

**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. 2022-00143

Jami Powell and Encore Technology Group, LLC,
Of which Encore Technology Group, LLC is the Petitioner,

v.

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

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

Gregory J. English (S.C. Bar No. 65470)
Rita Bolt Barker (S.C. Bar No. 77600)
WYCHE, P.A.
P.O. Box 728
Greenville, SC 29602-0728
Phone: (864) 242-8200
genglish@wyche.com
rbarker@wyche.com
Attorneys for Petitioner

Other Counsel of Record:
Joseph Owen Smith
Joshua Jennings Hudson
Smith Hudson Law, LLC
200 North Main Street, Suite 301-C
Greenville, SC 29601
jsmith@smithhudsonlaw.com
jhudson@smithhudsonlaw.com
Attorneys for Respondents

RECEIVED

Mar 24 2022

S.C. SUPREME COURT

INDEX

ARGUMENT.....1

 I. Where the Court of Appeals erroneously required Encore to elect between verdicts against Trask for breach of contract accompanied by a fraudulent act and violation of the Trade Secrets Act, the Court erred in failing to require Trask to pay exemplary damages for his willful violation of the Trade Secrets Act in addition to Clear Touch’s payment of exemplary damages.1

CONCLUSION.....5

ARGUMENT

- I. Where the Court of Appeals erroneously required Encore to elect between verdicts against Trask for breach of contract accompanied by a fraudulent act and violation of the Trade Secrets Act, the Court erred in failing to require Trask to pay exemplary damages for his willful violation of the Trade Secrets Act in addition to Clear Touch's payment of exemplary damages.**

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

The essence of Respondents' opposition to Encore's Petition is their argument 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 as payment of those funds" Return at 9. In other words, Respondents argue that because they were jointly and severally liable for Encore's actual damages caused by their violations of the South Carolina Trade Secrets Act, they may not be separately liable for exemplary damages. The premise of Respondents' position is wrong.

In the context of punitive damages, Respondents' position was expressly rejected by *McGee v. Bruce Hosp. Sys.*, 344 S.C. 466, 471-72 n.3, 545 S.E.2d 286, 288-89 n.3 (2001), which Respondents fail to address. There, two doctors were potentially jointly and severally liable for a wrongful death, and a verdict for actual and punitive damages against the first doctor was paid in full by that doctor. The second doctor then argued, like Respondents, that the plaintiff could not recover from him because liability was joint and several and plaintiff had been paid in full. This Court rejected that argument, holding that "[p]unitive damages awarded against one tortfeasor do not constitute double recovery with respect to a judgment against another tortfeasor since the purpose of punitive awards is to punish a particular offender rather than to compensate the victim

for its injury.” *Id.* Accordingly, the plaintiff could recover separate punitive damages against the second doctor. *Id.*

Respondents also argue that 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” Return at 15 (emphasis added). Again, Respondents’ interpretation of the statute is wrong.

S.C. Code Ann. § 39-8-40(C) does not limit exemplary damages to twice “actual damages” as argued by Respondents, only to “twice **any award** made under subsection (A).” *Id.* (emphasis added). Respondents seek to re-write this language to make the cap on exemplary damages an amount not exceeding twice “actual damages,” but that would substantially change the meaning. Specifically, in cases where multiple defendants misappropriate the same trade secrets and cause the same actual damages, even though they are jointly and severally liable for the same actual damages, the award against each defendant is necessarily a separate and independent award that can sustain separate awards of exemplary damages. Respondents’ interpretation would change that result in a way that would be inconsistent with *McGee*.

Respondents argue that, because the verdict form, R. p. 467, provided for a finding of “Defendants” liability for actual damages as well as “Defendants” willful, wanton, or reckless violation of the Trade Secrets Act, there was only one award under the Act. Return at 14-18. Respondents attempt to elevate form over substance. Trask was Clear Touch’s employee and agent, and his misappropriation of Encore’s trade secrets for Clear Touch necessarily made both liable, so that there was no need for a separate finding as to each defendant. Where a jury finds that two legally separate defendants have both violated the Trade Secrets Act, it is necessarily rendering two awards.

Respondents cite *Smith v. Strickland*, 314 S.C. 192, 442 S.E.2d 207 (Ct. App. 1994), for the proposition that the law prohibits “recovery of the same punitive damages for a single wrong more than once.” Return at 9. In that case, plaintiffs prevailed on four causes of action for the same injury, the same actual damages, and punitive damages under three of the causes of action. The Court merely held plaintiffs had to elect an award of actual damages under one cause of action, and could not add the punitive damages awards from three causes of action for each defendant. The Court did not address the issue in *McGee* and here—whether each defendant could be required to pay punitive damages separately when they were jointly and severally liable for the same actual damages. Following *McGee*, the law is clear that each defendant is responsible to pay punitive damages separately, even though jointly and severally liable for actual damages.

Moreover, because the Final Order and Judgment was on appeal, the Circuit Court had no jurisdiction to make subsequent findings inconsistent with the original ruling in the Final Order and Judgment that Trask and Clear Touch were each separately liable for exemplary damages. “Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal...” and the lower court can rule only on “matters not affected by the appeal.” Rule 205, SCACR; *Bunkum v. Manor Props.*, 321 S.C. 95, 98-99, 467 S.E.2d 758, 760 (Ct. App. 1996). Respondents argue that “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.” Return at 14. In truth, the Circuit Court reversed its own holding in footnote 3 of the Final Order and Judgment that Respondents were each separately liable for the exemplary damages.¹ Respondents never objected to or took issue with this part of

¹ Judge McIntosh reversed himself only on the narrow issue of whether multiple defendants can each be liable for double exemplary damages under the Trade Secrets Act because he was not clear on whether the Act allowed that, but otherwise stood by the Final Order and Judgment.

the Final Order and Judgment before they appealed, and they should not have been allowed a second bite at the apple after they appealed.

On November 24, 2021, the Court of Appeals issued Opinion No. 5871, now pending before this Court in Appellate Case No. 2022-00144. In reversing the trial court's decision on Election of Remedies (the "Election Decision"), the Court of Appeals determined that Encore was required to elect two of four jury verdicts against Trask and assumed Encore would elect the breach of contract accompanied by a fraudulent act verdict against Trask, leading the Court in this case to "presume Encore will not elect to recover on the trade secrets claim" against Trask.²

For the reasons stated in Encore's Petition for a Writ of Certiorari to review the Court of Appeals' Election Decision, which is incorporated herein by reference, errors by the Court of Appeals warrant reversal of the Election Decision, which would allow Encore to recover both verdicts against Trask for breach of contract accompanied by a fraudulent act and for violation of the Trade Secrets Act. Contrary to the Election Decision, once the trial court's decision on Election of Remedies is affirmed by this Court and Trask is required to pay exemplary damages on the trade secrets claim, Clear Touch and Trask will not have paid amounts sufficient to satisfy the judgments against them. Therefore, the Court should require Trask to pay exemplary damages to Encore on the trade secrets claim, plus post-judgment interest on same.

Finally, even though Clear Touch did not raise election of remedies issues regarding the judgment against it, Respondents have argued the Election Decision 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 exemplary damages

² Of course, Encore would choose the verdicts resulting in the highest combined judgment against Trask and Clear Touch.

award – on the Trade Secrets Act verdict against Clear Touch. Therefore, in addressing the trade secrets issue, the Court should make clear that the Election Decision 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.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari and issue an opinion requiring Trask to pay exemplary damages to Encore on the trade secrets claim, plus post-judgment interest on same.

Respectfully submitted,

WYCHE, P.A.

BY: s/ Gregory J. English

Gregory J. English

Rita Bolt Barker

Post Office Box 728
Greenville, South Carolina 29602
(864) 242-8200

Attorneys for Petitioner
Encore Technology Group, LLC

March 24, 2022

Other Counsel of Record:

Joseph Owen Smith
Joshua Jennings Hudson
Smith Hudson Law, LLC
200 North Main Street, Suite 301-C
Greenville, SC 29601

**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. 2022-00143

Jami Powell and Encore Technology Group, LLC,
Of which Encore Technology Group, LLC is the Petitioner,

v.

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

PROOF OF SERVICE

I, Gregory J. English, of Wyche, P.A., attorneys for the Petitioner in this appeal, do hereby certify that I have this date served upon opposing counsel for the party who has served a brief in this appeal the **ENCORE TECHNOLOGY GROUP, LLC'S REPLY TO RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI** by Email and first class U.S. mail, addressed to the following:

Joseph Owen Smith
Joshua Jennings Hudson
Smith Hudson Law, LLC
200 North Main Street, Suite 301-C
Greenville, SC 29601
jsmith@smithhudsonlaw.com
jhudson@smithhudsonlaw.com

s/ Gregory J. English

Gregory J. English
WYCHE, PA
Post Office Box 728
Greenville, South Carolina 29602
(864) 242-8200

Attorneys for Petitioner
Encore Technology Group, LLC

March 24, 2022

Greg English

From: Greg English
Sent: Thursday, March 24, 2022 10:51 AM
To: Josh Smith; Josh Hudson
Cc: Rita Bolt Barker; Greg English
Subject: Jami Powell (Encore) v. Clear Touch Interactive, et al. (Appellate Case No. 2022-000143)
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



Gregory English | Wyche

200 East Broad Street, Suite 400 | Greenville, SC 29601-2892

Phone: (864) 242-8247 | Fax: (864) 235-8900

genglish@wyche.com | www.wyche.com/genglish | [vCard](#)

A Lex Mundi Member Firm