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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

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.

Appellant-Respondent Decide4Action, Inc.'s Petition for Rehearing

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Pursuant to R. 221, SCACR, Decide4Action, Inc., respectfully requests rehearing of the Court's Opinion, Number 2024-UP-253, filed July 10, 2024. The Court has overlooked or misapprehended the following points:

I. The Circuit Court Erred in Granting a Directed Verdict.

In affirming the directed verdict for lack of damages, the Opinion did not consider the actual damages that appeared in the record. The purchase agreement at issue provided that "[i]f and to the extent that any Target cash is left in the possession or under the control of Target after Closing, such cash shall remain property of Target, and Sellers shall have no right or claim to such cash." [R. 585 § 6(c)]. As shown in the Brief of Appellant (p. 25), Decide4Action would be entitled to non-expert damages under that provision if the bonuses were contractually improper; the $300,000 in bonuses would have remained cash that belongs to Decide4Action under the contract. The jury should have been allowed to decide whether Decide4Action was entitled to some, or all, of the disputed amounts paid as bonuses.

The Opinion determined that the availability of nominal damages had not been preserved for review. With all due respect, that holding was error. As the Opinion notes, Decide4Action specifically referenced the concept of nominal damages at argument below. "Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review." *State v.*

Brannon, 388 S.C. 498, 502 (2010) (citation omitted). When the "exact name" is, however, used, the doctrine should be preserved for appeal. Indeed, the Brief of Respondent did not even contest error preservation.

Decide4Action respectfully submits that the Opinion also erred in holding that testimony of Mr. Bergeron—an officer but not a party—prevented Decide4Action from relying upon Plaintiff's Exhibit 10, including the damage calculations contained in it. "In ruling on a directed verdict motion, the trial court is concerned only with *the existence or non-existence* of evidence, and the court does not have the authority to decide credibility issues or to resolve conflicts in the testimony." *Jones v. GE*, 331 S.C. 351, 356 (Ct. App. 1998) (citation omitted) (emphasis added). Plaintiff's Exhibit 10 was admitted by consent. [R. 205 ("First, for the record, I'd like to note that the parties have agreed on the admissibility of Plaintiff's Exhibits 1 through 12 and 16 through 20….")]. Once admitted into evidence, Decide4Action was entitled to use the exhibit for its case. *See generally Greenville County v. Stover*, 198 S.C. 240, 248 (1941) ("But [the hearsay] was not admitted without his consent, but at his request, for it was he who offered it in evidence. So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible." (quotation omitted)); *Eargle v. Sumter Lighting Co.*, 110 S.C.

560, 566 (1918) ("It is immaterial from whose witnesses—whether plaintiff's or defendant's—the evidence in support of an element of damage or of the cause of action or defense may come."). It should have been left to the jury to decide whether to believe Mr. Bergeron's testimony that he was not qualified to opine about damages or the stipulated exhibit that set forth a calculation of damages, particularly given the testimony about the parties' negotiations. Indeed, the Opinion does not suggest that if Mr. Bergeron had not testified, Plaintiff's Exhibit 10 could not have established damages, if the jury had chosen to believe it. Because credibility of witnesses is irrelevant, it is thus impossible that anything in his testimony could have removed the legal power of Plaintiff's Exhibit 10.

II. The Circuit Court Erred in Excluding Evidence of Damages.

With respect to the discovery order, Decide4Action previously argued that, if the grant of the directed verdict was reversed (as it should be), then the more narrowly tailored sanction would be appropriate. If there is a retrial, there will be new witnesses, including an expert witness.

To the extent, if any, that this Court meant to affirm the discovery order even if a retrial were ordered, that would be error as there would be no prejudice nor bad faith, as required. *See Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154 (Ct. App. 1990) (citation omitted).

III. The Circuit Court Did Not Abuse Its Discretion in Denying Prejudgment Interest.

With respect to prejudgment interest, the parties disputed whether the standard of review was *de novo* or abuse of discretion. The Opinion does not definitely decide the point. But it appears to select the former. If so, that was error; abuse of discretion applies. *Jacobs v. Am. Mut. Fire Ins. Co.*, 287 S.C. 541, 544 (1986) ("Where interest is not expressly excluded by contract, a court may exercise discretion to award it as an element of damage.").

In its Brief of Respondent on cross appeal (p. 7-8), Decide4Action showed that any entitlement to prejudgment interest was not preserved for appellate review, an issue not considered in the Opinion. The law is well-settled in this state that a party "must object at [the] first opportunity to preserve an issue for appellate review." *State v. Williams*, 303 S.C. 410 (1991) (citation omitted). Yet, as shown in the Brief of Respondent (p. 7), Ms. Sibley-Jones improperly waited until a post-trial motion to argue about prejudgment interest even though the Circuit Judge indicated that he would deny prejudgment interest when granting the directed verdict. [R. 550 ("... I'm going to deny any prejudgment interest.")]. As Decide4Action showed previously, had Ms. Sibley-Jones raised the issue before the jury was discharged, the court could have submitted to the jury the question of whether the escrow arrangement

was intended by the parties to substitute for statutory interest. *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 Opinion also did not address the fact that "[a] judgment debtor is [only] 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, Inc. v. Court St., LLC*, 369 S.C. 121, 134 (2006). Yet Ms. Sibley-Jones, and not Decide4Action, was the legal owner of the money in the escrow account, [R. 619, § 7 ("Sellers [shall] be treated as the owners of the Escrow Fund and that Sellers [shall] report all income" from the Escrow Fund on their taxes.")]. If Decide4Action must pay prejudgment 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 and prejudgment interest from Decide4Action, which did not have the benefit of the money in the escrow account in the interim.

The Opinion also incorrectly states that Decide4Action did not "dispute that the $440,000 amount was owed to the selling shareholders upon the escrow release date." With all due respect, 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")].

IV. The Circuit Court Did Not Abuse Its Discretion in Denying Costs.

In its Brief of Respondent on cross appeal (p. 11-12), Decide4Action requested that the Court consider affirming the denial of costs on an alternate sustaining ground as permitted under R. 220, SCACR. The Opinion does not address that ground.

Specifically, Decide4Action showed that Ms. Sibley-Jones had not followed the proper procedure to request costs as set forth in the Rules of Civil Procedure. Not only was no affidavit timely tendered as required, but Ms. Sibley Jones impermissibly requested costs directly from the Circuit Judge, rather than first from the Clerk, thereby depriving the treasury of a second motion fee. *See* R. 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…. Costs may be taxed by the clerk on one day's notice. *On motion served within 10 days after receipt of notice, the action of the clerk may be reviewed by the court*." (emphasis added)).

Further, even if the request for costs had been properly presented, the Court still did not address all Decide4Action's arguments in defense of the judgment below. In Ms. Sibley-Jones' Opening Brief, she did not object to the insufficiency of the

explanation—the basis upon which this Court granted relief. As Decide4Action showed in its Brief of Respondent (p. 14), she did not file a motion to alter or amend complaining about the insufficiency of the explanation as required to appeal on that basis. *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)).

The Opinion's suggestion 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."). Yet cost denials on appeal are not 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.").

CONCLUSION

This Court should grant rehearing and revise the prior opinion to address the points raised above.

Dated this 24th day of July, 2022.

DECIDE4ACTION, INC.

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Proof of Service

I hereby certify that I sent a copy of the Petition for Rehearing and this Proof of Service to the following counsel at their email addresses of record this 24th day of July, 2024:

Gregory J. English (genglish@wyche.com)

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Dated this 24th day of July, 2024.

Respectfully submitted,

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