THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington

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SC Court of Appeals

Case No. 2009-CP-10-3333

Clifford C. Hansen .....Respondent/Appellant,

v.

Fields Company, LLC; Beechwood Advisory Group, Inc.; Beechwood Development Group of South Carolina, LLC; and Beechwood Development Group, Inc.....Defendants,

Of Whom Beechwood Development Group of South Carolina, LLC is the .....Appellant/Respondent.

APPELLANT'S BRIEF OF RESPONDENT/APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

I. DID THE TRIAL COURT ERR IN GRANTING A DIRECTED VERDICT ON PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES? 1

A. Was there any evidence from which a jury could reasonably find or infer the conduct of BDG to be reckless or in reckless disregard of Hansen's rights? 1

B. Was the trial court's ruling on punitive damages is wholly inconsistent with the jury's findings, conclusions and verdict, such that it must be set aside? 1

C. Where BDG did not move for directed verdict as to Hansen's claim for punitive damages at the conclusion of his evidence, should it have been allowed to raise it for the first time at the conclusion of all the evidence? 1

II. DID THE TRIAL COURT ERR IN GRANTING DEFENDANT'S MOTION FOR SET-OFF AGAINST THE JURY VERDICT FOR THE AMOUNT PAID BY BAG AND DENNIS BYRD? 1

A. Were the claims for which BAG settled and paid Hansen the "same claims" or "same injury" for which the jury returned a verdict against BDG? 1

B. Does the South Carolina Uniform Contribution Among Tortfeasors Act, or South Carolina's apportionment statute, does not apply to this case where the defendant's conduct was determined to be intentional? . 1

STATEMENT OF THE CASE 2

FACTS 5

STANDARD OF REVIEW 18

ARGUMENT 19

I. THE TRIAL COURT ERRED IN GRANTING BDG'S MOTION FOR DIRECTED VERDICT AS TO HANSEN'S CLAIM FOR PUNITIVE DAMAGES. 19

A. There was ample evidence from which a jury could reasonably find or infer the conduct of BDG to be reckless or in reckless disregard of Hansen's rights. 19

B. The trial court's ruling on punitive damages is wholly inconsistent with the jury's findings, conclusions and verdict. 23

C. BDG did not move for directed verdict as to Hansen's claim for punitive damages at the conclusion of his evidence and therefore should not have been allowed to raise it for the first time at the conclusion of all the evidence. 23

II. THE TRIAL COURT ERRED IN GRANTING BDG'S MOTION FOR SETOFF AGAINST THE JURY VERDICT IN THE AMOUNT PAID BY BAG AND DENNIS BYRD. 25

A. The claims for which BAG settled and paid Hansen were not the "same claims" or "same injury" for which the jury returned a verdict against BDG. 25

B. The South Carolina Uniform Contribution Among Tortfeasors Act, or South Carolina's apportionment statute, does not apply to a defendant whose conduct is determined to be intentional. 27

CONCLUSION 29

PROOF OF SERVICE 30

TABLE OF AUTHORITIES

Cases

Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 49-50, 691 S.E.2d 135, 149 (2010) 23

Broom v. Se. Highway Contracting Co., 291 S.C 93, 98, 352 S.E.2d 302, 305 (Ct. App. 1986) 20

Cody P. v. Bank of America, N.A., 395 S.C. 611, 627-28, 720 S.E.2d 473, 482 (Ct. App. 2011) 20

Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 508 S.E.2d 565 (1998); 20

Fairchild v. S.C.D.O.T., 385 S.C. 344, 361, 683 S.E.2d 818, 827 (Ct. App. 2009) 20

Freeman v. A. & M. Mobile Home Sales, Inc., 293 S.C. 255, 258-59, 359 S.E.2d 532, 535 (Ct. App. 1987) 24

Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984) 20

Hampton v. Pfohl, (S.C. Ct. App. Unpublished Opinion No. 2010-UP-418, Sept. 20, 2010) 24

Hawkins v. Pathology Associates of Greenville, P.A., 330 S.C. 92, 110, 498 S.E.2d 395, 405 (Ct. App. 1998) 20

Hawkins v. Pathology Associates of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 406 (Ct. App. 1998) 26

Hawkins v. Pathology Associates of Greenville, *P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998) 18

Hollis v. Stonington Dev., LLC, 394 S.C. 383, 393-94, 714 S.E.2d 904, 909 (Ct. App. 2011) 18

Hollis v. Stonington Dev., LLC, 394 S.C. 383, 394, 714 S.E.2d 904, 909-10 (Ct. App. 2011) 20

Keeter 27

Keeter v. Alpine Towers Int'l., Inc., (S.C. Ct. App. Op. No. 4995, June 27, 2012, p. 6) 20

Keeter v. Alpine Towers Int'l., Inc., (S.C. Ct. App., Op. No. 4995, June 27, 2012) 18

Magnolia North Property Owners' Ass'n. v. Heritage Communities, Inc., 725 S.E.2d 112, 124 (Ct. App. 2012) 20

Magnolia North Property Owners' Ass'n., at p. 121 20

Martasin v. Hilton Head Health System, L.P., 364 S.C. 430, 443, 613 S.E.2d 795, 802 (Ct. App. 2005) 20

Mishoe v. QHG of Lake City, Inc., 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005) 18, 20

Rhodes v. Winn-Dixie Greenville, Inc., 249 S.C. 526, 530, 155 S.E.2d 308, 310 (1967) 23

Sample v. Gulf Ref. Co., 183 S.C. 399, 410, 191 S.E. 209, 214 (1937) 20

Ward v. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986) 26

Welch v. Epstein, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000) 20

Statutes

S.C. Code Ann. § 15-38-15(F) 27, 28

S.C. Code Ann. §15-38-50 ..... 25, 27

Rules

S.C.R.C.P. 50, n. 2 24

STATEMENT OF ISSUES ON APPEAL

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B. Does the South Carolina Uniform Contribution Among Tortfeasors Act, or South Carolina's apportionment statute, does not apply to this case where the defendant's conduct was determined to be intentional?

STATEMENT OF THE CASE

On March 17, 2005, Respondent Clifford C. Hansen (hereinafter "Hansen") filed this action in the Orangeburg County Court of Common Pleas against Robert Fields, Fields Company, LLC, Beechwood Advisory Group, Inc., Dennis Byrd, Beechwood Development Group of South Carolina, Inc., and Beechwood Development Group of South Carolina, LLC (hereinafter "BDG "), which is the Appellant in this matter. (ROA, Vol. I, pp. 32-52). On June 13, 2005, the defendants filed a motion to change venue and on April 26, 2006 The Honorable James C. Williams, Jr. issued an Order Transferring Venue in which he ordered the case transferred to the Charleston County Court of Common Pleas. (ROA, Vol. I, p. 4-6).

On January 18, 2008, The Honorable R. Markley Dennis, Jr. signed a Consent Order Pursuant to Rule 40(j), in which the case was stricken from the active roster. Hansen filed his motion to restore the case on December 30, 2008 and a Consent Order Restoring Case was filed on May 13, 2009.

On January 18, 2010, pursuant to a Consent Order entered by the parties, Hansen filed an Amended Complaint in which Beechwood Development Group, Inc. was added as a defendant, and Robert Fields and Dennis Byrd were deleted as defendants. (ROA, Vol. I, pp. 13-31). Other than the change in parties and their respective involvement in the alleged misconduct, the Amended Complaint mirrored the original Complaint which asserted nine (9) causes of action related to the sale of a natural spring water company in Elloree, South Carolina.

Prior to trial, Hansen settled his claims against Beechwood Advisory Group, Inc. (hereinafter "BAG"). (ROA, Vol. III, pp. 1050-1051; Vol. I, pp. 243-244). The defendants Fields Company, LLC and Beechwood Development Group, Inc. never filed a responsive pleading and were in default. (ROA, Vol. I, p. 253, Vol. II, p. 764). At trial, Hansen only pursued his claims against BDG. Hansen voluntarily dismissed his claims for fraud, constructive fraud, and negligence, and proceeded on the remaining six (6) causes of action: (1) breach of contract, (2) breach of contract accompanied by a fraudulent act, (3) breach of fiduciary duty, (4) misrepresentation, (5) conversion, and (6) intentional interference with prospective contractual relations. (ROA, Vol. I, p. 76, Vol. I, pp. 218-219, Vol. II, p. 569).

At the close of Hansen's case, BDG made a motion for directed verdict on all his claims and causes of action, but did not move for directed verdict on Hansen's claim for punitive damages. (ROA, Vol. II, pp. 549-581).

At the close of all evidence, BDG renewed its motion for directed verdict on the remaining six (6) causes of action, which were again denied by the trial court. (ROA, Vol. II, pp. 664-668). Then, after being prompted by the Court, BDG for the first time made a motion for directed verdict as to Hansen's claim for punitive damages. (ROA, Vol. II, pp. 668-670). The trial court then summarily granted the motion for directed verdict as to Hansen's claim for punitive damages. (ROA, Vol. II, p. 670).

The jury returned a verdict in favor of Hansen on all six (6) causes of action. Hansen was required by the trial court to elect his remedy at that point and elected to

receive damages for the intentional interference with prospective contractual relations claim. The jury awarded a verdict of actual damages in the amount of $1,189,408. (ROA, Vol. II, pp. 804, 811).

BDG made a motion for new trial, remittitur, and judgment notwithstanding the verdict on very limited grounds, which motion was denied by the trial court in an Order or Judgment filed on March 25, 2011. (ROA, Vol. II, pp. 814-816; Vol. I, p. 2). BDG also made a motion for set-off against the jury verdict for the amount paid by BAG and Dennis Byrd to settle the claims against them in the amount of $130,000. (ROA, Vol. II, pp. 813-816). The trial court, relying upon S.C. Code Ann. §15-38-50, granted the motion in an Order or Judgment filed on March 24, 2011. (ROA, Vol. I, p. 3). The trial court entertained further written argument and briefs on BDG's motion for remittitur, but ultimately denied that motion, as well as BDG's motion for reconsideration, in an Order or Judgment dated May 11, 2011. (ROA, Vol. I, p. 1).

Hansen filed his Notice of Appeal on May 2, 2011.

FACTS

Clifford Hansen was born and raised in Charlotte, North Carolina. (ROA, Vol. I, p. 114). Hansen's father Floyd started and was a partner and General Manager of a water bottling plant in Union, South Carolina known as DHL Labs, as well as one in eastern North Carolina called Old Saratoga. (ROA, Vol. I, pp. 115-117). Hansen worked at the plants during summers and breaks while in high school and college and became intimately familiar and knowledgeable about all aspects of the water bottling business. (ROA, Vol. I, pp. 116-117).

After graduating from the College of Charleston in 1997 Hansen relocated to New York City, obtained his Series 7 license and became a stock broker and trader. (ROA, Vol. I, pp. 114-115). In December 2002, Hansen was living and working in New York City as a broker for Jefferies & Co. when he started looking for a water bottling company to purchase in the southeast. (ROA, Vol. I, pp. 119-121). Hansen visited and researched several water bottling companies before he learned about the Hickory Springs Water Company located in Elloree, South Carolina from some of his father's former colleagues. Hansen contacted the owner George Milner (hereinafter "Milner"). Hansen established a dialogue with Milner which ultimately led to discussions about Hansen purchasing the company. (ROA, Vol. I, pp. 119-122).

Over the next few months, Hansen spent a substantial amount of time, energy and money conducting due diligence on the company, including, but not limited to, reviewing the company's financial and other records, preparing pro formas and projections, obtaining hydrology reports regarding the natural springs which supply

the water, speaking to customers regarding future commitments, hiring and dealing with lawyers and accountants, and taking other necessary actions in furtherance of purchasing the water company from Milner. (ROA, Vol. III, pp. 823-826, 845-917, Vol. I, pp. 122, 129-138, 142-164).

Hansen also spent a considerable amount of time with Milner personally, ultimately becoming close friends with him. (ROA, Vol. I, p. 122). Through Milner, Hansen learned even more details about the company, the personnel, and what actions would be necessary to make the business more competitive and successful. On March 27, 2003, Milner sent a letter to Hansen with "an informal nonbinding Letter of Understanding" and indicated his desire and agreement to sell Hickory Springs to Hansen. (ROA, Vol. III, pp. 817-822; Vol. I, pp. 129-130).

After concluding his due diligence and investigation regarding the company, Hansen was convinced the company had great potential for growth and success, which was corroborated by Milner.[1] Hansen and Milner agreed upon a purchase price of $3.95MM. On April 21, 2003, Hansen and Milner executed a Purchase Term Sheet regarding the sale/purchase and in May of 2003 Hansen moved from New York to Charleston, South Carolina and proceeded to seek and secure financing to consummate the purchase. (ROA, Vol. III, pp. 817-822; Vol. I, pp. 129-130).

Hansen retained the accounting firm of Pratt-Thomas, Gumb & Co., P.A. to assist him with formal due diligence in connection with his purchase of Hickory

[1] Unlike most water bottling companies, which simply sell purified tap water, Hickory Springs sells actual natural spring fed water, with the natural springs located on the property. (ROA, Vol. I, p. 416).

Springs, for which he paid them $13,203.72. (ROA, Vol. I, pp. 129, 133). Hansen retained and paid $14,175 to a Financial Consultant in Philadelphia named Allison Rulon-Miller to assist him with business plans and preparing detailed financial projections. (ROA, Vol. III, pp. 823-826). Hansen also retained an attorney, John H. (Johnny) Warren, III and his law firm Warren & Sinkler, L.L.P. in Charleston to assist him in all legal matters, including incorporating his company Carolina Springs Bottling, Inc., pertaining to the purchase and by July of 2003 had paid them in excess of $15,000. (ROA, Vol. III, pp. 827-838; Vol. I, pp. 135-139).

In the fall of 2003, Hansen was provided the name of David Fields and his son Robert Fields (hereinafter "Fields") by his friend Rich McConnell as someone who could potentially assist him with securing financing for the purchase. Hansen met the Fields at their office (Fields Company) in Charleston, South Carolina. Fields told Hansen he was a partner in an entity known as "Beechwood" which could help him. (ROA, Vol. I, pp. 164-165). Fields informed Hansen he had partners in Chicago, whom Hansen later learned were Dennis Byrd (hereinafter "Byrd"), Rich Gregg and Greg Easter. (ROA, Vol. I, p. 164). Fields also introduced Hansen to Rolf Richter, another member of "Beechwood" who, for reasons unknown to Hansen, at some point was no longer affiliated with Fields or "Beechwood".

After several meetings with Fields and Richter, they told Hansen the deal was too expensive and that "Beechwood" was not interested. (ROA, Vol. I, p. 165). Hansen, on his own accord, went back to Milner and renegotiated the sale price. Milner agreed to accept $2.95MM to sell the business. (ROA, Vol. I, p. 165). Hansen

informed Fields and Richter of the change in purchase price and they told Hansen "Beechwood" was now on board. Beechwood Advisory Group, Inc. (hereinafter "BAG") agreed to represent Hansen and act as his agent in securing financing for the purchase of Hickory Springs Water Company in return for a flat fee of $100,000 to be paid at closing.

On December 15, 2003, Hansen, Fields and Richter had dinner with Milner to further discuss the deal and its details. (ROA, Vol. III, p. 839).

The following day, December 16, 2003, Hansen received from Fields a proposed Letter of Understanding between him and BAG regarding its representation of him in the purchase of Hickory Springs. (ROA, Vol. III, pp. 840-841). The Letter of Understanding which BAG prepared, however, now demanded a $10,000 retainer fee "up front" from Hansen to BAG, in addition to the $100,000 fee to be paid at closing, and stated Hansen would be responsible for securing $500k of investment capital and BAG would be responsible for raising $1.0MM in investment capital, with the remainder of the purchase price being in the form of a note to the seller and a bank loan. Fields and Byrd were well aware Hansen had exhausted his cash resources on due diligence and legal fees and accountants and could not pay such a fee on demand. (ROA, Vol. I, p. 170). Hansen did not pay the $10,000 up front fee. (ROA, Vol. I, p. 170).

On January 12, 2004, BAG, by and through Byrd, sent an e-mail to Hansen advising it was withdrawing from representing him in matters concerning the acquisition of Hickory Springs Water Company. (ROA, Vol. III, p. 842). The letter

also refers to a "Notice of Intention" sent to Hansen on December 24, 2003, which Notice of Intention Hansen never received. In its January 12, 2004 e-mail, BAG also attempted to reserve "the right to independently purchase Hickory Springs" and offered to pay Hansen a 1% "finder's fee". (ROA, Vol. III, pp. 842, 843).

At this point, Hansen was speaking to Fields daily and had already provided him and Byrd a large amount of confidential and proprietary information regarding the company, including a business plan, pro formas and other financial projections he had prepared with the assistance of accountants whom he paid, due diligence performed on the business by Pratt, Thomas & Gumb and the substance of conversations he had with prospective customers as well as former customers of the company who confirmed they would purchase product from the company if certain changes were made.

Despite its e-mail of January 12, 2004, BAG did not withdraw from representing Hansen and, in fact, continued to serve and act as agent for Hansen and on his behalf concerning the purchase of Hickory Springs Water Company. (ROA, Vol. I, pp. 175-176).

Around this same time, Hansen advised Fields and Byrd he was unable to immediately pay the $10,000.00 deposit they requested. Hansen advised Fields and Byrd, however, that he did have an investor who he believed would participate in the deal. Hansen provided the name of this investor, David Hunt (hereinafter "Hunt"), to Byrd and Fields. (ROA, Vol. I, p. 176). Hunt is a member of the very wealthy Hunt Oil family from Texas. Hansen and Hunt had known each other for years. As Pat

Cobb testified, "[E]verybody knows the Hunts in Texas and Oklahoma". (ROA, Vol. II, p. 598). Hansen provided his due diligence information to Hunt in an email and introduced Hunt to Fields via conference call. (ROA, Vol. III, pp. 844-917). Hansen also arranged a lunch meeting in Dallas, Texas between Fields and Hunt in early March of 2004.

Fields contacted Hansen on his return trip from Texas and informed Hansen that he and Hunt "had a great meeting". (ROA, Vol. III, pp. 918-919). Hunt also agreed to travel to South Carolina to tour the water plant. Fields stated in his email, however, that Hansen would only receive ten (10%) percent of the company, "his salary"[2] and "his management team".

Hansen immediately contacted Fields and told him that was not their agreement. (ROA, Vol. I, p. 179). Therefore, the same week of Hunt's planned visit to the water plant, and in order to protect his interest, Hansen drafted and presented to Fields a new written agreement (Letter of Understanding) and contract, which agreement was signed and initialed by Fields on behalf of BAG and an entity he labeled as "BDG, Inc.". (ROA, Vol. III, pp. 920-922).

This Letter of Understanding, among other things, assured that Hansen would own twenty five (25%) per cent of Carolina Springs Bottling, LLC, which would own one hundred (100%) percent of Carolina Springs Bottling, Inc., that no agreement

[2] Hansen was promised a salary of $100,000 annually, and at trial introduced through Tom Finnegan the salaries of the actual Plant Managers in support of his lost salary (breach of contract) damages. Tom Finnegan testified Sid Schingler made "about $110,000-$120,000" and the current Plant Manager Richard Stewart is "paid $106,000, maybe $107,000". (ROA, Vol. II, p. 529).

could be made with Hunt, or his affiliates, without the prior consent of Hansen, that BAG would advise Hansen on negotiating the purchase of the water company, negotiate and secure bank debt, and assist in securing new capital and/or investments. In return, BAG/BDG would be compensated $100,000. (ROA, Vol. III, pp. 920-922).

Negotiations regarding details of the purchase continued between Fields and Milner. Hansen was sent copies of communications and kept informed of all negotiations. On March 16, 2004, Fields sent Milner an e-mail setting forth what he indicated were to be the "last and final" terms of the deal, indicating the company would be purchased by a 60/40 partnership between Hunt and Beechwood, and indicating a purchase price of $2,930,000.00. Fields sent Hansen a copy of this e-mail on the following day, March 17, 2004. (ROA, Vol. III, pp. 923-924).

Hansen thereafter prepared an Executive Summary for potential investors in regards to Carolina Springs Bottling, LLC. On April 3, 2004, Fields delivered the Executive Summary to potential investor, Pat Cobb, via e-mail at 10:29:54 a.m. Eastern Standard Time. At all times, Hansen was and is the sole owner of one hundred (100%) percent of the shares of stock of Carolina Springs Bottling, Inc., which is the company he incorporated to be the purchaser of Hickory Springs. On page 8 of the Executive Summary sent by Fields to Cobb, it states: "[T]he Company is seeking to raise such funds in the form of equity and has retained the Beechwood Group to serve as its placement agent in such endeavor." The "Company" referred to in this sentence referred to Carolina Springs Bottling, Inc. Also included as part of this Executive Summary were pro formas and/or financial projections which were

based solely upon confidential and proprietary information prepared by Hansen and provided to Fields and Byrd. (ROA, Vol. III, pp. 925-948).

The recipient of this Executive Summary sent by Fields, Pat Cobb, did invest in the project and, at the time of trial, owned 51.5% of BDG, by and through his company ACC Ventures, LLC. Thus, the very document based upon which Cobb invested in the project stated that "Beechwood" was acting as agent for Hansen and that Hansen would be "CEO" and a "Director" of the company.

Three days later, April 6, 2004, in an e-mail from Fields to Pat Cobb, Fields referred to Hansen as the "owner/operator" of the company and stated Hansen would be entitled to a ten percent (10%) ownership interest in the company. (ROA, Vol. III, p. 949). Fields again attempted to whittle down Hansen's ownership interest to 10% despite signing an agreement indicating Hansen would own no less than 25% of the water company.

The first week of May, 2004, Hunt traveled to South Carolina to walk through the facility. Despite the previous existing relationship and friendship between Hansen and Hunt, and the introduction of Hunt to the deal by Hansen, Fields set about upon a plan to exclude Hansen from the meeting. Specifically, Fields informed Hansen that Hunt was "coming in late" and advising he would pick Hunt up in Augusta and the two would meet with Hansen after they went through the plant. (ROA, Vol. I, pp. 192-193). Fields further advised Hansen that Milner wanted as small a group as possible walking through the plant so as not to raise questions or concerns among the employees. After Hunt and Fields toured the plant with Milner, Hunt, Fields, Milner

and Hansen met for lunch at a nearby restaurant. Milner arrived on time, but Hunt arrived with Fields about 45 minutes later.

Hansen called Hunt the following week and, at this time, Hunt advised Hansen that after he and Fields visited the plant in Elloree Fields took Hunt to another facility which was for sale. (ROA, Vol. I, pp. 192-193). At this facility, Fields introduced Hunt to Sid Schingler who was, at the time, the Chief Operating Officer of Quality Beverage in Charleston, South Carolina and was operating the water plant for sale. Hunt further informed Hansen that Fields told him he intended to replace the management team Hansen had put together for Hickory Springs with Sid Schingler. Hansen was stunned and angered, and immediately called Fields.

Hansen met with Fields later that same day, May 10, 2004, and at this meeting Fields presented Hansen with an organizational chart which contained none of the management team Hansen had put together, including management who had many years of successful experience in other water companies. The same chart also had Hansen's ownership interest reduced to 2.5% with a potential earn in for an additional 2.5%.

Approximately a week after this meeting, Hunt informed Hansen he was backing out of the deal. (ROA, Vol. I, p. 205). Fields thereafter told Hansen the deal was dead. Hansen now began scrambling to get financing or investors on his own to salvage the deal with Milner, who was now anxious to sell the water company. (ROA, Vol. I, p. 204). Hansen reached out to a good friend by the name of Steve Wilson, whom he had become friends with while in New York City. (ROA, Vol. I, p. 205).

Steve Wilson is a very successful businessman, graduated from the U.S. Naval Academy and earned a Harvard MBA, who has served as Chief Financial Officer and President of several Fortune 500 companies, including RJR Nabisco, Footstar, Cadbury-Schweppes, Pepsi, USA, Frito-Lay, and others. (ROA, Vol. III, pp. 959-966, 967; Vol. I, pp. 402-458). Wilson is experienced in the water business through his experience with Cadbury-Schweppes and at the time of trial was serving as an expert witness in a matter involving a water bottling company. (ROA, Vol. I, pp. 405-408). Wilson served as a father figure to Hansen after his father died. (ROA, Vol. I, p. 409). Wilson testified he would have been willing, and probably able, to assist Hansen in successfully raising the necessary capital to consummate the sale if he had the necessary due diligence information Hansen had obtained and some additional time. (ROA, Vol. I, pp. 416-420).

In trying to obtain financing with new investors, including Wilson, Hansen needed and requested copies of various documentation he had given to Fields and Byrd in furtherance of the deal, and documents which they had prepared using his information while serving as his agents and on his behalf. Hansen's computer had crashed with all of the documentation that he had provided Fields & BAG and was unable to recreate it. (ROA, Vol. I, pp. 257-259). When Hansen requested the information be returned, Fields and BAG claimed the information was proprietary and refused to return it. Hansen approached Bank of America about financing with the understanding Wilson would assist him. Bank of America, however, required certain financial documentation related to Hickory Springs which Hansen had given to Fields

and Byrd. (ROA, Vol. III, p 950). Fields and Byrd refused to return the documents to Hansen in both an e-mail dated May 24, 2004 and a letter dated May 26, 2004, wherein Byrd purported to terminate its agency representation of Hansen. (ROA, Vol. III, pp. 951, 952-953).

At this point, BDG, through Fields and Byrd, had used Hansen's substantial confidential and proprietary information, including his business plan, pro formas, financial projections, contracts concerning the purchase, conversations with potential and former customers, and information obtained by Hansen during due diligence investigations, all of which he had paid for, to its benefit to obtain loans and financing, investors, and to negotiate and consummate a purchase of Hickory Springs without Hansen .

Hansen now began working hard to salvage the deal on his own with Wilson. On May 28, 2004, Hansen sent an e-mail to Fields advising him that if Beechwood pursued the purchase of Hickory Springs to his exclusion, he would pursue them legally.[3] (ROA, Vol. III, p. 954). Based upon this e-mail, Milner ceased negotiations with Hansen on May 31, 2004. (ROA, Vol. III, p. 955).

On Friday, June 11, 2004, Milner sent Hansen an e-mail advising of two changes to the Letter of Intent he had previously sent to Hansen and that, upon confirmation of these changes, and a change requested by Steve Wilson, he would be "prepared to sign the LOI." Milner also attached various documents to the e-mail for

[3] In a state of panic and frustration, Hansen also threatened to turn over recorded telephone conversations he had between him and Fields. There are none. (ROA, Vol. I, pp. 201-202).

Hansen's review to consummate the deal. (ROA, Vol. III, pp. 956-957). Hansen immediately forwarded the e-mail to Steve Wilson and Caleb Fort. (ROA, Vol. III, p. 958). Milner testified that while he was confident Wilson "had the financing and the wherewithal to do the deal", they "wanted more information for their own due diligence purposes", which he was simply not willing to provide at this time. (ROA, Vol. I, p. 377). Hansen asked for more time from Milner, but as Milner testified "Clifford wanted to extend the time and my – I was in the closing mode. It was time to get this thing done." (ROA, Vol. I, p. 375). While Fields sent Milner an e-mail telling him to allow Hansen to try and get the deal done first, BDG knew Hansen could not get the necessary information together for any investors or bank loans on Milner's time frame. Additionally, Milner testified that Fields actually tried to offer Milner an additional $100,000 to get the deal ahead of Hansen, which he refused. (ROA, Vol. I, p. 380).

By this point in time, Fields, along with Byrd, Easter and Gregg, his partners in BAG, had convinced Pat Cobb and Tom Finnegan to invest in the purchase of Hickory Springs Water Company, to the exclusion of Hansen. BDG would be a 48% owner of Hickory Springs and Greenbax would be a 52% owner. Fields formed and incorporated BDG for this purpose on July 12, 2004. (ROA, Vol. III, pp. 1052; 968-1005; 1006-1043; Vol. II, p. 618).

Due to BDG's wrongful conversion and retention of crucial information, almost all of which was provided by Hansen initially, paid for by Hansen initially, and/or prepared based upon information Hansen provided, and all of which was

utilized and/or prepared by Fields and Byrd in the course of their representing and serving as agent for Hansen via written contract, including the identity of the bank which had agreed to provide financing for the deal, information provided to the bank for its consideration in the loan application and approval process, such as appraisals, and other information, Hansen and his new partners/investors simply could not obtain financing or re-create the needed documentation necessary to obtain financing and conclude due diligence within the time frame desired by Milner, who had been trying to close on the sale for over six (6) months at this point.

On or about July 20, 2004, armed with the information, documents, loan approval, due diligence information, and everything else necessary to consummate the deal, BDG proceeded to purchase the business and assets of Hickory Springs Water Company to the exclusion of Hansen.

STANDARD OF REVIEW

When reviewing the granting of a motion for directed verdict as to punitive damages, this Court applies the same standard as the circuit court. *Keeter v. Alpine Towers Int'l., Inc.*, (S.C. Ct. App., Op. No. 4995, June 27, 2012); *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 393-94, 714 S.E.2d 904, 909 (Ct. App. 2011). Thus, the Court must view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party, and the issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless. *Id.*; *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005).

This Court reviews the granting of a motion for directed verdict or judgment notwithstanding the verdict as to the application of a setoff for an abuse of discretion. *Hawkins v. Pathology Associates of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998).

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING BDG'S MOTION FOR DIRECTED VERDICT AS TO HANSEN'S CLAIM FOR PUNITIVE DAMAGES.

At the conclusion of its case, BDG renewed its motions for directed verdict as to all six (6) of Hansen's claims and causes of action. The trial court denied the motions. (ROA, Vol. II, pp. 663-668). Then, the trial court *sua sponte* raised the issue of Hansen's punitive damage claim. Counsel for BDG had, at this point in time, not mentioned the punitive damages claim. Specifically, the trial court stated "[A]nd I don't recall Mr. Duffy, that – in your motion for directed verdict that you addressed that?" (ROA, Vol. II, p. 668). After very brief argument, the trial court stated: "[A]t this time I grant your motion for a directed verdict as to the issue of punitive damages. I do not believe that the testimony does present itself that anything was willful or wanton or would rise to the level of recklessness justifying the submission of the punitives to the jury." (ROA, Vol. II, p. 670).

A. There was ample evidence from which a jury could reasonably find or infer the conduct of BDG to be reckless or in reckless disregard of Hansen's rights.

The jury obviously had a very different take on the evidence and testimony than the trial court.

South Carolina law is clear that if the evidence regarding punitive damages, when viewed in a light most reasonable to the nonmoving party, is capable of more than one reasonable inference, the issue of entitlement to punitive damages **must** be submitted to the jury. *Keeter v. Alpine Towers Int'l., Inc.*, (S.C. Ct. App. Op. No.

4995, June 27, 2012, p. 6); *Magnolia North Property Owners' Ass'n. v. Heritage Communities, Inc.*, 725 S.E.2d 112, 124 (Ct. App. 2012); *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 394, 714 S.E.2d 904, 909-10 (Ct. App. 2011); *Fairchild v. S.C.D.O.T.*, 385 S.C. 344, 361, 683 S.E.2d 818, 827 (Ct. App. 2009) (finding trial court erred in granting defendant's motion for directed verdict as to plaintiff's punitive damages claim); *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005); *Martasin v. Hilton Head Health System, L.P.*, 364 S.C. 430, 443, 613 S.E.2d 795, 802 (Ct. App. 2005); *Cody P. v. Bank of America, N.A.*, 395 S.C. 611, 627-28, 720 S.E.2d 473, 482 (Ct. App. 2011); *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000); *Hawkins v. Pathology Associates of Greenville, P.A.*, 330 S.C. 92, 110, 498 S.E.2d 395, 405 (Ct. App. 1998); *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). This is a very low hurdle to clear and is the long standing law of our State. In fact, earlier this year this Court cited well settled South Carolina law in ruling that where a jury finds the plaintiff's rights have "been consciously, willfully, and recklessly violated", it is not just the jury's right or discretion to award punitive damages, but its duty to award punitive damages. *Magnolia North Property Owners' Ass'n.*, at p. 121 (citing *Broom v. Se. Highway Contracting Co.*, 291 S.C 93, 98, 352 S.E.2d 302, 305 (Ct. App. 1986); *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 333 S.C. 71, 508 S.E.2d 565 (1998); *Sample v. Gulf Ref. Co.*, 183 S.C. 399, 410, 191 S.E. 209, 214 (1937)).

The record is replete with evidence from which a jury could reasonably conclude or infer BDG's conduct in buying the water company from Milner to the exclusion of Hansen was a conscious, willful or reckless disregard of his rights, but just a few highlights are set out below:

- Buying the water company out from under Hansen knowing full well it was his deal that he put together from the beginning. Pat Cobb, through his company ACC Ventures, LLC, initially owned 41.5% of BDG, and later owned 51.5% when they kicked Fields out of the company and he took his 10%. (ROA, Vol. III, pp. 1044-1046; 1047-1049). Cobb testified at trial he did not "know anything about Cliff Hansen" when BDG bought the water company. (ROA, Vol. II, pp. 624-626). This is an outright lie. The very document which Fields sent to Cobb to introduce him to the deal is an e-mail dated April 3, 2004, in which Fields tells Cobb the customers who have left the water company "have confirmed they will give Clifford and the new company their business at change of ownership". (ROA, Vol. III, pp. 925-948). The attachment to the email, the Executive Summary for Carolina Springs Bottling, Inc. (Hansen's company, ROA, Vol. III, pp. 827-838), states on page 6 that Hansen is and will be the "CEO" and provides a brief summary of his experience and other information, and on page 19 indicates he will be on the Board of Directors. Two days later on April 6, 2004, Fields sent Cobb another e-mail stating Hansen would be the "owner/operator" and is to get 10% of the company. (ROA, Vol. III, p. 949).

- As the Executive Summary which Fields sent to Cobb states on page 8, Beechwood had agreed and was supposed to be serving as Hansen's "agent" in assisting him to procure investors to purchase the water company, not to be an investor itself or find co-investors for itself or otherwise compete with him to buy the business. (ROA, Vol. III, pp. 925-948).

- After promising him at first, in writing, a 25% ownership in the water company, and then unilaterally reducing it to 10%, telling Hansen that he, in fact, would have no ownership interest and would not be running the plant or serving as President of the company on May 10th, only after lining up and confirming its own financing of the purchase, and realizing it would now be impossible for Hansen to put together a competing offer or team, after relying on Fields and Byrd for nearly two (2) years to help him put the deal together. (ROA, Vol. I, pp. 192-198).

- Fields, who was a 10% owner of BDG, and signed all of the purchase documents and agreements on behalf of BDG as its "Manager", refused to return the financial information, due diligence information, and other materials provided to him by Hansen (and paid for by Hansen), thereby preventing him from timely seeking or obtaining other loans or investors, after it told him it was no longer giving him any ownership interest in the company or allowing him to serve as President. (ROA, Vol. III, pp. 844; 845-917; 950; 951; 952-953; 968-1005; 1006-1043).

- Attempting to disclaim any knowledge or approval or ratification of the acts of Fields, all the while allowing him to form the corporation in South Carolina (ROA, Vol. III, p. 1052), giving him 10% ownership in the corporation (ROA, Vol. III, pp. 1044-1046; 1047-1049), negotiate the terms of the deal with Milner and potential investor David Hunt (ROA, Vol. III, pp. 918-919; 923-924; 949; 956-967), and execute important documents on behalf of BDG (ROA, Vol. III, pp. 968-1005; 1006-1043; 1044-1046), all without any supervision or other members present. Milner testified the only person from BGD he ever dealt with or spoke to regarding the purchase of the water company was Fields. (ROA, Vol. I, p. 395).

- Attempting to disclaim any and all agreements or actions of Robert Fields other than those from which BDG benefitted, not each of which it approved and ratified without objection. While Cobb is seemingly happy to ratify the deal Fields negotiated with Milner on behalf of BGD (Wilson testified Hickory Springs is a "surprisingly profitable" company. ROA, Vol. I, p. 421), he does not like so much the deal Fields reached (and breached) with Hansen, and of which Cobb was aware. Cobb admitted that Fields was the "go to guy" for BDG. (ROA, Vol. II, pp. 623, 628, 631). Cobb even admitted that Fields is "ethically challenged". (ROA, Vol. II, p. 631).

There was more than enough evidence in the record of this case from which a jury could reasonably conclude, or at least infer, the actions and conduct of BDG were reckless, willful, wanton, intentional and carried out in conscious disregard of Hansen's rights. The trial court erred in granting BDG's motion for directed verdict on Hansen's claim for punitive damages and this Court should reverse and remand for a new trial only on punitive damages.

B. The trial court's ruling on punitive damages is wholly inconsistent with the jury's findings, conclusions and verdict.

The trial court's finding and ruling regarding a lack of any evidence of willful, wanton, or reckless misconduct on the part of BDG is wholly inconsistent with the jury's finding in favor of Hansen on his claims for, *inter alia*, intentional interference with prospective contractual relations. The trial court charged the jury, and the jury so found, that in order to recover under this cause of action it must find BDG "intentionally and unjustifiably procured a breach of the contract", which it did. (Vol. II, pp. 797, 803). The jury's finding of intentional misconduct is wholly at odds and inconsistent with the trial court's statement that the testimony did not "present that anything was willful or wanton or would rise to the level of recklessness justifying the submission of the punitives to the jury". (ROA, Vol. II, p. 670).

Since there was clearly evidence from which the jury could, and did, find or infer intentional and/or reckless misconduct on the part of BDG, the trial court erred in granting BDG's motion for directed verdict on Hansen's punitive damages claim. The trial court's "inconsistent" judgment with the jury's findings and verdict should not be allowed to stand. See, e.g., *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 49-50, 691 S.E.2d 135, 149 (2010); *Rhodes v. Winn-Dixie Greenville, Inc.*, 249 S.C. 526, 530, 155 S.E.2d 308, 310 (1967).

C. BDG did not move for directed verdict as to Hansen's claim for punitive damages at the conclusion of his evidence and therefore should not have been allowed to raise it for the first time at the conclusion of all the evidence.

BDG did not move for directed verdict on Hansens's punitive damages claim at the conclusion of Hansen's case. (ROA, Vol. II, pp. 549-581). BDG did not move for directed verdict regarding Hansen's claim for punitive damages until prompted to do so by the trial judge at the conclusion of all evidence. (ROA, Vol. II, Tr. p. 668). Under South Carolina law, a party must move for a directed verdict at both the conclusion of the plaintiff's case and the conclusion of all evidence to properly preserve an issue. *S.C.R.C.P. 50, n. 2* ("The motion for directed verdict may be made at the close of plaintiff's evidence, as well as at the close of all the evidence."); *Freeman v. A. & M. Mobile Home Sales, Inc.*, 293 S.C. 255, 258-59, 359 S.E.2d 532, 535 (Ct. App. 1987); *Hampton v. Pfohl*, (S.C. Ct. App. Unpublished Opinion No. 2010-UP-418, Sept. 20, 2010).

Since BDG failed to move for a directed verdict at the conclusion of Hansen's evidence, the issue was not preserved and should not have been considered by the trial court at the conclusion of all the evidence.

II. THE TRIAL COURT ERRED IN GRANTING BDG'S MOTION FOR SETOFF AGAINST THE JURY VERDICT IN THE AMOUNT PAID BY BAG AND DENNIS BYRD.

During the course of its case, BDG introduced into evidence a settlement agreement entered into between Hansen and BAG and Dennis Byrd as a result of mediation. (ROA, Vol. III, pp. 1050-1051; Vol. I, pp. 270-274). The amount of the payment by BAG to Hansen was redacted in the exhibit. As was later revealed to the Court, the amount of the payments were $125,000 paid by BAG and $5,000 paid by Dennis Byrd, for a total of $130,000.

After the jury returned its verdict, BDG made a motion for a setoff as to the jury verdict in the amount of the $130,000 settlements paid to Hansen. (ROA, Vol. II, pp. 813-816). The trial court, citing S.C. Code Ann. §15-38-50, granted the motion. (ROA, Vol. I, p. 3; Vol. II, p. 816).

A. The claims for which BAG settled and paid Hansen were not the "same claims" or "same injury" for which the jury returned a verdict against BDG.

South Carolina Code Ann. §15-38-50 states a release will reduce the claim against other tortfeasors to the extent of any amount paid by one tortfeasor where two or more persons are "liable in tort for the same injury or the same wrongful death". Simply put, the evidence clearly shows BAG and BDG are not jointly liable for the "same injury" to Hansen.

BDG bought the water company which Hansen had originally contracted with Milner to buy. As Milner aptly pointed out, BDG damaged Hansen by buying the water company out from under him after BAG ceased being his agent and leaving

Hansen insufficient time to procure other investors in a time period satisfactory to Milner. (ROA, Vol. I, p. 369). BAG did not buy the water company from Milner out from under Hansen. BAG agreed, in writing, to be Hansen's agent in helping him obtain financing for the purchase of the water company. (ROA, Vol. III, pp. 920-922; 925-948). BAG is the entity that took all of Hansen's due diligence and converted it to its own use and ownership and refused to return it to Hansen in order for him to be able to attract new investors or obtain any loans or other financing for the purchase of the water company. Fields and Byrd then brought in Finnegan and Cobb and formed BDG to consummate the purchase of the water company. Thus, the actions and misconduct, and resulting injuries, are clearly separate and distinct.

BAG breached its written contract with Hansen, and conceivably its breach was accompanied by the fraudulent acts of converting his due diligence material to its own use and ownership as well as getting investors Finnegan and Cobb to form BDG and purchase the water company to Hansen's exclusion. The cause of action on which the jury found BDG liable, and elected by Hansen, was intentional interference with prospective contractual relations. BAG could not be found liable on this cause of action as it was not the party who interfered with Hansen's contract with Milner and bought the water company. South Carolina law is clear and well settled that a defendant is only entitled to an offset of another settling defendant for the same cause of action. *Hawkins v. Pathology Associates of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 406 (Ct. App. 1998); *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986). Since BAG and BDG could not possibly be found to be liable to Hansen

on the same causes of action based upon their respective misconduct, as well as the different members of each entity, the trial court erred in finding the same claims and same injury and applying S.C. Code Ann. §15-38-50.

B. The South Carolina Uniform Contribution Among Tortfeasors Act, or South Carolina's apportionment statute, does not apply to a defendant whose conduct is determined to be intentional.

The purpose of the South Carolina Uniform Contribution Among Tortfeasors Act is to establish the legal rules regarding apportionment and contribution among one or more joint tortfeasors and their financial culpability to a single plaintiff for the "same injury". S.C. Code Ann. §15-38-50. As discussed above, Hansen contends BAG did not settle with him for the same claims and same injury for which the jury found BDG liable. Even assuming, *arguendo*, however, such was the case, the statute does not apply to a defendant whose misconduct is found to be "intentional', as was the case with the jury's findings of BDG, in particular in finding for Hansen on his claim for intentional interference with prospective contractual relations. Specifically, S.C. Code Ann. § 15-38-15(F) states that apportionment "does not apply to a defendant whose conduct is determined to be willful, wanton, reckless, reckless, grossly negligent, or intentional . . . ." This section was recently relied upon by this Court in refusing to apportion fault and financial culpability among joint tortfeasors in another case. *Keeter*, at p. 7.

Since BDG's conduct was determined by the jury to be 'intentional", BDG is not entitled to an offset or apportionment of the verdict, even assuming it was found

liable for the same claims or same injury suffered by Hansen, pursuant to S.C. Code Ann. §15-38-15(F).

CONCLUSION

Based upon the reasons stated herein, Hansen respectfully submits this Court should reverse the trial court's setoff in the amount of $130,000 against the jury's verdict for actual damages, and should remand for a new trial only on the issue of punitive damages.

Respectfully submitted,

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January 7, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington

Case No. 2009-CP-10-3333

Clifford C. Hansen .....Respondent/Appellant,

v.

Fields Company, LLC; Beechwood Advisory Group, Inc.; Beechwood Development Group of South Carolina, LLC; and Beechwood Development Group, Inc.....Defendants,

Of Whom Beechwood Development Group of South Carolina, LLC is the .....Appellant/Respondent.

PROOF OF SERVICE

I certify that I have served the Appellant's Brief of Respondent/Appellant by delivering a copy of it via Federal Express, the same manner filed with the Court, postage prepaid on January 7, 2013, addressed to:

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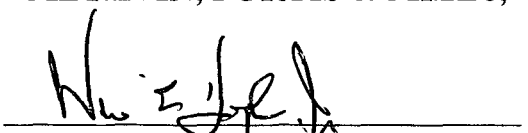

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..... Appellant/Respondent.

CERTIFICATE OF COUNSEL

The Undersigned certifies that Appellant's Brief of Respondent/Appellant complies with Rule 211(b), SCACR.

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