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.

Initial Cross-Appeal Brief of Appellant-Respondent Decide4Action, Inc.

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COUNTERSTATEMENT OF ISSUES ON APPEAL

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. [4/11/19 Summons & Comp. with Ex. A].

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. [12/28/2020 Amended Compl.]. 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. [1/25/21 Ans. to Amend. Compl.]. 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. [2/1/21 Reply].

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.

[7/30/2021 Form 4 Order].

III. The Posttrial Motion

On August 9, 2021, Ms. Sibley-Joes filed a motion to alter or amend the judgment. [8/9/2021 Motion to Alter or Amend]. 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. [9/21/21 Reply to Motion to Alter or Amend, Ex. A].

The circuit court denied the motion to alter or amend on October 13, 2021. [10/13/21 Order].

IV. The Notices of Appeal

Decide4Action timely served a notice of appeal on October 13, 2021. [10/13/21 Notice of Appeal]. Ms. Sibley-Jones timely served a notice of cross appeal on November 11, 2021. [11/11/21 Notice of Cross Appeal].

STATEMENT OF ADDITIONAL FACTS

Decide4Action agreed to purchase of CC+I for a total price of $4,400,00.00 [Pl. Ex. 8]. The parties also agreed that the sellers would put $440,000 of the funds received from Decide4Acton 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. [Tr. 307; Pl. Ex. 9]. 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.

[Pl. Ex. 9].

As of the conclusion of the trial below, the $440,000 in the escrow had grown to $443,000. [Tr. 372].

ARGUMENT

I. The Circuit Court Properly Denied Statutory Prejudgment Interest.

A. Standard of Review

"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 prejudgment 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)).

B. The Issue Was Not Preserved for Review.

Although Ms. Sibley-Jones presents several pages of argument on appeal about why she thinks she ought to receive pre-judgment interest, she points to nowhere in the transcript where she raised those arguments to the circuit judge before the jury was discharged, even though the judge announced in open court that prejudgment interest was going to be denied. *See* [Tr. 384 ("... I'm going to deny any prejudgment interest.")]. 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). *See also, e.g., Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554 (2002) ("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." (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)). Ms. Sibley-Jones could have raised the issue of prejudgment interest in open court but did not do so. Any argument for it was thus waived below.

C. Prejudgment Interest Was Properly Denied.

Even had she properly preserved her claim for prejudgment interest, Ms. Sibley-Jones still cannot show that the circuit court erred in denying it.

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).[1]

Here, the circuit court was well within its discretion to deny prejudgment interest on the grounds that the Escrow Agreement already fully compensated Ms. 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. [Pl. Ex. 9 at 1]. In turn, the bank was responsible for investing funds "in time deposits with or certificates of deposits." [Pl. Ex. 9 (Escrow Agreement) §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. [*Id.* § 7]. Thus, Decide4Action never had a period of "continued retention and use" of the

[1] Given that the circuit judge expressly considered the issue of prejudgment interest before discharging the jury, it would be especially inappropriate to consider her belated arguments now. To whatever extent that the contract was ambiguous about the import of the escrow interest, an issue of fact would have arisen that the jury could have resolved: Did the parties, as Decide4Action maintains, intend the interest accruing in the Escrow Account to be the exclusive interest provision with respect to the funds being held in escrow? Or, as Ms. Sibley-Jones claims, did they somehow want to allow a double recovery of 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.").

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.

In the alternative, the circuit court was within its discretion to find that Decide4Action's "viable claim under the Stock Purchase Agreement" made prejudgment interest inappropriate. [7/30/2021 Form 4 Order]. 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). Ms. Sibley-Jones had no right to the escrow balance during the pendency of Decide4Action's litigation. [Pl. Ex. 9 (Escrow Agreement) §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." [7/30/2021 Form 4 Order]. 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).

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

A. Standard of Review

A trial judge "has broad discretion" with respect to the taxation of costs. *Peterson v. AMTRAK*, 365 S.C. 391, 402 (2005) (citations omitted).

B. Where Costs Were Not Properly Demanded, Denial of Costs Was Not an Abuse of Discretion.

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), SCRCP. 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.

First, she 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.[2]

Second, she neglected to include the required affidavit within the 10-day deadline. [8/9/2021 Motion to Alter or Amend]. 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

[2] "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." R. 220, SCACR.

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* [9/21/21 Reply to Motion to Alter or Amend, Ex. A]—that argument is not properly before the Court. 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).

Even apart from the procedural defects in Ms. Sibley-Jones' cost motion, the trial court still 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 on 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 cannot show that the judge somehow erred in denying them.

CONCLUSION

This Court should affirm the circuit court's denial of prejudgment interests and its denial of costs.

[Signature Page to Follow]

Dated this 12th day of April, 2022.

DECIDE4ACTION, INC.

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as Personal Representative
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v.

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Appellant-Respondent.

Proof of Service

I hereby certify that I sent a copy of the Initial Cross-Appeal Brief of Appellant-Respondent Decide4Action, Inc., its Designation of Record Matter, and this Proof of Service to the following counsel at their email addresses of record this 12th day of April, 2022:

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Dated this 12th day of April, 2022.

Respectfully submitted,

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April 12, 2022

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P.O. Box 11629
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Re: William A.L. Sibley, Jr. v Decide4Action
Case No.: 2021-001177

To Whom It May Concern:

Enclosed find Designation of Record Matter, Initial Brief, as well as Proof of Service. Feel free to contact our office if you have any questions.

TRULUCK THOMASON, LLC

Very respectfully,

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enclosures

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