

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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

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

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

“Appellants entered into a contract with 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. Thereafter, 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 counterclaim was a request for interest on any payment due pursuant to the contract, at the agree-upon “daily rate of 1%”.

A May 2006 jury trial 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.” 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 to this court.” *Bickerstaff vs. Prevost*, 398 S.C. 231; 727 S.E.2d 769, p.233; pp. 770-771 (Ct. Appeals 2012).

In the Opinion filed January 7, 2009, this Court affirmed the Circuit Court’s award of prejudgment interest of 1% per day. *Bickerstaff vs. Prevost*, 380, SC 521 670 S.E. 2d 660 (Ct. Appeals 2009). Subsequently, Appellants Petition for Certiorari was denied.

Appellants then filed a Motion to Set Rate of Interest requesting the Circuit Court to

determine if post judgement interest accrued at the contract rate of 1% per day or statutory rate. (Plaintiffs' Motion to Set Rate of Interest filed September 22, 2009) The Circuit Court determined it lacked jurisdiction to hear matters involving post judgment interest and concluded that the 1% per day interest rate affirmed by this Court applied to prejudgment and post judgment interest. (Order of Judge Jefferson dated July 6, 2010). The Appellants then appealed this ruling to this Court. This Court reversed the Circuit Court determination that it lacked jurisdiction and remanded for reconsideration of the issue of post judgment interest. (*Bickerstaff vs. Prevost*, 398, SC 231; 727 S.E.2d 769 (Ct. Appeals, 2012).

The issue of post judgment interest then came back before Judge Jefferson on July 12, 2012. Judge Jefferson ruled that post judgment interest shall accrue at the contractual rate of 1% per day from the date of the judgment. (Judge Jefferson's Order Setting Rate of Post Judgment Interest dated March 29, 2013).

On April 15, 2013, Appellants filed a motion for Judge Jefferson to reconsider her Order Setting Rate of Post Judgment Interest. The Motion was not served upon Judge Jefferson. (Plaintiffs' Motion to Reconsider and attached Certificate of Service). By Order dated April 14, 2016, Judge Jefferson denied Appellants Motion to Reconsider finding in part that Appellants had failed to provide a copy of the Motion to the Judge within ten (10) days after the filing of the Motion. (Order Denying Plaintiffs' Motion to Reconsider dated April 14, 2016). Appellants then appealed Judge Jefferson's Order Setting Rate of Post Judgment Interest dated March 29, 2013, but did not appeal Judge Jefferson's Order Denying Plaintiffs' Motion to Reconsider dated April 14, 2016.

Appellants also appealed Judge Scarborough's Order on Defendant's Motion to Foreclose

Lien on Plaintiffs' Distributional Interest in B.O.B. Properties, LLC and on Plaintiffs' Motion to Reduce Judgment. The Appellants now, according to their Initial Brief, withdraw any arguments on Judge Scarborough's Order. The Respondent has not abandoned or withdrawn his foreclosure of the Appellants distributional interest.

ARGUMENTS

- I. THE APPELLANTS ARGUMENTS THAT INTEREST AT THE RATE OF ONE PERCENT PER DAY IS PUNITIVE IN NATURE AND VIOLATIVE OF THE UNITED STATES CONSTITUTION AND THE PUBLIC POLICY OF THIS STATE WERE RULED UPON BY THE COURT OF APPEALS IN THE FIRST APPEAL.

The Appellants make the same arguments concerning interest at One Percent per day that they made in their first appeal to the Court of Appeals. The Court of Appeals previously held that these arguments were presented for the first time on appeal and as a result they were not preserved for review. (*Bickerstaff v. Prevost* 380 S.C. 521, 670 S.E.2d 660 (S.C. App. 2008).

The Appellants argue that should not be precluded from raising constitutional arguments concerning the post judgment interest rate as post judgment interest does not arise until after trial. The fallacy of their argument is that post judgment interest is fixed according to law. Pursuant to §34-31-20(B) "A money decree or judgment of a court enrolled or entered must draw interest according to law."

The Court of Appeals has held that the statutory interest rate under §34-31-20(B) does not apply when the parties fixed a different rate of interest pursuant to a contract. The Court of Appeals in Renaissance Enterprise, Inc. v. Ocean Resorts, Inc. 326 S.C. 460, 466, 483 S.E.2d

796, 799 (S.C. App. 1997) stated that “our Supreme Court held the statutory interest rate under §34-31-20(B) is applicable only in the absence of a written agreement between the parties fixing a different rate of interest. 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.” Citing Turner Coleman, Inc. v. Ohio Construction & Engineering, Inc. 272 S.C. 289, 251 S.E.2d 738 (1979).

II. THE APPELLANTS’ CONTENTION THAT THE AWARD OF INTEREST OF 1% PER DAY VIOLATES THE UNITED STATES CONSTITUTION AND THE PUBLIC POLICY OF THIS STATE IS NOT SUPPORTED BY ANY CITED AUTHORITY OR THE RECORD.

The Appellants contend that an award of interest at the rate of 1% per day violates the United States Constitution and the public policy of this state. The Appellants, however, failed to cite any authority for their contention.

“ Sound public policy requires enforcement of deliberately made contracts not clearly contravening positive law or rule of public morals.”Oxman v. Profitt 126 S.E.2d 852, 854, 241 S.C. 28, 23 (S.C. 1962) Appellants do not point to any authority which provides parties cannot agree to contract to an interest rate for money not paid when due.

In addition, the Appellants did not raise this argument at trial. Appellants raised this issue for the first time on appeal. The Appellant Court cannot address an issue not raised to the trial court. Austin v. Specialty Transp. Services, Inc. 594 S.E.2d 867, 876, 358 S.C. 298, 315 (S.C. App. 2004).

III. THE APPELLANTS’ APPEAL OF JUDGE JEFFERSON’S ORDER SETTING RATE OF POST JUDGMENT INTEREST SHOULD BE DISMISSED AS

APPELLANTS RULE 59(g), SCRPC MOTION WAS TIME BARRED.

Pursuant to Rule 59(g), SCRPC, "A party filing a written motion under this Rule shall provide a copy of the Motion to the Judge within ten (10) days after the filing of the motion." (Rule 59(g), SCRPC) *Jones vs. State*, 382, SC 589, 594, 677, S.E.2d 20, 22 n.2 (2009).

The Appellants failed to provide a copy of their Motion to Reconsider to the Circuit Court within ten (10) days after the filing of the motion as required by the Rules. Judge Jefferson did not receive the Motion to Reconsider until April 11, 2016, approximately three (3) years after she issued her Order Setting Rate of Post Judgment Interest dated April 29, 2013. In Judge Jefferson's Order Denying Appellants' Motion to Reconsider, she held that the motion was time barred. (Order Denying Plaintiffs' Motion to Reconsider dated April 14, 2016).

The Appellants also failed to appeal Judge Jefferson's Order Denying Plaintiffs' Motion for Reconsideration. When there is no appeal from a Final Order it becomes the law of the case. *Doran vs. Doran*, 288, S.C. 477, 343, S.E.2d 618 (1986).

IV. THE APPELLANTS ARGUMENTS THAT INTEREST AT THE RATE OF ONE PERCENT PER DAY IS PUNITIVE IN NATURE AND VIOLATIVE OF THE UNITED STATES CONSTITUTION AND THE PUBLIC POLICY OF THIS STATE WERE NOT RAISED TO THE CIRCUIT COURT INCIDENT TO APPELLANTS' MOTION TO SET INTEREST RATE FILED SEPTEMBER 22, 2009.

Appellants filed a Motion to Set Rate of Interest and for expedited hearing on September 22, 2009. (Motion to Set Rate of Interest). The Appellants motion came before Judge Jefferson for a hearing on January 26, 2010.

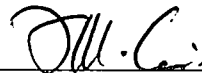
In Judge Jefferson's Order Denying Plaintiffs' Motion to Reconsider dated April 14, 2016, she found the Appellants could have raised the issue that the statutory rate should be applied because the contractual interest provision is unconscionable and violative of due process and public policy. The Appellants, however, failed to raise those issues in their motion to set interest rate or at the hearing. Judge Jefferson found that those claims were therefore waived. (Order Denying Plaintiffs' Motion to Reconsider Judge Jefferson's Order Denying Plaintiffs' Motion to Reconsider dated April 14, 2016).

"A party can not use a motion to reconsider to present an issue he could have raised prior to judgment but did not." *Anderson Memorial Hosp., Inc., vs. Hagen*, 313 S.C. 497, 498, 443, S.E.2d 399, 400 (Ct. Appeal 1994).

CONCLUSION

For the foregoing reasons the Respondent respectfully request that the Order of Judge Jefferson Setting Rate of Post Judgment Interest dated April 29, 2016 be affirmed.

Respectfully Submitted by:



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This 15th day of November, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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The Honorable Deadra L. Jefferson
The Honorable Mikell R. Scarborough, Master-in-Equity

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Appellate Case No. 2016-000879

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

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

PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief and Designation of Matter, in the United States Mail, postage prepaid, on November 15, 2016 addressed to their attorneys of record, Steven L. Smith, Esquire and Samuel L. Wheeler, Esquire at Smith & Closser, P.A. 7455 Cross County Road, Suite One, P.O. Box 40578, Charleston, South Carolina 29423-0578.

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November 15, 2016

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SC Court of Appeals

RE: Charles Bickerstaff, M.D. and Barbara Magera, M.D. vs. Roger Prevost d/b/a Prevost Construction, Inc.
Appellate Case No.: 2016-000879

Dear Ms. Kitchings:

Enclosed is the original and one (1) copy of the Respondent's Initial Brief, Designation of Matter to be included in the Record on Appeal and my Proof of Service. I would appreciate you filing the originals and returning one (1) filed copy of each to me in the self-addressed stamped envelope provided.

With kindest regards, I am

Very truly yours,



Frank M. Cisa

FMC/alp
Enclosures

cc: Samuel M. Wheeler, Esquire (w/enc.)
Steven L. Smith, Esquire (w/enc.)



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