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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
The Honorable Alex B. Hyman

Appellate Court Case 2025-002251

Thomas Wade Long and Clyde Kiser, individually,
And on behalf of TNW and More, LLC, ……. Respondents,

v.

Timothy D. Kettner and TNT and
More, Inc., d/b/a Crab Catchers on the Waterfront, ……. Defendants

of which Timothy D. Kettner and TNT and
More, Inc., d/b/a Crab Catchers on the Waterfront are Appellants

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Initial Brief of Respondents

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STATEMENT OF THE CASE

RespondentsWade Long and Chris Kiser were in business with Defendant Timothy Kettner by virtue of Plaintiff TNW & More, LLC. TNW was formed to operate a marina next door to Defendant TNT & More, Inc., also known as Crabcatchers. A dispute arose between all the various parties concerning the operation of the marina and the real estate of the respective companies. Respondents brought this action on March 12, 2021 alleging a joint venture existed between Appellants and Respondents. The Complaint alleged a breach of a joint venture agreement, interference with contractual relations, and promissory estoppel. Plaintiff brought an additional claim for breach of fiduciary duty against Mr. Kettner. A jury trial was conducted between June 10, 2024 and June 20, 2024, at the conclusion of which the jury returned a verdict in favor of Plaintiffs. All Appellants filed motions for judgement notwithstanding the verdict, which were denied by the lower court in September 2025. This appeal followed.

STATEMENT OF THE FACTS

Wade Long has been on the Little River waterfront his entire life as a fisherman. **T.233-234.** For the last 15 years or longer, he's been catching fish and bringing them to the local restaurants. One of those restaurants is called Crab Catchers. Crab Catchers is TNT & More, Inc. and it was originally owned and operated by Tim Kettner. Over the years, Wade and Tim developed a friendship. **T.236-237.** They decided that they wanted to build a marina, harbor master's office, an ice cream shop, and eventually a new restaurant that served steaks that were grown organically on a farm that Tim owned. **T.237-238.** They eventually brought Chris Kiser in as a member in 2018.

TnW was to purchase the waterfront property and TNT bought the land adjacent to the restaurant. **T. 240-241.** Tim and Wade worked to develop that adjacent property into a parking lot to alleviate the parking problem faced by Crabcatchers. **T. 240-241.** Moreover, with the new venture, there would need to be more parking. The joint venture was to combine all of the lots that were developed by Tim and Wade into a single large parking lot. **T.255-256; Plaintiffs' Exhibit 10.**

Tim and Wade formed TnW & More, LLC with the agreement and understanding that TnW was going to use the CrabCatchers property for everything, including their parking lot. **T. 248**; **Plaintiffs' Exhibit 7**. During the years of quiet cooperation, TnW did use the TnT property for office space, document storage, business meetings, and the jet ski customers used the CarbCatchers bathroom facilities. **T.249**. But TnW needed more property than the waterfront property. This was because of regulations that require a business operator to have access to a certain amount of upland frontage that is not in a critical area as defined by the regulations. **T.**

250-251. The critical area is a line that defines real property as environmentally sensitive. **T.278.** All parties knew that for TnW to operate, it had to have access to the parking lot developed by Tim and Wade. This was the fundamental agreement that led to the joint venture. **T. 272**. Respondents believed that all properties were going to be combined together to be jointly owned by TnW and TnT. **T.255-258**

To accomplish the goal of this joint venture, TnT and TnW jointly applied for and obtained a loan in the amount of $1.1 million dollars. **T.258; Plaintiffs'Exhibits 13 & 14.** Every member of TnT and TnW was required to personally guarantee that loan. **Id.** The bank underwriter created a credit memorandum that memorialized all of the information provided by the respective borrowers. That credit memorandum clearly indicates that the loan was for the purchase of property and improvements for the operation of a jet ski rental operation, an ice cream shop, dockage at the marina, and charter boat referrals at the marina. **Plaintiffs' Exhibit 15**. It also included income projections provided by the borrowers for each of those revenue streams. **Id.** It is important to note that none of the projections listed in the credit memorandum involve revenue streams from Crabcatchers. Every single projection was for the new business to be conducted by TnW doing business as Little River Watersports. **T.261-262.** The credit memorandum also specifies that the $1.1 million loan covered the payoff of two mortgages on the lots to be used as the parking lot. **Id.** While the name of the company was TnW & More, LLC, Wade and Tim decided to use the name Little River Watersports as a d/b/a for the new venture. **T.253**. Moreover, TnT placed signs all around the parking lot that stated "Parking for Crab Catchers and Little River Water Sports[sic] only. All others will be towed at owner's expense." **T.254.**

TnW purchased an initial stable of jet skis to rent for the TnW marina business. **T.279-280.** They installed a 10,000 gallon fuel pump in on TNT's land, a permanent structure. **Id.** That fuel pump ran fuel lines to the docks built on the waterfront property owned by TnW to sell gas to boats and use for the jet skis. The hut on TNT's land was used for the jet ski rental staff to collect money and assist customers. **Id.** Electricity and water were hooked up to the hut so they could use the ice cream machine that they bought for the joint venture. **T. 255, 279.**

TnT calculated the loan payments for the debt service of the $1.1 million loan. Though it was never explained, the repayment amounts were set at $5,033.00 a month for TnW and only $2200.00 for TnT. **T.262-264.**

TnT and TnW hired an architect, Nick Nye, to create design plans for the parking lot and building that would house the dock master's office and the future restaurant. **T.276-277**. All of these plans were paid for by TnW from proceeds of the joint $1.1 million loan. Nick Nye also assisted with applying for and obtaining permits for the new marina and other improvements.

The joint venture was established in 2018 and operated without much issue for over two years. The docks were built, the ski hut was placed with electricity and water hooked up. The office facilities of Crabcatchers were used by the joint venture and customers of Little River Watersports used the bathroom facilities located at Crabcatchers. Donny Kettner, a member of TnT and the son of Tim Kettner, was used as the rick management officer for TnW and was a signatory on the TnW bank accounts. **T. 289-290**. The marina could not legally operate without access to the Crabcatchers bathrooms, **T.287-288**, and the restaurant could not operate without the enlarged and improved parking lot. **T.705-706**; **Plaintiffs'Exhibit 15**. Both businesses needed the parking lot to continue business and operated by jointly using that parking lot until

Tim Kettner sent a group text message to all Members of TnT and TnW stating that he was buying Wade out of the business. **T.294**. Wade never agreed to this and immediately sought legal counsel. On the advice of that counsel, he withdrew the remaining funds from the operating account. **T.295**. Wade also suspected Tim of stealing from the company and began to ask about daily accounting records that Kettner kept in "dome books." **T.297, 815**, **951, 962**. Things came to a head when TnT sent an eviction notice to TnW in October 2020 demanding they remove all fuel tanks and lines from TnT property. **T.530-531**. At that point, Wade and Chris were barred from Crabcatchers and shut out of any financial records of TnW by Tim Kettner. **T.297-299.** The docks became too hostile for Wade or Chris to operate the jet ski rental business so they had to rent the space to a third-party, East Coast Atlantic Jet Ski. **T.304-305**. The members of TnT engaged in a campaign of harassment and obstruction against TnW, Wade and Chris. The locked the parking lot, they harassed customers, they destroyed equipment, they cut down signs with chainsaws, blocked access to the fuel tank, and interfered with the ski rental business. **T. 305-306; 310-314**. At one point, one member of TnT attempted to tear down an active fuel pump in the middle of the night with a chain and an atv. **T.31**; **Plaintiffs' Exhibit 40**: *Videos 1-5*. All of this harassment was done at the behest of Tim Kettner.

Despite his claim that he washed his hands of the dispute and moved back home to Minnesota, Tim Kettner directed the members of TnT to destroy Wade and the marina business:

- On September 4, 2020, Tim Kettner texted to his son: "Anyone buys fish from him [sic Long] … well you know that outcome." **Plaintiffs' Exhibit 5**, **T. 715**. This text demonstrates the open animosity Kettner felt towards Wade personally.

- On September 12, 2020, Tim Kettner texted to his son: "Remember who owns the property … eventually he will hang himself … patience." **Plaintiffs' Exhibit 5**, **T. 743**. Here Kettner is revealing that his plan all along was to dupe Wade Long by keeping title in the name of TnT.
- 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 …" **Plaintiffs' Exhibit 4**, **T. 830**. Kettner is well aware that the hut is the property of TnW and he is actively encouraging his son to steal and sell that property;
- 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." **Plaintiffs' Exhibit 4**, **T. 830**. This is Kettner actively advising his son how to gain an advantage over TnW by threatening to shut them down when electricity and water are cut off to the hut;
- 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." **Plaintiffs' Exhibit 4, T. 832**. Again, this is Kettner actively advising his son how to gain an advantage over TnW by using government authorities to take the hut away from TnW;
- 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!" **Plaintiffs' Exhibit 4, T. 833**. Here, Kettner is suggesting that Robert Benoit remain "incognito";

- On September 18, 2020, Tim Kettner texted to Robert Benoit: “Much more valuable for now behind the scenes and infiltration! You’ll have ur time to shine sir!” **Plaintiffs’ Exhibit 4**, **T. 834**. Kettner is actively directing a member of TnT to infiltrate TnW.
- 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.” **Plaintiffs’ Exhibit 4**, **T. 835**. Kettner is advising the TnT Members to pretend like they are friends while working against his business partner;
- 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 .” **Plaintiffs’ Exhibit 4, T. 836**. Kettner is reiterating that TnT members should hide their disgust of Wade in his presence;
- 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.” **Plaintiffs’ Exhibit 4, T. 836**. Kettner calls his business partner “the enemy”;
- 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.” **Plaintiffs’ Exhibit 4, T. 64**. Kettner continues to advise the TnT members how to actively work against the interests of TnW;

- On October 4, 2020, Tim Kettner texted to his son: "Time for war." **Plaintiffs' Exhibit 4, T. 70**. This is pretty self-explanatory.
- On April 22, 2021, Tim Kettner texted to his son: "Put the heat on and keep it on !!! Gloves are fucking off!!!", **Plaintiffs' Exhibit 4, T. 93.** Kettner continues his direction of TnT to destroy TnW, Wade Long and Chris Kiser six months after the initial text messages.

As a result of the actions of Kettner and TnT, Respondents suffered substantial general and special damages. **T.320**. Wade Long testified that his out of pocket costs were $1.4 million. **T.322-323**. During cross-examination, Wade Long was specifically asked by opposing counsel to read the following excerpt from his deposition:

> Q: What value do you put on it if you were to sell that property to me today?
> Answer: A good value. I would say it would be, you know, 10 million. I'm basing calculations on a couple nearby small marinas and tracts of land, some that sold, and some that hasn't sold, what they are listed for."

No one received any profit from TnW up until the time this lawsuit was filed in 2021. **T.324**.

At trial, Appellants presented the testimony of Wade Long first. After Wade, Dean Trent testified that he sold a portion of what would become the parking lot to Tim Kettner and that Tim Kettner stated it was going to be used for an ice cream parlor and bait shop that Tim and Wade were partnering on. **T.617-618**. The next witness was Jose Morales who laid the foundation for the introduction of the text messages between Tim Kettner and the members of TnT, described above.

Brett Todd testified next. Brett was an employee of Crabcatchers who was asked to operate the jet ski rentals. He testified that his agreement with Tim Kettner was that he would

run the jet ski operation and eventually receive a portion of the profit. **T.642-643**. He also testified that both Tim and Wade told TnT and TnW were working together on the jet ski business. **T.646.** Todd testified that when neither he or his wife were available, employees of Crabcatchers would run the jet ski business. **T.647.** Finally, he testified that all meetings were held in Crabcatchers and that TnW jet ski customers used the Crabcatcher bathrooms. **T.648**.

Nick Nye testified next. He was approached by Tim and Wade about their "joint venture" concerning the parking lot, the ship store and a new restaurant. It was his understanding that the real property was part of the joint venture. **T.662**. In fact, Mr. Todd testified that he was told by both Tim and Wade that Wade was the owner of part of the parking lot. **T.664-665**.

The next witness was Geoff Hopkins. Geoff is a banker currently working for First Palmetto Bank, but he was the loan officer for the joint $1.1 million loan given to TnT and TnW by Horry County State Bank. Mr. Hopkins testified that the projections in a loan proposal are critical for loaning money for a business expansion or addition. **T.700-701**. He stated that the projections were not pure speculation and that the bank would not accept speculation in those projections. **T.701-702**. He testified that the credit memorandum (Exhibit 15) was drafted from the information provided by the prospective borrowers. **T.702**. The primary source of repayment was supposed to be the income from the new businesses unrelated to Crabcatchers. T.705. Mr. Hopkins testified:

> **Q** How did you understand what they were going to do in terms of this new business venture?
> **A** I understood that they were working together to -- one had one expertise, the other had the other expertise, and they were going to join forces and make a big, you know --
> **Q** Together?
> **A** Yeah.
> **T.709.**

Steve Crosson testified next. Steve was an employee of TnT/Crabcatchers. He was a cook during the time that TnW and TnT began operating the joint venture. **T.734**. Crosson testified that the Crabcatcher employees were told in a staff meeting that they "needed to respect Wade with the same respect we would give Tim or Donny or any of the other owners of Crab Catchers." **Id.** According to Crosson:

> **A** So the partnership that we were told was that Wade was basically the money man, Tim was the brains of the operation, and we were -- they were going to build the marina and brewery and jet ski hut and rent jet skis and expand all of the parking that was there. They had gravel lots, pond. There was a pond that used to be there that Wade filled in and tore down a little house.
> **Q** And did you actually witness him filling in the pond and working?
> **A** Oh, yeah. He was out there. Took him weeks to fill that thing in.
> **T.735**

More importantly, Crosson testified that not only were Crabcatcher employees trained to operate the jet ski business and actually operated the fuel pumps for the marina, when they received money from the marina or jet ski business, it was given to the Crabcatcher bar tender. All credit cards used to pay for the gas or jet skis were run on the credit card machines at Crabcatchers. **T.736**. Crosson worked on the ski hut shed and the parking lot fence. He was always paid by Crabcatchers. **T.737**. He testified that "So when it -- first came up with the idea, and the first meeting we had, they told us that they were combining all of the parking lots, and eventually there would be a steak house/brewery built where the fuel tank is now, put in boat slips, and essentially a marina and a fish market." **T.738**. Crosson further testified that Don Kettner, Justine Viatis, and Casey Kuzmik told him they were in a joint venture with Wade long. **T.739**. Crosson further testified that the construction of the docks financially benefited Crabcatchers as it had very little access to patrons travelling by boat before the marina was built.

After the TnW marina was built, that traffic increased significantly. **T.739-740.** Finally, Crosson testified about a fishing tournament that was conducted jointly with TnW and TnT. TnW handled the boats and tournament while TnT/Crabcatchers supplied the food and drinks. **T.741**.

The next witness presented by Respondents was Eric Rolf. Rolf was the owner and operator or East Coast Atlantic Jet Ski. He began renting space for a jet ski business from TnW in 2021. **T.753**. His monthly payment was $10,000.00. **Id**. He immediately began to have problems with TnT and Crabcatchers. **T.754.** Rolf testified that TnT would block the gas station, block the fuel pumps, block the ski hut, threaten customers of the ski rental business with being towed, actually towing vehicles of ski rental customers, vandalized the jet skis, and falsely declared that they owned the docks in the marina. **T.754-757.** Rolf testified that the rental business was breaking even, but the fuel sales suffered from the obstructions of TnT. **T.760**. Rolf eventually had to shut down in 2021. **Id.**

The final witness presented by Respondents was Chris Kiser. Kiser testified that he paid $88,000.00 for a one-third interest in TnW in May 2018. **T.801-802**. Kiser testified about the meeting that preceded the rift between the parties. Kettner essentially told Kiser his interest in the company was worthless because he owned the property necessary for the marina to continue operating. **T.817-819**. This was his ace in the hole. He knew the marina could not operate without access to the upland frontage and he owned that upland frontage. **T.819-820**. Kiser then discussed the text sent to Geoff Hopkins about getting Wade off of the $1.1 million loan without the permission or knowledge of either Chris or Wade. **Exhibit 38**; **T.820-821**. He also testified about the constant harassment by TnT. **T.830-831**. Kiser is a realtor and testified in his personal

opinion that the land was worth $3 million if it was allowed to use the upland frontage and operate as a marina. He also testified that the land was worthless to anyone without that upland frontage access. **T.832-833**.

ARGUMENTS

STANDARD OF REVIEW

The denial of summary judgment and directed verdict motions are reviewed for abuse of discretion. *Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." *Peek v. Spartanburg Reg'l Healthcare Sys*., 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005). "In ruling on directed verdict or JNOV motions, 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." *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Id.* The appellate court "will reverse the trial court's rulings on these motions only [when] there is no evidence to support the rulings or [when] the rulings are controlled by an error of law." *Hinkle v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003). "When considering a JNOV, 'neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.'" *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (quoting *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 634, 500 S.E.2d 145, 154 (Ct. App. 1998), *abrogated on other grounds by Webb v. CSX Transp., Inc.*, 364 S.C. 639, 653, 615 S.E.2d 440, 448 (2005)). A "JNOV should not be granted unless only one reasonable inference can be drawn from the evidence." *Reiland*, 330 S.C. at 634, 500 S.E.2d at 154.

1**. The trial court did not err in refusing to vacate the jury award against Appellant Timothy Kettner for breach of fiduciary duty**

Appellant Kettner argues that the only evidence of any breach of fiduciary duty consists of a few text messages Kettner sent to the members of TnT. The text messages in question are laid out above and in Appellant's initial brief. They demonstrate that Tim Kettner was directing and advising his son and the other members of TnT on how to best destroy Wade Long and his marina business owned by TnW. There is nothing ambiguous about the texts. Appellant makes the argument that Kettner resigned from TnT and had no ability to control them. However, Kettner still had a substantial financial interest in TnT as every member financed their purchase of Kettner's interest in TnT. The source of that financing? Kettner himself. And no one had paid off that loan at the time of trial. **T.1076-1077**. While this may be true in a corporate capacity or in terms of agency, Tim Kettner still held substantial power over the members of TnT during the relevant time frame. But the issue on appeal is not how he acted on behalf of TnT, but how he acted in his individual capacity as a member of TnW. Kettner told TnT about his plan to dupe Wade from the beginning (**T.743**), actively advised them how to remove and convert a piece of property owned by TnW (**T.830**), how to deceive Wade Long into believing the members of TnT were friendly to Wade (**T.833-835**), how to infiltrate Wade's business and stay "incognito." (T.834). Every single one of these texts is evidence of Appellant Kettner directly working against the financial interests of the company which he owns with Wade Long and Chris Kiser. He literally referred to his business partner as "the enemy" and called for "war" against that same partner. Appellant makes the comment in his brief that Kettner still owed "whatever" fiduciary duties owed by an excluded member. Those duties are well defined in statute. South Carolina statutory law imposes fiduciary duties on members and states that those

duties exist until dissolution or disassociation. S.C. Code Section 33-44-409. If a member of a company is improperly excluded from the operation of the business, his remedy is not to forego his own statutorily mandated fiduciary obligations. His remedy is to seek relief in a court of law, which Kettner chose not to do until the conclusion of the jury trial. From the moment Appellant Kettner decided to become a member of TnW & More, LLC with Wade Long, his fiduciary duties began and continue to this day. The text messages unambiguously demonstrate a breach of loyalty by assisting an entity with purely adverse interests to TnW & More, LLC in destroying TnW & More, LLC. Appellant admits in his brief that he had a duty not to interfere with the business of TnW. The text messages show Appellant was directly interfering with TnW by directing the members of TnT to remove the ski hut, use the government against TnW, and "infiltrate" Wade's business (which is Appellant Kettner's business as well). Appellant argues he only sent text messages. This is disingenuous. Everything Kettner directed TnT to do, they did. The fact that Respondent could not get a group of conspirators to admit a conspiracy is not a bar to recovery. Tim Kettner declared war on his business partner, called him "the enemy," and induced the remaining members of TnT to actively work to destroy the business of TnW. This is the very definition of a breach of fiduciary duty and can certainly be reasonably inferred from the evidence. Therefore, the jury verdict was properly upheld by the lower court.

Appellant claims Respondents damages are restricted to the loss of East Coast Atlantic Ski Rentals. Yet, the evidence of loss far exceeds the loss of that rental. Appellants first claim the only evidence of damages was the value of the contract with Eric Rolf. Respondents agree that this is the only measure of special damages introduced by Plaintiffs. Wade Long testified that he was out of pocket approximately $1.4 million and suffered damage to his reputation as a

result of the dispute with TnT. **T.320**. Long, Rolf, and Kiser all testified that the customer base was constantly harassed by TnT. This necessarily caused a loss of good will to TnW. Equipment was destroyed and signs removed, which led to unforeseen and unnecessary costs. The jury was charged (without objection from any party) the measure of damages for interference with contract include:

- Unforeseen expenses
- Damage to reputation
- Damage for loss of employees
- Damage for loss of customers
- Damage for loss of goodwill
-

The testimony from Wade Long, Chris Kiser, and Eric Rolf was replete with examples of the bullying, hostility, and property destruction conducted by Appellants. While no mathematical calculation was provided, general damages are not typically susceptible to such reduction. The tax returns of TNW were in evidence and so were the projections from the Credit Memorandum. **Exhibit 15**. Geoff Hopkins testified that those projections were not pure speculation and were important to the decision by the bank to loan the $1.1. million. Those projections indicated that TnW should have been making $649,000 in the first year from marina operations alone. The testimony was that they barely broke even. **T.320**, **832-834** More importantly, Tim Kettner agreed that those projections were submitted on his behalf in applying for the loan. **T.1078**. The jury was charged regarding speculative damages and gave the evidence the weight they deemed appropriate in their deliberations. Let us not forget that Wade Long was asked to read his $10 million valuation of his company into the record on cross examination. There is more than sufficient evidence to support the jury's verdict.

2. The trial court did not err in refusing to vacate the jury award against Appellant Timothy Kettner for economic interference

Appellants both make the same argument regarding the damages for tortious interference with contract. Obviously, the Rolf contract was the most immediate proof of a broken contract caused by Respondents, but the testimony concerning the direct and abusive harassment of customers is also interference with contractual relations and interference with prospective contractual relations. Every single business transaction is a contract of some form. The intentional acts to harass customers by Respondents is clear and direct evidence of interference with contacts and potential contracts and the jury verdict must stand.

Appellants also claim that there was no evidence of Tim Kettner's financial status and that precludes an award of punitive damages. There is no caselaw that requires Defendant to introduce evidence of a Defendant's ability to pay. This is a factor to be considered, but it is not a pleading or evidentiary requirement of the party seeking punitive damages. Moreover, there was evidence in the record of Mr. Kettner's wealth. The financial declaration of Tim Kettner, which was provided by Mr. Kettner in relation to the $1.1 million loan, was introduced into evidence and discussed during his direct testimony. I specifically asked him about his $4.5 million valuation and he said some things had changed since it was introduced. **T.1062**. The only thing he could point out was the sale of some real estate, but he could not give a current value of net worth. Appellants want this Court to rule Mr. Kettner can completely avoid punitive damages by simply refusing to answer a question about his financial condition. This is ludicrous. Therefore, the lower court did not err in sustaining the jury verdict.

3. The trial court did not err in refusing to require the Appellants to elect remedies

Appellants are not required to elect between the damages for breach of fiduciary duty and tortious interference with contract. These were two separate and distinct causes of action based on

different duties and different damages. The tortious interference cause of action was based on the overt actions to damage the business of TNW through eliminating access to the parking lot, removing the ski hut (which Kettner specifically texted about to TnT Members), harassing customers on the dock, threatening to tow customer vehicles, using government authorities to cause problems, and destroying TNW property. The breach of fiduciary duty was based on Kettner's breach of loyalty (as demonstrated by the 2020 and 2021 texts declaring war on TNW), his failure to provide access to the financial records (Wade Long testified that he was shut out of the books after confronting Kettner about the missing cash, Kettner admitted he could not account for the cash received during the summer of 2020. **T.1059**). There is no double recovery by allowing Respondents to recover the $50,000.00 actual/$150,000.00 punitive award for the breach of fiduciary duty and the $120,000 actual/$120,000.00 punitive award for tortious interference. Therefore the jury verdict must stand.

4. The trial court did not err in denying a JNOV on the jury's finding that a joint venture exists

Appellants come to this Court and argue that there was no evidence of a "joint venture." Two companies obtain a single $1.1 million loan, pledge every real property owned by either company as collateral for that loan, and operate together for nearly three years were not a joint venture. I honestly think I could stop here and be fine. But there is more. A lot more. But first, let us look at the jury charge which was not objected to by any appellant:

> Ladies and gentlemen, next I charge you the law as to joint venture. A joint venture has been defined as an association of persons with the intent by way of an expressed or implied contract. The intent to engage in and carry out a single business venture for joint profit for which purpose they can combine their efforts, property, money, skills, and knowledge without creating – without creating a partnership or corporation. A joint venture is an agreement that there will be a community of interest among them as to

> the purpose of the undertaking, and that each participant will stand in the relationship – stand in relation of principal, as well as agent, to each of the others with an equal right to control the means employed to effect the common purpose of the venture. The mere sharing of an economic interest is not sufficient to form a joint venture. There must be some evidence that the parties participated and had control of the venture. Similarly, the assertion of a mutual and beneficial relationship without more is insufficient to establish an equal right and control of the venture. In order to establish the existence of a joint venture, it is essential to establish that each party enjoys equal control, equal right to control conduct of the others regarding the common purpose. Generally, the fiduciary relationship between co-venturers ordinarily precludes one of them from purchasing or leasing property related to the enterprises either for himself or another in the absence of a full disclosure to his associate. I charge you that the burden of proof to establish the relationship of a joint venturer is on the party who alleges the existence of the relationship.

Here is a summary of the plethora of evidence that the marina and parking lot were part of a joint venture:

- According to Tim Kettner, the agreement between TnT and TnW was a "joint venture" **Plaintiffs' Exhibit 1**
- According to Long, Crosson, Todd, and Kiser, TNW used the bathrooms in the TNT building as its own, which were required to obtain the marina permit, with full approval of TnT;
- According to Long, Crosson, Todd, and Kiser TNW used the offices in the TNT building as its own with the full approval of TNT;
- According to Long and Kiser all of TNW's records were kept in the TNT building;
- According to Long, Kiser, Hopkins and Tim Kettner, TNW could not operate a marina under the current applicable regulations without the use of the parking lot;

- The Credit Memorandum (Plaintiffs' Exhibit #15 and Defendant Kettner's #1) unambiguously stated that TNT needed the parking lot constructed by TNW to continue its operation as a restaurant;
- According to Long and Kiser, the joint venture was the use of the parking lot by TNW in exchange for the use of two boat slips in the marina by TNT for its customers;
- According to Long and Kiser, the joint venture was never to combine the businesses, control the businesses jointly, or allow either business to assert control over the core functions of the others' business;
- The testimony from Long, Kiser, Todd and Crosson was clear that both businesses operated in accordance with this joint venture agreement for three years;
- **Plaintiffs' Exhibit 34** demonstrated TNW was one of two entities that could control the parking lot as the signs placed by TNT stated that to the public;
- According to Long and Kiser, TNT used, and continues to use, the boat slips in the marina to this very day;
- Steve Crosson testified that TNT controlled the fuel operations of TNW whenever there were no employees of TNW present;
- Steve Crosson testified that credit cards for ski rentals were run on TNT credit card machines when TNT employees controlled the jet ski operations;
- Steve Crosson testified that TNT employees used the jet skis free of charge in the off season; and

- Defendants argued, ad nauseum, that TNW never made a profit. Now they seek a dismissal for the failure of TNW to share those non-existent profits;

All of this evidence satisfies the elements required to show a joint venture. This argument is simply without merit. While Appellants love the transcript of Wade Long's deposition(s), the jury is allowed to believe or disbelieve anything stated by a witness. The argument that TnW is the joint venture so it can't be a joint venture is simply false. At trial, Wade Long very specifically testified that the joint venture between TnT and TnW was (1) the development of the parking lot for use by both entities; (2) the construction of the marina/docks to benefit all parties; (3) the agreement that TnT was allowed to use two boat slips; (4) TnW was allowed to use the parking lot; and (5) a $1.1 million loan would be taken out to pay for the docks, parking lot, and future buildings including a new restaurant and a dock master office. This is exactly what the jury found and their verdict should not be disturbed.

5**. The trial court did not err in denying a JNOV as to Respondents' breach of joint venture agreement claim**

Appellants make the argument that Respondents were required to bring the action derivatively under Rule 23, SCRCP. This argument is without merit. It does not apply and it never applied. As stated above, a joint venture is a essentially a partnership that is not officially registered with the Secretary of State. There is no derivative action between partners in a general partnership. South Carolina law specifically grants the right to bring a derivative action against (1) corporations (S.C. Code 33-7-400); (2) limited liability companies (S.C. Code 33-44-1101) (3) non-profit corporations S.C. Code Corporations (S.C. Code 33-31-630) (4) and limited partnerships (S.C. Code 33-42-1810). There is no statute within the Uniform Partnership Act authorizing a derivative action. Even if there was such a statute, Plaintiffs made a Rule 15(b),

SCRCP Motion to amend to state the obvious: consultation was a fruitless endeavor and was not required to bring a direct claim against TNT. Finally, the Court would like to point out an obvious inconsistency in Defendants' argument. Derivative suits are necessary to protect minority shareholders from tyranny of the majority by giving them rights that may not be accessible within the entity itself. However, as Defendants argued in this case, there are no minority shareholders in a joint venture as all parties must have equal rights to control the purpose of the joint venture. Plaintiffs never sued a fictional entity that was the joint venture. Plaintiffs sued the other partner in the joint venture to satisfy its obligations according to the joint venture agreement and the unambiguous promise made by that partner. Therefore, the jury verdict must stand.

6. **The trial court did not err in denying a JNOV on Respondents' claim for breach of the joint venture agreement**

Statute of Frauds requires that certain contracts must be in writing, and to remove an oral contract from the Statute of Frauds, a party must show part performance of the oral contract. *Settlemeyer v. McCluney*, 359 S.C. 317, 596 S.E.2d 514 (Ct. App. 2004). In the context of real estate transactions, partial performance may be proven by evidence of the following: (1) improvements to the real estate; (2) possession of the real estate; or (3) payment of the purchase price. *Bradshaw v. Ewing*, 297 S.C. 242, 376 S.E.2d 264, (1989). In this case, we have unambiguous proof of all three. Wade Long improved the real estate to be combined by filling in a pond, tearing down a house, providing fill dirt and rock, and grading the entirety of the parking lot area owned by TNT & More, Inc. **T.245-252**. Kettner and Long paid for full architectural plans for the construction of a harbormaster building on the land owned by TNT & More, Inc.**T. 346**. Kettner and Long paid for the drafting of recombination plats joining the real properties of TNT & More, Inc. and TNW & More, LLC. *Id.*. Long placed a temporary hut and

a fuel tank on the land owned by TNT & More, Inc., *Id.* at p.286. Both TNT & More, Inc. and TNW & More, LLC jointly executed a loan for $1.1 million, pledging the real estate owned by both entities as collateral for that loan. *Id. pp.*165-181. Finally, all parties operated under and in accordance with this agreement for three years. Appellants would argue that the $1.1 million loan and accompanying documents qualify as a written agreement with regard to the joint venture. There is a plethora of additional evidence of partial performance in the record of this case, including Donald Kettner representing TNW & More, LLC as its risk manager for purposes of insurance, the use of the Crabcatcher's restaurant building as the home office for TNW & More, LLC, *T. 363* and the use of TNT & More, Inc. employees to help operate the ski and fuel business of TNW & More, LLC. *T.375*. All of these acts remove this case and the agreement between the parties from the Statute of Frauds and the jury's verdict must be sustained.

Finally, Appellants, for the first time, cite a Fourth Circuit decision to claim that partial performance does not remove a contract from the statute of frauds if it would take longer than a year to complete. *S. States Life Ins. v. Foster*, 229 F.2d 77, 81 (4th Cir. 1956). However, the primary ruling in that case was that a failure to act could not be seen as a performance necessary to take the contract out of the statute of frauds. It was not presented at trial and it was not requested to be charged to the jury. Appellants waived any argument related to this issue as they did not raise it below. Moreover, the Fourth Circuit stated in its nonbinding opinion that:

> The South Carolina decisions already cited disclose, in their reasoning, that non-action is not such part performance as exempts a contract from the statute." **Id** at 76-77. Again, for part performance to put the agreement beyond the pale of the statute, the claimant must, save under exceptional circumstances first acquit himself of his burdens in full, leaving only the other party in non- compliance. Gee v. Hicks, supra, Rich.Eq.Cas., S.C., 5, 18; White v. McKnight, 1928, 146 S.C. 59, 143 S.E. 552, 59 A.L.R. 1297; 1 Williston on Contracts, sections 504 and 533. The exceptional circumstances are estoppel or resultant fraud. This

> case does not exemplify these exceptions. The appellees have not, in reliance upon the new agreement, ***so changed their position that the appellant is estopped to plead the statute or that application of the statute would impose a fraud upon the appellees***. *Florence Printing Co. v. Parnell*, 1935, 178 S.C. 119, 182 S.E. 313; McMillan v. King, 1940, 193 S.C. 14, 7 S.E.2d 521. [Emphasis added]
> *S. States Life Ins. Co. v. Foster*, 229 F.2d 77, 81 (4th Cir. 1956)

Thus, the decision supports Respondents as the jury in this case found that Appellants were estopped from denying Respondents access to the parking lot and denying the joint venture. Therefore, the jury verdict must stand.

7. The trial court did not err in denying a JNOV on the tortious interference claim or in failing to remit the verdict amount

There is no merit to any of these arguments. Wade Long testified his out of pocket costs were $1.4 million. Appellant's counsel actually directed Wade Long to tell the jury he thought his business was worth $10 million dollars after the Court ruled prior to trial that he could not testify to that effect on direct examination. Eric Rolf testified that he shut his business down as a result of the interference perpetrated by TnT and Tim Kettner. To say there is no evidence of interference is requires one to ignore the direct testimony and evidence presented at trial. Appellants perpetrated this harassment repeatedly over the years. Then they were sued and listened to Respondents' testimony and evidence for nearly five days. Then it was their turn to respond.

And they didn't. The only witness from TnT to testify was Justine Vaitis, the one member who was not really involved in the harassment. Don Kettner, the risk manager for TnW and signatory on the TnW bank account did not testify. Robert Benoit, the incognito infiltrator, did not testify. Appellants essentially conceded all of the allegations made by Respondents. The absence of that testimony did more to prove Respondents' claims than anything else.

All punitive damages awarded in this case were well within the acceptable range under South Carolina law. No punitives were more that three times the actual damages and SC Courts have allowed up to 9.9 times the amount of actuals as punitive damages. *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 143, 584 S.E.2d 120, 130 (Ct. App. 2003) (finding a 9.9 to 1 punitive to actual damage ratio was proper based upon defendant's tortious interference with contract). The jury verdict was more than supported by the evidence and cannot be reversed.

CONCLUSION

Appellants appeal is without merit and must be dismissed and the lower court's rulings must be affirmed.

Respectfully submitted,

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