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

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RESPONSE 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. 66)**.

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. 282-283, 289)**. 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. 6, 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 even receive the whole amount of the 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 only 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; R. pp. 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 the check for EPSA's first quarter advising fees totaling $105,352.50 came in from Schwab and was sent directly to Clemson-EPS Advisors because Fredman had changed the clients over to his new firm (Clemson-EPS Advisors) before the end of March 2010. (**R. pp. 68-**

69, 260-261). In doing so, Fredman and Clemson-EPS Advisors took all the Commissions for those clients, including commissions owed to EPSA in arrears. **(Id.)** Then, Fredman unilaterally decided what he would toss EPSA's way. Fredman alleged he sent EPSA a $7,674.11 check, despite the advising fees contracts being solely between the clients and EPSA[1]. **(R. pp. 68-69, 260-261)**. At trial, Fredman first said he wrote the check individually to David Dameron. **(R. p. 82)**. Then, he said he "couldn't tell" whether he wrote it to Dameron or EPSA. **(R. p. 83)**. Regardless, Fredman NEVER produced at trial a copy of this cancelled check. **(R. pp. 173-175)**. Instead, he merely said he would have to "check [his] records" or "check [his] bank." **(R. pp. 83)**.

Specifically, Fredman had NO contracts with the individual clients for January through March 31st, 2010 whose advising fees he converted. Rather, those contracts were between EPS Advisors and the individual clients. Despite this, Fredman received 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.

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 <u>specifically</u> 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. <u>Any</u> 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**. Fredman was never *prevented* from returning those items. Rather, he was instructed to communicate with and return items to Plaintiff's attorney. (**Id.**)

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. 1-6)**

Thereafter, Fredman and Clemson-EPS Advisors, LLC filed this appeal on November 9, 2017. **(R. pp. 53-57)**. EPSA filed its cross-appeal on December 4, 2017. **(R. p. 59-61)** While Appellants cite sixteen (16) issues on appeal, they whittle their arguments down to three.

III. ARGUMENTS

A. APPELLANTS WAIVED THEIR RIGHT TO ASSERT CLAIMS TO "MITIGATE OR REDUCE" RESPONDENT'S DAMAGES BY FAILING TO ASSERT THESE CLAIMS IN ANY PLEADING, AND, FURTHER BY FAILING TO MOVE AT ANY TIME BEFORE, DURING OR AFTER TRIAL TO AMEND SAID PLEADINGS TO ASSERT SAID DEFENSE.

Appellants first assert that their first argument that "all money to which Plaintiff had a valid claim had been paid to it in April 2010 ..." covers issues one through ten of their Issues on Appeal.

EPSA Moved *in limine* at the beginning of the trial when Fredman and Clemson-EPS argued in their opening statement to the Court about Defendants assertion of claims or defenses pertaining to monies allegedly owed to Fredman because in the Answer they had pled no counterclaims nor any affirmative defenses. **(R. p. 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, 150-152, 154, and 170).**

Though Appellants now recharacterize what in their Amended Motion for Reconsideration they called "credits or setoffs for monies previously owed by Plaintiff to Defendants" as "mitigat[ion] and reduc[tion]," this does not save their claims. Clearly, whether it is accounting, accord and satisfaction or mitigation, it is an affirmative defense that should have been pled by Appellants.

In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality, injury by fellow servant, laches, license, misrepresentation, mistake, payment, plene administravit or the administration of the estate is closed, recrimination, release, res judicata, statute of frauds, statute of limitations, waiver, ***and any other matter constituting an avoidance or affirmative defense.***

SCRCP 8(c)

> Although Rule 8(c) of the South Carolina Rules of Civil Procedure does not specifically list mitigation of damages as an affirmative defense, it requires the defendant to affirmatively set forth in addition to the listed defenses "any other matter constituting an avoidance or affirmative defense."
>
> Under our former code pleading, the South Carolina Supreme Court recognized mitigation of damages must be pleaded and proved by the party asserting it. White v. Metcalf, 174 S.C. 350, 356, 177 S.E. 371, 374 (1934). More recently, our courts have recognized the burden of proof lies on the party asserting mitigation. *See* Sloan Constr. Co. v. Southco Grassing, Inc., Op. No. 27061 (S.C. Sup.Ct. filed Oct. 31, 2011) (Shearouse Adv. Sh. No. 38 at 32, 40) ("The defendant has the burden of establishing the plaintiff's lack of due diligence in mitigating damages."); Moore v. Moore, 360 S.C. 241, 262, 599 S.E.2d 467, 478 (Ct. App.2004) (stating the party who claims damages should have been minimized has the burden of proving they could reasonably have been avoided or reduced); *cf.* Youmans v. S.C. Dep't of Transp., 380 S.C. 263, 281–82, 670 S.E.2d 1, 10 (Ct. App. 2008) (stating defendant asserting an affirmative defense bears the burden of its proof). Generally, the failure to plead an affirmative defense constitutes a waiver of that defense. Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 615, 703 S.E.2d 221, 224 (2010). A party cannot benefit from an affirmative defense that was never pleaded. *Id.* at 616, 703 S.E .2d at 225.

Creative Commc'n Servs., Inc. v. Travelers Prop. & Cas. Co. of Am., No. 2011-UP-525, 2011 WL 11735816, at *1 (S.C. Ct. App. Dec. 5, 2011)

Additionally, there was no request for amendment to the pleadings made to the trial court before, during or subsequent to trial, to add causes of action or affirmative defenses, including accounting and/or setoff. Neither Fredman nor Clemson-EPS Advisors, LLC sought to amend their Answer to conform to the evidence (if any) of the presentation of these issues to the trial court despite Respondent's repeated objections. Finally, as the repeated objections by EPSA's counsel show, the issue clearly was not tried by consent of the parties.

As such, Appellants' "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 a result, Fredman and Clemson-EPS Advisors, LLC were ***not*** and ***are not*** entitled to any reduction or mitigation for commissions allegedly owed to Fredman and/or Clemson-EPS Advisors, LLC for the January-March 2010 quarter, previous quarters, or any other amounts allegedly owed to Fredman and/or Clemson-EPS Advisors, LLC.

B. THE COURT'S DETERMINATION OF THE VALUE OF $6,300.00 FOR THE FURNITURE AND COMPUTERS APPELLANTS REFUSED TO AND NEVER RETURNED AS OF THE DATE OF TRIAL WAS SUPPORTED BY THE EVIDENCE AS THERE WAS NO EVIDENCE APPELLANTS MADE ANY EFFORT TO RETURN SAID PROPERTY DESPITE RESPONDENT'S CLEAR AND UNEQUIVOCABLE DEMAND FOR THE SAME TO BE RETURNED TO HIS COUNSEL (WHO DIDN'T HAVE APPELLANTS ON TRESPASS NOTICE), AS WELL AS THERE WAS NO EVIDENCE THAT APPELLANT WAS PREVENTED FROM RETURNING SAID PROPERTY BY RESPONDENTS.

Appellant's assertion that the furniture and equipment that Appellants failed to ever attempt to return were improperly valued by the Court at $6,300.00 is without merit as the same was wholly supported by the evidence. Specifically, Ms. Lockwood knowledgeably and

unequivocably testified from her review of the Respondent's QuickBooks entries that the computers were purchased for $2,500.00, the furniture was purchased for $3,800.00, and the Printer was $1,700.00. **(R. pp. 165-166)**. Mr. Dameron testified that the items were used when purchased in mid-2009, except maybe for one of the two computers, and the conversion took place less than a year later at the beginning of April 2010. **(R. pp. 106-107)**. Appellants seem to solely rely on Dameron's speculative testimony that:

> A. Okay. I don't remember for sure, because I don't remember -- the number I wanted to answer your question with was like twenty-five hundred ($2,500) dollars.
>
> And I can't remember if that was because it was later and it was used stuff or if it was because I'd put pencil to paper at that time.
>
> Q. Would the QuickBooks records be the best record of what those amounts actually were at the time they were purchased?
>
> A. Likely. My caveat there was depending on if I bought just that by that transaction or other stuff too.

(R. p. 108)

However, Ms. Lockwood looked at the actual numbers and testified from those rather than what she "couldn't remember" five and a half years later. **(R. pp. 165-166)**

Further, by finding there was actually conversion of these items, the Court implicitly found there was no actions by Respondent that *prevented* Appellant from returning the items. The sole piece of evidence Appellant seems to rely upon for that proposition is the letter from Dameron to Fredman on April 20, 2010. **(R. pp. 312-315).** 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.
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> 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 or even attempted to return the items demanded on April 20, 2010 to Dameron's attorney before or after suit was filed **nor to this day**. Fredman was never *prevented* from returning those items. Rather, he was simply instructed to communicate with and return items to Respondent's attorney. (**Id.**)

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. Auto Owners Insurance Co. v. Rhodes, 405 S.C. 584 (2013); Alexander's Land Co. v. M&M&K Corp., 390 S.C. 582 (2010). In this case, Appellants have no support for their argument that the Court was without evidence that reasonably supported the Court's valuation of

the converted property or that Appellants were prevented from returning the furniture or computers to Respondent.

C. PUNITIVE DAMAGES WERE CLEARLY WARRANTED IN THIS CASE

"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 … are appropriate." (**R. pp. 2-3, 13**) While Respondent asserts that the Court reduction of the award

from $35,000.00 to $20,000.00 was in error, the award of punitive damages in general was not inappropriate. (**Appeal brief of Respondent/Appellant, pp.10-11; R. pp. 2-3**)

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. Auto Owners Insurance Co. v. Rhodes, 405 S.C. 584 (2013); Alexander's Land Co. v. M&M&K Corp., 390 S.C. 582 (2010). As such, the Court made factual finding about the Gamble factors and that Appellants' behavior was "reckless" and "in conscious disregard to [Respondent's] rights." As such, an award of punitive damages was appropriate against Appellants.

IV. CONCLUSION

For the reasons set forth above, all of Appellants' Issues on Appeal are without merit and should be dismissed.

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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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