THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
In the Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Appeal No.: 2017-002347

EPS Advisors, LLC ..... Respondent/Appellant

v.

Jan Fredman and Clemson-EPS Advisors, LLC.....Appellant/Respondent

BRIEF OF RESPONDENT/APPELLANT

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II. STATEMENT OF THE CASE

A. Factual Background

David Dameron and Susan Lockwood were the members of Respondent/Appellant EPS Advisors, LLC (EPSA). EPSA was a financial advising company based out of Anderson, South Carolina that was comprised of stock broker services and registered investment advisor (RIA) services for investors. (**R. pp. 64-65; 85-86**). As part of their business, they contracted with individual advisors who developed and advised a client base for the joint benefit of EPSA and the advisor representative.

Clients came to EPSA with the amount of money that they wanted to invest and EPSA charged the clients a percentage of those "assets under management" as the advising fee. That fee was one percent of the assets under management and it was billed in arrears at the end of every quarter. (**R. p. 65**). In the first quarter of each year (January through March 31st), EPSA

would earn a quarter of a percent of the assets under management for a particular client and that would be billed at the beginning of April. **(Id.)** In April, EPSA would get a list of all of their accounts from the investment holding company, which in the first quarter of 2010 was Charles Schwab, and EPSA would then look at the Schwab statement, compare it against EPSA's records, and then conduct a reconciliation to ensure that their clients' accounts were billed properly. After the reconciliation, Schwab would then deposit money into EPSA's fee account for the clients EPSA had advised the previous quarter. (**R. pp. 65-66**). Then, from that fee account, EPSA would pay its individual agents/advisors, like Ms. Lockwood, Mr. Dameron and Appellant/Respondent Jan Fredman. (**R. p. 6**).

Appellant/Respondent Jan Fredman began working with EPSA in December of 2008. He had previously worked for (UBS) from August 2004 until July 2008 before being discharged by UBS. When Fredman came to EPSA, he had been on a 6 month "sabbatical" as a result of criminal charges relating to his forging a physician/UBS client's name to several prescriptions to illegally obtain Lortab. (**R. pp. 244-245**). Additionally, he had two previous professional adverse incidents before the prescription forgery where he sold stocks without consulting a client and failed to properly allocate stock holdings in a client's account, the latter of which resulted in a $220,000.00 settlement by the companies involved to the client. (**R. pp. 274-291**). Fredman admitted that when he came to EPSA as an advisor he was "damaged goods" in the financial industry. (**R. p. 249**). EPSA then used its resources and reputation to rehabilitate Fredman in the investment industry where he still works today under the name of Clemson-EPS Advisors, LLC. (**R. pp. 66, 249**). Specifically, EPSA set Fredman up in Clemson, EPSA bought furniture for the Clemson office, EPSA bought him a computer, and EPSA provided valuable and necessary "back office support," which is critical in the customer-driven financial industry. (**R. pp. 66-67**).

It is for these reasons that an advisor, who is a contractor of EPSA, doesn't directly receive the advising fee or receive the whole amount of advising fee. (**R. p. 67**). The contracts that are signed by the clients are contracts between the clients who invest their money and EPSA. The client agrees to pay EPSA the one percent a year – not the contracted advisor. (**R. pp. 67, 256-257**).

In return for EPSA's taking a risk on Fredman and rehabilitating him in the financial industry, beginning in the fall of 2009 he incorporated an LLC called Clemson-EPS Advisors under the ruse that it was going to be a collaboration between him and EPS Advisors, but he intentionally only put the business in his own name. (**R. pp. 67-68, 257-258**). Then beginning in January of 2010, he initiated contact with Schwab to set up "his own" shop to cut out EPSA and receive all of the advising fees from all the clients that EPSA developed for him. (**R. pp. 68, 258**).

Sometime in March 2010, before the end of the first quarter of 2010, Fredman started transferring, with Schwab's collaboration, all of the clients he had been advising from EPSA over to Clemson-EPS Advisors so that come April 1, Clemson-EPS Advisors would get ALL of the advising fees deposited into its account for the accounts that had been managed under EPSA for the first quarter of 2010. (**R. pp. 68-69, 260-261**).

Then, in April 2010, Fredman reported to FINRA that he was then with Clemson-EPS Advisors. (**R. p. 279**). Of course, EPSA didn't discover this until they received their end of the quarter report in April 2010 and began conducting their reconciliation. The next blow EPSA received was that when the check for EPSA's first quarter advising fees totaling $105,352.50 came in from Schwab to Clemson-EPS Advisors, Fredman and Clemson-EPS Advisors took it all and then Fredman allegedly wrote EPSA a $7,674.11 check Fredman solely decided was the

amount due to EPSA, despite the advising fees contracts being solely between the clients and EPSA[1]. **(R. pp. 68-69, 260-261)**.

Fredman had NO contracts with the individual clients for January through March 31st, 2010. Rather, those contracts were between EPS Advisors and the individual clients, but Fredman took the entirety of the commissions for those clients for the first quarter of 2010. Then, on April 20, 2010, EPSA's principal, David Dameron, wrote Fredman and Clemson-EPS a demand letter which stated in part:

> While typing this to you I got today's mail and received your check and erroneous calculations you sent to me. As I stated in my conversation to you last week, all monies for billings prior to March 31, 2010, are solely the property of EPS Advisors, LLC and only EPS' money. **I expect a return of the money and EPS Advisors' other property as described below by noon, Friday, April 23, 2010.**
>
> **Return this money and the other property that belongs to EPS Advisors to my attorney, her contact information is below.**
>
> * * *
>
> In addition to the money you misappropriated from EPS Advisors to your new firm, you must return to me EPS Advisors, LLC's furniture and equipment. Additionally, you must compensate EPS Advisors, LLC for the amount you have diminished my firm and its decreased ongoing revenue through your tortious actions.
>
> To the furniture and equipment, I demand that you return all of the equipment under title or paid for by EPS Advisors, LLC. This includes but is not limited to:
>
> 1) The computer, keyboard, mouse and monitors for both you and Ellen. (up front) You are aware that I paid Phil for these, though you bought your own server box that is in the storage room.
>
> 2) The copier. The lease is under EPS Advisors, and I have paid the vast majority of the lease costs associated with that machine. The machine (and its lease) is the property of EPS Advisors and I will not sublet it to you.

[1] Fredman never tendered a copy of this cancelled check. **(R. pp. 173-174)**

3) Furniture. This includes but is not limited to the conference room table and chairs; the desk chairs bought by EPS Advisors (I think from Staples) and the two wing-back chairs that were in the Clemson office reception area.

4) Any and all other property of EPS Advisors, INCLUDING but not limited to the client files. The files are property of EPS Advisors and are protected under the S.C. Trade Secrets' law. Therefore, I expect you will not make a copy of them or attempt in any way to surreptitious copy them in violation of South Carolina law.

* * *

Dameron ended his demand letter by specifically telling Fredman to contact Dameron's attorney and return the demanded items to her:

Do not call, email, text, come by, or otherwise make any contact or attempt to contact me. Any effort to do so, I will consider harassment and I will deal with accordingly.

From this point forward, make all contact to my attorney:

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(R. pp. 312-315)

Despite this, Fredman never contacted Dameron's attorney and has never returned the items demanded on April 20, 2010 before or after suit was filed **nor to this day**.

B. Procedural History

This case was filed on April 3, 2013. **(R. pp. 18-26)**. This matter was heard non-jury by the Honorable Perry Gravely on November 3, 2016. On May 29, 2017, the Court issued its initial Order finding "*Plaintiff is entitled to a judgment on its cause of action for conversion as follows:*

For actual damages against Defendant Fredman in the amount $8046.30 for the value for the value of the furniture, plus interest from April 20, 2010 at the prejudgment interest of 8 3/4% as provided by S.C. Code Section 34-31-10 for total interest of $4909.07 for a total actual damages of $12,955.37.

For the wrongfully held portion of the commission check, the Court finds in favor of the Plaintiff against both Defendants Fredman and Clemson-EPS for $15,802.87, plus interest of $9,641.38 for a total actual damages of $25,444.25.

With the punitive damages, the judgments against the parties will be as follows:

1) Against Defendant Jan Fredman, individually $12,955.37 actual damages.

2) Against Defendant Jan Fredman and Clemson-EPS Advisors, LLC, jointly and severally, $25,444.25 actual damages; and

3) Against Defendant Jan Fredman and Clemson-EPS Advisors, LLC, jointly and severally, punitive damages of $35,000.00.

All other relief requested by Plaintiff is hereby denied."

(R. p. 14)

Defendant thereafter filed a *Motion for Reconsideration and Amendment or Alteration of Judgment or in the Alternative for a New Trial* which was ultimately heard on October 13, 2017. **(R. pp. 41-46)**. As a result of that motion, the Court amended its Order of May 19, 2017, by reducing the value of the converted furniture and equipment claim from $8,046.30 to $6,300.00, removing the pre-judgment interest previously awarded pursuant to S.C. Code Ann. §34-31-10, and reducing the award of punitive damages from $35,000.00 to $20,000.00. **(R. pp. 1-3)**

Thereafter, Fredman and Clemson-EPS Advisors, LLC filed this appeal on November 14, 2017. **(R. pp. 53-57)**. EPSA filed its cross-appeal on December 14, 2017. **(R. pp. 58-63)**.

III. ARGUMENTS

A. THE COURT ERRED IN FAILING TO AWARD PLAINTIFF THE FULL AMOUNT OF THE $105,352.50 OF FUNDS WRONGFULLY CONVERTED BY DEFENDANTS BECAUSE DEFENDANTS WERE NOT ENTITLED TO *ANY* COMPENSATION FOR SERVICES PERFORMED DURING THE FIRST QUARTER OF 2010 BECAUSE THEY ENGAGED IN ACTIVITIES CONSTITUTING A BREACH OF THE DUTY OF LOYALTY PURSUANT TO FUTCH V. MCALLISTER TOWING OF GEORGETOWN, *INC.*, 335 S.C. 598 (1999).

"In deciding whether an agent or employee acted disloyally, the [Court] must focus upon the particular circumstances of the case. The goal is to avoid the unjust enrichment of either party by examining factors such as the nature of the employment relationship, the nature and extent of the employee's services and the breach of duty, the loss or expense caused to the employer by the breach of duty, and the value to the employer of the services properly rendered by the employee. *See* Hartford Elevator, Inc. v. Lauer, 94 Wis.2d 571, 289 N.W.2d 280, 287 (1980) (refusing to adopt rigid rule requiring forfeiture of all compensation during disloyalty; instead the court must focus upon the particular circumstances of a case); *accord* Jet Courier Serv., Inc. v. Mulei, 771 P.2d 486, 497 (Colo. 1989) (in deciding whether employee impermissibly solicited his co-employees, consider factors such as the nature of the employment relationship, the impact or potential impact of the employee's actions on the employer's operations, and the benefit received by the employer during the period of disloyalty)." Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 609 (1999). However, "[s]olicitation of an employer's customers likely will constitute a violation of the duty of loyalty in almost every case while merely preparing and submitting forms to create a new corporation, for example, likely will be seen as permissible pretermination planning. *See* Jet Courier Service, 771 P.2d at 493; Auxton Computer Enterprises, Inc. v. Parker, 174 N.J.Super. 418, 416 A.2d 952, 955 (1980) (employee, while still employed, may make arrangements to go to work for a competitor or establish his own business in

competition with his employer, **but he may not solicit his employer's customers for his own benefit before he has terminated his employment**)." Id at 609-610 (Emphasis added).

Fredman, by his own admissions, and his registration report with FINRA, asserted that he did not terminate his relationship with EPSA until the end of March 2010. Further, at no time did Fredman tell EPSA or its managing partner that he was competing against EPSA or registering his own firm under Clemson-EPS Advisors. (**R. pp. 103, 113-114, 160**). For Fredman to have been registered with FINRA as his own firm AND registered under EPSA, it would've required the consent of both firms – something which Fredman had not gotten from EPSA. (**R. pp. 161-162**). Furthermore, though Fredman argued the customers he solicited for his own benefit from EPSA while he was still registered with EPSA were "his" clients, when Fredman came to EPSA, he was unregistered an on a "sabbatical." (**Tr. p. 181**) Furthermore, Fredman admitted that the contracts of those clients were solely between the client and EPSA. (**R. pp. 79-80, 256-257**).

However, the Court erroneously found that "under the agreement between the parties which had been entered into in January, 2010, Plaintiff was only entitled to retain 15% of the commissions, with the balance, 85%, going to Fredman. Therefore, Defendants wrongfully withheld EPS Advisors' 15% or $15,802.87." Despite arguing that under Futch v. Mcallister Towing of Georgetown, Inc., 335 S.C. 598 (1999) Fredman and Clemson-EPS Advisors, LLC was not entitled to *any* commissions, the Court erred in failing to make any analysis of the the impact or potential impact of Fredman's actions on EPSA's operations, and the benefit received by EPSA during the period of disloyalty. Id. at 609. The Court also failed to consider that "[s]olicitation of an employer's customers likely will constitute a violation of the duty of loyalty in almost every case. Id at 609-610. Finally, the Court failed to apply the principle that under

Futch, Fredman was *per se* disloyal by because he solicited EPSA customers for his own benefit before he had terminated his relationship with EPSA. Id at 610.

For these reasons, the Court erred in finding that Fredman only converted $15,802.87 of EPSA's first quarter 2010 billings when a) Fredman and Clemson-EPS Advisors, LLC had no legal entitlement to any of the billings pursuant to the contracts between the clients and EPSA; and b) was not entitled to any commissions for the quarter due to his disloyalty under the precedent of Futch v. Mcallister Towing of Georgetown, Inc., 335 S.C. 598 (1999). As such, the Court erred and should have found the amount converted by Fredman and Clemson-EPS Advisors, LLC was the entire $105,352.50 of the first quarter 2010 billings.

B. THE COURT ERRED IN SETTING OFF THE FUNDS CONVERTED BY DEFENDANTS FOR FREDMAN'S 85% "COMMISSION" WHEN DEFENDANTS NEVER FILED AN AFFIRMATIVE DEFENSE OR COUNTERCLAIM OF SET-OFF AND ACCOUNTING AND NEVER MOVED TO AMEND THEIR ANSWER TO ASSERT SET-OFF OR ACCOUNTING.

EPSA Moved *in limine* at the beginning of the trial when Fredman and Clemson-EPS argued in their opening statement to the Court about monies allegedly owed to Fredman because in the Answer they had pled no counterclaims nor any affirmative defenses. **(R. pp. 27-34, 71)** Despite this, the Court found that EPSA would need to object at the time of the testimony that Defendants tried to enter – something EPSA's counsel did *repeatedly* throughout the trial. **(R. pp. 72, 140, 143-144, 151-154, 170)**. Though a motion to amend is addressed to the discretion of the trial judge Appellant/Respondent **never** made a Motion under SCRCP 15 before, during, or after the trial to amend their Answer to add causes of action or affirmative defenses, including accounting and/or setoff. Collins Entm't, Inc. v. White, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005). Furthermore, neither Fredman nor Clemson-EPS Advisors, LLC sought to amend their Answer to conform to the evidence (if any) of accounting or set-off. Further, as the

repeated objections by EPSA's counsel show, the issue clearly was not tried by consent of the parties. Finally, "[t]he failure to plead an affirmative defense is deemed a waiver of the right to assert it." Collins Entm't, Inc. v. White, 363 S.C. 546, 563, 611 S.E.2d 262, 270 (Ct. App. 2005) *quoting* Adams v. B & D, Inc., 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989).

As such, the Court erred in finding that Fredman and Clemson-EPS Advisors, LLC only converted $15,802.87 of EPSA's first quarter 2010 billings because Fredman and Clemson-EPS Advisors, LLC were not entitled to any setoffs or accounting for commissions for that quarter or previous quarters and Fredman and Clemson-EPS Advisors, LLC had no other legal entitlement to those billings for the first quarter of 2010. As such, the Court erred and should have found the amount converted by Fredman and Clemson-EPS Advisors, LLC was the entire $105,352.50 of the first quarter 2010 billings.

C. THE COURT ERRED IN REDUCING THE AMOUNT OF PUNITIVE DAMAGES FROM $35,000.00 TO $20,000.00 AS THE AMOUNT OF PUNITIVE DAMAGES WAS REASONABLE AND NOT EVEN TWO TIMES THE AMOUNT OF THE REVISED ACTUAL DAMAGES.

"In South Carolina, "punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future." Laird v. Nationwide Ins. Co., 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964). Moreover, they serve "as a vindication of private rights when it is proved that such have been wantonly, willfully or maliciously violated." Harris v. Burnside, 261 S.C. 190, 196, 199 S.E.2d 65, 68 (1973). Lastly, punitive damages may be awarded only upon a finding of actual damages. Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965)." Gamble v. Stevenson, 305 S.C. 104, 110–11, 406 S.E.2d 350, 354 (1991)

The trial Court found that the Appellants/Respondents' conduct "was 'reckless . . . with the conscious indifference to the rights' of the Plaintiff and therefore the Plaintiff is entitled to punitive damages for its conversion cause of action." **(R. p. 13)**

The trial Court then went on to note the Gamble factors of "(1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) any other factors deemed appropriate." **(Id.** *citing* Gamble v. Stevenson, 305 S.C. 104, 111–12, 406 S.E.2d 350, 354 (1991)). After doing so, the Court found "[i]n consideration of these factors and the testimony presented, the Court finds that punitive damages in the amount of $35,000.00 are appropriate."

Upon reconsideration, the Court did not explain in any way how the removal of pre-judgment interest from the personal property converted and the cost of the copier impacted those 8 factors in such a way as to cause the Court to reduce punitive damages by $15,000.00. **(R. pp. 8-9)**. None of those items impacted the 8 factors in Gamble. Further, the revised actual damage award was reduced to $31,744.25 and punitive damages of $35,000.00 is barely more than 1 times the amount of the actual award damage. Therefore, it remains a single digit multiplier that does not arise to an equal protection violation. State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408 (2003).

As such, the reduction of the punitive damages award from $35,000.00 to $20,000.00 was in error and should be reversed.

D. CONCLUSION

For the reasons set forth above, the court erred in failing to award plaintiff the full amount of the $105,352.50 of funds wrongfully converted by Defendants because Defendants were not entitled to *any* compensation for services performed during the first quarter of 2010 because they engaged in activities constituting a breach of the duty of loyalty pursuant to Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 608 (1999), in setting off the funds converted by Defendants for Fredman's 85% "commission" when Defendants never filed an affirmative defense or counterclaim of set-off and accounting and never moved to amend their answer to assert set-off or accounting, and finally in reducing the amount of punitive damages from $35,000.00 to $20,000.00. As such, these holdings of the lower Court should be REVERSED.

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The undersigned attorney for Respondent/Appellant hereby certifies that that this final brief(s) complies with Rule 211(b).

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