

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.

RECORD ON APPEAL

SMITH | CLOSSER, P.A.

CISA & DODDS, LLP

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Attorneys for the Appellants

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RECEIVED

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SC Court of Appeals

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Charles Bickerstaff, M.D. et al.,
(X) Plaintiff

v.

Roger Prevost, et al.
() Defendant

check box above indicating submitting party

Case No. 2004-CP-10-3867

**MOTION INFORMATION FORM
AND COVER SHEET**

name, SC Bar no. and address of plaintiff's attorney

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Frank M. Cisa
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- (x) MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I AND III)
() FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II AND III)
() PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II AND III)

SECTION I: Hearing Information

Nature of Motion:

Supplemental Hearing

Estimated Time Needed:

30 minutes

Court Reporter Needed: NO

SECTION II: Motion Type

(x) Written motion attached

() Form Motion --

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Plaintiff / Defendant

9-18-09
Date submitted

SECTION III: Motion Fee

(X) PAID - AMOUNT: \$25.00

() EXEMPT:

(check reason)

- () Rule to Show Cause in Child or Spousal Support
() Domestic Abuse or Abuse and Neglect
() Indigent Status () State Agency v. Indigent Party
() Sexually Violent Predator Act () Post-Conviction Relief
() Motion for Stay in Bankruptcy
() Motion for Publication () Motion for Execution (Rule 69, SCRCP)
() Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
() Other: _____

JUDGE'S SECTION

- () Motion Fee to be paid upon filing of the attached order.
() Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

DATE FILED

Collected by:

() MOTION FEE COLLECTION:

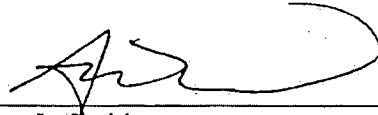
() CONTESTED - AMOUNT DUE:

(print name)

Plaintiffs would further respectfully request that a hearing on this matter be scheduled at the earliest date convenient for the Court, as Plaintiffs continue to be damaged on a daily basis until this may finally be resolved.

Respectfully submitted,

SMITH & KOONTZ, P.A.

A handwritten signature in black ink, appearing to read 'AS', is written over a horizontal line.

Steven L. Smith
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Attorney for the Plaintiffs

September 18, 2009
Charleston, South Carolina
06-537

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
CHARLES BICKERSTAFF, M.D.)
And BARBARA MAGERA, M.D.)
Plaintiffs)
VS.)
)
ROGER PREVOST d/b/a)
PREVOST CONSTRUCTION INC.,)
Defendants.)
_____)

IN THE COURT OF APPEALS

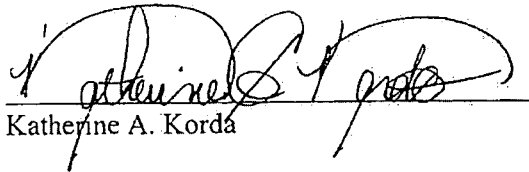
CASE NO. 2004-CP-10-3867

CERTIFICATE OF SERVICE

FILED
2009 SEP 22 AM 10:39
JULIE J. ARMSTRONG
CLERK OF COURT

I certify that on this date a copy of the foregoing Plaintiffs' Motion to Set Rate of Interest
and for Expedited Hearing was served by mailing or hand delivery on the following:

Frank M. Cisa
Cisa and Dodds, LLP
622 Johnnie Dodds Blvd.
Mt. Pleasant, SC 29464
Attorney for Defendant


Katherine A. Korda

Charleston, South Carolina.

September 18, 2009
06-537

entered a written order awarding Defendant attorney's fees in the amount of \$6,437.62 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 pre- 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." Defendant subsequently filed a Motion to Alter or Amend the Order of March 28, 2007 on April 11, 2007. This Court denied Defendant's Motion to Alter or Amend on May 16, 2007.²

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 one percent per day was punitive in nature and violative the United States Constitution. 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

² This Court's Order Denying the Motion to Alter or Amend notes that the parties agree 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 pre-judgment 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.

2016
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preserved for our review.”³ 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. The Motion requested that this Court determine whether the judgment award should accrue post-judgment interest at the rate set by law in South Carolina Code of Laws Section 34-31-20(B) or the rate established by the contract entered into by the parties.⁴ In regards to this matter and all other matters, the decision of the Court of Appeals is the law of the case.⁵ This case has been ended with finality and was not remanded to the Circuit Court with instructions for any further action.

Section 18-9-270 of the South Carolina Code of Laws provides that the Supreme Court or Court of Appeals “may reverse, affirm, or modify” the order of the lower court and then the “judgment shall be remitted to the court below to be enforced according to law.” Additionally, Rule 220 of the South Carolina Appellate Court Rules provides that the appellate court “may affirm, reverse or modify the decision below or remand all or any issues for further

³ The Court of Appeals noted that it “is not blind to the inequity that results from the imposition of the rate of one percent daily interest on this jury award,” but the finding that “interest was due under the contract beginning on June 1, 2004 . . . was not appealed.” The Court also noted that “[A]lthough the contractual interest rate term itself is potentially ambiguous, as opposed to the academic argument of entitlement to prejudgment interest, and although a court could find alternatively that the term is unconscionable or would lead to an absurd result, we are nonetheless confronted with the insurmountable obstacle that Appellants neither made these arguments below, nor presented them to us on appeal.”

⁴ The parties are in agreement that the contractual interest rate, if applicable, shall be calculated as simple interest, not compound interest.

⁵ The interest rate affirmed by the Court of Appeals applies to prejudgment interest and post-judgment interest. Our Courts have held that 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.” Renaissance Enterprises, 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 Enterprises, Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 513 S.E.2d 617 (1999) (citing Turner Coleman, Inc. v. Ohio Construction & Engineering, 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. This Court has no authority to modify the interest rate that was affirmed on appeal or rule on matters that were not remanded from the Appellate Court, but notes that these cases are controlling as to the issue of post-judgment interest.

proceedings.”⁶ This case was affirmed by the Court of Appeals and was not remanded to this Court.⁷ As such, the Circuit Court only has the authority to enforce the judgment according to law.

This Court, therefore, has no authority to modify the rate which was affirmed on appeal or make any further decisions in this matter,⁸ other than to enforce the judgment and take any action consistent with the appellate court’s ruling. S.C. Code Ann. §18-9-270; see Martin v. Paradise Cove Marina, Inc., 348 S.C. 379, 385, 559 S.E.2d 348, 351-52 (Ct. App. 2001) (holding that the Circuit Court had subject matter jurisdiction to entertain a Motion for Costs Under an Injunction Bond after a remittitur was issued, because “once the remittitur is issued from an appellate court, the circuit court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court’s ruling”); Moore v. North American Van Lines, 319 S.C. 446, 462 S.E.2d 275 (1995) (holding that, despite the fact the case was not expressly remanded, the Circuit Court had jurisdiction to entertain a Motion for Restitution filed by an employer to collect worker’s compensation benefits paid to its employee during the time the case was on appeal); Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 438 S.E.2d 248 (1993) (holding that, once the Court of Appeals reversed a judgment pursuant to a mechanic’s lien and

⁶ Further, Rule 205 of the South Carolina Appellate Court Rules provides that “[u]pon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal,” but nothing shall prohibit the lower court from proceeding matters not affected by the appeal.

⁷ As suggested by Judge Short in his dissent, the Court of Appeals could have remanded the case to this Court “for a hearing to determine the amount of prejudgment interest.” Bickerstaff v. Prevost, 380 S.C. 521, 670 S.E.2d 660 (Ct. App. 2009) (Short, J., concurring in part, dissenting in part); see also TranSouth Fin’l Corp. v. Cochran, 324 S.C. 290, 478 S.E.2d 63 (Ct. App. 1996) (remanding for an additional evidentiary hearing to determine the amount of the final judgment). Additionally, the Court of Appeals could have remanded the case to this Court to make necessary findings of fact or conclusions of law or to correct or determine the amount of the judgment. See Golden Strip Motors, Inc. v. Pennsylvania Nat’l Mut. Cas. Ins. Co., 288 S.C. 548, 343 S.E.2d 659 (Ct. App. 1986) (remanding to the trial court for determination of the issue of indemnification); Wood v. Reeves, 23 S.C. 382 (1885) (remanding the case to the lower court to determine the amount for which the plaintiff was entitled to judgment against the defendant). See generally 16 S.C. Jur. Appeal and Error § 145 (2010). However, the Court of Appeals did not choose to remand this case to the lower court.

⁸ It is conceivable that post-judgment interest is a matter that could be addressed by the parties in any supplemental proceeding to enforce the judgment.

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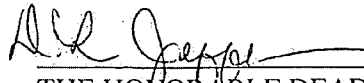
remitted the matter to the Circuit Court, the "Circuit Court was vested with jurisdiction to determine the issue of attorney's fees" and "trial costs" because, upon the reversal, the Appellant was entitled to attorney's fees as the prevailing party). The Court finds that Plaintiffs' Motion to Set Rate of Interest is not a motion to enforce a judgment or take action consistent with the appellate court's ruling, and, therefore, the Circuit Court does not have the authority to modify or set an interest rate.

Further, pursuant to SCRCP Rule 59(e), Plaintiffs had ten days from receipt of the Circuit Court's Order Awarding Attorney's Fees and Prejudgment Interest, entered on July 25, 2006, to file a Motion to Alter or Amend the Judgment. Plaintiffs did not file a Motion to Alter or Amend the Court's Order Awarding Attorney's Fees and Prejudgment Interest and Plaintiffs cannot now raise the issue for the first time post-appeal.⁹

If the Circuit Court allowed this type of relief, then parties could simply file post-trial motions each time a remittitur is sent to the lower court to achieve a desired result. This action would allow parties to effectively circumvent the Court of Appeals in order to obtain a result that was not achieved at the appellate level or to obtain a ruling on an issue which was not preserved. The Circuit Court is not at liberty to impose such relief. As such, the decision of the Court of Appeals is the law of the case. The Circuit Court only has the authority to enforce the judgment according to law and does not have the authority to rule on Plaintiffs' Motion to Set Rate of Interest.

⁹ Consistent with the ruling of the Court of Appeals, this Court notes that the only issue related to interest that the parties raised at trial was the issue of whether the Defendant was entitled to prejudgment interest. At trial, the parties did not raise the issue of whether the contractual interest rate was unconscionable, nor did the parties raise the issue of the applicability of the contractual interest rate to prejudgment or post-judgment interest. The parties were barred from raising these issues for the first time on appeal and are similarly barred from raising these issues at this stage of the proceedings.

IT IS SO ORDERED this 6th day of July, 2010 at Charleston, South
Carolina.



THE HONORABLE DEADRA L. JEFFERSON
Presiding Judge
Ninth Judicial Circuit



6/26/10
[Signature]

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO.: 2004-CP-10-3867

CHARLES BICKERSTAFF, M.D. and)
BARBARA MAGERA, M.D.,)

PLAINTIFF,)

VS.)

ROGER PREVOST d/b/a PREVOST)
CONSTRUCTION, INC.,)

DEFENDANT.)
_____)

MOTIONS HEARING

held before the Honorable Deadra L. Jefferson
Mia Perron, Circuit Court Reporter, 9th Judicial Circuit
in the Charleston County Courthouse
Charleston, South Carolina
on Thursday, July 12, 2012, Commencing at 9:38 a.m.

SUSAN "MIA" PERRON, CVR-CM-M
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 31865
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1-706-231-6028

APPEARANCES OF COUNSEL

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FOR THE DEFENDANT: Frank M. Cisa, Esquire
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EXHIBITS

[None]

MIA PERRON, CVR-CM-M

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PROCEEDINGS

THE COURT: This is Charles Bickerstaff and Barbara Magera versus Roger Prevost, doing business as Prevost Construction, Inc. The original case number is 2004-CP-10-3867.

This case was originally tried January 26th of 2010 -- no, actually, that's incorrect. Bear with me.

[Whereupon, the Court reviews documents]

THE COURT: This case was originally tried May 24th, 2006, through May 26th, 2006. At that time, the plaintiffs were represented by Patrick McDonald. The defense was represented by Mr. Frank Cisa.

At that time, the jury came back with a verdict in favor of the defense on the -- there was a verdict against the plaintiffs on their breach of contract cause of action and a verdict on the defendant's counterclaim and foreclosure of mechanics lien in the amount of \$6,437.62. At that time, the defendants also sought attorney's fees on its mechanics lien and sought pre-judgment interest at the contract rate of one-percent per day from June 24th -- June 1st, 2004.

Subsequently, the Court issued an order granting the defendant's attorney's fees and pre-judgment interest. The Court awarded attorney's fees in the amount of six thousand four thirty-seven sixty-two.

MIA PERRON, CVR-CM-M

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Bickerstaff vs. Prevost
Motions Hearing
July 12, 2012

1 This case has gone through several appeals, the
2 most latest appeal dealing with -- well, all of the
3 appeals actually revolving around an interest rate.

4 The case was subsequently remanded back to the
5 circuit court on -- the opinion was filed May 16th of
6 2012, and that was on the issue of --

7 The issue of the pre-judgment interest has already
8 gone up on appeal and was affirmed, as I recall.

9 And then there was a motion in March of 2007 for a
10 leave to deposit funds with the Court, the purpose of
11 which was to stay the interest rate.

12 The matter was remanded to the circuit court for a
13 calculation, as I read this opinion, of post-judgment
14 interest or the -- the issue of post-judgment interest
15 and the rate of post-judgement interest as a sole matter
16 before it on the appeal as they determined was pre-
17 judgment interest.

18 The Court further found that -- the appellants
19 argued before the Court of Appeals that one-percent per
20 day post-judgment interest was punitive, grossly
21 disproportionate, and violative of the equal protection
22 clause of the constitution. However, the Court found
23 that they failed to raise that argument before the lower
24 court and it was not preserved for their review. So
25 basically what they did was they remanded it to the

MIA PERRON, CVR-CM-M

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Bickerstaff vs. Prevost
Motions Hearing
July 12, 2012

1 lower court, which is me, for me to determine -- let's
2 see: we reverse the circuit court's determination that
3 it lacked jurisdiction and remand for reconsideration of
4 the issue of post-judgment interest.

5 Is that an accurate summary of the procedural
6 history of where we are today?

7 MR. SMITH: It is, Your Honor.

8 THE COURT: And for the record, the plaintiffs are
9 now represented -- plaintiffs/appellate are now
10 represented by Steve Smith.

11 Is that correct, Mr. Cisa?

12 MR. CISA: That's correct, Your Honor.

13 THE COURT: Be glad to hear any argument.

14 MR. SMITH: I guess it's my motion.

15 Your Honor, that was very correct, especially the
16 last thing you said, which is the courts, the appellate
17 courts, both times we've been up there, have made it
18 clear. They've distinguished two things. The last --
19 especially the last time, they distinguished between
20 post-judgment and -- or pre-judgment and post-judgment
21 as being two separate distinct items. And they made
22 that very clear because they said, well, our first
23 opinion only dealt with pre-judgment interest.

24 And in the pre-judgment interest, the arguments
25 that should have been ruled on by the appellate court

MIA PERRON, CVR-CM-M

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Bickerstaff vs. Prevost
Motions Hearing
July 12, 2012

1 weren't. And I totally understand that your hands were
2 handicapped -- your hands were tied, you were
3 handicapped, in the original because these motions were
4 never made in front of you by Patrick McDonald.

5 The issue -- however, again, it goes to pre -- or
6 two totally and distinct new issues. This will be the
7 first time that post-judgment interest has ever been
8 discussed. This will be the first time that these
9 arguments could have been raised. So, Your Honor,
10 they're going to be fair game.

11 And I think the appellate courts, when they said,
12 hey, look, nobody said these were unconscionable, they
13 didn't object on those grounds, they left it open for us
14 to appeal on the post-judgment if the Court says, well,
15 one-percent clause in the contract, that's okay.

16 And this is not anybody's favorite case. I can
17 tell you that. I know that.

18 THE COURT: It's a case.

19 MR. SMITH: But you've got to think commonsense
20 wise. We have a 6,000-dollar judgment that now -- if
21 you agree with them, the post-judgment continues to run,
22 is now \$143,000.

23 THE COURT: You know, and maybe I'm getting a
24 little ahead of myself, but it just befuddles me that
25 y'all haven't been able to resolve this --

MIA PERRON, CVR-CM-M

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1 MR. SMITH: They don't have the money.

2 THE COURT: -- because it just continues to
3 increase. And Mr. Prevost's legal fees continue to
4 increase. It seems to me, just for the peace of the
5 parties, y'all would want to just resolve this and be
6 done with it. I mean, it doesn't matter to me either
7 way. I mean, but I'm just curious.

8 And we've talked about this several times, because
9 the judgment continues to grow. And, you know, I guess
10 I get to be the most objective, I have the most
11 objective view of it, which is they say they don't have
12 the money to pay. That's questionable. I think they
13 have a philosophical issue with the as doctors they
14 signed something without really -- well, I think they
15 read it. But I don't think they really contemplated the
16 full complexity, of what they signed, by someone who
17 they really didn't think was as educated as them. And
18 now they're stuck with it. And then you have Mr.
19 Prevost's part of it, which is he may have a judgment
20 that he may or may not be able to collect. I don't know
21 if they're judgment proof or not. I have no clue what
22 their financial situation is. I have no idea what their
23 assets are.

24 But it would just seem to me that at some point it
25 becomes a diminishing return. You know, at some point,

MIA PERRON, CVR-CM-M

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Bickerstaff vs. Prevost
Motions Hearing
July 12, 2012

1 you would think that y'all would just want to resolve it
2 and get the money paid and be done with it.

3 MR. SMITH: Your Honor, you know, they --

4 THE COURT: So going back to Columbia: whatever
5 you think you're going to get is going to keep eating it
6 up.

7 MR. SMITH: I'm with you. That's the first thing
8 I asked Frank today was, boy, these -- it's to be
9 mounting.

10 But, you know, we had attempted to do that, and
11 we've attempted to do it all along. We don't have the
12 amount of money that they want. I think the best offer
13 we had was knocking 2500 bucks off of it, the total
14 amount that they considered was due. So it would be
15 about a hundred and -- but I don't even know if that's
16 really still there. But at the time, it would have been
17 over \$100,000.

18 What has happened with this case is, you know, we
19 attempted to deposit the money in the Court --

20 THE COURT: Uh-huh.

21 MR. SMITH: -- the judgment amount. However, you
22 made a determination of that amount.

23 Well, at that time, well, we want the entire
24 judgment amount, which was over \$70,000 because of post-
25 judgement interest running at one-percent, because you

MIA. PERRON, CVR-CM-M

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Bickerstaff vs. Prevost
Motions Hearing
July 12, 2012

1 were handicapped at the time because the unconscionable
2 argument was not raised before you. I totally
3 understand, you know, that logical progression of we
4 haven't.

5 THE COURT: Well, also, I'll be frank with you.
6 Some of my thought process was that the Bickerstaff's
7 were not acting in good faith and they were just trying
8 to stop the running of interest, and that just wasn't
9 fair to Mr. Prevost.

10 They knew what they signed, and at some point,
11 they should have conceded -- should have been more
12 conciliatory in their posture. And it would not be fair
13 to him. Irregardless of what the interest rate was,
14 even if it was the statutory rate, I just have --

15 You know, I have some real concerns about when
16 folk want to deposit money into the Court just because
17 they want to stop -- it's like they want the benefit of
18 both worlds, you know. And in some instances that's
19 appropriate, some it's not, especially when -- it
20 depends on whether you really have a good-faith argument
21 or not and whether you really are going to prevail on
22 that argument, so to speak.

23 And some of it was just -- it just had gotten so
24 emotional between everybody at some, you know, point of
25 the whole process.

MIA PERRON, CVR-CM-M

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Bickerstaff vs. Prevost
Motions Hearing
July 12, 2012

1 MR. SMITH: I'm going to disagree with one thing
2 you said.

3 I don't think anybody would have signed a contract
4 with one-percent a day. I just don't think they read
5 it.

6 THE COURT: I think they're doctors. And they're
7 like us, they read everything.

8 MR. SMITH: I don't -- you know, I'm buying a
9 house. I just signed the contracts. I hate to say
10 this, but I didn't read --

11 THE COURT: Well, I hate to tell you, I'm the
12 person in line that holds up everybody. I read
13 everything. I get out a magnifying glass. I even read
14 the small print at the car dealer, now that -- where
15 they make you arbitrate when they're servicing your car.
16 I read everything --

17 MR. SMITH: But I --

18 THE COURT: -- and I just find it difficult to
19 believe that educated folk don't read what they -- and
20 sometimes --

21 But the law says even if they didn't, they're held
22 to that standard --

23 MR. SMITH: I understand.

24 THE COURT: -- because they have a different level
25 of education.

MIA PERRON, CVR-CM-M

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Bickerstaff vs. Prevost
Motions Hearing
July 12, 2012

1 But the overriding -- because, of course, you
2 didn't try this case.

3 MR. SMITH: I didn't.

4 THE COURT: But some of it was that -- and I --
5 you know, I'm very observant of juries and I watch them.
6 And I listened to this whole case. But some of the
7 overriding tone in this case was that the Bickerstaff's
8 got Mr. Prevost to come in and do this great estimate,
9 they got all the money from the insurance company, and
10 then they wanted to nickle-and-dime him, basically,
11 about getting his work done. And that's really why he
12 prevailed --

13 MR. SMITH: You know, that's an interesting
14 question --

15 THE COURT: -- because they were being a little
16 unreasonable about every little perfectionist thing in
17 this house.

18 Now, this was tried a long time ago. But clearly
19 they made money from this deal, based on his estimate
20 that he provided to the insurance company, and then did
21 the work at a minimal cost, and then they basically,
22 with a magnifying --

23 I think I remember the hardwood floors basically,
24 you know, the -- at least as you listened to the
25 evidence, it was almost like they went over the floor

1 with a magnifying glass and every little piece of lint
2 they wanted to complain about or every little piece of
3 imperfection.

4 And so I think that, you know, when your posture
5 is that, you tend to -- a jury tends to think that
6 you're being unreasonable.

7 MR. SMITH: And then that's a curious argument,
8 because I was going to bring that up in my argument
9 today.

10 I don't think that no matter how much they liked
11 Mr. Prevost and how much they didn't --

12 THE COURT: I don't think it was a like or dislike
13 issue. I just think it was a reasonableness issue.

14 And I think people have lived enough -- and
15 Charleston is a fairly affluent community. You very
16 rarely have folk on a jury who don't own a home, who
17 have not owned several homes, who have not -- probably
18 three-quarters of them had lived through Hugo and had
19 work done on their houses.

20 So I think you have -- we are very fortunate in
21 Charleston that we have a very educated jury pool. Not
22 that blue-collar workers and folk who have less
23 education are any lessor jurors, because sometimes I
24 find they have more common sense than the rest of us.

25 But I think you have -- we have a unique kind of a

1 jury pool where people have a varying level of
2 experience. And I can't remember all the people that
3 were on that panel and what they did for a living.

4 But I think that Hugo kind of makes us a little,
5 what's the word I'm looking for, a little uniquely
6 situated, because I don't think there's anybody, after
7 Hugo, that didn't have work done to their house in
8 Charleston at some level, you know, or not. And so I
9 think that we have a different -- we have a different
10 jury pool.

11 So I don't think it was a like or dislike. I just
12 think it was just a very matter-of-fact issue. I think
13 every -- I don't know anybody that's gotten an estimate
14 that didn't hope they were going to make some money off
15 the insurance company. There are plenty of people who
16 got rich from Hugo.

17 MR. SMITH: Well, that's one of my arguments, and
18 that is that the jury gave them \$6,000. Do you think
19 that same jury would now give him \$143,000 today?

20 THE COURT: That's not the issue.

21 MR. SMITH: Well, that's what it's going to be. I
22 mean --

23 THE COURT: That's not the issue. That's a
24 contractual issue. It's a matter of law for the Court.
25 It's a matter of what they signed and what their meeting

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1 of the minds were and what they agreed to --

2 MR. SMITH: I think that that --

3 THE COURT: -- that's a legal issue.

4 MR. SMITH: I think that that's --

5 THE COURT: The issue of interest is not for a
6 jury. That's why we don't present it to them.

7 MR. SMITH: I think it actually, since it's a
8 contractual issue, should have been presented to the
9 jury. And we'll raise that when we get -- if we have to
10 go back. But I know that that wasn't presented to you
11 originally, so I understand all these arguments.

12 THE COURT: I've tried a lot of contract cases and
13 I've never had the issue of interest presented to a
14 jury. All lawyers always take the position, as well as
15 attorney's fees, that it's a matter of law for the
16 Court, especially --

17 MR. SMITH: I think that --

18 THE COURT: -- on the foreclosure of a mechanics
19 lien.

20 MR. SMITH: I think a contractual issue that says
21 one-percent a day is, in and of itself, is unreasonable
22 and I think the reasonableness then becomes a
23 determination issue for the jury. But, I mean, that's
24 something maybe we'll learn. I don't know.

25 But I just think that that should have been

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1 presented. But I know that wasn't argued, so I'm not
2 arguing it before you today.

3 THE COURT: Actually, Mr. McDonald conceded,
4 basically pre- and post-judgement interest, that it was
5 appropriate. He never raised it. He never questioned
6 it. He never argued it.

7 MR. SMITH: Well, the issue of post-judgement
8 interest never came up. We scoured the record. The
9 appellate court has scoured the record, and that's why
10 they said this is really a de novo issue of post-
11 judgement interest.

12 You're right. He didn't mention anything about
13 pre-judgment interest. Unfortunately, that's why --

14 THE COURT: No. No, and -- and I'm not going to
15 belie Mr. McDonald. He conceded it because he knew pre-
16 judgment interest was applicable in this case.

17 MR. SMITH: But he just didn't argue it. I mean,
18 that's been my problem. I've been handcuffed, just like
19 the Court was. I mean, if it's not presented to you,
20 you can't rule on it.

21 THE COURT: Well, no, he conceded it, basically.
22 I mean, he knew it was applicable.

23 MR. SMITH: He didn't --

24 THE COURT: At least that was his posture. He may
25 not have said it on the record, but that's how I read

1 his posture.

2 MR. SMITH: I mean, he didn't even know attorney's
3 fees were awarded.

4 But I mean, we had -- we've had some issues with
5 this. That was the big argument, was over fees. Frank
6 asked for fees and he got them. You can't get fees in a
7 mechanics lien case. That was really the post-judgment
8 argument.

9 THE COURT: Well, I think the fees I awarded were
10 incredibly reasonable.

11 MR. SMITH: No, I'm totally -- I have no problem.
12 That hasn't been an issue.

13 But my argument, Your Honor, is is that before --
14 Frank has a lot of case law that says you've got to
15 apply the post-judgement interest. I think the statute
16 says unless otherwise agree.

17 But one of the issues that you've got to determine
18 is -- and this is the first time this has been raised,
19 except by the appellate court saying that issue wasn't
20 raised before us on pre-judgment interest, is is that
21 term unconscionable, is it just so bad that it's against
22 public policy.

23 The thing that I -- I've received so many phone
24 calls from other attorneys, that have read this case,
25 saying what happened, I've never seen a Court award

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1 one-percent. I said, it wasn't argued.

2 THE COURT: It's in the contract.

3 MR. SMITH: Well, I mean, it wasn't argued. I
4 think that if it was argued as being unconscionable --

5 I think the appellate court has left that door
6 open saying, come back to us. Because I don't think the
7 appellate court of unconscionableness has argued 365-
8 percent interest was going to be upheld. I just don't
9 think that. That's just so against public policy, so
10 unconscionable, so just -- it leads to such fundamental
11 unfairness that it becomes almost punitive, which leads
12 me to my other arguments.

13 If somebody is hit with such a ridiculous -- now,
14 you know, when we did away with usury laws, the courts
15 issued an opinion and said, you know, it's kind of like
16 pornography, we'll know it when we see it, we don't need
17 a statute saying it. And it becomes, at that point,
18 just --

19 365-percent is just unconscionable. The effect it
20 has is it will deny the people the access of the courts
21 because if they have to worry about some ridiculous
22 interest amount in a contract that obviously they
23 overlooked that term -- because nobody would sign it,
24 but --

25 THE COURT: I think you're trying to make this

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1 analogy that it's an adhesion type contract, where it's
2 not, where you have big entities that have a
3 disproportional position over the general public. It's
4 not the same. You have private parties who had a
5 contract, it was drafted, where they had the opportunity
6 to read it, read it. And the distinction between the
7 general public and the Bickerstaffs is that they are
8 doctors, with probably three times the amount of
9 education of the general public, and they have a
10 different -- well, they don't have a different burden.
11 The public has a burden to read what they sign and to be
12 bound by it.

13 You know, it's like family court. And this maybe
14 would not be the best analogy. We used to talk about
15 fair when you talk about whether an agreement is fair
16 and equitable. And what's fair and equitable to you and
17 I may not be fair and equitable to the parties. You
18 know, people give up certain things in their best
19 interest that if I were in their shoes I would think,
20 gosh, I wouldn't do that. But to them, it's fair and
21 equitable to them because they're in the give-and-take
22 process and --

23 MR. SMITH: The problem, though --

24 THE COURT: -- it's fair to them. I don't know.

25 MR. SMITH: The courts have routinely held unfair

1 clauses in contracts that people have signed to be
2 unenforceable. I'll give you a great example. Paid
3 when paid clauses. You'll get paid when we get paid by
4 the owner. They were declared to be unconstitutional
5 because they were avoidance against public policy. We
6 now have a statute on that point actually saying that
7 they're against public policy. But prior to that, our
8 courts have determined that even though the parties have
9 contracted for that term, it was void because it was
10 unfair. And that's kind of my argument now. This was
11 just unfair, even though the parties have a contract to
12 that.

13 And I'll differ a little bit in your opinion of
14 the doctors. Having had to explain every minute detail
15 of this so many times because they don't understand
16 what's going on, I don't think -- they may be book
17 smart, but not business smart.

18 THE COURT: They're beyond book smart. They're
19 shrewd. I had the opportunity to observe them in trial.
20 They're not slow people. They are not un-astute in
21 business. They run a medical practice.

22 That is not -- and that may be your perception.
23 And I don't mean that in a bad way. I like shrewd
24 people. I think they're smart.

25 MR. SMITH: Well, Frank has --

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1 THE COURT: I think they --

2 MR. SMITH: Frank --

3 THE COURT: I think they tend to see things the
4 rest of us don't see.

5 MR. SMITH: Frank has has the ability to do a
6 supplemental on them and he can see that they're not
7 true business people.

8 THE COURT: Okay.

9 MR. SMITH: Because they're -- they're probably --
10 it's my position that they're judgment proof. He hasn't
11 found anything to seize yet.

12 THE COURT: Well, that goes to my argument that
13 y'all need to resolve it. But go ahead.

14 MR. SMITH: I understand.

15 THE COURT: Not my argument, but my position. I
16 think y'all need to resolve it, but y'all have to come
17 to that conclusion. But go ahead.

18 MR. SMITH: But the effect of enforcing these
19 unconscionable, exorbitant, unfair, absurd interest
20 rates have the effect of denying these people the access
21 of the courts, because they won't be afraid -- they'll
22 be afraid to go in. There'll be a chilling effect to go
23 into a courtroom knowing that if I lose this 6,000-
24 dollar judgment, I'm going to immediately, because of
25 pre-judgment interest, be hit for sixty or \$70,000,

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1 that's something I can't afford. The courts shouldn't
2 have that effect. They shouldn't have a chilling effect
3 on the fair access to the court system.

4 Also, because this interest rate is so bad --

5 THE COURT: Let me interrupt you one second.

6 MR. SMITH: All right.

7 THE COURT: Administrative duty calls. I
8 apologize.

9 [Whereupon, a recess is taken from 10:00 a.m. to
10 10:09 a.m.]

11 THE COURT: I appreciate y'all's patience.
12 Mr. Smith, you may continue.

13 MR. SMITH: Thank you, Your Honor.

14 Anyway, by penalizing somebody with this interest
15 rate over their head, it would deny them the ability to
16 come into court. There would be a chilling effect on
17 their access to the judicial system.

18 Also, holding people to a different standard --
19 and I know that that's been done saying, well, they're
20 well-educated, they're not --

21 THE COURT: No.

22 MR. SMITH: -- they're not educated --

23 THE COURT: I mean, it doesn't matter. I mean,
24 the law says, irregardless, you're held to the
25 responsibility of reading what you signed. But one of

1 those factors that they look at is a person's education,
2 their ability to understand what they're reading. So I
3 don't think that's holding anybody to a different
4 standard. It's no different than in a criminal case
5 when you're doing Miranda. It's one of those factors
6 you look at, which is a person's IQ, their education.
7 It goes to their ability to understand what they've
8 read. So I don't think that that's a higher standard.
9 It's simply one of those things where you're looking at
10 how a person is able and capable of understanding what
11 they've read and signed.

12 MR. SMITH: And it's just I think that probably --
13 and I understand that's one of the factors, that
14 everybody deserves to be treated equally and if it's
15 unconscionable as to one, it would be unconscionable as
16 to another, is kind of the way I see it.

17 But also this award has become so punitive on a
18 pre-judgment interest rate, that it's denied -- that the
19 threat of this kind of award would deny them the due
20 process of the court system because they wouldn't be
21 able -- people that couldn't afford this wouldn't be
22 able to come in and fight an issue, with the threat of
23 that, with that lingering over their head that they
24 could be hit with that kind of figure.

25 I think all of these go in -- not only under the

1 constitutional arguments, but they all kind of come into
2 the final argument, which is that this interest rate is
3 just so exorbitant. It's so fundamentally unfair, it's
4 so unconscionable, that it shouldn't be upheld. It just
5 should be, this is unfair, this is too much, the
6 interest rate is already way over what it should be;
7 post-judgment, we're just going to find that it's
8 unconscionable and that is an equity argument that you
9 always have.

10 Frank is going to say, well, you have to interpret
11 the contract provision to award interest because it says
12 unless otherwise agreed upon. But this Court always has
13 the inherent authority to find that a contract clause is
14 unconscionable, is against public policy. And if you do
15 that, then he doesn't have an argument because then he
16 can't enforce an unconscionable provision.

17 And that's what I really think, and that's what
18 the Court of Appeals in their first decision kind of
19 discussed: well, nobody argued this issue on pre-
20 judgment. They made it very clear that they distinguish
21 between pre-judgment and post-judgment.

22 This is the first time that this could have been
23 raised on post-judgement interest. I'm raising it on
24 post-judgement interest, and I think that it is just
25 fundamentally unfair to turn a 6,000-dollar judgment

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1 into a \$143,889.30 award. I think that that would be --
2 I think that that would be just way punitive, way
3 unconscionable.

4 Thank you, Your Honor.

5 THE COURT: You're welcome. Mr. Cisa?

6 MR. CISA: Thank you, Your Honor.

7 Judge, as a preliminary matter, I assure you that
8 I always try to settle cases. I've learned that no
9 matter how much you hope and believe in your case, you
10 never really know exactly what a judge is going to do or
11 a jury is going to do.

12 The problem is is you try cases, and I enjoy
13 trying cases, because somebody doesn't make you a
14 reasonable offer of settlement. And, you know, we've
15 got a case here where we've got two doctors, with no
16 children, and they haven't offered us a reasonable offer
17 of settlement.

18 Judge, as I review the Court of Appeals' opinion,
19 it's my understanding that they remanded it for you to
20 determine what the post-judgment rate of interest should
21 be. Should it be the statutory rate or should it be the
22 contract rate?

23 You previously wrote in your decision, which was
24 under this appeal: our courts have held that the
25 statutory interest rate under Section 34-31-20(b) is

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1 applicable only in the absence of a written agreement
2 between the parties fixing a different rate of interest.
3 You cited Renaissance Enterprises, Inc., versus Ocean
4 Resorts, Inc., 326 S.C. 460, which also cited the Turner
5 Coleman, Inc., versus Ohio Construction and Engineering,
6 Inc. case, which says exactly the same thing. You said
7 further that the contract has specified a lawful rate of
8 interest to be paid after maturity; the same rate will
9 apply on a judgment entered on the contract.

10 I think these ideas of pre-judgment interest and
11 post-judgment interest arises -- is a matter of
12 operation of law.

13 It's kind of interesting, Judge. If you look at
14 the pleadings, in the answer and counterclaim Roger
15 Prevost alleged in paragraph 20 that: pursuant to the
16 written agreement entered into between the parties, the
17 plaintiff agreed that any payment due under the contract
18 would bear interest at a daily rate of one-percent of
19 and from the date the payment was due.

20 In response to that allegation in paragraph number
21 20, Dr. Bickerstaff and Dr. Magera stated that the
22 plaintiffs admits so much of the allegations contained
23 in paragraph 20 of the defendant's counterclaim, that
24 the parties entered into an agreement, but we prayed
25 reference to the terms of the agreement -- terms of the

1 agreement itself as controlling.

2 They admitted that allegation. They raised no
3 affirmative defenses. They were -- they're required to
4 raise an affirmative defense because an affirmative
5 defense has to be raised under Rule 8(c) if you're
6 seeking to -- any matter constituting an avoidance, you
7 have to raise it as an affirmative defense.

8 Judge, I think the issue is whether or not the
9 pre-judgment interest rate is the same as post-judgment
10 because it's a contractual provision. I believe the law
11 is clear -- the same rate.

12 I ask you to issue an order saying that the
13 statutory rate does not apply, because we have a
14 contract between the parties.

15 And I'll be glad to answer any questions you may
16 have. But that's our position.

17 MR. SMITH: Your Honor, if I could just address
18 one more issue?

19 THE COURT: Sure.

20 MR. SMITH: It is somewhat interesting that Chief
21 Justice Toal's order that she issues every January 15th,
22 concerning the new interest rate, says that all
23 judgments rendered in this state shall accrue interest
24 at whatever particular interest rate is applicable at
25 that point.

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1 If she says that all judgments will run at that
2 rate, then I think that that would be all judgments.
3 And I have different -- excuse me. I have something
4 caught in my throat.

5 THE COURT: Yeah. The case law doesn't support
6 that, though. There are statutes that -- there's a
7 statute that provides that she is to do that every year
8 if the Wall Street -- whatever the index is. But that's
9 for judgments that don't have -- I mean, that applies to
10 everything, even where -- in like a wreck case, where
11 you wouldn't have a contract, or other judgments where
12 the parties are entitled to accrue interest. I don't
13 think that obviates the fact -- that would turn --

14 MR. SMITH: Well, the new statute --

15 THE COURT: -- that would turn the law on its
16 head, basically.

17 MR. SMITH: Well, the new statute that authorized
18 her to change the interest rate -- or the new rule that
19 authorized her to change it was after the statute we
20 have, which has been in existence forever.

21 Now, what it does is it gives some uniformity to
22 the court system and allows all judgments to run at one
23 particular interest rate.

24 THE COURT: That's just assessed interest rate.
25 It's ministerial. It's not to -- it doesn't subvert

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1 somebody's contractual -- I mean, if that's the case,
2 people wouldn't enter into contracts that provide post-
3 and pre-judgment interest. That's not --

4 MR. CISA: And, Judge, the other point about the
5 new statute is it specifically says that this statute
6 applies to judgments entered after a certain date, and
7 this judgment was entered before that date, so it
8 doesn't have any application to this particular
9 judgment.

10 THE COURT: Which statute are y'all referring to,
11 anyway?

12 MR. CISA: I didn't bring it, but I know it.

13 It was amended, but it does have a start date like
14 most statutes do. It applies to a judgment entered
15 after this particular date. And I think the statute was
16 -- well, I didn't bring it, so I don't really know. But
17 I know that's what it says. And I know that this
18 judgment was entered before that statute was passed.

19 MR. SMITH: 34-31-20, Your Honor, is the statute.

20 THE COURT: Is Mr. Cisa correct that it was passed
21 after this judgment?

22 MR. SMITH: I still think that it was applicable.
23 If you read the wording, it says --

24 THE COURT: Statutes clearly are not retroactive
25 unless provided for in the statute itself. They are

1 prospective, always.

2 MR. SMITH: Until the agreement interest, it's
3 going to be prospective because interest is going to
4 accrue --

5 THE COURT: No. It would have to -- that's
6 clearly against black-letter precedent.

7 When there's a statute, it applies for acts that
8 happened at the time and forward, not -- they would
9 apply to every judgment that was entered as of the date
10 that statute passed, and prospectfully. But you cannot
11 have statutes apply retroactively unless the statute
12 provides that it's retroactive to every judgment entered
13 before the date of that statute being passed.

14 MR. SMITH: The interest is going to run for
15 January 16th on January 16th, which would be the day
16 after she -- so that would be pro-active because --

17 THE COURT: Judgment would have had to have been
18 entered after or the date of the statute's passing, not
19 before.

20 MR. SMITH: I understand.

21 But for the year, it's going to run at a certain
22 interest rate.

23 I understand that you don't agree with me. I
24 just --

25 THE COURT: I just think that's clearly contrary

1 to black-letter precedent.

2 There's a very interesting opinion that Justice
3 Burnett wrote, before he ever retired, that talks about
4 the retroactive applicability of statutes. It goes into
5 great detail about how you apply a statute once it's
6 passed. And unless there's a savings clause or a clause
7 that says it's to be applied retroactively, it applies
8 from the date it's passed, forward.

9 MR. SMITH: Post-judgement interest isn't
10 retroactive. Interest that runs in --

11 THE COURT: The seminal event is not when interest
12 runs, it's the entry of the judgment that it would be
13 based upon.

14 MR. SMITH: For the record, could I put my
15 argument on the record, Your Honor?

16 THE COURT: I haven't precluded you from making
17 any argument.

18 MR. SMITH: I understand.

19 Interest that will accrue for 2012 will run in
20 2012, so any statute passed in 2013 would not apply to
21 2012. It would apply probatively to 2013 interest. If
22 the judgement is rendered in 2010, it's going to have a
23 different interest rate in 2011, a different interest
24 rate in 2012 --

25 THE COURT: Only if it didn't have a contract that

1 provided for its pre-judgment interest.

2 MR. SMITH: I understand that. I was just talking
3 about --

4 THE COURT: Or post-judgement interest.

5 MR. SMITH: I just want to address the retroactive
6 part of that.

7 I still think it's unconscionable, and that's our
8 argument on that, Your Honor.

9 THE COURT: Do you want to address his
10 unconscionableability or unconstitutional argument,
11 Mr. Cisa?

12 MR. CISA: Well, Your Honor, my first argument is
13 that it was not raised as an affirmative defense in the
14 pleadings. And I say that the post-judgment rate of
15 interest arises as by operation of law. There were no
16 affirmative defenses raised. They admit the allegation
17 concerning one-percent per day in the contract.

18 So I submit that at this point in time, that the
19 Court should not consider his unconscionableability
20 arguments because it was not raised and argued at the
21 time of trial.

22 MR. SMITH: Your Honor, if I could address that?
23 I apologize.

24 THE COURT: Yeah. You need to because --

25 MR. SMITH: I should have addressed that.

1 THE COURT: Yeah.

2 MR. SMITH: They had no choice but to admit that
3 that is contained in the contract, because it is
4 contained in the contract. I mean, you would have to
5 say --

6 THE COURT: But you still -- it doesn't preclude
7 you from raising any affirmative defenses that it's
8 unconscionable.

9 MR. SMITH: But you don't raise affirmative
10 defenses to post-judgement interest.

11 THE COURT: You would raise all of your
12 affirmative defenses. The Rules require it.

13 MR. SMITH: I don't think that there is an
14 affirmative defense to an interest rate if it's a legal
15 argument.

16 THE COURT: I've seen too many of them in answers,
17 especially when you deal with adhesion contracts. I see
18 them all the time in pleadings that deal with brokerage
19 houses where people allege somebody's mismanaged their
20 finances and that they are bound by arbitration clauses.
21 They raise them as affirmative defenses all the time,
22 that it's unconscionable, that it's unconstitutional,
23 and that they shouldn't be bound by that provision. And
24 they raise it as an affirmative defense because they
25 recognize if they don't, it is waived.

1 MR. SMITH: And I just think it would be difficult
2 to raise an affirmative defense dealing with post-
3 judgement interest.

4 THE COURT: Well, I think you know whether the
5 judgment -- whether you think an interest rate is
6 unconscionable or not, or whether you think it's
7 unconstitutional, whether it's pre- or post-judgment
8 interest when you look holistically at a cause of action
9 and where you have the requirement to raise affirmative
10 defenses. I think it's an interesting argument.

11 I'm going to take the matter under advisement.
12 And if you-all could provide me with proposed orders
13 within ten days of today -- send them to
14 djeffersonsc@sccourts.org in Word format -- it would be
15 greatly appreciated.

16 [HEARING CONCLUDES AT 10:22 A.M.]
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C E R T I F I C A T E

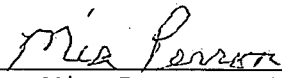
STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

I, the undersigned Mia Perron, Circuit Court Reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the motions hearing held before the Honorable Deadra L. Jefferson, on Thursday, July 12, 2012.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 6th day of July, 2016.


Mia Perron, CVR-CM-M
Circuit Court Reporter
9th Judicial Circuit

MIA PERRON, CVR-CM-M

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

CHARLES BICKERSTAFF, M.D., and
BARBARA MAGERA, M.D.,

Plaintiffs,

vs.

ROGER PREVOST d/b/a PREVOST
CONSTRUCTION, INC.,

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
2004-CP-10-3867

FILED
2013 APR - 1 PM 12:49
JULIE J. ARMSTRONG
CLERK OF COURT
BY

ORDER SETTING RATE OF
POST-JUDGMENT INTEREST

Presiding Judge:
Plaintiffs' Attorney:
Defendant's Attorney:
Date of Hearing:
Court Reporter:

Deadra L. Jefferson
Steven L. Smith, Esq.
Frank M. Cisa, Esq.
July 12, 2012
Mia Perron

This matter came before the Court on July 12, 2012¹ 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 Plaintiffs², 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 \$6,437.62³ 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.

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.

A handwritten signature in black ink, appearing to be "Hof 16" followed by a stylized signature.

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

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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

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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

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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

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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, SCRPC.

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." Ion, 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

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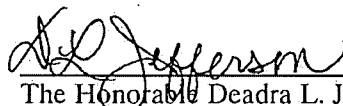
in their motion their specific contentions that the interest provision is unconscionable and violative of due process and public policy. The motion simply requested the Court to determine whether post-judgment interest should accrue at the statutory or contractual rate. No memorandum in support of Plaintiffs' 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

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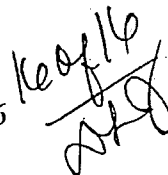
due process and public policy. However, Plaintiffs failed to do so, and the Court finds these claims are therefore waived. Moreover, based on the court of appeals' May 2012 decision, the Court finds the court of appeals remanded the matter solely for the determination of whether post-judgment interest 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



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Charles Bickerstaff, M.D., et al.,)
(x) Plaintiff)
v.)
)
Roger Prevost, etc.,)
() Defendant)
check box above indicating submitting party)

Case No. 2004-CP-10-3867
**MOTION INFORMATION FORM
AND COVER SHEET**

name, SC Bar no. and address of plaintiff's attorney

Steven L. Smith - 5173
Smith | Closser, PA
P.O. Box 40578
Charleston, SC 29423
telephone: 843-760-0220 fax: 843-552-2678
e-mail: ssmith@scnlaw.com

name, SC Bar no. and address of defendant's attorney

Frank M. Cisa
Cisa & Dodd, LLP
858 Lowcountry Blvd, Ste 101
Mt. Pleasant, SC 29464
telephone: 843-881-6530 fax: 843-881-5433
e-mail: frank@cisadodds.com

- (x) MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I AND III)
() FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II AND III)
() PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II AND III)

SECTION I: Hearing Information

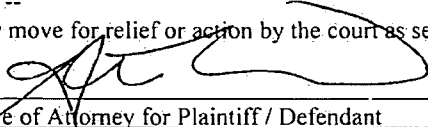
Nature of Motion: to Reconsider (interest rate)

Estimated Time Needed: 30 minutes Court Reporter Needed: YES /

SECTION II: Motion Type

- (x) Written motion attached
() Form Motion --

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for Plaintiff / Defendant

4-12-13
Date submitted

SECTION III: Motion Fee

- (x) PAID - AMOUNT: \$25.00
() EXEMPT: () Rule to Show Cause in Child or Spousal Support
(check reason) () Domestic Abuse or Abuse and Neglect
() Indigent Status () State Agency v. Indigent Party
() Sexually Violent Predator Act () Post-Conviction Relief
() Motion for Stay in Bankruptcy
() Motion for Publication () Motion for Execution (Rule 69, SCRCP)
() Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
() Other:

JUDGE'S SECTION

- () Motion Fee to be paid upon filing of the attached order.
() Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

DATE FILED

Collected by: _____ (print name)

() MOTION FEE COLLECTION: _____

() CONTESTED - AMOUNT DUE: _____

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
2004-CP-10-3867

PLAINTIFFS' MOTION TO
RECONSIDER

Plaintiffs,

v.

ROGER PREVOST d/b/a PREVOST
CONSTRUCTION, INC.,

Defendant.

2013 APR 15 PM 4:24
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

First, Plaintiffs believe that their original arguments with regard to the enforcement of the 1% per day interest provision in this particular case have substantial merit. Plaintiffs would respectfully ask the Court to review those arguments and consider the effect the application of this highly punitive measure would have in this instance, and consider that the impact of this clause could not have been reasonably foreseen by the parties at the time of the execution of the document. As has been noted, Plaintiffs' challenge is not now and never has been the contract itself; the issue is limited to the application of one specific provision in one specific instance.

The appeal which generated the decision of May 16 was taken from this Court's determination that it was unable to make any substantive decisions with respect to the post-judgment interest rate in light of the original appellate decision establishing the prejudgment rate at 1% per day. Plaintiffs did, in fact, raise their constitutional and other substantive arguments in their second brief to the Court of Appeals, and that Court found them not to be properly before it. The Court of Appeals did not, however, conclude that those arguments had been definitively waived. Rather, limiting itself to the arguments that had been expressly brought before this Court in the context of whether or not this Court had jurisdiction to consider the post-judgment issue, the Court of Appeals found those arguments had yet to be considered. They were not considered not because they had not been raised in the original pleadings, but because this Court declined to exercise any jurisdiction, and therefore declined to hear any substantive argument, on the post-judgment issue. That issue, in turn, could not have been raised until after the judgment itself was entered, and the failure to bring it before any court before the conclusion of the first appeal should not operate as a waiver of the right to appeal.

As was made clear in the Motion to Establish Rate of Interest filed by Plaintiffs following the remand and prior to the last hearing, the majority of Plaintiffs' claims with regard to the constitutionality of the post-judgment interest rate of 1% per day are challenges that could not have been made prior to the conclusion of the first appeal. Specifically, these are challenges to the interest provision as applied, rather than on its face. As Plaintiffs indicated in their earlier brief, they could not have raised the issues brought before the Court most recently at any earlier time, as the issues themselves did not exist.

The Court notes in its Opinion that Plaintiffs raised no affirmative defenses and made no motion to amend the pleadings to reflect the addition of any such defenses. With respect,

Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 703 S.E.2d 221 (2010), which clearly requires that affirmative defense be raised at the commencement of an action, is distinguishable. The affirmative defense appellant in *Earthscapes* had failed to raise was the contractor's lack of license, which referenced a condition existing at the time of contracting and most definitely existing at the time of the filing of the complaint and answer. In this case, however, Plaintiffs are referring to a condition that did not exist until after the conclusion of the trial, at the earliest. The availability of a potential future challenge to the application of a contractual provision, in the possible future in which certain extrinsic events unforeseen and unforeseeable by the parties should occur, is not something that can be raised by affirmative defense or any other pleading filed at the time of or in response to the original complaint.

Similarly, the Court's discussion of this issue in the context of the application of a penalty provision, and the failure to challenge that at the time of the filing of Plaintiffs' Answer, while a thorough and correct statement of the law in that respect, fails to fully acknowledge the prospective nature of this argument at the pleadings stage of this case. As the Court notes, Plaintiffs do not now and have never challenged the validity of the underlying contract itself. Furthermore, as of the time of the filing of the answer, there was no issue as to whether potential future events might create a scenario in which a particular provision became unduly, unconstitutionally, and punitively burdensome. Plaintiffs' challenge at this juncture, and the challenge made prior to the most recent hearing, was not in the nature of a claim that the interest provision in the contract is a *per se* penalty provision. Rather, it is a claim that it has become such a provision, as applied, in this instance.

Plaintiffs would, of course, reiterate their contention that this Court should amend the contract to provide for post-judgment interest at the statutory rate, rather than at the rate set out

in the contract. At the same time, Plaintiffs recognize that such a decision is highly unlikely. Plaintiffs would, however, respectfully request that the Court reconsider those portions of its Opinion and Order of May 1 which state that their constitutional arguments to this rate of interest have been waived. Plaintiffs would ask that the Court revise its Order to note that those arguments have been properly raised to the Trial Court having jurisdiction over this case, and that they have been raised at the proper time and in the proper form. In the alternative, Plaintiffs would ask that the Court revise its Order to omit its analysis regarding waiver, as this issue was not raised or argued during the hearing of July 12, 2012.

Respectfully submitted,

SMITH & KOONTZ, P.A.



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4-12, 2013
Charleston, South Carolina
06-537

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2004-CP-10-3867

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

Plaintiffs,

vs.

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

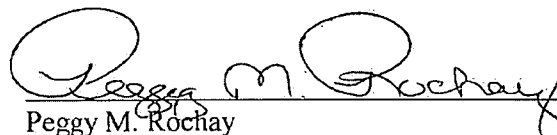
Defendant.

CERTIFICATE OF SERVICE

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2013 APR 15 PM 4:24
JULIE J. ARMSTRONG
CLERK OF COURT
BY

I certify that on this date a copy of the foregoing Plaintiffs' Motion to Reconsider was
served by mailing or hand delivery and/or electronic mail on the following:

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Peggy M. Rochay

Charleston, South Carolina

April 12, 2013
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April 12, 2013

Julie J. Armstrong, Clerk of Court
Charleston County Common Pleas
100 Broad Street, #106
Charleston, SC 29401

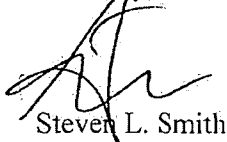
RE: Charles Bickerstaff, M.D., et al. v. Roger Prevost, etc.
Case No. 2004-CP-10-3867
S/C File No. 06-537

Dear Ms. Armstrong:

Enclosed please find the original and one copy of the Plaintiff's Motion to Reconsider in the above referenced matter. I would appreciate it if you would file this and return the filed copy to me in the envelope provided. I have also enclosed our firm's check in the amount of \$25.00 to cover your fee.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,



Steven L. Smith

SLS/pmr

Enclosures

cc: Frank M. Cisa, Esquire

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF CHARLESTON

4 Charles Bickerstaff, M.D., and
5 Barbara Magera, M.D.,

6 Plaintiffs,

7 vs. CASE NO. 2004-CP-10-3867

8 Roger Prevost, d/b/a
9 Prevost Construction, Inc.,

10 Defendant.

11
12
13 Hearing before the Honorable Mikell R.
14 Scarborough, reported by Christine A. Smith, Court
15 Reporter and Notary Public, at 3:18 p.m. on
16 January 6, 2015, at 100 Broad Street, Charleston,
17 South Carolina.

18
19 **COPY**

20
21 Christine A. Smith, Court Reporter

22 Master-in-Equity

23 P.O. Box 30276

24 Charleston, South Carolina, 29417

25 (843) 958-5071

casmith@charlestoncounty.org

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14 (INDEX AT REAR OF TRANSCRIPT)

P R O C E E D I N G S

THE COURT: What have we got before us today, Mr. Cisa?

MR. CISA: Judge, this is my action. I actually represent the Defendant, Prevost Construction, Inc. We have probably been before you a couple of times. My client got a judgment against the Plaintiffs on a counterclaim, and the judgment amount is now up to about, oh, I don't know, 265,000 or \$270,000.

We're here on my Motion to Foreclose a Charging Lien that you granted in a previous order and also to have a receiver appointed. Judge, if I could give just a little bit of background?

We were back before you on July 16, 2012. I was asking at that time for several things incident to supplemental proceedings. The most important thing I was asking for was a charging lien against an LLC and BOB Properties is owned by the Plaintiffs. They're the sole members.

You issued an order finding that the Plaintiffs were the sole members of BOB Properties, which is a limited liability company which owns two unimproved pieces of real estate in Berkeley County

1 and a doctor's office building on Folly Road in
2 Charleston County.

3 What you did is -- in your order you issued
4 the order in August of 2012. You granted the
5 Defendant a charging lien against the Plaintiff's
6 distributional interest in BOB Properties pursuant to
7 Section 33-44-504. You also prohibited and
8 restrained the Plaintiffs from selling or disposing
9 or conveying any property owned by BOB Properties
10 without first giving prior written notice to me as
11 Counsel for the Defendant, and then you gave me the
12 right to file a notice of charging lien in both
13 counties, which I have done.

14 Prevost Construction, my client, was granted
15 the charging lien on their distributional interest in
16 BOB Properties by your order of August 8, 2012. It
17 was filed on August 10, 2012. Judge, as of this date
18 my client hasn't been paid a nickel. Plaintiffs --
19 and if they gave any money at all relative to the
20 charging lien that was granted on their
21 distributional interest in BOB Properties, LLC.

22 Judge, this motion is for an order to
23 foreclose the lien on the Plaintiff's distributional
24 interest in BOB Properties, and also I'm asking that
25 a receiver be appointed to sell the properties in

1 Berkeley County and Charleston County that are owned
2 by BOB Properties so that a distribution can be made
3 because there have been no distributions made as of
4 this time.

5 Judge, in support of the motion I filed an
6 affidavit from my client, Prevost Construction by
7 Roger Prevost, who is here with me today in support
8 of the motion where we outlined that the judgments
9 were entered, and the amount owed as of September
10 12th, when we filed this, was about 262,000 or
11 \$263,000. A couple of things transpired, Judge.

12 In June of 2014 in a different case that was
13 also before you, but we resolved it before it was
14 tried, was where I foreclosed these judgment liens
15 against the Dr. Bickerstaff and Dr. Magera's personal
16 residence and another personal residence they own --
17 they're really on James Island or Folly Beach, that
18 area.

19 First Citizens Bank was named as a party
20 Defendant because there was a priority dispute about
21 my judgment lien versus their second mortgage. We
22 resolved that priority lien. In any event, First
23 Citizens Bank took the deposition of Dr. Bickerstaff
24 on June 9, 2014. During that deposition I asked
25 Dr. Bickerstaff -- and I've attached copies of the

1 excerpts.

2 I asked him, first of all, was the office
3 building at 452 Folly Road on the property for sale?
4 He said, Yes. I said, Who is marketing that
5 property? He said, I think Oliver Matthews with
6 Carolina One. That's one thing he told me.

7 Then I asked him whether or not the 3.14 acres
8 located in Moncks Corner, South Carolina were on the
9 market for sale, and he said, Yes. I asked him if
10 the taxes were current. He said, No, the taxes were
11 behind. I asked him if he's tried to sell the
12 property? He said, Yes, sir. I said, Any luck? He
13 said, No. No luck in selling the property.

14 Well, I also attached -- what I did was send a
15 subpoena to Oliver Matthews with Carolina One. Lo
16 and behold I found out that in January of 2014 about
17 five or six months before we took his deposition,
18 they had -- BOB Properties had entered into a
19 contract to sell the Moncks Corner property for
20 \$468,050.

21 It was a contract that had a due diligence
22 period, and under the terms of the contract it was to
23 close within the one-year anniversary, so it's
24 supposed to close January 24th of this year, but they
25 didn't get the 30-day extension.

1 My point is that in addition to that when I
2 subpoenaed the records with the listing agreement on
3 the 452 Folly Road property there was none. The
4 property hadn't been listed for sale. So number one,
5 it violated the terms of your prior order because
6 they didn't notify me that they had sold property in
7 Berkeley County. He didn't tell the truth very well
8 in his deposition. He said they had had no luck
9 selling it when they, in fact, signed a contract to
10 sell it five months before.

11 He said that the property taxes were behind,
12 which concerns me a little bit. So Judge, what I'm
13 asking, and I've kind of read through everything.
14 I've read the case law on this. The Statute, I
15 think, in question is Section 33-44-504. I will be
16 glad to hand you a copy up if you would like so you
17 can see what I'm talking about.

18 Judge, the first paragraph of Section
19 33-44-504, "On application by a judgment creditor,"
20 which is my client, "of a member of a liability
21 company or of a member's transferee, a Court having
22 jurisdiction may charge the distributional interest
23 of the judgment debtor to satisfy the judgment."

24 That's what you did back in 2012.

25 Then it goes on to say, "The Court may appoint

1 a receiver of the share of the distributions due or
2 to become due to the judgment debtor," -- this is the
3 important part -- "and make all other orders,
4 directions, accounts, and inquiries the judgment
5 debtor might have made or which the circumstances may
6 require to give effect to the charging order."

7 So I've got a lien on the distributional
8 interest. I'm asking the Court now order a
9 foreclosure of that distributional interest on the
10 basis that you gave me a charging lien over two years
11 ago, and we haven't seen a nickel. The case law
12 seems to support that. It says, If you try for a
13 reasonable period of time and it doesn't work out --
14 I think it is somewhat discretionary because this is
15 a master in equity.

16 THE COURT: Right.

17 MR. CISA: The case law supports a foreclosure
18 of that charging lien where the distributional
19 interest is actually sold at public sale and will
20 hopefully generate some income. This statute says to
21 me that you can issue an order directing the judgment
22 debtor to do anything that he can do.

23 The judgment debtor can clearly put the
24 property on the market for sale, so I'm asking that
25 you appoint a receiver to put the property on the

1 market for sale.

2 Judge, what I would prefer is to try to work
3 this out, and so that Dr. Bickerstaff and Mr. Magera
4 can get as much money as they can for these
5 properties, is for you to appoint a receiver to sell
6 this property. If the property is at fair market
7 value, that's fine with me. That's 452 Folly Road,
8 and then the property in Moncks Corner. Perhaps we
9 can let that run for some period of time, maybe six
10 months.

11 If it doesn't sell then order a sale of the
12 distributional interest. I'm getting concerned. I
13 got the judgment in May of 2006. We're now in 2015.
14 I have a little less than maybe two years or a little
15 less than two years on the judgment. I really want
16 to try to push to collect it.

17 So I'm asking you, pursuant to this code
18 section, if you would to appoint a receiver. I don't
19 really care -- whoever you would want to appoint,
20 Chip Limehouse. I've dealt with Dan Henderson. All
21 of them are good, or whoever you prefer if you're
22 inclined to do that. Let's see if we can sell these
23 properties. I don't think they're selling them.

24 Dr. Bickerstaff testified that he had 452
25 Folly Road on the market for sale, it isn't on the

1 market for sale. Then they told me that they hadn't
2 sold the other property and it is sold. Maybe it's
3 going to close January 24th and that will take care
4 of my problem, but I don't know anything about that
5 either.

6 They're not very forthcoming, and they don't
7 really obey your orders very well. I would suggest
8 that an appropriate remedy would be to appoint a
9 receiver to sell these properties. If they don't
10 sell within maybe six months or whatever time frame
11 you deem appropriate then for you to advertise them
12 for sale and sell the distributional interests so at
13 least I'll have something prior to the judgment
14 expiring.

15 THE COURT: Very good.

16 MR. SMITH: Your Honor, as the threshold issue
17 of this, Mr. Prevost and Frank have to prove that
18 they're, in fact, creditors. They foreclosed their
19 judgment against property in this foreclosure action
20 that he mentioned in 2012. We went to mediation and
21 they were paid money, a substantial amount of money.
22 It's our position -- and they won't tell us how much.
23 It's our position that it has been paid in full, and
24 they're no longer a creditor. They're not entitled
25 to any relief.

1 Until they prove that they, in fact, still
2 have a judgment and the amount of that judgment, I
3 don't see how they even have a gripe at this point.

4 They have argued -- somehow it came back to us
5 in mediation that they were going to claim collateral
6 source. The collateral source rule says, If it comes
7 from a source wholly independent of us. Our title
8 insurance that we paid for granted the bank as the
9 beneficiary because it protects their mortgage. We
10 paid for it. It's our policy.

11 We write the check for it, and it covers
12 exactly this scenario, that if there's something that
13 the closing attorney missed, that they're going to be
14 paid out of that policy. That's not wholly
15 independent of us. That's covering us. That's
16 protecting our mortgage. That's enabling the
17 mortgage company to pay it, and we pay for that
18 policy. It came out of our closing.

19 So until he proves that he's a creditor and
20 that there's money still owed under that judgment,
21 and that the judgment, in fact, has been reduced by
22 the amount they've previously been paid, he can't get
23 any relief today. I think that's the threshold
24 matter. I've got arguments against the rest of it,
25 but to me that's the threshold issue that has to be

1 addressed. He has to prove he's a creditor first.

2 THE COURT: All right. Well, let's talk about
3 that for a second.

4 MR. CISA: Steve Smith handed me a motion he
5 filed today. It's a Motion to Compel and Reduce
6 Judgment. I can argue that, Judge, but I don't have
7 my stuff. That's a separate file in a separate case.
8 Essentially what happened was when I foreclosed those
9 judgment liens --

10 THE COURT: There were two judgments. One
11 was --

12 MR. CISA: One was for attorney's fees, and
13 one was -- it was a mechanic's lien of foreclosure.

14 THE COURT: One had some exorbitant interest
15 rate that the Court of Appeals said was okay, right?

16 MR. CISA: That's right.

17 MR. SMITH: Which amazes me to this day,
18 Judge.

19 MR. CISA: It's up for review, I think. They
20 were giving me a hard time about it, too. Steve
21 Smith didn't handle the underlying case.

22 THE COURT: I recall that. Then there was
23 something that was previously sold, correct?

24 MR. CISA: Well, nothing's been sold.

25 THE COURT: Let me stop you there. Have there

1 been any payments on the judgment?

2 MR. CISA: No payments from the Mageras or on
3 the judgment at all. What I did was, when I
4 foreclosed -- this is a separate case -- it was
5 referred to you. When I foreclosed my judgment lien,
6 there was a first mortgage and a second mortgage both
7 to First Citizens Bank on both of the properties that
8 I foreclosed against.

9 The lawyer missed my judgment when she did the
10 foreclosure, I mean the second mortgage. It was in
11 her file. She just missed it. So I was claiming
12 priority over a \$150,000 second mortgage on one
13 property and a priority over a \$150,000 second
14 mortgage on the other property.

15 We went to a mediation and I settled it
16 with -- First Citizens Bank is who I settled it with.
17 Okay? The only thing I did was I settled the
18 priority issue. All I agreed to do was to
19 subordinate my judgment lien to their second mortgage
20 in exchange for some money. To be honest with you I
21 can't really remember how much money it was. I mean,
22 I've got it, but it was -- it was a fair amount of
23 money, and I know this part of it, too. In order to
24 get it resolved in that fashion, when I collect on my
25 judgment I have to pay back -- it was really settled

1 between the lawyer's PNO carrier and the title
2 company.

3 I have to pay back -- I can't remember which,
4 maybe both, a percentage of anything that I recover
5 relative to claims on my judgment. Nothing was paid
6 to me in satisfaction of this judgment. The money
7 was paid to my client to resolve the priority issue.
8 I did nothing more -- here's a file, and you actually
9 signed an order recognizing the subordination, and we
10 signed subordinations so First Citizens is in the
11 place they thought they were going to be when they
12 loaned the money on the second mortgage.

13 THE COURT: Right.

14 MR. CISA: So I'm a creditor. There's a court
15 file. There's a judgment of record. It has not been
16 paid one dime by the judgment debtors. All I got
17 paid was to resolve a priority dispute between my
18 judgment lien and a second mortgage. I got nothing
19 from them, nothing whatsoever.

20 Now, when I said I don't have all the stuff, I
21 don't have the stuff. I mean, I've got a settlement
22 agreement if you were going to make me produce it. I
23 have that agreement about we have to pay back a
24 certain percentage. I really can't remember what the
25 percentage is either. It was either 25, 30, or 40

1 percent. I can't really remember. It was solely to
2 resolve a priority issue, and then the case went
3 away. You dismissed the case.

4 So I'm back where I was before I started that
5 foreclosure action. I've been paid nothing by
6 Dr. Megara or Bickerstaff. My client has been paid
7 nothing. I'm clearly a judgment creditor. I've been
8 a judgment creditor since May of 2006, and I continue
9 to be.

10 In any event, I didn't pay off the judgment.
11 I can tell you that. I know that. So that's where
12 we are.

13 THE COURT: Do you have a way of calculating
14 what that figure would be and apply it to the
15 judgment? We can calculate what it is
16 mathematically, right?

17 MR. CISA: I could. I could.

18 THE COURT: All right.

19 MR. CISA: Even if I had that file with me --
20 if the Court wanted the information -- of course I'll
21 give it to the Court. I just didn't bring that file
22 with me. I remember Steve talking about this at the
23 mediation. I'm saying, look, if you don't pay me any
24 money I'm not reducing the judgment. I'm resolving a
25 priority dispute with First Citizens Bank. That's

1 what I was doing. That's what I did. That's my
2 position. I do have a file, and I do have the
3 information.

4 THE COURT: All right. I'm going to ask you
5 to get me that information.

6 MR. SMITH: Your Honor, there was one
7 judgment. You can't jump through hoops. You're
8 trying it, but you can't just jump through hoops to
9 say I'm resolving a priority that I had because of my
10 judgment and not give you credit for it. It's my
11 understanding --

12 THE COURT: I tend to agree with that,
13 Mr. Smith.

14 MR. SMITH: It's my understanding that the
15 amount paid was over \$200,000.

16 THE COURT: Well, that's not inconsequential.

17 MR. SMITH: It's not. That's what I'm saying.
18 I think they have to prove -- he's not entitled to
19 what he's asking for anyway statutorily as far as --
20 I wish he was. Normally -- I would love to be able
21 to seize LLC property and sell it.

22 THE COURT: Well, you're about to watch that
23 happen.

24 MR. SMITH: Well, I can tell you why I can't.

25 THE COURT: Tell me about your closing. I

1 have -- the Emerald Investment case tells me I can,
2 so --

3 MR. SMITH: Well, that's the one I pulled. I
4 was involved in that case. That's Kriti. Kriti says
5 that -- that's the Kriti case, the Emerald
6 Investments case. The property -- a member and the
7 LLC are totally separate properties. The member has
8 no ownership whatsoever in the assets of the
9 corporation. That's 501. It says real clearly, A
10 member is not a co-owner of and has no transferrable
11 interest in property of the LLC.

12 So the member has nothing. He's a judgment
13 creditor of the member. There are only three cases
14 that cite 501 through 504. When Frank was talking
15 about the case law that's part of his position I
16 pulled all three cases. I have each one of them
17 here. They all hold the exact same thing. They say
18 that you can get a lead against the distributional
19 interest of the member, which is under 504.

20 However, if you do foreclose that right and
21 you go ahead and take the next step you only become
22 the same position as the transferee of that
23 distributional interest.

24 Then 502 -- I'm sorry -- 503 talks about the
25 rights of a transferee. It doesn't give you anymore

1 rights than you have as a lienor of the
2 distributional interest. A transferee does not
3 become a member, is not entitled to participate in
4 the management -- he does not require access to
5 information concerning the transactions. He does not
6 become a member. He doesn't have anything.

7 One thing that has been overlooked today is --
8 it talks about the charging order against
9 distributional interest. It talks about foreclosure
10 of the distributional interest, not the assets of the
11 LLC.

12 THE COURT: Right. But that then allows for
13 the foreclosure of the distributional interest; does
14 it not?

15 MR. SMITH: Yes. But a distributional
16 interest is -- it's not the assets of the company
17 because they don't own them. They don't own them.
18 They're not the owner of it. It doesn't however
19 because Section E says, The lien of a distributional
20 interest is the sole and exclusive remedy under 504.
21 You can't issue all these other orders that Frank
22 wants you to issue.

23 The foreclosure of a distributional interest
24 is the exclusive remedy by which a judgment creditor
25 of a member or a transferee may satisfy a judgment.

1 There was a case in Family Court. The Family Court
2 ordered this guy to transfer an LLC interest to his
3 wife -- I'm sorry -- the property of the LLC.

4 They said he can't do it. All she is is the
5 distributional interest, no matter the order,
6 nothing, because he doesn't have any ownership of it.
7 They talk about 504, and say, The sole and exclusive
8 remedy you have is to go after a distributional
9 interest, if any, if there's ever a distributional
10 interest. That's all you can do. They cite this
11 Section E which says, This is the exclusive remedy
12 you can get.

13 You can't -- since a member does not own the
14 property that the LLC owned, has no interest in it
15 whatsoever, is only a member of that, you can only
16 seize that which he gets from the distributional
17 interest, that which he gets from the LLC.

18 THE COURT: Right.

19 MR. SMITH: That's all you can do. You can't
20 order that the property of the LLC be sold to create
21 distributional interest because the transferee
22 doesn't have -- which is what that section says. 504
23 says --

24 THE COURT: A foreclosure would be under the
25 distributional interest, right?

1 MR. SMITH: The foreclosure is purely of the
2 distributional interest, if any.

3 THE COURT: Right. If any is determined by
4 whatever happens with the LLC, right?

5 MR. SMITH: It determines what the members of
6 the LLC decide to do with the assets of the LLC. If
7 they decide not to sell them, then there's no
8 distributional interest.

9 THE COURT: Right. But there would be a
10 market for the distributional interest, would there
11 not be?

12 MR. SMITH: There would be or would not be?

13 THE COURT: There would be, would there not?

14 MR. SMITH: There would not be.

15 THE COURT: All right.

16 MR. SMITH: Who wants a distributional
17 interest of a privately held LLC?

18 THE COURT: I think Mr. Cisa does on behalf of
19 his client.

20 MR. SMITH: Well, you can't transfer it.
21 That's what I'm saying.

22 THE COURT: You can.

23 MR. SMITH: The statute says you cannot
24 transfer it. It's not personal property.

25 THE COURT: It's personalty. The

1 distributional interest --

2 MR. SMITH: I can cite the statute if you
3 would like, Your Honor.

4 THE COURT: Well, I've already had this
5 discussion in the Emerald Investment case, and I was
6 about to sell the property when the people filed
7 bankruptcy so that lead to that problem. I've been
8 down this road already, so if you think about it --
9 it seems to be a relatively hot topic. I have
10 another one going on in this courtroom this week
11 that's even hotter.

12 MR. SMITH: Section 502, "A transfer of a
13 distributional interest does not entitle the
14 transferee to come or exercise any rights of a
15 member."

16 THE COURT: But you don't become the owner,
17 and I think that's exactly what was said in that
18 case.

19 MR. SMITH: So how can the Court enforce an
20 LLC, which is not a party, to sell its assets? You
21 don't seize another party, Your Honor.

22 THE COURT: I'm not selling the LLC. I'm not
23 selling the underlying asset. I'm selling the
24 distributional interest.

25 MR. SMITH: I think you can sell the

1 distributional interest, but once you get that
2 distributional interest you have the rights of a
3 transferee which is nothing.

4 THE COURT: Not much.

5 MR. SMITH: That's why I said, who would be
6 interested in buying that? As a transferee -- 502
7 says the transfer -- I'm sorry -- 503 is the rights
8 of a transferee. A transferee does not become a
9 member, is not entitled to participate in management,
10 conduct the business --

11 THE COURT: They get nothing but the income
12 that comes off of it.

13 MR. SMITH: That's exactly right.

14 THE COURT: If the asset gets sold I think
15 they would be entitled to something there.

16 MR. SMITH: I think the asset -- I agree with
17 you there. If the asset got sold by the members of
18 the LLC, if they decide to sell that asset, and it
19 generated a distributional interest then Frank's
20 client -- if he's a creditor -- Frank's client is
21 entitled to that money. There's no doubt about that.
22 It doesn't give him the right to do what he's talking
23 about today which is to appoint a receiver to
24 actually sell the assets of something that's not even
25 a party here today. That's my point.

1 A distributional interest, if there ever is
2 one, I think he has a shot at it clearly under 504,
3 but he can't order or get this Court to order --

4 THE COURT: -- the sale of the underlying
5 asset.

6 MR. SMITH: -- The sale of the underlying
7 asset to create a distributional interest. That's
8 where Frank's trying to jump when he says -- or any
9 other order -- that's not it. You can get a charging
10 order against distributional interest, you can
11 foreclose that distributional interest, and that's
12 your exclusive remedy. It's that simple.

13 MR. CISA: Just briefly.

14 THE COURT: Go ahead.

15 MR. CISA: I agree with what you-all are
16 saying about distributional interest. Under Emerald
17 Investments and another case, you have a right to
18 order the sale of the distributional interest. I
19 also agree that there's a statute that says, If you
20 get a distributional interest you don't have the
21 right to management --

22 THE COURT: Right.

23 MR. CISA: -- which would say, I don't have
24 the right to sell the property. What I'm pointing to
25 is, and neither one -- this issue was not raised in

1 any of these Appellate Court decisions. What I'm
2 saying is that under 33-44-504, which gives you the
3 right to do the charging lien which you did in 2012,
4 it also says the Court may appoint a receiver to
5 share the distributions. I understand that. I'm not
6 really asking for that because there are no
7 distributions.

8 It says, And may all other orders, directions,
9 accounts, and inquiries that judgment debtor might
10 have made for which the circumstances may require to
11 give effect to the charging order. The effect of a
12 charging order is to get the judgment creditor paid.

13 So what I'm saying is, the statute -- this
14 wasn't addressed in these Appellate Court decisions.
15 The statute, in my view, gives the Court the right to
16 make any orders that the judgment debtor might have
17 made. The judgment debtor could have said, Yeah. I
18 need to sell both of these properties to pay a
19 distributional interest to Mr. Prevost's company.
20 They haven't done that.

21 So I'm saying under the plain language of this
22 code section, the Court has the right to order that.
23 You have the right to order them to do anything they
24 have a right to do, and that's why I asked that a
25 receiver be appointed to do just that because they're

1 not interested in creating a distribution. It's been
2 over two years since the order was issued, and it's
3 been over seven or eight years since the judgment was
4 issued.

5 I'm saying those issues weren't -- Emerald
6 Investments, you know the case. Judge Harrington got
7 reversed because she wouldn't order a foreclosure of
8 distributional interest. They clearly said, Yes.
9 It's taking too long, and they're entitled to it.

10 The other case was dealing more with --
11 there's a prohibition against transferring the
12 distributional interest as I understand it. Of
13 course, it doesn't matter. They're not members of
14 the LLC, so they're not prohibited.

15 What I'm saying is, neither one of these
16 Appellate Court decisions that address this issue
17 that seems clear to me if you read Section A, the
18 last sentence, that you have the right to order
19 things to be done that the judgment debtor would have
20 the right to do.

21 Clearly the judgment debtor in this case has a
22 right to sell the property. They just don't want to
23 because they don't want to distribute the money to
24 Roger Prevost's company. That's why I say you have
25 the right to appoint a receiver to do that, which has

1 not been addressed in either of these decisions, but
2 I agree with the first part of it, about
3 distributional interests. You get it, but what does
4 it get you? You've got to be a distribution.

5 The problem is the process of being
6 frustrated, and I think that's why this second
7 sentence in Section 33-44-504 was put in here so the
8 Court -- in order to give effect to the charging
9 order, you're entitled to do anything or order
10 anything that a judgment debtor can do including
11 having the property sold.

12 MR. SMITH: Your Honor, if I can address that?
13 Frank said that the purpose of the charging order is
14 to get his client paid. That is not the purpose of a
15 charging order. That may be the result of the
16 charging order. The purpose of a charging order is
17 to encumber the distributional interest of a member.

18 THE COURT: Correct.

19 MR. SMITH: I agree that the Court can issue
20 other orders to give effect to that encumbrance on
21 the distributional interest. I thought we'd already
22 done that. I thought we did that at a previous
23 hearing saying, We won't sell the property. We won't
24 generate a distributional interest without letting
25 you know.

1 THE COURT: What's the status of the sale of
2 the Berkeley County lot?

3 MR. SMITH: It's fallen through. They haven't
4 heard from the people in ten months. It's not being
5 sold.

6 THE COURT: All right. So the judgment
7 debtors here are them individually, or is the BOB,
8 LLC at interest?

9 MR. CISA: Judge, the debtors are them
10 individually, Judge.

11 THE COURT: Not the LLC, right?

12 MR. SMITH: The LLC is not a party at all,
13 Judge.

14 MR. CISA: Right.

15 THE COURT: So that's the distinction. So I
16 think they're entitled to their charging lien, which
17 they've already gotten, and then I think they're
18 entitled to foreclose on their charging lien.

19 Here's what I'm going to do. I'm going to
20 require each of you to get me some information. One,
21 I need from Mr. Cisa -- I need to know what the
22 amount of -- I need a calculation of what the amount
23 of the judgment debt is today because that interest
24 clock is outrageous and continues to tick. I can't
25 do anything about that. It just is what it is.

1 Then I need you to figure out for me what the
2 amount of the settlement was because I do find that
3 it was relevant. It's based upon Mr. Prevost's
4 judgment. Otherwise, there would be no basis for you
5 to be in that lawsuit. So I don't find necessarily
6 that it's a collateral source. I find that it's
7 relevant to this inquiry and apply that amount
8 towards the debt.

9 If there is some sort of recovery that makes
10 you kick something back off of that, then I need to
11 know what that figure is. So I need to find out what
12 the debt amount is. As Mr. Smith put it, I need to
13 figure out, one, if you're a debtor. I think that
14 you are. A judgment creditor would be proper, and
15 two, what the amount of that debt is. Okay?

16 And then I'm going to allow for the -- in this
17 instance this is what I'm going to do, since that lot
18 has not sold. I'm going to allow for the appointment
19 of a receiver. The receiver's job needs to be
20 understood, and that is that the receiver is only
21 free to try and sell the distributional interest of
22 the LLC that these people have. All right?

23 They're not selling the real estate. They're
24 selling the distributional interest. Somebody's
25 willing to pay money for that. Even Mr. Prevost is

1 willing to pay money for that. All right?

2 So I'll give you a receiver. I'm going to
3 appoint a receiver. You-all put you-all's heads
4 together and see if there's one you-all can agree on.
5 If you can't I'll appoint somebody. You have
6 property both on Folly Road and -- those two lots,
7 are they in Moncks Corner? Berkeley County? Where
8 are they?

9 MR. CISA: Two of them, I think, are downtown
10 in Moncks Corner, and then I think there's actually
11 another piece of property in Goose Creek. I'm pretty
12 sure I'm correct about that.

13 THE COURT: All right. What I'm inclined to
14 do is get a receiver up here to, say six months, to
15 try and find a buyer for that. If not, I'm going to
16 tell you -- the remedy -- I've been down this road in
17 that Emerald Investment case. We were prepared to
18 sell that.

19 The big discussion that we were having here in
20 the courthouse is is that the sale of a personalty,
21 which would be under the sheriff's sale, which would
22 pretty much guarantee you no income, or is it a
23 distribution of real estate and the nature of real
24 estate should be foreclosed upon.

25 The statute uses the language of foreclosure.

1 I would be inclined to sell it as if it was a
2 foreclosure sale. It is, in fact, personalty that is
3 being sold. It's not realty. It's personalty. So
4 it's whatever the distributional interest is. Okay?

5 It doesn't change the ownership or the make up
6 of the corporation. That's what's unusual and odd
7 about it, but anything that ever would happen with
8 that LLC down the road, whatever those incomes are is
9 going to go over to this entity over here I think.

10 MR. SMITH: Here's one question I have. There
11 is no distributional interest. There is no asset. I
12 mean, there's an encumbrance, but there is no
13 distributional interest. What is the receiver going
14 to receive?

15 THE COURT: He's going to go bang the doors
16 and see who's willing to pay money for --

17 MR. SMITH: For something that doesn't exist
18 because there's no interest.

19 THE COURT: It's going to exist at some point
20 in time. You're not going to generate a whole lot of
21 income off this. What's going to happen is these
22 people will never get any money out of that LLC.
23 That's what's going to happen.

24 MR. SMITH: As long as the judgment is in
25 effect?

1 THE COURT: No. Once that distributional
2 interest is sold they will never get anything out of
3 that LLC. The judgment may expire, but the interest
4 is going to get sold prior to the judgment.

5 MR. CISA: Exactly. Your entire right to
6 receive a distributional interest is now owned by
7 John Doe.

8 THE COURT: Right.

9 MR. CISA: Exactly.

10 THE COURT: It is interesting.

11 MR. CISA: This is interesting. It will be
12 more, I'm sure, litigation. I looked at this file in
13 the Court, the Emerald Investments. I called Will
14 about that. I said, How are you-all trying to do
15 what you're trying to do? Tell me. Apparently, it
16 didn't work out.

17 MR. SMITH: We've been involved in the case
18 since 2004.

19 THE COURT: They filed bankruptcy was the most
20 recent thing.

21 MR. SMITH: We still have to finish up part of
22 that. That's probably going to be tried in three
23 weeks with Will and Clay.

24 THE COURT: That's unbelievable. I think
25 that's where this transpires. I think that's where

1 this goes.

2 MR. SMITH: And we're all fighting over a dead
3 carcass in that case.

4 THE COURT: All right. I think your reality
5 is if some money was being paid pursuant to the LLC's
6 distributional interest. I don't think you ever get
7 to the foreclosure of that, but something gets paid.

8 MR. SMITH: I agree with you. I've read that
9 opinion, I can't tell you how many times, on the
10 Emerald Investment case, and that's the way I read
11 it. If you're getting nothing out of a charging
12 lien, then clearly you're entitled to foreclose on
13 your lien. You know? If they didn't say you could
14 get something out of the foreclosure with the
15 charging lien -- they didn't cover that.

16 How about within about 15 days -- Mr. Cisa,
17 you put pen to paper and give me some numbers? You
18 can run those by Mr. Smith, and you-all can put
19 you-all's heads together. If you can agree on a
20 receiver to appoint? I think that's in everybody's
21 best interest to maximize whatever the value would
22 be. I'm going to order that.

23 MR. SMITH: I'm just concerned that the
24 receiver shows up and starts asking for financial
25 documents and records.

1 THE COURT: Yes. That's what they're going to
2 want to do. We're going to have to explain to them
3 what they've got. They're going to be entitled to
4 find out what the future potential distributions
5 would be. You know? If it's raw land, it isn't
6 going to be anything but the value of the raw land.
7 Do you think it's a good investment today and
8 potentially in the future?

9 MR. SMITH: I mean, that's the value of the
10 property.

11 MR. CISA: Less encumbrances, right.

12 MR. SMITH: Not the financial records of the
13 doctors' operations.

14 THE COURT: No. No. No. If there's
15 something there from the LLC, I think --

16 MR. SMITH: It's purely the value of the
17 property.

18 THE COURT: Yes.

19 MR. CISA: Less encumbrances, right? Less --

20 THE COURT: They're all mortgaged, I guess?

21 MR. SMITH: Oh, yes, to the hilt.

22 MR. CISA: I'm sure they are.

23 MR. SMITH: Hence the first and second
24 mortgage.

25 MR. CISA: That's the other problem. They

1 keep mortgaging the property.

2 THE COURT: That should probably be stopped.
3 You've got a judgment out there somewhere.

4 MR. CISA: It's hard to get the RMC office,
5 both offices, to buy into -- recording a document
6 gives notice of the charging order, and I got you to
7 sign a form, a judgment form.

8 THE COURT: Did we enroll it down there?

9 MR. CISA: It still doesn't give notice of a
10 charging lien against BOB. They said, You need to go
11 to the RMC. So I go to the RMC, and they tell me
12 over there, you need to go to the Clerk of Court. I
13 said, No. I'm not going to the Clerk of Court.
14 Here's a document that I've got notarized, probated,
15 and they recorded it.

16 THE COURT: Well, I think that's one of the
17 distinctions here versus the Emerald Investment case.
18 Because they clearly had a judgment against the
19 entity, too.

20 MR. SMITH: They had a judgment against the
21 LLC.

22 THE COURT: Yes. That's a factual distinction
23 here. Yours is against these individuals.

24 MR. CISA: Thank you, Judge.

25 THE COURT: Good luck. Clear as mud. At

1 least I've got good lawyers I can work with on this
2 one.

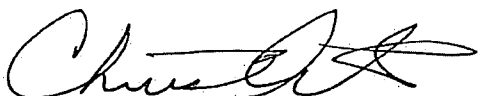
3 (The proceedings were concluded at 3:55 p.m.)
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1 State of South Carolina)
2 County of Charleston) C E R T I F I C A T E
3

4 I, Christine A. Smith, Court Reporter and
5 Notary Public for the State of South Carolina at
6 Large, do hereby certify that the foregoing
7 transcript is a true, accurate, and complete record.

8 I further certify that I am neither related to
9 nor counsel for any party to the cause pending or
10 interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 26th day of May, 2016 at
13 Charleston, Charleston County, South Carolina.
14

15
16 
17

18 Christine A. Smith
19 Notary Public
20 My Commission Expires
21 May 12, 2021
22
23
24
25

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MAR 21 2016

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March 17, 2016

The Honorable Mikell R. Scarborough
Charleston County Master-in-Equity
100 Broad Street, 266
Charleston, SC 29401

RE: Barbara Magera, M.D. and Charles Bickerstaff, M.D. vs. Prevost Construction, Inc.
Case No.: 04-CP-10-3867
Our file: 04-424

Dear Judge Scarborough:

The above case came before you on January 6, 2015 pursuant to the Defendant, Prevost Construction, Inc.'s Motion to foreclose its charging lien against the Plaintiff distributional interest in B.O.B. Properties, LLC. At the time of the hearing, you granted Prevost's motion, however, you ruled that the Plaintiffs' were entitled to a set off as to the judgment in the amount of a settlement that was reached in a case involving a priority dispute between Prevost and First Citizens Bank and Trust which resulted in a 175,000.00 payment to Prevost. You requested that I supply Steve Smith with documentation concerning the settlement of the First Citizens case and you asked us to work out an Order.

I supplied Steve Smith with a copy of the Mediated Settlement Agreement and evidence of the \$175,000.00 payment.

I also provided Steve with a copy of the proposed order which I have enclosed for your review. Steve disagrees with the post judgment interest rate of 1% per day. The post judgment rate of interest was established by the Order of the trial Judge, Deadra L. Jefferson, by Order filed April 1, 2013, a copy of which I have also enclosed.

If the proposed Order meets with your approval, I would appreciate you signing same and having it filed in the Clerk's office.

In the event, you want to have a conference concerning this matter I would appreciate you asking Laura to schedule a date and time.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to be 'F. Cisa', written in a cursive style.

Frank M. Cisa

FMC/alp

Enclosure

cc: Steven L. Smith, Esquire (w/enc.)
Roger Prevost (w/enc.)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

☐ Plaintiff

v.

Roger Prevost D/B/A Prevost Construction, Inc.

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2004-CP-10-3867

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Steven L. Smith, Bar No.

Address:

P.O. Box 40578

Charleston, SC 29423

phone: fax:

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phone: (843) 881-6530 fax:

e-mail: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

March 17, 2016

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:

- ☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☒ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions.

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2004-CP-10-3867

CHARLES BICKERSTAFF, M.D.,)
and BARBARA MAGERA, M.D.)
)
Plaintiffs,)

vs.)

ROGER PREVOST d/b/a)
PREVOST CONSTRUCTION, INC.)
)
Defendant.)
_____)

ORDER ON DEFENDANTS' MOTION TO
FORECLOSE LIEN ON PLAINTIFFS'
DISTRIBUTIONAL INTEREST IN B.O.B.
PROPERTIES, LLC AND ON PLAINTIFFS'
MOTION TO REDUCE JUDGMENT

The above case came before me on January 6, 2015 pursuant to the Defendant, Prevost Construction, Inc.'s Motion to Foreclose its charging lien against the Plaintiffs' distributional interest in B.O.B. Properties, LLC.

Also before me was the Plaintiffs' Motion to Reduce the judgment previously granted to the Defendant, Prevost Construction, Inc., by the amount of a settlement the Defendant received as a result of a separate lawsuit where the Defendant foreclosed its judgment liens against Plaintiffs' property which involved a priority dispute with First Citizens Bank and Trust Company, Inc.

After careful consideration of the Court records relative to this matter and the arguments of counsel, I find that the Defendant, Prevost Construction, Inc.'s motion should be granted and that the Plaintiffs' Motion to Compel and reduce judgment should also be granted.

The Defendant, Prevost Construction, Inc., has two unsatisfied judgments against the Plaintiffs. The first judgment is in the amount of \$6,437.62 together with interest in the amount of \$242,116.99 as of September 12, 2014 for a total due of \$248,554.61 as of September 12, 2014.

The second judgment is in the amount of \$6,437.62 together with interest in the amount of \$5,100.42 as of September 12, 2014 for a total due of \$11,538.20 as of September 12, 2014.

The Defendant, Prevost Construction, Inc., was previously granted a charging lien against the Plaintiffs' distributional interest in B.O.B. Properties, LLC pursuant to South Carolina Code Section §33-44-504 by this Court's Order dated August 8, 2012. The Plaintiffs are the sole members of B.O.B. Properties, LLC which owns real estate in Charleston and Berkeley County.

On March 27, 2012 the Defendant, Prevost Construction, Inc., commenced an action against the Plaintiffs and First Citizens Bank and Trust Company, Inc., to foreclose its judgment liens against two (2) parcels of property owned by the Plaintiff in Charleston County. The action involved a priority dispute between the Defendant's judgment liens and First Citizens Bank's Mortgage. The action resulted in a settlement paid on behalf of First Citizens Bank and Trust Company, Inc. to the Defendant, Prevost Construction in the amount of \$175,000.00 which settlement was paid on July 17, 2014. Pursuant to the settlement the Defendant is required to return twenty-five (25%) percent of the Defendant's recovery against the Plaintiffs.

The Plaintiffs argue that the Defendant, Prevost Construction, Inc.'s judgment should be reduced by the amount of the settlement obtained as a result of foreclosure of its judgment liens. The Court agrees that the settlement was not a collateral source as it was directly related to the Defendant, Prevost's foreclosure of its judgment lien.

The total due on Prevost's judgment as of July 17, 2014 was the sum of \$256,014.96, as shown by the Pay Off sheet which is attached hereto as Exhibit "A". After deducting for the settlement received by Prevost Construction, Inc., in the amount of \$175,000.00 and after giving Prevost credit for the repayment of twenty-five (25%) percent of his net recovery there is a balance due to Prevost Construction, Inc., of \$101,268.70 as of July 17, 2014. Per diem interest accrues at the per diem rate of \$64.37 of and from July 17, 2014.

CONCLUSIONS OF LAW

I, therefore, conclude as follows:

1. The Plaintiffs are entitled to reduce the Defendant, Prevost Construction, Inc.'s judgments by the amount of the settlement received by Prevost Construction, Inc., in the amount of \$175,000.00 which was received on July 7, 2014, however, the Defendant shall be given credit for twenty-five (25%) percent of the balance due on the judgments.
2. The balance due on the judgments of Prevost Construction, Inc., is \$101,268.70 as of July 17, 2014 with interest running thereafter that per diem rate of \$64.37.
3. The Defendant, Prevost Construction, Inc., is entitled to the foreclosure of its charging lien on the Plaintiffs' distributional interest in B.O.B. Properties, LLC.
4. The Defendant is entitled to have the Plaintiffs' distributional interest in B.O.B. Properties, LLC sold at public auction after due advertisement.

It is, therefore

ORDERED, ADJUDGED AND DECREED as follows:

1. That there is due on the Judgment held by Defendant the total sum of , is \$101,268.70 as of July 17, 2014 with interest running thereafter that per diem rate of \$64.37. to the date of sale or the date of payment in the event Defendant is not the highest bidder.
2. That on default of payment at or before the time herein indicated, the Plaintiffs' distributional interest in B.O.B. Properties, LLC, shall be sold at public auction, at the front entrance of the Charleston County Courthouse., Charleston, South Carolina on the following terms, that is to say:

The sale shall be for cash, and the highest bidder shall be required to make a cash deposit of five (5%) percent of the bid as earnest money and as evidence of good faith, provided, however, the Master-In-Equity shall determine whether the Defendant or any other lien holder shall be entitled to apply the debt due it against its bid in lieu of cash. Should the person making the highest bid at the sale fail to comply with the terms of its bid by depositing the said five (5%) percent cash, then the property shall be sold at the risk of such bidder on the same sales date or some subsequent date as the Master-In-Equity may find convenient and advantageous. Should the last and highest bidder fail to comply with the terms of its bid within thirty (30) days of the final acceptance of this bid, then the Master-In-Equity shall readvertise and resell the Plaintiffs' distributional interest in B.O.B. Properties, LLC on the same terms on a subsequent date at the risk of such bidder. Persons submitting additional bids after the initial sale shall deposit five (5%) percent of the bids in cash as prescribed above. The Master-In-Equity shall return all deposits except the deposit securing the highest bid.

3. That since no personal or deficiency judgment has been requested, the bidding shall not remain open, but shall be final as of the date of the sale.

4. That the Master-In-Equity, by advertisement according to law, shall give notice of the time and place of such sale, and the terms thereof; that the Master-In-Equity shall transfer and convey the Plaintiffs' distributional interest in B.O.B. Properties, LLC to the purchaser, or purchasers; and that the Defendant, or any other party to this action, may become a purchaser at such sale, and that if, upon such sale being made, the purchaser or purchasers, should fail to comply with the terms thereof, the Master-In-Equity may advertise the said property for sale on the next, or some other subsequent sales day, at the risk of the former highest bidder, and so from time to time thereafter until a compliance shall be secured.

5. That the Master-In-Equity shall apply the proceeds of the sale as follows:

FIRST: To payment of the amount of costs and expenses of this action, including the costs of advertising the Notice of Sale.

NEXT: To the payment to the Defendant or its attorney of the amount of Defendant's total debt, as hereinabove set forth, or so much thereof as the purchase money will pay the same.

NEXT: Any surplus funds to be held subject to further Order of this Court in accordance with the law and custom of this Court.

6. And it is further ORDERED, ADJUDGED AND DECREED that the Plaintiffs and all persons or entities whomsoever claiming under them, be forever barred and foreclosed of all right, title, interest, in the Plaintiffs' distributional interest in B.O.B. Properties, LLC.

AND IT IS SO ORDERED!

Mikell R. Scarborough
Master-In-Equity

Charleston, South Carolina

_____, 2016.

Smith | Closser, P.A.

Attorneys at Law
7455 Cross County Road, Suite One
Post Office Box 40578
Charleston, South Carolina 29423-0578

Steven L. Smith
ssmith@scnlaw.com

Office - 843-760-0220
Fax - 843-552-2678
www.smithclosser.com

March 21, 2016

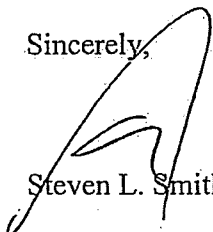
The Honorable Mikell R. Scarborough
Charleston County Master-in-Equity
100 Broad Street
Charleston, SC 29401

RE: Charles Bickerstaff, M.D., et al. v. Roger Prevost, etc.
Case No. 2004-CP-10-3867
SJC File No. 06-537

Dear Judge Scarborough:

I am in receipt of the Defendant, Prevost Construction, Inc., proposed Order in the above referenced matter. I object to this Order being executed by your Honor until the Plaintiff's Notice of Motion and Motion for Reconsideration which was filed on April 15, 2013, is ruled upon. Although Judge Jefferson ruled that the interest continued to run at 1% post judgment, we filed a timely motion to reconsider which has never been ruled upon by her. Until Judge Jefferson rules on this motion, the issue concerning post judgment interest is not final. I have attached a copy of this Motion for your reference. If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,



Steven L. Smith

SLS/cmp

Enclosures

cc: Frank M. Cisa, Esquire

Defendant.

ORDER DENYING PLAINTIFF
MOTION TO RECONSIDER

FILED
2016 APR 15 PM 12:02
JULIE J. ARMSTRONG
CLERK OF COURT
BY 
G PLAINTIFF,
ECONSIDER

Hon. Deadra L. Jefferson
Steven L. Smith, Esq.
Frank M. Cisa, Esq.
July 12, 2012
Mia Perron

Page 1 of 4

10/4

"Under Rule 59(e), SCRCP, a motion to alter or amend the judgment must be served not later than 10 days after the receipt of written notice of the entry of the order." Norris v. Heyward, 312 S.C. 67, 69, 439 S.E.2d 264, 265 (1993). The Supreme Court recently clarified the two situations in which a Rule 59(e) motion is appropriate. "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original). "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E. 2d 399, 400 (Cl. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E. 2d 268 (1993)).

Under Rule 59(g), SCRCP, "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), SCRCP. Jones v. State, 382 S.C. 589, 594, 677 S.E.2d 20, 22, n.2 (2009). Here, the Plaintiff failed to provide a copy of his Motion to Reconsider to the Court within ten (10) days after the filing of the motion as required by the rules. This Court did not receive the Motion to Reconsider until April 11, 2016. A copy of the motion was provided to the Court by the Master-In-Equity's Office prior to the commencement of supplemental proceedings in this matter. Therefore, the motion is Denied as time barred.

Alternatively, this Court finds no basis to reconsider or alter or amend its previous Order and reiterates its original order finding Plaintiffs' constitutional claims as untimely. Plaintiffs' September 22, 2009 Motion to Set Interest Rate specifically requested the Court determine



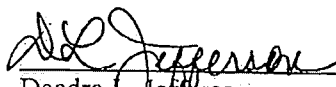
whether post-judgment interest should accrue at the statutory or contractual rate. It was at this time Plaintiffs could have raised the issue that the statutory rate should be applied because the contractual interest provision is unconscionable and violative of due process and public policy. However, 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.

CONCLUSION

Considering Plaintiff's arguments presented in his Motion this Court finds Plaintiff failed to serve the motion upon the court in a timely manner, presented no novel facts, arguments, or theories in support of his Motion to Reconsider. Moreover, Plaintiff has not highlighted any portions of the record this Court may have misunderstood, failed to fully consider, or perhaps failed to rule on. Having considered the Plaintiff's motion, the record herein, as well as the various interests balanced by the Court at the time of the ruling, and incorporating its findings in its previous Order Setting Rate of Post-Judgment Interest, the Plaintiff's motion is hereby DENIED.

IT IS SO ORDERED.


Deadra C. Jefferson
Presiding Judge
Ninth Judicial Circuit



April 14, 2016
Charleston, South Carolina

Handwritten signature/initials

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF CHARLESTON

4 Charles Bickerstaff, M.D., and
5 Barbara Magera, M.D.,

6 Plaintiffs,

7 vs. CASE NO. 2004-CP-10-3867

8 Roger Prevost, d/b/a
9 Prevost Construction, Inc.,

10 Defendant.

11
12
13 Hearing before the Honorable Mikell R.
14 Scarborough, reported by Christine A. Smith, Court
15 Reporter and Notary Public, at 11:21 a.m. on April
16 25, 2016, at 100 Broad Street, Charleston, South
17 Carolina.

18
19 **COPY**
20

21 Christine A. Smith, Court Reporter

22 Master-in-Equity

23 P.O. Box 30276

24 Charleston, South Carolina, 29417

25 (843) 958-5071

casmith@charlestoncounty.org

1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR THE PLAINTIFF:

3 Sam Wheeler, Esq.
4 Smith Closser, PA
5 7455 Cross County Road
6 Suite 1
7 Charleston, SC 29423
8 (84) 760-0220
9 Swheeler@scnlaw.com

7 ATTORNEYS FOR THE DEFENDANT:

8 Frank Cisa, Esq.
9 Cisa & Dodds
10 858 Lowcountry Boulevard
11 Suite 101
12 Mt. Pleasant, SC 29464
13 (843) 881-6530
14 Frank@cisadodds.com

15 (INDEX AT REAR OF TRANSCRIPT)

P R O C E E D I N G S

1
2
3 THE COURT: You're going to have to bring me
4 up to speed on this one. I got an order last week, I
5 think from Judge Jefferson, in this case; did I not?

6 MR. CISA: Let me kind of fill you in briefly
7 and maybe give you some background.

8 THE COURT: First off, remind me who is who,
9 and who is representing whom?

10 MR. CISA: Judge, I'm Frank Cisa. I represent
11 Prevost Construction.

12 THE COURT: And you-all are the Defendants in
13 this case?

14 MR. CISA: We're the Defendants, but we got a
15 judgment on our counterclaim.

16 THE COURT: On the counterclaim.

17 MR. WHEELER: Sam Wheeler, Your Honor. I'm
18 here for the Plaintiff. Steve Smith sends me down to
19 do the dirty work.

20 THE COURT: Okay. I'm with you. I'm with
21 you. Okay. So this is the one where there was a
22 success on the counterclaim, and the interest rate is
23 like through the roof?

24 MR. CISA: Right. We tried this case before a
25 jury back in 2006. We got a verdict for \$6,437. I

1 think it was filed May 30, 2006. Judge Jefferson --
2 we had a contract that provided 1 percent per day
3 interest. Judge Jefferson ruled that we were
4 entitled to prejudgment interest or Prevost
5 Construction was entitled to prejudgment interest at
6 1 percent per day up and from the date the debt was
7 due. So all of a sudden that \$6,400 started growing.

8 They appealed that to the Court of Appeals.
9 The Court of Appeals ruled that we were entitled to
10 1 percent per day. I understand then Judge
11 Jefferson -- I think Steve Smith filed a motion for
12 her to set post-judgment interest, and I said it was
13 1 percent per day just like prejudgment.

14 She declined to rule on that. Then she no
15 longer had jurisdiction. We appealed that. We went
16 up to the Court of Appeals and the Court of Appeals,
17 instead of ruling on the question of what the
18 post-judgment rate was -- like I begged them to do
19 after two trips -- they remanded it to Judge
20 Jefferson to rule on the post-judgment interest rate.
21 So she did rule on the post-judgment interest rate,
22 and she issued an order, Judge, back -- filed
23 April 1st, 2013.

24 Steve Smith, on behalf of Bickerstaff and
25 Magera filed their Motion to Reconsider, but he

1 failed to serve Judge Jefferson with that Motion to
2 Reconsider, so it kind of languished there.

3 So in the meantime, back in 2012, I made a
4 motion for you to grant because the parties -- they
5 own some real estate, but it is owned by a company
6 called BOB Properties, LLC. I made a motion for you
7 to grant a charging lien to Prevost Construction
8 against BOB Properties, or their distributional
9 interest in BOB Properties, LLC.

10 You granted that and you issued an order that
11 I recorded in Berkeley County because they have some
12 property in Berkeley, and of course they have some
13 property in Charleston. Nothing really happened. No
14 sales took place on those properties, so now I made a
15 motion last year requesting the Court to allow
16 Prevost Construction to foreclose the charging lien
17 against their distributional interest in BOB
18 Properties, Inc.

19 At that time, Judge, we had filed a separate
20 action to foreclose Prevost Construction's judgment
21 lien against their residents in Charleston County.
22 What happened is they had a first mortgage. A
23 judgment came in, and then they had a second mortgage
24 with First Citizens.

25 First Citizens' attorney failed to catch the

1 judgment, so we settled that case for \$175,000. When
2 I came before you back last year about giving me an
3 Order of Foreclosure of Distributional Interest,
4 Steve Smith filed a motion saying, Well, he's
5 entitled to a setoff of \$175,000 that I got in the
6 settlement.

7 I disagree, but you ruled, and I think you
8 ruled properly. So then you said, Okay. I'm going
9 to order the foreclosure of distributional interest.
10 You-all get together and figure out what's owed,
11 et cetera.

12 Then Steve said, Well, we've got one of the
13 properties, I think, sold. So things kind of
14 languished some more. Finally nothing ever -- it
15 kind of fizzled. So in September of last year I
16 prepared everything. I sent in the mediation
17 agreement. I sent in the canceled checks to verify
18 the 175,000 was paid. I sent him the calculation on
19 all the interest, and a proposed order.

20 Then he says, Well, Judge Jefferson has never
21 ruled on post-judgment interest. I said, Yes, she
22 did. She ruled back in 2013. Well, I filed a Motion
23 to Alter or Amend. Steve didn't serve her with it
24 pursuant to the rule he's supposed to serve her with
25 it.

1 So anyway, I finally just said, Let me just
2 send it to Judge Scarborough. What I'm looking for
3 is an Order of Foreclosure and Sale as to their
4 Distributional Interest, which you granted me, but we
5 never got you the order because I was waiting on
6 Steve to say, Yes, the calculations are good. I sent
7 it to you back in March of this year.

8 So what I'm asking you to do is to sign my
9 order basically. I gave you credit for just what you
10 told me. There was a little twist in there and you
11 said we've got to give 25 percent back to the people
12 that paid it, so 175, and that's all calculated in,
13 and you said, Calculate that in. So that's where we
14 are.

15 The twist now, I guess, Judge -- I'll let them
16 talk about it, they have now filed Notice of Intent
17 to Appeal of Judge Jefferson's order that was issued
18 April 15th denying their Motion to Alter or Amend on
19 the basis that they didn't give her ten days notice
20 and on the basis that she ruled in the first place to
21 amend the order.

22 What I'm looking for -- there was no appeal to
23 the charging lien. I'm seeking to collect. The
24 balance is about 120,000 or whatever it is.

25 THE COURT: A little over a half million

1 dollars left?

2 MR. CISA: There's 100,000 left.

3 THE COURT: 100,000? I'm sorry.

4 MR. CISA: Yes, sir. I think it's -- the
5 calculation is \$101,268.70 as of July 17, 2014. I
6 also got an order on attorney's fees that she limited
7 to the amount of debt that runs at the
8 statutory rate. So it gets a little complicated.
9 That's where we are.

10 I'm asking the Court to please sign my order
11 so I can move on with it.

12 THE COURT: I've got it. Mr. Wheeler, what do
13 you want to say? That's a pretty good recitation on
14 this one.

15 MR. WHEELER: I would have to agree. In
16 classic Steve Smith fashion, he tells me at 5:00 p.m.
17 on Friday, By the way, you're going to this hearing.
18 It's a ten-year old case. So I spent a lot of
19 Saturday going back through some appeals. It was a
20 good recount.

21 THE COURT: Was your head spinning?

22 MR. WHEELER: It's amusing, you know?

23 THE COURT: Well, the last case I just had to
24 suffer through was a no interest on a 20 or 30-year
25 lease with an option to buy. Here you've got

1 1 percent per day, and that's been affirmed by the
2 South Carolina Court of Appeals. It's just amazing.
3 Just amazing.

4 MR. WHEELER: I would never get into a
5 lease-to-own situation. We see everyone end up in
6 Court.

7 He's right, though. So we filed an appeal
8 today to appeal the ruling.

9 THE COURT: That would be Judge Jefferson's
10 April 15th ruling?

11 MR. WHEELER: Yes, Your Honor. Her --
12 affirmed by her order denying our Motion to
13 Reconsider which was April 15th of this year. We're
14 appealing post-judgment interest. Prejudgment
15 interest has been affirmed by the Court of Appeals.
16 I am not disputing that. The Court of Appeals
17 specifically did not rule on the post-judgment
18 interest.

19 THE COURT: It wasn't before them, was it?

20 MR. WHEELER: We tried to get it before them.
21 Like he said, he begged them to rule on it. They
22 would rule that the lower court had jurisdiction to
23 hear it, and they needed to hear it, so she did, and
24 that's where we are now.

25 The bulk of this judgment now is going to be

1 post-judgment interest. I don't think there's any
2 way you can foreclose the lien without knowing the
3 total debt owed and without knowing whether or not
4 the post-judgment interest is valid or
5 constitutional. I don't think you can foreclose a
6 lien.

7 THE COURT: Isn't it coming out in the --

8 MR. WHEELER: They did not. Well --

9 THE COURT: It sounded highly outrageous to
10 me, but yet they affirmed it.

11 MR. WHEELER: Well, it wasn't before them.

12 MR. CISA: It was a constitutional issue
13 before them the first time around. It was
14 interesting. Judge Hearn, who was the Chief Justice
15 at that time said, Mr. Cisa, didn't somebody say
16 unconscionable during that trial? I said, No, Your
17 Honor. Nobody mentioned it. Nobody raised it.

18 MR. WHEELER: For the record, we weren't
19 there.

20 THE COURT: That's a problem.

21 MR. CISA: That's true. They weren't there.
22 They didn't try that.

23 THE COURT: Well, I'm going to grant the
24 motion. I think your judgment time is starting to
25 run, isn't it?

1 MR. CISA: Yes, sir, it is.

2 THE COURT: You're going to have to move
3 quick. I've signed the order. I'll give it to you,
4 and you can go run it down. Okay?

5 All right, Mr. Wheeler, good luck.

6 I don't know why -- the one thing I read in
7 Judge Jefferson's order was she couldn't figure out
8 why it took three years to get the issue before her.

9 (The proceedings were concluded at 11:31 a.m.)

1 State of South Carolina)
2 County of Charleston) C E R T I F I C A T E
3

4 I, Christine A. Smith, Court Reporter and
5 Notary Public for the State of South Carolina at
6 Large, do hereby certify that the foregoing
7 transcript is a true, accurate, and complete record.

8 I further certify that I am neither related to
9 nor counsel for any party to the cause pending or
10 interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 26th day of May, 2016 at
13 Charleston, Charleston County, South Carolina.
14
15

16
17 
18 Christine A. Smith
19 Notary Public
20 My Commission Expires
21 May 12, 2021
22
23
24
25

Roger Prevost D/B/A Prevost Construction, Inc.
☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2004-CP-10-3867

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney: Steven L. Smith, Bar No. Address: P.O. Box 40578 Charleston, SC 29423 phone: fax: e-mail: other:		Defendant's Attorney: Frank M. Cisa, Bar No. Address: 858 Lowcountry Blvd., Suite 101 Mt. Pleasant, SC 29464 phone: (843) 881-6530 fax: e-mail: other:	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type			
☐ Written motion attached ☒ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☐ Plaintiff / ☒ Defendant		March 17, 2016 Date submitted	
SECTION III: Motion Fee			
☐ PAID - AMOUNT: ☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☒ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____		Date Filed: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2004-CP-10-3867

CHARLES BICKERSTAFF, M.D.,)
and BARBARA MAGERA, M.D.)

Plaintiffs,)

vs.)

ROGER PREVOST d/b/a)
PREVOST CONSTRUCTION, INC.)

Defendant.)

ORDER ON DEFENDANTS' MOTION TO
FORECLOSE LIEN ON PLAINTIFFS'
DISTRIBUTIONAL INTEREST IN B.O.B.
PROPERTIES, LLC AND ON PLAINTIFFS'
MOTION TO REDUCE JUDGMENT

FILED
2016 APR 25 AM 11:33
JULIE J. ARMSTRONG
CLERK OF COURT

The above case came before me on January 6, 2015 pursuant to the Defendant, Prevost Construction, Inc.'s Motion to Foreclose its charging lien against the Plaintiffs' distributional interest in B.O.B. Properties, LLC.

Also before me was the Plaintiffs' Motion to Reduce the judgment previously granted to the Defendant, Prevost Construction, Inc., by the amount of a settlement the Defendant received as a result of a separate lawsuit where the Defendant foreclosed its judgment liens against Plaintiffs' property which involved a priority dispute with First Citizens Bank and Trust Company, Inc.

After careful consideration of the Court records relative to this matter and the arguments of counsel, I find that the Defendant, Prevost Construction, Inc.'s motion should be granted and that the Plaintiffs' Motion to Compel and reduce judgment should also be granted.

The Defendant, Prevost Construction, Inc., has two unsatisfied judgments against the Plaintiffs. The first judgment is in the amount of \$6,437.62 together with interest in the amount of \$242,116.99 as of September 12, 2014 for a total due of \$248,554.61 as of September 12, 2014.



The second judgment is in the amount of \$6,437.62 together with interest in the amount of \$5,100.42 as of September 12, 2014 for a total due of \$11,538.20 as of September 12, 2014.

The Defendant, Prevost Construction, Inc., was previously granted a charging lien against the Plaintiffs' distributional interest in B.O.B. Properties, LLC pursuant to South Carolina Code Section §33-44-504 by this Court's Order dated August 8, 2012. The Plaintiffs are the sole members of B.O.B. Properties, LLC which owns real estate in Charleston and Berkeley County.

On March 27, 2012 the Defendant, Prevost Construction, Inc., commenced an action against the Plaintiffs and First Citizens Bank and Trust Company, Inc., to foreclose its judgment liens against two (2) parcels of property owned by the Plaintiff in Charleston County. The action involved a priority dispute between the Defendant's judgment liens and First Citizens Bank's Mortgage. The action resulted in a settlement paid on behalf of First Citizens Bank and Trust Company, Inc. to the Defendant, Prevost Construction in the amount of \$175,000.00 which settlement was paid on July 17, 2014. Pursuant to the settlement the Defendant is required to return twenty-five (25%) percent of the Defendant's recovery against the Plaintiffs.

The Plaintiffs argue that the Defendant, Prevost Construction, Inc.'s judgment should be reduced by the amount of the settlement obtained as a result of foreclosure of its judgment liens. The Court agrees that the settlement was not a collateral source as it was directly related to the Defendant, Prevost's foreclosure of its judgment lien.

The total due on Prevost's judgment as of July 17, 2014 was the sum of \$256,014.96, as shown by the Pay Off sheet which is attached hereto as Exhibit "A". After deducting for the settlement received by Prevost Construction, Inc., in the amount of \$175,000.00 and after giving Prevost credit for the repayment of twenty-five (25%) percent of his net recovery there is a balance due to Prevost Construction, Inc., of \$101,268.70 as of July 17, 2014. Per diem interest accrues at the per diem rate of \$64.37 of and from July 17, 2014.



CONCLUSIONS OF LAW

I, therefore, conclude as follows:

1. The Plaintiffs are entitled to reduce the Defendant, Prevost Construction, Inc.'s judgments by the amount of the settlement received by Prevost Construction, Inc., in the amount of \$175,000.00 which was received on July 7, 2014, however, the Defendant shall be given credit for twenty-five (25%) percent of the balance due on the judgments.
2. The balance due on the judgments of Prevost Construction, Inc., is \$101,268.70 as of July 17, 2014 with interest running thereafter that per diem rate of \$64.37.
3. The Defendant, Prevost Construction, Inc., is entitled to the foreclosure of its charging lien on the Plaintiffs' distributional interest in B.O.B. Properties, LLC.
4. The Defendant is entitled to have the Plaintiffs' distributional interest in B.O.B. Properties, LLC sold at public auction after due advertisement.

It is, therefore

ORDERED, ADJUDGED AND DECREED as follows:

1. That there is due on the Judgment held by Defendant the total sum of, is \$101,268.70 as of July 17, 2014 with interest running thereafter that per diem rate of \$64.37. to the date of sale or the date of payment in the event Defendant is not the highest bidder.
2. That on default of payment at or before the time herein indicated, the Plaintiffs' distributional interest in B.O.B. Properties, LLC, shall be sold at public auction, at the front entrance of the Charleston County Courthouse., Charleston, South Carolina on the following terms, that is to say:



The sale shall be for cash, and the highest bidder shall be required to make a cash deposit of five (5%) percent of the bid as earnest money and as evidence of good faith, provided, however, the Master-In-Equity shall determine whether the Defendant or any other lien holder shall be entitled to apply the debt due it against its bid in lieu of cash. Should the person making the highest bid at the sale fail to comply with the terms of its bid by depositing the said five (5%) percent cash, then the property shall be sold at the risk of such bidder on the same sales date or some subsequent date as the Master-In-Equity may find convenient and advantageous. Should the last and highest bidder fail to comply with the terms of its bid within thirty (30) days of the final acceptance of this bid, then the Master-In-Equity shall readvertise and resell the Plaintiffs' distributional interest in B.O.B. Properties, LLC on the same terms on a subsequent date at the risk of such bidder. Persons submitting additional bids after the initial sale shall deposit five (5%) percent of the bids in cash as prescribed above. The Master-In-Equity shall return all deposits except the deposit securing the highest bid.

3. That since no personal or deficiency judgment has been requested, the bidding shall not remain open, but shall be final as of the date of the sale.

4. That the Master-In-Equity, by advertisement according to law, shall give notice of the time and place of such sale, and the terms thereof; that the Master-In-Equity shall transfer and convey the Plaintiffs' distributional interest in B.O.B. Properties, LLC to the purchaser, or purchasers; and that the Defendant, or any other party to this action, may become a purchaser at such sale, and that if, upon such sale being made, the purchaser or purchasers, should fail to comply with the terms thereof, the Master-In-Equity may advertise the said property for sale on the next, or some other subsequent sales day, at the risk of the former highest bidder, and so from time to time thereafter until a compliance shall be secured.

5. That the Master-In-Equity shall apply the proceeds of the sale as follows:

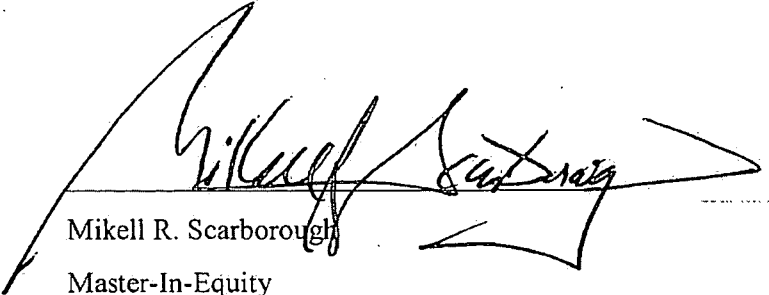
FIRST: To payment of the amount of costs and expenses of this action, including the costs of advertising the Notice of Sale.

NEXT: To the payment to the Defendant or its attorney of the amount of Defendant's total debt, as hereinabove set forth, or so much thereof as the purchase money will pay the same.

NEXT: Any surplus funds to be held subject to further Order of this Court in accordance with the law and custom of this Court.

6. And it is further ORDERED, ADJUDGED AND DECREED that the Plaintiffs and all persons or entities whomsoever claiming under them, be forever barred and foreclosed of all right, title, interest, in the Plaintiffs' distributional interest in B.O.B. Properties, LLC.

AND IT IS SO ORDERED!



Mikell R. Scarborough
Master-In-Equity

Charleston, South Carolina

4/25, 2016.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Charles Bickerstaff, M.D., et al.,)

(x) Plaintiff)

v.)

Roger Prevost, etc.,)

() Defendant)

check box above indicating submitting party)

Case No. 2004-CP-10-3867

**MOTION INFORMATION FORM
AND COVER SHEET**

name, SC Bar no. and address of plaintiff's attorney

Samuel M. Wheeler - 101088

Smith | Closser, PA

P.O. Box 40578

Charleston, SC 29423

telephone: 843-760-0220 fax: 843-552-2678

e-mail: swheeler@scnlaw.com

name, SC Bar no. and address of defendant's attorney

Frank M. Cisa

Cisa & Dodd, LLP

858 Lowcountry Blvd, Ste 101

Mt. Pleasant, SC 29464

telephone: 843-881-6530 fax: 843-881-5433

e-mail: frank@cisadodds.com

(x) MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I AND III)

() FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II AND III)

() PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II AND III)

SECTION I: Hearing Information

Nature of Motion: to Require Defendant to Post Bond Prior to Sale

Estimated Time Needed: 30 minutes

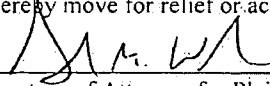
Court Reporter Needed: YES /

SECTION II: Motion Type

(x) Written motion attached

() Form Motion --

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for Plaintiff / Defendant

6/30/16
Date submitted

SECTION III: Motion Fee

(x) PAID - AMOUNT: \$25.00

() EXEMPT: () Rule to Show Cause in Child or Spousal Support

(check reason) () Domestic Abuse or Abuse and Neglect

() Indigent Status () State Agency v. Indigent Party

() Sexually Violent Predator Act () Post-Conviction Relief

() Motion for Stay in Bankruptcy

() Motion for Publication () Motion for Execution (Rule 69, SCRCP)

() Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

() Other: _____

JUDGE'S SECTION

() Motion Fee to be paid upon filing of the attached order.

() Other: _____

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

DATE FILED

Collected by: _____

(print name)

() MOTION FEE COLLECTION: _____

() CONTESTED - AMOUNT DUE: _____

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2004-CP-10-3867

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CLERK OF COURT
to have this

¹ The two named Plaintiffs are the only members of B.O.B., so the distributional interest at issue is 100%.

Honorable Deadra L. Jefferson denied the Plaintiffs' motion to reconsider her order which set the amount of post-judgment interest at 1% per day. The Plaintiffs filed a notice of appeal of that order on or about April 25, 2016. The same day, the Honorable Mikell R. Scarborough, issued an order allowing the Defendant to foreclose a charge lien on the Plaintiffs' distributional interest in B.O.B. The Plaintiffs filed a notice of appeal of that order on or about May 4, 2016. Despite notice of both appeals, the Defendant has set the date of sale of the Plaintiffs' distributional interest in B.O.B. for August 2, 2016.

Rule 241, SCACR, states the general rule that "notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision." Rule 241(a), SCACR. Under certain circumstances, however, the rule allows for a judgment creditor to pursue execution of his judgment, despite the appeal. Rule 241(b) states, "exceptions to the general rule are found in statutes, court rules, and case law. Where specific conditions must be met before the exception applies, those conditions must be strictly complied with. A list of some, but not all, of the exceptions to the general rule is: (1) Money judgments as provided in S.C. Code Ann. § 18-9-130..." Rule 241(b)(1), SCACR.

This case involves the Defendant being awarded a money judgment and his subsequent attempts at executing that judgment. Therefore, it is necessary to look to the language of Section 18-9-130 of the South Carolina Code of Laws.

Section 18-9-130(A)(1) states, "[a] notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution." It goes on to state that a judge may issue a stay and may also require a judgement debtor to post a bond to ensure payment of

the judgment after the appeal is heard. *Id.* This statute mirrors Rule 62 of the South Carolina Rules of Civil Procedure, which states, “[w]hen an appeal is taken, a party, by giving a supersedeas bond, may obtain a stay subject to the exceptions contained in subdivision (a) of this rule and the South Carolina Appellate Court Rules. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the supersedeas as the case may be. The stay is effective when the supersedeas bond is approved by the court.” Rule 62(d), SCRCP.

In this case, the Plaintiffs did not move to stay the execution of the money judgment pursuant to Rule 62(d), SCRCP, § 18-9-130(A)(1), S.C. Code of Laws, or Rule 241, SCACR, thus they were not required to post a bond, and the Defendant has been operating under the exception contained in § 18-9-130(A)(1) in his efforts to execute his judgment.² However, the rules change when a judgment creditor such as the Defendant attempts to sell property to execute a judgment. Section 18-9-130(A)(2) states, “[a judgment creditor] may not enforce a sale of property after a notice of appeal is filed without giving an undertaking or bond to the [judgment debtor], with two good sureties, in double the appraised value of the property or double the amount of the judgment, conditioned to pay all damages the [judgment debtor] may sustain by reason of the sale in case the judgment is reversed.”

As stated in Rule 241, SCACR, “[w]here specific conditions must be met before the exception applies, those conditions must be strictly complied with.” The Defendant in this action is utilizing the exceptions found in § 18-9-130, thus the language of that statute must be strictly complied with. Therefore, pursuant to § 18-9-130(A)(2), if the Defendant intends to move forward with the sale of the Plaintiffs distributional interest in B.O.B., which is currently set for

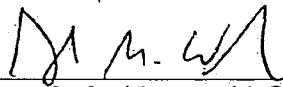
² The Defendant has in fact been successful, collecting more than \$175,000 against an original judgment that is nominal by comparison.

August 2, 2016, then he is required to post a bond, with two good sureties, in an amount equal to double the appraised value of the distributional interest or double the judgment, \$202,537.40.

Should he be unwilling or unable to post such a bond, then the sale should be stayed.

In addition to the above, pursuant to recent rulings issued by this Court, the Plaintiffs move to limit to the amount of the judgment, \$101,268.70, the extent of ownership in the Plaintiffs' distributional interest in B.O.B. transferred at auction, should the Defendant post the bond and should he later be the successful bidder at the sale. In other words, if the Defendant purchases the distributional interest, then he should only be given ownership up to \$101,268.70. He should not be conveyed an inequitable windfall of 100% of distributional interest in B.O.B. In the interest of fairness, this Court has made such a ruling in recent months, and the Plaintiffs request the same. For all of the above stated reasons, the Plaintiffs respectfully request that this motion is granted.

SMITH | CLOSSER, P.A.



Steven L. Smith – ssmith@scnlaw.com

(SC Bar No.: 05173)

Zachary J. Closser – zclosser@scnlaw.com

(SC Bar No.: 74005)

Samuel M. Wheeler – swheeler@scnlaw.com

(SC Bar No.: 101008)

7455 Cross County Road, Suite 1

P.O. Box 40578

Charleston, SC 29423-0578

843-760-0220

Attorneys for the Plaintiffs

June 30, 2016
Charleston, South Carolina

06-537

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2004-CP-10-3867

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

Plaintiffs,

vs.

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

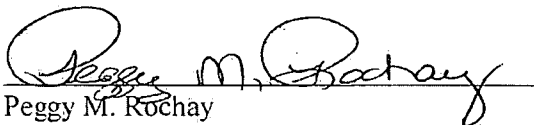
Defendant.

CERTIFICATE OF SERVICE

FILED
2016 JUL -5 PM 2:47
JULIE J. AUSTIN
CLERK OF COURT

I certify that on this date a copy of the foregoing Plaintiffs' Motion to Require Defendant to Post Bond Prior to Sale of Plaintiffs' Distributional Interest was served by mailing or hand delivery and/or electronic mail on the following:

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
858 Lowcountry Blvd, Ste 101
Mt. Pleasant, SC 29464


Peggy M. Rochay

June 30, 2016
06-537

Smith | Closser, P.A.

Attorneys at Law
7455 Cross County Road, Suite One
Post Office Box 40578
Charleston, South Carolina 29423-0578

Samuel M. Wheeler
swheeler@scnlaw.com

Office - 843-760-0220
Fax - 843-552-2678
www.smithclosser.com

June 30, 2016

Julie J. Armstrong, Clerk of Court
Charleston County Common Pleas
100 Broad Street, #106
Charleston, SC 29401

RE: Charles Bickerstaff, M.D., et al. v. Roger Prevost, etc.
Case No. 2004-CP-10-3867
S/C File No. 06-537

Dear Ms. Armstrong:

Enclosed please find the original and one copy of the Plaintiff's Motion to Require Defendant to Post Bond Prior to Sale of Plaintiffs' Distributional Interest in the above referenced matter. I would appreciate it if you would file this and return the filed copy to me in the envelope provided. I have also enclosed our firm's check in the amount of \$25.00 to cover your fee.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,



Samuel M. Wheeler

SMW/pmr

Enclosures

cc: Frank M. Cisa, Esquire

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

FILED

CASE NO. 2004 CP. 10-13867

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2016 JUL 12 PM 4:08

Prevost

PLAINTIFF(S)

JULIE J. ARMSTRONG
CLERK OF COURT

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

W's Motion to Require D to Post Bond Prior to Sale of W's Distributional Interest is GRANTED. Rule 2.41, SCACR Section 18-9-130, SC Code

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

3062

Judge Code

Date

7/14/16

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,

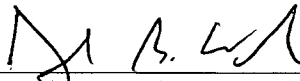
v.

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

CERTIFICATE OF APPELLANTS

I certify that the Record on Appeal contains all material proposed to be included by any of the parties in their respective Designation of Matter and not any other material.

SMITH | CLOSSER, P.A.



Steven L. Smith (SC Bar No.: 05173)
Samuel M. Wheeler (SC Bar No.: 101008)
7455 Cross County Road, Suite 1
P.O. Box 40578
Charleston, SC 29423-0578
843-760-0220
Attorneys for the Appellants

December 15, 2016

RECEIVED
JAN 24 2017
SC Court of Appeals