

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

RECEIVED

Perry H. Gravely, Circuit Court Judge

JUN 18 2018

SC Court of Appeals

Case No. 2017-002347

EPS Advisors, LLC Respondent/Appellant,

vs.

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

**APPELLANTS/RESPONDENTS'
FINAL BRIEF**

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STATEMENT OF ISSUES ON APPEAL

- 1: The Lower Court erred in granting judgment to Plaintiff in that Plaintiff failed to prove it was damaged in any way by the acts of Defendants.
- 2: The Lower Court abused its discretion and erred in failing and refusing to mitigate and reduce Plaintiff's damages by \$2,962.25 that belonged to Defendants but was sent by Schwab directly to EPS and retained by it.
- 3: The Lower Court erred in failing and refusing to mitigate or reduce Plaintiff's damages by \$6,345.00 that Plaintiff owed to Defendant Fredman for fees due to him from the fourth quarter of 2009.
- 4: The Lower Court erred in failing and refusing to mitigate or reduce Plaintiff's damages by the \$7,611.64 that Fredman paid to EPS (Dameron) prior to 04/20/2010.
- 5: The Lower Court erred in granting judgment to Plaintiff EPS in the amount of \$25,444.25 as that finding of damages is not reasonably supported by the evidence.
- 6: The Lower Court erred in finding that Plaintiff EPS had been damaged in the amount of \$15,802.87 when EPS had already recovered that value from Defendants prior to trial.
- 7: The Lower Court erred in finding that Plaintiff EPS' actual damages were \$25,444.25 when that finding includes elements not permitted to be recovered by law.
- 8: The Lower Court erred in finding that the amount converted by Defendants was \$15,802.87 when Defendants never possessed that amount of money belonging to Plaintiff EPS.
- 9: The Lower Court erred as a matter of law in finding that Plaintiff's (EPS') damages were \$25,444.25.
- 10: The Lower Court erred in awarding pre-judgment interest on \$15,802.87 or any portion thereof from 04/20/2010 to date of trial.
- 11: The Lower Court erred in finding that the value of Plaintiff's furniture items was \$6,300.00 on date of conversion and awarding Plaintiff judgment for that amount when the only evidence of value on 04/20/2010 was \$2,500.00.

- 12: The Lower Court erred in finding that a conversion of the furniture items occurred at all as that finding is not reasonably supported by the evidence.
- 13: The Lower Court erred and abused its discretion in finding that Defendants' retention of the furniture items under the facts of the case constitutes conversion.
- 14: The Lower Court erred and abused its discretion in failing and refusing to find that Defendants' retention of the furniture was justified by Plaintiff's own acts.
- 15: The Lower Court abused its discretion and erred in awarding punitive damages to Plaintiff EPS as the evidence does not reasonably support a finding that punitive damages in any amount is warranted.
- 16: The Lower Court abused its discretion and erred in awarding punitive damages in the amount of \$20,000.00 as a matter of law.

STATEMENT OF THE CASE

This action was commenced on April 3, 2010 by the Plaintiff filing a Summons and Complaint in the Court of Common Pleas for Pickens County. The Complaint alleged eight causes of action. The first cause of action alleged that Defendants converted property belonging to Plaintiff for their own use, namely, client accounts and items of office equipment including a computer and a desk, and asked for damages in the amount of their value on the date of the conversion. The second cause of action alleged breach of contract; the third cause alleged breach of contract with a fraudulent intent; the fourth cause of action alleged negligent misrepresentation; the fifth cause of action alleged tortious interference with contract; the sixth cause of action alleged fraud; the seventh cause of action alleged a conspiracy between Defendants and Charles Schwab and Co.; and the eighth cause of action alleged unfair trade practice act violations.

Defendants thereafter timely filed an Answer denying all causes of action and specifically alleging that, since Defendant Fredman did not enter into a non-compete agreement with Plaintiff, he had a right to do what he did and did not convert any property of Plaintiff.

The case was tried before judge alone without a jury on October 13, 2016, and an Order was subsequently issued on May 19, 2017 finding in favor of Defendants on causes two through eight but finding for Plaintiff on cause one (conversion). The Order also granted judgment against Defendants in the amount of \$15,802.87 being the amount of money the Judge found to have been converted and \$8,046.30 for the value of furniture items that belonged to Plaintiff. The Trial

Judge also awarded interest on the conversions at the statutory rate of 8 3/4% from the dates he determined the conversions occurred, to-wit: 04/09/2010-re: the money and 04/20/2010- re: the furniture items, and calculated the interest through the time of trial to be \$9,641.38 on the money and \$4,909.07 on the furniture. He also awarded punitive damages against the Defendants in the amount of \$35,000.00.

Defendants thereafter, on May 26, 2017, filed a Motion for Reconsideration and Amendment or Alteration of Judgment or, in the alternative, for a New Trial pursuant to Rule 59, SCRPC, and then amended the Motion on May 30, 2017.

On October 13, 2017, argument on the Defendants' Motion for Reconsideration was heard by the Trial Judge and, on October 31, 2017, the Trial Judge issued his Order altering and/or amending the original Order by reducing the judgment for conversion of the furniture items to \$6,300.00 without interest, and reducing punitive damages from \$35,000.00 to \$20,000.00; however, he reaffirmed his findings and judgment on the money conversion in the amount of \$25,444.25 actual damages which again consisted of the \$15,802.87 which he found to have been the money converted on 04/09/2010, and the pre-judgment interest that he had previously calculated at the statutory rate of 8 3/4% from 04/09/2010 until date of his initial Order on May 29, 2017.

Thereafter, on November 9, 2017, Defendants mailed and served a Notice of Appeal on Plaintiff's Counsel which was received and file stamped by the South Carolina Court of Appeals on November 13, 2017.

On December 14, 2017, Plaintiff filed its Notice of Appeal of the October 31, 2017 Order which was more than thirty (30) days after its Counsel received the Order on November 2, 2017.

STATEMENT OF FACTS

In or about October 2008, Jack Taylor, an acquaintance of the Defendant, Jan Fredman, and a contract financial advisor with Plaintiff, EPS Advisors, LLC, introduced Jan Fredman and David Dameron, the 90% owner and managing member of EPS, to each other. [R., p.85, II.21-23; Def. Exh. #4: R.,p.350, II.4-11] At the time, Dameron was looking for "rain makers" to bring into the firm to increase its much needed revenue. [R., p.86, I.15 - p.87, I.1] Fredman, on the other hand, was needing to associate himself with a registered financial advisor (RIA) such as EPS so that he could continue to advise and serve his clients who collectively had investment portfolios in excess of \$50,000,000.00. Fredman had been formerly associated with UBS as a contract advisor, but he was no longer affiliated with UBS because he had been terminated from his relationship with it due to some legal problems he had encountered in his personal life. [R., p.73, II.13-20] Resulting criminal charges had been expunged, however, through the South Carolina Pre-Trial Invention Program and were no longer of record, but Fredman fully disclosed his past problems to Dameron at the initial meeting. [R., p.74, II.9-12; p.75, II.6-11; p.87, II.5-7] After several meetings and discussions, Fredman and Dameron agreed that it would be advantageous to both, EPS and Fredman, to join together in a mutually beneficial business arrangement that would provide each of them with substantial income and allow Fredman to continue advising his clients concerning their investments. [R., p.87, II.9-25; Def. Exh. #4: R.,p.352, II.12-20] To accomplish this they entered into a verbal agreement whereby Fredman would bring

his clients to EPS which was affiliated with Charles Schwab & Co. as its brokerage firm and continue advising them on their financial matters. He would also split his commissions earned with EPS on a 50/50 basis. **[R., p.88, II.12-25; Def. Exh. #4: R.,p.352, II.12-25]** In return, EPS would, at its expense, provide him with an office at its Anderson, South Carolina, location equipped with the necessary furniture and equipment (phone, computers, etc.) and also furnish crucial "back office support" to enable him to advise his clients. **[R., p.84, II.2-25; p.89, I.1 - p.90, I.3; Def. Exh. #4: R.,p.354, I.1 - p.355, I.4]** A non-compete agreement was not discussed nor was one ever entered into at any time. **[R., p.132, II.8-10]** In order to accomplish this arrangement it was necessary that Fredman's clients sign an agreement placing their "assets under management" portfolios with EPS which, in turn, would place their accounts or "assets under management" with Charles Schwab & Co., the brokerage firm with which EPS was affiliated. Schwab's role was then to handle the actual transactions in the accounts as directed by Fredman and render to the clients monthly statements or accountings of the activities and values of the portfolios. Schwab was to also compute the quarterly billings in arrears for Fredman's services upon each account at 1/4 of 1% (1% annually), take the money to pay the fees from the portfolios of the individual investors and transfer the money to a distribution account in the name of EPS. EPS was then to issue a check to Fredman for his agreed percentage and retain the remainder for its use. **[R., p.100, I.21 - p.102, I.25; p.134, II.7-17; Def. Exh. #4: R.,pp.344-439]** In essence, the distribution account was a pass through account in the nature of a trust as all quarterly fees

earned by Fredman went into the account, and EPS was legally obligated to distribute to Fredman the portion of the fees belonging to him according to their fee split agreement. **[R., p.65, I.8 - p.66, I.14: Kern's Opening Statement]**

When the relationship between EPS and Fredman was first established in late 2008, EPS had one office in Anderson, South Carolina, and Fredman was provided office space there. Subsequently, however, EPS opened an office in Clemson, South Carolina, and Fredman and Jack Taylor relocated to that office. The agreement between EPS and Fredman did not change, however, and EPS and Fredman were still to split fees 50/50 with EPS continuing to furnish Fredman and Taylor with an office in Clemson and provide the furniture, equipment and necessary back office support to assist Fredman and Taylor in serving their clients. **[R., p.84, II.2-14; p.89, II.10-15]** Soon thereafter, however, within sixty (60) days or so, EPS failed to pay the power bill of the Clemson office and the power was turned off resulting in all computers and phones also going out of service. Lease payments for the office, cleaning lady fees and phone charges were also not paid, as well as several other bills which caused "crucial" services to be disrupted. To immediately reinstate service and keep the Clemson office functioning, Fredman paid the bills personally. As Dameron put it, *"I was having trouble keeping all of that rolling like it should have been."* **[R., p.90, II.4-17; Def. Exh. #4: R.,p.355, I.5 - p.356, I.7]** To correct the problems and make sure the bills were paid and the lights, computers and phones stayed on, Dameron and Fredman then agreed that the percentage split would be adjusted and that Fredman would get 80% from which

he would pay the monthly lease payments and utility bills, and EPS would get only 20% from which it would continue to pay for the “back office support” for Fredman and Taylor. **[Dameron: R., p.89, I.22 - p.90, I.25]**

Troubles continued to arise, however, and, in January 2010, Dameron refused to pay Fredman his fees for a period of twelve (12) days to force Fredman to come to an agreement about certain things going forward. **[Def. Exh. #4: R.,p.371, II.6-25; p.414, I.10 - p.415, I.17; p.416, II.9-25]** At the time, Dameron was aware that in October 2009, Fredman had incorporated his investment advisory services under the name of Clemson-EPS Advisors, LLC, and that Fredman was thinking about leaving EPS **[R., p.76, II.15-21; p.112, II.19-21]** which he had a right to do. **[R., p.132, I.22 - p.133, I.19]** Dameron wanted to keep Fredman at EPS, however, because he was performing well and producing much needed revenue for EPS which was losing money. **[Def. Exh. #3: R.,pp.342-343; R., p.137, I.24 - p.138, I.16; p.159, II.3-24]** As a result, the agreement was adjusted once again and it was agreed, starting on 01/01/2010, that Fredman would be entitled to 85% of the fees he earned and EPS would retain 15%. **[Pl. Exh. #3: R.,p.309; R., p.97, II.6-17]** Things did not get better, however, as Dameron became distant and would not communicate with Fredman although Fredman called, texted and emailed him on numerous occasions. Several meetings were scheduled with Dameron but they were cancelled, some at the last minute, by Dameron without explanation. This caused Fredman to become increasingly anxious and concerned about EPS and their business relationship. **[R., p.135, II.3-22]** Finally, Fredman decided in March

2010 to move his clients' accounts to the LLC which he had created in October 2009 under the name of Clemson-EPS Advisors, LLC, for his own protection. At no time did Fredman ever intend to deprive EPS of its share (15%) of the fees he earned for the first quarter of 2010. **[R., p.77, II.8-16; p.78, II.8-17; p.81, II.1-6; p.82, II.16-24]** By that time Fredman had become a registered investment advisor and could operate independently of EPS. By the end of March 2010, all of his clients but about 20, had signed the necessary documents to move their accounts from EPS to Clemson-EPS Advisors, LLC. This caused the quarterly billing and payment of fees by the clients at the end of March 2010 to be split by Schwab between EPS and Clemson-EPS Advisors, LLC. A check was sent on 04/09/2010 to Clemson-EPS Advisors, LLC, in the amount of \$105,352.50 and another check of \$3,485.00 was sent by Schwab directly to EPS for fees Fredman had earned on approximately twenty (20) accounts that had not been transferred to his new LLC by 03/31/2010. **[R., p.143, I.23 - p.144, I.6; p.144, I.21 - p.145, I.21]** In other words, Fredman's total billings for the quarter ended 03/31/2010 totalled \$108,837.50, not \$105,352.50. **[Dameron: R., p.143, I.21 - p.145, I.21; Lockwood: R., p.172, II.14-22; Fredman: R., p.191, II.10-11]** Pursuant to the agreement as of 01/01/2010, Fredman was entitled to 85% of the \$108,837.50 and EPS was entitled to 15%. **[Def. Exh. #4: R., p.378, I.22 - p.400, I.7]** In effect, Dameron was paid directly by Schwab the sum of \$2,962.25 (85% of \$3,485.00) which belonged to Fredman. **[Dameron: R., p.143, I.21 - p.145, I.21; Lockwood: R., p.172, II.20-22; Fredman: R., p.191, II.18-25; Pl. Exh. #5: R., pp.312-315]**

Upon learning that the accounts had been moved to Clemson-EPS, Dameron became angry and, on 04/20/2010, Dameron sent a letter to Fredman terminating his relationship with EPS Advisors effective 03/31/2010 and demanding 100% of the money that Fredman had received, to-wit: \$105,352.50. He also demanded a return of any and all furniture and equipment belonging to EPS that Fredman had in his possession **[Pl. Exh. #5: R.,pp.312-315]** along with a “no trespass letter” **[Def. Exh. #2: R.,p.341]** informing him not to come onto the premises of EPS or send any emissaries thereby making it impossible for Fredman to return the furniture as demanded. **[R., p.194, I.19 - p.196, I.8]** Prior to the 04/20/2010 letter from Dameron, Fredman and Dameron had talked, and Fredman had given to Dameron a check in the amount of \$7,674.11 which Dameron received and cashed. **[R., p.110, II.21-23; p.121, II.1-15; Def. Exh. #4: R.,p.381, I.23 - p.382, I.10]** Dameron (EPS) also had in its possession a check that it had received directly from Schwab in the amount of \$3,485.00 for quarterly fees earned by Fredman on the twenty (20) accounts that did not get moved from EPS by 03/31/2010, 85% or \$2,962.25 of which belonged to and was property of Fredman. Additionally, as the records of EPS clearly show, EPS owed to Fredman, from the quarter ended 12/31/2009, the sum of \$6,345.68 which was over \$1,000.00 more than enough to put all money in EPS’ possession that it was entitled to per the fee split agreement; therefore, when Fredman gave to Dameron his check prior to 04/20/2010, in the amount of \$7,674.11, EPS possessed all of the funds to which it was entitled pursuant to their agreement as to the splitting of fees and Fredman did not possess any monies that did not belong to him or convert any money of EPS’ to his own use

to the detriment of EPS. [Def. Exh. #5: R.,p.440; Def. Exh. #4: R.,p.380, I.18 - p.382, I.16; p.383, I.6 - p.384, I.19; R., p.93, I.23 - p.94, I.8; p.94, I.22 - p.95, I.22; p.99, II.12-19; p.100, II.1-10; p. 111, II.3-7, 12-14; p.115, I.22 - p.116, I.13; p.119, I.24 - p.120, I.20; p.121, II.1-15; p.140, I.16 - p.145, I.21; p.155, I.2 - p.158, I.4; p.184, I.1 - p.192, I.5]

No more was done or said about the matter until almost three (3) years later on 04/03/2013, when the Complaint was filed and this lawsuit initiated. Although Dameron no longer wished to prosecute the case and attempted to dismiss EPS's counsel, he was told he could not do so because he had filed personal bankruptcy and the matter was under the control of the Bankruptcy Trustee. [R., p.148, I.2 - p.150, I.10]

Three and a half (3½) years later, on 11/03/2016, the case was tried before Judge Perry H. Gravely without a jury and, thereafter, on 05/19/2017, Judge Gravely issued his Order finding that Fredman and Clemson-EPS Advisors, LLC had converted \$15,802.87, which was EPS Advisors' 15% share of the \$105,302.50 in fees that Schwab had sent to Fredman on 04/09/2010. He also held that Fredman and Clemson-EPS Advisors, LLC had converted office furniture belonging to EPS Advisors having a value of \$8,046.30, and he added pre-judgment interest on the \$15,802.87 from 04/09/2010 and on the value of the personal property converted of \$8,046.30, from 04/20/2010 through date of trial. He also awarded punitive damages of \$35,000.00 against Fredman and Clemson-EPS Advisors, LLC. Fredman and Clemson-EPS Advisors, LLC, then timely filed a Motion under *Rule*

59, SCRCPP, seeking reconsideration and a modification or alteration of the decision or, in the alternative, for a new trial based upon the grounds that the Court's findings were not reasonably supported by the evidence and that errors of law had also occurred in awarding damages for \$15,802.87 without reducing or mitigating in accordance with the evidence, particularly in awarding pre-judgment interest on the damages, as well as the value of the furniture from 04/20/2010 to date of trial when EPS Advisors had the money in its possession throughout that period and Dameron's no trespass letter had prevented the return of the personal property by Fredman. The hearing on the Motion was then held on 10/13/2017 by Judge Gravely and he thereafter, on November 2, 2017, issued an Order amending his prior Order in the following particulars: (a) the amount of the value of the personal items converted was reduced from \$8,046.30 to \$6,300.00; (b) the award of \$25,445.25 actual damages to EPS Advisors was reaffirmed which included the pre-judgment interest for the same period that he had awarded in his first Order; and (c) the punitive damages were reduced from \$35,000.00 to \$20,000.00. He also stated in reference to the personal property: *"For clarification, the Court did not award punitive damages as to this portion [the \$6,300.00] and does not make such a finding at this point."* From that second Order, Defendants, Jan Fredman and Clemson-EPS Advisors, LLC, timely appealed.

STANDARD OF REVIEW

In an action at law tried without a jury, the Trial Court's factual findings will not be disturbed on appeal unless found to be without evidence that reasonably supports the Court's findings; however, an Appellate Court may make its own determination on questions of law and need not defer to the Trial Court's rulings in this regard. [**Auto Owners Insurance Co. v. Rhodes, 405 S.C. 584, 748 S.E.2d 781 (Sup.Ct. 2013); Alexander's Land Co. v. M & M & K Corp., 390 S.C. 582, 703 S.E.2d 207 (S.C. 2010)]**

ARGUMENT

Defendants' appeal in this case is based upon the facts as set forth in the Statement of Facts above which clearly fail to reasonably support the Trial Judge's findings and the fact that he granted judgment for damages to which EPS is clearly not legally entitled to recover.

In addressing the Lower Court errors which require reversal of the judgment against the Defendants, this Court's attention is invited to those portions of the evidence cited in the Statement of Facts, Defendants' Amended Motion for Reconsideration filed with the Court on 05/30/2017 [R.,pp.41-46], the Memorandum in support of Defendants' Motion for Reconsideration given to the Trial Judge at the hearing on the Motion for Reconsideration on October 13, 2017 [R.,pp.47-52], and the Transcript of the hearing on the Motion for Reconsideration held on October 13, 2017 [R.,pp.204-232] all of which are incorporated by reference in the argument below.

I. THE TRIAL JUDGE'S FINDINGS THAT PLAINTIFF INCURRED ACTUAL DAMAGES FOR THE CONVERSION OF MONEY IN THE AMOUNT OF \$25,444.25 IS NOT REASONABLY SUPPORTED BY THE EVIDENCE NOR PERMITTED BY LAW BECAUSE ALL MONEY TO WHICH PLAINTIFF HAD A VALID CLAIM HAD BEEN PAID TO IT IN APRIL 2010, THREE (3) YEARS PRIOR TO THE FILING OF THE SUIT AND SIX (6) YEARS PRIOR TO TRIAL. [ISSUES 1-10]

In rendering the initial Order on May 19, 2017 [R.,pp.7-17], as well as the amended or revised Order on November 2, 2017 [R.,pp.1-6], the Lower Court made the finding that is supported by the evidence that Plaintiff's claim of conversion is

solely founded upon its interest in fees per the fee split agreement. This finding compels the Court to consider and give credit to Fredman against the \$15,802.87 which is EPS' share (15%) of \$105,352.50 and to find that no conversion of money occurred or, if one did occur as to the money, it was only a conversion of approximately eleven (11) days maximum in the amount of \$7,611.74, not the \$15,802,87. The evidence clearly shows that any money considered converted on 04/09/2010 had been returned to EPS prior to 04/20/2010 thus barring EPS from claiming and/or recovering money again as damages in an action filed three (3) years later.

Although there does not appear to be any South Carolina cases addressing the issue of damages recoverable when converted property is returned to the rightful owner prior to trial, general encyclopedic law and the laws of numerous other jurisdictions clearly establish that damages are reduced or mitigated by the value of the converted property or other similar property if returned or recovered by the owner prior to trial.

Restatement (Second) of Torts §922(1) (Return or Tender of Return of Converted Chattel) states:

“The amount of damages for the conversion of a chattel is diminished by its recovery or acceptance by a person entitled to its possession.”

Comment b for this section states, in pertinent part:

“When a chattel has been converted and the person entitled to its possession recovers it, whether by legal process or by self-help, or when the converter tenders its return and the return is accepted, the damages recoverable for the conversion are diminished to the extent of the value of the chattel at the time of its recovery or return.”

The most factual and on point case that Defendants have found is **Nance v. Miami Sand & Gravel, LLC**, 825 N.E.2d 826 (Ind. Ct. App. 2005) which holds that where converted property is returned, damages for the deprivation of the use of the property may be measured by the fair rental value for the period of conversion; the equivalent of fair rental value where money is concerned would be interest. In that case, the Court ruled that proper measure of damages for gravel pit owners' conversion of \$524.00, which owners were supposed to give directly to mining company but which they instead deposited into bank account, was not \$524.00 but rather was the interest which accrued during the conversion, as money was returned to mining company seven (7) days after it was deposited into the bank account. Other cases with consistent holdings are: **Brown v. Campbell**, 536 So.2d 920 (Ala. Sup. Ct. 1988); **Garcia v. Rutledge**, 644 S.W.2d 307 (Tex. Ct. App. 1982); **Lamb v. Salvage Disposal Co. of Georgia**, 244 Ga. App. 193, 535 S.E.2d 258 (Ga. Ct. App. 2000); **Campbell v. Bausch**, 195 Ga. App. 791, 395 S.E.2d 267 (Ga. Ct. App. 1990); **Colby v. Reed**, 99 U.S. 560, 25 L. Ed. 484 (1879); **Smith v. Cahill**, 182 So.3d 557 (Ala. Civ. App. 2014); **Kitchens v. Turquoise Properties Gulf, Inc.**, 70 So.3d 377 (Ala. Civ. App. 2010); **4WD Parts Ctr., Inc. v. Mackendrick**, 260 Ga. App. 340, 579 S.E.2d 772 (2003); **Alexander v. Link's Landing, Inc.**, 814 S.W.2d 614 (Mo. Ct. App. 1991)

In this case, any money converted was returned or paid to EPS on or before 04/20/2010. Since money value was paid there is no diminution in value between 04/09/2010 and 04/20/2010, so \$15,302.87 should not have been considered any

part of the Plaintiff's damages at trial which could be awarded by judgment; however, the Trial Court did not consider the facts or the law and awarded the judgment for the monies that had already been recovered three and a half (3½) years before trial. Clearly then, the Lower Court Order is in error and cannot be sustained.

The Court also clearly erred in finding that Fredman and Clemson-EPS Advisors converted personal property of a value of \$6,300.00, when the only evidence of value of the property on the date of the conversion (04/20/2010) was that offered through the testimony of Dameron, Plaintiff's own witness, that it was \$2,500.00. **[R., p.108, II.1-11]**

The Court further erred and abused its discretion in failing to find that EPS' (Dameron's) act of sending the no trespass letter and its failure to make any effort whatsoever to retrieve the personal items, together with Fredman and Clemson-EPS Advisors having adequately stored and protected those items to this very day and the items are still available for EPS to pick up, excuses the retention of those items by Fredman **[Def. Exh. #2: R.,p.341; R., p.118, I.16 - p.119, I.23; p.124, II.10-25; p.130, I.10 - p.131, I.12; p.194, I.7 - p.196, I.8] (Moon v. Jordan, 301 S.C. 161, 390 S.E.2d 488 (Ct. App. 1990))**

Addressing first the alleged conversion of the money, the Trial Judge's Order clearly holds that EPS' only proprietary right to any money stems from its entitlement pursuant to its agreement with Fredman to split fees earned by Fredman over the entire course of their business affiliation, to-wit: October 2008 through March 31, 2010. The Court correctly acknowledged that the agreement initially

started with a 50/50 split of fees in 2008 but migrated to 80/20 split in or about October 2009, then to 85/15 split in January 2010. In order to determine whether any monies were converted by Fredman in April 2010, the split of the fees for the entire period of the business relationship is required to be considered and, if EPS received in a reasonable timely fashion all monies to which it had a proprietary interest pursuant to the agreement from October 2008 through March 31, 2010, no conversion occurred.

Conversion is the unauthorized assumption and exercise of the right of ownership over the goods or chattels belonging to another to an alteration of the condition or the exclusion of the owner's rights. To prevail upon a claim of conversion, the burden is on the Plaintiff to show an alleged unauthorized retention of property after demand and either title or right to possession of the property at the time of the conversion. [**Moore v. Benson, 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010); Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007)**]

In this case, the Court held that the \$105,352.50 was paid to Fredman by Schwab on 04/09/2010, 15% of which or \$15,802.87 belonged to EPS. In other words, the portion (85%) of those funds to which Fredman was entitled were not converted. The Court, however, lost sight of the unrefuted facts and refused to consider and completely ignored EPS' receipt of \$3,485.00 directly from Schwab on or about the same date (April 9) of which 85% or \$2,962.25 belonged to Fredman. In other words, on 04/09/2010, EPS received directly from Schwab \$2,962.25 that belonged to Fredman. That fact alone establishes that Fredman never had in his possession at any time \$15,802.87 that belonged to EPS pursuant to the fee split

agreement for the first quarter of 2010. Fredman was entitled to 85% or \$92,511.87 of the total fees earned for the quarter which, as discussed in the Statement of Facts, was \$108,837.50, not \$105,532.50; therefore, that alone establishes that of the \$105,532.50 received by him, \$92,511.87 was his. Deducting that amount from the total funds that he received conclusively proves that only \$12,840.63 belonged to EPS, not \$15,802.87 (\$105,352.50 received by Fredman less \$92,511.87 which was Fredman's share of the total fees for the quarter). That alone renders the Lower Court's Order defective and requires reversal or, at least, modification without any other errors being considered as discussed below.

The evidence also clearly proves that EPS owed Fredman the sum of \$6,345.00 for the balance of his share of fees for the last quarter of 2009 that was not paid to him by EPS. As reviewed in the Statement of Facts, Fredman testified, and Dameron admitted, that prior to 04/20/2010, Fredman gave him an accounting showing that with his payment to Dameron (EPS) of the \$7,611.64 all of the money due EPS from the fee split agreement was in the possession of EPS. Dameron did not refute that claim and, in fact, testified consistent with and in support of Fredman's claim. He admitted that EPS could have very well owed Fredman the money and that EPS had all the money it was due when Fredman paid him the \$7,611.64 prior to his demand letter dated 04/20/2010. **[PI. Exh. #5: R.,pp.312-315]** Fredman testified how he computed the fees still owed to him from 12/31/2009. **[Def. Exh. #1: R.,pp.321-340; Def. Exh. #5: R.,p.440; R., p.182, l.1- p.192, l.5]** Dameron agreed with Fredman **[R., p.139, l.1 - p.145, l.21]** that the computation of the fees due to Fredman shown on Defense Exhibit #5 as of 12/31/2009 was

accurate based upon the fee split agreement, the check written to Fredman on 01/12/2010 [PI. Exh. #3: R.,p.309] and a statement showing fees earned for the last quarter of 2009 that was furnished to Fredman by EPS. [Def. Exh. #1: R.,pp.321-340] Although Dameron did not concede the math of Fredman's computation [Def. Exh. #5: R.,p.440], he clearly testified that the method of computation of the money owed to Fredman for the quarter ended 12/31/2009 was correct based on the documents of EPS, all of which were in evidence, and agreed that, if the math of the computation was correct, the books were balanced. [R., p.138, l.17 - p.145, l.21] There was absolutely no testimony or evidence offered by Plaintiff to contradict or bring into question Fredman's accounting [Def. Exh. #5: R.,p.440]. It was, therefore, incumbent upon the Court to follow the computation and testimony of Fredman or, if it did not wish to accept Fredman's testimony on its face, do its own computation using the evidence of record to determine whether the money was, in fact, owed to Fredman as claimed. If it had done so it would have discovered that the method of computation was correct with one small exception. In the computation [Def. Exh. #5: R.,p.440], Fredman claimed credit for the entire \$3,485.00 paid by Schwab directly to EPS for the twenty (20) or so clients that were not switched over by 03/31/2010 against the \$15,302.87 rather than 85% of that number or \$2,962.25 but, even with the correction, the computation still conclusively showed that when Fredman gave Dameron the check in the amount of \$7,674.11, any and all entitlements of EPS to funds from the fee split relationship of EPS and Fredman was in the hands of EPS and any period of conversion which may have

occurred ended. Again, the check to Fredman from Schwab was dated 04/09/2010 and, although there is no testimony as to the exact date that the \$7,674.11 was paid to Dameron (EPS), in his 30(b)(6) deposition, Dameron admitted that he received it before 04/20/2010. **[Def. Exh. #4: R.,p.380, ll.18-25; p.382, ll.3-10]** Based upon this uncontested and uncontroverted evidence, the longest period of any conversion of money that may have occurred lasted only ten (10) or eleven (11) days (04/09/2010 through 04/20/2010) and EPS was not entitled to judgment for the \$15,302.87. There is no evidence whatsoever to show that any entitlement to any money from the fee split agreement was retained by Fredman for any other period of time and, given the method and manner of the dealings of the parties, especially Dameron's refusal in January 2012 to pay Fredman all of his fees for the quarter ended 12/31/2009 and withholding the check for the portion of the fees that he did pay him for a period of eleven (11) days, no conversion should have been found. Even if it is considered that a ten (10) or eleven (11) day conversion of \$7,674.11 did occur, the conversion ceased at the latest on 04/20/2010 and the Court had no period of time after that date upon which to impose pre-judgment interest or to find that Fredman's conversion of the money continued entitling EPS to judgment for \$15,302.87. To hold otherwise effectively grants to EPS a double recovery.

II. THE TRIAL JUDGE'S FINDINGS RELATED TO THE CONVERSION OF THE PERSONAL PROPERTY WERE NOT SUPPORTED BY THE EVIDENCE BECAUSE THE VALUE OF THE PROPERTY WAS ONLY \$2,500.00 ON DATE OF CONVERSION, NOT \$6,300.00, AND THE ACTS OF THE PLAINTIFF PREVENTED FREDMAN FROM RETURNING THE PROPERTY. [ISSUES 11-14]

As for the issue of the conversion of the personal property, the evidence clearly does not support the finding of \$6,300.00 as being the value of any conversion which arguably could have occurred on 04/20/2010. As previously stated, the no trespass letter [Def. Exh. #2: R.,pp.341] prevented or substantially interfered with Fredman returning the property to EPS and EPS made no attempt to retrieve it. Fredman stored the property in a temperature controlled building, has not used it and has maintained it in the shape or condition it was in as of 04/20/2010 as he had a duty to do. Therefore, the evidence cries out that no conversion as to personal property should be found but, again, it renders the Lower Court Order in error requiring that the Order be reversed and/or modified to reduce the value of the property from \$6,300.00 to \$2,500.00.

III. THE AWARD OF PUNITIVE DAMAGES ARE NOT WARRANTED UNDER THE FACTS OF THIS CASE NOR THE GAMBLE FACTORS. [ISSUES 15-16]

Lastly, it is respectfully submitted that under the facts of this case punitive damages are not warranted and that the Trial Judge abused his discretion in awarding them.

The evidence clearly shows that Fredman's acts were not egregious nor in utter disregard of the Plaintiff's rights. He moved his clients to Clemson-EPS Advisors, LLC, which resulted in Schwab sending money to him that would have

otherwise been paid to EPS, but he then disbursed the money as EPS would have had to do even if it had received it. There was never a non-compete agreement and Dameron testified that Fredman had a right to leave at any time and take his clients with him. Within days after Fredman received the money, he settled up with EPS by paying Dameron \$7,611.64 which resulted in EPS receiving more than its entitlement of \$15,802.87. He did not return the personal property due to Dameron's no trespass letter, and he properly stored and protected the property as he had a duty to do. The property is still in the condition it was in on 04/20/2010 and remains protected. If Dameron (EPS) wishes to come and pick it up, he may do so at any time. Fredman has never told Dameron (EPS) that he could not have the property and Dameron has never called to arrange to come and get it. Neither has he ever showed up at Fredman's office demanding possession of the items. The only thing that Dameron did was send the demand letter. Dameron also stated that he had no use for the property now and the Trustee in Bankruptcy has never demanded its return or attempted to retrieve it.

In regards to the punitive damages award, it is submitted that the facts do not support the Trial Judge's findings per the factors enumerated in the Gamble case. Prior to moving his clients from EPS to Clemson-EPS Advisors, LLC, Fredman tried on numerous occasions to discuss with Dameron problems and questions he had with his business affiliation with EPS. Through no fault of his, Dameron was not responsive and would not talk with him and even cancelled scheduled meetings with him at the last minute without explanation. This caused Fredman to become concerned for his clients and his professional future. Clearly, he was justified in

moving his clients from EPS to Clemson-EPS Advisors, LLC, out of his concern for and his personal relationships with his clients whom he had brought to EPS and most of whom he had advised for many, many years. There is no evidence that he moved them to deny EPS anything to which it was legally entitled. All he did was do what he had a right to do and caused disbursement of the fees to be reversed -that is, he received fees and paid EPS rather than EPS receiving the fees and paying him. Either way, with the funds in the hands of Fredman or EPS, fees of the parties were merely temporarily in the hands of the other in a pass through situation which occurred within a reasonable time after being received from Schwab. There is no evidence whatsoever to indicate that Fredman did anything with the intention to steal money from EPS or cause it harm in any way. There is no evidence on any one of the factors enumerated in the **Gamble** case which would put punitive damages in play. The duration of any conversion was, at most, eleven (11) days. Fredman did not intentionally conceal his actions from EPS (Dameron) as he tried numerous times to talk with him and Dameron, for various reasons, would not grant him an audience. There is no evidence of any kind of similar past conduct or similar wrongdoing on the part of Fredman and there is no showing that the award of punitive damages would necessarily deter anyone from like conduct in the future. Dameron was angered initially but, as he said, he did not want to prosecute the case and even attempted to fire EPS' lawyer only to be told that he could not do so. [R., p.149, l.16 - p.150, l.10] Considering the manner and course of dealing between the parties and the failure of EPS to live up to its financial promises to Fredman, there is no reason to believe that this would ever occur again. The

actions of Fredman in paying to EPS the money it was due within a few days after he received it from Schwab and the facts concerning Fredman's reaction to the furniture items certainly shows good faith on Fredman's part and negates any suggestion of evil motives or intent warranting punitive damages. There is no basis therefor to punish Fredman by an award of punitive damages in any amount. Accordingly, that part of the Order requires complete reversal.

CONCLUSION

Defendants respectfully submit that the Order of the Lower Court Trial Judge cannot be sustained. No conversion of money or property under the facts of this case should be deemed to have occurred but, even if it is considered that a conversion of money in some amount occurred, it would have ceased within a period of about ten (10) or eleven (11) days and any damages would have to be reduced accordingly.

The purpose of any rule of law is to do justice to all parties before the Court, not to unjustly enrich one party at the expense of another or effect absurd and totally unjust results. To sustain the Lower Court Order granting judgment against the Defendants, Fredman and Clemson-EPS, Advisors, LLC, for \$15,802.87 when Plaintiff, EPS, had that entire amount in its possession and control on 04/20/2010 would do just that. The judgment, if sustained, would allow the Plaintiff to collect twice the amount it was due per the fee split agreement of the parties, plus retain the benefit of Fredman's money. Instead of Plaintiff getting \$15,802.87 or 15% of the fees paid by Schwab to Fredman, Plaintiff would get \$31,605.74 or 30%. In essence, the Order, if sustained as is, would bestow a total recovery upon EPS of

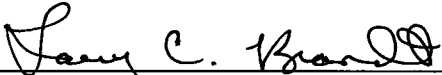
\$31,605.74, not just the \$15,802.87. Then adding pre-judgment interest on \$15,802.87 would further advance the absurdity and unjust enrichment of EPS by requiring Fredman to pay interest on his own money, to-wit: \$2,962.25 that was paid directly by Schwab to EPS, the money that was owed to Fredman by EPS in the amount of \$6,345.00 and the \$7,674.11 which Fredman paid to Dameron for the period of 04/09/2010 to date of trial. In essence, it requires Fredman to give EPS money for EPS' use and then pay EPS to use it. Surely, such an Order should not be allowed to stand.

Defendant's Exhibit #5 [R.,p.440], the testimony of Fredman [R., p.182, l.1 - p.192, l.5] and the testimony of Dameron [R., p.139, l.1 - p.145, l.21; p.153, l.16 - p.158, l.4] clearly shows that \$15,802.87 is not a correct number that Fredman could have converted and that sometime between 04/09/2010 and 04/20/2010, any perceived conversion of any money belonging to EPS ceased. Although it is admitted that Defendant's Exhibit #5 is in error in the amount of \$522.75 (15%) that EPS was entitled to of the money that was sent by Schwab directly to EPS for the twenty (20) or so clients of Fredman that had not been transferred over by 03/31/2010, Defendants' Exhibit #5 is inaccurate in only one particular -i.e., Fredman should be credited for only \$2,962.25 against the \$15,802.87, not the entire \$3,485.00. Notwithstanding this error, however, the evidence still clearly and unequivocally shows that EPS had all the money to which it was entitled in its hands by 04/20/2010 and that Fredman had nothing after that date belonging to EPS. In fact, EPS still has \$1,178.49 that belongs to Fredman, more than enough to compensate it for any interest on an eleven (11) day conversion of the entire

\$15,802.87 as erroneously determined by the Court ($\$15,802.87 \times .0875 = \$1,382.75$ per year $\div 365$ days = $\$3.79$ per day $\times 11$ days = $\$41.67$ total interest for an 11 day period of conversion). Clearly, the only money belonging to EPS that Fredman ever possessed for any length of time was the $\$7,674.11$ which he paid to Dameron sometime between 04/09/2010 and 04/20/2010. Interestingly, interest on that amount at the pre-judgment rate of .0875% for 11 days is only $\$20.24$.

Based on the above, it is, therefore, respectfully submitted that the Order of the Lower Court cannot be sustained and must be reversed in its entirety and judgment entered for the Defendants.

Respectfully submitted,



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June 11, 2018

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

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JUN 18 2018

SC Court of Appeals

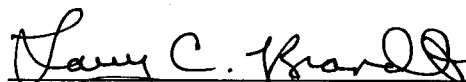
EPS Advisors, LLC Respondent/Appellant,

vs.

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

**CERTIFICATE OF COUNSEL
(Appellants/Respondents' Final Brief)**

The undersigned certifies that **APPELLANTS/RESPONDENTS' FINAL BRIEF** complies with Rule 211(b), SCACR.



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PROOF OF SERVICE
(APPELLANTS/RESPONDENTS' FINAL BRIEF)

I certify that I have served **APPELLANTS/RESPONDENTS' FINAL 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 **June 15th, 2018**, addressed as follows:

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