THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson
The Honorable Mikell R. Scarborough, Master-In-Equity

Case No. 2004-CP-10-3867
Appellate Case No. 2016-000879

Charles Bickerstaff, M.D., and
Barbara Magera, M.D., Appellants,

v.

Roger Prevost d/b/a/ Prevost
Construction, Inc. Respondent.

INITIAL BRIEF OF APPELLANTS

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2. DID THE CIRCUIT COURT ERR IN FINDING THAT A 365% ANNUAL POST-JUDGMENT INTEREST RATE WAS "WITHIN LEGAL LIMITS"?

STATEMENT OF THE CASE

Appellants entered into a contract ("Contract") with the Respondent, Roger Prevost d/b/a Prevost Construction, Inc. ("Prevost"), for interior remodeling of their home. The home experienced significant water damage when a broken water line to the washing machine flooded the first floor of the residence. In 2004, Appellants brought an action against Prevost alleging negligence and breach of implied warranty of workmanship as a part of the remodeling work. Prevost answered Appellants' complaint, and counterclaimed for breach of contract, implied contract/quantum meruit, and foreclosure of its previously filed mechanic's lien. Included in Prevost's counterclaims was a request for interest on any payment due pursuant to the Contract, at the agreed-upon daily interest rate of 1%.

A May 2006 jury trial before the Circuit Court for the Ninth Judicial Circuit ("Circuit Court") resulted in a $6,437.62 verdict in favor of Prevost. Prevost made a post-trial motion for attorney's fees and prejudgment interest under the Contract. The contractual provision at issue stated: "Payment due under this Contract but not paid shall incur a daily interest rate of 1% from the date the payment is due." [1] The Circuit Court subsequently issued an order awarding Prevost $6,437.62 in attorney's fees and prejudgment interest as defined under the Contract. Thereafter, Appellants appealed the Circuit Court's award of prejudgment interest.

In January 2009, this Court affirmed the Circuit Court's award of prejudgment interest. *See Bickerstaff v. Prevost*, 380 S.C. 521, 670 S.E.2d 660 (Ct.App.2008). Subsequently,

[1] Though quoted, the Contract itself will not be included in the Declaration of Matter or Record on Appeal. After two appeals, it cannot be disputed that the Contract contains this language. Its inclusion would only serve to clutter the Record with information not in dispute. In addition, the procedural history, up to and through the 2012 appeal, is well documented and not contested, thus filings concerning the same time frame will also not be included in the Record. The Appellants will attempt to limit the Record to documentation of procedural history after the 2012 appeal and, thus, relevant to the issues now on appeal.

Appellants' petition for certiorari was denied. Following remittitur, Appellants filed a motion to set the rate of interest requesting the Circuit Court determine whether the judgment award should accrue post-judgment interest at the rate set by law or the rate established by the Contract. The Circuit Court found that it did not have the authority to modify or set an interest rate, given the ruling handed down by this Court in the decision cited above. Essentially, the Circuit Court found that the above decision of this Court was the law of the case, and it further concluded that the 1% per day interest rate affirmed by this Court applied to both prejudgment and post-judgment interest. Appellants appealed this ruling, arguing that the 2008 appeal concerned only pre-judgment interest; therefore, the Circuit Court had jurisdiction to consider post-judgment interest.

On May 16, 2012, this Court agreed with the Appellants, reversing the Circuit Court's determination that it lacked jurisdiction and remanding this case to the Circuit Court for reconsideration of the issue of post-judgment interest. *Bickerstaff v. Prevost*, 398 S.C. 231, 727 S.E.2d 769 (Ct.App.2012).

The issue of post-judgment interest again came before the Honorable Deadra L. Jefferson on July 12, 2012. At this time, Appellants argued, *inter alia*, that the 1% daily interest violated their constitutional rights and principles of public policy. (*See* July 12, 2012, Tr.). Nearly nine months later, Judge Jefferson issued an opinion setting post-judgment interest at a rate of 1% per day, as stated in the Contract. This opinion was issued on March 29, 2013, filed on April 1, 2013, and thereafter sent to the parties. (*See* March 29, 2013, Jefferson Order). Appellants made a timely Motion to Reconsider on April 12, 2013. (*See* Motion to Reconsider). Inexplicably, Appellants Motion to Reconsider sat dormant for approximately three years, until January 6, 2016, when Prevost, in an effort to satisfy his judgment in this case, moved before the Honorable

Mikell R. Scarborough to foreclose a charging lien on Appellants' distributional interest in their limited liability company. (*See* January 6, 2016, Tr.).

On March 17, 2016, counsel for Prevost wrote Judge Scarborough requesting that he sign an order foreclosing the charging lien on the Appellants' distributional interest. A proposed order was enclosed with that letter. (*See* March 17, 2016, letter; Proposed Order). At this point, Appellants realized that their Motion to Reconsider had never been ruled on by Judge Jefferson. Counsel for the Appellants wrote a letter on March 21, 2016, requesting that Judge Scarborough hold off on signing any order until Judge Jefferson ruled on the Appellants' Motion to Reconsider. (March 21, 2016, letter). If Judge Jefferson had reconsidered post-judgment interest, then her ruling would have had an obvious effect on the amount to be foreclosed. Judge Scarborough obliged to this request.

On April 15, 2016, Judge Jefferson denied the Motion (*See* April 15, 2016, Jefferson Order). Appellants filed and served Prevost with a notice of appeal, numbered 2016-000879, on April 25, 2016. That same day, a follow-up hearing was held before Judge Scarborough on the issue of foreclosing the charging lien, and he signed an order allowing foreclosure and the subsequent sale of the distributional interest. (See April 25, 2016, Tr.; April 25, 2016, Scarborough Order). Appellant subsequently appealed this Order on May 2, 2016, which was given appeal number 2016-000998 but was ultimately consolidated with this appeal, at the motion of the Appellants.

Appellants withdraw any arguments concerning appeal number 2016-000998. If continued, Appellants would have maintained that the charging lien should not have been foreclosed on, as was ordered by Judge Scarborough, because it could not have contained an accurate total amount, considering the fact that the Appellants were, and are now, appealing the

post-judgment interest. That issue has been rendered moot by subsequent motions made to Judge Scarborough. In short, pursuant to Rule 241, SCACR, and S.C. Code Ann. § 18-9-130, Appellants moved to require Prevost to post a bond prior to selling their distributional interest. (*See* Appellants' Motion to Require Bond). Judge Scarborough granted this motion. (*See* July 11, 2016, Scarborough Order). Prevost was not willing to post such a hefty bond, which would have amounted to approximately $200,000, and has since abandoned and withdrew his foreclosure of the Appellants' distributional interest.

As such, this appeal will focus solely on errors committed by Judge Jefferson in her March 29, 2013, Order and April 15, 2016, denial of the Appellants' Motion to Reconsider.

ARGUMENTS

I. THE CIRCUIT COURT ERRED IN FINDING THE APPELLANTS' CONSTITUTIONAL AND PUBLIC POLICY ARGUMENTS WERE WAIVED, WHEN THE SOUTH CAROLINA SUPREME COURT HAS HELD THAT PRESERVATION RULES SHALL NOT PREVENT ANY COURT FROM VOIDING CONTRACTUAL PROVISIONS THAT VIOLATE THE SAME.

Rules of issue preservation do not preclude a court from voiding, at any procedural point, a contract or contractual provisions that are unconstitutional or violate public policy; therefore, the Circuit Court should have considered Appellants' constitutional and public policy arguments with respect to post-judgment interest. This Court should reverse the Circuit Court's decision and remand for further determination of these issues.

In the March 29, 2013, Order setting post-judgment interest at 1% per day, the Circuit Court agreed with the unjustness of such an interest rate, but it ultimately found that any constitutional or public policy arguments had been waived. (March 29, 2013, Jefferson Order, pp. 12-16). The Circuit Court did not even consider Appellants' arguments, citing to well-established rules of issue preservation. *Id.*

Based on the holding of the South Carolina Supreme Court in *Ward v. West Oil Company, Inc.*, 387 S.C. 268, 692 S.E.2d 516 (2010), the Circuit Court's failure to consider Appellants' "waived" constitutional and public policy arguments was committed in error. In *Ward*, the Supreme Court was tasked with determining whether a contract between the parties was an illegal contract, thus void. The Petitioners correctly noted that legality of the contract had never been raised to or ruled upon by the lower court. Despite the glaring issue preservation mistake, the Supreme Court held, "[a]lthough [Petitioners] correctly reference our appellate court rules regarding error preservation, we find these rules are inapplicable as this Court will not 'lend is assistance' to carry out the terms of a contract that violates statutory law or public policy." *Id.* at 274, 519 (quoting *McMullen v. Hoffman*, 174 U.S. 639, 19 S.Ct. 839 (1899)). The *Ward* court also cited to the South Carolina Supreme Court case of *White v. J.M. Brown Amusement Co.*, 360 S.C 366, 601 S.E.2d 342 (2004), which laid out the rule more broadly than the *Ward* court. *Id.* at 371, 245 ("The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions.")

While Appellants do not contend that the Contract in this case is void for illegality, they do, however, argue that *Ward* and *White* are nevertheless controlling, as these holding were not limited to illegal contracts but instead encompassed contracts that violate constitutional provisions and public policy. Appellants argued to the Circuit Court that the Contract is unconstitutional and violate public policy, yet these arguments were not given any weight, due to the Circuit Court's incorrect determination that they had not been preserved. Appellants ask that this Court reverse the Circuit Court's ruling and remand this case for determination of whether the post-judgment interest rate of 1% per day is unconstitutional or violates public policy.

II. THE CIRCUIT COURT ERRED IN FINDING THAT A 365% ANNUAL POST-JUDGMENT INTEREST RATE WAS "WITHIN LEGAL LIMITS"

In addition to the arguments asserted in Section I, or in the alternative to those arguments, Appellants contend that a 365% annual post-judgment interest rate is not "within legal limits," as considered by this Court and the South Carolina Supreme Court in the decisions relied on by Prevost and the Circuit Court.

Both the Circuit Court, in its March 29, 2013 Order, and Prevost, in oral arguments held on July 12, 2012, rely on three cases to propound its ruling and its arguments, respectively, that parties can contract for post-judgment interest rates either lower or higher than the statutory rate. (March 29, 2013 Order, p. 5; July 12, 2012 Tr., p. 26). These cases are *Harmon v. Bank of Danville*, 287 S.C. 449, 339 S.E.2d 150 (Ct.App.1985), *Renaissance Enterprises, Inc. v. Ocean Resort, Inc.*, 326 S.C. 460, 483 S.E.2d 796 (Ct.App.1997), and *Turner Coleman, Inc. v. Ohio Construction & Engineering, Inc.* 272 S.C. 289, 251 S.E.2d 738 (1979). Appellants concede that these courts all hold that parties may contract for interest rates lower or higher than those set forth by statute, namely S.C. Code Ann. § 34-31-20. However, the Circuit Court and Prevost have overlooked critical language that qualifies and significantly limits this rule of law.

In *Harmon*, the Court of Appeals stated, "[t]he parties to an agreement are at liberty to contract, ***within legal limits***, relative to interest to be paid on an obligation, including the rate of interest to be charged after maturity [emphasis added]." *Harmon*, 287 S.C. at 453, 339 S.E.2d at 153. In *Renaissance Enterprises, Inc.*, the Court of Appeals held, "[i]f 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 [emphasis added]." *Renaissance Enterprises, Inc.*, 326 S.C. at 466, 483 S.E.2d at 799. Both of these cases cite to *Turner Coleman, Inc.*, which ruled, "[i]t is well settled that the parties are at liberty to contract, ***within legal limits,*** relative to the interest to be paid on an

obligation...[emphasis added]." *Turner Coleman, Inc.*, 272 S.C. at 292, 251 S.E.2d at 740.

Several other courts have made similar rulings that included the same qualifying language. *See e.g. Butler Contracting, Inc. v Court Street, LLC*, 369 S.C. 121, 134 631 S.E.2d 252, 259 (2006) (finding, "...parties are free to agree, ***within legal limits***, on a higher rate of interest [emphasis added]."); *Taylor, Cotton & Ridley, Inc. v. Okatie Hotel Broup, LLC*, 372, S.C. 89, 99, 641 S.E.2d 459, 464 (Ct.App.2007) (holding, "[d]espite the existence of section 34-31-20, parties are free to agree to higher interest rates ***within legal limits*** [emphasis added].").

This is not immaterial or inconsequential language that was asserted in passing by one court in one ancient decision. This is qualifying and limiting language that was established again and again, in decision after decision. Notably, none of the opinions relied on by Prevost and the Circuit Court ventured to set forth what level of interest falls within or outside "legal limits," likely because those courts were faced with interest rates not nearly as offensive as the one at issue in this case. In *Harmon*, the court found that the parties intended to contract for a 6% compound annual interest rate. *Harmon*, 287 S.C. at 452, 339 S.E.2d at 152. In total, the debt was $46,000, and the interest amounted to $230 per month, or $2760 per year. In *Renaissance Enterprises, Inc.*, the court upheld an 18% compound annual interest rate. *Renaissance Enterprises, Inc.*, 326 S.C. at 463, 483 S.E.2d at 798. And in Turner Coleman, Inc., the court upheld a 12% annual interest rate, as opposed to the statutory rate of 6% at that time. *Turner Coleman, Inc.* 272 S.C. at 292, 251 S.E.2d at 740. By contrast, in this case, the interest rate is 1% per day, or 365% per year, amounting to the penal amount of nearly $24,000 in annual interest on an approximately $6,500 judgment. In other words, the annual interest equates to more than 3.5 times the judgment.

A scan of statutory interest rates reveals that the interest rate at issue in this case, 365%

per year, far exceeds anything remotely considered by the South Carolina General Assembly. *See* S.C. Code Ann. § 34-31-20 (setting an 8.75% annual interest rate on ascertainable amounts of money owned); S.C. Code Ann. § 29-6-50 (setting a 12% annual interest rate on moneys owed by an owner to his contractor, or on amounts owed by a contractor to his subcontractor); S.C. Code Ann. § 37-2-305 (setting an 18% annual interest rate on credit sales); S.C. Code Ann. § 37-3-101 *et seq.* (setting strict rules concerning interest rates applicable to a variety of consumer loans).

Appellants do not propose that this Court should strip contracting parties of their right to negotiate varying levels of interest rates. Contracted-for interest rates are necessary and valuable tools that curtail delay and induce prompt payment. But this right, as indicated by the decisions listed above, must be balanced with the injustice that would occur if interest rates exceed some unknown (at this time) "legal limits." Appellants further do not know the exact solution to this dilemma. Perhaps, the interest rates could be viewed under a reasonableness standard to determine if they exceed "legal limits"; maybe the solution is a list of factors set forth by this Court and tweaked by later courts; or it could be as simple as the you-know-it-when-you-see-it logic that used to apply to obscenity. *See Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683 (1964) (Stewart, J., concurring) (In attempting to establish a test to determine what is and what is not obscene, Justice Stewart stated famously, "...perhaps I could never succeed in intelligibly doing so. But I know it when I see it..."). Whatever the resolution may be, the above courts certainly meant something by inserting this "within legal limits" language time and time again. The Circuit Court has overlooked this language, requiring analysis by this Court and an ultimate reversal of the Circuit Court's ruling.

CONCLUSION

For the reasons set forth above, Appellants would respectfully request that this Court reverse the Circuit Court's rulings and remand this case for determination of whether the 365% annual post-judgment interest rate is unconstitutional or violates public policy. Additonally or Alternatively, Appellants request that this Court find that the interest rate does not fall within "legal limits," as considered by *Turner Coleman, Inc.* and its progeny, thus requiring a reversal of the Circuit Court's ruling.

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06-537

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Charles Bickerstaff, M.D., and
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Roger Prevost d/b/a/ Prevost
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PROOF OF SERVICE

I certify that on September 15, 2016, I served the Appellants' Initial Brief and Designation of Matter on Frank M. Cisa, counsel for the Respondent, Roger Prevost d/b/a Prevost Construction, Inc., by mailing, postage prepaid, a copy of it to the offices of Cisa & Dodds, LLC, located at 858 Lowcountry Boulevard, Suite 101, Mount Pleasant, South Carolina, 29464.

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RE: Charles Bickerstaff, M.D., and Barbara Magera, M.D., Appellants v. Roger Prevost d/b/a Prevost Construction, Inc., Respondent
Case No. 2004-CP-10-3867
Appellate Case No. 2016-000879
S|C File No. 06-537

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Appellants Initial Brief and Designation of Matter for the above appeal. Also enclosed is a Proof of Service.

Please file the original and return one stamped copy to my office in the prepaid envelope provided.

Thank you for your assistance. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Samuel M. Wheeler

cc: Frank M. Cisa, Esq.
Attorney for the Respondent

Enclosures

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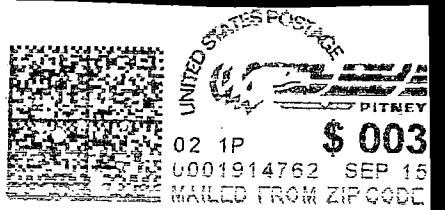

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