

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2017-002347

EPS Advisors, LLC Respondent/Appellant,

vs.

Jan Fredman and Clemson-EPS Advisors, LLC ... Appellants/Respondents.

**APPELLANTS/RESPONDENTS'
INITIAL REPLY BRIEF**

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APR 30 2018

SC Court of Appeals

INDEX

	<u>PAGE</u>
Reply Argument	1 - 6
Proof of Service	7

REPLY ARGUMENT

In reply to the Response Brief of Respondent/Appellant (EPS Advisors, LLC), Appellants/Respondents (Jan Fredman and Clemson-EPS Advisors, LLC) submit that the matters argued in the Response Brief have been addressed already in the Primary Brief of Fredman and Clemson-EPS Advisors; however, there are a few additional comments which Fredman wishes to make to assure that certain matters will not be overlooked and will be considered in the resolution of the case.

In the statement of the case, EPS Advisors emphasizes past transgressions of Jan Fredman and suggests that Fredman should be punished for them. Such actions are irrelevant here, however, as the evidence clearly shows that those actions had nothing at all to do with what occurred, and Fredman had a right to do what he did with the exception of temporarily interrupting the flow of the money from Schwab to EPS Advisors for distribution to him and EPS. All that Fredman did was change the order of payment of a portion of the funds from Schwab-to-EPS to Schwab-to-Fredman for distribution. The money still flowed through to the respective parties in the same timely manner and in the same percentages as required by the agreement between Fredman and EPS, and EPS received its full share of funds as required within a reasonable time frame consistent with the past dealings, customs, and practices of the parties and in the same manner that the money previously had been distributed when it passed from Schwab to EPS for distribution.

EPS also argues that the only money that is the subject of this action is \$105,352.50 and ignores the fact that \$3,485.00 of the total fees earned for the first quarter of 2010, of which eighty five percent (85%) or \$2,962.25 belonged to Fredman, was paid by Schwab directly to EPS Advisors - i.e., the total of fees earned for the quarter was \$108,837.50 that the parties were to share, and Fredman was entitled to eighty-five percent (85%) or \$92,511.87 of the \$105,352.50 that he received. Therefore, from the get go, EPS only had a proprietary interest in \$13,363.38 of the money in Fredman's hands, not \$15,802.77 as the Court found. Clearly, any argument of "accounting and setoff" does not apply to the \$3,485.00 under any stretch of the imagination. It was incumbent upon the Plaintiff to prove the proprietary interest in any funds which were claimed converted, particularly if its interest in the funds or the property was contested. Here it was contested by a denial that any conversion occurred. Clearly, the Court's failure to consider the \$3,485.00 was error, requiring that the Court Order should, at least, be adjusted by that amount, or that it be remanded for further consideration.

It is apparent that EPS's argument, in regards to the money conversion claim, is solely based upon its assertion that Fredman was required to plead "accounting and setoff" in order to collect his share of the money under the agreement, not that EPS had a proprietary interest in all of the funds which Fredman received. The Court correctly found, and EPS admitted, that Fredman was entitled to eighty-five percent (85%) of the total fees earned for the first quarter of 2010, but EPS's argument is essentially that he has forfeited his rights to any of

the money because he did not plead a certain way. It is submitted that such a position is preposterous. Following the logic of the Court Order, the Court clearly found that Fredman was entitled to eighty-five percent (85%) of the total fees earned for that quarter, and each party's proprietary interest was to be determined by the agreement. Without considering the credits, payments, etc., EPS could not prove the amount of the money that Fredman allegedly converted, nor could it prove its proprietary interest therein or the term of any alleged conversion, all of which was its burden to prove.

It is further submitted that, upon a review of the Court's rulings on the accounting and setoff objections and arguments at Trial, the Court clearly found that the amounts claimed as credits, payments, etc. were not, in fact, setoffs in the legal sense even though the term set-off was used loosely by the attorneys in referring to the payments and credits. In the full context of the Court's ruling, the Court correctly found that setoff did not apply, but rather the evidence was in mitigation of damages. The Trial Judge stated "Well, and I guess, I think I'm going to let it in and I think I need to take it whether it was claimed or not. It would best go to damages I guess. I guess there's an issue. At what point do you go from attacking damages to setoffs and accounting? I think its all a big blob." [T., p.278, II.6-18] In essence, he ruled that the evidence was admissible and was relevant regarding damages.

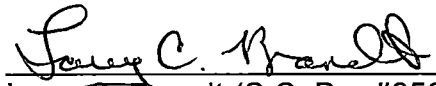
As for the assertion of EPS that Fredman is not entitled to consideration of money (\$3,485.00) paid by Schwab directly to EPS, the \$7,674.11 check paid by Fredman to Dameron and the recoupment by Fredman of monies owed to him for

the prior quarter (last quarter of 2009), the evidence of those events was first introduced by EPS in its case in chief. EPS's Attorney, Ms. Kern-Fuller, opened her case by admitting in opening statement that Fredman had paid "\$7,600.00" of the monies claimed. [T., p.9, ll.12-14; p.10, ll.5-8] She also began the trial by reading into the record excerpts of Fredman's deposition attesting that the money had been paid in April 2010 and the method and manner by which it was paid. [T., p.48, l.8 – p.49, l.13; T., p.37, l.18 – p.60, l.10] She also again introduced evidence of the "\$7,600.00" payment through Dameron's testimony [T., p.106, l.21 – p.107, l.14], and Dameron admitted that he had been paid indirectly. [T., p.116, l.22 – p.117, l.13] By doing that, she waived any claim that accounting and setoff must be plead and opened the door to Fredman's direct testimony and cross-examination of Dameron on those very matters. EPS's argument is that the Court must ignore the evidence and the truth as to what occurred and render a decision that is not in keeping with the evidence that its attorney introduced because of some technical rule of pleading thereby allowing EPS to collect the money twice plus damages for pre-judgement interest over a substantial period that EPS was in possession of all the money to which it was entitled. In all of my years of practicing law, I have never had an attorney introduce evidence into the record and then argue that the Court should not consider it and give it due weight, especially when that evidence is true. Therefore, whether such evidence would otherwise require "accounting and setoff" to be plead in order to admit and consider it is not applicable or relevant in this case. Again, EPS presented the evidence in its case in chief, opened the door to the evidence being admitted, and effectively nullified

the legitimacy of any argument re: “accounting and setoff.” As a result, the Court was obligated to either determine the damages in accordance with the evidence in the record or explain why it did not. Fredman’s attorney expressly stated in the Motion for Reconsideration “But if you rule that is not – that he is not entitled to that last credit, then I certainly think I need to know why. And I need your Order to specifically say that he is not entitled to it for ‘this reason.’ Or that you don’t believe it or whatever. Or your Order needs to be narrowed down and at least address the \$7,600 check that he got, he admits. And the other part of it – take a look at that and say, ‘wait a minute.’ Then tell me if he is not entitled to that why he is not entitled to it.” **[Motion Hearing T., p.9, l.22 – p.10, l.10]** Plaintiff’s Counsel also stated to the Court “Any calculation of damages by the Court – I agree that you can move things around, call it a question of fact, interpretation, whatever. But those damages still have to be supported by evidence. The Court can’t just reach up and pull a number out of thin air. That’s what I’m saying. If you review the evidence, what is a reasonable conclusion, what is a reasonable construction of that evidence? That’s what the court is saddled with, otherwise it’s an abuse of discretion. You can’t just reach and get it. So I think certainly the numbers in there are wrong. I don’t want to beat a dead horse to death... ..If you’re rejecting the evidence, certain portions of the evidence, I’m asking you to do that so that I can know where I need to go and what I need to do.” **[Motion Hearing T., p.27, l.7 – p.28, l.5]** The payment over to EPS of all money belonging to EPS was clearly before the Court and was deserving of an answer as to why the Court did not reduce damages. Without a justifiable reason for failing to do so, the Court was

obligated to consider the evidence and, based upon the fact that the evidence was not refuted, was duty bound to reduce any damages accordingly. Clearly the Court Order is not supported by the evidence and is an abuse of discretion. It is, therefore, submitted that the order cannot be sustained, and that, at least, the Order, in regards to conversion of any of the money, must be reversed.

Respectfully submitted,



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April 26, 2018

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**PROOF OF SERVICE
(APPELLANTS/RESPONDENTS' INITIAL REPLY BRIEF)**

I certify that I have served **APPELLANTS/RESPONDENTS' INITIAL REPLY BRIEF** upon the **Respondent/Appellant, by and through its attorneys of record**, by depositing a copy of it in the United States Mail, postage prepaid, on **April 26, 2018**, addressed as follows:

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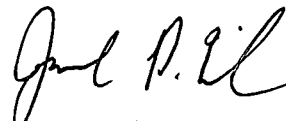
**Re: EPS Advisors, LLC v. Jan Fredman and Clemson-EPS Advisors, LLC
Appellants/Respondents' Initial Reply Brief
Appellate Case #2017-002347**

Dear Ms. Kitchings:

Enclosed for filing is the **Appellants/Respondents' Initial Reply Brief** along with the **Proof of Service** attached, evidencing service upon the Respondent/Appellant.

We trust you will find everything in order; however, if you have questions or need additional information, please let us know.

LARRY C. BRANDT, P.A.

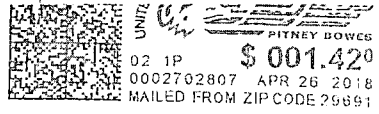


Jacob P. Wilson

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Enclosures

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