THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

C. Victor Pyle, Jr., Circuit Court Judge

Case No. 2012-CP-23-3501

McKinley Cooper and Company, LLC,.....Respondent,

v.

J. Todd Highsmith, Shane Highsmith, and Highsmith, LLC,..... Appellants.

REPLY BRIEF OF APPELLANTS J. TODD HIGHSMITH, SHANE HIGHSMITH, AND HIGHSMITH, LLC

R. Mills Ariail, Jr., S.C. Bar 15584
LAW OFFICE OF R. MILLS ARIAIL, JR.
11 North Irvine Street, Suite 11
Greenville, SC 29601
Attorney for Appellants J. Todd Highsmith,
Shane Highsmith, and Highsmith, LLC

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I. Appellants Did Not Waive Their Ability to Challenge the Jury's Verdict.

Because the trial court did not discharge the jury before Appellants' counsel objected to the defective Verdict Form, Appellants did not waive their ability to challenge the jury's verdict.

Respondent hinges its argument on its conclusion that the trial court discharged the jury before Appellants' counsel objected to the defective Verdict Form. This is false. Following the reading of the verdict, the Court directed the jury to "report downstairs to the jury room" to pick up their checks. (Tr. 884:2-884:9.) After the jury exited the courtroom into the secure hallway behind the courtroom, the Court then asked the Respondent's and Appellants' attorneys if they had any motions. Appellants' counsel asked to see the verdict form and, immediately upon looking at it, objected to the award of punitive damages for conversion without an award of actual damages:

> THE COURT: Any motions, gentlemen?
>
> MR. ARIAIL [sic]: Your Honor, I didn't understand the verdict. If I could see the verdict form?
>
> * * *
>
> MR ARIAIL [sic]: . . . Your Honor, my first question, and I need to research this, and I would ask for-first off, I'll renew my motions. But if they found a conversion of zero actual damages but punitive of sixty thousand dollars, I don't know if they can have the sixty thousand on the punitives if-
>
> THE COURT: How about that, Mr. Haynsworth?

(Tr. 884:20-885:6.)

Under these circumstances, Respondent's claim that Appellants waived their right to object to the punitive damages award is meritless. Respondent's reliance on *Dykema v. Carolina Emergency Physicians*, 348 S.C. 549, 553, 560 S.E.2d 894 (2002) is misplaced. There, despite an award of zero actual damages and an award of punitive damages on the same cause of action,

the defendant failed to object to a punitive damages award until after the jury had been discharged. The South Carolina Supreme Court court affirmed the punitive damages award notwithstanding the absence of an award of actual damages because the defendant had failed to object *before* the jury was discharged. The court rightly expressed concern that a party who fails to object following an obviously defective verdict cannot later complain after the jury has been discharged:

> We decline to hold that a party may allow the jury to be discharged in the face of an obviously defective verdict, which could easily be corrected upon resubmission to the jury, in the hopes of gaining a reversal on appeal. Accordingly, we find Companion waited too late to voice its objection to the verdict.
>
> This Court has repeatedly held that a party should not be permitted to sit idly by while a verdict erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence.

348 S.C. at 553-54 (emphasis added).

Any notion that the jury in the instant case had been finally discharged before the time defense counsel made this objection is meritless. Under South Carolina law, a jury may be reassembled notwithstanding a "formal discharge" so long as the jury has not been subjected to any outside influences between the discharge and the reassembly. *State v. Myers*, 318 S.C. 549, 551-52, 459 S.E.2d 304 (1955). This is particularly true when, as in the instant case, the very case for which the jury was impaneled is still under discussion by the court when the objection is made:

> Although *Dawkins* comports with the general rule that a jury may not be reassembled to amend its verdict after discharge, a number of courts permit the jury to be recalled if, for example, they are still in the courtroom, or, in certain limited circumstances, still under the court's control. Notwithstanding a "formal discharge," several courts recognize that the jury may be reassembled so long as it

remains an essentially undispersed unit, and has not been subjected to any outside influence in between the "discharge" and the reassembly. The Fourth Circuit Court of Appeals has stated:

> It is not so much what is said in passing as what is actually done and acted upon that determines the question of discharge. Without specific announcement, a jury may tacitly be permitted to retire and mingle with the bystanders after rendering its verdict, and thereby become irrevocably discharged. On the other hand, it may remain undischarged and retain its functions, though discharge may have been spoken by the court, if, after such announcement, it remains an undispersed unit, within control of the court, with no opportunity to mingle with or discuss the case with others, and particularly where, as here, the very case upon which it has been impaneled is still under discussion by the court, without the intervention of any other business.

State v. Myers, 318 S.C. 549, 551-52, 459 S.E.2d 304 (1955) (*citing Summers v. United States*, 11 F.2d 583, 586 (4th Cir. 1926)) (emphasis added) (internal citations omitted).

As stated in the Affidavit of Appellants' counsel submitted to the trial court, the jury had exited the courtroom and was standing in the secure hallway behind the courtroom at the time he made his objection to the punitive damages award. (Aff. of R. Mills Ariail, Jr. ¶ 5.) This hallway and the stairs leading to the clerk's office are secure areas where members of the public are not permitted. (*Id.*) Consequently, the jury was not subjected to questions from reporters or other members of the public. (*Id.*) The jury remained an undispersed unit with no opportunity to discuss the case with others. (*Id.*) The burden was on Respondent's counsel to object and to ask for the jury to be reassembled and sent back to the jury room with instructions to render a new verdict. Respondent's counsel *failed to make any objection* and did not request that the jury be reassembled and asked to re-deliberate the case. (Tr. 884:25-885:6.) Thus, as a matter of law, Respondent's counsel waived any objection to the verdict. This Court is therefore left with the

Appellants' proper, timely objection that the punitive damages award could not stand absent an award of actual damages.

Under these circumstances, the jury was not discharged at the time of the Appellants' objection and Appellants did not waive their right to challenge the defective Verdict Form.

II. Appellants Did Not Waive Their Ability to Seek a New Trial.

Because the trial court failed to offer Appellants the option of a new trial *nisi*, the trial court did not have the authority to modify the jury's verdict. Respondent conflates the issues by arguing that Appellants waived their objection regarding the Verdict Form by failing to raise it during trial. This is incorrect on two fronts. First, Appellants did raise their objection to the Verdict Form during the trial. (Tr. 884:25-885:6.) However, Respondents never objected to the Verdict Form. (*See generally id.*) Second, the trial court failed to offer the option of a new trial to Appellants, but then unilaterally changed the substance of the Verdict Form to reflect its own interpretation of the jury's intent. "The trial court's authority to correct, modify, or interfere with the jury's verdict is *embraced in and limited to the power to grant new trials.*" *Anderson v. Aetna Casualty & Sur. Co.*, 175 S.C. 254, 178 S.E. 819 (1934) (emphasis added). Here, as a threshold matter, the trial court's power to reform the jury verdict was confined to a request for a new trial; therefore, because a request for a new trial never occurred, the trial did not have the power to reform the jury verdict and the trial court's reformation was improper. Respondent's argument fails.

III. Punitive Damages are Not Recoverable Without an Award of Actual Damages.

Because Respondent misstates South Carolina case law, which holds that punitive damages may only be awarded upon a finding of actual damages, a jury may not award punitive damages without first awarding actual damages.

Respondent first launches into a discussion about the alleged reprehensibility of Appellants' conduct. (Brief at 8.) This jumps the gun. An analysis of the *amount* of the punitive damages award is only warranted where punitive damages *can* be awarded. Here, as argued in Appellants' Initial Brief and briefly below, the trial court could not award punitive damages—and *a fortiori* could not modify punitive damages—as the jury did not award actual damages against Appellants on the conversion claim.

Respondent cites two cases that support its proposition that "it was not necessary for the jury to find a specific amount of actual damages against appellants in order to support the award of punitive damages." (Brief at 8.) Respondent first cites *L.O. Hinson v. A.T. Sistare Construction Co.*, 236 S.C. 125, 113 S.E.2d 341 (1960), a 1960 South Carolina Supreme Court opinion. *Hinson* does not control for two reasons.

First, the facts are distinguishable from this case. In *Hinson*, the jury returned a verdict form for a trespass charge that listed "nominal dollars actual damages and two thousand dollars punitive damages." *Id.* at 125, 113 S.E.2d at 341. The trial court judge instructed the jury to replace the "nominal" actual damages award with an actual dollar figure. *Id.* Instead, the jury replaced the "nominal" award with an actual damages award of two hundred dollars, which the court found was a non-nominal award and not responsive to the judge's instruction. *Id.* Here, the claims at issue are for conversion and breach of fiduciary duty, neither of which are trespass claims. Here, the jury did not award nominal damages on the conversion claim. It awarded *no* damages on the conversion claim. Accordingly, because the trial court cannot presume a nominal damages award, an award of punitive damages cannot stand.

Second, South Carolina Supreme Court has impliedly overruled *Hinson* since the 1960 opinion. In *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991), the South Carolina

Supreme Court considered the constitutionalist of a $87,000 punitive damages award on a $5,000 actual damages award. *Id.* at 110-11, 406 S.E.2d at 354. In describing South Carolina punitive damages law, the Supreme Court stated the bedrock principle that "punitive damages may be awarded only upon a finding of actual damages." *Id.* (*citing Carroway v. Johnson*, 245 S.C. 200, 139 S.E.2d 908 (1965)). The Supreme Court also noted that the trial judge's "thorough jury charge included . . . that [the jury] must find actual damages before awarding punitive damages[.]" *Id.* *Gamble* and its progeny impliedly overrule *Hinson*—a sixty-five year old decision—and this Court should disregard Respondent's argument.

Regardless of Respondent's characterization of how the jury awarded the damages, it is undisputed that the jury Verdict Form listed zero actual damages on the conversion count, but yet awarded punitive damages on the same count. Zero actual damages are not nominal damages. They are zero damages. Because the jury must find an award of actual damages to award punitive damages, the trial court erred in upholding the punitive damages award, and this Court should vacate the trial court's verdict and strike the punitive damages award.

IV. The Trial Court's Analysis Fails to Respect the Jury's Intent.

Respondent argues that because the jury found Appellants liable for the conversion and breach of fiduciary counts, and the trial court reduced the original $60,000 punitive damages down to $30,000, that "any additional attack on or reduction of the remaining punitive damages award . . . would so eviscerate the jury's intent that it would be tantamount to rewarding appellants for their conduct." (Resp.'s Initial Br. at 10.) This is a straw man argument that misstates the issues before this Court. The issue before this Court is whether the trial court judge improperly reformed the substance of the jury verdict and, in doing so, invaded the province of

the jury and substituted his own verdict for the jury's. *Vinson v. Hartley*, 324 S.C. 389, 406-07, 477 S.E.2d 715, 724 (Ct. App. 1996).

Appellants' position is that the trial court judge should not have reformed the Verdict Form at all. The trial court correctly recognized that "[t]he court's power to reform extends only to changes in form, rather than changes in substance . . . [and] [t]he judge cannot, under the guise of amending the verdict, invade the province of the jury or substitute his verdict for theirs." (Order at 2 (*citing Vinson*, 324 S.C. at 406-07, 477 S.E.2d at 724). As discussed above, it is fundamental that a jury cannot award punitive damages where it has awarded no actual damages. *Gamble*, 305 S.C. at 111, 406 S.E.2d at 354. The trial court admits that the Verdict Form which it allowed to be used "did not clearly address the question of damages." (Order at 2.) Despite admitting that the Verdict Form lacked clarity, the trial court found that because the "jury clearly used one of the spaces to enter an actual damages award [on the breach of fiduciary duty claim,]" and used "another space to enter a punitive damages award [on the conversion claim,]" that these two figures are "compelling proof of the jury's clear intent to return a total award of $65,000." (Order at 3.)

Quite simply, Respondent's argument fails because at a core level the trial court judge improperly reformed the substance of the jury verdict to reflect a result inconsistent with the jury's intent.

V. The Trial Court's Punitive Damages Award Does Not Comport with Due Process Requirements.

Again, Respondent's argument launches hyperbole and offensive metaphors in an attempt to conflate the relevant issues before this court. The jury Verdict Form was ambiguous and did not clearly reflect the intent of the jury. The trial court judge should have called the jury back in to clarify their intent. Instead, the trial court judge dismissed the jury, improperly conducted

substantive reformations on a Verdict Form that it admitted was unclear, and then conducted a punitive damages reasonableness analysis.

Appellants included in their Initial Brief facts that militate against any alleged reprehensibility in the trial court's analysis of the punitive damages award. Appellants stated that they believe that Respondent initiated the action out of malice, that they did not commit the conduct at issue, and that their financial resources are drained from defending this lawsuit.

In response to Appellants' statements, Respondent states that Appellants' position in their Initial Brief:

> [w]hile not necessarily a direct analogy . . . is somewhat like the convicted rapist arguing that he should not be sentenced to life without parole because he did not commit the rape and even if he did, the resources expended in fighting the rape charges have so thoroughly exhausted him, the court can be confident he lacks the energy to commit any rapes in the future.

Brief at 15. Appellants are flabbergasted at this comparison. Needless to say, Respondent's suggestion that the fact that one jury found Appellants liable for conversion and breach of fiduciary duty is in any way comparable to a convicted rapist is offensive at best, and at a core level, lacks professional courtesy and human decency.

CONCLUSION

The trial court judge improperly invaded the jury's province and intent by substantively reforming the jury verdict. While Respondent urges this Court to ignore the "minutia" of verdict forms, punitive damages, and the other core issues in this case, the simple fact remains that regardless of any alleged underlying conduct, every defendant is entitled to the proper effectuation of a jury of his peers. As a result, the jury verdict is sacrosanct, and a trial court judge must not substantively reform the jury verdict to substitute his own verdict. That is exactly

what happened. Appellants respectfully request that this Court reverse the trial court's order and strike its punitive damages award.

Respectfully submitted,

R. Mills Ariail, Jr. (S.C. Bar No. 15584)
LAW OFFICE OF R. MILLS ARIAIL, JR.
11 North Irvine Street, Suite 11
Greenville, SC 29601
864-232-9390
mills@rmalawoffice.com

January 21, 2016
Greenville, South Carolina

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PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellants J. Todd Highsmith, Shane Highsmith, and Highsmith, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on January 21, 2016, addressed to the following:

Knox L. Haynsworth, III
Brown Massey Evans McLeod & Haynsworth, LLC
Post Office Box 2464
Greenville, SC 29602

R. Mills Arrail, Jr.

Greenville, SC
Date: 1/21/2016

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

11 NORTH IRVINE STREET, SUITE 11 • GREENVILLE, SC 29601
PHONE 864.232.9390 • FAX 864.232.9392 • E-MAIL MILLS@RMALAWOFFICE.COM

January 21, 2016

Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: McKinley Cooper and Company LLC v. Todd Highsmith, Shane Highsmith, and Highsmith and Highsmith, LLC
Case No. Appellate Case #2015-000964

Dear Ms. Kitchings:

Enclosed please find the Reply Brief of Appellants J. Todd Highsmith, Shane Highsmith, and Highsmith, LLC. I have also included a Proof of Service for the same. Please return a filed copy of each to my office in the envelope provided for your convenience.

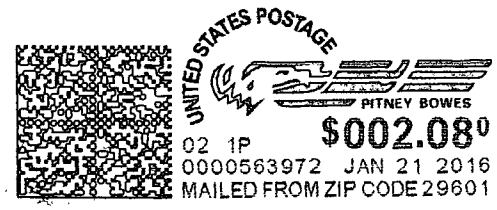
Thank you for your consideration of this letter.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law

R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

cc: Knox Haynsworth, Attorney for Respondent



R. MILLS ARIAIL, JR.

11 NORTH IRVINE STREET, SUITE 11
GREENVILLE, SC 29601

Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211