

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**APPEAL FROM GREENVILLE COUNTY
CIRCUIT COURT**
The Hon. R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2022-000144

Encore Technology Group, LLC..... Petitioner-Respondent,

v.

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

**ENCORE TECHNOLOGY GROUP, LLC'S
REPLY TO RESPONDENT-PETITIONERS' RETURN TO
PETITION FOR A WRIT OF CERTIORARI**

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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.1

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.5

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.7

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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.**

Respondent-Petitioners Keone Trask ("Trask") and Clear Touch Interactive, Inc. ("Clear Touch") (collectively, "Respondents") submitted a Return on March 14, 2022 (the "Return"), opposing Petitioner-Respondent Encore Technology Group, LLC's ("Encore") Petition for a Writ of Certiorari.

Respondents' arguments miss the mark because they aim at the wrong target. Respondents argue that neither the Court of Appeals "nor the Circuit Court could or should have made determinations concerning the jury's factual bases for and intention in entering the actual damage awards at issue." Return at page 16. As the Court of Appeals correctly held, however, in considering election of remedies, "the guidepost for the court is enforcing the jury's intent." *Encore Tech. Grp. v. Keone Trask & Clear Touch Interactive, Inc.* (S.C. App. 2021) (the "Opinion"), citing *Vinson v. Jackson*, 327 S.C. 290, 293, 491 S.E.2d 249, 250 (1997).

Thus, instead of trying to explain how the jury must have intended to support the theory of damages adopted by the Court of Appeals, i.e., arguing that the jury intended to include all damages except for wages in the breach of contract accompanied by a fraudulent act verdict, Respondents focus almost exclusively on Encore's arguments as to how it wanted the jury to allocate the total of all damages among the causes of action, Return at 5-10, and then falsely claim that "Encore relied upon the same set of facts and sought the same damages." Return at 17. The record and the Return itself, however, reveal that Encore sought to recover for four separate injuries based upon distinct facts:

1. Trask's wages and expenses during his disloyalty, totaling \$488,041 (R. 1692);
2. Encore's lost profits from Clear Touch's marking-up prices from suppliers to Encore, totaling \$675,361 (R. 1688);
3. Encore's lost profits on Clear Touch's sales to Leon County Schools ("Leon") totaling \$424,945 (R. 1689); and
4. The value of the lost business opportunity represented by Clear Touch and its reseller network, including past profits of \$1,636,254, and future profits of \$3,900,000, for a total of approximately \$5.5 million (R.1690).

Return at 4-5. The Return even summarizes these four different injuries and their distinct facts. *Id.* at 3 (“(1) Trask not disclosing to Encore the identity of CTI suppliers; (2) Trask not informing Encore that he was building a reseller network for CTI; (3) Trask not working with Encore to take advantage of the CTI opportunity; and (4) CTI making direct sales to Leon County.”).

Encore's attorney argued in closing that the jury could award Encore a grand total of \$5.5 million, which would compensate for the smaller, separate injuries, and then award that grand total of \$5.5 million under multiple causes of action that would not then be added together to result in more than \$5.5 million actual damages.¹ The jury, however, chose not to follow that approach. Instead, a review of the verdict makes clear the jury used the separate causes of action to compensate Encore separately for its four injuries:

¹ It was in this context Encore stated “if you were to award Encore the \$5.5 million,” then the jury would not “add all these together” to exceed \$5.5 million. R.1340, 1343. Likewise, Encore's expert Meilinger did not say “if the jury awarded damages from Table 3, it should not award those from Table 2,” as claimed in the Return at 5, but said that “you would not add the \$5,536,254 to the \$1.1 million.” Transcript, R. p. 1106, l. 9-12.

<u>Page</u>	<u>Cause of Action</u>	<u>Actual Damages</u>	<u>Punitive Damages</u>
1	Breach of Duty of Loyalty	\$375,733.40	\$ 175,000.00
2.	Breach of Fiduciary Duty	\$675,361.00	\$1,500,000.00
3.	Breach of Contract	\$424,945.00	n/a
4.	Violation of Trade Secrets Act	\$424,945.00	[awarded by court]
5.	Tortious Interference by CTI	\$424,945.00	\$ 500,000.00
6	Breach of contract acc. by fraud	\$1,476,039.40	\$2,000,000.00

Verdict, R. 1916-1921.

That the jury intended to compensate Encore for each of its four injuries is readily apparent. Verdict 1 is a portion of Trask's \$488,000 wages and expenses. Verdict 2 conforms exactly to the evidence of Encore's \$675,361 lost profits caused by Trask's taking a mark-up of supplier's prices to Encore. Verdicts 3, 4, and 5 conform precisely to the evidence of Encore's \$424,945 lost profits in sales to Leon.

That the jury intended to compensate Encore separately for the loss of the Clear Touch opportunity in Verdict 6 for breach of contract accompanied by a fraudulent act is also apparent. The jury compensated for separate, distinct injuries in each of Verdicts 1-5. The Court of Appeals' theory that the jury might have changed course and included the \$675,361 in mark-ups and \$424,945 in Leon profits in the \$1,476,039.40 in actual damages in Verdict 6 would mean that the jury awarded only about \$375,000 in actual damages for the Clear Touch reseller business opportunity, a figure that did not appear in evidence, is woefully low, and is obviously not consistent with the success of the Clear Touch opportunity. Moreover, that theory ignores that (a) the \$2,000,000.00 punitive damages award in Verdict 6 is different than for the other claims, and (b) no combination of actual plus punitive damages awards in Verdicts 1-5 equals the

\$3,476,039.40 actual plus punitive damages award in Verdict 6, demonstrating that the jury intended to address each injury separately. It is significant that the trial judge concluded that the four different verdicts were intended to compensate for the four different injuries, because he heard first-hand the arguments and evidence, and so necessarily shared a closer perspective with the jury – and knew its intent better – than the Court of Appeals.²

Finally, Respondents argue 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. Return at 18, n.5. They say, however, the Court should not address this issue because it would be an “advisory opinion,” but this is an inaccurate characterization given Respondents’ arguments. To prevent Respondents’ initiating another multi-year round of appeals when the Circuit Court implements this Court’s decision on election of remedies, it should be clear that the decision on the election of remedies against Trask does not eliminate Clear Touch’s liability for the judgment against it under the Trade Secrets Act (including exemplary damages).³

² Respondents also argue it “cannot be stressed enough that Encore drafted the final order ... and the Circuit Court entered it without revision.” Return at 16. Well before the order, however, the trial court was clear at the hearing on Respondent’s motion for election there were “four separate and distinct categories of damages [and] they presented that way at trial if I recall.” R. 1500. Additionally, the court thereafter required a deposit from Respondents for the full amount of the judgment for those four injuries. Moreover, as Respondents should know, trial judges in this State have an incredibly high volume of cases and heavy workload, and routinely depend upon attorneys for the parties to prepare drafts of orders that they then review carefully and adopt as their own if they are correct. Respondents should not be heard to impugn the integrity of the judicial system or Judge McIntosh for requesting that Encore’s attorneys draft the Final Order and Judgment and accepting it without making changes requested by Respondents, which the judge reviewed and rejected.

³ Contrary to Respondents’ arguments, their appellate briefs did not raise election of remedies issues concerning the \$1.7 million judgment against Clear Touch.

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.

Respondents do not dispute that the election of remedies doctrine is a "defense" that they must raise and carry. *Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 15, 397 S.E.2d 774, 777 (S.C. App. 1990). Nor do they dispute that 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. Instead, they continue to rely upon their over-generalization that Encore "relied on the same facts to seek the same damages under these claims." Return at 19.

As noted above, the evidence showed and Encore argued that there were different facts giving rise to four distinct injuries and damages. See Encore's opening argument, Transcript, R. p. 860, l. 19-R. p. 863, l. 5 ("There are basically four categories of damages I want to discuss and that the evidence will show"); Damages Exhibits, R. 1688-1692.

In closing, Encore pointed to the different facts in evidence showing the four injuries. See Transcript, R. p. 1333, ll. 11-20 ("[W]hile he was an employee of Encore, Mr. Trask received salary, bonus, benefits and expenses So for the first cause of action, Breach of Duty of Loyalty, we're asking you to check the box A, for plaintiff"); Transcript, R. p. 1337, ll. 1-19 ("Now, the second category of damages is Lost Profit, and there are two categories of that.... The first category are the products that Encore sold to its customers that it acquired from Clear Touch at the mark up.... That's the first three categories in Table Number 2. Those categories total \$675,361."); Transcript, R. p. 1337, l. 24-R. p. 1338, l. 8 ("The second category are those bottom two lines, and those are the sales made to Leon.... [T]he profit amount is \$424,945."); Transcript, R. p. 1339, l. 7-R. p. 1340, l. 14 ("[T]he third calculation ... is the business

opportunity calculation.... There are actually two components of this.... One is just for ... the profits that Clear Touch made through the end of 2015, and that figure is \$1,636,254.... And then at the end of 2015.... [W]hat was Clear Touch worth?.... That's where he comes up with the figure of \$3,900,000. Those two components add up to the \$5.5 million figure that you heard.”). Encore’s argument that the jury could award Encore a grand total of \$5.5 million, which would compensate for the smaller, separate injuries, and then award that grand total of \$5.5 million under multiple causes of action, did not make the four injuries the same.

Respondents do not and cannot contest that the total actual damages of the four verdicts on which judgment was entered against Trask were less than the \$5.5 million actual damages presented by Encore. Accordingly, the total of the verdicts on which judgment cannot be characterized as excessive because they fell 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).⁴

Respondents also do not address *GTR Rental, LLC v. DalCanton*, 547 F. Supp. 2d 510 (D.S.C. 2008). This Court should adopt the reasoning of *GTR Rental* and hold that election of remedies does not apply where a defendant’s actions occur “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 515.⁵ Otherwise, a defendant who has committed multiple wrongs resulting in multiple

⁴ See Plaintiff’s Exhibit 10.H, R. p. 1692.

⁵ Respondents admit that the “factual background in this matter is extremely complex” and that they cannot summarize it within a 25-page limit. Return at 3, n.3. This is because the

injuries – including fraudulent acts and willfully and intentionally destroying evidence – will receive a presumption that one verdict encompasses others.

Instead, such a defendant should carry the burden to prove that the jury intended one verdict to include others. This is consistent with the Court’s approach in *Stoneledge at Lake Keowee Owners v. IMK Dev. Co.*, Op. No. 28071 (S.C. S. Ct. Dec. 8, 2021), which held defendants liable for “\$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.” Only by doing so can the courts follow the rule that the evidence and all inferences from it 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.”).

Because Trask did not and cannot establish that the jury intended the breach of contract accompanied by a fraudulent act verdict to encompass other verdicts, Encore is entitled to collect all four verdicts upon which the trial court entered judgment.

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.

Respondents mistakenly claim that Encore, in its claim for restitution, is seeking “actual damages in the form of disgorgement” and “actual damages in the form of the value of the Clear

Respondents’ illegal acts, as well as the actions of their friends and family at their direction, to deceive, take advantage of, and steal from Encore, occurred over a period of more than two years. This is undoubtedly why the jury awarded different actual and associated punitive damage amounts, Respondents did not choose to seek further clarification from the jury, and the trial judge ruled that the jury’s intention was to compensate Encore for its four different injuries.

Touch business and profits through 2015 – both of which are actual damages.” Return at 21.

Again, Respondents’ arguments miss the mark.

Encore seeks restitution from Clear Touch as an alternative to legal damages because the latter are more limited in scope and did not afford the jury the ability to require Clear Touch to disgorge its full value. This is because the law required the jury to focus on the profits Encore lost as opposed to the profit Clear Touch made and would make going forward. Trask represented to the jury and this Court that he started Clear Touch in January 2014 with his “entire life savings” of approximately \$150,000, R. 1195; Respondents’ Petition for Cert. at 6, and told the jury that he could likely not continue Clear Touch if it rendered a multi-million dollar verdict. R. 108. Yet three years after allegedly starting Clear Touch with \$150,000 and 16 months after telling the jury he could not pay a multi-million-dollar verdict, in January 2017, Respondents were able to deposit over \$8.5 million to stop post-judgment interest accruing on the judgment. Respondents’ Petition for Cert. at 10. This demonstrates the enormous success of Clear Touch and the conservative nature of Encore’s \$5.5 million valuation.⁶

Encore asserted two causes of action against Clear Touch, violation of the Trade Secrets Act and tortious interference with contract. The Circuit Court charged the jury that 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

⁶ Moreover, given Respondents’ limited production of some financial documents and refusal to produce others, Encore moved forward to trial without the full information at the direction of the court, so was not able to fully present all financial information to the jury. Encore was fortunate that Good Samaritans, such as Dale Viola, came forward and provided evidence of Respondents’ significant efforts to build Clear Touch’s vast reseller network using Encore’s resources. R. 926-953.

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 net profits Encore would have made from Leon, because it awarded Encore the same \$424,945 on this legal claim. (Verdict Form, R. p. 1920)

The measure of restitution for unjust enrichment is different than the measure of legal damages and allows the court to examine the profits made by Clear Touch, with its different operating structure and overhead. It 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”).

Accordingly, the Circuit Court should have analyzed the value Clear Touch retained, apart from the legal damages Encore incurred, and required Clear Touch to disgorge this amount.

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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PROOF OF SERVICE

I, Gregory J. English, of Wyche, P.A., attorneys for the Petitioner-Respondent Encore Technology Group, LLC in the within action, do hereby certify that I have this date served upon opposing counsel the foregoing **ENCORE TECHNOLOGY GROUP, LLC'S REPLY TO RESPONDENT-PETITIONERS' RETURN TO PETITION FOR A WRIT OF CERTIORARI** by Email and first class U.S. mail, addressed to the following:

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March 24, 2022

Greg English

From: Greg English
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Cc: Rita Bolt Barker; Greg English
Subject: Encore's Reply to Respondent-Petitioners' Return to Petition for a Writ of Certiorari - Encore Technology Group, LLC vs. Keone Trask, et al., Appellate Case No. 2022-000144
Attachments: Encore Reply.pdf

Josh and Josh,

We hereby serve upon you Encore's Reply to Respondent-Petitioners' Return to Petition for a Writ of Certiorari in this case.

Sincerely, Greg



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