolina Supreme Court enunciation of the prevailing common law standard, which set a "proper and reasonable" standard for guarding trade secrets. *Lowndes Prods. v. Brower*, 259 S.C. 322, 331, 191 S.E.2d 761, 766 (S.C. 1972). In fact, the Supreme Court was applying the well-settled definition of trade secrets found in the *Restatement of Torts*, §757 (see particularly comment B) and comparing it (and other sources cited by *Lowndes*) to the S.C. Code Ann. §39-8-20(5). Consider a more extensive statement of the *Lowndes* holding:

[I]f the person entitled to a trade secret wishes to have its exclusive use in his own business, he must not fail to take *all proper and reasonable steps* to keep it secret. He cannot lie back and do nothing to preserve its essential secret quality, particularly when the subject matter of the process becomes known to a number of individuals involved in its use or is observed in the course of manufacture within plain view of others. '[O]ne may not venture on liberties with his own secret, may not lightly or voluntarily hazard its leakage or escape, and at the same time hold others to be completely obligated to observe it.' As a naturally known member of the patent bar has written, one who claims that he has a trade secret must exercise **eternal vigilance**. This calls for constant warnings to all persons to whom the trade secret has become known and obtaining from each an agreement, preferably in writing, acknowledging its secrecy and promising to respect it. To exclude the public from the manufacturing area is not enough.

*Lowndes Prods.*, 259 S.C. at 331, 191 S.E.2d at 766 (emphasis added). "All proper and reasonable steps" differs only in semantics from the "reasonable efforts under the circumstances"

standard found in S.C. Code Ann. §39-8-20(5). “Vigilance” is nothing more than the state of keeping careful watch. And as the trial court in our own case properly noted, “[u]nlike other assets, the value of a trade secret hinges on its secrecy. As more people or organizations learn the secret, the value diminishes quickly.” (R. pages 1785-1786, quoting *Lafitte v. Bridgestone Corp.*, 381 S.C. 460, 472, 674 S.E.2d 154, 161 (2009)). It is not enough to be temporarily vigilant; reasonable efforts must continue or else secrecy is eroded, value is diminished, and trade secret protection is lost because it no longer meets the definition.

As further indication that the trial court understood and applied the correct standard, consider the trial court’s denial of Respondent’s Neologic/Fresh Water’s motion for attorneys’ fees under the South Carolina Trade Secrets Act. In denying Respondent Neologic’s motion for attorney’s fees, the court stated “South Carolina law states that employees have a duty not to use or disclose trade secrets independent of and in addition to any written contract of employment or secrecy agreement. S.C. Ann. §39-8-30. It is not required that a contract or secrecy agreement exist, and it is understandable that a very small company such as CCC did not have elaborate agreements in affect.” (R. p. 1788). Clearly the Court understood and applied the correct standard while recognizing that Defendants had failed to present sufficient evidence that its information met the legal definition of “trade secrets.” The court applied the “reasonable efforts under the circumstance” test, bolstered by the guidance of S.C. Ann. §39-8-30.

But, even if this Court concludes that, as applied, the standard was in error, the record leaves little doubt that CCC did *not* take “reasonable efforts under the circumstances.” S.C. Code

Ann. §39-8-20(5).<sup>16</sup> The facts clearly demonstrate that Petitioner CCC failed to prove it had taken reasonable steps to protect information it claimed as trade secrets. In fact the contrary is true: Gandis and Shirley used and misappropriated this same information to create another business entity (ZOi) to sell polyester film to CCC's customers. Just two months after locking Wilson out of CCC (March 15, 2012), Gandis and Shirley began plotting to create a competing entity so they did not have "to haggle with Dave W about how much of the new stuff was his." (R. p. 186, lines 1-7; p. 713, lines 20-25; pages 1125-1133).

In July 2012, Gandis and Shirley, created ZOi Films, LLC to secretly compete in the film business; ZOi would have two members, one a company owned by Gandis (M-Tech) and the other a Georgia company owned by Comeau-Shirley (Major Brainstorms, Inc.). (R. p. 187, line 16-p. 189, line 21; pages 1134-1135; pages 1198-1200; *see also* p. 1197, pages 1201-1205, pages 1216-1218). Gandis was its president and Comeau-Shirley was its vice-president. (R. p. 190, line 17-p. 191, line 1; pages 1198-1200).

With Gandis' blessing, Comeau-Shirley sought an investment from Gandis' father, Cliff Gandis, to fund ZOi, including funding for an import deal belonging to CCC. (R. p. 193, line 22-p. 194, line 3; pages 1138-1143). She asked Cliff Gandis to fund a credit line for ZOi, which would fund the "silver transactions" while telling vendors and customers that CCC had no money to purchase inventory. (R. pages 1138-1143). CCC, through its manager John Gandis, was using information about CCC's corporate opportunities and sharing it all with ZOi – and creating a \$30,000 fee for Cliff Gandis. (R. pages 1198-1200; p. 184, line 12-p. 186, line 22; p. 194, line 19-196, line 22). It seems impossible for CCC to claim at one time that CCC took

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<sup>16</sup> This court can affirm on any ground found in the record. There are several alternative grounds presented based upon the findings of fact of this court, and Respondent requests this Court to affirm the judgment below on any such grounds. S.C. Appellate Rule 220(c) (2007).

reasonable steps to maintain the secrecy of its company information and its customer information when at the same time it created ZOi to utilize that information to generate profits that would be unknown to Wilson.<sup>17</sup>

Bill Shaw testified that he was told ZOi Films was “a new company that John [Gandis] and Andrea [Comeau-Shirley] were starting up.” (Tr. 325, 18-23). Shaw further testified that while he was being paid by CCC, he was in reality working on ZOi Film deals, before Gandis and Shirley became secretive about ZOi’s business. (R. p. 325, line 5-p. 327, line 18). ZOi Film business was being conducted at CCC and using its Quickbooks system to enter sales transactions and purchase orders to make it appear that ZOi was buying film from CCC. (R. p. 326, lines 1-8). Accordingly, CCC’s pricing and customer information used by Shaw in performing his customer service duties on behalf of CCC were being used by Shaw in performing purchasing and sales for ZOi Films

Thus, not only did CCC fail to take reasonable steps to maintain the secrecy of its “trade secrets,” but it also affirmatively gave information (and deals) to the newly created entity, ZOi Films. Moreover, despite e-mails and corporate resolutions showing a scheme to secretly funnel the best deals through ZOi Films, Gandis and Shirley maintained that ZOi was simply a “wholly owned subsidiary” of CCC. (*See e.g.*, R. p. 187, lines 12-15). Of course, the creation of ZOi and the cover story was exposed by emails, and the credibility of Gandis and Shirley was completely impeached on this subject as well as others.

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<sup>17</sup> ZOi was formed in July 2012, discovered by Wilson in August 2012 on LinkedIn. (R. p. 454, line 23-p. 456, line 6). In response, Gandis and Comeau-Shirley created a “declaration” in late August and attempted to back date it to July 9, 2012 to make it appear that it had been created at time ZOi Films was formed in Georgia. However, an email from Comeau-Shirley to Cliff Gandis tells the true intentions of the parties. (R. pages 1138-1143).

Although the ZOi scheme is sufficient to sustain the court's finding that Petitioner did not take reasonable steps to protect its company information, there was more evidence that reasonable efforts to maintain its secrecy were not undertaken to protect its information. In fact, other than password protecting Quickbooks, there was no testimony offered by CCC as to any effort to protect the secrecy of its information. (R. p. 883, lines 5-16). Bill Shaw, CCC's customer service representative, had possession of purchase orders and sales orders containing pricing and customer information in his home that contained all the information CCC now claims to be trade secrets (R. p. 318, lines 1-9; p. 320, line 24-p. 321, line 1). Shaw did not sign a non-disclosure agreement nor a non-compete. (R. p. 318, lines 21-25). Employees and members did not sign non-disclosures, and neither Wilson nor Andrea Comeau-Shirley had non-disclosure agreements (R. p. 179, lines 7-8; p. 175, lines 16-20; p. 434, lines 7-12). Mike Myers, an independent sales representative who had worked with CCC making sales to select customers, did not have a non-disclosure. (R. p. 304, lines 18-20). If Petitioner CCC actually believed that Wilson had was using misappropriated trade secrets to compete, it would be reasonable have sought the Court's intervention. CCC never did.

**2. The Circuit Court Applied the Correct Legal Standard in Concluding that Petitioner CCC Failed to that Trade Secrets Were "Misappropriated."**

The Trade Secrets Act states as follows:

"Misappropriation" means:

- (a) acquisition of a trade secret of another by a person by improper means;
- (b) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (c) disclosure or use of a trade secret of another without express or implied consent by a person who:

- (i) used improper means to acquire knowledge of the trade secret;
- or

(ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:

(A) derived from or through a person who had utilized improper means to acquire it;

(B) acquired by mistake or under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;

iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

S.C. Code Ann. §39-8-20(2) (2016). “Improper means include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, duties imposed by the common law, statute, contract, license, protective order, or other court or administrative order, or espionage through electronic or other means.” S.C. Code Ann. §39-8-20(1). There is no evidence in the record that Wilson obtained any alleged trade secrets by “improper means” or used or disclosed such information.

When Gandis arrived at Wilson’s office with law enforcement in January 2012 and told Wilson to leave, Wilson took his computer with him when he left so he could preserve the emails on the hard drive to protect his membership interest and to pursue remedies in connection with the oppression that had been in full force for months. (R. p. 442, line 1-p. 444, line 8). Importantly, he returned his CCC computer with all the information contained in the 40,000 emails, which were on the computer. (R. p. 442, lines 1-3). This is hardly “theft” as it has been interpreted under South Carolina law. “[T]o constitute a theft it is necessary that there be a taking of the property without the consent of the owner coupled with an intention on the part of the taker to convert it to his own use and deprive the owner of his property rights therein.” *Geiger v.*

*Aetna Ins. Co.*, 215 S.C. 144, 149, 54 S.E.2d 549, 551 (1949) (interpreting meaning of “theft” within the context of insurance policy.); *see also Moore v. Weinberg*, 373 S.C. 209, 226-227, 644 S.E.2d 740, 749 (Ct. App. 2007) (“Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights.”)<sup>18</sup> It is undisputed that Wilson returned the computer to Nexsen Pruet, one of the law firms that would represent CCC, Gandis, and Shirley. (R. p. 442, line 20-p. 444, line 8). There was no improper means used to obtain any information in Wilson’s possession after he left. CCC was not deprived of any of its business information. In fact, Wilson brought a derivative claim on behalf of CCC, and this information was intended to protect CCC from the sort of conduct that makes up the oppression case.

Moreover, there was no evidence presented at trial that Wilson used any of CCC’s “trade secrets.” CCC’s brief represents that “Wilson left CCC, then took and used all of this confidential information at Neologic/FWS – the circuit court made that specific finding.” (App. Brief 20). Yet Petitioner CCC makes no citation to the record where such a finding is supported, and the trial court’s order in fact did not make a finding that Wilson “took and used all of CCC’s confidential information,” as claimed by CCC. In fact, Bill Shaw testified that he used a single Excel spreadsheet (not a “program”) on which he had entered publicly is available information to assist him in doing his job at CCC. (R. p. 331, lines 3-21). Shaw testified that the spreadsheet was “a very generic vendor cross-reference for my own purpose there at CCC.” (R. p. 331, lines 3-21; pages 1534-1587). This document did not have customer information and there was no evidence this information was used in connection with any CCC customers. (R. pages 1534-1587). This is the single piece of information from Shaw’s time at CCC that he later used while

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<sup>18</sup> CCC’s complaint alleged a conversion claim relating to trade secrets.

at Neologic, and all of the information was readily and publicly available or ascertainable. (R. p. 331, line 22-p. 332, line 3). However, the spreadsheet in Neologic's possession (R. pages 1534-1587) was dated 11/4/2010, approximately fourteen months before Wilson's ouster. Gandis' testimony at trial about this spreadsheet was sparse, and Gandis' lack of credibility made Bill Shaw's testimony more believable on this precise nature of the spreadsheet and the information contained therein.

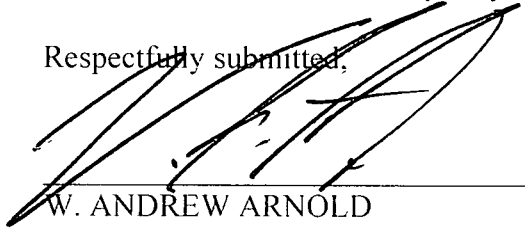
Clearly, Petitioner failed to prove any use of trade secrets, and therefore failed to prove any damages arising from such use. As stated above, every single customer Dave Wilson sold film to in 2012 was a customer he had sold to prior to coming to CCC. (R. p 447, lines 15-18; p. 445, lines 16-25; p. 446, lines 2-6; p. 446, lines 7-12; p. 446, lines 16-20; p. 446, line 21-p. 447, line 6; p. 447, lines 7-12; p. 447, lines 13-17). These accounts were small accounts and the total in sales for all of 2012 was \$132,000. Petitioner claims that Gandis' testimony demonstrated that eleven of Neologic's customers "were customers that CCC gained on its own." (App. Brief 23). However, reading the testimony of Gandis cited in CCC's brief in support of this argument simply established that there were eleven customers that were not on ONE list of former EFS customers, but Gandis made no mention of Wilson's relationships dating back to PCFI or Interfilm. (R. p. 883, line 23-p. 885, line 25). As outlined in the statement of facts above, there was evidence that all but three were customers with which Wilson had pre-existing relationships, and two of the three left CCC because of quality issues and the other did not do business with Neologic until 2014. (R. p. 449, lines 13-20; p. 448, lines 7-16; p. 449, line 21-p. 450 line 13). The biggest account, Supply One, initiated the contact with Wilson in 2013 (R. p. 451, lines 4-8). As the Court concluded "that there was insufficient evidence that [Wilson's] post-CCC activity

was anything but legitimate competition by one who had superior knowledge of and wide contacts in the film industry.” (R. p. 1786).

**IV. CONCLUSION**

The circuit court properly applied the South Carolina Trade Secrets Act and made findings of facts supported by the record, including findings related to credibility. There was little evidence presented regarding alleged trade secrets, and none regarding the use of alleged trade secrets that caused even the slightest monetary damage to Petitioner CCC. The trial court observed this weeklong proceeding and sat eyewitness to defendants’ testimony that all too often lacked in credibility. This Court should affirm the trial court’s decision in all respects, including those finding for Respondent on Petitioner CCC’s trade secret and fiduciary duty claims.

Respectfully submitted,



W. ANDREW ARNOLD  
SC Bar # 0065311  
Law Office of W. Andrew Arnold, P.C.  
712 East Washington Street  
Greenville, SC 29601  
(864) 242-4800  
aarnold@aalawfirm.com  
**Attorney for Respondent David Wilson**

January 15, 2019

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**JAN 17 2019**  
**S.C. SUPREME COURT**

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JAN 17 2019

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Opinion No. 2018-UP-078 (S.C. Ct. App. Filed Feb. 7, 2018)

DAVID WILSON, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF CAROLINA  
CUSTOM CONVERTING, LLC,.....Plaintiff,

v.

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, ZOI FILMS, LLC, AND CAROLINA  
CUSTOM CONVERTING, LLC,.....Defendants,

JOHN GANDIS AND ANDREA COMEAU-SHIRLEY, .....Third-Party Plaintiffs,

v.

CAROLINA CUSTOM CONVERTING, LLC,.....Third-Party Defendant  
and Counterclaim Plaintiff,

v.

DAVE WILSON, STEVE NORVELL, NEOLOGIC DISTRIBUTION, INC. AND FRESH  
WATER SYSTEMS, INC.,

Of Whom David Wilson, Neologic Distribution, Inc., and Fresh Water Systems,  
Inc., are the ..... Respondents,

And

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, AND CAROLINA CUSTOM  
CONVERTING, LLC, are the .....Petitioners.

CERTIFICATE OF SERVICE

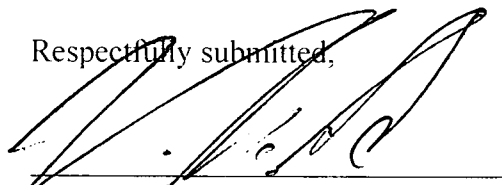
I certify that I have served the Brief of Respondent David Wilson in Reply to Brief of Petitioner Carolina Custom Concerning this 15th day of January, 2019, on counsel for John Gandis and Andrea Comeau-Shirley, counsel for CCC, in the underlying action by depositing the same in the United States Mail, first class postage prepaid, as follows, and by hand-delivering a copy to counsel for Neologic Distribution, Inc. and Fresh Water Systems, Inc.:

D. Randle Moody, III, Esquire  
John W. Sulau, Esquire  
JACKSON LEWIS P.C.  
15 South Main Street, Suite 700  
Greenville, SC 29601

Burl F. Williams, Esquire  
Nexsen Pruet, LLC  
P.O. Box 10648  
Greenville, SC 29603

Bruce B. Campbell, Esquire  
Horton Law Firm  
307 Pettigru Street  
Greenville, SC 29601  
(via hand-delivery)

Respectfully submitted,



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W. ANDREW ARNOLD  
SC Bar #65311  
Horton Law Firm, P.A.  
307 Pettigru St.  
Greenville, SC 29601  
(864) 233-4351  
aarnold@hortonlawfirm.net  
**Attorney for Respondent David Wilson**

**RECEIVED**

**JAN 17 2019**

**S.C. SUPREME COURT**