RECEIVED
Jun 21 2022
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.*

---

# Reply Brief of Appellant-Respondent Decide4Action, Inc.

---

Kimberly T. Thomason (#79179)
Howard W. Anderson III (#100329)
Devon M. Puriefoy (#102097)
TRULUCK THOMASON, LLC
3 Boyce Ave.
Greenville, SC 29601
kim@truluckthomason.com
howard@truluckthomason.com
devon@truluckthomason.com
864-331-1751 (p)

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

Appellant-Respondent Decide4Action, Inc., respectfully replies to Julia Sibley-Jones' Response Brief as follows.

## ARGUMENT

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

Contrary to the claims in the Response, evidence existed from which a jury could have found both liability and damages.

#### *A. The Jury Could Have Found Liability.*

Ms. Sibley-Jones makes the surprising claim that when the trial judge wrote that Decide4Action had, besides damages, presented a "viable claim under the Stock Purchase Agreement," [R. 011], the judge did not actually mean "viable." [Initial Resp. Br. at 14]. While the judge did not attempt to assess the merits of Decide4Action's liability showing on the bench, rulings after contemplation in chambers always control. *See, e.g.*, *Badeaux v. Davis*, 337 S.C. 195, 204 (Ct. App. 1999) ("It is well settled that a judge is not bound by a prior oral ruling and may issue a written order which is in conflict with the oral ruling." (citation omitted)).

In any event, the liability claim was in fact a "viable" one, as shown below.

*1. A Jury Could Have Found a Breach of the Contractual Representation and Warranty that CC+I Had Operated in the Normal Course from the Diligence Period to Closing.*

In trying to claim that the bonus payments were somehow proper under the Stock Purchase Agreement ("SPA"), Ms. Sibley-Jones overlooks the multiple contractual representation-and-warranty provisions contained in it. A general warranty was that "[e]xcept 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*." [R. 574-75 § 4(i) (emphasis added)]. Additional specific warranties included that no changes in base compensation had been made "outside the Ordinary Course of Business" and that Computer Control + Integration ("CC+I") had not "adopted, amended, [or] modified" any "bonus…plan." [R. 576]. The sellers also warranted that all the statements in SPA §4 (governing warranties) were "correct and complete." [R. 572].

Whether or not the 100% bonuses to non-owners were a material adverse change, ample evidence existed that they were not made in the ordinary course: CC+I had either never paid 100% bonuses, [R. 485-86], or at best, at least had not done so this century, [R. 397]. *See also* [R. 669 (showing 2013-17 bonus history)]. Further, whether or not the bonuses were listed in other tax and financial documents, the sellers' contractual promises were tied to correctness and completeness of what was

set forth in §4(i) of the Disclosure Schedule" [R. 574-75§ 4(i)]. But even in those tax and financial documents, "none of them specifically detailed who bonuses were paid to." [R. 402]. Thus, they were not complete.

Insofar as Ms. Sibley-Jones claims that the non-owner employee bonuses were satisfactorily described on Disclosure Schedule § 4(i), a jury could have found otherwise. The parties specifically negotiated the purchase price on the understanding that total compensation for non-owner employees would remain the same through closing, whereas the owners would receive a payout. [R. 430-33]. Awarding bonuses to non-owners would have necessitated a change in the purchase price. [R. 433]. Given that the decedent whom Ms. Sibley-Jones represents, Mr. William A. Sibley, Jr., did not believe that he was required to disclose the non-owner bonuses at all, [R. 404], a reasonable juror could conclude that the disclosure of bonuses on Schedule 4(i) was only intended to and/or only did encompass bonuses to owners and not to employees. In any event, it is undisputed that it is impossible "to determine based on this language [in Schedule 4(i)] how those bonuses were paid and who they were paid to." [R. 398]. Thus, the disclosure was not "complete."

With respect to the almost 7% increase in Ms. French's salary, Ms. Sibley-Jones' claim that the salary increase was part of the ordinary course is in tension with the fact that no other employee received a raise. *See* [R. 626]. Insofar as Ms. Sibley-

Jones claims that Ms. French was a "crucial" employee, *see* [Initial Resp. Br. at 15], contrary testimony was adduced at trial. *See* [R. 463 (testifying that she was just a "normal office person")].

Thus, the jury could (and should) have concluded that Decide4Action had shown a breach of the SPA's representations and warranties.

*2. A Jury Could Have Found Fraud.*

Ms. Sibley-Jones is also wrong when she says that liability for fraud was established. While she says that there was no misrepresentation, [Initial Resp. Br. at 15], misrepresentation abounded. As shown above, the disclosures were neither correct nor complete; CC+I had not operated in the ordinary course in general; and CC+I specifically made a salary increase outside the ordinary course and had adopted/paid a bonus plan for non-owner employees after May 17, 2017. Insofar as Ms. Sibley-Jones says that the bonuses were not a "plan," the payments would still have violated the general representation that CC+I had operated in the ordinary course of business. But Decide4Action respectfully submits that a jury could determine that the bonuses were part of a plan, rather than some random act.

*3. A Jury Could Have Found a Breach of Contract Accompanied by a Fraudulent Act.*

While Ms. Sibley-Jones is right to not dispute that evidence of a fraudulent intent was put before the jury, *see* [Initial Resp. Br. at 16-17], she is wrong to claim that no fraudulent act was shown. For the purposes of this cause of action, a "fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design." *Harper v. Ethridge*, 290 S.C. 112, 119 (Ct. App. 1986) (citation omitted). It is necessarily fact sensitive; "'fraud,' in this sense, assumes so many hues and forms, that courts... allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence." *Id.* (quotation and citation omitted). The breach was completed when Mr. Sibley signed the October 13, 2017, SPA. [R. 595]. A jury could well decide that Mr. Sibley's decision to withhold from Mr. Bergeron the June 2017 bonus letters to the non-owner employees until November 2017—after closing—was an independent act of dishonest or unfair dealing that was sufficient to authorize liability. [R. 402].

***B. The Jury Could Have Awarded Damages.***

*1. Evidence of Damages Was Admitted Without Objection.*

While Ms. Sibley-Jones may now wish that the letter to United Community Bank and the spreadsheet of damage calculations, [R. 624-26], had only been admitted for

a limited purpose, *see* [Initial Resp. Br. at 17], no such limitation was placed on the record when the parties *stipulated* to the admissibility of those documents. *See* [R. 205 ("First, for the record, I'd like to note that the parties have agreed on the admissibility of Plaintiff's Exhibits 1 through 12 and 16 through 20....")]. Having not only stipulated to their admissibility but herself having moved them into evidence, Ms. Sibley-Jones cannot be heard to complain that letter and spreadsheet were somehow not properly part of the record for the jury. *See, e.g.*, *State v. Curtis*, 356 S.C. 622, 632 (2004) ("A party cannot complain of an error which his own conduct created." (citation omitted)).[1]

As she implicitly concedes, *see* [Initial Resp. Br. at 18], a damages calculation based up an EBTDA multiple would be appropriate per SPA § 8(f) if the jury found "intentional fraud or intentional misconduct," [R. 591 §8(f)], because the $0 cap for such a claim would be removed. As shown above, both fraud and intentional misconduct were present.

[1] "Generally, statements by an attorney concerning a matter within his employment may be admissible against the retaining client," *United States v. Blood*, 806 F.2d 1218, 1221 (4th Cir. 1986) (citations omitted), even though the retaining client himself cannot put them into evidence absent an exception to the hearsay rule. Thus, there was nothing improper in Ms. Sibley-Jones offering the exhibit into evidence if, as she did, she thought the strategic benefit outweighed the costs.

As for her claim that the amount of shareholder bonuses themselves cannot serve as a measure of actual damages, Ms. Sibley-Jones is wrong there, too. As she herself notes, under the SPA, "Sellers shall ensure that the Target cash is distributed or otherwise paid out to the Sellers no later than Closing..." [R. 585 § 6(c)]. The crux of the dispute, however, is that Sellers paid more than $300,000 in cash out to employees rather than to the Sellers themselves. A jury could reasonably have decided that an appropriate measure of damage for the unauthorized payments would be to put Decide4Action in the position that it would have been in had Sellers refrained from collecting those funds in a way that did not violate the SPA: "[S]uch cash [would] remain the property of Target...." [R. 585 § 6(c)].

*2. Nominal Damages Were Available.*

Ms. Sibley-Jones does not dispute that "intentional fraud or intentional misconduct," [R. 591 §8(f)], would allow a jury to award nominal damages. *See* [Initial Resp. Br. at 19]. As above, however, she is wrong in suggesting that no fraud or misconduct was shown.

As for the argument that the tort of fraud requires actual damages, Ms. Sibley-Jones forgets that what must be shown is only a certainty of damage, not certainty as to the amount. *See, e.g., Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) ("It is true that there was uncertainty as to the extent of the

damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount."). When the fact of damage is certain, but the amount is not, nominal damages are appropriate. *See, e.g.*, *Taylor v. Va. Metal Prods. Corp*, 204 F.2d 457, 458 (4th Cir. 1953) ("The jury may well have thought that [party claiming slander] had not carried the burden of establishing the amount of damages it had sustained with sufficient certainty to justify the award of anything more than nominal damages.").

As for breach of contract accompanied by a fraudulent act, Ms. Sibley-Jones acknowledges that South Carolina views it as an action "*ex contractu*, not *ex delicto*." [Initial Resp. Br. at 19 (quotation omitted)]. An entitlement to nominal damages upon a breach is a fundamental part of South Carolina contract law. *Stevens v. Allen*, 342 S.C. 47, 53 n.5 (2000) (citations omitted). In suggesting that damages are an element of this cause of action, however, Ms. Sibley-Jones impermissibly asks this Court to overrule the Supreme Court, which has identified only three elements—none of which is damages. *See, e.g.*, *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66 (2002) ("In order to have a claim for breach of contract accompanied by a fraudulent act, the plaintiff must establish three elements: (1) a breach of contract;

(2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." (citation omitted)).

Insofar as Ms. Sibley-Jones suggests that a retrial solely for nominal damages cannot be appropriate, she has been unable to cite any South Carolina caselaw for that proposition. *See* [Initial Resp. Br. at 20]. If a trial in the first instance for solely nominal damages is appropriate, so is a retrial when the trial judge refused to allow the jury to render a verdict. *See, e.g.*, *Mid-Continent Refrigerator Co. v. Way*, 263 S.C. 101, 110 (1974) ("We further hold that there 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. The judgment below is accordingly reversed and the case remanded for a new trial.").

*3. Punitive Damages Were Available.*

As shown above, and despite Ms. Sibley-Jones' claims to the contrary, Mr. Sibley's withholding of the bonus letters until after closing showed evidence of fraud or fraudulent acts, for which punitive damages are appropriate.

Insofar as Ms. Sibley-Jones claims that the SPA precludes punitive damages, she is wrong. Section 8(b) sets a $25,000 threshold with $2.5 million cap for certain types of damages and a $0 cap ("in no event") for other types, including for "punitive

damages." *See* [R. 591]. But § 8(f) says that the threshold and cap "shall not apply" when there was "intentional fraud or intentional misconduct," [R. 591], which as discussed above was shown here. In attempting to give primacy to § 8(b), Ms. Sibley-Jones simply seeks to exclude the language of § 8(f). To whatever extent the Court finds the two clauses in tension, the Court should require the jury to decide what the parties intended on remand. *See Wheeler v. Globe & Rutgers Fire Ins. Co.*, 125 S.C. 320, 325 (1923).

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

Decide4Action requests that the sanctions order be vacated so that a more narrowly tailored can be imposed for the retrial that is already required.[2] Ms. Sibley-Jones does not dispute that South Carolina law sanctions has a proportionality component. *See Laney v. Hefley*, 262 S.C. 54, 60 (1974). Decide4Action agrees that she had no legal obligation to raise the deficiency prior to trial with Decide4Action, *see* [Initial Resp. Br. at 25-26]. But the fact that she did not insist that *the judge* rule before calling the case for jury selection suggests that she viewed the inadvertent nondisclosure more as a tactical opportunity than a real point of prejudice. Further,

[2] At retrial, Decide4Action plans to offer a witness who will satisfy the trial judge's non-sanctions, evidentiary concerns.

Ms. Sibley-Jones does not dispute that any real prejudice that may have been previously present will be reduced or eliminated by the time of retrial. As such, a more narrowly tailored sanctions order is appropriate.

## 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.

DECIDE4ACTION, INC.

s/Kimberly T. Thomason
Kimberly T. Thomason
(#79179)

s/ Devon M. Puriefoy
Devon M. Puriefoy
(#102097)

s/Howard W. Anderson III
Howard W. Anderson III
(#100329)

Kimberly T. Thomason (#79179)
Howard W. Anderson III (#100329)
Devon M. Puriefoy (#102097)
TRULUCK THOMASON, LLC
3 Boyce Ave.
Greenville, SC 29601
kim@truluckthomason.com
howard@truluckthomason.com
devon@truluckthomason.com
864-331-1751 (p)

*Counsel for Appellant-Respondent Decide4Action, Inc.*

RECEIVED
Jun 21 2022
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.*

---

# Certificate of Counsel Regarding Final Briefs

---

Kimberly T. Thomason (#79179)
Howard W. Anderson III (#100329)
Devon M. Puriefoy (#102097)
TRULUCK THOMASON, LLC
3 Boyce Ave.
Greenville, SC 29601
kim@truluckthomason.com
howard@truluckthomason.com
devon@truluckthomason.com
864-331-1751 (p)

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

Dated this 21st day of June, 2022.

s/Howard W. Anderson III
Howard W. Anderson III
(#100329)

Kimberly T. Thomason (#79179)
Howard W. Anderson III (#100329)
Devon M. Puriefoy (#102097)
TRULUCK THOMASON, LLC
3 Boyce Ave.
Greenville, SC 29601
kim@truluckthomason.com
howard@truluckthomason.com
devon@truluckthomason.com
864-331-1751 (p)

*Counsel for Appellant-Respondent Decide4Action, Inc.*

**CERTIFICATE OF SERVICE**

I, the undersigned, served a copy of this Final Reply 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:



Gregory J. English
James E. Cox, Jr.
200 East Camperdown Way
P.O. Box 728
Greenville, SC 29602-0728
*genglish@wyche.com*
*jcox@wyche.com*

s/Howard W. Anderson III
Howard W. Anderson III
SC Bard No.: 100329
P.O. Box 661
Pendleton, SC 29670
howard@hwalawfirm.com

*Counsel for Decide4Action, Inc.*