THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
J. Michael Baxley, Circuit Court Judge

Case Nos. 2008-CP-17-0376
2008-CP-17-0377

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

v.

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

RETURN TO APPELLANTS' PETITION FOR REHEARING

The Appellants Claude W. Graham and Vickie B. Graham ("Grahams") have petitioned this Court for a rehearing of its recent unpublished opinion in *Graham v. Town of Latta*, Op. No. 2016-UP-331 (S.C. Ct. App. filed June 29, 2016). In response, the Respondent Town of Latta ("Town") submits that this Court properly ruled on the issues challenged by the Grahams in their petition for rehearing.

I.

In their petition for rehearing, the Grahams continue to focus on the amendment of Section 34-31-20(B) in 2005 by which the term "shall" was changed to "must." The Grahams, however, now add a new argument.[1] They now cite to what they term "unambiguous fonting" and insist that the 2005 amendment used the term "MUST" in all capitals. They, in fact, accuse the Court of "misquoting" the "plain language" of the statute. It is unknown from where the Grahams got this notion that the statute emphasizes the word "must" by stating it in all capitals. A review of 2005 Act No. 27 does not show the word "must" as written in all capitals. *See*, 2005 Act No. 27, § 7. Likewise, the codification of Section 34-31-20(B), as adopted by the Code Commissioner, does not show the word "must" as written in all capitals. *See*, S.C. Code Ann. § 34-31-20(B). In short, there is no "unambiguous fonting" as claimed by the Grahams, and the word "must" is not entitled to any extraordinary emphasis.

Instead, as previously argued by the Town, South Carolina consistently holds that "shall" and "must" are synonymous and interchangeable terms. For example, in *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002), the Supreme

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[1] In *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001), the Supreme Court explained that "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." 564 S.E.2d at 322. *See also*, *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review); *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) (same).

Court explained that "[u]nder the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." 574 S.E.2d at 743. *See also*, *Bradley v. Doe*, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007) (same). That is also the holding of many cases from other jurisdictions, including the United States Supreme Court.[2]

In addition, if the General Assembly had intended to effect some substantive change by using a different mandatory term, i.e., changing "shall" to "must," that would have been clearly stated in the title of 2005 Act No. 27. As for the amendment to Section 34-31-20(B), the title to 2005 Act No. 27 only states as follows: "To amend Section 34-31-20, as amended, relating to the legal rate of interest, so as to change the rate from twelve percent a year to equal the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year plus four percentage points." *See*, 2005 Act No. 27.

In sum, the Court ruled correctly in finding that the 2005 amendment to Section 34-31-20(B) in changing "shall" to "must" did not change the meaning of the statute and that such a change should not be construed as the General Assembly's express or implied intent to overturn *Russo* and other precedent that allows for a judgment debtor to deposit the judgment amount with the court under Rule 67 so as to stop the accrual of post-judgment interest. The change from

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[2] The Court is referred to the Town's Respondent's Brief for these additional cites.

"shall" to "must" clearly did not effect the change in the law suggested by the Grahams.

II.

As this Court quoted, in *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995), the Supreme Court explained that "a judgment debtor's deposit of funds into the court pending his own appeal prevents further accrual of interest." 454 S.E.2d at 896. The Grahams now argue that that this Court's quotation from *Russo* is mere dicta and not precedential.

In *Nash v. Tindall*, 375 S.C. 36, 650 S.E.2d 81 (Ct. App. 2007), this Court explained that dicta "is a statement on a matter not necessarily involved in the case, and is not binding as authority. Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court's decision." 650 S.E.2d at 83. The rule of law from *Russo*, as this Court cited, is not dicta. The Supreme Court explained the rule of law and then concluded that "Sutton's unilateral deposit of the funds insufficient to stop accrual of the interest mandated by § 34-31-20." *Russo*, 454 S.E.2d at 897. The rule of law was not unnecessary to the decision. In fact, the Supreme Court wrote: "Accordingly, we ***hold*** that to stop accrual of interest, a debtor must comply with the plain language of Rule 67." *Id.* (Emphasis added). Certainly, this Court has not relied on mere dicta from *Russo*.

III.

The Grahams also argue that the Circuit Court erred in failing to exercise its discretion to decide whether it was appropriate to allow the Town of Latta to pay the judgment amount into court. This argument fails for several reasons.

First, the rule of law recognized in *Russo* does not state that a court may choose not to follow the rule. Instead, in *Russo*, the Supreme Court indicated that "to stop accrual of interest, a debtor must comply with the plain language of Rule 67." *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895, 897 (1995). Thus, contrary to the Grahams' assertion, a circuit court is tasked within its discretion to make certain that the party has fully complied with Rule 67.[3] In a footnote in *Russo*, the Supreme Court did explain that a court may also exercise discretion once the deposit is made in determining whether "the fund [should] be placed in an interest bearing account." *Id.*, n.3. The Supreme Court did not, however, set forth any factors for a circuit court to consider in determining whether a 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.

Yet, even if the decision is entirely discretionary with the court, the Grahams have not offered any discussion of the factors that a circuit court is required to

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[3] The Grahams do not argue that the Town failed to properly comply with Rule 67.

consider nor have the Grahams shown that this was not an appropriate case under such factors for allowing the Town to pay the amount of the judgments into court.

Finally, in its order, the Circuit Court found "no basis for the Court to disallow the use of Rule 67 in this case." (R. 14). To the extent that the Grahams contend that that is not a proper ruling or that the lower court failed to properly exercise discretion, that issue is not addressed in the Circuit Court's orders. Furthermore, while the Grahams did file a Rule 59(e) motion, this issue was not raised therein and should be deemed waived for appellate review.

IV.

Lastly, the Grahams appear to argue that there is a conflict between Rule 67 and Section 34-31-20(B). They argue that this Court "has also misapprehended or misapplied the constitution of South Carolina," citing the separation of powers doctrine. That doctrine was never raised in the Court below, nor in briefs filed with this Court. It is clearly an issue raised for the first time on rehearing, which is not permissible. *See, Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review). In addition, the argument is presented only in a conclusory fashion.[4]

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[4] It is well settled that "an issue is deemed abandoned on appeal, and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993). *See also, Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).

Nonetheless, even if properly preserved and presented, the argument lacks merit. Section 34-31-20(B), as amended in 2005, retained the qualifying language "according to law." By retaining that language, the General Assembly recognized that the requirement that a judgment accrue interest must be "according to law," which is obviously inclusive of the rule of law as identified in *Russo* and applied since. If Section 34-31-20(B) is to be construed as making the accrual of post-judgment interest mandatory without any exceptions previously recognized by the courts, then the phrase "according to law" is surplusage. There would have been no need to include "according to law"; it would add nothing to the statute. It is well settled, however, "that statutes should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *Abraham v. Palmetto Unified School District No. 1,* 343 S.C. 36, 538 S.E.2d 656, 662 (Ct. App. 2000), *citing Matter of Decker,* 322 S.C. 215, 471 S.E.2d 462, 463 (1995). In short, there is no conflict between Section 34-31-20(B) and Rule 67 as applied by the appellate courts.

CONCLUSION

Based on the foregoing discussion, the Respondent Town of Latta respectfully requests that this Court deny the Appellants' petition for rehearing.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: _____

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July 25, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
J. Michael Baxley, Circuit Court Judge

RECEIVED
JUL 25 2016
SC Court of Appeals

Case Nos. 2008-CP-17-0376
2008-CP-17-0377

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

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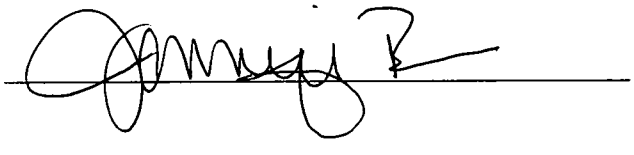
Town of Latta, South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondent, does hereby certify that service of the **Return to Appellants' Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 25th day of June 2016:

Reynolds Williams, Esquire
Willcox, Buyck & Williams
Post Office Box 1909
Florence, South Carolina 29503-1909



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July 25, 2016

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Claude W. Graham and Vickie B. Graham v. Town of Latta, South Carolina
Appellate Case Number: 2014-000208
Civil Action Numbers: 2008-CP-17-0376 and 2008-CP-17-0377
Claim Number: 690001C05341
Our File Number: 321.7974

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of the **Return to Appellants' Petition for Rehearing** in the above referenced matter. Please file the original and return a clocked-in copy to me by way of my courier. By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosure)

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