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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Hon. Perry H. Gravely, Circuit Court Judge
Common Pleas Case No. 2019-CP-23-02032

Opinion No. 2024-UP-253 (Rehearing Denied Aug. 16, 2024)
Court of Appeals Appellate Case No. 2021-001177

Supreme Court Case No. _____

JULIA SIBLEY-JONES,
as Personal Representative of the
Estate of William A.L. Sibley, Jr.

Respondent-Appellant,

v.

DECIDE4ACTION, INC.,

Appellant-Respondent.

Petition for Writ of Certiorari

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)

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that a petition for rehearing was made to the Court of Appeals and denied on August 16, 2024.

QUESTION PRESENTED

1. Where the claim for prejudgment interest was neither preserved for appellate review nor, in the alternative, correct under South Carolina law, should this Court hold that the circuit court erred in denying prejudgment interest?

2. Where costs were not properly demanded below and/or where valid reasons could have justified a denial of costs, should this Court hold that the circuit court abused its discretion in denying them?

STATEMENT OF THE CASE

This appeal arises out of Decide4Action, Inc.’s agreement to purchase all the shares of Computer Control + Integration, Inc. (“CC+I”).

I. The Pleadings

A. The Start of the Civil Action

On April 11, 2019, William A. Sibley, Jr., filed an action in the Court of Common Pleas in Greenville County against Decide4Action, Inc. [R. 017].

B. The Amended Complaint

Following Mr. Sibley’s death, Julia Sibley-Jones filed an Amended Complaint on December 28, 2020, against Decide4Action in her capacity as the Personal Representative of the Estate of William A.L. Sibley, Jr. [R. 042]. The Amended Complaint alleged two causes of action: breach of contract and breach of contract accompanied by a fraudulent act, both arising out of Decide4Action’s post-closing claim on \$440,000 held in escrow. [*Id.*]. As the Amended Complaint itself alleged, 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 the Escrow Agent continue to hold the funds in the Escrow Account.” [*Id.* ¶ 8].

C. Decide4Action's Amended Answer with Counterclaims

Via an answer filed January 25, 2021, Decide4Action denied liability and damages. [R. 048-68]. It also asserted counterclaims, for breach of contract, breach of contract accompanied by a fraudulent act, fraud, and intentional misrepresentation.

The reply to the counterclaims denied liability and damages. [R. 069-76].

II. The Jury Trial

At the close of the evidence at the jury trial, which was held on July 26-28, 2021, the circuit court announced that none of the claims or counterclaims would go to the jury, reasoning as follows:

At the conclusion of the Defendant's case, the Plaintiff moved for a directed verdict on the Defendant's counterclaims on numerous grounds. Since the Court had already ruled that the Defendant was foreclosed from presenting any evidence of damages, the Defendant was not able to establish all of the elements of its causes of action asserted in its counterclaims[,] and the Court granted the Plaintiff's Motion for Directed Verdict, dismissing all of Defendant's Counterclaims.... The Plaintiff then moved for a Directed Verdict on the Breach of Contract action regarding the distribution of the Escrow Account being held by United Community Bank ("UCB") under the Indemnity Escrow Agreement ("Escrow Agreement."). Since the Defendant's counterclaims had been dismissed and no claim for offset had been asserted, the Plaintiff was entitled to the escrow funds held pursuant to the Stock Purchase Agreement and Escrow Agreement[,] and the Court granted the Plaintiff's Motion for Directed Verdict and ordered that the escrow funds being held by UCB be released to Plaintiff. Defendant also moved for a directed verdict as to the Plaintiff's cause of action for Breach of Contract Accompanied by Fraudulent Act. The Court found that there was no credible evidence of fraud, even in the light most favorable to the

Plaintiff, and this Motion was granted[,] and the Plaintiff's 2nd Cause of Action for Breach of Contract Accompanied by Fraudulent Act was dismissed. The Plaintiff asserted a claim for pre-judgment interest[,] and the Court found 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 pre-judgment interest. In light of these rulings, no claims remained to be presented to the jury.

[R. 011].

III. The Post-Trial Motion

On August 9, 2021, Ms. Sibley-Joes filed a motion to alter or amend the judgment. [R. 173]. There, based upon arguments not previously made when the circuit judge orally denied her claim, she requested that the judgment be amended to allow prejudgment interest. She also requested an award of costs, but she did not include an affidavit as to the propriety of the costs until September 21, 2021. [R. 190-91].

The circuit court denied the motion to alter or amend on October 13, 2021. [R. 005-07].

IV. The Notices of Appeal

Decide4Action timely served a notice of appeal on October 13, 2021. [R. 192]. Ms. Sibley-Jones timely served a notice of cross appeal on November 11, 2021. [Supp. R. 024].

V. The Court of Appeals

Via an unpublished opinion, the Court of Appeals affirmed as to the directed verdict against Decide4Action, but it reversed the trial court's denial of prejudgment interest and costs to Ms. Sibley-Jones.

STATEMENT OF ADDITIONAL FACTS

Decide4Action agreed to purchase CC+I for a total price of \$4,400,00.00 [R. 569]. The parties also agreed that the sellers would put \$440,000 of the funds received from Decide4Action aside in escrow with United Community Bank, to hold during the post-closing period in which Decide4Action could assert claims under the stock purchase agreement. [R. 473, 615-23]. The parties' escrow agreement provided, among other things, as follows:

WHEREAS Sellers and Buyer entered into that certain Stock Purchase Agreement dated October 13, 2017 (the "Purchase Agreement") whereby Buyer agreed to purchase the stock of **Computer Control + Integration, Inc.**, a South Carolina corporation (the "Company"), from Sellers; and

WHEREAS as an inducement for Buyer to enter into the Purchase Agreement, Sellers agreed to deposit a portion of the proceeds received by Sellers (the "Escrow Contributions") into an escrow account to be available to satisfy indemnification obligations that Sellers might have to Buyer under the Purchase Agreement.

1. **Establishment of Escrow.**

(a) As soon as reasonably practicable after the Closing, Sellers shall deliver to Escrow Agent the Escrow Contributions, paid in United States Dollars in cash by wire transfer of immediately available funds (collectively, the "**Original Escrow Fund**"). Escrow Agent shall acknowledge receipt thereof. The Original Escrow Fund that is initially deposited with Escrow Agent, prior to any interest thereon or proceeds therefrom, constitutes a portion of the Purchase Price.

(b) Escrow Agent hereby agrees to act as escrow agent and to hold, safeguard and disburse the Original Escrow Fund, together with any earnings and income thereon ("**Fund Income**"), pursuant to the terms and conditions hereof. The Original Escrow Fund, less all distributions of the Original Escrow Fund, held pursuant to this Agreement shall be referred to herein as the "**Remaining Escrow Fund**". The Remaining Escrow Fund plus any undistributed Fund Income shall be referred to as the "**Escrow Fund**".

2. **Investment of Funds.** Within three (3) business days after receipt of the Original Escrow Fund, the Escrow Fund shall be deposited and maintained in time deposits with or certificates of deposit of a bank, trust company or federal savings and loan association having at least \$1,000,000,000 of capital, surplus and undivided profits at the time of the investment, until disbursement of the entire Escrow Fund or termination of this Agreement pursuant to **Section 4** hereof.

3. **Claims and Release of Escrow Amount.**

(a) General. Escrow Agent shall disburse the Escrow Fund in accordance with the terms of this Agreement. Escrow Agent shall be under no obligation to disburse funds from the Escrow Fund until (i) it receives a Joint Written Direction (defined herein below) directing it to so act, (ii) any party delivers a final, non-appealable court order (an "**Order**") directing Escrow Agent to act or (iii) the Escrow Agent is required to make a disbursement under the terms of this Agreement. Escrow Agent shall act solely upon this Agreement and the instructions that it receives and shall not be responsible for determining whether such instructions are in accordance with the terms of the Purchase Agreement.

[...]

7. **Fund Income; Ownership for Tax Purposes.**

All interest and other investment income earned on the Escrow Fund, net of any investment losses, shall accrue to the benefit of the Sellers. Interest and other investment income shall be paid to Sellers upon the final distribution of the Escrow Fund. Sellers 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. 615, 619].

As of the conclusion of the trial below, the \$440,000 in the escrow had grown to \$443,000. [R. 538].

ARGUMENT

I. This Court Should Grant the Petition as to the Claim for Prejudgment Interest.

A. Confusion Exists About the Standard of Review.

Before the Court of Appeals, the parties disagreed as to the appropriate standard of review that should be applied to the circuit court's denial of prejudgment interest. Ms. Sibley-Jones contended that the issue received *de novo* review, reasoning as follows:

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)).

[Reply Br. at 2].

By contrast, Decide4Action relied upon authority from this Court to request review for abuse of discretion:

“Where interest is not expressly excluded by contract, a court may exercise discretion to award it as an element of damage.” *Jacobs v. Am. Mut. Fire Ins. Co.*, 287 S.C. 541, 544 (1986) (affirming circuit court’s decision to allow pre-judgment interest but only dated from 60 days after the loss). *See also Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 133 (2006) (“The law has long *allowed* prejudgment interest on obligations to pay money....” (emphasis added)).

[Brief of Respondent at 7].

For its part, the Court of Appeals did not specifically acknowledge the parties’ conflicting views as to the standard of review—much less resolve the issue.

For the benefit of the bench and the bar, the Court should grant this Petition to clarify the appropriate standard of review.

B. This Court Should Grant the Petition to Clarify When a Claim for Prejudgment Interest Must Be Asserted to Be Preserved.

“This Court has repeatedly held that a party should not be permitted to sit idly by while a verdict erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence.” *Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554 (2002) (collecting cases). Post-trial motions are not vehicles to

raise issues “which could have been raised at trial.” *Patterson v. Reid*, 318 S.C. 183, 185 (Ct. App. 1995) (citations omitted)).

Before the Court of Appeals, Decide4Action argued that Ms. Sibley-Jones had failed to preserve any claim as to the improper denial of prejudgment interest. Although the circuit judge announced in open court that he was “going to deny any prejudgment interest,” [R. 550], Ms. Sibley-Jones did not suggest—much less establish—that he would be wrong to do so. Had Ms. Sibley-Jones raised the issue in open court, Decide4Action could have asked the circuit judge to let the jury decide whether the parties’ intention was, as Decide4Action maintains, for the interest already accruing in the Escrow Account to be in lieu of the statutory rate or whether, as Ms. Sibley-Jones contends, the parties intended a double recovery of interest. Instead, Ms. Sibley-Jones remained silent until post-trial motions, well after the jury was discharged—depriving Decide4Action of its jury rights. *See generally Wheeler v. Globe & Rutgers Fire Ins. Co.*, 125 S.C. 320, 325 (1923) (“[W]here a contract is not clear, or is ambiguous and capable of one or more constructions, what the parties really intended, as a matter of fact, should be submitted to a jury.”).

The Court of Appeals did not explain why it believed that Ms. Sibley-Jones had not waited too long to raise its claim of alleged error. For the benefit of the bench

and the bar, the Court should grant the Petition and clarify when and how claims for prejudgment interest must be preserved.

C. The Court of Appeals Was Wrong to Allow for a Double Recovery.

Even had she properly preserved her claim for prejudgment interest, the Court of Appeals should have affirmed the denial of prejudgment interest.

Under S.C. Code § 34-31-20(A), “[a] judgment debtor is required to pay interest on his debt as compensation for his continued retention and use of the creditor’s money beyond the date payment was due.” *Butler Contracting*, 369 S.C. at 134. But “parties are at liberty to contract, within legal limits, relative to the interest to be paid on an obligation, including the rate of interest to be charged after maturity.” *Turner Coleman, Inc. v. Ohio Constr. & Eng’g, Inc.*, 272 S.C. 289, 292 (1979).

Here, the circuit court was well within its discretion to deny prejudgment interest on the grounds that the Escrow Agreement already fully compensated the sellers. Under the parties’ contractual arrangements, Decide4Action paid the full purchase price to the sellers, who “agreed to deposit a portion of the proceeds received by Sellers...into an escrow account” with United Community Bank. [R. 615]. In turn, the bank was responsible for investing funds “in time deposits with or certificates of deposits.” [R. 615 §2]. The parties specifically agreed that the “Sellers [would] be treated as the owners of the Escrow Fund and that Sellers [would] report all income”

from the Escrow Fund on their taxes. [R. 619 § 7]. Thus, Decide4Action never had a period of “continued retention and use” of the Escrow Fund that required any reimbursement. *Butler Contracting*, 369 S.C. at 134. At all times, the sellers, including the Estate that Ms. Sibley-Jones represents, had legal ownership of the funds; Decide4Action fully paid the purchase price called for under the purchase agreement prior to the closing of the transaction.

If the decision of the Court of Appeals stands, and Decide4Action must pay pre-judgment interest, Ms. Sibley-Jones will get a double recovery of the time value of money: the interest from the bank that was paid into the escrow account plus pre-judgment interest on the same money from Decide4Action, which did not have the benefit of the money in the escrow account in the interim.

The decision from the Court of Appeals was also wrong for an independent reason: The circuit court was within its discretion to find that Decide4Action’s “viable claim under the Stock Purchase Agreement” made prejudgment interest inappropriate. [R. 011]. Prejudgment interest can only ever be awarded for the period after a liquidated claim is “due” to be paid. S.C. Code Ann. § 34-31-20(A).

The Court of Appeals incorrectly stated that Decide4Action did not “dispute that the \$440,000 amount was owed to the selling shareholders upon the escrow release date.” In fact, Decide4Action’s Brief of Respondent (p. 10) argued that Ms. Sibley-

Jones was not entitled to the funds until final judgment in this action. *See* [R. 615 § 3 (agreeing that the escrow account would not, absent agreement, release the funds until “any party delivers a final, non-appealable order”)].

Ms. Sibley-Jones had no right to the escrow balance during the pendency of Decide4Action’s litigation. [R. 615 §3(a)]. Thus, the only reason that the circuit court found that Ms. Sibley-Jones was entitled to retrieve the escrowed funds from the third-party at all was because Decide4Action’s “counterclaims had been dismissed and no claim for offset had been asserted.” [R. 011]. As such, the circuit court could and did have discretion to find that the escrow funds were not yet “due” earlier so as to make appropriate prejudgment interest (above and beyond what the escrow agent was already providing).

For the benefit of the bench and the bar, the Court should grant the Petition and clarify whether prejudgment interest was appropriate here.

II. This Court Should Grant the Petition as to the Claim for Costs.

A. The Court Should Clarify How a Claim for Costs Must Be Made.

A litigant who obtains judgment is not entitled to costs—merely presumptively so. *See* R. 54(d), SCRCP (“[C]osts shall be allowed as of course to the prevailing party *unless the court otherwise directs*[.]” (emphasis added)).

Costs “have always been regarded in this state as in the nature of penalties; hence statutes allowing them are strictly construed,” *S.C. Pub. Serv. Auth. v. Spearwant Liquidating Co.*, 201 S.C. 207, 209 (1942) (quotation omitted). Ms. Sibley-Jones’ failure to follow the required procedure to request costs made a denial of them an appropriate exercise of discretion. *See, e.g., Merchants’ Fertilizer & Phosphate Co. v. Am. Land & Bldg. Corp.*, 165 S.C. 394, 396 (1932) (finding no abuse of discretion to deny a continuance where the motion omitted the required affidavit).

The Rules of Civil Procedure require a party who desires costs to file “[a] motion for costs, supported by an affidavit that the costs are correct and were necessarily incurred in the action, ... within 10 days of the receipt of written notice of the entry of final judgment.” R. 54(d), SCRCF. The “clerk” rules on that motion, with the clerk’s decision subject to judicial review “[o]n motion served with 10 days after receipt of notice [of the clerk’s decision],” *id.*

Here, however, Ms. Sibley-Jones did not follow the required procedure in two respects, both of which were raised before the Court of Appeals as alternate sustaining grounds—but neither was addressed.¹

¹ “The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.” R. 220, SCACR.

First, Ms. Sibley included the request for costs in her motion to alter or amend, which raised other grounds. Combining the cost motion that should have gone to the clerk with another motion directed to the judge deprived the state treasury of one \$25 motion fee.

Second, she neglected to include the required affidavit within the 10-day deadline. [R. 173-82]. A failure to provide a required affidavit has long been seen as an appropriate basis to deny a motion. *See, e.g., Merchants' Fertilizer*, 165 S.C. at 396 (holding that trial court did not abuse its discretion to deny a continuance where the motion omitted the required affidavit). If a failure to provide a required affidavit can result in a criminal defendant being denied a new trial, *see State v. Gilstrap*, 205 S.C. 412, 421 (1944) (holding no error to deny new trial because of absent witness where no affidavit was filed proffering the witness's testimony), such a failure can certainly result in the denial of mere costs to a civil litigant.

To the extent that Ms. Sibley-Jones claims that the trial court should have accepted her belated affidavit—provided about a month after the 10-day deadline, *see* [R. 190-91]—that argument was not properly raised on appeal. She did not move for an after-the-fact extension of time under R. 6(b), SCRCP, much less receive a ruling denying leave for an out-of-time filing. “Issues not raised and ruled upon in the trial

court will not be considered on appeal.” *State v. Dunbar*, 356 S.C. 138, 142 (2003) (citation omitted).

For the benefit of the bench and bar, this Court should grant this Petition to explain whether Ms. Sibley-Jones’ request for costs was properly raised to the circuit court in the first instance.

B. The Court Should Clarify How to Preserve a Challenge to a Denial of Costs.

Even apart from the procedural defects in Ms. Sibley-Jones’ cost motion, the Court of Appeals should have held that trial court was within its discretion to deny costs. Like R. 54(d), SCRCP, the federal cost rule, Fed. R. Civ. Pro. 54(d), creates a presumption of costs that a court can alter. As such, federal case law is persuasive authority. *Unisun Ins. v. Hawkins*, 342 S.C. 537, 542 (Ct. App. 2000) (citation omitted) (“Although our courts have not addressed the degree of specificity required by our rules of civil procedure, Rule 12(b)(5) is substantially similar to its federal counterpart. In the absence of prior state law on the issue in question, federal cases interpreting the rule are persuasive.” (citation omitted)). Among reasons that the federal courts find justify denying costs are “the outcome of the underlying suit” and when “the case in question was a close and difficult one.” *Teague v. Bakker*, 35 F.3d 978, 996 (4th Cir. 1994) (quotation and citation omitted). The circuit judge may have

decided that costs were not appropriate because Ms. Sibley-Jones lost one of her two claims. Or perhaps the judge decided that the claim on which Ms. Sibley-Jones won was a close one. But Ms. Sibley-Jones did not ask for an amended order that explicitly stated reasoning for denying costs. Thus, she did not preserve any claim that the circuit judge somehow erred in denying them. *See generally Herron v. Century BMW*, 395 S.C. 461, 465 (2011) (“At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. It is axiomatic that an issue cannot be raised for the first time on appeal.” (citation and quotation omitted)).

Rather than addressing Decide4Action’s points on appeal, the Court of Appeals held that a one-sentence denial of costs constitutes error as a matter of law is respectfully incorrect for another reason. On appeal, costs are also presumptively taxable to the prevailing party. *See* R. 222(a), SCAR (“Unless otherwise ordered by the appellate court or agreed by the parties, costs shall be taxed against the appellant when the appeal is dismissed or judgment on appeal is affirmed. When a judgment is reversed, costs shall be taxed against the respondent unless the court orders otherwise.”). Cost denials on appeal are not, however, supported with an explanation, either. *See, e.g., Huntley v. Young*, 319 S.C. 559, 560 (1995) (*per curium*) (dismissing appeal and adding, without analysis, that “[e]ach party shall bear its own costs

and attorneys' fees.'"). If a one-sentence explanation on appeal suffices, it should suffice for lower courts, too.

For the benefit of the bench and bar, this Court should grant the Petition and clarify how a party properly preserves a challenge as to the circuit court's explanation of denial of costs.

CONCLUSION

This Court should grant this Petition and reverse the decision of the Court of Appeals.

Dated this 16th day of September, 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
devon@truluckthomason.com
864-331-1751 (p)

Counsel for Appellant-Respondent Decide4Action, Inc.