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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

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JUL 13 2016
SC Court of Appeals

Appellate Case No.: 2014-000208

Claude W. Graham and Vickie B. Graham, ...Appellants,

v.

Town of Latta, South Carolina, ...Respondent.

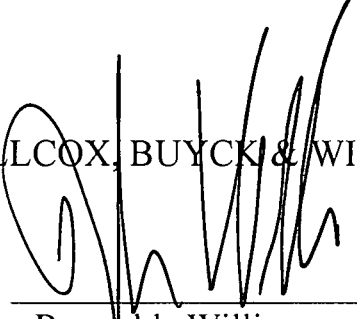
PETITION FOR REHEARING

The Appellants petition the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Graham v. Town of Latta*, Op. No. 2016-UP-331 (S.C. Court of Appeal filed June 29, 2016).

The grounds for the Appellants' petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Appellants' petition for rehearing is based on the Court's decision in *Graham v. Town of Latta*, Op. No. 2016-UP-331 (S.C. Court of Appeal filed June 29, 2016), the supporting memorandum filed herewith, the briefs and Record on Appeal, Rule 221(a), SCACR, Rule 224, SCACR, and other rules of court.

WILLCOX, BUYCKI & WILLIAMS, P.A.

By: 

Reynolds Williams
248 West Evans Street
P.O. Box 1909
Florence, South Carolina 29503
843-662-3258

Attorney for Appellants

Florence, South Carolina
July 12, 2016

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**MEMORANDUM IN SUPPORT OF
APPELLANTS' PETITION FOR REHEARING**

The Appellants have petitioned this Court for rehearing of the recent decision in *Graham v. Town of Latta*, Opinion No. 2016-UP-33 filed June 29, 2016. The Appellants respectfully submit that the following points were overlooked or misapprehended by this Court.

I. Precedent

S.C. Dep't of Transp. v First Carolina Corp. of S.C., 369 S.C. 150, 631 S.E.2d 533 was decided in 2006 based upon the resolution of a conflict between the eminent Domain Act, S.C. Code Ann. §28-2-420)(A)(2005) and Rule 67 SCRCP and has no precedential value relevant to §34-31-20(B), either before or after its 2005 amendment. The conflict in the instant case is between Rule 67 SCRCP and S.C. Code Ann. §34-31-20(B). This court misapprehends the effect of *Russo v Sutton*, 317 S.C. 441, 444, 445 S.E.2d 895, 896 (1995) when it relies upon *dicta* from that case as if it were a holding of precedential value. The holding of *Russo* is “we hold Sutton’s unilateral deposit of the funds insufficient to stop accrual of the interest mandated by §34-31-20.” And the portion quoted in the Opinion here should not be relied upon as if it were a *Russo* holding.

There is no controlling precedent resolving the inherit conflict between the currently applicable §34-31-20(B) S.C. Code Ann. (misquoted in the Opinion when it says a judgment “must draw interest according to law” instead of “MUST draw interest according to law”) and Rule 67 SCRCP which is being interpreted to make “MUST” discretionary.

II. Statutory Intent

S.C. Dep't of Transp. v First Carolina Corp. of S.C., *supra*, correctly observes that all rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used; whenever possible it should be found in the plain language; where the statute's language is plain and unambiguous and conveys the clear and definite meaning of the rules of statutory construction are not needed, thus the Court has no right to impose another meaning (citations omitted.). The Opinion here ignores, even misquotes, the plain language of the statute, the effect of the 2005 amendment to it, and its plain language when it relies upon a general statement that "shall and must refer to a mandatory requirement." *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) did not need to consider the effect of an amending statute replacing the former with the latter.

It is a misapprehension and a misinterpretation of the law, and the English language, to hold that "shall" and "must" are interchangeable commands of equal force. *Sears v Fowler*, 293 S.C. 43, 358 S.E.2d 574 (1987) noted the "mandatory tenor of the language" in "shall draw interest according to the law" but even so held that "the statute does not automatically apply in every case."

It is manifest on its face that the legislature did, in fact, change the post-judgment interest statute in 2005. If this court finds the legislature had no reason to change that statute, it should say so, since such a finding would be contrary to applicable law. So, it behooves this court to answer the questions: Why did the legislature take the action it took? What is the effect of that change? To analyze the reason for the change from “shall” to “**MUST**”, one assumes that the legislature choose with care the words it used when it enacted the statutory change, that the General Assembly intended to effect a substantive change in the law when amending the statute, and that such amendment is “purposeful rather than unnecessary”. *Cannon v S.C. Dep’t of Probation, Parole, and Pardon Serv.*, 371 S.C. 581, 584 641 S.E.2d 429 (2007).

As it stands, the Opinion flies in the face of controlling law when it holds the legislature acted without intent, without purpose, and without effect because it is unnecessary to draw *any distinction whatsoever* between “shall” and “**MUST**”. This court has misapprehended the importance of comparing and contrasting two statutory ways of saying similar things, particularly when the similar things are said differently after lower court rulings weakening a

mandatory requirement. From 2001 to 2005 it read:

All money decrees and judgments of courts enrolled or entered shall draw interest according to law.

Now it reads:

A money decree or judgment of a court enrolled or entered **MUST** draw interest according to law.

The plain reading of and the unambiguous fonting of the second block is that the legislature in 2005 made more emphatic the mandate for judgments to draw interest. By failing to consider the reasoning behind the content or the style of that emphasis, the court has misapprehended the legislature's plain and unambiguous intent.

By holding that a rule of civil procedure may limit the command of a subsequently enacted statute, this court has also misapprehended or misapplied the constitution of South Carolina. Article V, §4 specifically makes any such rules enacted by the Supreme Court "subject to the statutory law." Thus, the premise of §34-31-20(B)'s mandate over Rule 67 SCRPC is apparent not only from the sequence in which they were promulgated but also by the doctrine of separation of powers.

“If legislative intent is clear as reflected in the statutory language, any public policy as promulgated by (the South Carolina Supreme Court) must give way... .” *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 401 N.4, 728 S.E.2d 477, 481 (2012).

III. Discretion

The Opinion observes that the granting of leave to deposit money with the court pursuant to Rule 67 SCRCP is a matter within the discretion of the trial court which should only be overturned if there is an abuse of that discretion. “An abuse of discretion occurs when the ruling is based on an error of law... .” *S.C. Dep’t of Transp. v First Carolina Corp. of S.C.*, *supra*, citing *Connors v Forest Acres*, 363 S.C. 460, 467 611 S.E.2d 905 (2005). This court has misapprehended the lower court’s ruling. That court “realize(d) this is a very real monetary issue to your clients” (R. p. 119, ll. 2-7) but succumbed to the Town of Latta’s argument that it had “no discretion” and declined to exercise any. The error of law which has been misapprehended here is whether or not the trial court does, or does not, have any discretion. Such an error of law is itself an abuse of discretion.

IV. Preservation of the Record

(b) Decision by the Court. In every decision rendered by an Appellate Court, every point distinctly stated in the case which is necessary to the decision of the appeal and

fairly arising upon the record of the court must be stated in writing and must, with a reason for the court's decision, be preserved in the record of the case.... (2) the Court of Appeals need not address a point which is manifestly without merit.

Rule 220, S.C.A.C.R.

The following points necessary to the decision of the appeal are neither stated in writing nor addressed in the Decision:

1. The effect of the 2005 amendment to §34-31-20(B) S.C. Code Ann.
2. How it is that a rule of court (Rule 67 SCRCP) can alter the legal duty created by a subsequent statute.
3. Is the refusal to exercise discretion an exercise of discretion?
4. Does the legislature use "shall" and "**MUST**" randomly and interchangeably, without regard to the rules of grammar, or should it be presumed to have acted with deliberation and reason?

Each of the four points described in the preceding paragraph were distinctly stated by the Appellants and argued by the Respondent, in the record of the court. "(Rule 67) does not vary, alter, or amend the statutory mandate that the Grahams' judgment must draw interest at the rate of 7 ¼%, compounded annually." (Aplnt. Br. 7-8). The Appellants' argument that

Rule 67 can not be used to alter the legal duties of the parties “lack(s) merit.” (Respt. Br. 3).

“(The Tort Reform Act of 2005) rewrote the section to change from a fixed, simple rate of interest of 12% to an annually compounding rate which varies in accordance with market conditions and replaced the “shall” in the first sentence with “MUST”. When a legislature reenacts an existing statute, it is presumed to have been aware of the cases interpreting that statute and is reenacting the case law. Conversely, when it amends an existing statute, it is presumed to have a reason for choosing the words it uses.” (Aplnt. Br. 4-5). “The change from ‘shall’ ‘to’ ‘must’ (*sic*) clearly did not effect the change in the law suggested by the Grahams.” (Respt. Br. 12).

“There has never been a Supreme Court case applying Rule 67 SCRCF to the current statute governing the legal rate of interest. *S.C. Dep’t of Transp. v First Carolina Corp. of S.C.*, 369 S.C. 150, 631 S.E.2d 533 (2006)...involved the legal rate of interest as it used to read, from 2001 to 2005.” (Aplnt. Br. 8). “Moreover, the Grahams have disregarded existing South Carolina authority that treats ‘shall’ and ‘must’ (*sic*) as synonymous and interchangeable terms.” (Respt. Br. 8).

“The Court...made an error of law when he specifically declined to exercise discretion... .” (Aplnt. Br. 16). “The Supreme Court did not,

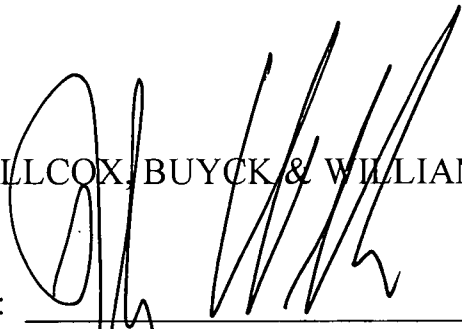
however, set forth any factors for the Circuit Court to consider in determining whether judgment debtor who complies with Rule 67 may nonetheless be denied the option of depositing funds with the court to stop the accrual of post-judgment interest.” (Respt. Br. 14).

CONCLUSION

Based on the foregoing discussion, the Appellants respectfully request that the Court rehear its decision in this case. The Appellants request this court reverse the Order of Judge J. Michael Baxley stopping the accrual of post-judgment interest.

Respectfully submitted,

WILLCOX, BUYCK & WILLIAMS, P.A.

By: 

Reynolds Williams
P.O. Box 1909
Florence, South Carolina 29503
843-662-3258

Attorney for Appellants

Florence, South Carolina
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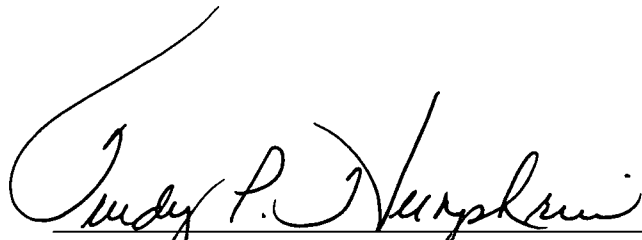
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CERTIFICATE OF SERVICE

The undersigned employee of Willcox, Buyck & Williams, P.A., counsel for the Appellants, does hereby certify that on the 12th day of July, 2016 service of the **Petition for Rehearing and Memorandum in Support of Appellants' Petition for Rehearing** in the above-captioned matter was made upon the *Respondent*, through its attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Andrew F. Lindemann
Michael B. Wren
Daniel C. Plyler
Post Office Box 8568
Columbia, South Carolina 29202

A handwritten signature in cursive script, reading "Trudy P. Humphries". The signature is written in black ink and is positioned above a horizontal line.

Trudy Humphries, Legal Assistant for
Reynolds Williams, Willcox, Buyck &
Williams, P.A.

Attorneys for Appellants

Mark W. Buyck, Jr.
Hugh L. Willcox, Jr.
Wm. Reynolds Williams♦
Mark W. Buyck, III
E. Lloyd Willcox, II
John H. Muench † GA & KY
Tracy L. Wright
J. Scott Kozacki
Walker H. Willcox
Paula A. Sartor
Katherine M. Ryan † AL

LAW OFFICES
WILLCOX, BUYCK, & WILLIAMS
PROFESSIONAL ASSOCIATION
WWW.WILLCOXLAW.COM
248 WEST EVANS STREET (29501)
POST OFFICE BOX 1909
FLORENCE, SOUTH CAROLINA 29503-1909

2050 Corporate Center Dr
Suite 230
Myrtle Beach, SC 29577
Telephone (843) 650-6777
Fax (843) 650-6767

† Additionally Licensed
♦ Certified Mediator

ESTABLISHED 1895

Telephone (843) 662-3258
Fax (843) 662-1342

July 12, 2016

Reply To: Florence

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THE HONORABLE JENNY ABBOTT KITCHINGS
CLERK OF COURT
SC COURT OF APPEALS
1220 SENATE STREET
COLUMBIA SC 29201

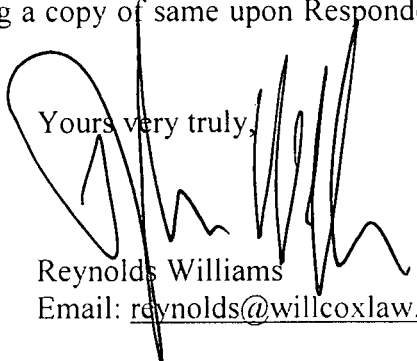
RE: Claude W. Graham & Vickie B. Graham vs. Town of Latta, South Carolina
Appellate Case No.: 2014-000208
C/A Nos. 2008-CP-17-376 and 2008-CP-17-377
Our File: 15410.15281

Dear Ms. Kitchings:

Enclosed for filing are the originals and seven copies each of the **Petition for Rehearing and Memorandum in Support of Appellants' Petition for Rehearing** in the above captioned case. Please return a clocked-in copy of each document to me in the envelope provided for your convenience. I have also enclosed our firm's check in the amount of \$25.00 for the filing fees.

By copy of this letter, I am serving a copy of same upon Respondent's counsel of record. Thank you for your assistance in this matter.

Yours very truly,


Reynolds Williams
Email: reynolds@willcoxlaw.com

WRW/tpb
Enclosures

cc: Andrew F. Lindemann, Esquire (w/enclosure)
Claude and Vickie Graham (w/enclosure)