

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

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APR 06 2016

C. Victor Pyle, Jr., Circuit Court Judge

SC Court of Appeals

Case No. 2012-CP-23-3501

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

v.

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

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

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ABUSE ITS DISCRETION BY SUBSTANTIVELY REFORMING THE JURY'S VERDICT IN CONTRAVENTION OF THE JURY'S INTENT AND AWARDED LEGALLY IMPERMISSIBLE PUNITIVE DAMAGES?

STATEMENT OF THE CASE

On June 27, 2012, Respondents McKinley Cooper & Company, LLP (“Respondent”) filed an action against Appellants J. Todd Highsmith, Shane Highsmith, and Highsmith & Highsmith, LLC (collectively “Appellants”). After a jury trial, the Appellants’ and Respondent’s counsel collectively created a jury verdict form (“Verdict Form”) to submit to the jury. The second page of the Verdict Form contained spaces for verdicts on three counts: (1) violation of the Trade Secret Act; (2) breach of fiduciary duty; and (3) conversion. The breach of fiduciary duty claim had a blank space for the jury to award actual damages, but no space for the jury to award punitive damages. The conversion claim had two blank spaces for the jury to award actual and punitive damages. The Trade Secret Act claim is not contested in this appeal. Respondent’s counsel did not object to the absence of a blank for punitive damages under the breach of fiduciary duty claim, and had previously acknowledged that a blank for punitive damages should not be included under the breach of fiduciary duty claim.

After deliberation, the jury awarded Respondent actual damages of \$5,000 on the breach of fiduciary duty claim. Because the Verdict Form had no blank for punitive damages under the breach of fiduciary duty claim, the jury could not, and did not, award Respondent any damages on the breach of fiduciary duty claim. On the conversion claim, the jury awarded Respondent actual damages of \$0, but then in the Verdict Form blank directly below, awarded Respondent punitive damages of \$60,000 for the conversion claim.

After the jury rendered its verdict, Judge Pyle heard motions from the parties’ counsel. Undersigned counsel noticed that the Verdict Form listed actual damages of

\$5,000 for the breach of fiduciary duty claim, and \$0 for the conversion claim, but still awarded \$60,000 in punitive damages for the conversion claim. Accordingly, undersigned counsel objected to the award of punitive damages for conversion without an actual damages award. (R. p. 971, line 25-p. 972, line 6.) Judge Pyle ordered the parties to research whether the jury can award punitive damages without an actual damage award. The parties briefed the issue.

On February 25, 2015 Judge Pyle issued his Final Order. In this Order, Judge Pyle acknowledged that the “verdict form . . . did not clearly address the question of damages.” (R. p. 59 (footnote omitted).) Judge Pyle stated that:

while there are two claims brought by the [Respondents] which could have permitted an award of punitive damages, only one place was provided on the verdict form for such an award. In spite of these complexities, the jury clearly used one of the spaces to enter an actual damages award of \$5,000.00. The jury further used another space to enter a punitive damages award of \$60,000.00. This Court finds that these two figures are compelling proof of the jury’s clear intent to return a total award of \$65,000.00.

(R. pp. 59-60.) Judge Pyle ordered that the Verdict Form be reformed to read as follows:

WE, THE JURY, FIND FOR PLAINTIFF AS FOLLOWS:

		Jury Response
1.	Trade Secret Act:	
a.	Did Plaintiff prove a cause of action for violation of the South Carolina Trade Secret Act?	No
b.	Did Plaintiff prove a willful violation?	No
2.	Breach of Fiduciary Duty:	
a.	Did Plaintiff prove a cause of action for breach of fiduciary duty?	Yes
3.	Conversion	
a.	Did Plaintiff prove a cause of action for conversion?	Yes
b.	Did Plaintiff prove a willful violation?	Yes

(R. p. 60.) Last, Judge Pyle ordered that the jury's damage findings be moved to a separate and additional section on the Verdict Form as follows:

- | | | |
|----|------------------|-------------|
| 4. | Damages | |
| a. | Actual Damages | \$5,000.00 |
| b. | Punitive Damages | \$60,000.00 |

(R. p. 60.) The trial court denied Appellants' Motion for Reconsideration on March 4, 2015.

This appeal followed.

STANDARD OF REVIEW

This court reviews an improper verdict for the trial court's abuse of discretion.

Johnson v. Phillips, 315 S.C. 407, 414, 433 S.E.2d 895, 900 (Ct. App. 1993).

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY SUBSTANTIVELY REFORMING THE JURY VERDICT IN CONTRAVENTION OF THE JURY'S INTENT.

Because the trial court abused its discretion in substantively reforming the verdict in direct contravention of the jury's intent, this Court should reverse the trial court's order and strike its award of punitive damages.

The trial court may amend the Verdict Form in matters of form, but not of substance. *Vinson v. Hartley*, 324 S.C. 389, 406-07, 477 S.E.2d 715, 724-25 (Ct. App. 1996). A change of substance is a change affecting the jury's underlying decision, but a change in form is one which merely corrects a technical error made by the jury. *Id.* Judge Pyle cannot, under the guise of amending the verdict, invade the province of the jury or substitute his verdict for the jury's. *Id.* After the amendment, the verdict must be not what Judge Pyle thought it ought to have been, but what the jury intended it to be. *Id.*

In *S.C. State Hwy. Dep't v. Miller*, 237 S.C. 386, 117 S.E.2d 561 (1960), the South Carolina Supreme Court addressed amendment of a verdict by the trial court:

The judge cannot, under the guise of amending the verdict, invade the exclusive province of the jury or substitute his verdict for theirs. After the amendment the verdict must be not merely what the judge thinks it ought to have been, but what the jury intended it to be. Their actual intent, and not his notion of what they ought to have intended, is the thing to be expressed and worked out by the amendment.

Miller, 237 S.C. at 394-95, 117 S.E.2d at 565.

The trial court cannot lawfully enter judgment on an inconsistent or incomplete verdict. *Johnson*, 315 S.C. at 407, 433 S.E.2d at 895.

This is the quintessential case of whether the trial court can reform a jury verdict for "no dollars." *Id.* Here, the jury returned a verdict of no actual damages for the

conversion claim, but then awarded Respondents \$60,000 in punitive damages on the same claim. As a matter of law, this is fatal to the punitive damages award, as it is axiomatic that a jury may not award punitive damages on a cause of action in the absence of an award of actual damages on the same cause of action. *Gamble v. Stevenson*, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991) (“punitive damages may be awarded only upon a finding of actual damages”).

When the jury returned a verdict of no actual damages for the Respondents, the trial court should have informed the jury that it could not accept the verdict, and should have returned the case to the jury with instructions explaining actual and punitive damages. The trial court should have then charged the jury to either assess a dollar amount of actual or nominal damages or charged them to return a verdict for the Appellant on the conversion charge. *See Johnson*, 315 S.C. at 416-17, 433 S.E.2d at 902. If the jury renders an ambiguous verdict, the court must resubmit the case to the jury, not act as a substitute for the jury. *Id.* at 417 n.7, 433 S.E.2d at 901 n.7.

Because the trial court erred in substantively reforming the verdict, in direct contravention of the jury’s intent, this Court should reverse the trial court’s order strike its award of punitive damages.

- a. The trial court abused its discretion in upholding Respondent’s punitive damages award on the ground that the jury “intended” to award both actual and punitive damages on the conversion count.

Because the trial court abused its discretion by holding that that the jury “intended” to award both actual and punitive damages count, this Court should reverse the trial court’s order and strike its award of punitive damages.

The trial court stated in its Order that it could, in exceptional circumstances, reform a jury's verdict to carry into effect the jury's clear intention. (R. p. 59 (*citing Vinson*, 324 S.C. at 406-07, 477 S.E.2d at 724).) The court then 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." (R. p. 59 (*citing 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." (R. p. 59.)

The Verdict Form gave \$5,000 of actual damages on the breach of fiduciary duty claim, and \$0 of actual damages and \$60,000 of punitive damages on the conversion claim. 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." (R. p. 59.) 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." (R. p. 60.)

The trial court fails to explain how a faulty Verdict Form that (1) did not contain a blank for punitive damages for the breach of fiduciary duty claim and (2) awarded punitive, but not actual, damages for the conversion claim is "compelling proof of the jury's clear intent to return a total award of \$65,000.00." (R. p. 60.) While the jury

awarded Respondent \$5,000 in actual damages for the breach of fiduciary duty claim and \$60,000 in punitive damages for the conversion claim, totaling \$65,000, it strains credulity that the jury, who was given the Verdict Form that contains a blank for actual damages underneath the conversion claim, ignored the actual damages blank underneath the conversion claim for any other reason except that they did not intend to award actual damages. Any other conclusion defies logic. These verdicts are not ambiguous. The jury did not intend to award punitive damages on the breach of fiduciary duty count or actual damages on the conversion count. This is a substantive reformation that invades the jury's province and *alters*—not clarifies—the jury's verdict. *Vinson*, 324 S.C. at 406-07, 477 S.E.2d at 724-25. The trial court ignored that the jury confirmed in open court that the verdict was the verdict of each member of the jury. (R. p. 970, lines 6-9.)¹ Furthermore, Appellants' counsel made his objections to the Verdict Form while the jury was still present within the courthouse, and the trial court could have called back the jury to clarify the intent.

The trial court impermissibly reformed the Verdict Form's substance. *Vinson*, 324 S.C. at 406-07, 477 S.E.2d at 724. In doing so, the trial court altered the jury's intent and replaced it with its own. Instead of reformation, the trial court should have either called back in the jury and clarified its intent or granted Appellants' judgment notwithstanding the verdict. Accordingly, Appellants request that this Court reverse the trial court's order and strike its award of punitive damages.

¹ The Court: "These [verdict forms] are signed by . . . our foreperson. Ladies and gentlemen, if you agree these are the verdicts you reached in your deliberation room, would you please raise your right hand. Thank you."

(WHEREUPON, all jurors raised their right hand.)

b. Appellants have standing to challenge the improper punitive damages award.

Because Appellants have properly preserved their objection to the trial court's improper punitive damages award, Appellants have standing to challenge the trial court's improper verdict reformation before this Court.

In Respondent's post-trial briefs, Respondents argue that Appellants have waived their right to challenge the trial court's punitive damage award. (R. p. 75.) Respondent claims that Appellants failed to object to the punitive damages award. The trial transcript, however, shows that Appellants' counsel *did* in fact object to the punitive damages award at the earliest possible opportunity. (R. p. 971, line 25-p. 972, line 6.) Following the reading of the verdict, the Court directed the jury to "report downstairs to the jury room" to pick up their checks. (R. p. 971, lines 15-17.) After the jury exited the courtroom into the secure hallway behind the courtroom, the Court then asked the Appellants' and Respondent's 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: Your Honor, I didn't understand the verdict. If I could see the verdict form?

* * *

MR ARIAIL: 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?

(R. p. 971, line 20-p. 972, line 7.)

Appellants' counsel confirmed that, under South Carolina law, Respondent cannot recover punitive damages on a cause of action in the absence of an award of actual damages on that cause of action. Appellants thereafter filed a combined motion and brief with authority that supported this position and formally asked the Court to enter judgment notwithstanding the verdict in favor of the Appellants on the punitive damages claim. (R. pp. 1-13.)

Any notion that the jury in the instant case had been finally discharged before the time Appellants' counsel made this objection is meritless. Under South Carolina law, a jury may be reassembled notwithstanding a "formal discharge," so long as they have not been subjected to any outside influences between the discharge and the reassembly. 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. The South Carolina Supreme Court stated that:

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.

State v. Myers, 318 S.C. 549, 551-52, 459 S.E.2d 304, 306-07 (1955); *see also Summers v. United States*, 11 F.2d 583, 586 (4th Cir. 1926) ("[The jury] 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.”)

Appellants’ counsel submitted an affidavit to the trial court stating all salient facts regarding the jury’s post-verdict status. (R. pp. 45-46.) Specifically, 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. (R. p. 46.) This hallway and the stairs leading to the clerk’s office are secure areas where members of the public are not permitted. (R. p. 46.) Consequently, the jury could not have been subjected to questions from reporters or other members of the public. (R. p. 46.) The jury remained an undispersed unit with no opportunity to discuss the case with others. Under these circumstances, the jury was not discharged at the time of the Appellants’ objection. 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. Thus, as a matter of law, Respondent’s counsel—not Appellant’s counsel—waived any objection to the verdict. The Court is left with the Appellants’ proper, timely objection that the punitive damages award could not stand absent an award of actual damages.

Furthermore, Respondent cannot make the credible argument that the trial court presumed nominal damages on the conversion count, and, accordingly, the trial court or this Court should uphold the trial court’s punitive damages award. This argument fails for at least four reasons.

First, as previously noted, the jury in this case expressly found that the Plaintiff had sustained “zero actual damages” for conversion:

3. Conversion

- | | | |
|----|------------------|-----------------|
| A) | Actual damages | \$0 |
| B) | Punitive Damages | <u>\$60,000</u> |

(Verdict Form). Given this express finding by the jury of no actual damages, no credible argument can be made that nominal actual damages may still be inferred, or that the jury somehow intended to award actual damages on the conversion count.

Second, absent express jury findings to the contrary, South Carolina law does presume damages in trespass and certain defamation actions. Respondent presented no authority to the trial court that damages are ever presumed in conversion actions. Even if this were true, the express finding of zero actual damages would rebut the presumption as a matter of law.

Third, the Appellants respectfully submit that *Gamble*, 305 S.C. at 104, 406 S.E.2d at 354 impliedly overrules any South Carolina cases holding that a punitive damages award may be upheld on grounds that nominal damages may be presumed. There the court stated “punitive damages may be awarded only upon a finding of actual damages.” 305 S.C. at 111, 406 S.E.2d at 361 (emphasis added). The court made no exception for nominal damages.

Fourth, any attempt to award punitive damages based on implied nominal damages would be unconstitutional. Under the due process analysis mandated by *BMW of N.A. v. Gore*, 517 U.S. 559 (1996), *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), and *Mitchell v. Fortis*, 385 S.C. 570, 686 S.E.2d 176 (2009), a trial court is required to make a post-trial review of all punitive damages to insure that the award does

not violate the defendant's due process rights. One of the critical factors the court must consider in this review is the ratio between the punitive damages awarded and the actual or potential harm suffered by the plaintiff. *Mitchell*, 385 S.C. at 588. Where no actual damages have been awarded and instead nominal damages are presumed, it is not possible to even identify the ratio. Even assuming *arguendo* that the court has discretion to presume nominal damages of one dollar, or two dollars, the resulting ratios would still be staggering. If "nominal damages" in this case are \$1.00, then the ratio is 60,000 to 1. If "nominal damages" are \$2, then the ratio would be 30,000 to 1.

Because Appellants timely objected to the impermissible Verdict Form, and Respondents failed to do so, this Court should consider Appellants' arguments and reverse the trial court's order and strike its award of punitive damages.

c. The trial court's punitive damages award violates Appellants' Due Process rights.

Because the trial court's order reformation of the Verdict Form to reflect \$30,000 in punitive damages is impermissible and fails as a matter of law, the trial court's punitive damages award violates Appellants' constitutional due process rights this Court should reverse the trial court's order and strike its award of punitive damages.

In their Opposition to Plaintiff's Request for Punitive Damages and Reply to Plaintiff's Memorandum, Appellants briefed the trial court at length regarding the constitutionality of the trial court's punitive damage award. In sum, Appellants argued that because the jury awarded \$0 in actual damages on the conversion count, the \$60,000 in punitive damages was not only legally impermissible, it was a gross violation of the Appellants' Due Process rights. (R. pp. 24-27.)

The trial court attempted to avoid this unconstitutional violation of Appellants' due process rights by reforming the verdict to award punitive damages of \$30,000. The trial court order granting this reformation did not specify as to which count the reformation applied. This baffling holding, on its face, provides Appellants with no guidance as to what count to appeal. Instead, Appellants attempt to divine from the trial court's order what the trial court intended in reforming the verdict award.

Appellants maintain that because this reformation was substantive, and invaded the jury's province, it was improper, and this Court should reverse the trial court's reformation. Accordingly, what is left before the trial court's reformation is a Verdict Form that lists actual damages on the breach of fiduciary duty count but none on the conversion count, and only lists punitive damages on the conversion count. Because the punitive damages award on the conversion count was facially improper and must be vacated, the trial court's reformation of the punitive damages award was similarly improper and must also be vacated.

The inescapable fact that undercuts Respondents' argument is that the jury awarded no actual damages on the breach of fiduciary duty count. On a core level, the lack of actual damages is the end of the inquiry. However, to account for any other circumstances, assuming *arguendo* that the jury had returned a nominal award of actual damages on the conversion count as well as the award of punitive damages, the punitive damages award would still have to be vacated because it would be in violation of the Appellants' Due Process rights, as guaranteed by the United States Constitution. In *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350, 354 (1991), the South Carolina Supreme Court directed trial courts to conduct a post-trial review of all punitive damages

awards to insure that they comply with the Due Process Clause. The *Gamble* court identified the following eight factors that trial courts should consider in conducting this review:

Hereafter, to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review and may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) 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) defendant's ability to pay; and finally, (8) as noted in *Haslip*, "other factors" deemed appropriate.

305 S.C. at 111-12.

In *BMW of North America v. Gore*, 517 U.S. 559 (1996), the United States Supreme Court refined the due process analysis for reviewing punitive damages awards. Other South Carolina Supreme Court decisions also addressed various aspects of this review. In 2009, in *Mitchell v. Fortis*, 385 S.C. 570, 686 S.E.2d 176 (2009), the South Carolina Supreme Court "updated" *Gamble* to incorporate these Supreme Court decisions. *Gamble* remains relevant "only insofar as it add substance to the Gore guideposts." 385 S.C. at 588. In this regard, however, the first four *Gamble* factors are included in the *Gore* reprehensibility analysis and need not be separately considered. 385 S.C. at 587 n.7.

Under *Mitchell*, a trial court reviewing a punitive damage award must first consider the degree of reprehensibility of the defendant's conduct:

[f]irst, any court reviewing a punitive damages award should consider the degree of reprehensibility of the defendant's conduct. Reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 565, 116 S. Ct. at 1589. "This principle reflects the view that some wrongs are more blame-worthy than

others.” *Id.* In considering reprehensibility, 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.

Mitchell, 385 S.C. at 587.

Second, as discussed above, the court must consider the ratio between the amount of punitive damages awarded and the actual or potential harm suffered by the plaintiff:

[s]econd, the court should consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award. The ratio of actual or potential harm to the punitive damages award is “perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award.” *Gore*, 517 U.S. at 580, 116 S. Ct. at 1589. Although the Supreme Court has “been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award,” and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *Campbell*, 538 U.S. at 425, 123 S. Ct. at 1513. Nevertheless, the Supreme Court has made clear that “there are no rigid benchmarks that a punitive damages award may not surpass,” so long as “the measurement of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered.” *Id.* at 425-26, 123 S. Ct. at 1513. With this instruction in mind, we note that a court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay. . . . Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award.

Mitchell, 385 S.C. at 587-88.

Third, the court must consider the difference between the punitive damages awarded by the jury and comparable civil penalties available:

The court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. When identifying "comparable cases" a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant.

Mitchell, 385 S.C. at 588-89.

Here, the inquiry begins with the jury's verdict. Because the jury did not award *any* actual damages on the conversion count, the trial court could not even undertake a *Mitchell* punitive damages analysis without substantively reforming the verdict. This ends the inquiry, and this Court should reverse the trial court's decision and remand for further proceedings. However, because the trial court *did* substantively reform the verdict and alter the intent of the jury, in violation of South Carolina Supreme Court case law, Appellants now must appeal to this Court for relief for a situation that could have easily been remedied by the trial court calling the jury back into the courtroom to clarify its decision. Instead, this costly appeal followed.

Addressing the reasonableness of the punitive damages award, the jury's verdict clearly establishes that the Appellants not culpable on the conversion claim because the jury awarded Respondents \$0 of actual damages on that claim. At trial, Appellants presented significant evidence that they had no knowledge of the documents on their computers, and Respondent's own expert testified that the documents at issue were never accessed by Appellants. These facts cut against the alleged reprehensibility that Respondents claim.

It is important for this Court to note that the Appellants are a two-person accounting firm. Appellants believe that the Respondents initiated this action out of malice towards the Appellants and to attempt to drive Appellants out of business. Based upon Respondent's lawsuit and subsequent behavior, Appellants have struggled to stay in business and are still paying for all expenses incurred in defending themselves from this lawsuit. Affirming the punitive damages award will not deter future similar action from Appellants because Appellants (1) did not commit the allegedly fraudulent actions and (2) as a result of defending against this lawsuit Appellants do not currently possess the required resources to perform their business.

Because the jury awarded Respondent \$0 on the conversion count, a punitive damages award on the conversion count violates Appellants' Due Process rights, and this Court should reverse the trial court's order and strike its award of punitive damages.

d. The trial court failed to properly reform the verdict because it failed to offer Appellants an option for a new trial.

Because the trial court failed to offer the parties with an option for a new trial, but instead reformed the jury verdict *sua sponte*, the trial court's verdict reformation is invalid as a matter of law, and this Court should reverse the trial court's order and strike its award of punitive damages.

South Carolina has extensive case law regarding the procedural and substantive predicates that parties and the trial judge must undertake before amending or reforming a jury verdict. A party seeking amendment of a verdict must lay a proper foundation by a motion for a new trial. *Anderson v. Aetna Casualty & Sur. Co.*, 175 S.C. 254, 178 S.E. 819 (1934). A party's objection that damages are inadequate must be raised in a motion for a new trial or the objection is waived and cannot be argued on appeal. *Id.*

Appellants' counsel only raised an objection; Respondents' counsel never did. (R. p. 971, line 25-p. 972, line 6.)

Although the court may amend a verdict, the amendment must be accompanied with an option of a new trial *nisi* to the party against whom the amendment militates. *Id.* Here, the jury verdict reformation militated against Appellants, as it converted a verdict that was facially fatal to Respondents because it contained a legally impermissible award of punitive damages with no actual damages.² The trial court never offered the option of a new trial *nisi* to Appellants: not in the post-trial discussions with the parties' counsel; not in the parties' briefing on Appellants' judgment notwithstanding the verdict; and not in the parties' briefing on Appellants' motion for reconsideration, where Appellants raised this exact issue. The record is devoid of any mention of the option of a new trial. *See id.* ("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.") (emphasis added).

In *S.C. State Hwy. Dep't v. Miller*, 237 S.C. 386, 117 S.E.2d 561 (1960), the South Carolina Supreme Court further addressed amendment of a verdict by the trial court:

The judge cannot, under the guise of amending the verdict, invade the exclusive province of the jury or substitute his verdict for theirs. After the amendment the verdict must be not merely what the judge thinks it ought to have been, but what the jury intended it to be. Their actual intent, and not his notion of what they ought to have intended, is the thing to be expressed and worked out by the amendment.

Miller, 237 S.C. at 394-95, 117 S.E.2d at 565.

² Appellants assume *arguendo* that without the other verdict form issues that the trial court would have properly determined that an award of punitive damages without actual damages is not sustainable. (*See* Order at 4 (*citing McGree v. Bruce Hosp. Sys.*, 344 S.C. 466, 471, 545 S.E.2d 286, 288 (2001)).)

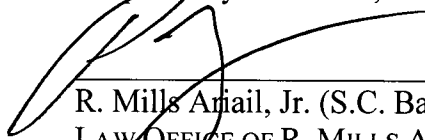
Here, the trial court invaded the jury's province by reforming the verdict without offering Appellants a new trial. This fundamentally undercuts Appellants' rights to a verdict reflecting the jury's intention. *Vinson*, 324 S.C. at 406-07, 477 S.E.2d at 724-25. This undercuts the purpose of the jury system; at the risk of hyperbole, if a party cannot rely on the jury to clearly and effectively convey a verdict without interference from the trial court, the veracity of the court system is at risk.

The trial court should have offered Appellants a new trial. It did not. This Court should reverse and strike the trial court's award of punitive damages.

CONCLUSION

Because the trial court abused its discretion by substantively reforming the jury verdict in contravention of the jury's intent and awarding legally impermissible punitive damages, Appellants respectfully request that this Court reverse the trial court's order and strike its award of punitive damages against Appellants.

Respectfully submitted,



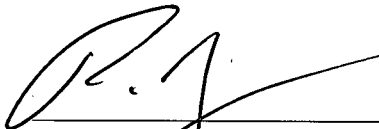
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with South Carolina Rule of Appellate Procedure 211(b).

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SC Court of Appeals

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

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

v.

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

PROOF OF SERVICE

I certify that I have served the Final Brief by hand-delivery, on April 4, 2016, addressed to the following:

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