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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The 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.

RESPONSE BRIEF OF RESPONDENT-APPELLANT JULIA SIBLEY-JONES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM A.L. SIBLEY, JR.

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STATEMENT OF THE CASE

On October 13, 2017, William A. Sibley, Jr., Joyce Featherstone, James T. Clark, Frank T. Starrett, Jr., Scott W. Dozier, and Robert E. Leviner (collectively, the "Selling Shareholders") and Decide4Action, Inc. ("Decide4Action") entered into a Stock Purchase Agreement (the "SPA"), pursuant to which the Selling Shareholders agreed to sell, and Decide4Action agreed to buy, all of the Selling Shareholders' shares of stock in Computer Control + Integration, Inc. (the "Company") for $4.4 million. (R. pp. 569-614) Decide4Action purchased the stock of the Company from the Selling Shareholders pursuant to the SPA at a closing that occurred three days later on October 16, 2017 (the "Closing Date").

As part of the closing, the Selling Shareholders and Decide4Action entered into an Indemnity Escrow Agreement, pursuant to which the Selling Shareholders agreed to place $440,000.00 of the purchase price into an escrow account (the "Escrow Account") at United Community Bank ("UCB") to satisfy any indemnification obligations that the Selling Shareholders might have to Decide4Action pursuant to Section 8 of the SPA within one year of the Closing Date, i.e., October 16, 2018. (R. pp. 615-623)

On September 19, 2018, less than a month before the Selling Shareholders were entitled to receive the funds in the Escrow Account, Decide4Action notified UCB that it had pending claims against the Selling Shareholders based on the alleged non-disclosure of non-stockholder employee bonuses. (R. pp. 624-626) Decide4Action requested that UCB continue to hold the funds in the

Escrow Account, *id.*, and then reaffirmed that position in reply to a response from the Selling Shareholders. (R. pp. 627-633)

William A. Sibley, Jr. ("Sibley") was the Selling Shareholders' Representative entitled to receive and disburse to the Selling Shareholders their respective shares of the Escrow Account pursuant to a Contribution and Indemnification Agreement. (R. pp. 637-643) Sibley filed a Complaint against Decide4Action, on April 11, 2019, asserting causes of action for breach of contract and breach of contract accompanied by a fraudulent act based on Decide4Action's actions preventing UCB from releasing the funds in the Escrow Account. (R. pp. 17-31) Decide4Action filed counterclaims against Sibley for breach of contract, breach of contract accompanied by a fraudulent act, and fraud, alleging that the Selling Shareholders' payment of bonuses to non-shareholders of the Company and the increase of one employee's salary by $2,500 constituted breaches of the SPA. (Supp. R. pp. 4-21) Sibley died on August 4, 2020, and his personal representative, Plaintiff Julia Sibley-Jones ("Sibley-Jones"), then pursued the claims as Selling Shareholders' Representative and defended Decide4Action's Counterclaims. (R. pp. 42-76; 661)

A trial was held on July 26-28, 2021. Prior to Decide4Action's case-in-chief, Sibley-Jones moved in limine to exclude any evidence from Decide4Action regarding the damages that Decide4Action claimed to have suffered on its counterclaims, as well as to exclude damages opinion testimony from Decide4Action's owner, Richard Bergeron. (R. pp. 78-107) The Circuit Court granted Sibley-Jones's motions and excluded damages evidence from Decide4Action. (R. p. 378, line 17-p. 380, line 4)

At the conclusion of the evidence, Sibley-Jones moved for and the Circuit Court granted a directed verdict on all of Decide4Action's counterclaims. (R. pp. 10-13, 108-117; p. 549, line 11-p. 551, line 4) The Circuit Court also issued a directed verdict in favor of Sibley-Jones on her

breach of contract claim and in favor of Decide4Action on Sibley-Jones's claim for breach of contract accompanied by a fraudulent act. (R. pp. 10-16; p. 549, line 11-p. 551, line 4)

Facts

This case arises from Decide4Action's attempt to avoid paying the agreed purchase price of $4.4 million -- for a Company valued at $7.3 million -- by making a bogus claim against the Selling Shareholders' Escrow Account. Specifically, Decide4Action argued the Selling Shareholders should not receive the final $440,000 of the purchase price because they had chosen to pay generous bonuses to employees who were not shareholders months before Decide4Action agreed to purchase the Company. The subject bonuses were allowed, were disclosed, and did not damage Decide4Action, so that the Circuit Court correctly directed a verdict for the Selling Shareholders and ordered the Escrow Account to be paid to them. (R. pp. 10-16; p. 549, line 11-p. 551, line 4)

The key facts were not disputed. On March 10, 2017, Decide4Action sent a non-binding letter of intent ("LOI") to Sibley in which Decide4Action offered to purchase the Company for $4.4 million, excluding the Company's cash. (R. pp. 554-558; p. 300, lines 18-21) Decide4Action's LOI provided that Decide4Action and the Selling Shareholders "shall have 90 days to agree on the SPA, if within that period the SPA is not essentially agreed then th[e] LOI shall be null and void." (R. p. 557) During the 90-day due diligence period, Decide4Action received a historical employee compensation table that demonstrated the Company had not determined what bonuses to pay employees at the end of the 2017 fiscal year, which was on June 30, 2017. (R. p. 559; p. 301, line 22-p. 303, line 5)

The 90-day period expired on June 8, 2017. Decide4Action admits that it was under no obligation to purchase, and the Selling Shareholders had no obligation to sell, the Company after this date. (R. p. 308, lines 12-16)

The Company was having a particularly successful year in 2017. An accountant retained by Decide4Action noted that the Company had experienced a "rapid growth in revenue over the last 3 years" and that "[i]f reported income is accurate, [the Company] will have significant income tax liabilities as of June 30, 2017." (R. pp. 560-561) As a result of the work of its employees to achieve this success, the Company paid bonuses to both its shareholder and non-shareholder employees at the end of the 2017 fiscal year, which was June 30, 2017. The Company also increased the salary of a particularly valued and crucial employee, Kimberly French, from $37,500 to $40,000. (R. p. 278, lines 5-9; p. 450, lines 12-21) All of these discretionary payments were made in the ordinary course of business and did not include a commitment to pay bonuses in the future. (R. p. 277, line 9-p. 278, line 12)

After the Company had paid the employee bonuses, the parties entered into the SPA on October 13, 2017. The SPA included the following representation and warranty: "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." (R. p. 576) (emphasis added) Although the SPA did not require disclosure of the one-time, discretionary bonus payments, the Selling Shareholders specifically disclosed in a schedule labeled "Events Subsequent to May 17, 2017" that the Company "paid a fiscal year-end bonus and subsequently paid special bonuses to employees on three occasions." (R. p. 614) Prior to execution of the SPA, Decide4Action also received tax returns and profit and loss statements that revealed the bonus payments by showing the non-stockholders' compensation had increased by the amount

of the bonus payments between April 2017 and July 2017. (R. pp. 559, 567, 568, 645-660; p. 305, line 12-p. 309, line 20)

As with the earlier LOI, the SPA also provided that the Selling Shareholders were entitled to keep the Company's cash:

> (c) Cash. Sellers shall ensure that the 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.

(R. p. 585) The SPA also provided 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 . . . until Buyer has suffered Adverse Consequences by reason of all such breaches in excess of $25,000.00 (the "Threshold") . . . . 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 reputation 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**.

(R. p. 589) (emphasis added)

On September 19, 2018, almost a year after the sale closed and only a few weeks before the Selling Shareholders would be entitled to receive the funds in the Escrow Account, Decide4Action made a claim on the funds in the Escrow Account. (R. pp. 624-626) Specifically, Decide4Action notified UCB that it had pending claims against the Selling Shareholders based on the alleged non-disclosure of the non-stockholder employee bonuses and requested that UCB continue to hold the funds in the Escrow Account. (*Id.*) Decide4Action claimed that the Company was diminished in value by the payment of cash to non-shareholder employees – instead of to shareholder employees – by $1,314,034. This figure was calculated by subtracting the non-shareholder bonuses from the earnings of the Company and multiplying the revised earnings by 3.75, a multiple prohibited by Section 8(b) of the SPA. (R. pp. 624-626; p. 377, lines 6-11)

Sibley responded in writing through counsel, noting that the SPA disclosed the bonuses in Schedule 4(i) and demanding that Decide4Action confirm to UCB that the escrow funds should be released immediately. (R. pp. 627-632) Decide4Action refused to permit the escrow to be released, and Sibley filed suit. (R. p. 633)

In part because Decide4Action's claim to UCB was not allowed by the SPA, Sibley served a standard interrogatory during pre-trial discovery asking Decide4Action to

> [s]et forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party, describing said damages and method of computation in detail, including but not limited to, the nature of the damage; the amount of lost wages, earnings or profits, if any; and the period for which loss is claimed.

(R. pp. 82-83) In response, Decide4Action merely referenced "valuations" it had produced that were authored by Patton and Associates, an accounting firm in Indiana, without explaining how such valuations would be used. (*Id.*) Sibley-Jones filed a motion to compel a further response. (R. pp. 32-41)

To resolve the motion to compel, Decide4Action consented to a court order requiring it to "[f]ully 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. pp. 1-4, 84-87) Decide4Action, however, did not provide any further response to the interrogatory, even after Plaintiff's counsel asked it to do so multiple times. (R. pp. 88-95)

During his deposition in pre-trial discovery, Decide4Action's chief executive officer, Richard Bergeron, disclaimed any ability to testify as to Decide4Action's damages and, instead, sought reference to the Patton and Associates' reports:

Q. What damages is Decide4action claiming in this case?

A. In my opinion I don't think they've fully made determination of damages. The first portion of the damages was a lower value claims you're not showing that, but we did to make our claim. There's a report prepared with the new numbers by Patton Associates. **The only way to value a company is with an expert**. Those people looked at the company with the number provided by the seller, and they valued after with the number that should have been provided by the seller. A big portion of the difference in value is the difference in value between the two reports which you have received as part of disclosure I believe.

Q. So you're saying that the Decide4action's damages is the value determined by Patton & Associates?

A. The loss of value.

Q. The loss of value based on Patton & Associates different calculations?

BY MR. PURIEFOY: Object to the form. You can answer.

BY THE WITNESS: Yes, it's part of the claim. I'm not a lawyer. I think there's some others that would go over and beyond that, but that's a big portion of the claim.

…..

Q. You don't have an opinion on what the right number is?

By Mr. Puriefoy: Object to the form.

By the witness: I don't have an exact opinion, no.

……

How it works, I can't tell you that. . . . Now, it's twenty-eight pages long. You can pick it apart but there's a reason why they didn't take my word for valuation, professional valuation. Now you're asking me my opinion. **Yes, I have a limited opinion, but that's not my opinion about the valuation that counts.**

(R. pp. 677-696) (emphasis added)

Although Decide4Action referred to the Patton and Associates reports to some extent in pre-trial discovery regarding damages, it did not name anyone from Patton and Associates as a witness at trial. (R. p. 77) In fact, at the beginning of trial, Decide4Action moved to exclude "[a]ny reference to the value of CC+I being more than Decide4Action paid." (Supp. R. pp. 22-23) This motion was directed at excluding the Patton and Associates' reports, the first of which opined

that the value of the Company was $7.3 million, and the second of which opined that, even if the Company were obligated to continue to pay the 2017 bonuses for many years into the future, it was worth $6 million, or $1.6 million more than Decide4Action paid for the Company. (R. pp. 125-164; p. 221, line 11-p. 223, line 7)

At trial, Sibley-Jones called three live witnesses and two by deposition. Sibley-Jones testified that her father had been appointed as the representative for the Selling Shareholders, that she had been appointed as the personal representative for her father's estate, that the claims made by Decide4Action on the funds in the Escrow Account were baseless and fraudulent, and that she was asking the jury to award her $440,000 to distribute to the Selling Shareholders. (R. p. 238, line 5-p. 266, line 14; pp. 634-636, 644, 661) Next, Sibley testified by deposition that the bonus payments at issue were made in the ordinary course of business, that they were disclosed to Decide4Action through financial disclosures as well as in section 4(i) of the SPA, and that Decide4Action's claim on the escrow was a fraudulent claim made in breach of the SPA. (R. p. 267, line 12-p. 288, line 13) Next, Bergeron testified by deposition, admitting that the Selling Shareholders were entitled to keep the cash in the Company, that Decide4Action received a document in April 2017 that indicated no determination on employee bonuses had yet been made, that the employee who received the $2,500 pay increase was a "crucial" employee, that he received documents after the bonuses were issued and before the SPA was executed that revealed a sharp increase in total employee compensation, and that the SPA included a schedule stating that bonuses had been paid to employees. (R. p. 297, line 2-p. 325, line 25) Sibley-Jones then published Decide4Action's responses to requests for admission, in which Decide4Action admitted that it received a copy of Plaintiff's Exhibits 2 (summary of Company employee salaries and bonuses as of April 28, 2017), 5 (Company profit and loss statement for July 2017), 6 (company profit and

loss statement for June 2017), and 7 (Company tax return for year ending June 30, 2017) prior to the closing. (R. p. 326, line 1-p. 327, line 17; pp. 645-660) Next, Sharon Whitney, a UCB employee, testified that UCB did not issue the funds in the Escrow Account to the Selling Shareholders because of Decide4Action's claim letter and provided the current balance in the Escrow Account. (R. p. 328, line 3-p. 334, line 4; pp. 662-664) Last, Joyce Featherstone, one of the Selling Shareholders and a Third Party Defendant below, testified that she was not involved in the Company's decision to pay the employee bonuses, but that she believed the Company was within its rights to pay the bonuses. (R. p. 336, line 21-p. 348, line 20)

Prior to Decide4Action's case-in-chief, Sibley-Jones moved in limine to exclude any evidence regarding the damages that Decide4Action claimed to have suffered on its Counterclaims, as well as to exclude expert opinions from Decide4Action's owner, Bergeron. (R. pp. 78-107; p. 352, line 4-p. 370, line 3) The motions in limine were based on three inter-related grounds. First, the only witness that Decide4Action had identified to provide testimony about Decide4Action's damages – Bergeron – had specifically admitted in his deposition that he was not qualified to offer opinions on the diminution of value of the Company. (R. pp. 96-107, 677-696) Second, the only documents that included damages calculations – the letter and spreadsheet from Decide4Action to UCB making a claim to the Escrow Account and the Patton and Associates' reports – used a methodology (multiple of earnings) that was explicitly barred by the SPA. Third, Decide4Action failed to comply with the consent order that required it to identify its claimed damages and the method of computation of the damages.

The Circuit Court granted Sibley-Jones's motion in limine to exclude damages evidence with the following explanation:

> Here's my evaluation of this. I'm looking at the deposition of Mr. Bergeron taken on September 29th, and it's a very clear question: What damages is Decide4Action

> claiming in this case? And he goes on to say that he doesn't know, he's not an expert, he needs an expert. But then it's clarified, and this is on page 80. "So you're saying that Decide4Action's damages is the value determined by Patton?" And he goes, "The loss of value." And he goes, "The loss of value based on Patton & Associates different calculations?" And his answer was, "Yes." All right. And in your reference to one of his emails was we're going to rely on the Patton & Associates valuation for our damage calculation. Then -- that was on January 5th. And I know that the Court gives certain leeway, but in an order that I didn't come up with, that you came up with, that you consented to is that you would fully answer -- because, in my mind, there's still very major issues of exactly what your damages are here, that on January the 8th, you agreed within ten days to set 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 and subject valuation will be used at trial, and what the total damages claim is. You said you've given a bunch of documents, you've given this Patton & Associates, and on top of that, I don't believe that this individual is qualified to testify about the value of a company. And based on – and he says in his deposition it was based on this Patton & Associates. Well, Patton & Associates aren't here. You don't have an expert to testify for any of this. I don't believe -- I mean, and I think under not only the Rule 37, but I think on -- based on his motion in limine, I don't believe there's a basis for you presenting your damages, and therefore, I grant his motion in limine in that regard.

(R. p. 378, line 17-p. 380, line 4)

During its case in chief, Decide4Action called two witnesses, Bergeron and Sibley by deposition. On cross-examination, Bergeron acknowledged that he fully expected the Selling Shareholders to take all of the cash of the Company at or before the Closing, that he was under no legal obligation to buy the Company prior to execution of the SPA, that the employees who received the bonuses were crucial, and that the SPA did not prohibit the payment of the bonuses. (R. p. 486, line 20-p. 502, line 21) Following the conclusion of Decide4Action's evidence, Decide4Action proffered certain testimony from the deposition of Bergeron in support of a motion to reconsider the decision on Sibley-Jones's motion in limine. (R. p. 513, line 23-p. 516, line 21) After denying the motion for reconsideration, the Court elaborated that its ruling excluding damages evidence was not based solely or even primarily on the discovery disclosure violation,

but rather on the need for expert testimony and Bergeron's admission that he was wholly unqualified to serve as that expert:

> But don't you have -- the other issue – I think I made my ruling, actually, on two, maybe even three of the grounds. One is the lack of having an expert that you need to be able to do this evaluation, and the other one was that he testified clearly I'm not the one to be able to testify to my damages. We have to have experts. I mean, that's what he said in reference to what are my damages. . . . As I told you before, it was not just a discovery ruling.

(R. p. 522-lines 13-20; p. 526, lines 13-14)

Sibley-Jones then moved for a directed verdict on (1) all of Decide4Action's claims because Decide4Action had failed to provide evidence to establish a number of elements of its claims, including damages, and (2) on her own claim for breach of contract because Decide4Action had not proved any damages that entitled it to the funds in the Escrow Account. (R. pp. 108-117; p. 519, line 13-p. 542, line 4) Decide4Action also moved for a directed verdict on Sibley-Jones's claim for breach of contact accompanied by a fraudulent act on the ground that Decide4Action's claim to the escrow proceedings did not constitute a fraudulent act. (R. p. 542, line 5-p. 549, line 6) The Court granted all of the motions, ruling as follows:

> All right. Considered all the motions, and I can say that none of the motions were not what I expected. So I do want you to know I spent more than just the ten minutes there, that I thought long and hard about this a lot last night on the way home. And since I believe that, in light of the motion in limine -- and, again, I made it on three bases and not just the discovery issue. I think, in light of the motion in limine which strictly said that no damages could be presented and any information along the damages would go towards your defenses, that there would not be any damages allowed. And I think even in the proffer of testimony, again, that wasn't directly before me, but I'm not sure that that crossed the threshold needed either for the damages anyway. If no damages can be presented, clearly, every one of the counterclaims has an element that damages must be shown, so therefore, that, and in addition to the other arguments on the counterclaim, I grant the plaintiff's motion for a directed verdict on each of the counterclaims. Since there is no claim or any offset that – whether there was an offset pled, but anything -- any claim I'm not sure since this is not a damages kind of issue, per se, it's dealing with an escrow account, I don't know that there's any basis for any offsets for the escrow, so I grant plaintiff's motion as to that. I do not find that there was any -- I find as a matter of law that the plaintiff has not met its burden on establishing any breach of contract

> with fraudulent intent, so I grant the defendant's motion on that and rule that the escrow account should be paid over to the plaintiff. I believe that, due to the claim that was presented by the defendant, that there was a dispute, so I'm going to deny any prejudgment interest. Attorney's fees are out. So therefore, it will be a judgment -- or, I guess, a finding for the plaintiff then that the escrow account be transferred to the plaintiff. And I would ask -- since I know you'll need specific language, I would ask that the plaintiff draft an order to be submitted to the bank on that regard. And based on this ruling, I believe there's nothing left to present to the jury. And that's the ruling of the Court.

(R. p. 549, line 7-p. 551, line 4)

STANDARD OF REVIEW

"When reviewing the trial court's ruling on a motion for a directed verdict, this court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *First S. Bank v. S. Causeway, LLC*, 414 S.C. 434, 444, 778 S.E.2d 493, 498 (Ct. App. 2015).

A decision to exclude evidence at trial is reviewed for an abuse of discretion. *See Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005) ("The admission of evidence is within the sound discretion of the [circuit court], and absent a clear abuse of discretion amounting to an error of law, the [circuit] court's ruling will not be disturbed on appeal.")

ARGUMENT

I. Where no evidence established the elements of any of Decide4Action's counterclaims, the Circuit Court was correct in granting Sibley-Jones's motions for directed verdict.

The Circuit's Court decision to grant a directed verdict to Sibley-Jones on Decide4Action's counterclaims was correct because Decide4Action failed to establish the necessary elements of its counterclaims. Decide4Action was also required to prove actual damages on all of its counterclaims and could not do so. Decide4Action's arguments that there was evidence of actual damages in the record and that it was not required to show actual damages are both incorrect.

Moreover, Decide4Action's claims suffered from a number of other fatal flaws that are evident in the record and which provide alternative bases for affirming the trial court.

A. Decide4Action failed to present evidence to support the elements of liability for its counterclaims.

While the Circuit Court's decision to direct a verdict in Sibley-Jones's favor focused on Decide4Action's failure to present evidence of damages, Decide4Action also failed to present evidence sufficient to establish other elements of its claims. These bases provide a sufficient independent ground for affirmance of the judgment below. *See* Rule 220(c), SCRAP ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

1. There was no evidence of a breach of contract.

First, Decide4Action presented no evidence of a breach of contract to support its breach of contract and breach of contract accompanied by a fraudulent act claims. Nothing in the SPA or any other document prohibited the Company from paying bonuses to non-owner employees. Indeed, the SPA was not even executed until four (4) months after the subject bonuses were paid. (R. pp. 569-614; p. 315, lines 15-20) Further, because the Selling Shareholders – and not Decide4Action – were entitled to keep the Company's cash, the payment of bonuses was not a "Material Adverse Change" for which disclosure was required by the SPA. Nevertheless, Sellers disclosed that bonuses were paid in Schedule 4(i), Section 3, of the SPA and in financial documents and tax returns given to Decide4Action before signing of the SPA and closing of the sale. (R. pp. 559, 567, 568, 614; p. 305, line 12-p. 309, line 20)

Contrary to Decide4Action's arguments, the Circuit Court's Form 4 Order issued after the trial also does not suggest that evidence existed of a breach of contract by the Selling Shareholders. (R. pp.10-13) The Circuit Court's reference to a "viable claim" in the Form 4 Order was not an

assessment on the legal merit of Decide4Action's claim, but only a finding that Decide4Action's letter to UCB created a dispute over the funds in the Escrow Account that precluded the granting of pre-judgment interest. At trial, the Circuit Court made clear that it was merely finding that "due to the claim that was presented by the defendant, that there was a dispute, so I'm going to deny any prejudgment interest." (R. p. 550, lines 17-19)[1] Thus, the Circuit Court's observation of a dispute over the funds does not suggest that evidence exists of any breach of contract by the Selling Shareholders.

2. There was no evidence of any fraudulent act, much less fraud.

Decide4Action also failed to provide any evidence of a fraudulent act that would support its breach of contract accompanied by fraudulent act claim, much less any fraud. To establish fraud, Decide4Action was required to "prove[] by clear, cogent, and convincing evidence: (1) a representation of fact; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." *Schnellmann v. Roettger*, 373 S.C. 379, 382, 645 S.E.2d 239, 241 (2007).

The only fraud or fraudulent act alleged by Decide4Action is that Sibley did not disclose the bonuses paid to certain non-owner employees prior to closing. Decide4Action, however, elicited no evidence that Sibley made any misrepresentations about the payment of the bonuses in the SPA or elsewhere. In its attorneys' letter to UCB, Decide4Action argued that the Selling Shareholders had made three false representations and warranties in the SPA:

[1] Sibley-Jones has filed a cross-appeal on this issue.

> (xv) Target has not entered into or terminated any employment contract or collective bargaining agreement, written or oral, or modified the terms of any existing such contract or agreement;
>
> (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);

(R. p. 625, citing R. p. 576 at Section 4(i)(i)(xv-xvii))

In fact, the bonuses did not violate any of these representations and warranties. First, the bonuses did not modify the terms of any employment contract. The undisputed evidence was that the bonuses were one-time, discretionary payments that were not obligated by contract and that did not result in any future obligation.

Second, there was no increase in base compensation of employees outside the Ordinary Course of Business. The only base compensation increase was an increase of a mere $2,500 (from $37,500 to $40,000) to an employee Decide4Action acknowledged was "crucial" to the Company. (R. p. 450, lines 12-21) The undisputed evidence was that this small pay raise was in the ordinary course of business. (R. p. 278, lines 5-9)

Third, there was no evidence that the payment of discretionary, one-time bonuses was a "plan, contract, or commitment for the benefit of any of its directors, officers, or employees" for which the SPA required disclosure. (R. p. 576)

Nonetheless, although disclosure of the bonuses was not required by any of these representations and warranties in the SPA, the bonuses were specifically carved out from the representations in any event because they were listed and disclosed in Schedule 4(i), Section 3, of the SPA as one of the four "Events Subsequent to May 17, 2017," which provided that "Target paid a fiscal year-end bonus and subsequently has paid special bonuses to employees on three

occasions." (R. p. 614) The disclosure in the SPA's schedule specifically excepted these events from the representations and warranties cited by Decide4Action as the bases for its claims. (R. pp. 574-575, "Except as set forth in § 4(i) of the Disclosure Schedule . . . .") The bonuses were also disclosed in financial documents and tax returns given to Decide4Action before signing of the SPA and closing of the sale. (R. pp. 559, 567, 568; p. 305, line 12-p. 309, line 20)

Furthermore, Decide4Action's breach of contract accompanied by a fraudulent act claim fails for the independent reason that the alleged fraudulent act –failure to disclose bonuses – is the same act as the alleged breach of contract. "In order to recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish: (1) a breach of contract; (2) that the breach was accomplished with a fraudulent intention, and (3) that the breach was accompanied by a fraudulent act." *Minter v. GOCT, Inc.*, 322 S.C. 525, 529–30, 473 S.E.2d 67, 70–71 (Ct. App. 1996). "Th[e] fraudulent act, although separate and distinct from the act(s) constituting the breach, must accompany the breach and not be too remote in either time or character." *Smith v. Canal Ins. Co.*, 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980). Decide4Action presented no evidence of any fraudulent act, and certainly not an independent fraudulent act, accompanying the alleged breach of contract that would support a breach of contract accompanied by a fraudulent act counterclaim. Thus, a directed verdict was also appropriate on the breach of contract accompanied by a fraudulent act counterclaim. *Minter*, 322 S.C. at 529–30 (affirming grant of a directed verdict when "there was no evidence of an independent fraudulent act which accompanied the breach").

B. Decide4Action failed to prove damages for any of its counterclaims.

1. There was no evidence of actual damages in the record.

The Circuit Court correctly determined there was no admissible evidence of actual damages that would permit Decide4Action's counterclaims to go to the jury. In arguing otherwise, Decide4Action cites a letter and spreadsheet sent by Decide4Action's counsel to UCB to prevent

UCB from issuing the funds in the Escrow Account to the Selling Shareholders. These documents were entered in evidence by Sibley-Jones only to show that Decide4Action had wrongfully made a claim in excess of the amount of funds in the Escrow Account that caused UCB to not release any of the funds in the Escrow Account to the Selling Shareholders. (R. p. 329, line 18-p. 331, line 13) Of course, Sibley-Jones did not offer the documents for the truth of the matters asserted in them, i.e., that Decide4Action had in fact suffered $1.3 million in damages from the non-shareholder bonuses.

Decide4Action did not elicit testimony from any witness at trial that would substantiate the opinions regarding damages in these documents, so those opinions were not admissible evidence. *See State v. James*, 255 S.C. 365, 371, 179 S.E.2d 41, 44 (1971) ("[W]ritten reports of tests made by persons not offered as witnesses [are] inadmissible as hearsay.") (citing *Cooper Corp. v. Jeffcoat*, 217 S.C. 489, 61 S.E.2d 53 (1950)); *State v. Slocumb*, 336 S.C. 619, 636–37, 521 S.E.2d 507, 516 (Ct. App. 1999) ("[T]o admit the hearsay opinion of an expert not subject to cross-examination goes against the natural reticence of courts to permit expert opinion unless the expert has been qualified before the jury to render the opinion." (quoting *Bryan v. John Bean Div. of FMC Corp.*, 566 F.2d 541, 546 (5th Cir. 1978)); Rule 705, SCRE (requiring an expert "to disclose the underlying facts or data on cross-examination"). Similarly, Decide4Action's attorneys' arguments in the letter do not constitute evidence. *Bowers v. Bowers,* 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are … not evidence.") (citing *McManus v. Bank of Greenwood,* 171 S.C. 84, 89, 171 S.E. 473, 475 (1933)) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.")).

Additionally, the letter and spreadsheet sent by Decide4Action's counsel to UCB also cannot serve as evidence of damages because the damages calculation in it undisputedly claims a

diminution of value based on a multiple of EBTDA, which is prohibited by section 8(b) of the SPA. (R. p. 317, lines 13-20; p. 373, lines 9-16) Decide4Action's argument that section 8(b) does not apply because the jury might have found fraud fails for all of the reasons expressed above.

Similarly, the amount of the non-shareholder bonuses cannot serve as a measure of actual damages because Decide4Action had no right to the money that was paid out as bonuses. Decide4Action's argument that the bonuses can serve as a measure of actual damages is based on a selective and misleading quote from Section 6(c) of the SPA that provides that Decide4Action retained the cash in the Company's account *after Closing*. (Appellant's Brief at 25) This quote is misleading because the immediately preceding sentence of the SPA provides that the Selling Shareholders were entitled to take all of the cash *at Closing*:

> Sellers shall ensure that the 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 the possession or under the control of Target after Closing, such cash shall remain the property of Target, and Sellers shall have no right or claim to such cash.

(R. p. 585; p. 300, line 18-p. 301, line 6) Moreover, it is undisputed that all bonuses were paid months before the SPA was signed and closing. Thus, Decide4Action could not recover the bonus amounts as damages.

Because Decide4Action failed to provide any admissible evidence permitting the jury to calculate damages on any of the counterclaims, Sibley-Jones, on behalf of the Selling Shareholders, was entitled to a directed verdict as a matter of law on all claims.

2. The possibility of nominal damages is not a basis for reversal.

Decide4Action's argument that its counterclaims could go to the jury based merely on the possibility of nominal damages is also incorrect. Nominal damages are precluded in this case because the SPA required Decid4Action to have suffered a minimum of $25,000 in adverse

consequences in order for the Selling Shareholders to incur obligations toward Decide4Action. (R. p. 589) As noted above, Decide4Action failed to elicit any evidence of intentional fraud or intentional misconduct that would cause this threshold not to apply.

Moreover, fraud claims require proof of pecuniary loss to go to the jury as a matter of law. *See Daniels v. Coleman*, 253 S.C. 218, 228, 169 S.E.2d 593, 597-98 (1969) ("In contradistinction with trespass and other direct injuries for which the complainant is awarded nominal damages if he should fail to plead and prove actual damage, deceit belongs to that class of tort of which pecuniary loss generally constitutes part of the cause of action. If the respondents suffered no actual damage from the fraud, there is no cause of action and they cannot recover even nominal damages.")

While there does not appear to be precedent on the issue, this rule should also apply to a claim breach of contract accompanied by a fraudulent act. "An action for breach of contract accompanied by a fraudulent act is an action *ex contractu,* not *ex delicto*, []; however, it partakes of elements of both contract and tort." *Peeples v. Orkin Exterminating Co.*, 244 S.C. 173, 178, 135 S.E.2d 845, 847 (1964) (internal citations omitted). The element at issue here – damages – is a tort-based element of the claim because the claim, if proven, permits the award of punitive damages. *See Welborn v. Dixon*, 70 S.C. 108, 115, 49 S.E. 232, 234 (1904) ("[I]n an action for breach of contract the motives of the wrongdoer are not to be considered in estimating the amount of damages, and that he is only liable for such damages as are the natural and proximate result of the wrongful act. When, however, 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."). Thus, the requirement of proof of pecuniary loss should apply to Decid4Action's breach of contract accompanied by fraudulent act claim.

Finally, appellate courts should not reverse a circuit court's directed verdict and require a jury trial solely to decide the potential availability of nominal damages. *See* Restatement (Second) of Contracts, § 346 cmt. b (Am. L. Inst. 1981) ("Unless a significant right is involved, a court will not reverse and remand a case for a new trial if only nominal damages could result."); *AttorneyFirst, Ltd. Liab. Co. v. Ascension Entm't, Inc.*, No. 06-2320, 2007 U.S. App. LEXIS 22455, at *4 (4th Cir. Sep. 20, 2007) ("[W]e conclude that even if the district court erred by not allowing the jury to determine whether nominal damages were appropriate, the possibility of a nominal damages award is insufficient to warrant a new trial."); *Northrop Grumman Computing Sys. v. United States*, 823 F.3d 1364, 1369 n.2 (Fed. Cir. 2016) ("We decline to remand to determine if nominal damages would be appropriate.").

3. The possibility of punitive damages is not a basis for reversal.

Likewise, Decide4Action's argument that its counterclaims could go to the jury based merely on the possibility of punitive damages is incorrect. As explained above, there was no evidence that Sellers engaged in any fraudulent act or fraud, much less clear and convincing evidence of willful violation of rights that could give rise to an award of punitive damages. *See Nesbitt v. Lewis*, 335 S.C. 441, 448, 517 S.E.2d 11, 15 (Ct. App. 1999) ("In order for a plaintiff to recover punitive damages, there must be evidence the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights.") (internal quotations omitted); *id.* at 448-49, 517 S.E.2d at 15 ("A tort is characterized as reckless, willful, or wanton if it was committed in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff's rights."); S.C. Code Ann. § 15-33-135 ("In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.").

Moreover, the SPA did not permit punitive damages in any event. (R. p. 589, "[I]n no event shall any Seller be liable to Buyer for any punitive, incidental, consequential, special or indirect damages . . . .") Contrary to Decide4Action's argument, section 8(f) of the SPA does not overrule this damages limitation. Section 8(f) of the SPA states that:

> 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 Buyers and Sellers in respect of any and all claims . . . .

(R. p. 591) As noted above, Decide4Action failed to offer any evidence of "intentional fraud or intentional misconduct" that would cause section 8(f) of the SPA to apply.

In addition, Section 8(f) of the SPA merely provides that the exclusivity of the indemnity remedy in the SPA – including the $25,000 threshold and $2.5 million cap – do not apply in cases of intentional fraud. It does not, however, override the broad "in no event" language of section 8(b) that applies in all circumstances. (R. p. 589) The Circuit Court noted this exact point at trial. (R. p. 536, lines 12-15, "I haven't looked at that case, but, I mean, and I don't know exactly where the caps are, but if the caps – you know, if fraud removes the caps, that doesn't necessarily remove punitive damages, does it?")

In sum, Decide4Action failed to present any evidence of breach of contract, breach of contract accompanied by a fraudulent act, or fraud, or any evidence of damages. The SPA prohibited recovery of nominal or punitive damages, and neither were warranted, so that the Circuit Court correctly granted Sibley-Jones' motions for directed verdict.

II. Where Decide4Action's only witness on damages admitted he was not qualified to give opinions about damages, the Circuit Court correctly precluded Decide4Action from offering his opinion on damages.

The Circuit Court did not abuse its discretion in granting Sibley-Jones's motion to exclude Decide4Action from presenting evidence of damages. As an initial matter, Decide4Action

mischaracterizes the Court's ruling on the motion in limine as a "discovery sanction." (Appellant's Brief 1, 26) In fact, as the Circuit Court emphasized on multiple occasions during the trial, the ruling was not solely or even primarily a sanction for Decide4Action's failure to comply with the order to identify its damages methodology. R. p. 522, lines 13-20; p. 526, lines 13-14, p. 549, lines 16-18) Rather, the decision was based primarily on Decide4Action's failure to name a qualified expert witness to testify about damages (such as the author of the Patton and Associates' reports) and to instead attempt to rely on its own executive, Bergeron, who acknowledged he was not qualified to offer opinions on damages. (R. p. 77) Furthermore, the Circuit Court's ruling was also justified because Decide4Action's proposed damages methodology was barred by the SPA and because Decide4Action failed to comply with the order requiring it to disclose its damages and methodology.

A. Decide4Action's only proposed witness on damages admitted he was not qualified to give opinions on damages, so his opinions were inadmissible.

The Circuit Court's decision to exclude Decide4Action's proposed damages evidence was a straightforward application of basic evidentiary principles. The only witness that Decide4Action identified to provide testimony about its damages – its owner, Richard Bergeron – had specifically admitted in his deposition that he was not qualified to offer opinions on the diminution of value of the Company. (R. pp. 677-696, "The only way to value a company is with an expert. . . . Yes, I have a limited opinion, but that's not my opinion about the valuation that counts.")) These admissions were absolutely correct, because Bergeron was not qualified to offer an expert opinion on damages. Rule 702, SCRE (An expert must be "qualified as an expert by knowledge, skill, experience, training, or education."); *Drews Co. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 214, 371 S.E.2d 532, 536 (1988) ("Owner's expectations, unsupported by any particular standard or fixed method for establishing net profits, [are] wholly insufficient to provide … a basis for

calculating profits lost with reasonable certainty."). Thus, Bergeron had correctly disqualified himself from providing any testimony about damages calculations, including testimony about the calculations in the letter Decide4Action's attorneys sent to UCB asserting a claim to the funds in the Escrow Account.

Furthermore, Bergeron also could not offer any testimony about the Patton and Associates' reports. Decide4Action itself excluded those reports from evidence, (Supp. R. p. 22), and the Circuit Court also correctly noted that any testimony by Bergeron about any reports would have been inadmissible hearsay because he was not the author of the reports. (R. p. 368, lines 21-23, "Well, I can definitely say that would be hearsay, and . . . I don't see how he can do that.") "[W]ritten reports of tests made by persons not offered as witnesses [are] inadmissible as hearsay." *James*, 255 S.C. at 371, 179 S.E.2d at 44 (citing *Cooper Corp.*, 217 S.C. 489, 61 S.E.2d 53); *Slocumb*, 336 S.C. at 636–37, 521 S.E.2d at 516 ("[T]o admit the hearsay opinion of an expert not subject to cross-examination goes against the natural reticence of courts to permit expert opinion unless the expert has been qualified before the jury to render the opinion." (quoting *Bryan*, 566 F.2d at 546); Rule 705, SCRE (requiring an expert "to disclose the underlying facts or data on cross-examination").

B. The proposed damages evidence of Decide4Action was also barred by the SPA.

The Circuit Court's decision to exclude Decide4Action from presenting evidence regarding its damages was also justified because the methodology it proposed to use was barred by the SPA. The SPA provides that:

> **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 reputation 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**.

(R. p. 589) (emphasis added)

This language is absolute and applies to bar any damages in favor of Decide4Action based upon diminution of value of the Company or any type of multiple. As Decide4Action admitted at trial and in its brief (R. p. 317, lines 13-20; p. 373, lines 9-16), the attorney letter to UCB claimed diminution of value based upon a multiple of earnings of the Company before interest, taxes, depreciation, and amortization (EBITDA). (R. pp. 624-626)

C. Decide4Action failed to comply with a Court Order to which it specifically consented.

The Circuit Court's decision to exclude damages evidence was only based in part on Decide4Action's failure to comply with the consent order requiring it to disclose its damages and methodology. Nonetheless, to the extent the decision was a discovery sanction, it was well-founded and certainly not an abuse of discretion. "Disclosure of information between the parties before trial is designed to avoid surprise and to promote decisions on the merits after a full and fair hearing." *Reed v. Clark*, 277 S.C. 310, 316, 286 S.E.2d 384, 388 (1982). A party's "failure to ascertain and inform [the opposing party] of his damage claims prior to trial clearly undermines the policy that every party should have the opportunity to fully prepare and develop his case for trial." *Morgan v. Carolina Door Prod., Inc.*, 281 S.C. 423, 426, 315 S.E.2d 119, 120 (1984). For that reason, a party's proof of damages at trial is limited to the damages the party specified in discovery. *See id.* (holding that trial court's failure to limit proof of damages to the amount specified in party's interrogatories was an abuse of discretion).

Moreover, Decide4Action's argument that the Circuit Court's sanction was disproportionate is unfounded. This is demonstrated by the differences here and the case cited by Decide4Action, *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 153, 399 S.E.2d 439, 440 (Ct. App. 1990). In *Balloon Plantation*, the defendant served its answers to plaintiff's discovery requests a few hours after a noon deadline set by the court. The defendant suffered no

prejudice from this delay, yet the court still ordered defendant to be in default and its counterclaims stricken. *Id.* at 154. Here, on the other hand, (1) Sibley-Jones did not receive any explanation of Decide4Action's damages calculation or methodology at any time prior to trial, (2) Decide4Action specifically disclaimed any intent to rely on the Patton and Associate reports it produced in discovery and, in fact, moved to exclude them, (Supp. R. p. 22), and (3) Decide4Action intended to present testimony on damages from a witness Bergeron, who had specifically disclaimed in his deposition any ability to provide such testimony. (R. pp. 77, 96-107, 677-696) Under such circumstances, there was no other remedy available.

Decide4Action's argument that Sibley-Jones should have done more to correct Decide4Action's failure to comply with its discovery obligations is similarly unfounded. Sibley-Jones did not simply lie in wait on this issue, as Decide4Action suggests, but rather affirmatively contacted Decide4Action's counsel to resolve the issue on multiple occasions. (R. pp. 88-95) It was not Sibley-Jones's obligation to repeatedly raise the issue up until trial.

Instead, it was Decide4Action's efforts to hide from the jury that it had a valuation of $7.3 million for a company that it purchased for $4.4 million that led it to refuse to disclose to Sibley-Jones how it intended to calculate its damages. If anything, Decide4Action's decision at trial to move to exclude the one expert opinion on the value of the Company that it referenced prior to trial – the Patton and Associates report – indicates that it was making a strategic decision to sandbag until trial that was not fair to Sibley-Jones. A party should disclose such a central issue as the damages it claims, and the defending party should receive full and timely disclosure to be able to prepare for trial.

D. The Circuit Court's judgment should be affirmed regardless of the outcome of this Court's review of the decision on the motion in limine.

Finally, a directed verdict in favor of Sibley-Jones was appropriate even if the motion in limine had not been granted, because Decide4Action failed to meet its burden on the non-damages elements of its claims and because the only claim of damages that Decide4Action ever asserted (the damages calculations in its attorneys' letter to UCB) was based on a multiple of earnings, and thus prohibited by the SPA. *See* supra part I.

CONCLUSION

For the foregoing reasons, the Circuit Court's directed verdict for Sibley-Jones should be affirmed.

Respectfully submitted,

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In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Hon. Perry H. Gravely, Circuit Court Judge

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v.

Decide4Action, Inc., …… Appellant-Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Gregory J. English, of Wyche, P.A., attorneys for the Respondent/Appellant in the within action, do hereby certify that I have this date served upon opposing counsel the foregoing **RESPONSE BRIEF OF RESPONDENT-APPELLANT JULIA SIBLEY-JONES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM A.L. SIBLEY, JR.** by first class mail, addressed to the following:

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