

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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SC Court of Appeals

Case No. 2018-001444

Encore Technology Group, LLC,.....Respondent/Appellant,

v.

Keone Trask and Clear Touch Interactive, Inc.

f/k/a Clear Touch Interactive, LLC,.....Appellants/Respondents.

AND

Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC,.....Appellant/Respondent,

v.

Encore Technology Group, LLC,.....Respondent/Appellant.

REPLY BRIEF OF RESPONDENT/APPELLANT
ENCORE TECHNOLOGY GROUP, LLC

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STANDARD OF REVIEW

Citing *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), Appellants argue that this Court cannot find facts in accordance with its own view of the preponderance of the evidence under the equitable standard of review, because this is “truly a law case.” Appellants’ Response Brief (“Appellants’ Brief”) at 6. Appellants ignore, however, that a “case with legal and equitable issues presents a divided scope of review” and that, “[w]hen legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal.” *Id.* at 545-46, 346; *see also S.C. Dep’t of Transp. v. Horry County*, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011); *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 338 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct. App. 2000). Therefore, this Court should apply the equitable standard of review to the unjust enrichment claim.

ARGUMENT

In their Brief, Appellants/Respondents Keone Trask (“Trask”) and Clear Touch Interactive, Inc. (“Clear Touch”) (collectively “Appellants”) do not dispute that Clear Touch has been immensely enriched in the amount of \$5,536,254 at the expense of Respondent/Appellant Encore Technology Group, LLC (“Encore”). Specifically, Appellants do not dispute that Clear Touch was built with Encore’s resources—employees, trade secrets, and money—and as a result was worth over \$5.5 million as of December 31, 2015, after less than three years in operation.¹ (Plaintiff’s Exhibit 10.E, R. p. 1690; Plaintiff’s Exhibit 10.J, R. pp. 1694-1742) They argue,

¹ Trask transferred his interest in Clear Touch to his mother on April 11, 2013 (Plaintiff’s Exhibit 14, R. p. 1749), shortly after he became employed by Encore and just before he induced Encore to sign a Reseller Agreement 13 days later, on April 24, 2013 (Plaintiff’s Exhibit 3, R. pp. 1652-1668). During discovery, Clear Touch objected and refused to produce financial information and documents after December 31, 2015, to hide how successful it was. With such additional information, the valuation of Clear Touch likely would have been much higher.

however, that Encore was not entitled to restitution from Clear Touch because (1) the jury awarded Encore \$424,945 in actual damages on two legal claims (Verdict Form, R. pp. 1916-1923), and (2) Encore had a contract with Trask. Neither argument, however, justifies denying Encore restitution. Accordingly, the Circuit Court should have awarded the value of Clear Touch to Encore from Clear Touch.²

I. Even though the law provided Encore some damages based upon the same facts, the Circuit Court erred in holding that Encore was not entitled to restitution from Clear Touch because the available damages were not an “adequate remedy.”

Appellants admit that, for the law to provide an “adequate remedy” precluding equitable relief, such remedy must be “as certain, practical, complete and efficient ... as the remedy in equity.” Appellants’ Brief at 6, citing *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm’n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989); *see also Milliken & Co. v. Morin*, 386 S.C. 1, 685 S.E.2d 828 (Ct. App. 2009), *affirmed on other grounds*, 399 S.C. 23, 731 S.E.2d 288 (2012).³ Moreover, Appellants do not dispute that “the remedy at law must ... attain the full end and justice of the case. It is not enough that there is some remedy at law....” *Chisolm v. Pryor*, 207 S.C. 54, 60, 35 S.E.2d 21, 24 (1945).

Instead, Appellants make the insignificant observation that the restitution Encore seeks is based upon the “same facts” for which it sought the “same damages” at law from the jury.

² The fact that Encore acknowledges such an award could be subject to election of remedies, Appellants’ Brief at 8, does not mean restitution should be denied.

³ This Court’s holding in *Milliken* is distinguishable from this case because *Milliken* was seeking actual damages and injunctive relief from its employee under his same contract. The Court held that the actual damages awarded under that contract constituted an adequate substitute for injunctive relief, which does not apply here because Encore sought restitution instead of injunctive relief. Moreover, because Clear Touch deceived Encore by hiding the fact that Trask owned Clear Touch, Appellants deprived Encore of the ability to fairly negotiate a contract with Clear Touch that could provide for adequate contractual remedies, making the equitable remedy of restitution the only way to provide Encore a complete and efficient remedy.

Appellants' Brief at 6. That, however, is not the test the Court is to apply. Instead, the issue is whether the legal causes of action available to Encore against Clear Touch provided a remedy as "complete and efficient" as the equitable remedy of restitution for unjust enrichment, which requires comparing the law charged to the jury with the equitable remedy.

Comparing the jury charges for the legal claims against Clear Touch with the remedy of restitution allowed in equity, it becomes clear that the law did not afford Encore with as "complete and efficient" a remedy as equity. Specifically, as the Circuit Court charged the jury, Encore could recover from Clear Touch for violation of the Trade Secrets Act only damages "incurred as a result of the wrongful acts ... **pertaining to the trade secrets.**" (Transcript, R. p. 1436, ll. 1-7) (emphasis added). The "trade secrets" Clear Touch misappropriated concerned only \$424,945 in profits from certain sales to Leon County Schools. (Verdict Form, R. p. 1919) Likewise, Encore could recover from Clear Touch for tortious interference with a contract only "the pecuniary loss resulting ... from the failure of the third person to perform the contract." (Transcript, R. p. 1438, ll. 1-9) Again, the jury focused solely on the lost profits from Leon County Schools, because it awarded Encore the same \$424,945 on this legal claim. (Verdict Form, R. p. 1920)

By contrast, the equitable remedy of restitution for unjust enrichment is much broader than the legal remedy of damages for misappropriation of trade secrets or tortious interference with a contract. Specifically, restitution for unjust enrichment "permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff." *Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1988). Stated differently, the remedy of restitution requires a defendant to disgorge "benefits or money which in justice and equity belong to another." *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009); *see also Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 409, 581 S.E.2d

161, 167 (2003) (noting the element that “it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value”); *Columbia Wholesale Co. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994); *Webb v. First Fed. Savings & Loan Ass’n of Anderson*, 300 S.C. 507, 513, 388 S.E.2d 823, 827 (Ct. App. 1989), *overruled on other grounds by Myrtle Beach Hosp. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000); *Niggel Assocs., Inc. v. Polo’s of North Myrtle Beach*, 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App. 1984).

Beyond the \$424,945 in profits Clear Touch received from the sales to Leon County Schools, the evidence presented at trial was undisputed that Clear Touch’s entire business was built using Encore’s monetary, personnel, and other resources, with Encore taking all of the risk. This scheme allowed Clear Touch to become a profitable and successful business worth at least \$5,536,254 as of December 31, 2015. (Plaintiff’s Exhibit 10.E, R. p. 1690; Plaintiff’s Exhibit 10.J, R. pp. 1694-1742) Even with exemplary damages of nearly \$850,000, the judgment against Clear Touch is nearly \$4 million, or 70%, less than the value of Clear Touch in 2015. This disparity between the judgment awarded and the value Clear Touch gained from Encore shows that the legal remedy is not adequate, because it is not “complete” and does not “attain the full end and justice of the case.” It was therefore error for the Circuit Court to fail to recognize that it would be inequitable for Clear Touch to retain this value, apart from any damages Encore proved for misappropriation of trade secrets or tortious interference with a contract.

II. Trask’s contract with Encore does not preclude restitution from Clear Touch.

Appellants also argue that, “[i]f the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract ..., the plaintiff may not recover under quantum meruit.” *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 734 S.E.2d 177 (S.C. App., 2012). The purpose of this rule is to prevent a plaintiff from recovering more than allowed by a contract he has negotiated with a defendant, so that, “[w]hile a

recovery may be had in quantum meruit for services fully performed under an express contract, the plaintiff's recovery is limited to the amount the parties agreed should be paid for the services.” *Johnston v. Brown*, 290 S.C. 141, 148, 348 S.E.2d 391, 395 (Ct.App.1986), *rev'd on other grounds*, 292 S.C. 478, 357 S.E.2d 450 (1987) (footnote omitted). These principles do not apply to Encore's unjust enrichment claim against Clear Touch.

Only Trask – not Clear Touch – had a contract with Encore for which Encore claimed breach and sought damages.⁴ Because Encore did not know that Trask was diverting to Clear Touch, and that Clear Touch was benefitting from, Encore's money, personnel, trade secrets, and other resources, Encore was deprived of the opportunity to negotiate a contract with Clear Touch that fully compensated Encore for Clear Touch's use of Encore's resources. Accordingly, the prohibition against recovering for both breach of contract and unjust enrichment cannot and does not apply to Encore's claim for restitution from Clear Touch.

CONCLUSION

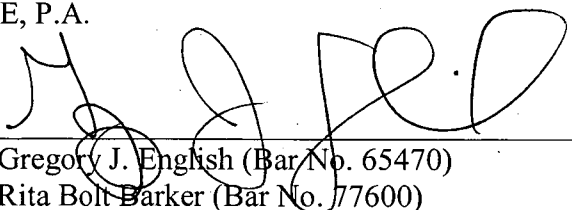
In light of Clear Touch's immense unjust enrichment, the Circuit Court erred in holding that Encore had an adequate remedy at law. Only the theory of unjust enrichment and the remedy of restitution could allow Encore to recover the full amount that Clear Touch should pay. Therefore, the Circuit Court should have held that Encore was entitled to restitution from Clear Touch on Encore's unjust enrichment claim and awarded the value of Clear Touch in 2015, or \$5,536,254, and this Court should reverse that ruling and remand with directions to enter that judgment in favor of Encore against Clear Touch.

⁴ Encore did not claim in the trial that Clear Touch breached the Reseller Agreement, which was entered without Appellants' disclosing that Trask was in control of Clear Touch.

Respectfully submitted,

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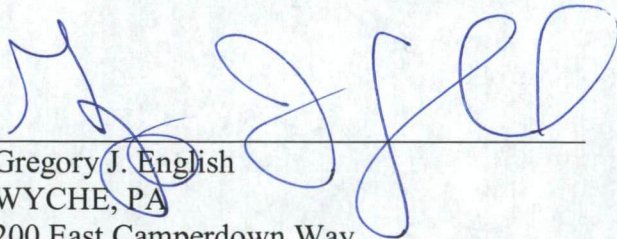
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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.



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