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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Circuit Court

The Honorable R. Lawton McIntosh, Circuit Court Judge

Case No. 2015-CP-23-5757

Appellate Case No. 2018-001444

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

v.

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

PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT

Appellants/Respondents, Keone Trask ("Trask") and Clear Touch Interactive, Inc. ("Clear Touch") (*collectively* "Defendants" or "Appellants"), through their undersigned counsel, respectfully move this Court pursuant to SCACR 221, for rehearing upon the narrow issues specified below arising out of its recent opinion filed in this consolidated appeal, such order being styled *Encore Technology Group, LLC v. Keone Trask and Clear Touch Interactive, Inc.*, Op. No. 5871 (S.C. Ct. App. Filed Nov. 24, 2021) (the "Order") and respectfully request the Court enter an Amended Order to address the issues raised in this Petition as the Court deems necessary and appropriate.

LEGAL ARGUMENTS AND ANALYSIS

A. The Order's *Res Judicata* Ruling is Made Upon an Inaccurate Factual Basis

The Court concluded that Clear Touch's independent action against Encore filed prior to the trial of the original matter was barred by *res judicata* and affirmed the lower court's dismissal of that case. (Order pp. 13-14). The Order's reasoning underlying that conclusion is based upon the inaccurate factual assertion that Clear Touch never moved for a continuance upon the grounds that it may need to amend its answer in light of the late disclosed evidence. Specifically, the Order states:

> The record is clear that Clear Touch never moved to amend its answer and never sought a continuance on the grounds that it needed more time to develop counterclaims that would be forthcoming in an amended answer. The point is made more salient by the fact that Clear Touch sought several continuances but never claimed it needed a continuance because it needed to amend its answer.

(Order p. 13).

However, Clear Touch filed a Second Motion for Continuance of the Trial Date six days after Clear Touch received the 10,000 plus pages of additional discovery documents that first alerted it to possible claims it may have against Encore. (R. pp. 240-289). In that motion, Clear Touch stated that it was seeking a continuance of the trial date for multiple reasons, including because the documents produced by Encore on May 31, 2017 indicated that additional discovery was necessary so that Defendants could potentially amend their Answer to add in counterclaims based upon those documents. That Second Motion for Continuance of the Trial Date stated that:

> Plaintiff's May 31st supplemental production also added to the list of necessary depositions Defendants must take due to the information revealed in the documents provided last week, which Defendants have been able to review thus far. *Those documents also indicate the potential need for Defendants to amend their pleadings to add in a counterclaim against the Plaintiff not previously known due to Plaintiff's withholding of these many relevant documents*.

(R. p. 245 at ¶31 – Defs' 2nd Motion for Continuance of Trial Date)(*emphasis added*).

Thus, the Order's holding on the *res judicata* issue is premised upon an inaccurate factual assertion which is belied by the record, warranting amendment reversing the lower court's dismissal of that case.

Additionally, the Order's treatment of the *res judicata* issue does not mention what Defendants view as an extremely important and impactful policy argument made on appeal and the result this ruling as written would have on litigation practice in South Carolina. Defendants' appellate briefs detailed Encore's actions surrounding the May 31st production, including their diametrically opposed representations to opposing counsel and the Court concerning whether the materials were relevant to the claims in the original action. (*See* Ap. Final Brief pp. 16-20). In sum, Encore withheld droves of responsive materials until less than four months before trial, which it claimed in writings and before the court were "irrelevant" to the original case. Then, later, when beneficial to Encore, it deemed those same materials "relevant" to the original action in order to argue that Clear Touch's independent action based on those very materials was barred by *res judicata* because it arose out of and related to the claims and issues presented in the first case.

On appeal, Defendants argued that Encore should not be rewarded for its gamesmanship, including its blatant self-contradictory statements, and that public policy called for a rebuke of such tactics. (Ap. Final Brief pp. 58-59). This provides a sound, and Appellants contend necessary, policy basis for reversing the lower court's dismissal of Clear Touch's action on *res judicata* grounds, because even if the doctrine could support such ruling, prudent public policy calls for its reversal. Without this, the Bar and the litigants Bar members represent are being sent a clear message that they will benefit, with no accountability, from withholding evidence long enough to prevent the opposition from being able to adequately utilize the evidence in the ongoing litigation. That is a dangerous message that will result only in proliferation of these tactics and the resulting

degradation in the litigation process. Therefore, Defendants respectfully urge this Court to address their public policy argument on the *res judicata* issue and amend the Order to reverse the lower court's dismissal of Clear Touch's case against Encore.

B. Election of Remedies

The Defendants agree with the Order's treatment of and holding on the election of remedies issue. They believe that the holding is clear as written – Encore must elect among the remedies awarded by the jury on all claims upon which they rendered a verdict with the exception of the breach of loyalty cause of action. The Order, however, omits explicit reference to Encore's tortious interference with contract claim against Clear Touch. The jury awarded the same $424,945 in actual damages on that claim as it did under the breach of contract and trade secrets causes of action. (*See* R. pp. 1916-23 - Verdict Form). The tortious interference claim was one of the three causes the lower court held Encore had to elect to recover under because the jury awarded the same actual damages under each. The Order at hand reads as if the Court inadvertently failed to mention or somehow overlooked the tortious interference claim against Clear Touch in discussing the election issue. The Order's reasoning and conclusions on the election issue, including its treatment of the claims expressly mentioned, necessarily apply to the tortious interference claim as well. While that much is clear, given the fraught history of this litigation, Defendants believe that minor amendment to the Order is warranted to avoid unnecessary and costly litigation over the meaning and scope of the Court's election holding. Defendants only raise this concern and propose revision out of an abundance of caution to foreclose what they anticipate would be unwarranted and baseless attempts by Encore to argue that the Court's holding is more limited than it actually is.

In addressing the election issue, the Order makes a few statements that are inaccurate as it omits mention of the tortious interference claim against Clear Touch, stating:

> The jury awarded Encore the same amount of actual damages-$424,945-for Encore's breach of contract and trade secret misappropriation claims. Actual damages for the other claims varied considerably.
>
> The circuit court required Encore to elect only between the breach of contract and trade secrets claims.

(Order p. 4).

To be accurate those statements would need to read as follows:

> The jury awarded Encore the same amount of actual damages-$424,945-for Encore's breach of contract, ***tortious interference with contract,*** and trade secret misappropriation claims. Actual damages for the other claims varied considerably.
>
> The circuit court required Encore to elect only between the breach of contract, ***tortious interference,*** and trade secrets claims.

Those revisions or something similar are necessary to accurately reflect the circuit court's holding and ensure Encore refrains from attempting to limit this Court's election holding in a manner that is unsupported by its own analysis and the law upon which it relies to reach its conclusion(s) on this issue.

After discussing the relevant background and legal framework for determining the election issue, the Order holds that "[a]pplying these guideposts, there can be no question that, with one exception—breach of duty of loyalty—Encore must elect between its causes of action against Trask." (Order p. 5). Defendants respectfully ask the Court make a minor revision to leave no room for Encore to attempt to argue it may recover more than the law allows by altering that sentence to read: "Applying these guideposts, there can be no question that, with one exception—breach of duty of loyalty—Encore must elect between its causes of action against ***the Defendants***."

The reasoning for the Court's holding on the election issue and the conclusions underlying it as expressed in the Order hold true for the tortious interference claim against Clear Touch and therefore necessarily include that cause of action. However, without an unequivocal statement to

that effect, Defendants are concerned that their adversary will attempt to pervert this Court's ruling to argue it may recover under both the breach of contract with fraud claim against Trask and the tortious interference claim against Clear Touch. This Court's ruling does not support such an outcome, yet the possibility Encore will argue otherwise upon remand is significant unless the Order is amended as proposed.

Accordingly, Defendants respectfully request the Court amend the Order as proposed above (or in a similar fashion) to ensure that its holding on the election issue is not subject to unwarranted and baseless attack upon remand.

CONCLUSION

Defendants respectfully request the Court amend the Order as requested above.

Respectfully Submitted,

SMITH HUDSON LAW, LLC

s/ Joseph O. Smith
Joseph O. Smith (S.C. Bar No. 77475)
Joshua J. Hudson (S.C. Bar No. 100311)
200 N. Main St., Suite 301-C
Greenville, SC 29601
Phone: (864) 908-3912
jsmith@smithhudsonlaw.com
jhudson@smithhudsonlaw.com
Attorneys for Appellants/Respondents

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PROOF OF SERVICE

I certify that I have served the Appellants/Respondents' Petition for Rehearing and Memorandum in Support on the above-named Respondent/Appellant by emailing and mailing a copy of the Petition for Rehearing to the persons below listed for opposing council on AIS pursuant to SCACR 262 as amended by the Supreme Court's August 25, 2021 Order on December 9, 2021, addressed to counsel of record as follows.

Gregory J. English
Rita Bolt Barker
WYCHE, P.A.
Post Office Box 728
Greenville, SC, 29602
genglish@wyche.com
rbarker@wyche.com
Attorneys for Respondent/Appellant

SMITH HUDSON LAW, LLC

s/ Joseph O. Smith
Joseph O. Smith (S.C. Bar No. 77475)
Joshua J. Hudson (S.C. Bar No. 100311)
200 N. Main St., Suite 301-C
Greenville, SC 29601
Phone: (864) 908-3912
jsmith@smithhudsonlaw.com
jhudson@smithhudsonlaw.com
Attorneys for Appellants/Respondents

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Greenville, South Carolina