2016

Jacob D. Williams, an Individual, Plaintiff/Appellant vs. Craig Alan Anderson, an Individual, Quinn Zite, an Individual, and Anderson Zite, LLC (F/K/a Fix a Phone, LLC), a Utah Limited Liability Company, Defendants/Appellees

Utah Court of Appeals

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JACOB D. WILLIAMS, an individual, Plaintiff/Appellant vs. CRAIG ALAN ANDERSON, an individual, QUINN ZITE, an individual, and ANDERSON ZITE, LLC (f/k/a Fix A Phone, LLC), a Utah limited liability company, Defendants/Appellees	Appellate Case No. ~~20160885~~ 20150886

REPLY BRIEF OF APPELLANT

Appeal from the Third Judicial District Court of
Salt Lake County
Case No. 130901891
The Honorable Robert P. Faust

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ARGUMENT

I. THE TRIAL COURT INCORRECTLY INTERPRETED RULE 26(a).

Defendants offer a narrow, rigid definition of the phrase "computation of damages" to justify the Trial Court's incorrect interpretation of Rule 26(a)(1)(C). Defendants assert that these words can only mean "a definite, concrete number" or a "damages figure." *See* Appellee's Brief at 13, 14 and 17.

But such a narrow interpretation cannot be reconciled with the definition of "computation," which has numerous meanings such as the act or action of computing or a system of reckoning (*see* www.merriam-webster.com/dictionary/computation (last visited May 7, 2016)) or an act, process, or method of computing (see www.dictionary.com/browse/computation (lasted visited May 7, 2016)). One possible definition of "computation" is also, as Defendants point out, "an amount computed." *Id.* But that is not the only or even the preferred definition.

Defendants offer no caselaw holding that only a "concrete number" satisfies the Rule 26 disclosure obligation. And the case Defendants rely primarily upon – *Design Strategy, Inc. v. Davis*, 469 F.3d 284 (2nd Cir. 2006) – is factually distinguishable and undercuts Defendants' narrow interpretation. In that case, the plaintiff provided generic and vague damage disclosures, including a claim for "all profits earned by the Defendants as a result of unlawful diversion of business from the Plaintiff to the Defendants...." *Id.* at 291-292. The plaintiff answered an interrogatory regarding damages with similar

language. *Id.* In the final pre-trial order, plaintiff disclosed two witnesses – one whom was identified as an expert – to testify regarding lost profits. Defendants moved to preclude these witnesses from testifying and to exclude any other evidence of lost profits. *Id.* The plaintiff argued that they had "turned over evidence from which a computation of damages could be made – Plaintiff's financial records. When pressed, [plaintiff] argued that it was not obligated to provide a calculation of damages because the calculation of damages from these records would be simple arithmetic – if our revenue is $100 and our expenses are $50, then we have a 50% profit margin, and that is the basis on which I would have our people testify." *Id.* at 293.

Design Strategy is thus distinguishable from the present case in that the plaintiff there never disclosed its lost profit percentage to defendants (i.e., the plaintiff never disclosed the percentage of the relevant revenue to which plaintiff believed it was entitled). Instead, the plaintiff provided a vague general description and a broad collection of financial documents, neither of which allowed the defendant to identify the extent and nature of the alleged damages. Nor did the District Court (or the Second Circuit) ever state that a "computation of damages" requires the disclosure of a "concrete number," and the District Court's language (as affirmed) conflicts with Defendants' narrow interpretation offered here. For example, the District Court stated to plaintiff's counsel that "it is not as simple as simply providing the [financial statements] to the defendant without your providing as well *a specific formula indicating how your theory of damages is supported.* That is not something that the defendant is in a position to do."

Id. (emphasis added). The District Court's written order further stated that "[plaintiff] has not provided any justification for its failure to disclose information regarding the amount of, *or the basis for computing*, its alleged lost profits. *Id. at 294.* (emphasis added). Again, here, Williams was clear regarding the details of his "theory of damages" and his "basis for computing" the amounts due as a result of Defendants' wrongful acts. And unlike the defendant in *Design Strategy*, Defendants here knew all the relevant and necessary information at all times.[1]

Other cases cited by Defendants undercut their argument as well. Defendants rely upon *Sleepy Holdings LLC v. Mountain West Title*, 2016 UT App. 62, for the proposition that "bare, formulaic disclosure" cannot be cured by the defendant's ability to do "its own math." *See* Appellee's Brief at 23. The facts in *Sleepy Holdings* are very different than the facts presented here. In that case, the plaintiff's initial disclosures simply stated that "damages are described in the complaint" and that "additional work will be done in assessing and computing such damages." *Id.* at ¶ 3. A year after the fact discovery cutoff,

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[1] Defendants' truncated quotation implying that the District Court (and subsequently the Second Circuit) found a simple arithmetic calculation as "wholly inadequate as a measure of damages" in relation to the phrase "computation of damages" is inaccurate. *See* Appellee's Brief at 17. The full quote demonstrates that the District Court was discussing the validity of the measure of damages asserted: "The need for computation and supporting documents is especially necessary in a case like this, where the damage claim is for lost profits from a project of a type with which the plaintiff had little-to-no prior experience. Design's 'simple arithmetic' calculation is wholly inadequate as a measure of damages, given that it is undisputed that, in order to perform on the project, Design would have had to establish an entirely new computer lab and hire all new personnel in the space of two weeks." The District Court was pointing out that Design's normal net profit percentage would not suffice for new, different types of work. No such complexities are present in the case before this Court.

the plaintiff submitted a supplemental disclosure in which it "presented damages theories, including what it called the lost $2 million sale." *Id.* at ¶ 4. Thus, unlike Williams, the plaintiffs in *Sleepy Holdings* never presented a computation of damages or a damages theory whatsoever, and had not identify their belief that they were entitled to the lost profits from the sale of certain land.

Importantly, in discussing the phrase "computation of damages," this Court nowhere stated that a "concrete figure" is required. Rather, the Court stated that "[e]ven if a plaintiff cannot complete its computation of damages before future events takes place, 'the fact of damages ... *and the method for calculating* the amount of damages' must be apparent in initial disclosures." *Id.* at ¶ 14 quoting *Steven-Henager Coll. v. Eagle Gate Coll.*, 2011 UT App. 37, ¶ 16. (emphasis added). The Court further stated that "while [plaintiff's] complaint describes the $2 million sale, it does not identify the failed sale as damages *or offer a computation or method of calculating the damages as required by law." Id.* (emphasis added). In contrast, Williams was presented with a situation in which the sale price of Fix-A-Phone was identified as $200,000.00 to be paid over 24 months (ending in early 2015), as well as certain ongoing "profit sharing." Williams promptly and properly identified a "method of calculating" his damages as required by Rule 26.[2]

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[2] Defendants also rely upon *Bodell Constr. Co. v. Robbins*, 2009 UT 52, another case with dramatically different facts. In that case, the plaintiff disclosed three new damages theories "three weeks after fact discovery had closed ..." *Id.* at ¶ 37. Notably, however, plaintiff's initial disclosures stated that "its damages 'constitute the funds advanced, together with interest at the legal rate, less the payment received from MSF.'" Neither

Indeed, there are numerous disputes in which a computation of damages would not necessarily contain a "concrete number." For example, a company's lawsuit against a former employer and her new company might seek lost profits for customers successfully and improperly solicited by the former employer. The Rule 26 disclosures in that case should provide detail as to the former employer's net profit percentage on the customers at issue (and produce the relevant documentation to support that computation), but the final amount of sales by the former employer and her new company might not be defined until trial and therefore a "concrete number" could not (and need not) be included in the Rule 26 disclosures. Likewise, a similar situation could also occur as a result of a landlord's lawsuit caused by a former tenant's breach. If the former tenant was paying $10,000.00 per month and the landlord's disclosures identified that the damages suffered were $10,000.00 per month until the former tenant's lease expired, subject to an offset for rents obtained from new tenants during the term of the former tenant's lease, there would be little doubt that the "nature and extent" of plaintiff's damages were fully disclosed. In such cases, as Professor Moore stated, the defendants would plainly have an "adequate basis to evaluate the injury the disclosing party has suffered." Moore's Federal Practice 3d, § 26.22[4][c][ii].

Defendants argue that the language of Rule 26 should be interpreted "in light of the purpose" that rule is "meant to achieve." *See* Appellee's Brief at 13 citing *Biddle v. Wash. Terrace City*, 1999 UT 110, ¶ 14. Williams agrees. The purposes of the Rule 26

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the trial court nor the Supreme Court criticized this "computation of damages" as not providing a "concrete number."

damages disclosure is three-fold: (1) to "accelerate the exchange of basic information" without the need of a formal discovery request; (2) to prevent a party from "being unfairly surprised by the presentation of new evidence;" and (3) to understand the proportionality of the case. *See Appellant's Brief at 11 and the cases cited therein.* These goals are reinforced in the 2011 Utah Advisory Notes stating that information about damages should be provided "early in the case" and the rules should be enforced to prevent "sandbagging."

Williams acted in accordance with these goals at all times. He immediately disclosed his belief that he was "entitled to 30% of the price Tricked Out Services, Inc. paid for Fix-A-Phone, LLC as well as 30% of any equity or ownership interest Defendants may have in Tricked Out Services, Inc...." (R. 485). In doing so, Williams provided discrete, immediate information about the "nature and extent" of his claims. He did so without a discovery request pending, and his description plainly allowed the parties to identify the relevant evidence – that is, what did Tricked Out Services Inc. actually pay for Fix-A-Phone under the Asset Purchase Agreement and, as part of that transaction, did Tricked Out provide Defendants with an equity interest. And while this information was unknown to Williams at the time his complaint was filed, Defendants were aware that the sale price was $200,000.00 (to be paid over 24 months) and that they received no equity in Tricked Out. Once these facts were disclosed to Williams, the parties addressed and prepared this case in a proportional manner, as discussed in more

detail below. Williams in no way engaged in any "sandbagging" and in no way were Defendants surprised by the presentation of any new evidence.

II. DEFENDANTS' RED HERRINGS SHOULD BE REJECTED.

Defendants offered the Trial Court, and now this Court, numerous red herrings to avoid the technical nature of its argument and to justify their narrow, improper interpretation of Rule 26. Each are addressed below and should be rejected.

Defendants assert that although Williams disclosed his entitlement to 30% of the "price paid" for Fix-A-Phone, Defendants were left to guess regarding how much Williams thought Defendant actually received for Fix-A-Phone. But Defendants admitted at oral argument that they knew "even at the time of the complaint that the company sold for $200,000" and that Williams had identified this amount in his deposition. (R. 929). Defendants then argued that perhaps Williams might be claiming that there was "some sort of collusion the – and that the purchase price was depressed." (R. 953-955). But when pressed at oral argument, Defendants admitted that Williams had never raised such an issued. And indeed, there is no ambiguity in Williams' disclosure on this point – he is seeking 30% of the "price Tricked Out Services, Inc. paid" for Fix-A-Phone – not some unknown hypothetical higher purchase price (that would be unsupported by any evidence whatsoever and on which Williams would have no foundation to testify in any event). Williams never argued for anything else, notwithstanding Defendants' creation of imaginary damages scenarios never raised.

Defendants also argue that this case was originally designated as Tier Three due to Williams' incorrect initial belief that Fix-A-Phone was sold for $1.5 million. But once the sales agreement was produced in discovery, the parties treated and prepared this case in a proportional matter. As referenced in Williams' opening brief, only three depositions were taken and a few sets of written discovery exchanged. *See* Williams' Brief at 5. Two half-day depositions were taken by Williams and one half-day deposition was taken by Defendants. No party came anywhere close to using the 15 hours of deposition testimony per side authorized by Tier Two, much less the 30 hours of deposition testimony per side allowed by Tier Three. Defendants cannot and do not dispute this point. Indeed, Defendants counsel admitted during oral argument that "I understand the notion that discovery has been minimal, at least in writing and in depositions..." (R.868).

The facts that Defendants hired one expert witness (on liability, not damages (R. 861)) and that a three day trial was scheduled (out of an abundance of caution since a jury was involved and even though the parties were hopeful to be finished in two days (R. 869)) does not mean that the parties prepared the case as if $500,000.00 was at issue. Rather, as reflected in Williams' deposition testimony, Defendants knew all along that Williams believed Fix-A-Phone was sold for $200,000.00 as set forth in the undisputed evidence on the issue –the Asset Purchase Agreement –and not $1.5 million. And nowhere can Defendants point to any part of the record whatsoever where a $500,000.00 damages number was advocated after the production of the Asset Purchase Agreement.

Defendants also incorrectly assert that Williams was never willing to "limit his damages to 30% of Fix-A-Phone's sale price." *See* Appellee's Brief at 7. In support of this position, Defendants rely upon a January 2014 email exchange between counsel (prior to an April 2014 mediation) and testimony from Williams' deposition in June 2014. Both events occurred, as Defendants recognize, *before* Defendants had fully responded to Williams' discovery requests (as the Trial Court's assistance was needed in obtaining compliance (R.368-370)) or Defendants were deposed in December 2014. (R.380-382). As this discovery was conducted, the evidence established that the $200,000.00 sale price was the total amount paid to Defendants. That is, Williams confirmed that there were no other payments from Tricked Out to Defendants.[3] Defendants' reliance upon statements made in the middle of discovery presents an incorrect picture to this Court (as it did to the Trial Court).

In fact, Williams always maintained that he is entitled to 30% of "the price Tricked Out Services, Inc. paid for Fix-A-Phone as well as 30% of any equity or ownership interest Defendants may have in Tricked Out Services, including any money owed by Tricked Out Services, Inc." (R. 475). The Asset Purchase Agreement set forth the "Purchase Price" in two parts. (R. 538-539). Section 2.01 stated that there would be a $200,000.00 purchase price paid over 24 months, with the final payment due in January 2015. Section 2.02 discussed an "incremental revenue share" setting forth payments to

[3] Williams eventually learned, just days before the motion in limine hearing, that such testimony turned out to be incorrect – as $30,000.00 in payments under Section 2.02 had in fact been made in early 2015. Defendants failed to promptly supplement their discovery responses on this point. (R. 861).

Defendants for certain "cell phone repair services." (R. 538-539). As Williams testified at his deposition in July 2014, he had read in the Asset Purchase Agreement that the company had been sold to Defendants for $200,000.00 under Section 2.01. What Williams did not know at the time, and did not learn until later, was that there were no payments to Defendants under Section 2.02.

Thus, as Williams pointed out in his opposition to the motion in limine, "Defendants have testified that they received no ownership interest in Tricked Out Services, Inc. as a result of the sale and there were no assets or cash kept in Fix-A-Phone LLC after the sale. Assuming Defendants testimony remain consistent on this point then there are no damages for these items." (R. 509). Williams was left to pursue the $200,000.00 referenced in the Asset Purchase Agreement, which Defendants signed and Williams testified about in June 2014. Williams did not "hedge" regarding his damages theory or "contest" his own damages theory. *See* Appellee's Brief at 21. His damages analysis was known and consistent. He was entitled to 30% of the $200,000.00 total sale price per Section 2.01, as no other payments had been made according to Defendants.

III. EVEN IF WILLIAMS' "COMPUTATION OF DAMAGES" DID NOT TECHNICALLY COMPLY WITH RULE 26(a), SUCH A FAILURE WAS HARMLESS.

Defendants provide no specifics regarding how they would have been prejudiced by proceeding to trial even if Williams had in fact failed to properly supplement his initial disclosures. And the cases cited by Defendants reinforce the fact that no prejudice existed here.

Defendants cite to *Bodell Constr. Co.* for the principal that new damages theories can be prejudicial because defendants "are now unable to conduct fact discovery to rebut those theories." *See* Appellee's Brief at 26, n. 11. But here Defendants needed no additional fact discovery to "rebut" any new theories as Williams advocated no new theories. Defendants therefore failed to identify any additional necessary fact discovery, most likely because all the relevant information had always been in Defendants' possession. Other cases cited by Defendants – for example, *Lippman v. Coldwell Banker Residential Brokerage Co.*, 2010 UT App 89, ¶ 3 – stand for the proposition that late disclosures can be prejudicial because they delay trial. *See* Appellee's Brief at 26. But Defendants have never explained why any delay would be necessary here, and Defendants' never asked the Trial Court to delay trial.

Defendants therefore offer arguments that fail to address the fundamental issue of whether any technical breach of Rule 26 was "harmless." Defendants likewise fail to address the factors identified by the Tenth Circuit as relevant to this issue. Defendants instead argue that the "District Court correctly noted that it was *Williams'* job to disclose his damages calculation." *See* Appellee's Brief at 27. This argument, in essence, can be reduced to the assertion that any rule violation causes prejudice in some way and therefore is not harmless. Utah law has never supported such a broad view of "prejudice," or such a narrow definition of "harmless," and Defendants cite to no caselaw in support of this proposition. Nor is Defendants' argument consistent with the text of

Utah R. Civ. P. 26(d)(4), which recongizes that some failures to supplement timely can in fact be "harmless."

Defendants are thus left to argue again that they were prejudiced because they over-prepared the case based on the Tier Three designation. But such a statement is neither true nor supported by the record. As addressed above, Defendants took *one* half-day deposition. A few sets of discovery were exchanged and subpoenas for documents were sent to third parties. (R. 141-158, 167-181, 163-164, 199-200, 318-319, 322,328, 333-334, 380-382). Nor did the Trial Court take evidence on whether Defendants had in fact "over-prepared" based on the Tier Three designation. Instead, the trial court simply accepted Defendants' unsupported and inaccurate statement that "they defended this lawsuit as if it were a $450,000.00 case" (R. 696) even through Defendants' counsel admitted that he "understood the notion that discovery has been minimal."

CONCLUSION

Defendants assertion that it was "forced to wade through years of discovery" wondering the whole time whether "they were facing a suit for millions of dollars" (*see* Appellee's Brief at 30) simply cannot be squared with the facts of this case. The truth is much more simple.

Williams asserted that he was entitled to 30% of the sales price of Fix-A-Phone. He never asserted that price was deflated, inflated, or in some way improper. He never asserted that he was entitled to other funds not provided to Defendants as part of the sale price. Defendants knew the entire time that the sale price was $200,000.00 to be paid

over 24 months and, once Williams learned that fact, the parties proceed forward with reasonable and proportional discovery, taking (in Defendants' words) "minimal discovery." Williams hid nothing and was not sandbagging anyone. His computation of damages was clear, unequivocal, and certainly provided Defendants with notice of the "nature and extent" of the claimed damages. Only by ignoring every single piece of written and testimony evidence in the case, including Williams testimony that he understood the company had sold for $200,000.00, could Defendants possibly believe that they were "facing a suit worth millions of dollars."

Williams' initial disclosure thus properly set forth a "computation" of his requested damages. As a result, the Trial Court's ruling that a "claim of a fixed percentage of damages does not comply with the requirement to disclose a calculation of damages . . ." is erroneous and should be overturned by this Court. For the reasons set forth above, Williams respectfully requests that the Trial Court's order, dated October 13, 2015, be reversed.

DATED this 11th day of May 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that in accordance with Rule 24(f)(1)(A) of the Utah Rules of Appellate Procedure, this Brief is in compliance with the Type-Volume Limitations set by the Court. Specifically, this Brief contains 3,873 words including all headings, footnotes, and quotations, and 379 lines of text.

DATED this 11th day of May 2016.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed with the Court on this 11th day of May 2016, and a copy was delivered via first class mail to:

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