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**Jan 26 2022**

**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

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Common Pleas Case No. 2019-CP-23-02032  
Appellate Case No. 2021-001177

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

v.

Decide4action, Inc., ..... Appellant-Respondent.

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**INITIAL 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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## 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”). (Plaintiff’s Trial Exhibit 8) 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. (Plaintiff’s Trial Exhibit 9) 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. (Plaintiff’s Trial Exhibit 17)

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. (Plaintiff's Trial Exhibit 10) 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. (Plaintiff's Trial Exhibit 11) Decide4Action refused to permit the escrow to be released. (Plaintiff's Trial Exhibit 12)

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. (Complaint) 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. (Amended Complaint; Answer to Amended Complaint and Counterclaims; Plaintiff's Trial Exhibit 20)

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. (Judgment dated July 28, 2021) 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. (August 6, 2021 Order)

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. (August 9, 2021 Motion to Alter or Amend; September 21, 2021 Reply in Support of Motion to Alter or Amend; October 13, 2021 Order) On November 11, 2021, Sibley-Jones timely filed a notice of cross-appeal from that order and the Judgment. (Notice of Cross-Appeal dated November 11, 2021)

### **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. (Judgment dated July 28, 2021) 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. (Plaintiff’s Trial Exhibit 9; Escrow Agreement, at p. 2, § 3(c)) (Plaintiff’s Exhibit 16; Agreement regarding Application of Funds, (“Fund Agreement”) at p. 2, § 5) 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. (Complaint; Amended Complaint) 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. (Plaintiff's Trial Exhibit 9; Escrow Agreement, p. 2, § 3(d) (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")) (Plaintiff's Trial Exhibit 16; Fund Agreement, at p. 2, § 5 ("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.<sup>1</sup>

**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

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<sup>1</sup> 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).

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

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. (Reply in Support of Motion to Alter or Amend, Exhibit A.) Accordingly, the Judgment should be amended to add \$999.31 in costs. Rule 59(e), SCRCP.

### 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,

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January 26, 2022

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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 **INITIAL BRIEF OF RESPONDENT/APPELLANT JULIA SIBLEY-JONES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM A.L. SIBLEY, JR.** by email and by first class mail, addressed to the following:

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