

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
)
Stevens & Wilkinson of South Carolina,)
Inc.,)
)
Plaintiff,)
)
v.)
)
City of Columbia, South Carolina,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No: 2005-CP-40-0336

FILED
SEP 25 AM 8:50
W. MICHAEL C. & G.S.
RICHLAND COUNTY

ORDER OF JUDGMENT RECEIVED
OCT 19 2015
SC Court of Appeals

This matter came before the Court on Plaintiff Stevens & Wilkinson of South Carolina, Inc.'s ("S&W") Motion for Entry of Judgment against Defendant City of Columbia, South Carolina (the "City"). S&W filed this action on July 12, 2005, seeking contractual damages. On February 18, 2009, S&W filed an offer of judgment offering to resolve this matter for \$1,581,486.64. On March 4, 2009, the City filed its rejection of the offer. The case came before the Court for a jury trial on July 27, 2015. On July 30, 2015, the jury returned a verdict in S&W's favor and awarded \$1,602,915.21.

On July 31, 2015, S&W moved the Court for entry of judgment in its favor. S&W seeks prejudgment interest pursuant to S.C. Code Ann. § 34-31-20(A) and Rule 68 of the South Carolina Rules of Civil Procedure. In sum, S&W seeks a total judgment of \$4,566,620.01 against the City. The City filed a Memorandum in Opposition on August 7, 2015.

DISCUSSION

S&W seeks prejudgment interest on the jury's award on two bases. The first basis is pursuant to S.C. Code Ann. § 34-31-20(A). The second basis is pursuant to Rule 68, SCRPC. The Court will address each of these arguments in turn.

I. S.C. Code Ann. § 34-31-20(A)

S.C. Code Ann. § 34-31-20(A) provides that "[i]n all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum." This Section, thus, "provides for pre-judgment interest in specified cases." Casey v. Casey, 311 S.C. 243, 245, 428 S.E.2d 714, 715 (1993). "A judgment debtor is required to pay interest on [its] debt as compensation for

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[its] continued retention and use of the creditor's money beyond the date payment was due." Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 134, 631 S.E.2d 252, 259 (2006).

S&W requests a judgment in an amount of \$3,012,759.28 pursuant to Section 34-31-20(A). This amount is calculated by multiplying the statutory interest rate (.0875) by the years since this action was filed (10.052), adding the number one (1), and multiplying the result by the verdict of \$1,602,915.21. This statutory interest calculation results in \$1,409,844.07 in prejudgment interest increasing the amount putatively owed to S&W to \$3,012,759.28.

The City objects to prejudgment interest being added to the jury verdict pursuant to S.C. Code Ann. § 34-31-20(A) for two reasons. First, the City contends that sovereign immunity bars S&W from recovering prejudgment interest from the City. Second, the City argues that the damages the jury awarded in this matter are not liquidated damages, and thus, precludes the application of prejudgment interest under Section 34-31-20(A).

A. Sovereign Immunity

S&W contends the City failed to sufficiently plead sovereign immunity as a defense to S&W's *breach of contract* cause of action upon which the jury ultimately awarded its verdict. The Court expressly does not decide whether the City properly pleaded the defense of sovereign immunity. The Court, however, does take this opportunity to find that assuming, *arguendo*, the City did properly plead sovereign immunity as a defense, such defense would be inapplicable in the instant action.

Sovereign immunity is a common law doctrine founded upon the notion that "[t]he king can do no wrong." See McCall by Andrews v. Batson, 285 S.C. 243, 253, 329 S.E.2d 741, 746 (1985) (Chandler, J., concurring) (quoting Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (1788)) superseded by statute as recognized in Jeter v. S.C. Dep't of Transp., 369 S.C. 433, 440, 633 S.E.2d 143, 146 (2006). The doctrine later was constitutionalized through the enactment of the Eleventh Amendment. See U.S. CONST. amend. XI. The United States Supreme Court has construed the Amendment to imbue states with residual sovereign immunity not surrendered to the federal government at the founding. See Alden v. Maine, 527 U.S. 706, 715 (1999). However, as with any privilege, sovereign immunity can be waived by the sovereign, see Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 480-81 (4th Cir. 2005), and in McCall, the South Carolina Supreme Court abolished the State's sovereign immunity from *tort* liability. See McCall, 285 S.C. at 246, 329 S.E.2d at 742.

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In McCall, the Court expressly noted that it previously “eliminated the State’s immunity from suit based upon its contractual obligations in Kinsey Construction Co. Inc. v. S.C. Dep’t of Mental Health, 272 S.C. 168, 249 S.E.2d 900 (1978).” McCall, 285 S.C. at 244, 329 S.E.2d at 742. Kinsey involved a contract dispute between a building contractor and a state agency where the agency disclaimed liability because of sovereign immunity. Kinsey, 272 S.C. at 170, 249 S.E.2d at 901, overruled by McCall and Unisys Corp. v. S.C. Budget and Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office, 346 S.C. 158, 167 n.5, 551 S.E.2d 263, 268 n.5 (2001) (“to the extent that [Kinsey holds] that an action may not be maintained against the State without its consent”).

The Court in Kinsey expressly rejected the state agency’s attempt to disclaim liability based upon sovereign immunity. The Court drew a distinction between an action in contract and one in tort:

With respect to the question of sovereign immunity[,] this Court has often held that the State cannot be sued without its consent. Harris v. Fulp, 178 S.C. 332, 183 S.E. 158 further supports the proposition that sovereign immunity applies in actions *[e]x contractu*. However, while we concur with the [state agency’s] assertion that absent a waiver of immunity an individual cannot maintain an action against the State; we do not agree that a waiver of sovereign immunity can only be obtained from a self-executing provision of the Constitution or by express statutory enactment. 72 Am. Jur. 2d, States, Territories, and Dependencies, Section 118, contains an apt statement of the principles controlling the case at bar.

... (W)here the legislature has by statute authorized the State to enter into certain contracts, the State, by entering into such a contract, thereby consents to be sued if it breaches the contract to the damage of the other contracting party.

Thus, when a State secures to itself the benefits of a contract, it implicitly assumes the corresponding liabilities.

Kinsey, 272 S.C. at 171, 249 S.E.2d at 902 (internal citations omitted) (italics added).

Ultimately, the court held that:

[W]herever the State of South Carolina pursuant to statutory authority enters into a valid contract, the State implicitly consents to be sued and waives its sovereign immunity to the extent of its contractual obligations. To hold otherwise would be to endorse an obvious contradiction, for it cannot be true that the State is empowered to contract with individuals and yet retains the power to avoid its obligations.

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Id. at 172, 249 S.E.2d at 903. Accordingly, “[c]ontract actions are not within the purview of suits proscribed by the doctrine of sovereign immunity.” Hutchins v. S.C. Budget & Control Bd.; Div. of Gen. Servs., 284 S.C. 485, 487, 327 S.E.2d 353, 354 (Ct. App. 1985).

Furthermore, S.C. Code Ann. § 15-78-120(b), the statute the City relies upon to assert an alleged defense of sovereign immunity, expressly forecloses its applicability to the instant question. The South Carolina Tort Claims Act’s preamble, which explains the legislature’s public policy rationale for its adoption, provides, “[n]othing in this chapter affects liability based on contract nor does it affect the power of the State or its political subdivisions to contract.” S.C. Code Ann. § 15-78-20(d). In Wright v. Smallwood, 308 S.C. 471, 473, 419 S.E.2d 219, 220 (1992), the South Carolina Supreme Court interpreted this statutory provision to mean precisely what it states. In Wright, an uninsured motorist injured a municipal employee in an automobile accident. After the employee obtained a default judgment against the defendant, he filed a declaratory judgment action to determine whether his personal insurer or the municipality’s was responsible for paying uninsured motorist benefits. Id. at 472, 419 S.E.2d at 220. The municipality sought to avoid the claim arguing, *inter alia*, that the South Carolina Tort Claims Act rendered the municipality immune from suit. Id. The Supreme Court disagreed:

City contends these provisions immunize it from liability to [the employee] for uninsured benefits. We disagree.

It is made clear in its title that the Act applies only to the *torts* of a governmental entity. See, e.g., § 15-78-20(b), § 15-78-40 (Cum. Supp. 1991). Contractual liability is expressly excluded from immunity: “Nothing in this Chapter affects liability based on contract.” S.C. Code Ann. § 15-78-20(d) (Cum. Supp. 1991).

This Court has previously held uninsured motorist coverage to be “contractual liability required by statute.” Senn v. J.S. Weeks and Co., 255 S.C. 585, 593, 180 S.E.2d 336, 339 (1971). Accordingly, the Act does not bar [the employee’s] claim against City for UM benefits.

Wright, 308 S.C. at 473, 419 S.E.2d at 220.

“The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense.” Steinke v. S.C. Dep’t of Labor, Licensing and Regulation, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999). The City has failed to meet such burden. Accordingly, the

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Court finds the South Carolina Tort Claims Act does not prohibit the State, or one of its political subdivisions, from entering into a contract and, similarly, being held legally accountable for breach of that contract.

As such, the Court finds that S&W's claim for prejudgment interest pursuant to S.C. Code Ann. § 34-31-20(A) is not barred by sovereign immunity.

B. Liquidated Damages

The City also argues that S&W is prohibited from receiving prejudgment interest pursuant to S.C. Code § 34-31-20(A) because S&W's damages were not liquidated. The Court agrees.

Prejudgment interest pursuant to S.C. Code Ann. § 34-31-20(A) is allowed only on a claim of liquidated damages. Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 133, 631 S.E.2d 252, 258–59 (2006). Liquidated damages are damages for a sum “certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties.” Id. “The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.” Id. at 133, 631 S.E.2d at 259.

“In general, damages are unliquidated where they are an uncertain quantity, depending on no fixed standard, referred to the wise discretion of a jury, and can never be made certain except by accord or verdict.” Beckmann Concrete Contractors, Inc. v. United Fire and Cas. Co., 360 S.C. 127, 132, 600 S.E.2d 76, 79 (Ct. App. 2004) (quoting 22 Am. Jur. 2d Damages § 489 (2003)). Where the parties agree a contract was formed but disagree as to the terms of the contract, the claim is unliquidated in nature. See Southern Welding Works, Inc. v. K&S Const. Co., 286 S.C. 158, 164–65, 332 S.E.2d 102, 106 (Ct. App. 1985) (holding the trial court did not err in denying prejudgment interest in an action on an account stated for repairs where the defendant denied the parties agreed it was a true account and where the evidence in the record did not show the parties agreed to a contract price before the repairs were performed). Moreover, prejudgment interest is inappropriate where there is an intermediate question that must be decided before the measure of damages can be ascertained. Vaughn Dev., Inc. v. Westvaco Dev. Corp., 372 S.C. 576, 580–81, 642 S.E.2d 757, 759–760 (Ct. App. 2007) (finding where a contract was not sufficiently specific as to the terms that the parties agreed upon, the damages were unliquidated).

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In Dixie Bell, Inc. v. Redd, an investor in a land development company sued the company and its principals for breach of contract. 376 S.C. 361, 364, 656 S.E.2d 765, 767 (Ct. App. 2007). The Court of Appeals held the trial court erred in determining the investor established its claim was a sum certain entitled to prejudgment interest pursuant to statute. The court reasoned the action arose upon a failure of the parties to reach an agreement on the purchase price of the investor's interest in the land development company, and that the claim itself was unliquidated. Specifically, the court reasoned the claim was "unliquidated because: (1) there was no agreement between the parties as to a sum certain, (2) it could not be reduced to a sum certain by computation or formula, (3) the purchase price was not contractually stipulated, (4) it is not reduced to a sum certain by operation of law or a controlling statute, and (5) it could only be reduced to certainty by a jury determination." Id. at 374, 656 at 771-72.

Applying these precedents to the record in this case, the court finds that the damages returned in the jury's verdict are not liquidated damages. It is clear from the record that the entire issue at trial was to determine the terms of the agreement between the parties. The South Carolina Supreme Court remanded the case for a determination of the terms of the contract. See Stevens & Wilkinson of SC, Inc., v. City of Columbia, 409 S.C. 563, 568, 762 S.E.2d 693, 696 (2014). The terms of the contract were disputed at trial, and damages could be determined only by jury determination.

Therefore, prejudgment interest pursuant to Section 34-31-20(A) is inappropriate.

II. Rule 68, SCRPC

The City also objects to prejudgment interest being added to the jury verdict pursuant to Rule 68(b), SCRPC, for three reasons. First, the City contends that recovery of prejudgment interest from the City is barred by the doctrine of sovereign immunity. Second, the City argues Rule 68 does not apply to causes of actions accruing before July 1, 2005. Lastly, the City argues S&W incorrectly calculated interest under Rule 68(b), SCRPC. Rule 68(b), in relevant part, provides:

If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall recover from the offeree: . . . if the offeror is a plaintiff, eight percent interest computed on the amount of the verdict or award from the date of the offer to the entry of judgment[.]

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A. Sovereign Immunity

The City argues S&W is not entitled to prejudgment interest pursuant to Rule 68(b), SCRCF, because of sovereign immunity based upon S.C. Code Ann. § 15-78-120(b) of the South Carolina Tort Claims Act. This defense has already been addressed in the discussion of S&W's claim for prejudgment interest pursuant to S.C. Code Ann. § 34-31-20(A). Accordingly, and similarly, concerning S&W's claim for prejudgment interest pursuant to Rule 68(b), SCRCF, the Court finds that sovereign immunity does not bar S&W's claim for prejudgment interest.

B. Rule 68(b) Application to Causes of Actions Accruing Before July 1, 2005

The City next argues that S&W cannot recover prejudgment interest under Rule 68(b) because S&W's cause of action accrued prior to July 1, 2005. More specifically, the City contends S.C. Code Ann. § 15-35-400, a statutory provision similarly relating to offers of judgment, was enacted in 2005. This statute expressly applied to causes of actions arising after July 1, 2005. Rule 68 was amended in 2006 to make it consistent with Section 15-35-400. The Note to the 2006 amendment provides that "[the] amendment makes this provision consistent with S.C. Code Ann. Section 15-35-400, which became effective July 1, 2005." Therefore, according to the City, S&W cannot recover prejudgment interest pursuant to Rule 68(b) because Rule 68 only applies to causes of action accruing after July 1, 2005 and S&W's cause of action arose prior to July 1, 2005. The Court finds untenable such contention.

The Court notes S&W seeks prejudgment interest pursuant to Rule 68, SCRCF, *not* S.C. Code Ann. § 15-35-400. Generally, procedural rules are entitled to retroactive effect. Graham v. Dorchester Cnty. School Dist., 339 S.C. 121, 124, 528 S.E.2d 80, 82 (Ct. App. 2000). Thus, newly enacted procedural rules are "given retroactive application to cases pending at the time of [their] enactment." See id. at 123, 528 S.E.2d at 81. Rule 68, SCRCF, is no different. When the South Carolina Rules of Civil Procedure originally were adopted in 1985, they were immediately implemented as to pending actions. Rule 86 provides:

These rules shall take effect on July 1, 1985. They govern all proceedings in civil actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

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Rule 86(a), SCRCP. The Advisory Committee note to the Rule explains further that “Rule 86 is similar to the Federal Rule, making these rules *immediately* applicable to pending actions, as of the effective date, except where the Court finds this not feasible.” Rule 86, SCRCP, advisory committee’s note. (emphasis added).

In Graham, the South Carolina Court of Appeals addressed the question of whether a South Carolina Rule of Civil Procedure that is amended during a pending action governs that instant action. In Graham, the case was struck from the trial roster in 1993 with leave to restore pursuant to former Rule 40(c)(3). 339 S.C. at 122, 528 S.E.2d at 81. In 1995, Rule 40(c)(3) was amended and replaced by Rule 40(j), which provided a new procedure for dismissing and restoring cases to the trial roster. Id. The new rule required that a motion to restore be filed within one year of the date the case was stricken. See Rule 40(j), SCRCP. In 1998, five years after the case was stricken from the roster, the plaintiff obtained an order restoring the case to the trial docket and the defendant moved to dismiss for failure to comply with Rule 40(j). Graham, 339 S.C. at 122, 528 S.E.2d at 81. The trial court granted dismissal reasoning that the plaintiff’s motion was untimely under new Rule 40(j). Id.

The Court of Appeals agreed, explaining that procedural rules were an exception to the general rule of prospective application. Id. at 124, 528 S.E.2d at 82. The court, moreover, echoed the South Carolina Rules of Civil Procedure by stating that the Rules “govern all proceedings in civil actions brought after they take effect.” Id. (quoting Rule 86(a), SCRCP).

S&W and the City agree that the pre-2006 version of Rule 68 differs from the current version of Rule 68. Like Graham, the current version of the Rule was adopted in 2006 after this action was filed. Also like Graham, the question here is whether the later-enacted rule should control the outcome of S&W’s 2009 offer of judgment or whether application of the rule is infeasible or would work an injustice. S&W presented its offer of judgment to the City some three years after Rule 68 was amended, and thus, the City cannot tenably claim that recognition of the amended Rule 68 works an injustice to it.

Accordingly, the Court finds that S&W properly can seek prejudgment interest pursuant to Rule 68, SCRCP.

C. Calculation of Interest

The City also argues that S&W improperly included prejudgment interest pursuant to S.C. Code Ann. § 34-31-20(A) in its calculation of interest pursuant to Rule 68. The Court,

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however, has found that S&W is not entitled to interest pursuant to S.C. Code Ann. § 34-31-20(A).


Rule 68 allows a party in a civil action to file a written offer of judgment offering to take judgment in the offeror's favor for a specific amount. See Rule 68(a), SCRCF. On February 18, 2009, S&W made an offer of judgment of \$1,581,486.64. If an offer is rejected and the plaintiff "obtains a verdict or determination at least as favorable as the rejected offer," then the plaintiff is entitled to recover "any administrative, filing, or other court costs from the date of the offer until the entry of the judgment . . . [and] eight percent interest computed on the amount of the verdict or award from the date of the offer to the entry of judgment[.]" Rule 68(b), SCRCF.

Based upon the plain language of the Rule, this interest is appropriate. Interest calculated under Rule 68, SCRCF, is based upon the applicable interest rate of eight percent (.08) multiplied by the years since the offer of judgment was made (6.447), the result is added to the number one (1) and then multiplied by the amount of the verdict, \$1,602,915.21, to obtain the final amount for which judgment should be entered in this action. This calculation results in a final judgment of \$2,429,634.76.

ORDER

Based upon the jury's finding and upon review of the relevant case law and statutes, Plaintiff's Motion for Entry of Judgment is **GRANTED IN PART**. The total judgment entered in favor of the Plaintiff is \$2,429,634.76.

AND IT IS SO ORDERED.



ALISON RENEE LEE
Presiding Judge

September 24, 2015
Columbia, South Carolina

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