THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge
Case No. 2004-CP-26-3498

Carey Graham and Rodney A. Chardukian

Respondents,

v.

Malcolm M. Babb, Brenda R. Babb, Cable Plus of Carolina, Inc., South Bay Lakes Cable Partnership, Southbridge Cable Television, LLC, Renaissance Enterprises, Inc., Now Known as Condo Services, Inc.,

Defendants,

Of Whom

Brenda R. Babb and Renaissance Enterprises, Inc, Now Known as Condo Services, Inc., are

Appellants,

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

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III. Did the trial court commit error when it awarded punitive damages in this case when such constituted double punishment; when Appellants had denied the allegations and had been placed in default with their meritorious defense stricken; and the punitive award was given to the corporate entities when they had neglected to protect their own interests?

IV. Did the trial court commit error when it allowed Respondents to act as receiver and to collect the judgment which had been entered against Appellant Babb?

STATEMENT OF THE CASE

Respondents filed this action on June 24, 2004 seeking an injunction, an accounting and damages for breach of contract relating to ownership rights and interests in certain cable television contracts. **R.105-113**. Appellants timely filed an Answer generally denying the allegations made in the complaint and counterclaimed for Specific Performance of a contract. **R. 115-123**. The Respondents filed a Reply to Appellants' counterclaim dated September 2, 2004. **R. 126-128**. Respondents thereafter served discovery requests. Appellants answered the requests in a manner they considered correct and complete. However, Respondents objected to the adequacy of the responses and filed a Motion to Compel, and sought sanctions and other relief. The Honorable J. Michael Baxley, Judge, heard and granted the motion striking Appellants' responsive pleadings and counterclaim and holding Appellants in default. **R. 36-48**. Appellants filed a Motion to Reconsider which was denied by Judge Baxley.[1] Appellants were placed in default pursuant to Rule 55, SCRCP.

On October 9, 2009, Respondents filed a Motion requesting the following: 1) a damages hearing; 2) the appointment of a receiver; and 3) a restraining order. **R 146-147**. A hearing on the motion was held on December 15, 2009, before the Honorable Clifton Newman, Judge. By Order filed March 16, 2010, Judge Newman approved the motion in part by allowing for a Receiver. **R. 69-76**. The Court appointed John Pharr of Strand Development, Inc., Myrtle Beach, pursuant to Rule 66, SCRCP. Judge Newman denied the remainder of the motion. Mr. Pharr accepted the position of Receiver on April 28, 2010.

Appellants filed a Motion to Reconsider Judge Newman's Order on March 25, 2010, but

Judge Newman denied the motion by Order filed March 30, 2010. Babb and Condo received written notice of Judge Newman's Order on April 15, 2010, and an appeal was taken on April 29, 2010. Judge Newman's order was affirmed.

The Honorable Benjamin H. Culbertson, Chief Administrative Judge for the Fifteenth Judicial Circuit then entered an order for the matter to be scheduled before the Honorable R. Ferrell Cothran, Jr., Judge for the purposes of establishing the damages to be awarded in this action. The matter came on for hearing before Judge Cothran on March 23, 2011, in Clarendon County, South Carolina. After hearing testimony in the matter Judge Cothran entered his *Judgment Against Defendants Brenda R. Babb and Renaissance Enterprises, Inc., Now Known as Condo Services, Inc.* on May 17, 2011. **R. 1-16.** This order allowed, *inter alia*, for judgment against the Appellants jointly and severally, in the amount of Seven Hundred Seventy Six Thousand Six Hundred and Four and 55/100thes ($776,604.55) Dollars in actual damages for the period beginning on July 1, 2003 through June 30, 2010, plus punitive damages in the amount of Two Hundred Thousand and no/100 ($200,000.00) Dollars. **R. 11.** A Motion for Reconsideration was filed by Appellants on June 27, 2011. **R. 137.** Thereafter, Judge Cothran entered an *Amended Judgment Against Defendants Brenda R. Babb and Renaissance Enterprises, Inc., Now Known as Condo Services, Inc.* on August 1, 2011. **R. 20-32.** Appellants' motion was denied on even date therewith, August 1, 2011. **R. 33-35.** The Amended order neither materially nor substantively altered the relief allowed for in the original order as against the Appellants. This appeal follows.

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[1] Judge Baxley's Order was appealed to the South Carolina Court of Appeals. However, that

STANDARD OF REVIEW

A shareholder's derivative action is one in equity. *McDuffie v. O'Neal*, 324 S.C. 297, 302-03 476 S.E.2d 702, 705 (Ct.App. 1996). Therefore, this court may find facts in accordance with its own view of the preponderance of the evidence. *Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). However, the reviewing court is not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility. *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct.App. 2003). Straight v. Goss, 383 S.C. 180, 192, 678 S.E.2d 443 (Ct.App. 2009).

When both equitable and legal causes of action are maintained in one suit, each must be analyzed separately according to its own identity as legal or equitable. *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005); *Future Group, II v. Nationsbank*, 324 S.C. 89, 97, 478 S.E.2d 45, 49 (1996). On appeal of an action at law tried without a jury, the findings of fact of the trial court will not be disturbed unless found to be without evidence which reasonably supports the trial court's findings. *Toivnes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). The trial court's findings are equivalent to a jury's findings in a law action. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975). This court must determine whether any evidence reasonably supports the factual findings of the trial court. *Townes Assocs., Ltd.*, 266 S.C. at 86, 221 S.E.2d at 776. Additionally, the appellate court can correct errors of law. *Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C.* 353 S.C. 327, 334, 577 S.E.2d 468, 472 (Ct.App. 2003).

The trial judge has considerable discretion regarding the amount of damages, both actual

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order was affirmed.

and punitive. *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct.App. 2003); *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 538 S.E.2d 15 (Ct.App. 2000). Because of this discretion, review on appeal is limited to the correction of errors of law as to actual damages. Kuznik, 342 S.C. at 611, 538 S.E.2d at 32; Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App. 2000). The Appellate Court's task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award. See *Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 314 S.E.2d 19 (Ct.App. 1984). A trial court's determination of the constitutionality of a punitive damages award is subject to a de novo standard of review. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 182 (2009). *Hale v. Finn*, 388 S.C. 79, 694 S.E 2d 51 (Ct.App. 2010)

ARGUMENT I

The trial court committed error when it denied the Appellants the right to testify at trial on the issue of damages and punitive damages. (Question I)

At the trial held below on the issue of damages, the Respondents characterized this action as a shareholders' derivative action, although such was not technically pled in the complaint. Respondents stated that the corporate defendants were the owning entities of 784 cable television subscriptions held in the corporate defendants' names, which were collectively owned by the individual plaintiffs and Mrs. Babb. The Plaintiffs brought the action in their capacity as owners of their respective interests in these corporate entities and as shareholders, directors and members of the corporate entities that own easements respecting the cable television services in various condominium communities. Respondents stated that monies were collected by Mrs. Babb which were rightfully owned by the corporate defendants and should be put back in the hands of the corporate defendants.

The corporate defendants had been operating pursuant to an agreement with Time Warner for the acquisition of cable signal which they distributed to the communities. **R. 228, line 1 – R. 229, line 24; R. 230, lines 11-25.** That agreement was expiring in July of 2003. **R. 231, lines 4-8.** At a meeting in July of 2003, held between these individual parties and representatives of Time Warner, there was a conversation between Ms. Babb and the Respondents concerning her purchase of Respondents' interests, so that Babb would actually take over control of the operations of the cable services and the collection of monies generated. **R. 232, line 17 – R. 233, line 11.** Respondents' counsel told the court that Ms Babb had reached an agreement with Time Warner Cable to provide services for a fee, the terms of which were not disclosed to Respondents. **R. 213, lines 13-21.** Mrs. Babb, through a new company, Condo Services, also known as Renaissance Enterprises, Inc., allegedly entered into a new seven year agreement with Time Warner Cable to continue to provide services to the 784 subscribers. Counsel argued that after their conversation, Respondents went to prepare a written agreement but Appellants refused to communicate further with them regarding her purchase of their respective interests. **R. 234, lines 7 – 23.**

Respondents brought this action to seek recovery of the monies allegedly wrongfully taken by Appellants. **R. 110 at ¶ 22**. Appellants denied the complaint's allegations and counterclaimed against the Respondents for specific performance. Because of discovery abuses by Appellants, they were sanctioned by Judge Baxley having their pleadings stricken and being placed in default. **R. 36.** Appellants' position in the litigation has always been that Time Warner simply no longer wanted to do business with the Respondents and was going to allow their service agreement to expire in calendar year 2003. In response to this, the Respondents abandoned the business altogether and simply walked away from it. At that point Appellants

entered into a new contract with Time Warner simply to avoid the communities from going dark as a result of a loss of cable signal completely. **R. 120 at ¶¶ 22-24.**

At trial the Appellants sought to introduce evidence on the issue of damages. **R. 217, line 12 - 220, line 5; R 219, line 14 - R. 220, line 5, R. 526-534** (Court's Exhibit 3), **R. 533-538** (Court's Exhibit's 4). They argued that even though the trial Court had previously held them in default as a sanction for not complying with a discovery order, the defendants should have been allowed to present evidence on issues not properly pled in plaintiff's complaint. **Id**. The Court did not permit the defendants to introduce any evidence on the issue of damages or the truthfulness of the allegations in the complaint which were not well pled because of the previously entered default against. **See e.g. R. 262, line 2 – R. 263, line 5.** In its final order, the trial Court failed to rule on Appellants' request or otherwise discuss it. We are asking this Court to consider the ruling from the bench during the trial of this case and to reverse the judgment and remand for a new trial.

Discussion

In *Howard v. Holiday Inns*, 271 S.C. 238, 246 S.E.2d 880 (1978), the Court discussed the procedure to be used in a default circumstance. Regarding the legal consequence of default, the Court stated,

> By defaulting, a defendant forfeits his "right to answer or otherwise plead to the complaint." 251 S.C. at 66, 160 S.E.2d at 193. [2] In essence, the defaulting defendant has conceded liability. However, a defaulting defendant does not concede the *amount* of liability.

Emphasis in original. The Court noted that there is one exception to this rule, that being, "When the action is one in contract for monetary damages and the demand is liquidated or, if un-

[2] *Morgan's, Inc. v. Surinam Lumber Corp.* 251 S.C. 61, 66, 160 S.E.2d 191, 193 (1968).

liquidated, an itemized, verified statement of account is served with the summons and complaint." *Compare Beckmann Concrete Co. v. United Fire & Casualty*, 360 S.C. 127, 600 S.E.2d 76 (Ct. App. 2004) (The mere demand for judgment of a specified dollar amount does not suffice to make plaintiff's claim one for "a sum certain" as contemplated by Rule 55(b))."

S.C.R.C.P. Rule 55 (b) governs the procedure to be followed when default has been entered. It states in part,

> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to ***take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter,*** the court may conduct such hearing or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties if a proper demand therefor has been made pursuant to Rule 38 and not withdrawn, or when and as required by any statute. Pursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the last known address of such party whether or not such party has appeared in the action.

Emphasis added. In this case, Respondents' complaint clearly shows that the amount of damages is not known. Judge Baxley's order itself (which struck Appellants' responsive pleading) called the damages hearing a "trial." See Order at page 13. While the order does state that, "The allegations of Plaintiffs Complaint and the Plaintiffs' Requests for Admission shall be deemed admitted by the Defendants Brenda Babb and Condo Services[,]" the complaint alleges only

> (6) "That ... the individual owners of the corporate and partnership Defendants (the Plaintiffs and the Defendants Babb) met with officials of Time Warner Cable for the purposes of attempting to establish a new agreement for providing cable services to the areas serviced by their common provider agreements. At that meeting, ***these individuals agreed in the presence of Time Warner that the Defendants Babb would pay unto the Plaintiffs substantial sums based upon an agreed formula, for their portion of the revenue stream from the cable provider agreements, provided that the agreement be reduced to writing.*** Pursuant to such oral understanding, the cable service bulk provider, Time Warner,

> executed an agreement with the Defendants Babb and Renaissance Enterprises, also known as Condo Services, Inc, a South Carolina corporation, which is upon information and belief, owned and controlled by the Defendants Malcolm M. Babb and Brenda Babb.
>
> (7) That as a result, the defendants Babb and the corporations under their control have billed and collected the revenues from the service areas heretofore mentioned, but have failed to make any payments whatsoever to the Plaintiffs or to the legal entities that own the rights to the provider agreements. Despite repeated demands, the Defendants Babb and the corporations under their control have failed and refused to execute a written agreement concerning the purchase of the service agreement and payment of funds to the Plaintiffs or the entities owning the service provider agreement.
>
> (8). "That immediately after such meeting, the Plaintiffs submitted a written agreement to the defendants Babb for execution as agreed earlier, but since such time, the Defendants Babb and the corporation under their control, have refused mail addressed to their address and have refused to return the Plaintiffs' repeated telephone calls concerning finalization of the transaction and payment of the income stream from the service agreement, whether to the individual owners or to the entities that own the service agreements.

Thus, while the allegations are deemed admitted, for example, that the Plaintiffs submitted a written agreement to the defendants Babb for execution as agreed earlier, the ***truthfulness of the agreements accuracy remained unsettled in this litigation at the time of trial.***

This is so because the complaint merely states that "a written agreement to the defendants Babb for execution as agreed earlier." The complaint alleges that the act of execution had been agreed upon, but it does not allege that the written agreement accurately encompassed the terms of the oral understanding or that it reflected the meeting of the minds which had occurred at the Time Warner offices, if any, had indeed occurred. **R. 217, line 12 – 220, line 9.** Appellants were required to accept as true that a written agreement was submitted as agreed, but we were left to question whether the agreement was accurate. See *Duncan v. Duncan*, 93 S.C. 487, 76 S.E. 1099

(1913) ("...the default admits the truth of every relevant fact ***well pleaded.***"). Emphasis added. But in this case, the complaint did not allege that the agreement accurately recounted the terms of the "oral agreement" which was allegedly made in the presence of Time Warner representatives; and the sanctions order did not so state. **R. 36 – R. 48.**

An inquiry into truthfulness is specifically allowed for by S.C.R.C.P. 55(b) and such an inquiry was not foreclosed by Judge Baxley's order imposing sanctions. S.C.R.C.P. 55(b) requires specific findings regarding damages. See *Hermanson v. Szafarowicz*, 457 Mass. 39, 927 N.E.2d 982 (2010), and cases cited therein interpreting the federal rule 55. And findings on this point were required due to questions left unanswered by the complaint itself. While the Court made specific findings it did so without allowing the defendants to introduce evidence on that point. As discussed below, the damages would have been impacted to a significant degree.

Moreover, the Respondents testified and acknowledged at trial that there was no agreement. See **R. 251, lines 12-13** where everyone agrees that there was no agreement as a result of the 2003 meeting between the parties at the Time Warner offices in 2003. This is significant we submit given that Respondents admitted they did nothing further to protect the interests of the community residents regarding the delivery of cable services to the consumers. Respondent Graham admitted he doesn't know why his company didn't enter into an agreement with Time Warner for continued signal for the consumers, **R. 288, line 5**; they did not have a contingency plan if the Babbs did not want to buy out their interests, **R. 293, lines 1-16;** he never made a complaint to Time Warner about its dealing with Mrs. Babb, **R. 297, lines 4-8;** and he never did anything to determine whether the signal even continued or not. **R. 299, lines 6-17.** Only Appellants could have provided testimony explaining the inaction of Respondents on these points left ambiguous by the complaint. Further it is essential to know these matters when the

question of punitive damages arises, as discussed infra.

ARGUMENT II

The Court committed error when it neglected to give Appellants credit for signal costs from 2003 until 2007 when proffer made by Appellants showed that such costs totaled $194,602.50. (Question II)

At page five of the trial Court's Order, it states, "Condo's expert gave credit for $58,000 advanced by Babb for renovation." **R 24.** However, the trial Court neglected to give Condo credit for ***signal costs*** from Time Warner from July, 2004 thru March, 2007. Paying for signal was a necessary and legitimate business expense paid by Appellants to Time Warner which ultimately benefited the Respondents. **R. 526, 529-533**. This document, relied upon by the Respondents and the trial Court, verifies that Appellant Condo Services paid $194,602.50 for signal from July, 2003 thru March, 2007. **R. 526, 529-533**. The trial Court's calculations on damages gives credit for signal costs from March, 2007 thru June, 2010 in the amount of $457,061.20. **R. 14-16.** However, it fails to give credit for business / signal expenses incurred prior to March, 2007. **R. 526-527**. Appellants argued this at trial and in their Motion to Reconsider @ page 8, **R. 98**, but the trial Court failed to attribute any merit to defendants' arguments in the final order. Appellants would ask this Court to reverse this error.

Discussion

The Exhibit proffered by Mrs. Babb shows the following: The signal costs from July, 2003 through March, 2007 were $194,602.50. **R. 526** (Court's Exhibit 3 at page 1). The signal from March, 2007 through June, 2010 was $457,061.20, **R. 14**, for a total payment by Appellants to Time Warner of $651,663.70. Given the $58,032.00 expense credit agreed to by Respondents,

R. 14, we submit this expense should have likewise been credited to Appellants.[3] Therefore, $854,914.34 would be the gross amount collected by Time Warner from March, 1, 2007 through June 30, 2010, **R. 14**. Deducting the total expenses there would be a $97,883.34 net to owners from March 1, 2007 through June 30, 2010 (40 months). Using the lower court's formula, $97,883.34 divided by 40 months (3/1/07-6/30/10) would equal an average of $2,447.08 per month to owners for the 84 months from July 2, 2003 through June 30, 2010. Multiplying 84 x $2,447.08 would total $205,554.72. Thus, the average income per subscriber for the seven (7) year period ($205,554.72 divided by 784 subscribers) would be $262.18.

SouthBridge Cable Television, LLC, included 288 subscribers, **R. 15**. Therefore, 288 x $262.18 would total $75,507.84 with 50% of this amount going to Mr. Graham ($37,753.92); and 50% going to Mrs. Babb ($37,753.92). Cable Plus of Carolina, Inc. had 496 subscribers, **R. 15**. Multiplying this number by $262.18 would total $130,041.28. Giving 25% of this amount to Mr. Graham would total $32,510.32; and giving 25% to Mrs. Babb would equal $32,510.32 and giving 50% to South Bay Lakes Cable Partnership (Mr. Chardukian only) would equal $65,020.64.

Recapping for foregoing: the total due SouthBridge Cable Television, LLC would be $75, 507.84; the total due to Cable Plus of Carolina, Inc. would be $130,041.28 for a total of $205,549.12. Also recapping individual totals would be as follows: $70,264.24 would go to Mr. Graham; $70,264.24 would go to Mrs. Babb; and $65,020.64 would go to Mr. Chardukian.[4] Appellants request this Court to reverse the lower court and remand this matter for retrial.

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[3] The trial court deducted this $58,000.00 amount, **R. 14**, as an expense credit after determining the net monthly income for 84 months instead of as an initial operating expense which should have come off the top. Given the *$47,367.41* expense credit agreed to by Respondents, **R. 5, 492** (Exhibit 2 to Strait deposition) this would total $757,031.11 for all expenses paid by Appellants.

ARGUMENT III

The Court committed error when it awarded punitive damages in this case: when such constituted double punishment; when Appellants had denied the allegations and had been placed in default with their meritorious defense stricken; and the punitive award given to the corporate entities when they had neglected to protect their own interests. (Question III)

Initially, Defendants would assert that they were placed in default as a punishment for not providing financial information to Plaintiff during discovery. For the Court to now impose additional punitive damages for that same conduct constitutes double punishment. Defendants would point out that the Respondents' attorney used the same arguments to place the Appellants in default that he used to ask for punitive damages in the trial. [5] Defendants would submit that the plaintiff chose what sanction they desired at the *prior* hearing before Judge Baxley.

In *Hunter v. Spaulding*, 97 N.C. App. 372, 379, 388 S.E.2d 630, 635 (1990), the Court held that it was error for a trial court to submit the question of punitive damages to a jury without affording defendant the opportunity to present evidence in a case where default was entered as a discovery sanction. This is because of the peculiar nature of punitive damages. Also see *Tricou v. ACI Management, Inc*, 37 Ark. App. 51 (1992) (not allowing punitive damages in that case where there was no proof beyond that which formed the basis for actual damages).

Secondly, defendants assert that punitive damages should not be allowed because they were placed in default, ***not because of the merits of the case, but because of alleged discovery***

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[4] Appellants are off approximately $4.50 on some numbers but this is due to rounding off of some numbers.

[5] The trial Court's order states at page 9, second paragraph, "What is most disturbing is that the majority of the damages occurred while this action was pending." **R. 9**. Thus Judge Baxley had already taken into account "most" of Appellants conduct at the time he struck Appellants' responsive pleadings. Further, the trial court noted, "Babb's conduct ***as discussed in Judge Baxley's order*** supports an award of punitive damages." **Id.** Emphasis added.

abuses. Defendants asserted a meritorious defense and a counterclaim against the plaintiffs in the responsive pleading. **R. 117-122.** All of that was stricken, however. Having denied the defendants the opportunity to be heard in any manner whatsoever, to impose punitive damages under such circumstances constitutes a denial of due process of law under the South Carolina and United States Constitutions we submit. In *Mitchell v. Fortis*, supra, our Supreme Court stated

> In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) . . . [t]he Supreme Court identified three bases for its promulgation of a de novo review standard. First, the concepts involved in the due process analysis of punitive damages awards are "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." *Cooper Industries*, 532 U.S. at 436, 121 S.Ct. 1678 (quoting *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)). Second, the due process criteria acquire content only through application, and "independent review is therefore necessary if appellate courts are to maintain control of, and clarify, the legal principles." *Id.* (quoting *Ornelas*, 517 U.S. at 697, 116 S.Ct. 1657). Third, "de novo review tends to `unify precedent' and `stabilize the law.'" *Id.* (quoting *Ornelas*, 517 U.S. at 697-98, 116 S.Ct. 1657). We agree with this analysis.

In the *Fortis* opinion the Court went on to adopt a test to be considered in punitive review. This test requires consideration of (1) the degree of reprehensibility of defendants' conduct, (2) the disparity between the actual harm suffered and the amount of punitive damages awarded by the jury, and (3) the difference between punitive damages awarded by the jury and those awarded in similar cases. *See id.* at 587-89, 686 S.E.2d 185-86. (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)).

We submit that the context of the award of punitive damages in our case would perpetuate fluidity in this area of the law. Not only is due process implicated and violated by the circumstances of the punitive award in this case, but such an award here is arbitrary we submit. This is because the Court is basing its decision in part on known factual errors. The parties agreed there was no contract agreed upon at their meeting at the Time Warner offices; **R. 251,**

lines 12-13, we know that Time Warner had given notice to no longer do business with the entities owned by Respondents **R. 288, line 16 – R. 291, line 7**; and we know that the Respondents did nothing to protect the interests of cable subscribers once they left that meeting of July 3, 2003. **R. 295, lines 1-20; R. 296, lines 3-20**. Punitive damages pose an acute danger of arbitrary deprivation of property. *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010). In order to avoid arbitrary issues in this punitive award the testimony from the Appellants was essential.

Thirdly, the Court awarded $200,000.00 to the *corporate entities* in punitive damages but distributed the monies to the individual plaintiffs exclusive of Appellant Babb. We submit this award permits the individual plaintiffs to bootstrap a punitive damages award through a misuse of the corporate entities which didn't even function in this litigation through neglect of the individual plaintiffs themselves. Respondents held no meetings, authorized no litigation, took no action to protect the interests of the corporations through any of this litigation, and defaulted on the claims against them, even though the individual plaintiffs held controlling interests in the corporate entities. Defendants would respectfully request of this Court to review the punitive award on this basis and reverse same.

Lastly, Appellants submit that the award is excessive. The combined award to the individual plaintiffs is $511,132.22. Twenty six percent of that amount would be $132,632.37. Consequently, even if punitive damages were warranted under the facts of this case, prior to the entry of default, which defendants respectfully submit is not the case, the amount awarded is excessive under the Gamble[6] factors enumerated by the Court in the final Order for Judgment.

[6] *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991). The factors to be considered are (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the

ARGUMENT IV

The Court committed error when it allowed Respondents to act as receiver and to collect the judgment which had been entered against Appellant Babb. (Question IV).

A.

In the trial court's order, John Pharr is relieved as receiver and plaintiff Graham is appointed as his replacement. However, this action as set forth in the Court order violates the law of the case. Previously the plaintiffs asked Judge Clifton Newman to appoint a plaintiff as Receiver. Judge Newman denied this request and stated that he wanted a neutral third party to be the Receiver in this matter. **R. 69-76.** Further, Judge Newman ordered that any monies to be received by Condo Services from Time Warner be paid over to John Pharr as receiver, not the plaintiffs as receivers. Id. No appeal was taken by plaintiff with respect to that order and as such, the ruling becomes the law of the case. Defendants would request that the Court reconsider the holding in this regard. *Charleston Lumber Co. v. Miller Housing Corp.*, 338 S.E. 171, 525 S.E.2d 869 (2000) (stating an unappealed ruling is the law of the case).

B.

The lower Court's order states, "In the event that Babb, due to her ownership interests in the Entities, receives funds before this Judgment is satisfied, Graham shall be entitled to apply any amount due to Babb as credit against the Judgment of the Court." **R. 12**. We respectfully submit this is error and we ask the Court to reconsider this issue. In the Time Warner action, [7]

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defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) as noted in *Haslip*, "other factors" deemed appropriate. *Pacific Mutual Life Insurance Company v. Haslip*, ___ U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

[7] *Time Warner Cable v. Condo Serv.*, 381 S.C. 275, 672 (Ct.App. 2009)

the trial judge allowed this same kind of collection process in that case. The Court of Appeals reversed holding that the creditor had an adequate remedy at law in order to collect its judgment. Consequently, we submit to allow that same procedure to be used in this action constitutes an error of law. Moreover, to deny this defendant access to monies due her from another case allows the plaintiffs to bypass the injunctive relief procedure such as specific performance (which heretofore been denied), to bypass supplemental procedures, and it allows these plaintiffs a process to collect a judgment that the Court of Appeals denied to Time Warner, [8] and which is denied to all other litigants.

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[8] The Court stated, "Because Time Warner has adequate remedies at law for enforcing and collecting its money judgment, the circuit court's use of the injunction or specific performance to satisfy this judgment was improper. Consequently, requiring REI's compensation for its specific performance to be diverted to Time Warner in payment of the judgment was error, and we reverse the circuit court's decision diverting REI's compensation to Time Warner." *Time Warner Cable v. Condo Serv.*, 381 S.C. 275, 284, 672 S.E.2d 816 (Ct.App. 2009).

CONCLUSION

For the foregoing reasons, Appellants would respectfully request that this Court reverse the judgment entered in this case and remand the matter for a new hearing.

Respectfully submitted,

Brenda Babb, Pro Se

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ATTORNEY FOR RENAISSANCE ENTERPRISES, INC., N/K/A CONDO

This 14th day of March, 2012
Myrtle Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge
Case No. 2004-CP-26-3498

Carey Graham and Rodney A. Chardukian

Respondents,

v.

Malcolm M. Babb, Brenda R. Babb, Cable Plus of Carolina, Inc., South Bay Lakes Cable Partnership, Southbridge Cable Television, LLC, Renaissance Enterprises, Inc., Now Known as Condo Services, Inc.,

Defendants,

Of Whom

Brenda R. Babb and Renaissance Enterprises, Inc, Now Known as Condo Services, Inc., are

Appellants,

CERTIFICATE OF COUNSEL

I certify that this brief complies with Rule 211(b), SCRAP.

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Appellants.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

The Respondents filed this derivative action on June 24, 2004 when the Appellants converted corporate properties and assets of the Defendants to their own use. (See Complaint and Motions, R. pp. 105-114, 146-147). The allegations of the Complaint have been deemed admitted by the Appellants. (See Order of Judge Baxley, R. at pp. 36, 46) The matter was heard before the Honorable R. Ferrell Cothran on March 23, 2011 as a default damages hearing. The named Defendants Cable Plus, South Bay Lakes and Southbridge (the "Defendants") own cable television lines, equipment and rights covering 784 customers in Horry County. Since the late 1980's, the Defendants contracted with Time Warner Cable ("TWC") to provide the cable services. The Defendants earned approximately 10-12,000.00 per month from the sale of the signal through 2003. (See testimony of Graham, R. p. 270).

The Appellant Babb is the sole owner of Appellant Condo Services, Inc. Babb is a 50% owner/shareholder/officer in Cable Plus and a 50% owner/member in Southbridge. In July 2003, Babb negotiated with TWC to renew the Defendants' contract with TWC to

provide signal for the Defendants' customers. Babb had discussions with the Respondents to purchase their interests in the Defendants for a stated period, but the agreement was never finalized. In July 2003, Babb, without legal authority from the Defendants, entered into a "Residential Services Provider Agreement" (the "Agreement", R. pp.152-164) with TWC through her wholly owned entity, Condo. Pursuant to the terms of that 84 month Agreement, Condo received all net income from the sale of the cable signal to the 784 customers of the Defendants. Babb and Condo had no authority from the Defendants to enter the Agreement or receive any funds from the operations.

The Respondents initiated this derivative action on behalf of the Defendants for actual and punitive damages sustained by the Defendants as a result of the Appellants converting the Defendants' rights and property to their own use. The Respondents sought an accounting from the Appellants of the receipts and expenses of the business to establish the actual damages sustained. The Appellants operated and had control of the Defendants assets for the 84 month period of the Agreement. Under the Agreement, Appellants purchased the cable signal from TWC for a set fee and sold the signal through the Defendants' cable lines and equipment to the 784 customers of the Defendants.

For the first 44 months of this 84 month Agreement, Condo collected all revenues and was responsible for payment of the monthly charge to TWC. Because of a default in payment by Condo to TWC, TWC billed and collected all of the revenues for the last forty (40) months of the Agreement. During discovery, the Appellants refused to produce any financial records from the cable operations, refused to answer questions about the income and expenses of Condo under the Agreement, and refused to produce a copy of the Agreement. The Appellants denied under oath they were receiving this

revenue. As a result of material misconduct, the Appellants were declared in default, the allegations of the Complaint were deemed admitted, and the matter scheduled for a default damages hearing. Appellants were unsuccessful in their appeal to the Court of Appeals.

Respondents subpoenaed and introduced into evidence without objection, the financial records of TWC covering income received and the expenses incurred during the 40 months that TWC collected the revenue under the Agreement. These records were used to establish the monthly income from operations and the monthly costs of service from TWC during the forty months from March 2007 through June 2010, a period when TWC collected the income directly from the 784 customers, due to Condo's default under the TWC. Appellants' expert, William Strait, CPA, established that Appellant Condo had an average monthly expense of $1,076.00 to run and operate the business, if it had collected the billings during this period. Strait's deposition with supporting data was admitted into evidence without objection. (See Dep. of Strait, R. pp. 409-523). Respondents' testimony was consistent with the testimony of Strait. Actual damages sustained each month of the 84 month Agreement were equal to the average net monthly income, minus the average net monthly cost for cable service from TWC, minus the monthly expense incurred by Condo if it had operated the business. These mathematical figures and calculations were not disputed at trial and are identical to the mathematical figures utilized by Strait, the expert witness for the Appellants. Respondents actual damages for the period of the Agreement were determined by multiplying the average net monthly income by 84 (the number of months under the Agreement) to establish the damages sustained by the Defendants during the 84 months of the Agreement. Babb

refused to provide any information concerning the first 44 months of operations at her deposition in February, 2011 and in Appellants' discovery responses. Respondents reduced the total damages by $58,000.00, the amount of expense paid by Babb to upgrade the Defendants' system at the beginning of the Agreement. This methodology of computing damages allowed a credit (a deduction) for the estimated cost of cable services paid to TWC and for the costs to operate incurred by Condo. Net income was then divided by the 784 subscribers to determine how much net income was generated by each customer.

On May 17, 2011, the Lower Court granted Judgment against the Appellants, jointly and severally, in the amount of $776,604.55 in actual damages, together with punitive damages in the amount of $200,000.00. The actual damages were apportioned to each Defendant based upon the ownership interest of each, as alleged in the Complaint. The Court, for information purposes, apportioned the damages to each individual owner based upon his/her ownership interest in each defendant, which was pled in the Complaint and deemed admitted by the Appellants.

The Lower Court directed that the punitive damages award in the amount of $200,000.00 on the conversion cause of action would not be shared with Babb, in her capacity as a shareholder/member/partner of the Defendants, as Babb's wrongful acts were the cause of the award being granted. The Court approved payment of the attorney's fees and expenses incurred by the Respondents on behalf of the Defendants, a Court appointed Receiver was discharged and the Court directed that all future payments would be paid to Respondent Graham on behalf of the Defendants, with specific

instructions as to accounting and disbursements. The Court directed that Babb would receive no disbursement from the Defendants unless and until the judgment was satisfied.

The Appellants filed their Motion to Reconsider on June 27, 2011, which was denied on August 1, 2011. The Appellants filed their Notice of Appeal on September 1, 2011.

FACTS

The Respondents and the Appellant Brenda R. Babb own all of the interests in the corporate Defendants for whom this action was brought: Cable Plus of South Carolina, Inc., South Bay Lakes Cable Partnership and Southbridge Cable Television, LLC (hereinafter, the "Defendants"). The ownership interest of Babb, Graham and Chardukian in each Defendant was established when the allegations of the Complaint were deemed admitted. (See Complaint, paragraphs 3-5 deemed admitted, R. pp. 105-106). These Defendants own easements, cable lines and equipment and the legal right to provide cable services to 784 customers in Horry County. Since the late 1980's, the Defendants provided cable television services to these customers and contracted with TWC Cable to provide the cable services.

The Defendants' agreement with TWC to provide cable services for a fee was set to expire in July, 2003. The Respondents alleged in the Complaint that Appellant Brenda R. Babb ("Babb"), while in a meeting in the Time Warner office in July 2003, orally agreed to pay unto the Respondents substantial sums based upon a formula, for Respondents portion of the "revenue stream" from the cable provider agreements, provided that a formal agreement be reduced to writing. (See Complaint, paragraph 6, R. pp. 106-107). The Respondents gave the Appellants a short memo of that agreement on

that date. (See Appellants Exhibits 1 & 2, R. pp. 327-328). After that meeting, Graham prepared and submitted a proposed agreement to the attorney for Babb. The Complaint alleges that Babb refused all attempts to communicate with them after this date. (See Complaint, paragraph 8, R. pp. 107-108). Babb and Condo, which is 100% owned by Brenda Babb, without the knowledge and permission of the Defendants and Respondents, then assumed control over the operations and income of the Defendants' business and entered a written "Agreement" with TWC to purchase the cable signal for a set fee. Under the Agreement, Condo billed and received all profits from the operations of the Defendants' business.

This action was filed after the Appellants refused to communicate with the Respondents concerning these monies or the Agreement. In discovery, the Appellants repudiated any "deal" with the Respondents and they refused to account for the revenues received or to produce a copy of the Agreement with TWC, despite Court Orders requiring production. During discovery, Appellants denied they were receiving the income from the cable operations, yet Condo alleged in its separate litigation with TWC that it was receiving the revenue. Babb refused to provide documents to Condo's attorney Diggs to allow him to make appropriate discovery responses. Appellants were sanctioned by Judge Baxley for this material misrepresentation to the Court and for other misconduct in this proceeding. Judge Baxley declared the Appellants in default, struck their Answers and Counterclaims, deemed the allegations of the Complaint admitted and the matter was ordered to be scheduled for a hearing on damages only. (See Order of Baxley, R. pp. 36-60).

The Lower Court denied the Respondents' initial request for the appointment of a Receiver and a Temporary Restraining Order, principally because Babb presented a confidential financial statement that she could satisfy any judgment rendered against the Appellants. The Lower Court granted the Respondents' second request for the appointment of a Receiver when the seven year "Agreement" between Condo and TWC was set to expire in July 2010 and the case had yet to be heard on the merits. Circuit Judge Newman appointed Receiver John Pharr, who was successful in negotiating a new agreement with TWC, which was examined and approved by the Court, without objection from the Appellants. (See Order Appointing Receiver, R. pp. 69-76 and Order of Newman, R. pp. 77-90). Under the new agreement, TWC pays the Defendants set monthly payments. The Receiver Pharr made his final report to the Court and he was discharged by the Court.

At the damages hearing, the Respondents established its damages through testimony of the Respondents, which was based upon financial records of gross income and expenses from the sale of the signal by TWC during a 40 month period when it collected the revenues and based upon opinion testimony of Appellants' expert Strait. Appellants did not challenge the correctness of the income and expenses forming the basis of Respondents' claim for damages and utilized the same income and expenses in their claims against TWC in separate litigation.

On May 12, 2011, the Lower Court issued it Order granting judgment against the Appellants for actual damages in the amount of $776,604.55 and $200,000.00 in punitive damages. The separate litigation between Condo and TWC was heard before Judge Cothran and Condo's claim for lost income during the 40 months of operations was based

upon the same financial records of gross income, costs of service and operation costs figures. This award and all future payments due from TWC have been paid to Graham pursuant to the terms of the Final Order.

ARGUMENTS

I. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN RENDERING JUDGMENT AGAINST THE APPELLANTS AND IN REFUSING TO ALLOW BABB TO TESTIFY CONCERNING DAMAGES IN THE CAUSE.

In this derivative action, the Respondents established that the Appellants took and converted the assets of the Defendants for their own use, which consisted of revenue generated by Defendants' cable television system. The Appellants were declared in default and the allegations of the Complaint were deemed admitted when the Appellants defied Court Orders requiring them to produce financial information concerning these operations. After an unsuccessful appeal of the sanctions order, Judge Newman ordered that Babb appear for her deposition, scheduled jointly with the TWC companion case. In that deposition held in February 2011, Babb refused to answer questions concerning the income and expenses of Condo during this period and to identify where the business accounts were located. She furthermore testified that she had not reported any of the income on federal and state income tax returns. (See Deposition of Babb, admitted into evidence, R. pp. 348-353). In the deposition taken in February, 2011, Ms. Babb defiantly stated in response to a question from Respondents' attorney DuRant as to what bank accounts the revenues were placed:

> I have been placed in default for not providing the financial information on the exact things you are asking me now. And because I was placed in default, there will be a damages hearing on March 23. I did not provide that information. Judge Baxley saw fit to place me in default because I didn't answer it. I didn't answer it then and I'm not going to answer it now. .....let's put it that way. But I'm not going to give you—I was placed

> in default for not giving you that information and I'm not going to give it to you now. .....I do not care to divulge it at this time. You received the ultimate sanction of having my answer and counterclaim struck.... for the same reason; for not providing that information. And I'm not going to provide it now.
>
> DuRant: Ms. Babb, do you stand by your statement that you refuse to answer any questions concerning what bank account you made the deposits?
>
> Answer: Yes, sir, I do.

When asked whether the monies were still in the account, she replied:

> I think I'm going to stand by my previous answer that our answer and counterclaim was struck for not providing information to your clients regards banks, bank accounts, amount of money in the bank accounts. I'm going to stand by my previous answer regarding any of REI's finances. (See Deposition Babb, R. at pp. 369-372)

At the hearing on damages, the Respondents established the net income earned by the Appellants from the operations of the cable system for the seven year period of the Agreement. The Appellants used these same financial records to establish the amount of their claim against TWC in its separate litigation, which TWC and Appellants stipulated to the Court as being correct. The Respondents used the same data from a 40 month period to establish an average net monthly income, which was multiplied by 84 to establish estimated damages or profits earned by Appellants during the term of the Agreement. The Lower Court properly refused to allow the Appellants to cross-examine the Respondents concerning written documents that the Respondents had never seen and could not self authenticate, which are identified as Court's Exhibits No. 3 and 4. (R. at pp. 526-528, 535-538). A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. The Respondents had no personal knowledge of the Appellants' income during

the first 44 months of the Agreement as the Appellants refused Court Orders to produce this information. It was improper for Babb to cross-examine Respondents upon this issue, once this lack of knowledge was established. See Rule 602, South Carolina Rules of Evidence. The Court correctly held that Babb would not be permitted to testify concerning matters she refused to disclose in discovery.

Respondents had no knowledge of the actual financial affairs during the Agreement because Babb continuously refused to provide that information to them. Graham testified that the Defendants earned $10-12,000.00 per month during pre-2003 periods of operations. The Lower Court stated verbally that the Appellants had no right to present their own "independent" evidence of damages or earnings, which had not been disclosed in discovery. It is well settled that by being in default, the Defendants are deemed to have admitted the truth of Respondents' allegations and to have conceded liability. Howard v. Holiday Inn Inc., 271 S.C. 238, 246 S.E.2nd 880 (1978); Schenk v. National Health Care, Inc., 322 S.C. 316, 471 S.E.2d. 736 (Ct. App. 1996). Though a defaulting party may be entitled to notice of the damages hearing, that Defendant is limited to cross-examining witnesses and objecting to evidence. Ammons v. Hood, 288 S.C. 276, 341 S.E.2d 816 (Ct. App. 1986). The Appellants did not object to the Respondents' evidence of damages and the Appellants did not cross-examine or otherwise challenge the Respondents on how the damages were calculated.

The Appellants refused to produce evidence of actual income and receipts from operations during discovery. Direct evidence of damages in this case would have been the actual income received and the expenses incurred by the Appellants during the period they operated the business, evidence that the Respondents could have verified in the

accounting requested in the Complaint. The Lower Court did not limit the cross-examination of the Respondents as to the amount of damages or how the damages were calculated, but properly sustained Respondents' objection that the Appellants could not cross-examine Respondents concerning a document that the witness did not prepare and had not seen and that could not be authenticated. Pro-se Babb attempted to introduce evidence of income and expenses she allegedly incurred during these operations which she refused to disclose and produce in discovery, including a Court ordered deposition the month before the damages hearing. These "alleged" proffered expenses were not given to her expert Strait, for the purposes of his expert opinion concerning the expenses of operation, which would have reduced her claim against TWC in her separate action.

Appellants wrongfully characterize the Respondents' action as one for specific performance of a contract, when the Complaint clearly seeks a declaratory judgment, an accounting, the appointment of a receiver and a temporary restraining order, and damages for civil conspiracy and conversion of the Defendants' property. The only evidence relevant at the damages hearing was how much money the Appellants earned or should have earned as "profits" or net income during the 84 month period of the Agreement. The Appellants refused to provide any information during discovery concerning these issues and the Court rightfully held Appellants could not testify or introduce new undisclosed evidence.

The Respondents' causes of actions against the Appellants are properly characterized as being legal and equitable causes of action. When the Appellants were declared in default, the Lower Court heard the Respondents' claims based upon the theory of accounting principles, civil conspiracy, and "conversion," an intentional tort.

The Appellants acted in concert in this civil conspiracy. Condo was the alter ego of Babb. The Lower Court had already held that the Appellants had no legal right to receive any funds from the operations of the cable system. The Appellants refused to account for the revenues to the Court. The standard of review is whether there is any evidence to reasonably support the factual findings of the Trial Court. Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). The Lower Court saw and heard the witnesses and was in a better position to judge their creditability, and the reviewing Court is not required to ignore these findings. Inlet Harbour v. S.C. Department of Parks, Recreation & Tourism, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008).

In "Argument II," the Appellants allege that the Lower Court erred in not giving Appellants credit for signal costs paid from 2003 through 2007, when "proffer made by Appellants showed that such costs totaled $194,602.50." The damages profile utilized by the Respondents allows a credit for payment to TWC for 84 months for the signal at an average monthly charge determined during a 40 month period, an amount greater than the amount allegedly paid by the Appellants. The Respondents submit that a certified public accountant could have determined what the Appellants' income, expenses and profits were during this period, **if the Appellants had provided the actual data, that was substantiated.** The Agreement required Condo to make a monthly payment to TWC for the signal and that Appellant Condo was sued by TWC when it failed to make such payments. The actual amount Condo paid TWC for these 44 months was never disclosed to the Respondents in discovery or at the hearing on damages. In fact, Condo disputed this amount in its trial with TWC. Without evidence of gross income and expenses, it

was impossible to establish the actual net income of Condo during this period. Babb testified that she did not report the income on state and federal tax returns. (See Deposition of Babb, R. at p. 373). The Respondents' computation of average net monthly income reflects an average monthly debit for payment made to TWC for signal over the life of the Agreement. Condo does not get to deduct these expenses twice. The actual damages sustained were proved by competent and unchallenged evidence of income received and expenses incurred.

II. THE LOWER COURT PROPERLY AWARDED PUNITIVE DAMAGES AGAINST THE APPELLANTS FOR THEIR SHOCKING AND WILFUL ACTS (ARGUMENT III)

The Lower Court awarded $200,000.00 in punitive damages against each of the Defendants after an exhaustive examination of the wrongful conduct of these Appellants measured by the standards established by this Court. The award of punitive damages is subject to review by this Court pursuant to the factors established in Gamble v. Stevenson, 305 S.C. 104, 112, 406 S.E.2d 350, 355 (1991), and BMW v. Gore, 517 U.S. 559, 116 S.CT. 1589, 134 L. Ed.2d 809 (1996), commonly referred to as the Gamble and Gore factors. The Lower Court made specific findings according to those standards. The misconduct occurred before and during the litigation. Babb is employed by the Court as a Court Reporter and deliberately used dilatory and deceptive practices during the proceedings to prevent justice from occurring. She ignored Court Orders. Appellants were placed in default because of misconduct in this case and there was a deliberate attempt to conceal the truth from the Court and the Respondents. This finding of default does not excuse the Appellants' behavior as the monies misappropriated did not belong to Appellants, but were corporate assets of the Defendants. Babb had a fiduciary duty to

account for the misappropriated funds. An award of punitive damages is hardly a "double" punishment. The punitive damage award was not designed solely to punish the Appellants for discovery abuses, but was designed to deter the Appellants and others from misappropriating corporate assets in the future and for using fraudulent and deceptive methods in litigation to conceal these actions. Babb still does not get the message—the monies and rights misappropriated did not belong to her and thus could not be given to her "alter ego" company Condo. When Babb's actions were determined to be unlawful, she had a legal and a fiduciary duty to account for the funds. Babb's deceptive conduct in this litigation is shocking, as she continued to collect misappropriated funds as the litigation continued. In the context of the amount of punitive damages, as discussed in Mitchell vs. Fortas, 385 S.C. 570, 686 S.E.2d 176 (S.C. 2009), the award of $200,000.00 in punitive damages was only 26% of the actual damages awarded, well under published guidelines that permit a multiple greater than actual damages. Judge Cothran discussed the shocking behavior of the Appellants in his written Order. Appellants misappropriated $776,000.00 from the Defendants over a seven year period while this action was pending and denied under oath that they received the monies. After Appellants were declared in default, they still defiantly refused to account for the funds or the location of the funds. The Appellants entered into a course of conduct designed to frustrate legitimate Court adopted rules and Orders, which were enacted to ensure fairness to all parties. Appellants offer no apology or remorse for their actions, even at this stage of the appellate process. As a Court Reporter employed by the South Carolina Court Administration, Babb ignored the rules of practice of this Court and disobeyed Court Orders to further her illegal means. In Mitchell, *supra*, the Court discussed the

defendants "improper litigation conduct," which can be considered as a factor if it results in an attempt by the Appellants to conceal the truth. Babb's conduct in this litigation was one of the many factors properly considered by the Court in the determination of the punitive damages award.

The financial statement of the Appellant Babb was submitted to the Lower Court, at the time of the first Receivership request, as evidence of Babb's ability to pay the damages that could be awarded. (See Financial Statement, R. pp. 206-208). After the decision of the Lower Court was announced, but before signing and filing of the Order, Babb transferred the real property listed on her financial statement to her brother, necessitating another legal action by the Respondent. Babb is fully capable of paying the award, which is only 26% of the award of actual damages and materially less than what the Defendants will have to pay to third parties to collect the award. Punitive damages should be awarded to punish unlawful conduct and to deter its repetition upon the theory that the "punishment should fit the crime." The conduct was reprehensible; and the award was only 26% of actual damages, which is well within the "ratios" approved in earlier cases. See Mitchell, *supra*, at page 188. Finally, the Lower Court specifically determined that Babb, as a shareholder/member, should not share in the punitive damage award, as she should not be rewarded for her substantial misconduct. The award of punitive damages was justified and reasonable under the circumstances.

III. THE LOWER COURT PROPERLY APPOINTED A RECEIVER AND DISCHARGED SUCH RECEIVER FROM FURTHER DUTIES. (ARGUMENT IV)

The Lower Court, on the Respondents' second application, appointed John Pharr as Receiver, with specific authority to collect monies and enter a new provider

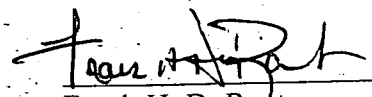
agreement. Receiver Pharr, with the assistance of Respondents, successfully entered into a new agreement with TWC, where the Defendants will receive a monthly payment for many years. The Receiver was requested by the Respondents initially to keep the Appellants from receiving and diverting the assets of the Defendants during the pendency of this action. This request was denied by Judge Cooper. The Respondents' second request was to have the Court appoint a Receiver to renew the provider agreement with TWC. Appellants did not object to the appointment. Receiver Pharr completed his duties and made his final Report to the Court that appointed him. The Receiver had not collected any monies at that time. The Court found no necessity for a Receiver in the future, and the Receiver was discharged and the Court made specific instructions concerning how Graham, as agent and officer for the Defendants, was to receive and disburse all funds of the Defendants, as he had done for many years in the past. The Respondents requested the Receiver be discharged after he had fulfilled his duties and the Respondents had been successful in their action against the Appellants. The Lower Court agreed and stated on the record that Judge Newman agreed with his decision. As the Receiver has made his final report and has been discharged, the argument to continue the Receivership is moot.

Babb now complains that the Court erred when it directed Graham not to pay any disbursements to Babb unless and until Babb had satisfied the judgment the Defendants held against her. The Order was appropriate as the entire purpose of the civil action was to recover money misappropriated by Babb from the Defendants. This argument is manifestly without merit and deserves no further argument.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should affirm the judgment entered in this case and tax costs against the Appellants.

Respectfully submitted,



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