IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

B. Alex Hyman, Circuit Court Judge

Appellate Case No. 2025-002251

Timothy D. Kettner.....Appellant

v.

Thomas Wade Long and Clyde Kiser, Individually and on behalf of TnW And More, LLC, ...Respondents

INITIAL BRIEF OF APPELLANT

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1. Did the trial Court err in refusing to vacate the jury award against Appellant Timothy Kettner (hereinafter "Tim Kettner") for breach of fiduciary duty when the record is devoid of evidence through which the jury could find that Tim Kettner took any action in violation of any fiduciary duty owed to any Defendant which was the direct and proximate cause of any resulting harm?

2. Did the trial Court err in refusing to vacate the jury award against Appellant Timothy Kettner for economic interference when the record is devoid of evidence to support a direct and proximate cause between any action of Tim Kettner and any resulting loss to the Defendants?

3. Did the trial Court err in refusing to require the Defendants to elect remedies when the jury returned awards against Appellant Timothy Kettner for breach of fiduciary duty and for economic interference when both awards were based upon the same conduct and the same alleged resulting harm?

STATEMENT OF THE CASE

Following a jury trial and the return of two verdicts against him, Tim Kettner appeals the verdicts against Tim Kettner, as well as the trial Court's denial of his Motions for Judgment Notwithstanding the Verdict as it relates to the jury awards for breach of fiduciary duty and tortious interference with contract / economic opportunity, as well as the trial Court's refusal to require the Respondents to elect between the awards.[1] The sole factual basis supporting both the claim of breach of fiduciary duty and the claim of tortious interference consists of a series of text messages from Tim Kettner in September 2020 and one text message in April 2021, which the Respondents argued were the direct and proximate cause of the loss of a contractual relationship with a third party in late 2022.

Based on the evidence presented, no reasonable jury could have concluded that the text messages in 2020 and the single text message in April 2021, were a direct and proximate cause of

[1] This appeal will not address issues related to the application of the statute of frauds to the contested matters litigated in this case, as Tim Kettner was not subject to any adverse verdicts related to the application of the statute of frauds.

any harm suffered by the Respondents and the trial Court should have directed verdict in favor of the Appellant and/or granted the Appellant's Motion for Judgment Notwithstanding the Verdicts. In addition, the record is devoid of evidence that Appellant Kettner knew of the contractual relationship in which he allegedly interfered such that he could not be held liable under a theory of tortious interference with a contractual relationship. Finally, as the factual basis supporting the claims of breach of fiduciary duty and tortious interference consisted of the exact same text messages and the alleged resulting harm for both causes of action were identical, the trial court erred in not requiring the Respondents to elect between the awards.

STANDARDS OF REVIEW

A. Judgment Notwithstanding the Verdict ("JNOV")

Rule 50(b), SCRCP, provides:

> Whenever a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict... A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed ….

A motion for judgment notwithstanding the verdict is "a renewal of a directed verdict motion." *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct.App. 2006). "In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the

evidence yields more than one inference or its inference is in doubt." *Steinke v. South Carolina Dept. of Labor, Licensing and Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). "The appellate court [which employs the same standard as the trial court when reviewing a motion for directed verdict or JNOV] must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor." *Wright*, 372 S.C. at 18, 640 S.E.2d at 495-96 (citation omitted).

In ruling on a motion for JNOV, the trial judge cannot disturb the factual findings of a jury unless a review of the record discloses no evidence which reasonably supports them. *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Force v. Richland Mem'l Hosp.*, 322 S.C. 283, 471 S.E.2d 714 (Ct.App.1996). In deciding a motion for JNOV, the trial judge is concerned with the existence of evidence, not its weight. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272 (2003).

A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. *Burns v. Universal Health Servs., Inc.*, 361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004). The appellate court will reverse the trial court's ruling on a JNOV motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law. *Hinkle v. National Cas. Ins. Co.,* 354 S.C. 92, 579 S.E.2d 616 (2003); *see also Strange v. South Carolina Dep't of Highways & Pub. Transp.,* 314 S.C. 427, 445 S.E.2d 439 (1994) (finding that trial court can only be reversed by this Court when there is no evidence to support the ruling below).

B. Election of Remedies

The requirement of election of remedies under these circumstances to prevent double recovery of damages is mandated by law. *See, e.g., Harper v. Ethridge*, 290 S.C. 112, 121, 348

S.E.2d 374, 379-80 (Ct.App. 1986) In *Harper* the court held:

> In many instances, [the rules governing election of remedies] means the case can go to the jury on all causes of action supported by the evidence at trial, with election required after verdict but before judgment is entered. *See, e.g., Nichols v. State Farm Mutual Auto. Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983) (circuit judge allowed case to go to jury on two causes of action but after verdict entered judgment on only one cause of action to prevent double recovery). When the facts entitle a party to alternative remedies, those remedies are not considered inconsistent, and he may plead and prove his entitlement to both. [citation omitted] As we have previously observed, "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**." (citation omitted and emphasis supplied).

STATEMENT OF FACTS

Tim Kettner was born and raised in Wisconsin. Transcript, p. 970, ll. 2-7. He first visited South Carolina on vacation in 1990 and decided to move to South Carolina permanently in 1996 or 1997 to start a business. Transcript, p. 971, l. 19 – p. 972, l. 5. Thereafter, TNT and More, LLC ("TNT") was formed for the purpose of operating Crab Catchers, a seafood restaurant and market in Little River, South Carolina. Transcript, p. 973, ll. 9-22. Tim Kettner worked tirelessly to grow his business into a success. Even according to Respondent Wade Long ("Long"), Tim Kettner was "one of the top ten hardest worker's [he'd] ever known." Transcript, p. 548, ll. 3-7. While Tim Kettner knew nothing about the restaurant business, through sheer will and hard work he grew the restaurant from 15 dinners on a good day to a thousand meals a day while in season. Transcript, p. 979, ll. 1-14.

TnW, LLC ("TnW") is a separate legal entity owned by Tim Kettner and Long. Transcript, p. 980, ll. 8-12. Tim Kettner met Long on the docks breaking down fish that Long had caught, and the two men became good friends. Transcript, p. 549, ll. 12-18 Long was a fisherman who

sold fish to the Crab Catchers restaurant. Transcript, p. 551, ll. 2-10. As Tim Kettner and Long cleaned fish together on the docks adjacent to the Crab Catchers, a conversation started about a "dream" of a larger operation with jet skis, an ice cream shop, a harbor master's suite and even a future restaurant, and that dream became TnW. Transcript, p. 553, l. 20 – p. 554, l. 3.

TnW was organized on June 30, 2016, and was engaged in the business of boat dock leasing, fuel sales and jet ski tour rentals from the docks immediately adjacent to the Crab Catchers restaurant. Transcript, p. 982, ll. 11-19. TNT owned the docks, a restaurant and a fish market, while TnW owned some land attached to the marina, a jet ski hut, and fueling equipment, such as a pump and tanks. Transcript, p. 982, l. 20 – p. 983, l. 2. In addition to operating TNT and its restaurant, Tim Kettner ran the day-to-day operations of TnW. Transcript, p. 984, ll. 14-15. On August 23, 2018, Tim Kettner and Long divested themselves of a portion of their ownership in TnW to bring in Clyde Chris Kiser ("Kiser") as an equal 1/3 partner of TnW. Transcript, p. 987, ll. 4-14.

Tim Kettner's original partner in TNT was his brother-in-law, Anthony "Tony" Howell, but in September 2020, all interests in TNT were transferred to Tim Kettner's son, Donald Kettner (37%), Tim Kettner's son, Casey Kuzmik (25%), a bartender turned manager at the restaurant, Justine Vaitis (20%) and Donald's friend, Robert Benoit (18%). Transcript, p. 974, l. 24 – p. 976, l. 13. Tim Kettner left South Carolina in September, 2020. Transcript, p. 971, ll. 18-20. After leaving South Carolina in September 2020, Tim Kettner maintained "absolutely zero" control over the business of TNT. Transcript, p. 979, l. 24 - p. 980, l. 3. Even so, Tim Kettner continued to hold an interest in TnW.

In March of 2020, "Covid hit," the restaurant business was down, and the bank account was "almost zero." "Everybody needed money." Transcript, p. 992, l. 22 – p. 993, l. 3. The

restaurant was closed and there was no "fish selling business." Transcript, p. 811, ll. 12-19. A dispute arose between Tim Kettner, Long and Kiser over Tim Kettner's management of TnW. Both Long and Kiser asked Tim Kettner to buy them out of TnW for $150,000.00 each. When Tim Kettner refused to pay them the demanded buyout, he was locked out of the business in September, 2020 and has played no role in TnW since. Transcript, p. 993, ll. 9-21. According to Kiser, he and Long "release[d] Tim of his responsibilities of being the member manager of the company." Transcript, p. 824, ll. 8-13.

Contemporaneously with his being "released" of his responsibilities and his departure from South Carolina to Wisconsin, Tim Kettner sent a series of text messages venting to his son Donald Kettner:

a. On September 4, 2020, Tim Kettner texted to his son: "Anyone buys fish from him [sic Long] … well you know that outcome." Trial Exhibit 5, p. 715.
b. On September 12, 2020, Tim Kettner texted to his son: "Remember who owns the property … eventually he will hang himself … patience." Trial Exhibit 5, p. 743.
c. On September 12, 2020, Tim Kettner texted to his son: "An idea may be to purchase the hut since it's on your land … You can have use for it …" Trial Exhibit 4, p. 830.
d. On September 12, 2020, Tim Kettner texted to his son: "Offer with contingency u can obtain permit .. and agree to turn off power and water to it." Trial Exhibit 4, p. 83.
e. On September 18, 2020, Tim Kettner texted to his son: "Look at citation closely .. state ur case to code enforcement that ur trying to buy it from another company and u had nothing to do with any of it .. It was a verbal usage thing between businesses .. Quick response to code enforcement is always a plus .. plus it supports the hut is on your land." Trial Exhibit 4, p. 832.

f. On September 18, 2020, Tim Kettner texted to his son: "Just my thought … Donnie or Justine to do the leg work .. Code enforcement knows them for a long time .. Rob should stay incognito as much as possible!" Trial Exhibit 4, p. 833.

g. On September 18, 2020, Tim Kettner texted to his son: "Much more valuable for now behind the scenes and infiltration! You'll have ur time to shine sir!" Trial Exhibit 4, p. 834.

h. On September 18, 2020, Tim Kettner texted to his son: "Actually you all are … Remember .. Wade hates me only … Remember that and use it .. example .. Maybe mention you know a guy looking for work to Chris and Wade." Trial Exhibit 4, p. 835.

i. On September 18, 2020, Kettner texted to his son: "Remember be nice signs! You guys can conceal your gut wrenching experience … thinm [sic] about that ." Trial Exhibit 4, p. 836.

j. On September 18, 2020, Tim Kettner texted to his son: "Could be very beneficial if ur all on the same page .. you guys know who the fn enemy is." Trial Exhibit 4, p. 836.

k. On October 3, 2020, Tim Kettner texted to his son: "Just reading emails on hut .. remember it's your land, your violation .. unless you have been involved in (working things out) every step and meeting. I would rely on what code enforcement has directed u to do .. The guy replying to ur emails is not code enforcement." Trial Exhibit 4, p. 64.

l. On October 4, 2020, Tim Kettner texted to his son: "Time for war." Trial Exhibit 4, p. 70.

m. On April 22, 2021, Tim Kettner texted to his son: "Put the heat on and keep it on !!!

Gloves are fucking off!!!", Trial Exhibit 4, p. 93.[2]

By the time of these texts, Tim Kettner had no ownership interest in TNT, had been "released" of any managerial control or authority over TnW and had relocated to Wisconsin. Upon his relocation in September 2020 and according to his uncontested testimony, Tim Kettner had "absolutely zero" control over TNT. Transcript, p. 979, l. 24 – p. 980, l. 3. The texts above ultimately form the sole basis upon which the Respondents contended that Tim Kettner committed a breach of fiduciary duty and engaged in tortious interference with contract and/or economic opportunity which proximately caused the loss of a contractual relationship between TnW and a third party in the summer of 2023 all as set forth herein below.

After Tim Kettner's departure from the State of South Carolina, a contentious relationship blossomed between Long and Kiser on the one hand and Donald Kettner, Casey Kuzmik and Robert Benoit on the other hand. While she remained a member of TNT, the trial of this case offered no criticism of Justine Viatis or her role in the ensuing dispute. The dispute between these other parties is well-chronicled in a series of motions for emergency relief in the underlying case.

On June 29, 2021, the Respondents filed a Motion for Temporary Injunction. In the Motion, the Respondents petitioned the Court that "[s]ince January 2021, the Defendants, **except possibly the Defendant Timothy Kettner**, have, in numerous ways, interfered with the business operations of Little River Watersports. Motion for Temporary Injunction, p. 2. **Emphasis Added**. In the Motion and accompanying affidavits, the Respondents described conduct through which Donald Kettner and TNT were allegedly interfering in the operation of the jet ski business that TnW had leased to a third party, Eric Rolf ("Rolf"), by towing cars, harassing customers, removing signs and blocking access to the parking lot. Motion for Temporary Injunction, p. 3. In the

[2] The underlying action was filed on March 12, 2021. Service on Kettner was accomplished via FedEx on March 30, 2021.

accompanying Affidavit of Eric Rolf, Rolf alleged that on June 17, 2021, Robert Benoit and Casey Kuzmik "verbally threatened my customers to get out of the parking lot." Affidavit of Eric Rolf, para. 5. In the accompanying Affidavit of Long, he attested that: "Over the last several months, **all of the Defendants except possibly Timothy D. Kettner**, have repeatedly interfered in the business operations of the Plaintiffs." Affidavit of Wade Long, para. 14. **Emphasis Added**. The Motion resulted in the entry of an Order on July 19, 2021, restraining certain behavior, including blocking the parking lot, interfering with the jet ski operations, harassing customers, etc. At the trial of the case, no evidence was offered that Tim Kettner blocked access to the parking lot, erected signs, harassed customers and/or engaged in any of the other conduct complained of in the Motion for Temporary Injunction. Likewise, no evidence was offered to suggest that Tim Kettner had directed these activities.

On January 19, 2022, the Respondents filed a Motion for Contempt and Sanctions against the Defendants Donald Kettner and TNT and More, Inc. for alleged violations of the July 19, 2021, Order. In the Motion, the Respondents sought an Order of the Court holding "Defendants Donald Kettner and TNT and More, Inc." in contempt. Motion for Contempt and Sanctions, p. 1. In the Motion, the Respondents complained of Defendants' Donald Kettner and TNT allegedly permitted a TNT customer to park at the TnW dock on September 28, 2021, locking and/or blocking access to the parking lot on October 21, 2021, locking the gate to restrict the ability to refill the diesel fuel tank on December 22, 2021, and keeping the parking lot gates locked on January 12 and 18, 2022. Motion for Contempt and Sanctions. pp. 2-3. At the trial of the case, no evidence was offered that Tim Kettner engaged in any of the conduct complained of in the Motion. Likewise, no evidence was offered to suggest that Tim Kettner had directed these activities.

On May 23, 2022, Long, Kiser and TnW filed a Motion for an Expedited Emergency

Temporary Restraining Order complaining of the conduct of "actions of Defendants Donald Kettner and TNT and More, Inc." The Motion was filed after counsel for TNT notified the Respondents' counsel of TNT's intent to shut down the pier to "remove damaged and rotting boards and replace them beginning May 27, 2022." Motion for Expedited Emergency Temporary Restraining Order, para. 3. Thereafter, a sign was posted on the pier giving public notice that it would be closed May 27, 2022 through May 29, 2022 – Memorial Day Weekend. Motion for Expedited Emergency Temporary Restraining Order, para. 6. At the trial of the case, no evidence was offered that Tim Kettner engaged in any of the conduct complained of in the Motion. Likewise, no evidence was offered to suggest that Tim Kettner had directed these activities.

On June 3, 2022, the Respondents filed a Motion for Contempt and Sanctions Against the Defendants Donald Kettner and TNT and More, Inc. The Motion complained that on the evening of May 30, 2022, Robert Benoit connected a chain from a tractor to the Respondent's 3,000-gallon fuel tank and attempted to move the fuel tank from its location. The Motion further alleged that "agents on behalf of Crab Catchers cut a padlock on Plaintiffs' panel box and flipped a breaker switch to access and utilize receptacles for food trailers over the weekend of the Blue Crab Festival." Motion, p. 4. At the trial of the case, no evidence was offered that Tim Kettner engaged in any of the conduct complained of in the Motion. Likewise, no evidence was offered to suggest that Tim Kettner had directed these activities.

After Tim Kettner's departure from South Carolina and the businesses in September 2020, Long testified that he "shut the business down" on October 12, 2020, and he then later caused TnW to rent the jet ski operations to Rolf in 2021. Transcript, p. 354, ll. 12-20. According to Rolf, when Long approached him, he explained that "they just didn't want to rent jet skis anymore." Transcript, p. 753, ll. 12-17. Rolf entered into a contract with TnW to rent the jet ski operations

for the full year of 2021 at the rate of $10,000.00 per month. Transcript, p. 753, l. 18 – p. 754, l. 4. The contract was marked as Plaintiff's Exhibit 37, and it erroneously reflects the term of the lease as being from March 4, 2021, to March 3, 2021. Exhibit 37, p. 1. Given his testimony that the contract was for the entire year of 2021, it is reasonable to assume that the end date of the term was actually March 3, 2022. Importantly, the contract contained no automatic extensions or renewal terms. As a result, Rolf continued as a month-to-month tenant after March 2022. Rolf testified about interference with his business:

> **Q** Other than blocking the ski hut and ski pump, did you have any issues during the year when you were trying to operate it?
>
> **A** Yes. As customers were walking down to the jet skis after they paid to get life vests, they would constantly say the cars are going to get towed.
>
> **Q** Who would say that?
>
> **A The owners of Crab Catchers, the three males**.
>
> **Q** The three males?
>
> **A** Uh-huh.
>
> **Q** Who is that?
>
> **A Rob, Donald, and Casey**. Justine kind of stayed out of it, for the most part.
>
> **Q** So they would actually talk to your customers that were in ski jackets going to the jet skis?
>
> **A** Yes, sir. And they did tow cars. Transcript, p. 755, ll. 6-22. **Emphasis Added**.

According to Rolf, his problems "got a lot worse" in 2022 when "they" ripped the shed out of the ground, blocked access with Rob's black Ram truck and chained the jet ski shed to

a tractor. Transcript, p. 756, ll. 2-24. Rolf continued to rent through "the end of 2022," but ceased the relationship because he "had enough of the nonsense." Transcript, p. 760, ll. 17-23. As it relates to Tim Kettner, however, Rolf testified that he had never met or talked to Tim Kettner prior to the trial. Transcript, p. 762, ll. 6-12. When asked by counsel for Tim Kettner why he voluntarily appeared for three days of trial, Rolf testified:

> **A** Sir, I'm coming to this courtroom because my business was vandalized and ruined -- two of my businesses -- by your clients over there.
> **Q** Stop. What clients? Mr. Kettner?
> **A** No, sir. p. 768, ll. 16 -20

The record is devoid of evidence that Tim Kettner participated in or directed any of the conduct that interfered with Rolf or the operation of the jet ski business in 2021 or 2022 or that Tim Kettner had the right to control the conduct of those who allegedly interfered. With the exception of Tim Kettner's "gloves … off" text after he was sued in April, 2021, the other texts that form the basis of the alleged interference in the Rolf lease predate even the existence of the Rolf lease. In fact, Rolf never testified that he would have continued his operation but for any action taken by Tim Kettner.

At the close of evidence, three damages claims against Tim Kettner were presented to the jury resulting in two adverse verdicts on the claims of breach of fiduciary duty and "economic interference." In arguments made to the Court, as well as in closing argument, counsel for the Respondents made it clear that the sole evidence of harm resulting from these claims was the alleged loss of the Rolf lease:

<u>As to economic interference:</u>

> **MR. PLAYER**: The evidence of them going down

and threatening the people with the docks with,
We're going to tow your car. It is a little
loosey-goosey.
But the one that is clearly there is the Eric
Rolf contract because he said they harassed me to
the point where I had to leave, and that was a
contract for $10,000 a month. So I think that
is -- the economic interference, I couldn't find
that cause of action. I think what she stated,
maybe in-artfully, is you interfered with our
contract, the interference with prospective would
be, if there were people coming to use the marina,
and their actions drive them away, that is
interference with prospective contract.
In terms of putting a value on that, I admit,
we're a little lacking in that department, so. Transcript, p. 1214., ll. 1-17

MR. PLAYER: But the only thing I'm arguing to the jury is the Rolf contract with regards to the interference. Transcript, p. 1216, ll. 1-3

MR. PLAYER (Closing): The next -- well, let me see. Okay. The
next one that we have is economic interference in
the complaint. That is basically tortious
interference with the contract. The judge will
charge you on one or two. I think it is
prospective, but our claim is solely based on Eric
Rolf. He was renting our docks for $10,000 a month

in '21 and '22. Transcript, p. 1253, ll. 4-11

MR PLAYER (Closing): Harassment, economic interference. It is real simple. The only thing is Eric Rolf. He said he didn't renew because of the harassment of them, so we lost '23 and '24, and it was $10,000 every month for two years. That is $240,000.[3] That is what we are asking for in the economic interference, tortious interference. Transcript, p. 1338, ll. 17-23

As to breach of fiduciary duty:

THE COURT: Talk to me about breach of fiduciary duty.

MR. PLAYER: Breach of fiduciary duty. I think it is simple. We have text messages where Tim is coordinating with the guys at Crab Catchers to remove the hut through the use of regulatory authorities. Like, that's your property, you might want it later, and according to Eric Rolf, that directly caused him to leave and to stop paying the rent to Wade. Once the ski hut was gone, we couldn't operate. That is $10,000 a month. That is a streamline.

Tim, after September, those text messages where he's going to say, Go to war. Gloves are off. Don't buy fish from Wade. That stretches

[3] In fact, the Rolf lease was for a one-year term ending March, 2022. There is no agreement to lease the jet ski operations for 2023 or 2024, and Rolf never testified that he would have continued the relationship for two years but for interference by Kettner.

into 2021. That goes against the idea that he had no participation with TNT, because they are all texting about how they are going to get Wade. But the most important one, for the purposes of conspiring to act against the interest of TnW, is when says, You all can use that ski hut. Tell him you are going to buy it. And then, you know, Donny has to make the offer as the president, and Robert is the incognito infiltrator. That is acting about as directly against the interest of TnW as you can get. He said, There is no damages tied to it. The Eric Rolf contract is directly tied to it, because he testified when the ski hut was removed, that was the last straw. And that was $10,000 a month. I think it was lowered to $7,000, but that is clearly a damage to TnW because they lost the lease on the docks because Tim was conspiring with the other members of TNT to remove the ski hut that was used for that business exclusively by TnW for three years at that point. So I think those text messages clearly show he was conspiring and acting against the interest of TnW. When they had their shareholders -- member meeting when they tried to salvage things, Tim said I'm not doing anything to salvage this, which is his right. But the activities of interfering with the business of TnW, at a very

minimum, the ski hut he participated in, that

caused direct damage. Transcript, p. 931, l. 16 - p. 933, l. 9

Tim Kettner appeals from the adverse verdicts and requests that they be vacated. Alternatively, Tim Kettner contends that the trial court erred in refusing to force the Respondents to elect between the two verdicts.

ARGUMENT

A. The trial Court erred in refusing to vacate the jury award against Appellant Timothy Kettner for breach of fiduciary duty when the record is devoid of evidence through which the jury could find that Tim Kettner took any action in violation of any fiduciary duty owed to any Defendant which was the direct and proximate cause of any resulting harm.

Establishing a breach of fiduciary duty has three elements: (1) existence of the relationship, (2) breach of the duty owed to the Plaintiff, (3) damages proximately resulting from that breach. *See Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). Proximate cause requires proof of cause-in-fact and legal cause. *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006). In causation, as in other contexts, "proximate" is the opposite of "remote." *See Stone v. Bethea*, 251 S.C. 157, 162, 161 S.E.2d 171, 173 (1968) ("When the [conduct] appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause."). The cause-in-fact and legal cause elements are designed to enable courts and juries to differentiate between proximate and remote causes in a reliable manner.

As to legal cause, "foreseeability is considered 'the touchstone ...,' and it is determined by looking to the natural and probable consequences of the defendant's act or omission." *Baggerly*, 370 S.C. at 369, 635 S.E.2d at 101 (quoting *Koester v. Carolina Rental Ctr.,*

Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994)). In most cases, foreseeability ends up being addressed as a question of fact for the jury. *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 317, 422 S.E.2d 128, 131 (1992). In the first instance, however, legal cause is just what its name suggests—a question of law. "[W]hen the evidence is susceptible to only one inference ... [legal cause] become[s] a matter of law for the court." *Id.* (citing *Matthews v. Porter*, 239 S.C. 620, 625, 124 S.E.2d 321, 323 (1962)); *see also Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) (discussing foreseeability, and stating "in rare or exceptional cases ... the issue of proximate cause [may] be decided as a matter of law" (quoting *Bailey v. Segars*, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct. App. 2001))).

A plaintiff must also prove cause-in-fact. "Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence." *Hurd v. Williamsburg Cty.*, 363 S.C. 421, 428, 611 S.E.2d 488, 492 (2005) (citing *Oliver*, 309 S.C. at 316, 422 S.E.2d at 130).

Respondents contend that Tim Kettner breached his fiduciary duty to TnW and his partners, Long and Kiser, by sending a series of text messages to his son following Tim Kettner's ouster from TnW and departure from the State of South Carolina in September, 2020, as well as a single text message that was sent several months later in April, 2021. Respondents further contend that these texts messages proximately caused harm to TnW because they resulted in Eric Rolf's decision to cease a business relationship with TnW **approximately two years after the messages were sent**.

After Tim Kettner was ousted from TnW in September, 2020, he owed whatever remaining fiduciary duties existed for an ousted (but still existing) partner of an LLC. After Tim Kettner was sued by TnW in March, 2021, he owed whatever remaining fiduciary duties existed for an ousted

and sued (but still existing) partner of an LLC. Tim Kettner will accept for argument sake that his remaining duties would have embraced the duty not to interfere in the business operations of the LLC.

Notwithstanding the existence of some remnant fiduciary duty, the Respondents' breach of fiduciary duty claim against Tim Kettner fatally lacks any evidence that any action by Tim Kettner interfered in the business of TnW and/or proximately caused any harm to TnW. In arguments to the Court and to the jury, the Respondents pointed exclusively to text messages sent by Tim Kettner to his son as evidence of Tim Kettner's breach of fiduciary duty resulting in harm to TnW. A closer look at the timeline and the evidence highlights the many defects in such a claim.

On September 4, 2020, Tim Kettner texted to his son: "Anyone buys fish from him [sic Long] … well you know that outcome." Trial Exhibit 5, p. 715. TnW was not in the business of selling fish. Long was in the business of selling fish. The sole basis of harm flowing from any alleged tortious interference with prospective contractual relations was the loss of the Rolf relationship in late 2022. It is impossible that Tim Kettner's text urging his son not to buy fish from Long was a breach of Tim Kettner's fiduciary duties to TnW that was a direct and proximate cause of harm to the Respondents in the form of the loss of the future economic benefit of the Rolf relationship.

On September 12, 2020, Tim Kettner texted to his son: "Remember who owns the property … eventually he will hang himself … patience." Trial Exhibit 5, p. 743. Not only is this communication vague and obtuse in its meaning, it does not direct or even suggest that anyone take any action. As it relates to the Rolf relationship, Rolf did not enter the one-year jet ski lease until March 4, 2021. As the Rolf relationship did not exist, it is impossible to point to this communication as a breach of Tim Kettner's fiduciary duties to TnW that was a direct and

proximate cause of harm through the future loss of the Rolf relationship some two years later.

On September 12, 2020, Tim Kettner texted to his son: "An idea may be to purchase the hut since it's on your land … You can have use for it … Trial Exhibit 4, p. 830. The hut (ie. the jet ski rental hut) was not purchased, nor was there any evidence in the record that anyone attempted to purchase the hut after this text. Moreover, as the Rolf relationship did not exist, it is impossible to point to this communication as a breach of Tim Kettner's fiduciary duties to TnW that was a direct and proximate cause of harm through the future loss of the Rolf relationship some two years later.

On September 12, 2020, Tim Kettner texted to his son: "Offer with contingency u can obtain permit .. and agree to turn off power and water to it." Trial Exhibit 4, p. 83. Again, this is a reference to a hypothetical purchase of the jet ski hut that never occurred and which was communicated approximately six months before the existence of the Rolf lease and approximately two years before Rolf's eventual departure. As the Rolf relationship did not exist, it is impossible to point to this communication as a breach of Tim Kettner's fiduciary duties to TnW that was a direct and proximate cause of harm through the future loss of the Rolf relationship some two years later.

On September 18, 2020, Tim Kettner texted to his son: "Look at citation closely .. state ur case to code enforcement that ur trying to buy it from another company and u had nothing to do with any of it .. It was a verbal usage thing between businesses .. Quick response to code enforcement is always a plus .. plus it supports the hut is on your land." Trial Exhibit 4, p. 832. Again, this is a reference to a hypothetical purchase of the jet ski hut that never occurred and which was communicated approximately six months before the existence of the Rolf lease and approximately two years before Rolf's eventual departure. As the Rolf relationship did not exist,

it is impossible to point to this communication as a breach of Tim Kettner's fiduciary duties to TnW that was a direct and proximate cause of harm through the future loss of the Rolf relationship some two years later.

On September 18, 2020, Tim Kettner texted to his son: "Just my thought … Donnie or Justine to do the leg work .. Code enforcement knows them for a long time .. Rob should stay incognito as much as possible!" Trial Exhibit 4, p. 833. Again, this is a reference to a hypothetical purchase of the jet ski hut that never occurred and which was communicated approximately six months before the existence of the Rolf lease and approximately two years before Rolf's eventual departure. As the Rolf relationship did not exist, it is impossible to point to this communication as a breach of Tim Kettner's fiduciary duties to TnW that was a direct and proximate cause of harm through the future loss of the Rolf relationship some two years later.

On September 18, 2020, Tim Kettner texted to his son: "Much more valuable for now behind the scenes and infiltration! You'll have ur time to shine sir!" Trial Exhibit 4, p. 834. It is simply impossible to tie this text to any action taken by any person, much less to an alleged harm suffered by TnW approximately two years later.

On September 18, 2020, Tim Kettner texted to his son: "Actually you all are … Remember .. Wade hates me only … Remember that and use it .. example .. Maybe mention you know a guy looking for work to Chris and Wade." Trial Exhibit 4, p. 835. It is simply impossible to tie this text to any action taken by any person, much less to an alleged harm suffered by TnW approximately two years later.

On September 18, 2020, Tim Kettner texted to his son: "Remember be nice signs! You guys can conceal your gut wrenching experience … thinm [sic] about that ." Trial Exhibit 4, p. 836. It is simply impossible to tie this text to any action taken by any person, much less to an

alleged harm suffered by TnW approximately two years later.

On September 18, 2020, Tim Kettner texted to his son: "Could be very beneficial if ur all on the same page .. you guys know who the fn enemy is." Trial Exhibit 4, p. 836. It is simply impossible to tie this text to any action taken by any person, much less to an alleged harm suffered by TnW approximately two years later.

October 3, 2020, Tim Kettner texted to his son: "Just reading emails on hut .. remember it's your land, your violation .. unless you have been involved in (working things out) every step and meeting. I would rely on what code enforcement has directed u to do .. The guy replying to ur emails is not code enforcement." Trial Exhibit 4, p. 64. While this text does reference the "hut," it suggests that Tim Kettner's son should "rely on what code enforcement has directed u to do." It is impossible to connect the dots between Tim Kettner suggesting to his son that he defer to and rely on code enforcement in October, 2020, with an alleged breach of Tim Kettner's fiduciary duties to TnW that was a direct and proximate cause of the loss of a relationship with Rolf that did not exist at the time and would not terminate until approximately two years later.

On October 4, 2020, Tim Kettner texted to his son: "Time for war." Trial Exhibit 4, p. 70. While the text certainly has a menacing tone, Tim Kettner had no interest in TNT and no right or ability to control its members. Moreover, the text does not suggest that anybody take any action, and the record is devoid of evidence that anyone did anything because of the text. Finally, and significantly, it is impossible that the text proximately caused the loss of a non-existent relationship and/or harm that resulted from the future loss of the non-existent relationship some two years later.

On April 22, 2021, Tim Kettner texted to his son: "Put the heat on and keep it on!!! Gloves are fucking off!!!, Trial Exhibit 4, p. 93. This is the single text that exists after the Rolf lease was

entered on March 4, 2021.[4] Still, there is nothing in the record to establish that Kettner was even aware of the Rolf lease at the time. Tim Kettner had no interest in TNT and no right or ability to control its members. Moreover, the text does not suggest that anybody take any action, and the record is devoid of evidence that anyone did anything because of the text. Finally, and significantly, it is impossible that the text was a direct and proximate cause of harm that resulted from the future loss of the Rolf relationship some two years later.

These text messages represent the entire body of evidence that Tim Kettner allegedly breached a fiduciary duty to TnW proximately causing harm through the loss of the Rolf relationship. Curiously, Rolf himself did not attribute any of the behavior he experienced to Tim Kettner (a man that he had never met). Transcript, p. 762, ll. 6-7. The following is a list of the conduct that Rolf testified as being the impetus for his decision to cease renting the jet ski operation from TnW. It is instructive in both what it says and in what it does not say:

1. He signed a lease for the full year 2021 at the rate of $10,000.00 per month. Transcript, p. 753, l. 22 – p. 754, l. 4.[5]
    - Rolf did not testify that he was aware of Tim Kettner at the time of the lease. No one testified that Tim Kettner was aware of Rolf at the time of the lease. Apart from the "gloves … off" text on April 22, 2021, the last of the prior Tim Kettner text messages was dated October 4, 2020.
2. "The owners of the restaurant, Crab Catchers, the males were blocking the gas station or fuel tanks so we could not get fuel." Transcript, p. 754, ll. 18-20.
    - Tim Kettner was residing in Wisconsin.

[4] The underlying action was filed on March 12, 2021. Service on Tim Kettner was accomplished via FedEx on March 30, 2021.
[5] In fact, the lease was entered into evidence as Plaintiff's 37, and it was not executed until March 4, 2021.

- Tim Kettner did not block the gas station or fuel tanks.
- Tim Kettner never directed anyone to block the gas station or fuel tanks.
- Tim Kettner had no ownership interest in Crab Catchers and no right or ability to control the conduct of its owners.

3. "They would block the front entrance of our jet ski office." Transcript, p. 754, ll. 20-21.
    - Tim Kettner was residing in Wisconsin.
    - Tim Kettner did not block the front entrance of the jet ski office.
    - Tim Kettner never directed anyone to block front entrance of the jet ski office.
    - Tim Kettner had no ownership interest in Crab Catchers and no right or ability to control the conduct of its owners.
4. "As customers were walking down to the jet skis after they paid to get life vests, they would constantly say the cars are going to get towed. … The three males… Rob, Donald and Casey." Transcript, p. 755, ll. 6-18.
    - Tim Kettner was residing in Wisconsin.
    - Tim Kettner did not threaten to tow cars of jet ski customers.
    - Tim Kettner never directed anyone to tow cars of jet ski customers.
    - Tim Kettner had no ownership interest in Crab Catchers and no right or ability to control the conduct of its owners.
5. "And they did tow cars." Transcript, p. 755, l. 22.
    - Tim Kettner was residing in Wisconsin.
    - Tim Kettner did not tow cars of jet ski customers.
    - Tim Kettner never directed anyone to tow cars of jet ski customers.

- Tim Kettner had no ownership interest in Crab Catchers and no right or ability to control the conduct of its owners.

6. "They blocked – would block all of our customers out of the parking lot." Transcript, p. 756, ll. 2-3.
    - Tim Kettner was residing in Wisconsin.
    - Tim Kettner did not block jet ski customers out of the parking lot.
    - Tim Kettner never directed anyone to block cars of jet ski customers out of the parking lot.
    - Tim Kettner had no ownership interest in Crab Catchers and no right or ability to control the conduct of its owners.
7. "They would have their customers go out where you pump the fuel out by the water and block the fuel station so we could not pump fuel for the customers." Transcript, p. 756, ll. 10-15.
    - Tim Kettner was residing in Wisconsin.
    - Tim Kettner did not block the fuel station.
    - Tim Kettner never directed anyone to block the fuel station.
    - Tim Kettner had no ownership interest in Crab Catchers and no right or ability to control the conduct of its owners.
8. "2022 … and then that's when the vandalized the jet skis." Transcript, p. 756, l. 24 – p. 757, l. 1.
    - Tim Kettner was residing in Wisconsin.
    - Tim Kettner did not vandalize the jet skis.
    - Tim Kettner never directed anyone to vandalize the jet skis.

- Tim Kettner had no ownership interest in Crab Catchers and no right or ability to control the conduct of its owners.

9. "It all started in 2021 when they took down the fishing tables, and they knocked out our surveillance system." Transcript, p. 757, ll. 2-7.
    - Tim Kettner was residing in Wisconsin.
    - Tim Kettner did not take down fishing tables, nor did he knock out the surveillance system.
    - Tim Kettner never directed anyone to take down fishing tables, nor did he knock out the surveillance system.
    - Tim Kettner had no ownership interest in Crab Catchers and no right or ability to control the conduct of its owners.
10. "In 2022 … they ripped our shed out of the ground … and brought it to the back of the parking lot about 200 yards away." Transcript, p. 757 ll. 8-13
    - Tim Kettner was residing in Wisconsin.
    - Tim Kettner did not rip the shed out of the ground or move it to the back of the parking lot.
    - Tim Kettner never directed anyone to rip the shed out of the ground or move it to the back of the parking lot.
    - Tim Kettner had no ownership interest in Crab Catchers and no right or ability to control the conduct of its owners.
11. "They chained our jet ski shed to a tractor with a chain on it, and then the next day after that, that is when they illegally took it off the property, ransacked the shed, damaged my equipment, and that was the final nail in the coffin." Transcript, p. 757, ll. 19-24.

- Tim Kettner was residing in Wisconsin.
- Tim Kettner did not chain the shed to a tractor, remove the shed, ransack the shed or damage anyone's equipment.
- Tim Kettner never directed anyone to chain the shed to a tractor, remove the shed, ransack the shed or damage anyone's equipment.
- Tim Kettner had no ownership interest in Crab Catchers and no right or ability to control the conduct of its owners.

12. "We tried to put up shade, and at night Rob would take a circular saw with a battery on it and cut our shade down." Transcript, p. 758, ll. 1-3.
    - Tim Kettner was residing in Wisconsin.
    - Tim Kettner did not use a saw to cut down Rolf's shade.
    - Tim Kettner never directed anyone to use a saw to cut down Rolf's shade.
    - Tim Kettner had no ownership interest in Crab Catchers and no right or ability to control the conduct of its owners.
13. "They went to court without my knowledge or lawyer's knowledge at the time. They were moving the ski hut. It was already on a flatbed trailer, already trying to take it." Transcript, p. 759, ll. 7-11.
    - Tim Kettner was residing in Wisconsin.
    - Tim Kettner did not try to take the shed on a flatbed trailer.
    - Tim Kettner never directed anyone to try to take the shed on a flatbed trailer.
    - Tim Kettner had no ownership interest in Crab Catchers and no right or ability to control the conduct of its owners.
14. "Rob instructed the officers to arrest me for trespassing on the land that I'm paying

$10,000 a month for rent." Transcript, p. 760, ll. 4-6.

- Tim Kettner was residing in Wisconsin.
- Tim Kettner never threatened to arrest anyone.
- Tim Kettner never directed anyone to threaten the arrest of Rolf.
- Tim Kettner had no ownership interest in Crab Catchers and no right or ability to control the conduct of its owners.

15. "Casey, Donny, Rob and Justine" were photographed on Rolf's leased docks. Rob told Rolf, "This is my dock." Transcript, p. 760, l. 24 – p. 761, l. 12.

- Tim Kettner was residing in Wisconsin.
- Tim Kettner was not on the dock, nor did he say that he owned the dock.
- Tim Kettner had no ownership interest in Crab Catchers and no right or ability to control the conduct of its owners.

When asked whether it was Tim Kettner who "vandalized and ruined" his business, Rolf testified, "No, sir." Transcript, p. 768, ll. 19-20.

As to the alleged resulting damage, TnW argued to the Court and to the jury that it lost rental revenue in the amount of $10,000.00 per month from Rolf for the years 2023 and 2024 because of the alleged breaches of Tim Kettner's fiduciary duties to TnW. However, there was no agreement between Rolf and TnW to lease the docks for 2023 or 2024. Instead, Rolf was merely a month-to-month tenant after March 2022. More importantly, Rolf never testified that he intended to continue or would have continued his relationship with TnW for any defined period after 2022, much less for the entire years of 2023 and 2024, but for the conduct of Tim Kettner. "Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy." *Austin v. Stokes-Craven*

Holding Corp., 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) (quoting *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981)). "While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." *Id.* (quoting *Whisenant*, 277 S.C. at 13, 281 S.E.2d at 796). This jury was left to speculate wildly that Rolf would have paid $10,000.00 per month to TnW for 2023 and 2024 despite the lack of any factual predicate. This is true even though TnW had every right and opportunity to establish its damages theory through Rolf's testimony had the questions simply been asked.

The Court erred in refusing to direct a verdict in favor of Tim Kettner on the cause of action for breach of fiduciary duty. There is simply no evidence upon which a reasonable jury could have concluded that a text message in April, 2021, even assuming *arguendo* that the message was a breach of fiduciary duty, was a direct and proximate cause of Rolf's decision to stop leasing the jet ski operation from TnW nearly two years later. Likewise, there is no evidence to support the amount of damages determined by the jury outside of pure speculation.

Finally, the lower Court erred also in failing to vacate the punitive award against Tim Kettner as there is simply nothing in the record upon which the jury could base a punitive award against him. There are no Tim Kettner tax returns, no financial statements or other reliable evidence to demonstrate his ability to pay.

B. <u>The trial Court erred in refusing to vacate the jury award against Appellant Timothy Kettner for economic interference when the record is devoid of evidence to support a direct and proximate cause between any action of Kettner and any resulting loss to the Defendants</u>.

The jury verdict form asks the question of whether an award should issue regarding "economic interference" without separately distinguishing tortious interference with contract and intentional interference with prospective contractual relations. The trial court charged the jury on

both theories. A verdict on either theory is fatally flawed and should be vacated.

i. Tortious Interference with Contract

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Camp v. Springs Mortgage Corp.,* 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). "[A]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties." *Threlkeld v. Christoph,* 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct.App.1984).

The contract purportedly interfered with in this setting is the Rolf lease agreement. The Rolf lease agreement was for a one-year term from March 2021 through March 2022. As the lease was never formally extended, Rolf continued as a month-to-month tenant until he chose to vacate the property in late 2022. Simply put, the record in this case is devoid of evidence that Tim Kettner knew about the Rolf lease agreement and/or that Tim Kettner took any action to procure its breach. There was no basis upon which a reasonable jury could have returned a verdict against Tim Kettner for tortious interference with contract and the trial court erred in refusing to vacate the award against Tim Kettner, if in fact the "economic interference" award was based on this theory. Moreover, by late 2022, Rolf was merely a month-to-month tenant. Even if Tim Kettner knew about the contract and even if he sought to procure its breach (both of which are rejected), the interference in a month-to-month relationship without more evidentiary development could not have resulted in more than one month of damages. The trial court erred in refusing to vacate the verdict to the extent that it was based on intentional interference with contract.

ii. Intentional Interference with Prospective Contractual Relations

"To establish a cause of action for intentional interference with prospective contractual

relations, a plaintiff must show: 1) intentional interference with prospective contractual relations; 2) for an improper purpose or by improper methods; and 3) resulting in injury." *Eldeco, Inc. v. Charleston Cty. Sch. Dist.,* 372 S.C. 470, 480, 642 S.E.2d 726, 731 (2007). In September and October, 2020, when Tim Kettner texted his son, there was no contract between Rolf and TnW. The fact that Rolf entered into a lease in March 2021 proves that the September and October, 2020 texts did not interfere in any prospective contractual relationship between Rolf and TnW.

The only remaining conduct by Tim Kettner that the Respondents point to in support of their tortious interference with prospective contractual relations claim is the single text from Tim Kettner to his son on April 22, 2021. In April 2021, there was not a "prospective" contractual relationship between Rolf and TnW. There was an actual contractual relationship between Rolf and TnW. As a result, the proper cause of action would be tortious interference with contract which fails for the reasons set forth above.

Even if the Respondents were to argue that the "month to month" aspect of the Rolf lease was a prospective contractual relationship, as opposed to an actual contractual relationship, as set forth in the argument regarding breach of fiduciary duty, the record is devoid of any evidence that Tim Kettner took any action to interfere in the Rolf lease. In fact, during his testimony, Rolf never once mentioned Tim Kettner as a reason for deciding not to renew his lease with TnW. The single text message in April 2021 is simply not enough to create a proximate cause link between Tim Kettner's conduct and Rolf's decision to discontinue his relationship with TnW. The jury's findings completely lack factual support and it was the function of the trial Court to correct their error. The trial court erred in not vacating the award for tortious interference with prospective contractual relations.

Likewise, the trial court erred in not vacating the punitive award as there is simply nothing

in the record upon which the jury could have based a punitive award against Tim Kettner personally. There are no Tim Kettner tax returns, no financial statements or other reliable evidence to demonstrate his ability to pay.

C. The trial Court erred in refusing to require the Defendants to elect remedies when the jury returned awards against Appellant Timothy Kettner for breach of fiduciary duty and for economic interference when both awards were based upon the same conduct and the same alleged resulting harm.

"Election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action." *Taylor v. Medenica,* 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996). The basic purpose of election of remedies is to prevent double recovery for a single wrong. *Save Charleston Found. v. Murray,* 286 S.C. 170, 333 S.E.2d 60 (Ct.App.1985). "When 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." *Id.* at 175, 333 S.E.2d at 64.

It is inescapable that both the factual predicate and the alleged harm for both the breach of fiduciary duty and tortious interference claims that resulted in verdicts against Tim Kettner are identical. With regard to the liability, both claims point to the series of text messages in late 2020. With regard to the damages, both claims allege that the resulting harm was the loss of the Rolf relationship. While Tim Kettner urges the Court that both verdicts should be vacated for the many reasons set forth above, it would be improper for the Respondents to be allowed a double recovery through the retention of two awards that are based on the same facts and complain of the same harm. The trial court erred in refusing to require the Respondents to elect their remedy between the two separate verdict awards.

CONCLUSION

In September 2020, Tim Kettner left South Carolina empty and defeated and returned home

to Wisconsin. By the time of his departure, Tim Kettner had long since transferred ownership and control of his seafood restaurant in Little River, South Carolina, known as Crab Catchers, to his son Donald Kettner and others. By the time of his departure, Tim Ketter had also been ousted from a separate marina / jet ski business that he shared with Respondents Wade Long and Chris Kiser. As the relationships between those he left behind soured, the owners of the seafood restaurant battled with the owners of the marina / jet ski business over a host of issues involving parking, dock access, etc. Tim Kettner did not participate in the disputes. Tim Kettner watched in horror from Wisconsin as the dream that he worked tirelessly to build in South Carolina was destroyed by disagreements, disputes and lawsuits. At the trial of the case, Tim Kettner was sued for breach of fiduciary duty and economic interference related to the jet ski / marina business. Even though the record is devoid of any evidence of any interference by Tim Kettner, the jury's view of Tim Kettner was obviously smeared by their view of the conduct of his co-Defendants and verdicts were returned against him on both theories. It was incumbent upon the trial court to cure the jury's errors by vacating the awards against Tim Kettner given the utter absence of evidence to support the awards. The trial court erred in refusing to do so, as well as alternatively in refusing to force the Respondents to elect between the jury awards.

Respectfully submitted,

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