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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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SC Court of Appeals

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2016-000232
Case No. 2014-CP-42-1759

Denise Parker, ... Respondent,

v.

The National Honorary Beta Club, ... Appellant.

APPELLANT'S FINAL REPLY BRIEF

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SUMMARY OF THE ARGUMENT

This appeal concerns the narrow issue of whether Parker is entitled to punitive damages for the breach of her alleged employment contract with the Beta Club. South Carolina law provides that punitive damages are barred in actions for breach of contract unless proof of fraudulent intent relating to the breach and a separate fraudulent act accompanying the breach are established by competent evidence. Despite clear guidance to the contrary, the trial court was persuaded to abandon both reason and the well-established precedent of this State in favor of Parker's muddied view of tort law. The trial court's decision to allow the jury to award Parker punitive damages on a breach of contract claim absent evidence proving fraudulent intent related to the alleged breach or proof of a fraudulent act separate and distinct from the alleged breach of contract is a clear error of law.

Parker's Respondent's Brief ("Parker's Brief") demonstrates the incurable shortcomings of her arguments. First, Parker's Brief attempts to avoid the Beta Club's "fraudulent intent" argument altogether by muddying the waters of this appeal with misguided procedural arguments. Even though the record makes it unequivocally clear that the issues have been sufficiently preserved, approximately one-third of Parker's brief is dedicated to challenging whether the issue is properly before the Court. Further, Parker's Brief offers an indefensible legal argument in support of the trial court's determination relating to the "independent fraudulent act" requirement. Parker's strained justification of the trial court's erroneous interpretation of *Conner* does not alter the fact that *Conner* does not mean what Parker wishes it to mean. Nothing in *Conner* upsets the well-settled rule that the act(s) constituting the alleged breach must be separate and distinct from the activity forming the basis of the alleged fraudulent act(s).

Parker's Brief endeavors to bait the Court away from the tent pole issues of this appeal. Contrary to Parker's assertions, the outcome of this appeal rests exclusively on the answers to two questions:

1. Could Bright have formed the necessary fraudulent intent to breach Parker's employment contract if there is no evidence in the record that he had knowledge of the alleged contract or if there is no evidence in the record that any fraudulent intent he may have had was related to the alleged contract?

2. Can Bright's termination of Parker for alleged false and pretextual reasons constitute both a breach of her alleged employment agreement and the separate fraudulent act accompanying the breach?

Simply put, the answer to both questions is no. The law in South Carolina is clear: a plaintiff can only recover punitive damages for breach contract when both a fraudulent intent relating to the breach of the contract and an independent fraudulent act accompanying the breach are established. Based on the record in this case and the forgoing principles, the inevitable conclusion is that there was no legal basis for the award of punitive damages in this case. This Court should set aside the award of punitive damages handed down by the jury.

LEGAL ARGUMENT

At trial, Parker bore the burden of presenting evidence sufficient to establish both: (a) a specific fraudulent intent relating to the breaching of the contract (and not merely to its making); and (b) a separate and distinct fraudulent act accompanying the breach.[1] Parker was required to establish each element with clear and convincing evidence that the Beta Club acted in a willful, wanton, or in reckless disregard of the plaintiff's rights.[2] Parker is in agreement that her

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[1] *See e.g. Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002).

[2] See *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 148, 641 S.E.2d 53, 60 (Ct. App. 2007); *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 149, 494 S.E.2d 449, 458 (Ct. App. 1997).

entitlement to punitive damages rests on whether she has satisfied both elements.[3] Parker failed to carry her burden.

A. The Court should set aside the jury's punitive damages award on Parker's cause of action for breach of contract accompanied by fraudulent act because she failed to present evidence of a fraudulent intent relating to the breach of her alleged employment contract.

As explained in the Beta Club's Initial Brief, there is nothing in the record from which the jury could infer a fraudulent intent relating to the breach of Parker's alleged employment contract.[4] There is nothing in the record which supports the proposition that Bright, the person who terminated Parker's employment, had any knowledge of her alleged employment contract with the Beta Club. There is also no record evidence supporting the notion that Bright ever acted with fraudulent intent relating to the breach of Parker's alleged contract. Simply put, there is no record evidence from which the jury could infer the requisite fraudulent intent related to the breaching of Parker's alleged employment contract to support their award of punitive damages.

1. The Beta Club's Rule 50 motions at trial and its motion for judgment notwithstanding the verdict post-trial preserved for appeal the issue of lack of evidence of fraudulent intent related to the alleged breach of contract.

In an effort to avoid the misguided conclusions underlying the trial court's decision to deny the Beta Club's Rule 50 motions, a substantial portion of Parker's Brief is dedicated to attacking the procedural posture of the Beta Club's argument.[5] In particular, Parker spends nearly a third of her brief advancing the argument that the issue of fraudulent intent has not been preserved for appeal; a contention that completely unravels once the record and controlling

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[3] *See generally* Parker's Brief.

[4] The Beta Club's Initial Brief, 7-13.

[5] Parker's Brief, 19-29.

authorities are studied. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review."[6] In order to preserve an issue for appeal a party need not mention the exact name of the legal doctrine or theory they are challenging.[7] The law only requires that the issue be sufficiently stated so that the precise nature of the argument can be reasonably understood by the lower court so that it may render a decision on the issue.[8] Furthermore, it is well-settled that "[p]ost-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it."[9]

At trial, the Beta Club raised the issue of fraudulent intent related to the breaching of Parker's alleged contract when it made its initial Rule 50 motion at the close of Parker's case.[10] In particular, the Beta Club stated:

- "so far as the evidence has been presented today, there is nothing about any fraudulent act, any fraudulent intent, anything associated with the breach of the contract here."[11]

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[6] *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.,* 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006).

[7] *State v. Russell,* 345 S.C. 128, 546 S.E.2d 202 (Ct.App.2001) (finding issue was preserved even though defendant did not use exact name of the legal theory being raised in his request for a directed verdict).

[8] *See e.g. Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (explaining the purpose of preservation rules); *and S.C. Dep't of Transp. v. First Carolina Corp. of S.C.,* 372 S.C. 295, 641 S.E.2d 903 (2007) (finding that although the SCDOT did not phrase objection in the exact terms used in the issues on appeal, the objection was sufficiently specific to allow the trial court to rule on the issue).

[9] *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998).

[10] R. pp. 213-16, 221-22.

- "there is no evidence of even fraudulent intent. She disagrees that she should have been terminated. She disagrees that she didn't answer e-mails. Yes, we have a dispute about those things but that's not evidence of fraudulent act [sic]. And for that reason we feel that ... directed verdict should be granted with regard to the breach of contract accompanied by fraudulent act [claim]."[12]
- "Your Honor, we contend there is no contract. We contend there is no breach. We contend that it doesn't satisfy the Statute of Frauds. <u>We would allege there is no evidence of fraud</u>."[13]

Further, when making its directed verdict argument as to the breach of contract claim, the Beta Club continued to raise the issue of Bright's personal knowledge and intent related to Parker's alleged contract:

- "Now, there can't be a breach of [contract] if Mr. Bright didn't know anything about her going to the board or what she said."[14]
- "I would point out that [Parker's] failed to present any evidence that Bright knew anything about what was said to the board or what she said"[15]

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[11] R. p. 215.

[12] R. p. 216.

[13] R. p. 222 (emphasis added).

[14] R. p. 221.

[15] R. p. 222.

When the trial court denied the Beta Club's Rule 50 motion at the close of Parker's case it explicitly incorporated the parties arguments—including the Beta Club's argument related to fraudulent intent—into the record as a part of its denial of that motion.[16]

The Beta Club raised the issue of fraudulent intent again when it renewed its Rule 50 motion for directed verdict at the close of all the evidence.[17] The Beta Club, again, explained:

> Finally, Your Honor, with regard to the matter of fraud, there has been nothing that's been presented in this case that smacks of fraud. About all we have—at best you could say that we have in terms of facts in this case, Your Honor, is that [the Beta Club] terminated [Parker] and she didn't think she deserved to be terminated. If that's fraud [then] it's going to convert any contract claim into a breach of contract accompanied by fraudulent act, then every employment case becomes a fraudulent act case. There has been no evidence of fraud. All we have is 'they fired me. I don't think they should have. They didn't have a good reason. They didn't investigate it the right way,' and that in and of itself does not evidence fraud or the intent to defraud.[18]

The Beta Club further incorporated each of the arguments made in support of its initial Rule 50 motion into its renewed motion at the close of all the evidence.[19]

Despite Parker's contentions to the contrary, these facts alone establish that the issue has been properly preserved on appeal. The Supreme Court has stated that post-trial motions are not

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[16] R. pp. 237-38.

[17] R. pp. 439-41.

[18] R. p. 441.

[19] R. pp. 439, 446-47.

necessary to preserve issues raised and ruled upon at trial.[20] That is precisely the case here. When the trial court denied the Beta Club's initial Rule 50 motion it did so, in part, because it specifically found there to be sufficient evidence indicating a "fraudulent intent."[21] When denying the Beta Club's renewed motion for directed verdict at the close of all evidence the trial court explicitly incorporated its prior comments, including its comment that the "[record is] complete enough for any appellate court,"[22] and ruled that there was sufficient evidence for Parker's claim for punitive damages to proceed to the jury.[23] The cumulative effect of the trial court's rulings was to determine that Parker had presented sufficient evidence of fraudulent intent to submit her claim for punitive damages to the jury. It is that very decision which the Beta Club appeals.[24] Because the Beta Club's arguments relating to the fraudulent intent were raised and ruled upon by the trial court, the issue was sufficiently preserved for appeal.

Even though it had already preserved the issue for appeal through its Rule 50 motions, the Beta Club continued to raise the issue of fraudulent intent relating to breaching of Parker's alleged contract in its Motion for Judgment Notwithstanding the Verdict or Alternatively for New Trial. While Parker's Brief makes much of the fact that the issue was left out of the bullet point summation contained the Beta Club's post-trial motion, it disregards the fact that the Beta

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[20] *See Wilder Corp.*, 330 S.C. at 77.

[21] R. pp. 237-38.

[22] *Id.*

[23] R. p 447.

[24] The Beta Club's Initial Brief, 7 ("The Beta Club has appealed the trial court's decision to deny its motions for directed verdict and JNOV on Parker's claim for breach of contract accompanied by fraudulent act on the grounds that Parker failed to present evidence sufficient to warrant an award of punitive damages.")

Club conspicuously referred both Parker and the trial court to its supporting memorandum contemporaneously filed therewith for a "detailed analysis of the legal arguments supporting [the Beta Club's] Motion." [25] In the supporting memorandum filed with its post-trial motion, the Beta Club further explains that its post-trial motions were based on the fact that "[Parker] has failed to present evidence relating to each of the required the elements."[26] Further, the portion of supporting memorandum addressing Parker's punitive damages award specifically noted that such damages should also be set aside for "the above-described reasons."[27] Such language clearly incorporates the previous discussion section that addressed issues relating to Bright's specific intent and knowledge related to Parker's alleged employment contract.[28] Thus, it is clear that the Beta Club continued to advance arguments related to Bright's personal knowledge and intent related to Parker's alleged contract in its post-trial motion.

The Beta Club reiterated its personal knowledge and specific intent arguments in its supplemental brief filed in support of its post-trial motion.[29] Indeed, the sole focus of the Beta Club's supplemental brief was Parker's failure to present evidence from which the jury could have reasonably concluded that Bright formed the requisite fraudulent intent relating to the breach of Parker's alleged employment contract. The supplemental brief raised the very same personal knowledge and specific intent arguments that had been raised at trial and in its memorandum supporting its post-trial motion.

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[25] R. p. 53. ("For a detailed analysis of the legal arguments supporting Defendant's Motion, Defendant refers the Court to its memorandum of law contemporaneously filed herewith.")

[26] R. p. 64. (emphasis added).

[27] *Id.*

[28] R. pp. 63-64.

[29] *See generally* R. pp. 92-97.

Parker's Brief also urges the Court to disregard the supplemental memorandum supporting the Beta Club's post-trial motion.[30] Parker contends that the supplemental memorandum contained new, untimely post-trial arguments.[31] But this argument carries no weight. First, as explained above, the arguments contained in the supplemental memorandum are the same arguments that the Beta Club made at trial and in the memorandum supporting its post-trial motions.[32] Because the supplemental memorandum did not raise any new arguments, and instead, merely reiterated and expanded the Beta Club's earlier contentions, timeliness never becomes an issue. Second, the trial court did not make any determinations related to timeliness of the Beta Club's supplemental memorandum. Indeed, there is nothing in the trial court's Order of Judgment indicating that the trial court considered anything less than what the parties briefed when making its final determination as to the Beta Club's post-trial motion.[33]

Simply put, Parker's procedural arguments evaporate under the scrutiny of the actual record.

2. There is no record evidence supporting the proposition that Bob Bright formed the requisite fraudulent intent relating to Parker's alleged employment contract.

Once past the smoke and mirrors of her procedural arguments, the fatal flaws underlying Parker's understanding of the record become woefully apparent. Parker's Brief boldly states that "Bright knew about the promise," but then endeavors to convince the Court that Bright's knowledge and specific intent related to the alleged contract are irrelevant to the matter at hand.

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[30] Parker's Brief, 20.

[31] *Id.*

[32] *Compare* R. pp. 92-97 *with* R. pp. 213-16, 221-22; *and* R. pp. 439-41.

[33] *See* R. pp. 7-28.

In fact, the apparent objective of Parker's argument is to direct the Court's attention away from the record evidence presented at trial.

It has been well-established, that when a breach of contract accompanied by fraudulent act is asserted against an entity, it is the specific intent of the decision maker that is relevant.[34] As explained in the Beta Club's Initial Brief, there is no evidence in the record supporting the proposition that Bright knew about Parker's alleged contract such that he could form the requisite fraudulent intent relating to its breach. The discipline that Parker received from Bright on October 21, 2013, cannot establish personal knowledge or fraudulent intent pertaining to Parker's alleged contract because the discipline occurred four (4) days before the contract even came into existence.[35] The same is true for Bright's critique regarding Parker's responsiveness to e-mails on October 22, 2013.[36] Even if Bright was simply trying to manufacture reasons for the purpose of terminating Parker's employment, and even if his criticisms were fabricated and untrue (*i.e.* a pretext), and that the totality of his testimony established Bright's "fraudulent intent" to terminate Parker's employment, that alleged fraudulent intent cannot be "related" to a contract that did not yet exist. It must also be remembered that the reasons Bright gave for Parker's dismissal on November 4, 2013, were the very same reasons articulated on October 21 and 22.[37]

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[34] *See e.g. Thompson v. Home Sec. Life Ins.*, 271 S.C. 54, 55, 244 S.E.2d 533, 534 (1978) (finding that insurer's fraudulent intent was established by individual agent's intentions relating to insurance policy); *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 54, 336 S.E.2d 502, 504 (Ct. App. 1985) (analyzing fraudulent intent of salesmen is breach of contract accompanied by fraud claim against mobile home seller).

[35] *See* The Beta Club's Initial Brief, 8-10.

[36] *Id.* at 10.

[37] *Compare* R. pp. 566, 568-71 *with* R. p. 567; *and* pp. 357-59.

Even if the reasons given for Parker's discharge were a fabricated pretext for the "real reasons" for her termination, it does not advance Parker's claim for punitive damages. There is nothing in the record to establish that Bright had even the slightest knowledge of Parker's alleged employment contract formed on October 25, 2013.[38] Parker never testified that she told Bright what Dinkins told her in the October 25th meeting.[39] Dinkins testified that he did not tell Bright of the alleged "promise" he made to Parker that she could not be fired for talking with the Board. It is true that Dinkins testified that he told Bright that employees were afraid for their jobs and that long time employees should get due process prior to discharge.[40] It is also true that Parker testified that Bright told her that he had heard that she was "negative" with the Board.[41] Nevertheless, such testimony is far short of informing Bright that an employment contract was formed between the Beta Club and Parker on October 25th. The fact of the matter is this: there is absolutely no evidence in the record that Bright had any personal knowledge of the oral employment contract allegedly formed between Plaintiff and the Beta Club on October 25, 2013. Absent such a showing, there is no basis for the jury's punitive damages award because there is no evidence establishing that element of Parker's claim. That portion of the jury's award must be set aside.

Realizing that the weight of the evidence is against her, Parker attempts to sidestep the record with two muddied and misguided arguments. First, Parker endeavors to persuade the

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[38] The Beta Club's Initial Brief, 8-13.

[39] R. pp. 422-23.

[40] R. p. 423.

[41] R. p. 151.

Court to ignore the evidence presented at trial on the grounds that the Beta Club is not challenging the jury's determination that the Beta Club breached Parker's alleged employment contract.[42] Parker contends that Bright's alleged fraudulent intent relating to her contract may be inferred from the fact that the jury found that Parker was terminated in breach of her contract.[43] Parker even offers a cherry-picked sentence from the Beta Club's memorandum in support of its post-trial motion as support for her argument.[44] But this argument holds no water. All that the jury concluded when it decided the contract claim in Parker's favor was: (a) that the Beta Club had entered into a contract not to terminate Parker for speaking to the Board; and (b) Parker was, in fact, terminated for speaking to the Board. The jury's conclusion, however, does nothing to help Parker establish the facts necessary to prove her entitlement to punitive damages, namely:

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[42] Parker's Brief, at 29-32.

[43] *Id.*

[44] Parker's Brief states:

> As Appellant previously conceded, fraudulent intent can be inferred from the basic fact that Bright gave false reasons for the termination. 'Even if [Parker] presented sufficient evidence to show that Bright lied to her about the reasons for her discharge, this would only establish that the contract was breached with a fraudulent intent or purpose.' This is precisely what happened.

Id. at 29 (emphasis excluded). But Parker's attempt to bind the Beta Club with its own arguments falls flat. First, the language is taken completely out of context. The sentence, which is from the memorandum supporting the Beta Club's post-trial motion, was delivered in the context of Parker's failure to establish the fraudulent act element of her breach of contract accompanied by fraudulent act claim. The excerpted language says nothing about the record evidence (or lack thereof) presented at trial pertaining to the fraudulent intent requirement of Parker's claim. Second, Parker's use of the excerpt, fails to reach the heart of the matter. Assuming *arguendo*, that Bright had it out for Parker and gave false reasons for her termination, that fact in and of itself does <u>nothing</u> to link such intent to the alleged breaching of Parker's contract. Parker cannot point to anything in the record supporting the notion that Bright had even the faintest knowledge of Parker's alleged contract. Whatever fraudulent intent Bright may have had, it could not have been related to the breaching of Parker's alleged contract because he knew nothing about it.

- that Bright had knowledge of the alleged contract;
- Parker's termination was the product of Bright's fraudulent intent to breach the contract.

The jury merely concluded that the reasons Bright gave for Parker's terminations were not the "real reason" for her discharge. That determination, however, does not establish (or even suggest) that Bright formed the requisite fraudulent intent relating to the alleged contract that arose on October 25, 2013. The jury's conclusions regarding the reasons for Parker's termination do not establish either Bright's knowledge of the alleged contract or any fraudulent intent with regard to that contract.

Parker further attempts to avoid the weight of the record by recasting her presentation of the evidence in an effort to conceal the deficiencies of her arguments. Parker's Brief contends that evidence related to the October 21, 2013 Conference Note (the so called "shot across the bow")[45] and Bright's critique of her responsiveness to e-mails on October 22, 2013 was not introduced to show fraudulent intent, but instead, was offered to establish separate fraudulent acts related to the breaching of her alleged contract.[46] Parker then boldly asserts that Bright's fraudulent intent relating to her alleged contract may be "inferred" from those acts.[47] But this

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[45] Parker's Brief, 7. The problematic nature of Parker's argument is further exposed in her own characterization of the facts in Parker's Brief. Parker continually refers to Bright's discipline on October 21, 2013 as the first "shot across the bow" which evidences his supposed ill-will towards Parker. Putting aside the question of whether Bright's actions on October 21, 2013, establish a fraudulent intent (which the Beta Club disputes), whatever intent Bright may have formed towards Parker on October 21, it could not have been related to the breaching of her alleged employment contract with the Beta Club. This is because Parker's alleged contract as did not come into existence until four (4) days after he issued the October 21, 2013 Conference Note.

[46] Parker's Brief, 33-36.

[47] *Id.* at 34.

argument, too, crumbles when confronted with reason. How can one infer fraudulent intent relating to the breaching of a contract from unrelated events which occurred before the alleged contract even came into existence? Logic provides the only answer: one cannot. Parker's insistence that fraudulent intent relating to the breaching of a contract can be "gleaned" from unrelated events occurring days before the alleged contract even came into being stretches the very bounds of credulity. [48] The inescapable truth is that there is no evidence in the record from which the jury could have inferred fraudulent intent relating to the breaching of Parker's alleged employment contract. Accordingly, the Court should set aside Parker's punitive damages award.

B. Parker's punitive damages award should be set aside because the trial court's understanding of the "independent fraudulent act" requirement was based on an erroneous interpretation of Supreme Court precedent.

As set forth in the Beta Club's Initial Brief, there is no legal basis to support the conclusion that there was a separate and distinct fraudulent act accompanying the breach of Parker's employment contract. South Carolina law provides that breach of contract, even with willful intent or fraudulent purpose, is insufficient to entitle a plaintiff to a punitive damages award.[49] Indeed, a plaintiff must go further and present specific evidence of a separate and district fraudulent act accompanying the breach.[50] Moreover, the independent fraudulent act

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[48] *Id.*

[49] *See* Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil,* §§ 10-1-4 (2d ed. 2009);*and Hardee v. Penn Mut. Life Ins. Co. of Philadelphia,* 215 S.C. 1, 11, 53 S.E.2d 861, 865 (1949) (explaining that the fraudulent breach of contract is insufficient to make out a claim for breach of contract accompanied by fraud); *Dunsil v. E. M. Jones Chevrolet Co.*, 268 S.C. 291, 298, 233 S.E.2d 101, 104 (1977) (same).

[50] *Smith v. Canal Ins. Co.*, 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980) (nothing that the fraudulent act must be separate and distinct from the act(s) constituting breach).

cannot be made up of the same acts constituting the breach.[51] Despite ample guidance to the contrary, the trial court was persuaded to disregard controlling authorities in favor of Parker's erroneous and problematic understanding of *Conner*.

The trial court impermissibly allowed Parker to "double-dip" the elements of her claim in an attempt to justify her entitlement to punitive damages. The trial court wrongfully embraced Parker's misguided understanding that, under *Conner*, being terminated for false reasons is sufficient to give rise to a cause of action of breach of contract accompanied by fraudulent act.[52] The trial court reasoned:

> The fraudulent act is not the termination itself. Rather, [Parker] has contended throughout that the fraudulent acts upon which she relies are the pretextual reasons Bright gave at the time and subsequently for the termination.
>
> The act of the termination and the giving of reasons are separate, distinct, and independent of each other. The former may exist without the latter. At the same time, they are related as they must be and the latter accompanies the former.[53]

The trial court determined that Parker's termination (the breach) was accompanied by separate fraudulent acts (the fabricated reasons for the discharge). But such a determination allows the very same conduct to satisfy two separate elements of the claim. It must be remembered, that the jury's determination of the breach of contract claim established that Parker was terminated for

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[51] *Coker's Mobile Home Plaza, Inc. v. ITT Commercial Fin. Corp.*, 900 F.2d 250 (4th Cir. 1990) (finding that the rudimentary aspects constituting breach of contract, even if fraudulent, cannot also form the basis of fraudulent act(s) accompanying the breach).

[52] Parker's Brief, 36-39.

[53] R. p. 19.

reasons other than those given by Bright on November 4.[54] This means that the false reasons supposedly provided by Bright triggered the breach of the alleged contract. If one accepts that conclusion, then those same false reasons given for Parker's termination cannot also form the basis of the alleged independent act accompanying the breach. So where then is the separate and distinct fraudulent act? The answer is it does not exist. The trial court's Order of Judgment alludes to other, "subsequent" reasons but fails to elaborate or otherwise provide any support for its statement.[55] The only pretextual reasons provided by the trial court are those which form the basis of the alleged breach of contract. And the law in South Carolina is clear: the same action(s) forming the basis of the alleged breach cannot also form the basis of the alleged independent fraudulent act.[56]

The error in the trial court's reasoning is further revealed in Parker's strained attempt to analogize the facts of this case to the controlling authorities, most notably *Conner*. Parker's

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[54] *Id.* at 37.

[55] Though the trial court does not identify Bright's verified discovery as a subsequent "pretextual reason" connected to the breach of Parker's alleged contract, it mentions the fact that Parker presented evidence disputing Bright's responses. *See* R. p. 12. To the extent the trial court considered Bright's discovery responses an independent fraudulent act connected to the breach, it did so in error.

While the fraudulent act accompanying the breach can be "prior to, contemporaneous with, or subsequent to the breach of contract... it must be connected to the breach itself and cannot be too remote in either time or character." *Lister*, 329 S.C. at 142 (citations omitted). Bright's discovery responses are hardly connected with the actual breaching of Parker's alleged contract. The responses merely explain Bright's recollection of the reasons for Parker's discharge. Moreover, the fact that Parker presented conflicting testimony hardly deems the responses "fraudulent." Discovery responses made within the context of litigation and made ten (10) months following act(s) forming the basis of the alleged breach of Parker's purported contract are far too attenuated in both time and character to constitute an independent fraudulent act.

[56] *Smith*, 275 S.C. at 260.

Brief repeatedly states that she has satisfied the independent fraudulent act requirement because, like in *Conner*, pretextual reasons were given for her termination.[57] But Parker fails to reconcile the key difference between *Conner* and the facts presented by this case. In *Conner*, the pretextual reasons given for the dispatcher's termination occurred independent of the actual termination. In that case, the alleged breach (the dispatcher's termination) and the alleged accompanying fraudulent acts (overturning of the grievance decision) occurred as separate and distinct acts. The facts in this case are clearly distinguishable. Here, Parker contends that the false reasons supposedly given for her termination (which the jury concluded was a breach) constitutes an independent fraudulent act accompanying the alleged breach. The same act(s) giving rise to the alleged breach also gives rise to the purported independent fraudulent act accompanying the breach. The record evidence forming the basis of dispatcher's claim in *Conner* is nothing like the record evidence upon which Parker relies in this case.

Parker's attempt to draw similarities between this case and other decisions emanating from this Court is similarly unavailing. Parker's attempt to draw parallels between the pretextual reasons given for her termination and the alleged fraudulent acts in *Floyd v. Country Squire Mobile Homes*[58] fails to advance her arguments. There, prospective homeowners agreed to purchase a mobile home from a salesman if he could obtain financing which resulted in monthly payments within an agreed upon range.[59] The homeowners and the salesman further agreed that the salesman would be paid a binder fee to be refunded if the salesman could not obtain the

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[57] Parker's Brief, 38-43.

[58] 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985).

[59] *Id.* at 503.

agreed upon financing. [60] The salesman man did not obtain financing.[61] Instead, the he arranged financing for an amount higher than the agreed upon range (without the homeowner's permission), lied to homeowner's about it, drew up false sales contracts, and retained the binder.[62] In *Floyd*, the breach of contract (the salesman's failure to perform) was accompanied by several fraudulent acts which occurred separate and independent of the breach (procuring financing without permission, cashing the binder, executing false documents). While the fraudulent acts in *Floyd* were "connected" to the alleged breach, they were independent acts supported by separate and distinct activity. This is different than what Parker advances. Parker urges to the Court to allow the same activity (Bright's alleged pretextual reasons) to satisfy two different elements of her claim.

Parker's attempt to analogize the alleged independent fraudulent act in this case to the ones alleged by the plaintiffs in *Scott v. Mid Carolina Homes* [63] also fails to launch. There, a salesman reneged on an oral agreement to sell a mobile home to plaintiffs.[64] The record in *Scott* showed that <u>after</u> the breach salesmen made up false reasons for reneging on the agreement, he sold the home at a higher price to other buyer, and cashed the plaintiff's down payment.[65] This Court, with clear emphasis on the salesman's act of cashing the plaintiff's check, found that the

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[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] 293 S.C. 191, 359 S.E.2d 291 (Ct. App. 1987) *overruled on other grounds by Ward v. Dick Dyer & Associates, Inc.*, 304 S.C. 152, 403 S.E.2d 310 (1991).

[64] *Id.* at 197.

[65] *Id.* at 193 – 196.

plaintiffs had presented sufficient evidence of an independent fraudulent act.[66] Like *Floyd*, the record evidence in *Scott* is dissimilar from what Parker presented at trial. In this case, Parker failed to present any evidence of an independent fraudulent act occurring independent of the activity forming the basis of the alleged breach of contract. Recognizing this fact, Parker wishes to have the Court accept the same act(s) as satisfaction for separate elements of her claim.

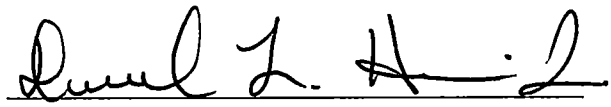
The unavoidable fact is this: there is no case law authority in this State supporting the proposition that a plaintiff can recover punitive damages on a breach of contract when the same activity forms the basis of the alleged breach and the alleged independent fraudulent act. Because there is no factual or legal basis for concluding that Parker presented evidence of an independent fraudulent act accompanying the alleged breach of contract, her punitive damages award should be set aside.

CONCLUSION

The sole issue presented by the Beta Club's appeal is whether Parker is entitled punitive damages on her claim for breach of contract accompanied by fraudulent act. Neither the record nor the controlling authority in this State supports the trial court's decision to submit Parker's claim for breach of contract accompanied by fraudulent act to the jury or the jury's award of such damages. There is no evidence in the record from which the jury could have reasonably inferred that Bright knew about the alleged contract or formed a fraudulent intent related to its purported breach. Further, there is no factual or legal authority supporting a finding of an independent fraudulent act accompanying the breach of Parker's alleged contract. Parker has failed to establish by clear and convincing the evidence the facts necessary to warrant an award

[66] *Id.* at 197-198.

of punitive damages. Therefore, the Beta Club requests that the Court set aside Parker's punitive damages award.



September 29, 2016

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Keith R. Kelly, Circuit Court Judge

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Appellate Case No. 2016-000232

Denise Parker, Respondent,

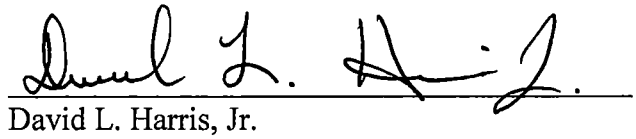
v.

The National Honorary Beta Club, Appellant.

CERTIFICATE OF COUNSEL REGARDING COMPLIANCE WITH RULE 211(B), SCACR

I certify that the Appellant's Final Reply Brief complies with Rule 211(b), SCAR.

September 29, 2016



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PROOF OF SERVICE

I hereby certify that on this 29th day of September, 2016, I served a copy of the forgoing ***Appellant's Final Reply Brief*** in the above-styled cause upon the following by hand-delivery at the address set forth below:

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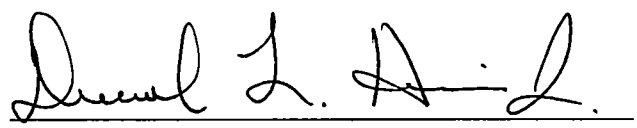

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