
Court of Appeal of the State of California
Fourth Appellate District, Division One

STORIX, INC.,

Plaintiff and Respondent

v.

ANTHONY JOHNSON,

Defendant, Appellant.

ANTHONY JOHNSON,

Cross-Claimant, Appellant

v.

DAVID HUFFMAN, RICHARD
TURNER, MANUEL
ALTAMIRANO, DAVID
KINNEY, and DAVID
SMILJKOVICH,

*Cross-Defendants,
Respondents.*

ANTHONY JOHNSON,

Plaintiff, Respondent

v.

DAVID HUFFMAN, RICHARD
TURNER, MANUEL
ALTAMIRANO, and DAVID
KINNEY

Defendants, Respondents

Court of Appeals Case No. **D075308**

Superior Court case no.

37-2015-00028262-CU-BT-CTL

Consolidated under lead case no.

37-2015-00034545-CU-BT-CTL.

On appeal from Judgments and Orders
of San Diego Superior Court
Judge Kevin A. Enright

Court of Appeals Case No. **D077096**

Superior Court Case No.

37-2019-00002457-CU-BT-CTL

On Appeal from Orders of San Diego
Superior Court Judge
Katherine A. Bacal

**APPELLANTS' APPLICATION FOR
CONSOLIDATION OF APPEALS**

Anthony Johnson

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TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE: Appellant, Anthony Johnson, respectfully submits this application requesting that the two above-captioned appeals pending before this Court be consolidated according to the lowest-numbered case – Court of Appeals case no. D075308. This application for consolidation is based upon the present memorandum of points and authorities and declaration of appellant Anthony Johnson.

MEMORANDUM

I. INTRODUCTION

Anthony Johnson is the single appellant (“Johnson”) and respondents in both appeals to be consolidated are the same individuals. (“Respondents”.) No prejudice will be caused and judicial economy will be served by consolidating the appeals since both have been fully briefed by the same parties and attorneys, and all issues can be adequately addressed in a single appeal.

The appeals are also related and inter-dependent such that resolution of both will be expedited by the consolidation. The first appeal challenges a trial judgment based on a claim introduced in closing arguments. If reversed on any one of several legal grounds, the order challenged in the second appeal must also be reversed since its grounds for awarding fees will be rendered moot. Both appeals also ask the same question of whether Respondents incurred costs.

II. A REVIEWING COURT HAS INHERENT POWER AND BROAD DISCRETION TO CONSOLIDATE APPEALS

“[T]he granting or denying of a motion to consolidate appeals is entirely in the discretion of the reviewing tribunal.” (*Sampson v. Sapoznik* (1953) 117 Cal.App.2d 607, 609.) Consolidation is merited when the issues presented are so related that resolution will be expedited by the consolidation. (*See, Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 165, fn. 3 [noting the Court of Appeal erred

in consolidating appeals raising “fundamentally different issues”]; *Sampson v. Sapoznik*, supra, 117 Cal.App.2d at p. 609.) Witkin is in agreement: Where actions separately tried are nevertheless so related, they may often profitably be considered together on appeal. So far as the reviewing court is concerned, it may without order place them on the calendar together, make use of briefs and arguments interchangeably, and write only one detailed opinion, deciding the other cases on the authority of the first. (9 Witkin, California Procedure (5th ed. 2008) Appeal, §788.)

III. STATEMENT OF CASES AND FACTS

Johnson demonstrated substantial knowledge of relevant statutes and law, civil procedures, and appellate procedures when acting pro se in the underlying cases and when drafting and filing the appeals to be consolidated. (Johnson Decl. ¶ 2.)

Respondents are the collective 52% majority shareholders of Storix who are also the board majority and occupy all officer positions. Respondents have exclusive control of Storix, and they use its funds and attorneys to sue Johnson and defend themselves against all counter claims. (*Id.* ¶¶ 3-10, 17, 22.)

Johnson received no such benefit from his 40% ownership of Storix, even as he funded a shareholder derivative lawsuit on Storix’s behalf. (*Id.* ¶ 8, “Derivative Lawsuit”.) Johnson can no longer afford an attorney, and therefore limited his appeals to judgments and orders in which he was a direct party so that attorney representation is not required. (*Id.* ¶ 12.)

Judge Enright’s Judgment & Pre/Post-Trial Orders (Case D075308)

This appeal involves a direct lawsuit Respondents brought against Johnson in Storix’s name alleging unfair head-start by operating a competing business, demanding \$1.25 million from Johnson as unjust enrichment, which was consolidated under the Derivative Suit. (Johnson Decl. ¶¶ 6-9, “Direct Lawsuit”.) The jury awarded nothing on the claim, but they awarded \$3,739.14 on a new claim of “employees’ loss of productivity” Respondents added in closing arguments. (*Id.* ¶ 9.) The claim was based entirely on an email Johnson sent to Respondents *after* they sued him. (*Ibid.*)

Johnson appeals the jury's verdict, judgment, JNOV and new trial motions on grounds that the lawsuit was never approved by a disinterested Storix board, falsely alleged Johnson lived in California, must have been a shareholder derivative suit, involved prejudicial pre-trial motions, misleading and omission of relevant jury instructions, and Storix prevailed only on a new claim introduced in closing arguments. (Johnson Decl. ¶ 14.)

Johnson brought cross-claims against Respondents alleging breaches of fiduciary duty and fraud related to their majority abuse. (Johnson Decl. ¶ 7.) Johnson's primary cross-claim was for their using Storix to file the Direct Lawsuit against him without board approval, which was dismissed on the ground that Johnson alleged protected activity. (*Id.*) The jury decided against Johnson's remaining cross-claim that the cross-defendants unfairly deprived him a job or any income from Storix. (Johnson Decl. ¶ 9.)

Johnson appeals the dismissal of his primary cross-claim on the basis that that alleged illegal conduct, and the jury's verdict against his remaining cross-claim based on prejudicial pretrial motions and misleading/omitted jury instructions relevant to his claims. (Johnson Decl. ¶ 14.) Johnson further appeals the post-trial orders awarding Respondents (as Storix and individuals) \$180,000 in costs and fees to all parties in all consolidated actions, including Johnson's \$50,000 bond posted to secure his standing as a derivative plaintiff after the court dismissed Johnson as a plaintiff. (*Id.* ¶¶ 13-14.)

A. Judge Bacal's Post-Dismissal Order (D077096)

After the jury and bench trials, Johnson discovered the individual Respondents had syphoned \$475,560 from his Storix profits while he was on a medical leave in 2011 Respondents didn't expect him to return from. (Johnson Decl. ¶¶ 4-5, 15.) Johnson filed this new lawsuit against the them for conversion and for malicious prosecution of Storix's competition claim in the Direct Lawsuit, which he defeated at trial. (*Id.* ¶ 16.)

The court rejected Johnson's first request to enter default against Respondents and ignored the second until after Respondents concurrently filed a special motion to strike (anti-SLAPP motion) and a 28-day late demurrer. (*Id.* ¶¶ 18-23.) This prevented Johnson from amending his complaint before or after the court heard Respondents' \$160,000 out-

of-state plaintiff's bond motion. (*Id.* ¶¶ 17, 24.) Johnson voluntarily dismissed his complaint without prejudice to avoid a motion intended to prevent him from having the financial resources to prosecute his claims. (*Id.* ¶ 25.)

After the dismissal, the court denied Johnson's motion to strike or tax costs and awarded Respondents \$2,364 despite their having incurred no costs. (*Id.* ¶ 26.) The court also denied Johnson's request to stay the decision until after the appeal of Judge Enright's cost award on the same grounds. (*Ibid.*)

The court further granted Respondents \$12,237 in attorneys fees, finding they would have partially prevailed on their anti-SLAPP motion if Johnson hadn't dismissed the case before it was heard. (*Id.* ¶ 27.) The ground was that Johnson could not allege favorable termination of the entire Direct Lawsuit underlying the malicious prosecution claim, specifically the \$3,739.14 judgment against him on the email claim. (*Ibid.*)

Johnson appeals the court's post-dismissal order awarding fees and costs to Respondents. (Johnson Decl. ¶ 28.) Johnson appeals on grounds that Respondents would not have prevailed on their anti-SLAPP because a malicious prosecution does not require favorable termination of the entire underlying lawsuit, Johnson's malicious prosecution action was directed only to the claim alleged in the complaint on which he prevailed (and not the claim Respondents added in closing arguments), a claim pending appeal is severable when determining favorable termination, and Johnson he voluntarily dismissed the lawsuit for reasons other than to avoid their anti-SLAPP motion. (*Id.* ¶¶ 27-28.) Johnson further appealed the costs award to Respondents because they didn't prevail on a practical level and never incurred any legal expenses. (*Id.* ¶ 28.)

B. The Appeals are Related and Inter-Dependent

Johnson appealed Judge Enright's judgment against him, which was based solely on Storix's \$3,739 email claim ("Email Judgment"), on several grounds. (*See* § A.)

Johnson appealed Judge Bacal's post-dismissal orders awarding attorney's fees ("Fee Order") and costs ("Cost Order") because her decision that Respondents would have prevailed against Johnson's malicious prosecution action was premature. (*See* § B.) The Fee Order is dependent on Email Judgment which, if reversed, requires reversal of

the Fee Order as well. The Fee Order was based on the court’s assumption that Johnson could not allege favorable termination of the lawsuit (Email Judgment) underlying his malicious prosecution action. That assumption was premature because the Email Judgment was pending appeal and its reversal will establish favorable termination of the entire lawsuit. (Johnson Decl. ¶ 27.) Only if the Email Judgment is affirmed will it be necessary to decide the appeal of the Fee Order appeal on several other grounds. (*Ibid.*)

Also, Johnson asked Judge Bacal to stay her decision in the Cost Order until the appeal of the Email Judgment since it involved the same question of whether it was proper to award costs to Respondents who incurred no costs (and what it means to “incur” costs). (*See* Johnson Decl. ¶ 26.) She would not stay her decision, so both appeals ask the Court to resolve the same issue.

Lastly, both appeals demonstrate substantial bias by both Judge and Judge Bacal against Johnson while he was acting pro se, especially in needlessly ordering him to pay Respondents \$195,000 in costs and fees knowing they incurred no expenses and were using Johnson’s own shareholder profits to litigate against him. (Johnson Decl. ¶¶ 8-13, 18-23.) None of their decisions followed the law, and both judges assumed Johnson didn’t have the means to afford an attorney to appeal them. Johnson can’t afford an attorney, but he no longer needs one. (*Id.* ¶¶ 2, 12.)

IV. CONCLUSION

For all the foregoing reasons and to promote judicial economy, appellant requests that the two appeals, case numbers D075308 and D077096, be consolidated and heard as a single appeal.

Dated: July 6, 2020

Respectfully submitted by:

/s/Anthony Johnson
In Pro Per

DECLARATION OF ANTHONY JOHNSON

I, Anthony Johnson, declare:

1. I am self-represented in this action, have personal knowledge of the following facts and, if called upon to do so, could and would testify thereto.

2. I have substantial knowledge of relevant statutes and law, civil procedures, and appellate procedures. I personally filed the appeals that I now wish to consolidate, created and electronically filed the appendices, and drafted and electronically filed the opening and reply briefs. I can adequately represent myself on appeal and confidently provide oral argument if allowed.

3. I am the founder of Storix, Inc., which I incorporated in 2003 to sell the software I designed, developed, and copyrighted in 1999. I was the sole shareholder, officer and director of Storix until 2011, when I gifted a collective 60% of Storix's shares to my long-term employees after receiving a terminal cancer diagnosis. The new shareholders have since occupied the Storix board majority and all officer positions.

4. After an unexpected recovery, I returned to Storix in 2013 to work on a year-long project to update the network security of my software. As I was nearing completion, my former employees began criticizing my work and otherwise created such a hostile work environment that I was forced to resign.

5. The facts below are found in the appendices of the appeals I wish to consolidate, case no. D075307, Clerk's Transcript ("CT") and Reporter Transcript ("RT"), and in case no. D077096, Appellant's Appendix ("AA").

6. In 2015, I used my remaining 40% share of Storix to elect myself and another (8%) shareholder, Robin Sassi ("Sassi") to the Storix board. (6 CT 1532.) Shortly thereafter, Storix filed a direct lawsuit against me for allegedly intending to operate a competing business while serving as a Storix director. (1 CT 49, "Direct Lawsuit".) The Storix board was not notified and did not approve the lawsuit, which falsely alleged I lived in San Diego but was filed after I moved to Florida. (2 CT 426; 11 RT 1479.)

7. I was a self-represented defendant in the Direct Lawsuit the 52% shareholders directed Storix's attorneys to file against me. I was pro se in filing a cross-complaint against the 52% shareholders for various acts of majority abuse. (3 CT 585.) The primary cross-claim was for their filing the Direct Lawsuit without notice or approval by the Storix board (3 CT 595), which was dismissed on cross-defendants' anti-SLAPP motion as protected activity. (5 CT 1292.)

8. I hired an attorney to represent Storix's claims in a shareholder derivative lawsuit that Sassi and I brought against the 52% majority shareholders. (3 CT608, Derivative Lawsuit"). I funded the shareholder derivative claims on Storix's behalf. (4 CT 882.) The Direct Lawsuit was eventually consolidated under the Derivative Lawsuit, after which the attorney had to also represent me in the Direct Lawsuit. The 52% majority used Storix's counsel and their personal counsel to defend against all lawsuits upon which these appeals are based, and all their bills were paid by Storix. (9 RT 1007; 10 RT 1181; 2 AA 320.)

9. In 2018, The Direct Lawsuit was tried before a jury in Judge Enright's Court, where counsel for Storix and the 52% majority shareholder defendants submitted joint pre-trial motions, and sat together at the plaintiff's table, and joined in examining and cross-examining every witness during Storix's prosecution of the Direct Lawsuit against me and on my cross-claims.. (*See generally* 8 RT 799 – 16 RT 2731.) The jury rejected Storix claim that I was unjustly enriched \$1.25 million by preparing to operate a competing business, but awarded Storix \$3,739.14 on a new claim of "loss of employees' productivity" raised in closing arguments and based on a 2015 email that did not exist when the Direct Lawsuit was filed. (*See* 13 RT 1944; 17 RT 2847-2848, 2927; 17 CT 2849; 11 CT 3054; 12 CT 3098.) The jury generally decided in favor of the cross-defendants on my cross-claims. (11 CT 3055-3056.)

10. Two months later, the Derivative Lawsuit was tried at bench before Judge Enright. The 52% majority shareholders, who were the defendants, filed a motion to dismiss me as a representative plaintiff. (11 CT 3061.) Judge Enright granted the motion based on the jury award of \$3,739.14 on the 2015 email claim demonstrating I could not

“fairly and adequately represent the interests of the shareholders.” (19 CT 3002.) All shareholders but the 52% defendants opposed the motion.

11. Because Sassi remained a derivative plaintiff, Judge Enright heard “Sassi’s claims”, and found in favor of the defendants on all causes of action. (12 CT 3359.)

12. Following the bench trial, I was no longer able to afford an attorney. I therefore could not appeal the decisions in the Derivative Lawsuit and limited my post-trial motions, oppositions and appeals to cost and fee awards against me and other issues in the Direct Lawsuit in which I could represent myself.

13. Judge Enright awarded over \$180,000 in costs and fees in all consolidated actions to Storix, the cross-defendants, and the derivative defendants. Judge Enright ignored that they were all the same individuals and that Storix, as a “nominal defendant” in the Derivative Lawsuit, had no right to recover legal expenses of its attorneys who defended against its own claims. (14 CT 3785.) He released the \$50,000 bond I posted to secure my standing as a shareholder derivative plaintiff after dismissing me as a plaintiff based on the jury’s verdict of \$3,739.14. (14 CT 3914; 19CT3002.)

14. In 2018, I filed the appeal of the judgment and orders in the Direct Lawsuit, including the orders awarding costs and fees against me. I appealed the dismissal of my primary cross-claim because I alleged illegal (not protected) conduct, and the jury’s verdict against my cross-claim due to prejudicial pretrial motions and misleading and omitted jury instructions pertinent to my claim. (*See gen.* case no. D075308, Appellant’s Opening Brief (AOB).)

15. In October 2018, I discovered that the cross-defendants syphoned \$475,560 from my Storix retained earnings when I was on medical leave in 2011. (1 AA 19, 197.)

16. In January 2019, I filed a new lawsuit against Storix’s 52% majority shareholders for the conversion of my retained earnings and for malicious prosecution by bringing and maintaining the Direct Lawsuit against me for 3 years without cause. (1 AA 12.) The new lawsuit was assigned to Judge Katherine Bacal. (1 AA 29.)

17. The defendants in the new lawsuit filed a motion demanding I post a \$160,000 out-of-state plaintiff’s bond to cover their costs of suit through trial, despite

their using Storix funds to pay all their legal bills, and a motion to stay proceedings until the bond is furnished. (1 AA 37.)

18. After the defendants failed to answer, I filed a request to enter default which was rejected six days later because there was a motion to stay on file. (1 AA 52, 63.)

19. Knowing that a bond motion under CCP § 1030(b) is not a responsive pleading, I contacted the court clerk, who instructed me to refile my request. I did so the same day, and the request remained pending for three weeks. (1 AA 64.)

20. Judge Bacal scheduled a status conference to address the defendants' pending bond motion. (1 AA 61.) The day before the status conference, the defendants filed an anti-SLAPP motion and a motion to demurrer 28 days late. (1 AA 75, 98.) On the same day, I filed a request for default judgment against all defendants for damages stated in the complaint, a declaration and evidence in support of compensatory damages and pre-judgment interest, and a statement of punitive damages. (1 AA 190.)

21. I appeared at the status conference in person, whereat I asked about my pending request for default. Judge Bacal said me she would not grant the default because there was a demurrer on file. I noted that the demurrer was a month late, filed without requesting an extension and while my default was pending. Judge Bacal responded that she had authority to grant an extension without a request and that the date of my request for default was irrelevant because only the date the court enters it that matters.

22. Judge Huff's order on the status conference states, "The Court notes that the Status Conference was set to address Mr. Johnson's repeated requests for entry of default. The Court notes that default could not be entered and indicates that there are responses on file." (1 AA 189.) The status conference was not set to address my repeated requests for default. At the time it was scheduled, I had only filed one request, and the notice of the conference said, "SET PER COURT RE: PENDING MOTIONS." (1 AA 61.) The motions referred to were the defendants' motions for a plaintiff's bond and to stay proceeding until the bond is posted.

23. Two days later, my request for entry of default was denied, stating that “No Action due to Demurrer and Anti-Slapp Motion on File.” (1 AA 204.) A month later, my request for default judgment was rejected because “Parties have not been defaulted.” (1 AA 227.)

24. Based on the arguments in the defendants’ motions, I wanted to amend my complaint to include additional facts pertaining to delayed discovery and that an appeal of the email claim in the Direct Lawsuit underlying the malicious prosecution action was pending. I couldn’t amend my complaint while my request for default was pending, and I couldn’t amend after the defendants filed their demurrer because they filed a concurrent anti-SLAPP motion.

25. Because Judge Bacal exhibited blatant bias toward me at the status conference whereat stated a number of facts and legal statements I knew to be false, I expected she would also grant the defendants’ motion for the \$160,000 bond to prevent me from prosecuting the claims, which was scheduled to be heard before their other motions. I also expected she would dismiss my claims with prejudice without allowing me leave to amend. I therefore voluntarily dismissed my complaint without prejudice before any motions were heard. (1 AA 229.)

26. Judge Bacal denied my motion to strike or tax costs and awarded the defendants \$2,364 for costs of suit, finding them prevailing parties because they “obtained a dismissal”. (2 AA 406-407.) She opposed all my arguments in her order by misapprehending cost statues and case law and ignoring those I properly cited to the contrary. She also refused my request to stay her ruling pending the outcome of my appeal of Judge Enright’s cost order in which he also granted costs to the defendants despite their having incurred no expenses. (Case no. D075307.)

27. Judge Bacal next granted the defendants’ \$12,237 in attorney’s fees by finding their anti-SLAPP motion would have been successful had I not dismissed the case. (2 AA 412.) She decided the defendants would have prevailed on their motion as to the malicious prosecution claim because of the \$3,739.14 judgment against me in the Direct Lawsuit. (*Ibid.*) I argued the “severability rule” allows a malicious prosecution

action to be directed to different claims and even related that are pending appeal. (2 AA 332.) She found “there must be a favorable termination of the entire underlying action” by citing cases involving only one claim but partial recovery or different theories of recovery. (2 AA 412.)

28. I filed an appeal of Judge Bacal’s orders awarding costs and anti-SLAPP attorneys fees on the basis that she wrongly found the defendants would have prevailed on their anti-SLAPP motion and I dismissed the lawsuit for reasons other than to avoid the motion. I also appealed her cost awards because the defendants incurred no expenses and were not the prevailing party on a practical level. (*See gen.* case no. D077096, Appellant’s Opening Brief (AOB).)

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct, and this declaration was signed in Las Vegas, Nevada.

DATED: July 7, 2020

/s/ Anthony Johnson
In Pro Per

PROOF OF SERVICE

I, Anthony Johnson, declare that I am over the age of 18 and self-represented in the two foregoing actions to be consolidated. I am familiar with the business practice for electronic filing and service through the TrueFiling system, pursuant to which practice I served the foregoing:

APPELLANT’S APPLICATION FOR CONSOLIDATON OF APPEALS

by electronic filing and sending to the e-mail addresses of counsel listed below:

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I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on July 7, 2020 at Las Vegas, Nevada.

/s/ Anthony Johnson _____