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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

Charles B. Simmons, Jr., Master-in-Equity

Case No. 2012-CP-23-02887

Appellate Case No. 2020-001587

DAVID WILSON, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF CAROLINA CUSTOM CONVERTING, LLC, ………………………………………………………. Plaintiff,

vs.

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, ZOI FILMS, LLC, AND CAROLINA CUSTOM CONVERTING, LLC, …………………………………………………… Defendants,

vs.

CAROLINA CUSTOM CONVERTING, LLC,
………………………………………………................................... Counterclaim Plaintiff,

vs.

DAVID WILSON, STEVE NORVELL, NEOLOGIC DISTRIBUTION, INC. AND FRESH WATER SYSTEMS, INC., ……………………………………………Counterclaim Defendants

OF WHICH CAROLINA CUSTOM CONVERTING, LLC, JOHN GANDIS, AND ANDREA COMEAU-SHIRLEY are the……………………………………………………..Appellants

and

DAVID WILSON is the.…………………………………………………….…..Respondent.

PETITION FOR REHEARING

Carolina Custom Converting, LLC (the "Company" or "CCC"), John Gandis, and Andrea Comeau-Shirley (together, the "members") petition the Court pursuant to Rule 221, SCACR, for a rehearing of *Wilson v. Gandis, et al.*, Unpublished Opinion No. 2024-UP-037 (the "Unpublished Opinion").

The Appellants' lead argument should not be side-stepped on issue preservation grounds. The words of former Chief Justice Toal are, respectfully, apt: "an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice. To be clear, I do not discount the importance of our issue preservation rules. As an appellate court, we sit to review decisions of lower courts for error. As such, '***it is axiomatic that an issue cannot be raised for the first time on appeal***.'" *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 332-33, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in part, dissenting in part) (emphasis added). In responding to former Chief Justice Toal's position, the majority noted that, "[w]e certainly share her concerns about a hypertechnical application of a procedural bar to appellate arguments, but error preservation has been a critical part of appellate practice in this State for a long time, serving to ensure, as noted by the Chief Justice, that ***we do not reach issues which were not ruled upon by the trial court***." *Atlantic Coast*, 398 S.C. at 329, 730 S.E.2d at 285 (emphasis added).

The lower court ruled on the lead argument. It is preserved for appellate review.

SUMMARY OF THE ARGUMENT

First, the Unpublished Opinion misapprehended the law of issue preservation and overlooked the record on appeal. "***At a minimum***, issue preservation requires that an issue be raised to and ruled upon by the trial judge." *Herron v. Century BMW*, 395 S.C. 461, 465, 719

S.E.2d 640, 642 (2011) (emphasis added). "We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner. Yet, because Appellant can point to no instance where [the issue] was properly raised ***or*** ruled upon, to disregard our issue preservation rules under these circumstances would render them meaningless." *Id.* at 470, 719 S.E.2d at 644-45 (emphasis added). As discussed below, *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 693 (2014) is distinguishable and should not control the Court's decision.

The lower court ruled as follows: "The substance of the argument is that by posting an appeal bond, interest on a judgment no longer accrues. An appeal bond suspends enforcement of a judgment but does not, in the court's opinion, suspend accruing of statutory interest." (R.p. 39). The appeal bond was singled out in the Supreme Court's opinion, which was handed down on June 30, 2020 (the "Opinion"). (R.p. 70). The existence of the appeal bond was noted in an affidavit filed by one of the members on September 16, 2020. (R.p. 80). The argument was squarely presented to the lower court in a supplemental brief filed on June 10, 2021. (R.p. 109-13). And, as noted above, it was ruled upon by the lower court on June 17, 2021. (R.p. 39). The lower court's ruling preserves the argument for appellate review. *Compare with Herron*, 395 S.C. at 468, 719 S.E.2d at 644 ("We have carefully re-examined the record. In all of the submissions, memoranda, and hearings before the trial court, not once was there a single mention of federal preemption as it relates to the issue before us."). This Court, respectfully, has an obligation to resolve this argument on the merits.

On the merits, when a supersedeas bond is posted pursuant to a court order, that act suspends the judgment. *See* Rule 241(c)(1), SCACR. Suspension of the judgment means that post-judgment interest does not accrue because the judgment is on hold and temporarily inoperative.

Second, the Unpublished Opinion misapprehended the policy underlying post-judgment interest and doing so resulted in error. Appellants posted a supersedeas bond and it secured future payment for Respondent. Posting the supersedeas bond means that Appellants did not "retain" funds or assets belonging to Respondent. Posting the supersedeas bond meant also that Appellants were not disregarding the obligation to pay a judgment. Finally, the Opinion changed the judgment debtor. These indisputable facts are incompatible with the policy arguments that support the running of post-judgment interest. *Sears v. Fowler*, 293 S.C. 43, 45-46, 358 S.E.2d 574, 575 (1987) ("[A judgment debtor is] required to pay interest on his debt as compensation for his further retention and use of the judgment creditor's money."); *id.* at 45, 358 S.E.2d at 575 ("The reason most frequently given for the majority's position is that the purpose of postjudgment interest is to penalize non-payment of a judgment by a judgment debtor."). As a result, the Unpublished Opinion incorrectly relied on *Calhoun v. Calhoun*, 339 S.C. 96, 529 S.E.2d 14 (2000) to affirm the lower court.

Third, the Unpublished Opinion again improperly applied issue preservation. It misapprehended and overlooked the record on appeal when it concluded that Appellants did not preserve the argument that post-judgment interest could have only begun to accrue from the issuance of the remittitur from the Opinion. (Unpublished Opinion, at 3). This argument was raised in briefing before the lower court on February 25, 2021. (R.p. 99-100 (*Section C* ("Post judgment interest could not begin accruing until after a reasonable amount of time from entry of the Supreme Court's decision on June 26, 2020.")). The lower court rejected that argument when it concluded that *Calhoun* controlled the outcome. Specifically, the lower court noted that "post-judgment interest accrues from the date of the judgment's origin and not the date of the judgment's finalization. So, it is in this case, and this Court finds that Plaintiff is entitled to [post-judgment

interest] from the date of the January 9, 2015 judgment." (R.p. 36). This argument is preserved for appellate review and the Court has an obligation to resolve the argument.

Fourth, the Unpublished Opinion misapprehended the reach of the Supreme Court's opinion when it concluded that (assuming post-judgment interest was not suspended by the supersedeas bond and did accrue during the appeal) the obligations of the members could be transferred to the Company. The Unpublished Opinion found it significant that there was an absence of any "directives indicating an intention to 'vacate' or 'abrogate' the circuit court's holding or any accrued interest." (Unpublished Opinion, at 3). As a result, the Unpublished Opinion found that the lower court did not reverse pierce the corporate veil of the company. Instead, "it ruled in accordance with the supreme court's opinion." *Id.* The Unpublished Opinion's holding is a misapprehension of the Opinion and causes an improper reverse piercing of the corporate veil.

The Court should grant the petition and issue an opinion addressing the merits of the lead argument. In doing so the Court should hold that no post-judgment interest accrues after a supersedeas bond is entered pursuant to a court order. Alternatively, the Court should grant the petition, and issue an opinion holding that no post-judgment interest is owed to Respondent as a result of the posting of a supersedeas bond, the change in judgment debtor, and the timely payment of that new judgment. Alternatively, the Court should grant the petition and remand to the lower court to address whether reverse veil piercing is even a viable claim for Respondent.

I. THAT POST-JUDGMENT INTEREST DID NOT ACCRUE AFTER APPELLANTS POSTED A SUPERSEDEAS BOND PURSUANT TO COURT ORDER IS PRESERVED FOR APPELLATE REVIEW

Appellants presented a singular issue for resolution by the lower court and this Court: whether Respondent is entitled to post-judgment interest. Through multiple rounds of briefing in

the lower court, Appellants presented various arguments for why post-judgment interest should not be awarded. The lower court ruled on every argument.

"In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court." *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006). "The rationale for the rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error. Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Id.* at 373, 628 S.E.2d at 919.

The lower court ruled on the question of whether posting a supersedeas bond prevented the accrual of post-judgment interest. Therefore, this Court has the obligation to review the record and law and determine whether the lower court's ruling was correct. The Appellants met the bare minimum requirement to preserve the argument for appellate review. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge."). *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 693 (2014), is distinguishable and should not be relied upon to avoid this argument.

Stevens & Wilkinson of S.C., Inc. ("S&W") moved for partial summary judgment that it had a contract with the City of Columbia (the "City"). 409 S.C. at 565, 762 S.E.2d at 694. The City defended that motion by arguing that it did not have a contract with S&W. *Id.* at 565, 762 S.E.2d at 694. The City lost the motion. The City filed a Rule 59(e), SCRCP, motion. The motion did an about-face. The City argued that there was a counter-offer provided to S&W. *Id.* at 565,

762 S.E.2d at 694. Further, the City argued that it and S&W performed under that counter-offer, resulting in a contract with S&W, and a satisfaction of the contract. *Id.* at 565, 762 S.E.2d at 694.

The circuit court declined to rule on the City's Rule 59(e) argument that a different contract was entered into, accepted, and satisfied. The City appealed. The Court of Appeals affirmed the lower court, but modified its affirmance to adopt the City's about-face argument that a different contract was accepted. *Id.* at 566, 762 S.E.2d at 695. The Court of Appeals remanded for a determination of whether the contract was satisfied. S&W appealed, and the Supreme Court affirmed the Court of Appeals for a modified reason.

The Supreme Court found that the Court of Appeals should not have addressed the City's about-face argument. In doing so, the Supreme Court noted the rule that an issue must have been raised to and ruled upon by the trial court in order to preserve that issue for appellate review. *Id.* at 567, 762 S.E.2d at 695. In addition, the Supreme Court noted that a "party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not." *Id.* at 567, 762 S.E.2d at 695.

The new issue rule does not apply. In *Stevens & Wilkinson*, the City raised a wholly different and new issue at the Rule 59(e) stage. It went from there is "no contract" to "there is a contract, and it has been satisfied." Further, the circuit court did not rule on the City's new issue. It is against the backdrop of these facts that the Supreme Court wrote that, "[i]t is improper for the City to concede the sole issue before the circuit court and attempt to inject new issues and theories on appeal." *Id.* at 567-68, 762 S.E.2d at 695.

Here, Appellants advanced the same issue (whether post-judgment interest is owed). The argument in support of the same issue was supplemented at the Rule 59(e) stage. And the lower court ruled on that supplemental argument.

The facts of *Stevens & Wilkinson*, coupled with the lower court order ruling on this argument, create the necessary opening for the Court to find this argument is preserved. *See Atlantic Coast*, 398 S.C. at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in part, dissenting in part) ("I believe that where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation."); *Herron*, 395 S.C. 470, 719 S.E.2d at 644-45 ("We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner. Yet, because Appellant can point to no instance where [the issue] was properly raised or ruled upon, to disregard our issue preservation rules under these circumstances would render them meaningless."). The Court should proceed through that opening and resolve this dispute.

II. WHEN APPELLANTS POSTED THE SUPERSEDEAS BOND PURSUANT TO THE CIRCUIT COURT'S ORDER THAT PREVENTED THE ACCRUAL OF POST-JUDGMENT INTEREST

When the circuit court entered the order requiring Appellants to post a supersedeas bond in order to avoid any collection activities, and Appellants complied with the order, the accrual of post-judgment interest ceased. Accrual of post-judgment interest ceased to occur because the supersedeas bond suspended the judgment. Under Rule 241(c)(1), "[t]he effect of the granting of a supersedeas is to ***suspend*** or stay the matters decided in the order, judgment, decree or decision on appeal and, where a prior order or decision was in effect at the time the appealed order, judgment, decree or decision was filed, to revive the terms of the prior order or decision." (emphasis added).

The Court should interpret this rule according to its plain and ordinary meaning. *See Ex parte Wilson*, 367 S.C. 7, 15, 625 S.E.2d 205, 209 (2005) ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes."). "If a rule's language is plain, unambiguous, and conveys a clear meaning,

interpretation is unnecessary and the stated meaning should be enforced." *Id.* at 15, 625 S.E.2d at 209. "Courts should consider not only the particular clause in which a word may be used, but the word and its meaning in conjunction with the purpose of the whole rule and the policy of the rule." *Id.* at 15, 625 S.E.2d at 209. "In construing a rule, language in the rule must be read in a sense which harmonizes with its subject matter and accords with its general purpose." *Id.* at 15, 625 S.E.2d at 209.

The verb *suspend* means "to hold in an undetermined or undecided state awaiting further information"; "to set aside or make temporarily inoperative."[1] Allowing post-judgment interest to accrue on a judgment that is placed on hold or made temporarily inoperative is at odds with the plain meaning of the words used in the rule. If post-judgment interest accrues on a judgment that is on hold or temporarily inoperative, then the judgment is ***not*** on hold or temporarily inoperative. As a result, the plain meaning of the word *suspend* in Rule 241(c)(1) must mean that the judgment is on hold or temporarily inoperative and, therefore, cannot accrue interest.

The remainder of the language following the word *suspend* in the rule supports this interpretation. The last sentence of Rule 241(c)(1) provides that "where a prior order or decision was in effect at the time the appealed order, judgment, decree or decision was filed, [the supersedeas bond operates] to revive the terms of the prior order or decision." Stated more clearly, the supersedeas bond causes the current judgment or order to effectively cease to exist. A judgment or order that ceases to exist cannot accrue interest.

This interpretation comports with the guarantee of payment provided by a supersedeas bond. It is a guarantee because a supersedeas bond requires a party to pledge collateral to satisfy

[1] https://www.merriam-webster.com/dictionary/suspend

the judgment amount. *See Van Romer v. Interstate Prods*., Inc., 2010 WL 1999528, at *1-3 (D.S.C. May 19, 2010) (describing what a full supersedeas bond requires).

South Carolina Code Section 18-9-130 operates in concert with Rule 241, SCACR. It provides that "[i]f the presiding judge grants a stay of execution and requires a bond or other surety to guarantee the payment of the judgment pending the appeal, the amount of the bond or other surety *may not exceed the amount of the judgment*." S.C. Code Ann. §18-9-130(A)(1) (emphasis added). The bond may not exceed the amount of the judgment because the judgment is on hold and temporarily inoperative.

It is well established that, "a judgment debtor may stop the running of interest by paying the amount of the judgment into court during the pendency of an appeal." *Sears v. Fowler*, 293 S.C. 43, 44 n.1, 358 S.E.2d 574, 575 n.1 (1987); *see also* Rule 67, SCRCP. Similarly, under Rule 241(c)(1), SCACR, the General Assembly and the Supreme Court have decided that a supersedeas bond should operate in the exact same manner. This interpretation makes sense because a supersedeas bond is the equivalent of paying a judgment into court: the money is guaranteed; the judgment will be collected if there is a successful appeal. After Appellants posted the supersedeas bond, post-judgment interest stopped accruing.[2]

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[2] If the Court adopts this argument in support of the post-judgment interest issue, then it should remand to the lower court to determine whether post-judgment interest accrued before Appellants posted the supersedeas bond.

III. THE UNPUBLISHED OPINION ERRED IN CONCLUDING THAT CHANGING THE JUDGMENT DEBTOR DID NOT ALTER POST-JUDGMENT INTEREST

A. Imposing Post-Judgment Interest is Guided by Policy Considerations and those Policy Considerations Point in Favor of Not Imposing Post-Judgment Interest.

The stated policy reason for imposing post-judgment interest is two-fold: (1) to penalize the judgment debtor for the continued use of its assets, and (2) to penalize the judgment debtor for failing to promptly pay the judgment creditor. Neither of these policy goals are present in this case. When the purposes of the policy behind post-judgment interest are absent, that is a good sign that post-judgment interest should not be imposed. The Unpublished Opinion misapprehended the law by failing to appropriately give weight and consideration to the absence of the purposes of the policy for post-judgment interest.

1. Appellants Did Not Continue to Use Their Assets

During the lower court proceedings and on brief, Respondent argued that Appellants' retention and use of the capital supported an award of post-judgment interest. This argument, apparently credited by the lower court, is in direct conflict with how a supersedeas bond operates. Appellants were required to pledge assets, and make the members and the Company a named party to the supersedeas bond. Appellants were financially impaired for the entire time the supersedeas bond was in existence. *See Van Romer*, 2010 WL 1999528, at *1-3 (describing what a full supersedeas bond requires).

The Supreme Court has noted that, "[a] judgment debtor is required to pay interest on his debt as compensation for his further retention and use of the judgment creditor's money." *Sears*, 293 S.C. at 45-46, 358 S.E.2d at 575. A judgment debtor is, of course, a "person against whom a money judgment has been entered but not yet satisfied." Black's Law Dictionary, 861 (8th ed. 2004). This argument does not apply in the present situation because Appellants were required to

post a supersedeas bond in the amount of $347,863.23 to guarantee the purchase of Wilson's distributional interest.

2. *The Changed Judgment Debtor Means there is No One to Penalize for Non-Payment*

The Supreme Court has also recognized that the "reason most frequently given for the majority's position is that the purpose of post-judgment interest is to penalize nonpayment of a judgment by a judgment debtor." *Sears*, 293 S.C. at 45, 358 S.E.2d at 575. The Opinion created a new judgment debtor when it made the Company as the primary judgment debtor. Respondent acknowledged this indisputable fact in the lower court, "there certainly is a new individual or new entity who is responsible for the judgment, so perhaps, yes, there is a new judgment debtor." (R.p. 153, ln. 4-6). Respondent continued to argue that notwithstanding that fact, there is not a new judgment. But that argument cannot be correct. When a new party is ordered to respond to a judgment when it previously had no obligation, that must mean there is a new judgment.

After the Opinion, there is not a non-compliant individual or entity to penalize for nonpayment of a debt. The members previously appealed the Buy-Out Order, in part, because they believed that the circuit court committed legal error by imposing individual and joint and several liability for Respondent's buy-out. The Supreme Court agreed with their legal position when it instituted the Company as the primary judgment debtor. Ordering the Company to pay post-judgment interest that accrued when it was not a judgment debtor does not serve the policy purpose of awarding post-judgment interest.

B. *Calhoun Did Not Establish a "Bright Line" Test Applicable to the Fact Pattern Presented*

The Unpublished Opinion wrongly relied on *Calhoun* to find that post-judgment interest was appropriate pursuant to the Opinion. The Unpublished Opinion acknowledged the factual

distinction between *Calhoun* and the Opinion. *Calhoun* addressed a monetary dispute between two parties, and the Opinion addressed a monetary dispute between multiple parties that included the question of which of the parties should be liable in the first instance. The Unpublished Opinion did not apply the policy purposes behind post-judgment interest to the presence of the factual distinction between *Calhoun* and the Opinion. This was a misapprehension of law and should be corrected. Correcting this misapprehension should result in the Court holding that no post-judgment interest is owed.

IV. POST-JUDGMENT INTEREST COULD ONLY ACCRUE, IF AT ALL, AFTER THE SUPREME COURT HANDED DOWN THE OPINION BECAUSE THE OPINION CREATED A NEW JUDGMENT

The Opinion created a new judgment, and the Company timely complied with its obligations after it became a judgment debtor. As a result, no post-judgment interest accrued. The Opinion held that the Company must purchase Respondent's membership interest. (R.p. 75 (noting the Company was "first obligated to purchase Wilson's interest in CCC")). Following the remittitur and the remand status conference, the Company instructed the bond company to pay the judgment. As a result, the Company complied with its obligation to purchase Respondent's membership interest within a reasonable time.

A. This Argument is Preserved for Appellate Review.

The Unpublished Opinion overlooked the record on appeal when it found that this argument is not preserved for appellate review. This argument was raised in briefing before the lower court on February 25, 2021. (R.p. 99-100 (Section C ("Post judgment interest could not begin accruing until after a reasonable amount of time from entry of the Supreme Court's decision on June 26, 2020.")). The lower court rejected that argument when it concluded that *Calhoun* controlled the outcome. Specifically, the lower court noted that *Calhoun* held that "post-judgment

interest accrues from the date of the judgment's origin and not the date of the judgment's finalization. So, it is in this case, and this Court finds that Plaintiff is entitled to [post-judgment interest] from the date of the January 9, 2015 judgment." (R.p. 36). The Appellants renewed the argument in the Rule 59(e) motion filed on May 14, 2021. (R.p. 105 (Part III)). This argement is preserved for appellate review.

B. The Lower Court Erred in Concluding That Respondent Was Entitled to Post-Judgment Interest From the Date of the Buy-Out Order Because the New Judgment Was Not Entered Until June 26, 2020.

The lower court erred in concluding that Respondent was entitled to post-judgment interest on the Buy-Out Order when it failed to apply the undisputed facts to the language of the statute. "[T]his [argument] is purely one of statutory interpretation, dependent only on how the undisputed facts apply to the statute." *Commissioner of Public Work of the City of Lauren v. The City of Fountain Inn*, 428 S.C. 209, 218 n.4, 833 S.E.2d 834, 838 n.4 (2019). "Questions of statutory interpretation are questions of law." *Id.* at 218 n4., 833 S.E.2d at 838 n4.

On June 6, 2020, the Supreme Court held that, "[w]e modify the court of appeals' oppression holding and hold CCC is first obligated to purchase Wilson's interest in CCC." (, R.p. 75). For the first time, beginning on June 26, 2020, a judgment was entered against the Company and the Company was named the judgment debtor with the obligation to purchase Respondent's membership interest in the Company—a result that Respondent opposed for the entirety of the appeal.

The post-judgment interest statute provides that, "[a] money decree or ***judgment*** of a court enrolled or ***entered*** must draw interest according to law." S.C. Code Ann. § 34-31-20. (emphasis added). The judgment of the Supreme Court was entered by the Greenville County Clerk of Court on June 26, 2020.

After the Opinion, Respondent had one option to collect on the judgment: demand that the Company purchase his membership interest; if the Company did not comply, then Respondent could cause the 10% member to pay 10% of the purchase price of his membership interest and cause the other member to pay the remainder of the purchase price. Prior to the entry of that judgment, Respondent had two different options: demand that the 10% member purchase the entirety of his membership interest, or have the other member purchase the entirety of his membership interest. These are markedly different scenarios. Plainly a new judgment was entered for purposes of § 34-31-20.

The lower court failed to follow the rules of statutory interpretation and substituted its own sense of fairness to obtain a result it deemed correct. In its order, the lower court justified transferring the post-judgment interest that, assuming *arguendo*, accrued during the appeal against the members of the Company as follows:

> [A]lthough the decision makes CCC primarily liable for payment of the money judgment, [the members] remain obligated in the event that the judgment is not paid within a reasonable time. Moreover, the fact that [the members] are the majority owners of CCC, and the individuals who made the decisions leading to the trial court's order, there is no undue prejudice by allowing the statutory interest. In fact, to hold otherwise would be to allow a windfall to the at-fault and appealing parties.

(R.p. 36). The language used by the lower court indicated that it improperly considered extraneous facts when deciding the legal argument. As a result, the Court committed legal error by failing to correctly apply the undisputed facts to the language of the unambiguous statute.

Lastly, Respondent's membership interest was timely purchased on or about November 1, 2020. The lapse of approximately four (4) months between the remittitur and the purchase was based upon the Company's request to the circuit court to implement a structured buy-out. The Company made this good faith request based upon the change in the judgment debtor. (R.p. 76). The Company filed the motion for a remand status conference on July 13, 2020. (R.p. 76). The

status conference was held on September 21, 2020. The circuit court denied the request for a structured buy-out. Thereafter, the bond company made the full payment to Respondent. Considering the timeline of events that occurred between the remittitur and the purchase of Respondent's membership interest, the Company complied with its obligation to purchase Respondent's membership interest within a reasonable time.

V. THE UNPUBLISHED OPINION ERRED BY REVERSE PIERCING THE CORPORATE VEIL WHEN IT ORDERED THE COMPANY TO PAY FOR THE POST-JUDGMENT INTEREST THAT ACCRUED WHILE THE JUDGMENT WAS AGAINST THE MEMBERS

The Unpublished Opinion improperly affirmed the reverse veil piercing. The Unpublished Opinion misapprehended the reach of the Supreme Court's opinion when it concluded that (assuming post-judgment interest was not suspended by the supersedeas bond and did accrue during the appeal) the obligations of the members could be transferred to the Company. The Unpublished Opinion found it significant that there was an absence of any "directives indicating an intention to 'vacate' or 'abrogate' the circuit court's holding or any accrued interest." (Unpublished Opinion, at 3). As a result, the Unpublished Opinion found that the lower court did not reverse pierce the corporate veil of the company. Instead, "it ruled in accordance with the supreme court's opinion." The Unpublished Opinion's holding is a misapprehension of the Opinion and causes an improper reverse piercing of the corporate veil.

The Opinion did not address the transfer of any post-judgment interest to the Company. The Unpublished Opinion interpreted the Opinion's silence on this point as the equivalent of an acknowledgment that post-judgment interest accrued. For the reasons discussed herein, this interpretation is at odds with the operation of a supersedeas bond and the post-judgment interest statute. Nevertheless, the lower court erred by reverse piercing the corporate veil when it ordered the Company to pay post-judgment interest. In the May 4, 2021, Order, the Court stated, "the fact

that Gandis and Shirley are the majority owners of CCC and the individuals who made the decisions leading to the trial court's [Buy-Out Order], there is no undue prejudice by allowing the statutory interest." (Order, R.p. 36). This finding improperly treats the members and the Company as one in the same.

"As a general rule, a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears." *Wilson v. Friedberg*, 323 S.C. 248, 251, 473 S.E.2d 854, 856 (Ct. App. 1996). "However, the law will regard the corporation as an association of persons when the notion of the legal entity is used to protect fraud, justify wrong, or defeat public policy. *Id.* at 251, 473 S.E.2d at 856. "[R]everse veil piercing attaches liability to the entity for a judgment against the individuals who hold an ownership interest in that entity." *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375, 385-86 (4th Cir. 2018). South Carolina courts hold that, "[t]he equitable doctrine of piercing the corporate veil is not to be applied without substantial reflection and the party seeking to have the corporate identity disregarded has the burden of proving the doctrine should be applied." *Wilson*, 323 S.C. at 251, 473 S.E.2d at 856; *see also Mid-South Management Co. v. Sherwood Development Corp.*, 374 S.C. 588, 597, 649 S.E.2d 135, 140 (Ct. App. 2007); *Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984).

Courts "have developed a two-prong test to be used in determining whether the corporate entity should be disregarded. The first prong of the test looks to the observance of corporate formalities by the dominant shareholder and consists of the following factors: (1) whether the corporation was grossly undercapitalized; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) insolvency of the debtor corporation at the time; (5) siphoning of corporate funds by the dominant stockholder; (6) non-functioning of other officers or directors; (7) absence of corporate records; and (8) the fact that the corporation was merely a facade for the

operations of the dominant stockholder. . . . The second prong of the test requires that there be an element of injustice or fundamental unfairness if the acts of the corporation are not regarded as the acts of the individual." *Wilson*, 323 S.C. at 252, 473 S.E.2d at 856.

The Respondent never moved the lower court to consider a veil piercing claim. Further, the lower court never addressed the required and substantial factual prerequisites to effectuate a veil piercing. And, of course, the Respondent never introduced any evidence that would support a veil piercing. The lower court simply did so apparently based upon its own sense of what a just result should look like. The Unpublished Opinion misapprehended the law and this Court should issue a new opinion finding that a reverse veil piercing occurred and remand with instructions to determine whether reverse veil piercing is even a viable claim for Respondent.

CONCLUSION

The Court should grant the petition for rehearing and issue an opinion addressing the merits of the lead argument. In doing so the Court should hold that no post-judgment interest accrues after a supersedeas bond is entered pursuant to a court order. Alternatively, the Court should grant the petition for rehearing and issue an opinion holding that no post-judgment interest is owed to Respondent as a result of the posting of a supersedeas bond, the change in judgment debtor, and the timely payment of that new judgment. Alternative, the Court should remand for a determination of whether the veil piercing claim is even viable claim for Respondent.

[SIGNATURE PAGE FOLLOWS]

Dated: February 15, 2024

Respectfully submitted,

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s/ D. Randle Moody, II

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RECEIVED
Feb 15 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity

Case No. 2012-CP-23-02887

Appellate Case No. 2020-001587

DAVID WILSON, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF CAROLINA CUSTOM CONVERTING, LLC, ………………………………………………………. Plaintiff,

vs.

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, ZOI FILMS, LLC, AND CAROLINA CUSTOM CONVERTING, LLC, …………………………………………………… Defendants,

vs.

CAROLINA CUSTOM CONVERTING, LLC,...Counterclaim Plaintiff,

vs.

DAVID WILSON, STEVE NORVELL, NEOLOGIC DISTRIBUTION, INC. AND FRESH WATER SYSTEMS, INC., ...Counterclaim Defendants,

OF WHICH CAROLINA CUSTOM CONVERTING, LLC, JOHN GANDIS, AND ANDREA COMEAU-SHIRLEY are the ....Appellants,

and

DAVID WILSON is the..Respondent.

PROOF OF SERVICE

I certify that on February 15, 2024, I served the Petition for Rehearing by sending a copy of the same to the email address for Respondent David Wilson, counsel of record as identified in

the Attorney Information System. Specifically, I certify that a copy was sent to: aarnold@aalawfirm.com.

Dated: February 15, 2024

Respectfully submitted,

s/ Burl F. Williams
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