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Jun 12 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

Appellate Case No. 2024-000688

David Wilson, individually and on behalf of Carolina Custom Converting, LLC, ...Plaintiff,

v.

John Gandis, Andrea Comeau-Shirley, ZOi Films, LLC, and Carolina Custom Converting, LLC, ...Defendants,

v.

Carolina Custom Converting, LLC, ...Counterclaim Plaintiff,

v.

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..... Petitioners

and David Wilson is the.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case began on April 27, 2012. On that day, Respondent David Wilson ("Wilson"), who owned a minority ownership interest in Appellant Carolina Custom Converting, LLC ("CCC") with Petitioners John Gandis ("Gandis") and Andrea Comeau-Shirley ("Shirley") filed an action alleging several causes of action against Gandis and Shirley including an action for shareholder oppression. Prior to trial, the parties agreed to waive any jury trial demands and submit all the claims to a bench trial before Circuit Judge D. Garrison Hill. A bench trial on the merits of the case was held the week of September 29 – October 4, 2014. On January 9, 2015, the trial court issued its Order and determined that Wilson had proven his claim of shareholder oppression and the court ordered and awarded a judgment against Gandis and Shirley for $347,863.23 in favor of Wilson. As this Supreme Court specifically noted in its opinion: "After the trial court entered its initial order ordering Gandis and Shirley to purchase Wilson's interest, CCC, Gandis and Shirley filed a joint Rule 59(e) motion (authored by counsel for CCC) and argued CCC, not Gandis and Shirley, should be required to purchase Wilson's interest." (R. pp. 70, fn. 4). Gandis and Shirley appealed their judgment, and CCC appealed its unsuccessful claims against Wilson.

On April 16, 2016 (over a year after entry of judgment and a year after the "Buy-Out Order"), Gandis, Shirley and CCC finally posted a bond in the amount of $347,863.23 thereby staying enforcement of the judgment pending appeal (R. pp. 178-180). On February 7, 2018, the South Carolina Court of Appeals affirmed the trial court's judgment in favor of Wilson and adopted the trial judge's opinion in full (R. pp. 47-49). The Supreme Court affirmed the judgment (5-0) but modified the judgment making CCC primarily liable

for the purchase of Wilson's interests and Gandis and Shirley secondarily liable after a reasonable time (R. pp. 50-75). The Supreme Court remanded the case to the circuit court on June 22, 2020. (The amount of duplicity and deception recited by the Supreme Court's unanimous opinion should not be forgotten when considering the Petitioners' pleas for "equity.")

Upon remand, CCC refused to tender the amount of the judgment, and on September 2, 2020, Wilson filed a Motion to Lift the Stay and to Execute on the Supersedeas Bond[1] (R. pp. 87-88). CCC, Gandis and Shirley all opposed the motion and had filed a "Motion for Remand Status Conference and Ruling Regarding the Time to Complete Purchase of Distributional Interest and Wilson's Motion to Execute on Supersedeas Bond" (R. pp. 76-78). At the hearing on these motions, CCC requested that the Court allow for a structured buy-out procedure comprised of a down payment in the $200,000 range followed by monthly payments over a period of years drawing interest at 4%. Following the hearing, the circuit court entered an order requiring CCC to make a $250,000 payment towards judgment ($347,863.23) of Wilson's distributional interest in the company and permitted Wilson to seek the remaining balance from the supersedeas bond. (CCC ignored this order and directed the bond company to pay Wilson the entire amount of the bond). Further, the court referred the case to the Master-in-Equity to conduct supplemental proceedings and determine the amount of post-judgment interest.

The parties submitted written arguments to the Honorable Charles B. Simmons, Jr., Master-in-Equity of Greenville County as to Wilson's entitlement to post-judgment

[1] In anticipation of this result, Wilson had requested that the supersedeas bond also secure CCC's payment in the event the judgment was modified. Wilson did not care who paid him.

interest. On April 13, 2021, a hearing was held before the Master-in-Equity to determine the amount of post-judgment interest collectable on the judgment entered January 9, 2015—the Buy-Out Order (R.pp. 148-165). (CCC did not argue that posting a supersedeas bond stayed the accrual of post-judgment interest). Judge Simmons later entered an order on May 4, 2021 (R.pp. 33-37), finding that post-judgment interest had accrued from the date of the original judgment (January 9, 2015) in the amount of $208,930.15.

On May 14, 2021, Petitioners filed a Rule 59(e) Motion to Alter or Amend the judgment (R. pp. 102-108): Again, Defendants did not make the argument that posting a supersedeas bond stayed the accrual of post-judgment interest. However, on June 10, 2021, Petitioners filed a Supplemental Rule 59(e) Motion to Alter and Amend (R. pp. 109-113) finally making several unprecedented arguments, including the newly minted argument that a supersedeas bond stayed the accrual of post-judgment interest. The Master-in-Equity denied both Rule 59 motions, and this appeal followed.

The Court of Appeals issued a per curiam opinion rejecting Appellant's arguments and finding that two arguments were untimely. Appellant's petition for rehearing and this Petition for a Writ of Certiorari seek to excuse its failure to timely make arguments that have no support in law or logic. It is time for this case to come to an end.

STANDARD FOR WRIT OF CERTIORARI

In its Unpublished Opinion No. 2024-UP-037, the South Carolina Court of Appeals thoughtfully addressed the procedural and substantive issues raised by Carolina Custom Converting, LLC, John Gandis, and Andrea Comeau-Shirley (collectively, "Petitioners") in their appeal from the lower court's rulings regarding post-judgment interest. "A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only

where there are special and important reasons. ” S.C. App. Ct. R. 242(b). This petition does not meet the standards for issuing a writ of certiorari; there are no special or important reasons for issuing a writ of certiorari. The considerations for review as set by Rule 242(b) of the South Carolina Appellate Court Rules ("SCACR") simply do not exist here.

Petitioners failed to timely raise and preserve its latest contention that posting a supersedeas suspends the mandatory interests provided by S.C. Code §34-31-20(B). The Court of Appeals applied South Carolina precedent in finding this argument to have been waived as was another untimely argument without authority. As for Petitioners' remaining arguments to change existing law, the appellate court rejected each in turn based upon established precedent. There is no important or special reason to create exceptions to current law – statutory nor case law – in this case. In fact, on the arguments related to "reverse piercing" are hard to stomach realizing that it was the Petitioners themselves who advocated for CCC to be left holding the liability. Although, in the end, the decision to issue a writ of certiorari is within the discretion of this Court.

QUESTIONS PRESENTED

1. Whether Petitioners Preserved for Appellate Review an Issue First Advanced in Petitioner's Second Rule 59(e) Motion Filed More than 10 Days after the Entry of Judgment by the Court.

2. Whether Creating an Exception to S.C. Code §34-31-20(B) By Suspending Statutory Post-Judgment Interest when a Supersedeas Bond Has Been Posted is an Important or Special Issue.

3. Whether Creating An Exception to S.C. Code §34-31-20 (B) By Suspending Post-Judgment Interest After the Supreme Court Affirms But Modifies a Judgment Changing the Party Primarily Responsible for Payment of the Judgment is an Important or Special Issue.

4. Whether the Trial Court Reversed Pierced the Corporate Veil of CCC by Imposing Its Members Liabilities Upon the Company.

ARGUMENT

1. The Trial Court and the Appellate Court Correctly Applied the Law of Rule 59(e) and Issue Preservation.

The Court of Appeals' opinion correctly applied the principles and precedent of issue preservation. The Court simply found that Petitioners failed to timely raise the argument that a supersedeas bond stays the accrual of interest. First, on February 25, 2021, Petitioners submitted a detailed memorandum in opposition to an award of post judgment interest but did not make the unprecedented argument that a supersedeas bond stayed the accrual of interest. At the hearing on the matter before the trial court on April 13, 2021, the issue of post judgment interest was argued, and Petitioners never contended that a supersedeas bond stayed the accrual of interest during the hearing.

The Court issued its order calculating the amount of interest to be paid to Wilson on May 4, 2021 without ever having heard Petitioners new supersedeas bond theory. On May 14, 2021, Petitioners filed their Rule 59(e) motion, which once again failed to raise the issue that a supersedeas bond stayed the accrual of interest. (R. pp. 102-08). On June 8, 2021, the trial court held a hearing on Petitioners Rule 59(e) motion, and again Petitioners failed to make the argument that a supersedeas bond stayed the accrual of interest. On June 10, 2021, Petitioners filed a second Rule 59(e) motion (called it a "supplemental" motion), where Petitioners finally unveiled the theory that the supersedeas bond stayed the accrual of interest. (R. p. 109).

To be preserved for appellate review, an issue must have been "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *Walterboro Cmty. Hosp., Inc. v. Meacher,* 392 S.C. 479, 709 S.E.2d 71 (Ct. App. 2010). Clearly, Petitioners did not raise

the issue in in timely manner. First, "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." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) *quoting Hickman v. Hickman,* 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990); see also *Spreeuw v. Barker*, 385 S.C. 45, 69, 682 S.E.2d 843, 855 (Ct. App. 2009) (determining that an appellant failed to preserve an issue for appellate review when he raised it for the first time in post-trial motions.) This is precisely the situation before the Court in this case.

But, even if the Court overlooks the Rule 59(e) motion to advance a new issue," [a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." SCRCP 59(e). Petitioners motion was filed four weeks later, and after the hearing two days earlier where Petitioners still failed to raise the issue. There is nothing special or important at issue here. The Court of Appeals applied the law on preservation of an issue for appeal exactly as the law provides. The most important ruling this Court can issue is one that does not unnecessarily unsettle settled law.

The other argument untimely advanced by Petitioners is that the Supreme Court's opinion in *Wilson v. Gandis* affirming the trial court's money judgment suspended the accrual of interest because it allowed CCC a "reasonable time" to pay the original judgment before Wilson could enforce the judgment against those secondarily liable (Gandis and Shirley). There is nothing in this Court's opinion that even hints that it intended to create an exception to §34-31-20(B) mandate of post-judgment interest, which would have represented a significant loss to Wilson. Surely, this Court would have provided some justification or even acknowledge of such a dramatic change in the law of post-judgment

interest. Our Supreme Court would not take judicial modification of a statutory requirement so cavalierly. This is another untimely argument without merit.

2. There are no special or important reasons that this Court Should Create an Exception to S.C. CODE §34-31-20 (B) By Suspending Statutory Post-Judgment Interest when an Appellant Posts a Supersedeas Bond.

Continuing a 12-year campaign to avoid the Petitioners' legal obligation to purchase Respondent's interest and pay statutory interest as S.C. Code §34-31-20(B) mandates by creating a never before discovered exception hardly seems the highest and best exercise of this Court's sound discretion. The argument that the supersedeas bond stays the accrual of interest is without any support. Petitioners now demand nothing less than judicially created exception(s) to this state's statutory interest mandate. This Court should not remake the law of post-judgment interest on a whim without any countervailing value being served by such a change.

Even if this Court were to consider this untimely theory, the creative editing and interpretation of court rules and statutes does not justify a judicially manufactured exception to §34-31-20(B)

> A money decree or judgment of a court enrolled or entered ***must*** draw interest according to law. The legal rate of interest is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points.

S.C. Code Ann. §34-31-20 (B)(emphasis added). "Our courts have consistently held that use of words such as "shall" or "must" indicates the Legislature's intent to enact a mandatory requirement." *See e.g., State v. Frey*, 362 S.C. 511, 516, 608 S.E.2d 874, 877

(Ct. App. 2005). This Supreme Court has acknowledged that post-judgment interest under §34-31-20(B) is mandatory (such that a plaintiff does not even need to request it nor plead its entitlement). *Calhoun v, Calhoun,* 339 S.C. 96, 102, 529 S.E.2d 14 (2000). This statute creates no exceptions. The change being sought would remake the landscape of appellate practice and deprive judgment creditors of their statutorily mandated post-judgment interest.

Petitioners seek to draw comparison between a party who posts a supersedeas bond and a party who under SCRCP 67 pays the entire judgment into an account maintained by the Clerk of Court. First, it argues that a bond deprives a judgment debtor of its money pending appeal. Although this argument is without any factual support in the record, a bond is merely a promise to pay upon the occurrence of an event. In the normal course, a bond company conducts some form of due diligence to determine if the bond applicants have sufficient wherewithal to (maybe) eventually pay the amount of the bond. However, the bonded litigants keep possession of their funds and have use of those funds during the entirety of the appeal. This is not the case when a party makes a deposit with the clerk of court.[2]

There is nothing in the language or legislative history of S.C. Code §18-9-130 which suggests that posting of a supersedeas bond was intended to do anything more than stay the execution of the judgment. S.C. Code §34-31-20(B) is specific and mandatory as it pertains to the accrual of post-judgment interest. "Generally, '[a] specific statutory

[2] When a party makes a deposit with the Clerk of Court, the clerk normally makes a deposit into an interest-bearing account and upon order of the trial court, will pay all sums in such deposit account as ordered. In this case, Petitioners (with Wilson's consent) have deposited $208,930.15 in a bond fund subject to appreciation (or depreciation) in value.

provision prevails over a more general one.'" *Bruning v. SCDHEC*, 418 S.C. 537, 545, 795 S.E.2d 290, 294 (Ct. App. 2016)(citation omitted). Stated another way, Petitioners argue without support that what they contend is implicit in §18-9-130 prevails over what is explicit in §34-31-20(B). These arguments do not deserve Supreme Court airtime.

3. Creating An Exception to S.C. Code §34-31-20 (B) By Suspending Post-Judgment Interest After the Supreme Court Affirms But Modifies a Judgment Changing the Party Primarily Responsible for Payment of the Judgment is Not an Important or Special Issue.

Next, Petitioners contend that the Supreme Court's modification of the judgment by making CCC primarily responsible for the purchase of the interest created a new judgment. But, of course, this Court did not reverse the judgment of the trial court or vacate the judgment. The appellate court fully considered and rejected this request for a second exception to S.C. Code §34-31-20 (B) Specifically, the Court of Appeal's opinion state's as follows:

> Although Petitioners assert the Supreme Court created a new judgment by modifying the Buyout Order and allegedly vacating any previously accrued interest, they fail to put forth authority supporting such a proposition. To the contrary, *Calhoun* clearly states "when a money judgment is finalized, whether in a lower court or in an appellate court, the interest on that amount, whether it has been modified upward or downward *or remains the same*, runs from *the date of the original judgment*."

The Petitioners' petition does not successfully identify any specific points of law or fact that were overlooked or misapprehended by the trial court or the Court of Appeals.

This Court has established a "bright-line test" for determining the date of judgments "affirmed, but modified." In *Calhoun v. Calhoun*, 339 S.C. 96, 529 S.E.2d 14 (2000), the amount of the judgment had changed on appeal and one of the issues on cert before the Supreme Court was whether modification of the judgment impacted application of the §34-31-20(B). The Supreme Court held that statutory post-judgment interest runs from the date

of the original judgment despite a modification. The Court found that the statute's mandatory language (shall/must) control. The Court reasoned as follows:

> The case before us is a perfect example of how complicated calculating post-judgment interest can become when a money judgment is modified at several different junctures before reaching finality and why a bright line rule for the accrual of interest needs to be established. While different jurisdictions have come up with creative and complicated methods of resolving the issue, it appears that the simplest way to resolve it is by adopting a rule that when a money judgment is finalized, whether in a lower court or in an appellate court, the interest on that amount, whether it has been modified upward or downward or remains the same, runs from the date of the original judgment.

Calhoun v. Calhoun, 339 S.C. 96, 104, 529 S.E.2d 14, 18–19 (2000)(emphasis added).

In *Calhoun*, the Court clearly stated that after a judgment is modified (even at "at several different junctures"), the judgment becomes "finalized" in the appellate court. However, post-judgment interest runs from the "date of the original judgment." Petitioners suggest that there is a "new judgment" although the Supreme Court in Wilson v. Gandis affirmed the original judgment, albeit with one modification. Post-judgment interest accrues from the date of judgment's origin and not the date of the judgment's finalization. *Id.* It really is that simple.

Moreover, all the Petitioners had argued in their original Rule 59(e) motions that the obligation to pay for the purchase was CCC's obligation, and of course, nothing prevented CCC from stepping in and paying the judgment at any time its members decided. As will be dealt with in the next section below, the fact that Petitioners are depending on a shell game that argues that CCC was primarily responsible for the liability all along, but that making CCC also liable for interest some fundamental injustice that deprives it of due process. It just demonstrates gamesmanship, arguing both sides of argue in a never-ending

search for a means of avoidance of their legal obligations that they have so consistently and blatantly disregarded.

4. The Trial Court Did Not "Reverse Pierce" the Corporate Veil of CCC by Imposing Its Members Liabilities Upon the Company.

Petitioners' final argument is disingenuous. Petitioners (CCC and its members) argued that it was CCC's legal obligation to purchase Respondent's membership interest. Instead, the Supreme Court's opinion in *Wilson v. Gandis,* 430 S.C. 282, 844 S.E.2d 631 (2020) imposed primary liability on CCC while assigning secondary liability to Gandis and Shirley based upon the Court's construction of the South Carolina limited liability statute. CCC never argued the interest obligation was that of Gandis and Shirley. So, the Master-in-Equity simply applied the post-judgment interest statute and Supreme Court authority. Because Appellants' arguments ironically made appeals to equity, Judge Simmons responded by pointing out the fact that the individual members (Gandis and Shirley) control and direct CCC, and that there is no undue prejudice to CCC in applying the bright-line test found in *Calhoun*, 339 S.C. at104, 529 S.E.2d at18–19.

And, CCC could have certainly purchased Wilson's interest at any time, and in preparation for this potentiality, CCC and its members secured a bond in the amount of the judgment. Petitioners made the decision not to pay the amount in court, which meant Petitioners had use of Respondent's money for years after the judgment. However, what we know for certain is that Respondent was owed $347,863.23 during the pendency of the appeals before the Court of Appeals and Supreme Court. He was denied the use of his money. And CCC having not paid the interest after a reasonable time, there is certainly an argument that this statutory obligation is now shared by all Petitioners per the Supreme

Court's opinion. Either way, this matter is not sufficiently important to grant Petitioner's petition.

CONCLUSION

Given the analysis provided in the Court of Appeal's opinion and the lack of any new or overlooked issues presented by the Petitioners, the petition for a writ of certiorari does not meet the requisite standard under SCACR 242(b). The Court of Appeals properly applied precedent regarding preservation of issues for appeal, and Petitioners point to no error in considering arguments timely raised. Accordingly, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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Dated June 11, 2024

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

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LLC,……Plaintiff,

v.

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LLC,……Defendants,

v.

CAROLINA CUSTOM CONVERTING, LLC,……Counterclaim Plaintiff,

v.

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

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

and

DAVID WILSON is the ……Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent David Wilson's Return to Petition for A Writ of Certiorari on Petitioners John Gandis, Andrea Comeau-Shirley and Carolina Custom Converting, LLC by electronic mail, on June 11, 2024, to their attorneys of record addressed as follows:

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