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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM Greenville County Circuit Court

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2022-000143

Jami Powell and Encore Technology Group, LLC
of which Encore Technology Group, LLC is the.....Appellant.

v.

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

RESPONDENTS' RETURN TO ENCORE TECHNOLOGY, LLC'S PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Did the Court of Appeals correctly determine that the issue of whether Encore can recover the full statutorily prescribed amount of exemplary damages for violation of the Trade Secrets Act from Trask when Clear Touch has already paid those funds into the Court was irrelevant in light of the Election Decision?**

I. INTRODUCTION

The central and determinative issue raised by this writ is whether Encore must follow the law or be allowed to recover twice the legislatively prescribed amount of exemplary damages for trade secret misappropriation. As detailed below, Respondents, Keone Trask (*hereinafter* "Trask) and Clear Touch Interactive, Inc. (*hereinafter* "Clear Touch," and collectively with Trask, "Respondents" or "Defendants"), paid a total of over $8.3 million dollars into the Court to secure Encore's judgments against them, and partly to advance hundreds of thousands in Receiver fees not yet owed. Encore claims that Trask remains responsible for $845,945 in exemplary damages awarded under the South Carolina Trade Secrets Act ("SCTSA") against Respondents, which Clear Touch paid into the Court in April 2018. The Circuit Court rightly found that the unambiguous provisions of the SCTSA limited Encore's recovery of exemplary damages to two times the actual damage amount awarded at trial for Respondents' violation of the Act, and, as a result, Respondents had deposited the full judgment debts against them into the Court. As a consequence, Encore's post-trial campaign to destroy Trask and its competitor Clear Touch through an over-empowered Receiver and intervention in another lawsuit was put to an end. Encore asked the Court of Appeals to reverse the Circuit Court's decision so it could resume those efforts unless and until Trask paid additional damages that he does not owe. The Court of Appeals determined that this whole issue was moot in light of its decision as to Encore having to elect its remedies as to all causes of action, an interpretation of which can only mean that Encore does not get the double recovery it is seeking.

II. STATEMENT OF THE CASE

A. Trial in *Encore Tech. v. Trask and Clear Touch* - September 25-29, 2017

A week-long trial was held in September 2017 with the jury rendering a verdict in favor of Encore on six of the eight causes of action submitted to them. (R. pp. 464-471 - Verdict Form). Encore's Trade Secrets claim was pled, pursued, and tried against both Defendants jointly, without any differentiation between their alleged actions in violation of the Act. (R. p. 90 - Encore Compl. ¶ 57; *see also* Ap. Br. p. 3-4.)[1]

At trial, Encore sought $5.5M in damages it claimed resulted from Respondents' trade secret misappropriation. (R. pp. 377-381 - Tr. Trans. 1108-1112)(Requesting jury award $5.5M under breach of fiduciary duty claim and then asking it "to use the same damage figure for this claim as you used in the breach of fiduciary duty claims."). An agreed upon Verdict Form was provided to the jury with the SCTSA section asking it to award actual damages if they found for Encore and answer a special interrogatory relevant to the Court's potential award of exemplary damages under the Act. It read in pertinent part:

> **As to Plaintiff, Encore Technology Group, LLC's violation of South Carolina Trade Secrets Act claim *against Defendants Keone Trask and Clear Touch Inc.*, we the jury, unanimously find**:
>
> ____ A. For the Plaintiff in the amount of: _____($ _____ actual damages)
>
> **B. Was the *Defendants'* conduct in violating the South Carolina Trade Secrets Act committed by the *Defendants* in a willful, wanton, or reckless disregard of Plaintiff's rights?**

(R. p. 467 - Verdict Form p. 4)(*emphasis added*). The Parties and Court discussed and agreed upon the wording in the Verdict Form prior to its submission to the jury. In discussing the Verdict Form, Encore stated that the Court doubles the actual damages upon a willfulness finding – "I think the

[1] "Trask and Clear Touch misappropriated Encore's trade secrets and utilized them to take away business…. Specifically, as an employee of Encore, Trask learned that Leon County Schools in Florida had preferences to purchase specific interactive panels at specific prices, ***and along with Clear Touch*** utilized these trade secrets to take away the sales form Encore and make them directly to Clear Touch…."

same is true for the Trade Secrets Act. In other words, the jury makes the willfulness finding, and you double it." (R. p. 375, lines 19-22 - Tr. Trans. 978:19-22). And later Encore recognized the statute caps punitive damages to twice any award made – "the statute says the Court may award separate exemplary damages in an amount not exceeding – not exceeding twice any award made, so it's sort of a cap." (R. p. 376, lines 3-17 - Tr. Trans. 987:3-17).

The jury found for Encore on its Trade Secrets claim, awarded $424,945 in actual damages against the Defendants, and answered "Yes" to the special interrogatory. (R. p. 467 - Verdict Form p. 4). In light of the jury's response to this special interrogatory, the Court awarded Encore its attorney's fees and costs of $440,500 and levied the maximum amount of exemplary damages allowed under the SCTSA against the Defendants of $849,890 (twice the actual damages awarded by the jury). S.C. Code Ann. § 38-9-40(C). That brought the Trade Secrets verdict against the Defendants to a total of $1,715.335.00.

Following post-trial filings and arguments, the Circuit Court entered a Final Order and Judgment on April 2, 2018 against Respondents. Specifically, it awarded the following:

Against Defendant Keone Trask

Actual Damages		**Punitive Damages**		**Cause of Action**
$ 375,733.40		$ 175,000.00		Breach of Loyalty
675,361.00		1,500,000.00		Breach of Fiduciary Duty
424,945.00		849,890.00		Violation of Trade Secrets Act
+1,476,039.00		+2,000,000.00		Breach of Contract Accompanied by a Fraudulent Act
$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 JUDGMENT AGAINST TRASK:				**$7,917,468.40**

Against Defendant Clear Touch Interactive, Inc.

Actual Damages	**Punitive Damages**	**Cause of Action**
$ 424,945.00	849,890.00	Violation of Trade Secrets Act
	or	
424,945.00	500,000.00	Tortious Interference
$ 424,945.00 +	$ 849,890.00 =	$1,274,835.00
Plus attorneys' fees		+ 345,600.00
Plus costs & expenses		+ 94,900.00
TOTAL JUDGMENT AGAINST Clear Touch:		**$1,715,335.00**

(R. pp. 10-11 - Final Order p. 10-11). Encore elected to recover under the Trade Secrets Act cause of action against Clear Touch, as the higher total judgment award of the two levied against it. Thus, the Trade Secrets award of $1,715,335.00 comprised the entire judgment against Clear Touch and a notable portion of the judgment against Keone Trask.

The Final Order granted Respondents' Motion to pay the respective judgments against them into the Court under Rule 67 pending resolution of any appeal. By April 17, 2018, Clear Touch paid the entire $1,715,335 judgment against it into the Court under Rule 67.

Respondents filed a timely notice of appeal of the Final Order following post-trial motions on numerous grounds. Encore filed a cross-appeal soon afterward seeking review of the Circuit Court's refusal to award additional damages under equitable causes of action.

B. Encore's Post-Trial Actions Claimed to be in Pursuit of the Trask Judgment

In May 2018, Encore filed a Motion for Appointment of a Receiver, which the Circuit Court granted. The Receiver Order was entered on July 23, 2018 for the stated purpose of identifying and taking possession of Keone Trask's assets to secure the outstanding judgment debt against him pending resolution of the appeal. (R. pp. 37-49 - Receiver Order).

The Receiver began his job in earnest shortly after entry of the Receiver Order in July 2018. As discussed in Respondents' consolidated appeal filings, the Receiver Order gave the Receiver

license to violate various laws related to collecting judgment debts. The Receiver utilized those overreaching aspects of the Receiver Order through the end of 2018, endangering and embattling not just Trask personally, but Clear Touch, its business partners, and others neither owing anything to Encore nor possessing assets that could satisfy Trask's judgment debt. To add insult to injury, as written, the Receiver Order may require Trask pay the fees and costs incurred by the Receiver in perpetrating these illegal acts allowed under the Receiver Order "[i]f the Judgment is affirmed in whole or in part" on appeal. (R. p. 45 - Receiver Order p. 9). As of early February 2019, the Receiver claimed to have incurred over $200,000 in fees and expenses, and as discussed below, Trask was ordered to advance yet to be owed funds. (*See* Supp. R. p. 3 - Plf. Memo Opp. Diss. Rec. p. 3).

C. Trask Pays Judgment Debt into the Court

By the end of 2018, it seemed clear that the Receiver's activities and Encore's independent actions were aimed at using the judgment debt to gain oversight of Clear Touch and eventual possession or control of the company in some form or fashion. On January 3, 2019, Trask paid the outstanding judgment balance against him into the Court by depositing $6,660,769.58 with the Clerk. (R. p. 473 - Clerk's Email 1.3.19, Def. Hearing Exh. 4). Trask credited Clear Touch's payment of the Trade Secrets damages ($1,715,335) in calculating his outstanding judgment debt to Encore, as follows:

Actual Damages		**Punitive Damages**		**Cause of Action**
$ 375,733.40		$ 175,000.00		Breach of Loyalty
675,361.00		1,500,000.00		Breach of Fiduciary Duty
000,000.00 (CT Paid)		000,000.00 (CT Paid)		Violation of Trade Secrets Act
+1,476,039.00		+2,000,000.00		Breach of Contract Accompanied by a Fraudulent Act
$2,527,133.80	+	$3,675,000.00	=	$6,202,133.80

Plus Interest Accrued through 1.03.18	+ 398.635.78
TOTAL JUDGMENT AGAINST TRASK:	**$6,600,769.58**

(R. p. 472 - Def. Hearing Exh. 3-Defendants' Calculation of Judgments). Trask's payment, along with Clear Touch's April 2018 deposit, totaled $8,316,104.58 and fully secured Encore's respective judgments against the Respondents pending resolution of the consolidated appeal.

D. Ending the Receivership

Trask's January 3, 2019 deposit of the outstanding judgment against him with the Clerk eliminated the need for the Receiver. Accordingly, on January 8, 2019, Respondents filed a Motion to Dissolve the Receivership. (R. pp. 208-210 - Mot. Dissolve Rec.). Encore opposed this Motion, claiming the January deposit was short $1.2M. Resolution of Respondents' Motions turned upon whether Trask accurately calculated the judgment debt he owed Encore under the controlling law—namely whether he was liable for paying the $849,890 in punitive damages under the Trade Secrets claim even though Clear Touch had already paid that amount into the Court.

i. February 7, 2019 Hearing on Defendants' Motions

The Circuit Court heard arguments on Defendants' Motions in a February 7, 2019 hearing.[2] Encore claimed Trask miscalculated the judgment debt against him, and a $1.2 million-dollar shortfall remained. (Supp. R. pp. 1-4 - Plf. Memo. Opp. 2.5.19). That alleged shortfall was comprised of three items: (1) $849,890 in exemplary damages under the Trade Secrets claim (Encore calculated to total $904,515.38 with interest as of February 7, 2019) that Encore argued Trask owed despite Clear Touch's payment of the Trade Secrets verdict into the Court; (2) the Receiver's fees and costs incurred to that point; and (3) the fees and costs charged by Encore's

[2] The Honorable Judge Lawton McIntosh presided over the trial of the original 2015 *Encore v. Clear Touch* case. Following the 2017 trial, all related litigation between these parties was assigned to the Business Court with Judge McIntosh as the appointed judge. He entered the Final Order and Judgment and all other Orders mentioned in the Parties' filings. He presided over the February 7, 2019 hearing.

counsel it attributes to post-judgment collection efforts. (Supp. R. pp. 1-2 - Plf. Memos. Opp. at 1-2; R. pp. 218-242 - Hearing Trans. pp. 2-26). The only item bearing upon the judgment debt was the $849,890 in exemplary damages. The other two components of the alleged shortfall were fees and costs that Trask *may* be responsible for at a later date, but that he did not owe Encore.

Respondents maintained that because liability for the exemplary damages award under the Trade Secrets claim was and must be joint and several under the controlling law, and in light of it being treated as such during trial, Trask was entitled to credit for Clear Touch's payment of those funds into the Court in calculating his judgment debt. (R. pp. 217-229 - Hearing Trans. pp. 1-13). Otherwise, Respondents contended, Encore would be allowed to recover its exemplary damages under the Trade Secrets claim twice, for a total amount of $1,699,780, in violation of the Act's unambiguous limitation on the amount of recoverable punitive damages to no more than two times the actual damages awarded, and well-established common law prohibiting recovery of the same punitive damages for a single wrong more than once. (R. pp. 217-229 - Hearing Trans. pp. 1-13); *see* S.C. Code Ann. § 39-8-40; *Smith v. Strickland*, 314 S.C. 192, 197, 442 S.E.2d 207, 210 (Ct. App. 1994). Respondents also noted that their liability for the Trade Secrets claim damages was treated as joint and several at trial. The jury was asked to assess liability and award actual damages against "Defendants" and answer the special interrogatory asking whether the "Defendants' conduct" in violating the Act was perpetrated in willful, wanton, or reckless disregard of Plaintiff's rights. (R. p. 467 - Verdict Form p. 4).

Encore's opposition to adherence to the law relied upon a footnote in the Final Order that states: "Each Defendant, however, will owe exemplary damages of $849,890 for this claim because each engaged in willful, wanton, and reckless disregard of the Plaintiff's rights." (R. p. 11 - Final Order p. 11 fn3). In Encore's view, the footnote being in the Final Order which was on

appeal required Trask pay the full amount of exemplary damages for the Trade Secrets claim into the Court regardless of whether the controlling law required treating those damages as joint and several amongst the Respondents. Encore further argued that the statutory provisions relied upon by Respondents were ambiguous and urged they should be interpreted as a cap on the amount of exemplary damages recoverable from *each* Defendant, rather than a limitation on the total amount recoverable from *all* Defendants. (R. pp. 233-240 - Hearing Trans. pp. 17-24). Encore rather boldly attempted to convince the Circuit Court that Respondents' liability for the Trade Secrets punitive damages was not treated as joint and several at trial, most notably by inaccurately claiming the Verdict Form posed two distinct special interrogatories to the jury: "Your Honor will recall the verdict form on this asked for each defendant – did Mr. Trask willfully and deliberately violate the Trade Secret Act? The jury said yes. Did Clear Touch willfully and deliberately violate the Trade Secret Act?" (R. p. 230 - Hearing Trans. p. 14). The Circuit Court reviewed the Verdict Form, pointed out that Encore's claim was incorrect, and concluded that the Verdict Form reflected a general verdict against the Respondents under the Trade Secrets claim. (R. pp. 232-233 - Hearing Trans. pp. 16-17).

Encore ultimately admitted that if the Plaintiff can recover exemplary damages on the Trade Secrets claim only once, and the Receiver fees and costs and its post-judgment attorney's fees and costs are not included in calculating the judgment against Trask, then the Respondents paid the judgments against them in full into the Court as of January 3, 2019. (R. p. 239 - Hearing Trans. p. 23). Regardless, Encore persisted in urging the Circuit Court to require Trask advance the Receiver fees and its own collection fees and costs not yet owed, simply because he may be liable for them in the future. (R. pp. 239-246 - Hearing Trans. pp. 23-30).

During the hearing, the Circuit Court stated that it did not intend to include the footnote relied upon by Encore to claim Trask was separately liable for the exemplary damages under the Trade Secrets claim, and doing so was a "mistake" because enforcement as Encore urged would violate the controlling law. (R. pp. 229-230 - Hearing Trans. pp. 13-14). It agreed with Respondents that the SCTSA, common law, and manner in which Respondents' liability for the alleged trade secret misappropriation was treated at trial, mandated it be joint and several. (R. pp. 247-248 - Hearing Trans. pp. 38-39). Therefore, the Circuit Court concluded that Trask's calculation of his judgment liability as of January 3, 2019 correctly credited him for Clear Touch's payment of all the Trade Secrets damages, and Respondents had paid the entirety of the judgments against them into the Court. (R. p. 241 - Hearing Trans. p. 25). The Circuit Court also agreed with the fact that the post-judgment components of the claimed $1.2 million-dollar shortfall had no bearing on the judgment calculation. (R. pp. 221-222 - Hearing Trans. pp. 5-6). Regardless, it conditioned staying the Receiver upon Trask depositing all of the Receiver fees and costs through February 7, 2019 with the Court. (R. p. 62 [Order Staying Rec. at 9]; R. p. 77 [Order Dis. at 9]). Following the hearing, Trask was able to deposit the approximate $200,000 in Receiver fees and costs he did not owe in order to obtain the relief sought in Respondents' Motions.

ii. Order Staying Receiver (March 8, 2019)

Following the hearing, the Circuit Court entered an Order Staying the Receiver because Respondents had paid the judgments against them into the Court in full. It found that the clear and unambiguous language of § 39-8-40(C) capped the amount of exemplary damages a court may award for trade secret misappropriation to no more than twice the actual damages awarded for violating the Act, and "to adhere to that limitation, Defendants' liability for all aspects of the Trade Secrets award must be treated as joint and several." (R. p. 63 - Order Stay Rec. p. 10). The jury

awarding $424,945 in actual damages under the Trade Secrets claim in this case, the Circuit Court found, limited the exemplary damages Encore could recover for violation of the SCTSA to a total of $849,890. (R. pp. 57-62 - Order Stay Rec. pp. 4-9). It concluded that "because [Encore] can recover the $849,890 in exemplary damages under the Trade Secrets Act from only one Defendant, Encore is not entitled to the monies comprising its claimed $1.2 million-dollar shortfall and that Defendants properly calculated the judgment against Trask and paid those sums into the Court." (R. p. 58 - Order Staying Rec. at 5). It cited to the common law prohibition on recovering the same damages arising from a single wrong twice and the fact that Respondents' liability for the alleged trade secret misappropriation was treated as joint and several during trial as reflected in the Verdict Form as further support for its ruling. (R. pp. 59-62 - Order Stay Rec. pp. 6-9).

Encore appealed the Order Staying the Receiver on March 25, 2019 and the Court of Appeals consolidated it with the *Encore v. Clear Touch* appeals.

E. Court of Appeals Order

On November 24, 2021, the Court of Appeals issued Opinion No. 2021-UP-418 in this matter, which affirmed the Circuit Court's decision not to require Trask to pay exemplary damages. The Court of Appeals stated: "Because we presume Encore will not elect to recover on the trade secrets claim, any modifications the Circuit Court made to the judgment against Trask on that claim are irrelevant." Notably, on September 21, 2021, and prior to the issuing of this Opinion, Respondents filed a Motion for Leave to Correct Clerical Mistake in Final Order pursuant to SCRCP 60(a), which stated:

> [I]nclusion of FN3 was due to Judge McIntosh's admitted oversight and not an instance in which he changed his mind because of a legal or factual mistake or sought to alter his earlier ruling by exercising discretion in a different matter. He simply did not see FN3 in the proposed Final Order drafted by Encore and entered it without revision. That is the very type of clerical mistake that SCRCP 60(a) allows for correction, even if the order containing it is on appeal.

The Court of Appeals addressed this Motion and their ultimate conclusion regarding this issue in Opinion No. 5871 in Appellate Case No. 2018-001444 (the "Election Decision"), which accompanied Opinion No. 2021-UP-418. In the Election Decision, the Court of Appeals held as follows:

> After we conducted oral argument, Trask and Clear Touch filed a motion aimed at asking the circuit court to modify the part of its judgment that said Trask and Clear Touch were both separately liable for exemplary damages on the trade secret claim. We dismiss that motion as moot in light of our decision on election of remedies, as we presume Encore will elect to recover on the largest award—breach of contract with a fraudulent act.

III. LEGAL ARGUMENT AND AUTHORITIES

A. The Court of Appeals correctly determined that the issue of whether Encore can recover the full statutorily prescribed amount of exemplary damages for violation of the Trade Secrets Act from Trask when Clear Touch has already paid those funds into the Court was irrelevant in light of the Election Decision.

The Court of Appeals' Election Decision can only be interpreted as disposing of the issue herein, and consequently Respondents submit that this Court need only address it if the Court were inclined to reverse the Court of Appeals' Election Decision. Additionally, because the Court of Appeals specifically held the issue as moot in light of the remand to the Circuit Court on election of remedies, Encore is arguing against a decision that has not yet been made. (*See Richland Cty. Sch. Dist. 2 v. Lucas*, 434 S.C. 299, 306, 862 S.E.2d 920, 924 (2021) ("It is elementary that the courts of this State have no jurisdiction to issue advisory opinions." (citation omitted)). Nevertheless, Respondents will address each of Encore's substantive arguments.

Ultimately, Encore's claim that the SCTSA allows it to recover the entire $849,890 in exemplary damages from both Trask and Clear Touch is premised upon mischaracterization of the jury's Trade Secrets award and the Circuit Court's rulings in the challenged Orders. Furthermore, it assumes that the provisions of the SCTSA at issue require interpretation. (Writ pp. 7-11).

Acceptance of Encore's position requires ignoring the unambiguous law, the manner in which Respondents' trade secrets liability was treated at trial, and a misreading of the Circuit Court's rulings.[3]

1. The Circuit Court had jurisdiction to make subsequent findings regarding a mistake in the Final Order and Judgment

Encore contends, while citing no authority, that the Circuit Court had no jurisdiction to correct its own error while the Final Order and Judgment was on appeal. First, the Circuit Court did not in fact correct its decision; it simply clarified in a subsequent order that Encore was not entitled to double exemplary damages as the overlooked footnote in the Final Order had indicated. Second, this jurisdictional argument assumes that the Court of Appeals addressed the mistake and ruled on it. It did not; it simply noted that the issue was irrelevant. Had the Court of Appeals felt the need to address it, it would have also had to address Respondents' SCRCP 60(a) Motion. The bottom line is that Encore is arguing against something (correcting an acknowledged clerical mistake) that never occurred, and, according to the Court of Appeals, need not occur.

2. The jury's Trade Secrets award was joint and several

Encore insists the jury awarded "two awards under the SCTSA – one against Trask and one against Clear Touch." (Writ p. 8). It did not. At trial, Respondents' liability for the alleged trade secret misappropriation was treated as joint and several as reflected by the wording of the Verdict Form. (R. p. 467 - Verdict Form p. 4). That Form asked the jury to determine whether the "Defendants" violated the SCTSA and provided a single line for inserting the actual damage award. *Id*. The jury found for the Plaintiff and wrote in a single actual damages award of $424,945.

[3] Respondents disagree with the numerous representations Encore makes related to what Respondents allegedly "do not dispute." (See Writ pp. 7-8). Suffice it to say, Respondents expressly deny those representations but think it unnecessary to address each in detail for the purposes of this Response.

The Verdict Form then asked: "Was the ***Defendants'*** conduct in violating the South Carolina Trade Secrets Act committed by the ***Defendants*** in a willful, wanton, or reckless disregard of Plaintiff's rights?" *Id*. (***emphasis added***). The jury answered "yes." Both questions asked the jury to make a finding as to *Defendants'* alleged acts of trade secret misappropriation and had them render the actual damages verdict as one figure against both. Encore agrees that the actual damages award was joint and several, and credited Trask for Clear Touch's payment of it. (*See* R. pp. 229-230 [Hearing Trans. pp. 13-14]; Supp. R. p. 3 [Plf. Memo Opp. p. 3]). Yet, somehow Encore insists the jury's Trade Secrets verdict resulted in two awards, one against Trask and another against Clear Touch, thereby permitting the court to assess separate exemplary damages against each. (Writ p. 9). The objective facts and record show otherwise, and the SCTSA caps total exemplary recovery based upon the one joint actual damages award returned by the jury in this case.

3. Section 39-8-40 of the SCTSA does not allow Encore to recover quadruple the amount of actual damages awarded at trial

The South Carolina Trade Secrets Act limits the amount of exemplary damages recoverable for willful violation of the Act to no more than two times the actual damages awarded for the misappropriation, stating in pertinent part that:

> (A) A complainant is entitled to recover *actual damages* for misappropriation of trade secrets….
>
> (B) Damages may include both the actual loss caused by misappropriation or the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss….
>
> (C) Upon a finding of willful, wanton, or reckless disregard of the plaintiff's rights, the court *may award separate exemplary damages in an amount not exceeding twice any award made under subsection (A)*.

S.C. Code Ann. § 39-8-40(*emphasis added*).

Encore claims that the SCTSA "unambiguously allows the Circuit Court to award exemplary damages in the amount of twice any award and, because there were two separate awards—one against Trask and one against Clear Touch—the Court's initial award to exemplary damages against each of Trask and Clear Touch was proper." (Writ p. 9). Put simply, this makes no logical sense. The unambiguous language of the Act requires considering the number and amount of each actual damage award granted to determine the statutory cap on the amount of exemplary damages recoverable under the statute. That analysis would account for the number of defendants insofar as different actual damage awards were levied against them individually. If, however, as was the case here, only one actual damages award is levied against the "Defendants," then the number of defendants has no impact on the amount of exemplary damages recoverable under the Act because it is a single award for which all defendants, whether one or ten, are jointly liable. That conclusion is bolstered by the fact that the Verdict Form had a single special interrogatory related to exemplary damages under the trade secret claim which asked the jury, "Was the ***Defendants'*** conduct in violating the South Carolina Trade Secrets Act committed by the ***Defendants*** in a willful, wanton, or reckless disregard of Plaintiff's rights?" (R. p. 467)(*emphasis added*). The jury provided its single response without any differentiation between Trask and Clear Touch. *Id*.

Encore summarily concludes that these statutory provisions authorize the Court to award "'separate' exemplary damages against each defendant … where two or more defendants are jointly and severally liable for actual damages." (Writ p. 9). According to Encore, had the General Assembly intended the Circuit Court's interpretation, "Section 39-8-40(C) would need to be re-written to make the cap on exemplary damages an amount not exceeding twice 'actual damages,'" instead of 'any award.' *Id.* That's exactly what the General Assembly did. Subsection (C) limits

exemplary damages to "an amount not exceeding twice *any award* made under subsection (A)." "Any award" under subsection (A) is and can only be the "actual damages for misappropriation of trade secrets." Here, the Trade Secrets verdict and actual damage award of $424,945 was returned against "Defendants" jointly, making the total recoverable amount of exemplary damages $894,890. Thus, the General Assembly did intend the Circuit Court's interpretation, and the one advanced by Encore is betrayed by review of the clear statutory language.

4. Interpretation consistent with common law was not required for an Act that explicitly displaced conflicting laws providing civil remedies for trade secret misappropriation

Encore attempts to argue for err in the Circuit Court's application of the SCTSA by accusing it of failing to interpret the Act consistent with common law due to a purported misinterpretation of the holding in *Smith v. Strickland*, 314 S.C. 192, 442 S.E. 2d 207 (Ct. App. 1994) and failing to follow *McGee v. Bruce Hosp., Sys.*, 344 S.C. 466, 543 S.E.2d 286 (2001). (Writ p. 10). Encore claims that common law "provides for separate punitive damages against joint tortfeasors." *Id*.

First, this incorrectly assumes interpretation of the statute was necessary. *Hodges v. Rainey*, 314 S.C. 79, 85 (Ct. App. 2000)("Where the statute's language is plain and unambiguous, and coveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to interpose another meaning."). Second, assuming *arguendo*, interpretation was needed, the court did not need to consider its impact on common law rights because the SCTSA provides the exclusive and controlling law concerning what one may recover for trade secret misappropriation and explicitly displaced "conflicting tort, restitutionary, and other laws of this State providing civil remedies for misappropriation of a trade secret." S.C. Code § 39-8-110. Accordingly, Encore's claim that the Circuit Court erred by interpreting the statute in "derogation

of"[4] common law is a red herring, as common law has nothing to do with the amount of exemplary damages it may recover for trade secret misappropriation.

Similarly, Encore argues that the Circuit Court's interpretation of the SCTSA is inconsistent with the common law in that "where defendants are jointly and severally liable for actual damages, they are each still liable for punitive damages." (Writ p. 10). This is another digression and attempt to confuse a simple issue. If Encore wished to have exemplary damages imposed upon each of Trask and Clear Touch, it could have sought to have the Verdict Form contain separate liability inquiries and award determinations for each. It did not, and Respondents' Trade Secrets liability was therefore treated as joint and several at trial, requiring it continue to be regarded as such in order to adhere to the SCTSA's limits on the amount of recoverable punitive damages. The fact is, Encore pursued its Trade Secrets claims as a joint liability cause of action from the outset, and only post-trial has it diverged from that approach.

The Circuit Court's application of the Act does not prohibit imposition of individual punitive damages as Encore claims. The Circuit Court simply found that is not what happened in this case, and therefore, the SCTSA prohibited imposing exemplary damages against Trask and Clear Touch beyond two times the actual award amount. A court's adherence to legislatively mandated limits on the amount of exemplary damages it may impose cannot be deemed an error of law. The Circuit Court handed down against Respondents the most severe punitive measure it could have taken for the particular misdeed, yet Encore makes a nonsensical claim that there was a failure to adequately punish Respondents, and urges this Court to find reversable error in it. In short, Encore wants this Court to find that Respondents' alleged act of trade secret misappropriation was so reprehensible they can be subjected to a greater degree of punishment

[4] Writ p. 10.

than established by the legislature. This is an untenable outcome that requires ignoring the law to give Encore some $900k more than it is entitled to in addition to the millions already awarded. Encore has extracted its pound of flesh and then some from Respondents, and it cannot deem the Circuit Court's refusal to sanction Encore obtaining more than the law allows an error of law.

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