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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Hon. Perry H. Gravely, Circuit Court Judge

Common Pleas Case No. 2019-CP-23-02032

Appellate Case No. 2021-001177

JULIA SIBLEY-JONES,
as Personal Representative of the
Estate of William A.L. Sibley, Jr.

Respondent-Appellant,

v.

DECIDE4ACTION, INC.,

Appellant-Respondent.

Brief of Appellant-Respondent Decide4Action, Inc.

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err in granting a directed verdict against Decide4Action, Inc., on its counterclaims where sufficient evidence existed in the trial record to allow the jury to return a verdict in favor of Decide4Action, Inc.?

2. Did the circuit court err in entering an order *in limine* that prohibited Decide4Action, Inc., as a discovery sanction, from introducing evidence of damages in its case-in-chief?

STATEMENT OF THE CASE

This appeal concerns a dispute arising out of Decide4Action, Inc.'s agreement to purchase all the shares of Computer Control + Integration, Inc. ("CC+I").

I. The Pleadings

A. The Start of the Civil Action

On April 11, 2019, William A. Sibley, Jr., filed an action in the Court of Common Pleas in Greenville County against Decide4Action, Inc. [R. 017-31].

B. The Amended Complaint

Following Mr. Sibley's death, Julia Sibley-Jones filed an Amended Complaint on December 28, 2020, against Decide4Action in her capacity as the Personal Representative of the Estate of William A.L. Sibley, Jr. [R. 042-47].[1] The Amended Complaint alleged two causes of action: breach of contract and breach of contract accompanied by a fraudulent act, both arising out of Decide4Action's post-closing claim on $440,000 held in escrow. [*Id.*]. As the Amended Complaint itself alleged, Decide4Action "notified the Escrow Agent that it had pending claims against the Selling Shareholders in the amount of One Million Three Hundred Fourteen

[1] Decide4Action will hereafter refer to the Respondent-Appellant as the "Estate."

Thousand Thirty-Four and No/100 Dollars ($1,314,034.00) and requested that the Escrow Agent continue to hold the funds in the Escrow Account." [*Id.* ¶ 8].

C. Decide4Action's Amended Answer with Counterclaims

Via an answer filed January 25, 2021, Decide4Action denied liability and damages. [R. 050-68]. It also asserted counterclaims.[2] It alleged that Mr. Sibley had wrongly increased the annual salary of Kimberly French by $2,500 prior to closing, [*id.* ¶68], and that he had wrongly authorized $334,864 in employee bonuses prior to closing, [*id.*], bonuses which Decide4Action alleged had reduced the value of CC+I "by nearly $1,300,000.00," [*id.* ¶84]. The causes of action asserted were breach of contract, breach of contract accompanied by a fraudulent act, fraud, and intentional misrepresentation.[3]

The reply to the counterclaims denied liability and damages. [R. 069-76].

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[2] Although Decide4Action also asserted a third-party claim against Joyce Featherstone, that claim was later dismissed by agreement. [R. 011].

[3] On appeal, Decide4Action does not contend that Count Four, for "intentional misrepresentation" is a separate cause of action. Rather, it is subsumed into fraud and/or breach of contract accompanied by a fraudulent act.

II. The Pretrial Order Compelling Discovery

On January 8, 2021, the circuit court issued a consent order to resolve a motion to compel. [R. 001-04]. The circuit court ordered Decide4Action to "fully answer Plaintiff's Interrogatory 25, setting forth an itemized statement of all damages claimed, describing in detail the damages claimed and method of computation, including the amounts and period for which the loss is claimed, how the amounts in the subject valuations will be used at trial, and what the total damages claim is." [R. 001]. Further, the circuit court ordered Decide4Action to produce "all documents responsive to Plaintiff's Request for Production of Documents 23, including Defendant's and CC+I's financial statements and tax returns...." [R. 002].

III. The Order *in Limine* and Directed Verdicts at the Jury Trial

On July 26, 2021, the circuit court began a jury trial on the claims and counterclaims. [R. 197]. Following the close of the Estate's case-in-chief, on the second day of trial, the Estate made two motions *in limine*. One sought to preclude Decide4Action from presenting evidence of damages, and one sought to preclude Decide4Action's president, Richard Bergeron, from offering any expert testimony. [R. 362-63]. The circuit court granted both motions. [R. 378-80]. The next day, the circuit court denied Decide4Action's motion to reconsider the discovery sanction. [R. 118; 518-19].

At the end of all the evidence, the circuit court granted a directed verdict in favor of the Estate on all Decide4Action's counterclaims, granted a directed verdict in favor of the Estate on the Estate's breach-of-contract claim, and in favor of Decide4Action on the Estate's claim of breach of contract accompanied by a fraudulent act, as explained in the circuit court's written order:

> At the conclusion of the Defendant's case, the Plaintiff moved for a directed verdict on the Defendant's counterclaims on numerous grounds. Since the Court had already ruled that the Defendant was foreclosed from presenting any evidence of damages, the Defendant was not able to establish all of the elements of its causes of action asserted in its counterclaims[,] and the Court granted the Plaintiff's Motion for Directed Verdict, dismissing all of Defendant's Counterclaims.... The Plaintiff then moved for a Directed Verdict on the Breach of Contract action regarding the distribution of the Escrow Account being held by United Community Bank ("UCB") under the Indemnity Escrow Agreement ("Escrow Agreement."). Since the Defendant's counterclaims had been dismissed and no claim for offset had been asserted, the Plaintiff was entitled to the escrow funds held pursuant to the Stock Purchase Agreement and Escrow Agreement[,] and the Court granted the Plaintiff's Motion for Directed Verdict and ordered that the escrow funds being held by UCB be released to Plaintiff. Defendant also moved for a directed verdict as to the Plaintiff's cause of action for Breach of Contract Accompanied by Fraudulent Act. The Court found that there was no credible evidence of fraud, even in the light most favorable to the Plaintiff, and this Motion was granted[,] and the Plaintiff's 2nd Cause of Action for Breach of Contract Accompanied by Fraudulent Act was dismissed. The Plaintiff asserted a claim for pre-judgment interest[,] and the Court found that due to Defendant's viable claim under the Stock Purchase Agreement and the lack of such a provision in the Escrow Agreement, there was no basis for pre-judgment interest. In light of these rulings, no claims remained to be presented to the jury.

[R. 011].

IV. The Entry of the Final Order

The circuit court issued a final order approving the release of the funds from UCB on August 2, 2021, which referenced its prior Form 4 Order's explanation of the rulings on the directed verdicts. [R. 014-16].

V. The Estate's Motion to Alter or Amend

On August 9, 2021, the Estate filed a motion to alter or amend the judgment. [R. 173-82].

VI. The First Notice of Appeal

Decide4Action served a notice of appeal, which this Court dismissed without prejudice pending ruling on the Estate's post-trial motion. [R. 009]. The remittitur was dated September 21, 2021. [R. 008].

VII. The Denial of the Motion to Alter or Amend

On October 13, 2021, the circuit court denied the Estate's motion to alter or amend. [R. 005-06].

VIII. The Instant Notice of Appeal

On October 13, 2021, Decide4Action timely served its notice of appeal, conferring jurisdiction on this Court to decide this appeal. [R. 192].

STATEMENT OF ADDITIONAL FACTS

I. Evidence Admitted at the Jury Trial

CC+I was a company that designed computer software. [R. 242]. In 2017, its CEO and largest shareholder was William Sibley, Jr., [R. 299; R. 558; R. 612].

A. The Purchase Price Set Based Upon an EBITDA[4] Multiple

On March 10, 2017, Decide4Action, acting via its CEO and sole shareholder, Richard Bergeron, presented proposed terms for the purchase of all of CC+I's outstanding shares. [R. 554; 299]. The Letter of Intent ("LOI"), signed by Decide4Action and the CC+I shareholders, including Mr. Sibley, set a $4.4 million purchase price, with 10% to be held in escrow following closing. [R. 554]. It provided for a three-month due-diligence period. [R. 554-55]. The LOI set forth numerous conditions, including that "[t]he Due diligence shall demonstrate that the average EBITDA of 2015 and 2016 including the recast to be no less than 98% of EBITDA from the financials of the Offering memorandum of the financials submitted by Bill Sibley for year 2016" and that CC+I have sufficient sales "in line to produce a 2.8M revenue at year end 2017 and EBIDTA consistent with the year 2015 and 2016." [R. 555]. The EBIDTA for 2016 was $1.173 million. [R. 388]. The parties set the $4.4

[4] "EBIDTA" is an accounting term meaning "earnings before interest, taxes, depreciation and amortization." [R. 316].

million proposed purchase price in the LOI based upon an EBIDTA multiple of 3.75. [R. 388]. The LOI also included among the list of representations and warranties that would be required in a final agreement that "cash at the time of closing will be distributed to the current shareholders prior to closing." [R. 555]. According to Mr. Bergeron, that provision was designed to prevent undisclosed bonuses to non-shareholder employees. [R. 430-33]. If the compensation to non-shareholders increased prior to closing, Mr. Bergeron testified that the parties "would have had to change the [purchase] price." [R. 433]. According to Mr. Bergeron, it was specifically important to Decide4Action "to make sure that there [was] no hidden bonus to employee, nonowners, because if they're hidden, you don't know the true salary that they were really making." [R. 432].

In May 2017, during the due-diligence period, CC+I sent Mr. Bergeron a spreadsheet showing employee and owner salaries and bonuses for fiscal years 2013 to 2017. [R. 668-69]. That spreadsheet showed that while CC+I's owners historically received bonuses of up to almost 100% of their salaries, the non-owner employees had not received any bonuses in fiscal years 2013-15 and, for fiscal year 2016, had received bonuses of between 0% and 33% of their compensation:

		CC+I Fiscal 2017 as of 4/28/2017		CC+I Fiscal 2016		CC+I Fiscal 2015		CC+I Fiscal 2014		CC+I Fiscal 2013	
		Annual Salary	Bonus	Annual Salary	Bonus	Annual Salary	Bonus	Annual Salary	Bonus	Annual Salary	Bonus
OWNERS:											
Clark, James T.		$125,000		$150,000	$100,000	$150,000	$75,000	$106,703	$0	$97,811	$0
Dozier, Scott W.		$96,249		$103,883	$100,000	$100,200	$75,000	$77,020	$0	$70,583	$0
Levinor, Robert E.	(*)	833,412		$60,141	$20,000	$60,105	$30,000	$71,597	$0	$64,447	$0
Sibley Jr, William A. L.		$125,000		$150,000	$80,000	$150,000	$95,000	$102,917	$0	$57,600	$0
Starrett, Frank T.		$70,834		$97,921	$45,000	$97,921	$45,000	$93,921	$0	$76,923	$0
Featherstone, Ernest H.	(**)	$12,000		$24,000	$0	$24,000	$0	$24,000	$0	$91,667	$0
NOTES: (*) Began Working Half Time (**) Deceased December 2016											
NON-OWNERS:											
Lahti, Diane E.								$0	$0	$14,241	$0
Morrow, Hollo A.		$28,225		$37,500	$0	$34,375	$0	$7,731	$0		
Childress, William C.				$0	$0	$44,275	$0	$7,497	$0		
Taylor, Joseph B. Date of Hire		$30,333		$46,000	$15,000	$43,000	$0	$1,667	$0		
Hermann, Nathan D. Date of Hire --- July 2015		$52,935		$59,382	$15,000						
Viveros, Carlos A. Date of Hire --- Mar. 2016		$62,028		$21,883	$5,000						
Clark, Ryan O. Date of Hire --- Oct. 2016		$24,934									
Jones, Christopher L. Date of Hire --- Oct. 2016		$23,769									
Pavatte, Justin D. Date of Hire --- Jan. 2017		$18,033									

[R. 669].

Although the LOI originally provided for only a three-month period for due diligence, Mr. Bergeron testified that that period was, by consent, extended twice such that it never expired before the written Stock Purchase Agreement ("SPA") was executed on October 13, 2017. [R. 437; 569].

B. The SPA's Provisions

SPA § 4 contained various representations and warranties, including as follows:

> 4. *Representations and Warranties Concerning Target.* The Sellers other than Joyce Featherstone jointly and severally represent and

warrant to Buyer that, except as set forth in the Disclosure Schedule, the statements contained in this §4 are correct and complete as of the date of this Agreement:

[...]

(i) *Events Subsequent to May 17, 2017*. Except as set forth in §4(i) of the Disclosure Schedule, since May 17, 2017, there has not been any Material Adverse Change and Target has conducted its business in the Ordinary Course of Business. Without limiting the generality of the foregoing, since May 17, 2017:

> (i) Target has not sold, leased, transferred, assigned or otherwise disposed of any of its assets, tangible or intangible, other than in the Ordinary Course of Business;
>
> (ii) Target has not entered into any agreement, contract, lease, or license (or series of related agreements, contracts, leases, and licenses) either involving more than $2,000 or outside the Ordinary Course of Business;

[...]

(xvi) Target has not granted any increase in the base compensation of any of its directors, officers, or employees outside the Ordinary Course of Business;

(xvii) Target has not adopted, amended, modified or terminated any bonus, profit sharing, incentive, severance, or other plan, contract or commitment for the benefit of any of its directors, officers, or employees (or taken any such action with respect to any other Employee Benefit Plan);

(xviii) Target has not made any other change in employment terms for any of its directors, officer, or employees outside the Ordinary Course of Business[.]

[R. 572-76].[5]

Throughout the SPA, "'**Ordinary Course of Business**' means the ordinary course of business consistent with past custom and practice (including with respect to quantity and frequency, where applicable)." [R. 599].

The disclosure schedule for SPA § 4 read in part as follows:

Schedule 4(i)
Events Subsequent to May 17, 2017

[...]

3. Target paid a fiscal year-end bonus and subsequently has paid special bonuses to employees on three occasions.

[R. 614]. Prior to his death, Mr. Sibley conceded in a deposition that that paragraph did not disclose "how those bonuses were paid and who they were paid to." [R. 398].

SPA § 6 addressed the entitlement to CC+I's cash on hand on the date of closing. It reads as follows:

(c) *Cash.* Sellers shall ensure that all Target cash is distributed or otherwise paid out to Sellers no later than Closing, providing that a de minimis amount shall be left in the Target payroll bank account to keep that account open. If and to the extent that any Target cash is left in possession or under the control of Target after Closing, such cash shall remain

[5] ~~A handwritten note on the trial exhibit beside item 4(i)(i)-(ii) reads: "BONUS VIOLATE [sic] THESE 2 AS WELL." [Pl. Ex. 8].~~ The admission of the exhibit was by agreement. [R. 205].

the property of Target, and Sellers shall have no right or claim to such cash....

[R. 585].

SPA § 8 dealt with remedies for breach. Its provisions included the following:

8. *Remedies for Breaches of This Agreement.*

(a) *Survival of Representations and warranties.* All of the representations and warranties of the Sellers contained in §4 above shall survive the Closing and continue in full force and effect until the date that is 12 months after the Closing Date....

(b) *Indemnification Provisions for the Buyer's Benefit.* In the event any Seller breaches any of his or its representations, warranties, covenants or agreements contained herein, and Buyer makes a written claim for indemnification against such seller pursuant to §10(h) below within the Survival Period...., then such seller shall indemnify Buyer and Target from and against any and all Adverse Consequences suffered or incurred by Buyer or Target from and against any and all Adverse Consequences suffered or incurred by Buyer or Target that arise from or are attributable to such breach; *provided, however*, that Sellers shall not have any obligation to indemnify Buyer or Target from and against any Adverse Consequences arising from or attributable to the breach of any representation or warranty of Sellers contained in §4 above... until Buyer has suffered Adverse Consequences by reason of all such breaches in excess of $25,000 (the "Threshold"), after which point Sellers will be obligated to indemnify Buyer from and against all such Adverse Consequences, including those counted towards the Threshold; ... and ... the aggregate (B) notwithstanding any other provision of this Agreement, the aggregate, cumulative liability of a Seller to Buyer with respect to any breach of a representation or warranty shall not exceed the portion of the Purchase Price actually received by such Seller; and (C) in addition to and without limiting clause (B), the aggregate, cumulative liability of Sellers to Buyer shall not exceed $2,500,000. In addition, in no event shall any Seller be liable to Buyer

> for any punitive, incidental, consequential, special or indirect damages, including loss of future revenue or income, loss of business representation or opportunity relating to the breach or alleged breach of this Agreement, or diminution of value or any damages based on any type of multiple.
>
> [...]
>
> (f) *Exclusive Remedy*. Buyer and Sellers acknowledge and agree that, following the Closing, except in cases of intentional fraud or intentional misconduct (it being understood that the Threshold and the Cap shall not apply to such cases)..., the foregoing indemnification provisions in this § 8 shall be the exclusive remedy of Buyer and Sellers in respect of any and all claims (other than claims that a representation or warranty made by a party was deliberately made by such party with actual knowledge that a representation or warranty was materially untrue) for any breach of any representation, warranty, covenant, agreement or obligation set forth herein or otherwise relating to the subject matter of this Agreement.... Except for the specific representations and warranties expressly made by Sellers in this Agreement, Buyer specifically disclaims that it is relying upon or has relied upon any other representations or warranties that may have been made....

[R. 588-91].

C. Mr. Bergeron's Post-Closing Discovery of Large Employee Bonuses

In June 2017, CC+I prepared bonus letters for its non-owner employees. [R. 670-75]. Per those letters, six of the seven employees would receive a 100% bonus on June 30, 2017. [R. 670-75]. The seventh, Kimberly French, would receive a bonus equal to approximately 25% of her $37,500 annual salary but would also receive a $2,500 annual raise. [R. 676].

According to Mr. Sibley prior to his death, he told Mr. Bergeron about the specific bonus amounts post-closing, in November 2017, eliciting a "horrified" reaction from Mr. Bergeron:

> Q Do you recall a conversation with Mr. Bergeron taking place in November of 2017 in your office or your former office regarding the payment of these bonuses?
>
> A Yes. I gave him a document that outlined each one specifically.
>
> Q And what document was that?
>
> A It was just a typed piece of paper that showed each employee and the bonus they got and the letter. It was basically a copy of the letter that each employee got....
>
> Q And this was the first time, in November of '17 was the first time that you gave him those letters or the first time he had seen those letters?
>
> A To my knowledge, and I don't recall the date that I did it. It might have been late October or early November. I'm not sure.
>
> Q But it was post closing?
>
> A Yes.
>
> Q So would it be fair to say that this was the first time that Mr. Bergeron had seen a specific list of employees and the amounts of bonuses they received?
>
> A Correct, to my knowledge.
>
> Q Do you recall Mr. Bergeron's reaction to receiving those letters?

A I do.

Q And what was that?

A He was horrified....

Q. Why?

A. He thought they were too generous.

[R. 402-04].

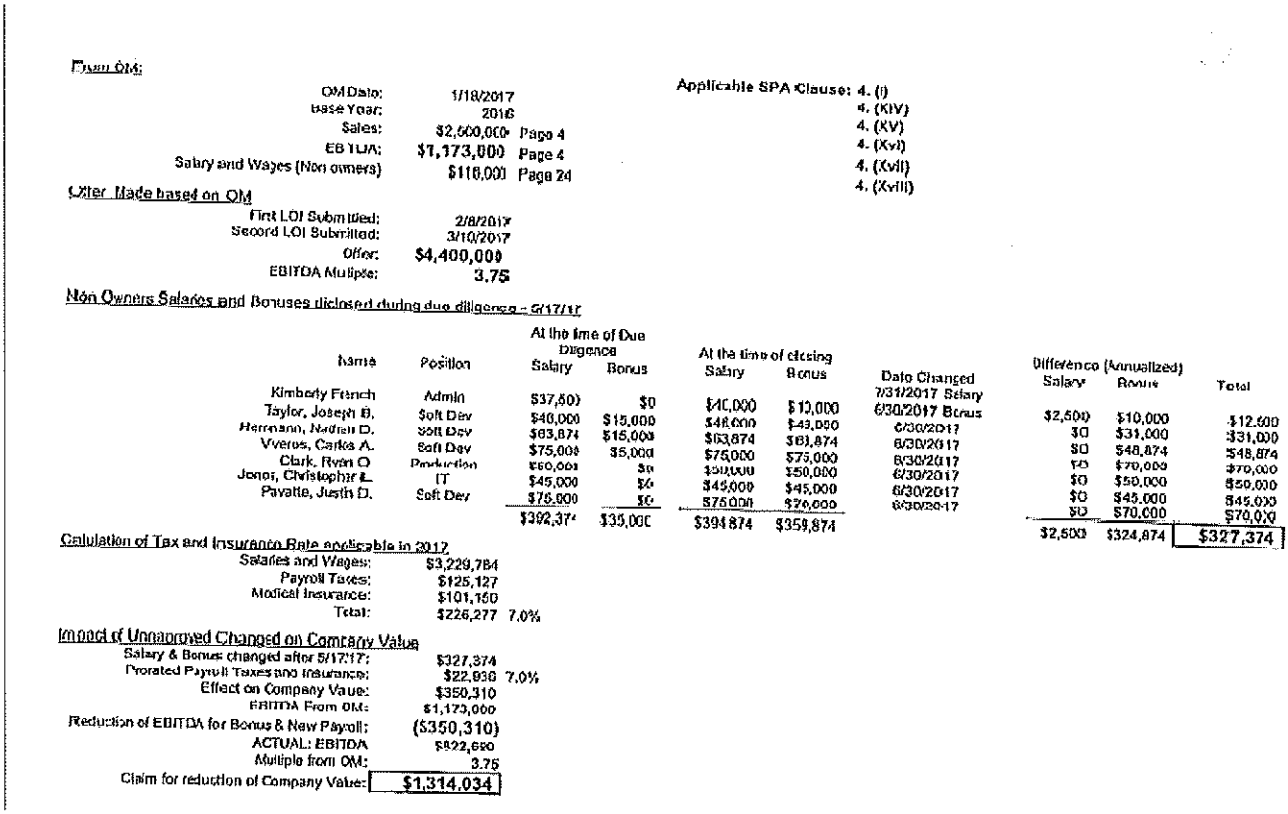
From Mr. Sibley's perspective, he did not believe that he had any obligation at all to inform Mr. Bergeron of the non-owner employee bonuses "[b]ecause it was a normal form of business." [R. 404]. But the last time that CC+I had paid a 100% employee bonus was in 1999 according to Mr. Sibley. [R. 397]. Mr. Bergeron's review of the business records, however, showed that a 100% bonus was not even paid in 1999, as Mr. Sibley had claimed. [R. 485-86 ("So they did not pay a 100 percent bonus back in 1999. That's just not a true statement.")].

While Mr. Sibley conceded that SPA Disclosure § 4(i) did not show which particular employees received bonuses in which amounts, he thought that using math on the P&L statement and the corporate tax returns would reveal the aggregate amount of bonus payments. *See, e.g.*, [R. 402 ("Q So of the three documents that we've referred to, the disclosure schedule, the P&L statement, and the year-end June

30, 2017 tax return, none of them specifically detailed who bonuses were paid to? A Not individually, but in total.")].

D. The Estate's Introduction of Decide4Action Damages Calculations

At trial, the Estate introduced into evidence a damages itemization, [R. 626], that Decide4Action had previously submitted to the escrow agent, which precluded the escrow agent from releasing to the Sellers the final 10% of the purchase price. *See* [R. 615-23; 633]. In that itemization, Decide4Action set forth calculations resulting in a $1,314,034 claim for actual damages based upon the Estate's breach of the SPA's representations and warranties:



From OM:

OM Date:	1/18/2017	
Base Year:	2016	
Sales:	$2,600,000	Page 4
EBTDA:	$1,173,000	Page 4
Salary and Wages (Non owners)	$116,000	Page 24

Applicable SPA Clause: 4. (i)
4. (xiv)
4. (xv)
4. (xvi)
4. (xvii)
4. (xviii)

Offer Made based on OM

First LOI Submitted:	2/8/2017
Second LOI Submitted:	3/10/2017
Offer:	$4,400,000
EBITDA Multiple:	3.75

Non Owners Salaries and Bonuses disclosed during due diligence - 5/17/17

Name	Position	At the time of Due Diligence Salary	Bonus	At the time of closing Salary	Bonus	Date Changed	Difference (Annualized) Salary	Bonus	Total
Kimberly French	Admin	$37,500	$0	$40,000	$10,000	7/31/2017 Salary 6/30/2017 Bonus	$2,500	$10,000	$12,500
Taylor, Joseph B.	Soft Dev	$48,000	$15,000	$48,000	$43,000	6/30/2017	$0	$31,000	$31,000
Hernando, Nadiah D.	Soft Dev	$63,874	$15,000	$63,874	$63,874	6/30/2017	$0	$48,874	$48,874
Viveros, Carlos A.	Soft Dev	$75,000	$5,000	$75,000	$75,000	6/30/2017	$0	$70,000	$70,000
Clark, Ryan O	Production	$60,000	$0	$50,000	$50,000	6/30/2017	$0	$50,000	$50,000
Jones, Christopher L.	IT	$45,000	$0	$45,000	$45,000	6/30/2017	$0	$45,000	$45,000
Pavatte, Justin D.	Soft Dev	$75,000	$0	$75,000	$75,000	6/30/2017	$0	$70,000	$70,000
		$392,374	$35,000	$394,874	$359,874		$2,500	$324,874	$327,374

Calculation of Tax and Insurance Rate applicable in 2017

Salaries and Wages:	$3,229,784	
Payroll Taxes:	$125,127	
Medical Insurance:	$101,150	
Total:	$226,277	7.0%

Impact of Unapproved Changed on Company Value

Salary & Bonus changed after 5/17/17:	$327,374	
Prorated Payroll Taxes and Insurance:	$22,936	7.0%
Effect on Company Value:	$350,310	
EBITDA From OM:	$1,173,000	
Reduction of EBITDA for Bonus & New Payroll:	($350,310)	
ACTUAL: EBITDA	$822,690	
Multiple from OM:	3.75	
Claim for reduction of Company Value:	$1,314,034	

[R. 626].

II. The Inadvertent Failure to Have Provided the Interrogatory Answer

In response to the Estate's motion *in limine* on the second day of trial, concerning Decide4Action's failure to supply an updated written answer to Interrogatory 25, Decide4Action conceded that while it had prepared a draft answer for the Estate's counsel, that draft email was never actually sent. [R. 358-59]. Nonetheless, Decide4Action did produce two expert reports examining CC+I's value. [R. 360]. The Estate questioned Mr. Bergeron about Decide4Action's damages during his deposition, and he specifically pointed to one of those reports. [R. 688 ("Q. So you're

saying that Decide4Action's damages [are] the value determined by Patton & Associates? A. The loss of value.")].

ARGUMENT

I. The Circuit Court Erred in Granting a Directed Verdict on Decide4Action's Counterclaims.

A. Standard of Review

Whether the circuit court erred in granting a directed verdict is a pure question of law, receiving *de novo* review on appeal. *E.g.*, *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 200 (Ct. App. 2005) (citation omitted). A court considering a motion for directed verdict "must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created, and the motion should be denied." *Id.* (citations omitted).

B. Evidence Existed for Decide4Action's Claims.

Whether or not the circuit court was correct to have precluded Decide4Action from offering additional evidence about damages, the circuit court erred in granting a directed verdict on Decide4Action's counterclaims. The availability of nominal damages, the availability of punitive damages, and the evidence actually introduced was each sufficient to have precluded a directed verdict.

1. The Availability of Nominal Damages

Even assuming no evidence of damages had been in the record, it would still have been error to have granted a directed verdict on the breach-of-contract and the breach-of-contract-accompanied-by-a-fraudulent-act counterclaims. "[E]very violation of a legal right imports damage and authorizes the maintenance of an action and the recovery of at least nominal damages, regardless of whether any actual damage has been sustained." *Stevens v. Allen*, 342 S.C. 47, 53 n.5 (2000) (citations omitted). Thus, a party in breach of a contract faces at least nominal damages as a matter of law. *See, e.g.*, *Mid-Continent Refrigerator Co. v. Way*, 263 S.C. 101, 110 (1974) ("[T]here was no proof of any damage by the plaintiff, with the result that on the present record, it was not entitled to any damages other than nominal damages, if in fact, the contract was breached by the defendant rather than the plaintiff."). Here, the circuit court itself determined that Decide4Action had adduced evidence that raised a "viable claim under the Stock Purchase Agreement," [R. 011]. *Compare also, e.g.*, [R. 574-76 at § 4(i) & § 4(i)(xvii) (warranting that CC+I had not engaged in business outside of the ordinary course, including concerning payment of bonuses to employees, "[e]xcept as set forth in §4(i) of the Disclosure Schedule," and specifically "has not adopted, amended, modified or terminated any bonus…for the benefit of any of its directors, officers, or employees….")], *with* [R. 398 (Mr. Sibley

conceding that Disclosure Section § 4(i) did not state "how those bonuses were paid and who they were paid to.")].

Furthermore, the Estate cannot argue that the SPA necessarily precludes an award of nominal damages. If the jury were to find that the breach was, as alleged, the result of "intentional fraud or intentional misconduct," then the $25,000 damages "Threshold…shall not apply," [R. 591 at § 8(f)].

2. The Availability of Punitive Damages

A breach of contract accompanied by a fraudulent act authorizes an award of punitive damages. *See, e.g.*, *Welborn v. Dixon*, 70 S.C. 108, 115 (1904) ("When … the breach of the contract is accompanied with a fraudulent act, the rule is well settled, certainly in this State, that the defendant may be made to respond in punitive as well as compensatory damages."). So, too, does proof of fraud. *E.g.*, *Carter v. Boyd Constr. Co.*, 255 S.C. 274, 283 (1971) ("In an action for fraud and deceit punitive damages are warranted where the tortfeasor knew the representation to be false, or where a false representation is recklessly made, as a positive assertion, without knowing or caring whether it is true or false.").

Proof of a dollar amount of actual damages for either theory is not required to authorize punitive damages:

> Where the pleadings allege and the evidence shows a conscious and willful violation, invasion, or infringement of a legal right, the law will presume damages sufficient to sustain an action, even though such damages may be only nominal and not capable of exact measurement; and in such case a verdict for punitive damages without the finding of actual damages will be sustained, since it will be presumed that such nominal damages incapable of admeasurement have been merged in the punitive damages.

Cook v. Atl. Coast Line R.R. Co., 183 S.C. 279, 281 (1937).

Here, evidence existed from which the jury could have found a breach of contract, accompanied with a fraudulent act. *See generally Lister v. NationsBank of Del., N.A.*, 329 S.C. 133, 142 (Ct. App. 1997) (setting forth elements as breach, a fraudulent intent for the breach, and an accompanying fraudulent act). As previously shown, a breach of contract occurred. [R. 011 (stating that Decide4Action had presented an otherwise "viable claim under the Stock Purchase Agreement" except for the issue of damages)]. Mr. Sibley also acted with fraudulent intent. For example, even under oath in his deposition, he maintained that CC+I had previously paid a 100% bonus in 1999—but Mr. Bergeron's review of the records showed that claim to have been obviously false. [R. 485-86 (disputing as "not a true statement" Mr. Sibley's claim to have paid a 100% bonus in 1999 because, after reviewing the relevant records, Mr. Bergeron found that the bonus to the non-owner employee was only "like 5 percent")]. Likewise, no reasonable person would think that a 100% bonus for the

first time in more than 15 years was the ordinary course of business. Finally, Mr. Sibley committed fraudulent acts in connection with the breach, including withholding the actual employee bonus letters until after the closing had occurred.

For similar reasons, evidence existed that would have allowed the jury to have found that Mr. Sibley committed fraud with respect to the employee bonuses. *M. B. Kahn Constr. Co. v. S.C. Nat'l Bank*, 275 S.C. 381, 384 (1980) (listing elements for fraud). He falsely represented in the SPA that CC+I had not paid bonuses out of the ordinary course to non-employees—a representation that was material to the transaction, *see, e.g.*, [R. 430-33]; he knew or should have known of its falsity; Decide4Action did not know of the falsity, *see, e.g.*, [R. 402-04]; Decide4Action did, as permitted, contractually rely upon the written disclosures, *see* [R. 591 at § 8(f)], and those undisclosed bonuses caused Decide4Action to overpay under the formula that was used to set the purchase price, [R. 388].

Accordingly, even a failure to have quantified actual damages would not have justified a directed verdict.

Furthermore, the Estate cannot argue that the waiver of punitive damages contained in SPA § 8(b) applies. That contractual limitations on damages recoverable from Sellers does not apply to "claims that a representation or warranty made by a party was deliberately made by such party with actual knowledge that a

representation or warranty was materially untrue," [R. 591 at § 8(f)].[6] That is what Decide4Action showed at trial—after all, Mr. Sibley's position was not that he had actually tried to fully disclose the bonuses, but rather that he "had no obligation" to disclose the bonuses because, in his view, "it was a normal form of business." [R. 404]. For its part, the jury could well have concluded that paying 100% employee bonuses in 2017 was certainly not the normal course given that bonuses of that amount were, in Mr. Sibley's view, last paid "in 1999", [R. 398], and, according to Mr. Bergeron, not even paid then, [R. 485-86 ("So they did not pay a 100 bonus back in 1999. That's just not a true statement.")].

3. The Damages Shown in the Evidence Actually Admitted

When evaluating a motion for directed verdict, all the evidence admitted prior to the motion is relevant. *See, e.g.*, *State v. Hepburn*, 406 S.C. 416, 432 (2013) ("[O]nce the defense has come forward with its proof, the propriety of a directed verdict can only be tested in terms of all the evidence." (quotation omitted)). *See also* [R. 512

[6] To whatever extent that the Estate may seek to argue that SPA § 8(b) somehow precludes punitive damages at issue here, despite the carveout mentioned above, Decide4Action respectfully submits that the SPA would be ambiguous and thus a question of fact would exist for the jury. *See, e.g.*, *Wheeler v. Globe & Rutgers Fire Ins. Co.*, 125 S.C. 320, 325 (1923) ("[W]here a contract is not clear, or is ambiguous and capable of one or more constructions, what the parties really intended, as a matter of fact, should be submitted to a jury.").

(trial judge indicating that he would permit Decide4Action to argue based upon exhibits introduced during the Estate's case because "I mean, those are into evidence. I don't see any reason why you wouldn't be able to refer to them."). Indeed, even improperly admitted evidence is considered when reviewing the motion. *See, e.g.*, *Gill v. Ruggles*, 97 S.C. 278, 291 (1914) ("[E]ven if testimony tending to prove the allegations of a complaint is erroneously ruled to be competent, the proper remedy is to appeal from the erroneous ruling as to the admissibility of the testimony, and, if the appeal is sustained, a new trial will be granted; but this Court will not order a nonsuit.").

Regardless as to whether the circuit court were correct to have precluded Decide4Action from offering evidence of damages in its-case-in-chief, evidence of Decide4Action's damages was admitted during the Estate's case-in-chief. Most notably, the Estate introduced a letter from Decide4Action's attorney, which stated that the breaches of the SPA's representations and warranties resulted in claims for damages "of at least One Million Three Hundred Fourteen Thousand Thirty-Four Dollars and No/100 ($1,314,034.00)." [R. 624]. Attached to the letter was a spreadsheet of damages calculations showing "$327,374" in improper payments. [R. 626]. It also showed how those improper payments adversely impacted the EBITDA multiple used to calculate the purchase price, resulting in $1,314,034 in lost value. [*Id.*]. To

whatever extent that the Estate would suggest that such damages are not permitted under SPA § 8(b), Decide4Action would respectfully note that the waiver of claims contained there does not apply if "a representation or warranty made by a party was deliberately made by such party with actual knowledge that the representation or warranty was materially untrue." [R. 591 § 8(f)].[7]

In any event, the jury could have awarded other damages that have nothing to do with EBITDAs or loss of value. Specifically, if CC+I's funds had not been improperly distributed as bonuses, the funds could have remained as cash that would have belonged to Deicde4Action at the time of closing per SPA § 6(c). [R. 585 § 6(c) ("If and to the extent that any Target cash is left in the possession or under the control of Target after Closing, such cash shall remain property of Target, and Sellers shall have no right or claim to such cash.")].

Because evidence of damages was admitted at trial, the circuit court should not have granted a directed verdict based upon a perceived lack of proof of damages.

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[7] Alternatively, the conflict between SPA § 8(f) and SPA § 8(b) would create an ambiguity in the SPA that the jury would have to resolve. *See, e.g.*, *Wheeler*, 125 S.C. at 325.

II. The Trial Court Abused Its Discretion in Precluding Decide4Action from Affirmatively Offering Testimony Concerning Damages.

A. Standard of Review

This Court reviews for an abuse of discretion a trial court's imposition of discovery sanctions. *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154 (Ct. App. 1990) (citation omitted).

B. The Circuit Court Wrongly Chose a "Hydrogen Bomb" Rather than the "Rifle-Shot" that this Court Requires.

Although Decide4Action does not dispute that it inadvertently failed to provide the written interrogatory response—producing only underlying documents—the circuit court still erred in precluding Decide4Action from presenting any evidence of damages in its case-in-chief. Any discovery sanction must "be reasonable" and "not go beyond the necessities of the situation to foreclose a decision on the merits of a case" absent "some element of bad faith, willfulness, or callous disregard of the rights of other litigants" *Id.* (citations omitted). Thus, for example, in *Balloon Plantation*, this Court reversed as a "hydrogen bomb" a default judgment entered against a defendant who untimely served court-ordered discovery responses, noting that applicable law requires the circuit court to select only a "rifle-shot" of a sanction. *Id.*

Particularly absent a finding of bad faith on Decide4Action's part, this Court ought not tolerate a sanction that was, in the circuit court's view, tantamount to a

default judgment. Furthermore, one important consideration in selecting a sanction is "the degree of prejudice" *Laney v. Hefley*, 262 S.C. 54, 60 (1974) (quotation omitted) to the other party. Decide4Action would note that the Estate evidently did not feel prejudiced in the presentation of its case from the lack of the interrogatory answer. After all, it did not file a rule to show cause before trial, request a continuance, or even insist that its motion be heard before the close of its case-in-chief. Further, the Estate itself offered into evidence the damages itemization that Decide4Action provided prior to litigation. [R. 624-26].

This Court should thus vacate the sanction order and remand for entry of a more narrowly tailored sanction—particularly one that accounts for the reduced potential for prejudice that the already required retrial will afford (for example, a denial of prejudgment interest from any recovery).

CONCLUSION

This Court should reverse the judgment below, vacate the imposition of the discovery sanction, and remand for retrial.

Dated this 21st day of June, 2022.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Hon. Perry H. Gravely, Circuit Court Judge

Common Pleas Case No. 2019-CP-23-02032

Appellate Case No. 2021-001177

JULIA SIBLEY-JONES,
as Personal Representative of the
Estate of William A.L. Sibley, Jr.

Respondent-Appellant,

v.

DECIDE4ACTION, INC.,

Appellant-Respondent.

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I, the undersigned, certify that Appellant-Respondent's Opening Brief, Reply Brief, and Cross-Brief in Opposition comply with R. 211(b), SCACR.

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I, the undersigned, served a copy of this Final Brief of Appellant-Respondent on the following counsel of record this 21st day of June 2022, by email and U.S. mail to the following addresses of record:

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