

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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 theAppellants,

and

DAVID WILSON is the.....Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Company did not have a judgment against it during the entire *Wilson I* appeal. During most of that appeal, the Company was also bound by a supersedeas bond in favor of Respondent. By ordering the Company to pay post-judgment interest, the lower court and the court of appeals nevertheless treated the Company as if it had a judgment against it during the entire *Wilson I* appeal and disregarded the role of the supersedeas bond. The Respondent asks this Court to do the same thing. This Court should deny this request. The petition raises weighty and novel legal issues that should be resolved by this Court. The Petitioners respectfully request that the Court grant the petition for a writ of certiorari.

I. THE COURT OF APPEALS IMPROPERLY RELIED ON ISSUE PRESERVATION TO AVOID DECIDING WHETHER THE SUPERSEDEAS BOND PREVENTED POST-JUDGMENT INTEREST FROM ACCRUING.

The issue is preserved for appellate review. (Petition, at 9-11). Although the argument was raised late in the lower court proceedings, it was raised. Moreover, it was ruled on. The court of appeals' decision to avoid this argument on issue preservation grounds is itself an incorrect application of issue preservation rules. *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644-45 (2011) (“We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner.”). Based on the research of counsel, it does not appear that this Court has ever addressed whether posting a supersedeas bond pursuant to a court order prevents the accrual of post-judgment interest. It is a novel issue. It is therefore not surprising that the argument arose in the way it did. The novel feature of the argument supports a finding that the issue is preserved. *See id.* at 469, 719 S.E.2d at 644 (declining to find an issue preserved and commenting that the argument “was neither a novel nor an unknown argument”).

The Petitioners raised the argument in a supplemental memorandum that was submitted after the timely Rule 59(e) motion. The Respondent argues the timing of the supplemental

memorandum should be deemed untimely and serve as an alternative basis to find the issue is not preserved for review. (Response, at 6). The Respondent's argument should be rejected.

The entire lower court proceeding focused on a single issue: is post-judgment interest owed. After the lower court found in favor of Respondent, Petitioners timely filed a Rule 59(e) motion. Before the lower court ruled on the Rule 59(e) motion, Petitioners supplemented their argument for why no post-judgment interest should be awarded. And as the Court knows, the lower court ruled on and ruled against Petitioners' supplemental argument. The argument is preserved for appellate review.

II. POSTING A SUPERSEDEAS BOND PURSUANT TO A COURT ORDER PREVENTS POST-JUDGMENT INTEREST FROM ACCRUING.

Although the Company did not have a judgment against it, it was still ordered to bind itself to a supersedeas bond pursuant to Rule 241(c)(1), SCACR. Posting a supersedeas bond suspended the judgment. Under Rule 241(c)(1), "the effect of the granting of a supersedeas is to suspend . . . the judgment." To *suspend* means to set aside or make temporarily inoperative. (*See also* Petition, at 13). Rule 241(c)(1) is a specific rule that, when applied, operates in direct conflict with S.C. Code Ann. § 34-31-20(B), a general statute that authorizes post-judgment interest. When a specific rule addresses the subject matter of a general statute, the specific rule controls. *Wooten ex rel. Wooten v. S.C. Dept. of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999).

The Respondent argues that the general post-judgment interest statute should control over the specific rule that makes the judgment temporarily inoperative. (Response, at 8-9). The Respondent has it backwards. Rule 241(c)(1) controls in this fact pattern.

The Respondent also argues that the language used in the post-judgment interest statute makes post-judgment interest mandatory. (Response, at 7-8). The Respondent is wrong. This Court has already recognized that Rule 67, SCRCR, takes precedence over § 34-31-20(B). *Sears v.*

Fowler, 293 S.C. 43, 44 n.1, 358 S.E.2d 574, 575 n.1 (1987) (noting that when a judgment debtor deposits monies owed into the court pursuant to a court order, that act stays the enforcement of the judgment and the accrual of post-judgment interest).

The Respondent argues that Rule 67 is not analogous to posting a supersedeas bond because a party continues to have the use of its funds. (Response, at 8). This argument is not supported by any legal or factual citation. It should be disregarded. Furthermore, a supersedeas bond is a guaranteed payment. To obtain a supersedeas bond, funds must be pledged. *See Van Romer v. Interstate Prods., Inc.*, 2010 WL 1999528, at *1-3 (D.S.C. May 19, 2010) (describing what a supersedeas bond requires). A supersedeas bond is a legal instrument that can be enforced against the issuer of the bond. (R. p. 178-80). Indeed, Respondent acknowledges that it was the bond company that paid the judgment following remand. (Response, at 2). Posting a supersedeas bond pursuant to a court order is the equivalent of depositing money into a clerk of court account pursuant to a court order.

III. WHEN A NEW JUDGMENT DEBTOR WAS CREATED AFTER THE APPEAL, THE ORIGINAL JUDGMENT WAS SECURED BY A SUPERSEDEAS BOND, AND THE NEW JUDGMENT WAS TIMELY PAID, THOSE INDISPUTABLE FACTS MUST MEAN THAT POST-JUDGMENT INTEREST DID NOT ACCRUE.

This Court created a new judgment debtor in *Wilson I*. This Court does not make material changes to judgments for no reason. *See Gainey v. Gainey*, 279 S.C. 68, 69, 301 S.E.2d 763, 764 (1983) (noting the “Court will not issue advisory opinions”). To his credit, Respondent convinced the lower court and the court of appeals that this material change meant nothing. The legal effect of the Court’s material change, however, was to create a new judgment debtor. The lower court and the court of appeals ordered the Company to pay over five years’ worth of post-judgment interest that allegedly accrued on a judgment during which time the Company was not a judgment debtor. The Company is a legal entity separate and distinct from its members. S.C. Code Ann. §

33-44-201 (declaring “a limited liability company is a legal entity distinct from its members”). The lower court and the court of appeals have disregarded this bedrock principle of corporate law. Ordering the Company to pay post-judgment interest that allegedly accrued on a judgment when the Company had no obligation to pay the judgment is a legal error.¹

The Petitioners incorporate the portions of their petition that address the policy behind awarding post-judgment interest and the role of the supersedeas bond and the new judgment debtor. (Petition, at 17-18).

The lower court and the court of appeals erred by relying on this Court’s decision in *Calhoun v. Calhoun*, 339 S.C. 96, 529 S.E.2d 14 (2000), to impose post-judgment interest on the Company. The Respondent also relies heavily on *Calhoun*. (Response, at 9-10). *Calhoun* does not, however, address whether post-judgment interest is owed when a new judgment debtor is created after an appeal. (Petition, at 19). The Respondent’s effort to shoehorn *Calhoun*’s holding into the facts presented brings to mind the classical image of trying to force a square block into a round hole.

IV. THE REVERSE VEIL PIERCING WARRANTS REVIEW AND REVERSAL

The lower court erred by transferring the post-judgment interest from the members to the Company without first making the necessary findings to determine if post-judgment interest accrued against the members and whether to conduct a reverse veil piercing. (Petition, at 19-22). The court of appeals side-stepped this issue and did not address the error. (Unpublished Opinion, at 3 (finding only that the lower court’s ruling was in compliance with *Wilson I*)). The lower court

¹ The Respondent opposed placing the buyout obligation on the Company, and the Company would have exposed itself to legal liability had it acted to pay the judgment during the *Wilson I* appeal. The Respondent argues now that he “did not care who paid him.” (Response, at 2 n.1). But that was not the legal position he took in the trial and during the appeal that resulted in *Wilson I*.

never conducted the factual inquiry necessary to determine whether a reverse veil piercing is supported by the facts. Moreover, the lower court never grappled with the question of how the individuals could have owed post-judgment interest. As contingent judgment debtors, per *Wilson I*, the individuals never should have been ordered to make the buy-out in the first instance. If this Court does not address or rule for Petitioners on the preceding issues, it should remand to the lower court for the appropriate factual and legal factual findings to determine whether a reverse veil piercing is appropriate.

V. CONCLUSION

This Court's modified opinion in *Wilson I* must mean that post-judgment interest did not accrue. The lower court and the court of appeals were apparently swayed by Respondent's rhetoric. As a result, only lip service has been given to the bedrock principle of corporate law that a corporation is an entity separate and distinct from its members. In addition, the language of Rule 241(c)(1) and the presence of the supersedeas bond should prevent any post-judgment interest from accruing. The Court should respectfully grant the petition for a writ of certiorari.

Dated: June 24, 2024

Respectfully submitted,

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