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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.

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

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INTRODUCTION

In the underlying proceedings, Respondent-Appellant Julia Sibley-Jones ("Sibley-Jones") obtained a judgment that Appellant-Respondent Decide4Action, Inc. ("Decide4Action") breached the contracts between the parties by making an unsupported claim that caused Sibley-Jones to not receive money in an escrow account. The Circuit Court's judgment unequivocally established that the money in the escrow account was due on a specific date set by contract, October 16, 2018, and that the amount due was ascertainable, $440,000. These facts established Sibley-Jones's legal entitlement to prejudgment interest under S.C. Code Ann. § 34-31-20(A), and it was an error of law for the Circuit Court to deny that request, as well as the request for court costs.

Contrary to Decide4Action's argument, the Circuit Court did not have discretion to deny the request for prejudgment interest because the entitlement to it is based on S.C. Code Ann. § 34-31-20(A), not other grounds for which discretion may exist. Moreover, Sibley-Jones preserved the issue for appeal by pleading entitlement to prejudgment interest and raising the issue sufficiently to get two rulings from the Circuit Court on it. Decide4Action's argument that the conditions of S.C. Code Ann. § 34-31-20(A) were not met because the contracts permitted the escrow agent to hold the funds during the pendency of the litigation is unfounded. It is well-established that a defendant's dispute of a sum due does not render the claim unliquidated for the purposes of an award of prejudgment interest. It makes no difference whether the defendant refused to pay the funds due itself or caused a third-party to not release the funds due. The sum is liquidated and due either way, and Decide4Action's argument otherwise has no support in S.C. Code Ann. § 34-31-20(A) and would defeat the clear intent of the statute.

Finally, Sibley-Jones was entitled to receive her costs under Rule 54(d), SCRCP, because she was unquestionably the prevailing party and all of the requested costs were amply documented

and undisputed. Decide4Action's argument that the application for costs was procedurally deficient is unfounded and unsupported by any authority.

ARGUMENT

I. The Denial of Sibley-Jones's Request for Prejudgment Interest Was an Error of Law that Should be Reversed.

A. The Circuit Court did not have discretion to deny prejudgment interest which Sibley-Jones was entitled to receive under S.C. Code Ann. § 34-31-20(A).

Decide4Action's erroneous arguments begin with the standard of review. The trial court does not have the discretion to deny prejudgment interest when the requirements of S.C. Code Ann. § 34-31-20(A) are met. Rather, the award of prejudgment interest is mandatory, as indicated by the plain language of the statute. *See* 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.") (emphasis added). Appellate courts have repeatedly confirmed this conclusion. *See Lee v. Thermal Eng'g Corp.*, 352 S.C. 81, 90, 572 S.E.2d 298, 303 (Ct. App. 2002) (holding that trial court was authorized to correct its mistake of omitting prejudgment interest from the judgment "[b]ecause prejudgment interest is mandatory under" S.C. Code Ann. § 34-31-20(A)).

The authority cited by Decide4Action is distinguishable because it referenced a court's discretion to *award* prejudgment interest as part of damages and does not suggest any discretion to *deny* prejudgment interest when S.C. Code Ann. § 34-31-20(A) applies. In *Jacobs v. Am. Mut. Fire Ins. Co.*, 287 S.C. 541, 543, 340 S.E.2d 142, 143 (1986), the trial court awarded prejudgment interest to an insured whose property damage claim had been denied by his insurer. Citing cases from 1927 and 1930, the state Supreme Court observed that "[w]here interest is not expressly excluded by contract, a court may exercise discretion to award it as an element of damage." *Id.*

(citing *Knight v. Sullivan Power Co.*, 140 S.C. 296, 138 S.E. 818 (1927); *Cogsdill v. Metropolitan Life Ins. Co.*, 158 S.C. 371, 155 S.E. 747 (1930)). These cases merely establish the Court's discretionary power to award prejudgment interest. The *Jacobs* court then went on to note that the statutory conditions for prejudgment interest had been met and that the trial court "correctly applied § 34-31-20 as a matter of law."

Similarly, the Court's statement in *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 134, 631 S.E.2d 252, 259 (2006), that "[t]he law has long allowed 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, if the sum is certain or capable of being reduced to certainty," merely recognizes the availability of prejudgment interest and does not suggest that trial court has discretion to ignore the statutory mandate in S.C. Code Ann. § 34-31-20(A).[1]

B. Sibley-Jones preserved her claim.

Decide4Action also misunderstands the law in arguing that Sibley-Jones failed to preserve for review her claim of prejudgment interest. Contrary to Decide4Action's argument, there was no requirement for Sibley-Jones to formally object at trial to the trial judge's decision denying prejudgment interest prior to the discharge of the jury. Such a requirement would make no sense because the award of prejudgment interest is an issue for the judge, not the jury. *See Bickerstaff v. Prevost*, 380 S.C. 521, 524, 670 S.E.2d 660, 661 (Ct. App. 2009) ("It is well settled in this state that the award of prejudgment interest is a function of the trial court, and has never been held to be an issue of fact requiring its submission in a jury trial."). The authority cited by Decide4Action

[1] Apart from S.C. Code Ann. § 34-31-20(A), there are bases for an award of prejudgment interest that lie within the discretion of the trial court. *See, e.g., Boykin Contracting, Inc. v. Kirby*, 405 S.C. 631, 642, 748 S.E.2d 795, 801 (Ct. App. 2013) ("[T]he circuit court has the discretion to award prejudgment interest in an action to recover under the theory of quantum meruit."). But such discretionary bases are not at issue in this appeal.

is distinguishable because it involved jury issues or criminal matters, not questions of prejudgment interest. *See Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002) (error in jury verdict form); *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168, 169 (1991) (error in sentencing of defendant in criminal case).

An immediate motion to reconsider the prejudgment interest prior to the discharge of the jury not only was unnecessary, it also would have been futile because the Circuit Court clearly considered and rejected the claim for prejudgment interest, and such an oral motion would not include the legal authorities to show the Circuit Court that the ruling was wrong. Appellate courts "do[] not require parties to engage in futile actions in order to preserve issues for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000). Notably, Sibley-Jones did take steps at trial to preserve the issue by specifically requesting and receiving a right to file a post-trial motion on the issue. (R. p. 550, lines 17-19; p. 551, lines 20-24) (The Court: "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 . . . Mr. English: Yes, Your Honor. We'd ask for ten days for posttrial motions . . . .")

In order to preserve her claim for prejudgment interest, Sibley-Jones was required to take only two steps, both of which she took. First, she was required to include a request for prejudgment interest in her pleadings. See *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 369, 656 S.E.2d 765, 769 (Ct. App. 2007) (holding that the plaintiff "did not place the demand for prejudgment interest on the claims submitted to the jury before the trial judge and cannot recover prejudgment interest because it has not been specifically pled") Second, she was required to receive a ruling on the issue sometime during the proceedings in the trial court. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be

considered on appeal.") Here, where the claim was pled (R. pp. 42-47), ruled upon (R. p. 550, lines 17-19; R. pp. 10-13), raised again (R. pp. 173-191), and ruled upon again (R. pp. 5-7), Sibley-Jones unquestionably preserved the issue for appeal.

C. The Escrow Agreement conclusively demonstrates that Sibley-Jones is entitled to prejudgment interest.

Decide4Action's argument that the Escrow Agreement allowed the Circuit Court to exercise discretion to deny the request for prejudgment interest is also unavailing. As noted above, the Circuit Court did not have the discretion to deny a request for prejudgment interest when S.C. Code Ann. § 34-31-20(A) applies. *Supra* part I.A.

Moreover, the terms of the Escrow Agreement do not provide any basis for the denial of prejudgment interest. Unlike the authority cited by Decide4Action, none of the agreements at issue here provided for a rate of interest different than the statutory rate. *See Turner Coleman, Inc. v. Ohio Constr. & Eng'g, Inc.*, 272 S.C. 289, 291, 251 S.E.2d 738, 740 (1979) (holding that the 12 percent interest rate agreed to in the note between the parties is controlling over the statutory rate).

Decide4Action presents the misleading argument that the Selling Shareholders were not deprived of the Escrow Fund because the Selling Shareholders were always "treated as the owners of the Escrow Fund." But this partial quote comes from a section of the Escrow Agreement entitled "Fund Income; Ownership for Tax Purposes." The entire sentence makes clear that the alleged "ownership" of the account is only a treatment for tax purposes:

> Seller and Buyer agree that, for purposes of federal and other taxes based on income, Sellers will be treated as the owners of the Escrow Fund and that Sellers will report all income, if any, that is earned on, or derived from, the Escrow Fund as their income in the taxable year or years in which such income is properly includable and pay any taxes, if any, attributable thereto.

(R. p. 619)

Being "treated" as the owner of an escrow account for tax purposes, of course, does not equate to having possession and use of the funds in the account. The Escrow Agreement required the escrow agent, United Community Bank ("UCB"), to release the Escrow Fund to Sibley on October 16, 2018 (the Indemnification Escrow Release Date) unless Decide4Action had submitted a "Pending Claim" to the funds no less than three business days prior to that date. (R. pp. 616, 635) Decide4Action submitted a claim to UCB, which caused the Selling Shareholders to not receive the Escrow Fund on October 16, 2018. (R. pp. 624-633; R. p. 329, line 5-p. 333, line 7) Decide4Action's owner Richard Bergeron acknowledged these indisputable facts at trial:

> Q So you wanted to keep the selling shareholders from getting the escrow money on the one-year anniversary under the Escrow Indemnity Agreement, right?
>
> A Yeah.

(R. p. 314, lines 9-12)

Thus, there is no dispute that a liquidated amount of money ($440,000) was due to the Selling Shareholders on a set date (October 16, 2018) and that Decide4Action deprived the Selling Shareholders of the possession and use of that liquidated amount.

Decide4Action's "alternative" argument is that there was no sum of money due to the Selling Shareholders because the Escrow Agreement did not permit UCB to release the escrow funds to the Selling Shareholders in light of Decide4Action's pending claim. This argument fails for similar reasons. The law is clear that the defendant's dispute of the plaintiff's claim makes no difference in the prejudgment interest inquiry. *See Smith-Hunter Const. Co., Inc. v. Hopson*, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005) ("The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest."). As noted, the only reason that UCB did not pay the escrow funds to the Selling Shareholders is because Decide4Action disputed the Selling Shareholders' entitlement to the funds. The fact that a

defendant keeps a third-party from releasing funds due based on a dispute is no different in substance then the defendant itself refusing to pay the funds due based on a dispute. Decide4Action's argument otherwise lacks any legal support and would defeat the plain purpose of S.C. Code Ann. § 34-31-20(A).

In sum, Decide4Action prevented the Selling Shareholders from receiving $440,000 from October 16, 2018, to the date of judgment. Accordingly, Sibley-Jones is entitled to prejudgment interest during that time period, and post-judgment interest since the judgment, as a matter of law.

II. The Denial of Costs Was an Error of Law that Should be Reversed.

Decide4Action concedes, as it must, that Sibley-Jones was presumptively entitled under Rule 54(d), SCRCP, to recover her costs. *See* Rule 54(d), SCRCP ("Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ."). Decide4Action couches the Court's decision denying costs as an exercise of discretion, but the Circuit Court provided no reasoning for the decision, so the decision cannot be defended based on such deference. *See Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ('When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."). The only bases that Decide4Action can find to justify the Circuit Court's denial of costs are supposed procedural defects that lack any support.

First, Decide4Action claims it was improper for Sibley-Jones to combine her motion for costs with her motion for reconsideration of the denial of prejudgment interest, but it provides no legal authority to support its contention that combining the two issues in one motion is a basis for denial of costs. Moreover, the Circuit Court did not cite the combination as a basis for the denial of the request.

Similarly, Decide4Action presents no authority that a failure to file an affidavit of costs within 10 days after a final judgment is a basis for denial of a request for costs. The cases cited by Decide4Action involved failures to file affidavits in support of continuances when the court needed the information in the missing affidavits to support a ruling in the movant's favor. *See State v. Gilstrap*, 205 S.C. 412, 421, 32 S.E.2d 163, 167 (1944) (criminal case involving failure to provide affidavit stating the likely testimony an absent witness would have provided at trial to justify continuance); *Merchants' Fertilizer & Phosphate Co. v. Am. Land & Bldg. Corp.*, 165 S.C. 394, 396, 164 S.E. 17, 17 (1932) (failure to file attorney affidavit justifying a continuance).

Here, on the other hand, the evidence supporting the costs of all of the items for which Sibley-Jones sought recovery – filing fee for summons and complaint, filing fee for motion to compel, and the deposition of Decide4Action (S.C. Code Ann. § 15-37-40) – were included in the record and subject to judicial notice under Rule 201, SCRE. The text of Rule 54(d), SCRCP, itself indicates an affidavit is not necessary when the relevant facts are already in the record. See Rule 54(d), SCRCP ("A motion for costs, supported by an affidavit that the costs are correct and were necessarily incurred in the action, *may* be filed by the prevailing party within 10 days of the receipt of written notice of the entry of final judgment.") (emphasis added).

Nevertheless, Sibley-Jones did attach an affidavit establishing such costs in her reply brief requesting the costs. (R. pp. 190-191) This affidavit was filed before the Circuit Court's final decision denying Sibley-Jones's Rule 59, SCRCP, motion.

Decide4Action does not dispute that Sibley-Jones actually incurred these costs, nor that they were necessary. Accordingly, the Court should reject Decide4Action's efforts to elevate form over substance and deny its arguments.

CONCLUSION

Although the Circuit Court's judgment on Decide4Action's liability for breach of contract 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 $115,500 for the period of October 16, 2018 through October 13, 2021, and costs of $999.31.[2]

Respectfully submitted,

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[2] Alternatively, the Court may choose to award prejudgment interest from October 16, 2018 to July 28, 2021 (the date of the initial judgment at trial). In either event, 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).

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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 **REPLY 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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