

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia Verdin, Circuit Court Judge

Case No. 2012-CP-23-3532
Appellate Case No. 2015-001744

Check First of Greenville, LLC
d/b/a Evo Merchant Coop.,

Appellant,

v.

Merchant Services of the Upstate, Inc.
and Alfred J. Pearce, IV,

Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. THE RESPONDENTS FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE OF FRAUD.
- II. THE TRIAL JUDGE ERRED IN FAILING TO REVERSE AN AWARD OF PUNITIVE DAMAGES AGAINST THE APPELLANT.
- III. THE TRIAL JUDGE ERRED IN FAILING TO SETOFF THE FULL AMOUNT OF RESPONDENTS' SETTLEMENT WITH THE MERCHANT COOPERATIVE AGAINST THE VERDICT AGAINST CHECK FIRST.

STATEMENT OF THE CASE

This case has a complex procedural history. It began on April 5, 2010, when Plaintiffs Merchant Cooperative, Inc. and Check First of Greenville, LLC d/b/a EVO Merchant Coop., filed a summons and complaint in the Greenville County Court of Common Pleas against Defendants Merchant Services of the Upstate, Inc. and Alfred J. Pearce, IV. (Summons & Complaint).

The initial complaint alleged the following causes of action: breach of fiduciary relationship; misappropriation of trade secrets; conversion of property; interference with economic relationship; negligence; defamation of character; breach of contract; and injunctive relief.

On April 28, 2010, the Defendants Merchant Services and Alfred Pearce answered the complaint and asserted both counterclaims and a third-party complaint. (Answer & Counterclaim). In addition to a number of affirmative defenses, the Defendants named John Cutler and Christian Maurer as Third-Party Defendants.

The counterclaim and third-party complaint alleged the following causes of action against the Plaintiffs and the Third-Party Defendants: unfair trade practices; fraud; breach of contract accompanied by a fraudulent act; breach of the implied covenant of good faith and fair dealing; promissory estoppel; fraud in the inducement; negligent misrepresentation; negligence; outrage; and conversion.

On July 15, 2010, the Plaintiffs responded to the Defendants' counterclaims and denied the allegations, as well as raising a number of affirmative defenses. (Reply). On August 11, 2010, the Third-Party Defendants filed an answer, also denying the allegations and raising affirmative defenses. An amended answer to the third-party complaint was filed on January 4, 2011, adding additional defenses. (Amended Answer)

Prior to trial, Plaintiff Merchant Cooperative, Inc., reached a settlement with the Defendants and was dismissed from the action. John Cutler, who had passed away during the litigation, was also dismissed individually from the case.

A jury trial began in this matter on March 2, 2015. After the Plaintiff rested, Defendants made directed verdict motions. All of those motions were denied by the trial court. The Plaintiff conceded to a directed verdict on misappropriation of trade secrets. (Tr. p.372, ll.24-25)

The defense then presented its case. After the defense rested, Plaintiff Check First moved for directed verdicts on all causes of action. A directed verdict was granted on the unfair trade practices cause of action. (Tr. p.686, l.3 – p.687, l.4). The judge also granted a directed verdict on the fraudulent inducement cause of action, but allowed the other fraud causes of action to go to the jury. (Tr. p.689, l.10 – p.691, l.7) A directed verdict was granted on the outrage cause of action. (Tr. p.691, l.8 – p.692, l.24). Finally, the judge allowed the defense to amend its counterclaim to include a cause of action for unjust enrichment. (Tr. p.687, l.10-p.689, l.3; p.694, ll.7-17).

The jury returned a verdict on March 5, 2015. The various causes of actions resulted in the following verdicts for the parties.

The jury found for the Plaintiff on the cause of action for breach of fiduciary duty but awarded no damages. (Tr. p.839, ll.11-23).

The jury found for the Plaintiff on the cause of action for conversion and awarded \$50 in actual damages and \$1500 in punitive damages. (Tr. p.839, l.24 – p.840, l.19).

The jury returned \$160,000 in actual damages for the Plaintiff for intentional interference with economic relationships. (Tr. p.840, l.20 – p.841, l.3).

A defense verdict was returned on the negligence cause of action. (Tr. p.841, ll.4-8).

The jury found for the Plaintiff on the defamation cause of action and awarded no actual or special damages, but did award \$25,000 in punitive damages. (Tr. p.841, ll.8-23).

A verdict for the Plaintiff was returned on the breach of contract cause of action, but no damages were awarded. (Tr. p.841, l.24 – p.842, l.5).

On Defendants' cause of action for fraud, the jury returned a verdict for \$175,000 in actual damages and \$85,000 in punitive damages. (Tr. p.842, ll.6-14).

On Defendants' cause of action for breach of covenant of good faith and fair dealing,

negligent misrepresentation, negligence, and conversion the jury found for the Defendants but awarded no damages. (Tr. p.842, l.15 – p.844, l.4).

The jury returned a verdict for \$100,000 for the Defendants on their cause of action for unjust enrichment. (Tr. p.844, ll.5-13).

After trial, both parties made a variety of post-trial motions. Both parties renewed motions for sanctions based on discovery abuse, which were denied and are not at issue in this appeal. The Plaintiff moved for a judgment notwithstanding the verdict pursuant to Rule 50 of the South Carolina Rules of Civil Procedure, as well as a new trial absolute or a new trial nisi remittitur pursuant to Rules 50 and 59. (Final Order, p.1)

The Defendants moved for both a judgment notwithstanding the verdict pursuant to Rule 50(b) and a new trial pursuant to Rule 59. (Final Order, p.1) The Defendants also elected recovery on the fraud cause of action rather than the unjust enrichment cause of action, resulting in the trial court striking the verdict for unjust enrichment. (Final Order, p.9)

The trial court denied both sides' motions for new trials. It did, however, take a number of actions related to the verdicts. Based on the findings of no damages, the verdicts for the Plaintiff on causes of action for breach of fiduciary duty and breach of contract were both construed as verdicts for the Defendants. (Final Order, p.8). Similarly, the trial court found an award of no damages on Defendants' causes of action for breach of covenant of good faith and fair dealing negligent misrepresentation, negligence, and conversion should result in those verdicts being converted to verdicts for the Plaintiff. (Final Order, p.8).

In addition to realigning the verdicts, the trial court modified some of the damages awards. The Plaintiff's punitive damages award against the Defendants was reduced from \$1500 to \$500. (Final Order, p.8). Plaintiff's defamation verdict against the Defendants was reformed to reflect an award of \$5000 in actual damages and \$20,000 in punitive damages. (Final Order, p.9). The trial court also allowed a partial setoff of \$21,500 to the Plaintiff based on a co-Plaintiff's settlement prior to trial. (Final Order, p.9).

At the end of trial and the post-trial decisions, Plaintiff was left with a total award of \$185,550, consisting of a \$550 award for conversion, a \$25,000 award for defamation, and a \$160,000 award for intentional interference with economic relations. Defendants were left with an award for \$238,500 on their cause of action for fraud, which included the partial setoff.

STATEMENT OF FACTS

At the heart of the numerous causes of action and competing claims in this case, the dispute between the parties was over payment from credit card processing. Though the facts appear complex on the surface, they are really quite simple. From the time a consumer swipes a card for payment at a business to the deposit of that money into the business's account, a number of things happen and a number of people are involved.

John Cutler operated Check First, a company that sold credit card processing. (Tr. p.114, ll.2-3). His company sold service to businesses allowing them to accept credit cards. (Tr. p.116, ll.5-7). Sales people, who worked for Cutler, would meet with business owners. If a business owner agreed to sign up for the service, the business filled out a service application and, if necessary, a leasing application for credit card equipment. (Tr. p.116, ll.7-10).

The applications were sent to the leasing company, as well as a company in Charleston who would approve or decline the business for credit card service. (Tr. p.116, ll.15-23). That company was EVO or the Merchant Cooperative (referred to as "the Merchant Cooperative in this appeal). (Tr. p.116, l.24 – p.117, l.3).

Sales people in this business were paid in one of two ways. Some salespeople chose a salary, which involved some money up front at the time of the service's sale. (Tr. p.117, ll.19-25). The other way, which was the focus of this trial, was a commission-based pay. The salesperson was entitled to a percentage of the total credit card sales made each month. These were called residuals. Individuals who chose the residual pay method were theoretically entitled to residual payments as long as the business was using the credit card service it was sold. (Tr. p.118, ll.4-10).

While the residual method of payment was potentially lucrative, it was also problematic. Witness Jerry Harris described the constant headaches John Cutler dealt with trying to verify and reconcile Check First's residual payments from the Merchant Cooperative. (Tr. p.118, ll.11-19). During Harris' time working for both John Cutler and Alfred Pearce, there were constant issues with payment. (Tr. p.123, ll.1-13). The residual payments were inconsistent. (Tr. p.123, ll.14-15).

John Cutler was extremely involved in his employee's sales calls. He often assisted employees with their sales calls. (Tr. p.120, ll.23-24). If a potential customer was hesitant to sign up for Check First's services, the salesperson would often call John before the sales call ended. John would then talk with the customer and was often able to convince them to sign up for service. (Tr. p.121, ll.1-14). There were numerous times John did this for Alfred Pearce ("A.J."). (Tr. p.121, ll.15-20). The testimony reflected John Cutler was very involved in his business and helped his salespeople as much as possible.

After a sale was made, the primary way representatives were paid was through the residual reports. Early on in the business, the residual reports came as hard copies via courier. (Tr. p.181, ll.1-13). John would typically take that report and go through it to determine who was owed what. (Tr. p.181, ll.1-13). He would separate out accounts by sales representative and determine what to pay each person. (Tr. p.181, ll.14-19).

Occasionally, the residual reports were inaccurate. Witness Amber Reynolds described a time when accounts were missing from a residual report. An employee thought he was missing accounts. (Tr. p.183, ll.3-4). Check First kept a spreadsheet with all of the accounts on it from the start of the business. (Tr. p.182, ll.2-9). The spreadsheet also reflected which salesperson had started the account. (Tr. p.182, ll.10-11).

In response to the employee's complaint, Reynolds went through the residual reports and compared them to the office's master spreadsheet. (Tr. p.183, ll.3-7). She then made a list of accounts missing from the residual reports. (Tr. p.183, ll.7-8).

These residual reports were created by the Merchant Cooperative's office in Charleston, rather than at the local level. (Tr. p.187, ll.6-11). Witness Delassye Rice testified about the reports missing merchants he should have been paid on. However, he initially stopped receiving certain residuals because of a physical confrontation with John Cutler, his boss at the time. (Tr. p.219, ll.23-25).

The cause of the altercation was missing merchants from residual reports. (Tr. p.219, ll.1-

8). Rice took responsibility for keeping up with the residual payments he was owed. (Tr. p.220, l.22 – p.221, l.2). Amber Reynolds helped Rice keep track of what he was owed. (Tr. p.221, ll.2-6).

Rice was clear that he did not trust the Merchant Cooperative. (Tr. p.221, ll.11-18). He held the office in Charleston responsible for the missing money. Rice described Pearce and John constantly communicating about problems with the Merchant Cooperative's reports. (Tr. p.221, l.19-p.222, l.4).

Because John Cutler passed away during the course of this litigation, his wife Melinda Cutler testified in-depth about many of the facets of this business and the dispute that grew between the parties. John was in the restaurant business after college as a general manager for a steakhouse in Charleston. (Tr. p.235, ll.15-21). After the September 11th attacks, he was laid off as a result of the subsequent economic crash. (Tr. p.235, ll.19-21). He answered an ad to work with the Merchant Cooperative. (Tr. p.235, ll.21-25).

John was initially a sales representative in Charleston. (Tr. p.236, ll.3-9). He did such a good job as a sales representative he was asked by management to start Greenville as a region. (Tr. p.237, ll.10-17). He built the Greenville territory from nothing, starting his business at the dining room table. (Tr. p.237, ll.6-9).

Melinda Cutler started out doing anything needed to help grow the business. (Tr. p.237, l.22-p.238, l.5). She eventually became a sales representative, working on residual payments for nearly four years. (Tr. p.238, ll.6-11). She was intimately familiar with the residual payment process. (Tr. p.238, ll.12-15).

On February 10, 2012, John Cutler died in a tragic car accident. (Tr. p.238, ll.18-19). After probate concluded, Melinda Cutler was left as the owner of Check First. (Tr. p.239, ll.5-24). Melinda offered the jury a more in-depth view of the business her husband started.

The business relationship with a potential customer begins with a sales call. The sales person evaluates the potential customer's needs and how it can best process credit card payments. The credit card payment process is then explained. (Tr. p.241, ll.2-12).

Check First was an independent sales organization, responsible for selling credit card payment services and submitting applications for customers to accept those credit card payments. (Tr. p.241, ll.18-23). A processor, like the Merchant Cooperative, is responsible for tracking that data and creating reports of that data. (Tr. p.241, l.23-p.242, l.2).

Melinda also explained exactly how payments worked in the credit card processing business. When money is spent on a credit card, a particular percentage goes to the ultimate credit card company, like Visa or MasterCard. (Tr. p.242, ll.5-18). Another percentage, beyond the cut that goes to Visa or MasterCard, is split between the sales organization and the processor. (Tr. p.242, ll.19-21). The pricing an independent sales organization like Check First gets is based on the amount of business the organization does. (Tr. p.242, l.23 - p.243, l.3). A contract between Check First (the independent sales organization) and the Merchant Cooperative (the processor) governed the residual payments. (Tr. p.243, ll.8-11). The residual reports are considered confidential because of the pricing information they contain. (Tr. p.250, ll.18-25).

Melinda also described the relationship between Check First and the Merchant Cooperative. It started out well, especially since John Cutler accounted for a large portion of the Cooperative's business. (Tr. p.251, ll.5-13). John received a large amount of money and did not seem to have a problem with the residual payments at the beginning of the relationship. (Tr. p.251, ll.14-24). While the payments continued past John's death, they stopped when Melinda testified unfavorably to the Cooperative at her deposition. (Tr. p.252, ll.4-25).

Over the time Check First and the Merchant Cooperative worked together, the reporting system for residual payments seemed to increase the number of mistakes. (Tr. p.254, ll.5-10). Initially, the reports came in a paper form. (Tr. p.256, ll.12-19). The procedure for calculating and verifying payment information was tedious.

John and Alfred Pearce would sit down with the paper reports and spend hours going through them to determine any problems with the reports. (Tr. p.256, l.20-p.257, l.2). They would create documents they could then use to address any issues with the Merchant Cooperative. (Tr.

p.257, ll.2-4). This was a constant process. (Tr. p.257, ll.5-6).

John was diligent in making sure the payment information he received was correct. He spent hours accounting for inaccuracies in the residual reports. (Tr. p.257, ll.7-11). Because of John's experience in the business and knowledge related to the reports, he was often able to spot the inaccuracies in the reports and point them out to the processor. (Tr. p.257, ll.12-21).

Each month, John created a hand calculation from the Merchant Cooperative's report that showed the amount each sales representative was owed. (Tr. p.258, ll.4-12). He then created a report that set out the amount they were paid each month. (Tr. p.258, l.23 – p.259, l.2). He would sit down with each sales representative and calculate any money they were owed beyond what was listed in the reports. (Tr. p.259, ll.2-4).

The Plaintiff introduced the April 2007 report for Pearce, which reflected money owed from February 2007 activity. (Tr. p.259, ll.10-17; Plaintiff Ex. 8). The report had multiple tiers, which reflected the pricing each customer received. (Tr. p.259, l.21-p.260, l.7). At the bottom of the report, there were totals for every category, including high risk business which was handled by a different processor. (Tr. p.260, ll.8-22).

The April 2007 report calculated a total residual of \$2483.79. (Tr. p.260, ll.23-24). The split resulted in a \$1241.89 commission owed Pearce on this report. (Tr. p.260, l.24 – p.261, ll.3. In addition, this specific month included a \$500 bonus and a \$60 payment for gas. (Tr. p.261, ll.3-11).

Melinda discussed a residual report from October of 2007, which accounted for activity from August of 2007. (Tr. p.262, ll.3-7; Plaintiff Ex. 9-10). On that specific report, there was a notation regarding missing accounts. According to handwritten notes on the report, there were \$533.23 in missing accounts, which resulted in \$266.62 in missing commissions. (Tr. p.263, ll.4-9).

Each sales representative signed a contract governing their relationship with Check First. (Tr. p.263, l.24-p.264, l.1). Specifically, the contract required each representative to write two

deals a month in order to continue receiving residual payments. (Tr. p.264, ll.1-3). Despite that agreement, John agreed to pay Pearce residuals even when he moved away and was no longer writing the required number of deals to maintain his residual payments. (Tr. p.264, ll.1-8).

Melinda introduced a number of checks written to Alfred Pearce. The list of checks reflected payments to Pearce from January of 2006 to November of 2009. (Tr. p.267, ll.4-12; Plaintiff Ex. 11). She testified the checks were consistent and appeared to be commissions and residuals. (Tr. p.267, ll.9-20). There were a number of checks written when Pearce was living in Ohio and not in compliance with his contract. (Tr. p.268, ll.7-25). This was particularly important because John Cutler paid Pearce even when he did not have to. (Tr. p.273, ll.7-16).

Melinda reviewed Pearce's damages calculations. Pearce claimed missing merchant amounts of \$5460 in 2008 and \$27,615.83 in 2009. (Tr. p.277, ll.2-5; Plaintiff Ex 15). He claimed \$2 off of every merchant statement fee for a total of \$11,440. (Tr. p.277, ll.5-7). Pearce claimed total residuals of \$82,847.40 from December of 2009 to December of 2012. (Tr. p.277, ll.7-9). He claimed annual fees from 2010 to 2012 totaling \$15,941.25. (Tr. p.277, ll.9-11). Pearce claimed a penny per transaction totaling \$1581.59. (Tr. p.277, ll.12-13). He claimed \$1635 in additional missing annual fees; ACH rejects of \$10,000; negative amounts totaling \$5000 from 2007 to present; dialer license for \$4500; and EZ check non-paid residuals at \$3600. (Tr. p.277, ll.13-19). His total damages were \$169,621.07, though he also extrapolated much larger damages based on running totals. (Tr. p.277, ll.19, Plaintiff Ex. 15).

Melinda went through each of Pearce's calculations. She started with the missing merchants from 2008. There were hard copy residual reports from that year. (Tr. p.278, ll.3-24). Melinda created a report that showed the residuals paid to Pearce and Pearce's clients that were misplaced by the Merchant Cooperative. (Tr. p.279, ll.5-22; Plaintiff Ex. 16). The yearly total for missing merchants in 2008 was \$744.37, far less than Pearce's claimed \$5600. (Tr. p.280, ll.10-23).

Melinda also testified about a document she created called "Search of All Potential

Merchants" claimed by Pearce. (p.281, ll.7-10; Plaintiff Ex. 17). Melinda had gone into the database and reviewed all of the accounts to determine whether they should have been paid to Pearce. (Tr. p.281, ll.11-16). Based on a list provided by Pearce, Melinda was able to review various accounts to determine that errors were appearing on the reporting side, not the Check First side. (Tr. p.281, l.19-p.282, l.5).

A handwritten list provided by Pearce during litigation listed problems with payments and accounts from February of 2009. This month, February of 2009, was specifically significant because it was the month the credit card processor switched to a new reporting system for payment accounts. (Tr. p.282, ll.9-22).

Check First, as an individual sales organization, was not responsible for reporting. (Tr. p.283, ll.1-4). Check First was responsible for obtaining business and submitting initial paperwork. (Tr. p.283, ll.4-5). The processor is paid 25% in part to create accurate payment documents. (Tr. p.283, ll.6-7). In February of 2009, every single past cancelled merchant was loaded into the reporting system, which created an unusually high amount of errors. (Tr. p.283, ll.7-14). Melinda had gone through those accounts and determined what errors were related to payments to Pearce. (Tr. p.283, ll.15-23).

Melinda reviewed the damages by checking the list Pearce produced against residuals to see what was owed. (Tr. p.284, ll.7-12). She initially found errors in the amount of \$486.85, which resulted in a residual owed of \$243.43. (Tr. p.284, l.20-p.285, l.3). Payments from February of 2009 were made in April of 2009. According to Check First records, Pearce was written two checks related to the month rifest with reporting errors. (p.285, ll.9-16). Pearce was written one check for \$1500 and another check for \$1325. (p.285, ll.20-25).

The 2009 missing merchants that Pearce claimed were missing were not actually missing. The processor had loaded multiple accounts into the reporting system that had been cancelled, creating the appearance there were missing merchants. (Tr. p.286, l.20-p.287, l.4).

Pearce's claim for \$2 off of every merchant column seemed to result from the Merchant

Cooperative having charged Check First too much for a number of their accounts. (Tr. p.287, ll.5-8). John Cutler had discovered the discrepancy and found out Check First was being shorted the amount on each account. (Tr. p.287, ll.6-9). It does not appear this money was ever paid to Check First, so it was unclear to Melinda why Pearce was claiming the amount as damages. (Tr. p.287, ll.9-10).

Pearce claimed a significant amount of damages from residuals he said should have been paid from 2009 to 2012. (Tr. p.288, ll.18-20). According to Melinda, it was the Merchant Cooperative that stopped paying Pearce based on a breach of his non-compete agreement. (Tr. p.288, ll.4-20). Because of the breach, he was not owed residuals for that time period. (Tr. p.288, ll.21-24).

Melinda also testified she did not know why Pearce was claiming a transaction for 10% off the top of annual fees. (Tr. p.289, ll.1-10). Melinda explained ACH rejects, but was unable to determine why Pearce was claiming damages for that item. (Tr. p.289, ll.11-22).

The reports which listed all of these residual amounts were sent to Check First as an Excel spreadsheet. The spreadsheets were locked, so they could not be manipulated by the person receiving them. (Tr. p.290, ll.2-11). Check First could not alter the reporting once it was done by the processor. (Tr. p.290, ll.12-18).

Melinda testified about her review of a report produced by Pearce, though she was unable to review all of his reports. (Tr. p.291, ll.9-25). Melinda found 13 merchants on that report that were written under Check First of Greenville, but transitioned to Pearce's new company. (p.292, ll.1-6). It seems this list represented accounts Pearce should not have been paid for, though he was requesting damages based on similar calculations.

Pearce testified to his version of events at trial. His description of the credit card business in general and the background of his relationship with John Cutler and Check First was not substantially different from the Plaintiff's witnesses.

At the outset of his testimony regarding the dispute with Check First, Pearce was adamant

it made no difference to him what John Cutler or Check First was paid. He was calculating damages based on what he thought he was owed by the processor. (Tr. p.463, ll.5-12). He was also clear that there were no problems at the beginning of his relationship with John Cutler. The two men not only worked together, they were very close friends. (Tr. p.463, l.18-p.464, l.21).

Pearce described errors with residual payments during this time period, but they were always addressed. During the earlier years of their business, the residual reports came on a paper reporting system called "Lighthouse reporting." (Tr. p.464, ll.24-25). While the Lighthouse reports did contain errors, John always corrected those errors. (Tr. p.465, ll.2-13).

Pearce testified about how the problems between Check First and him arose. He moved back to his hometown in Ohio to become a State Farm agent. (Tr. p.471, ll.5-8). At the time of the move, Pearce said he had a large book of business that was generating residuals. (Tr. p.471, ll.9-14). He left town on good terms with John. (Tr. p.471, ll.16-21).

Either before or at the time of his move back to Ohio, Pearce noticed merchants missing from his book of business, though he also testified he was not diligent about keeping records related to his merchants. (Tr. p.472, ll.1-25). He also mentioned again that he felt his deal with John was not dependent on what John was paid. (Tr. p.473, ll.18-24). If there was an error on the processing end, Pearce testified he attributed that error to John, not the processor.

Pearce described having a handshake deal with John initially. (Tr. p.474, ll.2-7). However, John sent him a new contract after he moved to Ohio. The contract contained a minimum business requirement that Pearce obtain two new customers a month to continue receiving his residuals. (Tr. p.272, ll.8-24). Though Pearce did not maintain the minimum deals required, John continued paying him residuals. (Tr. p.475, ll.2-22).

Pearce testified he started having problems with his residual payments around August of 2008, when he moved back from Ohio. (Tr. p.478, ll.6-8). John allowed Pearce to review every merchant he had ever signed up and compare the master list to the residual payments. (Tr. p.478, ll.8-11). Pearce identified merchants he said were missing from his residual payments and

provided the list to John. John then sent that list to the Merchants Cooperative. (Tr. p.479, ll.3-22; p.480, ll.2-7).

Pearce claimed there was often a delay of several months before new customers showed up on his book of business. (Tr. p.481, ll.2-8). In January of 2009, he testified he started noticing more problems with his merchants. (Tr. p.486, ll.14-16). He pointed out that the Merchant Cooperative was taking residual reports and entering them into its own homemade spreadsheet. (Tr. p.497, ll.6-17).

When the electronic reports rolled out and the mistakes were more prevalent, John Cutler tried to address the problems with Jarret Smotrila, a representative of the Merchant Cooperative. (Tr. p.500, l.3-p.501, l.3; Defendant Ex. 14). Again, Pearce recognized John was not being paid by the processor on certain items, but was unconcerned about payments to John. His agreement was with John and he reiterated his opinion John not getting paid was not his problem. (Tr. p.501, ll.11-15). For example, even Pearce's own testimony makes it clear the damages claimed for ACH rejects were caused by the Merchant Cooperative, not John Cutler. (Tr. p.501, ll.16-24).

John explained to Pearce the new residual reporting system was responsible for the problems with payment. (Tr. p.504, ll.7-15). Pearce continued contacting that company to try to resolve his problems.

In November of 2009, Pearce went to Charleston to personally meet with the processor regarding his missing merchants. (Tr. p.516, ll.17-24). According to Pearce, he was shown a restraining order at the meeting which prevented John from receiving residuals or handling files in the office. (Tr. p.517, ll.4-17). According to Pearce, he was to be paid directly by the Merchant Cooperative on John's book of business. (Tr. p.519, ll.1-10). Whatever dispute arose between Cutler and the Merchant Cooperative was resolved a few days later. (Tr. p.522, ll.1-7).

Pearce was then cut off from residual payments by the Merchant Cooperative. (Tr. p.523, ll.4-9). It appears the Merchant Cooperative was only willing to pay residuals and correct past problems if Pearce agreed to sign an exclusive deal to only do business with the Cooperative. (Tr.

p.532, ll.17-23).

Pearce continued trying to get reports regarding the residual payments he claimed he was owed. He testified that Melinda Cutler, during the course of litigation, became aware of the errors coming from the Merchant Cooperative. (Tr. p.546, ll.11-24). She testified at a deposition regarding these errors. Almost immediately, the Merchant Cooperative and its attorneys met with Pearce and his attorney to cooperate regarding residual reports. (Tr. p.547, ll.2-8). Pearce testified he was able to locate his missing merchants on John Cutler's book of business. (Tr. p.552, ll.18-25).

While Pearce made it clear he believed John Cutler was stealing from him, he also referenced mistakes made by the Merchant Cooperative. (Tr. p.570, ll.8-9). Pearce insisted that his pay was based on total revenue, regardless of what the Merchant Cooperative was paying Check First. (Tr. p.570, ll.9-13). Many of the errors seemed to be coming from the Merchant Cooperative. (Tr. p.575, ll.20-22). However, because Pearce had a contract with Check First, he did not believe that was the right party to pursue for damages. (Tr. p.575, l.22-p.576, l.1). In fact, in Pearce's testimony he made it clear he would help Melinda Cutler pursue the Merchant Cooperative for damages based on the mistakes they made and the failure to pay Check First. (Tr. p.576, ll.1-6). Even Pearce agreed it was the Merchant Cooperative, not John, that was stealing from him.

Pearce continued testifying that John Cutler and Check First were not getting paid the amounts they were supposed to, in turn, pay him. (Tr. p.576, ll.7-15). The reports that formed the basis for the parties' dispute came from EVO New York to the Merchant Cooperative, who then passed them along to Check First. (Tr. p.591, ll.6-18). Pearce testified that while the Merchant Cooperative was responsible for the initial problems, he believed Check First carried on the problems. (Tr. p.591, ll.18-19). However, he also admitted he and John Cutler agonized over the reports in an attempt to discover why the Merchant Cooperative was not making full payment to Check First. (Tr. p.592, ll.1-17).

Pearce agreed John was trying to help fix the problems Pearce was having getting paid. (Tr. p.602, ll.3-11). Pearce blamed Check First for these problems based on his belief John had an obligation to pay him. (Tr. p.602, ll.12-16). He was not worried about whether the processor correctly paid Check First. (Tr. p.602, l.17-p.603, l.2).

Pearce also testified he had the same problems with the Merchant Cooperative that Check First was having when he started his own business. (Tr. p.612, ll.7-25). He was clearly aware the Merchant Cooperative was a source of error in his payment. (Tr. p.612, ll.24-25).

Pearce went through a number of emails and communications with the Merchant Cooperative regarding the problems he was having with his payment. There were missing merchants on residual reports that came to him directly from the Merchant Cooperative. (Tr. p.613, l.19-p.614, l.22; Plaintiff Ex. 24). He was having immediate problems getting paid, even in his own business. (Tr. p.616, ll.2-21; Plaintiff Ex. 25). He agreed there were residual problems that had nothing to do with John Cutler or Check First. (Tr. p.617, ll.12-14; Plaintiff Ex. 26).

These facts set the stage for this appeal. To the extent there are additional facts relevant to the various arguments in this case, they are included in the argument portion.

ARGUMENT

I. THE RESPONDENTS FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE OF FRAUD.

Fraud is a unique cause of action in South Carolina civil jurisprudence; it requires a much higher burden of proof than other torts. Clear, cogent, and convincing evidence is required to prove fraud. *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 595 (2001). On appellate review, this Court must decide whether there was evidence presented from which a jury could reasonably infer that fraud occurred. *Harold Tyner Dev. Builders v. Firstmark Dev. Corp.*, 311 S.C. 447, 450 (Ct.App. 1993).

Fraud has nine elements. To recover on an action for fraud, a party must prove: (1) a representation; (2) the representation's falsity; (3) the representation's materiality; (4) either knowledge of the representation's falsity or a reckless disregard for its falsity; (5) intent that the representation be acted on; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely on the representation's truth; and (9) the hearer's consequent and proximate injury. *M.B. Kahn Construction Co. v. South Carolina Nat'l Bank*, 275 S.C. 381, 384 (1980). A false statement is never enough to prove fraud. The failure to prove any element of fraud is fatal to the entire cause of action. *O'Shields v. Southern Fountain Mobile Homes, Inc.*, 262 S.C. 276, 281 (1974).

The Respondents laid out their basis for a fraud claim in their counterclaim:

"The Plaintiffs and Third Party Defendants, knowingly or with a reckless disregard for the truth, led the Defendants to believe falsely that they would pay residuals to the Plaintiffs and Third Party Defendants pursuant to specifically agreed upon percentages. Then, by means of deceit and false reporting they have avoid[ed] paying the Defendants. These understandings were material to any agreement that may be construed regarding these interests in land. The Plaintiffs and Third Party Defendants intended that said misrepresentation would, in part, lead the Defendants to do work securing merchant accounts which would provide income for the Plaintiffs and Third Party Defendants. The Defendants had no knowledge that the Plaintiffs and Third Party Defendants did not intend to act in accordance with their representations at the time of entering into the agreement. The Defendants had the right to rely

upon said misrepresentations.”

(Defendant’s Answer and Counterclaim, p.11).

This language is important, because it forms the foundation for Pearce’s argument in the trial court. His primary contention was that he was not properly paid his residuals from business he earned. At the pleadings stage, he asserted both Check First, through John Cutler, and the Merchant Cooperative were acting in concert to deliberately and fraudulently avoid paying his residuals.

The evidence at trial, however, presented a very different picture. While Pearce claimed in his counterclaim that both Check First and the Merchant Cooperative were responsible for his missing residual payments, his testimony told a different story. Pearce was adamant throughout the trial that it made no difference to him whether John Cutler was being properly paid by the Merchant Cooperative. He recognized that John and Check First had their own problems with the Merchant Cooperative. In fact, when Pearce started his own business he experienced the same problems with residual reporting. Pearce even stated during the trial he thought the Merchant Cooperative was the problem and he would help Melinda Cutler pursue them for damages.

The repeated testimony from Pearce that he was aware there were problems between Check First and the Merchant Cooperative is important. Despite his belief that had nothing to do with him, it had everything to do with his cause of action for fraud. Check First cannot be responsible for perpetrating a fraud on Pearce when they were not even responsible for the payment problems that form the basis for Pearce’s claim.

Fraud is never simply a failure to perform. In order for a broken promise to serve as the basis for a fraud claim, the promise must be made with the present, undisclosed intention not to perform the promise in order to induce the victim of the fraud not to act. *Winburn v. Insurance Co. of North America*, 287 S.C. 435, 440 (Ct.App. 1985). Fraud cannot be based on an expression of intention. *Id.*

A critical element of this case is when the representation regarding residual payments was

made. The truth or falsity of a statement must be determined at the time the statement was made or acted on, not at a later date. *Id.* When John Cutler initially made the promise to pay Pearce his residuals, there is no evidence he did not intend to keep that promise. To the contrary, Pearce's detailed testimony shows the exact opposite; Cutler always intended to pay Pearce but was unable to due to circumstances beyond his control. Even as time went on, there is no evidence John ever tried to avoid paying Pearce.

As a general rule, a fraudulent misrepresentation must relate to a present or preexisting fact, not an unfulfilled promise or statement as to future events. *Emerson v. Powell*, 283 S.C. 293, 295 (1984). Any statement made to Pearce regarding his residual payments was true when it was made, even as time progressed.

At the beginning of the relationship between Pearce and John Cutler, there was no problem with payment. Early on, all residuals were paid the way they were supposed to be paid. (Tr. p.464, ll.11-20). As the problems with residuals became apparent, Pearce was quite clear that the Merchant Cooperative was responsible for those problems. It was evident throughout the entire case the reports from the Merchant Cooperative were the foundation for the problems with the residual payments.

Pearce claimed that, as far as he was concerned, the reports were created by both John Cutler and the Merchant Cooperative. (Tr. p.575, ll.20-22). Because his agreement was with Check First, Pearce felt like he could not go directly to the Merchant Cooperative about the errors in his residual payments. (Tr. p.575, ll.22-25). He testified he would be glad to help Melinda pursue relief against the Merchant Cooperative when his trial was over. (Tr. p.576, ll.1-3). Most importantly, Pearce testified he knew John Cutler was also getting shorted by the Merchant Cooperative. (Tr. p.576, ll.5-6).

Pearce's testimony was even clearer that he was well aware John Cutler was not responsible for his payment shortcomings. When John was getting shorted by the Merchant Cooperative, he gave half of his residual to Pearce. (Tr. p.576, ll.7-8). What he wanted John to do

was pay him what he was owed and turn around and try to collect from the Merchant Cooperative. (p.576, ll.9-12).

Quite simply, this is not fraud. There was not only a failure of proof, there was actually proof of the opposite. There was no fraud committed on Pearce by Check First. Instead, what actually happened was the Merchant Cooperative was failing to pay John Cutler and Check First. In turn, he was unable to pay Pearce. But he never hid that fact from Pearce. As the evidence reflected, they spent hours together trying to solve this problem.

Not only was this not fraud, Pearce never thought it was fraud. He states over and over throughout the trial that he knew the real problem was the Merchant Cooperative failing to pay Check First. Because of the clear reporting problems, the testimony points to one conclusion; the Merchant Cooperative was responsible for the various residual payment problems.

There was no evidence Check First made a false statement to Pearce. He testified repeatedly that he knew Check First was not being paid the correct amount. Pearce just felt he should be paid regardless of Check First's issues with the Merchant Cooperative. His failure to be paid his residuals was neither the result of a false statement nor the result of an omission. The lack of falsity is fatal to a fraud claim.

Falsity of a statement can be proven by the circumstances surrounding the statement. *Halsey v. Minnesota-South Carolina Land & Timber Co.*, 174 S.C. 97, 116 (1934). A fraud case is submitted to the jury when there is evidence of "fraud, deceit, and evil intent." *Id.* at 117. When the evidence points to the opposite, the case should not be submitted to the jury. In this case, there was no evidence or falsity. Rather than fraud or deceit, the evidence revealed good faith attempts by John Cutler to try to resolve the payment problems. This was not a false statement, A.J. Pearce knew it was not a false statement, and it is fatal to any fraud claim in this case.

Regardless of whether the statement regarding the residual payments were true or false as a matter of fact, there was no evidence John Cutler was intentionally passing on untrue statements in an attempt to defraud Pearce. It is well-settled a party cannot claim fraud when it negligently

avoided learning the truth about a representation. *Gary v. Jordan*, 236 S.C. 144, 155 (1960). In this case, Pearce bears far more responsibility. Not only did he ignore obvious facts, he actually knew the real facts. This was not at all a case of Pearce being tricked by Cutler. Instead, it was a situation in which Pearce knew another party, who he elected to settle with before trial, was the actual party responsible for his losses. Not only did he repeatedly state at trial he was aware the Merchant Cooperative was responsible for his losses, he repeatedly stated he knew they were doing the same thing to John Cutler and Check First.

There has been no proof John Cutler represented to Pearce he would be properly paid, while at the same time knowing or recklessly disregarding the fact Pearce would not be paid properly. The failure to prove this element is fatal to a cause of action for fraud.

For the same reasons, Pearce cannot claim he was ignorant of the possibility he was not going to be paid correctly on the residuals. In reality, it was the exact opposite. Not only was Pearce aware of the problems with residuals throughout his time at Check First, he spent extensive time with John Cutler trying to correct the residual payment problems. He was also well aware John was having the same problems with the Merchant Cooperative. Pearce's argument is more accurately framed as the allegation that the Merchant Cooperative failed to fulfill its agreement with John Cutler and Check First, which in turn made it impossible for John Cutler to properly pay Pearce. This is not fraud.

An almost identical argument supports the theory Pearce had no right to rely on statements about his residual payments at the same time he and John Cutler were extensively working together to fix problems with those payments. Pearce repeatedly states he knew there were problems with the residual payments throughout his relationship with Check First. His testimony that he knew John Cutler was being shorted by the Merchant Cooperative shows an awareness of the payment problems. He cannot now state he relied on representations he would be paid all of his residuals when he at the same time says he knew there was a problem with payments coming from the Merchant Cooperative.

Pearce presented no evidence of fraud in this case. In addition, he testified throughout trial the statement he based his fraud claim on was true at the time it was made; the problems arose with its future performance. Pearce's testimony also reflected John Cutler did not make a representation to him knowing it was false or recklessly disregarding its truth. Finally, Pearce's right to rely on any statements made must be tempered by his actual knowledge of the what was going on behind the statements. Because he was aware of the problems with residual payments, worked with John Cutler to address the payment problems, and freely admitted John Cutler and Check First were not the parties responsible for the problems, his cause of action for fraud should fail.

This Court should reverse the verdict for fraud in this matter based on the insufficiency of the evidence presented at trial in support of that cause of action.

II. THE TRIAL JUDGE ERRED IN FAILING TO REVERSE AN AWARD OF PUNITIVE DAMAGES AGAINST THE APPELLANTS.

The trial court's determination of the constitutionality of a punitive damages award is evaluated by de novo review in the appellate courts. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583 (2009). A trial court is required to review an award of punitive damages to insure it complies with due process. *Id.*

Punitive damages are unique from other damages contemplated by a judicial proceeding. Rather than making a party whole, punitive damages are intended to punish and deter bad conduct. *Id.* at 584. While there is no mathematical formula to determine if punitive damages are appropriate, their award implicates constitutional concerns, unlike many other aspects of a civil trial. *Id.*

Despite the de novo review, appellate courts do treat a jury determination with some deference. *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 404-05 (2011). An appellate court does not directly review the jury's award of punitive damages, but instead reviews the trial judge's determination of the constitutionality of the award. *Id.* at 405. The trial judge's review in this case

was limited and its order cites to no real evidence to support the jury's award.

After reviewing the historical jurisprudence regarding punitive damages, the South Carolina Supreme Court's opinion in *Mitchell v. Fortis* sets out a framework for evaluating an award of punitive damages. *Mitchell*, 385 S.C. at 587-89. A punitive damages award will be upheld if there is evidence to reasonably support the trial judge's factual findings. *Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 314 (Ct.App. 2004). In this case, there was no evidence to support the trial judge's determination, which appears to have been cursory. Like fraud, punitive damages are only awarded on the highest burden of proof known to civil law; punitive damages must be proven by clear and convincing evidence. *Id.* at 313.

The most important factor in an award of punitive damages is reprehensibility. South Carolina courts recognize that this factor reflects the view that some wrongs are worse than others. *Mitchell*, 385 S.C. at 587. Five considerations govern the degree of reprehensibility when evaluating a party's conduct: (1) whether the harm was physical or economic; (2) whether there was an indifference or reckless disregard for the safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct was isolated or involved repeated actions; and (5) whether the harm resulted from intentional malice, trickery, or deceit, rather than mere accident. *Mitchell*, 385 S.C. at 587.

In the instant case, there is no evidence of reprehensibility at all. The final order from the Court references "a sufficient degree of reprehensibility demonstrated during the trial" but cites no evidence to support this statement. (Final Order, p.7). When the evidence in the case is matched to the factors for reviewing reprehensibility, the failure to prove punitive damages is obvious.

The potential harm to Pearce in this case was economic and involved no risk of physical harm. Unless unique circumstances exist, this weighs against an award of punitive damages. *Mitchell v. Fortis*, 385 S.C. at 589.

There was no evidence of indifference or reckless disregard for the safety of another. While

it is reasonable to say this factor does not apply to a business dispute, there is no evidence Check First or John Cutler took any action that disregarded Pearce's rights. His testimony is clear that the Merchant Cooperative was responsible for his losses. John Cutler spent extensive time trying to correct the residual payment problems. The trial court did not consider this factor in upholding the punitive damages award.

The trial court did not consider whether or not the target of the conduct was financially vulnerable. The evidence reflects Pearce was not vulnerable in this case. He was allowed to continue making money when he moved away, though he was technically in violation of his contract. He was often paid from Check First even when Check First was not being properly paid by the Merchant Cooperative. There was no evidence of vulnerability presented at trial.

It is unclear whether the conduct was isolated or repeated. There was no evidence to suggest John Cutler was repeatedly trying to avoid paying Pearce. In fact, the trial testimony revealed the opposite. He was trying to resolve the problems. At the same time Cutler was having his own problems with the Merchant Cooperative and Pearce recognized that and admitted it at trial.

For the same reasons described in the preceding section of the brief, there was no evidence Check First acted with intentional malice, trickery, or deceit. The opposite occurred. Pearce's testimony was clear that he agreed John Cutler was having similar payment problems with the Merchant Cooperative and those problems were trickling down to Pearce. Pearce testified that he had no agreement with the Merchant Cooperative, so the problem was between Pearce and Cutler. At the same time, he was clear that the Cooperative was the bad actor, not Cutler. Because the trial court never reviewed and recognized the lack of evidence supporting this factor, its consideration was error.

While the trial court cited sufficient reprehensibility, it cited no support for that ruling. Looking to the record, no evidence of reprehensibility existed.

The trial court is also required to review the ratio of punitive damages to actual damages.

Mitchell, 385 S.C. at 588. The trial court did review this ratio and it is not out of line with ratios this Court and the Supreme Court have approved. However, because of the lack of support for the other factors in this matter, this element should be given little weight in this case. Perhaps more importantly, the ratio is out of line with the party who was held responsible for the damages, as opposed to the party who was actually responsible for the damages.

Though Pearce had settled with the Merchant Cooperative prior to trial, he repeatedly stated the Merchant Cooperative was the party actually responsible for his damages. That evidence is critical to the final consideration the trial court was required to consider with regard to punitive damages.

The trial court did not consider comparative penalties in this case. In *Mitchell*, the Supreme Court looked to its prior history of similar cases. *Mitchell*, 385 S.C. at 593. Though there were no cases that squarely matched the conduct in that case, the Supreme Court did not a history of upholding punitive damages awards against insurance companies who acted in a reprehensible manner. *Id.*

The evidence in this case, and specifically the testimony of Pearce throughout trial, reflected action more in line with a breach of contract than actual fraud. Pearce repeatedly stated he had an agreement with John Cutler and Check First. Based on that agreement, he felt he was not being properly paid on his residuals. In the same breath, he repeatedly acknowledged the real party responsible for causing the problem with payment was the Merchant Cooperative, with whom he had already settled.

It is well-settled that a pure breach of contract does not support an award for punitive damages in South Carolina. *Moody v. Stern*, 214 S.C. 45, 57-58 (1948). Even an intentional breach of contract does not support a claim for punitive damages. *Id.* at 58. The evidence in this case supports, if anything, a finding there was an unintentional breach of a contract. Pearce was clear that he felt the Merchant Cooperative prevented Cutler and Check First from paying Pearce the residuals he was owed. In addition to his testimony, the evidence corroborates his beliefs. It was

obvious throughout trial that the reports which formed the basis for the entire dispute were generated and controlled by the Merchant Cooperative, not Check First.

In light of the trial evidence, this case is more akin to a breach of contract. Comparatively, these cases never warrant an award of punitive damages. This factor weighs heavily against an award of punitive damages. Yet it does not appear it was considered at all by the trial judge.

The trial court's post-judgment review of the factors warranting an award of punitive damages was incomplete. The evidence in the case clearly counsels against a punitive award. While this Court is not charged with re-weighing the evidence, that evidence is critical to the trial court's review. That review is considered de novo by this Court. Because it did not comply with due process, the award of punitive damages in this matter should be reversed. In the alternative, this Court should remand the matter to the trial court and order a proper review of the factors required to justify an award of punitive damages.

III. THE TRIAL JUDGE ERRED IN FAILING TO SETOFF THE FULL AMOUNT OF RESPONDENTS' SETTLEMENT WITH THE MERCHANT COOPERATIVE AGAINST THE VERDICT AGAINST CHECK FIRST.

Throughout the trial, Pearce claimed it was the Merchant Cooperative that was responsible for his residual payment problems. Even when he tried to blame Check First and John Cutler for those problems, it was clear he knew the problems originated with the Merchant Cooperative.

Pearce testified he spent hundreds of hours with John Cutler discussing the problems with payment from the Merchant Cooperative. (Tr. p.602, ll.3-11). When asked why he blamed John for those problems, Pearce testified John had the obligation to pay him. (Tr.p.602, ll.12-16). He felt that it made no difference if the Merchant Cooperative was refusing to properly pay Check First, because it was John's obligation to pay Pearce. (Tr. p.602, l.20-p.603, l.2).

As soon as Pearce started his own business, independent from Check First, he experienced the same problems with residual payments from the Merchant Cooperative. (Tr. p.608, ll.5-17). Though there were not as many problems, according to Pearce, that is easily accounted for by the fact his business was growing. Less payment problems should be expected, as less business was

being done.

Pearce himself had to complain to the Merchant Cooperative, when he was dealing with them on his own, that they were not "playing fair." (Tr. p.610, l.19- p.611, l.6; Plaintiff Ex. 23). Beyond unfairness, the evidence reflected the Merchant Cooperative was doing the exact same thing to Pearce it had been doing to Check First; failing to properly pay owed residuals. (Tr. p.611, ll.10-25). The problems were not limited to Check First's relationship with Pearce, because they were clearly originated with the Merchant Cooperative. (Tr. p.611, l.22-p.612, l.6). Pearce's new business had the identical problems with the Merchant Cooperative that Check First had. (Tr. p.612, ll.12-25).

Problems between Pearce and the Merchant Cooperative never seemed to improve. He was constantly complaining to the Cooperative about a failure to pay residuals. (Tr. p.616, ll.2-21; Plaintiff Ex. 25; p.617, ll.9-14; Plaintiff Ex. 26).

Throughout the trial, Pearce repeatedly testified that the payment problems originated with the Merchant Cooperative. Though Check First was not paid correctly, Pearce felt he should have been paid and Check First should have addressed their own payment problems with the Merchant Cooperative. Because he felt he did not have an agreement with the Merchant Cooperative, blamed Check First for the payment problems. This was despite the fact he knew they were actually not being paid correctly, either. His complaints were against Check First as a result of Check First's problems with the Merchant Cooperative.

Though Pearce repeatedly made it clear the Merchant Cooperative was the true wrongdoer in this case, he elected to settle with them prior to trial. He received \$43,000 as part of that settlement agreement. (Tr. p.681, l.4-p.682, l.12).

After Check First request a setoff for the amount of the settlement, the trial court granted a partial setoff based on the close connection of the claims in the amount of \$21,500. (Final Order, p.6.). There was no further discussion of why the setoff was partial, rather than in full.

A setoff for monies obtained by settlement arises by operation of law under South Carolina

statutory authority. S.C. Code § 15-38-50 reduces a claim against a party when a settlement is reached against one party in an action on the same claim. *S.C. Code Ann.*, §15-38-50. The fraud claim this this case is against both Check First and the Merchant Cooperative jointly. (Answer and Counterclaim, p.11). In fact, all claims were brought jointly.

Combined with Pearce's testimony and the evidence at trial, the claims in this case were actually a joint accusation against the Merchant Cooperative and Check First. While the evidence actually reflected the Merchant Cooperative was responsible for the wrongdoing here, there was certainly no claim of a separate action against the Cooperative in addition to an action against Check First, or vice versa.

There can only be one satisfaction for an injury. *Smith v. Widener*, 397 S.C. 468, 471 (Ct.App. 2012). When a settlement involves the same factual scenario as the claim resulting in a verdict, there are not different injuries. *Ellis by Ellis v. Oliver*, 335 S.C. 106, 113 (Ct.App. 1999). The meaning of "injury" used in the setoff statute is broad enough to encompass all damages which result from the joint action of the responsible parties. *Id.*

The wrongs claimed by Pearce against Check First were intertwined with his complaints against the Merchant Cooperative. Based on the evidence presented at trial, they were actually identical. Pearce consistently testified he assigned blame to both Check First and the Merchant Cooperative, regardless of who actually started the problems.

The trial court had no discretion in applying the setoff. *Vortex Sport & Entm't, Inc. v. Ware*, 378 S.C. 197, 210 (Ct.App. 2008). Check First was entitled to a full setoff in this case and should have received credit against the verdict in the amount of \$43,000.

CONCLUSION

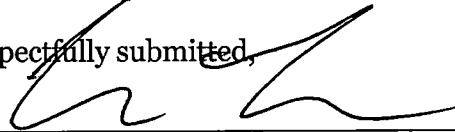
The issues underlying this dispute and argued on appeal are deeply intertwined. Fraud can only be proven by the highest burden of proof in the civil system. There is not only a complete lack of evidence fraud occurred in this case, but vast testimony that supports the opposite conclusion; there was never a fraud perpetrated by the Plaintiff. Based on the insufficiency of the evidence

that supported a finding of fraud in this case, that verdict should be reversed.

The same evidence fails to support an award of punitive damages in this case. Such an award is never to be taken lightly. Punitive damages occupy a unique position in the civil system and should be used sparingly. A trial court is required to follow the specific framework set out by the South Carolina Supreme Court in upholding such an award. The trial court did not conduct the required review in this matter. The punitive damages award should be reversed or remanded for the proper consideration.

Finally, the injuries claimed as a result of actions by Check First and the Merchant Cooperative arose from the same factual scenario. South Carolina law mandates a full setoff for the amount Pearce received in settlement from the Merchant Cooperative.

Respectfully submitted,



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July 22, 2016
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2012-CP-23-3532
Appellate Case No 2015-001744

RECEIVED
JUL 22 2016
SC Court of Appeals

Check First of Greenville, LLC
d/b/a Evo Merchant Coop.,

Appellant,

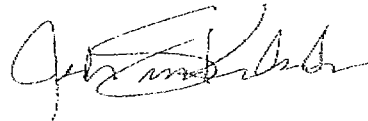
v.

Merchant Services of the
Upstate, Inc., and Alfred J.
Pearce, IV,

Respondents.

PROOF OF SERVICE

I certify that I have served the **Motion to File Out of Time, Designation of Matter, and Initial Brief** on The Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on July 22, 2016, addressed to his attorney of record, John Read, Esquire, 101 West Park Ave, Greenville, SC 29601.



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July 22, 2016