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**Oct 01 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY  
CIRCUIT COURT

The Hon. R. Lawton McIntosh, Circuit Court Judge

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Appellate Case No. 2018-001444

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

v.

Keone Trask and Clear Touch Interactive, Inc..... Appellants/Respondents.

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**RETURN TO APPELLANTS' MOTION FOR  
LEAVE TO "CORRECT CLERICAL MISTAKE" IN FINAL ORDER**

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Appellants/Respondents Keone Trask ("Trask") and Clear Touch Interactive, Inc. ("Clear Touch") (collectively, "Appellants") filed a motion on September 21, 2021, for leave to change what they inaccurately characterize as a "clerical mistake" in the Final Order and Judgment entered over three years ago on April 2, 2018 (the "Final Order"), which is currently on appeal.

Respondent/Appellant Encore Technology Group, LLC ("Encore") objects to Appellants' motion on the grounds that it seeks improper substantive relief on issues Appellants have failed to preserve, and that granting the motion would unfairly prejudice Encore. Specifically, Appellants' motion should be denied for the following reasons:

1. **The Final Order does not contain a mistake, but correctly ruled that each Appellant willfully violated the Trade Secrets Act and therefore was separately, not jointly and severally, liable for exemplary damages under the Trade Secrets Act.** That ruling is set forth on page 11 of the Final Order. R. 11, n.3 (the “Ruling”).

The trial court’s Ruling did not contain a factual mistake because the jury and trial court found that both Appellants willfully violated the Trade Secrets Act. Appellants attach a portion of the hearing transcript from the Record in Appellate Case No. 2019-000530 (the “2019 Appeal”), but omit pages 236-237, attached hereto as Exhibit A, in which the trial judge agreed the jury found that Appellants “were both willfully violating the Trade Secret Act.” *Id.* (“MR. ENGLISH: This verdict form found both Clear Touch and Mr. Trask ... liable for violating the Trade Secrets Act, and the willful and wanton – it’s clear that it refers to ‘defendants’ plural, so I think the finding is clear. THE COURT: Sure. I don’t disagree with that.”).<sup>1</sup>

Nor was the Ruling a legal mistake. Instead, it was substantively correct for the reasons set forth in Encore’s Brief and Reply Brief in the 2019 Appeal. In short, the Trade Secrets Act authorizes exemplary damages of “twice any award,” S.C. Code Ann. § 39-8-40(C), and where two defendants are both found to have willfully violated the Act, there are necessarily two

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<sup>1</sup> Similarly, both Appellants went on to willfully obstruct the Receiver’s access to information about Trask’s assets. In fact, after months of noncompliance and multiple hearings, during which the Receiver noted an unprecedented refusal to cooperate, the trial court held both Appellants in contempt for their continued, willful violations of the court’s orders:

... [T]he Court finds that Defendants and Tamara Trask have failed to show cause why they should not be held in contempt for violating the Receivership Order. Specifically, Defendants and Tamara Trask have failed to show cause why they have not produced all the information and documents set forth in the Receiver’s Exhibit 3, entitled “Documents/Information Needed by the Receiver” ... requested by the Receiver on one or more occasions .... As such, Defendants and Tamara Trask are held in civil contempt for failing to comply with the Receivership Order.

Order filed December 6, 2018, R. 69.

awards, one against each defendant. Contrary to Appellants' position, the Act does not say exemplary damages are limited to "twice actual damages." Even if the statute were ambiguous on this point, it should be interpreted consistent with the common law of punitive damages, for which liability is separate for each defendant, not joint and several. *McGee v. Bruce Hosp. Sys.*, 344 S.C. 466, 471-72 n.3, 545 S.E.2d 286, 288-89 n.3 (2001) ("Punitive damages awarded against one tortfeasor do not constitute double recovery with respect to a judgment against another tortfeasor ...."). Encore incorporates its legal arguments from its briefs in the 2019 Appeal herein by reference.

Moreover, Appellants failed to preserve any objections to the Ruling on grounds of mistake. Although Appellants objected to numerous portions of the Final Order, they did not object to the subject Ruling. Defendants' Rule 59 Motion for Reconsideration, R. 593, Exhibit D (Defendants' Redline of Proposed Final Judgment and Order with Accompanying Email), R. 639, at R. 651 (indicating no objection to the Ruling). Nor did Appellants object to the Ruling in their briefs in this appeal. Further, any motion for relief from a judgment must be "made within a reasonable time," and for reasons of mistake, "not more than one year after the judgment." Rule 60(b), SCRCF. Accordingly, Appellants have failed to preserve or timely make any argument that the Ruling contains a factual or legal mistake.

Finally, although Appellants failed to preserve their argument that the Ruling was a mistake, if it reaches the merits of the 2019 Appeal, this Court should rule that Appellants are separately, not jointly and severally, liable for exemplary damages under the Trade Secrets Act. Accordingly, there is no reason for this Court to grant leave for the trial court to change the Final Order.

2. **The Ruling did not contain any “clerical mistakes.”**

Recognizing that they have failed to preserve any objection to the Ruling as a factual or legal mistake, Appellants try to shoehorn their argument into the exception for “clerical mistakes” under Rule 60(a), SCRPC. That shoe, however, does not fit.

As noted by this Court in *Dion v. Ravenel, Eiserhardt Associates*, 316 S.C. 226, 449 S.E.2d 251 (Ct. App. 1994), a “clerical mistake” is akin to a typographical error contradicted by the record, not a substantive ruling on a controverted issue:

Generally, a clerical error is defined as a mistake in writing or copying. ... As applied to judgments and decrees, it is a mistake or omission by a clerk, counsel, judge or printer which is not the result of exercise of judicial function. While a court may correct mistakes or clerical errors in its own process to make it conform to the record, it cannot change the scope of the judgment.

*Id.* at 230, 253 (citations omitted) (holding master could not revise legal description in foreclosure order).

As noted by the South Carolina Supreme Court, “[t]he basic distinction between clerical mistakes and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of blunders in execution whereas the latter consist of instances where the court *changes its mind*, either because it made a legal or factual mistake in making its original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination.” *Landry v. Landry*, 430 S.C. 153, 161, 843 S.E.2d 491, 495 (2020) (emphasis in original; citation omitted).

The mistake claimed by Appellants was the result of the exercise of judicial function: deciding legal liability for exemplary damages under the Trade Secrets Act. To allow the change Appellants request would reduce the scope of the judgment against Trask by nearly \$850,000.

Appellants do not seek to “clarify” a “clerical mistake” as allowed by Rule 60(a), SCRC, but instead to substantively reduce the scope of the judgment on a contested issue.

**3. Allowing amendment of the Final Order at this stage would unfairly prejudice Encore.**

The Final Order noted that “the jury verdicts of \$424,945 were to compensate Encore for lost profits on sales to Leon County Schools” and that, “assuming these damages are coupled with double exemplary damages, attorneys’ fees, costs and expenses as **set forth above**, Encore seeks to recover these actual damages only under the Trade Secrets Act.” Final Order, R. 25 (emphasis added). The Final Order “set forth above” both Trask and Clear Touch paying \$849,890 in exemplary damages to Encore. *Id.*, R. 10-11. Thus, Encore elected the Trade Secrets Act recovery against Clear Touch in reliance upon the Final Order’s finding that Trask would also be liable for \$849,890 in exemplary damages.

If the Final Order had provided that Clear Touch’s payment of exemplary damages would excuse Trask from having to pay exemplary damages, Encore could have elected to collect the Trade Secrets Act verdict from Trask and the tortious interference verdict—including \$500,000 in punitive damages—from Clear Touch, which would have resulted in a recovery to Encore that was \$500,000 higher than that now argued by Appellants. To allow the Final Order to be changed and deprive Encore of that election would unfairly prejudice Encore.

**CONCLUSION**

For the foregoing reasons, the Court should deny Appellants’ motion for leave to “clarify clerical mistake” in the Final Order.

Respectfully submitted,

WYCHE, P.A.

s/ Gregory J. English

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Attorneys for the Respondents

October 1, 2021

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY  
CIRCUIT COURT

The Hon. R. Lawton McIntosh, Circuit Court Judge

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Appellate Case No. 2018-001444

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

v.

Keone Trask and Clear Touch Interactive, Inc..... Appellants/Respondents.

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**EXHIBIT A**

**TRANSCRIPT EXCERPTS FROM HEARING HELD FEBRUARY 7, 2019**

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STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

) IN THE COURT OF COMMON PLEAS  
) THIRTEENTH JUDICIAL CIRCUIT  
) CASE NO: 2015-CP-23-05757

Encore Technology Group, LLC,

PLAINTIFFS,

-vs-

Keone Trask and Clear Touch Interactive,  
Inc., f/k/a Clear Touch Interactive, LLC

DEFENDANTS.

TRANSCRIPT OF RECORD

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STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

) IN THE COURT OF COMMON PLEAS  
) THIRTEENTH JUDICIAL CIRCUIT  
) CASE NO: 2017-CP-23-06520

Jami Powell and Encore Technology  
Group, LLC,

PLAINTIFFS,

-vs-

Clear Touch Interactive, Inc. (a Nevada  
Corporation) f/k/a/ Clear Touch Interactive,  
LLC (a Nevada LLC); Keone Trask and  
Tamara Trask,

DEFENDANTS.

TRANSCRIPT OF RECORD

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STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

) IN THE COURT OF COMMON PLEAS  
) THIRTEENTH JUDICIAL CIRCUIT  
) CASE NO: 2018-CP-23-03966

Encore Technology Group, LLC,

PLAINTIFFS,

-vs-

Tamara Beatrice Trask, individually and as  
Trustee of Clear Touch Interactive

TRANSCRIPT OF RECORD

MR. ENGLISH: And I think that would be an unreasonable interpretation of that statute. Because, for example, imagine that you have ten defendants conspiring to steal somebody's trade secrets. Under that interpretation, all ten defendants would just divide up the exemplary damages among themselves.

THE COURT: No, what you would do at trial is that you would tailor a verdict form that would be applicable to the individual defendants. And that way it would be clear and the argument's not being made.

MR. ENGLISH: This verdict form found both Clear Touch and Mr. Trask ---

THE COURT: Jointly and separately liable.

MR. ENGLISH: --- liable for violating the Trade Secret Act, and the willful and wanton -- it's clear that it refers to defendants plural, so I think the finding is clear. They were both willfully violating the Trade Secret Act.

THE COURT: Sure. I don't disagree with that.

MR. ENGLISH: And let me just -- I want to address some of the background here, because I don't feel like I've gotten a chance to be heard on that.

THE COURT: You go ahead. I'm sorry.

MR. ENGLISH: Thank you. Judge, Mr. Smith got up and said his clients have paid a lot of money. But they paid that money to the clerk. They haven't paid a dime to the Plaintiff in this case who has a judgment, and still hasn't collected a single penny on that. And contrary to what Mr. Smith suggested, Encore has offered to resolve this case and take a big discount. So, the reason that we're -- the reason that we are here is because the positions that Mr. Trask has taken, and specifically what we were told at the beginning of this case is that Mr. Trask -- you know, Clear Touch deposited its money. Mr. Trask had no -- virtually no assets to pay.

And so, when we served discovery -- again, we got this verdict in September 2017. We got the judgment about six months later in about April of 2018, and served post-judgment discovery on Mr. Trask. He didn't answer any of that. He wouldn't tell us what bank accounts he had. He wouldn't tell us anything. So, in part, because of that, we filed and asked for a receiver, and the Court agreed that that was appropriate, especially with what ---, given to us or not given to us.

And then, instead of cooperating with the receiver, Mr. Trask -- I counted this morning, or last night -- Mr. Trask has filed no less than seven different motions to try to alter or change or having to turn over information. So, that's why these attorney's fees and receiver's fees are so high. In fact, the Court just recently, back in November, held Mr. Trask in contempt for not cooperating with the receiver. So, to the extent he's claiming he's suffering some hardship, it's his own lack of cooperation that is the cause of that.

Now, if Mr. -- if the receiver were here, he could tell you that even to this day Mr. Trask has not cooperated with the receiver ---

THE COURT: Well, let me tell you -- let me just state for the record. I had a call from the receiver. I was down in Columbia taking care of other things yesterday, and I told him that he did not need to come. I didn't think his presence would be necessary. If that's a mistake, that's on me, that's not on anybody else. I did that. And one of the reasons was I didn't see any basis, you know -- incur any additional fees and costs without him -- you know, I didn't think it was necessary. But I may be wrong about that.

MR. ENGLISH: And then what Your Honor put in that receivership order, I've attached that as page 5 -- to the last page of what I handed up. And in the receivership order, the Court ordered that the receiver shall be entitled to payment of professional fees and expenses incurred by the receiver. While Trask appeal remains pending, receiver's fees and expenses shall be paid by Plaintiff. That's my client that's had to pay that. If the judgment is

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Appellate Case No. 2018-001444

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

v.

Keone Trask and Clear Touch Interactive, Inc..... Appellants/Respondents.

**PROOF OF SERVICE**

I hereby certify that I have served the foregoing Return to Appellants' Motion for Leave to "Correct Clerical Mistake" in Final Order on the above-named Appellants by email and by depositing a copy in the U.S. mail, first class postage prepaid, addressed to their counsel of record as follows:

Joseph O. Smith, Esq.  
Joshua J. Hudson, Esq.  
Smith Hudson Law  
200 N Main St. Ste. 301  
Greenville, SC 29601

WYCHE, P.A.

s/ Gregory J. English  
Gregory J. English (S.C. Bar No. 65470)  
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October 1, 2021

## Greg English

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**From:** Greg English  
**Sent:** Friday, October 1, 2021 2:07 PM  
**To:** Alison Strother; Josh Smith; Josh Hudson  
**Cc:** Rita Bolt Barker; Greg English  
**Subject:** RE: SERVICE OF DOCUMENT: Encore Technology Group, LLC v. Clear Touch Interactive, et al. (Appellate Case No. 2018-001444)  
**Attachments:** Return to Motion for Leave to Correct.pdf

Dear Josh and Josh,

We hereby serve upon you our Return to Appellants' Motion for Leave to "Correct Clerical Mistake" in Final Order.

Thanks, Greg



### Gregory English | Wyche

200 East Camperdown Way | Greenville, SC 29601-2972  
Phone: (864) 242-8247 | Fax: (864) 235-8900  
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A Lex Mundi Member Firm

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**From:** Alison Strother <astrother@smithhudsonlaw.com>  
**Sent:** Tuesday, September 21, 2021 9:57 AM  
**To:** Court Of Appeals Filings <ctappfilings@sccourts.org>; Burns, LaToyla <lburns@sccourts.org>  
**Cc:** Greg English <genglish@wyche.com>; Rita Bolt Barker <rbarker@wyche.com>; Josh Smith <jsmith@smithhudsonlaw.com>  
**Subject:** FW: SERVICE OF DOCUMENT: Encore Technology Group, LLC v. Clear Touch Interactive, et al. (Appellate Case No. 2018-001444)

Good Morning,

| The forwarding of this email and any attachments constitute your <u>service copy(ies)</u> of the document(s) listed below. |   |
|--|---|
| COURT  | Court of Appeals  |
| APPELLATE CASE NO.   | 2018-001444   |
| RESPONDENT/APPELLANT   | Encore Technology Group, LLC  |
| APPELLANTS/RESPONDENTS   | Keone Trask and Clear Touch Interactive, et al.   |
| DOCUMENT TITLES  | 1. Motion for Leave to Correct Clerical Mistake in Final Order; and<br>2. Amended Proof of Service. |
| ATTORNEY NAME  | Joseph O. Smith   |
| ATTORNEY TELEPHONE   | 864-908-3912  |

The Motion fee is being mailed. Should you have any questions or issues, please do not hesitate to contact us.

Thank you,