

STATE OF SOUTH CAROLINA)
 COUNTY OF GREENVILLE)
)
 Check First of Greenville, LLC, d/b/a)
 Evo Merchant Coop.,)
 Plaintiff,)
)
 v.)
)
 Merchant Services of the Upstate, Inc. and)
 Alfred J. Pearce IV,)
 Defendants.)
 _____)

IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT

C.A. No. 2012-CP-23-3532

ORDER

FILED WITH CLERK OF COURT
 COUNTY OF GREENVILLE
 2015 JUL 17 AM 9 49
 PAUL G. HARRIS, CLERK

This matter was tried to a verdict before a jury from March 2, 2015 to March 5, 2015. After the jury returned its verdict, the parties submitted several post-trial motions.

Plaintiff Check First of Greenville, LLC ("Check First"), renewed its Motion for Sanctions for discovery abuse, moved for judgment notwithstanding the verdict ("JNOV") pursuant to Rule 50, SCRCP, and also moved for a new trial absolute or alternately a new trial nisi remittitur pursuant to Rules 50 and 59, SCRCP. Defendant Pearce renewed his Motion for Sanctions for discovery abuse, moved for JNOV Pursuant to Rule 50(b), and also moved for a new trial pursuant to Rule 59, SCRCP.

The Court requested additional argument on the subject of election of remedies. The parties appeared for a hearing on all post-trial motions, including the election of remedies issue, on May 28, 2015.

As a preliminary matter, the Court notes that the jury found for Plaintiff on its causes of action for breach of fiduciary duty and breach of contract. The jury also found for Defendant Pearce on his causes of action for breach of covenant of good faith and fair dealing, negligent misrepresentation, negligence, and conversion. However, the jury did not return any award of

damages for any of these causes of action—the jury wrote in “0” damages for each claim. As damages are an essential element of civil causes of action¹, the Court construes the jury’s verdict on these causes of action to find against the party asserting the claim.

Principles of Law

Post-Trial Motions

A motion JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Gause v. Smithers, 403 S.C. 140, 149, 742 S.E.2d 644, 649 (2013). In ruling on a motion JNOV, the trial court must view the evidence, and the inferences that can reasonably be drawn from the evidence, in a light most favorable to the party opposing the motion. Cody P. v. Bank of America, N.A., 395 S.C. 611, 620, 720 S.E.2d 473, 478 (Ct. App. 2011). A motion JNOV is limited to the grounds stated in the motion for a directed verdict. V.E. Amick & Assoc., LLC v. Palmetto Environmental Group, Inc., 394 S.C. 538, 548–49, 716 S.E.2d 295, 300 (Ct. App. 2011).

A party who has moved for JNOV may also move for a new trial, jointly or in the alternative. Rule 50(b), SCRPC. The trial judge may grant a new trial when he finds the amount of the verdict to be grossly inadequate or excessive. Vinson v. Hartley, 342 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996). The Court may also grant a new trial where the jury’s award indicates that it was reached as the result of passion, caprice, prejudice, partiality, corruption, or some other improper motive. Id.

¹ See, e.g., Sauner v. Public Serv. Auth. of S.C., 354 S.E. 397, 407, 581 S.E.2d 161, 167 (2003) (negligent misrepresentation); Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002) (negligence); S. Glass & Plastics Co. v. Kemper, 399 S.C. 483, 492, 732 S.E.2d 205, 209 (Ct. App. 2012) (breach of contract); Vortex Sports & Entm’t, Inc. v. Ware, 378 S.C. 197, 201, 662 S.E.2d 444, 448 (Ct. App. 2008) (breach of fiduciary duty); Hawkins v. City of Greenville, 358 S.C. 280, 297, 594 S.E.2d 557, 566 (Ct. App. 2004) (conversion); Gaskins v. S. Farm Bureau Cas. Ins. Co., 343 S.C. 666, 672, 541 S.E.2d 269, 272 (Ct. App. 2000) (breach of covenant of good faith and fair dealing).



While a trial judge may grant a new trial on the ground that a verdict is excessive or inadequate, the jury's determination of damages is entitled to substantial deference. Wall v. Suits, 318 S.C. 377, 458 S.E.2d 43 (Ct. App. 1995). In South Carolina, a court must uphold a jury verdict if it is possible to reconcile its various features and achieve the jury's intent. Camden v. Hilton, 360 S.C. 164, 174, 600 S.E.2d 88, 93 (Ct. App. 2004); see also Sapp v. Wheeler, 402 S.C. 502, 741 S.E.2d 565 (Ct. App. 2013). In order to achieve this objective, the trial judge may, in exceptional circumstances, reform a jury's verdict to carry into effect the jury's clear intention. Vinson, 324 S.C. at 406-07, 477 S.E.2d at 724.

The court's power to reform extends only to changes in form, rather than changes in substance. Id.; see also 89 C.J.S. Trial § 1074 (West, 2015). The judge cannot, under the guise of amending the verdict, invade the province of the jury or substitute his verdict for theirs. Vinson, 324 S.C. at 406-07, 477 S.E.2d at 724. After the reformation is complete, the verdict must reflect the jury's clear and definitely manifested intention. Id.

Review of Punitive Damage Awards

Punitive damages are designed to deter the wrongdoer and others from committing like offenses in the future. Mitchell v. Fortis Ins. Co., 385 S.C. 570, 584, 686 S.E.2d 176, 183 (2009). While a state may properly impose and enforce punitive damage awards, there are procedural and substantive constitutional limitations which must be observed. Id. In light of these limitations, a trial court must conduct a post-judgment review of each punitive damage award returned by a jury, including the reprehensibility of the conduct, the ratio of the award of actual damages to punitive damages, and the existence of comparative penalty awards. Id. at 586-87, 686 S.E.2d at 184-85 (citing BMW of N. Am. V. Gore, 517 U.S. 559, 574-85 (1996)). South Carolina requires eight particular considerations of substance within these three



categories: (1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate. Id. (citing Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991)).

Regarding the reprehensibility of the conduct, a court should consider whether (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. Id. at 587, 686 S.E.2d at 185. Reprehensibility is perhaps the most important indicium of the reasonableness of a punitive damages award. Id.

Regarding the ratio of the actual and punitive damages awards, the court should consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award. Generally, few awards exceeding a single-digit ratio between actual and punitive damages will satisfy due process. Id. (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)). However, there are no bright line rules or rigid benchmarks for this analysis, so long as the measure of punishment is both reasonable and proportionate to the harm suffered and the damages recovered. Id.

Finally, the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Id. at 588-89, 686 S.E.2d at 186. Comparable cases include those which have similar types of harm suffered by the



plaintiff; similar degrees of reprehensibility of the defendant's conduct; similar ratios of actual and punitive damage awards' similar sizes of damage awards; and any other factors which the court deems relevant. Id.

There must be an award of actual or nominal damages for a verdict of punitive damages to be supported. McGee v. Bruce Hosp. System, 344 S.C. 466, 471, 545 S.E.2d 286, 288 (2001). This rule is premised on the fact that liability must be established before a plaintiff can seek punitive damages. Id.

Election of Remedies

The 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 action. Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 56, 691 S.E.2d 135, 152-53 (2010). The basic purpose of election of remedies is to prevent double recovery for a single wrong. Id. at 56, 691 S.E.2d at 153. 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. The decision as to when an election of remedies shall be required is within the discretion of the trial judge. Adams v. Grant, 292 S.C. 581, 585, 358 S.E.2d 142, 144 (Ct. App. 1986).

Analysis

I. Plaintiff's Motions for JNOV; for a New Trial; and for setoff from the settlement of Defendant's cross-claim.

Plaintiff moved for JNOV on Defendant's cause of action for fraud, arguing that Defendant had not proven the essential elements of the claim by clear and convincing evidence. The Court finds that there was evidence presented to the jury which demonstrated fraud by clear and convincing proof, and that a reasonable jury could have reached this verdict. The Court therefore denies Plaintiff's motion.



Plaintiff also moved for a new trial due to the amounts of the awards for fraud and unjust enrichment returned in favor of Defendant. Plaintiff argued that these sums were excessive, unduly liberal, and contrary to the fair preponderance of the evidence. The Court finds that, in light of the evidence presented to the jury, these awards should not be set aside. A reasonable jury could have reached these verdicts when presented with the evidence of the case. Therefore, Plaintiff's Motion is denied.

Plaintiff also moved for a setoff in light of Defendant's settlement with Co-Defendant Merchant Services of the Upstate, Inc., entered into the week prior to trial. This settlement resolved all pending cross-claims between the two parties in exchange for Merchant Services of the Upstate, Inc. paying Defendant Pearce \$43,000.00.

In light of the facts, the close connection of all claims involved between all original parties, and in the interests of equity, the Court finds that a partial setoff is proper in light of Defendant Pearce's settlement with Defendant Merchant Services of the Upstate. Therefore, Plaintiff may set off \$21,500.00 from Defendant's total award.

II. Defendant's Motions for JNOV and for a New Trial.

Defendant moved for JNOV, or alternately for a new trial, in relation to the jury's award for Plaintiff's cause of action for intentional interference with economic relationships. The Court finds that there was evidence presented to the jury to support the award, and a reasonable jury could have reached the verdict. Therefore the Court denies Defendant's Motion.

Defendant also moved for JNOV or for a new trial on Plaintiff's award for defamation. Defendant correctly argues that a verdict for punitive damages may not stand in the absence of an award for nominal damages. In light of the jury's substantial awards for damages for other causes of action, however, the Court denies Defendant's motion and reforms the jury's verdict in



form. The jury's award for defamation is reformed to reflect \$5,000.00 in actual damages and \$20,000.00 in punitive damages.

III. Review of the awards of punitive damages awarded to both parties.

The jury returned a verdict for Plaintiff for conversion, including \$50.00 in actual damages and \$1,500.00 in punitive damages. The Court finds that there was a sufficient degree of reprehensibility demonstrated at the trial to sustain the award. However, the 1:30 ratio of actual to punitive damages is unsupportable. The Court therefore reduces the jury's punitive damage award from \$1,500.00 to \$500.00. In comparison to other awards for conversion of the property of a business, this punitive damages amount is reasonable. In light of the reduction, the Plaintiff's award for conversion is within the parameters required by due process and is therefore affirmed as modified.

The jury also returned a verdict for Plaintiff for defamation, which the Court reformed as discussed above. The evidence of reprehensibility produced at trial sufficiently supports a punitive damage award. The reformed ratio of 1:4 is within the range of acceptable punitive damage awards. The Court finds that these amounts are supportable when compared to other penalties imposed by courts in this state. Therefore, Plaintiff's award for defamation is affirmed as reformed.

Finally, the jury returned a verdict for Defendant for fraud, including \$175,000.00 in actual damages and \$85,000.00 in punitive damages. The Court finds that there was a sufficient degree of reprehensibility demonstrated during the trial to support this award. The ratio of actual to punitive damages—1:2.19—is well within the parameters of the due process clause. When compared to other punitive awards for fraud, the Court finds that the amounts returned by the jury are reasonable. Therefore Defendant's award of punitive damages for fraud is affirmed.



IV. Defendant's Election of a Remedy.

This Court finds that Defendant must elect a remedy among the awards returned by the jury, because the awards compensate Defendant for the same injury arising from the same set of facts. At the May 28, 2015 hearing, Defendant expressed that, should an election of remedies be required, he elects to recover for fraud rather than for unjust enrichment. In light of this preference, the Court hereby STRIKES the jury's award for unjust enrichment.

V. Cross-Motions for Sanctions.

Both parties at various times submitted motions for sanctions stemming from discovery violations pursuant to Rules 33, 34, and 37, SCRCP.

The Court denies all outstanding Motions for Sanctions. The Court finds that there were delays in production and disclosure on the part of both parties, and any award against one party would be cancelled out by the award to the other. The Court also finds that the attorneys involved in this matter were not at fault for the discovery violations which occurred. The attorneys acted at all times to prevent these violations and are at no fault for them.

Conclusion

In summary, the Court takes the following actions:


- (1) The jury's findings of "0" damages for Plaintiff's causes of action for breach of fiduciary duty and breach of contract are construed as verdicts for Defendant.
- (2) The jury's findings of "0" damages for Defendant's causes of action for breach of covenant of good faith and fair dealing, negligent misrepresentation, negligence, and conversion are construed as verdicts for Plaintiff.
- (3) Plaintiff's award of punitive damages for conversion is reduced from \$1,500.00 to \$500.00.



- (4) Plaintiff's award for defamation is reformed to reflect \$5,000.00 in actual damages and \$20,000.00 in punitive damages.
- (5) Plaintiff's request for a setoff from Defendant's settlement with Co-Defendant Merchant Services of the Upstate is GRANTED in part. Plaintiff may set off \$21,500.00 from Defendant's total award.
- (6) Defendant is required to elect a remedy. Pursuant to Defendant's statements during the May 28, 2015 hearing, Defendant elects to recover under his cause of action for fraud. Therefore, the jury's award to Defendant on his cause of action for unjust enrichment is STRICKEN.
- (7) Defendant's award for fraud, including actual and punitive damages, is AFFIRMED.
- (8) All outstanding motions for sanctions are DENIED.

IT IS SO ORDERED.

July 16, 2015



Letitia H. Verdin
Circuit Court Judge



STATE OF SOUTH CAROLINA
 COUNTY OF GREENVILLE
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-23-3532

RECEIVED

AUG 14 2015

SC Court of Appeals

CHECK FIRST OF GREENVILLE, LLC D/B/A

MERCHANT SERVICES OF THE UPSTATE, INC AND

EVO MERCHANT COOPERATIVE
 PLAINTIFF(S)

ALFRED J. PEARCE, IV
 DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(g), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
 Additional information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Check First of Greenville, LLC, d/b/a EVO Merchant Cooperative	Alfred J. Pearce, IV	\$185,550.00
Alfred J. Pearce, IV	Check First of Greenville, LLC, d/b/a EVO Merchant Cooperative	\$238,500.00
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

JHC Circuit Court Judge 2162 Judge Code 7/16/15 Date

