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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
CIRCUIT COURT

The Hon. R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5871 (S.C. Ct. App. filed November 24, 2021)

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

v.

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

ENCORE TECHNOLOGY GROUP, LLC'S PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION

The undersigned counsel for Petitioner certifies that a Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 11, 2022.

QUESTIONS PRESENTED FOR REVIEW

I. **Did the Court of Appeals erroneously reduce the judgment below by $2.6 million by substituting its theory of damages for the jury's and requiring Encore to elect two of the four remedies awarded against Trask, where the jury rendered, and the trial court entered judgment on, four different verdicts against Trask that corresponded to Encore's four separate and distinct injuries?**

II. **Where Trask's complex, multi-year scheme caused multiple injuries and the total amount of the jury's combined verdicts was less than the total amount of damages shown by the evidence, did the Court of Appeals erroneously fail to require Trask to prove that the largest verdict encompassed the smaller verdicts for the doctrine of election of remedies to apply?**

III. **Where the legal remedies available to Encore did not provide for Clear Touch to disgorge its full value, did the Court of Appeals erroneously fail to require the trial court to order restitution from Clear Touch?**

STATEMENT OF THE CASE

In February 2013, Encore Technology Group, LLC ("Encore") employed Keone Trask ("Trask") and paid him nearly $200,000 per year to serve as its Chief Business Development Officer and to locate suppliers for interactive touch-screen panels that Encore sells to K-12 schools ("panels"). (Transcript, Supp. R. p. 71, l. 8-Supp. R. p. 72, l. 9; R. p. 968, l. 21-R. p. 969, l. 18; R. p. 1228, l. 19-R. p. 1229, l. 7; Plaintiff's Exhibit 1, R. pp. 1644-1648) Instead of working loyally and solely for Encore, however, Trask surreptitiously formed a side company, Clear Touch Interactive, Inc. ("Clear Touch") (collectively, "Appellants"), to steal profits, trade secrets, and opportunities from Encore while he was on Encore's payroll. (Transcript, R. p. 1220, l. 16-R. p. 1221, l. 10) Trask engaged in a complex, multi-year scheme of theft, fraud, and deception that caused Encore multiple injuries and actual damages totaling approximately $5.5 million.

Specifically, the evidence demonstrated that Trask:

- Maintained control of Clear Touch's operations throughout his time of employment with Encore (Transcript, R. p. 965, l. 8-R. p. 966, l. 10);

- Did not disclose his involvement in Clear Touch to Encore while he was an employee of Encore (Transcript, R. p. 995, l. 9-R. p. 996, l. 13; R. p. 998, ll. 20-24; R. p. 1034, l. 19-R. p. 1036, l. 22; Plaintiff's Exhibit 8, R. pp. 1682-1684; Plaintiff's Exhibit 83, R. pp. 1861-1864; Final Order and Judgment, R. p. 33);

- Listed his mother—using her maiden name—as owner of Clear Touch to hide his affiliation from Encore while doing all of the work for Clear Touch (Transcript, Supp. R. p. 93, ll. 14-22; Supp. R. p. 98, ll. 15-21; R. p. 961, l. 1-R. p. 962, l. 17; Video Deposition of Kathy Cruse-Krebs, R. p. 1643; Final Order and Judgment, R. p. 33);

- Drafted and induced Encore to sign a Reseller Agreement to purchase panels from Clear Touch by approving it for Encore and having his mother sign for Clear Touch (Transcript, R. p. 970, l. 10-R. p. 974, l. 13; Plaintiff's Exhibit 3, R. pp. 1652-1668; Plaintiff's Exhibit 21, R. pp. 1758-1777; Plaintiff's Exhibit 22, R. p. 1778; Final Order and Judgment, R. p. 33);

- Had the true suppliers of the panels remove their labels and replace them with Clear Touch labels to hide suppliers' identities from Encore (Transcript, Supp. R. p. 93, ll. 23-25; Supp. R. p. 98, ll. 7-14; Supp. R. p. 99, ll. 1-8; R. p. 1000, l. 18-R. p. 1001, l. 25; R. p. 1003, l. 9-R. p. 1005, l. 9; Plaintiff's Exhibit 5, R. p. 1670; Plaintiff's Exhibit 39, R. p. 1805; Plaintiff's Exhibit 40, R. pp. 1806-1808; Plaintiff's Exhibit 43, R. pp. 1810-1813; Final Order and Judgment, R. p. 33);

- Marked up the prices of the panels from the suppliers that Clear Touch charged to Encore (Transcript, Supp. p. 99, ll. 9-18; R. p. 1005, l. 10-R. p. 1007, l. 10; Plaintiff's Exhibit 44, R. p. 1814; Final Order and Judgment, R. p. 33);

- Had Encore pay Clear Touch by sending its checks to a Nevada post office box and then having them forwarded back to South Carolina to hide his affiliation with Clear Touch (Transcript, Supp. R. p. 94, ll. 14-19; Supp. R. p. 98, ll. 22-25; R. p. 983, l. 9-R. p. 986, l. 2; Final Order and Judgment, R. p. 34);

- Had his wife, Tamara Trask, work for Clear Touch but present herself to Encore under the false name "Amy Andrews" to hide his affiliation (Transcript, Supp. R. p. 94, l. 1; R. p. 978, l. 1-R. p. 983, l. 8; R. p. 991, l. 19-R. p. 994, l. 17; R. p. 1196, ll. 14-19; Plaintiff's Exhibit 4, R. p. 1669; Plaintiff's Exhibit 26, R. p. 1779; Plaintiff's Exhibit 27, R. pp. 1780-1781; Plaintiff's Exhibit 29, R. pp. 1782-1786; Plaintiff's Exhibit 33, R. p. 1797; Plaintiff's Exhibit 34, R. p. 1798; Final Order and Judgment, R. p. 34);

- While at conferences Encore was paying for him to attend, worked to develop a reseller network for Clear Touch, initially "baiting" resellers by leading them to believe Encore

was the owner of Clear Touch (Transcript, R. p. 933, l. 4-R. p. 943, l. 24; R. p. 1007, l. 11-R. p. 1008, l. 3; Plaintiff's Exhibit 48, R. p. 1815; Plaintiff's Exhibit 78, R. p. 1847; Plaintiff's Exhibit 79, R. p. 1848; Plaintiff's Exhibit 80, R. p. 1849-1855; Final Order and Judgment, R. p. 34);

- Had Encore employees, Leo Gallant and Jimmy Higginbotham, sign non-disclosure agreements—including one on the day Trask left Encore—so that he could disclose his ownership of Clear Touch but prevent them from disclosing that ownership to Encore and thereby induce them to work for Clear Touch and its benefit while on Encore's payroll and leave Encore months later to work for Clear Touch (Transcript, Supp. R. p. 94, l. 20-Supp. R. p. 96, l. 15; R. p. 987, l. 14-R. p. 991, l. 18; Plaintiff's Exhibit 15, R. pp. 1750-1754; Plaintiff's Exhibit 32, R. pp. 1792-1796; Final Order and Judgment, R. p. 34); and

- Permanently deleted incriminating e-mails, both from Encore's server and from Clear Touch (Transcript, R. p. 1030, l. 21-R. p. 1032, l. 19; R. p. 1169, l. 20-R. p. 1171, l. 9; R. p. 1172, ll. 2-8; R. p. 1231, l. 17-R. p. 1234, l. 21; Plaintiff's Exhibit 73, R. pp. 1841-1843; Plaintiff's Exhibit 79, R. p. 1848; Final Order and Judgment, R. p. 34).

Appellants realized significant ill-gotten profits from their scheme. (Transcript, R. p. 1028, l. 7-R. p. 1030, l. 20; Plaintiff's Exhibit 68, R. p. 1828-1830; Plaintiff's Exhibit 69, R. p. 1831-1832; Plaintiff's Exhibit 70, R. p. 1833-1840) Encore's expert opined, based upon the limited discovery that Encore was able to obtain from Clear Touch, that the value of Clear Touch's profits through 2015, plus the value of Clear Touch as of December 31, 2015, was $5,536,254. (Transcript, R. p. 1093, l. 10-R. p. 1097, l. 9; R. p. 1103, l. 22-R. p. 1105, l. 3; Plaintiff's Exhibit 10.E, R. p. 1690; Plaintiff's Exhibit 10.J, R. pp. 1694-1742)

Encore filed its Complaint against Appellants on September 18, 2015. (Complaint, R. pp. 82-131) Encore's action included causes of action for breach of duty of loyalty, breach of fiduciary duty, breach of contract, and breach of contract accompanied by a fraudulent act against Trask, for violation of the South Carolina Trade Secrets Act against both Appellants, and for tortious interference with contractual relations against Clear Touch. After Appellants received multiple continuances, a jury trial occurred over two years later, on September 26-30, 2017.

Shortly before trial, Appellants stipulated as to Trask's liability on Encore's claims for breach of duty of loyalty and breach of fiduciary duty. (Plaintiff's Exhibit 83, R. pp. 1861-1864) Appellants denied liability for the other claims.

At trial, Encore outlined Appellants' multiple wrongs and four distinct injuries in its opening statement. (Transcript, R. p. 860, l. 19-R. p. 863, l. 5) Encore's Chief Executive Officer, Todd Newnam, testified regarding Encore's injuries, Appellants' liability for same, and the calculations of certain damages. (Transcript, Supp. R. p. 64, l. 18-Supp. R. p. 190, l. 6.) Mr. Dale Viola, owner of another business like Encore's, explained the sales process, the profits to be made by buying direct from suppliers, and Trask's solicitation of his company and other companies to become Clear Touch resellers while at a conference, which Trask attended as an employee of Encore. (Transcript, R. p. 926, l. 15-R. p. 950, l. 6; R. p. 951, l. 21-R p. 953, l. 9) Mr. Trask, in his depositions that were read to the jury and in live testimony, admitted numerous aspects of his and Clear Touch's wrongdoing. (Transcript, R. p. 954, l. 1-R. p. 1036, l. 24; R. p. 1208, l. 15-R. p. 1268, l. 12) In a video deposition that must be watched to be believed, Trask's mother, Kathy Cruse-Krebs, further exposed the depths of Appellants' deceptive conduct toward Encore and made clear that she was in no way running Clear Touch. (Transcript, R. p. 1037, ll. 2-6; Kathy Cruse-Krebs' Video Deposition, R. p. 1643) Mr. Jimmy Higginbotham testified about Clear Touch's hiring him, asking him to copy and bring Encore's customer list, and Appellants' efforts to take Leon County Schools' ("Leon") business from Encore. (Transcript, R. p. 1039, l. 17-R. p. 1051, l. 19) Mr. Michael Meilinger, a CPA and business valuation expert, testified to Encore's damages. (Transcript, R. p. 1060, l. 11-R. p. 1167, l. 25) Mr. Michael Knight testified to Trask's permanently deleting Clear Touch-related emails on Encore's computer server. (Transcript, R. p. 1169, l. 20-R. p. 1171, l. 22; R. p. 1172, ll. 1-8; R. p. 1173, l.

5-R. p. 1174, l. 11) In closing arguments, Encore outlined Trask's multiple wrongs and its four injuries and showed how the evidence proved that Appellants caused the four injuries outlined below and requested actual damages of $5,536,254. (Transcript, R. p. 1319, l. 1-R. p. 1341, l. 15)

Encore suffered—and the jury found—four separate and distinct injuries arising from Appellants' methodical course of deceit. The evidence, and the jury's verdicts on different causes of action, corresponded to these four injuries as follows:

1. Wages and conference expenses paid to benefit Trask as a Clear Touch employee. Encore paid Trask $402,809 in wages ($335,120) and conference expenses (of which Encore only sought a portion, $67,689) while he was working solely to benefit Clear Touch. (Transcript, Supp. R. p. 112, ll. 2-23; Supp. R. p. 113, l. 21-Supp. R. p. 116, l. 18; Plaintiff's Exhibits 10(G), R. p. 1691 and 10(B), R. p. 1687) The jury awarded Encore a portion of this amount, or $375,733, in actual damages on its cause of action for breach of duty of loyalty against Trask, plus $175,000 in punitive damages. (Verdict, R. p. 1916)

2. Lost profits on panels Encore purchased from Clear Touch at marked-up prices. If Trask had disclosed the true identities of the suppliers, Encore could have purchased panels from them directly instead of through Clear Touch and made an additional $675,361 in net profits. (Transcript, Supp. R. p. 104, l. 24-Supp. R. p. 105, l. 13; Supp. R. p. 189, l. 8-Supp. R. p. 190, l. 6; R. p. 1073, l. 15-R. p. 1074, l. 15; R. p. 1082, l. 4-R. p. 1085, l. 10; Plaintiff's Exhibit 10(C), R. p. 1688) The jury awarded Encore this **exact amount**—$675,361—in actual damages on its cause of action for breach of fiduciary duty against Trask, plus $1,500,000 in punitive damages. (Verdict, R. p. 1917)

3. Lost profits on Clear Touch's sales to Leon. If Trask had honored the restrictive covenants in his contract and had not misappropriated Encore's trade secrets, Encore could have made $424,945 in profits on sales that Clear Touch made to Encore's customer Leon. (Transcript, Supp. R. p. 101, l. 24-Supp. R. p. 103, l. 10; Supp. R. p. 116, l. 19-Supp. R. p. 117, l. 1; R. p. 1073, l. 15-R. p. 1074, l. 5; R. p. 1085, l. 11-R. p. 1086, l. 25; Plaintiff's Exhibit 10(D), R. p. 1689) The jury awarded Encore this **exact amount**, $424,945, in actual damages on its causes of action for breach of contract against Trask, tortious interference against Clear Touch, and violation of the Trade Secrets Act against both Appellants. (Verdict, R. pp. 1918-1920)

4. Loss of the value of the Clear Touch reseller network business opportunity. Encore argued that, under the "business opportunity" clause of Trask's contract, because Trask built Clear Touch's network of resellers on Encore's time with Encore's resources,[1] Encore should receive the value of Clear Touch, which Encore's expert valued at $5,536,254. The jury awarded Encore $1,476,039 in actual damages on its cause of action for breach of contract accompanied by a fraudulent act against Trask, plus $2,000,000 in punitive damages. (Verdict, R. p. 1921)

In sum, the Greenville County jury reached verdicts of $3,377,023 in actual damages and $4,524,890 in punitive damages against Trask, totaling $7,901,913. (Verdict, R. pp. 1916-1921). Against Clear Touch, the jury rendered two awards: (1) one for tortious interference with Encore's contractual relations in the amount of $424,945 in actual damages and $500,000 in punitive damages, and (2) the other for violation of the South Carolina Trade Secrets Act in the

[1] Encore was Clear Touch's first and only customer from the beginning for over a year, during which time Encore paid all of Clear Touch's marketing expenses and bore all the risk. A third-party witness, Dale Viola, explained how Trask signed up resellers at conferences Trask was supposed to be attending for Encore. (Transcript, R. p. 926, l. 22-R. p. 953, l. 9)

amount of $424,945 in actual damages and $849,890 in exemplary damages (based upon the jury's findings of willful violation of the Trade Secrets Act). (Verdict, R. pp. 1919-1920)

Following the trial court's requirement that Encore elect remedies to ensure that it would not recover twice for the same injury, *i.e.*, the $424,945 in profits on sales that Clear Touch made to Encore's customer Leon, and the addition of attorneys' fees, costs, and expenses, the Court entered its Final Order and Judgment in favor of Encore as follows: (1) against Trask in the amount of $7,917,468, and (2) against Clear Touch in the amount of $1,715,335, as follows:

Against Defendant Keone Trask

Actual Damages	**Punitive Damages**	
$ 375,733.40	$ 175,000.00	breach of loyalty (portion of Trask's wages + conference expenses)
675,361.00	1,500,000.00	breach of fiduciary duty (Encore's lost profits from non-disclosure of suppliers)
424,945.00	849,890.00	violation of Trade Secrets Act (Leon County profits – same as breach of contract)
+1,476,039.00	+2,000,000.00	breach of contract accompanied by a fraudulent act (portion of Clear Touch profits)
$2,952,078.40 +	$4,524,890.00 =	$7,476,968.40
Plus attorneys' fees		+ 345,600.00
Plus costs & expenses		+ 94,900.00
TOTAL AGAINST TRASK:		**$7,917,468.40**

Against Defendant Clear Touch Interactive, Inc.

Actual Damages	**Punitive Damages**	
$ 424,945.00	849,890.00	violation of Trade Secrets Act (Leon County profits)
or		
424,945.00*	500,000.00*	tortious interference (*$424,945.00 in actual damages same as Leon County profits)
$ 424,945.00 +	$ 849,890.00 =	$1,274,835.00

Plus attorneys' fees	+ 345,600.00
Plus costs & expenses	+ 94,900.00
TOTAL AGAINST CLEAR TOUCH:	**$1,715,335.00**

(Final Order and Judgment, R. p. 35)

Although Clear Touch quickly deposited the $1.7 million judgment against it, Trask refused to pay or turn over financial documents, leading the trial court to appoint a receiver. (Receiver Order, R. pp. 40-52) Appellants then violated the Receiver Order, transferring funds to a related entity and refusing to provide the receiver with the information and documents he requested, and so were held in contempt. (Order filed Dec. 6, 2018, R. pp. 67-70) Only after they were on the verge of criminal contempt did Trask deposit $6,600,769.58 with the Greenville County Clerk of Court (Clerk's Email dated January 3, 2019; Defendants' Hearing Exhibit 4, R. p. 1950),[2] and over $240,000 for the Receiver's fees and costs. By doing so, Appellants were able to avoid disclosing to Encore the full extent of their finances, which could support an even higher award than given by the jury.

On November 24, 2021, the Court of Appeals issued Opinion No. 5871 in this matter (the "Opinion"). In reversing the trial court's decision on Election of Remedies and affirming the trial court's decision not to consider Restitution, the Court of Appeals overlooked undisputed facts in the record and also departed from well-established precedent regarding the deference due jury verdicts and the availability of equitable relief. As a result, the Court of Appeals determined

[2] That deposit left Trask responsible for $849,890 in exemplary damages under the Trade Secrets Act plus post-judgment interest on that amount under the Final Order and Judgment, but Judge McIntosh modified the Final Order and Judgment during the appeal to give Trask credit for Clear Touch's payment of that amount. This post-appeal modification of the Final Order and Judgment is the subject of a separate appeal.

that Encore was required to elect two of four jury verdicts against Trask – effectively reducing the judgment against Trask by $2.6 million from $7,917,468 to $5,317,162[3] – and was limited to the damages awarded against Clear Touch. These errors warrant issuance of a writ of certiorari and reversal of the Opinion, thereby affirming the trial court's decision on Election of Remedies and directing the trial court to consider Restitution.

ARGUMENT

I. Where the jury rendered, and the trial court entered judgment on, four different verdicts against Trask that corresponded to Encore's four separate and distinct injuries, the Court of Appeals erroneously reduced the judgment by $2.6 million by substituting its theory of damages for the jury's and requiring Encore to elect two of the four remedies awarded against Trask.

In the Election of Remedies section of the Opinion, the Court of Appeals correctly acknowledged that "the guidepost for the court is enforcing the jury's intent." Opinion, citing *Vinson v. Jackson*, 327 S.C. 290, 293, 491 S.E.2d 249, 250 (1997). Instead of comparing the evidence to the verdicts to determine the jury's intent, however, the Court of Appeals substituted its theory of how damages should have been awarded in violation of the principle that courts "must respect the verdict of the jury in fact as well as in pretense or theory and must not interfere or substitute its own judgment for that of the jurors." *Brabham v. S. Asphalt Haulers, Inc.*, 223 S.C. 421, 430, 76 S.E.2d 301, 306 (1953).

[3] Encore would choose the verdicts resulting in the highest combined judgment against Trask and Clear Touch, which under the Opinion Encore understands would include $375,733 in actual damages and $175,000 in punitive damages on its cause of action for breach of duty of loyalty against Trask, plus $1,476,039 in actual damages and $2,000,000 in punitive damages on its cause of action for breach of contract accompanied by a fraudulent act against Trask, but not the $675,361 in actual damages and $1,500,000 in punitive damages on its cause of action for breach of fiduciary duty against Trask, or the $424,945 in actual damages under the Trade Secrets Act. (Encore believes Clear Touch remains fully liable for its $1.7 million judgment under the Opinion.)

Specifically, the Court of Appeals found that Encore's argument that the jury intended its different verdicts to compensate for different injuries is "just speculation." The Court overlooked, however, that Encore argued, and the evidence demonstrated, that Encore incurred four separate injuries and that the jury rendered four different verdicts against Trask that corresponded to those four injuries.

That the jury intended to compensate for each of these four injuries is far more than "speculation." Verdicts 2 and 3 were for odd-dollar figures that corresponded exactly to the evidence for those damages: $675,361 for breach of fiduciary duty, which was the exact amount of profits Encore's expert calculated Encore lost caused by Trask's failing to disclose and allow Encore to purchase directly from suppliers and instead taking a "mark-up," and $424,945, for breach of contract against Trask, tortious interference against Clear Touch, and violation of the Trade Secrets Act against both Appellants, which was the exact amount of profits Encore's expert calculated Encore lost in sales to its customer Leon. And while the Court of Appeals concluded "we have no way whatsoever to know that the jury's award of nearly $1.5 million in damages for breach of contract with a fraudulent act does not include the damages mentioned above," we do know that because the punitive damages award – which the Court of Appeals overlooked – is different for that claim than the other claims. Although the Court found "proof" in Encore's closing argument seeking $5.5 million in actual damages that the breach of contract accompanied by a fraudulent act claim included the other two claims, Encore did not seek specific amounts of punitive damages for these claims, so that the different punitive damages awards show that the jury intended to address each injury separately. Moreover, proof of the jury's intent is most accurately derived from the admitted evidence of Encore's injuries and the differing amounts of the jury verdicts.

Further, the trial judge, who heard the arguments and evidence, concluded that the four different verdicts were intended to compensate for the four different injuries.

In sum, while the Court of Appeals stated, "[n]othing from the jury indicated it intended the awards in this case to be added together," the facts that (a) each verdict is for a different amount of actual damages, and (b) the punitive damages for the breach of contract accompanied by a fraudulent act do not equal the others, indicate that the different amounts were intended to compensate for Encore's four separate injuries reflected by the evidence. It was the Court of Appeals' conclusion that these verdicts were not to be added together that was speculative and inconsistent with the evidence, arguments, and verdicts.[4]

II. Where Trask's complex, multi-year scheme caused multiple injuries and the total amount of the jury's combined verdicts was less than the total amount of damages shown by the evidence, the Court of Appeals overlooked that it was Trask's burden to prove that the largest verdict encompassed smaller verdicts for the doctrine of election of remedies to apply.

A defendant can raise the defense of election of remedies only when a plaintiff has been awarded multiple damages for the same injury. "**Election of remedies** involves a choice between different forms of redress afforded by law **for the same injury** ...." *Taylor v. Medencia,* 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996) (emphasis added). A "plaintiff must elect his remedy 'where two distinct wrongs result only in **a single and the same loss** ...." *Rivers v. Rivers*, 292 S.C. 21, 31, 354 S.E.2d 784, 790 (Ct. App. 1987), *overruled on other*

[4] Even though Clear Touch did not appeal the election of remedies rulings by the Circuit Court on the judgment against it, Appellants have argued the Opinion means that Encore's election of the verdicts of breach of duty of loyalty and breach of contract accompanied by a fraudulent act against Trask precludes Encore from recovering anything – including the $850,000 in exemplary damages – on the Trade Secrets Act verdict from Clear Touch. Therefore, in addressing the election issue, the Court should also clarify that the Opinion does not eliminate Clear Touch's liability for the judgment against it under the Trade Secrets Act (including exemplary damages) in order to avoid another multi-year round of appeals by Appellants.

grounds by Russo v. Sutton, 310 S.C. 200, 422 S.E.2d 750 (1992) (holding no election of remedies required of a plaintiff who received damages for alienation of affection and criminal conversation because "[t]he causes of action are distinct, they arose out of separate and distinct facts, and the two alleged wrongs did not result in a single and the same loss.") (emphasis added; internal citations omitted).

Election of remedies is a "defense" that a defendant may raise "at any stage of the case," *Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 15, 397 S.E.2d 774, 777 (S.C. App. 1990), but this defense has no application in cases where a defendant causes multiple injuries and cannot establish that the jury awarded multiple damages for the same injury. Trask has not established, and cannot establish, that any of the four verdicts at issue were for the same injury. This is especially true where, as here, the actual damages of the verdict fall within the range of damages testified to. *Gastineau v. Murphy*, 323 S.C. 168, 183, 473 S.E.2d 819, 828 (Ct. App. 1996), *rev'd on other grounds*, 331 S.C. 565, 503 S.E.2d 712 (1998); *Buzhardt v. Cromer*, 272 S.C. 159, 163, 249 S.E.2d 898, 900 (1978).[5]

In this respect, this case is like *GTR Rental, LLC v. DalCanton*, 547 F. Supp. 2d 510 (D.S.C. 2008), which the Court of Appeals did not consider. As in *GTR Rental*, Trask's actions occurred "over a lengthy period and involved numerous activities involving [plaintiff's] customers, property, and finances," so that "the complex series of transactions undertaken by defendants does not comprise a single wrong." *Id.*, at 515. Where a defendant such as Trask has committed multiple wrongs resulting in multiple injuries, he should not receive a presumption that one verdict encompasses others, especially where he has been found to have committed

[5] The total actual damages of the four verdicts at issue were less than the $5.5 million actual damages presented by Encore. *See* Plaintiff's Exhibit 10.H, R. p. 1692.

fraudulent acts and willfully and intentionally destroyed evidence. (Final Order and Judgment, R. p. 33-34)

Instead, such a defendant should be required to prove that the jury intended one verdict to include others. Because Trask did not do so, and cannot do so, Encore is entitled to collect all four verdicts upon which the trial court entered judgment. *See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co.*, 425 S.C. 276, 301, 821 S.E.2d 509, 522 (Ct. App. 2018) (rejecting defendant's election argument in part because it failed to "request the court ask the jury what its intent was in how it awarded damages. Accordingly, [defendant] is unable to argue on appeal the court's decision was in error."), *affirmed in part and reversed in part, Stoneledge at Lake Keowee Owners v. IMK Dev.* Co., Op. No. 28071 (S.C. S. Ct. Dec. 8, 2021) (noting that the "jury awarded $3,000,00 for negligence; $1,000,000 for breach of the implied warranty for workmanlike service; and $1,000,000 for breach of fiduciary duty, for a total award of $5,000,000.").

In sum, because the jury found Trask to have committed multiple wrongs causing multiple injuries, the Court of Appeals should have required proof that the breach of contract accompanied by a fraudulent act included damages awarded by other verdicts instead of assuming that it did. The Court of Appeals' assumption against Encore on this point contravened established law that the evidence and all inferences from the evidence must be viewed in the light most favorable to the party that prevailed before the jury. *Elders v. Parker*, 286 S.C. 228, 230, 332 S.E.2d 563, 565 (Ct. App. 1985) ("On appeal of a jury verdict, the evidence and any inferences to be drawn therefrom must be viewed in the light most favorable to the respondent. [The Court's] review is limited to determining if there is any evidence which reasonably tends to support the verdict.").

III. Where the legal remedies available to Encore did not provide for Clear Touch to disgorge its full value, the Court of Appeals erred in failing to require the trial court to order restitution from Clear Touch.

In finding that Encore had an adequate remedy at law against Clear Touch, the Court of Appeals overlooked that such remedy must be "as certain, practical, complete and efficient ... as the remedy in equity." *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), *aff'd as modified,* 399 S.C. 23, 731 S.E.2d 288 (2012). Moreover, "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).

The legal causes of action available to Encore against Clear Touch did not provide a remedy as "complete and efficient" as the equitable remedy of restitution for unjust enrichment, and therefore it was error by the Court of Appeals not to require restitution.

This becomes clear by comparing the jury charges for the legal claims against Clear Touch with the remedy of restitution allowed in equity. As the Circuit Court charged the jury, Encore could recover from Clear Touch for violation of the Trade Secrets Act only those 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. (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, 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 completely different from the legal remedy of – and measurement for – 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, 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 was 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 its flagrant

wrongdoing 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 legal damages Encore proved for misappropriation of trade secrets or tortious interference with a contract.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari and reverse the Court of Appeals' decision on Election of Remedies and direct the trial court to consider Restitution.

Respectfully submitted,

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