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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

CASE NO. 2011-CP-21-941

Tracking Number: 2013-001764

Scient Partners, LLC ..... Appellant,

v.

Pinnacle Network Solutions, Inc. and Cliff Smith ..... Respondents.

REPLY BRIEF OF APPELLANT

TURNER, PADGET, GRAHAM & LANEY, P.A.

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ERR IN DIRECTING A VERDICT AS TO THE CONSPIRACY THEORY WHEN, VIEWED IN THE LIGHT MOST FAVORABLE TO APPELLANT, IT SHOULD HAVE BEEN PRESENTED AS AN ALTERNATIVE THEORY OF RECOVERY WITH ITS OWN SPECIAL DAMAGES?

STATEMENT OF THE FACTS
(RE-VISITED)

As fully documented in Appellant's Brief and statement of facts therein, this is a case of employee disloyalty and theft. Respondent's Brief takes offense (footnote 1) to Appellant's characterization of Respondent Smith's conduct as "theft" – or relatedly, characterization of Respondent Smith as a "thief". ***Certainly no incivility was intended.***[1] It is the South Carolina Trade Secrets Act (hereinafter "TSA") itself that uses the term "theft" in describing the "improper means" by which a trade secret is "misappropriated" by one who "owed a duty ... to maintain its secrecy or limit its use." S.C. Code § 39-8-20 (1) and (2). Appellant maintains that Respondent Smith conspired with Respondent Pinnacle to "misappropriate" by "improper means" a "product" or "design". S.C. Code § 39-8-20 (5).

As documented in Appellant's Brief (page 9), Respondent Smith *admitted* that he took documents from Hillsouth and used them to prepare and submit a quote to South of the Border on behalf of Respondent Pinnacle less than 2 days after leaving Appellant's employ. R. p. 130 line 20 – R. p. 131 line 10. Moreover, this occurred *after* Respondent Smith had signed written obligations to protect Appellant's work product. R. p. 86 line 13 to R. p. 90 line 1; also R.pp. 227 -- 250 (Trial exhibits 7, 8, 9).

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[1] Regardless of the facts supporting the term's use, Respondent recognizes and respects counsel's sensitivity to the term "thief" given the long-term personal relationship between counsel and Respondent Smith. R. p. 220 lines 5 -- 11, R. p. 44 lines 14 -- 15, and R. p. 221 line 23 to R. p. 222 line 3.

Finally, as much as Respondents continue in their Brief to oversimplify the complex, integrated, team-derived, technology solution offered to South of the Border by Appellant,[2] the real value of that work was recognized by the Respondent Smith who immediately stamped it as "confidential" *after* it was taken to Respondent Pinnacle without authorization and against his written commitment to his original employer. See Appellant's Brief, pp. 3-9 for complete details of the complexity and protected value of the Appellant's work misappropriated in this case.

ARGUMENT

THE TRIAL COURT ERRED IN DIRECTING A VERDICT AS TO THE CONSPIRACY THEORY WHEN, VIEWED IN THE LIGHT MOST FAVORABLE TO APPELLANT, IT COULD HAVE BEEN PRESENTED AS AN ALTERNATIVE THEORY OF RECOVERY WITH ITS OWN PLEADED AND PROVEN SPECIAL DAMAGES.

Seeking to avoid the naturally applicable conspiracy alternative to the trade secret theory, Respondents suggest deficiencies in the conspiracy option –either in pleading or proof. As framed in Appellant's argument, however, the conspiracy alternative was "pleaded and proven."

Conspiracy Damages Were Pleaded

As much as Respondents might want to return to the code-pleading days and related "gotcha" strategies, the Rules of Civil Procedure only require pleadings sufficient to put a party on general notice of a claim or defense. Moreover, the procedural rules are designed to promote the disposition of matters on their actual merits and not pleading technicalities.

Here, of course, the amended complaint specifically pleaded the conspiracy theory and alleged the necessary "special damages." While the case of AJG Holdings, LLC v. Dunn, 392

[2] Brief at 3 (suggesting it was merely a "price and equipment list" with BBCI (the wiring contractor) "primarily charged with system design.").

S.C. 160, 7708 S.E. 2d 218 (Ct. App. 2011), cited by Respondents (Brief at 8) did involve a complaint which, literally pleaded "special damages", unlike the Amended Complaint here, the complaint in Dunn went further to define those special damages using language that was "no different from the damages alleged in the Dunn's other causes of action." Thus, Dunn does *not* stand for the proposition that using the phrase "special damages" is a pleading failure; indeed, there was no pre-trial dismissal here for a pleading failure – there was only a directed verdict for a perceived lack of proof.

As discussed in Appellant's Brief, South Carolina case law consistently states, without much explanation, that a Plaintiff asserting a civil conspiracy claim must allege and prove "special" damages. A few cases, however, define what "special damages" *are not* – they are not the same as damages recoverable under other theories. (See Appellant's Brief for case citations and discussions). Thus, pleading "special damages" really serves to alert parties that some alternative theory of damages and/or recovery is at play which make trigger preemption or a need to impose an election of remedies. As described in Appellant's Brief (page 10), "The risk of inconsistency from the Appellant's trial theories essentially is recognized both in the TSA itself and in the case law requiring "special damages" for claims of civil conspiracy. The solution to such risk of inconsistency is to bifurcate determination of the issues or require appropriate election of remedies at the proper time."

Election of Remedies

Seeking to avoid the naturally applicable conspiracy alternative to the trade secret theory, Respondents also suggest that the conspiracy theory is not really an alternative to the trade secret theory and that Appellant "completely misapprehends the nature and purpose of the doctrine of election of remedies" (Respondents' Brief at 11); to the contrary, Appellant fully understands

that the doctrine involves a choice between different coexisting modes of procedure and relief afforded by law for the same injury.

Indeed, Appellant's argument is that the trial court prematurely and needlessly made that "choice" for the Appellant without allowing "a full opportunity to prove his claim to some form of relief" – the very policy behind the doctrine. Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc., 279 S.C. 468, 309 S.E.2d 763 (Ct. App. 1983). As noted in Appellant's Brief, the doctrine is designed to prevent double recovery – not circumvent a viable alternative route to recovery. Thus, "a party is not required to make an election of remedies until after the verdict is entered and prior to the entry of judgment." Enhance-It, L.L.C., v. American Access Technologies, Inc., 413 F. Supp. 2d 626; (D.S.C. 2006) (U.S. District Judge Duffy) (citing Save Charleston Found. v. Murray, 286 S.C. 170, 333 S.E.2d 60 (1985)).

Moreover, none of the cases cited in Respondent's Brief directly address or prohibit the possibility of an election of remedies being used to protect the uniqueness of damages required in a civil conspiracy claim. To the contrary, the case of Hackworth v. Graywood, 385, S.C. 110, 682 S.E. 2d 871 (Ct. App. 2009), expressly notes that "the holding in Todd does not prevent a party from pleading alternative theories in cases involving civil conspiracy." Hackworth only notes that any civil conspiracy damages must be "separate and independent" of damages from other causes of action within the same complaint.

Here, where the jury found no damages from the South Carolina Trade Secrets Act (TSA) claim, the possible alternative theory of civil conspiracy could have supported damages certainly "separate and independent" and non-duplicative of the non-damages awarded under the Trade Secrets Act cause of action. Moreover, although the hindsight of the jury verdict renders it a

non-event, the possibility of a duplicative award would easily be addressed by an election consistent with the well-established doctrine of election of remedies.

The case of Gordon v. Busbee, 397 S.C. 119, 723 S.E.2d 822 (Ct. App. 2012), also cited by Respondents, also states that it is insufficient to allege the same damages under the civil conspiracy claim that are alleged under other theories. Of course, the Gordon Court first found that there was no proof of conspiracy itself; thus, Gordon, like the cases of Pye v. Estate of Fox, 369 S.C. 555; 633 S.E.2d 505 (2006); Kuznik v. Bees Ferry Associates, 342 S.C. 579; 538 S.E.2d 15 (Ct. App. 2000); Vaught v. Waites, 300 S.C. 201, 387 S.E.2d 91 (Ct. App. 1989), discussed in Appellant's initial brief, *also* bases its demurrer or dismissal on the plaintiff's failure to show evidence of conspiratorial conduct and not simply an alleged pleading failure. Again, this is in contrast to Island Car Wash, Inc. v. Norris, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987) where the damages of allegedly unauthorized payments or compensation from a car wash could be sought pursuant to multiple alternative theories of fraud, conversion, unjust enrichment. Island Car Wash (much like Nucor Corp v. Bell, 482 F. Sup. 2d 714 (D.S.C. 2007) discussed below) even noted that where a plaintiff fails to prove concerted design, he may still recover those damages for a tort alleged to be the object of the conspiracy--with the conspiracy allegations "considered as mere surplusage" (citing Goble v. American Ry. Express Co., 124 S.C. 19, 115 S.E. 900 (1923)).

As noted in its initial brief, Appellant believes that the question (of whether civil conspiracy may be an electable alternative theory of recover for damages also sought under the TSA) is one of first impression. Respondents correctly footnote (footnote number 2) that Nucor does not *directly* address the election of remedies in a case involving claims of both civil conspiracy and the TSA; if it did, this wouldn't be the first impression that Appellant suggests.

What Respondents fail to address in that footnote, or anywhere else in their brief, is the clear language of Nucor recognizing the precise possibility presented here – that a civil conspiracy alternative *would* provide remedies (i.e. special damages) in the event of a failed TSA claim. As the Court confirmed "It is possible that, in breach of his duties, Bell disclosed confidential information that does not qualify as a "trade secret" and is therefore not protected by the SCTSA. In such a case, causes of action for breach of duty of loyalty, tortious interference with relations, unfair trade practices, conspiracy, conversion, unjust enrichment, and imposition of constructive trust would provide remedies not available under the Act." Nucor Corporation v. Bell, 482 F. Supp. 2d at 726-27 (citing, e.g., Combined Metals of Chicago Ltd. P'ship v. Airtek, Inc., 985 F. Supp. 827, 830 (N.D. Ill. 1997) (breach of fiduciary duty claim not preempted where underlying information may not qualify as trade secrets). This is also completely consistent with the language from Hackworth acknowledging that Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 278 S.E.2d 607 (1981) does not prohibit presenting alternative theories.

Thus, while Respondents summarily attempt to dismiss Nucor as "inapposite" because it dealt with preemption of remedies rather than election of remedies, that is a distinction of no consequence here. The trial court's decision here to direct a verdict with regard to the conspiracy theory *preempted* that remedy based upon an erroneous conclusion that special damages had to be mutually exclusive from any *possible* damages sought, defined, or measured under any other theory.[3]

[3] If such a narrow definition of "special damages" is applied, Appellant still has pleaded and proven damages in that narrow range as well. Specifically, the Appellant did not rely *only* upon the possible election between theories to recover the *same* damages (in which case they would necessarily be mutually exclusive), the Appellant also argued that there was proof of conspiracy damages beyond those recoverable pursuant to S.C. Code § 39-8-40 (which suggests TSA damages are measured by the unjust enrichment to the misappropriator); specifically, Appellant

Respondents' Brief (pages 11-12) quotes from Save Charleston[4] in noting that the election of remedies doctrine requires "a choice between two or more different coexisting modes of procedure and relief afforded by law for the same injury." (emphasis added). Respondents suggest that "by definition" the doctrine of election of remedies is inapplicable to civil conspiracy because the special damages requirement necessarily means that the same injury or damages can not even be asserted under another theory; as analyzed above, that is certainly *not* the suggestion of Nucor , and is *not* the holding in Island Car Wash (where a plaintiff fails to prove concerted design, he may still recover those damages for a tort alleged to be the object of the conspiracy--with the conspiracy allegations "considered as mere surplusage"), and is *not* the holding in Hackworth ("the holding in Todd does not prevent a party from pleading alternative theories in cases involving civil conspiracy").

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argued that there was evidence that the Respondent's conduct had damaged Appellant's brand and reputation. R. p. 199 lines 4 – R. p. 200 line 20. That argument is not abandoned here.

In its July 2, 2013 order denying a new trial, the trial court also concluded that the Plaintiff "failed to provide evidentiary proof of special damages." R. p. 5. At the hearing on the directed verdict motion during trial, however, the court acknowledged that the testimony of customer Ryan Schafer (President of SOB) "was favorable for the Plaintiff" and demonstrated that "[h]e wanted to deal with HillSouth" and later determined "that he was dealing with Pinnacle..." R. p. 204 lines 19 -- 23. Nevertheless, the trial court found the evidence insufficient.

[4] Save Charleston is truly "inapposite" in that it does not involve a claim of civil conspiracy and an election of remedies pertaining thereto. Rather, the case involved factually related claims of fraud, breach of contract, and anticipatory breach. The claims were submitted to arbitration by the parties during which the fraud claim was voluntarily dismissed without prejudice. Following arbitration, the Fraud claim was again asserted in court and was dismissed because the submission to arbitration was an election of remedies; The Court of Appeals affirmed the dismissal of that claim.

Jones v. Winn-Dixie Greenville, Inc., 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995), also quoted in Respondent's Brief (page 12), serves as an example where an election of remedies was not required between false imprisonment damages and assault & battery damages although erroneously imposed by the trial judge. Election was not required because, although factually related, the two claims and their damages were distinct. Here, an election may have well been required in the event of a duplicative verdict, but not before; Jones offers little illumination of the issues here.

Just as the federal courts have recognized that civil conspiracy and the TSA may be alternative theories to damage recovery with statutory preemption only coming to play to prevent duplicative recovery, this Court should recognize that the two theories may be alternative theories to damage recovery subject to post-verdict election of remedy only if needed to avoid duplicative recovery.

Evidence of Conspiracy Damages In The Record

SOB would have awarded the contract to HillSouth *but for* Respondent Smith's undetected departure and use of the misappropriated information. Specifically, SOB President Schafer testified that *he thought he had contracted with HillSouth* or some affiliated firm (R. p. 72 line 25 – R. p. 73 line 14), and that had he known it was Respondent Pinnacle, he "very seriously doubt" that he would have contracted with them. R. p. 68 lines 11-13. At trial, the Appellant offered evidence of direct damages of $97,203.67 – a sum equal to lost profit on the SOB project. R. p. 262 (Plaintiff's Exhibit 21); R. p. 176 line 1 – R. p. 180 line 24 (Robby Hill testimony). These damages are clearly the natural consequence of the Respondent's conduct and were not any "surprise" to Respondents as they were disclosed and discussed by Appellant's Robby Hill in his deposition by Respondents' counsel as he explained months later at the trial. R. p. 193 line 20 – R. p. 195 line 16. Thus, the principles of Rule 9(g) SCRCP discussed in Hackworth and Benedict College v. Nat'l Credit Sys., Inc., 400 S.C. 538, 735 S.E.2d 518 (Ct. App. 2012) were satisfied.

In Benedict College, the Court found that SCRCP 9(g) was satisfied where the totality of the pleading put the Defendant on notice of the type of damages sought (there specific attorney's fees and costs) so that there was no surprise. Like the pleadings in Benedict College, the

Appellant's Amended Complaint referenced and incorporated other sections of the pleading into each cause of action including the civil conspiracy claim; for example, the Amended Complaint states in the first cause of action (TSA) that "Plaintiff has lost and continues to lose business" – and that allegation is realleged in every subsequent cause of action – including the civil conspiracy claim. R.p. 22 (Amended Complaint ¶ 14).

CONCLUSION

Appellant was denied an appropriate opportunity to have its conspiracy claim considered by the jury as an alternative theory of liability as authorized by Hackworth, Island Car Wash, and NuCor. Thus, this Court should remand the matter to the trial court for a new trial on the theory of civil conspiracy.

February 2, 2015

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PROOF OF SERVICE

I certify that I have served a copy of the ***Reply Brief of Appelant*** by depositing copies of the same in the United States mail, postage prepaid, on February 3rd, 2015, to all counsel of record at the following address:

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Reply Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

2/3/2015

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