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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

Appellate Case No. 2024-001548

Julia Sibley-Jones, as Personal Representative
of the Estate of William A. Sibley, Jr..... Respondent,

v.

Decide4Action, Inc.....Petitioner.

JULIA SIBLEY-JONES'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I. **Where the amount due Sibley-Jones was liquidated, did the Court of Appeals correctly determine that Sibley-Jones was entitled to prejudgment interest?**

II. **Where Sibley-Jones prevailed at trial, did the Court of Appeals correctly hold that the Circuit Court abused its discretion in not articulating a basis for the denial of 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 "Escrow Agreement"), 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)

Pursuant to the Escrow Agreement and an Agreement Regarding Application of Funds, the Escrow Agent was to release the $440,000 on October 16, 2018. (R. pp. 615-16; 634-35) Instead, on September 19, 2018, Decide4Action notified the Escrow Agent that it had pending claims against the Selling Shareholders and requested that the Escrow Agent continue to hold the funds in the Escrow Account. (R. pp. 624-626) Sibley responded in writing, denying that Decide4action's claims were valid and demanding that Decide4Action confirm to the Escrow Agent that the escrow funds should be released immediately or be responsible for prejudgment interest on the $440,000 in escrow. (R. pp. 627-632) Decide4Action replied to the Escrow Agent and refused to permit the funds in the Escrow Account 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)

In her Amended Complaint (as in the initial Complaint), Sibley-Jones sought a judgment for damages of $440,000 plus prejudgment interest on the same and to have the amount in the Escrow Account applied to such judgment. (R. pp. 45-46) 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 for $440,000. (*Id.*) As noted in its Judgment in a Civil Case dated July 28, 2021, and filed July 30, 2021 (the "Judgment"), the Court also ordered the escrow funds

be released to Sibley-Jones. (R. p. 11) ("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 a separate order on August 6, 2021, directing UCB to release and deliver all funds in the Escrow Account to Sibley-Jones, which would then be applied to Plaintiff's Judgment. (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)

The Court of Appeals ruled in favor of Sibley-Jones on both Decide4Action's appeal and on Sibley-Jones's cross-appeal regarding prejudgment interest and costs. On the cross-appeal, the Court of Appeals noted that "Sibley-Jones met the requirements for prejudgment interest under [S.C. Code Ann. § 34-31-20(A)]." Unpublished Opinion No. 2024-UP-253 (the "Opinion"), at *5. The Court held that "Sibley-Jones was entitled to prejudgment interest" because the escrow account fell "squarely within" S.C. Code Ann. § 34-31-20(A), because "[t]he parties do not dispute the account held $440,000, nor do they dispute that the $440,000 amount was owed to the selling shareholders upon the escrow release date." *Id.* Furthermore, "Decide4Action's claims against the escrow account do not preclude an award of prejudgment interest" because "'[i]t is the character of the claim and not the defense to it that determines

whether prejudgment interest is allowable.'" (quoting *Butler Contracting, Inc. v. Ct. St., LLC*, 369 S.C. 121, 133-34, 631 S.E.2d 252, 259 (2006)). *Id.*

Regarding costs, the Court of Appeals held that the Circuit Court erred by "not giv[ing] any basis for denying costs in either its oral ruling, form order, or order denying Sibley-Jones's motion to alter or amend." *Id.*

ARGUMENT

I. The Court of Appeals Correctly Held that Sibley-Jones Was Entitled to Prejudgment Interest.

A. There is no confusion about the standard of review.

Decide4Action is incorrect in arguing that there is "confusion" about the standard of review applied by the Court of Appeals in reaching its decision. (Petition at pp. 7-8.) The Court of Appeals applied de novo review because the language of S.C. Code Ann. § 34-31-20(A) is mandatory. "Sibley-Jones was *entitled* to prejudgment interest" because she "met the requirements for prejudgment interest under the applicable statute." Unpublished Opinion No. 2024-UP-253, at *5 (emphasis added).

Moreover, the Court of Appeals was correct in holding that the trial court does not have discretion to deny prejudgment interest when the requirements of S.C. Code Ann. § 34-31-20(A) are met. The language of the statute is plainly mandatory, not discretionary. 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); *Calhoun v. Calhoun*, 339 S.C. 96, 102, 529 S.E.2d 14, 18 (2000) ("Use of the word 'shall' in a statutory provision indicates the provision is mandatory.") (discussing S.C. Code Ann. § 34-31-20(B)); *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 Court of Appeals recognized that the authority cited by Decide4Action is distinguishable because it involved 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, this 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 add prejudgment interest. *See also 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.").

Similarly, the Court's statement in *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 133, 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).

B. Sibley-Jones did not waive her claim to prejudgment interest.

Contrary to Decide4Action's argument, Sibley-Jones did not waive her claim to prejudgment interest. (Petition at pp. 8-10.) Specifically, 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 is distinguishable because it involved jury issues, not questions of prejudgment interest. *See Wheeler v. Globe & Rutgers Fire Ins. Co.*, 125 S.C. 320, 325, 118 S.E. 609, 610 (1923) (ambiguity in contract interpretation to be decided by jury).

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 decision was correct on the merits.

Decide4Action's argument that the Escrow Agreement allowed the Circuit Court to exercise discretion to deny the request for prejudgment interest is also unavailing. (Petition at pp. 10-12.) 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 funds 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) (emphasis added).

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 "Escrow Release Date") unless Decide4Action submitted a "Pending Claim" to the funds no less than three business days prior to that date. (R. pp. 616, 635) Decide4Action submitted a baseless claim to UCB, which prevented the Selling Shareholders from receiving the $440,000 in 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.

Moreover, there is no "double recovery" of prejudgment interest along with the interest in the Escrow Account because Decide4Action only owes prejudgment interest on the $440,000 principal and the Escrow Account will be applied to the Judgment. Thus, in granting Sibley-Jones directed verdict on her breach of contract claim, Sibley-Jones was entitled to the $440,000 plus prejudgment interest on that amount from the agreed Escrow Release Date of October 16, 2018. When the funds in the Escrow Account are eventually applied to the Judgment, any amount the Escrow Agent has added to the Escrow Account will be applied to and reduce the balance of the Judgment.

Finally, the Court of Appeals also correctly rejected Decide4Action's "independent" argument 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. 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 on October 16, 2018, is because Decide4Action disputed the Selling Shareholders' entitlement to the funds. The fact that a defendant keeps a third-party from releasing funds based on a dispute is no different in substance then the defendant itself refusing to pay the funds 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 was entitled to prejudgment interest during that time period, as the Court of Appeals correctly held.

II. The Court of Appeals Correctly Held that the Circuit Court Abused its Discretion by Not Providing a Basis for Denying Sibley-Jones's Petition for Costs.

Decide4Action also petitions the Court to review the Court of Appeals' decision in order to "clarify how a claim for costs must be made" and "clarify how to preserve a challenge to a denial of costs." (Petition at pp. 12-15.) This argument misunderstands the limited nature of the Court of Appeals' decision on the costs issue and would inappropriately insert this Court into reviewing the issue before the Circuit Court addresses it in the first instance.

The Court of Appeals held only that the Circuit Court erred by "not giv[ing] any basis for denying costs in either its oral ruling, form order, or order denying Sibley-Jones's motion to alter or amend." Opinion at *6 (citing *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.").) Thus, the Court of Appeals "render[ed] no decision on whether the requested costs should be awarded and remand[ed] to the circuit court for consideration." *Id.* This limited relief was appropriate because "[f]ailure to exercise discretion constitutes an abuse of discretion," *id.*, particularly because, as Decide4Action acknowledges, 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's petition to the Court to "clarify" the procedures for seeking costs is inappropriate because the Circuit Court should in the first instance decide whether to grant

Sibley-Jones's cost petition, and, if not, to articulate the basis for the denial. *See Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 600-01, 675 S.E.2d 414, 416 (2009) ("Although we agree with the Court of Appeals' ruling that the trial judge's award of treble damages was controlled by an error of law, we find it was for the trial court to determine, in the first instance, whether there existed a bona fide dispute such that treble damages were not warranted.").

Following this time-tested rule of appellate procedure is particularly appropriate here because of the genuine uncertainty about the basis for the Circuit Court's initial decision to deny the petition for costs. This uncertainty is demonstrated by the many arguments made by Decide4Action about the alleged deficiencies in the cost petition, none of which hold merit.

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.

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 case cited by Decide4Action involved a failure to file an affidavit when the court needed the information in the missing affidavit to support a ruling in the movant's favor. *See 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).[1]

Finally, Decide4Action also makes the baseless argument that Sibley-Jones did not preserve her argument for costs on appeal because she did not move for reconsideration of the Circuit Court's order denying costs. As noted above, though, such futile actions are not necessary to preserve an issue for appeal. Decide4Action's meritless preservation arguments would only create unneeded traps for practitioners.

In short, the Court of Appeals correctly held that it was an abuse of discretion for the Circuit Court to not explain the basis for denying Sibley-Jones' petition for costs, and the remand for a decision on that point was appropriate.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition, allowing the Court of Appeals' Opinion to stand.

Respectfully submitted,

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[1] 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.

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