THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity

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Appellate Case No. 2020-001587

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David Wilson, individually and on behalf of Carolina Custom Converting, LLC, .....Plaintiff,

v.

John Gandis, Andrea Comeau-Shirley, ZOi Films, LLC, and Carolina Custom Converting, LLC, .....Defendants,

v.

Carolina Custom Converting, LLC, .....Counterclaim Plaintiff,

v.

David Wilson, Steve Norvell, Neologic Distribution Inc., and Fresh Water Systems, Inc., .....Counterclaim Defendants,

of which Carolina Custom Converting, LLC, John Gandis, and Andrea Comeau-Shirley are the..... Appellants

and David Wilson is the.....Respondent.

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# INITIAL BRIEF OF RESPONDENT DAVID WILSON

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3. WHETHER THE LOWER COURT ERRED BY REVERSE PIERCING THE CORPORATE VEIL OF CCC BY IMPOSING ITS MEMBERS' LIABILITIES UPON THE COMPANY.

## II. STATEMENT OF THE CASE

Respondent David Wilson ("Wilson") owned a minority ownership interest in Appellant Carolina Custom Converting, LLC ("CCC") with Appellants John Gandis ("Gandis") and Andrea Comeau-Shirley ("Shirley"). Beginning in 2010, Gandis and Shirley plotted to squeeze Wilson out of CCC and undertook to subject Wilson to oppressive tactics over the next two years to force him out of CCC. (Supreme Court Opinion No. 27980, June 22, 2020). On April 27, 2012, Wilson filed an action alleging several causes of action against Gandis and Shirley including an action for shareholder oppression. Prior to trial, the parties agreed to waive any jury trial demands and submit all the claims to a bench trial before Circuit Judge D. Garrison Hill. A bench trial on the merits of the case was held the week of September 29 – October 4, 2014. On January 9, 2015, the trial court issued its Order and determined that Wilson had proven his claim of

[1] Although Appellants state four issues on appeal, issues numbers 2 and 4 are the same issue. Respondent addresses this single issue in its entirety in addressing the second issue on appeal as stated in this brief.

shareholder oppression and the court ordered and awarded a judgment against Gandis and Shirley for $347,863.23 in favor of Wilson. Gandis and Shirley appealed the judgment.

On April 16, 2016 (over a year after entry of judgment and a year after the "Buy-Out Order"), Gandis, Shirley and CCC finally posted a bond in the amount of $347,863.23 thereby staying enforcement of the judgment pending appeal. (Supersedeas Bond dated April 16, 2016). On February 7, 2018, the South Carolina Court of Appeals affirmed the trial court's judgment in favor of Wilson and adopted the trial judge's opinion in full. The Supreme Court affirmed the judgment (5-0) but modified the judgment making CCC primarily liable for the purchase of Wilson's interests and Gandis and Shirley secondarily liable after a reasonable time. The Supreme Court remanded the case to the circuit court on June 22, 2020.

CCC refused to tender the amount of the judgment, and on September 2, 2020, Wilson filed a Motion to Lift the Stay and to Execute on the Supersedeas Bond.[2] CCC, Gandis and Shirley all opposed the motion and filed a "Motion for Remand Status Conference and Ruling Regarding the Time to Complete Purchase of Distributional Interest and Wilson's Motion to Execute on Supersedeas Bond." At the hearing on these motions, CCC requested that the Court allow for a structured buy-out procedure comprised of a down payment in the $200,000 range followed by monthly payments over a period of years drawing interest at 4%. Following the hearing, the court entered an order requiring CCC to make a $250,000 payment towards judgment ($347,863.23) of Wilson's distributional interest in the company and permitted Wilson to seek the remaining balance from the

[2] In anticipation of this result, Wilson had requested that the supersedeas bond also secure CCC's payment in the event the judgment was modified. Wilson did not care who paid him.

supersedeas bond. (CCC ignored this order and directed the bond company to pay Wilson the entire amount of the bond.) Further, the court referred the case to the Master-in-Equity to conduct supplemental proceedings to determine the amount of post-judgment interest to be awarded.

The parties submitted written arguments to the Honorable Charles B. Simmons, Jr., Master-in-Equity of Greenville County as to the Wilson's entitlement to post-judgment interest. On April 13, 2021, a hearing was held before the Master-in-Equity to determine the amount of post-judgment interest collectable on the judgment entered January 9, 2015—the Buy-Out Order. (Transcript Apr. 13, 2021). (CCC did not argue that posting a supersedeas bond stayed the accrual of post-judgment interest.) Judge Simmons later entered an order on May 4, 2021, finding that post-judgment interest had accrued from the date of the original judgment (January 9, 2015) in the amount of $208,930.15.

On May 14, 2021, Appellants filed a Rule 59(e) Motion to Alter or Amend the judgment: Again, Defendants did not make the argument that posting a supersedeas bond stayed the accrual of post-judgment interest. However, on June 10, 2021, Appellants filed a Supplemental Rule 59(e) Motion to Alter and Amend finally making several unprecedented arguments, including the newly minted argument that a supersedeas bond stayed the accrual of post-judgment interest. The Master-in-Equity denied both Rule 59 motions, and this appeal followed.

## III. LEGAL ARGUMENTS AND AUTHORITIES

### A. WHETHER THIS COURT SHOULD CREATE AN EXCEPTION TO S.C. CODE § 34-31-20 (B) BY SUSPENDING POST-JUDGMENT INTEREST WHERE A SUPERSEDEAS BOND HAS BEEN POSTED.

Wilson obtained a money judgment for the value of his membership interest in Carolina Custom Converting, LLC. Without precedent, Appellants argue for a monumental change in the law; It requests that this Court suspend the accrual of post-judgment interest under §34-31-20(B) because 15 months after entry of judgment, Appellants posted a supersedeas bond as a condition of staying execution of a judgment under South Carolina Code §18-9-130. (Supersedeas Bond, April 16, 2016). However, CCC did not advance this argument until the filing of Appellant's second Rule 59(e) Motion to Alter or Amend more than 35 days after the order it sought to alter/amend. (Supplemental Rule 59(e) Motion to Alter or Amend, June 10, 2021). Appellants did not present the Master-in-Equity with this argument prior to entry of his order awarding Wilson $208,930.15 in post-judgment interest. In fact, at no time during the 12 months of contesting post-judgment interest did Appellants advance this unprecedented argument. "A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (S.C. 2014) *quoting Hickman v. Hickman,* 301 S.C. 455*,* 392 S.E.2d 481 (1990). It would be error for this Court to consider an argument raised for the first time in the Rule 59(e) motion. *Id.*

Moreover, the second 59(e) motion ("supplemental" motion) was filed almost a month after the time permitted for filing a Rule 59(e) motion. "A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." *Hickman at* 456, 392 S.E.2d at 482 quoting SCRCP 59(e). The Supreme Court has "held that the ten-day limit for serving a Rule 59(e) motion is an absolute

deadline." *Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 432 (2018).[3] It is clear that Appellants have not properly nor timely raised this argument.

Even if this Court were to consider this untimely argument, the creative editing and interpretation of court rules and statutes does not justify a judicially manufactured exception to §34-31-20(B) for those who post a supersedeas bond. S.C. Code §34-31-20(B) states post-judgment interest for money judgments is mandatory:

> 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. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points.

S.C. Code Ann. §34-31-20 (B)(emphasis added). "Our courts have consistently held that use of words such as "shall" or "must" indicates the Legislature's intent to enact a mandatory requirement." *See e.g., State v. Frey*, 362 S.C. 511, 516, 608 S.E.2d 874, 877 (Ct. App. 2005). Not surprisingly, the Supreme Court has acknowledged that post-judgment interest under §34-31-20(B) is mandatory (such that a plaintiff does not even

[3] "Rule 6(b) of the South Carolina Rules of Civil Procedure gives trial courts limited authority to extend deadlines set forth in the Rules. However, Rule (6)(b) explicitly excludes Rule 59 and certain other rules from that authority. Rule 6(b) states, "The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them." Rule 59(e) does not have any "conditions stated" which would allow such an extension. Rather, Rule 59(e) states, 'A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.'" *Overland* at 255-56, 815 S.E.2 at 432. Rule 15(c)'s "relation back of amendments" only applies to pleadings.

need to request it nor plead its entitlement). *Calhoun v, Calhoun,* 339 S.C. 96, 102, 529 S.E.2d 14 (2000). This statute creates no exceptions. The change being sought would remake the landscape of appellate practice and deprive judgment creditors of their statutorily mandated post-judgment interest.

Appellants seek to draw comparison between a party who posts a supersedeas bond and a party who under SCRCP 67 pays the entire judgment into an account maintained by the Clerk of Court. First, it argues that a bond deprives the judgment debtor of its money pending appeal. Although this argument is without any factual support in the record, a bond is merely a promise to pay upon the occurrence of an event. In the normal course, a bond company conducts some form of due diligence to determine if the Appellants have sufficient wherewithal to (maybe) eventually pay the amount of the bond. However, Appellants keep possession of its funds and have use of those funds during the entirety of the appeal. This is not the case when a party makes a deposit with the clerk of court.[4]

Moreover, the Appellants find significance that a supersedeas bond is only for the amount of the judgment, but what other amount is there? Interest accrues over time, and the timing and the amount of post-judgment interest is uncertain and undeterminable. Interest rates go up and down. Who would have guessed that Wilson v. Gandis would last a decade? If the legislature intended S.C. Code §18-9-130 to suspend the accrual of post-judgment, then it could have clearly stated such. Suspension of post-judgment interest is a

[4] When a party makes a deposit with the Clerk of Court, the clerk normally makes a deposit into an interest-bearing account and upon order of the trial court, will pay all sums in such deposit account as ordered. In this case, Appellants (with Wilson's consent) have deposited $208,930.15 in a bond fund subject to appreciation in value.

significant change in the law. It is not plausible that the legislature to implicitly circumvent the clear meaning of §34-31-20(B).

There is nothing in the language or legislative history of S.C. Code §18-9-130 which suggests that posting of a supersedeas bond was intended to do anything more than stay the execution of the judgment. S.C. Code §34-31-20(B) is specific and mandatory as it pertains to the accrual of post-judgment interest. "Generally, '[a] specific statutory provision prevails over a more general one.'" *Bruning v. SCDHEC*, 418 S.C. 537, 545, 795 S.E.2d 290, 294 (Ct. App. 2016)(citation omitted). Stated another way, Appellants argue that what they contend is implicit in §18-9-130 prevails over what is explicit in §34-31-20(B). It is no wonder that Appellants did not make this argument until one year after the Supreme Court's remand to the trial court. It is fanciful, and in the end, it was not timely. If an exception §34-31-20(B) should be created, then the legislature should be the body to do so.

**B. WHETHER THIS COURT SHOULD CREATE AN EXCEPTION TO S.C. CODE §34-31-20(B) BY SUSPENDING POST-JUDGMENT AFTER THE SUPREME COURT AFFIRMS BUT MODIFIES THE PARTY PRIMARILY RESPONSIBLE FOR PAYMENT OF A JUDGMENT.**

In recognition of the mandatory nature of §34-31-20(B), our Supreme Court created a "bright-line test" for determining the date of judgments "affirmed, but modified." In *Calhoun v. Calhoun*, 339 S.C. 96, 529 S.E.2d 14 (2000), the amount of the judgment had changed on appeal and one of the issues on cert before the Supreme Court was whether modification of the judgment impacted application of the §34-31-20(B). The Supreme Court held that statutory post-judgment interest runs from the date of the original judgment despite a modification. The Court found that the statute's mandatory language (shall/must) control. The Court reasoned as follows:

> The case before us is a perfect example of how complicated calculating post-judgment interest can become when a money judgment is modified at several different junctures before reaching finality and why a **bright line rule for the accrual of interest needs to be established**. While different jurisdictions have come up with creative and complicated methods of resolving the issue, it appears that the simplest way to resolve it is by adopting a rule that **when a money judgment is finalized, whether in a lower court or in an appellate court, the interest on that amount, whether it has been modified upward or downward or remains the same, runs from the date of the original judgment.**

*Calhoun v. Calhoun*, 339 S.C. 96, 104, 529 S.E.2d 14, 18–19 (2000)(emphasis added).

In *Calhoun,* the Court clearly stated that after a judgment is modified (even at "at several different junctures"), the judgment becomes "finalized" in the appellate court. However, post-judgment interest runs from the "date of the *original* judgment." Appellants suggest that there is a "new judgment" although the Supreme Court in *Wilson v. Gandis* affirmed the original judgment, albeit with one modification. Post-judgment interest accrues from the date of judgment's origin and not the date of the judgment's finalization. *Id.* It really is that simple.

The other version of this argument advanced by Appellants is that the Supreme Court's opinion in *Wilson v. Gandis* affirming the trial court's money judgment suspended the accrual of interest because it allowed CCC a "reasonable time" to pay the original judgment before Wilson could enforce the judgment against those secondarily liable (Gandis and Shirley). There is nothing in the Supreme Court's order that even hints that it intended to create an exception to §34-31-20(B) mandate of post-judgment interest, which would have represented a significant loss to Wilson. Surely, the Supreme Court would have provided some justification or even acknowledge of such a dramatic change in the law of

post-judgment interest. Our Supreme Court would not take judicial modification of a statutory requirement so cavalierly.

The Supreme Court's holding in *Wilson v. Gandis* decided that CCC was *primarily* liable under the statute: So, CCC had been in possession of $347,863.23 belonging to Wilson since at least January 9, 2015 (the date of the original judgment).[5] "[T]he purpose of post-judgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835–36, 110 S. Ct. 1570, 1576, 108 L. Ed. 2d 842 (1990)(citation omitted). (*See* Affidavit of David Wilson.) "[A judgment debtor is] required to pay interest on his debt as compensation for his further retention and use of the judgment creditor's money." *Sears v. Fowler*, 293 S.C. 43, 45-46, 358 S.E.2d 574, 575 (1987) *quoting State ex rel. Southern Real Estate & Financial Company v. City of St. Louis*, 234 Mo. App. 209, 213, 115 S.W. (2d) 513, 515 (1938). The post-judgment interest attaches to the original judgment, which in this case was affirmed by the Supreme Court. This Court must follow Supreme Court precedent and apply the "bright-line" test enunciated in *Calhoun v. Calhoun.*

### C. WHETHER THE LOWER COURT ERRED BUY REVERSE PIERCING THE CORPORATE VEIL OF CCC BY IMPOSING ITS MEMBERS' LIABILITIES UPON THE COMPANY.

Despite an assertion to the contrary, the Master-in-Equity did not impose the individual members liabilities on CCC. Instead, the Supreme Court's opinion in *Wilson v.*

[5] An analogy is that Wilson's money was in a briefcase. Someone had possession of that briefcase. The trial court identify Gandis and Shirley; the Supreme Court determined that it was CCC who had the brief case. It should not only hand over the briefcase but pay Wilson for the use of his money while the matter was sorted out.

*Gandis,* 430 S.C. 282, 844 S.E.2d 631 (2020) imposed primary liability on CCC while assigning secondary liability to Gandis and Shirley. The Master-in-Equity simply applied the post-judgment interest statute and Supreme Court authority. Because Appellants' arguments ironically made appeals to equity, Judge Simmons responded by pointing out the fact that the individual members (Gandis and Shirley) control and direct CCC and that there is no undue prejudice to CCC in applying the bright-line test found in *Calhoun*, 339 S.C. at104, 529 S.E.2d at18–19. If there is no liability for post-judgment interest awarded, the reality is that money goes into the pockets of Gandis and Shirley. Despite the fiction created by law, the Master-in-Equity was simply acknowledging reality.

## IV. CONCLUSION

For the reasons stated above and for any others found in the record on appeal, Respondent asks this Court to affirm the holding of the Master-in-Equity awarding $208,930.15 in post-judgment interest.

Respectfully submitted,

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