STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT
) 2004-CP-10-3867
CHARLES BICKERSTAFF, M.D., and)
BARBARA MAGERA, M.D.,)
)
Plaintiffs,)
)
vs.) ORDER SETTING RATE OF
) POST-JUDGMENT INTEREST
ROGER PREVOST d/b/a PREVOST)
CONSTRUCTION, INC.,)
)
Defendant.)

Presiding Judge:	Deadra L. Jefferson
Plaintiffs' Attorney:	Steven L. Smith, Esq.
Defendant's Attorney:	Frank M. Cisa, Esq.
Date of Hearing:	July 12, 2012
Court Reporter:	Mia Perron

This matter came before the Court on July 12, 2012[1] for a hearing pursuant to a remand from the South Carolina Court of Appeals in Bickerstaff v. Prevost, 398 S.C. 231, 727 S.E.2d 769 (Ct. App. 2012). The court of appeals reversed this Court's determination that it lacked jurisdiction to determine post-judgment interest and remanded it for reconsideration of the issue of post-judgment interest. Steven L. Smith, Esquire was present at the hearing on behalf of the Plaintiffs[2], and Frank M. Cisa, Esquire was present on behalf of the Defendant.

PROCEDURAL HISTORY

This case originally came before the Court on May 24, 2006 for a trial by jury on the Plaintiffs' breach of contract cause of action and the Defendant's breach of contract, mechanic's lien, and implied contract quantum meruit counterclaims. The jury returned a verdict in the

[1] The issuance of this order was delayed in order to allow the Court to receive and review the original trial transcript of May 24, 2006.
[2] Trial counsel was Patrick J. McDonald, Esquire, on behalf of the Plaintiffs, and Frank M. Cisa, Esquire, on behalf of the Defendant.

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amount of $6,437.62 in favor of the Defendant on its counterclaim for breach of contract. After the verdict was returned, the Defendant made a post-trial motion for the award of attorney's fees and costs as the prevailing party pursuant to South Carolina Code Ann. § 29-5-10 and for the award of prejudgment interest at the rate of 1% per day of and from June 1, 2004 pursuant to the written contract entered into by the parties on January 18, 2004. The Court heard argument and took these matters under advisement. On July 25, 2006, this Court entered a written order awarding Defendant attorney's fees in the amount of $6,437.62[3] and prejudgment interest at the contractual rate of 1% per day of and from June 1, 2004.

On February 8, 2007, Plaintiffs filed a Motion for Leave to Deposit Funds into the Register of the Court. This Motion was granted by the Court on March 28, 2007 providing the following relief: "[s]hould Plaintiffs wish to deposit funds into the Registry . . . such deposit shall reflect the entirety of the judgment entered against them, including prejudgment and post-judgment interest on the initial principal, the full amount of the award of attorney's fees, and the interest on the latter from the date of the award, all to be calculated to the date of the deposit." Plaintiffs did not choose to make this deposit, and interest continued to accrue on the judgment. Subsequently, on April 11, 2007, Defendant filed a Motion to Alter or Amend the Order of March 28, 2007 granting Plaintiffs' Motion for Leave to Deposit Funds into Registry of Court requesting that post-judgment interest on the principal accrue at the rate of 1% per day per the contract rather than at the statutory rate of 11.25% per annum. This Court denied Defendant's Motion to Alter or Amend on May 16, 2007.[4]

[3] The Defendant originally sought $15,134.54 in attorney's fees.

[4] This Court's Order Denying the Motion to Alter or Amend noted that the parties agreed that the calculation of interest contained within the Order regarding Leave to Deposit Funds into the Register of the Court has no bearing on the actual calculation of prejudgment and post-judgment interest other than to set the amount of money that would have needed to be deposited into the Register of the Court to stop the accrual of interest while the case was pending on appeal.

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Plaintiffs filed a timely appeal and raised the following two issues to the court of appeals: (1) whether the circuit court erred in awarding prejudgment interest, and (2) whether the award of interest at the rate of 1% per day was punitive in nature and violative of the United States Constitution.[5] In an Order filed January 7, 2009, the court of appeals affirmed this Court's award of prejudgment interest, finding that "the circuit court properly considered the applicable law on prejudgment interest, and was correct in its determination that Prevost is entitled to interest on the amount of damages awarded by the jury." Bickerstaff v. Prevost, 380 S.C. 521, 525, 670 S.E.2d 660, 662 (Ct. App. 2009). Further, the court of appeals held that the issue regarding the appropriateness of the contractual interest rate was raised "for the very first time on appeal" and "[a]s a result, [was] not ruled upon by the circuit court, and [is] not preserved for our review." Id. Plaintiffs' Petition for Writ of Certiorari was denied by the South Carolina Supreme Court on September 3, 2009. The court of appeals remitted a copy of their opinion to this Court on September 9, 2009.

Plaintiffs filed a Motion to Set Rate of Interest in this Court on September 22, 2009 which was heard on January 26, 2010. The Motion requested that this Court determine whether the judgment award should accrue post-judgment interest at the rate set by law pursuant to S.C. Code Ann. § 34-31-20(B) or the rate established by the contract entered into by the parties. An Order was filed by this Court on July 6, 2010 finding this Court had no authority to modify the rate which was affirmed on appeal or make any further decisions in this matter, other than to enforce the judgment and take any action consistent with the appellate court's ruling. This Court found that Plaintiffs' Motion to Set Rate of Interest was not a motion to enforce a judgment or take action consistent with the appellate court's ruling, and, therefore, it did not have the

[5] This issue was never raised by previous trial counsel Patrick J. McDonald, Esquire. This argument was raised for the first time on appeal of the judgment.

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authority to modify or set an interest rate.

The Plaintiffs filed a timely appeal to the South Carolina Court of Appeals in which they contended:(1) the rate of interest applicable post-judgment at the statutory rate of 11.25% per annum was established in a prior order of this Court and that order is the law of the case, (2) this Court erred in declining to consider matters not affected by the court of appeal's decision in the initial appellate process, (3) a post-judgment interest rate of 1% per day is punitive and grossly disproportionate to the amount of principal, and (4) the excessive post-judgment interest violates the Equal Protection Clause. The court of appeals found that post-judgment interest was not established by this Court in its Order granting Plaintiffs' Motion for Leave to Deposit Funds. The court of appeals also found that the issue of post-judgment interest was not an issue before it during the first appeal; therefore, this Court erred in finding the court of appeals' January 2009 decision was the law of the case. As to the constitutional claims, the court of appeals found that Plaintiffs failed to raise their claims to this Court and therefore were not preserved for appellate review. The court of appeals reversed this Court's determination that it did not have jurisdiction to determine the issue of post-judgment interest and remanded for reconsideration of the issue of post-judgment interest.

ANALYSIS

"A claimant is entitled to interest from the date of the rendition of the verdict, or post-judgment interest, as a matter of course." Hunting v . Elders, 359 S.C. 217, 597 S.E.2d 803 (Ct. App. 2004). Section 34-31-20 (B) sets forth in relevant part,

> 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.

However, "[t]he parties to an agreement are at liberty to contract, within legal limits, relative to the interest to be paid on an obligation, including the rate of interest to be charged after maturity." Harmon v. Bank of Danville, 287 S.C. 449, 453, 339 S.E.2d 150, 153 (Ct. App. 1985). Our courts have held that the statutory interest rate under Section 34-31-20(B) "is applicable only in the absence of a written agreement between the parties fixing a different rate of interest." Renaissance Enters., Inc. v. Ocean Resorts, Inc., 326 S.C. 460, 466, 483 S.E. 2d 796, 799 (Ct. App. 1997), rev'd on other grounds by Renaissance Enters., Inc. v. Ocean Resorts, Inc., 334 S.C. 324, 513 S.E. 2d 617 (1999) (citing Turner Coleman, Inc. v. Ohio Constr. & Eng'g, Inc., 272 S.C. 289, 251 S.E. 2d 738 (1979)). Further, "if a contract has specified a lawful rate of interest to be paid after maturity, the same rate will apply on the judgment entered on the contract." Id.

The parties hereto entered into an agreement on January 18, 2004 in which the Plaintiffs are the "owners" and the Defendant is the "contractor." Article 3 entitled "Contract Sum, Deposit, and Payments" states, "Payment due under this Contract but not paid shall incur a daily interest rate of 1% from the date the payment is due." The Defendant obtained a favorable jury verdict on its counterclaim for breach of contract on May 26, 2006. The Court finds there to be an express agreement between the parties which fixes the interest rate to be paid after maturity at 1% per day, and the Plaintiffs do not dispute this fact. Accordingly, based on Renaissance Enters., Inc., the contractual interest rate, rather than the statutory rate, would apply post-judgment, just as it did prejudgment. 326 S.C. at 466, 483 S.E.2d at 799.

The Plaintiffs contend that the term in the contract setting the interest rate at 1% per day from the date the payment is due is unconscionable, unconstitutional, and violative of public policy if applied as post-judgment interest. While Plaintiffs raise several different issues with

respect to the enforcement of this contractual provision, the gist of the argument is, in essence, that the imposition of this rate is so outrageous it should not be enforceable as a matter of law. However, the issue of post-judgment interest or its constitutionality was never raised to the trial court during any stage of the proceedings. Further, during post-trial motions, the only issues raised were the award of prejudgment interest and attorney's fees and costs. Plaintiffs contend this is the first time post-judgment interest has been discussed in this case, and, therefore, the first time they could have raised such claims. This Court disagrees.

The Defendant contends the Plaintiffs failed to raise these issues in their initial pleadings, at trial or by post-trial motion. The Defendant alleged in paragraph 20 of the Counterclaims filed October 18, 2004 "[t]hat pursuant to the written agreement entered into by the parties, the Plaintiffs agreed that any payment due under the contract would bear interest at the daily rate of one (1%) of and from the date that the payment was due." In response to this allegation, the Plaintiffs alleged in their Reply "[t]hat the Plaintiffs admit so much of the allegations contained in paragraph 20 of the Defendant's Counterclaim, that the parties entered into an agreement but we crave reference to the terms of the agreement itself as controlling." The Plaintiffs admit in their Reply that the actual terms of the written contract regarding 1% interest are controlling on the parties. Further, the Plaintiffs failed to plead any affirmative defenses in their Reply filed January 7, 2005.

The South Carolina Supreme Court in Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 615–16, 703 S.E. 2d 221, 224–25 (2010) stated:

> A party in replying to a preceding pleading shall affirmatively set forth his or her defenses. Rule 8(c), SCRCP. "Every defense, in law or fact, to a cause of action in any pleading . . . shall be asserted in the responsive pleading thereto . . . ." Rule 12(b), SCRCP; see also Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007) ("[A]ffirmative defenses to a cause of

> action in any pleading must generally be asserted in a party's responsive pleading."). "Statutory prohibition is in the nature of an affirmative defense precluding enforcement of a contract and should be pled." Madren v. Bradford, 378 S.C. 187, 193, 661 S.E. 2d 390, 393 (Ct. App. 2008) (citing Costa and Sons Constr. Co. v. Long, 306 S.C. 465, 469, 412 S.E. 2d 450, 453 (Ct. App. 1991)); see also Skip, 374 S.C. at 210, 648 S.E. 2d at 606 (noting that section 40–11–370 is an affirmative defense). "The failure to plead an affirmative defense is deemed a waiver of the right to assert it." Whitehead v. State, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002). Rule 15(b), SCRCP provides an exception to the waiver rule by permitting a party to amend his or her pleadings to conform to the evidence. Madren, 378 S.C. at 193, 661 S.E. 2d at 393.

In this case, no affirmative defenses were raised by the Plaintiffs and no Motion to Amend the pleadings were made by the Plaintiffs. Plaintiffs argued at the hearing that they had no choice but to admit to Defendant's paragraph 20 because it indeed states a term in the contract into which they entered. The Plaintiffs contend the constitutionality of the enforcement of a post-judgment interest rate is not a statutory bar on the enforcement of the contract itself, and the specific application of a particular provision, as it affects post-judgment matters, is not a matter that can be raised in the form of an affirmative defense, as it does not arise in the first instance until well after the pleadings are closed. This Court disagrees.

Where the unenforceability of a contractual provision based on the alleged penalty nature of the provision is not raised as an affirmative defense, such defense is waived. See D&D Leasing Co. of South Carolina, Inc. v. David Lipson, Ph.D., P.A., 305 S.C. 540, 542, 409 S.E. 2d 794, 796 (Ct. App. 1991). In D&D Leasing, the plaintiff sued the defendant for damages under a car lease pursuant to the "Default" clause in the lease. 305 S.C. at 542, 409 S.E. 2d at 796. D&D Leasing sought damages in excess of $10,000. The trial court found in favor of D&D Leasing on liability but only awarded damages in the amount of $481.95 holding that "it would be inappropriate for the plaintiff to be allowed to have possession of a vehicle and to hold the

defendants responsible for future payments. There is no acceleration of payments clause, as such, in the lease." The Court of Appeals found that if the trial court premised its order on a theory of lack of enforceability due to the alleged nature of the termination clause, that theory was unavailable, as "[u]nenforceability based on a penalty theory is an affirmative defense that must have been pled." Since the defendant failed to plead unenforceability based on the alleged penalty nature of the termination provision, he waived that defense. This Court finds D&D Leasing to be directly on point with the present case. Plaintiffs contend the interest provision of 1% per day is unenforceable because it is unconscionable and violates the Due Process and Equal Protection Clauses of the United States Constitution. Specifically, Plaintiffs allege that the imposition of such an excessive rate of interest is punitive in nature, and can reasonably be likened to an award of punitive damages. Plaintiffs also allege that allowing such an interest rate would place an insurmountable obstacle in the path of a litigant seeking review of a judgment by an appellate court. Plaintiffs are asserting that the interest provision is unenforceable based on the alleged penalty nature of the provision. As the Court of Appeals found in D&D Leasing, this Court finds Plaintiffs failed to assert this defense in their Answer, and, therefore, it is waived.

Plaintiffs contend their challenge is not to the enforcement of the contract, nor does it reach to contemplate the ability of parties to contract, in general, to negotiate and agree to specific terms; rather, it is limited to the imposition of 1% interest per day in post-judgment interest in this one instance. Plaintiffs further assert that while they have not expressly contended they were unaware of the existence of the 1% per day interest provision until this action had reached the post-trial motions stage, that allegation is implicit in many of their arguments. The Court finds the Plaintiff's challenge is directly about the enforcement of a contractual provision. The Court further finds, and the Plaintiffs agree, that whether or not

Plaintiffs read the full contract or recognized the full importance of what they read to be immaterial. Barring some specific assertion that there was fraud, or that one party to a document was either ignorant or unwary, the signatories to a contract are bound by its terms whether they read it or not. See Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). As the Regions Bank court stated:

> A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. Sims v. Tyler, 276 S.C. 640, 643, 281 S.E. 2d 229, 230 (1981); Evans v. State Farm Mut. Auto. Ins. Co., 269 S.C. 584, 587, 239 S.E. 2d 76, 77 (1977). A person signing a document is responsible for reading the document and making sure of its contents. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it. Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 39, 340 S.E. 2d 786, 789 (1986); Sanders v. Allis Chalmers Mfg. Co., 237 S.C. 133, 139-40, 115 S.E. 2d 793, 796 (1960); Stanley Smith & Sons v. D.M.R. Inc., 307 S.C. 413, 417, 415 S.E. 2d 428, 430 (Ct. App. 1992). One who signs a written instrument has the duty to exercise reasonable care to protect himself. Maw v. McAlister, 252 S.C. 280, 285, 166 S.E.2d 203, 205 (1969); Evans, 269 S.C. at 587, 239 S.E.2d at 77; DeHart v. Dodge City of Spartanburg, 311 S.C. 135, 139, 427 S.E.2d 720, 722 (Ct. App. 1993).

Id. at 663–64, 582 S.E.2d at 440.

At trial, Plaintiffs were asked various questions regarding the contract they entered into with the Defendant. Plaintiffs admitted both entering into a contract with the Defendant and reading the contract before signing it (Trial Tr. vol. 1, 85, 135, May 24, 2006). Testimony establishes that Plaintiffs were well aware of essential terms of the contract, such as commencement and end dates, total price, and scope of work to be completed (Trial Tr. vol. 1, 86, 135, 189, May 24, 2006). Further, the Plaintiffs even added handwritten notes to the contract regarding specifics of the project (Trial Tr. vol. 1, 229-30, May 24, 2006). The Plaintiff's testified at length and in extensive detail regarding the specific provisions of the contract. (Trial Tr. vol. 1, 85-86, 135-36, 189-93, 229-30, 256, 267-68, May 24, 2006). Considering Plaintiffs

thorough review of the contract and its terms, along with their highly advanced educational degrees and business background, it is unlikely the Plaintiffs failed to understand the essential terms of and realize the potential ramifications of entering into the contract.

It is conceivable had Plaintiffs contemplated protracted litigation and realized the full mathematical computations of the rate of interest they agreed to be charged on any past due balance, they would have hesitated to enter into the contract in question. It is not, however, the Court's duty or prerogative to rewrite imprudent contracts negotiated at arm's length between parties of equal bargaining power. A party is deemed to have read a contract he signs and is bound by its terms whether he has actually read it or not. Id. at 663, 582 S.E. 2d at 440. There is, in addition, no question regarding the ability of Plaintiffs to read and comprehend documents and contracts, as both Plaintiffs are doctors, highly-educated and sophisticated, who successfully operate their own medical practices. They are not entitled to the protections afforded to one who reads with difficulty, or who is susceptible to undue influence when deciding whether or not to enter into a contract with terms that may not be advantageous. Whether or not they read the contract they signed, the Plaintiffs do not dispute that they are bound by its terms.

However, Plaintiffs contend that merely because a contract exists, some of its provisions may be invalidated by the Court, as courts have routinely invalidated contractual provisions that are unlawful or illegal, or which violate public policy. Citing Stonhard, Inc. v. Carolina Flooring Specialists, Inc., 366 S.C. 156, 621 S.E.2d 352 (2005) (covenant not to compete without geographical limitation invalid); Fisher v. Stevens, 355 S.C. 290, 584 S.E.2d 149 (Ct. App. 2003) (broad exculpatory clause unenforceable as a matter of public policy); Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007) (holding where a particular provision of an arbitration agreement evidenced fundamental unfairness it was unenforceable). The Court

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finds the cases cited by Plaintiffs are not factually analogous to this case, and they deal with specific types of provisions, namely a covenant not to compete, exculpatory clause, and arbitration provision. Further, there is no mention in any of these cases that the party opposing the provision failed to move to invalidate the provision prior to trial, at trial or in a post-trial motion.

The Court agrees that a provision, if found to be unconscionable, may be limited to avoid an unjust result. "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Simpson, 373 S.C. at 24–25, 644 S.E.2d at 668. "If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result." Id. at 25, 644 S.E.2d at 668. "Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." Id. at 25, 644 S.E.2d at 669. Here, the Plaintiffs do not contend the contract is like an adhesion contract. There was no lack of mutuality, no disparity in bargaining power between the parties, and there is no evidence of duress placed on the Plaintiffs to sign the contract. Further, the Plaintiffs are sophisticated individuals with a higher degree of education than the Defendant. Moreover, there was ample time to negotiate. The parties had the opportunity to and did negotiate at arm's length for an extended period of time. In fact, the Defendant had inspected the premises on many occasions and provided several repair estimates for presentation to the Plaintiff's insurance company over an extended period of time that spanned the insurance claims process. Further, the Plaintiffs had a prior relationship with the

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Defendant because he had performed work for them in the past. Plaintiffs do not contend the bargaining process was one-sided, nor do they dispute they are bound by the contract's terms. However, Plaintiffs contend the specific interest provision is oppressive and should be limited in its application to exclude post-judgment interest, as it would be unconscionable and against public policy.

The Court recognizes that an interest rate of 1% per day to be applied post-judgment is beyond the legal rate of interest and could be viewed as unconscionable. However, the Court also agrees with the Defendant in that the Plaintiffs failed to raise these issues in their initial pleadings, at trial, or by way of post-trial motion. The Court agrees unconscionability of a contract provision should be raised as an affirmative defense and is waived if not done so. However, the Plaintiffs are not attempting to invalidate the specific interest provision as a whole. Plaintiffs essentially request the Court to limit the interest provision as it applies to post-judgment interest only.

The Court disagrees with Plaintiffs contention that it could not raise the application of the interest provision, as it applies to post-judgment interest, in the form of an affirmative defense. Plaintiffs' argument that they could not raise unenforceability of the interest provision, as it applies to post-judgment interest, as an affirmative defense because it does not arise until well after the pleadings are closed is without logic. If the Court were to follow this logic, a party would not be required to assert the unconstitutionality of punitive damages as an affirmative defense until punitive damages are awarded at trial and have been subjected to post-trial review. The Plaintiffs cannot concede they are bound by the contract and its terms as they apply to prejudgment interest but argue the interest provision should not be enforceable post-judgment. The Plaintiffs concede they are bound by the contract and its terms, and if they find the interest

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provision to be unconscionable or unconstitutional they should have pled such as an affirmative defense in their Answer pursuant to Rule 8, SCRCP.

The Court further finds the Plaintiffs could have raised these arguments in a post-trial motion. Only the issue of prejudgment interest and not the contract rate was contested during post-trial motions. There was no request and the Court did not extend the ten day period for post-trial motions to be heard. Subsequently, on September 22, 2009, Plaintiffs raised the issue of post-judgment interest for the first time, but failed to raise the specific argument that the provision is unconscionable and violative of due process and public policy.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 75, 379 S.E.2d 731, 733 (1998). Imposing a preservation requirement allows the "lower court to rule properly after it has considered all relevant facts, law, and arguments." I'on, L.L.C v. Town of Mt. Pleasant, 338 SC 406, 422, 526 S.E.2d 716, 724 (2000). Any issues not raised to the trial court will be deemed waived. Herron v. Century BMW, 395 SC 461, 465, 719 S.E.2d 640, 642 (2011).

"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. v. Meacher, 392 S.C. 479, 493, 709 S.E.2d 71, 78 (Ct. App. 2011) (finding appellant never specifically argued to the circuit court that the Vermeer test should be modified for vicarious liability cases and was therefore not preserved) (internal quotation marks omitted). Constitutional arguments are not an exception, as they too are waived if not raised to and ruled upon by the circuit court. See State v. Powers, 331 S.C. 37, 42–43, 501 S.E.2d 116, 118 (1998). When the appellate court remands a case, the trial

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court has only the jurisdiction and authority mandated by the appellate court. Prince v. Beaufort Mem'l Hosp., 392 S.C. 599, 605, 709 S.E.2d 122, 125 (Ct. App. 2011); see also Woodward v. Woodward, 294 S.C. 210, 363 S.E.2d 413 (Ct. App. 1987) (specifically instructing the trial court to consider an issue not preserved for appellate review). In Woodward, the husband (appellant) contended the trial court made several errors in determining equitable distribution, namely that the court failed to credit him money that he gave his wife for renovations, failed to consider the wife's economic misconduct, and failed to place a value on certain jewelry and flatware awarded to the wife. Id. at 215–16, 363 S.E.2d at 416–17. The court of appeals found the record did not reflect the husband raised these issues in his post-trial motion or that the trial court ruled on these issues and, therefore, were not preserved for review. Id. at 216, 363 S.E.2d at 417. However, the court specifically instructed, "On remand . . . the trial judge will consider the impact these matters have on the final equitable division award." Id.

At trial, Plaintiffs were asked various questions regarding the contract they entered into with the Defendant. Plaintiffs admitted both entering into a contract with the Defendant and reading the contract before signing it (Trial Tr. vol. 1, 85, 135, May 24, 2006). Testimony establishes that Plaintiffs were well aware of essential terms of the contract, such as commencement and end dates, total price, and scope of work to be completed (Trial Tr. vol. 1, 86, 135, 189, May 24, 2006). Further, Plaintiff even added handwritten notes to the contract regarding specifics of the project (Trial Tr. vol. 1, 229-30, May 24, 2006).

On September 22, 2009, Plaintiffs, by way of Attorney Smith, filed a Motion to Set Rate of Interest and Expedited Hearing requesting this Court to determine "whether the post-judgment interest rate is that set by law or whether interest continues to accrue at the contractual rate throughout the period this matter has remained pending post-judgment." Plaintiffs did not raise

in their motion their specific contentions that the interest provision is unconscionable and violative of due process and public policy. The motion simply requested the Court to determine whether post-judgment interest should accrue at the statutory or contractual rate. No memorandum in support of Plaintiffs' motion was filed. This motion was heard on January 26, 2010, and the Court issued an Order on July 6, 2010 finding this Court had no authority to modify the rate which was affirmed on appeal or make any further decisions in this matter, other than to enforce the judgment and take any action consistent with the appellate court's ruling. It is this Order from which the Plaintiffs appealed, and in its appeal argued the 1% per day post-judgment interest rate is punitive, grossly disproportionate to the actual damages, and violative of the Equal Protection Clause. The court of appeals, in its discussion of Plaintiffs' argument that this Court erred in finding the court of appeals' January 2009 decision was the law of the case, reversed this Court's determination that it lacked jurisdiction and remanded for reconsideration of the issue of post-judgment interest. The court of appeals then discussed Plaintiffs constitutional claims in a separate section and found the Plaintiffs failed to raise these constitutional claims to this Court, and, therefore, were not preserved for review. Plaintiffs' counsel conceded at the remand hearing on July 12, 2012 that this was the first time these claims have been argued to the circuit court. Plaintiffs contended the July 12, 2012 hearing was the first time post-judgment interest was discussed and, therefore, Plaintiffs could not have raised the constitutional claims before this date. This Court disagrees, finding Plaintiffs' constitutional claims as untimely. Plaintiffs' September 22, 2009 Motion to Set Interest Rate specifically requested the Court determine whether post-judgment interest should accrue at the statutory or contractual rate. It was at this time Plaintiffs could have raised the issue that the statutory rate should be applied because the contractual interest provision is unconscionable and violative of

due process and public policy. However, Plaintiffs failed to do so, and the Court finds these claims are therefore waived. Moreover, based on the court of appeals' May 2012 decision, the Court finds the court of appeals remanded the matter solely for the determination of whether post-judgment interest should accrue at the statutory rate or the contractual rate of 1% per day, as requested in Plaintiffs' Motion to Set Rate of Interest.

Based on the foregoing, the Court declines to apply the statutory rate pursuant to Section 34-31-20(B). Accordingly, post-judgment interest shall accrue at the contractual rate of 1% per day from the date of judgment. See Renaissance Enters., Inc., 326 S.C. at 466, 483 S.E.2d at 799.

IT IS SO ORDERED this 29th day of March, 2013 at Charleston, South Carolina.

The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit