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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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.

**BRIEF ON CROSS-APPEAL OF RESPONDENT/APPELLANT
JULIA SIBLEY-JONES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
WILLIAM A.L. SIBLEY, JR.**

Gregory J. English (S.C. Bar No. 65470)
James E. Cox, Jr. (S.C. Bar No. 103886)
WYCHE, P.A.

200 East Broad St., Suite 400
Greenville, South Carolina 29601
Post Office Box 728
Greenville, South Carolina 29602
(864) 242-8200

Attorneys for Respondent/Appellant Julia Sibley-Jones, as
Personal Representative of the Estate of William A.L.
Sibley, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ISSUES ON APPEAL 1

STATEMENT OF THE CASE..... 1

STANDARD OF REVIEW 3

ARGUMENT 3

 I. WHERE THE \$440,000 DUE SIBLEY-JONES WAS LIQUIDATED, THE
 CIRCUIT COURT ERRED IN NOT AWARDING SIBLEY-JONES
 PREJUDGMENT INTEREST ON THAT AMOUNT FROM OCTOBER 16,
 2018, TO OCTOBER 13, 2021..... 3

 II. WHERE SIBLEY-JONES WAS THE PREVAILING PARTY, THE
 CIRCUIT COURT ERRED IN NOT AWARDING SIBLEY-JONES COSTS
 OF \$999.31. 6

CONCLUSION..... 7

TABLE OF AUTHORITIES

Cases

Babb v. Rothrock,
310 S.C. 350, 426 S.E.2d 789 (1993) 4

Builders Transport, Inc. v. South Carolina Property & Casualty Ins. Guaranty Ass’n,
307 S.C. 398, 415 S.E.2d 419 (Ct. App. 1992)..... 5

Burnett Dubose Co., Inc. v. Starnes,
284 S.C. 196, 324 S.E.2d 651 (Ct. App. 1984)..... 5, 6

Carolina First Bank v. BADD, LLC,
414 S.C. 289, 78 S.E.2d 106 (2015) 3

Peterson v. National R.R. Passenger Corp.,
365 S.C. 391, 618 S.E.2d 903 (2005) 6

Robert E. Lee & Co. v. Commission of Public Works,
248 S.C. 92, 149 S.E.2d 59 (1966) 4

Smith-Hunter Const. Co., Inc. v. Hopson,
365 S.C. 125, 616 S.E.2d 419 (2005) 4, 5

Turner Coleman, Inc. v. Ohio Const. & Engineering, Inc.,
272 S.C. 289, 251 S.E.2d 738 (1979) 5, 6

Weeks v. McMillan,
291 S.C. 287, 353 S.E.2d 289 (Ct. App. 1987)..... 5

Statutes

S.C. Code Ann. § 15-37-40..... 6

S.C. Code Ann. § 34-31-20..... 3, 5, 6

Rules

Rule 201, SCRE 7

Rule 54, SCRCP..... 6

Rule 59, SCRCP..... 6, 7

ISSUES ON APPEAL

- I. **Where the amount due Sibley-Jones was liquidated, did the Circuit Court err in not including prejudgment interest in the judgment against Decide4Action, Inc.?**
- II. **Where Sibley-Jones was the prevailing party, did the Circuit Court err in not awarding Sibley-Jones costs?**

STATEMENT OF THE CASE

On or about 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 “Purchase Agreement”) 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”). (R. pp. 569-614) Decide4Action purchased the stock of the Company from the Selling Shareholders pursuant to the Purchase Agreement at a closing that occurred on October 16, 2017 (the “Closing Date”).

As part of the closing, the Selling Shareholders and Decide4Action entered into an Indemnity Escrow Agreement (the “Contract”), pursuant to which the Selling Shareholders agreed to place Four Hundred Forty Thousand and No/100 Dollars (\$440,000.00) of the purchase price into an escrow account (the “Escrow Account”) at United Community Bank (the “Escrow Agent”) to satisfy indemnification obligations that the Selling Shareholders might have to Decide4Action pursuant to Section 8 of the Purchase Agreement within one year of the Closing Date, i.e., October 16, 2018. (R. pp. 615-623) 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 dated October 16, 2017. (R. pp. 637-643)

Instead, on September 19, 2018, Decide4Action notified the Escrow Agent that it had pending claims against the Selling Shareholders in the amount of One Million Three Hundred Fourteen Thousand Thirty-Four and No/100 Dollars (\$1,314,034.00) and requested that Escrow Agent continue to hold the funds in the Escrow Account. (R. pp. 624-626) Sibley responded in writing, demanding that Decide4Action confirm to UCB that the escrow funds should be released immediately or be held responsible for prejudgment interest on the escrow in addition to costs and attorneys' fees. (R. pp. 627-632) Decide4Action refused to permit the escrow to be released. (R. p. 633)

Sibley filed his Complaint on April 11, 2019, asserting causes of action against Decide4Action, Inc. for breach of contract and breach of contract accompanied by a fraudulent act. (R. pp. 17-31) Decide 4Action filed counterclaims against Sibley for breach of contract and breach of contract accompanied by a fraudulent act. Sibley died on August 4, 2020, and his personal representative, Plaintiff Julia Sibley-Jones ("Sibley-Jones"), then pursued the claims as Selling Shareholders' Representative. (R. pp. 42-68, 661)

A trial was held on July 26-28, 2021. At the conclusion of the evidence, the Circuit Court granted Plaintiff's motion for a directed verdict in favor of Sibley-Jones on all of Decide4Action's counterclaims. (R. pp. 10-13) The Circuit Court then granted Sibley-Jones's motion for a directed verdict in favor of Sibley-Jones on her breach of contract claim. (*Id.*) As noted in its Judgment in a Civil Case dated July 28, 2021, and filed July 30, 2021 (the "Judgment"), the Court ordered the Escrow Fund be released to Sibley-Jones. *Id.* at p. 2 ("The Plaintiff then moved for a Directed Verdict on the Breach of Contract action regarding the distribution of the Escrow Account being held by [UCB] under the [Escrow Agreement].... [T]he Court granted Plaintiff's Motion for Directed Verdict and ordered that the escrow funds being held by UCB be released to the

Plaintiff.”). However, the Court denied Sibley-Jones’s claim for prejudgment interest, finding “that due to Defendant’s viable claim under the Stock Purchase Agreement and the lack of such a provision in the Escrow Agreement, there was no basis for prejudgment interest.” (*Id.*) The Circuit Court then entered an order on August 6, 2021, directing UCB to release and deliver all funds in the Escrow Account to Sibley-Jones. (R. pp. 14-16)

Sibley-Jones moved to alter or amend the judgment to include prejudgment interest and costs, but the Circuit court denied that motion in an order received on October 13, 2021. (R. pp. 5-7, 173-191) On November 11, 2021, Sibley-Jones timely filed a notice of cross-appeal from that order and the Judgment. (Supp R. p. 24)

STANDARD OF REVIEW

In an appeal based on an error of law, the Court reviews *de novo*, owing no deference to the lower court’s decision. *Carolina First Bank v. BADD, LLC*, 414 S.C. 289, 292, 78 S.E.2d 106, 108 (2015).

ARGUMENT

As of October 16, 2018, Decide4Action had no valid, pending claims against the Selling Shareholders pursuant to the Purchase Agreement and therefore should have authorized the Escrow Agent to release the entire Escrow Fund to the Selling Shareholders. (R. pp. 10-13) Although the Circuit Court’s decision on liability was correct, it erred in failing to award Sibley-Jones prejudgment interest and costs. Accordingly, the judgment should be amended to award Sibley-Jones both prejudgment interest and costs.

I. Where the \$440,000 due Sibley-Jones was liquidated, the Circuit Court erred in not awarding Sibley-Jones prejudgment interest on that amount from October 16, 2018, to October 13, 2021.

Under S.C. Code Ann. § 34-31-20(A), liquidated sums bear prejudgment interest at the legal rate of 8.75% per annum. S.C. Code Ann. § 34-31-20(A) (“In all cases of accounts stated

and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum.”); *see also Robert E. Lee & Co. v. Commission of Public Works*, 248 S.C. 92, 149 S.E.2d 59, 62 (1966); *Babb v. Rothrock*, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993) (all finding that the law allows prejudgment interest on amounts that are liquidated). This “law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable and if the sum is certain or capable of being reduced to certainty.” *Smith-Hunter Const. Co., Inc. v. Hopson*, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005).

The Circuit Court incorrectly believed that because Decide4Action contested payment, the amount was disputed and not liquidated. However, pursuant to the parties’ Escrow Agreement, the Escrow Fund was to be released to Sellers on October 16, 2018. (R. p. 616, 635) Therefore, Decide4action owes Sibley-Jones interest on the \$440,000 from October 16, 2018, to October 13, 2021, or three years, at the legal rate of 8.75% in the amount of \$115,500 ($\$440,000 \cdot 0.0875 \cdot 3$). “The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest.” *Smith-Hunter Const. Co., Inc.*, 365 S.C. at 128. Rather, “[t]he proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.” *Id.*

Sibley-Jones requested prejudgment interest in her complaint and throughout the case. (R. pp. 17-31, 42-47) The measure of recovery on her breach of contract was fixed by conditions existing at the time the claim arose, i.e., it was fixed by the contracts at issue. Because the Closing Date was October 16, 2017, the \$440,000 originally placed in the Escrow Fund should have been

released to Sellers on October 16, 2018. (R. p. 616 (Escrow Fund to be released to Sellers “[o]n the first Business Day following the Indemnification Escrow Release Date,” defined as “the first anniversary of the date of the Closing Date”)) (R. p. 635 (“on the first anniversary of the Closing (i.e., twelve (12) months following the Closing), any remaining amounts in the Escrow Account shall be paid to Sellers”))

The Escrow Fund is a liquidated sum because it is “certain or capable of being reduced to a certainty.” *Builders Transport, Inc. v. South Carolina Property & Casualty Ins. Guaranty Ass’n*, 307 S.C. 398, 406, 415 S.E.2d 419, 424 (Ct. App. 1992); *Weeks v. McMillan*, 291 S.C. 287, 353 S.E.2d 289, 293 (Ct. App. 1987). Therefore, the Judgment should have included prejudgment interest on the \$440,000.

The Circuit Court also incorrectly ruled that the lack of a provision in the Escrow Agreement for prejudgment interest precluded an award of prejudgment interest. Instead, the law is that where a contract is silent on the rate of interest and plaintiff is entitled to a liquidated amount, the plaintiff is entitled to prejudgment interest at the legal rate set forth in S.C. Code Ann. § 34-31-20(A). *Burnett Dubose Co., Inc. v. Starnes*, 284 S.C. 196, 324 S.E.2d 651 (Ct. App. 1984) (holding the statutory interest rate prescribed by Section 34-31-20 is applicable “in the absence of a written agreement between the parties fixing a different rate of interest.”); *Turner Coleman, Inc. v. Ohio Const. & Engineering, Inc.*, 272 S.C. 289, 251 S.E.2d 738 (1979) (same). The law does not require the parties to agree to prejudgment interest, just a “sum is certain or capable of being reduced to certainty.” *Smith-Hunter Const. Co., Inc.*, 365 S.C. at 128. The \$440,000 placed into and due to be released from the Escrow Fund satisfies that requirement.

Decide4action’s argument in the court below that the parties agreed to a rate of interest in the Escrow Agreement is also incorrect. The parties simply agreed that the Escrow Fund, plus

whatever interest UCB paid on those funds between October 16, 2017, and October 16, 2018, would be paid to Sibley-Jones on October 16, 2018, if Decide4action had no legitimate Pending Claims Amount. The Escrow Agreement was silent as to the interest that would be due if Decide4action prevented the Escrow Funds from being paid on and after October 16, 2018. Because the contract was silent on the rate of interest to which Sibley-Jones was entitled on the liquidated amount after October 16, 2018, Sibley-Jones is entitled to prejudgment interest at the legal rate set forth in S.C. Code Ann. § 34-31-20(A). *Burnett Dubose Co., Inc. v. Starnes*, 284 S.C. at 197 (holding the statutory interest rate prescribed by Section 34-31-20 is applicable “in the absence of a written agreement between the parties fixing a different rate of interest.”); *Turner Coleman, Inc.*, 272 S.C. at 292 (same).

Accordingly, the Judgment should be amended to add prejudgment interest of \$115,500. S.C. Code Ann. § 34-31-20(A); Rule 59(e), SCRCP.¹

II. Where Sibley-Jones was the prevailing party, the Circuit Court erred in not awarding Sibley-Jones costs of \$999.31.

“[T]he Rules of Civil Procedure recognize that the prevailing party shall be allowed costs per a trial court’s ruling. Rule 54(d), SCRCP.” *Peterson v. National R.R. Passenger Corp.*, 365 S.C. 391, 618 S.E.2d 903, 908 (2005). Sibley-Jones incurred the following costs that are recoverable under Rule 54(d), SCRCP:

\$180.32	Filing fee for summons and complaint (Rule 54(e)(2), SCRCP)
31.74	Filing fee for motion to compel (Rule 54(e)(2), SCRCP)
<u>+787.25</u>	Deposition of Decide4action (S.C. Code Ann. § 15-37-40)
\$999.31	

¹ The amended judgment should also provide that post-judgment interest accrues from the date of the original judgment, so that Plaintiff is not unfairly prejudiced by a successful cross-appeal regarding prejudgment interest. *See* S.C. Code Ann. § 34-31-20(B).

The filing fees for the summons and complaint and motion to compel are matters of public record, the deposition was read into the record in this case and the receipt was attached to the motion, so the Court can take judicial notice of these costs. Rule 201, SCRE. Further, Sibley-Jones filed an affidavit establishing such costs. (R. pp. 190-191) Accordingly, the Judgment should be amended to add \$999.31 in costs. Rule 59(e), SCRC.P.

CONCLUSION

Although the Circuit Court's decision on liability was correct, the Circuit Court erred in not including prejudgment interest and costs in the judgment. Thus, the Court should remand with instructions that the judgment be amended to include prejudgment interest of \$115,000 and costs of \$999.31.

Respectfully submitted,

WYCHE, P.A.

BY: s/ Gregory J. English
Gregory J. English
James E. Cox, Jr.

200 East Broad St., Suite 400
Greenville, South Carolina 29601
Post Office Box 728
Greenville, South Carolina 29602
(864) 242-8200

Attorneys for Respondent/Appellant Julia Sibley-Jones, as
Personal Representative of the Estate of William A.L. Sibley, Jr.

June 23, 2022

Other Counsel of Record:

Howard W. Anderson III
Kimberly Thomason
Devon Puriefoy
Truluck Thomason, LLC
3 Boyce Avenue
Greenville, SC 29601

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CERTIFICATE OF COUNSEL

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

s/ Gregory J. English
Gregory J. English
James E. Cox, Jr.

200 East Broad St., Suite 400
Greenville, South Carolina 29601
Post Office Box 728
Greenville, South Carolina 29602
(864) 242-8200

Attorneys for Respondent/Appellant Julia Sibley-Jones, as
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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 **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:

Howard W. Anderson III
Kimberly Thomason
Devon Puriefoy
Truluck Thomason, LLC
3 Boyce Avenue
Greenville, SC 29601

s/ Gregory J. English
Gregory J. English
James E. Cox, Jr.

200 East Broad St., Suite 400
Greenville, South Carolina 29601
Post Office Box 728
Greenville, South Carolina 29602
(864) 242-8200

Attorneys for Respondent/Appellant Julia Sibley-Jones, as
Personal Representative of the Estate of William A.L. Sibley, Jr.

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